VISUAL PRESENTATIONS IN DUTCH POLICE INTERROGATIONS: AN ANALYSIS AND LESSONS FOR THE UNITED STATES[1]

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I. INTRODUCTION

> Frans. J. [the suspect] was brought into the interrogation room . . . and looked up in surprise. The walls were covered with posters about his case. Jarl and Rachel [Police detectives] first discussed with Frans his internet search behavior about Henk Peters' Golf and the inconsistencies in Frans' explanation about this. They then explained the meaning of the new wall covering.

[1] This paper builds on the original research one of the authors conducted for her Masters' project in science and investigation (MWO) commissioned by the National Police, North Holland Unit and the Police Academy in Apeldoorn (Mariska Dekker, Gevisualiseerd bewijsmateriaal [Visualized evidence] (2017) (unpublished Master's thesis, School of Criminal Investigation of the Police Academy, Apeldoorn, the Netherlands) (on file with authors)). We rely on and reference this thesis throughout.

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> The sheets of paper are put up to help him to maintain an overview. "Now that it has become apparent that you are unable to remember what you have told us in previous statements, we think this will help to clear matters up for you." Wherever Frans looks, he sees accusatory texts and images which drive him into a tight corner. Some posters are surprising. There are more than ten hanging, with texts such as: *You have lied about your alibi on 29/30 April.* Underneath: two photos originating from cameras at his work.
>
> *You cleaned Henk Peters' vehicle to cover your tracks.* Underneath: seven pieces of evidence.
>
> *You had contact with Henk Peters (more than you had indicated in your first statement).* With summaries of his contradictory statements alongside.
>
> *You were busy getting hold of Henk Peters' VW Golf* and *You drove with Henk Peters' vehicle shortly after his disappearance.* With numerous statements and pieces of evidence.
>
> *You destroyed and discarded Henk Peters' camera.* Plus, the evidence.
>
> And, to top it all off: *You were in possession of a firearm*. Underneath, a statement by Ingrid B., who is also referred to with remarkable frequency on other papers as prima facie evidence for the accusations.[4]

This excerpt is from the book *Murder without a Corpse*, a non-fiction account of the disappearance of Dutch amateur photographer Henk Peters in 2009. The main suspect, Frans J., was extensively interrogated by Dutch detectives – a total of 23 interrogation sessions.

Throughout the interrogations, Frans sometimes spoke in response to less accusatory questions, but when asked more crucial questions, Frans mostly either remained silent or avoided the subject.

Dutch investigators, like their counterparts in other countries, attach great value to suspect interrogations. What was relatively novel was the interrogators' use of the visual display to persuade Frans to make a statement.

For at least a decade, police investigators in some units of the Dutch National Police have been using visual presentations—most often PowerPoint, sometimes other methods, including video—when interrogating suspects.[5] These

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[4] JAC. TOES & PAUL BOLWERK, MOORDZAAK ZONDER LIJK [Murder Without a Corpse] 147-48 (2015) (translation by co-author Dekker).

[5] In some contexts, it may be important to distinguish "interrogations" from "interviews." For instance, in the United States, certain constitutional rights attach (e.g., the right to remain silent) only when a "custodial interrogation" begins, and the dominant police practice differentiates the preliminary interview from the subsequent interrogation. Because these distinctions do not pertain to the Dutch criminal investigative law and

presentations display, in a logical sequence, the claims and evidence constituting the police's case file regarding the suspect: texts backed by the suspect's own words or those of other witnesses; photographic evidence; audio recordings; and/or videos of crime scene walkthroughs or re-enactments of crucial events.[6] The aim is to increase the likelihood of obtaining full and accurate statements[7] from suspects who would otherwise not be willing to make them, especially during recent years when Dutch suspects' exercise of their right to remain silent has become more widespread. These presentations have the potential to achieve their aim because, generally speaking, guilty suspects are more likely to confess when they perceive the evidence against them to be stronger.[8] Visual presentations can increase the perceived strength of the evidence.[9] However, the use of visual presentations also poses risks. A biased presentation could, for instance, mislead the suspect into perceiving the evidence against him as stronger than it actually is, and thus to confess when it may not be in his best interests to do so.[10] At the extreme, visual presentations could induce false confessions.

We begin this paper by outlining the law and practice of Dutch police interrogations along with relevant aspects of the Dutch criminal justice process generally. Having set the context, we then describe the use of visual presentations

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practice on which we focus in this paper, however, we generally use the term "interrogation" throughout, except, for instance, when referring to a particular source that itself uses the term "interview" (e.g., the PEACE method; *see infra* pp. 13-14 and note 42). Also, we generally refer to "suspects" rather than "defendants" because, in Dutch criminal procedure, the accused is not referred to as "defendant" at any stage of the proceedings. The distinction is not important for our purposes; when discussing American practice or the psychological literature, we refer to "suspects" and "defendants" interchangeably.

[6] Strictly speaking, in Dutch police interviews with suspects, the visual presentations display "tactical clues" (sometimes translated as tactical "pointers"), defined as "all information regarding the event for which there is a source" (Dekker, *supra* note 1, at 28). For ease of understanding by American readers (and others outside the Netherlands), however, we will generally refer to "evidence" rather than "clues," on the assumption that readers understand that while everything that the police do or say during official police interviews becomes part of the case file or dossier, the judge need not use everything in the file as part of his decision making process and judgment in the eventual trial (if indeed any trial takes place).

[7] Accurate statements that are useful to the prosecution and police need not be admissions of guilt, much less full confessions; they may not even be self-inculpatory to the extent of establishing the suspect's or defendant's guilt regarding the charged crime, although of course they often are. We generally use the term "statement" in describing Dutch interrogation practices to signal that the goal of police interrogations in the Netherlands (in contrast to the prevalent practice in the United States, for instance; *see infra* pp. 35) is supposed to be finding the truth rather than obtaining a confession (*but see infra* note 25). We use the term "confession" especially when referring to the psychological literature in a later section of the paper because that is the term used in that field of study. But we do not intend to convey any important substantive distinction between the two terms.

[8] *See infra* Part IV, pp. 33-34.

[9] *See infra* Part V, pp. 40-43.

[10] *See infra* Part V, pp. 43-49.

in several actual criminal investigations: their timing in the course of the sequence of interrogations, their format and content, and the suspects' behavior in response to the presentations.

To explain why Dutch police and prosecutors believe these visual presentations to be a promising method for obtaining accurate statements from suspects, we briefly survey the psychology of confessions and interrogation methods and the psychology of visual evidence. The most important reason why guilty suspects confess when subjected to the information-gathering method of interrogation that Dutch police employ is that the suspects accurately perceive the evidence against them to be strong. This is in contrast to suspects subjected to the accusatorial method of interrogation predominant in the United States, who, whether guilty or innocent, more often confess because they feel threatened or cajoled into believing that confessing is in their best interest, or because they have been misled into thinking that the government's evidence is stronger than it actually is. Research on the effects of visual evidence indicates that police investigators' use of PowerPoint, video, or other visual presentations during suspect interrogations could increase suspects' perceptions of evidence strength and therefore, by bringing those perceptions into better alignment with the actual strength of the evidence, lead to more confessions, more of which are truthful, although the number of cases fully studied is too small as to yet confirm or disconfirm this hypothesis.

Prior research also suggests, however, that visual presentations may increase the likelihood that suspects will confess for reasons other than their more accurate perceptions of evidence strength.[11] Visual narratives, for instance, may bias suspects' judgment and/or disable them from conceptualizing legally viable alternatives to the police's version of events, especially if neither the suspect nor his lawyer has had adequate access to the investigators' file when the visual presentation is shown.

We argue, nevertheless, that when these sorts of visual presentations are properly created and appropriately presented, the benefits they might yield, primarily in increasing the number of truthful statements from suspects who might not otherwise give them, outweigh any risks they may pose to the fair administration of criminal justice. We recommend various best practices for adoption by police, prosecutors, judges, and others, which are aimed to maximize the giving of accurate statements and to enhance procedural fairness.

Finally, we ask: If Dutch police and prosecutors consider these visual presentations to be a promising investigative tool, why have police investigators in the United States, a country often at the forefront of the uses of visual evidence and argument in the legal system, not already adopted anything similar to the Dutch practice, and should they consider doing so?[12] We discuss the pros and cons of employing visual presentations in American police interrogations in light of various

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[11] *See infra* Part V, p. 43-48.

[12] It appears that Canadian police investigators may use visual presentations, including PowerPoint (Sgt. Darren Carr, Investigative Interviewing Program Manager, Training Material onThe RCMP Phased Interview Model for Suspects (2015)), although we have been unable to determine how common the practice is.

differences between the Dutch and American criminal justice systems. We believe that, on balance, American investigators would likely perceive less benefit and more risk in the use of such presentations than Dutch investigators would, and that such risk may well lead American investigators to conclude that creating and deploying visual presentations are not worth the costs.

II. POLICE INTERROGATIONS IN THE NETHERLANDS

In this section of the paper, we briefly discuss the law and practice of police interrogations in the Netherlands, which provides the framework into which the visual presentations to be discussed later are being integrated. It may be helpful first to say a very few words about the Dutch criminal justice process in general. The Netherlands follows an inquisitorial process[13] in which the criminal trial is based largely on a dossier which the police assemble for the public prosecutor,[14] who then presents it to the judge. Depending on the type of case, judges may also play an active role in developing the facts.[15] The judge ultimately decides whether the defendant is to be convicted or acquitted.[16] This inquisitorial system is widely

[13] *See, e.g.*, Chrisje Brants, *Wrongful Convictions and Inquisitorial Process: The Case of the Netherlands*, 80 U. CINN. L. REV. 1069 (2012); Ministerie van Veiligheid en Justitie [Ministry of Security and Justice], Criminaliteit en rechtshandhaving 2016 [Crime and Law Enforcement 2016] (S.N. Kalidien ed., 2017), https://inspectievenj.archiefweb.eu/#archive.

[14] Art. 2:149, para. 1 Sv (Dutch Code of Criminal Procedure) assigns responsibility for assembling the dossier to the public prosecutor, but in practice this responsibility is delegated to the police.

[15] The text presents a greatly simplified description of the role of judges in Dutch criminal procedure. Different types of judges preside over different kinds of cases and defendants; for instance, the *kantonrechter* (cantonal judge) for lighter offenses; the *politierechter* (police judge) for offenses with a maximum jail sentence of 12 months; and the *kinderrechter in strafzaken* (special judge in child criminal cases). In addition, the judges of the criminal law sector deal with all criminal cases which do not come before the sub-district judge. These cases can be heard by a single judge or in full-bench panels with three judges. The full-bench panel deals with more complex cases and all cases in which the prosecution demands a sentence of more than one year's imprisonment. In significant criminal cases, the *rechter-commissaris* (investigative or magistrate judge) plays an important role. The investigative judge is responsible for supervising the progress and legitimacy of the police investigation, which is led by the public prosecutor. The public prosecutor can ask the investigative judge to interrogate witnesses. When this judge summons the witness, the witness has to comply-- not doing so is a punishable offense. The investigative judge also has to give permission for some investigative methods such as a wiretap (telephone interceptions), is present when searching a private home, and decides on whether provisional detention during the investigative period should be prolonged. The investigative judge is not, however, the judge who will preside over the trial and determine guilt or innocence. *See generally* Ministerie van Veiligheid en Justitie, *supra* note 13.

[16] This inquisitorial procedure is to be distinguished from the adversarial criminal justice system of the United States and other common law countries, in which the parties (prosecution and defense) are responsible for gathering the evidence and presenting it

believed to serve the aims of justice because the public prosecutor is, in principle, dedicated to "non-partisan truth finding."[17]

The judge's ultimate judgment whether to convict or acquit the suspect depends upon the dossier.[18] This, according to Article 149, paragraph 2 of the Dutch Code of Criminal Procedure, consists of all documents which could reasonably be relevant to the court's decision at trial, subject to certain exceptions.[19] The trial dossier includes the general dossier (the reading guide and the document in which the police write the narrative of the case with references to the sources in the case file); the personal dossier (all of the information regarding the suspect); and the case file (which includes all of the other relevant documents, such as

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during a live trial to the judge and, at the defendant's request, a jury; the judge referees the trial process rather than actively participating in developing the evidence; and the jury, if the defendant has requested one, ultimately decides guilt or innocence. Of course, this capsule description greatly oversimplifies the adversarial system and its differences from (and similarities to) the inquisitorial. More generally, as Brants, *supra* note 13, at 1074-1080, observes, "inquisitorial" and "adversarial" are better conceived as points along a spectrum rather than absolutely different types of systems, each with some features of the other (*see also* MIRJAN DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY 3-6 (1986)).

[17] C.H. Brants-Langeraar, *Consensual Criminal Procedures: Plea and Confession Bargaining and Abbreviated Procedures to Simplify Criminal Procedure*, 11 ELECTRONIC J. COMP. L. 1, 3 (2007). A more elaborate statement of this may be found in Brants, *supra* note 13, at 1076: "Guarantees that the final decision [in an inquisitorial system like the Dutch one] can be accepted as the substantive truth lie in the prosecutor's, or investigating magistrate's, non-partisan role of representing and guarding all interests involved and in the prosecutor's control over the police. Other guarantees also flow from the notion that the truth is best found through investigation by the state: the role of the defense in pointing to factual and legal deficiencies in the prosecution case and the limited, attendant rights necessary for this, the active involvement of the judges in the truth-finding process at trial and their duty to give reasoned decisions, and appeal on the facts – a full re-trial before a higher court – as a form of internal judicial control. In the inquisitorial tradition, the legitimacy of criminal justice and the fate of the defendant depend to a large extent on the integrity of state officials and their visible commitment to non-partisan truth finding. What this system needs to work fairly is a good, i.e., non-partisan, prosecutor and an impartial judge willing to verify, actively and critically, the accuracy of the prosecutor's case."

[18] To be precise, there are two types of dossier, the research dossier and the trial dossier. The police assemble the trial dossier from the files in the research dossier, sometimes from all of those files and sometimes not; the police decide this together with the public prosecutor. The police then hand the trial dossier to the prosecutor. The text describes the trial dossier.

[19] The exceptions are set out in Article 2:149b: The public prosecutor may, upon the magistrate judge's written authorization, exclude certain documents or parts thereof from the dossier if justified under Article 2:187d1: "if there are justified reasons to assume that disclosure of this information: a. will cause serious inconvenience to the witness or seriously hinder him in the performance of his office or profession, b. will prejudice a compelling investigative interest, or c. will prejudice the interest of state security."

forensics, wiretaps, and so on).[20] The public prosecutor can add files such as criminal records and detention records, and the investigative judge can also add files from the probation officer and mental health reports.

Dutch suspects and their lawyers, in principle, have extensive, but not always unlimited, access to the case files. Under Article 30, paragraph 1 of the Dutch Code of Criminal Procedure, the suspect, from the point of his first post-arrest interrogation, has the right to request the documents in the file from the public prosecutor. Disclosure can be restricted, however, if the prosecutor persuades the court that there is a substantiated fear that the suspect may seriously impede the discovery of truth if given access to the content of these documents. In addition, if the public prosecutor wants the suspect to be detained beyond 90 hours after arrest, the court must approve the prolonged detention at an *in camera* hearing at which all parties, including the suspect, are present. Before this meeting, the defense lawyer receives a copy of the investigative team's preliminary report—the case file as of that moment. That said, the public prosecutor and the investigators may try to withhold as much information as possible until they are done interrogating; as a consequence, when a visual presentation is made, the suspect and his attorney may or may not have had full access to all of the information that investigators have.

Suspects and their lawyers may also participate in other respects in the production of information to be included in the dossier. They "may point the prosecutor toward avenues of investigation favorable to the defendant and the prosecutor has a duty to investigate them."[21] Suspects have the right to ask the examining magistrate to conduct further research and/or to submit a request to the public prosecutor to add documents to the case file.[22] They can also ask for a forensic review by an outside expert. When performed by a reputable entity, this sort of "counter-expertise" can be highly valued by the judge. Suspects' lawyers may also conduct their own research, as is often done in the United States, although Dutch judges may tend to look critically upon the information thus generated.[23]

The interrogation of suspects is a central part of the pretrial investigation of the case. Brants offers the following summary:

> The police may arrest and interrogate persons against whom there exists a reasonable suspicion that they committed an offense and may hold suspects for a maximum of [18] hours before involving the prosecutor. Detention can last for three days and, in cases of urgent necessity, up to six days. After the original [18] hours has elapsed, custody must be ordered by the prosecutor [or assistant prosecutor], after which the judge of instruction (14 days), and

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[20] ERIC JOOSTEN & CORNÉ VAN ROOSENDAAL, HANDLEIDING DOSSIERVORMING [Dossier building Manual] (4th ed. 2011), https://www.bol.com/nl/f /handleiding-dossiervorming/9200000001159068/.

[21] Brants, *supra* note 13, at 1076.

[22] Art. 2:183 Sv.

[23] Telephone interview with Erik Visser, Public Prosecutor, in North Holland (Aug. 18, 2016).

> then the court (90 days) may order further detention. During all this time, the suspect may be questioned by the police in the context of the prosecutor's investigation. The police also have a number of intrusive investigative powers, the use of almost all of which requires the prosecutor's permission. In general, the police are answerable to the Prosecution Service (and internally, to their superior officers) and it is the prosecutor who is responsible for the investigation and may, therefore, also issue instructions to the police.[24]

Obtaining statements from suspects is, of course, a very important objective of police interrogations.[25] The suspect's explanation of the events can provide the police with the context for, and the meaning of, the evidence,[26] and can lead to the discovery of other evidence. The suspect's statements also play an important role during any subsequent criminal proceedings. Under Articles 339 and 341 of the Dutch Code of Criminal Procedure, the suspect's own statement is one of the five acceptable types of evidence which the judge may consider. And while, according to Article 341, the suspect's statement must be supported by other proof to justify a conviction – the suspect cannot be convicted solely on the basis of his statement – these statements can be decisive for a judge who initially might have had doubts.[27]

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[24] Brants, *supra* note 13, at 1082. The bracketed material in the quotation updates and/or otherwise corrects Brants' account based on current law.

[25] *See generally* Peter J. van Koppen, *Waarom Ik Jou Wil Laten Bekennen: Over Valse Bekenners en Hun Ondervragers [Why I Want You to Confess: On False Confessors and Their Interrogators]*, 1 KOUD BLOED 007 [Cold Blood], (Nov. 11, 2009), at 31, despite training that emphasizes that the goal of the investigation is truth-finding rather than obtaining confessions and an emphasis on investigative rather than accusatory interrogation methods (see *infra* section V for discussion on the psychology of confessions), Dutch police still tend to regard a confession as the ultimate goal of an interrogation. Van Koppen also explains that suspects are routinely interrogated intensely even in cases with strong incriminating evidence and when the suspect denies having committed the crime. (As discussed below, the tension between police investigators' desire to obtain incriminating statements from suspects and the legal protection accorded to suspects' right to remain silent (or to insist on denying involvement in the charged crime) is inherent in the interviewing process and the driving force behind the implementation of visual presentations).

[26] Ron de Ruiter & Martijn van Beek, *Het Bevorderen van de Verklaringsbereidheid [Promoting the Willingness to Explain] IN* Het Verdachtenverhoor: Meer dan het Stellen van Vragen [The Questioning of Suspects: More than Asking Questions] (Rudi Schellingen & Nienken Scholten eds., 2014).

[27] L. J. A. van Zwieten, BIJZONDERE VERHOORMETHODEN EN ART. 29 SV [SPECIAL INTERROGATION METHODS AND ARTICLE 29] (2001); Brants, *supra* note 13, at 1087 n. 35. (Under the "negative system of proof" that obtains in the Netherlands, "the court may not convict without sufficient legal evidence even if it is convinced of guilt, but may also not convict if there is sufficient evidence but it is not convinced.").

Just as in any other country, suspects in the Netherlands are not always willing to give a statement. They are not obligated to do so; Article 29, paragraph 2 of the Dutch Code of Criminal Procedure gives the suspect the right to remain silent and requires that the authorities inform him that he is not obligated to answer before they ask any questions.[28] This is just one of the procedural protections for Dutch criminal suspects, which collectively indicate that fairness to individuals is, along with truth-seeking, an important goal of the Dutch criminal justice system. Another safeguard, in effect since 2016, ensures that adult suspects have an absolute right to have an attorney present during their interrogations.[29] Even if the attorney is delayed, the police cannot begin questioning without his presence. Because one of the lawyer's functions is to inform the suspect of his rights, including his right to remain silent,[30] it may be presumed that the suspect's right to a lawyer before and during the interrogation could result in fewer suspects making self-inculpatory statements. The suspect may, however, waive the right.[31]

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[28] *See also* Brants, *supra* note 13, at 1086. In the Netherlands, however, unlike the United States, the court may, in limited circumstances, draw an adverse inference from the defendant's silence during interrogations (or at trial). In this regard, Dutch criminal procedure follows the leading European precedent of Murray v. United Kingdom, 22 E.H.R.R. 29 (1996) (*see* Miet Vanderhallen, Alexandra de Jong, Hans Nelen, & Taru Spronken, RECHTSBIJSTAND EN DE WAARDE VAN HET VERHOOR [Legal Assistance and the Value of the Interrogation] (2014)). For instance, in the case with which this section opens, the appellate court partially overruled the trial court's acquittal of the defendant Frans for lack of sufficient evidence; one of the main reasons the court gave was that the defendant did not provide any clarification about the incriminating evidence brought against him despite being provided with extensive opportunities to do so (Dekker, *supra* note 1, at 9 n.5).

[29] Wet van 17 november 2016, Stb. 2016, 475 (houdende implementatie van richtlijn nr. 2013/48/EU van het Europees Parlement en de Raad van 22 oktober 2013 betreffende het recht op toegang tot een advocaat in strafprocedures en in procedures ter uitvoering van een Europees aanhoudingsbevel en het recht om een derde op de hoogte te laten brengen vanaf de vrijheidsbeneming en om met derden en consulaire autoriteiten te communiceren tijdens de vrijheidsbeneming [implementing Directive 2013/48 /EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in proceedings for the execution of a European arrest warrant and the right to inform a third party from the deprivation of liberty and to communicate with third parties and consular authorities during the deprivation of liberty], https://zoek.officiel

ebekendmakingen.nl/stb-2016-475.html. Minor suspects had previously been guaranteed this right. *See* Brants, *supra* note 13, at 1105).

[30] Ministerie van Veiligheid en Justitie, *supra* note 13.

[31] It appears that the vast majority of Dutch suspects – in the neighborhood of 90% – do not insist on their right to remain silent. C.M. KLEIN HAARHUIS, LANGETERMIJNMONITOR 'RAADSMAN BIJ VERHOOR' [LONG-TERM MONITOR: "COUNSELOR AT INTERROGATION"] 93 (2018). More specifically, the research indicates that during the second interrogation, more suspects use their right to remain silent when a lawyer is present. In addition, it appears that young adults aged 18 and 25 most often appeal to the right to remain silent. In the perception of police, there is a strong connection between the consultation (between the suspect and the attorney) and the use of the right to remain silent.

When the suspect is not willing to make a statement, Dutch investigators, just like those in other countries, attempt to persuade them to do so. Only recently – within the last 10 years – did Dutch investigators begin to look at new persuasion methods.

An earlier experience had made them somewhat more wary about using certain tactics, including the use of visual imagery. This cautious attitude can be traced to the prohibition of the "Zaanse verhoormethode," an interrogation method developed by Henk Hoenderdos based on the "Case 36" communication model. The Zaanse verhoormethode involved long and intensive questioning. In one homicide case, the method also involved displaying for the suspect a collage of photos of the suspect's family – obviously irrelevant to the crime – between images of the victim's body.[32] The Zaanse verhoormethode also included attempts to get the suspect to relive incriminating situations by the use of smells or sounds not related to the charged offense.[33] In 1996, however, the Minister of Justice, on the advice of the Criminal Investigation Advisory Committee, ruled parts of the Zaanse verhoormethode to be unlawful as violative of Article 29 of the Dutch Code of Criminal Procedure, which prohibits investigators from using "unlawful pressure,"

Nearly three quarters of police respondents stated that suspects provide the police with statements "less to much less often" when they have an attorney present during the interrogation. According to the police respondents and lawyers, the influence of the lawyer on the suspects' willingness to give a statement can go two ways, depending on the type of suspect, type of lawyer, and type of case. Lawyers, for example, more often advise clients to give a statement in case of first-time offenders, lighter offenses, or when the suspect is caught in the act, in order to prevent a criminal case. Also, if the lawyer is unable to attend the interrogation or has not received prior access to documents, he is inclined to advise the suspect in advance to remain silent. Furthermore, lawyers state that as soon as a suspect's statement threatens to become inconsistent, the suspect is advised to remain silent.

In the United States, similarly, the vast majority of suspects do not insist on their right to remain silent. *See e.g.*, Saul M. Kassin et al., *Police Interviewing and Interrogation: A Self-report Survey of Police Practices and Beliefs*, 31 LAW & HUM. BEHAV. 381 (2007); RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE (2008). *See also infra* pp. 30-39 (further discussion of psychology of interrogations and confessions).

[32] Henk Hanssen (nd), *De Zaanse verhoor-methode* [*The Zaanse interrogation method*], http://www.hanssen.nl/portfolio/de-zaanse-verhoormethode; *see also* HR 13 mei 1997, NJ 1998, 152 (Zaanse Verhoormethode). This method had some similarities to the Reid technique predominant in the United States. Fred E. Inbau, John E. Reid, Joseph P. Buckley & Brian C. Jayne, CRIMINAL INTERROGATIONS AND CONFESSIONS (4th ed. 2001). The main objective of this methodis to break the suspect's resistance through psychological manipulation and even deceit, impelling him to confess. Leo, *supra* note 31, at 112-114; Aldert Vrij, *Het Horen van Verdachten* [*Hearing of Suspects*], *in* REIZEN MET MIJN RECHTER [TRAVELS WITH MY JUDGE] 723 (Peter J. van Koppen, H.L.G. J. Merckelbach, Marko Jelicic, & Jan de Keijser eds., 2010). The Reid method will be discussed in more detail below. *See infra* pp. 34-35.

[33] M.A.G. de Kluis, ARTIKEL 29 WETBOEK VAN STRAFVORDERING. DE GRENZEN VAN HET PRESSIEVERBOD [ARTICLE 29 CODE OF CRIMINAL PROCEDURE. THE LIMITS OF THE PRESSURE BAN] (2013).

that is, techniques or methods to force a confession or statement from a suspect.[34] The Committee noted, however, that the Zaanse verhoormethode included some "usable elements," such as confronting the suspect with photos or other evidence, so long as they related to the charged criminal offense, and advised that these elements should be retained and refined in the future.[35]

"An interrogation without any form of pressure is . . . an illusion."[36] From the moment of arrest, stress and pressure are generated on the suspect. Article 29 sets some limits on what sorts of pressure the police themselves may lawfully apply. For instance, the police may interrogate a suspect intrusively, but the pressure they use cannot be disproportionate in relation to the suspect's mental well-being. The seriousness of the crime and the importance of truth-finding can affect the amount of pressure.[37] A few limitations are clear. Suspects may not be physically beaten or subjected to mental or psychological intimidation. Moreover, lying to the suspect about the evidence or misleading the suspect by trick or suggestive questions constitutes unlawful pressure.[38] Similarly, the police may not deceive the suspect through the use of suggestive or guiding questions that incorrectly attribute knowledge of the information in question to him.[39] Article 29 does not, however, forbid investigators from using "lawful pressure" on a suspect. Dutch case law indicates that pressure is acceptable as long as the suspect is not *forced* into giving a confession or statement.[40] Exactly which interrogation methods are acceptable is

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[34] *Id*.

[35] Recherche Advies Commissie, *De "Zaanse Verhoormethode": Advies van de Recherche Adviescommissie aan de Minister van Justitie over Rechtmatigheid en Doelmatigheid van de "Zaanse Verhoormethode" [The "Zaanse Interrogation Method": Advice from the Criminal Investigation Advisory Committee to the Minister of Justice on the Legality and Effectiveness of the "Zaanse Interrogation Method"]* (1996); *Zaanse Verhoormethode Mag Niet Meer [Zaanse Interrogation Method is No Longer Allowed]*, TROUW (November 13, 1996), http://www.trouw.nl/tr/nl/5009/Archief/article/detail/2594172/1996/11/13/Zaanse-verhoormethode-mag-niet-meer.dhtml.

[36] De Kluis, *supra* note 33, at 102.

[37] ADRI VAN AMELSVOORT & IMKE RISPENS, HANDLEIDING VERHOOR [INTERROGATION MANUAL] 356-57 (7th ed. 2017).

[38] *Id*. Yet, in a recent decision, the Dutch High Council (equivalent to the Supreme Court) upheld a police interrogator's use of a lie (about the existence of fictitious loot) during interrogation as a way to get the suspects to talk to each other after the interrogation session; the court upheld the lower court's ruling that this "limited deception" did not violate the suspects' fundamental rights, "partly in view of the Court's findings about the seriousness of the offense (house-robbery in the evening hours, where residents are threatened) and the lack of success of other methods of investigation" (ECLI:NL:HR:2018:18).

[39] TOM BLOM, VORMEN VERZUIMD TIJDENS HET POLITIEVERHOOR [PROCEDURAL ERROR DURING POLICE INTERROGATIONS] 10 (2011).

[40] *See* C.P.M. Cleiren, M.J.M. Verpalen, and J.H. Crijns, TEKST & COMMENTAAR STRAFVORDERING [TEXT & COMMENTARY DUTCH CODE OF CRIMINAL PROCEDURE] (13th ed. 2019).

not always clear, and it is ultimately up to the presiding judge to decide whether the pressure the police have applied is acceptable.[41]

Within the foregoing legal framework, Dutch police investigators have adopted an *information-gathering* approach to suspect interrogations similar to the PEACE method already widely implemented in the United Kingdom and elsewhere.[42] This method aims to elicit statements primarily by getting the suspect to appreciate the strength of the evidence against him and thus to decide that there is no point in continuing to resist giving a statement, while also encouraging the suspect's trust in, and respect for, the investigators, which may further dispose the suspect to comply with the investigators' request that he offer a statement. That said, the aim of Dutch police investigators is never exclusively to obtain statements from suspects; it is to discover the truth of the matter.[43]

The former standard Dutch interrogation procedure, the "General Interviewing Strategy" (GIS), has recently been changed to the "Scenario Investigation Method."[44] Using this method, investigators research alternative scenarios by verification and falsification. The bases of the method are the minimization of resistance; the use of encirclement questions regarding the "tactical pointers";[45] confrontation, by which the lawful pressure on the suspect is gradually increased; and the rewarding of good behaviour, i.e., when the suspect changes his story after confrontation and when his statement aligns with the tactical pointers or gives a plausible alternative explanation.[46]

"[Lawful] pressure can be reinforced by 'stacking' the pointers. During stacking, the observations and confrontations are put to the suspect after each other, without giving the suspect time to respond in the interim."[47] Stacking can also give the suspect the impression that the investigators have a large amount of evidence

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[41] De Kluis, *supra* note 33.

[42] *E.g.*, Dave Walsh & Ray Bull, *Interviewing Suspects: Examining the Association Between Skills, Questioning, Evidence Disclosure, and Interview Outcomes*, 21 PSYCHOL. CRIME & L. 661, 661 (2015). "PEACE is an acronym for the elements of the interview: *p*lanning and preparation, *e*ngage and explain, *a*ccount, *c*losure, and *e*valuate" (Rebecca Milne & Ray Bull, *Interviewing by the Police*, in Handbook of Psychology in Legal Contexts 111, 113 (David Carson & Ray Bull eds., 2d ed. 2003). It is one of a group of largely *cognitive* interviewing techniques (*see id.*), deemed to be more ethical than the accusatorial methods previously employed (to be discussed further below). Dutch interrogation procedure is based on the PEACE method, although questioning methods differ in some respects.

[43] Van Amelsvoort & Rispens, *supra* note 37. Van Amelsvoort and Rispens add that the interrogation cannot have as its exclusive aim a confession to the scenario that the police have in mind. When police do this, it increases the chance that they may inadvertently use unlawful pressure on the suspect, which can ultimately lead to the conviction of an innocent person while the actual perpetrator remains at large. *Id*.

[44] *Id*.

[45] *See* Dekker, *supra* note 1.

[46] Van Amelsvoort & Rispens, *supra* note 37.

[47] Dekker, *supra* note 1, at 13. This is one respect in which Dutch interrogation practices differ from the PEACE method.

tending to prove the suspect's guilt.[48] When confronted with a suspect who denies or discredits the accumulated tactical cues, investigators are encouraged to summarize them, because "[o]ften it appears it is not the sum of individual tactical clues that raises internal pressure [on the suspect to make a statement], but the way they are interconnected."[49] Dutch police refer to this summarizing as the "mounting up" of tactical pointers. Investigators aim to present the accumulated tactical pointers in a way that rules out alternative explanations, increasing the inconsistency between the police's version of events and any alibi or other version that the suspect may still be claiming.[50]

Even so, many suspects are not as forthcoming as investigators would prefer. It has already been mentioned that Article 29 of the Dutch Code of Criminal Procedure requires all suspects to be reminded that they are not obligated to answer questions. In addition, Article 29 embraces the *nemo tenetur* principle, which posits that no one should be obliged or compelled to cooperate in his own conviction; the suspect can therefore choose his own "attitude" during the police investigation and the criminal trial, including remaining silent.[51] Although Klein Haarhuis has found, on the basis of interviews with over a thousand Dutch police officers, that relatively few suspects insist on their right to remain silent,[52] an earlier study found that after *Salduz v. Turkey*, the landmark 2008 decision of the European Court of Human Rights affirming criminal suspects' right to counsel, Dutch suspects' use of the right to remain silent almost tripled.[53]

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[48] *Id.*

[49] Martijn Van Beek & Jos Hoekendijk, *The Interview Table: A Toolbox-Approach for Suspect Interviewing*, 7 INVESTIGATIVE INTERVIEWING: RES. & PRACTICE, 10, 18 (2015); *see* discussion on internal versus external pressure, *infra* pp. 30-32.

[50] *Id.*

[51] *See* de Kluis, *supra* note 33.

[52] *See* Klein Haarhuis, *supra* note 31, at 93.

[53] Soeraya Lazrak, The Right to Remain Silent: Een Onderzoek naar het Beroep op Zwijgrecht Sinds de Uitspraak Salduz en de Invoering van de Aanwijzing Rechtsbijstand Politieverhoor [The Right to Remain Silent: An Investigation into the Right to Remain Silent Since the Salduz Ruling and the Introduction of the Instruction for Legal Assistance during Police Interrogations] (2013) (unpublished Bachelor's thesis, Amsterdam University of Applied Sciences) (on file with authors); *see also* Divya Sukumar, Kimberley A. Wade, & Jacqueline S. Hodgson, *Strategic Disclosure of Evidence: Perspectives from Psychology and Law*, 22 PSYCHOL. PUB. POL'Y & L. 306 (2016) (when evidence has not yet been disclosed, lawyers are more likely to advise their clients to remain silent during police interviews); *accord*, Klein Haarhuis, *supra* note 31). On the other hand, based on an extensive field study of actual interrogations, Verhoeven and Duinof found that the presence versus the absence of the lawyer seemed to have little effect on suspects' willingness to make a statement. (W.J. Verhoeven & E. Duinhof, Effectiviteit van het Verdachtenverhoor: Een Veldstudie naar de Relatie Tussen Verhoortechnieken, de Verklaring van Verdachten en de Aanwezigheid van de Advocaat in Zware Zaken [Effectiveness of the Suspect's Hearing: A Field Study of the Relationship Between Interrogation Techniques, the Statement Provided by the Suspect, and the Presence of an Attorney During Serious Crime Cases] (2017)).

This has made it all the more important for Dutch police investigators to devise appropriate new ways to improve their ability to obtain suspect statements and confessions. Investigators throughout the country have experimented with one striking new method: visualizing tactical pointers and presenting the visualizations to the suspect during interrogation.

III. VISUAL PRESENTATIONS

The visual presentations developed by Dutch prosecutors and police to help them persuade suspects to make truthful statements may consist of PowerPoint slide shows, flip charts, whiteboard, and even video presentations that resemble documentary films.[54] In general, these aim to convey the prosecution's tactical pointers vividly so the suspect can not only understand each assertion against him but also its evidentiary support. In addition, by displaying the tactical pointers one after the other in a cumulative fashion, visual presentations, regardless of format, can enable investigators to take advantage of visual stacking and mounting up, which help the suspect understand the connections between the pointers and the charged crime and, by leaving no time for reflection between pointers, increase the suspect's sense that there is no way around the accumulating evidence of his guilt.[55]

Visual presentations may be displayed at different junctures during the interrogation. In 8 of the 16 cases Dekker studied, anywhere from four to ten rounds of interrogation preceded the interrogation in which the visual presentation was introduced.[56] In two other cases, investigators used the visual presentation as early as the second interrogation, at which point they had not previously confronted the suspect with the tactical pointers against him. The timing of the visual presentation is significant, considering research that indicates that the timing of investigators' factual disclosures in general affects suspects' willingness to make statements and observers' ability to distinguish between true and false suspect statements. While the research is not entirely consistent, it appears that when information is gradually disclosed during the interrogation, as opposed to being disclosed early or late, the interrogation is carried out more skillfully and more extensive statements are elicited from suspects.[57] In addition, gradual disclosure facilitates investigators' ability to identify when suspects' statements are deceptive based on salient inconsistencies between the statements and the evidence.[58] Thus, it would appear that the usual practice to date (delaying the use of the visual presentation until most,

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[54] Dekker, *supra* note 1 (of the 16 instances of visual presentations Dekker (*supra* note 1, at 11) mentions, nine used PowerPoint, three video (film), three flip-charts, and one whiteboard).

[55] Dekker, *supra* note 1. The police may, however, allow and even invite the suspect to respond during the visual presentation. *See* discussion of case studies *infra*.

[56] *Id*.

[57] Walsh & Bull, *supra* note 42.

[58] Pär Anders Granhag, Leif A. Strömwall, Rebecca M. Willén, & Maria Hartwig, *Eliciting Cues to Deception by Tactical Disclosure of Evidence: The First Test of the Evidence Framing Matrix*, 18 LEGAL & CRIMINOLOGICAL PSYCHOL. 341 (2012).

if not all, of the tactical pointers have already been revealed) is consistent with the social science on optimal sequencing of information disclosure during interrogations generally.[59]

The visual presentations vary in length. One discussed below took the form of a video documentary, and lasted almost 45 minutes. Others are considerably shorter. In three of the four cases, Dekker reports in detail the entire visual presentation, which was shown only once. In the fourth case, some portions were replayed.[60] All of the video and PowerPoint presentations were displayed full-screen or nearly full-screen on a 32-inch color television monitor in the interrogation room. The monitor was positioned on the wall near one end of the table at which the suspect, the suspect's lawyer (if present), and interrogators sat. In that location, the monitor was easily visible by all at a distance of between two to four feet, depending on which chair each was occupying. Visual material on paper was presented on A3 sheets (11.7 by 16.5 inches) attached to the wall of the room. In a case discussed below, investigators also presented the suspect with prints of individual images that had just been shown as part of the PowerPoint slide show.

The suspect's lawyer was present in the interrogation room during the visual presentation in only one of these four cases; although, it should be noted that all of the interrogations Dekker studied took place before the new Dutch rules governing legal assistance.[61] In that one case, the suspect consulted with his lawyer before the start of the interrogation, but neither the suspect nor his lawyer asked questions or requested private consultation time during the visual presentation.

The timing, content, and format of visual presentations, as well as suspects' behavior during and after the presentations, vary considerably. Three of those that Dekker describes will serve to provide a more concrete idea of the nature of this innovative practice.[62]

A. The *Klimtoren* Case[63]

[59] *But see* Sukumar et al., *supra* note 53 (if evidence disclosure is delayed, that means that the defendant and his lawyer do not know that evidence before that point in the interrogation and hence would be less capable of responding to it in ways that advance the investigation, whether that evidence is presented visually or otherwise).

[60] Dekker, *supra* note 1.

[61] *Id.*

[62] Due to research protocols, Dekker could not report additional details of these cases, including certain details of the crimes and the ages of the suspects. *See* Dekker, *supra* note 1.

[63] The description of all three cases and visual presentations are based on Dekker, *supra* note 1, and on the authors' review of the presentations. Pursuant to the policies of the Public Prosecutor's Office of the Netherlands, the presentations themselves are not publicly available. All three of the investigations discussed in the text involved the most serious sorts of crimes and were designated as Team Grootschalige Opsporing ("TGO") investigations. The data from these (and all other) TGO investigations are classified and stored in a protected environment which is accessible only to persons with certain ranks within the Dutch police force. Co-author Dekker is an Operational Specialist (with the rank

This was a murder case, investigated by the East Brabant Unit of the Dutch National Police. The suspect was accused of stabbing another man to death in a park at night. During the second and final interrogation, which was split into two parts, investigators showed the suspect several series of images that together formed a visual timeline of the events in question, confronting him with photographs and video clips of objects and events relating to the crime.

Because the suspect was on the autism disorder spectrum, the investigators' consultation with a psychologist—something done in one form or another in all of these cases—was especially important. Based on that consultation, the investigators chose to prepare a single interrogation in which they would confront the suspect with all of the tactical clues against him. The investigative team leaders were concerned that the suspect's mental state rendered him highly impressionable so that in the course of ordinary interviews he might simply accept everything the investigators told him, in which event no uniquely "offender knowledge" would be able to be established.

The solution was to break the visual presentation into four blocks, ranging in length from about two and a half minutes to just over four minutes each; the total length of the presentation was about 14 minutes. The interrogation was divided into two parts: the defendant was confronted with the first three blocks in the morning and with the last one, after a break, in the afternoon. To create a clear structure for this suspect, investigators followed the same pattern with each block. Before each, they told the suspect that he would be shown the visual presentation and then asked questions about it, and how long the presentation would last. After each block, they asked the suspect questions about what he had seen. Occasionally these questions were supported by showing the suspect printed photos of visual material which had just been used in the presentation.[64]

Each of the four blocks focused on a particular theme. The first depicted the suspect's route to the crime scene, beginning with a photo of his mother's house where his evening began. This included a brief surveillance video clip showing his car heading in the direction of the scene at a time consistent with the police's

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of inspector) in the Dutch National Police. To obtain that rank, she completed specialized training and the master's thesis on which we have drawn for this article (*see* Dekker, *supra* note 1). For purposes of her thesis research, Dekker was given access to the case materials in these three investigations, on condition that, among other things, the case materials themselves could not be attached to the thesis or otherwise disclosed to third parties. Moreover, the Public Prosecutor's Office of the Netherlands took an interest in the thesis; the thesis was reviewed by an appointed information officer (also a public prosecutor) and a senior member of the Office. After ascertaining that there were no objections from the specific Public Prosecutors in charge of the respective investigations, these reviewing officials determined that the thesis could be shared with third parties but that neither the underlying case materials nor any additional information or details from the cases could be. All such underlying materials and information are still classified and subject to Dutch privacy laws.

[64] During the interrogation after the third block, investigators replayed that portion of the presentation, pausing repeatedly to ask the suspect questions.

timeline of events, as well as video footage the investigative team made themselves. The first block ended with an image of the suspect's car parked near the entrance to the woods where the crime was committed. The second block presented a slide show walk-through of the crime scene in the woods, with some photos featuring police tape and others annotated to show blood traces or smears on branches and a road sign. It then tracked the suspect's route back to his apartment that evening, including another video clip from the same surveillance camera showing his car heading in the opposite direction from earlier; it continued with photos (replete with evidence markers) of blood stains leading from his parked car up the steps to his apartment and ended with several photos of his bloodstained clothing, which he had placed in a trash bag.

The third block showed photos of the suspect's weapon collection, consisting of several (ostensibly) imitation guns and dozens of knives of various sizes and styles, as well as the two knives found at the crime scene. The fourth and final block showed pages from the suspect's notebooks from the months preceding the crime, in which the suspect ideated about committing a crime very much like the one of which he was accused, accompanied by an audio track on which the passages were read aloud. This block also displayed several photos the suspect himself had taken of the park and woods as he scouted them out before the night in question, juxtaposed with police photos of the identical scenes. Thus, taken as a whole, the visual presentation offered the suspect a systematic visual stacking of the prosecution's tactical pointers, divided into the themes that together comprised a coherent narrative of guilt: the chronological reconstruction of the events of the evening, overlaid with the police's investigation of those same events, followed by visual evidence of the means and, finally, the motive for and planning of the crime.

A few more specific features of the slide-show are worth noting. The images in the first two blocks were carefully assembled to support the timeline of events according to the police investigation and contained indexical verifiers of that timeline where possible. For instance, early in the first block, a slide showed a screenshot of a social media platform that the suspect had used to meet "nonperfect and shy people" with a timestamp indicating when he had last been online (the date was already known from a previous interrogation session). The surveillance video recordings also displayed timestamps, which the investigators scrupulously indicated in text slides that differed from the actual time by two minutes.

In the second block, by visually merging the timeline of the suspect's walk into the woods, the stabbing, his path back to his car, and then to his apartment with indicators of the police investigation of those very events—photos annotated with red outlined ovals to call attention to the location of bloodstains; police tape strung around the scene; yellow, numbered evidence markers—the presentation sought to make clear that the story the investigators were telling was a reality they had reconstructed in the form of tactical pointers, which a judge would understand and believe. Indeed, throughout all four blocks, it is the accumulation of sober evidence photo after evidence photo (and, occasionally, surveillance video clip), individually non-argumentative in themselves, that would seem most likely to lead the suspect to acknowledge the strength of the prosecution's case against him.

One respect in which the visual presentation in the *Klimtoren* case differed from the others described below is that instead of presenting spoken or written assertions in the third person, it provided text slides or photo captions in the second person. For instance, the first block began with a text slide, "Your mother's house," followed by an exterior shot of the house; "Your own living room," followed by three photos of it; "Your own car," followed by a photo of the suspect's car at the police station; and finally, "Your own car" as a caption over the final slide in the first block: a photo of a dirt area near the entrance to the woods where the crime was committed with the image of the suspect's car Photoshopped in to show how it was parked.[65] It might be asked whether given the suspect's mental limitations and suggestibility, this framing tactic might have posed a risk that the suspect would substitute the police's account of events for his recollections.

The last slide in the first block of the visual presentation may have been problematic for another reason: the presentation's creator used image processing software to superimpose a photographic image of the suspect's car on a photograph of an unpaved area to the side of the road near the crime scene where, according to investigators, the suspect had parked his car. (This was the image over which the text, "Your own car," appeared.[66]) The manipulated image, moreover, was not labeled as a "reconstruction" or "illustration." While the Photoshopped image of the parked car may well have served to enhance the narrative coherence of the investigators' version of events by supplying a "missing frame" in the timeline, it arguably confused different levels of reality by presenting in photographic guise a fact for which investigators did not have direct photographic evidence.

According to the internal journal of the investigation, the overall method of the visual presentation and interrogation that surrounded it was intended to create structure: "[The] presentation should be aimed primarily at supporting the timeline and to find out the exact events relating to this timeline from the suspect's own statement. . . . The purpose of this methodology of interrogation is to increase the internal pressure on the suspect."[67] The goal of building up internal pressure is consistent with the standard Dutch interrogation practice. It is unclear, however, whether the use of the second person image captions may have tended to exert more external pressure on the suspect, thus partly undermining the stated goal of building up internal pressure.

The suspect remained calm before, during, and after the visual presentation. Through all four blocks, he sat with his arms crossed over his body or on the table and with his upper body aligned with the table, turning his head to the left only to watch the monitor on which the presentation was shown. Perhaps because the interrogators had emphasized before the start of the video that the suspect had to pay particular attention during the presentation and ask no questions

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[65] Dekker, *supra* note 1, at 43, 47. The second person was also used in Murder Without a Corpse. *See* Toes & Bolwerk, *supra* note 4.

[66] Image processing software was also used in the second block to annotate crime scene photos and in the fourth block to show close-ups of pages from the suspect's notebooks.

[67] Klimtoren investigation, *afsprakenjournaal* (journal of agreements) (on file with co-author Dekker).

during it, the suspect appeared fully attentive and cooperative. When questioned afterward, the suspect tended to say that he did not remember anything, couched his answers in terms of what he "assumed" had happened based on the images he had been shown, or emphasized his role as a victim. That is, to the extent that he offered answers, these could well have been derived from information he had just seen in the visual presentation rather than his independent recollection.[68] For instance, at one point in the questioning after the first block, the suspect said: "I see that my license plate light was broken because you just showed me." The visual presentation, then, did not fully achieve its aim of persuading the suspect to make a complete statement based on his own "offender knowledge" of the events.

B. The *Arial* Case

This was also a murder investigation pursued by the North Holland Unit of the Dutch National Police.[69] The suspect was accused, together with his on-again, off-again girlfriend, of killing and then burning the body of a flower tradesman on whose property he lived. The visual presentation was used at the fifth interrogation session. The suspect had already been informed in previous interrogations of some of the tactical clues that were included in the visual presentation, and he had been able to extract facts from the file before the interrogation. The suspect became ill shortly after the interrogation at which the visual presentation was used, and died before trial.[70]

The visual presentation took the form of a documentary film, consisting mainly of video clips—interviews with a police officer, the forensic investigator, and the tactical coordinator who was one of the chiefs of the investigation; re-enactments of various aspects of the investigation; segments of surveillance video; and live footage of the discovery of evidence—as well as photos, text, and audio. The full documentary was nearly 45 minutes long. It was created by Ed Schildknegt, at that time a senior investigator in the North Holland Unit, supported by the Operational Support and Coordination Service (*Dienst Landelijke Operationele Samenwerking* or DLOS) of the National Unit, and in particular, C.M. (Cees) Van Eck, who used to work in Dutch public television. Van Eck's production assistance helped to account for the overall "feel" of the documentary—much like a crime investigation program one might see on public television —as well as its relatively strong production values. We describe this fascinating presentation at some length.

The presentation opens with the audio of a 112 call (the Dutch equivalent of the American 911) reporting a missing person while the screen shows in succession: the exterior of the Haarlem police station, a road sign indicating the small town where the missing person lived, and then his house, farm, and flower

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[68] Dekker, *supra* note 1.

[69] Much of the story can be found in Erik van der Veen, *In Beeld Gevangen [Captured by the Picture]*, 8 BLAUW [Blue], September 24, 2016, at 20.

[70] Dekker, *supra* note 1.

shop. A police detective appears in shirtsleeves and narrates the beginning of the investigation. He was on call when he received a telephone call from his superior, asking him to go to a police station where the witnesses who had telephoned in the disappearance of the flower tradesman would meet him to provide a statement. Their statements, backed by others, prompted the superior to go with the detective to the farm. As the detective explains this, the presentation shows a re-enactment of the two witnesses at the police station, followed by a re-enactment of police cars traveling to the farm. The detective then explains that after arriving at the farm, he got the assignment to take the man he found there—who later turns out to be the suspect—to the police station to get a statement from him. Accompanying this is a re-enactment of the man sitting in the police car, rolling a cigarette, and smoking it outside the station. The man provided a detailed statement; however, when officers then talked to a second person still living on the farm—the man's girlfriend—they noticed discrepancies between their stories, which prompted the police to send a forensic investigator to the property.

The video now shows the forensic investigator on the property, walking toward the camera as she explains why she was asked to go there, when she went, and that the investigating judge was also present, as required by law. Scenes from her walk-through of the house are intercut with shots of her at her desk, pointing at her computer screen as she recounts her investigation; for instance, directing the viewer's attention to spots on surfaces in a room in the house that turns out to be part of a blood-spatter.

The documentary now introduces the tactical coordinator, one of the chiefs of the unit, at his desk, explaining his investigation of the suspect's statement. One part of the statement concerned the route the suspect claimed to have driven. While the tactical coordinator speaks, the video shows shots of the surveillance cameras along that route, which can generate a report of the license plates of vehicles passing by, as well as a picture of the official report and a map used to indicate the location of the license plate recognition cameras. The tactical coordinator reports that there was no record of the suspect's license plates on the route during the time in question. By this point, the case had become a large-scale investigation.

A new character appears: a dog trained to search for human remains. The video shows a re-enactment of the dog sniffing around the farm and then barking when it finds the scent. The first forensic investigator explains that the dog found what appeared to be partial human remains. She explains that she sent the findings to a forensic anthropologist at the Dutch National Forensic Institute, who confirmed her conclusion and later joined her at the site where they found more remains. Because there were also ashes, they suspected an outdoor oven, which they found.

The documentary continues as the investigators recount their pursuit of various threads of the story. The first forensic investigator explains the report from the National Forensic Institute indicating a possible exit wound from the victim's skull fragment and concluding that the shot could have been fatal. The first investigator then narrates a series of photographs of the interior of the house, which indicated the existence of other evidence.

The video shifts back to the tactical coordinator, who narrates as a sequence of brief segments of footage from surveillance cameras on the property

are offered to support the hypothesized timeline of the crime. One camera shows the last known appearance of the victim; another, the suspect leaving the next morning: "Between those two times, we suspect the victim has been killed." Further footage shows the suspect walking into the flower shop with a rifle, and later that day, with a wheelbarrow; then a period during which the camera was turned off, then back on: "which is when we suspect he burned the body."

The next phase of the investigation also appears via camera footage, this time from audio-visual registration (AVR) cameras in the police station as the suspect's girlfriend is being interrogated. She states that the suspect told her he shot the victim and that she helped him get rid of the body. She also explains how the suspect killed the victim: by making a hole in the ceiling above the bathroom and shooting him from above. Based on that new information, investigators returned to the property and found other physical evidence consistent with the woman's account.

The documentary now cuts to the tactical coordinator, who explains that the suspect, after being arrested, was recorded talking to a friend. An audio recording of their conversation plays. The conversation further implicates the suspect and leads investigators to persuade the friend to tell them where, at the suspect's request, he had buried one of the suspect's guns. The video cuts to live footage of the discovery of that gun. More live footage of the search for the other weapon follows; the scene is captioned, "In water of North Holland canal divers found the rifle." The documentary concludes as the camera, in a reverse of the opening sequence, takes the viewer away from the farmhouse and back onto the road, then fades to black.

The documentary format of this visual presentation was both novel and remarkable. Yet, assessed in the broader context of Dutch interrogation practices and goals discussed above, the presentation appears, on the whole, to have been appropriately probative and professional. As the documentary unfolds, tactical clues accumulate in accordance with the standard Dutch interrogation method.[71] The film depicts the story of the investigation rather than, as in the first two blocks of the *Klimtoren* slide show, primarily the timeline of the crime. It explains how the investigation developed and why the police took the decisions they did. By setting out in ostensibly neutral fashion the facts the investigators had found, the documentary seems to have been well designed to lead viewers to conclude on their own that the suspect did it—and, ideally, to lead the suspect himself to realize the strength of the prosecution's case against him. The on-screen narrators relate the information using the third person, conveying a sense of objectivity the documentary lacks the second-person, accusatory captions seen in the *Klimtoren* presentation.

The documentary also sought to persuade the suspect of the strength of the prosecution's case through its *ethos* as well as the *logos* of its construction. The

[71] Some tactical clues, however, were deliberately omitted. The investigative team reasoned that if it disclosed all of the tactical clues, any resulting suspect statement could not reliably be attributed to unique offender knowledge; that is, the suspect might have acquired the knowledge reflected in his statement from the investigators themselves.

main narrators – the female forensic investigator and the male forensic chief – are informal but direct, dressed in workaday clothes, exuding a calm competence and authority. Their on-screen personae convey a sense of trust, one of the objectives of the PEACE interrogation protocol. The investigators' repeated enlistment of the expertise of others, including most importantly the Dutch National Forensic Institute, bolsters their authority with that of the entire research and investigative mechanism of the state, implicitly communicating to the suspect and his lawyer that their forensic conclusions are highly unlikely to be the flawed output of a hasty or rogue detective. The step-by-step depiction of the stages of the developing investigation; moreover, and in particular the sequence in which the investigators returned to the farmhouse to follow up on a lead that the suspect's girlfriend disclosed in her statement at the stationhouse, illustrate that the investigators were not blindered by an initial hypothesis, but instead were prepared to adapt their pursuit of the truth as the evidence itself dictated.

As noted, the documentary incorporates re-enactments of several episodes including: the suspect's ride to the police station for his initial interview, his account of having driven the tradesman, and the trained dog searching for and finding human remains on the property. Although Schildknegt, the senior investigator whose idea it was to create the documentary, has said that these re-enactments were labeled as such when the video was shown to the suspect,[72] no labels or captions appear on any available copies of the video. The intercutting of unlabeled re-enactments with other types of ostensibly factual video footage (photographs, surveillance video, and live video) appears to mix different levels of representation, which could confuse inattentive viewers.

According to the investigators themselves, the purpose of presenting the visualized evidence in this form "was to show this documentary, as support of the interrogation, to the suspect . . . to inform him about the course of the investigation and to visualize tactical evidence, thereby explaining what the evidence means for the investigation."[73] Karst Maas, an investigator in the North Holland Unit and at that time a team member of the *Arial* investigation and the lead investigator about the visual presentation, has explained that "supporting the interrogation" meant that the investigative team wanted to use the documentary to try to expand the suspect's willingness to explain the facts.[74] Again in the words of the official report, the documentary was:

> [I]nformative in nature and show[ed] the course of the investigation and the tactical evidence. Two colleagues from the tactical research team and one colleague from the forensic investigation tell in a neutral way which

[72] Telephone interview with E.G.N. Schildknegt, Senior Investigator, North Holland Unit (Apr. 2018).

[73] Official report of E.G.N. Schildknegt (Apr. 28, 2015) (on file with co-author Dekker).

[74] E-mail from Karst Maas, Investigator, North Holland Unit (Dec. 19, 2016) (on file with co-author Dekker).

> tactical clues and evidence were found and what that meant for the investigation. A picture formed of aspects from reality."[75]

The documentary was first shown to three prosecutors for their assessment who agreed that it could be used to support the interrogation.[76]

The suspect had consulted with his lawyer before the start of the interrogation. The lawyer was also present during the interrogation and the screening of the documentary, the only such instance among the cases Dekker studied. The lawyer, however, said nothing during the showing of the documentary. At the very beginning of the interrogation, the suspect emphasized that, for personal reasons, he did not feel like participating in the interrogation. He gave short, unhelpful answers to the interrogators' questions and firmly disagreed with their assertions. He asserted his right to remain silent and largely adhered to it. During the screening of the documentary, the suspect appeared attentive and not resistant: he turned his chair to the screen and put on his glasses. Investigator Maas observed that the suspect displayed emotion when the documentary showed material in which his co-defendant accused him of accusing her, but Maas could not distinguish whether the emotion was grief or anger. Otherwise, the suspect did not appear to show any emotional response. After the visual presentation, he maintained his right to remain silent as he had before.[77]

C. The *Kiwi* Case

The *Kiwi* case was an arson-murder investigation pursued by the Central Netherlands Unit. The suspect had already undergone seven or eight previous interrogations and, while generally cooperative, had made false statements and had insisted, at the beginning of the interrogations and at crucial times thereafter, on his right to remain silent. Due to the emotional nature of the case, investigators may have been especially frustrated with the suspect's refusal to be more forthcoming. According to investigation team leader Folkert van Dekken, the visual presentation was used to motivate the suspect to change his attitude about giving a statement.[78]

The visual presentation consisted of 25 PowerPoint slides, an introductory slide followed by two dozen slides, each of which featured one photograph from the case's forensic investigation. In all, the slide show comprised a walk-through of the scene; starting with an exterior view of the burned house and showing the devastated rooms, the burn patterns, and, in two pictures, a jerrycan used to hold gasoline. The camera angle from which the photos were taken was generally straight at eye level, but some of the crime scene photographs were taken from a high or low position. The entire presentation lasted about 40 minutes.

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[75] Official report of E.G.N. Schildknegt (Apr. 28, 2015) (on file with co-author Dekker).

[76] *Id.*

[77] Dekker, *supra* note 1, at 49.

[78] *Id.* at 46.

The most unusual feature of this visual presentation is that it was narrated during the interrogation not by the investigators but by a forensic fire reconstruction expert. According to van Dekken, the team leader, the objective of presenting the visuals this way was twofold: "explaining the clues and the cohesion between them and, on the other hand, having it done by a specialist, so that questions regarding specialist knowledge c[ould] be answered by him."[79] The expert started with a general explanation of the development and behavior of fires and then presented specific pointers and clues from the investigation, explaining each clearly. The expert modulated the speed of his delivery, slowing down as needed so that he could be better understood, allowed for silences, and adjusted his language to avoid specialist jargon whenever possible. Toward the end of the slide show, the expert summed up the forensic evidence and his theory of how the suspect had set the fire. As a whole, the visual presentation offered an objective and complete representation of the forensic investigation. Both the expert and the interrogators encouraged the suspect to ask questions if there was anything that he did not understand.[80] Unlike the presentations in the *Klimtoren* and especially the *Arial* case, both of which can be understood without any further narrative accompaniment, the *Kiwi* slide show was not self-sufficient; it would be very difficult for an audience not present during the interrogation to grasp its probative value.[81]

The suspect did not offer any substantive comments during the PowerPoint presentation. He remained calm throughout, sat upright, listened to the expert, and watched the presentation or looked at the expert when the expert clarified something with hand gestures. He asked some questions to seek clarification, as the expert and interrogators had encouraged. After the presentation concluded, the suspect said:

> "I know what happened and what did not happen that night. I know that because I was the only one there.

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[79] *Id.*

[80] *Id.*

[81] Some other aspects of the presentation were not, unfortunately, included in the official investigation report, but can also be gleaned from a review of the recording of the interrogation. For example, after about two hours and 45 minutes into the interrogation, the interrogators said that they and the suspect could take some time to eat lunch in the interview room. At this point the interrogators told the suspect that another police officer would join them – namely, the forensic expert. The interrogators explained that this colleague would make a presentation on the television screen in the interrogation room. They emphasized that this colleague was an expert and that they thought they should leave this presentation to the expert. A few minutes later the interrogators continued their explanation of colleague's expertise and identified him by name. The interrogators explained that the suspect would see photos he had not seen before and that he would be told what the investigation was and what the results of it were. Also, the interrogators emphasized that the suspect must also ask his questions and that the expert was the best person to answer those questions. The interrogators also indicated that the suspect's lawyer would receive all documents. It is possible that the interrogators' emphasizing the colleague's expertise influenced the suspect's perception of the expert and the information he presented (Dekker, thesis research notes (notes on file with co-author Dekker)).

> But in this context, I am a layman. I understand a lot. I have ideas when you tell such a story. At least if you do your presentation. But it is not up to me to – it is
> not up to me at the moment to say anything about it."[82]

D. Use of Visual Presentations after the Interogation

What happens to the visual presentations after they are used during suspect interrogations? Presumably, the default practice would be that they would be included in the investigative file like all other materials that are part of the official investigation, but this has not always been the case. In the *Arial* case, the prosecutor's office chose not to add the video documentary to the official case file.[83] Thus, had the case proceeded to trial, the final judge would not have seen it. Apparently, the Public Prosecution Service did not want the documentary to "lead its own life," becoming more widely available; especially since it depicts police officers and detectives.[84] In addition, it is possible that the Public Prosecution Service wanted to use the documentary extra cautiously because it was the first time that a visual presentation of this nature had been used in the Netherlands during a criminal investigation.[85] The documentary could, however, have been viewed on request by the judge and/or the defense attorney.[86]

Visual presentations may also be prepared with an eye toward their use not only during the investigation but also potentially at trial. One of the co-authors (Dekker), together with the video specialists from DLOS, prepared a visual presentation for use in the interrogation phase of a complex, multi-defendant jewelry store robbery. The presentation, over an hour in length, knitted together surveillance footage from multiple cameras inside and outside the store, juxtaposed

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[82] Dekker, thesis research notes (notes on file with co-author Dekker).

[83] Dekker, *supra* note 1.

[84] Interview with E.G.N. Schildknegt, Senior Investigator, North Holland Unit (June 2, 2016).

[85] *Id.*

[86] To the extent that visual presentations do become part of the case file and thus disseminated beyond their original presentational context, a problem may arise if the dossier does not contain any contemporaneous oral narration or explanation needed to make the visuals fully intelligible. The authors would like to thank Professor Christina Spiesel for this point. This would appear to be a particular concern with regard to the visual presentation in the Kiwi case described above, for instance, in which the prosecution's forensic expert presented photographs from the forensic investigation for 40 minutes, yet the expert's explanation of the visual material was not included in the official report of the interrogation; a summary of the presentation in the official report mentions only two questions the expert asked (Dekker, *supra* note 1). The comprehensive audiovisual recording of interrogations would sometimes help to address this problem, but the recordings also need to be reviewed by a third party, such as the judge or the defendant's lawyer. We discuss this further below in the section on best practices (*see infra* Part VI, pp. 50-55).

with a street map of the neighborhood showing the positions of the cameras and the locations of the various defendants as they cased the store and later committed the robbery. Investigators decided not to use the video during interrogations, but the public prosecutor used about 10 minutes of it at trial.

IV. THE PSYCHOLOGY OF CONFESSIONS AND INTERROGATION METHODS

In this portion of the article, we explain, based on psychological research on interrogation methods, why the information-gathering method used in the Netherlands, compared to the accusatorial method used in the United States, would be expected to lead more suspects to confess when they are guilty but not when they are innocent—presumably a major objective of a just and efficient criminal investigative process. In the following section, we explain, based on the psychology of visual communication and visual evidence, why visual presentations of the sort we have described might well enhance this positive outcome.

Many suspects, at least initially, do not make statements inculpating themselves in the crime for which they have been arrested. As noted above, under Dutch law, they are not obligated to do so. Suspects may be unwilling to confess for various reasons, including fear of legal sanctions, concern about their reputation, not wanting to admit to themselves that they have done something perhaps terribly wrong, and fear of retaliation.[87] Suspects who confess face harsher outcomes at every step of the criminal justice process.[88] Yet "many suspects interrogated at police stations confess to the crime of which they are accused."[89] Studies conducted in England and the United States, using different methodologies, report confession rates ranging from 42% to 76%.[90] In the Netherlands, the percentage is between 71% and 73%.[91] Given the powerful reasons *not* to make an inculpatory statement to police interrogators, why do so many suspects nevertheless do so? And given the perhaps surprising frequency of false confessions, e.g., nearly 30% of persons convicted but later exonerated by DNA evidence had falsely confessed[92] and their costs to the legal system, in terms of both wrongful convictions and failures to

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[87] Gisli H. Gudjonsson, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS (2003).

[88] Kassin et al., *supra* note 31; Leo, *supra* note 31; 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 (1998).

[89] Gudjonsson, *supra* note 87, at 133.

[90] *Id.* at 137; *see also* Kassin et al., *supra* note 31 (showing a percentage of 68%).

[91] Verhoeven & Duinhof, *supra* note 53.

[92] Saul M. Kassin, *The Social Psychology of False Confessions*, 9 SOC. ISSUES & POL'Y REV. 25 (2015); *see also* Fadia M. Narchet, Christian A. Meissner, & Melissa B. Russano, *Modeling the Influence of Investigator Bias on the Elicitation of True and False Confessions*, 35 LAW & HUM. BEHAV. 452 (2011) (citing studies reporting 5-25% false confession rates, depending on methodology).

apprehend the actually guilty, is any particular interrogation method more likely to lead the guilty but not also the innocent to confess; and if so, why?

Many theoretical models purport to explain why suspects confess.[93] Characteristics of the suspect, e.g., age, mental ability, previous convictions,[94] the offense (type and seriousness), and the context, e.g., interrogator characteristics and techniques, access to legal advice, may all play a part.[95] Gudjonsson's review of suspects' self-reported reasons for confessing identifies three factors: external pressure, internal pressure, and perception of proof.[96]

External pressure to confess includes fear of continued confinement, as well as police interrogation techniques that seek to *maximize* the suspect's sense of peril by "expressing absolute certainty in the suspect' s guilt. These techniques include: shutting down denials, exaggerating the seriousness of the offense, bluffing about evidence." They also may *minimize* the seriousness of the offense by "stressing the importance of cooperation, expressing sympathy, blaming the victim, and providing face-saving excuses."[97] Suspects who are actually guilty may also experience an internal pressure to confess and thereby relieve themselves of the guilt they feel for having committed the crime.

Finally, suspects' perception of the strength of the proof against them may lead them to confess when they believe there is no longer any point in denying their culpability because the prosecution will be able to prove their guilt at trial. "[T]he most frequent and important reason why suspects confess is the strength of their belief in the evidence against them."[98] Interview and survey data[99] and

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[93] *See generally* Gudjonsson, *supra* note 87; Kate A. Houston, Christian A. Meissner, & Jacqueline R. Evans, *Psychological Processes Underlying True and False Confessions*, in INVESTIGATIVE INTERVIEWING 19 (Ray Bull ed., 2014).

[94] For instance, younger suspects tend to confess, truthfully or falsely, more frequently than older ones (Gudjonsson, *supra* note 87); suspects who are more suggestible or compliant or who are anxiety-prone tend to confess, truthfully or falsely, more frequently (*id.*); and cognitively impaired suspects falsely confess at a higher rate than do persons of ordinary intelligence (*see* Saul M. Kassin, Sara C. Appelby, & Jennifer Torkildson Perillo, *Interviewing Suspects: Practice, Science, and Future Directions*, 15 LEGAL & CRIMINOLOGICAL PSYCHOL. 39 (2010); Leo, *supra* note 31).

[95] Gudjonsson, *supra* note 87; Stephen Moston, Geoffrey M. Stephenson, & Thomas M. Williamson, *The Effects of Case Characteristics on Suspect Behaviour During Police Questioning*, 32 BRIT. J. CRIMINOLOGY 23 (1992).

[96] Gudjonsson, *supra* note 87.

[97] Allyson J. Horgan, Melissa B. Russano, Christian A. Meissner, & Jacqueline R. Evans, *Minimization and Maximization Techniques: Assessing the Perceived Consequences of Confessing and Confession Diagnosticity*, 18 PSYCHOL. CRIME & L. 65, 66 (2012).

[98] Gudjonsson, *supra* note 87, at 153.

[99] *See, e.g.*, Nadine Deslauriers-Varin et al., *Confessing Their Crime: Factors Influencing the Offender's Decision to Confess to the Police*, 28 JUST. Q. 113 (2011); G.H. Gudjonsson & I. Bownes, *The Reasons Why Suspects Confess During Custodial Interrogation: Data for Northern Ireland*, 32 MED. SCI. & L. 204 (1992); Gisli H. Gudjonsson, & Hannes Petursson, *Custodial Interrogation: Why Do Suspects Confess and How Does It Relate to Their Crime, Attitude and Personality?*, 12 PERS. & INDIVIDUAL

experimental studies[100] confirm that suspects are more likely to confess when they perceive the evidence against them to be stronger.[101] It is of course rational for a suspect's decision whether or not to confess to be driven by his perception of the strength of the prosecution's proof; all things being equal, the stronger the proof against the suspect, the more likely he will be convicted even without a confession, and hence, the smaller the benefit obtained by remaining silent.[102]

Different interrogation methods trigger these three factors differently, with important consequences for the diagnosticity of the resulting confession—the likelihood that it is a true statement. At the macro level, two basic types of interrogation methods, as already noted, are the *accusatorial* and the *information-gathering* methods.[103] In the accusatorial method, widely used in the United

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DIFFERENCES 295 (1991); Moston et al., *supra* note 95; Stephen Moston & Terry Engelberg, *The Effects of Evidence on the Outcome of Interviews with Criminal Suspects*, 12 POLICE PRAC. & RES. 518 (2011); Brent Snook, Diana Brooks, & Ray Bull, *Predicting Self-Reported Confessions and Cooperation*, 42 CRIM. JUST. & BEHAV. 1243 (2015).

[100] *See, e.g.*, Mark R. Kebbell, Emily J. Hurren, & Shannon Roberts, *Mock-suspects' Decisions to Confess: The Accuracy of Eyewitness Evidence is Critical*, 20 APPLIED COGNITIVE PSYCHOL. 477 (2006); Steven Todd Sellers, The Role of Evidence in Suspect Interviewing: A Mixed Methods Approach (February 2009) (unpublished dissertation, Griffith University) (Study 2).

[101] Research reaching this conclusion based on interview data has been drawn from countries (e.g., the U.S.) employing the accusatorial interrogation method as well as those (e.g., the UK) employing an information-gathering method. With regard to the former, this might seem to be inconsistent with the frequent claim that the accusatorial method elicits confessions through external pressure. There is no necessary inconsistency, however. First, people confess for a variety of reasons, as the models propounded by Gudjonsson (Gudjonsson, *supra* note 87) and others posit. Second, to the extent that accusatorial interrogators misstate or lie about the strength of the evidence against a suspect, the suspect who believes those misrepresentations may still be confessing based on his perception of the strength of that evidence; it's simply that his perception may be mistaken, increasing the likelihood of a false confession.

[102] The guilty suspect who does not confess when he (correctly) perceives the evidence against him to be strong also forgoes the potential benefits of confessing, such as the alleviation of internal pressure, without the benefit of substantially reducing his chances of conviction.

[103] *See, e.g.*, Jeaneé C. Miller et al., *Accusatorial and Information-gathering Interview and Interrogation Methods: A Multi-country Comparison*, 24 PSYCHOL. CRIME & L. 935 (2018).

States,[104] as well as Canada and various Asian nations,[105] "the goal of police interrogation is not necessarily to determine the truth," but rather to obtain a confession.[106] The primary aim is "to convince the suspect that it is in his self-interest to confess when that in fact is rarely the case."[107] Pursuant to the "Reid method," which for decades has been the accusatorial approach most commonly taught and deployed in the United States,[108] the police first conduct a "Behavioral Analysis Interview" with the suspect to decide, on the basis of various verbal but mostly nonverbal cues, whether they believe the suspect to be guilty.[109] It is important to note that many of the nonverbal cues on which police interrogators rely at the preliminary interview stage to determine whether the suspect is guilty have been shown to be unreliable.[110] Experimental studies have found that trained police interrogators are no better than laypeople at distinguishing lying from truthful suspects—both perform at about chance levels—although police are more confident in their often-mistaken judgments.[111]

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[104] *See, e.g.*, *id.* (survey of investigators in several countries indicates that U.S., and to a lesser extent, Canadian interrogators are more likely to employ techniques associated with the accusatorial method than are those in Europe and Australia). At least some American police departments are beginning to train officers in and possibly implement the HIG (High-value detainee Interrogation Group) "cognitive interview" method (see High-Value Detainee Interrogation Group (HIG), *Interrogation: A Review of the Science* (2016), for details on the method and the underlying psychology) as an alternative to the Reid technique (Robert Kolker, *Nothing But the Truth*, THE MARSHALL PROJECT (May 24, 2016), https://www.themarshallproject.org/2016/05/24/nothing-but-the-truth).

[105] Christian A. Meissner et al., *Accusatorial and Information-gathering Interrogation Methods and Their Effects on True and False Confessions: A Meta-analytic Review*, 10 J. EXPERIMENTAL CRIMINOLOGY 459 (2014).

[106] Leo, *supra* note 31, at 23.

[107] *Id.* at 34.

[108] *See, e.g.*, Brian R. Gallini, *Police "Science" in the Interrogation Room: Seventy Years of Pseudo-psychological Interrogation Methods to Obtain Inadmissible Confessions*, 61 HASTINGS L. J. 529 (2010); Inbau et al., *supra* note 32; Leo, *supra* note 31.

[109] *See* Gallini, *supra* note 108.

[110] *See, e.g.*, Kassin, *supra* note 92; Miller et al., *supra* note 103; DAN SIMON, IN DOUBT (2012).

[111] *See, e.g.*, Saul M. Kassin & Christina T. Fong, *"I'm Innocent!": Effects of Training on Judgments of Truth and Deception in the Interrogation Room*, 29 LAW & HUM. BEHAV. 499, 511 (1999). Having already presumed or decided that the suspect is guilty, moreover, interrogators are prone to *confirmation bias* during the subsequent interrogation: they tend to seek and interpret further information in a way that confirms their initial assessment of guilt. *See* Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 Rev. Gen. Psychol. 175 (1998); Barbara O'Brien, *Prime Suspect: An Examination of Factors that Aggravate and Counteract Confirmation Bias in Criminal Investigations*, 15 PSYCHOL. PUB. POL'Y & L. 315 (2009); Eric Rassin, *A Psychological Theory of Indecisiveness*, 63 NETH. J. PSYCHOL. 1 (2007). This way of putting the matter understates the bias built into the adversarial interrogation process, however, because it assumes that the primary goal is unbiased truth-seeking rather than persuading the suspect to confess. *See* Leo, *supra* note 31.

If police believe the suspect to be guilty, the launch a psychologically manipulative interrogation which aims to ramp up external pressures on the suspect.[112] Meissner and colleagues summarize this interrogation process as follows:

> (1) custody and isolation, in which the suspect is detained in a small room and left to experience the anxiety, insecurity, and uncertainty associated with police interrogation; (2) confrontation, in which the suspect is presumed guilty and told (sometimes falsely) about the evidence against him/her, is warned of the consequences associated with his/her guilt, and is prevented from denying his/her involvement in the crime; and finally (3) minimization, in which a now sympathetic interrogator attempts to gain the suspect's trust, offers the suspect face-saving excuses or justifications for the crime, and implies more lenient consequences should the suspect provide a confession.[113]

In contrast, the information-gathering method prescribed in one form or another in the Netherlands since the late 1990's, as well as the United Kingdom, Australia, New Zealand, and some other countries, tends to eschew external pressure-generating techniques.[114] Instead, it:

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[112] *See, e.g.*, Inbau et al., *supra* note 32; Meissner et al., *supra* note 105, at 462.

[113] Meissner et al., *supra* note 105, at 462 (based on Saul M. Kassin & Ghisli H. Gudjonsson, *The Psychology of Confession Evidence: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. PUB. INT. 35 (2004)).

[114] Van Amelsvoort & Rispens, *supra* note 37. Interrogations are not always carried out as the manuals prescribe; in practice, the methods used may also reflect a combination of interrogators' personal styles and what they have been taught in the past. For these reasons, the methods set out in the Dutch interrogation manual may actually be used in a more "accusatory" fashion than the manual prescribes. For instance, Verhoeven studied a sample of interrogations in 2008-10 (when the GIS rather than Scenario Investigation Method was standard in the Netherlands; *see supra* p. 14). He writes that "the GIS is based on the idea that the guilt of the suspect can and must be determined before the interrogation phase. In general terms, the GIS is therefore an interviewing method that attempts to influence a suspect who is presumed guilty into giving a statement . . ., an approach that is consistent with the accusatory questioning methods. . . . [I]t can be concluded that the GIS consists of aspects from both the accusatory and information-gathering interviewing methods and techniques from both categories can be expected to be used during Dutch interviews of suspects." Willem-Jan Verhoeven, *The Complex Relationship Between Interrogation Techniques, Suspects Changing Their Statement, and Legal Assistance. Evidence from a Dutch Sample of Police Interviews*, 28 POLICING & SOC'Y 308, 310 (2018). We believe it is nevertheless true that Dutch interrogation methods are on the whole much closer to the information-gathering model. Moreover, to the extent that Dutch police and prosecutors go to the trouble of preparing and presenting visual presentations, they do so in cases in which they believe the evidence of the suspect's guilt to be quite strong, as might interrogators employing primarily accusatory methods – the difference being that Dutch police and prosecutors' belief in the suspects guilt is largely

> focuses on developing rapport, explaining the allegation and the seriousness of the offense, emphasizing the importance of honesty and truth gathering, and requesting the suspect's version of events. Suspects are permitted to explain the situation without interruption and questioners are encouraged to actively listen. Only after suspects have been given a full opportunity to provide information are they questioned and presented with any inconsistencies/ contradictions (e.g., information known to the interviewer but not yet revealed to the suspect) . . . . [T]his interview method has the goal of "fact finding" rather than that of obtaining a confession.[115]

Most interrogation methods combine internal and external pressures.[116] For instance, even in an information-gathering regime, suspects may be questioned in isolation and interrogated repeatedly over extended periods of time. Nevertheless, police investigators in countries using the accusatorial approach engage significantly more often than do those in information-gathering countries in interrogation techniques aimed to increase external pressures, and they resort to bluffing about the evidence and even confronting the suspect with false evidence significantly more often than their counterparts in information-gathering countries do.[117]

The use of either interrogation method, accusatorial or information-gathering, increases the likelihood that suspects will confess.[118] But because "true confessions appear to be the product of 'internal' pressures, while false confessions appear to be elicited via 'external' pressures,"[119] the accusatorial approach, which aims to increase external pressures on the suspect, poses a greater threat of inducing the suspect to confess even when he is not guilty—because he has been browbeaten by relentless accusations, despairs of ever extricating himself from confinement, and/or has been implicitly if not explicitly promised leniency if he confesses.[120] Following a flawed initial assessment of guilt with interrogative techniques driven

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evidence-based as opposed to being based on the reading of unreliable cues during an initial suspect interview.

[115] Meissner et al., *supra* note 105, at 462-63.

[116] *See generally* Christopher E. Kelly, Jeaneé C. Miller, Allison D. Redlich, & Steven M. Kleinman, *A Taxonomy of Interrogation Methods*, 19 PSYCHOL. PUB. POL'Y & L. 165 (2013).

[117] Miller et al., *supra* note 103; *see also* Kassin et al., *supra* note 31 (police interrogators' frequent recourse to false evidence ploy in mock suspect interrogations). That said, investigators in information-gathering jurisdictions such as the Netherlands may also be susceptible to confirmation bias and/or may not follow accepted interrogation methods, resulting in false confessions that may or may not be uncovered by other actors in the system. *See e.g.*, Brants, *supra* note 13.

[118] Meissner et al., *supra* note 105, at 461-62.

[119] Horgan et al., *supra* note 97, at 68; *see also* Houston et al., *supra* note 93.

[120] *See generally* Leo, *supra* note 31.

by the goal of obtaining confessions, the accusatorial method would seem especially prone to generating false confessions.[121] In addition, if the police have misled the suspect into believing that the evidence against him is much stronger than it is, the suspect may rationally decide that it is in his best interest to confess even though that perception is misaligned with the actual strength of the evidence. Several experimental studies have indeed shown that presenting an interrogated person with false evidence can induce false confessions.[122] By contrast, interrogators who use the information-gathering approach, less frequently resort to the techniques that result in external pressure and avoid bluffing or lying about the evidence against the suspect, but instead reveal or confront the suspect with the evidence only when that evidence exists and is genuinely inculpatory, increase the likelihood of confession by accurately aligning the suspect's perceptions of evidence strength with its actual strength, making it more likely that the guilty but not the innocent will confess.

Empirical research supports this proposition. Meissner and colleagues' meta-analysis of field studies found that both the accusatorial and the information-gathering interrogation methods significantly increase the rate of confession, compared to a baseline direct-questioning method.[123] Their meta-analysis of experimental studies, which alone can assess the diagnosticity of the confession i.e., whether it is true or false because the ground truth, i.e., whether the "suspect" actually committed the "crime" or not is known, found that the information-gathering method increases the likelihood of true confessions and reduces the likelihood of false confessions, but that the accusatorial approach increases *both* true and false confessions.[124] Consistent with these results, Houston and colleagues found that while suspects' motivations for making true versus false confessions partly overlap, false confessions tend to be more strongly associated with external social pressures created by the interrogator and the interrogation environment, i.e., the pressures that the accusatory method seeks to amplify, whereas true confessions tend to be more strongly associated with internal pressure and perceptions of the strength of the prosecution's evidence.[125]

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[121] Meissner et al., *supra* note 105, at 462 ("The strong belief in 'guilt' on the part of interrogators [using accusatorial methods] has been shown to lead to the use of longer interrogations that involve more psychologically manipulative tactics–ultimately leading to the elicitation of both true and false confessions that confirm the beliefs of the interrogator").

[122] *See, e.g.*, Robert Horselenberg, Harald Merckelbach, & Sarah Josephs, *Individual Differences and False Confessions: A Conceptual Replication of Kassin and Kiechel (1996)*, 9 PSYCHOL. CRIME & L. 1 (2003); Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCHOL. SCI. 125 (1996); Robert A. Nash & Kimberley A. Wade, *Innocent but Proven Guilty: Eliciting Internalized False Confessions Using Doctored-video Evidence*, 23 APPLIED COGNITIVE PSYCHOL. 624 (2009).

[123] Meissner et al., *supra* note 105.

[124] *Id.*

[125] Houston et al., *supra* note 93. This is a meta-analysis of five laboratory studies, four of which were among the 12 analyzed in the Meissner et al. meta-analysis. Meissner et al*, supra* note 105.

In sum, while both of the basic types of interrogation significantly increase confession rates, only the information-gathering method, which seeks to persuade suspects to make statements but is primarily concerned with getting at the truth, increases the likelihood that the actually guilty but not the actually innocent will confess to police during interrogations, and that they will do so for normatively defensible reasons: because they experience a psychological need to relieve their sense of guilt by confessing and, importantly, because they accurately perceive that the evidence against them is strong enough to convict. The next question is whether these benefits to criminal investigations can be enhanced by using visual presentations as part of information-gathering interrogations.

V. THE PSYCHOLOGY OF VISUAL PRESENTATIONS

Research on the effects of visual evidence and visual argument in general suggests that the sorts of visual presentations that Dutch police investigators have been using during suspect interviews can increase the perceived strength of the prosecution's evidence when it actually is strong and thus help to induce guilty suspects who would otherwise remain silent to make self-inculpatory statements. To understand why, it may be useful to analyze the concept of evidence strength, and hence perceived evidence strength, into three components: how reliable the evidence is, i.e., whether it really is what it purports to be; how supportive the evidence is, i.e., how far the evidence tends to prove the conclusion it is offered to prove; and how comprehensive the evidence is, i.e., whether other potential evidence going to the same matter has been omitted.[126] Visual presentations can better align the suspect's perceptions of the strength of the evidence against him with its actual strength in all three respects.

By presenting the prosecution's case against the suspect in visual form instead of merely describing it to him, the police can make the case and the supporting evidence easier for the suspect to understand. People tend to think visually as well as verbally (*dual coding theory*),[127] and research on multimedia learning indicates the efficacy of well-designed visual instruction.[128] Visual presentations appeal more directly to the visual processing channel and may be especially effective for suspects whose learning style inclines toward the visual.[129]

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[126] SUSAN HAACK, EVIDENCE MATTERS (William Twinning et al. eds., Cambridge University Press 2014).

[127] ALLAN PAIVIO, IMAGERY AND VERBAL PROCESSES (Holt, Reinhart and Winston 1971); ALLAN PAIVIO, MENTAL REPRESENTATIONS: A DUAL CODING APPROACH (Oxford University Press 1986).

[128] RICHARD E. MAYER, MULTIMEDIA LEARNING (Cambridge University Press 2001).

[129] Rita Dunn, *Capitalizing on College Students' Learning Styles: Theory, Practice, and Research*, *in* PRACTICAL APPROACHES TO USING LEARNING STYLES IN HIGHER EDUCATION 3 (Rita Dunn & Shirley A. Griggs eds., 2000); *but cf.* Harold Pashler, Mark McDaniel, Doug Rohrer, & Robert Bjork, *Learning Styles: Concepts and Evidence*, 9

Facilitating the suspect's understanding of the evidence should enhance the second if not also the third components of perceived evidence strength: the suspect should be better able to understand how well the evidence supports each element of the prosecution's case and better able to appreciate how the various elements fit together, especially insofar as the visual presentation conveys the stacking and mounting up of the prosecution's tactical pointers.[130] In addition, by conveying information more vividly than words alone can, pictures tend to hold the audience's attention better and be better remembered.[131] This can facilitate the suspect's understanding of the evidence, perhaps especially when the suspect is undergoing a lengthy series of interviews in a state of distraction and stress, mental states that can impair recall.[132] Enhancing the suspect's understanding of the evidence may be an especially productive strategy when the suspect's ability to process information in general, and hence his ability to draw connections between and appreciate the aggregate significance of the evidence, is limited by his cognitive defects,[133] as in the *Klimtoren* case described above.

Visual presentations, in comparison to merely spoken assertions and descriptions of the evidence, would also be expected to lead suspects to perceive the prosecution's evidence to be stronger because they would find the interrogators'

PSYCHOL. SCI. PUB. INT 105 (2010) (finding insufficient support for hypothesis that instruction tailored to individuals' learning styles facilitates learning).

[130] *See supra* pp. 7-8.There may be a tension between the (perceived) comprehensiveness of the evidence against the suspect, enhanced by "stacking," and the current lack of a requirement that the visual presentation itself include potentially exculpatory evidence (even though the investigative team will have been obligated to share such evidence with the suspect) *Id.*

[131] Brad Bell & Elizabeth Loftus, *Vivid Persuasion in the Courtroom*, 49 J. PERSONALITY ASSESSMENT 659 (1985); Georg Stenberg, *Conceptual and Perceptual Factors in the Picture Superiority Effect*, 18 EUR. J. COGNITIVE PSYCHOL. 813 (2006). The vividness effect is to be distinguished from the presentation of the evidence against the suspect in *more detail* than speech alone can, although images (videos, photos, graphics) may indeed offer more detail than a verbal description of the same events or objects. The research on the effects of level of evidentiary detail on relevant judgments are somewhat at odds. Some studies show that more detailed statements are more likely to be believed, e.g., Aldert Vrij, Samantha Mann, Shyma Jundi, Jackie Hillman, & Lorraine Hope, *Detection of Concealment in an Information-gathering Interview*, 28 APPLIED COGNITIVE PSYCHOL. 860 (2014) (liars' accounts of events in information-gathering interview less detailed than truth-tellers' accounts)); others, however, have found that suspects presented with more detailed eyewitness evidence against them are not more likely to confess. Kebbell et al., *supra* note 100.

[132] *See, e.g.*, Tom Smeets, Henry Otgar, Ingrid Candel, & Oliver T. Wolf, *True or False? Memory is Differentially Affected by Stress-induced Cortisol Elevations and Sympathetic Activity at Consolidation and Retrieval*, 33 PSYCHONEUROENDOCRINOLOGY 1378 (2008) (stress at retrieval stage impairs memory for both neutral and emotional words); *cf.* Sabrina Kuhlmann, Marcel Piel, & Oliver T. Wolf, *Impaired Memory Retrieval After Psychosocial Stress in Healthy Young Men*, 25 J. NEUROSCIENCE 2977 (2005) (stress at retrieval stage impairs memory for emotional but not neutral words).

[133] Dekker, *supra* note 1.

claims to be more credible. According to the concept of *processing fluency*,[134] the easier it is for people to perceive or otherwise mentally process something, the more likely they are to believe it is true.[135] It should generally be easier for suspects to process text and especially pictures than it is for them to understand and retain the interrogators' words, especially as the claims and evidentiary details accumulate. In addition, by showing the suspect photographic (or videographic) representations of the actual items involved in the commission of the crime, rather than merely describing them, the police can remove any reasonable doubt on the part of the suspect about the existence of the items and their relevant visual characteristics, thus increasing the perceived reliability of the prosecution's evidence—the first component of perceived evidence's strength. This is well illustrated by the forensic photographs of the knives in the *Klimtoren* case and the many forensic photos of the investigation of the farmhouse in the *Arial* case.

Furthermore, by coherently sequencing the evidence against a subject, a visual presentation—whether a series of PowerPoint slides or a documentary-style video—can also construct a *narrative* of the suspect's guilt. Considerable research shows that laypeople best understand trial evidence in the form of stories and that they are most convinced by the story that seems to them most coherent, leaving the fewest gaps.[136] A suspect presented with a compelling visual narrative of the prosecution's case would, accordingly, be more likely to perceive that the evidence against him fits together with the prosecution's claims and has been more comprehensively marshaled (the second and third components of evidence strength) and thus that the prosecution's evidence is stronger. As described earlier, the narrative may take different forms: it may reconstruct a chronological timeline of the events leading up to and including the crime itself, as in the first two blocks of the *Klimtoren* slide show, or it may fit within the genre of televised crime scene investigations in which investigators start with a puzzle and solve it by the program's end, as in the *Arial* documentary.

For all these reasons, then, to the extent that a suspect's reluctance to make a statement is due to a failure to understand or refusal to accept the actual strength of the evidence against him, visual presentations would be expected to increase the likelihood of statements by increasing the perceived strength of the evidence. And by better aligning perceived with actual evidence strength, visual presentations may further the just resolution of criminal investigations.

Visual presentations might also make suspects more likely to give statements for reasons other than by increasing the perceived strength of the evidence, while maintaining the correlation between perceived and actual evidence strength. For example, the suspect may consciously or unconsciously perceive that

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[134] Daniel M. Oppenheimer, *The Secret Life of Fluency*, 12 TRENDS COGNITIVE. SCI. 237 (2008).

[135] Rolf Reber & Norbert Schwarz, *Effects of Perceptual Fluency on Judgments of Truth*, 8 CONSCIOUSNESS & COGNITION 338 (1999).

[136] *E.g.*, Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991); *see also* W. LANCE BENNETT & MARTHA FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM (1981).

the visual presentation provides a peripheral cue[137] to the likelihood that he will be convicted, believing that the presentation demonstrates the prosecution's thoroughness and professionalism and hence its readiness to put together a dossier that the judge will find utterly convincing.

Visual presentations during suspect interviews, like displays of visual evidence and arguments to lay jurors in American trials, may also, however, pose risks of biasing judgment—in particular, of leading suspects to perceive that the prosecution's case is stronger than it actually is and, thus, of inducing suspects to confess when they might otherwise be able to avoid conviction. At least in theory, police investigators might induce false confessions by deliberately including false or misleading material in the presentation,[138] but we set this extreme possibility aside. Dutch police investigators are obligated to follow the information-gathering interviewing protocol, which aims at finding the truth, not primarily at obtaining a confession,[139] and forbids such deception.[140] They work under the supervision of the public prosecutor, whose professional obligation is non-partisan truth-finding;[141] and any use of sufficiently serious deception in the visual presentation could lead the judge to acquit the suspect on the ground that the suspect's statement was the result of undue pressure (although this has not yet been found in any case involving visual presentations).[142]

Rather, the concern is that professionally constructed visual presentations may nevertheless lead suspects to overestimate the strength of the prosecution's case against them—and hence the likelihood of conviction—even if they do not give a statement. For instance, because the visual presentation may include emotionally charged images of the sort (such as gruesome crime-scene photos) that have been shown to increase lay jurors' predilection to punish,[143] the suspect may anticipate that the judge will be similarly influenced by her emotional response to the images and sentence the suspect more harshly than the evidence going to the suspect's guilt actually warrants.[144] Specific aspects of particular images may also

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[137] *E.g.*, Richard E. Petty & Duane T. Wegener, *The Elaboration Likelihood Model: Current Status and Controversies*, *in* DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY 41 (Shelly Chaiken & Yaacov Trope eds., 1999).

[138] *See, e.g.*, Nash & Wade, *supra* note 122.

[139] Van Amelsvoort & Rispens, *supra* note 37; Dekker, *supra* note 1.

[140] *Id.*; *but see supra* note 38.

[141] Brants-Langeraar, *supra* note 17.

[142] Dekker, *supra* note 1 (we recognize, of course, that false confessions leading to wrongful convictions occur in the Netherlands (*e.g.*, Brants, *supra* note 13) as they do in the United States and elsewhere).

[143] *E.g.*, David A. Bright & Jane Goodman-Delahunty, *Gruesome Evidence and Emotion: Anger, Blame, and Jury Decision-making*, 30 LAW & HUM. BEHAV. 183 (2006); Jessica M. Salerno, *Seeing Red: Disgust Reactions to Gruesome Photographs in Color (But Not in Black and White) Increase Convictions*, 23 PSYCHOL. PUB. POL'Y & L. 336 (2017).

[144] Some suspects may not anticipate others' strong emotional responses to such images because, to the suspect, the images may not be especially upsetting, perhaps less so than having seen the actual thing depicted in the image. We would like to thank Professor Sheila Hayre for this observation. On the other hand, an innocent suspect may well

bias the suspect's judgments relating to those images. For instance, the angle of the camera may make a given person or object depicted in the image relatively more salient than would appear if the scene were shot from a different angle, and as a consequence, the suspect, like other viewers, may overattribute the person's or object's causal role in the events in question.[145] The presentation may include a video clip that has been slowed down to make the depicted events easier to see and understand, but slowing the motion may increase the perceived intentionality of the actor's behavior,[146] and thus the actor's perceived culpability, again leading the suspect to overestimate the strength of the prosecution's case (assuming that intent is an element of the crime charged).

The very fact that a visual presentation in the form of a PowerPoint slide show or video is shown on a screen may imbue it with a degree of perceived objectivity, independent of the credibility of the persons who constructed and presented it.[147] Consequently, suspects may perceive the interrogators' claims and representations of supporting statements by witnesses or the suspect himself, displayed as text, to be more objective and hence stronger evidence against him than those words would be if merely spoken. This may be especially problematic when the words on the screen are not direct quotations from actual statements by witnesses or the suspect but rather are paraphrased in ways that increase the apparent fit between the statements and the prosecution's theory of the case,[148] because the suspect may come to favor the interrogators' (presumptively objective) version of the supporting evidence over his own.[149]

Some specific components of the visual presentations described above raise related concerns. Consider, for instance, the video re-enactments in the *Arial* documentary. When offered as evidence in American courtrooms, video re-enactments must be authenticated as fair and accurate representations of the depicted events, but even so, jurors "may confuse art with reality"[150] and accord the re-enactment more probative value than it deserves. The fact that the re-enactment is based on only the prosecution's version of the depicted events poses an additional risk of unfair prejudice to the accused. Video re-enactments raise similar issues in

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respond strongly to the image and infer from his own response that other viewers, in particular, the judge, may respond similarly.

[145] G. Daniel Lassiter et al., *Videotaped Confessions: Is Guilt in the Eye of the Camera?* in 33 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 189 (Mark P. Zanna ed., 2001) (reporting studies of the *camera perspective bias*).

[146] Eugene M. Caruso et al., *Slow Motion Increases Perceived Intent*, 113 PROC. NAT'L ACAD. SCI. 9250 (2016).

[147] NEAL FEIGENSON & CHRISTINA SPIESEL, LAW ON DISPLAY (2009).

[148] We do not mean to suggest that the prosecutor or police would deliberately manipulate or misrepresent the supporting evidence, only that in the course of preparing the presentation they might unconsciously restate or summarize witness or suspect statements in ways that further their case.

[149] Dekker, *supra* note 1 (note also that if the suspect and his lawyer have not seen the actual witness statements, they may be unable to detect variations between those statements and any rephrasing of those statements in the visual presentation).

[150] KENNETH S. BROUN, MCCORMICK ON EVIDENCE 380 (6th ed. 2006).

the context of police interrogations to the extent that the reconstruction may taint the suspect's memory of the depicted events and/or mislead him into believing as fact aspects of the events that may represent mere prosecution inferences from the known facts. These concerns are exacerbated when, as in the *Arial* visual presentation, the re-enactments appear not to have been clearly labeled as such. This poses the risk that the suspect will not clearly differentiate between visual material such as surveillance video and photography, which bear a more direct indexical relationship to the facts they depict, and staged re-enactments.[151]

The use of digitally processed photographs or video stills that are not clearly labeled as such, as in the *Klimtoren* case, raise similar concerns. Given the malleability of memory and the power of manipulated photographs to implant false memories,[152] a video still of a location near the murder scene with the suspect's car Photoshopped in and captioned, "Your own car," might create the risk that the suspect would substitute the depicted image for his own memories of the events – a risk that might be greater when the suspect, as in the *Klimtoren* case, was unusually impressionable.

Perhaps most importantly, seeing the police investigators' visual narrative of the evidence, as opposed to merely hearing a verbal narrative, may make it more difficult for the suspect to imagine formulating an alternative interpretation of the evidence that could possibly persuade the police, the prosecutor, and the judge that the suspect is not guilty of the charges against him.[153] To be sure, it is often in the interrogators' interest to confront the non-confessing suspect at a strategic moment with the evidence (the tactical pointers) against him in such a way as to rule out alternative explanations.[154] The issue is whether the visual presentation of that evidence so risks disabling the suspect's ability to formulate and sustain an available alternative explanation that it might be considered psychologically manipulative to the point of constituting impermissible pressure.[155] Generally, when people see visual evidence, they tend to think they know all they need to know about the depicted facts, making them less likely to look for disconfirming information or to consider how their understanding of what they see has been shaped by their preconceptions, the medium, or other factors.[156] Visual evidence

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[151] Some of the re-enactments in the Arial documentary – for instance, the scene of a cigarette being rolled and lit in the back of a dark vehicle – are incidental at best to the main focus of the investigation; they simply add visual interest to the spoken narration (at that point, by the police detective first assigned to the case). Any confusion between re-enactment and reality in such scenes would probably not be unduly prejudicial.

[152] *E.g.*, Maryanne Garry & Matthew P. Gerrie, *When Photographs Create False Memories*, 14 CURRENT DIRECTIONS PSYCHOL. SCI. 321 (2005).

[153] Dekker, *supra* note 1.

[154] Jos Hoekendijk & Martijn van Beek, *The GIS-model: A Dutch Approach to Gather Information in Suspect Interviews*, 7 INVESTIGATIVE INTERVIEWING: RES. & PRACT. 1, 6 (2015).

[155] *See* discussion of Article 29 of the Dutch Code of Criminal Procedure, *supra* pp. 12-13.

[156] *E.g.*, Adam Benforado, *Frames of Injustice: The Bias We Overlook*, 85 IND. L. J. 1333 (2010); FEIGENSON & SPIESEL, *supra* note 147.

tends to occupy the cognitive field, displacing other sources of information about the same events[157] and even people's memories of their own recent personal experiences.[158] And visual evidence tends to be more persuasive when only one side of the case uses it.[159] Visual presentations in documentary form may also trigger associations in the suspect's mind with television crime investigation shows, in which the suspect is always guilty and the police always get their man, which may lead the suspect to think that continuing to resist admitting guilt is hopeless.[160] Thus, the visual modality of the narrative may lead the suspect to overestimate how well supported the claims against him are (the second component of evidentiary strength) and how comprehensively the evidence against him has been marshaled (the third component), and thus to perceive the prosecution's case to be more conclusive than it actually is.

Two of the visual presentations described at length above illustrate these concerns. Recall that the four blocks of the slide show in *Klimtoren* comprised of a convincing theory of the prosecution's case: the suspect's commission of the crime, the police's investigation of it, the means of commission (the knives used to kill the victim), and finally, the suspect's motive, as revealed in his own handwritten notebook entries. Interestingly, the suspect did plausibly resist the last part of this narrative. He maintained that the passages in his notebooks that appeared to show an intent to commit just the sort of killing of which he was accused did not mean what the investigators thought they meant: "For starters, it wasn't my intention to kill him. I know it says that in my book, but it wasn't my intention. I wrote it down in my book so I could read it back. I read diaries from other serial killers and used that to make one for my own. I took it from a non-fiction movie. I wrote it down as some kind of escape from my own world."[161] With regard to the rest, however – the timeline of the crime and the manner in which it was committed – the suspect merely deflected the implications rather than rejecting them outright or developing an alternative story, tending to say either that he didn't remember e.g., how the struggle with the victim transpired or that "I think so because you showed it to me."

The documentary presentation in the *Arial* case aimed to persuade the suspect of the strength of the prosecution's version of events not merely by displaying forensic and other visual evidence but also by instilling the prosecution's account with a powerful, familiar, narrative impetus. The story built slowly but dramatically from a seemingly innocuous missing person report, adding evidence piece by piece until it accumulated in a very convincing fashion – the plot of entire

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[157] *E.g.*, Ulrich Neisser & Nicole Harsch, *Phantom Flashbulbs: False Recollections of Hearing the News About* Challenger, in AFFECT AND ACCURACY IN RECALL: STUDIES OF "FLASHBULB" MEMORIES 9 (Eugene Winograd & Ulrich Neisser eds., 1992).

[158] Nash & Wade, *supra* note 122.

[159] Meghan A. Dunn, et al., *The Jury Persuaded (and Not): Computer Animation in the Courtroom*, 28 L. & POL'Y 228 (2006); Jaihyun Park & Neal Feigenson, *Effects of a Visual Technology on Mock Juror Decision Making*, 27 APPLIED COGNITIVE PSYCHOL. 235 (2013).

[160] Dekker, *supra* note 1.

[161] Klimtoren case, interrogation report (on file with co-author Dekker).

genres of crime investigation programs with which the suspect, like any other Dutch adult, would presumably be acquainted. The production was actually rather old-fashioned by contemporary commercial television editing standards: deliberately paced sequences rather than quick cuts, with no eye-catching transitions, dramatic camera angles, or close-ups. Regardless, viewers would be likely to associate this conservative documentary approach with seriousness, with the aim of informing rather than primarily entertaining. Thus, in its sober demeanor, its depiction, over almost fourty-five minutes of uninterrupted video, of the relentless advance of the investigation, and its conformity to a familiar genre in which the guilty are always identified and brought to justice, the documentary may well have given the suspect and his lawyer the impression that the prosecution's case was airtight even if it was not.

For all these reasons, visual presentations, even when honestly and competently constructed and presented as part of a genuinely truth-seeking criminal investigative process, may tend to defeat the suspect's ability to assess accurately the strength of the evidence against him. If so, that would increase the risk that some suspects—perhaps some innocent as well as guilty ones—may be induced to make self-inculpatory statements they would not have made but for the presentations' biasing effects.[162]

Although some of the psychological research on which the preceding analysis of the benefits and drawbacks of visual presentations is grounded consists of studies of basic perceptual and cognitive processes, which might be expected to generalize to other contexts, much of the research is of mock juror decision making in the American justice system. It is unclear how far those results generalize to the situation of individuals suspected of or charged with serious crimes who are undergoing real police interrogations and whose decisions whether to make statements are therefore likely to be influenced by external and internal pressures as well as by their perceptions of the strength of the proof against them, which visual presentations are designed to affect. (Even participants in false evidence studies were not subject to real interrogations and knew that they had not committed crimes and therefore were not at risk of punishment.) In some instances, differences between experimental participants and actual suspects might suggest predictions opposite to those suggested above. For instance, a suspect who, unlike jurors, has personal knowledge of the events in question might well be more likely to identify (small) inaccuracies in police interrogators' visual presentations, which could lead the suspect to believe that the prosecution's case against him is weaker, not stronger, and make the suspect less, not more, likely to confess.[163] More experimental research of suspect responses to visual presentations and decision making in realistic settings would be worth conducting.

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[162] We evaluate below these and other risks and weigh them against visual presentations' potential benefits to the criminal justice system (*see infra* Part VI, pp. 48-49).

[163] *See* Mark R. Kebbell & Troy Daniels, *Mock-Suspects' Decisions to Confess: The Influence of Eyewitness Statements and Identifications*, 13 PSYCHIATRY PSYCHOL. & L. 261 (2006); Kebbell et al., *supra* note 100.

VI. BENEFITS VERSUS RISKS OF VISUAL PRESENTATIONS IN POLICE INTERROGATIONS AND RECOMMENDATIONS FOR BEST PRACTICES

The research on the psychology of confessions and of visual evidence discussed above indicates that visual presentations could well yield the primary benefit that Dutch police seek by introducing them: to induce suspects who would not otherwise be inclined to make a statement to do so. Certainly, the experienced police investigators across multiple units of the Dutch National Police who have been employing visual presentations for the last several years believe that it is a worthwhile investigative tool.[164] In practice, the upper bound of this benefit is unclear. While some research "strongly indicates that once a suspect enters the interview he has already decided whether or not to make an admission or a full confession,"[165] other studies have found that up to a third of those who confessed did not initially intend to do so.[166] In three of the four cases that Dekker studied in detail, the use of visual presentations did not affect suspects' willingness to make a statement; there was a "marginal" effect in the fourth.[167] For sake of argument, however, we proceed on the assumption that visual presentations may increase the likelihood that guilty suspects will make statements they otherwise would not have. The use of visual presentations also appears to enhance, or at least sustain, a positive working relationship between the suspect and the interrogators, measured in terms of suspects' attentiveness, focus, and attitude during the interrogation.[168]

The risks of using visual presentations during interrogations are also evident from the review of the psychological literature above. Visual displays, while capable of making information easier to understand and remember, are inherently capable of misleading viewers. Specific aspects of visual presentations may prompt particular perceptual and judgmental biases. Most importantly, a visual narrative can preempt alternative accounts of the relevant events, especially when only the police are offering a presentation and if they are not obligated to include exculpatory evidence in the presentation itself (although such evidence will be in the final case file). The risk that visual presentations will make it harder for suspects to imagine and develop viable defenses to the charges against them is heightened by the parties' unequal access to the relevant evidence. In effect, the visual presentation resembles a prosecutor's summation or closing argument, packaging

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[164] Dekker, *supra* note 1, at 9-10.

[165] GUDJONSSON, *supra* note 87, at 133. Gudjonsson reports that Inbau et al. (Inbau et al *supra* note 32) claim that the Reid-Inbau technique used in the U.S. leads about 80% of those who initially deny criminal involvement to confess, but "[t]here is no empirical evidence to support these most extraordinary claims."

[166] Hayley M.D. Cleary & Ray Bull, *Jail Inmates' Perspectives on Police Interrogation*, 25 PSYCHOL. CRIME & L. 157 (2018); Nadine Deslauriers-Varin, Les Facteurs Determinants Dans le Processus D'aveu Chez les Auteurs D'actes Criminels [Determining factors in the confession process of criminal actors] (April 2006) (unpublished Master's thesis, Université de Montréal) (on file with authors).

[167] Dekker, *supra* note 1, at 49-50.

[168] *Id.*

the elements of the charged crime with all of the supporting evidence and presented to the suspect without the benefit of the defense lawyer having had an opportunity to see everything in the prosecutor's file (or having conducted much, if any, independent investigation).[169] While Article 149 of the Dutch Code of Criminal Procedure obligates prosecutors to include all relevant material in the dossier,[170] including exculpatory material, there is no obligation to incorporate exculpatory material into the visual presentation itself,[171] and in any event, the prosecutor, whose job it is to develop proof of the charges against the suspect, may not recognize material that the suspect's lawyer could use to build a viable defense and thus may fail to include it. For instance, material in the prosecution's file that is not exculpatory on its face may, if disclosed to the suspect's lawyer, suggest to him ways of challenging the government's evidence by impeaching a witness.[172] The consequence may be to discourage the suspect from considering counterarguments or defenses to the prosecution's case, and thus to overestimate the strength of that case and possibly to make a statement when a fuller and more balanced consideration of the evidence would indicate that he should not do so.

Dutch courts have thus far provided no guidance as to the propriety of visual presentations either during interrogations or at trial. To the best of our knowledge, only one judicial opinion, by the Amsterdam Court of Appeals, has addressed this topic, upholding the use of a visual presentation during the suspect's interrogation but not specifically evaluating any of its features or its possible risks or benefits.[173] This lack of jurisprudence makes it all the more important not only to assess the strengths and weaknesses of visual presentations but also to offer recommendations to guide prosecutorial, police, and judicial practices. We believe that the risks of visual presentations can be minimized if Dutch prosecutors and police investigators, and possibly the authorities responsible for the Dutch criminal justice system in general, adopt a set of "best practices" for their creation and use.

To begin with, the content of the presentations should be constrained by something like the rules governing the admissibility of evidence at American trials.[174] Any information conveyed in the presentation should be *relevant*: it must tend to make some fact of consequence to the case more or less probable than that fact would be without the information.[175] Photos or videos, audio recordings, or transcriptions of witnesses' words included in the presentation should also be *reliable*. Police and prosecutors should be prepared to offer sufficient evidence to show that the images, sounds, and words are what they purport to be: a fair and accurate recording or representation of the objects or events in question in the case of images or sounds, or an accurate reproduction of witnesses' words.[176] The police should also strive to ensure that the probative value of the information they present

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[169] We would like to thank Professor Linda Meyer for this observation.
[170] Except as excluded under Articles 149(b) and/or 152; *see also* Art. 149 Sv.
[171] Dekker, *supra* note 1.
[172] We would like to thank Professor Meyer for this suggestion as well.
[173] *See* Dekker, *supra* note 1, at 52.
[174] *See id.*
[175] *See* Fed. R. Evid. 401 (2018).
[176] *See* Fed. R. Evid. 901(a) (2018).

(that is to say, its evidentiary strength) is not substantially outweighed by the danger that the information in question might mislead or confuse the suspect – or the judge who may later see the presentation as part of her review of the dossier before trial – or that the information might unfairly prejudice the judge against the suspect. For instance, the presentation should not unnecessarily provoke emotion; it should not include gruesome images unless they are essential to establishing the tactical pointers; nor should it feature subtitles, titles, music, or sound effects lacking relevancy.[177]

In addition, those preparing the visual presentation should be required to include in it any materially exculpatory information that they are obligated to include in the dossier and to make available to the suspect and his lawyer. The visual presentation need not offer competing theories of the case or explicit counterarguments to the police and prosecutor's visually assembled evidence. It is the responsibility of defense counsel to develop those. The exculpatory information should not be included in a way that undermines the effects of the "stacking" and "mounting up" of tactical pointers that is so important to the function of the visual presentation: inducing the suspect to appreciate the strength of the evidence against him. The presentation should, however, display the required exculpatory information in a way that the suspect can perceive and understand. The fact that at least one visual presentation has already included exculpatory information[178] indicates that this is a feasible practice.

How to ensure that visual presentations comply with these standards? To some extent, the adoption of the information-gathering method of interrogation in general, an integral part of Dutch police and prosecutors' professional obligation to seek the truth rather than primarily to obtain a confession, will guide police practices. Police who are already prevented from engaging in deliberate deception in oral interrogations will be less likely to do so when presenting information visually. Nevertheless, visual communication is prone to produce effects of which the communicator himself is unaware,[179] so the criminal justice system should not

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[177] *See* Fed. R. Evid. 403 (2018). Under American evidence law, technically speaking, the visual presentation itself —the formatting and sequencing of PowerPoint slides or video documentaries—would not be considered "substantive" evidence subject to the rules of evidence because, but even merely illustrative evidence (sometimes referred to as "demonstrative aids"), as well as non-evidentiary audiovisual presentations offered during opening statements and closing arguments, are governed by analogous principles: They must be pertinent to the case and not unfairly prejudicial or unduly misleading or confusing. (The rules and practices applicable to this aspect of American trials are, however, somewhat muddled and vary from one jurisdiction to another; *see* Maureen A. Howard & Jeffery C. Barnum, *Bringing Demonstrative Evidence In From the Cold: The Academy's Role in Developing Model Rules*, 88 TEMP. L. REV. 513 (2016)).

[178] In the Harz murder investigation, conducted by the North Holland Unit (Dekker, *supra* note 1, at 67), the visual presentation included "positive statements about the suspect" and the complete case "as it was at that moment" (Interview with Piet Oele, Senior Police Officer, North Holland Unit (October, 2018)).

[179] Neal Feigenson & Richard K. Sherwin, *Thinking Beyond the Shown: Implicit Inferences in Evidence and Argument*, 6 L. PROBABILITY & RISK 295 (2007).

rely entirely on self-regulation by the police. Nor can it rely on the suspect himself to identify whether and how the visual presentation has diverged from sound evidentiary principles. Most suspects are under considerable stress; some are cognitively impaired; all will most likely have other things on their minds than a close examination of the nuances of the presentation; and, like any other audience of a visual communication, they are likely to be unaware of at least some of the effects the presentation has on their judgment.[180]

Hence the importance of a *critical third party* (or "objective third party" or "critical opponent") who can scrutinize the visual presentation for breaches of evidentiary rules.[181] The principal candidate for this role is the suspect's lawyer. As noted, all Dutch suspects now have the right to have their lawyers present during custodial interrogations. Being trained in the law and not subject to the same psychological pressures as the client, the defense lawyer will most likely be better able to identify the respects, if any, in which the visual presentation is misleading or incomplete.[182] The lawyer will also be able to discuss the visual presentation with the suspect and advise the suspect as to the actual strength of the prosecution's case, which, due perhaps to the existence of viable defenses or exculpatory information not included in the visual presentation, but of which the lawyer is aware, may not be quite as compelling as the presentation induces the suspect to believe it is.

Still, the suspect's lawyer may not be able to assess the visual presentation as expertly as she might desire. As already noted, Dutch defenders are much less likely than their American counterparts to conduct independent factual investigations, which might yield important exculpatory evidence and hence an alternative to the police and prosecutor's narrative of the suspect's guilt. And the lawyer may simply be insufficiently adept in the close scrutiny of visual communications to recognize ways in which the visual presentation may be significantly misleading or prejudicial.

It is therefore important that the presiding judge be an additional critical third party who can objectively review the visual presentation for fairness and accuracy, in compliance with the evidentiary principles above. The visual presentation often becomes part of the dossier (although at present it need not be; it was not in the *Arial* case, described above), so the judge will routinely have the opportunity to review it. The inclusion of the presentation in the official case file that goes to the judge should be required unless there is some compelling reason not to include it; for instance, the prospect of a significant breach of privacy. The judge's power to exclude a confession that was illegally obtained should act as a check on police overreaching and incentivize them to construct and display visual

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[180] Feigenson & Spiesel, *supra* note 147.

[181] Dekker, *supra* note 1, at 57-58.

[182] Sometimes, of course, the suspect himself, who may know things about the case that his lawyer does not, will be more alert to omissions or misrepresentations. Article 28 of the Dutch Code of Criminal Procedure guarantees the defendant the right to confer with his lawyer during interrogations "as much as possible," although there are some restrictions on the lawyer's participation in the case; for instance, the lawyer cannot deliberately thwart the investigation.

presentations that the judge will not deem to be substantially misleading or psychologically coercive.[183]

Interestingly, the potential dual use of visual presentations – at trial as well as during interrogations – will sometimes enable the judge to assess the presentation for different purposes. A judge might well find that a presentation offered at trial contains information that helps him or her decide the suspect's guilt or innocence but, as shown to the suspect during interrogation, constituted unlawful coercion. Conversely, a judge might find the presentation to have been entirely within the range of proper interrogation techniques and yet that it does not add anything significant to the written proof in the dossier. The mere prospect of judicial review of the visual presentation as a representation of evidence at trial, though, should function as an additional incentive for the police to construct the presentation fairly and accurately.

Additional procedures should be instituted to maximize the abilities of the suspect, his lawyer, and the judge to evaluate the visual presentation carefully and to guarantee that the use of visual presentations does not violate the suspect's rights.[184] When showing the presentation, the police should give the suspect and, if present, his lawyer appropriate opportunities to respond to and critique it, and should give the suspect adequate opportunities to tell his side of the story.[185] If the suspect insists on his right to remain silent, the police should respect his position and not seek further to elicit a statement, especially by repeatedly presenting the visuals.

The showing of the visual presentation itself should be recorded audiovisually in such a way that those who are not present—perhaps the suspect's lawyer and certainly the judge—will later be able to assess whether the presentation was conducted in a proper fashion, including according the suspect appropriate opportunities to respond to it. Since January 1, 2013, the audio visual registration (AVR) of police interrogations has been required in the Netherlands for many sorts of suspects and cases.[186] We recommend that AVR be required in all cases in which a visual presentation is used, and that recording protocols, including camera

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[183] In addition, Dekker suggests that an independent person not associated with the investigation could fulfill the role of objective critical third party. Within the Dutch police, some persons may be assigned the role of being "opposing speakers," in effect, playing devil's advocate during major investigations, to strengthen the investigation by helping the team avoid tunnel vision. Presumably a similar role could be assigned with regard to the review of the visual presentation itself. It needs to be considered whether incurring the additional procedural and logistical costs of requiring the enlistment of a third person to participate in evaluating the visual presentations would be practical. Dekker, *supra* note 1, at 58.

[184] *See* Dekker, *supra* note 1.

[185] *Cf.* Cleary & Bull, *supra* note 166 (of all interrogation techniques, suspects themselves most highly value being given the opportunity to explain their perspectives).

[186] *Aanwijzing Auditief en Audiovisueel Registeren van Verhoren van Aangevers, Getuigen en Verdachten* [Designation Auditory and Audiovisual Registration [AVR] of Interrogations of Declarants, Witnesses, and Suspects], Overheid (Oct. 31, 2018), https://zoek.officielebekendmakingen.nl/stcrt-2018-60346.html.

placement, angle, and so on, be adopted to ensure that the entirety of the visual presentation, the behavior of the interrogators presenting it, and the behavior of the suspect (and his lawyer, if present) in response to it can be preserved for later review.

The police investigators who are constructing the visual presentation can also adopt best practices to maximize its efficacy and minimize its risks. To the extent they are not already doing so,[187] police should work with psychological consultants to evaluate the suspect's intelligence level and relevant personality characteristics so that they can design a presentation that is properly pitched to the suspect's capabilities and, for instance, does not produce cognitive overload, which could undermine the presentation's goal of enhancing the suspect's comprehension of the strength of the evidence against him.[188] The police should also, as needed, work with visual consultants who can help them enhance the professionalism of the presentation's design. The presentation itself should always, by means of clear labeling or otherwise, make plain to viewers the level of reality that component visuals depict, e.g., surveillance video versus video re-creation, and adequately contextualize all information presented so that viewers understand what they are looking at and why. The police should also always preserve the original data (photographic, videographic, documentary, or physical) incorporated into the presentation so that viewers can, as needed, compare the presentation to the original to check for any (inadvertent) misrepresentations or omissions. Verbal assertions in the presentation should be couched in the third person rather than the second to avoid implicitly encouraging the suspect to uncritically adopt the prosecution's version of events as his own.

Finally, all professional participants in the investigative and criminal justice —, defense lawyers, and judges—could benefit from additional education and training in understanding visual media.[189] By being more informed about the perceptual, psychological, and cultural factors that affect people's uptake of visual media, participants would be better able ensure that visual presentations do the job they are intended to do: align suspects' perceptions of the strength of the evidence against them with its actual strength, incentivizing them to make truthful statements and furthering the truth-seeking goals of the justice system as a whole.

VII. SHOULD AMERICAN POLICE ADOPT THE DUTCH PRACTICE?

Assuming for the sake of argument that the use of visual presentations in Dutch police interrogations, especially with the adoption of the recommended reforms, could benefit the criminal justice system, primarily by inducing more actually culpable suspects to make truthful statements without undue risk of unfair

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[187] Every police unit in the Netherlands currently has multiple investigative psychologists who might be consulted for these purposes.

[188] *E.g.*, John Sweller, *Cognitive Load Theory, Learning Difficulty, and Instruction*, 4 LEARNING & INSTRUCTION 295 (1994).

[189] *See* Feigenson & Spiesel, *supra* note 147.

treatment, we wonder whether American police investigators should consider using them as well indeed, why, to the best of our knowledge, they are not already commonly using them. We suspect that certain fundamental differences between the investigative and criminal justice systems of the two countries explain why police in the United States are not using visual presentations during interrogations and, we believe, are unlikely to do so on a widespread basis in the future.

Before addressing those reasons, consider two arguments in favor of the use of visual presentations by American police. First, at least in theory, American police might have more to gain than their Dutch counterparts from an additional effective technique for eliciting confessions from suspects who would otherwise remain silent. As noted earlier, Dutch suspects' silence, unlike that of American suspects, may be used against them in limited circumstances. All things being equal, this would seem to make the right to remain silent somewhat less valuable to the suspect in the Netherlands than in the United States, which might make Dutch suspects less likely than American suspects to insist on it, which in turn suggests that there would be *more benefit* to American police in investing the additional resources to make a visual presentation in the hopes of eliciting statements from suspects who would otherwise not be inclined to make them. In addition, as noted earlier, in the Netherlands, prosecutors must produce additional proof beyond the suspect's statement in order to obtain a conviction;[190] since this is not the case in the United States, American police and prosecutors would, at least in some cases, derive more benefit from any proper technique, including visual presentations, that would induce suspects to make statements.

Second, in an adversarial justice system, American defense lawyers have more leeway (if often not more resources) than their Dutch counterparts to conduct independent factual investigations and to present evidence and cross-examine witnesses at any subsequent trial. This suggests that American defense lawyers would be better able and thus (again, all things being equal) more likely to counter any potential one-sidedness of the visual presentation. This, in turn, would make it less likely that visual presentations would bias American suspects' decisions whether to make statements and thus would reduce one potential source of unfairness arising from the use of visual presentations in general.

Nevertheless, other differences between the American and Dutch criminal justice processes weigh against the widespread implementation of visual presentations in the United States. Police in the United States, where the Reid interrogation method still predominates, have so much more freedom to engage in psychologically manipulative and even deceptive tactics to persuade suspects to make statements that they may perceive less need to go to the effort and expense of adopting a new technique that makes confession only marginally more likely. This may partly explain why police interrogators in the United States have not already done more along these lines. On the other hand, since they have long been empowered under the Reid method to manipulate and deceive verbally, American police interrogators might well feel empowered to use visualized evidence in manipulative or deceptive ways, thus amplifying the perceived effects of their

[190] *See also* Verhoeven & Duinhof, *supra* note 53.

current practices. It is unclear whether the net effect would be a greater or lesser inclination to create and deploy visual presentations, although, in any event, it would not serve the justice system's legitimate goals if visual presentations were used to deceive and coerce.

More to the point, the fact that American defense attorneys are more likely than their Dutch counterparts to conduct independent factual investigations that will put them in a position to respond critically to visual presentations would, all things being equal, reduce the benefit to police and prosecutors of using presentations, because American defendants and their lawyers would be less likely to be persuaded to accept the prosecution's version of events uncritically and thus to give statements. In addition, the fact that defense attorneys in the American adversarial system will, if the case goes to trial, be able to put on their own witnesses, cross-examine the prosecution's witnesses, and make their own opening statements and closing arguments to the judge or jury would further reduce the expected benefit to American police of putting together elaborate visual presentations, since the presentations (perhaps especially if they are indeed a kind of preview of the prosecution's closing argument) may well enable American defense attorneys to do a better job of identifying weaknesses in the prosecution's case and exploiting them at trial. Avoiding this perceived expected benefit to the opposing party would further reduce American police and prosecutors' incentives to create and use visual presentations during interrogations.

In sum, we think it is unlikely that American police investigators and prosecutors will broadly adopt the practice of using visual presentations during suspect interrogations, even once the Dutch practice becomes more widely known. That said, we also believe that it is well worth bringing these visual presentations to the notice of police, prosecutors, judges, and other participants in American as well as other criminal justice systems so that they can make their own evaluations of the benefits and drawbacks of this innovative practice.