

**“You Made Me Promises, Promises” —
Determining the Existence of Promises of
Leniency During Custodial Interrogation and the
Proper Standard of Review. [*State v. Sharp*, 210
P.3d 590 (Kan. 2009)]**

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I. INTRODUCTION

This Comment aims to answer the question of how courts should determine when the police stop coaxing a suspect to talk and when they begin making impermissible promises of leniency. Answering this question requires an examination of current standards for evaluating the existence of a promise and an analysis of the impact videotape evidence has on the standard of review a court may exercise.

When faced with these questions in *State v. Sharp*,¹ the Kansas Supreme Court chose to define a promise as something that exists solely in the mind of the promise-maker and ignored how an objective observer would interpret the promise-maker's words. The case involved a young woman, Kimberly Sharp, who believed the interrogating officer promised her immunity before she confessed to being an accomplice to kidnapping and murder.²

This Comment explores the court's reasoning behind its decision, the influence of videotaped evidence on the appropriate standard of review, and the more logical approaches to reviewing videotaped evidence that the court should have taken. Part II describes the events leading up to Kimberly Sharp's interrogation and concentrates on the specific language used by the detective.³ Part III provides a background on the evolution of the role of police coercion and promises as they affect the voluntariness of a confession.⁴ Part III also contains a history of the police use of video-recording technology and its relation to an appellate

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1. 210 P.3d 590 (Kan. 2009).
2. *Id.* at 597.
3. *See infra* Part II.
4. *See infra* Part III.A.

court's ability to determine voluntariness.⁵ Part IV recounts the opinion of the court, including the dissenting opinion of Justice Johnson.⁶ Lastly, Part V argues that the reasoning in the majority's opinion was misguided and outdated; furthermore, it suggests a different interpretation that fully takes into account the facts and circumstances of Sharp's interrogation.⁷

II. CASE DESCRIPTION

On July 2, 2006, cadaver dogs from the Topeka Police Department in Topeka, Kansas discovered David Owen's body near the Kansas River.⁸ Although the degree of decomposition prevented a determination on the autopsy alone, the medical examiner concluded from the body and the police investigation that the cause of death was homicide.⁹ Detective Bryan Wheelles was assigned to the case, and during the investigation, Wheelles encountered Sharp and another suspect, Charles Hollingsworth, seated together on a bench.¹⁰ Noticing that Sharp appeared afraid of Hollingsworth, Wheelles separated the two before he told Sharp that he wanted to talk to her about the death of Owen.¹¹ Wheelles transported Sharp to the Topeka Police Department where he took her into custody and read Sharp her *Miranda* rights.¹²

Wheelles proceeded to question Sharp about Owen, and she recounted the following version of events.¹³ On the night of June 16, 2006, Sharp sat around a campfire in a makeshift homeless camp with Hollingsworth and two other homeless men, Carl Lee Baker and John Cornell.¹⁴ On that night, David Owen entered the campground.¹⁵ Owen, a self-styled homeless advocate, encouraged Sharp and the three men to use his cell phone to call and reconnect with their families.¹⁶ He

5. See *infra* Part III.B.

6. See *infra* Part IV.A.-B.

7. See *infra* Part V.A.-B.

8. Brief of Appellee at 4, *State v. Sharp*, 210 P.3d 590 (Kan. 2009) (No. 06-CR-1228).

9. *Id.*

10. Brief of Appellant at 4, *State v. Sharp*, 210 P.3d 590 (Kan. 2009) (No. 06-CR-1228).

11. *Id.*

12. Brief of Appellee, *supra* note 8, at 7.

13. Brief of Appellant, *supra* note 10, at 14.

14. *Id.* at 5. Sharp was recently divorced and had two young children: Edward, age six, and Autumn, age three. *Id.* at 2. Sharp spent some nights at the Topeka Rescue Mission, but had no permanent residence. *Id.* at 4-5.

15. *Id.* at 5.

16. Brief of Appellee, *supra* note 8, at 2. Owen considered himself an advocate for the homeless and would provide cell phones and calling cards for homeless persons to contact their families. *Id.* Owen believed that reconnection was the best way to combat homelessness, and he was known to take drastic means to that end. Brief of Appellant, *supra* note 10, at 2. Cornell testified "that Mr. Owen said that he had to get 'Nazi' with homeless people." *Id.* at 3. When Owen found an unoccupied campground, he would destroy the camp by cutting the tents and taking any supplies he found. *Id.* Owen believed people would stay homeless if they learned the skills necessary to survive and became comfortable in their camps. *Id.* The local rescue mission posted notices warning campers to be aware of Owen. *Id.*

then told them that if they had not been at the camp, he would have destroyed their tents and taken their supplies.¹⁷ Baker and Hollingsworth began to argue with Owen, and when Owen reached for his cell phone to call the police, one of the men knocked him to the ground.¹⁸

Believing Hollingsworth was going to kill Owen, Sharp implored him not to do so, to which Hollingsworth replied that he would not harm Owen.¹⁹ Hollingsworth and Baker then dragged Owen out of sight in the direction of a nearby river.²⁰ When the men returned, Sharp asked the two men whether they had killed Owen; they replied that they had not.²¹ Sharp declined their offer to accompany them to provide Owen food and water, opting to return to a local rescue mission for the night.²²

Sharp concluded her story and denied having any part in the events leading to Owen's death, but Wheelles did not believe Sharp and continued to question her about her involvement in the crime.²³ Eventually, Sharp relented and admitted to destroying evidence of Owen's presence at the campsite.²⁴ Sharp then immediately asked if she was going to jail, and Wheelles responded, "No, no, no, no, no, no, no, no, no, no. You . . . are a witness to this thing as long as you do not do something dumb and jam yourself."²⁵ He went on to say that if Sharp was scared, she should tell Wheelles. He added, "Just don't tell me no if I ask you something."²⁶

Upon Wheelles's request, Sharp took Wheelles to the area where she and the three other men had been camping to reenact the events of the night of June 16.²⁷ While reenacting the events, Sharp told Wheelles that when Hollingsworth approached Owen with the axe, she told him,

17. Brief of Appellant, *supra* note 10, at 5.

18. *Id.* Baker told Owen he could not release him because he worried Owen would contact the police. *Id.* Sharp contends the two men led Owen into the woods at the edge of the campground where Sharp followed and found Owen on his knees with Hollingsworth standing over him holding an axe. *Id.* at 5-6.

19. *Id.* at 6. Sharp stated that Baker and Hollingsworth then bound and gagged Owen. *Id.*

20. *Id.* Sharp maintains that this was the last time she saw Owen. *Id.* at 6-7. It was at this time that Sharp and Cornell burned Owen's personal possessions per Baker's instructions. *Id.* at 6. However, the State maintained that it was Sharp's idea to burn Owen's belongings. Brief of Appellee, *supra* note 8, at 3.

21. Brief of Appellant, *supra* note 10, at 6-7. Later, Sharp heard that Owen's body had been found, and when she questioned Hollingsworth and Baker about whether they had killed him, the men replied that they had untied Owen and let him go. *Id.* at 7. The State disputes this, alleging that Hollingsworth told Sharp that Owen was "probably dead by now." Brief of Appellee, *supra* note 8, at 4.

22. Brief of Appellant, *supra* note 10, at 7.

23. *Id.* at 15.

24. *Id.* Sharp admitted that she helped dispose of some of Owen's possessions by burning them in a fire at the campsite. *Id.* at 16.

25. State v. Sharp, 210 P.3d 590, 596 (Kan. 2009).

26. Brief of Appellant, *supra* note 10, at 16. After this exchange, Wheelles and Sharp left the station to collect Sharp's children. *Id.* at 17. The children were staying with Baker, and Detective Wheelles informed Sharp that Baker was a registered sex offender with an outstanding warrant for his arrest. *Id.* at 16. After collecting the children, all four people returned to the police station. *Id.* at 17.

27. *Id.*

“No, don’t kill him.”²⁸ Wheelles asked, “Did you say ‘No, don’t kill him,’ or did you say ‘No, don’t kill him here?’”²⁹ Sharp then changed her statement to conform to Wheelles’s suggestion, saying she stated, “Don’t kill him here.”³⁰ Sharp and Wheelles returned to the police station after the reenactment. Following further questioning, Wheelles informed Sharp that the district attorney had decided to press charges and that Sharp was under arrest for the kidnapping and murder of David Owen.³¹

Prior to the trial, Sharp moved to suppress her comments to Wheelles concerning her role in Owen’s death.³² During the suppression hearing, the judge heard arguments and watched the videotapes of Sharp’s interrogation and reenactment at the campsite.³³ Wheelles testified that he viewed Sharp not as a suspect but as a witness during the interrogation.³⁴ Because of this belief, Wheelles testified that his statements to Sharp were only exhortations for her to be truthful and that he never intended to elicit a confession from her.³⁵

After observing her behavior on the videotapes, the trial court found that Sharp never appeared to be under duress; therefore, her confession was “freely, voluntarily and intelligently made.”³⁶ With Sharp’s statements entered into evidence, the jury convicted her of kidnapping and felony murder, and she was sentenced to life without the possibility of parole for twenty years on the felony murder conviction to run concurrently with a sixty-one month sentence on the kidnapping conviction.³⁷ Upon review of Sharp’s appeal, the Kansas Supreme Court

28. *Sharp*, 210 P.3d at 596. A video recording was made of the reenactment. See Brief of Appellant, *supra* note 10, at 18.

29. Brief of Appellant, *supra* note 10, at 7.

30. *Id.* at 8. However, Cornell testified at trial that he never heard Sharp say, “Don’t kill him here,” only that he heard Sharp say they were never going to kill or harm Owen. *Id.* at 10-11. During the reenactment, Sharp admitted that it was her idea to burn Owen’s belongings. *Id.* at 18. Sharp told Wheelles, “I said we have to burn it ‘cause I don’t need the evidence. I don’t want to be tied to this.” *Id.*

31. *Id.* Sharp became visibly upset with Wheelles, repeatedly saying that he had lied to her and tricked her, finally stating, “This is bullshit.” *Id.* at 18-19.

32. *Id.* at 13.

33. *Id.* at 18; *Sharp*, 210 P.3d at 599.

34. Brief of Appellant, *supra* note 10, at 19-20. “I didn’t consider her to be a suspect until she was criminally charged. I treated her *like a witness* throughout. . . . I don’t recall any specific discussions of her being a suspect, and I certainly didn’t treat her or view her like that.” *Id.* at 20 (emphasis added).

35. *Sharp*, 210 P.3d at 600-01. Wheelles further stated that because Sharp was a cooperating witness, he did not believe she should have been charged. Brief of Appellant, *supra* note 10, at 20.

36. *Sharp*, 210 P.3d at 599. Upon the court’s judgment, Sharp entered a continuing objection to the admission of her statements, which Sharp renewed before the prosecutor published the statements to the jury. Brief of Appellant, *supra* note 10, at 20.

37. *Sharp*, 210 P.3d at 596; Brief of Appellee, *supra* note 8, at 5. At trial, Sharp testified consistently with the content of her interview with Wheelles, except that when describing Hollingsworth standing over Owen with the axe, Sharp testified that she only said, “Don’t kill him.” *Sharp*, 210 P.3d at 596. Pursuant to a plea bargain, Cornell testified at trial against Sharp. *Id.* Cornell testified that Sharp opened Owen’s bag and became agitated when she saw the pictures of homeless camps that Owen had destroyed and that she burned Owen’s possessions as retribution. *Id.* When Cornell testified about Owen being tied up, he stated that Sharp said, “We’re not gonna kill him, we’re just gonna

found no error in the trial court's decision and affirmed Sharp's conviction.³⁸

III. BACKGROUND

In *Sharp*, the Kansas Supreme Court had to determine whether the State had made a promise during the interrogation. In making this determination, the court exhibited deference to the trial court's decision, despite the existence of videotape detailing the entire process. The first section of this Part examines the legal evolution of coercion and promises of leniency in a criminal interrogation.³⁹ The second section discusses the standard of review in the context of coerced confessions in relation to the immersive records provided by video recordings.⁴⁰

A. Confessions and Voluntariness

1. Common Law Roots

The history of criminal procedure regarding confessions exhibits a continual trend toward protecting the rights of the suspect. Courts have long recognized that police may not elicit confessions from suspects through methods, such as physical force, which leave the truthfulness of the confession in doubt.⁴¹ Yet, legal safeguards against psychological coercion through promises of immunity or leniency have evolved much slower than that of physical coercion.⁴² For years, courts have struggled to define the boundaries between a coerced and a voluntary confession.⁴³ The general trend has been to provide more protection against coerced confessions.⁴⁴

The United States derives its common law from Great Britain, which prior to the 1700s provided no prohibition against confessions induced by promises of leniency.⁴⁵ However, the turn of the eighteenth century brought with it new jurisprudence on coerced confessions be-

tie him up to a tree, have him spend the night outside." *Id.*

38. See *Sharp*, 210 P.3d at 594-95.

39. *Infra* Part III.A.1-3.

40. *Infra* Part III.B.

41. JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 218 (2003).

42. See *Brown v. Mississippi*, 297 U.S. 278, 285-86 (1936) (indicating that the law has long recognized the problems presented by physical coercion).

43. See LANGBEIN, *supra* note 41, at 218 (detailing the progression from excluding only physically-coerced confessions to also excluding psychologically-coerced confessions); WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* 311 (3d ed. West 2000) (examining the various meanings of voluntariness).

44. For the purposes of this Part, "coercion" refers solely to psychological coercion and not physical, unless otherwise stated.

45. LANGBEIN, *supra* note 41, at 218. The *Session Papers*—early compilations of English trial court proceedings—demonstrate that the ideological shift to exclude psychologically-coerced confessions began as early as the 1740s and that exclusions were common by the 1760s. *Id.*

cause courts realized that many confessions were extracted by promises of leniency.⁴⁶ The reason for excluding coerced confessions was not out of respect for the fundamental rights of a suspect but due to concerns that coerced confessions were unreliable.⁴⁷ By the 1760s, exclusion of coerced confessions was the norm,⁴⁸ and in 1769, appellate courts removed the discretion from trial judges' purview by excluding coerced confessions.⁴⁹

2. The Evolution of American-Confession Jurisprudence

In the United States, the first case dealing with a coerced confession concerned a young boy in Philadelphia accused of arson.⁵⁰ The reviewing court overturned the boy's conviction, holding that "[t]he hope of mercy actuates almost every criminal, who confesses his crime; and merely that he cherishes the hope, is no reason, in morality, nor in law, to disbelieve him. The true point for consideration, therefore, is whether the prisoner has falsely declared himself guilty of the capital offence [sic]."⁵¹ Initially, American law adopted the British standard that

46. See LANGBEIN, *supra* note 41, at 230-31. An example of this was the reward system, which offered rewards to persons who would find and convict criminals. *Id.* at 148. Those seeking to claim the rewards would make promises of leniency or immunity if the criminal confessed, then use the confession to turn in the criminal and claim the reward. *Id.* at 232-33. Another example comes from cases of coerced confessions arising from domestic disputes between house servants and the master of the house often over the servant's compensation. *Id.* at 231. Masters would use the tactic of threatening to charge the servant with theft, offer to drop them if the servant would confess, then proceed with pressing charges after the servant confessed and returned the item. *Id.* Courts began to view coerced confessions with increasing skepticism and instructed juries to consider any promise made to a defendant in exchange for their confession as a mitigating factor for conviction. *Id.* at 221. As with any shift in thinking, this new approach to handling confessions was not universally adopted. See *id.* at 218. In 1722, Margaret Wilson was convicted based on her confession despite her claim that the police told her that "if she'd confess they would forgive her." *Id.*

47. *Id.* at 229 (framing the argument for exclusion as "whether particular confessions 'are or are not entitled to credit'").

48. *Id.* at 221. During the transition period from 1700 to 1760, in which coerced confessions went from being universally admitted to essentially inadmissible, judges adopted three different approaches to dealing with the problem. *Id.* These three general approaches were: to exclude the confession, to admit the confession with a note of caution to the jury, or to admit freely the confession. *Id.*

49. *Id.* at 222. In 1767, prosecutors were admonished to no longer use promises to elicit confessions with the court stating, "It is hoped this will warn prosecutors not to draw out confessions with promises of favor." *Id.* The common law began to draw clear distinctions between the admissibility and veracity of freely given confessions and those acquired through torture or false promise.

A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it, and therefore it is rejected.

DAVID M. NISSMAN ET AL., LAW OF CONFESSIONS 4 (1985) (quoting *The King v. Warickshall*, 168 Eng. Rep. 234-35 (K.B. 1783)). In 1783, courts elucidated the modern rule that renders confessions obtained by promise or threat inadmissible, mandating exclusion of confessions "forced from the mind by the flattery of hope, or by the torture of fear." LANGBEIN, *supra* note 41, at 218 (quoting *Warickshall*, 168 Eng. Rep. 234).

50. NISSMAN ET AL., *supra* note 49, at 4. The child, a twelve-year-old boy, was "denied clothing, warmth, and nourishment" for three days until he confessed. *Id.*

51. *Id.* at 5. (quoting *Commonwealth v. Dillon*, 4 U.S. (4 Dall.) 116, 117-18 (1792)).

a confession was only to be excluded if it was untrustworthy. Soon, courts recognized that societal and psychological factors caused untrustworthy confessions and began to view confessions with general distrust.⁵² In 1897, *Bram v. United States*⁵³ formalized this distrust by establishing a “bright-line” rule excluding confessions induced by police coercion regardless of the level of the state’s coercive activity.⁵⁴

It is clear that police interrogation tactics played a large role in excluding confessions induced by police coercion. Often this coercion was extreme; in fact, in the early half of the twentieth century, police still used “third degree” interrogation tactics, which involved beating and detaining suspects for unreasonably long periods.⁵⁵ The United States Supreme Court’s decision in *Watts v. Indiana*⁵⁶—that police could not interrogate a suspect constantly for days at a time—prompted a movement by the police away from physical coercion and toward psychological deception.⁵⁷ By the 1940s, the Supreme Court acknowledged in *Chambers v. Florida*⁵⁸ that psychological, as well as physical, coercion can overcome the voluntariness of a confession.⁵⁹

Although voluntariness has long been the test for the admissibility of a confession,⁶⁰ the definition of voluntariness has evolved since the passage of the Fourteenth Amendment to the United States Constitution.⁶¹ In *Brown v. Mississippi*,⁶² the Court held that state interrogations

52. JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 822 (4th. ed. 1995). Scholars believed that because many criminals were lower-class citizens, criminals felt compelled to agree with whatever their police “superiors” suggested to them, therefore, compromising the voluntariness of their confession. *Id.*

53. 168 U.S. 532 (1897).

54. *See id.* at 565.

55. *See* Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Interrogation in America*, 18 CRIME L. & SOC. CHANGE 35, 38 (1992). The “Report on Lawlessness in Law Enforcement” published in 1931 revealed the use of “brute physical force” during police interrogations. *Id.*

56. 338 U.S. 49 (1949). In *Watts*, the defendant was questioned continually in relation to a murder investigation for four straight days, two of which he spent in solitary confinement. *Id.* at 52-53.

57. *Id.* at 54 (holding that interrogators could not use the relative seclusion of the police station to extract confessions that would be otherwise prevented by the protections of courtroom procedure); NISSMAN ET AL., *supra* note 49, at 8.

When a subject speaks because he has been overborne, it is immaterial whether he has been subjected to a physical or mental ordeal. . . . To turn the detention of an accused into a process of wrenching from him evidence which could not be extorted in open court with all its safeguards, is so grave an abuse of the power of arrest as to offend the procedural powers of due process.

Watts, 338 U.S. at 53-54; *see also* *McNabb v. United States*, 318 U.S. 332, 340 (1943) (holding that confessions must be voluntary, trustworthy, and obtained by “civilized” interrogation methods); Leo, *supra* note 55, at 36.

58. 309 U.S. 227 (1940).

59. *See id.* at 238-39. In *Chambers*, a murder suspect was questioned for five consecutive days, culminating in an all-night interrogation after which the suspect confessed. *Id.* at 231-32.

60. *See* *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961). “The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness.” *Id.*

61. *Brown v. Mississippi*, 297 U.S. 278, 287 (1936). Prior to being subjected to a Fourteenth Amendment analysis, there was no consensus on how courts defined voluntariness. *See* YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS 15 (1980) (stating that while all verbal utter-

are subject to the requirements of the Fourteenth Amendment's Due Process Clause.⁶³ Furthermore, the Court has held that "tortured confessions [are] a type of compulsion that violate[s] a federal due process right."⁶⁴ The Court's rationale for excluding coerced confessions changed once it began to analyze whether police have coerced a confession under the Due Process Clauses of the Fifth and Fourteenth Amendments.

As discussed above, courts historically excluded coerced confessions at trial because of trustworthiness concerns.⁶⁵ However, by 1961, the Court had changed its stance in *Culombe v. Connecticut*⁶⁶ and recognized that the admissibility of a confession is independent of its truthfulness.⁶⁷ Constitutional principles do not allow the trustworthiness of a confession to factor into its admissibility.⁶⁸ The admission of a confession depends on the manner in which police extract the confession; namely, coerced confessions offend constitutional due process rights of suspects and are inadmissible regardless of their veracity.⁶⁹

In deciding *Culombe*, the Supreme Court provided new logical underpinnings for why voluntariness and coercion should be used to determine the admissibility of a confession beyond what was provided for at common law. Nevertheless, the factors necessary to merit exclusion were still developing. By the 1980s, the bright-line rule established in *Bram* had not been applied for decades because it placed too great a burden on the state to conform its actions to the rule,⁷⁰ thus, the Court changed the criteria for exclusion in *Colorado v. Connelly*.⁷¹

Connelly contributed two elements to confession jurisprudence. First, courts must consider the totality of the circumstances when de-

ances are a conscious choice and, therefore, psychologically voluntary, there exists a disconnect between legal and psychological definitions of voluntariness). "[A] complex of values underlies the stricture against use by the state of confessions which, by way of convenient shorthand, this Court terms involuntary . . ." *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960).

62. 297 U.S. 278 (1936).

63. *Id.* at 287; see also *LAFAVE ET AL.*, *supra* note 43, at 311.

64. *NISSMAN ET AL.*, *supra* note 49, at 8. The Fourteenth Amendment made state cases reviewable under federal law. See *Jackson v. Denno*, 378 U.S. 368, 393-94 (1964) (establishing a due process right to pre-trial hearings about contested confessions). Voluntariness has evolved from merely meaning the suspect made a conscious decision to speak, to a more comprehensive definition including an evaluation of the suspect's psychological state. *KAMISAR*, *supra* note 61, at 15.

65. *KAMISAR*, *supra* note 61, at 11. Many courts used the term "voluntary" as a synonym for trustworthy or reliable. *Id.* at 10-11. A confession was voluntary as long as the coercive tactics used to elicit it did not render it "unreliable" or "probably untrue." *Id.* at 11. As recently as 1941, the United States Supreme Court stated, "[t]he aim of the rule that a confession is inadmissible unless it was voluntarily made is to exclude false evidence." *Lisenba v. California*, 314 U.S. 219, 236 (1941).

66. 367 U.S. 568 (1961).

67. *Id.* at 602 (excluding coerced confession on the grounds that its admission offends due process).

68. See *Jackson*, 378 U.S. at 385; *LAFAVE ET AL.*, *supra* note 43, at 312 (stating Fourteenth Amendment protection is meant to deter police conduct).

69. See *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961).

70. See Welsh S. White, *Confessions Induced by Broken Government Promises*, 43 *DUKE L.J.* 947, 953 (1994).

71. 479 U.S. 157 (1986).

termining the admissibility of a confession.⁷² Second, coercive police conduct must be causally related to the allegedly coerced confession.⁷³ In 1991, the Court finally abolished *Bram*'s bright-line rule in *Arizona v. Fulminate*⁷⁴ in favor of the totality of the circumstances test, which is now the guiding standard by which the voluntariness of confessions are judged.⁷⁵ As recognized in *Connelly*, the bright-line rule had fallen into disuse, and *Fulminate* marked the formal adoption of the totality of the circumstances test, a rule already in use.⁷⁶ Under this totality of the circumstances test, courts evaluate coercive police conduct and its effect on a suspect's voluntariness.⁷⁷ Although the law has evolved over the last three hundred years to establish a uniform test to determine the legal admissibility of a coerced confession, the Supreme Court has not answered the question of what standard a court should apply to decide if a promise has been made.

B. Role of Promises

1. Promises Under State and Federal Law

American courts have responded to changing police interrogation tactics by increasing the protections afforded to a suspect in a criminal investigation. In the 1930s, widespread reform of police interrogation practices shifted interrogation tactics away from physical coercion to psychological deception.⁷⁸ Because of this shift, courts had to identify more subtle psychological ploys as opposed to the marks of physical coercion. The task of identifying whether a promise of leniency was made is often difficult to determine. Interrogators rarely make express promises to induce confessions and are trained to impart their messages through subtle means.⁷⁹ These subtle tactics have forced courts to determine if a promise was made and, if so, the effect it had on the voluntariness of the suspect's confession. Most courts either do not state a

72. *Id.* at 188. When considering the totality of the circumstances, courts apply more than a simple balancing test. *See, e.g.*, *State v. Sharp*, 210 P.3d 590, 598 (Kan. 2009). Instead of weighing all the relevant factors against each other, courts consider the weight of each factor. *See id.* The violation of one factor, if egregious enough, is sufficient to overcome the voluntariness of a confession. *See id.*

73. *Connelly*, 479 U.S. at 167 (holding that the defendant confessed due to a mental condition that interfered with his free and rational ability to make choices, not because police conduct prompted his confession; therefore, the confession was admissible).

74. 499 U.S. 279 (1991).

75. *See id.* at 285-86.

76. *See id.*

77. *Id.*

78. Leo, *supra* note 55, at 37-38; *see also* Richard J. Ofshe, *Defending the Innocent: Interrogation and False Confession*, THE CHAMPION, Dec. 2007, at 10, available at <http://www.nacdl.org/public.nsf/01c1e7698280d20385256d0b00789923/35986cc45c6af2b4052573ed0056ff9f?OpenDocument>.

79. Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 998-99 (1997).

standard or choose to decide if a promise was made from the police's point of view, yet some courts have taken another approach.

A minority of state and federal jurisdictions choose to view the existence of a promise of leniency from the defendant's reasonably objective point of view.⁸⁰ The most clear-cut and persuasive authority comes from *United States v. Walton*,⁸¹ in which the United States Court of Appeals for the Third Circuit stated, "[t]o decide this issue [of whether a police promise induced the confession], we must examine the statement from [the defendant's] viewpoint."⁸² *Walton* involved federal agents using a phrase with an ambiguous meaning—promising the suspect his remarks would be "off the cuff"—to induce a suspect to reveal information.⁸³ The court held that it is unreasonable to ask a defendant to read the agents' minds to ascertain the agents' subjective belief of what their words meant.⁸⁴

Other courts have adopted reasoning similar to *Walton*. The United States Court of Appeals for the Fourth Circuit has held that whether a promise was made depends upon what a reasonable defendant would have believed the state was promising.⁸⁵ Providing an even more expansive interpretation of the defendant's point-of-view approach is *Miller v. State*.⁸⁶ In *Miller*, the court suggested that even when the source of the defendant's belief is a misunderstanding between the judge and defense counsel, a defendant's belief as to the existence of a promise is controlling.⁸⁷ Although in the minority, several jurisdictions

80. See *United States v. Walton*, 10 F.3d 1024, 1029 (3d Cir. 1993); *United States v. Shears*, 762 F.2d 397, 402 (4th Cir. 1985); *Miller v. State*, 250 So. 2d 624, 626 (Miss. 1971).

81. 10 F.3d 1024 (3d Cir. 1993).

82. *Id.* at 1029. In *Walton*, agents told the defendant that he should relate his story to the agents "off the cuff." *Id.* at 1027. The agents intended "off the cuff" to be understood in a traditional criminal sense that meant "without attribution." *Id.* at 1029. However, the court held that the defendant had no reason to understand "off the cuff" in the traditional criminal manner that the agents asserted they meant it. *Id.* Additionally, the court noted that the trial court made no finding of whether the defendant actually believed the representations of the agents. *Id.* The court further suggested that, because the agents believed what they were telling the defendant was the truth, it was reasonable for the defendant to have believed them, regardless of the fact that the two sides differed on what they believed the message to be. *Id.* The court's effort to analyze the apparent earnestness of the agents strengthened the idea that the defendant's point of view should be the controlling one. See *id.*; see also *Miller v. Fenton*, 796 F.2d 598 (3d Cir. 1986). "[I]f (the defendant) had made remarks that indicated that he truly believed that the State would treat him leniently . . . we might not find the confession voluntary." *Miller*, 796 F.2d at 613.

83. *Walton*, 10 F.3d at 1029.

84. See *id.*

85. *Shears*, 762 F.2d at 402; see also *Ferguson v. Boyd*, 566 F.2d 873, 876 (4th Cir. 1977) (holding that defendant could have reasonably believed his girlfriend was going to be released after repeated conversations about her release); *Grades v. Boles*, 398 F.2d 409, 412 (4th Cir. 1968) (holding that the questionable existence of a promise of leniency should be viewed from the defendant's perspective).

86. 250 So. 2d 624 (Miss. 1971).

87. *Id.* at 625. The defendant's attorney met with the judge and informed his client of his mistaken belief that the judge had offered the defendant immunity if he cooperated with the state's investigation. *Id.* "This belief was transformed into reality by defense counsel informing the [defendant] that she had been granted immunity from prosecution and advising her to cooperate with the State." *Id.* (emphasis added).

have come to consider the objective viewpoint of the defendant when examining the existence of a promise.

2. Promises Under Kansas Law

Kansas's jurisprudence regarding confessions induced by promises of leniency has evolved in a manner similar to the nation's at large. Following the *Connelly* precedent, Kansas courts evaluate voluntariness under the totality of the circumstances.⁸⁸ Kansas courts recognize that promises affect the voluntariness of a confession but have determined some common language that police use with suspects has no bearing on voluntariness.⁸⁹ To be a promise in Kansas, the words:

must concern action to be taken by a public official; it must be such that it would be likely to cause the accused to make a false statement to obtain the benefit of the promise; and it must be made by a person whom the accused reasonably believes to have the power or authority to execute it.⁹⁰

When attempting to introduce a statement made during an interrogation, the State has the burden of convincing the court that the suspect made the confession voluntarily.⁹¹ The State accomplishes this goal by proving by a preponderance of the evidence that the suspect was not operating under any coercion, whether it be physical or psychological.⁹² Under Kansas jurisprudence, any promise to a suspect involving leniency or immunity is inherently coercive and affects the subsequent voluntariness of the suspect's confession.⁹³

C. Video Evidence at Trial and the Standard of Review

Kansas's courts have treated the issue of the existence of a promise to a suspect as a question of fact.⁹⁴ Indeed, the court in *Sharp* noted that

88. See *State v. Brown*, 173 P.3d 612, 623 (2007). Relevant factors under Kansas law include: "(1) the accused's mental condition; (2) the manner and duration of the interrogation; (3) the ability of the accused to communicate on request with the outside world; (4) the accused's age, intellect, and background; [and] (5) the fairness of the officers in conducting the interrogation." *State v. Walker*, 153 P.3d 1257, 1266 (Kan. 2007).

89. See *State v. Harris*, 162 P.3d 28, 41 (Kan. 2007). "[T]he advice or admonition to the defendant to speak the truth, which does not import either a threat or benefit, will not make a following confession incompetent." *Id.* (quoting *State v. Wakefield*, 977 P.2d 941, 951 (Kan. 1999)). Examples include telling a defendant his cooperation would be noted by authorities, requesting that a defendant confess, and telling a defendant that things would go better if he told the truth. *Id.* *Contra* *People v. Martorano*, 194 N.E. 505, 508 (Ill. 1935) (holding that a defendant's confession was involuntary because the sheriff told him he would do everything he could to make the defendant's burden light for him).

90. *State v. Sharp*, 210 P.3d 590, 598-99 (Kan. 2009) (citing *Brown*, 173 P.3d at 626).

91. See *id.* at 597. In some states, confessions are treated as *prima facie* involuntary. See, e.g., *Ex parte Price*, 725 So. 2d 1063, 1067 (Ala. 1998); *State v. Trostle*, 951 P.2d 869, 879 (Ariz. 1997); *Dorsciak v. Gladden*, 425 P.2d 177, 180 (Or. 1967).

92. *Sharp*, 210 P.3d at 597.

93. See *id.* at 598.

94. *Id.* at 602. The court cites several cases from Kansas and the United States Court of Appeals for the Tenth Circuit that treat the existence of a promise of leniency to a suspect as a question of fact that is reviewed under a substantial competent evidence standard. *Id.* at 602-03.

even the United States Court of Appeals for the Tenth Circuit has treated the existence of a promise as a question of fact.⁹⁵ Although questions of law are subject to de novo review, courts determine questions of fact under a substantial competent evidence standard.⁹⁶ Substantial competent evidence is a significantly more deferential standard than de novo, and it only requires that evidence be relevant and have some substance from which a reasonable person could have reached the same conclusion.⁹⁷

Historically, appellate courts have reviewed cases from a “cold” record because a transcript was the only means of recording an event; however, implementation of videotaping in police departments gives the record a voice and a face.⁹⁸ Video-recording technology allows an appellate court to immerse itself in the facts that led to a dispute and provides a complete record from which to review a lower court’s decision.⁹⁹ In fact, the completeness of the videotape record has spurred debate over what the proper standard of review should be for courts reviewing videotaped evidence.¹⁰⁰

The use of video evidence by police departments and courts is a recent development but has quickly been met with widespread acceptance.¹⁰¹ Cassette camcorders have been readily available since the 1980s, and recent advancements in digital technology have made electronic recording both widely available and relatively affordable.¹⁰² The

95. *United States v. Lopez*, 437 F.3d 1059, 1064 (10th Cir. 2006); *United States v. Morris*, 247 F.3d 1080, 1089 (10th Cir. 2001).

96. *Sharp*, 210 P.3d at 597. Substantial competent evidence “possesses both relevance and substance and . . . furnishes a substantial basis in fact from which the issues can reasonably be resolved.” *Id.* at 602. However, the ultimate question of the voluntariness of a confession is a question of law. *Id.* at 597.

97. *Id.* at 602.

98. For the purposes of this section, “videotape” refers to all manners of video-capture technology, whether it be through video cassette, hard disk storage, or any other medium.

99. Thomas P. Sullivan, *Recording Federal Custodial Interviews*, 45 AM. CRIM. L. REV. 1297, 1318 (2008) (stating that “some of the most detailed assessments of voluntariness have come in cases of recorded interrogations, which permit judges to parse implicit promises and threats made to obtain an admission”) (quoting *United States v. Lewis*, 355 F. Supp. 2d 870, 871-72 (E.D. Mich. 2005)).

100. See Robert C. Owen & Melissa Mather, *Thawing Out the “Cold Record”: Some Thoughts on How Videotaped Records May Affect Traditional Standards of Deference on Direct and Collateral Review*, J. APP. PRAC. & PROCESS 411, 412 (2000) (“[Videotape] refutes the rhetoric of necessity that has long been invoked to defend traditional standards of appellate court deference to trial court decision making.”) (alteration added); Michael Kirby, Justice of the High Court of Australia, *Appellate Advocacy—New Challenges*, The Dame Ann Ebsworth Memorial Lecture 26 (Feb. 21, 2006) (“Already available technologies may permit appellate courts, where appropriate, to reduce the gap that has hitherto existed between the experiences of the trial judge and those of the appellate court.”) (transcript available at http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_21feb06.pdf).

101. Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127, 1128 (2005) (referring to a survey that shows more than 300 police and sheriffs’ departments in more than forty-three states record custodial interrogations); Sullivan, *supra* note 99, at 1305 (stating that more than 600 police departments, including at least one in every state, record felony custodial interrogations). *Contra id.* at 1316 (detailing federal investigative agencies’ opposition to electronic recording of custodial interrogations).

102. LARRY SHARP, ENFORCEMENT IN-CAR VIDEO CAPABILITIES (2006), http://www.police-technologies.com/digital/digital_white_paper2.pdf.

videotaping of interactions possesses many advantages over transcripts or audio recordings, including the ability to observe people's demeanor and the nuances of their behavior.¹⁰³

Police departments first adopted video technology by using recording devices in police cruisers and the station house to record interactions between themselves and the public.¹⁰⁴ Though initially skeptical of the value of videotaping, many departments have reported that the practice is overwhelmingly positive.¹⁰⁵ Although implementing the technology does impose a financial burden at the outset, the long-term savings resulting from reduced litigation concerning disputed interrogations offsets this cost.¹⁰⁶

Responding to police use of video evidence at trial, courts have accepted the utility of videotape and applied its benefits toward protecting fundamental constitutional rights. At the vanguard of this movement was the Alaska Supreme Court, which stated that "due process is not static . . . it must change to keep pace with new technological developments."¹⁰⁷ In 1985, it held that Alaskan authorities were required to videotape all felony custodial interrogations.¹⁰⁸ The court stated that video recordings protect the interests of both the state and the accused by providing an objective viewpoint from which to evaluate the circumstances of the interrogation.¹⁰⁹ Following Alaska's lead, the highest courts in Minnesota, Iowa, Massachusetts, and New Jersey now require police to record interrogations.¹¹⁰ In addition, several states have advocated, but not mandated, the recording of interrogations.¹¹¹

103. Mark Ritter, *Appellate Review of Video Recorded Trials: More Just Justice or Just a Headache?*, INT'L ASS'N OF YOUNG LAWYERS 8, Nov. 3, 2008, www.aija.org.au/Ap08/Ritter.pdf.

104. See W. Lloyd Hicks, *Video Recording in Police Identification*, 59 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 295 (1968) (suggesting some police departments have been using video recording equipment since as early as 1966).

105. See Sullivan, *supra* note 99, at 1314; Julie Renee Linkins, *Satisfy the Demands of Justice: Embrace Electronic Recording of Custodial Investigative Interviews Through Legislation, Agency Policy, or Court Mandate*, 44 AM. CRIM. L. REV. 141, 155 (2007) (stating that 97% of departments that videotape interrogations favor the practice).

106. Sullivan, *supra* note 101, at 1130. The judicial system is saved future expenses by "reducing motions to suppress, increasing the incidence of guilty pleas, saving defense costs in civil suits based on police coercion and perjury, and avoiding civil judgments based on wrongful convictions traced to false or coerced confessions." *Id.*

107. *Stephan v. State*, 711 P.2d 1156, 1161 (Alaska 1985).

108. *Id.* at 1161-62. The court reasoned that because interrogations are recorded to satisfy due process requirements, the recording should reflect the entirety of the interview and that officers need to provide on-camera explanations for any gaps or interruptions in the tape. *Id.* at 1162. Further, when no recording is made, the state is required to persuade the trial court that such a recording was not reasonably feasible and the "failure to record should be viewed with distrust." *Id.* at 1162-63.

109. *Id.* at 1161 (suggesting that costs of recording interrogations are offset by the resources saved by not having to resolve disputes arising from interrogations); see REPORT OF THE SUPREME COURT SPECIAL COMMITTEE ON RECORDATION OF CUSTODIAL INTERROGATIONS 2 (2005), *available at* <http://www.judiciary.state.nj.us/notices/reports/cookreport.pdf>.

110. See *State v. Hajtic*, 724 N.W.2d 449, 456 (Iowa 2006); *Commonwealth v. DiGiambattista*, 813 N.E.2d 516 (Mass. 2004); *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994); N.J. Sup. Ct. R. 3:17 (2008) (requiring police departments to record custodial interrogations).

111. Sullivan, *supra* note 99, at 1312. Twelve states have favorably discussed the practice of recording custodial interrogations. *Id.* at 1312 n.47.

Unfortunately, legislatures have been slow to promote the use of videotape, but that, too, is changing.¹¹² For example, in the wake of the exonerations of several death-row convicts,¹¹³ the Illinois Legislature enacted a statute that required state officials to videotape felony custodial interrogations.¹¹⁴ Six other states and the District of Columbia have enacted substantially similar legislation, and similar bills are pending in other legislatures.¹¹⁵

As discussed above, the use of videotape has become widespread and commonly accepted as a means to protect the rights of both the state and the accused.¹¹⁶ Whether through legislative, judicial, or departmental action, the recording of custodial interrogations allows an impartial observer to review the often-contentious interactions between the state and its citizens.¹¹⁷ Although the role of video evidence at trial and appeal has not been fully determined,¹¹⁸ the practice of videotaping interrogations will only become more pervasive in the future.¹¹⁹

IV. COURT'S DECISION

Sharp's appeal revolved around the central issue of the voluntariness of her confession to Detective Wheelles. The majority focused on Sharp's apparent comfort during the interrogation and Wheelles's testimony in determining that Sharp's confession was freely and voluntarily

112. Sullivan, *supra* note 101, at 1128.

113. Thomas P. Sullivan, *The Time Has Come for Law Enforcement Recordings of Custodial Interviews, Start to Finish*, 37 GOLDEN GATE U.L. REV. 175, 176 (2006). Due to wrongful convictions, some of which were obtained through psychologically coercive interrogation tactics, Illinois has imposed a moratorium on death penalty sentences since 2000. *Illinois Keeping Death Penalty Moratorium: Quinn*, HUFFINGTON POST, Feb. 6, 2009, available at http://www.huffingtonpost.com/2009/02/06/illinois-keeping-death-pe_n_164767.html.

114. Sullivan, *supra* note 101, at 1128.

115. Sullivan, *supra* note 99, at 1311.

116. REPORT OF THE SUPREME COURT, *supra* note 109, at 2.

117. Although videotape is impartial in the sense that it provides a record of the interview apart from the testimony of an interested suspect or interrogator, this does not mean videotape is totally without bias. See INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 201 (G. Daniel Lassiter, ed., 2004). The perspective of the video camera is important, as it affects the observer in his evaluation of the tape. *Id.* The "illusory-causation" phenomenon states that, *ceteris paribus*, a viewer assigns more weight to the words of the speaker they are facing than one they are not. *Id.* In the context of videotaped confessions, the camera is most often focused on the suspect. *Id.* at 202. Because the viewer only sees the suspect, and not the interrogator, illusory-causation states the viewer is more likely to view a confession by the suspect as a voluntary act. *Id.* Studies show that when the camera is focused on the suspect, a resulting confession is viewed as less coerced; however, when the camera is focused on the interrogator, confessions are viewed as more coerced. *Id.* The most neutral perspective is one in which both the suspect and the interrogator are viewed equally. See *id.* Because of this, New Zealand requires all recorded interrogations to portray the interrogator and the suspect equally. *Id.* at 211.

118. See Owen & Mather, *supra* note 100, at 412-13 (suggesting that video evidence should render traditional standards of review outdated). *Contra* Adele Hedges & Robert Higgason, *Videotaped Statements of Facts on Appeal: Parent of the Thirteenth Juror*, 33 Hous. LAW. 24, 25 (1995) (suggesting that video evidence will result in appellate courts impermissibly sitting as essentially "thirteenth jurors").

119. Although individual departments, such as the Topeka Police Department, choose to record some custodial interrogations, no judicial or legislative action has been taken in Kansas to standardize the practice.

given.¹²⁰ However, Justice Johnson's dissent concentrated on the specific words used by Wheelles and how the majority failed to consider its impact on Sharp in light of the entire interaction.¹²¹

A. Arguments and Majority Opinion

In reviewing *Sharp*, the main issue the Supreme Court of Kansas considered was whether the trial court committed reversible error when it denied the defendant's motion to suppress her confession, which she argued was obtained in violation of her Fifth and Fourteenth Amendment rights.¹²² Sharp argued that Wheelles made an explicit promise of leniency to her that was contingent upon her cooperation in the investigation.¹²³ Sharp's primary argument was that any admissions she made must be viewed in the context of her trying not to "jam" herself, which included following Wheelles's instructions to not say "no" if he asked her something.¹²⁴

The court, however, agreed with the State's argument that just because Sharp became more truthful after this exchange does not mean that she was acting under the influence of the alleged promise.¹²⁵ Relying heavily on the videotape of Sharp's interrogation, the trial court repeatedly noted that Sharp appeared relaxed and candid, and the Kansas Supreme Court agreed with that analysis, noting that "[a]t no time did [Sharp] appear that she was under duress."¹²⁶ The supreme court rejected Sharp's contention that Wheelles had allegedly promised immunity in return for her cooperation because Wheelles never explicitly said "promise."¹²⁷ Furthermore, the court held that Wheelles's subjective belief as to the meaning of his words was controlling.¹²⁸

In this respect, Wheelles testified at trial that he believed Sharp was

120. See *infra* Part IV.A.

121. See *infra* Part IV.B.

122. *State v. Sharp*, 210 P.3d 590, 594-95 (Kan. 2009). Several factors weigh in determining the voluntariness of a confession. See *State v. Johnson*, 190 P.3d 207, 216-17 (Kan. 2008). However, both sides agreed that the primary issue affecting the voluntariness of Sharp's confession was the fairness of the interrogation. See Brief of Appellee, *supra* note 8, at 15; Brief of Appellant, *supra* note 10, at 21.

123. Brief of Appellant, *supra* note 10, at 22. To influence the voluntariness of a confession, the promises have to be of a nature that would induce a person to make false statements in order to obtain the benefits of the promise. *State v. Baston*, 928 P.2d 79, 84 (Kan. 1996) (quoting *State v. Norris*, 768 P.2d 296, 303 (Kan. 1989)).

124. Brief of Appellant, *supra* note 10, at 21-22.

125. Brief of Appellee, *supra* note 8, at 17. The prosecution argued that Sharp's most incriminating statements were made after she was informed that Baker and Hollingsworth were also in custody and giving statements; therefore, she was motivated more by their disclosures than she was by a desire to receive any benefits. See *id.*

126. *Sharp*, 210 P.3d at 599. Although the appellate court considered the trial court's decision under a substantial competent evidence standard, the appellate court had to review extensively the videotape to form the basis for its substantial competent evidence review. See *id.* at 599-602

127. See *id.* at 603.

128. *Id.* In support of this holding, the court stated that substantial competent evidence existed that the trial court could have determined "from Wheelles'[s] express denial that he made any promises" and from his statements in general that he made no promise. *Id.*

only a witness to Owen's death and that any questions he asked were only attempts to get "a complete and truthful account of what she knew."¹²⁹ The Kansas Supreme Court, therefore, held that Sharp was not operating under any promise from Wheelles, but, instead, Wheelles was only exhorting Sharp to tell the truth because it was in her best interest.¹³⁰ Because there were no other factors that would warrant considering Sharp a "particularly vulnerable" person, the court held that under the totality of the circumstances Sharp had failed to prove that her statements were involuntarily made.¹³¹

B. Dissenting Opinion

Justice Johnson argued that Sharp's confession was coerced and involuntary.¹³² Johnson reasoned that because Wheelles believed Sharp to be a witness and not a suspect, Wheelles was trying to obtain an accurate account of the events involving Owens.¹³³ Departing from the majority,

129. *Id.* at 601.

130. *See id.* at 603. In addition, the prosecution argued that Sharp could not have reasonably believed that Wheelles had the ability to promise leniency because he told Sharp the decision was up to the district attorney. Brief of Appellee, *supra* note 8, at 17. A promise of leniency or immunity has to be made by a state actor who the accused believes has the ability to effectuate that promise. *State v. Brown*, 173 P.3d 612, 625 (Kan. 2007). However, Sharp pointed to Wheelles's statement that he told her the decision whether to prosecute rested with the district attorney only after Sharp's admissions during the reenactment. Brief of Appellant, *supra* note 10, at 22. The court discussed an alternative scenario in which the trial court found a promise was made, but that Sharp was not "operating under" that promise. *Sharp*, 210 P.3d at 604. Reasoning that any promise Wheelles made was conditional upon Sharp not "jamming" herself—for example, inculcating herself in any crime surrounding Owen's death—the court stated that Sharp failed to meet the condition by implicating herself in Owen's death during the reenactment at the campsite. *Id.* (referring specifically to Sharp stating "Don't kill [Owen] here," suggesting she had no problem with his being killed elsewhere") Sharp further argued that Wheelles made promises to her concerning the safety of her children in exchange for her cooperation. *Id.* at 605. The court held that the promise of taking Sharp's children to safety was a collateral benefit. *Id.* Collateral benefits do not affect the voluntariness of a confession unless "the circumstances surrounding the promise of the collateral benefit were such as to render the confession untrustworthy or the promise could reasonably be calculated to produce a confession irrespective of its truth or falsity." *Id.* (quoting *State v. Holloman*, 731 P.2d 294, 300 (Kan. 1987)).

131. *Sharp*, 210 P.3d at 606. Sharp raised three more issues in her appeal: (1) that the trial court abused its discretion by refusing to allow Sharp's counsel to question a witness about receiving a downward departure from the sentencing guidelines; (2) that the trial court abused its discretion in allowing into evidence statements by two of Sharp's co-conspirators against the co-conspirator hearsay rule; and (3) that the trial court cumulatively erred. *Id.* at 594.

On the first issue, the court held that although the trial judge excluded any questioning of Cornell about a downward departure he might receive as a result of his testimony, the judge did allow inquiry into a plea bargain Cornell had struck with the state. *Id.* at 607 (illustrating that plea-bargaining to a specific offense and downward departures are two separate events in the sentencing process). Applying the abuse of discretion standard, the Kansas Supreme Court held that because questioning was allowed concerning Cornell's motivations for testifying, the trial judge did not abuse his discretion in excluding the testimony. *Id.* at 608.

On the second issue, the court overruled a line of cases that added an additional element to the Kansas co-conspirator hearsay exception, rendering Sharp's argument moot. *Id.* at 610 (citing earlier cases that erroneously required that "the statement of the coconspirator must have been outside the presence of the accused"). Because the court found no error in the previous two issues, cumulative error did not apply. *Id.* at 612.

132. *See id.* (Johnson, J., dissenting). Johnson agreed with the majority that there are no disputed facts about what actually transpired during the interview. *Id.* The videotape allowed the court to "know precisely what was said and how it was said." *Id.*

133. *Id.*

Johnson believed that Wheelles's subjective reasons for making a promise to Sharp should have no impact on the legal consequences of those promises.¹³⁴ According to Johnson, one should look at the objective viewpoint of the defendant to determine whether a reasonable person would have been induced to confess by the State's promises.¹³⁵

Johnson's argument that the State made a promise to Sharp and that she was operating under the promise arose from his interpretation of the totality of the circumstances test.¹³⁶ In essence, Johnson contended that the court did not truly consider the totality of the circumstances because it did not consider the practical effects of Wheelles's various statements on such an impressionable suspect.¹³⁷ Johnson stated that under a totality of the circumstances test the court should have rendered the confession involuntary.¹³⁸

V. COMMENTARY

The Kansas Supreme Court exhibited questionable judgment in allowing Sharp's confession to stand, both by adopting the officer's subjective viewpoint as the test for determining the existence of a promise and by using an obsolete standard of review. This Part details the legal reasons for adopting an objective point of view as the standard for determining the existence of a promise of leniency. Examples of this interpretation abound in criminal procedure when defendants are forced to rely on the promises of the State. The analysis in this Part discusses the role of videotape evidence in assisting the court in its determination. In addition, the availability of video-recording technology not only high-

134. *Id.*

135. *Id.*

136. *Id.* Johnson argued that a totality of the circumstances test not only applied to the admissibility of the confession, but also applied when evaluating the separate statements made to Sharp by Wheelles. *Id.*

137. *Id.* Wheelles made a promise, conditional or otherwise, that Sharp would not go to jail "as long as she did not do something dumb and jam herself." *Id.* (brackets omitted). This admonition was immediately followed by an example of how Sharp could avoid jamming herself: "Just don't tell me no if I ask you something." *Id.* Johnson argued that this instruction not to disagree must be considered when analyzing Sharp's statements made during the reenactment at the river. *Id.* When Sharp said that she told Hollingsworth "don't kill him," Wheelles offered the alternative statement "don't kill him *here*." *Id.* (emphasis added). Following his earlier instruction of "don't tell me no if I ask you something," Sharp agreed with this statement, believing she was satisfying the terms of Wheelles's promise to her. *Id.* Regarding the general admissibility of confessions, Kansas employs a totality of the circumstances test. *See, e.g.,* State v. Johnson, 190 P.3d 207, 216 (Kan. 2008). The State has the burden of proving by a preponderance of the evidence that a confession is admissible. *See id.*

138. *Sharp*, 210 P.3d at 612 (Johnson, J., dissenting). Johnson further disagreed with the majority's position that the promises to help Sharp's children were a "collateral benefit." *Id.* Johnson noted that Sharp indicated she would be a direct beneficiary of the promise to find her children shelter when she asked a question about whether she would accompany her children to a battered woman's shelter. *Id.* He stated that a promise to help one's children would be as compelling, if not more so, than promises of benefit to parents. *Id.* Justice Johnson questioned the holding that the State's promise to arrange shelter for Sharp's homeless children was less coercive than a promise of leniency would be. *Id.*

lights the questionable nature of the decision in *Sharp*, but also draws into question the standard of review currently employed in evaluating the existence of promises.

A. Courts Should Evaluate the Existence of a Promise from the Objective Viewpoint of the Defendant

1. Drawbacks of Adopting the Officer's Subjective Belief About the Existence of a Promise

The majority's decision to uphold the trial court's finding appears questionable considering Wheelles's statements and is seemingly unsupported by any considerations of public policy. By agreeing with the trial court's use of Wheelles's subjective belief to determine the effect of his words, the court endorsed a theory of law that simultaneously opens the door for police exploitation while creating disincentives for suspects to cooperate with authorities.

The Kansas Supreme Court's contention that this area of confession law is "well settled" is suspect.¹³⁹ A promise of benefit overcomes the voluntariness of a suspect when: (1) a public official will carry out the promise; (2) the promise would be so beneficial as to induce a person to make a false statement to obtain its benefits; and (3) the person making the promise could reasonably be believed to have the power or authority to carry out the promise.¹⁴⁰ Although this "well settled" law establishes the effect on voluntariness *when* a promise is made, it does not provide guidance on how to determine *if* a promise was made.

Promises are often difficult to identify because personal communication varies wildly between cultures and individuals.¹⁴¹ Studies suggest the majority of human communication is nonverbal. Evaluating only the spoken words is, therefore, insufficient for determining the meaning of human communication.¹⁴² The court in *Sharp* ignored these realities when it evaluated the existence of a promise from the subjective viewpoint of the interrogating officer. When the elusive nature of human communication is coupled with the inherently coercive nature of custodial interrogations,¹⁴³ justice requires objectively reasonable guidelines

139. See *Sharp*, 210 P.3d at 598.

140. *Id.* at 598-99 (quoting *State v. Brown*, 173 P.3d 612, 626 (Kan. 2007)).

141. See Pamela Peters, *Gaining Compliance Through Non-Verbal Communication*, 7 PEPP. DISP. RESOL. L.J. 87, 109-10 (2007); Michelle LeBaron, *Cross-Cultural Communication*, BEYOND INTRACTABILITY, July 2003, available at http://www.beyondintractability.org/essay/cross-cultural_communication/.

142. See Susan M. Heathfield, *Listen with Your Eyes: Tips for Understanding Nonverbal Communication*, ABOUT.COM, http://humanresources.about.com/od/interpersonalcommunication1/a/nonverbal_com.htm (stating that studies suggest that between 55% and 93% of communication is nonverbal) (last visited Apr. 3, 2010).

143. See *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

by which these ambiguous situations may be evaluated.

The need becomes even more cognizable given that reformation of interrogation tactics has placed an emphasis on psychological deception.¹⁴⁴ Explicit promises of leniency are obvious—for example, promising to drop charges in return for cooperation¹⁴⁵—and will render a confession inadmissible.¹⁴⁶ As a result, police rarely make explicit promises of leniency to suspects.¹⁴⁷ Instead, interrogators employ techniques that exploit the practical way people convey and process information.¹⁴⁸

It is human nature to read “between the lines” to discern the message a speaker intends to communicate.¹⁴⁹ In psychology, this process is known as “pragmatic implication” and is a phenomenon used by the police to their advantage.¹⁵⁰ Interrogators are trained to exploit this human condition to imply a message they cannot explicitly impart.¹⁵¹ The messages that people perceive through pragmatic implication seem as reliable as any overt threat or promise.¹⁵²

The Kansas Supreme Court’s opinion demonstrates the dilemma that arises between the reality of pragmatic implication and the holding in *Sharp*. In analyzing Sharp’s confession, the court chose to view the issue of whether a promise was made from the officer’s subjective point of view.¹⁵³ Because Wheelers considered Sharp a witness, not a suspect, the court reasoned that any alleged promises made to Sharp were

144. Leo, *supra* note 55, at 36-37; see also Ofshe, *supra* note 78, at 10. “[T]he modern practice of in-custody interrogation is psychologically rather than physically oriented.” *Miranda*, 384 U.S. at 448.

145. *State v. Baston*, 928 P.2d 79, 84 (Kan. 1996) (promising to drop kidnapping charges if defendant supplied information relating to another crime).

146. See *Arizona v. Fulminate*, 499 U.S. 279, 285-86 (1991).

147. See Ofshe & Leo, *supra* note 79, at 998-99. Police may “test the limits” to lead suspects to believe that they have been promised leniency or immunity without actually making the promise. LAWRENCE S. WRIGHTSMAN & SAUL M. KASSIN, *CONFESSIONS IN THE COURTROOM* 18 (1993).

148. Ofshe, *supra* note 78, at 10. “[D]etectives conducting recorded interrogations usually take pains to disguise their illicit messages.” *Id.*

149. See Ofshe & Leo, *supra* note 79, at 987; see also Saul M. Kasson & Karlyn McNall, *Police Interrogations and Confessions, Communicating Promises and Threats by Pragmatic Implication*, 15 *LAW & HUM. BEHAV.* 233 (1991). “Cognitive and language research indicate that listeners often process information between the lines and recall hearing not just what was asserted, but what was pragmatically implied.” *Id.* at 235.

150. Ofshe & Leo, *supra* note 79, at 1121.

151. See *id.* at 987. An example is the accident-scenario technique, in which the suspect is given the opportunity to suggest that the incident was an accident, and, therefore, the suspect is not as culpable, implying a measure of leniency. *Id.* at 999. On the other hand, this technique implies a threat of greater punishment if the suspect does not cooperate, that is, confess. *Id.* at 999 n.71. Fred Inbau suggests that pragmatic implication has no real value because he deems it unlikely that interrogators could provide enough incentive to cause a suspect to confess falsely. FRED INBAU, *CRIMINAL INTERROGATIONS AND CONFESSIONS* 422 (4th ed. 2004). Inbau’s manual on police interrogation tactics is widely used by police across the country. Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 *HARV. C.R.-C.L. L. REV.* 105, 118 (1997). However, in one instance, interrogators from the Maricopa County (Ariz.) Sheriff’s department subjected five innocent individuals to psychologically coercive interrogations and obtained three false confessions to murder. Ofshe & Leo, *supra* note 79, at 986 n.36.

152. Ofshe & Leo, *supra* note 79, at 999 n.73. “[O]ur data indicate[s] that because people often process information ‘between the lines’ . . . these different means of communication are functionally equivalent [to overt threats or promises] in their impact.” *Id.* at 999 (quotations omitted).

153. See *State v. Sharp*, 210 P.3d 590, 603 (Kan. 2009).

merely exhortations to tell the truth.¹⁵⁴

Although the court seemed to grant significant weight to the differing subjective labels of suspect and witness, the record of the interrogation reveals that this differentiation was never made known to Sharp.¹⁵⁵ The Kansas Supreme Court's holding requires legally unsophisticated people,¹⁵⁶ like Sharp, to interpret the context and meaning of the words used by the interrogating officer to determine their legal effect. Requiring a suspect to engage essentially in mind reading promotes vagueness in the law, and the court should avoid this vagueness given the important fundamental interests at stake.

This subjective approach means interrogators can look to the *Sharp* decision for reassurance that they can tread the thin line between permissible and impermissible conduct when questioning suspects. If a defendant challenges interrogators' tactics in court, they may cite *Sharp* as support that, legally, the objective facts have little weight, given that the interrogators' perception of the situation largely determines the legal effect of their words.¹⁵⁷ Practically, authorities must rely on suspects to solve crimes, which means the suspect is a resource police can ill afford to alienate.¹⁵⁸ Nevertheless, *Sharp* provides suspects a reason not to trust assertions by the police and gives suspects little incentive to cooperate with investigations.¹⁵⁹

2. Adopting the Reasonable, Objective View Point

The court in *Sharp* chose to analyze the existence of a promise from the subjective viewpoint of the interrogator. This decision is understandable, even if inappropriate, given that the state often has little evidence beyond the confession of the accused.¹⁶⁰ Therefore, suppressing the defendant's confession makes it more difficult for the state to meet its burden of proof.¹⁶¹

However, the amount of evidence the prosecution can produce should have no weight when deciding the merits of a suppression mo-

154. *Id.* at 603-04.

155. Brief of Appellant, *supra* note 10, at 19-20. "I don't recall any specific discussion of her being a suspect, and I certainly didn't treat her or view her like that." *Id.* at 20.

156. White, *supra* note 70, at 970 (stating that many suspects lack legal sophistication and are unable to determine either the existence or nature of assertions made by the police).

157. *See supra* note 128.

158. *See* Ofshe & Leo, *supra* note 79, at 982 n.7 (observing that studies show suspects give a confession 42% of the time); Daniel Givelber, *Lost Innocence: Speculation and Data About the Acquitted*, 42 AM. CRIM. L. REV. 1167, 1169 (2004) (stating that only a small percentage of criminal defendants opt not to accept a plea bargain).

159. *See supra* Part IV..

160. *See* Ofshe & Leo, *supra* note 79, at 1120 n.352. Approximately 20% of criminal cases involve an allegedly coerced confession that is potentially subject to suppression. WRIGHTMAN & KASIN, *supra* note 147, at 113.

161. *See* Ofshe & Leo, *supra* note 79, at 1120 n.352. When a false confession is suppressed, the vast majority of the time the prosecution lacks any other evidence and is forced to drop the charges. *Id.*

tion.¹⁶² Because juries assign confessions a high degree of reliability, confessions are highly prejudicial to a defendant.¹⁶³ Even when jurors believe that an admitted confession was coerced, the impact of the confession can be so powerful that many jurors would choose to convict regardless of the voluntariness of the confession.¹⁶⁴ Because of the prejudicial effect that confessions have against defendants, courts need to ensure that additional safeguards are in place to protect defendants whose confessions were induced by coercion, regardless of whether it was physical or psychological.

As stated in *Sharp*, the standard of adopting the subjective viewpoint of the officer serves as a policy favoring the state. This standard allows interrogators to “walk the line” of illegal coercion and explain it away by merely stating that it was not their intention to induce a confession. The more appropriate rule would be the one espoused by several jurisdictions that have chosen to view the existence of a promise from the objective reasonable viewpoint of the defendant.¹⁶⁵

This approach is preferable because a court would rule on admissibility based on what the officer’s words would have meant to an objective, reasonable person, which does not require consideration of the officer’s testimony about what he *thought* his words should mean. The objective, reasonable person standard is preferable because otherwise courts require the defendant to do the impossible, which is to read the interrogators’ minds to ascertain their true intentions.¹⁶⁶

Viewing the existence of a promise from the defendant’s objective view would provide greater protection to the defendant than the subjective viewpoint test. The objective, reasonable person standard protects defendants from deceptive police tactics because it requires the court to determine the meaning of the words from the vantage point of an ob-

162. See NISSMAN ET AL., *supra* note 49, at 310. Because confessions are regularly vital to the success of the prosecution’s case, judges err on the side of admission to allow the case to reach the court. *Id.* Although this reasoning is legally impermissible, judges are human and are afraid of headlines and of reversal. *Id.*

163. See Kassir & McNall, *supra* note 149, at 233. “[T]he introduction of a confession makes the other aspects of the trial superfluous.” *Id.* “[I]nvoluntary confession(s) may have a more dramatic effect on the course of a trial than do other trial errors—in particular cases it may be devastating to a defendant” *Arizona v. Fulminate*, 499 U.S. 279, 312 (1991) (Rehnquist, J., dissenting). “[C]onfessions have [a] profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.” *Bruton v. United States*, 391 U.S. 123, 140 (1968) (White, J., dissenting). The introduction of a confession into evidence establishes an essentially un rebuttable presumption against the defendant. WRIGHTMAN & KASSIN, *supra* note 147, at 18.

164. Kassir & McNall, *supra* note 149, at 233. In a study using a police interrogation tactic that implied promises of leniency, 47% of subjects believed the tactic rendered the confession involuntary, but responded that they would have voted guilty regardless. *Id.* at 248; see also WRIGHTMAN & KASSIN, *supra* note 147, at 108. When test subjects reviewed two confessions, one elicited by threats and the other by positive offers (that is, promises of leniency), subjects viewed the culpability of the promise-confession defendant as “significantly” higher than the defendant who confessed because of threats. *Id.*

165. See *supra* Part III.A.2.

166. See *supra* Part III.A.2.

server with no vested interest in the investigation. Although this method provides increased protection to defendants from deception by the state, it actually favors neither the suspect, nor the state, nor subjective beliefs—it only favors the facts.¹⁶⁷

3. Justification from Other Areas of the Law

Examples in similar areas of law favor an objective test. For instance, in determining whether an interrogation is custodial and, therefore, deserving of *Miranda* protections, many courts “give little weight to the state of the interrogator’s mind.”¹⁶⁸ In these cases, courts have adopted an objective test that looks at whether a defendant would reasonably believe himself to be in custody.¹⁶⁹

Because a suspect’s statement may be suppressed if police elicited it before *Miranda* warnings were given,¹⁷⁰ police have an incentive to characterize a situation as non-custodial by treating a person as a witness instead of a suspect. Courts have acknowledged that police have an incentive to characterize potential suspects as witnesses,¹⁷¹ which explains why courts in many situations consider the defendant’s objective belief as to the nature of the circumstances rather than the subjective belief of the police.

Another setting in which courts consider the objective viewpoint of the defendant is during criminal plea negotiations.¹⁷² Because of the sensitive and possibly incriminating information disclosed during these negotiations, protecting the defendant’s interests is paramount.¹⁷³ Just as the state would benefit from denying that promises of leniency were

167. See *Williams v. Runnels*, No. CIV S-04-2284 GEB DAD P, 2008 U.S. Dist. LEXIS 76970, at *21 (E.D. Cal. Sept. 26, 2008) (considering the defendant’s viewpoint when deciding that the elements of official compulsion were not present).

168. JAMES B. ZAGEL, CONFESSIONS AND INTERROGATIONS AFTER MIRANDA 1 (1982).

169. *Id.* “[C]ustody was found despite the absence of police intent of custody because a reasonable man in [the] defendant[s] position would believe he was in custody.” *Id.* (citing *United States v. Kennedy*, 573 F.2d 657 (9th Cir. 1978)).

170. George C. Thomas III, *The End of the Road for Miranda v. Arizona? On the History and Future of Rules for Police Interrogation*, 37 AM. CRIM. L. REV. 1, 9 (2000). Police must inform suspects in custodial interrogations of their *Miranda* rights before any suspect responses may be admitted into evidence. *Id.* If *Miranda* rights are not read to the suspect, a presumption exists “that all statements given in response to custodial police interrogation are compelled unless the suspect is informed of his right not to answer and his right to have counsel present during the interrogation.” *Id.* Therefore, questioning a suspect who has not been read her *Miranda* rights will likely result in the exclusion of the resulting statements at trial. See *Missouri v. Seibert*, 542 U.S. 600, 608 (2004).

171. See *McCall v. People*, 623 P.2d 397, 403 (Colo. 1981), *overruled by People v. Davis*, 187 P.3d 562 (Colo. 2008) (overruled on other grounds). In dicta, the court chastised the police for failing to secure a warrant when they entered the house of a suspect by telling his parents they intended to question him as a witness. *McCall*, 623 P.2d at 403.

172. *Cf.* FED. R. EVID. 410(3)-(4). This rule makes any statement made in the course of plea discussions inadmissible against the defendant. *Id.* Although Fed. R. Evid. 410(4)(i)-(ii) provides an exception that allows the introduction of the plea if the defendant is being prosecuted for perjury or if the defendant first offers testimony from the plea discussion and fairness dictates the prosecution be allowed to respond, neither is applicable to this situation.

173. See White, *supra* note 70, at 967.

made, the state would also benefit from denying that plea negotiations occurred because the incriminating information obtained would be available for use at trial. Courts provide protection against such abuses by evaluating the existence of plea negotiations from the viewpoint of the defendant.¹⁷⁴

In determining the existence of plea negotiations or a custodial interrogation, courts have recognized the inherent prejudice that leads police to assign the most favorable label to a situation.¹⁷⁵ Therefore, courts have chosen to adopt the most logical viewpoint, which is to examine the situation from the perspective of an objective outside observer.¹⁷⁶ Holding otherwise presents too great an incentive for the state to portray the events of an interrogation in a self-serving light.

Often in making these decisions, the court must rely upon a transcript of the interrogation, but testimony is still required from participants to clarify and add context to the written record.¹⁷⁷ In an issue like an implied promise of leniency, the court is forced to weigh the credibility of the officer's testimony against that of the suspect, a battle the suspect is almost certain to lose.¹⁷⁸ The following section details how videotape evidence lacks the shortcomings of other methods of recording interrogations and the effect that it should have on appropriate standards of review.

B. Appellate Courts Should Treat the Voluntariness of Videotaped Confessions as a Question of Law and Apply De Novo Review

The Kansas Supreme Court failed to correct the underlying fault of the trial court in considering Wheelles's subjective viewpoint; however, this was not the court's only mistake. In Sharp's case, the supreme court chose to categorize the existence of a promise of leniency to Sharp as a question of fact, which is evaluated under a "substantial competent evidence" standard of review.¹⁷⁹ This is a very deferential standard, which only asks if a reasonable person might have reached the same conclusion the trial court did.¹⁸⁰ Nevertheless, whether a confession was given

174. See, e.g., *United States v. Sayakhom*, 186 F.3d 928, 936 (9th Cir. 1999); White, *supra* note 70, at 975.

175. See White, *supra* note 70, at 975.

176. See *United States v. Kennedy*, 573 F.2d 557, 660 (9th Cir. 1978).

177. See *State v. Morton*, 186 P.3d 785, 789 (Kan. 2008). In *State v. Morton*, the defendant filed a motion to suppress his statements made in a non-recorded interview. *Id.* During the suppression hearing, "[b]oth [the state agent] and Morton testified. Their respective versions of events differ[ed] somewhat." *Id.* This example shows how, in the absence of videotape, the differing perceptions of two participants make the actual occurrence of an event a question of fact.

178. See Barbara Child, *The Involuntary Confession and the Right to Due Process: Is a Criminal Defendant Better Protected in the Federal Courts than in Ohio?*, 10 AKRON L. REV. 261, 280-81 (1976) (suggesting that in a "swearing contest" between a defendant and the state the defendant will almost always lose).

179. See *State v. Sharp*, 210 P.3d 590, 602 (Kan. 2009).

180. *Tucker v. Hugoton Energy Corp.*, 855 P.3d 929, 934 (Kan. 1993) (stating substantial compe-

voluntarily is treated as a question of law and afforded de novo review.¹⁸¹

When a suspect alleges that a promise of leniency overcame her ability to confess voluntarily, the current standard of review divorces the question of whether a promise was made from the effect that the alleged promise had on her voluntariness. By offering two vastly different standards of review for what is essentially the same determination, the appellate court fails to protect a suspect's fundamental right against police coercion by unduly deferring to the trial court. Videotape allows the court to immerse itself in the facts of an interview, which should change the standard of review the appellate court applies, because doing so would allow appellate courts to correct egregious errors involving fundamental rights.¹⁸² Coerced confessions violate a suspect's constitutional due process rights, and videotaped interviews enable an appellate court to make the most informed decision in protecting those rights.

The use of video-recording technology by police has expanded rapidly in the last forty years,¹⁸³ developing to the point that police departments across the country record most custodial interrogations of suspects.¹⁸⁴ Appellate review of video evidence in the suppression context, however, has not kept up with technological advances.¹⁸⁵ As noted above, appellate courts treat the findings of trial courts on suppression motions "with great deference."¹⁸⁶ This deference is based upon the theory that the trial court directly observed the demeanor and behavior of the witnesses testifying. Given the inherent issue of credibility in every case, the trial court is in a better position than the appellate court to decide what actually occurred.¹⁸⁷

However, with video evidence of a confession, technology has presented appellate courts with an opportunity to change the standard by

tent evidence is the relevant evidence that "a reasonable person might accept as being sufficient to support a conclusion").

181. *Sharp*, 210 P.3d at 597.

182. See *White*, *supra* note 151, at 155. Videotape presents such "[a] complete record of the proceedings" that it allows jurors to detect false confessions even when the interrogators use only permissible tactics. *Id.*

183. Mimi Samuel, *Focus on Batson: Let the Cameras Roll*, 74 BROOK. L. REV. 95, 109 (2008) (stating, "in the past four decades the use of video in trial and appellate courts has exploded"); *supra* Part III.B.

184. Sullivan, *supra* note 99, at 1305 (stating that interrogations of felony suspects are the most common types of recorded interrogations); *White*, *supra* note 151, at 155 (stating benefits include "rendering confessions more convincing . . . assisting prosecutors in negotiating more acceptable plea bargains . . . and helping in securing convictions"); *supra* Part III.B.

185. See *Scott v. Harris*, 550 U.S. 372, 378 (2007). *Scott v. Harris* was the first case in which the Supreme Court relied on video evidence. Samuel, *supra* note 183, at 117. Justice Scalia stated in the majority opinion that the viewer should "allow the videotape to speak for itself." *Scott*, 550 U.S. at 379 n.5.

186. See, e.g., *State v. Jorrick*, 4 P.3d 610, 615 (Kan. 2000).

187. See Timothy P. O'Neill, *Standards of Review in Illinois Criminal Cases: The Need for Major Reform*, 17 S. ILL. U. L.J. 51, 55 (1992).

which they review evidence.¹⁸⁸ Because of the completeness of a video record, the appellate court is in the exact same position as the trial court in reviewing the circumstances of the confession.¹⁸⁹ In the past, an appellate court could not have viewed the subtle nuances of interrogation but would have had to have read the transcript of testimony about the interrogation¹⁹⁰—testimony only the trial judge could directly observe. Video evidence renders the need for such testimony largely superfluous.¹⁹¹

In a situation similar to Sharp's, an appellate court would be able to weigh the voluntariness of a confession as well as the trial court because the videotape would present the exact same facts to each.¹⁹² In several other instances, the Kansas Supreme Court has exercised de novo review when it determined that it was in as good a position as the trial court to render a judgment.¹⁹³ Although some legal scholars worry that this proliferation of video evidence might "blu[r] the line between the role of the fact-finder and that of the reviewing court," reviewing videotaped evidence is not about making determinations of fact; it is about determining the legal effect of those facts.¹⁹⁴

Although the court followed the correct precedent in addressing the issue of the alleged promise, the precedent is ill-suited for the current times. As stated above, the court used a "substantial competent evidence" standard in determining whether Wheelles made a promise to Sharp because previous cases in Kansas had treated the existence of a promise as a question of fact. Yet only one of the cases cited in the

188. See Owen & Mather, *supra* note 100, at 412-13. *Contra* Samuel, *supra* note 183, at 110. "[M]any appellate judges oppose review of video on appeal." *Id.*

189. *People v. Al-Yousif*, 49 P.3d 1165, 1171 (Colo. 2002) (The existence of video allowed the appellate court to review the disputed matter "in precisely the same manner as the trial court."); Ritter, *supra* note 103, at 31-32 (suggesting videotape resolves ambiguous portions of the record by providing a complete record).

190. See Samuel, *supra* note 183, at 112-13. When no video is available, attorneys read a transcript of the conversation to the jury. *Id.*

191. *Id.* at 113. The United States Court of Appeals for the Fifth Circuit observed that reviewing videotape made it possible to observe witness behavior that would not have shown up in the typed deposition. *Id.*

192. *Id.* at 109 (suggesting video evidence will allow courts at all levels to "come to their own conclusions about what happened").

193. See, e.g., *Barr v. State*, 196 P.3d 357, 362 (Kan. 2008) ("Because we are in as good a position as the judge hearing the 60-1507 motion to consider its merits, our review is de novo."); *Midwest Land Inv. Co., L.L.C. v. Veach*, 135 P.3d 1263, 1265-66 (Kan. 2006) ("Since we are in as good a position as the trial court to review the record and consider the parties' claimed uncontroverted facts and the legal conclusions that may flow from them, our review is de novo."); *Layne Christensen Co. v. Zurich Canada*, 38 P.3d 757, 767 (Kan. 2002) ("The district court decided this issue based on the parties' stipulations, as well as affidavits and documents, meaning this court is in as good a position as the district court was to answer this question."); *Dowling v. Sw. Porcelain, Inc.*, 701 P.2d 954, 961 (Kan. 1985) ("We are in as good a position to interpret those documents as was the trial court."); *Long v. Buehler*, 648 P.2d 270, 272 (Kan. 1982) ("Whether a joint and mutual will is contractual is a question of fact. When such a determination is made from the will itself, however, the appellate court is in as good a position to make the determination as the trial court.").

194. Samuel, *supra* note 183, at 110.

Sharp decision, *State v. Pham*,¹⁹⁵ addressed a videotaped confession.¹⁹⁶

The presence of a videotaped confession in only one of the cited cases is significant because the confessions in the other cited cases were only known from the testimony of those present.¹⁹⁷ The huge amount of information conveyed in videotape, as opposed to other means of recording, cannot be overstated.¹⁹⁸ A written transcript of an interview cannot convey the subtleties in tone and inflection that make up most speech.¹⁹⁹ Although an audio recording captures those qualities, it does not impart the vast amount of non-verbal communication people convey: everything from a subtle wink-of-the-eye to overtly threatening gestures.²⁰⁰

With either transcripts or audio recordings, testimony from the participants is required for a trial court to understand fully the situation.²⁰¹ It is the differing accounts that arise from this testimony, as well as inherent issues of credibility, that make the existence of a promise a question of fact.²⁰² Yet, a videotape of the interrogation would allow a court to make all the necessary observations of tone and demeanor, while at the same time obviating the need for explanatory testimony from the participants.²⁰³ The cited cases in *Sharp* that did not involve videotape are distinguishable from *Sharp* because their records lacked the degree of factual certainty that is present with videotape.²⁰⁴

Indeed, neither side could dispute the content of the conversation, which Justice Johnson noted in his dissenting opinion.²⁰⁵ The videotape of Sharp's interrogation shows the entirety of the encounter: beginning with the waiver of her *Miranda* rights, through the reenactment at the

195. 136 P.3d 919 (2006).

196. See *id.* at 928. Of the other three cases the court cited, none involved a videotaped confession. See generally *United States v. Lopez*, 437 F.3d 1059 (10th Cir. 2006); *United States v. Morris*, 247 F.3d 1080 (10th Cir. 2001); *State v. Swanigan*, 106 P.3d 39 (Kan. 2005).

197. See generally *Lopez*, 437 F.3d 1059; *Morris*, 247 F.3d 1080; *Swanigan*, 106 P.3d 39.

198. Samuel, *supra* note 183, at 111 (stating that videotape is a manipulable medium that allows a reviewer to slow down, speed up, or rewind until the reviewer has reached a conclusion).

199. *Id.* at 110 (stating that videotape allows the court to observe the "demeanor, body language, and tone of the speaker" in addition to the actual spoken words).

200. See *supra* note 142.

201. See *supra* note 177.

202. JOSEPH D. GRANO, *CONFESSIONS, TRUTH, AND THE LAW* 116 (1993) (stating that the current tests used by courts to determine voluntariness often result in swearing contests between the participants about what occurred).

203. *Id.* at 221 (stating that videotaping interrogations provides such a complete record that it "relieve[s] courts of the need to rely on swearing contests").

204. The court did cite to one case, *State v. Pham*, 136 P.3d 919 (Kan. 2006), involving a videotaped confession, but the voluntariness issue did not involve a promise of leniency. The issue in *Pham* centered on the suspect's fluency in English and the corresponding need for a translator. *Id.* at 930-33. *Pham* contended that because English was not his primary language, the absence of a translator during his interrogation violated Kansas law and rendered his confession inadmissible. *Id.* at 930. The court held that because *Pham* showed reasonable proficiency in English—demonstrated by his reading of his *Miranda* rights from a card printed in English—the absence of a translator did not violate his rights. *Id.* at 932.

205. See *supra* note 132.

river, and concluding at the police station.²⁰⁶ Although the court attempted to frame the issue as one of fact, the content of the interrogation is fully-known and agreed upon by the parties. The truly contested issue was the legal effect that Wheelles's assertions had on the voluntariness of Sharp's confession. Under this analysis, the real issue becomes a legal one, which the court should have reviewed *de novo*.²⁰⁷ Given the prevalence of confessions made during custodial interrogations,²⁰⁸ Kansas would be remiss to follow a standard that essentially chooses not to protect a suspect's right against state coercion.

VI. CONCLUSION

The Supreme Court of Kansas ruled incorrectly in affirming Sharp's conviction. Although Detective Wheelles may have believed that he was making promises to a witness in order to get a true version of the events, his subjective belief should not determine the legal effect of his promises to Sharp. Instead, the court should have applied an objective, reasonable person test to determine whether Wheelles's words were promises; under such a standard, the court should have excluded as involuntary any statement that Sharp made in reliance upon Wheelles's promise.

Given that Sharp's confession was videotaped and presented no true question of fact, the court did not apply the proper standard of review when evaluating Sharp's confession. The court relied on precedent to label the existence of a promise as a question of fact, yet the relied-upon cases were each distinguishable from what happened in *Sharp*. The combination of a coerced confession induced by promises of leniency and the existence of a videotaped record of that promise make *Sharp* unlike any other case argued before the Kansas Supreme Court.

Historically only the parties present in an interrogation room could recount what occurred, but that is no longer the case. The court had the facts before it in the form of the videotape and was asked on appeal not to determine what words were said but what the legal effect of those words should be. Because of the effect those words had on the voluntariness of Sharp's confession, the court should have reviewed her confession *de novo*. By adopting an overly deferential standard of review and not correcting the trial court's underlying mistake of admitting Kimberly Sharp's coerced confession, the Kansas Supreme Court failed

206. Brief of Appellant, *supra* note 10, at 4, 7, 14.

207. *People v. Al-Yousif*, 49 P.3d 1165, 1169-70 (Colo. 2002) (reviewing the video of a suspect's alleged waiver of his *Miranda* rights). "Thus, where the historical facts are supported by competent evidence in the record, we will not disturb them. But interpreting the significance of those facts to resolve the constitutional question at hand we undertake as if for the first time." *Id.* at 1169.

208. *Ofshe & Leo*, *supra* note 79, at 982 n.7 (observing that studies show suspects give a confession 42% of the time).

in its duty to protect the fundamental rights of Kansas citizens. The Alaska Supreme Court has acknowledged that “[t]he concept of due process is not static . . . it must change to keep pace with new technological developments.”²⁰⁹ It is time for Kansas to do the same.

209. *Stephan v. State*, 711 P.2d 1156, 1161 (Alaska 1985).