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Extra-Judicial Confessions—Sufficiency of Corroboration

To convict a person of a felony, the criminal law requires that the corpus delicti be established beyond a reasonable doubt. The corpus delicti is made up of three elements: (1) there must be an injury or loss; (2) the injury or loss must result from the doing of a criminal act; and (3) the accused must be identified as the doer of the criminal act.¹ Unless the accused confesses or admits the crime, all three of these elements must be proved by competent evidence which will exclude all reasonable doubt of his guilt. Where there is an infra-judicial confession, which amounts to a plea of guilty, these elements need not be proved since the accused, in effect, admits all the facts charged in

¹ 7 Wigmore, Evidence § 2072 (3d ed. 1940).
the indictment; assuming, of course, that the indictment is well pleaded
and avers the legal crime to which the plea is directed.2

An extra-judicial confession, as distinguished from an infra-judicial
confession, is one which is made outside the court proceedings. The
admissibility of such a confession as evidence depends not upon to
whom it was made but upon the manner in which it was obtained.3 A
confession to one in authority would not by that fact alone render the
confession inadmissible. However, the trustworthiness of such a con-
fusion must always be considered with regard to the relationship be-
tween the accused and the person of authority who claims that the
confession was made.4 Extra-judicial confessions are not limited to
signed confessions5 or verbal admissions of guilt to persons of
authority,6 but such confessions also result from voluntary oral ad-
missions of guilt to other persons as well.7 Letters written between
the accused and another,8 and affidavits by the accused, though false,
stating that public funds had been properly entered on record9 have
been held to be extra-judicial confessions.

It is well settled that an accused person cannot be convicted solely
upon his own uncorroborated extra-judicial confession,10 and the cor-
roboration generally required must provide evidence that relates to
and tends to establish that the crime was committed.11 Evidence
delicti the confession is generally held not to be such that must
establish the corpus delicti beyond reasonable doubt,12 and the corpus
delicti need only be proved to the extent of the first two elements, since

2 2 Wharton, Criminal Evidence § 587 (11th ed. 1935).
3 2 id. § 638.
4 Ibid.
5 Cryderman v. State, 101 Neb. 88, 161 N.W. 1045 (1917); State v. Wescott,
130 Iowa 1, 104 N.W. 341 (1905).
6 Messel v. State, 176 Ind. 214, 95 N.E. 565 (1911); State v. Blay, 77 Vt. 56,
58 Atl. 794 (1904).
8 Whomble v. State, 143 Neb. 667, 10 N.W.2d 627 (1943) (accused was
acquitted of charge of rape).
10 Forte v. United States, 94 F.2d 236 (D.C. Cir. 1937); People v. Eding,
292 Mich. 46, 289 N.W. 324 (1939); Weller v. State, 150 Md. 278, 132 Atl. 624 (1926);
Sullivan v. State, 58 Neb. 796, 79 N.W. 721 (1899). Also see Note, 127 A.L.R.
1131 et seq. (1940), for an exhaustive collection of cases by jurisdiction.
11 Forte v. United States, 94 F.2d 236 (D.C. Cir. 1937); State v. Jordan, 146
Ore. 504, 26 P.2d 558 (1933); Burrows v. State, 38 Ariz. 99, 297 Pac. 1029 (1931);
Blacker v. State, 74 Neb. 671, 105 N.W. 302 (1905). For a collection of cases by
jurisdiction, see Note, 127 A.L.R. 1134 et seq. (1940). But see 7 Wigmore, Ev-
dence § 2071 (3d ed. 1940); Bunch v. People, 87 Colo. 84, 285 Pac. 766 (1930).
12 Forte v. United States, 94 F.2d 236 (D.C. Cir. 1937); State v. Johnson, 95
Utah 572, 82 P.2d 1010 (1938); Sullivan v. State, 58 Neb. 796, 79 N.W. 721 (1899);
People v. Badgley, 16 Wend. 53 (N.Y. 1838) ("Full proof of the body of the
crime, the corpus delicti, independently of the confession, is not required by
any the cases; and in many of them slight corroborating facts were held suffi-
cient.").
the third element, which is the identity of the accused as the perpetrator of the crime, has been established by voluntary confession. In Nebraska and most jurisdictions the rules pertaining to extra-judicial confessions are applied in all felony cases.

The purpose of this article is to analyze and consider the merits of the rule in Nebraska that only slight corroboration of extra-judicial confessions is necessary to establish the corpus delicti.

The problem of determining what amount of corroborating evidence is deemed to be sufficient between the point where there is a bare confession without corroborating evidence and that which would establish the corpus delicti beyond reasonable doubt is one which has vexed the courts. Courts have held that such evidence is sufficient: if it is clear and convincing; if it based on inconclusive facts and circumstances tending prima facia to show the corpus delicti; if it is but slight evidence; if it establishes the corpus delicti to a probability or if it is a preponderance of the evidence; or simply, if it is evidence independent of the confession which does not necessarily and completely establish the corpus delicti. The evidence other than the confession may be considered to be sufficient though making no reference to the accused, and, when taken in conjunction with the confession, the combined effect will sustain a finding of guilty although neither the confession nor the evidence would alone be sufficient to produce such a finding.

Sullivan v. State is generally cited as the leading case establishing the Nebraska rule regarding sufficiency of corroboration. In that case the court stated "... while a voluntary confession is insufficient standing alone, to prove that a crime has been committed, it is, nevertheless, competent evidence of that fact, and may, with slight corroborative circumstances establish the corpus delicti as well as the defendant's guilty participation." However, it is doubtful that the word "slight" in the court's formulation of the rule is a true description of the

13 7 Wigmore, Evidence § 2072 (3d ed. 1940). Professor Wigmore points out that including the third element, i.e. the accused's identity, would be absurd, since it would require that all three elements be proved independently of the confession and thereby render the confession a nullity.
16 Hill v. State, 207 Ala. 444, 93 So. 460 (1922).
18 Pope v. State, 158 Miss. 794, 131 So. 264 (1930).
19 State v. Mabry, 324 Mo. 239, 22 S.W.2d 639 (1929).
evidence which was actually presented in the case for corroborative purposes.

In this case Sullivan was heard to utter statements that he had shot his best friend, and the court regarded such oral statements as an extra-judicial confession. The only element sought to be provided by the oral confessions plus the circumstantial evidence was that a man had died as a result of criminal means. The corroborative evidence relied upon to show this may be summed up as follows: first, in an angered state of mind the defendant procured a revolver for the expressed purpose of killing some person; second, the defendant had the revolver in his possession at the time of the death of the deceased; third, the defendant was in the vicinity at the time of the death; fourth, there was a flash and report of a pistol; and, fifth, the defendant returned with the revolver just after the flash and report, and then hurried to the point where the body was lying.

Since the corpus delicti need not be proved beyond all reasonable doubt where there has been an extra-judicial confession, the corroborative evidence relied upon by the court would seem to stem from evidence which was more than just "slight," if such word is to be given its ordinarily defined meaning, that is, synonymous with "insignificance" or "unimportance."\(^2\)

It would seem that in none of the other cases reciting the rule that only slight corroborative evidence of the corpus delicti is necessary was there evidence which could be regarded as being merely "slight."\(^3\)


\(^3\) The cases of Whomble v. State, 143 Neb. 667, 10 N.W.2d 627 (1943); Blacker v. State, 74 Neb. 671, 105 N.W. 302 (1905); Priest v. State, 10 Neb. 393 (1880); Dodge v. People, 4 Neb. 220 (1876), are not helpful in determining the sufficiency of corroborative evidence. In none of these cases was there any corroborating evidence to establish the corpus delicti. Likewise, the cases of Clark v. State, 151 Neb. 348, 37 N.W.2d 601 (1949); Anderson v. State, 141 Neb. 306, 3 N.W.2d 447 (1942); Cryderman v. State, 101 Neb. 85, 161 N.W. 1045 (1917), are not helpful since in all of these cases the accused gave direct testimony at the trial proceedings which substantiated the extra-judicial confession.

In the following cases there was more than slight corroborative evidence to prove the corpus delicti: Ashford v. State, 36 Neb. 38, 53 N.W. 984 (1893) (Accused, in a burglary prosecution, made oral extra-judicial confession admitting entrance of the house involved at 4 o'clock in the morning. There was evidence to show that an entrance had been made, however, the conviction was reversed and remanded due to the statutory requirement that proof be made that entrance took place during the night.); Davis v. State, 51 Neb. 301, 70 N.W. 984 (1897) (Accused, in a murder prosecution, made several oral admissions that he had dislodged a rail on a railroad track which was the cause of a train wreck in which several persons were killed. The proof showed the rail to have been dislodged in a manner that required human force. Garments of the accused were also found nearby.); Egbert v. State, 113 Neb. 790, 205 N.W. 252 (1925) (Accused, in a manslaughter prosecution, made several oral admissions that he had shot his son-in-law. Daughter of the accused gave direct
For example, *Gallegos v. State*\textsuperscript{24} was a case which squarely raised the problem of sufficiency of corroboration. The accused was charged with murder after he had made a detailed written confession of the crime. In his confession he stated that a Mrs. Carrillo, not his wife, had been living with him; that one night while arguing with her, he hit her behind the left ear with a piece of stovewood; that she fell to the floor, and blood formed a spot thereon; that she died as a result of the blows, and on the next night he dug a grave near the house and placed her body in it; that at the time he buried her she was wearing a pair of his overalls, a lady's shirt, but no shoes; and that she was wrapped in a blanket. The accused did not tell anyone of her death until the confessions were made.

County authorities went to the place where he stated the body was buried. They found a body which had been placed and clothed as the accused had related. The body was partly decomposed, but it was shown that it was the body of a woman of Mexican or Spanish descent. The brown spot on the floor of the house was also found.

The court held that this evidence, taken together with the confessions, was sufficient to establish the corpus delicti. Although the body of Mrs. Carrillo was not proved by direct testimony, still, there was strong circumstantial evidence that it was her body. Thus, the first element of the corpus delicti was established when the evidence was taken together with the confession.

It is rather doubtful that the accused could have been convicted upon the evidence had he not made the confession, for it would seem that such evidence would have left a reasonable doubt as to his guilt. Establishing the second and third elements of the corpus delicti would have required proof beyond reasonable doubt. That being so, and upon the facts presented, actual death by criminal means probably could not have been established without more proof than the inferences which could be drawn. To link the identity of the accused with the crime would also have required proof beyond reasonable doubt,

\textsuperscript{24} 152 Neb. 831, 43 N.W.2d 1 (1950), aff'd, 342 U.S. 55 (1951).
and such proof, on the facts presented, would appear to be lacking in this case.\textsuperscript{25}

As previously stated, the weight of authority holds that evidence to establish the corpus delicti need not be proved entirely independent of and without reference to the confession of the accused, but it may be taken together with the confession to show guilt beyond a reasonable doubt. No doubt the theory behind this is that if the corpus delicti is shown to exist, a sufficient trustworthiness appears in the confession to link the confessor as the person committing the crime.

Hence, if proving death by criminal means is limited to a showing that the death of the deceased actually resulted from a certain type of an act, then the only evidence to support it in the \textit{Gallegos} case would be the brown spot or stain on the floor of the house, since no mark or wound denoting violence was shown to exist on the body. The peculiarities of the grave and manner of clothing of the deceased would but raise inferences of criminal agency and would not actually prove that death resulted from criminal means. Such a limitation of the evidence would have, in this case as well as in the \textit{Sullivan} case, ruled out all inferences of criminal agency that could have been drawn from the surrounding circumstances. However, the court in both cases, in effect, held that evidence to prove the actual cause of death is not necessary, and that resulting inferences from the surrounding facts may also be used as circumstantial evidence. Therefore, it may safely be said that in addition to the brown spot or stain on the floor, inferences of criminality could reasonably be drawn from the nature of the grave and burial, its location, the clothes on the body of the deceased, and the failure of the accused to make inquiry of the whereabouts of the deceased. Such corroborative evidence would appear to be more than "slight."

The California case of \textit{People v. McWilliams}\textsuperscript{26} illustrates a case where a conviction for forgery and issuing a check without funds was sustained although there was but slight corroborating evidence. It was essential for the prosecution to show that the name of the drawee was that of a fictitious person. To show that no such person as the drawee existed, the court relied upon circumstantial evidence through testimony of a witness who stated that he "checked the Fort Worth [Texas] city directory for the years 1926 and 1930" and no such person was listed. This, coupled with a confession, was sufficient evidence.

\textsuperscript{25} This case was appealed to the United States Supreme Court on the ground that the confessions of Gallegos were made involuntarily, and, therefore, were not admissible as evidence. It is important to note that had the Supreme Court reversed and remanded the decision on this ground, the facts of the Gallegos case, as presented, would probably have been insufficient to a conviction without a confession.

\textsuperscript{26} 117 Cal. App. 732, 4 P.2d 601 (1931); .
The ruling of the McWilliams case indicated that the attitude of the court was such as to give weight to even the slightest bit of evidence which would provide at least some corroboration. This decision would seem to be representative of one applying the slight corroboration rule to evidence which was doubtlessly bare and inconclusive.

That there is a difference in degree as to the amount of evidence regarded as being sufficient in the McWilliams case and that which has been relied upon in the decisions of the Nebraska cases cannot be doubted, even though both jurisdictions state the rule that slight corroboration is sufficient.

It would seem that the Supreme Court of Nebraska has not been confronted with a case which really invokes the “slight corroboration” rule in its truest form. If the factual situations of either the Sullivan or Gallegos cases are to be viewed as providing the measurement for the rule regarding sufficiency of corroboration, the word “slight” seems to be a misnomer. If, however, the court intends the word “slight” to be accorded the meaning ordinarily given that word, the present statement of the rule seems to be dictum, since it has never been necessary to apply the rule to its fullest extent.

Policy Considerations Surrounding the Rule

The rule requiring corroboration of extra-judicial confessions, although firmly established in American law, has been criticized as being superfluous. There is no doubt that an ever present possibility of false confessions of guilt does exist, and a rule to guard against such confessions can be plausibly supported as a safeguard of the rights of those whose hidden motives drive them to accept punishment designed for the real criminal.

Perhaps just as plausible is the argument of Professor Wigmore; that the danger to be safeguarded against is greatly exaggerated, since the number of such confessions is exceedingly small.27 He also points out that often unscrupulous lawyers resort to the rule as a legal subterfuge from which to entrap the trial judge into an erroneous charge to the jury.28 Both of these viewpoints assume that the confession was given voluntarily. However, it would seem that the more obvious danger, of false confessions made involuntarily, would provide the more cogent argument in favor of the rule.

The report made in 1931 to President Hoover by the National Commission on Law Enforcement29 was the first nation-wide comprehensive

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27 7 Wigmore, Evidence §§ 867, 2070 (3d ed. 1940).
28 Ibid.
29 Nat'l Comm. on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement (No. 11 June 25, 1931). The Report considered two topics: (1) the third degree and (2) unfairness in prosecutions. The study of the third degree methods was very comprehensive, and the important cities of every state
study conducted to determine the existence and prevalence of police third degree methods in the United States. The Commission concluded that illegal third degree methods such as physical brutality, protracted questioning, threats and illegal detention were employed by police authorities throughout the country in order to obtain confessions or statements. Since 1931, there has not been a comprehensive study made with which to compare the present day conditions with those existing at the time the Commission's survey was made. However, in 1946, the Committee on Civil Rights appointed by President Truman reported that brutality in the extortion of confessions still existed.

It was especially noted that the lawless methods were practiced against racial and religious minorities with particular attention focused on the treatment of Negroes in the South. Although steps have been taken in many parts of the country to reduce these practices, it is readily apparent that they still exist, thereby providing a sound basis for the assumption that claims as to the prevalence of false confessions are not as exaggerated as they were once thought to be. Fortunately, modern police schools are being widely used by law enforcement agencies in an effort to teach the use of more subtle and effective means and the District of Columbia were analyzed for such practices. Twenty-two types of unfairness in prosecution were mentioned, with reference made to all states and the District of Columbia. It is interesting to note that from the years 1926 to 1930, the investigators found approximately six hundred cases involving such unfair practices.

The President's Committee on Civil Rights was appointed by President Truman on December 5, 1946, to study and make recommendations for strengthening and improving "the civil rights of the people." The committee was composed of fifteen distinguished citizens, headed by Mr. Charles E. Wilson, then president of General Electric. This report embodied the Committee's findings with respect to the status of the right to security of the person at the end of 1947. The committee's appraisal may be taken as an authoritative, if perhaps moderate, statement of the problem.

Many states have passed third degree statutes which make it a criminal offense to illegally extort confessions from an accused person. Various punishments include fines, jail or penitentiary confinement and removal from office. Nebraska does not have a third degree statute in the sense that officials may be punished for illegally extorting confessions, but under Neb. Rev. Stat. § 28-717 (Reissue 1948), if sheriffs, constables, coroners or jailers designedly, wilfully or corruptly injure, defraud or oppress any person, they may be fined in an amount up to $200, and also answerable to the person in treble damages. And under § 23-2001 all county officers may be tried and removed from office for "oppression." It is submitted that subjecting officials to fines and/or confinement for extorting confessions illegally is another reason why officials would not as a rule admit their illegal acts when questioned about it during the trial court's determination of whether the confession was voluntarily obtained.

For a discussion of the legal status of lie-detector test results and how the lie-detectors is used in obtaining confessions, see Inbau, Lie Detection and Criminal Interrogation 83-95 (2d ed. 1948).

3 Wigmore, Evidence § 822 (3d ed. 1940).
of handling an accused person. Police science methods have utilized
the lie detector to great advantages today, and its usage has reduced
the extensiveness of coercive practices.\textsuperscript{33}

Judicial experience has provided the grounds for viewing confes-
sions in general with distrust, although no accurate statistics have
been tabulated on the number of untrue confessions.\textsuperscript{34} It is, however,
definitely settled that confessions extracted through physical violence,
promised immunity or other similar collateral inducements are in-
admissible. The majority of the jurisdictions regard the trial judge
as the one to determine the admissibility of a confession,\textsuperscript{35} although
recently there has been some movement to allow the jury to pass on
its admissibility.\textsuperscript{36} But, before it is admitted, the trial judge must
hear evidence by the defense which goes to rebut the voluntariness.\textsuperscript{37}

Body scars or other physical marks on the accused could provide
means by which the judge could properly determine that the confession
was illegally obtained. However, no such obvious clue of illegality is
found when threats, promises and some forms of physical brutality
are used, and the resourcefulness of the trial judge in his deterimna-
tion becomes highly important. Persons of peculiar temperament,
defective mentality, unusual timidity, or those plainly ignorant of
their rights may chose to confess fairly readily rather than face the
consequences to which they would be subjected by remaining silent.

The Report on Lawlessness in Law Enforcement\textsuperscript{38} concluded that
those employing these third degree methods will not, as a general
rule, admit their practices; and, further, that the victims are likely to
either exaggerate or fabricate their testimony or even remain silent
because of fear of police retaliation.\textsuperscript{39} Thus, the trial judge can be
confronted with a situation where the prosecution attempts to admit a
confession which has been illegally obtained; and, when questioned
about its voluntariness, will strongly deny any coercive methods.
Just as strongly, the accused may make statements against its volun-

\textsuperscript{33} State v. Wilson, 217 La. 470, 46 So.2d 738 (1950); Caudill v. State, 224
Ind. 531, 69 N.E.2d 549 (1946); State v. Crank, 105 Utah 332, 142 P.2d 178
(1943); Rasin v. State, 153 Md. 431, 138 Atl. 338 (1927) (the admissibility
"... ought in all cases to be decided by the Court before the confession is per-
mitted to go to the jury."); Harris v. People, 55 Colo. 407, 135 Pac. 785 (1913).

\textsuperscript{34} 3 Wigmore, Evidence § 861 (3d ed. 1940). Professor Wigmore is of the
opinion that this trend is improper as (1) it abolishes the true function of the
judge in his determination of questions of admissibility of evidence; (2) con-
fession rules are artificial and do not measure the ultimate value of the
confession; and (3) the jury is not familiar enough with the rules to attempt
to employ them.

\textsuperscript{35} The jury may be withdrawn during the presentation of the proof; but
once the confession has been admitted, the weight and credence to be given it
is a question for the jury. See Wigmore, Evidence § 861 (3d ed. 1940).

\textsuperscript{36} Note 31 supra.

\textsuperscript{37} Nat'l Comm. on Law Observance and Enforcement, Report on Lawlessness
in Law Enforcement 21 (No. 11, June 25, 1931).
tariness in order to further his own ends. Since it would seem fairly natural for the accused to attack the confession, the court cannot refuse admittance merely on the pleas of the accused. The argument that the accused has the right to introduce his own testimony to reduce the weight and value of the confession is one which would seem to be adequate for that purpose and is no doubt a valuable rule. However, the fallacy in this rule is that it assumes that the testimony of one being tried for a serious crime and who has apparently confessed to it is just as honest as the testimony of the law enforcement officials, an assumption which is contrary to public thinking regarding law enforcement agencies. The trial judge is bound by the principles of his office to make reasonable inquiry and investigation concerning a confession's voluntariness. But when he is traveling a circuit or the docket becomes burdened with forthcoming cases, his time may be taken up by other important matters.

The point in the trial proceedings when an extra-judicial confession is to be introduced is within the discretion of the trial judge. Since the corroborative evidence is so closely connected with the confession and may be taken together with it to produce a finding of guilty, the better practice would seem to be to determine the sufficiency of the evidence before allowing the confession to be entered.

Sufficiency of Corroboration Required

Three categories of factual situations usually arise in applying the corroboration rule (assuming that the corpus delicti to be proved consists of the harm or injury and the criminal agency causing such harm or injury). First, where the aliunde corroborating evidence alone has no probative value as to guilt, since the evidence is just as consistent with innocence, e.g., A admits killing B by pushing B down a flight of stairs, and the marks upon the body show that death resulted from the fall. Second, where the aliunde corroborating evidence establishes guilt beyond a reasonable doubt when taken in conjunction with the confession, e.g., A admits killing B by beating B to death, and the evidence shows that death resulted from injuries which were impossible of being self-inflicted. Third, where the aliunde corroborating evidence itself will establish guilt beyond a reasonable doubt without the aid of the confession, e.g., A admits killing B with a revolver, and C is an eye witness to the crime. Although cases seldom fall exactly


41 Many juries today may even reject the confession after it has once been admitted into evidence. See cases collected in 3 Wigmore, Evidence § 861 (3d ed. 1940).
within one of these categories, they usually take on characteristics common to one of the three.42

The rationale behind the corroboration rule is simply to show that a crime was committed. The problem is deciding to what degree the evidence must show such a crime. Cases within categories two and three establish the crime upon their facts and present the court with little trouble. But a case having a factual situation from which a prima facie inference of innocence can be drawn as well as one of guilt squarely forces the court to decide upon some measure of sufficiency of corroborating evidence. Regardless of the measure that the court claims to be sufficient, its ruling is no doubt in some way proportional to its trust for confessions in general.

Even though a jury may have the privilege of weighing the value of a confession, as a practical matter, such a confession would have a certain psychological effect tending to show guilt, even though the defense might present strong argument to rebut its legality. No doubt this is based, at least in part, upon the erroneous belief that law enforcement agencies only reserve rough treatment and trickery for the guilty and not the innocent.43

**CONCLUSION**

Since judicial experience has provided some basis for a general feeling of distrust for confessions, and since pretrial coercive methods in obtaining confessions still exist today, it is submitted that the rule requiring corroboration of an extra-judicial confession is one well designed not only to protect the so-called exaggerated danger of voluntary false confessions, but even more important, the danger of involuntary false confessions.

The sufficiency of corroboration to be applied within a jurisdiction should correspond to the general trustworthiness of confessions based upon the common knowledge and experience accumulated by the court system of the particular jurisdiction since the courts are in the best position to view law enforcement practices within the jurisdiction. The trial judge is the first line of defense against such coerced confessions once they enter the channels of litigation. Any measure of sufficiency so applied should be flexible in order to cope with any coercive practices which become known to the courts.

It is common knowledge that certain religious and racial minority groups have been and still are discriminated against, not only by members of the general public, but by law enforcement officials as well.

42 The third category could actually be excluded from the standpoint of policy consideration regarding the need for the rule, since guilt could be established without the aid of the confession.

Where these practices are known to exist, courts which require small and insignificant amounts of evidence to corroborate the accused's confession run the risk of creating a grievous injustice.

Lawrence L. Wilson, '55