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IN THE SUPREME COURT OF LOUISIANA

JOHN DAVID FLOYD, Petitioner,

vs.

BURL CAIN, in his official capacity, Respondent.

On a writ to review the ruling of the Criminal District Court for the Parish of Orleans, Section C
No. 280-729 "C"
The Honorable Benedict Willard, Judge Presiding

BRIEF OF *AMICUS CURIAE* THE AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF PETITIONER JOHN FLOYD

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TABLE OF CONTENTS

I. INTEREST OF AMICUS 1

II. SUMMARY OF THE ARGUMENT 1

III. ARGUMENT 2

A. Confessions That Are Voluntary As A Matter of Law Can Be Unreliable in Fact 2

1. Innocent People Sometimes Confess To Crimes They Did Not Commit .. 4

B Why Innocent People Confess 5

1. Police Interrogation Involves a Multi-step Set of Processes 6

2. Certain Police Interrogation Tactics Can Elicit False Confessions from Ordinary, Law Abiding Citizens 8

3. Some People Are Highly Vulnerable To Influence During Interrogation 9

C. Voluntary False Confessions Are Difficult For Judges, Juries, and Others to Discern 11

1. False Confessions Often Contain Vivid Details And Other Hallmarks of Credibility 12

2. False Confessions Can Corrupt Other Evidence, Creating an Illusion of Corroboration 13

3. Innocent Suspects Are Not Necessarily Protected by Miranda 15

D. The Presence of a Voluntary Confession Should Not Preclude a Finding of Innocence 16

IV. CONCLUSION 19

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I. INTEREST OF AMICUS

The American Psychological Association (the "APA"), a voluntary nonprofit, scientific and professional organization, serves as the leading association of psychologists in the United States. The APA has more than 152,000 members and affiliates, including the majority of psychologists holding doctoral degrees from accredited universities in the country. Among the APA's major purposes is to increase and disseminate knowledge of human behavior and to foster the application of psychology to important human concerns.

The issue before this Court, which turns on the reliability of a legally voluntary confession, has been researched and studied scientifically. Drawing on that extensive scientific research, the APA submits that a legally voluntary confession does not establish guilt conclusively. On the contrary, numerous psychological factors may cause innocent suspects to tender false confessions. Confessions, therefore, should not bar consideration of scientific evidence such as DNA testing, which can often demonstrate the innocence or guilt of the accused.

II. SUMMARY OF THE ARGUMENT

A confession that may be ruled legally "voluntary," and therefore admissible into evidence, does not conclusively establish actual guilt. Psychologists have conducted extensive studies concerning the reasons why accused criminal defendants sometimes confess falsely despite their actual innocence. These scientific studies confirm a phenomenon that is apparent from a number of cases. False confessions--even if they are determined to be "voluntary" for admissibility purposes--may be provoked by any number of circumstances ranging from the manner of interrogation to the psychological

attributes of some criminal defendants. In any search for the truth, even voluntary confessions are fallible. Based on the scientific findings described in this brief, the APA urges this Court to recognize that in some exceptional cases a legally voluntary confession may still be found to be objectively false based on other evidence of innocence.

A court faced with other evidence of innocence should look beyond the fact that the defendant has confessed to ascertain the truth. This is particularly true where the defendant has characteristics, such as mental retardation, that predispose him to falsely confess.

III. ARGUMENT

A. Confessions That Are Voluntary As A Matter of Law Can Be Unreliable in Fact.

Over the years, psychologists, other social scientists, and legal scholars have examined the causes, characteristics, and consequences of false confessions. This empirical literature is broadly grounded in three types of research: (1) individual and aggregated case studies of wrongful convictions involving known innocent suspects who had confessed,[1] (2) basic research on core principles of human behavior established across a range of non-forensic domains of psychology;[2] and (3) laboratory and field

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[1] Analyses of wrongful convictions are not new. *See, e.g.*, Borchard, *Convicting The Innocent: Errors of Criminal Justice* (New Haven: Yale University Press 1932); for a review, *see* Leo, *Re-thinking The Study of Miscarriages of Justice: Developing a Criminology of Wrongful Conviction*, 21 J . Contemp. Crim. Just. 201 (2005).

[2] Prominent examples include the volumes of research indicating that human beings are highly responsive to reward and punishment; that behavior is influenced more by perceptions of short-term than long-term consequences; that this tendency is exacerbated in people who are cognitively and psychosocially immature, or who are subject to acute stress or fatigue; that human beings are highly vulnerable to influence from social impact agents, particularly when isolated from familiar others, often being led to engage in self- and other-defeating acts of conformity, compliance, and obedience; and that observers

experiments, naturalistic observation studies, and self-report surveys that specifically focus on the processes of interviewing, including interrogations and the elicitation of confessions.[3]

Collectively, this literature provides a strong empirical foundation for certain conclusions regarding the phenomenon of false confessions.[4]

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routinely accept confessions and other self-reports at face value, predictably underestimating the power of external social influences. These core principles can be found in virtually all modern psychology textbooks.

[3] *See* Kassin et al., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs,* 31 Law & Hum. Behav. 381 (August 2007) [hereinafter Kassin et al., *Police Practices*]. Modern psychological theorizing on false confessions can be traced to Munsterberg, *On the Witness Stand* (Garden City, N.Y.: Doubleday 1908)-and, more recently, to Bern, *Inducing Belief in False Confession,* 3 J. Personality & Soc. Psychol. 707 (1966), Zimbardo, *The Psychology of Police Confessions,* 1 Psychol. Today 17-20, 25-27 (June 1967), Kassin & Wrightsman, *The Psychology of Evidence and Trial Procedure, in Confession Evidence,* 67-94 (1985) [hereinafter Kassin & Wrightsman, *Psychology of Evidence*]; and Gudjonsson, *The Psychology of Interrogations, Confessions, and Testimony* (London: Wiley 1992) [hereinafter Gudjonsson, *Psychology of Interrogations*]. For reviews and perspectives on recent research on police interrogations and why people confess, *see* Conte, *The Psychology of False Confessions,* 2 J. Credibility Assess. & Witness Psychol. 14-36 (1999); Davis & O'Donohue, *The Road to Perdition: "Extreme Influence" Tactics in The Interrogation Room, in Handbook of Forensic Psychology* 897- 996 (O'Donohue, Laws & Hollin eds. Basic Books 2003); Drizin & Leo, *The Problem of False Confessions in the Post-DNA World,* 82 N.C. L. REV. 891 (March 2004) [hereinafter Drizin & Leo, *Problem of False Confessions]*; Gudjonsson, *Psychology of Interrogation;* Gudjonsson, *The Psychology of Interrogations and Confessions: A Handbook* (John Wiley & Sons eds., 2003) [hereinafter Gudjonsson, *A Handbook];* Irving & Hilgendorf, *Police Interrogation: The Psychological Approach,* Research Studies No. 1 (London, HMSO 1980): Kassin et al., *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis,* 21 Law & Hum. Behav. 469 (1997) [hereinafter Kassin et al., *On the Power of Confession Evidence*]; Kassin et al., *Coerced Confessions and the Jury: An Experimental Test of the "Harmless Error" Rule,* 21 Law & Hum. Behav. 27 (1997) [hereinafter Kassin et al., *Coerced Confessions*]; Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk,* 60 Am. Psychologist 215 (2005) [hereinafter Kassin, *On the Psychology of Confessions*]; Kassin, *The Psychology of Confessions,* Annual Review of Law & Social Science (Aug. 6, 2008) [hereinafter Kassin, *The Psychology of Confessions*]; Kassin & Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues,* 5 Psychological Science in the Public Interest 33 (2004) [hereinafter Kassin & Gudjonsson, *Psychology of Confessions, Review of the Literature]; Kassin & Gudjonsson, True Crimes, False Confessions: Why Do Innocent People Confess to Crimes They Did Not Commit?,* Scientific American Mind, 24-31 (June 2005). Lassiter, *Interrogations, Confessions and Entrapment* (New York: Kluwer Academic 2004) [hereinafter Lassiter, *Interrogations, Confessions];* Leo, *Police Interrogation and American Justice* (Cambridge: Harvard University Press 2008) [hereinafter Leo, *Police Interrogation*]; Leo & Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation,* 88 J. Crim. L. & Criminology 429 (Winter 1998) [hereinafter Leo & Ofshe, *Consequences of False Confessions*]; Ofshe & Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action,* 74 Den. U. L. Rev. 979 (1997) [hereinafter Ofshe & Leo, *The Decision to Confess Falsely;* Williamson, *Investigative Interviewing: Rights, Research, Regulation* (Devon, UK: Willian Publishing 2006); Wrightsman & Kassin, *Confessions in the Courtroom* (Newbury Park, CA: Sage 1993).

1. Innocent People Sometimes Confess To Crimes They Did Not Commit

Although a precise prevalence rate is unknown, it is clear that false confessions occur with some degree of regularity. Within the recent and growing population of post-conviction DNA exonerations reported by the Innocence Project, false confessions were a contributing factor in 20% to 25% of these cases— a sample that may represent the tip of an iceberg.[5] Other less direct sources reinforce these data. In Europe, 12% of prisoners, 3-4% of college students, and 1-2% of older university students report that they have confessed to crimes they did not commit.[6] In the United States and Canada, 631 police investigators recently surveyed estimated that, on average, 4.78% of innocent people confess during interrogation.[7]

Proving conclusively that a confession is, in fact, false requires the existence of verifiable contrary evidence. In one study that analyzed demographic, legal, and case-specific data from 125 cases of proven false confessions, four methods were described by which disputed confessions can be classified as "proven" to be false. First, a proven false confession can occur when it can be objectively established that the confessed crime did not occur.[8] Second, a confession can be classified as false when it is established

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[4] For a single comprehensive overview of this literature, see Kassin & Gudjonsson, *Psychology of Confessions, Review of the Literature,* and the accompanying editorial by Loftus, *The Devil in Confessions,* Psychological Science in the Public Interest, *5* (2), i-ii (2004).

[5] This sample does not include false confessions that were rejected by police or prosecutors, those for which DNA evidence was not available, and those to lesser crimes that elicit less post-conviction scrutiny. *See* Drizin & Leo, *Problem of False Confessions;*Garrett, *Judging Innocence,* 108 Colum. L. Rev. 55 (January 2008) [hereinafter Garrett, *Judging Innocence*]; Gross et al., *Exonerations in the United States 1989 through 2003*, 95 J. Crim. Law & Criminology 523 (2005); Scheck et al., Actual Innocence (Garden City, NY 2000).

[6] Gudjonsson, *A Handbook.*

[7] Kassin et al., Police Practices.

objectively that it was physically impossible for the confessor to have committed the crime (e.g., the suspect was in custody or was too young to have produced semen).[9] Third, a proven false confession can be identified when the true perpetrator is apprehended and his guilt is objectively established.[10] Fourth, a proven false confession can occur when DNA or other scientific evidence dispositively establishes the confessor's innocence.[11] As a result of these methods, and in contrast to the belief that people do not confess to crimes they did not commit, it is clear that significant numbers of men and women have been wrongfully prosecuted, convicted, and imprisoned because of false confessions.

B. Why Innocent People Confess.

Sometimes, innocent people volunteer confessions without undue pressure from police. For example, when Charles Lindbergh's baby was kidnapped in 1932, approximately 200 people stepped forward to confess.[12] More recently, in 2006, John Mark Karr voluntarily claimed responsibility for the unsolved murder of Jon Benet

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[8] Drizin & Leo, *Problem of False Confessions* (citing Leo & Ofshe, *Consequences of False Confessions*).

[9] *Id.* at 925-26 (citing Leo & Ofshe, *Consequences of False Confessions,* at 450-51).

[10] *Id.* at 926 (citing Leo & Ofshe, *Consequences of False Confessions, at* 452-53).

[11] *Id.* (citing Leo & Ofshe, *Consequences of False Confessions,* at 454-55). For reviews, see Drizin & Leo, *Problem of False Confessions*; Garrett, *Judging Innocence*; Gudjonsson, *Psychology of Interrogations*; Gudjonsson, *A Handbook*; Kassin et al., *On the Power of Confession Evidence*; Kassin et al., *Coerced Confessions*; Kassin, *On the Psychology of Confessions*; Kassin, *The Psychology of Confessions*; Kassin &: Gudjonsson, *Psychology of Confessions, Review of the Literature*; Kassin & Wrightsman, *Psychology of Evidence*; Lassiter, *Interrogations, Confessions*; Leo, *Police Interrogation*; Leo & Ofshe, *Consequences of False Confessions*; Wrightsman & Kassin, *Confessions in the Courtroom* (Newbury Park, CA: Sage 1993).

[12] Jan Hoffman, *Police Refine Methods So Potent, Even the Innocent Have Confessed*, N.Y. Times, March 30, 1998, at A-1.

Ramsey.[13] There are several reasons why innocent people might voluntarily confess, such as a pathological need for attention or notoriety; feelings of guilt or delusions of involvement; the perception of tangible gain; or the desire to protect a parent, child, or someone else.[14]

In the vast majority of known cases, however, false confessions are induced by lawful interrogation processes that are designed to elicit confessions from suspects. In addition, there are two categories of factors that increase the risk that an innocent person may confess. First, certain interrogation methods especially when used in the extreme- can lead ordinary people to capitulate in order to extricate themselves from a highly aversive situation; second, some people in particular are uniquely vulnerable to influence and malleable in the face of pressure.

1. Police Interrogation Involves a Multi-step Set of Processes

The process of custodial interrogation and the resulting elicitation of self-incriminating statements is a valuable and necessary law enforcement tool. Custodial interrogation helps police solve crimes and enables prosecutors to bring offenders to justice. The surgical objective is to secure admissions and full confessions from suspects who are guilty but not from those, initially misjudged, who are innocent. In theory, interrogation draws confessions from suspects by increasing the anxiety associated with denial and lessening the perceived consequences of confession. Clearly, these objectives can be achieved through unlawful threats, promises, and physical mistreatment. The literature on wrongful convictions, however, supported by empirical research, indicates

[13] Julie Bosman, *Reflection and Red Faces After the Ramsey Storm,* N.Y. Times, Aug. 30, 2006, at E-3 p.2; *see also* Judith Graham, *Experts See Red Flags in Confession,* Chicago Tribune, Aug. 20, 2006, at C-3.

[14] For a fuller discussion, *see id.*

that certain lawful interrogation tactics may also lead not only offenders but also innocent suspects to confess. [15]

Typically, the confrontational process of police interrogation is preceded by an information gathering interview conducted to determine if the police believe a suspect is guilty or innocent. For a person who is falsely accused, this first impression may determine whether he or she is interrogated or sent home.

To elicit confessions, police investigators isolate the suspect often in a small, bare, windowless private room, without family or friends. These conditions heighten the suspect's anxiety, sense of helplessness, and need for relief. In the process that ensues, trained interrogators employ a combination of positive and negative incentives. First, they confront the suspect in custody with strong accusations of guilt, without opportunity for denial, and they may bolster these assertions by citing either real or manufactured incriminating evidence. During this phase, the suspect's denials are interrupted and challenged. Over time, a suspect may come to feel trapped by the apparent weight of the evidence and fall into a state of hopelessness and despair. Second, interrogators often offer sympathy and understanding, minimize the crime, and provide moral justification. They may suggest that the crime was spontaneous, accidental, provoked, drug-induced, peer pressured, or otherwise justified by extenuating circumstances. Themes that minimize the seriousness of the crime can lead a beleaguered suspect to see confession as an expedient means of relief. Once a suspect is persuaded to admit guilt, interrogators

[15] For an analysis of the suspect's decision-making process in this situation, Ofshe & Leo, *The Decision to Confess Falsely* at 985-986.

seek to convert that admission into a full narrative confession.[16] Both natural observational studies and self-report surveys of police confirm that these techniques are routinely employed.[17]

2. Certain Police Interrogation Tactics Can Elicit False Confessions from Ordinary, Law Abiding Citizens

Lawful interrogation tactics have elicited false confessions from ordinary and law-abiding adults.[18] There are several aspects of custodial interrogation that can increase this risk. First, false confessions are related to length of interrogation.[19] In a large sample of proven false confessions in which time records were available, 34% lasted 6 to 12 hours, 39% lasted 12 to 24 hours, and the average was 16.3 hours.[20]

A second interrogation tactic that can induce confessions from innocent people involves the presentation of false evidence. Investigators will sometimes confront a suspect with allegedly incontrovertible evidence of guilt such as a fingerprint, blood or hair sample, eyewitness, or failed polygraph, even if that evidence is false. This tactic was employed in numerous proven false confession cases.[21] The presentation of false

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[16] Inbau et al. (2001); *see also* Zulawski & Wicklander, *Practical Aspects of Interview and Interrogation* (CRC Press) (1993).

[17] See, e.g., Leo, *Inside the Interrogation Room*, 86 J. Crim. L. & Criminology 266 (Winter 1996) [hereinafter Leo, *Interrogation Room*]; Feld, *Police Interrogations of Juveniles: An Empirical Study of Policy and Practice*, 97 J . Crim. Law & Criminology 219 (2006); Kassin et al.; *Police Practices*; for an overview, see Leo, *Police Interrogation.*

[18] Leo, *Police Interrogation; see also* Leo & Ofshe, *Consequences of False Confessions,* at 470 (detailing Luis Roberto Benevidez's confession as motivated by police threats that they would put his girlfriend in prison and baby in foster care if he did not confess and the judge's subsequent determination that the confession was admissible).

[19] Inbau et al. (2001).

[20] Drizin & Leo, *Problem of False Confessions.*

[21] In a 1989 case, for example, a detective told 17 year-old Marty Tankleff (accused of murdering his parents in the absence of any evidence) that his hairs were found on his mother, that a "humidity test"

evidence has been implicated in numerous convictions of innocent people, including those resulting in DNA exonerations.[22]

A third interrogation tactic that poses risk if used in the extreme is minimization, whereby a sympathetic interrogator minimizes the crime through "theme development," suggesting to suspects that their actions were spontaneous, accidental, provoked, peer-pressured, or otherwise justifiable by external factors. Analysis of numerous tape recorded interrogations and transcripts has revealed that these techniques are often used to imply promises and threats.[23] Indeed, research confirms that minimization tactics lead people to infer that they would be treated with leniency upon confession even when no explicit promises are made.[24] In one controlled experiment, for example, this tactic led 18% of innocent college students to confess that they cheated on an experimental problem that they were supposed to solve without assistance, a possible violation of the university honor code.[25]

3. Some People Are Highly Vulnerable To Influence During Interrogation

Given certain situational factors, anyone may be at risk of rendering a false confession, but certain individual factors make this outcome even more likely. Some

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indicated he had showered (hence, the lack of blood on him), and that his hospitalized father had emerged from his coma to say that Marty was his assailant--all were lies. Tankleff confessed and spent nineteen years in prison before his conviction was vacated and the charges dropped in 2008. Kassin, *The Psychology of Confessions* at 13.10. *See also People* v. *Tunklef,* No. 1535-88,2008 N.Y. Misc. LEXIS 4869 (N.Y. July 22,2008).

[22] For a review, see Kassin & Gudjonsson, *Psychology of Confessions, Review of the Literature.*

[23] Ofshe & Leo, *The Decision to Confess Falsely.*

[24] Kassin & McNall, *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 Law & Hum. Behav. 233 (1991).

[25] Russano et al., *Investigating True and False Confessions Within a Novel Experimental Paradigm*, 16 Psychol. Sci. 481 (2005).

people are characteristically more vulnerable to influence than others, and hence at greater risk to confess during a police interrogation. Statistics show a disproportionate number of juveniles and individuals with mental retardation comprise the population of false confessors. In the earlier described database of 125 proven false confessions, for example, 35% involved juveniles, most of whom had confessed, often in vivid detail, to brutal murder.[26]

The intellectually impaired are also more vulnerable to influence in an interrogation. In the previously cited sample of false confessors, individuals with mental retardation, as measured by conventional intelligence tests, comprised at least 22%.[27] Research shows that most individuals with mental retardation cannot comprehend the *Miranda* warnings they receive, rendering their rights to silence and to counsel as "words without meaning."[28] Controlled experiments have shown that individuals with mental retardation also exhibit a high need for approval, particularly in the presence of authority figures. Furthermore, they display an acquiescence response bias that leads them to answer "yes" to a wide range of questions, even when an affirmative response is

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[26] Drizin & Leo, *Problem of False Confessions*. Comparatively, of all persons arrested for murder, only 8% are juveniles (Snyder, Juvenile Arrests 2004 (Washington, D.C.: Office of Juvenile Justice & Delinquency Prevention, Office of Justice Programs 2006)). See also Redlich, *False Confessions and False Guilty Pleas, in Interrogations and Confessions: Current Research, Practice & Policy* (Lassiter & Meissner eds. Washington, D.C.: APA Books) (2010).

[27] Drizin & Leo, *Problem of False Confessions*.

[28] Cloud et al., *Words Without Meaning: The Constitution, Confessions and Mentally Retarded Suspects*, 69 U. Chi. L. Rev. 495 (2002).

incorrect, inappropriate, or absurd.[29] They are also highly suggestible, as measured by their influence to leading and misleading questions.[30]

Using the Gudjonsson Suggestibility Scale (GSS; a measure of interrogative suggestibility), researchers found that people with mental retardation were more likely to yield to leading questions and change their answers in response to mild negative feedback.[31] In an examination of three groups--alleged false confessors, alleged true confessors, and suspects who resisted confession during questioning--researchers found the alleged false confessors to have the lowest IQ scores as well as the highest suggestibility scores compared to the other two groups.[32]

The U.S. Supreme Court thus cited the possibility of false confession as a rationale for its decision in *Atkins* v. *Virginia* to exclude individuals with mental retardation from capital punishment.[33]

C. Voluntary False Confessions Are Difficult For Judges, Juries, and Others to Discern.

False confessions rendered by innocent suspects for crimes they did not commit are not readily detected or corrected by prosecutors, courts, and jurors who may mistakenly credit them with truthfulness. The safety net that should protect innocent confessors requires that key decision makers can distinguish with accuracy between true

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[29] Finlay & Lyons, *Acquiescence in Interviews with People Who Have Mental Retardation*, 40 Mental Retardation 14 (2002).

[30] Gudjonsson, A *Handbook.*

[31] Everington and Fulero, *Competence to Confess: Measuring Understanding and Suggestibility of Defendants with Mental Retardation,* 37 Mental Retardation 212 (1999); O'Connell et al., *Miranda Comprehension in Adults with Mental Retardation and the Effects of Feedback Style on Suggestibility,* 29 Law & Hum. Behav. 359 (2005).

[32] Gudjonsson & Clare (1995).

[33] *Atkins* v. *Virginia,* 536 U.S. 304, 320 (2002).

and false confessions and discount the latter in their decision making. Yet, as demonstrated by the convictions of many innocent people who confessed but then retracted their confessions and pled not guilty, this is not the case.

The inability to differentiate between true and false confessions can be attributed to two factors. First, common sense dictates that we trust confessions because they represent statements that go against the suspect's self-interest. Because people tend to behave in self-serving ways, it is natural to conclude that confessions must be particularly diagnostic of guilt. Second, numerous scientific experiments have shown that most people--including police investigators, psychologists, customs inspectors, judges, and other "experts"--are not adept at detecting deception and struggle to distinguish truth from untruth at high levels of accuracy.[34]

1. False Confessions Often Contain Vivid Details And Other Hallmarks of Credibility

Particularly misleading and problematic is that false confessions often contain content cues that are presumed to be associated with truthfulness. Research shows that false confessions made by innocent suspects may appear so similar to those made by their guilty counterparts that people mistakenly credit them with truthfulness. In a study in which male prisoners delivered both videotaped false confessions and confessions to the crimes that they actually committed, neither experienced police investigators nor college students were able to distinguish between the true and false confessions at high levels of accuracy. These study participants scored only 42% to 64% of the confessions accurately,

[34] For recent reviews of this scientific literature, *see* Bond & DePaulo, *Accuracy of Deception Judgments,* 10 Personal. Soc. Psychol. Rev. 214 (2006); Vrij, *Detecting Lies and Deceit: Pitfalls und Opportunities* (Chichester, UK: Wiley 2008).

a performance that is not significantly better than mere chance.[35] Examination of proven false confessions reveals that these statements often contain vivid and accurate details about the crime and victim that the innocent confessor learned from leading questions, photographs, visits to the crime scene, and other secondary sources of information.[36] To further confuse matters, many false confessions contain not only a narrative account of *what* the suspect allegedly did and *how* he did it, but a motivational statement about *why* as well as apologies and expressions of remorse. As a result of the failure to appreciate the factors that contribute to this phenomenon, as described above, false confessions are often trusted.

2. False Confessions Can Corrupt Other Evidence, Creating an Illusion of Corroboration.

Judges and juries may also struggle to identify false confessions, even in the context of a full trial, because these confessions can taint other evidence. A case in Pennsylvania is illustrative. In Laughman's case, the defendant confessed to rape and murder during an unrecorded interrogation. The next day, however, serology tests show that Laughman had Type B blood; yet the semen recovered from the victim was from a Type A secretor. Clearly influenced by the confession, the state forensic chemist went on to propose four theories not grounded in science to explain away the mismatch. Sixteen years later, Laughman was set free.[37]

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[35] Kassin et al., *I'd Know a False Confession If I Saw One: A Comparative Study of College Students and Police Investigators*, 29 Law & Hum. Behav. 211 (2005).

[36] Kassin, *A Critical Appraisal of Modern Police Interrogations, in Investigative Interviewing: Rights, Research, Regulation* (Williamson ed. Devon, UK: Willan Publishing 2006).

[37] http://www.innocenceproject.org/Content/197.php

Grounded in a large body of psychological research on behavioral confirmation biases,[38] recent empirical studies have demonstrated the problem as well. In one experiment, for example, researchers presented five latent fingerprint experts with pairs of prints from a crime scene and suspect in an actual case in which they had previously made either a match or exclusion judgment. The prints were accompanied either by no extraneous information, an instruction that the suspect had confessed (suggesting a match), or an instruction that the suspect was in custody while the crime was committed (suggesting an exclusion). Strikingly, the misinformation changed 17% of the original, previously correct judgments.[39] In a second study, research participants witnessed a staged theft and made photographic identification decisions from a photographic lineup. One week later, individual witnesses, depending on the experimental condition to which they were randomly assigned, were told that the person they had identified denied guilt, or that he confessed, or that a specific other lineup member confessed. Influenced by this information, many witnesses went on to change their identification decisions. Among those who had made a selection but were told that another lineup member confessed, 61% changed their identifications and did so with confidence. Among those who had not made a previous identification, 50% erroneously went on to select the confessor, again doing so with confidence.[40] Therefore, taken as a whole, the body of evidence that flows from false confession evidence compounds the problem. Judges and juries group

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[38] For reviews, *see* Nickerson, *Confirmation Bias: .*A Ubiquitous *Phenomenon in Many* Guises. 2 *Review of General Psychology* 175-220 (1998); Rosenthal, *Covert communication in classrooms, clinics, courtrooms, and cubicles*, 57 American Psychologist 839-849 (2002).

[39] Dror and Charlton, *Why Experts Make Errors,* 56 J. Forensic Identif. 600 (2006).

[40] Hasei & Kassin, *On the Presumption of Evidentiary Independence: Can Confessions Corrupt Eyewitness Identifications*, 21 Psychol. Sci. 122 (2009).

seemingly independent sources of corroborative evidence together rather than appreciate the influence that false confessions wield in creating that evidence.

3. Innocent Suspects Are Not Necessarily Protected by *Miranda.*

Numerous false confessions have been taken from suspects who had voluntarily waived their rights under *Miranda v. Arizona.*[41] In *Miranda,* the U.S. Supreme Court provided a means by which accused people can protect themselves from self-incrimination. Over the years, the *Miranda* warning and waiver requirement have served as a means of inferring the voluntariness of confessions thereafter elicited by police. Some studies have shown, however, that suspects with serious mental disorders[42] or mental retardation,[43] and many young adolescents face substantial impairments in understanding the rights afforded under *Miranda.*[44] Comprehension notwithstanding, other studies have shown that roughly four out of five suspects waive their rights and submit to questioning.[45] The tendency to waive their rights to silence and to counsel is

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[41] 384 US. 436 (1996).

[42] Rogers et al., *Knowing and Intelligent: A Study of Miranda Warnings in Mentally Disordered Defendants*, 31 Law & Hum. Behav. 401 (2007).

[43] Clare & Gudjonsson, *Recall and Understanding of the Caution and Rights in Police Detention Among Persons of Average Intellectual Ability and Persons with a Mild Mental Handicap*, 1 Issues in Criminological & Legal Psychol. 34 (1991); Everington & Fulero, *Competence to Confess: Measuring Understanding and Suggestibility of Defendants with Mental Retardation*, 37 Mental Retardation 212 (1999); Fulero & Everington, *Mental Retardation, Competency to Waive Miranda Rights and False Confessions, in Interrogations, Confessions and Entrapment* (Lassiter ed., New York: Kluwer Academic/Plenum 1995); O'Connell et al., *Miranda Comprehension in Adults with Mental Retardation and the Effects of Feedback Style on Suggestibility*, 29 Law & Hum. Behav. 359 (2005).

[44] Abramoviteh et al., *Young Persons ' Comprehension of Waivers in Criminal Proceedings,* 5 Canadian J. Criminology 309 (1993); Goldstein et al., *Juvenile Offenders Miranda Rights Comprehension and Self-Reported Likelihood of False Confessions,* 10 Assessment 359 (2003); Grisso, *Juveniles' Waiver of Rights: Legal and Psychological Competence* (New York: Plenum 1981); Viljoen et al., *Legal Decisions of Preadolescent and Adolescent Defendants: Predictors of Confessions, Pleas, Communication with Attorneys and Appeals,* 29 Law & Hum. Behav. 253 (2005); Viljoen & Roesch, *Competence to Waive Interrogation Rights and Adjudicative Competence in Adolescent Defendants: Cognitive Development, Attorney Contact and Psychological Symptoms,* 29 Law & Hum. Behav. 723 (2005).

most evident among individuals without a criminal record.[46] Consistent with the recidivist proposition that first-timers are less likely to offend, controlled experiments[47] and self-report surveys of police[48] suggest that innocent suspects who believe that they have nothing to fear or hide and seek to prove their innocence are particularly prone to waive their rights.[49] As a consequence, many innocents, including some who ultimately confess, do not avail themselves of the constitutional rights they are afforded.

D. The Presence of a Voluntary Confession Should Not Preclude a Finding of Innocence.

The United States Supreme Court has noted that:

> A system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.[50]

But a suspect who confesses, even if that confession is false, will be treated more harshly throughout the process.[51] In many cases, once a suspect confesses, investigators tend to "close the investigation, clear the case as solved, and make no effort to pursue

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[45] Leo, *Interrogation Room;* Leo & White, *Adapting to Miranda: Modern interrogators' strategies for dealing with the obstacles posed by Miranda,* 83 Minn. *L.* Rev. 397 (1999). Note that the same pattern is found in Great Britain. Baldwin, *Police Interviewing Techniques: Establishing Truth or Proof,* 33 *The British Journal of Criminology* 325- 352 (1993); Moston et al., *The Effects of Case Characteristics on Suspect Behaviour During Police Questioning,* 32 Brit. J . Criminal. 23 (1992); Softley, P. *Police interrogation*: An observational study in four police stations. London: Home Office Research Study, Royal Commission on Criminal Procedure Research Study (1980).

[46] Leo, *Interrogation Room*

[47] Kassin & Norwick, *Why People Waive Their Miranda Rights: The Power of Innocence,* 28 Law & Hum. Behav. 211 (April 2004); Moore & Gagnier, *"You Can Talk if You Want To": Is the Police Caution on the Right to Silence Comprehensible?,* 51 Crim. Rep. 233 (2008).

[48] Kassin et al., *Police Practices.*

[49] For a review of how innocence puts innocents at risk, *see* Kassin, *On the psychology of Confessions; see also People v. Wise,* 752 N.Y.S.2d 837 (N.Y. 2002).

[50] *Escobedo v. Illinois,* 378 U.S. 478,488-89 (1964).

[51] Drizin & Leo, *Problem of False Confessions.*

other possible leads."[52] Prosecutors often charge defendants who have confessed with the highest number of offenses and do not accept plea bargains.[53] Moreover, judges rarely suppress confessions and juries typically disbelieve claims of innocence made by defendants who have confessed.[54] When proven false confessors pled not guilty and proceeded to trial, the jury conviction rates ranged from 73% [55]to 81%.[56] If a false confessor is convicted, he is then typically sentenced more harshly than other defendants.[57] In sum, a false confession may "contaminate the perception and treatment of a case as it makes its way through the entire criminal justice process."[58]

Despite its limitations, confession evidence is so powerful that "the introduction of a confession makes the other aspects of a trial in court superfluous, and the real trial, for all practical purposes, occurs when the confession is obtained."[59] An analysis of case outcomes illustrates the point. In a study that examined proven false confession cases in the United States from 1971 to 2002, roughly four out of five innocent confessors who went to trial were convicted.[60] In this study, 93% of the false confessors were men and

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[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] Leo & Ofshe, Consequences of False Confessions

[56] Drizin & Leo, Problem of False Confessions.

[57] *Id.* at 923.

[58] *Id.*

[59] *Colorado v. Connelly,* 479 US 157, 182 (1986).

[60] Drizin & Leo, *Problem of False Confessions.*

81% occurred in murder cases. Forty six percent of exonerations were based on the discovery of new scientific evidence.

When compared to the numerous post conviction exonerations, the influence of confessions is plain. Confession evidence has thus been described as "inherently prejudicial and highly damaging" even when it is unsupported by other evidence or later disproved beyond a reasonable doubt by DNA evidence.[61]

Controlled mock jury research reinforces these case outcome data by showing that confession evidence typically has more impact on jurors than other potent forms of evidence and that people do not fully discount confessions even if it is logically or legally appropriate to do so.[62] In one experiment, participants were significantly prompted to vote guilty by a defendant's confession to police that was indisputably induced by an explicit promise of leniency.[63] In a second experiment, participants were significantly influenced by an indirect or "secondary confession" reported by an accomplice or jailhouse informant--even when told that this cooperating witness had a personal incentive to claim that the defendant had confessed.[64] In a third experiment, the presence of a confession significantly boosted the conviction rate even among jurors who perceived it to be coerced, among those specifically admonished to disregard such

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[61] *Id.* at 961

[62] Kassin et al., *On the Power of Confession Evidence*

[63] Kassin & Wrightsman, *Prior Confessions and Mock Juror Verdicts,* 10 J . Applied Soc. Psychol. 133 (1980)

[64] Neuschatz et al., *The Effects of Accomplice Witnesses and Jailhouse Informants on Jury Decision Making*, 32 Law & Hum. Behav. 137 (2008).

confessions, and among those who later reported that the confession did not influence their decision.[65]

These studies underscore why a court faced with other evidence of innocence should look beyond the fact that the defendant has confessed to ascertain the truth. This is particularly true where the defendant has characteristics, such as mental retardation, that predispose him to falsely confess.

IV. CONCLUSION

"Voluntary" confessions have been shown to be false and unreliable in numerous cases, and psychological research explains the circumstances that have sometimes led innocent people to confess. Determination of guilt based solely on the existence of a confession is fallible without careful scrutiny of the circumstances under which it was obtained and the characteristics of the individual defendant.

Respectfully Submitted, this 20th day of May, 2010.

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[65] Kassin et al., *Coerced Confessions*.

VERIFICATION AND CERTIFICATE OF SERVICE

BEFORE ME, the undersigned authority, personally came and appeared Stephen J. Haedicke who, being duly sworn, deposed and said that he is acting as counsel for The American Psychological Association, that the statements contained in the forgoing Brief of The American Psychological Association as *Amicus Curiae* in Support of Petitioner John Floyd are true and correct to the best of his information, knowledge and belief, and that a copy of the forgoing Brief of The American Psychological Association as *Amicus Curiae* in Support of Petitioner John Floyd and Motion for Leave to File A Brief as *Amicus Curiae* in Support of Petitioner John Floyd have been forwarded to the following by U.S. Mail:

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SWORN TO AND SUBSCRIBED before me, this 20th day of May, 2010.

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Notary Public: Kristin Wenstrom

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My Commission is issued for Life.