

**Court of Appeals
of the
State of New York**

DOUGLAS WARNEY,

Claimant-Movant,

– against –

THE STATE OF NEW YORK,

Defendant-Respondent.

AMICUS BRIEF IN SUPPORT OF CLAIMANT

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Date Completed: July 9, 2010

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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.

Division 41 of the APA, the American Psychology-Law Society, focuses its work on the intersection of law and psychology. Among its purposes is to promote the contributions of psychology to the understanding of law and legal institutions through basic and applied research and to inform the legal community of current research in the field of law and psychology. As part of its work, Division 41 prepared a white paper summarizing the robust body of research that has emerged regarding the phenomenon of false confessions. Drawing on past and current police practices, laws concerning the admissibility of confession evidence in court, relevant core principles of psychology, and forensic studies involving an array of empirical methodologies, this white paper summarizes much of what we know about false confessions. This white paper was extensively peer reviewed and published this year in the Society’s flagship journal. See S.M. Kassin et al.,

Police-induced confessions: Risk factors and recommendations, 34 Law and Hum. Behav. at 3-38 (Feb. 2010), available at <http://www.springerlink.com/content/85vh322j085784t0/fulltext.pdf> (hereinafter “Kassin et al., *Police-induced Confessions*”).

In addition to sponsoring dozens of educational initiatives and publishing scores of scholarly and general interest books and periodicals on matters of psychology, to fulfill its mission, the APA has filed more than one hundred *amicus curiae* briefs in state and federal courts, including many in the United States Supreme Court. APA *amicus curiae* briefs have addressed topics ranging from competency to stand trial, child sexual abuse, and the insanity defense, to the death penalty, mental retardation and matters involving gay and lesbian rights. The APA has a rigorous internal approval process for *amicus curiae* briefs, the touchstone of which is an assessment of whether there is sufficient scientific research, data and literature to present a strong position on a question of critical importance to the court, and whether the APA can usefully contribute to a court’s understanding of the issues before it. APA’s *amicus curiae* briefs have been cited in a number of cases over the years. See, e.g., *Graham v. Florida*, 130 S.Ct. 2011, 2026, ___ U.S. ___ (2010); *In re Marriage Cases*, 43 Cal. 4th 757, 839-840 & n.59 (2008), *abrogated* by amendment to California Constitution; *Panetti v. Quarterman*, 551 U.S. 930, 962 (2007); *Roper v. Simmons*, 543 U.S. 551, 569

(2005); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002); *Hodgson v. State of Minnesota*, 497 U.S. 417, 437 n.24 (1990); *Ohio v. Akron Center for Reproductive Health, Inc.* 497 U.S. 502, 537 n.5 (1990) (Blackmun, J., dissenting); *Kentucky v. Stincer* 482 U.S. 730, 746 n.20 (1987). Moreover, the APA has submitted an *amicus curiae* brief to the Supreme Court of Pennsylvania, Eastern District, in *Wright v. Commonwealth of Pennsylvania*, E.D. Allocatur Docket 2008, No. 21 EAP 2008, explaining some of the psychological factors that may cause innocent suspects to tender false confessions.

The issue before this Court — whether a false confession elicited from a vulnerable suspect by means of the police interrogation process can fairly be deemed to arise from the suspect’s “own conduct” (and thus bar recovery under New York’s Unjust Conviction Act, Court of Claims Act § 8-b) — is one that can be illuminated by an extensive body of scientific research that has emerged in the twenty-five years since the Act was passed in 1984. This body of research shows that false confessions, even if they are judicially determined to be “voluntary” for admissibility purposes, may be provoked by specific aspects of the police interrogation process, particularly when applied to suspects with intellectual deficits or psychological vulnerabilities. The APA believes that this body of research is material to the issues presented in this case.

SUMMARY OF THE ARGUMENT

When New York’s Unjust Conviction and Imprisonment Act (the “Act”) was enacted in 1984, relatively little was known about the phenomenon of false confessions. Since that time, however, a significant and directly relevant body of empirical research has emerged to help explain this phenomenon from a psychological perspective and to identify factors that contribute to the risk of people confessing to crimes they did not commit.

In some number of cases, criminal suspects not placed under legally coercive or other psychological pressure willingly volunteer false statements for self-interested or venal reasons, such as to protect someone else or to gain notoriety, attention, or other psychological benefit. For these suspects, it is proper to say that the negative consequences of their actions reside in their “own conduct” and, thus, that they should be barred from recovery under New York’s Unjust Conviction Act.

In other cases, however, false confessions have resulted not from a suspect’s calculated venal motives, but from the specific psychological processes of police interrogation — especially as they affect suspects with demonstrable intellectual deficits or psychological vulnerabilities. Based on the scientific findings described in this brief, the APA thus urges that this Court hold that the existence of a false confession, even one that was deemed voluntary as a matter of

law, should not automatically bar a wrongfully-convicted person from recovering under the Act.

ARGUMENT

I. 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 experiments, naturalistic observation studies, and interviews and self-report surveys that

¹ Analyses of wrongful convictions in general are not new. See, e.g., E.M. Borchard, *Convicting the innocent: Errors of criminal justice* (New Haven, CT: Yale University Press 1932). For a review, see R.A. Leo, *Re-thinking the study of miscarriages of justice: Developing a criminology of wrongful conviction*, 21 J. Contemp. Crim. Just., 201-23 (2005). One study focused specifically on 125 proven false confessions. See S.A. Drizin & R.A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891 (2004) (hereinafter “Drizin & Leo, *The Problem of False Confessions in the Post-DNA World*”).

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 have intellectual deficits or psychological vulnerabilities, 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 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.

specifically focus on the processes of interrogation and the elicitation of confessions.³

Collectively, these literatures provide a relatively new and strong empirical foundation

³ See S. 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 H. Munsterberg, *On the Witness Stand* (Garden City, N.Y.: Doubleday 1908)—and, more recently, to D. Bern, *Inducing Belief in False Confession*, 3 J. Personality & Soc. Psychol. 707 (1966), P.G. Zimbardo, *The Psychology of Police Confessions*, 1 Psychol. Today 17-20, 25-27 (June 1967), S. Kassin & L. Wrightsman, *The Psychology of Evidence and Trial Procedure*, in *Confession Evidence* (Kassin & Wrightsman eds. 1985) (hereinafter “Kassin & Wrightsman, *Psychology of Evidence*”); G. Gudjonsson, *The Psychology of Interrogations, Confessions and Testimony* (Chichester, London: John Wiley & Sons 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 (2000); 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*; 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*, Ann. Rev. of L. & Soc. Sci. (Aug. 6, 2008) (hereinafter “Kassin, *The Psychology of Confessions*”); Kassin & Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 Psychol. Sci. 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?*, Sci. Am. 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: Willan Publishing 2006); Wrightsman & Kassin, *Confessions in the Courtroom* (Newbury Park, CA: Sage 1993) (hereinafter “Wrightsmen & Kassin, *Confessions in the Courtroom*”).

concerning the phenomenon of false confessions.⁴

A. 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 nearly 25% of these cases.⁵ Other less direct sources reinforce these data. In Europe, 12% of prisoners and 3-4% of college students who had been interrogated by police report that they confessed to a crime they did not commit.⁶ In the United States and Canada, 631 police investigators recently surveyed estimated that, on average, nearly 5% of innocent persons subjected to police interrogation will confess to a crime.⁷

Proving conclusively that a confession is, in fact, false requires the

⁴ For a single comprehensive overview of this literature, see Kassin et al., *Police-induced Confessions*.

⁵ This sample does not include: false confessions that were rejected by police or prosecutors, often when the real perpetrator was found; those for which DNA evidence was not available; and those to lesser crimes that elicit less post-conviction scrutiny. See Drizin & Leo, *The problem of false confessions in the post-DNA world*; Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55 (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, *Psychology of Interrogation*; Gudjonsson, *The Psychology of Interrogations and Confessions: A Handbook* (John Wiley & Sons eds., 2003) (hereinafter “Gudjonsson, *A Handbook*”).

⁷ Kassin et al., *Police Practices*.

existence of verifiable contrary evidence. In a study by Drizin and Leo that analyzed demographic, legal, and case-specific data from 125 cases of proven false confessions, four methods were described by which disputed confessions were 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 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 occurs when DNA or other scientific evidence dispositively establishes the confessor’s innocence.¹¹

B. Some False Confessions Arise from a Defendant’s Own Conduct; Others Clearly Do Not.

It is clear that significant numbers of men and women have been wrongfully prosecuted, convicted, and imprisoned because of false confessions. It is

⁸ Drizin & Leo, *The problem of false confessions in the post-DNA world*, at 449-50.

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*.

also clear that innocent people over the years have confessed in different ways and for different reasons.

In some number of cases, suspects who are not placed under legally coercive or other psychological pressure willingly volunteer false statements for what may be called self-interested or venal reasons. Over the years, this phenomenon has occurred in several high-profile cases. When Charles Lindbergh's infant son was kidnapped in 1932, approximately 200 people—all of whom were innocent—voluntarily stepped forward to confess. More recently, in 2006, John Mark Karr voluntarily claimed responsibility for the unsolved murder of JonBenet Ramsey. There are several reasons why innocent people might confess without prompting—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.¹² For cases like these, where the techniques of police interrogation played no role in the suspects' decision to confess, it is proper to say that the negative consequences of the suspects' confessions reside in their “own conduct” and, thus, such persons should be barred from recovery under the Act.

¹² For a discussion of such false confessions, see Kassin & Wrightsman, *Psychology of Evidence*; Gudjonsson, *A Handbook*; Kassin & Gudjonsson, *Psychology of Confessions, Review of the Literature*.

In contrast to these instances, however, research indicates that many individuals ultimately proven innocent make false confessions due to the nature of the interrogation they faced (such as excessive lengths of time and misrepresentations of evidence), their own intellectual deficits or psychological vulnerabilities (age, intellectual disabilities, mental illness) or, in many cases, both. Research indicates that some number of suspects—despite initial and often prolonged protestations of innocence—are induced over time to confess, less as a result of their own conduct and more as a result of the interrogation.

Recent research has also shown that, quite apart from the use of explicit threats and promises which would often produce confessions ruled inadmissible, certain psychologically-based interrogation tactics, even when not legally coercive, can lead even normal people who are innocent to capitulate and make a false admission in order to extricate themselves from an aversive situation. See Kassin et al., *Police-induced Confessions*.¹³ In this case, the allegations are that Mr. Warney initially and truthfully denied any involvement in the murder while being questioned. During the course of the ensuing interrogation, however, he changed his truthful denial, after several statements, to a false confession. A careful consideration both of Mr. Warney's vulnerability as well as the interrogation methods used to elicit this change is relevant in this case.

¹³ This article is an official White Paper of Division 41 of the APA.

II. Certain Factors Predictably Increase the Risk of False Confessions.

In a vast majority of known cases, false confessions are induced by the processes of persuasion that characterize interviewing and interrogation. In this setting, two types of factors may increase the risk that an innocent person would confess. First, certain interrogation tactics—especially when used in the extreme—can lead ordinary people to become confused or capitulate in order to extricate themselves from an aversive situation. Second, some individuals, as a matter of disposition, are particularly vulnerable to influence and malleable in the face of pressure.

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

Police interrogation involves a multistep process designed to elicit incriminating admissions and full narrative confessions from suspects who are presumed guilty. Eliciting incriminating statements is accomplished by increasing the anxiety associated with denial and reducing the anxiety associated with confession.¹⁴ Clearly, these objectives can be achieved through unlawful threats, promises, and physical mistreatment. The literature on wrongful convictions, however, supported by empirical research, confirms that even lawful interrogation tactics will lead not only guilty perpetrators but also some innocent suspects to confess.¹⁵

¹⁴ F.E. Inbau, J.E. Reid, J. Buckley, J., & B. Jayne, *Criminal interrogation and confessions* (4th ed. Boston: Jones and Bartlett 2004) (hereinafter “Inbau, *Criminal Interrogation*, 4th Ed.”).

¹⁵ For an analysis of the suspect’s decision-making process in this situation, see Ofshe & Leo, *The Decision to Confess Falsely*.

To achieve their goals, police investigators are advised to isolate the suspect in a private room, without family or friends, which increases the suspect's anxiety and his or her need for relief. In the questioning that ensues, the trained interrogator employs both positive and negative incentives. First, the interrogator confronts the suspect in custody with strong accusations of guilt, without opportunity for denial, and may bolster these assertions by citing incriminating evidence, either real or manufactured. As the suspect is led to feel trapped by the weight of evidence, the interrogator may then offer sympathy and moral justification, normalizing and minimizing the crime and leading the suspect to see confession as an expedient way out of his or her predicament. Once the suspect is persuaded to admit guilt, the interrogators seek to convert that admission into a full narrative confession—on tape or in writing.¹⁶ Both observational studies and self-report surveys of police confirm that these techniques are routinely employed.¹⁷

¹⁶ Inbau, *Criminal Interrogation*, 4th Ed.

¹⁷ See, e.g., Leo, *Inside the Interrogation Room*, 86 J. Crim. L. & Criminology 266 (1996); 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*.

B. Certain Lawful Police Interrogation Tactics Increase the Risk of Eliciting False Confessions.

When used in the extreme, certain interrogation methods that have been upheld by the courts as lawful can elicit false confessions.¹⁸ Research has show that three additional aspects of the interrogation process increase the risk.

The first risk factor for yielding a false confession concerns time. Most interrogations last from thirty minutes to two hours. Indeed, from a law enforcement training perspective, it has been suggested that interrogators will seldom require more than four hours to obtain a confession from an offender, even in cases of a very serious nature.¹⁹ Yet, in contrast to these parameters, 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

There are two psychological reasons why the risk of false confession increases over time. First, a good deal of research shows that people under stress seek to affiliate with others for the psychological, physiological, and health benefits that social support provides.²¹ Hence, prolonged isolation from significant

¹⁸ Leo, *Police Interrogation*; see also Leo & Ofshe, *Consequences of False Confessions*, at 470.

¹⁹ F.E. Inbau, J.E. Reid, & J.P. Buckley, *Criminal interrogation and confessions* (3rd ed. Baltimore, MD: Williams & Wilkins 1986).

²⁰ Drizin & Leo, *The Problem of False Confessions in the Post-DNA World*.

²¹ See S. Schachter, *The psychology of affiliation: Experimental studies of the sources of gregariousness* (Stanford, CA: Stanford University Press 1959); Y. Rofe, *Stress and affiliation: A utility theory*, 91 *Psychological R.* 235-50 (1984); B.N. Uchino, J.T. Cacioppo, & J.K Kiecolt-Glaser, *The relationship Between Social Support and Physiological Processes: A Review with*

others constitutes a form of deprivation that can heighten a suspect's distress and increase the urgency to escape the situation. Second, depending on the hours and conditions of interrogation, sleep deprivation is often a source of concern.

Laboratory experiments have shown that sleep deprivation heightens susceptibility to influence and impairs perceptions and decision-making.²² Indeed, performance decrements during sleep deprivation have also been observed in medical interns, motorists, and F-117 fighter pilots. Combining the results of numerous studies, researchers have concluded that: "overall sleep deprivation strongly impairs human functioning."²³

A second interrogation tactic that can induce confessions from innocent people involves the presentation of false evidence, a method of confrontation by which interrogators may allege to have incontrovertible proof of the suspect's guilt—such as a fingerprint, blood or hair sample, eyewitness, or failed polygraph—even if that allegation is untrue. This tactic was employed in numerous proven false confession cases.²⁴ From a convergence of sources—including laboratory experiments and

Emphasis on Underlying Mechanisms and Implications for Health, 119 Psych. Bulletin 488-531 (1996).

²² For a review, see Harrison & Horne, *The Impact of Sleep Deprivation on Decision Making: A Review*, 6 J. Experimental Psychol.: Applied 236 (2000).

²³ Pilcher & Huffcut, *Effects of Sleep Deprivation on Performance: A Meta-Analysis* (1996).

²⁴ In 1989, 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" indicated he had showered (hence, the lack of blood on him), and that his hospitalized father had emerged from his coma to say that his son Marty was his assailant—

individual case studies—there is strong support for the proposition that this type of deception puts innocent suspects at a greater risk to confess by fostering confusion and by leading them to feel trapped by the weight of the case against them.²⁵ Hence, the National Research Council’s Committee to Review the Scientific Evidence on the Polygraph (2003) recently expressed concern over the risk of false confession that is produced by telling suspects they had failed the polygraph.²⁶

A third interrogation tactic that poses risks 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. Analyses of numerous tape-recorded interrogations and transcripts have revealed these techniques are often used to imply promises (of leniency) and threats (of harsher treatment by the criminal justice system).²⁷ 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.²⁸ In one controlled experiment, for example, this tactic

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; see also *People v. Tankleff*, No. 1535-88, 2008 N.Y. Misc. LEXIS 4869 (N.Y. July 22, 2008).

²⁵ For a review, see Kassin & Gudjonsson, *Psychology of Confessions, Review of the Literature*.

²⁶ National Research Council, Committee to Review the Scientific Evidence on the Polygraph, *The Polygraph and Lie Detection* (Washington, DC: National Academies Press 2003).

²⁷ Ofshe & Leo, *The Decision to Confess Falsely*.

²⁸ Kassin & McNall, *Police Interrogations and Confessions: Communicating Promises and*

led 18% of innocent college students to falsely confess that they cheated on an experimental problem that they were supposed to solve without assistance, a possible violation of the university honor code.²⁹

C. Certain Suspects Are More Vulnerable To Influence And At Greater Risk, Than Others.

It is clear that some suspects are dispositionally more vulnerable to influence than others, and hence at greater risk for false confessions. For example, youth is a risk factor for false confessions. Statistics show a disproportionate number of juveniles in the population of false confessors. In the Drizin and Leo database of 125 proven false confessions described earlier, *see supra* note 1, for example, 35% involved juveniles, most of whom had confessed, often in vivid detail, to brutal murder.³⁰ As to what makes juveniles more vulnerable in this regard, developmental psychology research indicates that adolescents are not only more compliant and suggestible than adults but that their decision making is characterized by an “immaturity of judgment”—a pattern of behavior marked by impulsivity, a focus on immediate gratification, and a diminished capacity for perceptions of risk. To the adolescent not sufficiently focused on long-term consequences, confession may thus serve as an expedient way out of a stressful

Threats by Pragmatic Implication, 15 Law & Hum. Behav. 233 (1991)

²⁹ Russano et al., *Investigating True and False Confessions Within a Novel Experimental Paradigm*, 16 Psychol. Sci. 481 (2005).

³⁰ Drizin & Leo, *The Problem of False Confessions in the Post-DNA World*. 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)).

interrogation.³¹ To further exacerbate matters, the National Center for Mental Health and Juvenile Justice estimates that the vast majority of justice-involved youth have diagnosable psychological disorders, also a risk factor for false confessions.³²

Research shows that people who are intellectually impaired are also more vulnerable to influence in an interrogation. In the Drizin and Leo sample of false confessors, *supra* note 1, at least 22% were diagnosed with mental retardation, as measured by conventional intelligence tests.³³ This proportion is understandable. Research shows that people with mental retardation often exhibit a high need for approval, particularly in the presence of authority figures, and an acquiescence response bias by which they answer “yes” to a wide range of questions—even when an affirmative response is incorrect, inappropriate, or absurd.³⁴ Those with mental retardation are also highly suggestible, as measured by their susceptibility to leading and misleading questions. Indeed, research shows that people with mental retardation score higher than average on the Gudjonsson Suggestibility Scale, a psychological test commonly used to measure interrogative suggestibility.³⁵ Importantly, this

³¹ For a review, see Owen-Kostelnik et al., *Testimony and Interrogation of Minors: Assumptions About Maturity and Morality*, 61 Am. Psychol. 286 (2006)

³² See Redlich, *False Confessions and False Guilty Pleas*, in *Interrogations and Confessions: Current Research, Practice & Policy* (Lassiter & Meissner eds. Washington, D.C.: APA Books) (in press).

³³ Drizin & Leo, *The Problem of False Confessions in the Post-DNA World*.

³⁴ Finlay & Lyons, *Acquiescence in Interviews with People Who Have Mental Retardation*, 40 Mental Retardation 14 (2002).

³⁵ Gudjonsson, *A Handbook*.

suggestibility reflects an intellectual weakness, not a motive to lie or deceive others.

In *Atkins v. Virginia*, 536 U.S. 304, 320 (2002), the Supreme Court cited the possibility of false confession as a reason for its decision to categorically exclude persons with mental retardation from capital punishment.

Finally, people with a history of serious mental health problems also are at increased risk of false confession. Over the years, forensic clinical psychologists and psychiatrists have studied individuals with personality traits and mental disorders that may put them at risk. As psychopathology often involves such symptoms as distorted perceptions of reality, a proneness to confusion, anxiety, mood disturbances, lack of assertiveness, and feelings of guilt, persons with mental illness are over-represented in the population of false confessions.³⁶ At present, there is little research to show how specific disorders (such as anxiety, depression, and schizophrenia) impair an innocent suspect's ability to withstand interrogation. Yet prisoners with diagnosed mental illness self-report a 22% false confession rate during their life, a number far higher than has been found in other populations.³⁷

³⁶ For a review, see Gudjonsson, *A Handbook*.

³⁷ See A.D. Redlich, *Double jeopardy in the Interrogation Room: Young Age and Mental Illness*, 62 Am. Psychologist 609-11 (2007); see also A.D. Redlich, A. Summers, & S. Hoover, *Self-reported False Confessions and False Guilty Pleas among Offenders with Mental Illness*, 34 Law and Human Behavior 70-90 (2010).

CONCLUSION

Over the past twenty-five years, empirical research conducted subsequent to the Act has transformed our understanding of false confessions, how they occur, and why. This research has identified different types of false confessions as well as the dispositional and situational factors that increase their risk, factors that are clearly present in this case. APA believes that this body of research is directly relevant to the question before this court. Based on the scientific findings described above, the APA believes this Court should hold that the existence of a false confession, even one that was legally admissible, should not automatically be deemed to constitute the Defendant's "own conduct" under the statute so as to deny compensation to an innocent suspect.

Dated: July 9, 2010

Respectfully submitted,



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