ESSAY

CONTAMINATED CONFESSIONS REVISITED

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INTRODUCTION

A second wave of false confessions is cresting. In the first twenty-one years of postconviction DNA testing, 250 innocent people were exonerated, forty of whom had falsely confessed.[1] Those false confessions have attracted sustained public attention from courts, law enforcement, policymakers, and the media; many did not previously believe that a person could confess falsely until DNA testing became available to sometimes prove confessions false quite conclusively.[2] In just the last

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[1] The first 250 DNA exonerations occurred from 1989 through early 2010 (the case of Freddie Peacock was the 250th), a time period just over twenty years. I first studied those cases in an Article and updated those data in my book *Convicting the Innocent*. Brandon L. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong 5–21 (2011) [hereinafter Garrett, Convicting the Innocent]; Brandon L. Garrett, The Substance of False Confessions, 62 Stan. L. Rev. 1051, 1052 (2010) [hereinafter Garrett, The Substance of False Confessions].

[2] The U.S. Supreme Court, for example, has cited to examples of false confessions uncovered by DNA testing in capital cases. Atkins v. Virginia, 536 U.S. 304, 320 n.25 (2002) ("[I]n recent years a disturbing number of inmates on death row have been exonerated. . . . includ[ing] at least one mentally retarded person [Earl Washington, Jr.] who unwittingly confessed to a crime that he did not commit."). For examples of lower courts citing research documenting false confessions, see, for example, United States v. Preston, 706 F.3d 1106, 1127 (9th Cir. 2013); Harris v. Thompson, 698 F.3d 609, 631 (7th Cir. 2012); State v. Lockhart, 4 A.3d 1176, 1206–07 (Conn. 2010); Commonwealth v. Wright, 14 A.3d 798, 811 n.11 (Pa. 2011). John Grisham's nonfiction book told the story of another such false confession case, and the Central Park Five case has been the subject of an award-winning documentary by Ken Burns. John Grisham, The Innocent Man: Murder and Injustice in a Small Town 119–29 (2006); The Central Park Five (IFC Films 2012). Regarding a shift in law enforcement attitudes, see Saul M. Kassin et al., Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs, 31 Law & Hum. Behav. 381, 384–85, 396 (2007).

five years, however, over half as many again have come to light—twenty-six more false confessions—among DNA exonerations.[3] Why are so many of the recent exonerations cases with false confessions, often despite the availability of DNA testing at the time of trial? That is a puzzle that initially motivated this Essay.

The outsized weight placed on confession evidence may explain why recent DNA exonerations are so dominated by false confessions. Judges, defense lawyers, prosecutors, and jurors may have a very hard time believing that a person could confess falsely. As it turns out, contaminated false confessions may appear particularly credible and worthy of belief. Like the first wave of false confessions that came to light through DNA testing, the more recently exposed false confessions were seemingly detailed—containing information that police had said only the true culprits could have known. Now we know that these innocent people could not have volunteered such "inside information" about the crime scenes, and in fact, their false confessions were contaminated.

While the exonerations occurred from 2009–2014, some of the convictions occurred decades earlier, but were so hard fought that despite the postconviction DNA test results, prosecutors prolonged the litigation for years before ultimately acceding to exonerations. Other convictions were more recent and are troubling for a different reason: Nearly half of these false confession cases involved convictions despite DNA tests that excluded the defendants at the time of conviction. Nineteen of the entire group of sixty-six exonerees had DNA tests exclude them at the time they were convicted. Sixteen of the new cases involved groups of false confessions by individuals inculpating each other, in which false confessions had cascading effects encouraging police to aggressively pursue more false leads.

This second wave of false confessions should cause even greater alarm than the first. It suggests what future wrongful convictions may look like—even in cases where DNA tests can be performed and with more hard-fought cases involving poorly documented and contaminated confession evidence. Despite decades of DNA exonerations that have proven confessions false and even potentially fabricated, some in our

[3] An updated table with information concerning the twenty-six additional false confession cases and the previous forty false confessions examined, is available in the Appendix and also in an expanded version at this resource website: Brandon L. Garrett, False Confessions: Transcripts and Testimony, U. Virginia Sch. L., http://www.law.virginia.edu/html/librarysite/garrett_falseconfess.htm (last visited Nov. 16, 2014).

criminal justice system remain uninformed of those dangers—and highly resistant to revisiting confessions. Exonerations in cases involving confessions, but without the benefit of DNA testing, may face a far more uphill battle.[4] In the death penalty cases of Henry Lee McCollum and Leon Brown, the half-brothers challenged their 1984 convictions for over thirty years on appeal, obtaining retrials but new convictions and seeking habeas corpus review with no success, until it was discovered in 2010 that police still had the crime scene evidence; and DNA tests of that evidence in 2014 cleared them and inculpated another man.[5] Even in the comparatively recent cases, involving DNA testing at the time of trial or conviction, as well as older cases relitigated with the benefit of more recent DNA tests, these exonerations were slow in coming. Despite the presence of scientific evidence of a highly probative character, judges denied relief pretrial and postconviction, and jurors readily convicted. Indeed, in one 1997 death penalty case, law enforcement refused to conduct DNA tests, having secured a false confession.[6] These false confessions highlight the importance of proposals to improve interrogation techniques, minimize coercion, and require special procedures for interrogations of juveniles and the mentally disabled. These false confessions also highlight the importance of videotaping entire interrogations to document carefully who said what in order to prevent confession contamination.[7] However, there is little evidence that interrogations are themselves better regulated in many jurisdictions, despite the increasingly well-known dangers of false confessions and the growing adoption of recording in more jurisdictions.

Revisiting judicial review of confession evidence raises still additional challenges. Many have argued that the current constitutional voluntar-

[4] The National Registry of Exonerations includes over 178 exonerations that involved confessions, the majority of which were non-DNA exonerations. % Exonerations by Contributing Factor, Nat'l Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx (last visited Nov. 16, 2014); see also Samuel R. Gross & Michael Shaffer, Nat'l Registry of Exonerations, Exonerations in the United States, 1989–2012, at 2–4 (June 2012), available at www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf (listing exonerations).

[5] Joseph Neff, Judge Overturns Convictions of Robeson Men in Child's 1983 Rape, Murder, News Observer (Sept. 2, 2014), http://www.newsobserver.com/2014/09/02/4115955/robeson-men-innocent-of-childs.html.

[6] This is the Damon Thibodeaux case discussed infra note 55.

[7] Laura H. Nirider, Joshua A. Tepfer & Steven A. Drizin, Combating Contamination in Confession Cases, 79 U. Chi. L. Rev. 837, 845–53 (2012) (reviewing *Convicting the Innocent* and focusing on the problem of confession contamination).

iness test under the Fifth Amendment and Due Process Clause does not successfully regulate interrogations, nor does *Miranda* meaningfully affect interrogation practices in most cases or substantially safeguard reliability.[8] A framework for better regulating confessions in the courtroom could instead begin with an evidence law analysis, as Richard Leo, Peter Neufeld, Steven Drizin, Andrew Taslitz, and others have proposed, with a reliability hearing under Federal Rule of Evidence 403 or its state law equivalent.[9] No jurisdiction has yet adopted that proposal, but nevertheless, I suggest ways to broaden it. Due process review of confession evidence, including examining *Brady v. Maryland*[10] and *Napue v. Illinois*[11] issues surrounding undocumented confession statements, could supplement existing Fifth Amendment-geared review of confessions. A *Napue* analysis would ask whether there is evidence that a confession was fabricated due to contamination by law enforcement disclosure of crime scene facts.[12] Neither pretrial reliability, nor due process, nor Fifth Amendment review is sufficient.

A scientific framework should inform the use of interrogation procedures by police departments, as well as the review of confession evidence pretrial, through a trial, on appeal, and postconviction. Police departments are increasingly considering best practices to electronically

[8] Miranda v. Arizona, 384 U.S. 436 (1966); Sharon L. Davies, The Reality of False Confessions—Lessons of the Central Park Jogger Case, 30 N.Y.U. Rev. L. & Soc. Change 209, 223–41 (2006); Garrett, The Substance of False Confessions, supra note 1, at 1092–97; Richard A. Leo et al., Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century, 2006 Wis. L. Rev. 479, 490–99 (2006); Eugene R. Milhizer, Confessions After *Connelly*: An Evidentiary Solution for Excluding Unreliable Confessions, 81 Temp. L. Rev. 1, 20–28 (2008); Eve Brensike Primus, The Future of Confession Law: Toward Rules for the Voluntariness Test, 115 Mich. L. Rev. (forthcoming 2015) (manuscript at 1–2) (on file with author); Boaz Sangero, *Miranda* Is Not Enough: A New Justification for Demanding "Strong Corroboration" to a Confession, 28 Cardozo L. Rev. 2791, 2802 (2007); Andrew E. Taslitz, High Expectations and Some Wounded Hopes: The Policy and Politics of a Uniform Statute on Videotaping Custodial Interrogations, 7 Nw. J.L. & Soc. Pol'y 400, 420–23 (2012); Sandra Guerra Thompson, Judicial Gatekeeping of Police-Generated Witness Testimony, 102 J. Crim. L. & Criminology 329, 365–68 (2012).

[9] Richard A. Leo, Police Interrogation and American Justice 285–91 (2008); Richard A. Leo et al., Promoting Accuracy in the Use of Confession Evidence: An Argument for Pretrial Reliability Assessments to Prevent Wrongful Convictions, 85 Temp. L. Rev. 759, 792–810 (2013). Regarding the intersections between constitutional law and the law of evidence, see Brandon L. Garrett, Constitutional Law and the Law of Evidence, 100 Cornell L. Rev. (forthcoming 2015).

[10] 373 U.S. 83 (1963).

[11] 360 U.S. 264 (1959).

[12] See id. at 269–72.

record and conduct interrogations. However, following an interrogation, judges are understandably highly reluctant to completely exclude confession evidence, even in the face of other exculpatory evidence such as DNA test results, in part because the confession may be the central evidence of guilt in a very serious criminal case. Extending judicial review proposals, I suggest that a reliability inquiry, accompanying due process and Fifth Amendment review, should frame factors informed by scientific research that could also be set out in jury instructions.[13] Courts would examine whether to frame relevant scientific framework evidence using such jury instructions or in the preferable alternative, using expert testimony to explain aspects of the research that informs an understanding of confession evidence. Such instructions or expert testimony, grounded in evidentiary reliability concerns, would inform a jury regardless of whether it was a custodial interrogation regulated by the Constitution or a noncustodial confession or inculpatory statement elicited by a nonstate actor. Criminal investigations and trials should be informed by the research on how to identify and prevent false confessions.[14] Appellate and postconviction review should be informed by this research, particularly when reviewing claims that information was withheld or not documented concerning interrogations or that trial lawyers were ineffective for failing to adequately challenge confession evidence. While DNA testing increasingly clears suspects before trial, and as a result, will increasingly not produce postconviction exonerations, the problems of false confessions and confession contamination are here to stay.

I. THE TWENTY-SIX FALSE CONFESSIONS

A. Characteristics of the Twenty-Six Cases

Of these twenty-six new false confessions among the DNA exonerees, ten were juveniles, at least two more had an intellectual disability, and

[13] This proposal follows the influential model for "social framework evidence" developed by Laurens Walker and John Monahan. Laurens Walker & John Monahan, Social Frameworks: A New Use of Social Science in Law, 73 Va. L. Rev. 559, 559–70 (1987) ("[G]eneral research results are used to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a specific case.").

[14] A recent National Academy of Sciences report on the different subject of eyewitness identification evidence takes a similar approach in recommending that courts adopt a scientifically informed framework towards the evidence. See Nat'l Research Council, Identifying the Culprit: Assessing Eyewitness Identification 1–4 (2014).

one more was mentally ill.[15] Over one-third of all sixty-six false confessions involved juveniles, and similarly, one-third involved individuals who were mentally ill or had an intellectual disability.[16] Apparently, only one among the sixty-six exonerees had an interrogation recorded in its entirely (and that individual, Johnny Williams, was unable to say anything about the crime beyond "I guess I did it"[17]). Of the most recent twenty-six false confessions, six had videotaped statements made of their ultimate confession statements, two had audio recordings of parts of the interrogation, one had a complete audio recording, and others had written statements prepared by police. These false confession cases have been concentrated in cases involving a murder. Three of the recent twenty-six cases involved a rape, and the twenty-three others involved a murder, seventeen of which involved both a rape and a murder. Three had been sentenced to death.[18]

[15] The ten juveniles are: Leon Brown, Anthony Caravella, Harold Richardson, Michael Saunders, Shainne Sharp, Terrill Swift, Robert Taylor, Shariff Wilson, Robert Lee Veal, and Anthony Yarbough. See infra Appendix. Of those ten, Leon Brown and Anthony Caravella also had an intellectual disability. Of the remaining sixteen, two others who had an intellectual disability were Bobby Ray Dixon and Henry McCollum, and Curtis Jasper Moore was mentally ill. See id.

[16] In the group of sixty-six false confessions, twenty-three were juveniles, and at least twenty-two had an intellectual disability or were mentally ill. See infra Appendix. This tracks the pattern among the first forty such false confessions, in which fourteen had an intellectual disability, three were mentally ill, and thirteen were juveniles. Garrett, Convicting the Innocent, supra note 1, at 21. The term "intellectual disability" has replaced the term "mental retardation" in federal regulation and in usage by the American Psychiatric Association. See Change in Terminology: "Mental Retardation" to "Intellectual Disability," 78 Fed. Reg. 5755, 5756 (proposed Jan. 28, 2013); Am. Psychiatric Ass'n, DSM-5 Intellectual Disability Fact Sheet 1 (2013), available at http://psychiatry.org/FILE%20library/PRACTICE/DSM/DSM-5/DSM-5-intellectual-disability-fact-sheet.pdf. Still others among these exonerees, while not diagnosed with such a disability at the time of trial, may have been quite suggestible or may have not been diagnosed because the defense did not retain experts. For example, in 2001, an expert conducting a postconviction examination found that Damon Thibodeaux, while having an IQ of seventy-nine and not considered mentally retarded using the terminology then in use, was "passive, avoidant, obedient and depressed." Petitioner's Motion for a New Trial at 67–69, State ex rel. Thibodeaux v. Cain, No. 96-4522 (Dist. Ct. Jefferson Parish, La. Nov. 27, 2012) (on file with author).

[17] Transcript of Trial at 330, People v. Williams, No. 134543 (Sup. Ct. Alameda Cnty., Cal. Nov. 17, 1999) [hereinafter Williams Trial Transcript]. All exoneree trial transcripts are on file with the author.

[18] Leon Brown, Henry McCollum, and Damon Thibodeaux had been sentenced to death. A total of ten of the twenty DNA exonerees to date that were sentenced to death had falsely confessed. Among the first forty false confessions studied, twenty-five cases involved a rape and a murder, three involved a murder, and twelve were rape cases. Garrett, Convicting the Innocent, supra note 1, at 21. In the entire group of sixty-six exonerees who falsely con-

Sixteen of the twenty-six false confessions involved group confession cases in which multiple people falsely confessed, implicating themselves and sometimes also additional people, including some who did not confess.[19] Confessions can have a multiplying effect, particularly in cases in which police do not have a firm theory regarding how many culprits were involved. This may particularly occur in murder cases in which there were no eyewitnesses to the crime, making confessions potentially crucial evidence, and in which the forensics do not make clear how many people were involved in the murder.

Two sets of group false confession cases that occurred in Chicago stand out.[20] Four of these exonerees, Terrill Swift, Harold Richardson, Michael Saunders, and Vincent Thames, had all been convicted of a murder as teenagers in South Side Chicago based on confessions in a case called the Englewood Four.[21] In a second Illinois case called the Dixmoor Five, Jonathan Barr, James Harden, Shainne Sharp, Robert Taylor, and Robert Veal were convicted of a rape and murder, and three of the youths, Sharp, Taylor, and Veal, had confessed to authorities.[22] Six of those defendants were juveniles at the time of their arrest and interrogations. And nine of the twenty-six recent false confessions were in Illinois cases (the cases of James Edwards and Juan Rivera also involved Illinois false confessions, both in Lake County, Illinois). Additional cases involving group false confessions are those of Philip Bivens, Bobby Ray Dixon, and Larry Ruffin who together falsely confessed to a murder in Mississippi; Sharrif Wilson and Anthony Yarbough who both falsely

fessed, forty-two involved a rape and a murder, nine involved a murder, and fifteen involved a rape. See infra Appendix.

[19] See infra notes 20–23 and accompanying text. Among the first forty DNA exonerees, there were group confessions among the Central Park Five, the Beatrice Six, the Ford Heights Four, and other cases. Seventeen of those forty exonerees not only inculpated themselves but also falsely inculpated others. Garrett, The Substance of False Confessions, supra note 1, at 1065 (stating that the two additional cases, William Kelly and Freddie Peacock, in which exonerations had not occurred when that study was published, did not involve the inculpation of others).

[20] As a result of this series of false confessions, some involving allegations of police brutality, many involving youths, some have nicknamed Chicago the "false confession[s] capital." 60 Minutes: Chicago: The False Confession Capital (CBS television broadcast Dec. 9, 2012), available at http:// www.cbsnews.com/videos/chicago-the-false-confession-capital/.

[21] Steve Mills, U.S. Looking at Englewood 4 Case, Chi. Tribune, Dec. 9, 2012, § 1, at 13.

[22] Press Release, Innocence Project, Three Men from Cook County, Illinois, Exonerated of 1991 Rape and Murder, Exonerations of Two Others to Follow (Nov. 3, 2011), available at http://www.innocenceproject.org/Content/Three_Men_from_Cook_County_Illinois_Exonerated_of_1991_Rape_and_Murder_Exonerations_of_Two_Others_to_Follow.php.

confessed to murders in Brooklyn, New York; and the Harry McCollum and Leon Brown cases discussed previously, in which the brothers were sentenced to death in North Carolina based on their confessions.[23]

The twenty-six cases involved lengthy interrogations that took place for more than three hours,[24] with one exception: the case of William Avery, who was interrogated for eighty minutes and who outright refused to sign the confession statement prepared by the detectives.[25] At the other end of the spectrum, James Edwards was interrogated for about twenty-seven hours over multiple interrogation sessions. Frank Sterling was interrogated for twelve hours before giving a videotaped statement, including with the use of a "relaxation technique" that his lawyer claimed had partially hypnotized him, and during which Sterling supposedly first volunteered some of the key details concerning the crime.[26]

These twenty-six exonerees all waived their *Miranda* rights when they were questioned by the police, just as the first forty exonerees who had falsely confessed had done.[27] Many waived their rights on video or in signed statements.[28] Judges then affirmed the voluntariness of all of these confessions.[29] In the Englewood Four cases, the judge initially

[23] Additionally, Kenneth Kagonyera falsely confessed in a case also involving guilty pleas of Robert Wilcoxson, who was also exonerated, and three other men whose cases are pending before the North Carolina Innocence Inquiry Commission. See Kenneth Kagonyera, Innocence Project, http://www.innocenceproject.org/Content/Kenneth_Kagonyera.php (last visited Oct. 19, 2014).

[24] See, e.g., Williams Trial Transcript, supra note 17, at 93.

[25] Among the first forty exonerees who falsely confessed, only four of forty cases involved interrogations that lasted less than three hours. Garrett, Convicting the Innocent, supra note 1, at 38. Thus, only eight percent or five of the sixty exonerees who falsely confessed were interrogated for less than three hours. I chose three hours as a marker of length because the Inbau and Reid treatise has recommended that interrogations not typically last more than three hours (now "three or four" hours). Fred E. Inbau et al., Criminal Interrogation and Confessions 423 (4th ed. 2001). The Fifth Edition instead states that "for the ordinary suspect" a "properly conducted interrogation that lasts 3 or 4 hours" would not constitute "duress." Fred E. Inbau et al., Criminal Interrogation and Confessions 347 (5th ed. 2013). I note also that exoneree Johnny Williams was interrogated actively for two hours but remained in an interrogation room for five hours. Williams Trial Transcript, supra note 17, at 93, 349.

[26] Brandon L. Garrett, Who Confesses to a Crime They Didn't Commit?, Slate (Apr. 13, 2011, 3:53 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/features/2011/getting_it_wrong_convicting_the_innocent/who_confesses_to_a_crime_they_didnt_commit.html.

[27] Garrett, Convicting the Innocent, supra note 1, at 37.

[28] Id.

[29] In the first forty such false confessions by DNA exonerees, of the twenty-nine who had a trial and whose available records indicated whether an admissibility challenge was brought, twenty-eight, or ninety-seven percent, made such a challenge, and all were unsuccessful. Garrett, Convicting the Innocent, supra note 1, at 36.

ruled that Michael Saunders's confession was involuntary. The agitated prosecutor informed the judge that if the confession were thrown out, he would have to drop all of the charges. The judge granted a one-week continuance for the State to put on additional witnesses, and after a second suppression hearing, the judge ruled that the confession was voluntary. In Robert Taylor's case, the judge found the testimony of the prosecutor who wrote down the confession statement truthful and the confession statements admissible, explaining:

> And, yes, there are occasions when the police officers overstep their bounds, and the case law addresses those, and there have been cases, and I am very well aware of those cases. I am not naive, and I know that that sometimes happens, and that they exceed their authority. This is not one of these cases.[30]

Seven of the twenty-six exonerees pleaded guilty (and one more, Sharrif Wilson, pleaded guilty after trial, agreeing to testify against Anthony Yarbough, who had also falsely confessed, in exchange for a reduced sentence). In total, eighteen of sixty-six exonerees who falsely confessed pleaded guilty. Some had lost suppression hearings and perhaps were advised to plead guilty since the confession would be admitted at trial, while others confessed and agreed to cooperate with police in the prosecution of other innocent people in exchange for a reduced sentence. Nine of the nineteen among these recent exonerees who had a trial testified at trial. The exonerees typically denied having confessed and described the circumstances of the interrogation.[31] For example, Ted Bradford testified: "The detail I got from the detectives. I did not supply any information at all."[32]

The table below summarizes some of the features of the most recent twenty-six false confessions and situates them in the entire group of sixty-six false confessions among DNA exonerations that have occurred to date in the United States.

[30] Transcript of Trial at H-174, State v. Taylor, No. 95 CR 23475 (Cir. Ct. Cook Cnty., Ill. Jan. 17, 1997) [hereinafter Taylor Trial Transcript].

[31] Of the entire group of sixty-six exonerees, twenty-five testified at their own trial, typically recanting confession statements and describing how police pressured them to falsely confess. Additionally, eight exonerees testified at co-defendants' trials (one of whom, Shariff Wilson, also testified at his own trial), and seven testified at pretrial suppression hearings. See infra Appendix.

[32] Transcript of Trial at 1510, State v. Bradford, No. 96-1-00583-1 (Sup. Ct. Yakima Cnty., Wash. June 12, 1996).

Figure I. Characteristics of False Confessions in DNA Exoneration Cases

	Contaminated with Inside Information	**Interrogations of More than 3 Hours**	**Guilty pleas**
40 False Confessions (1989–2009)	38	36	10
26 False Confessions (2009–2014)	24	25	8
Total N (% of 66 cases)	**62 (94%)**	**61 (92%)**	**18 (27%)**

B. Confessions Trumping DNA

The average year of conviction in this group of twenty-six exonerees was 1993, and the average year of exoneration was 2011, making the eighteen-year time lag from conviction to exoneration slightly longer than that among DNA exonerees in general, which have had about a fifteen-year average duration from conviction to exoneration.[33] What makes these more recent false confession exoneration cases more troubling is that many of them were convicted well into the modern DNA era. DNA testing was first conducted postconviction in the United States in 1989, and by the mid-1990s, DNA tests became quite routine in criminal investigations.[34] Several of the most recent false confession DNA exoneration cases involved decades-old convictions; two of these exonerees, Curtis Jasper Moore (convicted in 1978) and Bobby Dixon (convicted in 1980) had passed away before they were exonerated.[35] But

[33] See Garrett, Convicting the Innocent, supra note 1, at 215.

[34] See Brandon L. Garrett, Claiming Innocence, 92 Minn. L. Rev. 1629, 1659 (2008) (describing how while DNA testing was possible in the late 1980s and early 1990s, the improved Short Tandem Repeat ("STR") testing became widely adopted by the mid-to-late 1990s, resulting in a sharp increase in the rate of DNA exonerations).

[35] See Curtis Jasper Moore, Innocence Project, http://www.innocenceproject.org/Content/Curtis_Jasper_Moore.php (last visited Oct. 19, 2014); Bobby Ray Dixon, Innocence Project, http://www.innocenceproject.org/Content/Bobby_Ray_Dixon.php (last visited Oct. 19, 2014).

most involved convictions in the 1990s at which time DNA tests could have been conducted, and in some, they were conducted.

Eleven of the twenty-six most recent false confessions were cases in which DNA tests excluded defendants at the time of their convictions. This was the case in the Englewood Four and Dixmoor Five cases as well as the third trial of Juan Rivera; all of these were Illinois cases.[36] In addition, Kenneth Kagonyera pleaded guilty, as did his co-defendants, despite DNA test results excluding them all.[37] Jamie Lee Peterson's confession statements changed after police received DNA tests excluding him, and he then confessed to murdering the victim along with another man. As the defense lawyer put it at trial: "There was no discussion regarding a second perpetrator until after they found Jamie was excluded" by the DNA tests; that was when "they somehow started scrambling for a second perpetrator theory."[38]

In the Englewood Four and Dixmoor Five cases, the prosecutors tried to explain the absence of DNA (or any other forensics, such as hair comparison or serology) linking any of the defendants to the attacks by arguing that this was a group crime. In the Englewood case, the victim, known to have abused drugs and engaged in prostitution, was found strangled in a dumpster behind a liquor store.[39] The four teenagers, Thames, Richardson, Swift, and Saunders, each allegedly confessed to the four of them all having sexually assaulted the victim, with each confessing to this having occurred in a different order. Yet DNA extracted from a vaginal swab had excluded all of them. The defense pointed out at trial that the parties had stipulated at trial that the DNA did not match; the State suggested that the biological evidence might have been degraded, but in fact, the lab found that male DNA could be identified and that

[36] In the Rivera case, postexoneration DNA testing has since matched DNA test results found in another murder committed while Rivera was in prison. Steve Mills & Dan Hinkel, Same DNA Detected at Scenes of 2 Killings, Chi. Tribune, June 11, 2014, § 1, at 1. The eleven cases are those of: James Edwards, Kenneth Kagonyera, Jamie Lee Peterson, Harold Richardson, Juan Rivera (third trial), Michael Saunders, Shainne Sharp, Terrill Swift, Robert Taylor, Vincent Thames, and Robert Lee Veal.

[37] Clarke Morrison, Panel Probes New Innocence Claims, Asheville Citizen-Times, June 8, 2012, at A1.

[38] Transcript of Trial at 158, People v. Peterson, No. 97-1707-FC(D) (Cir. Trial Ct., Kalkaska Cnty., Mich. Dec. 11, 1998).

[39] Petition for Certificate of Innocence at 8, People v. Thames, No. 95 CR 09676 (Cir. Ct. Cook Cnty., Ill., June 6, 2012) [hereinafter Thames Petition for Certificate of Innocence].

it excluded the suspects.[40] There was no other evidence; as the trial judge had commented in the Swift trial, "[T]his case is really relatively simple. It's all a confession. . . . We have got a 22 page confession, and that is enough for me. There will be a finding of guilty."[41] The trial judge also noted in the Richardson trial, "If there's a DNA link . . . then we're talking something different altogether."[42] In 2010, new DNA tests pointed to a man named Johnny Douglas, a "known serial killer," "convicted murderer with a proclivity for violently assaulting and strangling women, particularly women willing to exchange sex for money or drugs," a man who was in fact present at the crime scene in 1994 when police found the body, and who at the time claimed not to have known the victim.[43]

The Dixmoor Five case similarly involved a group of youths, three of whom had falsely confessed (the two others, with the support of their father, refused to make a statement). The State called a DNA analyst from the state crime lab, who testified that the samples contained a single male profile, not that of the victim, which did not match any of the five suspects in the case.[44] The prosecutor implied that the victim, a fourteen-year-old girl, could have had consensual sex up to seventy-two hours before the murder and that this might explain the presence of the unknown male DNA.[45] However, no consensual male donor was ever identified by the prosecutor. Instead, in closing arguments, the prosecutor emphasized: "I'm not saying that DNA is[n't] incredible evidence when it applies. It's great," but adding, "[L]adies and gentlemen . . . . We know

[40] Transcript of Trial at K-66 to -68, State v. Swift, No. 95-9676 (Cir. Ct. Cook Cnty., Ill. May 1, 1998) [hereinafter Swift Trial Transcript] ("It is conclusive evidence that [Swift] did not leave any seminal fluid in there. How does that get explained? No other physical evidence, merely, his statement.").

[41] Id. at K-76, K-78.

[42] Transcript of Trial at A-13, State v. Richardson, No. 95-9676 (Cir. Ct. Cook Cnty., Ill. Dec. 18, 1997); see also Order to Vacate Convictions at 9, State v. Thames, No. 95 CR 9676 (Cir. Ct. Cook Cnty., Ill. Nov. 16, 2011) [hereinafter Thames Order to Vacate Convictions].

[43] Thames Petition for Certificate of Innocence, supra note 39, at 1, 8; Petitioners' Joint Opposition to the State's Motion to Dismiss at 2, *Swift*, No. 95-9676 (Sept. 28, 2011) (on file with author); see also Thames Order to Vacate Convictions, supra note 42, at 4–8. Douglas went on to assault additional victims following this murder and had an arrest report "including eighty-three arrests and thirty-eight convictions." Thames Petition for Certificate of Innocence, supra note 39, at 7–8.

[44] Transcript of Trial at L-19 to -22, L-33, State v. Barr, No. 95 CR 23475 (Cir. Ct. Cook Cnty., Ill. Feb. 10, 1997).

[45] Id. at L-34 to -35.

this girl was sexually active."[46] The prosecutor added that as to the DNA profile, "We do not know who that belongs to. We will never know."[47] However, a crime lab analyst also testified that there were hairs found on the victim's body that were dissimilar to the victim and also did not match any of the five youths.[48] In 2011, new DNA tests pointed to a then-recently paroled rapist, twenty years older than the five boys, with no known connection to the victim.[49]

The prosecutors' explanation for the DNA exclusion in the Juan Rivera case was similarly quite strained, but nevertheless the jury convicted Rivera of murder for a third time despite DNA tests. The prosecution theory was that either the eleven-year-old victim had been sexually active at the time, and so any DNA did not come from the murderer, or that the DNA sample was somehow contaminated.[50]

A total of nineteen of the entire group of sixty-six exonerees who falsely confessed had DNA test results that excluded them at the time of the conviction.[51] The confessions seemed to "trump" the DNA test results in those nineteen cases, as Professor Saul Kassin has put it.[52] Professors Saul Kassin, Jeff Kukucka, and Itiel Dror, in a series of studies, have described how confession evidence can taint perceptions of other evidence in a case; confirmation bias can cause investigators not to pursue other evidence, view inculpatory evidence as stronger than it is, and discount exculpatory evidence.[53]

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[46] Id. at P-24 to -25.

[47] Id.

[48] Taylor Trial Transcript, supra note 30, at N-88 to-89 (Jan. 15, 1997). For a detailed description of the cases, see Joshua A. Tepfer & Laura H. Nirider, Adjudicated Juveniles and Collateral Relief, 64 Me. L. Rev. 553, 568–73 (2012).

[49] Steve Mills, DNA Evidence Links Man to 1991 Murder, May Clear 5 Convicted in Case, Chi. Tribune (Apr. 15, 2011), http://articles.chicagotribune.com/2011-04-15/news/ct-met-dixmoor-dna-0415-20110414_1_murder-dna-evidence-links-man-dna-tests.

[50] Emily S. Achenbaum & Steve Mills, Third Trial for 1992 Killing, Chi. Trib., Apr. 12, 2009, § 2, at 1 (noting that "one of the nation's top DNA experts" disputed the prosecution contamination theory).

[51] Garrett, Convicting the Innocent, supra note 1, at 35 (stating that eight exonerees among the forty who had falsely confessed had DNA exclude them at trial, and the eight were not exonerated until subsequent DNA tests not only excluded them but also inculpated others).

[52] See Saul M. Kassin, Why Confessions Trump Innocence, 67 Am. Psychol. 431, 431, 440–41 (2012); Andrew Martin, The Prosecution's Case Against DNA, N.Y. Times Magazine, Nov. 27, 2011, at 44 ("More often, though, the fate of an inmate with powerful new evidence of innocence still rests with local prosecutors, some of whom have spun creative theories to explain away the exculpatory findings.").

[53] See Saul M. Kassin, Itiel E. Dror & Jeff Kukucka, The Forensic Confirmation Bias: Problems, Perspectives, and Proposed Solutions, 2 J. Applied Res. Memory & Cognition 42,

Confirmation bias may also help to explain why in still additional cases, like that of Ted Bradford in Washington State, prosecutors pursued a retrial despite DNA test results excluding him; in that case, however, the jury acquitted.[54] In Damon Thibodeaux's case, a death penalty case tried in 1997, no DNA testing was conducted; the prosecution took pains to question the investigators on why none was conducted, to bring out that if you have a "known perpetrator" and if "somebody confesses," then you do not "need DNA to tell you who he is."[55] In general, evidence, whether forensic evidence, alibi evidence, evidence pointing to the guilt of others, or inconsistencies in confession statements themselves, was disregarded. What about these confessions made them so powerful? The answer lies in the problem of confession contamination.

C. Confession Contamination

Confession contamination is overwhelmingly prevalent in false confessions among persons exonerated by DNA tests, as I have detailed elsewhere.[56] DNA testing provides us with "something like a crystal ball," allowing us to uncover how supposedly detailed confession statements could have been made by a person who we now know to have been innocent.[57] As I have described, unless that "inside information" about the crime had been casually released to the public by the investigators and then somehow retained and accurately parroted back by a deceptive suspect, or unless the entire confession statement was fabricated whole-cloth, the most likely scenario is that the innocent convict had details disclosed during a lengthy interrogation. Police may do so intentionally, to "feed facts" in violation of their training, but it may also happen completely unintentionally, since interrogations can be such complex affairs in which police offer suspects a set of complicated and

43–48 (2013); Kassin, supra note 52, at 440–41; Jeff Kukucka & Saul M. Kassin, Do Confessions Taint Perceptions of Handwriting Evidence? An Empirical Test of the Forensic Confirmation Bias, 38 Law & Hum. Behav. 256, 256 (2013).

[54] Ted Bradford, Nat'l Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3040 (last visited Feb. 2, 2015).

[55] Transcript of Trial at 85, 185, State v. Thibodeaux, No. 96-4522 (Dist. Ct. Jefferson Parish, La. Oct. 4, 1997) (on file with author).

[56] Garrett, Convicting the Innocent, supra note 1, at 14–44.

[57] Mark A. Godsey, Reliability Lost, False Confessions Discovered, 10 Chap. L. Rev. 623, 623 (2007).

increasingly inculpatory accounts of the crime in an effort to secure a confession.[58]

All but two of these most recent twenty-six confessions included crime scene details that supposedly were corroborated by crime scene information that only investigators and the culprit could have known. The first case was that of William Avery, who refused to sign a confession statement after the detective tried to secure his agreement to a statement in which he allegedly admitted responsibility but without explaining how the crime took place. The second was the case of Johnny Williams, in which the officers had hoped to "see if he would give us specific case details" so that they could "come to the conclusion that he has information that he wouldn't normally have unless he was there," but they received "[n]ot any, nothing substantial."[59] Williams had initially said, "I don't remember. I can't say I do. I don't remember. I was high. If I did, I was high. I don't know."[60] After the officers told him that they had him on a surveillance video and that DNA matched him, among other fabrications, he finally broke down and said, "I guess I did it. I guess I did it. I did everything."[61] He could not describe what he did though, although the officers did tell him what the basic charges were.

Still other innocent people may resist efforts by police to secure a confession. For example, DNA exoneree David Ayers did so and refused to confess; therefore he is not one of the twenty-six cases studied here. However, it is not hard to see how his case could have included a false confession. Following a murder in Cleveland public housing, Ayers was interrogated multiple times by two detectives, told he failed a "voice stress test," and that tapes of phone records of calls to the victim would show that he was lying.[62] At one point he did ask that if he admitted he

[58] Garrett, Convicting the Innocent, supra note 1, at 28; Garrett, The Substance of False Confessions, supra note 1, at 1068, 1079; see also Richard A. Leo, False Confessions: Causes, Consequences, and Implications, 37 J. Am. Acad. Psychiatry & L. 332, 337 (2009) ("Interrogators help create the false confession by pressuring the suspect to accept a particular account and by suggesting facts of the crime to him, thereby contaminating the suspect's postadmission narrative. . . . If the entire interrogation is captured on audio or video recording, then it may be possible to trace, step by step, how and when the interrogator implied or suggested the correct answers for the suspect to incorporate into his postadmission narrative.").

[59] Williams Trial Transcript, supra note 17, at 1424–26 (Apr. 7, 2000).

[60] Id. at 328 (quoting from Williams' initial statement to police).

[61] Id. at 330.

[62] Transcript of Trial at 211–14, 217, 225, State v. Ayers, No. CR-388738, (Ct. Com. Pl. Cuyahoga Cnty., Ohio Dec. 11, 2000).

hit the victim, could he go home, but he would not confess, leaving the detectives with "this feeling that we had that he was about to tell us something."[63] Nevertheless, law enforcement secured an informant who testified at trial that Ayers had confessed in jail, and Ayers was convicted in 2000, despite surveillance video footage confirming his alibi, only to be exonerated in 2011 by DNA tests.[64] And still additional cases involve inculpatory statements that can similarly be undocumented and contaminated but that were not part of a full confession or admission to the crime. For example, in the case of Anthony Johnson, law enforcement made much of the fact that during his interrogation, he did not confess, but police claimed, in a written report created two months after the fact, that he had said, "I wouldn't have killed her like that . . . . [w]ith the pick and fork."[65] Johnson testified that it was the officer who told him en route to the police station that the victim was stabbed and that, as the victim's boyfriend, he knew she kept an icepick and fork under her pillow for protection when he was not home.[66]

A total of ninety-four percent, or sixty-two of sixty-six false confessions by DNA exonerees to date, were contaminated by such allegedly "inside" information.[67] Almost without exception, these confession statements were contaminated with crime scene details which these innocent suspects, as we now know, could not have themselves been familiar with until they learned of them from law enforcement.

In these recent exonerations, the detectives similarly denied having disclosed any such information to the exonerees when asked by the defense about the source of the details contained in the confession statements; they did so in all but one of the fourteen cases in which there was a trial.[68] After all, police training on the subject is very clear: One does not ask leading questions or disclose key facts concerning the crime. The

[63] Id. at 221, 229.

[64] David Ayers, Innocence Project, http://www.innocenceproject.org/Content/David_Ayers.php (last visited Oct. 16, 2014). Another recent exoneree who was interrogated but did not confess was Robert Dewey. Robert Dewey, Innocence Project, available at http://www.innocenceproject.org/Content/Robert_Dewey.php (last visited Oct. 16, 2014).

[65] Transcript of Trial at 76, State v. Johnson, No. 2007-KP-2034 (Jud. Dist. Ct. Washington Parish, La. Feb. 25, 1986).

[66] Id. at 211.

[67] See Garrett, Convicting the Innocent, supra note 1, at 20; infra Appendix (describing facts present in twenty-four of the twenty-six most recent confessions).

[68] See the expanded Appendix, supra note 3, for quotations from law enforcement in these cases. Detectives also denied feeding facts in cases involving guilty pleas, such as the Dixmoor and Englewood cases.

leading manual on police interrogations, the Inbau and Reid treatise, now in its Fifth Edition, has long been emphatic that officers are to withhold from the public key facts and then ask nonleading questions to solicit that information, without disclosing them to the suspect.[69] One police officer at an exoneree trial therefore explained:

> Well, when you're conducting an interview, you want the subject to give you information—certain information about the crime that only the killer would be aware of.
>
> So you let him give you that information so this way you know that he was at the scene, he was involved, 'cause this is information that only the killer would know.[70]

Prosecutors similarly emphasized in their arguments that these confessions included details that only the killer could have known.[71] For example, in the Frank Sterling case, the prosecutors said:

> How does the defendant know it's a purple jacket or purple top? A guess? Instead of saying yellow, red, orange, blue, black, green, gray, brown? He just guesses purple? And what is she wearing? A purple jacket, coincidentally, a two tone sweater. . . . [This was] never released to the media, held back from the media, was the purple jacket.[72]

In Terrill Swift's case, the prosecutor stated in the opening argument that "[y]ou will see from the physical evidence, from the medical examiner that that confession is corroborated by the injuries that this victim suffered."[73] In the closing arguments, the prosecutor then concluded, "[L]ook at the details of this confession . . . . You have to make a judg-

[69] See Inbau et al., 4th ed., supra note 25, at 369 ("When developing corroborative information, the investigator must be certain that the details were not somehow revealed to the suspect through the questioning process, news media, or the viewing of crime scene photographs."). The most recent edition modifies that language slightly. Inbau et al., 5th ed., supra note 25, at 315, 355 ("It is highly important . . . that the investigator let the confessor supply the details of the occurrence and, to this end, the investigator should avoid or at least minimize the use of leading questions . . . the lead investigator should decide and document on the case folder what information will be kept secret."); see also Garrett, The Substance of False Confessions, supra note 1, at 1066–67 (describing police training on avoiding contamination).

[70] Taylor Trial Transcript, supra note 30, at MMM-42.

[71] See the expanded Appendix, supra note 3, for quotations from prosecutors' opening and closing arguments in these cases.

[72] Transcript of Trial at 1433, People v. Sterling, No. 91-0624 (N.Y. Cnty. Ct. Monroe Cnty. Sept. 29, 1992).

[73] Swift Trial Transcript, supra note 40, at A-7 (Apr. 28, 1998).

ment call of someone's credibility based on all of the evidence that this defendant was not fed these details."[74] In Anthony Yarbough's case, the prosecutor called it "preposterous" to suggest

> that those detectives had the brilliance and the ability and the capability of concocting a story and a confession that would actually make sense; that would sound right, and that they could then take that . . . and convince him and feed him and have all of this done by 2:45 in the afternoon, and have him actually regurgitate the whole story.
>
> Absurd.[75]

The brothers Henry McCollum and Leon Brown were both sentenced to death in 1984 for a brutal murder of an eleven-year-old girl in the tiny town of Red Springs, North Carolina. For decades, that crime, in which the victim was found raped and murdered by having her panties stuffed down her throat using a stick, was held out as the type of case that the death penalty was made for.[76] At trial, one of the officers who interrogated McCollum claimed that all of the details he had volunteered came from him: "We didn't have to use any technique. He was cooperative from the time we picked him up."[77] The officer continued: "I didn't ask him questions. He would volunteer some things and I would ask him some things."[78]

McCollum was an intellectually disabled nineteen-year-old who testified that he had always maintained his innocence but signed a statement without knowing what was in it because police said that he could then leave.[79] His brother, Leon Brown, was an intellectually

[74] Id. at K-71 (May 1, 1998).

[75] Transcript of Trial at 1013, People v. Yarbough, No. 7325/92 (N.Y. Sup. Ct. Kings Cnty. Feb. 16, 1994).

[76] Eric Garcia, Henry McCollum's Innocence and the Stakes for Death Row Inmates in a Red State**,** American Prospect, Sept. 25, 2014, http://prospect.org/article/henry-mccollum%E2%80%99s-innocence-and-stakes-death-row-inmates-red-state (describing how McCollum was used as a "poster child" by pro-death penalty politicians in North Carolina (internal quotation marks omitted)).

[77] Transcript of Trial at 1373, State v. McCollum, No. 83 CRS 15506-15507, 15822-15823 (N.C. Super. Ct. Robeson Cnty. Oct. 23, 1984) [hereinafter McCollum and Brown Trial Transcript].

[78] Id.

[79] Id., at 1150, 1166, 1288, 1546, 1567, 1570; see also Jonathan M. Katz & Erik Eckholm, DNA Evidence Clears Two Men in 1983 Murder, N.Y. Times, Sept. 2, 2014, at A1, available at http://www.nytimes.com/2014/09/03/us/2-convicted-in-1983-north-carolina-murder-

disabled fifteen-year-old who testified that he similarly insisted on his innocence, and could not read cursive and had no idea what was in the confession statement police pressured him to sign: "I looked at the paper real close. I said, 'No, sir. I don't understand the paper.'"[80] Both brothers were interrogated for many hours into the night, by multiple police officers.[81] Both brothers denied any knowledge of the detailed facts concerning the crime, from the way that the victim was killed, to the location of the crime, to a plank of wood that the victim was found on, to the Newport cigarettes smoked at the crime scene, to the six-pack of Bull Malt Liquor Schlitz found at the scene.[82] None of the physical evidence or forensics, such as fingerprint evidence, matched the brothers, and while the brothers had supposedly confessed to participating with three others, there was no effort to prosecute those they supposedly said primarily carried out the murder.[83]

One of the lead interrogators testified that he himself did not know any of those details and therefore could not have suggested the facts to McCollum or Brown; when asked, for example, "[D]id you know anything about the Schlitz Bull Malt Liquor beer or a plastic holder for beer cans?" he responded, "No, sir. I had never been to the crime scene."[84] One of the interrogators was a forensic expert from the state crime lab, who the prosecutor admitted was "the crime scene man" and who one of the officers admitted was there to "either confirm or

freed-after-dna-tests.html?_r=0 (describing the case and how DNA exonerated the defendants).

[80] McCollum and Brown Trial Transcript, supra note 77, at 1317, 1320, 1656.

[81] Id. at 1147–62, 1170.

[82] Id. at 1636–38, 1648 (denying that defendant told police any of the long list of facts contained in confession statement); id. at 1338 (noting that Brown stated he had no knowledge of anything in the statement, stating "[t]hat ain't true and you know it yourself").

[83] Id. at 1791–92 (highlighting how none of the "victim's blood was on that clothing" worn by the defendants, and how "[w]e don't have any footprints matched up," or "hair samples," or "any semen that matches up with any blood type of the defendants" during defense's closing argument). The prosecutor responded that the "fingerprints [found on beer cans at the crime scene] were smudged," and how the detailed facts in the confession statements were corroborated by the autopsy and crime scene investigation. Id. at 1816. The confession statements described three others, two of whom were said to have raped and asphyxiated the victim. Id. at 1360–64, 1392–95. None of the three were charged after their alibis were confirmed and evidence failed to connect them to the murder. See Henry McCollum, Case Detail, National Registry of Exonerations (Sept. 2, 2014), http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4492.

[84] McCollum and Brown Trial Transcript, supra note 77, at 1362.

deny the truth as it came out," since he was knowledgeable about the crime scene.[85]

In response to the suggestion that these statements may have been fabricated whole-cloth by the police, the prosecutor argued in his closing statement:

> The [defense] lawyer stood up here and argued to you that the officers, by some sort of foul means, pulled this confession out of these two defendants. Is that what their evidence is? Their evidence is that they never made a statement of any kind and that the officer just sat down and made up these statements . . . . Now, come on, folks. They must think you were born yesterday to swallow something like that.[86]

Damon Thibodeaux alleged contamination of his confession statement on appeal and argued that the detective "talked to him while the tape recorder was turned off" in order to feed him facts concerning the crime.[87] The appellate courts concluded, however, that "there is no due process requirement that a statement given to the police must be recorded" and found the statements voluntary and reliable "in the absence of proof to the contrary."[88] Of course, without a recording of the entire interrogation, there was no way to prove whether police did feed those facts—until the DNA tests were performed in the case. The officer in James Edwards's case explained that "we wanted to gather all the information first to make sure it was accurate, and then we offered him the opportunity if he wished to be on videotape"; they did not videotape the interrogation.[89]

These specific crime scene details were powerful enough that investigators, prosecutors, judges, and juries overlooked the lack of fit in so many of the confession statements: Many of the details provided by these individuals were inconsistent with the crime scene evidence. In these most recent twenty-six cases, twenty of the cases in-

[85] Id. at 1372, 1810.
[86] Id. at 1819–20.
[87] State v. Thibodeaux, 750 So. 2d 916, 923 (La. 1999).
[88] Id.; State v. Lefevre, 419 So. 2d 862, 867 (La. 1982).
[89] Transcript of Trial at 55, State v. Edwards, No. 96 CF 42 (Cir. Ct. Lake Cnty., Ill. Dec. 6, 1996). Illinois now videotapes interrogations. 725 Ill. Comp. Stat. 5/103-2.1(b) (2014).

cluded facts inconsistent with crime scene information.[90] Had there been complete recordings of the interrogation statements, one might have been able to observe that when asked nonleading questions, these innocent people volunteered incorrect information and that they could only offer correct information when prompted. Absent such a recording, prosecutors could and did argue that these people were purposefully lying about some aspects of the crime, and that the "inside information" they offered betrayed their guilt.[91]

II. A SCIENTIFIC FRAMEWORK FOR REVIEWING CONFESSION EVIDENCE

The U.S. Supreme Court has stated, "A confession is like no other evidence."[92] However, the Court's rulings, and state court rulings and procedures, have not yet reflected a careful understanding of what makes confession evidence different. There is now a growing and detailed body of empirical evidence concerning the impact, reliability, and potential unreliability of confession evidence. As Professor Saul Kassin puts it: "False confession is not a phenomenon that is known to the average layperson as a matter of common sense."[93] Although "mock jury studies have shown that confessions have more impact on verdicts than do other potent forms of evidence," at the same time, "People do not adequately discount confessions—even when they are retracted and judged to be the result of coercion, even when jurors are told that the confessor suffered from psychological illness or interrogation-induced stress."[94] Moreover, innocent people may actually be at risk during interrogations, believing, naively perhaps, that they will

[90] A total of fifty of the sixty-six cases involved such inconsistent facts. Still additional cases involved differing accounts by codefendants. See Garrett, Convicting the Innocent, supra note 1, at 33–35 (noting cases involving false confessions based on inconsistent facts).

[91] See id. at 34.

[92] Arizona v. Fulminante, 499 U.S. 279, 296 (1991).

[93] Kassin, Why Confessions Trump Innocence, supra note 52, at 433.

[94] Id at 433–34 (citations omitted); see also Sara C. Appleby et al., Police-Induced Confessions: An Empirical Analysis of Their Content and Impact, Psychol. Crime & Law, Dec. 2001, at 1–2 (discussing impact of confession evidence on mock jurors and still greater impact of more detailed narrative confession evidence); Danielle E. Chojnacki et al., An Empirical Basis for the Admission of Expert Testimony on False Confessions, 40 Ariz. St. L.J. 1, 39–40 (2008) (discussing misperceptions of confessions); Mark Costanzo et al., Juror Beliefs About Police Interrogations, False Confessions, and Expert Testimony, 7 J. Empirical Legal Stud. 231, 233–34 (2010).

clear their names if they cooperate with law enforcement requests to provide inculpatory statements.[95]

Recording entire interrogations is an important first step. Far too few police departments record entire interrogations, although this is changing. Fifteen states and the District of Columbia now require recording of at least some interrogations in statutes, typically in homicide and other serious felony cases, with varying provisions concerning admissibility consequences of any failure to do so,[96] while five others do so as a result of judicial rulings;[97] and still other jurisdic-

[95] Saul M. Kassin, On the Psychology of Confessions: *Does* Innocence *Put* Innocents *at Risk*?, 60 Am. Psychologist 215, 222–24 (2005).

[96] Cal. Penal Code § 859.5 (Deering 2014) (requiring recordings for juveniles suspected of murder with an exception for "exigent circumstances"); Conn. Gen. Stat. § 54-1o(b), (d) (2013) (requiring recordings for suspects of capital or class A or B felonies and that statements made during or after unrecorded interrogations be presumptively inadmissible); D.C. Code § 5-116.01(a)(1) (LexisNexis 2012) (requiring police to record all custodial investigations for violent crimes); 725 Ill. Comp. Stat. 5/103-2.1(b) (2012) (requiring police to record interrogations in all homicide cases); 725 Ill. Comp. Stat. 5/103-2.1(b-5) (2014) (expanding range of felonies for which recording is required for adult suspects); 705 Ill. Comp. Stat. 405/5-401.5(b-5) (2014) (expanding range of felonies for which recording is required for juvenile suspects); Me. Rev. Stat. Ann. tit. 25, § 2803-B(1)(K) (2013) (mandating recording "interviews of suspects in serious crimes"); Md. Code Ann., Crim. Proc. § 2-402(1) (LexisNexis 2008) (requiring that law enforcement make "reasonable efforts" to record certain felony interrogations "whenever possible"); Mich. Comp. Laws Ann. §§ 763.8(2), 763.9 (West 2014) (requiring recordings for individuals suspected of major felonies); Mo. Rev. Stat. § 590.700(2) (2013) (requiring recording for certain felonies); Mont. Code Ann. § 46-4-408 (West 2013) (requiring the recording of all custodial interrogations); Neb. Rev. Stat. §§ 29-4503, -4504 (2008) (requiring recording for interrogations relating to certain offenses and providing for jury instructions in the event of failure to do so); N.M. Stat. Ann. § 29-1-16 (West 2011) (requiring recordings of all custodial interrogations); N.C. Gen. Stat. § 15A-211 (2013) (requiring complete electronic recording of custodial interrogations in homicide cases); Ohio Rev. Code Ann. § 2933.81(B) (LexisNexis 2010) (providing for a presumption of voluntariness for recorded statements made in response to interrogation); Or. Rev. Stat. Ann. § 133.400(1) (West 2014) (requiring the recording of interrogations of suspects for aggravated murder, crimes requiring imposition of a mandatory minimum sentence, or adult prosecution of juvenile offenders); Vt .Stat. Ann. tit. 13, § 5581(b)(1), (2) (2014) (requiring recording of entire interrogations in homicide and sexual assault investigations, with a burden on prosecutors to show by a preponderance of the evidence than an exception justified failure to comply); Wis. Stat. §§ 968.073(2), 972.115(2) (2012) (requiring recording of felony interrogations and permitting a jury instruction if interrogation not recorded); see also Tex. Code Crim. Proc. Ann. art. 38.22, § 3(a)(1), (c) (West 2014) (rendering unrecorded oral statements inadmissible unless the statement contains "assertions of facts or circumstances that are found to be true").

[97] Stephan v. State, 711 P.2d 1156, 1158 (Alaska 1985) ("[A]n unexcused failure to electronically record a custodial interrogation conducted in a place of detention violates a suspect's right to due process . . . ."); State v. Hajtic, 724 N.W.2d 449, 456 (Iowa 2006) ("[E]lectronic recording, particularly videotaping, of custodial interrogations should be en-

tions, including federal law enforcement agencies, now record interrogations pursuant to official memoranda and policies.[98] Still other jurisdictions have considered adopting recording requirements in recent years.[99] Agencies report positive experiences when requiring electronic recordings, because video records frequently provide clear documentation that interrogations were conducted professionally.[100]

couraged, and we take this opportunity to do so."); State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994) ("[A]ll questioning shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention."); State v. Cook, 847 A.2d 530, 547 (N.J. 2004) ("[W]e will establish a committee to study and make recommendations on the use of electronic recordation of custodial interrogations."); In re Jerrell C.J., 699 N.W.2d 110, 123 (Wis. 2005) ("[W]e exercise our supervisory power to require that all custodial interrogation of juveniles in future cases be electronically recorded where feasible, and without exception when questioning occurs at a place of detention."); see also N.J. Ct. R. 3:17(a) (following *Cook*, requiring electronic recording of custodial interrogations); Commonwealth v. DiGiambattista, 813 N.E.2d 516, 535 (Mass. 2004) (allowing defense to point out failure to record interrogation and calling unrecorded admissions "less reliable"); State v. Barnett, 789 A.2d 629, 632 (N.H. 2001) ("[I]mmediately following the valid waiver of a defendant's *Miranda* rights, a tape-recorded interrogation will not be admitted into evidence unless the statement is recorded in its entirety.").

[98] Memorandum from James M. Cole, Deputy Attorney Gen., Dep't of Justice, Policy Concerning Electronic Recording of Statements 1 (May 12, 2014), http://archive.azcentral.com/ic/pdf/DOJ-policy-electronic-recording.pdf; Me. Criminal Justice Acad., Mandatory Policy: Recording of Suspects in Serious Crimes & the Preservation of Notes & Records 1 (Jan. 11, 2012), available at http://www.maine.gov/dps/mcja/links/index.htm (model policy requiring local police to formulate similar policies "[recognizing] the importance of recording custodial interrogations related to serious crimes"); R.I. Police Accreditation Comm'n, Accreditation Standards Manual 44–45 (May 2013), available at http://ripolicechiefs.org/images/RIPAC_Accreditation_Standards_Manual_-_First_Edition_May_2013.pdf (requiring recording of all interrogations of suspects for capital offenses); see also Consent Decree Regarding the New Orleans Police Department at 46, United States v. New Orleans, No. 12-1924, 2013 WL 2297208 (E.D. La. May 24, 2013) (mandating that all custodial interrogations of homicide or sexual assault suspects must be recorded in their entirety). For a list of agencies that record interrogations, see Thomas P. Sullivan, The Time Has Come for Law Enforcement Recordings of Custodial Interviews, Start to Finish, 37 Golden Gate U. L. Rev. 175 app. 1 (2006). Regarding the lack of uniformity and adoption of recordings in jurisdictions that adopt them only pursuant to recommended best practices or guidelines, see Thomas P. Sullivan, Arguing for Statewide Uniformity in Recording Custodial Interrogations, 29 Crim. Just. 21, 22 (2014), available at http://www.nlada.org/forensics/for_lib/Documents/1107449792.59/5e336a318e50295185256f81007887b1%3FOpenDocument.

[99] Custodial Interrogation Recording Compendium by State, Nat'l Ass'n of Crim. Def. Law., http://www.nacdl.org/usmap/crim/30262/48121/d/ (last updated July 1, 2014) (describing legislation introduced but not enacted in Arizona, New York, North Dakota, Rhode Island, South Carolina, and Tennessee).

[100] See Garrett, The Substance of False Confessions, supra note 1, at 1113–14; Saul M. Kassin et al., Police Interviewing and Interrogation, supra note 2, at 385; Thomas P. Sullivan

However, even the important step of recording entire interrogations is not enough; legal consequences should result if a recording documents a coercive or contaminated interrogation. A scientific framework should govern confession evidence that provides guiding principles for the set of evidentiary and constitutional rules that regulate confession evidence.

As noted, scholars have advocated for a renewed focus on reliability of confession evidence, including at pretrial hearings, but also through the use of expert and other evidence.[101] I describe in the sections that follow those proposals that, taken together, are consistent with applying a scientific framework to inform the development, review, and litigation of confession evidence. I propose that judges take judicial notice of such scientific framework evidence and that judges, lawyers, legislators, and policymakers consider the use of such evidence to inform interrogation procedures, pretrial hearings, expert evidence, jury instructions, and postconviction review. Confession evidence at all stages should be informed by scientific research, particularly given its importance in a wide range of criminal cases.[102] Doing so can also encourage the use of less coercive and more accurate techniques during interrogations. Nor should we be overly concerned with the result of making litigation of confession evidence overly complex.[103] Currently, pretrial suppression hearings already

& Andrew W. Vail, The Consequences of Law Enforcement Officials' Failure to Record Custodial Interviews as Required by Law, 99 J. Crim. L. & Criminology 215, 221 (2009); Adam Liptak, Taping of Interrogations Is Praised by Police, N.Y. Times, June 13, 2004, at N35; Thomas P. Sullivan, The Police Experience: Recording Custodial Interrogations, Champion, Dec. 2004, at 24.

[101] See sources cited supra note 94; see also Nirider et al., supra note 7, at 859–62 (proposing that judges entertain a "pretrial motion in limine requesting the suppression of the confession squarely on *reliability*—not voluntariness—grounds").

[102] Confession evidence is also important in many civil cases, including civil commitment and detention cases, as well as Section 1983 litigation and commercial litigation. E.g. McKune v. Lile, 536 U.S. 24, 45 (2002) (finding a state may require waiver of Fifth Amendment rights as a condition of a sexual offender treatment program); Warney v. New York, 947 N.E.2d 639, 641 (N.Y. 2011) (civil wrongful conviction claim); Brandon L. Garrett, Corporate Confessions, 30 Cardozo L. Rev. 917, 918–21 (2009) (discussing the role of inculpatory statements in corporate criminal prosecutions and internal corporate investigations).

[103] Additional research should examine how confession evidence is litigated in routine criminal cases. When I examined the trials of the first 310 DNA exonerees, to assess whether the presence of a confession was associated with a more lengthy trial, I found no such relationship when examining just a few basic variables, to be sure (although I often did not have transcripts of pretrial suppression hearings). Examining length of trial (in days), whether

occur in cases involving confessions, and they can be quite complex.[104] While not all courts permit expert testimony on confessions, they currently permit police to explain their interrogation techniques in a manner that largely resembles expert testimony.

A. Scientific and Empirical Research on Confessions

As Justice Souter wrote in *Corley v. United States*, "[T]here is mounting empirical evidence that [custodial police interrogation] can induce a frighteningly high percentage of people to confess to crimes they never committed."[105] There is a large and growing body of research on false confessions, of several types, including survey and archival research and experimental research. Major books have been published on false confessions.[106] The American Psychological Association, the largest professional and scientific organization in the field, has published reviews of

there was a confession, and whether the case involved a murder conviction or not, there was only a modest but statistically insignificant effect in which trials resulting in a murder conviction were longer. I thank Vahid Gholampour for his assistance in conducting these regressions. Adding information about the numbers of witnesses each side called at trial further reduced the size of the effects as well as the numbers of observations (and numbers of witnesses would be expected to be somewhat correlated with the length of trial in days). The results are displayed below, with R-squared of 0.2274 and 207 observations (for many exoneree trials there was incomplete information):

Trial	**Coeff.**	**Std. Err.**	**t**	**P>|t|**	**[95% Conf. Interval]**
Murder	3.86952	0.5491252	7.05	2.7868	4.952241
Death	-0.3716188	0.9240447	-0.40	-2.193575	1.450338
Confession	-0.305602	0.7053088	-0.43	-1.696273	1.085069
Constant	3.704735	0.2856566	12.97	3.1415	4.267969

[104] For example, the suppression hearings in one high-profile case in New York City were trial length and scheduled to last about three weeks. Pervaiz Shallwani, Etan Patz's Parents in Court for Pedro Hernandez's Video Confession, Wall St. J. Online, Sept. 15, 2014, http://online.wsj.com/articles/parents-of-etan-patz-whose-1979-kidnapping-gripped-new-york-in-court-to-see-video-of-pedro-hernandez-confess-to-his-killing-1410791032.

[105] 556 U.S. 303, 321 (2009).

[106] See Gisli H. Gudjonsson, The Psychology of Interrogations and Confessions: A Handbook, vii–xii (2003); Gisli H. Gudjonsson, The Psychology of Interrogations, Confessions and Testimony v–viii (1992); G. Daniel Lassiter & Christian A. Meissner, Police Interrogations and False Confessions: Current Research, Practice, and Policy Recommendations xi–xvii (2010); Interrogations, Confessions, and Entrapment xv–xix (G. Daniel Lassiter ed., 2004); Investigative Interviewing: Rights, Research and Regulation,v–vi (Tom Williamson ed., 2006); Lawrence S. Wrightsman & Saul M. Kassin, Confessions in the Courtroom 84–100 (1993).

the psychology of confessions, and has submitted important amicus briefs that describe the literature.[107] Indeed, one of those amicus briefs was submitted in DNA exoneree Juan Rivera's case.[108] As the American Psychological Association ("APA") has put it, "The body of research on the causes of false confessions and their effects on trial outcomes is well established and widely accepted within the field of psychology."[109] A division of the APA, the American Psychology-Law Society ("AP-LS"), issued a white paper in 2010 on false confession research.[110] As researchers and the APA underscore, this research is counterintuitive to most people, who assume that an innocent person would not falsely confess, and certainly neither would nor could falsely confess in seemingly accurate detail.[111] Judges should take judicial notice of this research. And, as noted, scholars have proposed that judges conduct pretrial hearings to examine the reliability of confession evidence.[112] As the following sections will describe, courts have increasingly considered this research when examining the voluntariness of confessions, the admissibility of expert evidence regarding confessions, and when examining postconviction claims related to confession evidence.

B. Interrogation Practices and Policy

Most important is that police adopt measures to prevent contamination of interrogation evidence in the first instance. Videotaping entire interrogations is an important first step towards averting contamination. In

[107] See Lassiter & Meissner, supra note 106, at xi–xvii (providing scholarly reviews on confessions published by the American Psychological Association); see, e.g., Brief for American Psychological Association as Amicus Curiae Supporting Petitioner, Floyd v. Cain, 62 So.3d 57 (La. 2011) (No. 280-729 "C"), available at https://www.apa.org/about/offices/ogc/amicus/floyd.aspx; Brief for American Psychological Association as Amicus Curiae Supporting Claimant, Warney v. State, 947 N.E.2d 639 (N.Y. 2011) (No. CA 08 02261), available at https://www.apa.org/about/offices/ogc/amicus/warney.aspx; Brief for American Psychological Association as Amicus Curiae Supporting Appellant, Commonwealth v. Wright, 14 A.3d 798 (Pa. 2011) (No. 21 EAP 2008), available at https://www.apa.org/about/offices/ogc/amicus/wright.aspx.

[108] Brief for American Psychological Association as Amicus Curiae Supporting Appellant, People v. Rivera, 962 N.E.2d 53 (Ill. App. Ct. 2011) (No. 2-09-1060), available at https://www.apa.org/about/offices/ogc/amicus/rivera.aspx [hereinafter Rivera Amicus Brief].

[109] Id. at 4.

[110] Saul M. Kassin et al., Police-Induced Confessions, Risk Factors, and Recommendations: Looking Ahead, 34 Law & Hum. Behav. 49, 49–52 (2010).

[111] Rivera Amicus Brief, supra note 108, at 4.

[112] See Leo et al., supra note 9, at 764–65.

addition to voluntarily recording interrogations, written police policies should describe the steps to be followed when properly recording an interrogation, including at what angles the cameras should be placed, and what should be put on the record if there is a break in the recording. There are model law enforcement policies that lay out these steps and can inform police training and supervision.[113] Additionally, model policies and training guide police on how to take particular care to avoid contamination of interrogations and coercion of particularly vulnerable suspects, such as juveniles and mentally ill or intellectually disabled persons.[114] Not only may a turn towards less coercive and deceptive techniques during interrogations help to avoid false confessions, but police may also adopt policies designed to track key nonpublic facts in a case to avoid disclosing those facts during an interrogation. Forensic psychologist Greg DeClue has proposed the use of checklists to track a "holdback list" of known and unknown details of the crime, and then to document inside information volunteered by a suspect during a recorded interview or interrogation.[115]

Police could conduct interrogations "blind," such that the interrogators are not aware of certain crime scene details, and cannot leak such information during the questioning. In a number of DNA exoneree cases, the interrogators claimed not to have been familiar with certain crime scene information; we now suspect they must have been quite familiar, since as those same officers later maintained, no innocent suspect could have plausibly guessed such detailed information.[116] Proper policies to ensure that the interrogators do not know certain details, and can only

[113] N.Y. State Div. of Criminal Justice Servs., Recording of Custodial Interrogations Model Policy (2013) (providing a model policy concerning recording interrogations); Int'l Ass'n of Chiefs of Police, Electronic Recording of Interrogations and Confessions Model Policy (2006) (laying out a detailed model policy providing procedures for electronic recording of interrogations).

[114] See, e.g., Int'l Ass'n of Chiefs of Police, Interviewing and Interrogating Juveniles Model Policy (2012) (detailed policy concerning questioning of juveniles); Ken Jenne, Broward Cnty. Sheriff's Office, G.O. 01-33, Interrogation of Suspects with Developmental Disabilities (Nov. 17, 2001) (describing detailed policies concerning interrogation of suspects with developmental disabilities, including guidelines for interrogation and post-confession analysis) (on file with author). For an analysis of interrogation policies across the state of Virginia, see Brandon L. Garrett, Interrogation Policies, 49 U. Rich. L. Rev. 8–13 (forthcoming 2015).

[115] Gregory DeClue, Inside Information Checklist (on file with author).

[116] See Garrett, Convicting the Innocent, supra note 1, at 28; supra note 84 and accompanying text.

ask open-ended questions about what happened during the commission of the crime, could also safeguard interrogations against contamination. In addition, policies should, as recommended by the Inbau and Reid Treatise, ensure that key details concerning the crime not be made public, and be documented in the casefile, so that witnesses are not contaminated through public disclosure of those key facts.[117]

C. Pretrial Judicial Review

Judges are understandably highly reluctant to exclude confession evidence at trial, since the result may practically dispose of the prosecution's case. Nevertheless, the judicial review currently conducted is disconnected with the scientific research on confessions. I have described elsewhere how judges ruled in DNA exoneree cases where these confessions, which we now know to have been false, were voluntarily given, despite the typical length of the interrogations, the often coercive techniques used, and the youth and intellectual disability of many of the defendants.[118] Particularly striking in the recent set of DNA exonerations was the ruling by the trial judge in the death penalty cases of Henry McCollum and Leon Brown that the statements were voluntary because "neither officer made any threat or show of violence and made no act which suggested violence" and where they had claimed that the "answers of the defendant and each of them as given to the respective officers were not incoherent and were sensible."[119] Despite their documented intellectual disability, despite the many hours of questioning and their young ages, despite the fact that they claimed not to have read or understood the confession statements, and despite no recording of any of the interrogation, the confession was readily admitted and provided the sole evidence of guilt to support their death sentences.[120]

Scientific research on false confessions could better inform the voluntariness analysis under the Fifth Amendment and the Due Process Clause. The voluntariness analysis remains poorly defined; courts weigh a totality of the circumstances, using a range of factors without clear

[117] See sources cited supra note 69.

[118] See Garrett, The Substance of False Confessions, supra note 1, at 1107–09.

[119] McCollum and Brown Trial Transcript, supra note 77, at 1348–50.

[120] For an appellate opinion affirming, see *State v. McCollum*, 433 S.E.2d 144, 160 (N.C. 1993) (finding trial court's conclusions regarding voluntariness of the confession "amply supported by substantial evidence"), and *State v. Brown*, 436 S.E.2d 163, 166–68 (N.C. Ct. App. 1993).

weights. The Supreme Court, for example, has not clarified whether interrogations lasting more than a few hours are inherently coercive, which is the view of police trainers; the Supreme Court has only held that a thirty-six-hour interrogation was inherently coercive, but without suggesting a lower bound.[121] Professor Eve Brensike Primus has proposed that more rule-like approaches to such questions be incorporated into the existing voluntariness caselaw, to add clearer guidance to the doctrine.[122]

While reliability is not a separate ground for excluding a confession under the U.S. Constitution, following *Colorado v. Connelly*,[123] evidence of suggestion and contamination of a confession can inform the voluntariness analysis as a factor. After all, an individual who will parrot back facts fed during an interrogation is highly likely to have had his will overborne during the process. The Ninth Circuit recently embraced such analysis in an en banc ruling, highlighting how pressure "placed on [the defendant] to adopt certain responses" and "suggestive questioning that provided details of the alleged crime" provided evidence of involuntariness,[124] as have other prominent courts, such as the New York Court of Appeals.[125] The Supreme Court has suggested that intellectually disabled persons are more suggestible and likely to give false confessions; as the Court put it recently in *Hall v. Florida*, such persons "face 'a special risk of wrongful execution' because they are more likely to give false confessions, are often poor witnesses, and are less able to give meaningful assistance to their counsel."[126]

[121] Ashcraft v. Tennessee, 322 U.S. 143, 153 (1944).

[122] Primus, supra note 8, at 2.

[123] 479 U.S. 157, 167 (1986).

[124] United States v. Preston, 751 F.3d 1008, 1028 (9th Cir. 2014) (en banc).

[125] Warney v. State, 16 N.Y.3d 428, 436 (N.Y. 2011) (describing how in a civil wrongful conviction case "[t]he allegations describe how no member of the public other than the perpetrator could have known all the details contained in the confession—whether negligently or through intentional manipulation, police misconduct led to the inclusion of these details in Warney's statement").

[126] 134 S. Ct. 1986, 1993 (2014) (quoting Atkins v. Virginia, 536 U.S. 304, 320–21 (2002)). The Court in *Atkins* noted:

> Despite the heavy burden that the prosecution must shoulder in capital cases, we cannot ignore the fact that in recent years a disturbing number of inmates on death row have been exonerated. These exonerations have included at least one mentally retarded person who unwittingly confessed to a crime that he did not commit.

Atkins, 536 U.S. at 320 n.25.

A separate constitutional source for reliability review is the Court's ruling in cases such as *Napue v. Illinois* that it violates due process for the State to present fabricated witness testimony.[127] While *Napue* claims of fabrication are litigated postconviction,[128] and they have been used in civil wrongful conviction litigation in which confession contamination can be proven,[129] courts have not examined the potential for fabrication in a given case pretrial. My proposal is that courts could ask pretrial whether it is possible that a confession was contaminated by suggestive questioning, including by reviewing records of the interrogation, to safeguard against fabrication of evidence. Any concealed evidence concerning the contamination of a confession could also violate *Brady v. Maryland* and provide further due process support for a pretrial inquiry into reliability, although as with *Napue*, courts have typically examined such claims only postconviction.[130]

Pretrial judicial review can and should focus on not only whether interrogations are unduly coercive, but also on their reliability. Not only do constitutional sources support such review, but federal and state law reliability standards can and should be interpreted to incorporate scientific research that can inform the analysis of the reliability of confession statements.[131] Such evidence rules may be particularly well suited to incorporating concerns regarding reliability. In cases in which a judge finds a confession to be admissible, judges should turn to the questions whether to permit expert evidence concerning that evidence, and how to best inform the jury concerning the relevant scientific evidence.

[127] 360 U.S. 264, 269 (1959).

[128] See, e.g., Lisker v. Knowles, 651 F. Supp. 2d 1097, 1140 (C.D. Cal. 2009) (reversing conviction in part and granting relief on *Napue* claim).

[129] See Jerry Markon, Wrongfully Jailed Man Wins Suit, Wash. Post, May 6, 2006, at B01 (describing multimillion dollar civil rights verdict regarding *Napue* claim in false confession case).

[130] I have previously developed a theory of how and when courts could conduct such review pretrial. Brandon L. Garrett, Aggregation in Criminal Law, 95 Calif. L. Rev. 383, 385 (2007).

[131] For an example of a state court using scientific research to inform reliability standards in the area of eyewitness identification evidence, see State v. Lawson, 244 P.3d 860, 872–73 (Or. Ct. App. 2010). For an excellent in-depth discussion proposing such reliability review under state evidence rules, see Leo et al., supra note 9, at 834.

D. Expert Evidence

Although confessions have a great impact on mock-juror decisions,[132] there is some evidence that those prior statements can be countered and that jurors can be sensitized to the research on confessions, including through expert evidence.[133] Few exonerees had experts testify at trial concerning their confessions. Only three of the first forty exonerees had experts and five of the more recent twenty-six exonerees had experts.[134] Many of these exonerees were juveniles or intellectually disabled and particularly susceptible to suggestion by the authorities. Yet the jury never had that explained to them. State and federal courts have been divided, at least in published appellate rulings, on whether expert testimony on false confessions can be admitted. Many of those rulings are themselves inconsistent in a way that does not reflect a sound or consistent scientific framework that could guide lower courts. Some appellate courts find such expert testimony admissible.[135] Some appellate courts rule that confession-related expert testimony would not assist the jury, since it is within the commonsense of laypersons.[136] Others find the scientific research itself not sufficiently established.[137] Other courts have demanded that such evidence evaluate the particular defendant in question,[138] while still other courts forbid direct evaluation of the defendant's

[132] See Kassin, supra note 52, at 433–34; see also Linda A. Henkel, Jurors' Reactions to Recanted Confessions: Do the Defendant's Personal and Dispositional Characteristics Play a Role? 14 Psychol. Crime & L. 565, 567 (2008) (explaining the impact of coerced confessions on mock juries and conviction rates).

[133] See Iris Blandon-Gitlin, Katheryn Sperry & Richard A. Leo, Jurors Believe Interrogation Tactics Are Not Likely to Elicit False Confessions: Will Expert Witness Testimony Inform Them Otherwise?, 2010 Psychol. Crime & L. Online 1, 17–19; Costanzo et al., supra note 94, at 242. This is an area in which more research should be done, particularly on whether expert testimony assists juror discriminability.

[134] See Garrett, Convicting the Innocent, supra note 1, at 40. The recent cases are those of Leon Brown, Curtis Jasper Moore, Jamie Lee Peterson, Frank Sterling, and Damon Thibodeaux. At least three DNA exonerees, Travis Hayes, David Allen Jones, and Douglas Warney had requests for false confession experts denied by the trial judge.

[135] See, e.g., United States v. Hall, 93 F.3d 1337, 1341–46 (7th Cir. 1996); Boyer v. State, 825 So. 2d 418, 419–20 (Fla. Dist. Ct. App. 2002); Miller v. State, 770 N.E.2d 763, 770–74 (Ind. 2002).

[136] See, e.g., People v. Son, 93 Cal. Rptr. 2d 871, 883 (Cal. Dist. Ct. App. 2000); People v. Gilliam, 670 N.E.2d 606, 619–20 (Ill. 1996); Commonwealth v. Alicia, 92 A.3d 753, 764 (Pa. 2014) (finding proposed false confession testimony "constitutes an impermissible invasion of the jury's role as the exclusive arbiter of credibility").

[137] See, e.g., Riley v. State, 604 S.E.2d 488, 495 (Ga. 2004).

[138] See, e.g., State v. King, 904 A.2d 808, 818–22 (N.J. Super. Ct. App. Div. 2006); State v. Free, 798 A.2d 83, 95–96 (N.J. Super. Ct. App. Div. 2002).

suggestibility and compliance while permitting the jury to hear general research on the counterintuitive causes of false confessions.[139] Still more troubling, some of the same courts that exclude defense expert testimony nevertheless permit law enforcement officers to testify based on their special expertise that the defendant exhibited indicia of deception during the interrogation.[140] Moreover, courts have long routinely permitted mental health experts to opine on other important matters, such as a defendant's competency to stand trial or a defense of diminished capacity;[141] failing to provide an indigent defendant with an expert psychiatrist regarding an insanity defense can violate the due process rights of the defendant.[142] Despite inconsistent appellate caselaw on confession-related experts, trial court rulings may present a somewhat different picture. It is unknown how often trial courts refuse to find or rule inadmissible expert testimony on false confessions, and conversely how often trial courts admit such testimony routinely and without any reported opinion.[143]

As that brief summary of the caselaw suggests, not only do courts reason differently about what an expert can present to the jury, but there are also multiple forms of expert testimony potentially relevant in confession cases. First, experts may explain general research on false confessions, including by explaining that false confessions can occur at all, under what general circumstances, and based on what types of psychological phenomenon.

Second, experts may testify concerning factors that may contribute to false confessions, which may include situational factors, such as the use

[139] See Chojnacki et al., supra note 94, at 24–26.

[140] See State v. Davis, 32 S.W.3d 603, 608–09 (Mo. Ct. App. 2000); Chojnacki et al., supra note 94, at 22–23.

[141] See, e.g., John T. Philipsborn, Dealing with Experts on Competence to Stand Trial: Suggestions and Approaches, Champion, Jan.–Feb. 2008, at 12, 12.

[142] See, e.g., Ake v. Oklahoma, 470 U.S. 68, 83 (1986).

[143] Richard Leo has described to me, for example, that his expert testimony on false confessions has been found admissible in the overwhelming majority of the hundreds of cases in which he was retained. However, an appeal resulting in a written opinion would typically only occur where the testimony was excluded, the defendant was convicted, and the defense seeks a new trial, all of which skews reported decisions towards those in which the expert testimony was not admitted. For descriptions of the case law, see, e.g., Amy G. Gore, Jill Gustafson & Janice Holben, 31A Am. Jur. 2d Expert and Opinion Evidence § 138 (2014); Brian Cutler et al., Expert Testimony on Interrogation and False Confession, 82 UMKC L. Rev. 589, 600 (2014); Nadia Soree, Comment, When the Innocent Speak: False Confessions, Constitutional Safeguards, and the Role of Expert Testimony, 32 Am. J. Crim. L. 191, 238–55 (2005).

of certain coercive or deceptive interrogation tactics, as well as dispositional factors, that is, the characteristics of the suspect.[144] Certain deceptive tactics or false evidence ploys may contribute to false confessions; the National Resource Council has, for example, noted the concern that telling suspects that they failed polygraph tests may contribute to false confessions.[145] The duration of the interrogation is itself a factor, as noted. Sleep deprivation, relatedly, can be a factor in impairing functioning.[146] And that type of testimony may include description of general research concerning the vulnerability of certain types of individuals to pressure in interrogation situations, including research on juveniles[147] and the intellectually disabled.[148] What research does not support, however, are conclusions about the frequency of false confessions; we simply do not know how often they occur, and there are not (and likely cannot be) empirical data on rates of false confessions under particular conditions.[149] Researchers cannot ethically test coercive interrogation techniques in a laboratory setting, and in actual cases there often may not be evidence like DNA that can confirm whether the confession is true or false.

Third, expert testimony not on general research, but on the specific case, may take still additional forms. An expert may study the documentation concerning the confession to analyze whether leading questions or other tactics were used to disclose key facts to the suspect, thereby contaminating the confession, and in contrast, whether the suspect could

[144] See State v. Perea, 322 P.3d 624, 638 (Utah 2013) (reversing lower court bar on expert testimony, noting that juries "do not understand the prevalence of false confessions, the aggressive and persuasive techniques employed by police to elicit confessions from suspects, or other factors that contribute to false confessions"); Gudjonsson, The Psychology of Interrogations and Confessions: A Handbook, supra note 106, at 308–31. For a ruling affirming that threats of violence were within the jury's experience, see *Brown v. Horell*, 644 F.3d 969, 978, 982–83 (9th Cir. 2011).

[145] Comm. to Review the Scientific Evidence on the Polygraph, Nat'l Res. Council, The Polygraph and Lie Detection 56 (2003), available at http://www.nap.edu/openbook.php?record_id=10420&page=R1].

[146] Mark Blagrove, Effects of Length of Sleep Deprivation on Interrogative Suggestibility, 2 J. Experimental Psychol.: Applied 48, 56–57 (1996).

[147] See, e.g., Jessica Owen-Kostelnik et al., Testimony and Interrogation of Minors: Assumptions About Maturity and Morality, 61 Am. Psychologist 286, 300–301 (2006).

[148] See, e.g., W.M.L. Finlay & E. Lyons, Acquiescence in Interviews with People Who Have Mental Retardation, 40 Mental Retardation 14, 25–26 (2002).

[149] See United States v. Deuman, 892 F. Supp. 2d 881, 886 (W.D. Mich. 2012) (citing Steven A. Drizin & Richard A. Leo, The Problem of False Confessions in the Post-DNA World, 82 N.C. L. Rev. 891, 931 (2004)).

volunteer accurate information about the crime when given the opportunity to do so.[150] Experts may examine the defendant, and may conduct a clinical evaluation to assess the suggestibility of an individual, and may measure whether the individual is intellectually disabled, by using instruments such as an IQ test. Experts may also examine an individual's capacity to understand right from wrong and to be charged criminally at all; such expert testimony is routine.

Testimony by detectives describing an interrogation is itself a form of expert testimony, where detectives make claims regarding their ability to detect deception versus truth in a suspect. Few courts have treated such testimony as expert testimony that must be rigorously assessed for its admissibility as such, but some courts have begun to scrutinize such testimony far more carefully. For example, the Tenth Circuit recently found it to be reversible error that the trial judge allowed a detective to testify that as an FBI agent; he had conducted over a thousand interviews and could detect lies.[151] He opined that when the suspect called "on his faith," during the interview, that: "My training has shown me, and more[] so my experience in all these interviews, when people start bringing faith into validating . . . their statements, that they're deceptive. Those are deceptive statements."[152] As to other statements by the suspect, he opined, "Never in my career have I seen that with an innocent person."[153] The Tenth Circuit ruled that in contrast to expert testimony resting on specialized knowledge such as scientific research, this was improper testimony making credibility determinations.[154] In that case, the detective was making amplified lie-detection claims. However, detectives more routinely claim the ability to detect signs of untruthfulness in suspects, and they cite their training and experience as interrogators. Professor Brian Gallini describes why the "Reid technique" used today by law enforcement may create a psychological advantage for interroga-

[150] See Nirider et al., supra note 7, at 859 (describing how an expert may examine this question of "fit," and how a defense lawyer may explore such issues on cross-examination as well).

[151] United States v. Hill, 749 F.3d 1250, 1251–52, 1265–66 (10th Cir. 2014).

[152] Id. at 1251, 1257 (alteration in original).

[153] Id.

[154] Id. at 1267.

tors, but lacks any validated ability to "distinguish between true and false confessions."[155]

Any law enforcement claims regarding experience or methods used to detect lies versus truth are in the nature of expert evidence, and should be subject to all of the gatekeeping strictures of expert testimony, such as *Daubert* analysis and Federal Rule of Evidence 702.[156] Moreover, if the government introduces such testimony, that subject should at minimum be properly the subject of expert evidence by the defense. For too long the presentation of what amounts to expert testimony on interrogations has been unscientific, and it has been one-sided.

E. Jury Instructions

As with other forms of scientific evidence, expert testimony may provide a far more complete description of the scientific research and its characteristics and limitations, but where such expert testimony is not available, or to supplement and guide such testimony, judicial instructions can also set forth relevant framework evidence for the jury.[157] Unfortunately, traditional jury instructions concerning confession evidence typically repeat constitutional standards and ask that the jury consider the voluntariness of the statements; some also refer to whether the officers complied with *Miranda v. Arizona*.[158] The Supreme Court has em-

[155] Brian R. Gallini, Police "Science" in the Interrogation Room: Seventy Years of Pseudo-Psychological Interrogation Methods to Obtain Inadmissible Confessions, 61 Hastings L.J. 529, 531 (2010).

[156] See Daubert v. Merrell Dow Pharm., 509 U.S. 579, 592–94 (1993).

[157] See Nat'l Research Council, supra note 14, at 27, explaining:

> Expert testimony on eyewitness memory and identifications has many advantages over jury instructions as a method to explain relevant scientific framework evidence to the jury: (1) Expert witnesses can explain scientific research in a more flexible manner, by presenting only the relevant research to the jury; (2) Expert witnesses are familiar with the research and can describe it in detail; (3) Expert witnesses can convey the state of the research at the time of the trial; (4) Expert witnesses can be cross-examined by the other side; and (5) Expert witnesses can more clearly describe the limitations of the research.

The report also noted, however, that expert testimony is more costly, and that state courts routinely deny funds to indigent defendants for expert assistants. Id.

[158] See, e.g., New Jersey Model Jury Charge, Statements of Defendant 1 (June 14, 2010) (asking "whether or not the statement was actually made by the defendant, and, if made, whether the statement or any portion of it is credible" and noting that the court should "discuss any proof adduced before the jury which went to defendant's *Miranda* rights or the statement's voluntariness"). To provide another example, the Washington State Pattern Instructions largely just ask that the jury find that the defendant was properly advised of the

phasized that a pretrial voluntariness hearing before a judge, using a preponderance of the evidence standard of proof, is sufficient, citing to "the normal rule that the admissibility of evidence is a question for the court rather than the jury."[159] In addition, federal courts, following 18 U.S.C. § 3501(a), instruct the jury simply to "give such weight to the confession as the jury feels it deserves under all the circumstances."[160] In contrast, few state courts provide information to the jury regarding how to assess voluntariness, nor do they instruct the jury to examine the reliability of the statement or provide information concerning what can cause false confessions, or conversely, what are indicia of a reliable confession.[161]

Miranda rights and voluntarily waived them, and then provide the following general guidance: "You may give such weight and credibility to any alleged out-of-court statements of the defendant as you see fit, taking into consideration the surrounding circumstances." Wash. State Supreme Court Comm. on Jury Instructions, Washington Pattern Jury Instructions—Criminal: WPIC6.41 Out of Court Statements by Defendant 1 (3d ed. 2008), available at https://govt.westlaw.com/wcrji/Document/Ief9e3bc7e10d11daade1ae871d9b2cbe?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default).

[159] Lego v. Twomey, 404 U.S. 477, 490 (1972); see also id. ("We are not disposed to impose as a constitutional requirement a procedure we have found wanting merely to afford petitioner a second forum for litigating his claim."); id. at 486 n.14 (noting that defendant may present such circumstances to the jury, and citing with approval 18 U.S.C. § 3501(a)); Miranda v. Arizona, 384 U.S. 436, 490 (1966) (stating that the "issues presented [by confessions] are of constitutional dimensions and must be determined by the courts"). 18 U.S.C. § 3501 (2012) provides:

> (a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

[160] 18 U.S.C. § 3501(a) (2012); see, e.g., The Comm. on Fed. Criminal Jury Instructions for the Seventh Circuit, Pattern Federal Criminal Jury Instructions for the Seventh Circuit § 3.02, available at https://www.ca7.uscourts.gov/Pattern_Jury_Instr/pjury.pdf; U.S. Courts for the Ninth Circuit, Manual of Model Criminal Jury Instructions § 4.1, available at http://www3.ce9.uscourts.gov/jury-instructions/node/355.

[161] For examples of states that do provide somewhat expanded instructions regarding voluntariness, see, e.g., N.H. Bar Ass'n Criminal Jury Instructions Drafting Comm., Draft Model Criminal Jury Instructions, Confessions or Admissions 14, available at http://www.nhbar.org/uploads/pdf/CJI-14.pdf; New York Model Criminal Jury Instructions, Statements (Admission, Confessions), available at http://www.nycourts.gov/judges/cji/1-General/CJI2d.Confession.pdf (providing an "expanded charge on traditional voluntariness").

Compare the types of instructions that an increasing number of jurisdictions now provide to situate eyewitness evidence in a scientific framework.[162] New Jersey now provides quite detailed instructions on eyewitness evidence, based on the 2011 decision by its Supreme Court in *State v. Henderson*[163]; the Massachusetts Supreme Judicial Court recently adopted more concise jury instructions that convey similar information about scientific research on eyewitness memory.[164] No such model instructions exist in the area of confession evidence, although several jurisdictions do include cautionary jury instructions should a statute requiring that interrogations be recorded not be complied with.[165] Bar committees tasked with revising model jury instructions should revisit the question of how to phrase such instructions, and scholars should study the helpfulness of such instructions on lay decisionmakers, who may place particular weight on confession evidence.

Should a judge not suppress a confession—and such suppression of confession statements is vanishingly rare—but also not permit expert witnesses to carefully explain the relevant scientific evidence, then as a second-best option, and at minimum, jurors should be informed of far more than their task to examine the seeming credibility of the confession evidence, and factors bearing on voluntariness. They must have the process of interrogation explained and the risk factors concerning false confessions detailed. They should hear any relevant evaluations of the defendants' suggestibility. Unless such a framework exists, detectives will not have appropriate incentives to conduct interrogations carefully themselves, using recording to document and prevent contamination, and using special procedures to assess juveniles and intellectually disabled suspects.

F. Appellate and Postconviction Review

When a convict challenges confession evidence on appeal or postconviction, as I have documented elsewhere, even in cases in which we now

[162] See Nat'l Research Council, supra note 14, at 21–30.

[163] 27 A.3d 872, 928 (N.J. 2011).

[164] Commonwealth. v. Gomes, No. SJC-11537, at 15–25 (Mass. Jan. 12, 2015).

[165] Neb. Rev. Stat. §§ 29-4503, -4504 (2008); Wis. Stat. Ann. § 972.115(d)(2)(a) (West 2012); see also Commonwealth v. DiGiambattista, 813 N.E.2d 516, 534 (Mass. 2004) ("[T]he jury should also be advised that the absence of a recording permits (but does not compel) them to conclude that the Commonwealth has failed to prove voluntariness beyond a reasonable doubt.").

know the confessions to have been false, judges will typically deny relief, citing to the seemingly powerful details in the confession statements that were precisely the produce of the contamination.[166] Making the danger of such rulings still greater, in 1991 in *Arizona v. Fulminante* the Supreme Court controversially, and incorrectly in my view, opened the door to overly deferential harmless error review of confession errors on appeal and postconviction; statutory restrictions on federal habeas review since that time, and the Court's interpretation of those statutes, may further constrain review of central trial evidence such as confession evidence.[167] Courts, once aware of the scientific research concerning false confessions and the danger of confession contamination, may become more skeptical of claims that detailed confession statements that are not the product of interrogations recorded in their entirety are necessarily accurate evidence. Further, courts may become more open to reversing decisions by trial judges not to permit expert evidence, or finding counsel ineffective for failing to develop evidence, including scientific evidence, concerning a confession, or by reversing due to police or prosecutorial misconduct concerning the suppression of information concerning contamination of confession statements.[168] The Sixth

[166] See Garrett, The Substance of False Confessions, supra note 1, at 1107–09 (describing how courts often cited to the "overwhelming" nature of the evidence, particularly the "fully corroborative" facts that they had allegedly confessed to); see also Garrett, Convicting the Innocent, supra note 1, at 185–86 (noting that of twenty-two innocent people who falsely confessed and had written decisions on appeal or postconviction, only seven raised Fifth Amendment claims and three more raised *Miranda* claims, but none were successful; one exoneree received a reversal on an ineffective assistance of counsel claim relating to the confession evidence, but also failed to challenge a range of other evidence at trial). Only one of these sixty-three DNA exonerees, Curtis Jasper Moore, had a federal judge reviewing his habeas petition grant postconviction relief on a confession-related claim. Moore v. Ballone, 488 F. Supp. 798, 807–08 (E.D. Va. 1980).

[167] 499 U.S. 279, 284–85 (1991). The Court's ruling in *Arizona v. Fulminante* has been much criticized elsewhere. See, e.g. Charles J. Ogletree, Jr., Comment, *Arizona v. Fulminante*: The Harm of Applying Harmless Error to Coerced Confessions, 105 Harv. L. Rev. 152, 165–67 (1991). I would add to those criticisms my own evidence concerning judicial willingness to cite to apparent "overwhelming" evidence of guilt when finding confession-related errors harmless. The enactment of the Antiterrorism and Effective Death Penalty Act of 1996 has only made such review more deferential during federal habeas corpus proceedings, as have subsequent Supreme Court rulings, such as *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398–99 (2011), cabining the scope of factual development in federal habeas courts. Thus, even revisiting *Fulminante* would not be enough to provide sufficiently searching review, and nor will such review focus on the appropriate questions unless the Court revisits *Colorado v. Connelly*, 479 U.S. 157, 167 (1986).

[168] Compare People v. Oliveras, 90 A.D.3d 563, 563–64 (N.Y. App. Div. 2011) (reversing conviction where "defense counsel failed to take any steps whatsoever to obtain defendant's

Circuit recently noted, in the context of a postconviction *Brady* claim, that the State's theory of the case was already weak, since there may be "good reason to question the legitimacy" of a confession statement that was largely unrecorded (the detectives were "turning off the tape recorder periodically throughout the questioning") and allegedly given by a suggestible person; as a result, it was "exceedingly difficult to determine what information [the defendant] offered organically and what was 'contaminated' by the detectives."[169]

CONCLUSION

In *Escobedo v. Illinois*, the U.S. Supreme Court explained:

> We have learned the lesson of history, ancient and modern, 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.[170]

Despite those words in its 1964 ruling, and the Court's subsequent ruling in *Miranda v. Arizona*, citing to the case of George Whitmore, a suggestible man who falsely confessed in New York due to "brainwashing, hypnosis, fright," it is not at all clear that judges have learned those lessons, nor taken account of new techniques that can more accurately document the confessions themselves.[171] Instead, over the past several decades since *Miranda* was decided, the Court has endeavored to not only weaken the *Miranda* rule at nearly every turn, but also to remove concerns of reliability from the voluntariness analysis in rulings like *Colorado v. Connelly*.[172] In recent rulings like that in *Salinas v.*

relevant psychiatric and educational records, or to consult with an expert psychiatrist or psychologist in support of the defense"), and Ex parte Villegas, 415 S.W.3d 885, 887 (Tex. Crim. App. 2013), with Simmons v. State, 105 So. 3d 475, 493 (Fla. 2012) ("[E]ven if [false confessions expert] had been presented at trial to testify that the circumstances of the interrogation could lead to a false confession, such would not have significantly diminished the incriminating effect of the other evidence.").

[169] Bies v. Sheldon, 775 F.3d 386, 402–04 (6th Cir. 2014).

[170] Escobedo v. Illinois, 378 U.S. 478, 488–89 (1964) (footnotes omitted).

[171] 384 U.S. 436, 455 n.24 (1966); Dickerson v. United States, 530 U.S. 428, 444 (2000).

[172] Colorado v. Connelly, 479 U.S. 157, 167 (1986); see also Garrett, The Substance of False Confessions, supra note 1, at 1109–12 (discussing *Connelly* and the Supreme Court's turn away from reliability review).

Texas,[173] the Court permitted if not outright encouraged police to take advantage of informal, undocumented, and noncustodial questioning.[174] Confessions have become far less regulated at the federal level at a time when we know far more about what can cause false confessions.[175]

The Supreme Court and lower court judges tasked with reviewing confessions both pretrial and postconviction should be still more chastened by the cases of Henry McCollum and Leon Brown, both of whom had their convictions affirmed at every level for decades before DNA ultimately proved their innocence. When Supreme Court Justice Harry Blackmun famously wrote in a dissent in 1994, "From this day forward, I no longer shall tinker with the machinery of death,"[176] Justice Antonin Scalia responded: "[What about] the case of the 11-year-old girl raped by four men and then killed by stuffing her panties down her throat. . . . How enviable a quiet death by lethal injection compared with that!"[177] To be sure, when McCollum's case reached the Supreme Court, Justice Blackmun dissented from the denial of certiorari in the case, and insisted that although the crime was "abhorrent," there was "more to the story." After all, McCollum had "an IQ between 60 and 69 and the mental age of a 9-year-old. He reads on a second-grade level." Justice Blackmun wrote, "This factor alone persuades me that the death penalty in his case is unconstitutional."[178] Never before had North Carolina jurors imposed the death penalty on a young man under the age of twenty.[179] Never before had they imposed the death penalty on a man "whom they had found mentally retarded."[180] As described, in 2014, DNA tests were done on the evidence in the case. Police had said for years that it was all

[173] 133 S. Ct. 2174, 2177–79 (2013).

[174] Brandon L. Garrett, Remaining Silent After *Salinas*, 80 U. Chi. L. Rev. Dialogue 116, 116 (2013). For scholarship concerning the "erosion" of *Miranda*, see, e.g., Barry Friedman, The Wages of Stealth Overruling (with Particular Attention to *Miranda v. Arizona*), 99 Geo. L.J. 1 (2010); Yale Kamisar, The Rise, Decline, and Fall (?) of *Miranda*, 87 Wash. L. Rev. 965 (2012); Charles D. Weisselberg, Mourning *Miranda*, 96 Calif. L. Rev. 1519 (2008).

[175] One exception to this trend was the Court's important recognition that juvenile suspects are especially vulnerable during police questioning in *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2408 (2011); the Court had earlier rejected the view that age was a required consideration in the *Miranda* analysis, Yarborough v. Alvarado, 541 U.S. 652, 668 (2004).

[176] Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

[177] Id. at 1143 (Scalia, J., concurring).

[178] McCollum v. North Carolina, 512 U.S. 1254, 1255 (1994) (Blackmun, J., dissenting).

[179] Id. at 1256.

[180] Id.; see also State v. McCollum, 433 S.E.2d 144, 167–68 (N.C. 1993) (Exum, C.J., dissenting) (explaining the rarity of capital cases involving mentally retarded defendants).

lost, but in fact, for decades, the box with the evidence sat in storage. The North Carolina Innocence Inquiry Commission, a government body whose job it is to investigate potential wrongful convictions, finally located the evidence and ordered the DNA tests. McCollum's sister had sent them a letter asking for their help in her brother's case. The results cleared McCollum and Brown and implicated a man who had committed a similar rape and murder in 1984 and who lived next door to the field where the crime was committed.[181] If even this poster-child case for the death penalty could be completely wrong, then far more care is warranted in accepting undocumented confession evidence as true.

Due to cases like McCollum's, and the others described in this Essay, far more is changing on the ground, even if constitutional criminal procedure remains fairly static. Voluntariness analysis can take better account of the suggestibility of defendants and the potential unreliability of confession statements. Increasingly, courts now recognize that "whether negligently or through intentional manipulation," police can cause "the inclusion of these details" in a confession statement.[182] Confession evidence is also increasingly informed by scientific research that explains why false confessions like those by DNA exonerees can happen, and that can help in reviewing evidence from interrogations better in the future.[183] That scientific research is slowly leading to real improvements in police practices.

As described in this Essay, not only did sixty-two of sixty-six exonerees who falsely confessed have their confessions contaminated by seemingly accurate crime scene details, but a total of nineteen of the group of sixty-six exonerees had DNA test results exclude them at the time of trial. If false confessions may lead to convictions even in cases in which DNA excludes the defendant, then the problem is far greater—and more worrisome—in the vast majority of cases in which there is

[181] Joseph Neff, Judge Overturns Convictions of Robeson Men in Child's 1983 Rape, Murder, News & Observer (Sept. 2, 2014), http://www.newsobserver.com/2014/09/02/4115955/robeson-men-innocent-of-childs.html.

[182] Warney v. State, 16 N.Y.3d 428, 436 (2011).

[183] Garrett, Convicting the Innocent, supra note 1, at 248 (describing how eleven states and the District of Columbia require electronic recording of at least some interrogations, and seven more state supreme courts either require or encourage recording of interrogations; in addition, many hundreds of police departments record interrogations); see also State v. Lockhart, 4 A.3d 1176, 1206 (Conn. 2010) ("The value in recording interrogations is so obvious as to require little discussion."); Taslitz, supra note 8, at 426 (2012) (noting how states are looking at stricter reliability standards for confessions).

simply no evidence to perform a DNA test upon. We will continue to revisit the problem of confession contamination, including in high-profile exonerations, until a scientific framework is put firmly in place to improve interrogations, evaluate their reliability at trial, inform the jury, guide appellate and postconviction courts, and most fundamentally, to safeguard the reliability of interrogations and confessions.

APPENDIX: CHARACTERISTICS OF DNA EXONEREE FALSE CONFESSIONS[184]

Exoneree	State	J/ID/MI[185]	Non-Public Facts, Corroborated Facts, and Inconsistencies	Documented?
Avery, William	WI		• None: no details. He reportedly stated: "I am responsible. I just don't remember how." • Avery testified that he "didn't hurt that woman and I don't know who had hurt that woman." • And they were "trying to ask me give him some details to that murder; where that woman's clothes was. . ."	Signed statement
Bivens, Philip	MS		• Went with Ruffin and Dixon to lady's house to get money; they forced way in through front door • Says victim was raped • "I seen Bobby Ray, I mean Larry cut her throat" using a long knife or butcher knife	Video
Bradford, Marcellius	IL	J	• Victim was hit with a brick – then changed in the statements to a piece of concrete • Victim was kicked BUT • Testified victim found inside car when found outside. • Did not initially name Saunders, then did at trial; also named other persons never located	Signed statement
Bradford, Ted	WA		• Rape was between 9 and 10 am on date of crime. • Entered through basement window • Victim was short, had light-colored hair, not fully clothed • Assault in area downstairs, not a room • Victim was turned away from attacker during assault, cuffed behind back, and nylon stocking covered culprit's face BUT • Inconsistencies included that he entered through window on the east side of house • That no one else was in the house (there was a baby)	Audio

[184] This Appendix updates data presented in Brandon L. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong 14–44 (2011), and Brandon L. Garrett, The Substance of False Confessions, 62 Stan. L. Rev. 1051, passim (2010) and made available online at http://www.law.virginia.edu/html/librarysite/garrett_falseconfess.htm.

[185] J indicates a juvenile at the time of arrest. ID indicates intellectually disabled and MI indicates mentally ill. Still others may not have been adequately examined by experts or fully diagnosed at the time of trial.

Exoneree	State	J/ ID /MI[185]	Non-Public Facts, Corroborated Facts, and Inconsistencies	Documented?
Brown, Dennis	LA		• Victim was wearing dark blue jeans or slacks • Victim was watching television on her couch • Couch was tan/beige/brown • Rapist grabbed victim's left arm • Facts about style/interior of home BUT • Stated entered through window when attacker entered through the door • Brown had a learning disability	
Brown, Keith	NC		• Two page confession statement described entering the front door of a "big two story white house," the address of the house, and two "old ladies" present • Describing taking a black change purse. • But in his own statement, he did not describe a rape, rather hitting the women and running away • A longer set of notes prepared by police included very different and apparently more accurate details, including entering the rear of the house, assaulting a woman with a hammer and a wooden chair, and raping her and an 8 year-old girl	
Brown, Leon	NC	J, ID	• Victim was raped, vaginally and anally • Victim was choked with a stick and with her panties balled up in a knot in her mouth (consistent with what medical examiner found) • Victim left in ditch near woods and across bean field • Victim's clothes had been balled up and thrown into the woods BUT • Excluded by fingerprints found on beer cans. • No evidence linked the two others who, according to the statement, were named as part of the group and raped and asphyxiated the victim	Signed statement
Caravella, Anthony	FL	ID, J	• Victim had an English accent • Victim hit over the head with a chair, strangled with wire, stabbed with a steak knife • Victim's clothes partially pulled off, with her bra pulled up above breasts BUT • Said hit victim over head with Pepsi bottle when she was raped, strangled, and stabbed • Called victim a "girl." but she was 58 yrs. old	Audio

Exoneree	State	J/ID/MI[185]	Non-Public Facts, Corroborated Facts, and Inconsistencies	Documented?
Cruz, Rolando	IL		• Victim's nose was broken (in taped confession) In statement Cruz gave describing a "vision": • The victim's head was bashed from behind • The victim's head formed an imprint in the mud • The victim had been raped anally	Audio
Dean, James	NE		• Described layout of victim's apartment • Described rape and strangulation of victim • Described hearing a sound like a bone breaking, and autopsy concluded that the victim's left arm was broken BUT • Inconsistent descriptions of Joseph White and described memory problems and inability to recall details before speaking to law enforcement • No records of mental evaluation at time of interrogations or trial obtained, but at trial described difficulty distinguishing between dreams and reality	
Deskovic, Jeffrey	NY	J	• Gatorade bottle used to hit victim • Locations of "three distinct crime scenes" • Victim was carrying a camera and knew the location where it was found • Victim received blow to the head • The victim was dragged and her bra ripped off	Audio
Dixon, Bobby Ray	MS		• Three culprits knocked on door; victim came to door, one went behind the house through back door and let the other two in • Victim raped by other two culprits • One cut her across the throat and the other cut her on the stomach • Took officers to shack where the culprits allegedly went after murder and found a pair of pants and a sweatshirt in a plastic bag BUT • Testified that he testified differently on different occasions concerning the details, including who cut the victim's throat. • He testified at Ruffin's trial that was forced to confess: "To tell you the truth, you said that I was there and which you wouldn't let me bring the word out." • And "my mind comes and goes, and I don't like to see nobody took away for nothing they ain't done."	Video

Exoneree	State	J/ID/MI[185]	Non-Public Facts, Corroborated Facts, and Inconsistencies	Documented?
Edwards, James	IL		• Victim beaten to death at his store • Over $1,000 was taken from store, in bag with checks and receipts • Victim beaten with 3.5 foot long mahogany/oak stick • During struggle, threw stick out the car window • Victim's car taken, it broke down, and it was left in Chicago BUT • No black bag described found at scene • Said he used gloves or socks to cover fingers during robbery, but fingerprints not matching Edwards found at scene • No evidence victim had left keys in front door	Signed statement, Video
Godschalk, Bruce	PA		First victim: • Wearing a tampon, which her attacker removed and threw on the floor of her room. • Had a bedside lamp on • Reading a magazine before being assaulted • Attacker entered through a window • Victim was a brunette BUT • Initially said he entered through a kitchen window; the apartment had no kitchen window Second victim: • Assaulted in her bedroom • A pillow from victim's don's bedroom was used during attack • Victim was blonde • Rape occurred on the floor • Attacker fled after victim said someone was returning home	Audio
Gray, Anthony	MD	ID	• Based on court file, new reports and conversations with Gray's lawyers and former prosecutors involved in the case, Gray "had given a detailed confession." Attorney Grievance Comm'n v. Kent, 653 A.2d 909, 917 (Md. 1995). • He had reportedly offered details including a description of how and where the murder took place while he stood watch • His statements also reportedly contained certain inconsistencies with crime scene evidence. See Todd Richissin, Trying to Right an Injustice; Murder: A Defense Attorney and Calvert County State's Attorney Say a Man Has Been Wrongly Imprisoned for the Past Seven Years, Baltimore Sun, Feb. 6, 1999, 1A.	

Exoneree	State	J/ ID /MI[185]	Non-Public Facts, Corroborated Facts, and Inconsistencies	Documented?
Gray, Paula	IL	ID	• Location of crime scene • Where cars were parked • There were two victims • One victim was kept at the bottom of the stairs in the abandoned house • The second victim was shot twice in the head from a very close range • The first victim was taken to a field and shot twice in the head and once in the back	
Halsey, Byron	NJ	ID/MI	• Two children were killed • Panties placed in one victim's mouth • Nails and blue cloth hammered into one victim's head with a brick • Scissors used in assault • Red wire used in assault • Semen in one victim's mouth	Signed statement
Hatchett, Nathaniel	MI		• Victim was a white woman • Victim was forced into her car • Victim had infant car seat in back seat • Told victim not to look and raped victim • Implied he had a gun • Told victim it was her "lucky day" • Left victim on service drive near expressway • Described victim's pubic hair BUT • Denied taking victim's purse or contents, whereas victim described assailant taking contents of purse	Audio
Hayes, Travis	LA	J, ID	• None. He reportedly agreed he was present as a getaway driver	Audio
Hernandez, Alejandro	IL	J	• He and his accomplices drove to the scene in a dark green, late model Ford • Abducted girl's lip was bleeding • Victim was blindfolded, hit with a bat and kicked on head • Victim was dragged on ground BUT • Gave incorrect description of a light and described an appliance being stolen from the house when nothing had been stolen • Apparently at first trial, a transcript of which was not obtained, a defense expert conducted an examination and found that he was "dull-normal"	
Jones, David Allen	CA	ID	• Location of one crime BUT • He denied taking one victim's clothes off, describes giving that victim money, and being taken to location by the victim	Audio

Exoneree	State	J/ID/MI[185]	Non-Public Facts, Corroborated Facts, and Inconsistencies	Documented?
Jones, Ronald	IL		• Location of crime scene in abandoned hotel • Location of blood stains • Victim was stabbed • Described victim's appearance BUT • He claimed victim was a prostitute who had propositioned him and pulled a knife on him	Signed statement
Kagonyera, Kenneth	NC		• Drove car and van to victim's house, in group armed with two guns • Four people were inside, including a two men, a girl, and an old man • Shotgun was fired BUT • DNA did not match any of the defendants	Signed statement
Kelly, William	PA	ID	• Provided "somewhat detailed account of the murder" • Admitted presence at Dinger's Café/Bar with victim shortly before her death • Drive with victim to landfill • Hit victim with a plank • Dragged victim to location (which he identified) where body was found, and covered body • Confessed to raping victim vaginally BUT • He told police he did not ejaculate (in fact perpetrator did ejaculate)	
Kogut, John	NY		• Description of victim • Description of victim's death by strangling; autopsy confirmed that victim had been killed by a ligature tightened around her throat • Location of body, which had been hidden in the corner of a cemetery • Location of victim's ring, pendant, and cracked heart locket • Color of pants, jacket, blankets found at crime scene BUT • Stated jewelry was removed from crime scene, which was not accurate	Video

Exoneree	State	J/ID/MI[185]	Non-Public Facts, Corroborated Facts, and Inconsistencies	Documented?
Laughman, Barry	PA	ID	• Victim received head wound not visible to naked eye but uncovered during autopsy • Victim killed with entire bottle of pills in her mouth, and pill bottle placed in her hand • Victim was raped • Victim was wearing only a bra • White rag found in victim's hand • Number and brand of cigarette butts found at the scene • Blue cloth bag and shoe box with money inside • Described victim's house BUT • Initially described seeing the deceased victim through her window, which was impossible especially because there was no light in the room	Audio
Linscott, Steven	IL		• Described murder victim's living room, including lighting, wood panels, table and door • Describes weapon as a tapered metallic object, then tire iron or a blunt object (blood and hairs were found on a tire iron found in bushes in front of victim's apartment building) • Victim did not physically resist or scream • Described attacking motions consistent with blood stains • Described the victim receiving seven blows to the head and other blows on her body (consistent with autopsy) BUT • Statement described a "dream" which incorrectly described the race of the victim, the location of the body, and did not describe stab wounds	Audio

Exoneree	State	J/ID/MI[185]	Non-Public Facts, Corroborated Facts, and Inconsistencies	Documented?
Lloyd, Eddie Joe	MI	ID	• Described the victim having been sodomized with a bottle • Green color of the bottle • Described strangulation of victim using a ligature, including how he grabbed her throat, consistent with finger marks • Described pushing up victim's sweater and bra • Described "her clean Gloria Vanderbilt jeans." • Described victim's gold colored earrings • Described victim's underwear left on a tree at the crime scene • Described leaving victim laying on her side • Diagram of crime scene • Described street light on wooden telephone pole near garage where crime occurred BUT • Lloyd, committed in a mental institution, had written letters to police regarding a host of crimes • Lloyd described this rape occurring in a stolen car, and the license plates matched an inoperable and different vehicle • He incorrectly identified the location of the body on the diagram of the crime scene	Audio
Lowery, Eddie	KS		• The victim's house was on the corner of the street • The house was white • Entry took place in the rear of the home • The screen door was torn and the latch flipped for entry • A kitchen knife was used; the victim was struck with a knife handle • The victim's gown was pulled off • The victim's face was covered with a pillow BUT • Stated that the knife was thrown down after the rape, when although a knife was found at the victim's home, it was determined not to have been the murder weapon	

Exoneree	State	J/ID/MI[185]	Non-Public Facts, Corroborated Facts, and Inconsistencies	Documented?
McCollum, Henry Lee	NC	ID	• Met victim at little red house near ballpark • Culprits brought six-pack of Bull Malt Liquor Schlitz, sixteen-ounce cans to murder scene and drank them • Took victim across bean field • Picked up six-foot-long board (found with blood stains on it) • Victim naked laying on board • Victim choked with own panties on a stick (consistent with what medical examiner found) and he reportedly "got up and demonstrated" how this was done • Victim cut with knife • Body dragged in bean field • Victim's white blouse had "a little flower on it" • Two culprits smoked Newport cigarettes • Marked location of the rape and murder on a map BUT • Excluded by fingerprints found on beer cans • No evidence linked the two others who, according to the statement, were named as part of the group that raped and asphyxiated the victim	Signed statement
McCray, Antron	NY	J	• Described female jogger • Described her clothes being ripped off • Described jogger being hit with a pipe • Described location of attack as "by the reservoir" • Described rape • Described in detail other attacks in the park that night, including of a male jogger BUT • Inconsistencies included the location of the crime; in the video statement, he had stated, "We was at the tennis courts and then we seen this lady jogging lady," but those tennis courts were many blocks from that area • He also described the victim wearing "blue shorts," when she was wearing long black running tights	Video

Exoneree	State	J/ID/MI[185]	Non-Public Facts, Corroborated Facts, and Inconsistencies	Documented?
Miller, Robert	OK		• Victim was attacked in her kitchen • Victim was wearing a nightgown and robe • Described victim's bedroom accurately, including location in the house, that it included a night stand with a lamp, and a religious picture over the bed • Second victim killed in front bedroom • Second victim's electricity had been cut off • Second victim wearing a nightgown • Perpetrator tore his clothes during the attack and left a piece of his underwear behind • Second victim raped more than once on bed, covered with sheets • Second victim's hair was pulled • Perpetrator wiped his bloody hands on her bed sheets • Described the positions in which the bodies were found BUT • Among other inconsistencies, described stabbing both victims, and neither was stabbed	Video
Moore, Curtis Jaspeer	VA	ID, MI	• Victim wore dark coat when walking on the street the night of the murder • Victim was elderly woman, described weight, height • Victim was assaulted on a "big rug, carpet" that had been removed and sent to the lab at the time the defendant was taken to the crime scene and indicated area in which attack took place • Victim choked BUT • Also testified that victim was eighteen or nineteen years old • Unclear on rape of victim. Said "got some" but did not describe a rape	Audio
Ochoa, Christopher	TX		• Victim was shot one time in the "back of the left side of her head" • Victim was shot while kneeling on her knees • Victim's hands were tied behind her back with her bra and her ankles tied together with her blouse, her mouth gagged with her scarf • The water from the sink in the women's bathroom was left running • That sink was clogged with aprons • The restaurant had been wiped down to prevent leaving any fingerprint evidence BUT • He incorrectly described the gun used and how he gained entry to the restaurant	Audio

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Ollins, Calvin	IL	J, ID	• The victim was raped • The victim was killed by being smashed in the head with a piece of concrete • The victim was kicked repeatedly	Signed statement
Peacock, Freddie	NY	ID	• None. All he could say to the police about the crime was "I did it. I did it. I raped the girl. I did it."	
Peterson, Jamie Lee	MI		• Took $30 from victim's billfold and a small candle in a glass jar • Victim had kitchen knife drawer that was open, with knives including butcher knife • Ransacked house, with lamps knocked over, hangers knocked down in laundry room • Victim locked in trunk of her car, while alive, rags placed under victim's head in truck of car • Victim's bra taken off and ripped • Victim hit in head several times, consistent with autopsy • Victim sexually assaulted, vaginally and orally • Victim's left arm scratched • The time of the murder BUT • As the audio taped portions of the interrogation showed, many of these facts were told to him by the officers in leading questions during the interrogations • A second perpetrator was not mentioned in the first interrogation, but only later after police received DNA test results excluding the defendant • When facts were volunteered, many were incorrect, such as that the sexual assault did not occur in the bedroom as he had stated	Audio & Signed statement
Richardson, Harold	IL	J	• Location of the murder • Victim's injuries • Describes the shovel • Clothing placed with body of victim in dumpster BUT • DNA excluded defendants at the time of trial. Victim's clothing not found inside sheet	

Exoneree	State	J/ ID /MI[185]	Non-Public Facts, Corroborated Facts, and Inconsistencies	Documented?
Richardson, Kevin	NY	J	• Description of height, weight, build of victim • Description of color of victim's pants and top • Description of crime scene • Description of other attacks in the Park • Victim was hit with a pipe covered with black tape BUT • Among inconsistencies, describes the group leaving the reservoir before encountering the jogger; this was likely "some 45 minutes" later. For a description of the timeline problem, see Jim Dwyer & Kevin Flynn, New Light on Jogger's Rape Calls Evidence into Question, N.Y. Times, Dec. 1, 2002.	Video
Rivera, Juan	IL	J	• Victim was babysitting two children, a boy and a girl • Washed hands in the sink after murder • Victim's apartment had two floors, was messy with clothes strewn everywhere, and a TV was on • Victim raped, vaginally and anally • Victim cut more than two times with knife • Knife broken into two pieces • Left through back door, breaking it with a mop BUT • DNA excluded at third trial • Inconsistencies included what victim was wearing, directions to the house, not mentioning breaking the back door	
Rollins, Lafonso	IL	J, ID	• Identified victim from series of photographs and signed photo • Stated date of crime and address for crime at senior citizens home • Described method of attack, as victim entered apartment, pulled a knife, told victim not to yell, and was given $60 • Described ordering victim to take off clothes, masturbating on victim, and wiping self with pillow case before leaving. Serologist identified semen on victim's pillow case	Signed statement
Ruffin, Larry	MS		• Location of victim's house • Layout of the house	Signed statement
Salaam, Yusef	NY	J	• Described attack on a female jogger in Central Park • Described rape • Victim was hit with a pipe • The pipe was about sixteen inches long, with tape on it • Victim's clothes were partially removed	

Exoneree	State	J/ID/MI[185]	Non-Public Facts, Corroborated Facts, and Inconsistencies	Documented?
Santana, Raymond	NY	J	• A white female, wearing jogging clothes, was attacked in the Park • Described involvement in attack on victim • Victim was hit with a brick • Described a series of other attacks, including the radio headset worn by male jogger • Told detectives during crime scene visit that victim was first struck on roadway and then dragged into the woods BUT • Among inconsistencies, describes the group leaving • For a description of the timeline problem, see Jim Dwyer & Kevin Flynn, New Light on Jogger's Rape Calls Evidence into Question, N.Y. Times, Dec. 1, 2002.	Video
Saunders, Michael	IL	J	• Description of victim's clothing • Victim's injuries • Presence of a shovel • Location of the murder BUT • DNA did not match the defendants • Did not mention that shovel was used to hit victim. Initially described victim's jacket as red, then yellow; it was red with yellow lettering	Signed statement
Sharp, Shainne	IL	J	• Group drove victim to field near expressway • Drawstring placed in victim's mouth, victim hit • Victim raped in bushes by expressway, struck with gun, shot with small automatic gun in the mouth • Victim wairing baseball team shirt, blue and white, blue jeans BUT • DNA did not match defendants. Gym shoes and other objects not observed at crime scene	Signed statement
Shelden, Debra	NE		• Described general layout of victim's apartment • Described involvement of others in a rape • Described that victim had been found with head wrapped tightly in a scarf, wearing a blue nightgown, with towels wrapped around wrists, and with wrists broken BUT • Also denied having any independent knowledge of the victim's residence and did not describe victim's hands having been bound	Video

Exoneree	State	J/ID/MI[185]	Non-Public Facts, Corroborated Facts, and Inconsistencies	Documented?
Sterling, Frank	NY		• Location of murder on walking trail • Victim was wearing "a purple top or two-toned and dark pants." • Victim was hit and kicked, and had pants taken off • Victim shot with a BB gun, thrown on trail BUT • Signs victim was dragged into brush, not that she fell into the brush as described • No BB Gun found • Victim was wearing a purple jacket with white stripes	Video
Swift, Terrill	IL	J	• Location of mop and shovel and description of each • Shovel was three or four feet long, with a green metal spade and a brown wood handle • Victim's shirt and pants were ripped • Victim's body wrapped in a white sheet and left in an alley • Victim's injuries, and specifically that she was strangled, with foam coming out of her mouth, after being hit in the head/face, consistent with the medical examiner's testimony BUT • DNA did not match defendants. Neither mop nor shovel were described as being broken, but both objects found near scene in pieces	Signed statement
Taylor, Joanne	NE		• Described general layout of victim's apartment • Described involvement of others in a rape • Described a pink towel used to bind the victim • Described Sheldon being pushed into the wall BUT • Had described attack occurring in a "light colored house" not an apartment • She also described that law enforcement helped her to remember much of what she testified to • Taylor had been diagnosed with a "personality disorder" by a police psychologist and described having problems with her memory and a belief she had telepathic abilities, but was not evaluated by a defense expert	Video
Taylor, Robert	IL	J	• Group drove victim to field near expressway. • Victim punched in mouth and something put in victim's mouth • Victim raped • Victim shot in face • Victim was wearing baseball team shirt and blue and white jeans. Shirt ripped off victim	Signed statement

Exoneree	State	J/ID/MI[185]	Non-Public Facts, Corroborated Facts, and Inconsistencies	Documented?
Thames, Vincent	IL		• Victim choked from behind • Victim hit in the head with a shovel with a wooden handle • Victim wrapped in a white sheet with colored flowers on it • Crime scene was cleaned with a mop	Signed statement
Thibodeaux, Damon	LA		• Victim choked and strangled with a wire • Victim assaulted on levee on side closest to river; position of victim's body • Victim had sex with him while lying on back and with shorts removed BUT • Although he stated he ejaculated, no semen was recovered from victim's clothing or at autopsy, nor on ground at crime scene • Physical evidence suggested no rape occurred • Physical evidence also suggested victim had been dragged, and also kicked from behind • Having been told victim was strangled, stated he used a white or gray speaker wire from his car, but victim was strangled with red electrical cord burned off section of cord found hanging on a tree above victim's body • Victim not assaulted with bare hands, but rather with a blunt object • Victim not choked with hands, but rather a wire	Video
Townsend, Jerry	FL	ID	• Townsend led police to six different crime scenes, confessed at each, and correctly identified location of the body at one crime scene • He knew one victim was strangled • He described that one victim was wearing a dress • He described that a white house at the crime scene had previously been yellow BUT • Townsend gave incorrect information, including the wrong name for a victim, claimed to have cut a victim who suffered no cuts. See Amy Driscoll & Manny Garcia, Townsend Confession at Odds with Evidence, Miami Herald, May 27, 2001.	Audio
Vasquez, David	VA	ID	• Venetian blind cords used to hang victim (see next column) BUT • Leading apparent from the recording and State acknowledges that "at times his statements were virtually incomprehensible"	Audio

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Veal, Robert Lee	IL	J	• Victim taken to vacant field, description of field • Victim punched in face • Victim punched in mouth, dark scarf tied around mouth • Coat, jeans, and ring removed • Victim shot with dark colored handgun in the mouth, scarf removed prior to shooting	Signed statement
Warney, Douglas	NY	MI	• Victim was wearing a nightshirt • Victim was cooking chicken • Victim was missing money from his wallet • The murder weapon was a knife that was kept in the kitchen, about 12 inches with serrated blade • The victim was stabbed multiple times • The victim owned a pink ring and gold cross • The timeframe of the killing • There was tissue used as a bandage covered with blood • There was a pornographic tape in the victim's television BUT • Inconsistencies included that there was no evidence of the stabbing or struggle in the kitchen • Defendant had a history of mental illness	Signed statement
Washington, Earl	VA	ID	• Victim was a woman who was raped and stabbed • He left his shirt at crime scene • He left it in a back bedroom in a dresser drawer • He took off the victim's halter top • He cut himself and bled • The radio was on • Location of attack in Culpeper BUT • The statement also included numerous inconsistencies, including the race of the victim, describing her as short when she was tall, describing just a few stabbings when there several dozen, among others • He could not locate the victim's apartment until being brought directly to it • He had confessed to a series of other crimes when asked to do so, but the witnesses to those crimes and other evidence cleared him	Signed statement

Exoneree	State	J/ ID /MI[185]	Non-Public Facts, Corroborated Facts, and Inconsistencies	Documented?
Watkins, John Kenneth	AZ	J	• Date and time of assault • Location on grassy hill in park, near ballfield • Victim was walking with friend a long ways in front of her, and was forced down in between bushes • Victim had shorts lowered, not removed completely off legs • Culprit had buttocks fully exposed and pants partially lowered, penis made contact with victim • A witness interrupted the attack	Video
Williams, Johnny	CA		• None. He finally reportedly admitted, "I guess I did it. I guess I did it. I did everything." And: "What you want me to say? I must have done it." And "I don't remember. I can't say I do. I don't remember. I was high. If I did, I was high. I don't know. I mean, you got me on the tape and everything."	Audio (in its entirety)
Williamson, Ronald	OK	MI	• Female victim was killed by a cord wrapped around neck to strangled her and stabbed BUT • Medical examiner concluded that wounds were not caused by a knife • Williamson was mentally ill and actively psychotic at the time of the trial, if not also during the time of police interrogations	
Wilson, Sharif			• Stabbed sleeping victim on couch • Used steak knife with "a brown handle and ridges on the edge" • Stabbed second victim in bedroom • Moved one victim to couch in living room; corrected district attorney on which room one victim was in • One victim punched in the face, consistent with autopsy • Cords from radio, telephone and fan used to tie victims BUT • Steak knives found at the scene had no traces of blood and were very dull. According to autopsy, victims died from strangulation and not from stabbing • Statements concerning victims falling back asleep during the assault	

Exoneree	State	J/ID/MI[185]	Non-Public Facts, Corroborated Facts, and Inconsistencies	Documented?
Winslow, Thomas	NE		• Described how one would reach the victim's apartment • Described general layout of victim's apartment • Described involvement of others in a rape BUT • Also denied having any independent knowledge of the victim's residence	Video
Wise, Kharey	NY	J	• The jogger's clothing colors • Details about attacks on others in the Park • Description of crime scene, including during visit to scene • Victim was gagged • Male victim was hit with a "bar" BUT • Statements in the video were inconsistent with the crime scene evidence, such as the description of how "before they left, he pulled out his knife and cut her up. They cut her legs. They pull out and start cutting her legs up, her chest, whatever, I didn't really see it."	Video
Yarbough, Anthony	NY	J	• Stabbed victim three times in stomach with kitchen knife • Tied second victim with "radio cord." • Stabbed second victim sleeping on couch BUT • The steak knives found at scene had no traces of blood and were very dull • According to the autopsy, victims died from strangulation and not from stabbing	Video
Yarris, Nicholas	PA		• That the victim had been raped • A brown landau roof on the victim's car BUT • Both of those specific facts were reportedly made during an unrecorded and undocumented portion of the interrogation	Audio