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PETITION

FOR

EXECUTIVE CLEMENCY

for

EVERETT LEE MUELLER

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PETITION FOR EXECUTIVE CLEMENCY

for

EVERETT LEE MUELLER

Everett Lee Mueller maintains his innocence of the crimes for which he is scheduled to be executed on September 16, 1999. He firmly believes that his innocence can be proven with the minimal assistance of the Governor and he asks that he be allowed a chance to prove his innocence.

In this petition we will set out the limited character and quality of the physical evidence of Mr. Mueller's guilt, attempt to describe the evidence which would prove Mr. Mueller's innocence, and show the inadequacy of the single piece of evidence linking Mr. Mueller to these crimes.

Mr. Mueller cannot prove his innocence without the Governor's help. He wishes to tell you his story, and has tried to do so in a letter attached to this plea for assistance. We ask that you consider Mr.

Mueller's case carefully and help provide him with the tools to prove that the Commonwealth convicted, and is about to execute, a man who is not guilty of the crimes charged.

THERE IS NO PHYSICAL EVIDENCE THAT MR. MUELLER COMMITTED ANY CRIMES AGAINST CHARITY POWERS

On the evening of October 6, 1990, ten-year-old Charity Powers was dropped off at a Chesterfield County skating rink by her mother, who had arranged for a family friend to pick Charity up later that evening. The friend never showed up. The skate rink closed. Charity walked to a nearby Hardee's and waited. She was last seen at approximately 12:50 a.m. by four teenage boys, sitting on the curb at Hardee's. The teenagers also saw a white male, medium height and approximately 30 years old, driving a cream colored station wagon with wood siding around the Hardee's parking lot that night. The prosecution told the jury that this was the man who abducted, raped, and killed Charity Powers.

Mr. Mueller's description fit generally with the description of the

man at the Hardee's provided by the four witnesses. Mueller drove a car similar to the one described by the witnesses. He also had previous convictions for rape. Because of these factors, he was sought for questioning shortly after Charity's disappearance.

Several months later, on February 8, 1991, Charity Powers' body was found in a shallow grave in a wooded area in Chesterfield County. There was no physical evidence that Mueller had anything to do with the crimes, and none has ever been produced.

FACTS THAT RAISE GRAVE DOUBTS ABOUT MUELLER'S GUILT

Prosecutors claimed that the four teenage boys at the Hardee's on the night Charity Powers disappeared, had seen the man who abducted, raped, and murdered Charity Powers. The description they initially gave of the man fit generally with a description of Mueller, although two of the boys said that the man had a beard and Mueller has never had a beard. A car they described fit generally the description of Mueller car - a cream colored, wood paneled station wagon.

At the outset of the investigation, police obtained a Polaroid photograph of Mueller. Although no one ever told Mueller or his attorneys until after the trial started, the police had the four witnesses from the Hardee's come to the police station where they were shown a set of photographs. The police asked the boys to pick the person who most resembled the person they saw at the Hardee's that night. Each of the four boys selected a photograph. App. 7-8 (Affidavit of Kevin Speeks). When they later spoke about their selections, it was clear to them that they had not all picked the same person. Id. None of the four boys selected Mueller's photograph.

Contrary to law, this information was never disclosed to Mueller's trial attorneys prior to the trial. Although the prosecutor never disputed the fact that a photographic lineup was shown to the witnesses, or that they picked someone other Mueller form the lineup, he claimed that he could not find out which police officers involved in the investigation might have conducted the lineup. In circumstances such as these, a prosecutor is legally responsible for knowing everything

that the police know, but the trial judge in the case didn't ask the prosecutor or police anything more on the matter.

That was the end of the issue in the trial court. The court and the jury never found out the identities of the persons picked out of that lineup by the four witnesses. Mr. Mueller has been refused all subsequent attempts to independently investigate the detail of the photographic lineup and other suspects. Remarkably, courts that ave looked at this "missing evidence" have actually blamed Mueller for not somehow learning what so far only the police involved in the investigation know - the identities of the person in the photographic lineups and the identities of the persons selected as the man last seen with Charity Powers at the Hardee's on the night she disappeared.

For the four months following Powers' disappearance, the police followed Mueller and questioned him, his family, and his friends at work, at his home, on the street, and at the police station. According to Mr. Mueller, the police hounded him continuously; they told him that they knew he was guilty; they told friends, neighbors, co-workers, and

employers about his previous convictions; he girlfriend was threatened; he found notes and posters about the missing girl on his car windshield. He had to leave his jobs and move from the place he was staying.

On February 8, 1991, Charity Powers' body was found in a shallow grave in a wooded area near where Mueller lived. Mueller was arrested on February 12, 1991. He was immediately taken into custody and interrogated for almost 4 hours by a Chesterfield County Detective Garber and an FBI agent Palfi. After approximately two and a half hours of questioning (during which time he repeatedly asked to be taken to jail), he confessed to a crime he did not commit.

Mueller explained that his confession was false and he pled not guilty. The centerpiece of the Commonwealth's evidence was this false confession and his knowledge of the location of the buried body. There was no physical evidence connecting him to the crime. There was no forensic evidence which linked him to Charity Powers' abduction, rape or death. The only hair found on Charity Powers' body did not belong to Mueller or Powers. No one ever saw Mueller with Charity Powers on

the night of her death. There was nothing found in his car, fingerprints or otherwise, which indicated in any way that Charity Powers had ever been in the car. Mueller's knowledge of the whereabouts of the body came from the fact that he had discovered the little girl's body when walking through the woods. Because he was afraid that he would be blamed for harming her, he returned and buried her body.

Despite the questionability and inaccuracy of Mueller's inculpatory statement to police and the paucity of other evidence, not to mention Mueller's plea of not guilty, Mueller's lawyers told the jury that it was their "duty" to find him guilty of capital murder.[1] The jurors followed Mueller's lawyer's instructions.

When the jurors were asked to decide an appropriate sentence, the prosecutor and trial judge kept truthful and accurate information about the sentence from them. The prosecutor told the jurors about Mueller's previous convictions, including convictions for rape. The prosecutor

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[1]Trial counsel instructed the jury that it was their duty to find Mueller guilty of Charity Power's rape and murder. Under the instructions they were given, this meant that they had to Mueller guilty of capital murder.

insisted, however, that jurors not learn the truth that for Mueller a life sentence would mean a sentence of life without the possibility of ever being released on parole. In Virginia, and across the nation, jurors' preference for a death sentence drops dramatically when they learn that the alterative sentence is life without possibility of parole. App. 20-21 (Center for Survey Research at Virginia Polytechnical Institute). The Governor has been a strong supporter both of "truth in sentencing" reform and the availability of a "life without parole" sentence. A grant of clemency would be appropriate in this case where each of these notions have been ignored and the principles which support them violated.

UNDISCOVERED BUT AVAILABLE FACTS

There are several ways to prove that Everett Mueller is innocent and determine who actually committed this crime. The following facts have yet to be uncovered and their discovery is absolutely crucial in order to determine who killed Charity Powers.

REGARDING THE PHOTO ARRAY SHOWN TO THE FOUR WITNESSES

1. **Which police officers showed the eyewitnesses the photographs?**

2. **Which suspects' photographs were shown to the eyewitnesses?**

3. **Which suspects were selected by the eyewitnesses as the person they saw at the Hardee's on the night Charity Powers disappeared?**

The man the prosecutor said abducted Charity Powers from the Hardee's and who raped and killed her was the man the four witnesses saw at the Hardee's. But, according to these witnesses, there was a man other than Everett Mueller who was last seen with Charity Powers at the Hardee's. Mueller maintains that the photographs of other suspects were shown to the witnesses and that the witnesses actually selected one or more of these other suspects. Not only did the witnesses pick these suspects out of a photo lineup but the police knew the identities of these other men.

No one has ever denied that Mueller's picture was contained in

this photo array, nor has anyone ever contended (in court or otherwise) that Mueller was identified as the man those witnesses saw. To the contrary, Kevin Speeks, one of the eyewitnesses testified and described the man he saw that night but *did not* make an in court identification of Everett Mueller as being that man.

OTHER EVIDENCE

4. Whose hair was found in Charity Power's anal area?

There is physical or forensic evidence that someone who was not Everett Mueller had intimate contact with Charity Powers on the night she was killed. According to an expert from the Federal Bureau of Investigation, the only piece of physical evidence collected at the crime scene - a hair fiber removed from the anal area of Charity Powers - "was not consistent with coming from either [Ms. Powers] or Mr. Mueller." App. 18-19 (Testimony of FBI forensic expert, Robert Fram). The police gave the expert samples on two occasions of hair from Mueller's head, chest and pubic areas. None of the hair obtained matched that found on Charity Powers' body. This hair was never tested for DNA.

The result of a DNA test can be run through the state's DNA data bank to determine whose hair it is. Mueller maintains that this testing would show that the hair was from one of the other suspects the police had in this case.

5. Why not collect scientific evidence which would confirm Mueller's innocence?

As stated above, no physical or forensic evidence connecting Everett Mueller to Charity Powers, or these crimes, was ever found or presented. Moreover, if, for instance, Mueller's car or clothes were combed forensically for evidence that Charity Powers had been in contact with either, this would absolutely eliminate any lingering doubt on your part that Charity Powers was ever in Mueller's car or ever in contact with him on the night of her death. These tests will further corroborate Mueller's account of his innocence.

6. Who were the other persons in the neighborhood who drove cars similar to the one described as being at the Hardee's and where were these people on the night Charity Powers disappeared?

Deborah Pruitt stated in a sworn affidavit that there were at least three vehicles in the neighborhood that looked identical to Mueller's wood-panel station wagon. App. 10-12 (affidavit of Deborah Pruitt). She also reported that she saw *two* of these vehicles parked at Mueller's house on the night Charity Powers disappeared. Id. No attempt has ever been made to determine the whereabouts of the owners of these vehicles on the night of the crimes against Charity Powers nor have these people ever been investigated in any way. According to Ms. Pruitt, one of the vehicles was owned by a woman whose son resembled Mueller in appearance. App. 11. Again, the son has never been questioned or investigated.

Thus there is, at a minimum, available and "testable" forensic evidence, including DNA evidence, and other suspects and potential suspects, against whom such evidence could be compared. Such

evidence could provide definitive scientific evidence exculpating Mueller. With your help, these yet unconfirmed or undiscovered facts can be discovered and confirmed. With this, Everett Mueller will be revealed as an innocent man who confessed to a crime he did not commit.

WHY MUELLER FALSELY CONFESSED

From the time Charity Powers first disappeared, Mueller was persistently questioned, followed, and harassed by members of the state and federal law enforcement agencies investigating the crime. He already suffered from severe mental health and alcohol abuse problems, and began to deteriorate even more desperately into alcohol abuse and related ill-health under the pressure created by the investigation. He tried to avoid the harassing and intrusive treatment of law enforcement personnel but failed. As a result, and in combination with his own debilitating disease, Mueller became increasingly paranoid and exasperated. His paranoia caused additional isolation and confusion. Exasperated, isolated, and without the advice and protection of counsel,

Mueller falsely told police what they insisted he must tell them in order to avoid a death sentence.

Substantially false confessions, even to serious criminal behavior, occur persistently in the justice system. App. 22-113 (Articles explaining the phenomenon of false confessions). They may be the result of a wide array of factors. According to leading experts in the field of false confessions, false confessions are especially likely when they are precipitated by two broad factors, i.e. when the suspect is particularly vulnerable and when the interrogation is psychologically coercive. Academic literature and expert opinion shows that one can isolate those factors more likely to be present in false confession cases. When these factors are compared with those present in Petitioner's case, they support his contention that his confession was false.

According to Dr. Richard Ofshe, the following types of interrogation techniques and suspect characteristics increase the likelihood of a false confession:

Interrogation techniques

1 Interrogator repeatedly states his belief in suspect's guilt. (*Officers in Mueller's case had been telling him he was guilty for 4 months*)

2 Suspect is isolated from those who undermine this belief. (*Officers repeatedly told Mueller's friends and family that Mueller was guilty*)

3 Lengthy interrogation and emotional intensity. (*Interrogation of Mueller occurred persistently for several months at his home and work, as well as on the street. After his arrest, Mueller was kept in a tiny room at the police station for 4 hours despite repeated requests to leave and be taken to jail*)

4 Interrogator repeatedly states there is clear proof of suspect's guilt. (*Officers told Mueller that they knew he was guilty because they had obtained semen, hair, and fiber samples implicating him [none of which is true]*)

5 Interrogator repeatedly reminds suspect of mental disorder or memory problems that would explain lack of memory for crime. (*Officers repeatedly told Mueller that there were two Everett Muellers, and that Mueller was a different person (a person who could commit such a crime) when he was drinking*)

6 Interrogator demands that suspect accept his explanation of crime. (*Officers told Mueller that they knew what happened and how it happened, and that they had all the evidence they needed to convict Mueller of the crime*)

7 Interrogator reminds suspect of harmful consequences of repeated denials. (*Officers repeatedly informed Mueller that he was only hurting himself by not telling them what they wanted to hear and that they couldn't help him in any regard [his sentence or where he would serve it] unless he*

confessed to the crime)

Suspect's characteristics

1 Good trust of people in authority.
2 Lack of self-confidence.
3 Heightened suggestibility.

Also, false confessions are most likely to occur in high profile murder cases where police have a dearth of viable suspects and a lack of objective evidence.

Gisli H. Gudjonsson, another expert in this area, focuses on the specific vulnerabilities of the accused which are likely to affect how he or she copes with interrogation and which may lead to a false confession:

Suspect's characteristics

1 Low intelligence.
2 Mental illness.
3 Recent bereavement.
4 Proneness to anxiety.
5 High suggestibility.
6 Strong tendency to comply with people in authority.
7 Language problems.

Coerced-compliant false confessions (as relevant to Petitioner's

case) are most likely to occur when "powerful and highly salient techniques of social control" are used.

Trial counsel should have been readily aware of these factors and how they relate to Petitioner's case:

a. Petitioner possessed only a fifth grade education and vocabulary;
b. the State identified Petitioner's history of emotional instability, mental illness, and other diseases which indicate a predisposition to anxiety;
c. Petitioner sustained significant head injury during early childhood with the resulting possibility of brain damage which (according to White) increases the likelihood that a confession may be false. White;
d. Petitioner has a profound history of alcohol abuse and was in withdrawal on the morning of arrest and mentally and physically weak.
e. Petitioner had been under surveillance for several months and was the subject of lengthy questioning;
f. Petitioner's interrogators claimed they had concrete physical evidence linking him to the crime, such as semen, flesh and hair found on the girl's body (Video Tape of Confession at 0410, 0057, and 0866; J.A. 568, 599-601 and that they had witnesses who said Petitioner committed the crime. (Video tape of Confession at 0410, 1489).
g. Petitioner's interrogators promised him that if he confessed, they would tell the jury that the crime was an accident (Video Tape of Confession at 1823, 1975, and 2885) they would do their best to get him a name change and onto an out-of-state program (Video Tape of Confession at 1741,

1823, 2230, and 3005); and that they would help his girlfriend on a federal parole violation. J.A. 584, 594.

h. False confessions are most likely to occur in high profile murder cases where police are pressed to identify a viable suspect but lack objective evidence fits closely with the facts of Petitioner's case.

In light of the above and the relevant academic research applied to the current case, the facts surrounding Petitioner's confession cast more than a reasonable doubt on whether his confession was genuine and reliable. This evidence, coupled with the identification of someone else at the Hardee's near Charity Powers, the presence of physical evidence at the crime scene connecting someone other than Mueller to Charity Powers, and the complete lack of any physical or forensic evidence connecting Mueller to Charity Powers' abduction, rape, or death, certainly indicates the overwhelming likelihood that the person who committed this crime is still walking the streets.

Virginia Governors know well that people who confess to crimes are not necessarily guilty. See also App. 22-113. In recent years clemency has been granted to both Joseph Giarratano and Earl

Washington, each of whom gave a full confession to the crimes charged. Both had their death sentences commuted when they had a chance to show - in clemency proceedings - that their confession were false and that there was substantial evidence that they were innocent. Mr. Mueller asks that his petition for clemency be considered in the same careful manner that the petitions in these cases were considered, and that he be provided the time and resources to make his equally persuasive case for clemency.

Mueller asks the Governor to provide him the assistance of an expert with special knowledge and experience in the field of false confessions, and sufficient time for such an expert to review this case. Mueller also asks that the Governor obtain and review the videotape of the police interrogation on February 12, 1991. This videotape is now in the custody of the Chesterfield County Circuit Court Clerk. By reviewing this videotape the Governor will more fully appreciate the need for further inquiry into the accuracy of the statement obtained from Mueller.

Conclusion

Mr. Mueller asks that the Governor give careful consideration to the matters outlined above, and to his request for assistance in proving his innocence. As the Governor is aware, the Commonwealth provides no assistance in clemency proceedings, so the Governor himself would have to act to make such assistance available. Mr. Mueller also requests the opportunity to meet with the Governor or his representative and/or to have someone meet with them on Mr. Mueller's behalf.

Respectfully submitted,

EVERETT LEE MUELLER

PETITION

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EVERETT LEE MUELLER

APPENDIX

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September 1999

The Honorable James S. Gilmore, III
Governor of the Commonwealth of Virginia
Office of the Governor
State Capitol, 3rd Floor
Richmond, Virginia 23219

Dear Governor Gilmore:

I did not kill Charity Powers. With your help, I can prove my innocence. Do not let an innocent man be put to death on September 16, 1999.

The evidence against me

There isn't any physical evidence that I committed any crimes against Charity Powers because I didn't. No one has ever discovered any evidence that I killed Charity Powers. Because I didn't. No one has ever found any evidence that I raped or abducted her. Because I didn't. As a matter of fact, all of the evidence discovered in the case shows that someone else did these things to Charity Powers.

Even today, the only evidence that I did these things is my false confession to police. Please let me tell you what I know about the death of Charity Powers. I will also tell you why I said that I did something that I didn't do and how with your help I can prove my innocence.

What I know about the death of Charity Powers

Shortly after the news reports that Charity Powers disappeared, police came and questioned me. They asked me if I knew anything about what happened to her and told me that I was a suspect. They told me that a car like mine was seen where she was last seen and someone who looked like me was driving the car.

Not long after they talked to me, I was cutting through the woods on my way back from Pike Pond in Chesterfield County and noticed some clothes off the path. I saw a body a few feet from these clothes. The body was partially covered by

some leaves. I brushed some of the leaves off and could see that it was the body of a girl with blond hair. The clothes were off. She looked to me to be dead. I could not believe what I was seeing. I'd never seen anyone dead before. I just went to pieces and started crying. I felt like I could not stand up. I think I was there for about 5 minutes trying to pull myself together.

Around this time, I was a bad alcoholic and had been for years. I felt sick if I didn't drink. My hands would shake and I would sweat. I felt like I was always about to panic until I had a drink. That was the way I felt when I saw her body.

When I finally started to think, I thought I should call the police. But then I got scared. They had already questioned me about her disappearance. Also, I had a criminal record and believed that, if I was charged with something, I would get put away just because I had a record. Although I served my time and did well in every prison program I was in, I still thought it would be used against me.

I thought about the little girl's body constantly. I couldn't get her out of my head. I thought that I shouldn't just leave her there. I bought a shovel and went back into the woods. It was the hardest thing I've ever done. I knew I should not have been doing this. But I thought there was no choice.

I buried her and burned her clothes. I have always said that this was the wrong thing to do. Afterwards, at night, I would lie in my bed thinking about that little girl I found. I would wake up crying. I couldn't handle the guilt. I should not have buried her. I should have just called the police. I am so ashamed that I didn't.

I was not the same person after I found and buried her. I felt like I was losing my mind. I could not eat. I could not sleep. My drinking got worse. All I wanted to do was drink more and more. I guess I was trying to drown the pain and guilt I felt. I kept thinking that if I told anyone what I had done,

everyone would think that I attacked her. So I said nothing.

Why I Confessed

I drank more and more. The police followed me everywhere. They followed my car. They stopped me on the street. They came to my work and spoke to my bosses, to me and to other workers about me. They told them that I was a convicted criminal. They spoke to my friends and my family. They told me and my friends that I was guilty, that they knew I was guilty, and that they would make sure that I was found guilty. Someone left posters and notes about the missing girl on the windshield of my car.

At one point, I told police that I would take a lie detector test and went to the police station to take the test. When I got there they said I also had to let them go through my car and belongings and I wanted to be with my car when they went through it. When they kept telling me I was guilty I was afraid that the test was rigged so I would be found guilty. I was too afraid to take it then. I wish now that I took that test.

After several months of being harassed and questioned I was frustrated and angry but I knew I couldn't tell the police because they already decided that I was guilty of more than I did.

When the police arrested me they told me that I was going to jail. They said they had all the evidence they needed to convict me and put me in prison. They told me that the only choice I had was to talk to them or go to jail. Because I didn't want to talk to them anymore, I asked them over and over to take me to jail. They ignored me and kept after me. They said that I was definitely going to jail. They said that if I told them that I did it they would make sure that I was held somewhere where no one would know what I was in for. They said that if I didn't confess to everything, they would make sure everyone knew that I was convicted of having sex with a little girl.

After over two hours of police telling me that I had to tell them that I

was guilty, I gave up and told them what they wanted to hear. I can't explain exactly why I told them that I did it. I thought it was the only way to protect myself in prison. I was tired and angry and thought I had no choice but to tell them what they wanted to hear. I thought that I could get back at them if I told them something that wasn't true and that they would later find out wasn't true. I was so guilty about burying her body. I wasn't thinking straight. When I get frustrated and upset I have a problem sometimes saying things without thinking that hurt me and others. This happened to me again at trial when the prosecuting attorneys got me upset.

I was relieved to tell someone in authority that I knew something about the little girl. I felt better to get that out of me. Everything that I told them was what I remembered about finding the body. I took the police up to where I found the little girl's body and showed them where I dug to bury her. I didn't know how the little girl was killed. I told them I guess I strangled her, but I later found out that she was not strangled. I told them I did the other things they said because they said they wouldn't help me unless I confessed to all of it.

Evidence that I am innocent

Every piece of evidence in this case shows that I am innocent. Police showed photographs of suspects including me to the four eyewitnesses at the Hardee's who saw the man who was with Charity Powers on the night she disappeared. The police asked the witnesses to pick out the person at the Hardee's that night. Each of the four did NOT pick me and picked a photograph of one of the other suspects. I have tried to find out who the other photographs were but have been told that no one will tell me.

There was no physical evidence even suggesting that I abducted, raped or killed Charity Powers. The physical evidence that was found proved that someone else had intimate contact with Charity Powers. A hair found on her body did not

belong to me or Charity. Even though the Commonwealth can run the DNA of this hair through its DNA bank, no tests have ever been done to find out whose hair this is. There was nothing found in my car, my house, on my clothes or Charity's, or on my body or Charity's (like fingerprints, blood, fibers, skin etc.,) that indicated in any way that I had any contact with Charity Powers. I didn't.

There was no evidence that I had sex with her. I didn't.

The police said that my confession was accurate but in my confession I said that Charity was choked and she was not. The medical examiner reported that Charity Powers' throat had been cut and that this was the cause of death.

I drove a car similar to the one described by the boys at the Hardee's but there were at least two other cars identical to mine in the neighborhood near the Hardee's. One of my neighbors gave a sworn statement that this is true. Not one of the owners of these cars was questioned and not one of these cars was checked by police.

I can prove my innocence with your help

With your help I can prove my innocence. I asked the courts to allow me the help I needed to prove my innocence but I did not get the help I needed. I hope that you will not make a decision on my clemency without any of the available evidence of my innocence. You will have all of the evidence that the prosecutor presented against me but you will never hear my evidence. At my trial there was just about no evidence put on for me.

I am not asking you to believe that I am innocent just because of this letter. But I am asking you to give me a chance to prove my innocence in this clemency. The court said that it could not look at evidence of my innocence at this point, but you can. Being able to look at evidence of innocence means little if you do not give me a chance to get this evidence in the first place. I don't have the money to get this evidence myself but with a little time and a few orders from you, I will prove to everyone that I am innocent.

Sincerely,

Everett L Mueller

Everett L. Mueller, #190275
Sussex I State Prison
24414 Musselwhite Dr.
Waverly, VA 23891

AFFIDAVIT OF KEVIN HUGHLAND SPEEKS

I, Kevin Hughland Speeks, of 16060 Flatfoot Road, Dinwiddie, Virginia, do hereby state the following:

1. I was a witness called by the prosecution in the 1991 capital murder trial of Everett Mueller.

2. I called the Chesterfield County Police the day after Charity Powers disappeared to report that I had seen her at a Hardee's Restaurant on Jefferson Davis Highway at approximately 1:00 a.m. the previous morning, October 6, 1997. I spoke with Lieutenant Shelton.

3. After this phone conversation, I went to the Chesterfield County Police Department and talked to Lt. Shelton in person. Lt. Shelton asked me if I would call the other three friends that were with me at the Hardee's on the morning of October 6, 1990. I agreed, and later that day Chris Cooper, Stephen Cooper, and John Burke joined me at the Chesterfield County Police Department to talk to detectives about Charity Power's disappearance.

4. The four of us returned together to the Chesterfield County Police Department on 3 or 4 more occasions during that next week. I believe we went to the police station on Monday, Tuesday, and Wednesday of the following week. We were told on several occasions that we would be meeting with a sketch artist who would sketch the man we saw at the Hardee's, although we never met with any sketch artist.

5. On each visit to the station, we met with approximately three detectives who were dressed in coats and ties. On our third or fourth visit, which I believe was on or around Wednesday, October 10, 1990, the detectives asked each of us to accompany them into a small conference room on one of the upper floors of the Chesterfield County Police

Department. On this day, there were approximately 3 detectives, one of whom was short with brown hair and a brown mustache. We were each escorted individually and asked to look at 7 or 8 polaroid photos of men to see if we could pick out the man we saw at the Hardee's. After viewing the photos, I made a selection. I left the room and another one of my friends was escorted into the same room.

6. After all of us had been taken into the conference room, the four of us left together and compared notes about what happened in the conference room with the pictures. Each of us had selected one of the photos as the person we saw at the Hardee's from among those spread out in front of us. After discussing and describing the photos, it was clear to us that two of us chose the same man, while my other two friends had chosen other men. The police did not ask me anymore questions regarding this photo identification after that day.

7. The above statements are true to the best of my recollection.

Kevin Hughland Speeks
DA 75

Signed and sworn before me this
16 day of October, 1997.

Notary Public

My commission expires July 31, 1997.

AFFIDAVIT OF STEPHEN S. COOPER

I, Stephen S. Cooper, of 3317 Walnut Cove Court, Chesterfield, Virginia, do hereby state the following:

1. I was at Hardee's Restaurant on Jefferson Davis Highway at approximately 1:00 a.m. on the morning of October 6, 1990 with Kevin Speeks, John Burke, and my brother Chris Cooper.

2. On October 7, 1990, Kevin Speeks called me and told me that the Chesterfield County Police would like me to come to the police headquarters to discuss Charity Powers' disappearance. I arrived at the police station that day and talked with several detectives.

3. The four of us returned to the police station together on several more occasions. I believe we returned 3 times within that next week. The police told us we would be meeting with a sketch artist, but that never happened.

4. On one occasion, I had a conversation with detectives that was being taped. On another occasion, I was shown polaroid pictures of different cars. I was asked if I recognized any of these cars as the one I saw in the Hardee's parking lot.

5. On a separate occasion, we were individually taken into a room to look at polaroid pictures of men. I was taken into an upstairs room with 2 detectives and asked to look at theses pictures to see if I recognized any of the men as the man I saw at the Hardee's Restaurant on the morning of October 6, 1990.

6. The above statements are true to the best of my recollection.

Stephen S. Cooper

Signed and sworn before me this
24th day of October, 1997.

Notary Public

My commission expires 4/30/2001

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AFFIDAVIT

I, DEBORAH PRUITT, do hereby certify that the following is true and accurate to the best of my knowledge. I live at 2926 Mount Clair Road, Chester, Virginia 23831. I was Everett Lee Mueller's next-door neighbor at the time of the disappearance of Charity Powers.

On the night of October 5, 1990, I went to bed around 11:00 o'clock p.m. Because the weather was fair that night, I kept my bedroom window open. I often keep my bedroom window open when I sleep to get some fresh air. Since my bedroom is on the side of my house closest to Mr. Mueller's house, I had a direct view to his house, especially the front portion of it because his house is at a slight angle to mine. Around 12:45 a.m. or 1:45 a.m. in the early morning hours of October 6, 1990, I was awaken by the sound of a car pulling up the driveway of Mr. Mueller's house. I was not sure of the time, but remembered the numbers :45 since I looked at the clock and wondered who could be making all that noise at that time of night.

As I got up and walked towards the window, I looked out and saw five individuals in the driveway of Mr. Mueller's house. They were Georgia Whitley, David Nixon, Charlie Buckler, another man and another female with what appeared to be blond or light-colored hair. Although I could not see for sure who the other man was, I knew that it was not Mr. Mueller since I recognized Mr. Mueller. At that time, Mr. Mueller was sharing the house with Georgia Whitley and David Nixon. That night I saw two identical station wagons with wood-grained paneling in Mr.

Mueller's drive-way. One vehicle was Mr. Mueller's; the other belonged to the individuals that I saw.

I paid no attention to them and soon got back in my bed and fell back to sleep. I did not think much of that incident, not even when I learned that Charity Powers had disappeared since I found nothing suspicious at that time with what I saw. However, when Mr. Mueller was arrested for the murder, rape and abduction of Charity Powers, that incident then became significant to me.

I related this information to the police investigators who questioned me, and also to Mr. Christopher J. Collins, one of Mr. Mueller's attorneys. I met with Mr. Collins shortly before Mr. Mueller's trial and related to him that information and also other information as I will mention below. However, Mr. Collins appeared not to take what I said seriously, and he kept saying to me that Mr. Mueller was guilty. We spoke for only approximately 30 minutes at the most. I also told Mr. Collins about the other vehicle that looked identical to Mr. Mueller's. There was also a third station wagon which looked identical to Mr. Mueller's. That station wagon belonged to an elderly lady by the name of Louise, who lived on Jefferson Davis Highway, but I do not know exactly where. Louise had a son named Ron, who looked similar to Mr. Mueller in appearance. Ron would often drive Louise's car. Both Louise and Ron would visit Georgia Whitley and David Nixon and would drink beer in their house or in their trailer behind their house. I also related that information to the police.

I also told Mr. Collins and the police that I found it

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difficult to believe that Mr. Mueller would have committed such offenses, because I have five children. Mr. Mueller had been around both my teenage daughters and my youngest son, and all of my children liked him. He got along well with them. My son and my daughters spent time with him and nothing had ever happened to them.

Although I was subpoenaed as a witness to court, I was never called to testify as a witness for either the Commonwealth or Mr. Mueller. I give this affidavit freely and voluntarily and to the best of my knowledge.

Deborah J. Pruitt

DEBORAH PRUITT

STATE OF VIRGINIA

County OF Chesterfield, to-wit:

The foregoing Affidavit was signed and sworn to before me this 28th day of April, 1994, by Deborah Pruitt.

Notary Public

My commission expires: 12-31-97

AFFIDAVIT

I, **GAIL TATUM**, do hereby certify, under oath, the following:

I was a friend of Everett Lee Mueller for two to three years until he was arrested for the murder of Charity Powers. When he was arrested, I could not believe that he was capable of what the police said that he did, because he was always so helpful to me and my family. He would always be there to fix it when something went wrong. I could depend on him at all times. He was always a fine person and a gentleman with me. I never felt threatened by him nor did he give me any reason to be.

I have two sons. At that time, they were 7 and 13 years old. I left them with Everett sometimes when I was either at work or had to go out on an errand. They went on outings with him and spent the night with him on several occasions. I never felt that their safety would be at issue with Everett. They got along fine with him.

I spoke only at the trial with Everett's trial attorneys. They did not contact me before the trial, but I was subpoenaed.

I give this affidavit freely and voluntarily.

Gail Tatum

GAIL TATUM

Witness by Cecil L. Hunt
Central Virginia Inv. Svc.

STATE OF VIRGINIA

_____ OF _____, to-wit:

The foregoing Affidavit was acknowledged before me this ___

certification.

Q How many cases have you had occasion to work on?

A Approximately 500 or so.

Q Have you testified in court before?

A Yes, I have.

Q As an expert witness in your field?

A Yes, sir.

Q In connection with the Charity Powers' case, did you receive some evidence to examine?

A Yes, sir, I did.

Q Did some of that evidence consist of a hair fiber from the rectum area of the deceased, Charity Powers?

A Yes.

Q Did you also receive hair samples, other hair samples from Charity Powers that were known to be Charity Powers' hair?

A Yes, I did.

Q Did you receive hair samples that were known to be collected from Mr. Mueller?

A Yes, I did.

Q What did your evaluation of that evidence as to the hair found in the rectum show?

A That hair was not consistent with coming from either the individual or Mr. Mueller.

Q Did you receive hair samples from Mr. Mueller from various parts of his body?

A Yes.

Q Did you, can you tell the Court what hair samples were collected from Mr. Mueller?

A Head samples, chest hair sample, pubic hair samples.

Q Did you receive samples on more than one occasion?

A Yes, sir, on two occasions.

Q Isn't it correct that when you didn't get a match the first time, that you requested additional samples be provided?

A Yes.

Q And those were provided?

A Yes.

Q And again, no match was found between that hair and any of Mr. Mueller's hair?

A That's correct.

MR. COLLINS: Thank you, Mr. Fram. Answer any questions Mr. Von Schuch

might have.

CROSS-EXAMINATION

BY MR. VON SCHUCH:

Q Could you tell us whether that hair was a male hair or a female hair?

A No. I could not.

Q It could have been a female hair?

A Yes, it could have been.

Q Can you tell the ladies and gentlemen of the jury about hair transfer and how hair is transferred?

A Yes, hair is transferred in a large number of ways. The number one way is people coming in contact with each other, in addition, a person coming in contact with an object on which that hair has already been transferred. So, for example, hairs can transfer if you bump into somebody. Hairs can transfer if you sit in a chair that someone else sat in. In addition, other ways such as hairs being on an item of clothing, even as far as clothes in a washer can pick up hairs from other items of clothing on to them and have them

transfer. There are a large number of mechanisms, ways that hairs can transfer.

Q Is it possible that any hair found on an individual could have come from someone who they never had any contact with at all?

A Yes, it is.

MR. VON SCHUCH: Thank your. No further questions.

MR. COLLINS: I have no further questions.

THE COURT: You may stand down. May the witness be excused?

MR. COLLINS: Yes, sir.

MR. VON SCHUCH: Yes, sir.

WITNESS STOOD ASIDE

MR. COLLINS: The defense would rest, Your Honor.

THE COURT: Any rebuttal on behalf of the Commonwealth?

Virginians Say They Want An Alternative

Virginians' Attitudes Toward the Death Penalty

Politicians loudly support the death penalty because they believe it is popular -- and it's easier than finding more complex, effective solutions to crime. Independent statewide polls from 1989 and 1993-1999 asked this question to a broad sample of Virginians:

"Would you favor abolition of the death penalty if the alternative were a life sentence with no possibility of parole for 25 years, combined with a restitution program requiring the prisoner to work for money that would go to families of murder victims?"

The response: The 1989 poll from Virginia Commonwealth University and the 1993-1999 polls from the Center For Survey Research at Virginia Tech show that Virginians overwhelmingly prefer the alternative over the death penalty. (See 1997 poll results below). The figure is consistent with similar polls nationwide.

1999 Survey Results Once Again Show Virginians In Favor of Alternatives to the Death Penalty

For the 7th consecutive year survey results from the Quality of Life in Virginia Poll show that Virginians prefer an alternative to the death penalty. When surveyors asked 514 respondents whether they supported the death penalty, 74 % agreed. This is the lowest percentage that responded in favor of the death penalty in the 7 years. For the second consecutive year nearly 20% opposed the death penalty which is the highest recorded in the 7 years of polling..

But when respondents were asked their views if there were the alternative of Life, with no possibility of parole for a minimum of 25 years combined with restitution to the victims' family, 54.8% agreed with the alternative and 40.5 % disagreed.

"What this survey shows us is that once again, for the 7th consecutive year, Virginians prefer an alternative to the death penalty", said Henry Heller, director of Virginians for Alternatives to the Death Penalty. "If the public doesn't really want the death penalty why are a large majority of our legislators pushing it down our throats?"

1998 Poll Results

Results of the 1998 Poll are very encouraging. For the 6th consecutive year, Virginians support for the death penalty is cut by more than half when given the alternative of life with no possibility of parole for a minimum of 25 years combined with restitution to the victims' family. This year's results also show a continuing downward trend in support of the death penalty overall. 75.4% supported the death penalty in this year's poll. That is a decrease from 79.5% last from last year and 82.8% from the year before. Consequently, opposition to the death penalty has risen through the last 3 years. While 13.2% opposed the death penalty in 1996, and 17% opposed it last year, nearly 20% opposed it this year.

When given the alternative, 56.3% agreed with the alternative while 37.9% disagreed. This is consistent within a percentage point of results through the last 4 years.

Results based on 726 completed interviews with a margin of error +- 3.8%.

1997 Poll Results

The Center for Survey Research at Virginia Tech has released this year's (1997) results to their annual poll. Highlights of the questions pertaining to the death penalty are:

When asked the generic question of for or against, 79.5% supported the death penalty, compared to 82.8% last year. 17.1% opposed compared to 13.2% last year. While support for the alternative of Life, with no possibility of parole for a minimum of 25 years combined with restitution to the victims' families remained at 57%, support for the death penalty decreased from 40.3& to 38.2%.

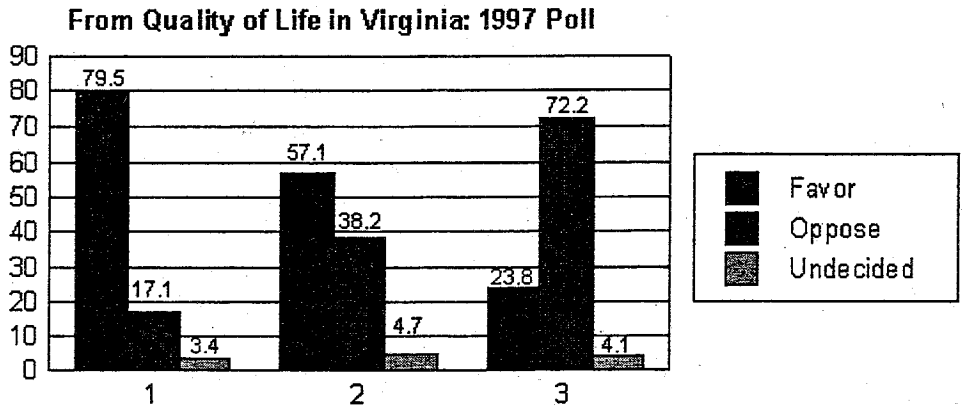
844 interviews were completed with a margin of error of +-3.4% at the 95% level of confidence.

From This Year's Quality of Life in Virginia Poll (1997)

Question #1) Do you support the death penalty for convicted murderers?

Question #2) Would you favor an alternative sentence of Life, with no possibility of parole for 25 years, plus restitution to the victims' families?

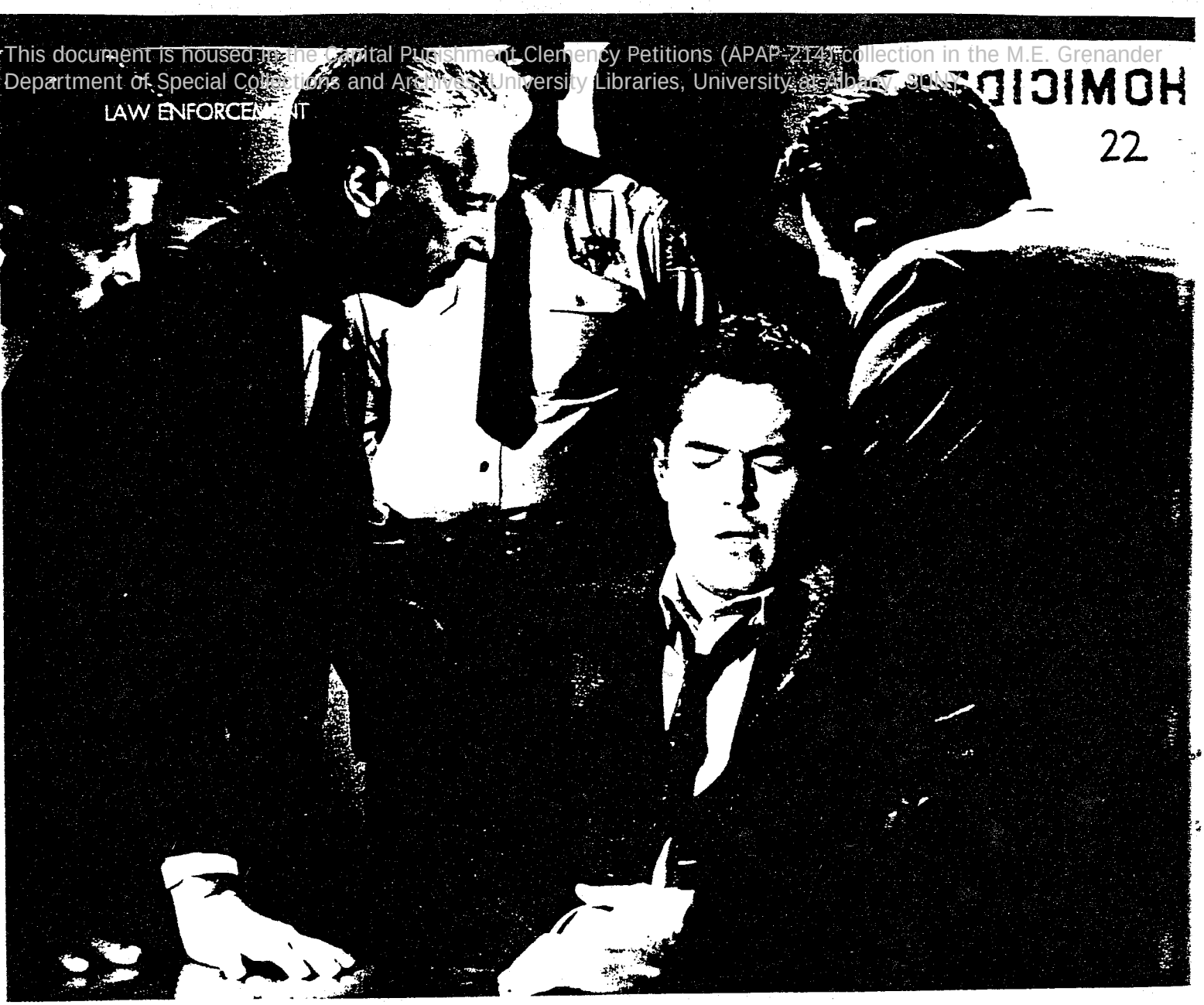
Question #3) Do you favor the Virginia law that does not allow any new evidence of innocence in a death penalty case to be presented more than 21 days after the trial?



This annual survey reaffirms that support for the death penalty dwindles to a minority when the public is given the alternative of life, with no possibility of parole for 25 years, plus restitution to the victims' families.

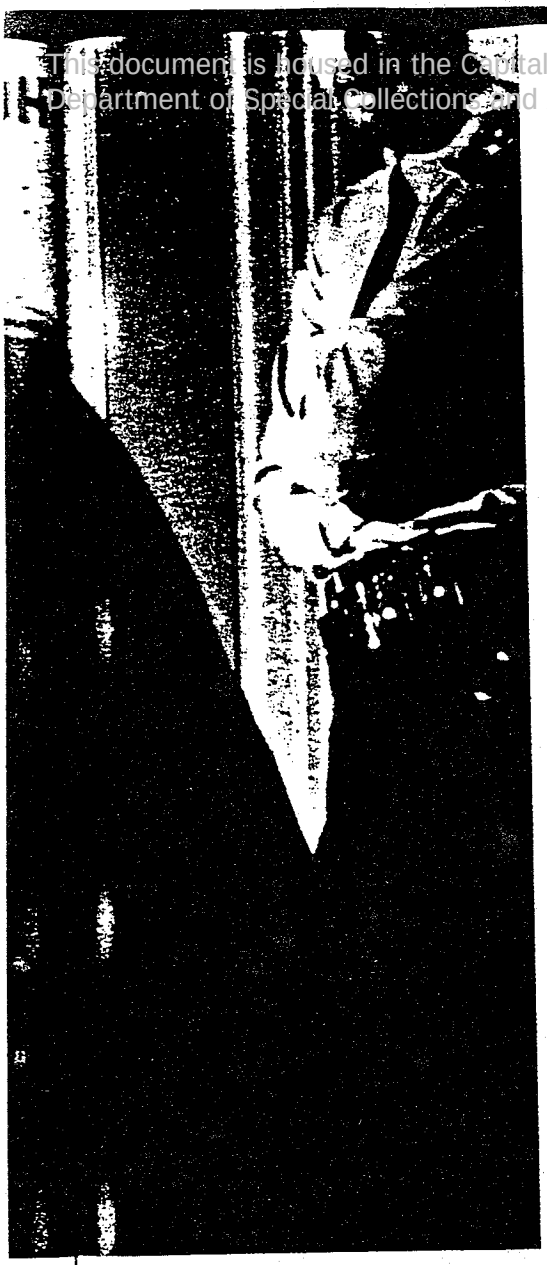
Virginians clearly oppose, by a 3 to 1 margin, the state law which prevents the accused from introducing new evidence of innocence 21 days after trial.

Source: Center for Survey Research at Virginia Tech, 1997
Based on 844 interviews - margin of error + 3.4%



UNTRUE CONFESSIONS

No one says that police have brought out the rubber hose, but some of their interrogation techniques are raising questions about why innocents confess to crimes they didn't commit.



MOVIE STILL ARCHIVES

BY MARK HANSEN

Two days after 12-year-old Stephanie Crowe was found stabbed to death on the bedroom floor of her Escondido, Calif., home, her 14-year-old brother, Michael, told police he had killed his younger sister as she slept.

Not long afterward, one of his friends and classmates told police he stood lookout the night of Jan. 20, 1998, while Michael and a third boy sneaked into Stephanie's bedroom and killed her.

Based entirely on the two boys' statements, police came up with the theory that Michael, jealous of the attention his sister was getting, enlisted his friends in a plot to kill her.

Mark Hansen is a reporter for the ABA Journal. *His e-mail address is markhansen@staff.abanet.org.*

The only thing missing in the investigation was the murder weapon. Police thought they found it when they came across the younger brother of one of the boys playing with a hunting knife. Later the older boy told police he had been given the knife after the killing and told to hide it.

With that, all three were arrested on charges of conspiracy and first-degree murder, and the case became an overnight media sensation: Three seemingly typical teenagers from apparently "good" homes whose shared fascination with knives and computer games had gotten way out of hand. One TV tabloid show even went so far as to describe the case as "The Devil Son Who Murdered the Angel Daughter."

The only problem with the whole scenario is that all three boys may be innocent. That became clear at the start of jury selection in a trial in January, when prosecutors disclosed that Stephanie's DNA had been found on a bloody sweatshirt worn by a 29-year-old vagrant seen knocking on doors and peering in windows the night the girl was murdered.

In late February, prosecutors dismissed all charges against the three, though they left open the possibility that they may be refiled later. By late May, the vagrant had not been charged in connection with Stephanie's death.

If the boys hadn't joined in a plot to kill Stephanie, the "confessions" by two of them, who both quickly recanted, raise troubling questions about human nature. But they also raise troubling questions about standard police interrogation tactics.

What kind of person would confess to a crime he or she didn't commit? And given the fact that some people apparently do, what makes them more likely than anybody else to confess falsely?

A person who reaches the breaking point just wants to escape, and confession is a quick escape.

The answer, experts say, is that while practically anybody can be made to confess to something he or she didn't do under the intense psychological pressures of a modern police interrogation, the young and the mentally impaired are more susceptible than most.

That's because the young and the mentally impaired tend to be more suggestible, more eager to please, more deferential toward people in positions of authority and less capable of rational decision-making than the average person.

The whole point of an interrogation, after all, is to extract a confession from somebody police suspect is probably guilty by leading that person to believe the evidence is overwhelming, his or her fate is certain, and the benefits from confessing outweigh the costs.

To do that, police interrogators employ a variety of psychological tactics designed to wear down a suspect and break the person's resistance—from appealing to the suspect's conscience to fabricating claims of evidence—all of which is perfectly legal and highly effective.

Hopeless Confusion

But the same tactics that work so well at getting the guilty to confess sometimes work just as well with the innocent, who tend to confess to a crime they didn't commit for one of two reasons. Either they come to the conclusion that their situation, while unjust, is hopeless and will only be improved by confessing, or their faith in their own memory is so badly shaken they come to believe they are guilty even though they don't remember it.

"The logic is really quite simple," says Richard J. Ofshe, a sociology professor at the University of California at Berkeley who studies the relationship between police interrogation tactics and false confessions. "If you put somebody in a situation he believes is hopeless and you give him a choice between two bad options, you can get him to say just about anything you want."

Ofshe recalls one case in which police induced a suspect to confess by telling him they had satellite photos of him committing the crime. In another case, he says, a quick-thinking detective invented a new type of bogus technology—called a neutron proton negligence intelligence test—to persuade a suspect that police had scientific proof he fired the gun used to kill two people.

Saul Kassin, a social psychologist at Williams College in Williamstown, Mass., who specializes in the dynamics of police interrogations, says average people tend to think they would never confess to a crime they didn't commit. But average people don't understand how stressful a police interrogation can be, he says.

"We all have our breaking point," Kassin notes. "When somebody reaches his or her breaking point, all he or she wants to do is escape. And the quickest means of escaping a police interrogation is to tell [interrogators] what they want to hear."

The Vulnerable Ones

The question, then, is not whether innocent people falsely confess, but how often.

E. Michael McCann, Milwaukee's district attorney, says any experienced prosecutor knows it can, and sometimes does, happen, particularly when the person confessing is a young child or someone with limited intellectual abilities.

But McCann says a false confession can usually be distinguished from a truthful one depending on whether it includes details about the crime only the offender would know. The danger, he says, is that the false confessor could inadvertently have been provided those details before or during interrogation.

"Even the most conscientious cop can make a mistake," McCann says. "That's why you have to be extremely careful in a situation like that, particularly if there is no independent, corroborating evidence to go along with the confession."

Some prosecutors admit there are false confessions and there are coerced confessions, but they say there is no such thing as a police-induced false confession.

"Innocent people do confess sometimes, which is a real problem for law enforcement," says Joshua Marquis, the Clatsop County, Ore., district attorney. "But the idea that somebody can be induced to falsely confess is ludicrous. It's the Twinkie defense of the 1990s. It's junk science at its worst."

Paul Cassell, a law professor at the University of Utah and a former federal prosecutor, studies the phenomenon of false confessions. He says the problem doesn't appear to be pandemic, as others have suggested, but confined to a very narrow and especially vulnerable subset of the population, namely the mentally impaired.

PAUL CASSELL People with mental limitations are at special risk of confessing, but it rarely results in wrongful conviction.

"The evidence suggests that those with mental limitations are at special risk of false confessions, but that it's actually quite rare and hardly ever results in a wrongful conviction," he says.

Yet Kassin says there have been enough documented instances of false confessions in capital cases, which tend to get far more scrutiny than noncapital cases, to suggest that the problem is a lot bigger than anyone would like to think.

Ofshe and a colleague, Richard A. Leo, a professor of criminology, law and society at the University of California at Irvine, claim to have identified more than 250 likely cases of false confessions in the post-*Miranda* era. Sixty of these have been documented in an article they wrote for the Winter 1998 issue of the *Journal of Criminal Law and Criminology*. 88 J. Crim. L. & Criminology 429.

In their article, Ofshe and Leo not only analyzed the evidence in the 60 cases they examined but grouped them into three categories: 34 of which they classify as proven false confessions, 18 as highly probable and eight as probable.

One case they classify as probable may even have resulted in an innocent man's execution, the authors contend. That is the case of Barry Lee Fairchild, who was executed in 1995 for being an accessory in the 1983 abduction, rape and murder of a Pulaski County, Ark., woman.

According to Ofshe and Leo, no independent evidence linked Fairchild to the crime. And Fairchild, a mentally handicapped man who had steadfastly maintained his innocence, insisted he had confessed to the crime only because he had been beaten and tortured by the local sheriff and one of his deputies. (Two former sheriffs now admit that beatings were a common interrogation tactic at the time of Fairchild's arrest.)

A case Ofshe says is sure to appear on the next list surfaced in Chicago last August, when the police announced they had solved the July 28 murder of an 11-year-old girl, Ryan Harris, with the arrest of two boys, ages 7 and 8, both of whom were said to have confessed to the crime. But charges against the boys were dropped after semen found on the victim's underwear was linked to Floyd Durr, an ex-convict who was already awaiting trial for sexually assaulting three young girls. In late April, Durr was charged with Harris' murder as well.

Interrogation Tactics

But the Stephanie Crowe case is a textbook example of how a police interrogation can go wrong, according to Ofshe, who was an expert for the defense, and others connected with the case.

Police thought from the beginning that the murder was an inside job because the house showed no sign of forced entry. And they quickly settled on Michael as the prime suspect. One of the first officers on the scene had described him as being "inappropriately bereaved."

Michael, who was immediately separated from his parents, was brought in to the station for ques-

ABAJ/DIRK DOUGLASS

tioning the day after Stephanie's murder. Over the course of the next five hours he adamantly and repeatedly insisted he had nothing to do with his sister's death. But he was brought back the next day and administered a controversial lie detector test known as a computerized voice stress analyzer—which he was told he had failed—and then grilled for another six hours.

Police used every trick in the book to get Michael to confess, according to a transcript of the interrogation, most of which was videotaped.

They told him there was a mountain of evidence against him. They made him write a note of apology to his dead sister for having killed her. They told him his parents hated him and never wanted to see him again because they had come to believe he had killed his sister. And they told him if he confessed he would receive psychological treatment instead of prison, where, he was reminded, he would have to shower with some unsavory characters.

At one point in the interrogation Michael began to wonder aloud whether he might have had something to do with his sister's death, though he still maintained he had no memory of it. Eventually, he came to accept the notion that he must be guilty.

"I completely blocked myself out," he said near the end of the session. "And I wouldn't even know that I did it if she wasn't dead. It just as easily could have been a dream. I can't remember."

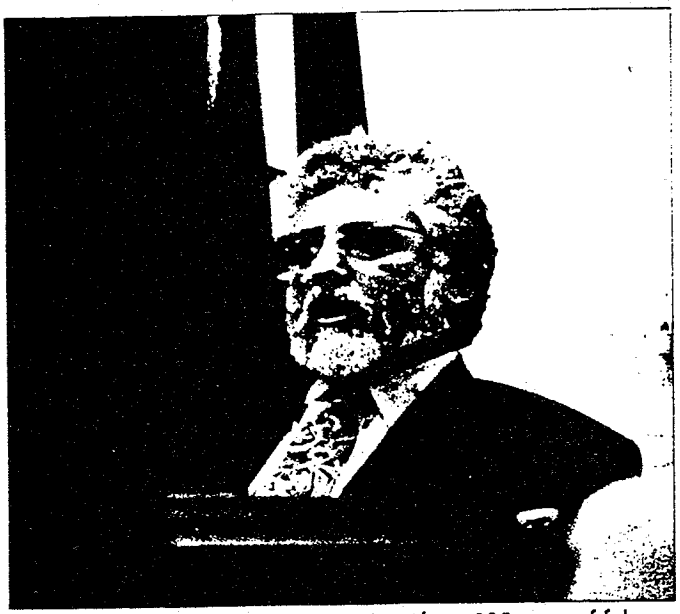
After Michael's confession, police repeated the same process with Joshua Treadway, the 14-year-old friend who supposedly stood lookout. After 11 hours of questioning, he not only confessed but implicated 15-year-old Aaron Houser.

"You'd have to know Josh to understand why," says Mary Ellen Attridge, Treadway's public defender. "He's very naive and very gullible. There's not a streetwise bone in his body."

Meanwhile, Richard Raymond Tuite, the 29-year-old vagrant and a diagnosed schizophrenic with a lengthy arrest record who is now serving a three-year sentence for an unrelated burglary, was questioned by police the day Stephanie's body was found.

But he was quickly discounted as a possible suspect. And while the red sweatshirt Tuite was wearing during questioning was confiscated, it wasn't until late last year, when Attridge spotted what appeared to be blood stains on one sleeve, that it was tested for DNA.

The Crowe family has already filed a civil rights suit against the Escondido police and the San Diego County district attorney's office. And the Treadway and Houser families are said to be contemplating similar legal action.



RICHARD OFSHE An expert witness in at least 125 cases of false confession, he says something must be done to reduce them.

ARKANSAS DEMOCRAT GAZETTE/RICK McFARLAND

"It's like one long nightmare," says Stephen Crowe, Michael and Stephanie's father, who bitterly accuses police and prosecutors of trying to put away three innocent boys to save their own behinds. "I don't know how they sleep at night."

Ofshe, who estimates that he has appeared as an expert witness in more than 125 false-confession cases, admits that his view of police interrogation tactics may be skewed by his experience with the practice. But he says the evidence he and others have amassed should persuade any fair-minded person that something needs to be done to reduce the likelihood of police-induced false confessions.

A requirement that all interrogations be recorded, which is now the rule in only two states—Alaska and Minnesota—would help, he and other experts say.

What the Justice System Can Do

But the real solution, they argue, would be to give courts authority to evaluate the reliability of a confession by comparing a suspect's account of the crime with the known facts. If the substance of the confession conformed closely with the facts, it would be admitted; if not, the confession would be suppressed.

But Cassell of the University of Utah isn't convinced that false confessions are as serious a problem as Ofshe and others suggest. Cassell doesn't believe giving the courts authority to scrutinize confessions is a good idea. The consequence, he suggests, would be suppression of more truthful confessions from the guilty.

Cassell says that his examination of the facts in nine of the 29 cases in which Ofshe and Leo claim a false confession may have led to the wrongful conviction of an innocent person shows that all nine confessors were probably guilty.

In the Fairchild rape and murder case, for example, Ofshe and Leo claim there was no independent evidence connecting the defendant to the crime. But Cassell says he found that Fairchild took police on a tour of the crime scene after confessing, and that a watch recovered from his sister, which Fairchild claimed to have bought in a pool hall, was identical to the victim's missing watch.

In eight of the nine cases he examined, Cassell says, the defendant appeared to be mentally retarded or suffering from serious mental problems.

The only solution, he says, is to videotape all interrogations and do away with the *Miranda* warning, which he says does nothing to protect the innocent and only makes it tougher to get truthful confessions from the guilty.

In the meantime, the innocent may have only their willpower to rely on. ■

FALSE CONFESSIONS BY ADULTS

www.religiontolerance.org /false_co.htm

The use by police of bright lights, rubber hoses and other physical methods of extracting confessions was once common in North America. However, court decisions rendering such confessions inadmissible have led to the abandonment of such techniques. Trial judges have even rejected confessions that were obtained though threats of lengthy sentences or promises of short sentences. Police now generally use psychological pressures, which may well be more effective.

Some modern methods include (1):

1. feigned sympathy and friendship,
2. appeals to God and religion,
3. blaming the victim or an accomplice
4. placing the suspect in a sound-proof, starkly furnished room
5. approaching the suspect too closely for comfort
6. overstating (or understating) the serious of the offense and the magnitude of the charges
7. presentation of exaggerated claims about the evidence
8. claiming falsely that another person has already confessed and implicated the suspect
9. other forms of trickery and deception.
10. wearing a person down by a very long interview session

The results is that some individuals confess to crimes that they did not do. Sometimes they even grow to believe that they are guilty.

Some police departments use a 1985 book, *Criminal Interrogation and Confessions* as a reference. It recommends isolation of the suspect, and involving the suspect in possible crime scenarios. *"An innocent person will remain steadfast in denying guilt."*

Saul M. Kassin is a leading researcher into false confessions. He divides them into three categories:

1. voluntary, involving no external pressure
2. "coerced-compliant" in which the person realizes that they are not guilty but confesses to the crime to receive a promised reward or avoid an adverse penalty
3. "coerced-internalized" in which an innocent suspect is induced to believe that they are guilty.

Police and courts often doubt that the second two cases actually exist.

Lab Experiment

Dr. Kassin and his student Catherine L. Kiechel designed a (1,3) lab experiment that demonstrates how innocent people can be led to a false confession, and that some may even become convinced that they are guilty. In the study, college students were asked to type letters on a keyboard as they were pronounced by a researcher. Some researchers read out the letters quickly (67 per minute); others slowly (47 per minute). The subjects were warned to not touch the ALT key, because a bug in the testing program would cause the computer to crash and lose all of the data. One minute into the test, the computer was manually caused to crash. In half the tests, the researcher said that they had actually seen the subject depressing the ALT key. At first, the subjects correctly denied hitting the key. The researcher then hand-wrote a confession and asked the subjects to sign it. The penalty would be an angry telephone call to the subject by Dr. Kassin. 100% of the subjects who had been typing the letters quickly and had been told by the researcher that they had been observed hitting the ALT key signed the confession; 65% of them believed themselves guilty; 35% even confabulated non-existent details in order to fit their belief. Overall, 69% signed the note and 28% believed that they were actually guilty.

Suspects who are Developmentally Handicapped

Richard Ofshe, a sociologist at the *University of California, Berkeley* has researched the effects of interrogation techniques. He said *"Mentally retarded people get through life by being accommodating whenever there is a disagreement. They've learned that they are often wrong; for them, agreeing is a way of surviving."* Obtaining a confession from such people *"is like taking candy from a baby."* Florida lawyer Delores Norley has trained police in 30 states to handle interviews of developmentally handicapped suspects. She says that they often have *"an excessive desire to please...This is especially true with authority figures."* She and her colleagues are currently aware of some 100 cases of possibly false confessions by impaired defendants.

Some Examples of Apparently False Confessions

- Perhaps the most famous recent case is that of Paul Ingram, a police officer from Olympia, WA. He was subjected to:
  - 23 interrogations over five months
  - hypnotism
  - coertion by his church minister to confess
  - provided with graphic crime details
  - influenced by a police psychologist who told him that sex offenders often repress memories of their crimes

  He eventually confessed to sexual assault of his two daughters, as well as killing infants in Satanic rituals. No hard evidence was ever produced; some evidence proved that some of the accusations were false. The case became

Satanic Ritual Abuse in the US. Dr. Ofshe told him that his children had disclosed that he had forced them to engage in sexual activities with each other. The statement was false; the scenario was invented by Dr. Ofshe as a test, and confirmed by the children to have not happened. Within days, Ingram generated false memories of the non-existent event and wrote out a confession. One unusual factor that facilitated Ingram's confession was his religious belief that Satan can cause a person to perform horrendous acts and then destroy their memory of the events. Ingram later came to the realization that his memories were false, and attempted to change his plea to not-guilty. This was denied; he received a 20 year jail sentence and is currently imprisoned for crimes that he did not commit and which probably never happened.

- In 1979, Girvies Davis, aged 20, confessed to 11 crimes, including the murder of an 89 year old man in Belleville, IL. Davis was an alcoholic with a childhood history of brain damage and suicide attempts. During his teenage years, he was diagnosed with *"organic brain dysfunction,"* which doctors believe was induced by a bicycle accident when he was 10 years of age. They believe that he falls within the *"borderline range of intelligence."* There was absolutely no evidence linking him to the murder, other than the confession. Police say that the confession was freely given; Davis says that it was coerced. He was executed by the State of Illinois on 1995-MAY-18.
- The confession of Jessie Misskelley, Jr. who was convicted of participating in the sex-murders of three boys in West Memphis AR in 1993, may well be false. He was 17 years old at the time of the confession, and has an IQ of 72 (vs. a normal value of 100). Although a polygraph (lie detector) test indicated his innocence, he was interrogated for over 5 hours. He retracted his confession afterwards, claiming that he had caved in under police pressure. He pleaded not-guilty at trial. An expert testified at the trial that Jessie was a prime candidate for a false confession, because of his young age and low IQ.

The Arkansas Supreme Court, in its ruling in this Memphis case, (4) outlined some of its criteria for determining the accuracy of the confession:

- the "voluntariness" is judged on the basis of many factors, including: *"the age, education and intelligence of the accused, the advice or lack of advice on constitutional rights, the length of detention, the repeated or prolonged nature of questioning, or the use of mental or physical punishment."*
- Confessions while in custody are assumed to be involuntary, *and the burden is on the State to show that the confession was voluntarily made."*
- *"A confession obtained through a false promise of reward or leniency is invalid"*
- *"youth alone [is] not sufficient to exclude confession."*
- A *"low intelligence quotient alone will not render confession involuntary."*
- *"Between the first time appellant was advised of his rights and the time he gave his first statement, a period of just over four hours elapsed, which was not undue.."*

statement."

- *"...where a person under age eighteen is charged as an adult in circuit court, failure to obtain a parent's signature on a waiver form does not render a confession inadmissible."*

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Return to the OCRT home page; or the "Not So Spiritual" page

NATIONAL CONFERENCE ON WRONGFUL CONVICTIONS AND THE DEATH PENALTY – The Wrongly Convicted

November 13-15, 1998 Northwestern University Legal Clinic Chicago, Illinois

THE WRONGLY CONVICTED

The following brief synopses are intended to provide a general flavor of the nature of each of the 75 cases since 1972 in which people have been exonerated after having once been sentenced to death. Each of these cases deserves book-length treatment, and we apologize in advance for any material omission or errors in the facts as set forth here.

Source: http://www.ncwcdp.com/wrongly.html
Note: only the cases involving false confessions are listed below

David Keaton
Florida
Convicted 1971; Released 1973
Mr. Keaton was sentenced to death after having been convicted of killing a police officer during an armed robbery. The case against him was built on a confession, which Mr. Keaton consistently maintained was a false confession that had been coerced out of him through threats, lies and beatings. In the aftermath of the trial, a close friend of the slain police officer learned about some of the tactics that had been used to extract confessions in the case: one of the suspects had been beaten bloody and the police had slammed a door so hard on another suspect's that the toe was severed. Moreover, it emerged that the police had repeatedly shown pictures of the suspects to the witnesses in order to prompt an identification. When the trial judge learned of the attempts by police and prosecutors to suppress exculpatory evidence, he ordered that all evidence be brought to directly to court. Based on a review of the real facts, the judge dismissed all charges against Mr. Keaton.

Wilbert Lee
Florida
Convicted 1963; Released 1975
Mr. Lee, together with Freddie Pitts, was sentenced to death after having been convicted of killing a gas station attendant. The case against them was built on the police claim that these two African-American men, arrested in a segregated town, had confessed to the murder. In fact, it turned out, these confessions had been mercilessly beaten out of the two men. With just a few weeks of their sentencing (which took the all-white jury twenty minutes to decide), the local sheriff learned that another man who had been arrested for another gas station robbery had confessed to the murder for which Mr. Lee and Mr. Pitts had been sentenced to death. The Sheriff responded to this information by declaring that he wanted nothing to do with any other person's confession because "I already got two niggers waiting for the chair in Raiford for those murders." A polygraph examiner who had heard this other man confess took the matter to the press, and once these facts emerged a new trial was ordered. During that second trial, however, the jury again convicted Mr. Lee and Mr. Pitts. Ultimately, Florida's governor investigated the case and uncovered the truth. Both Mr. Lee and Mr. Pitts were pardoned on the

grounds of innocence. In 1998, after many years of struggle, they were afforded some compensation from the State of Florida for the damage they suffered.

Robert Lee Miller, Jr.
Oklahoma
Convicted 1988; Released 1998
Mr. Miller was convicted of the rape and murder of two elderly women based on a supposed confession, even though the supposed confession was inconsistent with over 100 facts of the cases. After seven years on death , DNA testing excluded Mr. Miller as the person who raped the victims, and his conviction was overturned. Three years later, the prosecution announced that it would not be pursuing any charges against Mr. Miller, who had passed a lie detector test denying any involvement in the crime.

James Richardson
Florida
Convicted 1968; Released 1989
Mr. Richardson was sentenced to death after being convicted of murdering seven of his children by poisoning him with the pesticide parathion. The prosecution built its case around the claim that Mr. Richardson, a poor migrant farm worker, had purchased life insurance policies for the children the very evening before their deaths. Police officers testified, moreover, that they found a sack of parthion in Mr. Richardson's shed. In addition, the prosecution presented the testimony of two jailhouse informants who claimed to have heard Mr. Richardson incriminate himself. After Mr. Richardson was convicted and sentenced, a new group of lawyers began to investigate the case. This investigation revealed that Mr. Richardson had never, in fact, bought any life insurance for his children. Moreover, the police had not found the bag of parthion when they exhaustively searched the shed during their crime scene investigation, but the police had later received a tip from a woman named Bessie Reese that the parthion was there. It would later be shown that Bessie Reese, who was babysitting the children when they died, had been convicted herself of killing her husband, who had dies of poison-like symptoms. Reese was upset at Mr. Richardson at the time of the children's deaths because her third husband had just left her for Mr. Richardson's cousin. Years after the crime, while Reese was living in a nursing home, she confessed to killing the children, although the prosecution discounted her confession due to her senility. In 1989, some 21 years after Mr. Richardson was convicted, then-Dade County District Attorney Janet Reno was named special prosecutor to examine the case. Based on her conclusions that a grave injustice had been done to Mr. Richardson, he was released and charges were dropped.

Johnny Ross
Louisiana
Convicted 1975, Released 1981
Mr. Ross was sentenced to death for a rape he was alleged to have committed when he was 16 years old. The trial--which lasted but three hours--consisted of the prosecution's claim that Mr. Ross had signed a confession after the victim had identified him. Mr. Ross, by contrast, consistently maintained that he had signed a blank piece of paper after he was beaten by his interrogators. On appeal, the conviction was upheld, although the death sentence was vacated and Mr. Ross was sentenced to a term of years. Several years later, tests revealed that the blood type of the rapist positively did not match Mr. Ross's blood type. Based on this new

evidence, the New Orleans District Attorney agreed to drop charges and have Mr. Ross released from prison.

The following cases are taken from the Death Penalty Information Center's website at www.essential.org/dpic

Ronald Jones Illinois Conviction 1989 Charges Dropped 1999

Jones was a homeless man when he was convicted of the rape and murder of a Chicago woman. After a lengthy interrogation in which Jones says he was beaten by police, he signed a confession. Prosecutors at his conviction described him as a "cold brutal rapist" who "should never see the light of day." (NY Times 5/19/99). Recent DNA testing revealed that Jones was not the rapist and there was no evidence of any accomplice to the murder. The Cook County state's attorney filed a motion asking the Illinois Supreme Court to vacate Jones's conviction in 1997. In May, 1999, the state dropped all charges against Jones. He is being temporarily detained pending another matter in a different state.

Henry Lee Lucas Texas Conviction 1984 Commuted to Life 1998

Lucas originally confessed to the murder of an unnamed hitchhiker in Texas in 1979. He also confessed to hundreds of other murders including the murder of Jimmy Hoffa and his fourth grade teacher, who is still alive. Most of his confessions have proved false. Two investigations by successive Attorneys General in Texas have concluded that he almost certainly did not commit the murder for which he faced an execution date of June 30, 1998. Gov. George Bush commuted his sentence to life upon recommendation of the Board of Pardons and Paroles in June, 1998.

Leo Jones Florida Convicted 1981 Executed 1998

Jones was convicted of murdering a police officer in Jacksonville, Florida. Jones signed a confession after several hours of police interrogation, but he later claimed the confession was coerced. In the mid-1980s, the policeman who arrested Jones and the detective who took his confession were forced out of uniform for ethical violations. The policeman was later identified by a fellow officer as an "enforcer" who had used torture. Many witnesses came forward pointing to another suspect in the case.

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*429 THE CONSEQUENCES OF FALSE CONFESSIONS: DEPRIVATIONS OF LIBERTY AND MISCARRIAGES OF JUSTICE IN THE AGE OF PSYCHOLOGICAL INTERROGATION [FNa1]

Richard A. Leo [FNaa1]
Richard J. Ofshe [FNaaa1]

I. Introduction

A. DEFINING THE PROBLEM

Because a confession is universally treated as damning and compelling evidence of guilt, [FN1] it is likely to dominate all other case evidence and lead a trier of fact to convict the defendant. [FN2] A false confession is therefore an exceptionally dangerous piece of evidence to put before anyone adjudicating a case. In a criminal justice system whose formal rules are designed to minimize the frequency of unwarranted arrest, unjustified prosecution, and wrongful conviction, police-induced false confessions rank amongst the most fateful of all official errors.

***430** As many investigators have recognized, the problems caused by police- induced false confessions are significant, recurrent, and deeply troubling. [FN3] Police elicit false confessions so frequently that social science researchers, legal scholars, and journalists have discovered and documented numerous case examples in this decade alone. [FN4]

***431** Yet no one knows precisely how often false confessions occur in the United States, how frequently false confessions lead to wrongful convictions, or how much personal and social harm false confessions cause. This is because: (1) no organization collects statistics on the annual number of interrogations and confessions or evaluates the reliability of confession statements; (2) most interrogations leading to disputed confessions are not recorded; and (3) the ground truth (what really happened) may remain in genuine dispute even after a

defendant has pled *432 guilty or been convicted. [FN5] These problems prevent researchers from defining a universe of confession cases, sampling a subset, and confidently determining the truth or falsity of each underlying confession.

Until these methodological obstacles are overcome, no one can authoritatively estimate the rate of police-induced false confessions or the annual number of wrongful convictions caused by false confessions. [FN6] The lack of such information also prevents researchers from estimating the full magnitude of personal and social harm that police-induced false confessions cause: the days and months innocent persons spend in pre-trial incarceration; the resources, time, and dollars wasted prosecuting and defending them; the months and years defendants languish in prison after wrongful conviction; and the additional crimes carried out by the true perpetrators.

Although it is presently not possible to estimate the magnitude of harm caused by false confessions, this article sheds light on another dark corner of the problem by addressing the following questions: What is the impact of demonstrably unreliable confession evidence on criminal justice officials? What are the consequences of false confessions on defendants as they move through the criminal justice system? And how much influence does a false confession alone exert on the decision-making of jurors?

B. FALSE CONFESSIONS AND THE ADMINISTRATION OF JUSTICE

Following Edwin Borchard's pioneering study of miscarriages of justice, [FN7] a series of investigators [FN8] have documented numerous cases of wrongful arrest and conviction of the innocent in the United States. [FN9] We continue the tradition of research *433 into errors in the criminal justice system by reporting a study of sixty cases of police-induced false confessions in the post-Miranda era, [FN10] and by analyzing the consequences of these *434 errors affecting defendants as they move through the criminal justice system. [FN11]

We suggest that confessions are regarded as the most damning and persuasive evidence of guilt simply because most suspects who confess are guilty, and because most confessions are corroborated by additional evidence. Under these conditions, however, it is impossible to isolate the effect of the defendant's "I did it" admission [FN12] on the decision-making of criminal justice officials and juries because the confession co-varies with inculpatory witness or physical evidence. The research reported here isolates the effect of a defendant's "I did it" statement on the decision-making of criminal justice officials and juries by studying only cases in which the defendant's confession is not supported by any physical or reliable inculpatory evidence. The research design thus allows measurement of the effect of an untrue admission when a detective, prosecutor, judge or jury is required to weigh the admission against evidence that would ordinarily establish the defendant's innocence.

***435** This article explores whether contemporary American psychological interrogation practices continue to induce false confessions like the third degree methods that preceded them. This article also analyzes how likely police-induced false confessions are to lead to the wrongful arrest, prosecution, conviction, and incarceration of the innocent. And this article examines with field data [FN13] whether confession evidence substantially biases a trier of fact even when the defendant's statement was elicited by coercive methods. [FN14] We explore this issue with cases in which the defendant's statement has not only been coerced but is also demonstrably unreliable, and in which other evidence proves or strongly supports the defendant's innocence.

Part II of this article discusses the selection and classification of the sixty disputed confession cases under study. [FN15] Part III describes the findings of our research. Part IV analyzes the deprivations of liberty and miscarriages of justice associated with the sixty cases described in this article. Finally, Part V discusses the import of this research and offers some concluding remarks.

II. Method

A. SELECTION AND CLASSIFICATION

Cases of disputed confessions were identified through multiple sources: electronic media database searches; directly from case files; [FN16] and from secondary sources. The sixty cases discussed ***436** below do not constitute a statistically adequate sample of false confession cases. Rather they were selected because they share a single characteristic: an individual was arrested primarily because police obtained an inculpatory statement that later turned out to be a proven, or highly likely, false confession.

Based on the information that we obtained and reviewed, all of the cases studied satisfy the following conditions: no physical or other significant and credible evidence indicated the suspect's guilt; [FN17] the state's evidence consisted of little or nothing more than the suspect's statement "I did it;" and the suspect's factual innocence was supported by a variable amount of evidence--often substantial and compelling--including exculpatory evidence from the suspect's post-admission narrative. [FN18] For every case included in this study, there was no credible evidence corroborating the defendant's "I did it" admission or supporting the conclusion that he was guilty. [FN19]

Based on the strength of the evidence indicating a defendant's probable innocence, each case was classified into one of three categories: proven false confession; highly probable false confession; or probable false confession.

For the thirty-four cases classified as proven false confessions, the confessor's innocence was established by at least one dispositive piece of independent evidence. [FN20] For example, a defendant's confession was classified as proven false if the murder victim turned up alive, the true perpetrator was caught and *437 proven guilty, or scientific evidence exonerated the defendant. Not only was the confessor definitively excluded by dispositive evidence, but the confession statement itself also lacked internal indicia of reliability. Any disputed confession case that fell short of this standard--no matter how questionable the confession and no matter how much direct or circumstantial evidence indicated the suspect was innocent--was excluded from this category.

For the eighteen cases classified as highly probable false confessions, the evidence overwhelmingly indicated that the defendant's confession statement was false. [FN21] In these cases, no credible independent evidence supported the conclusion that the confession was true. Rather, the physical or other significant independent evidence very strongly supported the conclusion that the confession is false. In each of these cases, the confession lacked internal reliability. Thus, the defendant's statement is classified as a highly probable false confession because the evidence led to the conclusion that his innocence was established beyond a reasonable doubt.

For the eight cases classified as probable false confessions, [FN22] no physical or other significant credible evidence supported the conclusion that the defendant was guilty. There was evidence supporting the conclusion that the confession was false, and the confession lacked internal indicia of reliability. Although the evidence of innocence in these cases was neither conclusive nor overwhelming, there were strong reasons--based on independent evidence--to believe that the confession was false. Cases are included in this category if the preponderance of the evidence indicated that the person who confessed was innocent.

We recognize that for any case that could not be classified as a proven false confession, there is a possibility that our classification of the case might be in error. Despite strong evidence supporting the conclusion that the confession is false, it remains theoretically possible that one or more of the defendants we classify as false confessors may have committed the crime. Nevertheless, we believe that the disputed confessions discussed in *438 this article would be judged false by an overwhelming majority of neutral observers with access to the evidence we reviewed. [FN23]

B. POST-ADMISSION NARRATIVE ANALYSIS

When evaluating the likelihood that a person committed a crime, investigators should first consider witness statements, biological evidence linking the suspect to the crime (fingerprint, DNA, hair, etc.), and alibi evidence. The

identification by an eyewitness, the identification of the person as the donor of one or more type of biological material found at the crime scene, and the lack of an alibi all point to guilt. By contrast, an opposite pattern of evidence (e.g., no match with eyewitness descriptions, exculpating biological evidence, and the existence of an unimpeachable alibi) all support innocence.

In addition to these traditional sources of evidence, the defendant's post- admission narrative of the crime may provide helpful evidence of guilt or innocence, assuming contamination [FN24] has been eliminated. If a suspect has made an "I did it" admission and given a post-admission narrative of a crime, the fit--or lack thereof--between the contents of the narrative and the crime scene facts provides evidence of guilt or innocence. Evaluation of the fit can reveal that a suspect possesses the sort of accurate, personal knowledge of the specifics of the crime that the perpetrator would be expected to have, or it can demonstrate the suspect's ignorance of the crime because his answers about the crime scene evidence are grossly incorrect. [FN25]

The fit between the specifics of a confession and the crime facts determines whether the "I did it" admission should be judged as reliable or unreliable evidence. There are at least three indicia of reliability that can be evaluated to reach a conclusion about the trustworthiness of a confession. Does the statement: (1) lead to the discovery of evidence unknown to the police? (e.g., location of a missing weapon that can be proven to have been used in the crime, location of missing loot that can ***439** be proven to have been taken from the crime scene, etc.); (2) include identification of highly unusual elements of the crime that have not been made public? (e.g., an unlikely method of killing, mutilation of a certain type, use of a particular device to silence the victim, etc.); or (3) include an accurate description of the mundane details of the crime scene which are not easily guessed and have not been reported publicly? (e.g., how the victim was clothed, disarray of certain furniture pieces, presence or absence of particular objects at the crime scene, etc.).

If, for example, a suspect's post-admission narrative either leads the police to missing evidence, or reveals that the suspect knew precisely how the victim was bound and mutilated, or which window was jimmied open with what sort of unlikely tool, then the suspect possesses actual knowledge of the crime that would reasonably be expected of the perpetrator. Therefore, the suspect's confession should be deemed reliable. If, on the other hand, the suspect is unable to provide police with accurate information revealing evidence not already known to them (e.g., where to locate the murder weapon or the loot), is demonstrably wrong about the method of killing, or is demonstrably inaccurate about the specifics of the crime scene, then the statement should be judged unreliable and, if anything, treated as evidence of innocence. Therefore, the statement should be seen as lacking

evidence of actual knowledge--something to be expected of a false confessor who has not been contaminated by the police or due to leakage of information into the community.

When the police elicit a post-admission narrative from a suspect, they typically seek only information about major crime elements (e.g., location of the missing weapon, type of mutilation, etc.). However, a suspect's report about the mundane (but unique or improbable) details of the crime and the crime scene is of great value in establishing a suspect's guilt or innocence. [FN26] This is true, in part, because the suspect's knowledge of ***440** mundane details is less likely to be the result of contamination by the police. Mundane details are less likely to have been mentioned during off-tape conversations or during the pre-admission phase of an unrecorded interrogation.

A suspect's post-admission narrative need not demonstrate indicia of reliability in each category for it to reveal personal knowledge of the crime. It is generally accepted that one or more aspects of a crime may be so heinous that a guilty party may refuse to state them even while admitting to other major components of the crime. For example, Richard Allen Davis, who admitted to kidnapping and killing a child, was not willing to admit that he also raped her. [FN27] Nevertheless, if a defendant has been properly and thoroughly debriefed, his personal knowledge of the crime should allow him to supply sufficiently detailed information to prove a confession's reliability by demonstrating his specific knowledge of what happened (e.g., the circumstances of the kidnapping, the child's clothing, the location of the killing ground, the description of the killing scene, etc.), even if he resists confessing to certain particularly heinous acts.

C. POLICE-INDUCED FALSE CONFESSION

Police-induced false confessions arise when a suspect's resistance to confession is broken down as a result of poor police practice, overzealousness, criminal misconduct and/or misdirected training. [FN28] Interrogators sometimes become so committed to closing a case that they improperly use psychological interrogation techniques to coerce or persuade a suspect into giving a statement that allows the interrogator to make an arrest. Sometimes police become so certain of the suspect's guilt that they refuse to even- handedly evaluate new evidence or to consider the possibility that a suspect may be innocent, even when all the case evidence has been gathered and overwhelmingly demonstrates that the confession is false. Once a confession is obtained, investigation often ceases, and convicting the ***441** defendant becomes the only goal of both investigators and prosecutors. As the investigative process progresses, some interrogators, who overstepped procedural boundaries to obtain a false confession, engage in criminal conduct to cover up their procedural violations (e.g., coerce false witness statements, suborn perjured testimony from

Evidence Against Mueller

~~No PHYSICAL EVIDENCE~~
Confession
Crime Scene visit
Description of person and car at Hardee's

Problems with the Evidence

No tests of physical evidence to exonerate Mueller
Confession
- Inaccuracies - Manner of death (fits what police knew at time).
- Fits with innocent account - what he knew
- Fits profile of false confession - pp 15-17
- circumstances - pp 5-6

Evidence and Potential Evidence of Innocence
- No physical evidence - (Apparently, no tests done...)
- other suspects - prostitute cause
- hair - DNA -
- lineup -

No murder weapon
other cases - Deborah Pruitt

1. **Which police officers showed the eyewitnesses the photographs?**
2. **Which suspects' photographs were shown to the eyewitnesses?**
3. **Which suspects were selected by the eyewitnesses as the person they saw at the Hardee's on the night Charity Powers disappeared?**
4. **Whose hair was found in Charity Power's anal area?**
5. **Why not collect scientific evidence which would confirm Mueller's innocence?**
6. Who were the other persons in the neighborhood who drove cars similar to the one described as being at the Hardee's and where were these people on the night Charity Powers disappeared?

snitches, or perjure themselves at suppression hearings or at trial). Furthermore, some prosecutors who are determined to convict obstruct justice by withholding exculpatory evidence from the defense. [FN29]

443** American police are poorly trained about the dangers of interrogation and false confession. Rarely are police officers instructed in how to avoid eliciting confessions, how to understand what causes false confessions, or how to recognize the forms false confessions take or their distinguishing characteristics. [FN30] Instead, some interrogation manual writers and trainers persist in the unfounded belief that contemporary psychological methods will not cause the innocent to confess [FN31]--a fiction so thoroughly contradicted by all of the research on police444** interrogation [FN32] that it can be labeled a potentially deadly myth. This fiction perpetuates the commonly held belief that only torture can cause an innocent suspect to confess, and it allows some police to rationalize accepting coerced and demonstrably unreliable confession statements as true. [FN33]

D. FALSE CONFESSION CASES

The identification of the sixty cases examined and their classification into three categories of disputed confession cases (Proven, Highly Probable and Probable False Confessions) is reported below:

Table A1

First Category: Proven False Confessions (N =34)

Case ID	Confessor	Year	Source(s)
1	Anthony Atkinson	1990	Colwell; [FN34] Demoretchky [FN35]
2	Richard Bingham	1996	Associated Press [FN36]
3	Leo Bruce	1991	Kimball & Greenberg; [FN37] Parloff [FN38]
4	Lavale Burt	1985	Radelet et al.; [FN39] Warden [FN40]
5	Christopher Cole	1995	Smith [FN41]
6	Bradley Cox	1980	Huff et al. [FN42]
7	Billy Gene Davis	1990	Phillips [FN43]
8	Pedro Delvillar	1987	Feldman; [FN44] Pristin [FN45]

9	Ralph Jacobs	1991	Booher [FN46]
10	William Kelley	1990	Shellem [FN47]
11	Guy Lewis	1994	Perrusquia [FN48]
12	Steven Linscott	1980	Connors et al.; [FN49] Linscott [FN50]
13	Jose Martinez	1993	Granberry [FN51]
14	Christina Mason	1993	Rossmiller; [FN52] Rossmiller & Creno [FN53]
15	Robert Moore	1996	Herbert; [FN54] Dwyer [FN55]
16	Rick Nieskins	1995	Smith [FN56]
17	Mark Nunez	1991	Kimball & Greenberg; [FN57] Parloff [FN58]
18	Dante Parker	1991	Ofshe & Leo; [FN59] Kimball & Greenberg [FN60]
19	George Parker	1980	Bedau & Radelet; [FN61] Nathan [FN62]
20	Laverne Pavlinac	1991	Siegel [FN63]
21	George Peterson	1990	McMahon; [FN64] Kimball & Greenberg [FN65]
22	John Purvis	1983	Davis [FN66]
23	Paul Reggetz	1979	Yant; [FN67] Paxton [FN68]
24	Peter Reilly	1973	Connery; [FN69] Barthel [FN70]
25	Ivan Reliford	1986	UPI [FN71]
26	Melvin Reynolds	1979	Ganey; [FN72] Radelet et al. [FN73]
27	James Reyos	1982	Carroll; [FN74] Swindle [FN75]
28	Martin Salazar	1996	Ofshe & Leo; [FN76] Folks [FN77]
29	Donald Shoup	1996	Holland; [FN78] Murphy [FN79]
30	Christopher Smith	1991	Booher [FN80]
31	Ruben Trujillo	1987	Feldman; [FN81] Pristin [FN82]

32	David Vasquez	1984	Mones; [FN83] Douglas [FN84]
33	Earl Washington	1983	White; [FN85] Hourihan [FN86]
34	Johnny Lee Wilson	1986	Ofshe & Leo; [FN87] Shapiro [FN88]

***447** Table A2

Second Category: Highly Probable False Confessions (N =18)

Case Identification	Confessor	Year	Sources
35	George Abney	1986	Cooper; [FN89] Ofshe [FN90]
36	Melvin Beamon	1988	Radelet et al. [FN91]
37	William Boyd	1983	Drell [FN92]
38	Betty Burns	1989	Siegel [FN93]
39	Jack Carmen	1975	Radelet et al.; [FN94] Franken [FN95]
40	Edgar Garrett	1995	Ofshe & Leo; [FN96] BNA Crim. Prac. Man. [FN97]
41	Gary Gauger	1993	Held; [FN98] Quintanilla; [FN99] Mount [FN100]
42	Joseph Giarratano	1979	Arney; [FN101] McCarthy [FN102]
43	Paul Ingram	1988	Ofshe; [FN103] Wright [FN104]
44	John Knapp	1973	Parloff; [FN105] Radelet et al. [FN106]
45	Richard Lapointe	1989	Connery; [FN107] Perske [FN108]
46	Jessie	1993	Ofshe; [FN109] Chase [FN

110]

Miskelley

47 & Aronson	Bradley Page	1984	Page; [FN111] Pratkanis
48] Martin &	Juan Rivera	1993	[FN112] Brandon & Martin; [FN113
49 he [FN116]	Tom Sawyer	1986	Parsons [FN114] Ofshe & Leo; [FN115] Ofs
50 7] BNA Crim.	Martin Tankleff	1988	Writ of Hab. Corp; [FN11
51 FN120]	Douglas Warney	1996	Prac. Man. [FN118] Herbert; [FN119] Dwyer [
52 FN122]	Dale Zamarrippa	1993	Thomas; [FN121] Manson [

***449** Table A3

Third Category: Probable False Confessions (N =8)

Case Identification	Confessor	Year	Sources
53 [FN124]	Luis Benavidez	1992	Lozano; [FN123] Bidwell
54 [FN126]	Jane Bolding	1985	Ginsburg; [FN125] Patch
55 [FN128]	Barry Fairchild	1983	ABC News; [FN127] Perske
56	Tammy Harrison	1979	Hart [FN129]
57	Charles Lawson	1991	Houtz [FN130]
58	Linda Stangel	1995	Freedlander; [FN131]
59	Cyril Walton	1991	Darby [FN132]
60 ; [FN134]	Delbert Ward	1990	Perske; [FN133] CBS News

III. Findings

A. PROVEN FALSE CONFESSIONS

There are four sub-types of proven false confessions: the suspect confessed to a crime that did not happen; the evidence objectively demonstrates that the defendant could not possibly have committed the crime; the true perpetrator was identified and his guilt established; or the defendant was exonerated by scientific evidence.

1. The Suspect Confessed to a Crime That Did Not Happen

Police interrogators may extract a confession to a crime that did not, in fact, occur. In Austin, Texas in 1990, after twice failing ***450** a polygraph test, Billy Gene Davis confessed that he killed his ex-girlfriend; she subsequently turned up alive in Tucson, Arizona. [FN136] Even if the underlying event did in fact occur, police may induce a confession to a non- existent crime. In 1993, Phoenix, Arizona police elicited a confession from Christina Mason to killing her three-month-old infant by letting another woman inject the child with heroin and cocaine to prevent it from crying. [FN137] The autopsy, however, revealed no drugs other than Tylenol in the baby's body, and the medical examiner concluded that the likely cause of death was pneumonia or a viral infection. [FN138]

2. The Defendant Could Not Have Committed The Crime

Police may extract a confession from an individual who could not have committed the crime. In 1987, Los Angeles, California police interrogators elicited false confessions from two suspects--Ruben Trujillo and Pedro Delvillar--to the same double murder and robbery. [FN139] Yet both men were in police custody (one in a county jail and the other at a California Youth Authority facility) for other crimes when the murders occurred. [FN140] In another example of flawed interrogation, police in Laguna Beach, California obtained a confession to arson from Jose Soto Martinez in 1993, but prosecutors dismissed charges when they discovered that Martinez had been in a Mexican prison at the time of the arson. [FN141] Similarly, in 1986 Montana police elicited a false confession to a sexually motivated killing from Ivan Reliford, but later discovered that Reliford was in custody when the crime was committed. [FN142]

The cases in this study reveal many reasons why someone could not have committed the crime to which he confessed. In 1973, Connecticut State Police elicited a confession from Peter Reilly to killing and mutilating his mother. [FN143] After a jury trial, conviction, and then reversal by an appellate court, the prosecutor ***451** handling the second trial discovered that the

former prosecutor's files contained documents showing that Reilly arrived at the scene of the murder only minutes before the police and thus could not have committed the crime. [FN144]

In 1982, James Harry Reyos confessed in New Mexico that he had killed a Catholic priest a year earlier. [FN145] The victim died between 7 p.m. and midnight in Odessa, Texas, [FN146] but gas receipts and an eyewitness established that Reyos was in Roswell, New Mexico (200 miles away) at 8 p.m. that evening, [FN147] and a speeding ticket proved that he was also in Roswell shortly after midnight. [FN148] To have committed the murder, Reyos would have had to drive 200 miles to the murder site, kill the priest in no more than one minute and speed 215 miles back to where he received the speeding ticket--in four hours (averaging well over 100 miles an hour on narrow, country roads). Eventually the state's attorney handling Reyos' appeal conceded that Reyos could not have committed the crime. [FN149]

In 1995, in Portland, Oregon, police extracted false confessions from Rick Nieskins and Christopher Cole to the 1991 murder of John Sewell. [FN150] Both men were charged with homicide, and both spent thirteen months in jail awaiting trial--even though two other men had been convicted of Sewell's murder in 1991 and had always maintained that they acted alone. [FN151] Prosecutors eventually dropped charges against Nieskins after records showed that he could not have committed the crime because he was at a homeless shelter in Seattle at the time of the killing. [FN152] Once they acknowledged Nieskins' false confession, prosecutors admitted that Cole also could not have been involved in the crime and dropped charges against him. [FN153]

***452** 3. The True Perpetrator Was Identified and His Guilt Established

Police may elicit a confession that is proven false when the true perpetrator is identified. Sometimes this occurs fortuitously when police encounter the perpetrator in connection with another crime and obtain a demonstrably reliable confession. In 1979, after twenty-one hours of interrogation by West Virginia State Police, Paul Reggetz confessed to murdering his wife and two children. [FN154] Reggetz spent eleven months in pre-trial incarceration before one of his neighbors confessed. [FN155] In 1990, Suffolk County, New York police interrogated Anthony Atkinson for three-and-a-half hours before he confessed to murder and sodomy. [FN156] Later, two other men confessed to the crime, and charges against Atkinson were dismissed. [FN157] In 1994, Guy Lewis confessed to Memphis, Tennessee police to shooting and killing his girlfriend. [FN158] The prosecutor was preparing to bring charges against him when Tony Hedges and Michael Maclin were arrested and each confessed to the murder. [FN159] In 1996, Robert Moore confessed to the capital murder and robbery of a taxi driver after Nassau County, New York detectives interrogated him for twenty-five hours. [FN160] Moore was released only

because police happened to arrest one of the actual killers on unrelated charges, and he confessed and identified his two co-perpetrators. [FN161] In 1996, in Daytona Beach, Florida, police extracted a confession to capital murder and robbery from Donald Shoup, a mentally handicapped teenager. [FN162] While Shoup was awaiting trial, the true killer confessed. [FN163]

In one of the century's most dramatic and disturbing false confession cases, prosecutors dismissed charges against three false confessors after routine detective work identified the true *453 killers. [FN164] In 1991, during interrogations that lasted up to twenty-one hours, Maricopa County Sheriffs in Phoenix, Arizona coerced false confessions from Leo Bruce, Mark Nunez, and Dante Parker to the mass murder of nine persons at a Buddhist temple. [FN165] While prosecutors were preparing capital cases against the defendants, a ballistics test was carried out on a rifle that was picked up for testing the same day that Bruce, Nunez, and Parker were interrogated. [FN166] It proved to be the murder weapon. The rifle had been in the possession of Jonathan Doody and Alex Garcia the night of the murder. Searches led to the discovery of loot in the possession of both Doody and Garcia. Both adolescents confessed to the murders, and Garcia supplied the police with a detailed account of how he and Doody planned and carried out the killings. [FN167]

Garcia not only confessed to the nine Temple murders, but also to murdering Alice Marie Cameron shortly before being arrested for the Temple murders. [FN168] The police delayed doing the ballistics test on the rifle that led to Garcia's arrest because they were occupied first with coercing false confessions from Bruce, Nunez, and Parker and then with the media storm and public protests against the police that followed the disputed confessions. [FN169]

To make matters even worse, Maricopa County Sheriffs had also extracted a confession to Cameron's murder from George Peterson, a mentally ill adult, during a sixteen hour interrogation. [FN170] When Garcia admitted to the Cameron murder fourteen months later, Peterson was awaiting trial for capital murder for the same crime. [FN171]

*454 4. The Defendant Was Exonerated By Scientific Evidence

Police may elicit a confession that is conclusively proven false by scientific evidence. In 1996, police in West Palm Beach, Florida elicited a confession to capital murder from Martin Salazar, but prosecutors dropped charges when the defense discovered that fingerprint evidence clearing Salazar had been withheld by the police and the prosecutor. [FN172] During an interrogation in 1980, Chicago police reshaped a dream by Steven Linscott into a murder confession, but DNA testing established his innocence many years later. [FN173] In 1983, Virginia police elicited several confessions from Earl Washington--including one to the rape and murder of Rebecca Williams. [FN174] In 1993, DNA

evidence established that Washington could not have been responsible for any of these crimes. [FN175] In 1996, in Sitka, Alaska, Richard Bingham confessed to being the lone rapist and killer of seventeen- year-old Jessica Baggen. [FN176] DNA testing excluded Bingham as the source of the semen found in the victim. [FN177] The foreign hair found on the victim's body was not Bingham's nor was the fingerprint found on a cigarette pack at the crime scene. [FN178] Bingham was also unable to describe the unusual properties of the physical scene where the body was found nor the unusual way in which the victim had been silenced. [FN179] Bingham was acquitted at trial. [FN180]

Notwithstanding the numerous examples of proven false confessions reported in this article, it is difficult to establish conclusively that a defendant's confession is false even when the evidence of innocence is compelling. Once a suspect has confessed, it is rare for the crime to evaporate, for the true perpetrator ***455** to be apprehended, for police or prosecutors to discover that the defendant could not have committed the crime, or for scientific evidence to exonerate him. The standard for inclusion into the proven false category--established innocence--is a formidable barrier.

B. HIGHLY PROBABLE FALSE CONFESSIONS

While our research has unearthed numerous examples of highly probable false confessions, only a small number of these cases are reported here.

1. Bradley Page

In 1984, Oakland, California police persuaded Bradley Page that he killed his girlfriend, Bibi Lee. [FN181] His vague, confused, and speculative confession occurred during a sixteen hour interrogation that was only partially recorded. [FN182] Despite Page's confession, no evidence (physical or otherwise) corroborated his involvement in the crime. [FN183] On the other hand, abundant evidence supported the conclusion that he was innocent. [FN184]

Page's post-admission narrative did not fit the known crime facts. Page stated that Lee died after he slapped her with the back of his hand, [FN185] causing her to fall and become unconscious as a trickle of blood came from her nose. [FN186] It was not until days after the interrogation that the coroner determined that Lee had three large breaks at the base of the skull, causing considerable bleeding. [FN187] At the time of Page's interrogation the police did not know the extent of Lee's skull fractures, nor ***456** apparently did Page. [FN188] Page also stated that he made love to the dead body on a blanket taken from his vehicle; [FN189] in fact, the blanket contained no evidence of sexual activity, [FN190] no blood stains from Lee's massive head wounds, [FN191] no signs of having been washed, [FN192] and the hairs found on the blanket were not Lee's. [FN193] Page

guessed that he used a spare hubcap that was in his vehicle in an attempt to bury Lee, [FN194] but the fibers and soil from the hubcap did not match either the fibers of Lee's clothing or the soil where her body was found. [FN195] Page also stated that he dragged Lee's body more than 100 yards before burying it. [FN196] Had this happened there would have been a trail of blood [FN197] that surely would have been found by the various search and rescue and dog tracking teams that, beginning the day after her disappearance, spent hundreds of hours combing the area where Lee's body was eventually found. [FN198]

In addition to the numerous discrepancies between Page's post-admission narrative and the facts of the crime, police ignored eyewitness evidence pointing to another suspect. [FN199] In ***457** 1994 CBS News identified Michael Ihde--whose appearance was consistent with the reported eyewitness evidence and whose DNA and pattern of killing linked him to other local area murders--as Lee's murderer. [FN200] Ihde was in prison in Washington State for two similar murders when he bragged that he killed three San Francisco Area women--one of whom was non-white (Lee was Asian American). [FN201] Having convicted Page after two jury trials, [FN202] Alameda Country prosecutors declined to charge Ihde with Lee's murder, but did charge him with a similar murder that happened within weeks of Lee's death. [FN203]

2. Tom Sawyer

In 1986, Clearwater, Florida police coerced a confession from Tom Sawyer to the rape and murder of Janet Staschak after sixteen hours of interrogation that included numerous threats. [FN204] There was no evidence linking Sawyer to the crime, [FN205] and his post-admission narrative fit poorly with the facts of the case. [FN206] For example, presuming that Staschak had been sexually assaulted, the interrogators led Sawyer to admit to both vaginal and anal rape during the creation of the post-admission narrative of the crime, [FN207] but the medical examiner reported no evidence of sexual assault. [FN208] Despite strenuous efforts by the interrogators, Sawyer was unable to corroborate the confession by supplying information about the victim's missing clothing, missing ***458** keys, or the tape used to bind her. [FN209] After the trial judge suppressed Sawyer's confession, [FN210] the state dismissed the charges, since no evidence of his guilt existed. [FN211]

3. Martin Tankleff

After five-and-one-half hours of accusatory interrogation in 1988, [FN212] Suffolk County, New York police obtained a confession from Martin Tankleff, then seventeen-years-old, to brutally stabbing and murdering his parents. [FN213] No evidence linked Tankleff to the crime, and his post- admission narrative did not match the facts of the case. [FN214] Instead, Tankleff's narrative matched (indeed it was) the flawed theory of the crime that police detectives held at the time of Tankleff's interrogation. [FN215] Tankleff confessed to killing his parents

with a dumbbell and a watermelon knife, yet both items tested negative for blood traces, hair and fibers. [FN216] Medical testimony established that the head injuries to Martin's father were caused by a hammer. [FN217] Tankleff confessed to beating his mother with a dumbbell and then fighting with her, which would have been consistent with the defensive wounds on her arms, but Tankleff's body was unscratched and the absence of any bruises suggested that he had not been in a life or death struggle with anyone. [FN218] Tankleff confessed that he took a shower to wash away the substantial bloodstains the killings would have left on the perpetrator, but no blood residue or hairs from his parents were found in his shower. [FN219] Tankleff had one bloodstain on his shoulder that could have been acquired when he discovered the bodies, but would have been washed away if he showered to remove the substantial bloodstains that likely marked the killer. [FN220] Tankleff confessed to assaulting his parents between 5:35 a.m. and 6:10 a.m., but his mother's time ***459** of death was established to be much earlier. [FN221] Tankleff confessed to killing his mother and then walking through the house before attacking his father, but none of his mother's blood was found along this pathway. [FN222] The killer used gloves, but Tankleff's confession made no reference to gloves. [FN223] Tankleff confessed that after showering he removed his father from the chair and did not shower again, yet Tankleff's clothes were not bloodstained. [FN224] His confession was not corroborated by the physical evidence that should have linked him to the crime (if, in fact, he were guilty) and was merely a regurgitation of the factually erroneous theory the detectives admitted they had initially held. Nevertheless, a jury convicted Tankleff of two counts of second degree murder. [FN225] Tankleff's judge sentenced him to prison for fifty years to life. [FN226]

4. Richard Lapointe

In 1989, two years after the murder of Bernice Martin, Manchester, Connecticut Police interrogated Richard Lapointe, the husband of the victim's granddaughter. [FN227] During an unrecorded nine and one-half hour interrogation, Lapointe, a mentally handicapped adult, signed three contradictory confessions to raping, stabbing, and strangling the victim. [FN228] No physical evidence either linked Lapointe to the crime or corroborated any of his incriminating statements. In fact, each of Lapointe's three confessions was inconsistent with the others and contradicted the facts of the crime. [FN229] In 1992, a jury convicted ***460** Lapointe of capital felony murder and eight related charges, and sentenced him to life in prison without the possibility of parole plus sixty years. [FN230] Lapointe remains in prison today with little hope of ever being released.

An analysis of the fit between Lapointe's post-admission narrative and the facts of the crime reveals that it would have been virtually impossible for Lapointe to have committed the crime in the time available to him. In an interview with his

wife immediately following Lapointe's arrest (an interview police chose to record), [FN231] Mrs. Lapointe recounted her husband's activities on the day of her grandmother's death. Her account provided Lapointe with an alibi for all but thirty to forty-five minutes of the day. [FN232] In that brief period Lapointe would have had to have walked ten minutes to Bernice Martin's apartment, have coffee with her, rape her, bind her, stab her, set fire to the apartment and walk back to his residence. [FN233] Yet, when he returned after his walk Lapointe did not appear sweaty or disheveled. [FN234] Lapointe confessed to killing the victim at the location in her apartment where the police believed she had been stabbed, on the couch. [FN235] However, medical testimony established that she was not killed while on the couch. [FN236] Lapointe admitted to an erroneous police theory of the victim's death, manual strangulation with both hands, [FN237] but the medical examiner reported that the victim died from strangulation by compression (i.e., a blunt object had been pushed against the right side of her neck). [FN238] Lapointe confessed to moving the victim's body (the police theory of the crime at the time of the interrogation), which weighed 160 pounds. [FN239] However, Lapointe, suffers ***461** from Dandy-Walker Syndrome [FN240] and has shunts surgically inserted in his head that render him incapable of lifting more than fifty pounds. [FN241] Lapointe confessed to the sexual assault theory of the crime held by the police--rape with his penis. In fact, the victim was raped with a blunt instrument. [FN242] The killer's gloves were left behind at the crime scene, but they were too large to fit Lapointe's tiny hands. [FN243] Eyewitnesses saw a large man who did not match Lapointe's description running away from the crime scene; [FN244] they insisted that this man was not Lapointe. [FN245]

5. Jessie Misskelley, Jr.

In 1993 West Memphis, Arkansas police coerced a confession from Jessie Lloyd Misskelley, Jr., a mentally handicapped seventeen-year-old. [FN246] He confessed to participating as an accessory in the brutal murder of three eight- year-old boys. [FN247] Misskelley's statement to police was inconsistent with the facts of the case, was not supported by any evidence, and demonstrated that he lacked personal knowledge of the crime. Misskelley confessed that he witnessed the murders taking place around noon [FN248] when, in fact, the victims were all in school. They did not disappear until after approximately 5:30 p.m. [FN249] Misskelley confessed that a brown rope had been used to bind the boys [FN250] ***462** when, in fact, shoelaces of various colors had been used. [FN251] Numerous alibi witnesses testified that at the time the three children disappeared and for the next five hours (during which the murders probably occurred), Misskelley was at a wrestling competition in a town forty miles away from the crime scene. [FN252] Despite the complete lack of any evidence of Misskelley's participation in the crime and despite his grossly incorrect confession, an Arkansas jury convicted Misskelley of one count of first degree murder and two

counts of second degree murder. [FN253] He is currently serving a life sentence. [FN254]

6. Gary Gauger

In 1993, after eighteen hours of confrontational, intense and highly deceptive interrogation in McHenry County, Illinois, sheriff's detectives extracted from Gary Gauger a hypothetical, unsigned confession to the brutal murder of both his parents. [FN255] According to police, Gauger said that he approached his parents from behind and slit their throats. [FN256] However, his alleged confession was inconsistent with the facts of the crime. [FN257] Even though police confiscated more than 160 items from the house where the double murders occurred, [FN258] not a single piece of evidence linked Gauger to the crime. [FN259] Police could not find any of Gauger's blood on knives [FN260] or faucets, [FN261] even though he allegedly washed his hands after the double murder. [FN262] Gauger gave the police the wrong number of slash wounds to his ***463** mother's throat, and his confession did not make any mention of the additional bludgeon wounds that his father suffered. [FN263] Gauger confessed to the police theory of the crime--slashing his parents' throats from behind while they were standing. [FN264] If they had been killed as Gauger described, blood would have spurted from both parents' throats across the room and onto the walls. [FN265] Though police found the victims lying in pools of blood, there was little or no blood on the walls and shelves surrounding them. [FN266] Moreover, medical testimony established that the victims' throats were slit while they were on the ground, not while they were standing. [FN267] An autopsy revealed that both victims had been beaten over the head, and that Gauger's father had been stabbed in the back--facts not contained in the confession. [FN268] A jury convicted Gauger of first degree murder. [FN269] The trial judge initially sentenced him to death, [FN270] but subsequently re- sentenced Gauger to life imprisonment without eligibility of parole. [FN271] Sixteen months later, an Illinois Appeals Court reversed his conviction and released him from prison because police had improperly obtained his confession. [FN272] Since then, federal prosecutors have charged two men belonging to a Detroit-based motorcycle gang with the murders of Gauger's parents. [FN273]

7. Edgar Garrett

In 1995, police in Goshen, Indiana persuaded Edgar Garrett that he killed his daughter, Michelle, [FN274] who had mysteriously ***464** disappeared. [FN275] During fourteen hours of interrogation, [FN276] Garrett gave an increasingly detailed confession describing how he murdered his daughter, [FN277] whose body had not yet been found. [FN278] No independent evidence linked Garrett to the crime or corroborated his confession, [FN279] and his post-admission narrative contradicted all the major facts in the case. [FN280] Garrett confessed to walking into a park with his daughter through new-fallen snow, bludgeoning her with an axe

handle at a river's edge and dumping her body in the river. [FN281] However, the police officer who arrived first at the crime scene did not see footprints in the snow-covered field at the entry to the park, but instead saw tire tracks entering the park, bloody drag marks leading from the tire tracks to the river's edge and a single set of footprints going to and returning from the river. [FN282] Obviously, Michelle Garrett's body had been unloaded from a vehicle and dragged to the river, but Edgar Garrett did not own a car, and no evidence was ever uncovered that he had access to a car that day. [FN283] Michelle's coat was recovered from the river separately from her body, [FN284] suggesting Michelle had been killed indoors and transported to the river-bank.

Garrett's confession expressed the theory the police held at the time of the interrogation--that Michelle was clubbed to death. [FN285] It was not until weeks later, when her body was recovered, that the police and Garrett learned that Michelle had been stabbed thirty-four times. [FN286] Michelle's head showed no evidence of blunt force trauma, and, not surprisingly, the axe handle Garrett supposedly used to kill her carried no traces of ***465** her hair or blood. [FN287] At trial, the jury acquitted Garrett of capital murder. [FN288]

8. Douglas Warney

In 1996, Rochester, New York police elicited a confession from Douglas Warney to the brutal stabbing and murder of sixty-three-year-old William Beason. [FN289] Warney, a mentally handicapped man who was suffering from AIDS-related dementia at the time of his interrogation, [FN290] confessed to stabbing Beason fifteen or more times. [FN291] The District Attorney initially charged Warney with capital murder, [FN292] but reduced the charge to second degree murder after the New York media published several high profile stories criticizing his charging decision (even though the confession, if true, supported a capital charge). [FN293] There was no physical evidence linking Warney to the brutal murder. [FN294] Instead, virtually all of the physical evidence contradicted Warney's confession. [FN295] Warney confessed that he stabbed Beason in the kitchen, but Beason was found stabbed in his bedroom. [FN296] There was no blood in the kitchen. [FN297] Warney confessed that he cut his finger during a struggle with Beason and wiped his hand in the bathroom. [FN298] A medical examination shortly after Warney's arrest revealed no evidence of a cut, [FN299] and laboratory tests showed that the blood in the bathroom did not come from Warney or Beason. [FN300] The killer left a trail of blood at the scene, but none of the blood matched Warney's blood type. [FN301] Warney confessed that he threw his bloody ***466** clothes into a garbage can outside his apartment, but the garbage contained no bloody clothing. [FN302] Warney confessed that he drove his brother's brown Chevy to the murder, but his brother had not owned a Chevy for six years and did not own a car at the time of the killing. [FN303] Nevertheless, a jury convicted

Warney of second degree murder, [FN304] and the judge sentenced Warney to twenty-five years to life. [FN305]

C. PROBABLE FALSE CONFESSIONS

1. Tammy Lynn Harrison

In 1979, following several days of intensive interrogation by Duncanville, Texas police Lieutenant Robert Moore, Tammy Lynn Harrison, a seventeen-year- old, signed a confession to stabbing her mother to death. [FN306] Moore coerced Harrison's confession by repeatedly telling her that she would die in the electric chair if she did not confess. [FN307] There was no physical or other evidence connecting Harrison to the crime, [FN308] and she steadfastly maintained her innocence, [FN309] repudiating her post-admission narrative while making it. [FN310] After the trial judge ruled Harrison's confession inadmissible, the prosecutor dismissed all charges for lack of evidence. [FN311] Shortly after the confession was suppressed, the Duncanville Police Department fired Lieutenant Moore. [FN312]

2. Barry Lee Fairchild

In 1983, Pulaski County, Arkansas sheriffs extracted a confession from Barry Lee Fairchild, [FN313] a mentally handicapped African-American, ***467** [FN314] to participating as an accessory in the abduction, rape and murder of Majorie Mason. [FN315] There was no independent evidence connecting Fairchild to the crime; [FN316] in fact, blood, hair and semen failed to positively link Fairchild to the crime. [FN317] Fairchild maintained his innocence and insisted that he confessed only because Sheriff Tommy Robinson and Deputy Sheriff Larry Dill physically beat, assaulted, and threatened him. [FN318] Fairchild's videotaped confession statement shows him looking away from the camera and responding to the prompting of others in the room. [FN319] In 1990--seven years after Fairchild's conviction on capital murder charges-- thirteen African-American men publicly disclosed that, like Fairchild, they too had been detained for questioning about the Mason murder and were tortured. [FN320] One of these men, Michael Johnson, reported that he heard sheriffs in the next room torture Fairchild ***468** into confessing. [FN321] Two former Pulaski County Sheriff Deputies, Frank Gibson and Calvin Rollins, have admitted that physical assault and abuse were common interrogation tactics at the time of Fairchild's arrest. [FN322] Nevertheless, all of Fairchild's legal appeals failed, and he was executed on August 31, 1995. [FN323]

3. Jane Bolding

In 1985, after twenty-three hours of continuous interrogation, Virginia police extracted a confession from nurse Jane Bolding to injecting two patients with fatal doses of potassium. [FN324] The prosecution charged her with three counts of first degree murder and seven counts of assault with intent to murder. [FN325]

No credible evidence linked Bolding to the crimes. [FN326] The medical examiners had initially classified Bolding's patients as dying from natural causes. [FN327] The trial judge suppressed Bolding's confession and then acquitted her of all charges. [FN328] He wrote that, "the state at most has placed the defendant at the scene. . . . The state's reach exceeded its grasp. The evidence failed to supply the missing link that would tie the defendant to the criminal act." [FN329]

4. Delbert Ward

In 1990, New York State Police interrogated Delbert Ward, a fifty-nine-year- old illiterate and mentally handicapped farmer. Ward eventually signed a confession admitting that he had murdered his brother, William, by putting his hand over William's nose and mouth. [FN330] Ward reported that he had been intimidated ***469** into confessing, [FN331] and thereafter steadfastly maintained his innocence. [FN332] When the Assistant Medical Examiner of Onondaga County, Dr. Humphrey Germaniuk, filled out William Ward's death certificate and turned the body over to the funeral home, he did not believe that a homicide had occurred. [FN333] However, immediately after learning of Delbert Ward's confession, Dr. Germaniuk re-classified William Ward's death as a homicide. [FN334]

There was no credible evidence linking Delbert Ward to his brother's death. Instead, the evidence supported the conclusion that William Ward died of natural causes, not of asphyxiation. Four common and telltale signs that should have been present if William Ward had died of asphyxia were not there: (1) William Ward's nose and mouth were free of trauma or blood; (2) there was no evidence of regurgitation; (3) there was no thinning of the blood; and (4) there was not a bluish or purple appearance to the skin. [FN335] At the same time, William Ward's enlarged heart, clogged coronary and pulmonary arteries, and his fluid-filled lungs supplied clear evidence that he had died of natural disease. [FN336] Nevertheless, at trial, Dr. Germaniuk testified for the prosecution that William Ward died of asphyxiation, [FN337] while the forensic pathologist Dr. Cyril Wecht testified for the defense that William Ward died of natural causes. [FN338] After almost ***470** nine hours of deliberation, the jury acquitted Ward of murdering his brother. [FN339] Two days after the trial, the investigator who had elicited Ward's false confession "was reprimanded and ended up taking an early retirement in Florida." [FN340]

5. Luis Roberto Benavidez

In 1992, in Simi Valley, California, Luis Roberto Benavidez confessed to the slaying of Marcos Anthony Scott more than two years earlier. [FN341] Benavidez claimed that he confessed only because his interrogators threatened to send his girlfriend to prison for the murder and place their two-year-old daughter in a foster home if he did not confess. [FN342] The police denied

that they coerced Benavidez's confession, [FN343] and the judge ruled that the confession was admissible. [FN344] There was no credible evidence linking Benavidez to the crime, and the jury acquitted Benavidez of the murder charge. [FN345] The jury forewoman stated that "the prosecution did not prove that Roberto was the killer. We had to find corroborating evidence besides his confession that pointed to his guilt. . . . there was no separate evidence to substantiate the murder charge." [FN346]

6. Linda Stangel

In 1995, Oregon State Police coerced Linda Stangel into confessing to shoving her boyfriend, David Wahl, off a trail 320 feet above the Oregon Coast. [FN347] After Wahl's death, Oregon State Police lured Stangel from her home state, Minnesota, back to Portland by secretly funding her trip (via Wahl's family) to attend ***471** Wahl's memorial service. [FN348] After Stangel arrived in Portland, the police transported her to the scene of the alleged crime, several hours away. [FN349] Knowing that Stangel was terrified of heights, [FN350] two detectives obliged her to walk up the narrow, steadily rising bluff trail from which they presumed her boyfriend had fallen. Stangel broke down in apparent fear of the cliff edge as they climbed the trail. [FN351] Despite considerable pressure from the police, Stangel maintained her innocence prior to being manipulated up the trail, [FN352] and consistently told police that she had last seen Wahl when he went off to take a walk along the coast. [FN353] To escape the immediate stress of the narrow and terrifying heights, Stangel confessed to accidentally pushing her boyfriend off the cliff. [FN354] The police elicited Stangel's confession not only by playing on her fear of heights, but also by using the accident scenario technique [FN355] to create the impression that her admission--to pushing Wahl off the cliff in a panic after he gave her a "joking, fake push"--carried no punishment. [FN356]

Yet there was no evidence linking Stangel to the crime. Stangel's several different accounts of her panic response were inconsistent with one another and all failed to describe physical circumstances that would have caused Wahl to fall from the cliff--even if Stangel had panicked and pushed him. Moreover, the state never produced any evidence that a crime occurred, since Wahl's body did not wash up for weeks, [FN357] and thus no ***472** cause of death could be determined. [FN358] Based solely on the contents of her coerced and unreliable confession, [FN359] a jury convicted Stangel of second degree manslaughter, [FN360] and she was sentenced to more than six years in prison. [FN361]

IV. False Confessions and Case Outcomes

A. DEPRIVATIONS OF LIBERTY AND MISCARRIAGES OF JUSTICE

Cases involving suspected or established false confessions typically result in some deprivation of the false confessor's liberty. The amount of deprivation may vary from a brief

wrongful arrest and detention to lifelong incarceration or execution. The harms of false confessions can be measured by the amount of liberty deprived in each case. Table B1 summarizes the deprivations of liberty and miscarriages of justice associated with the sixty cases involved in this study. Each case outcome is classified into one of four categories (wrongful arrest/detention, wrongful prosecution, wrongful incarceration and wrongful execution) corresponding to the amount of harm done.

Table B1

Magniture of Harm Resulting From False Confession

Degree of Deprivation of Liberty	Total	Percentage of Total
Cases (60)		
Arrest and Detention	5 [FN362]	8%
Prosecutions	26	43%
Dismissed Prior to suppression hearing	8 [FN363]	13%
Dismissed Post suppression/prior to trial	10 [FN364]	17%
Dismissed Acquitted at trial	8 [FN365]	13%
Convictions	29	48%
Vacated by Judge prior to sentence	1 [FN366]	2%
Defendant sentenced to: [FN367]		
5-9 Years	3 [FN368]	5%
>10 Years	10 [FN369]	17%
Life Imprisonment	11 [FN370]	18%
Death Sentence	3 [FN371]	5%

Executed 1 [FN372]
2%

*473 B. CLASSIFYING CASE OUTCOMES

In general, false confession cases can be usefully divided into two categories: those that result in pre-trial deprivations of liberty (Type I cases); and those that result in miscarriages of justice and wrongful deprivation of many years of liberty and/or of life (Type II cases). Type I cases occur when police, prosecutors, trial judges or juries correct the initial error of relying on a questionable confession. There are multiple points in the trial process at which the criminal justice system has the potential to be self-correcting. Indeed, the rules of American criminal procedure are structured to allocate the risk of error so as to minimize the possibility of convicting the innocent.

1. Type I Cases: False Confessions That Do Not Lead to Conviction (52%)

a. General

Sometimes police extract a confession from an innocent suspect that they initially believe to be true, but either they or the prosecutors realize is false before the filing of charges. In other instances, police and prosecutors realize that an innocent suspect has confessed because it is physically impossible for the suspect to have committed the crime. Sometimes officials do not come to the realization that the confession is false until after another suspect has confessed to the crime. And sometimes police *474 and prosecutors never come to this realization even though the confession is demonstrably not true (i.e., contradicts the known facts of the crime).

The Type I false confession cases described above include: Billy Gene Davis' confession that he killed his ex-girlfriend (who turned up alive); [FN373] Ruben Trujillo's, [FN374] Pedro Delvillar's, [FN375] Jose Soto Martinez's [FN376] and Ivan Reliford's [FN377] confessions to crimes which were committed when all were in custody; Christina Mason's confession to killing her child, who died of natural causes; [FN378] and Martin Salazar's confession to a crime that scientific evidence proved he did not commit. [FN379]

b. Confessions From The True Perpetrator

Often police or prosecutors only discover and acknowledge their error in eliciting a false confession or charging an innocent defendant prior to conviction because they have accidentally or unintentionally obtained a reliable confession from the true perpetrator(s) of the crime. [FN380] Several such cases described above include: Paul Reggetz, who was cleared of

murdering his wife when a neighbor confessed to the crime; [FN381] Anthony Atkinson, who confessed to murder and sodomy but was released when two other men confessed to the crime; [FN382] Guy Lewis, who confessed to killing his girlfriend, but was released when the real killers confessed; [FN383] Robert Moore, whose confession to capital murder and robbery was disregarded when the true killer confessed and identified his two co-perpetrators; [FN384] and Donald Shoup, whose capital murder charges were dropped after the true killer confessed. [FN385]

***475** c. Prosecutorial Intervention

Though it appears to happen relatively infrequently, prosecutors sometimes drop charges against a defendant who has confessed because the confession does not match the facts of the crime and the prosecutor thus recognizes that it is of no evidentiary value. In 1991, Snohomish County, Washington prosecutors dropped charges against Charles Lawson when they realized that Lawson had wrongly reported many of the crucial facts in his confessions to two separate murders. [FN386] Similarly, in 1994 prosecutors in Louisiana dismissed second degree murder charges against Cyril Walton after realizing that many of the details in his confession simply did not fit the facts of the crime. [FN387]

d. Judicial Suppression

Sometimes prosecutors are forced to drop charges after a judge suppresses a confession because there is no physical or even uncompromised testimonial evidence to implicate the defendant. In 1983, using a guided visualization and relaxation based hypnotic induction, Wheeling, Illinois police elicited from fourteen-year-old William Boyd a confession to murdering a schoolmate. [FN388] Although bite marks on the victim's body did not match Boyd's teeth, prosecutors charged him with murder. [FN389] After a Cook County Circuit Court judge suppressed Boyd's confession, prosecutors dismissed charges. [FN390] Similarly, in the Sawyer case, [FN391] Florida prosecutors dismissed charges after the trial judge suppressed Tom Sawyer's grossly inaccurate confession. [FN392]

Though judges can prevent Type I cases from developing into Type II cases if they suppress the confession prior to trial, [FN393] they may also vacate a conviction both prior to and after sentencing. This happened to the charges against Lavale Burt in ***476** 1985. Chicago, Illinois police extracted a confession from Burt after slapping him around, threatening him with the death penalty, and fabricating evidence of his guilt. [FN394] A jury subsequently convicted Burt. Between his conviction and sentencing, however, the grandmother of the murder victim contacted the judge and provided new evidence showing that Burt was not the killer, causing the trial judge to vacate his conviction. [FN395] Similarly, a judge in Montgomery, Alabama vacated Melvin Beamon's 1989 murder conviction (and

twenty-five-year prison sentence) after an eyewitness to the crime came forward and exonerated him. [FN396] Beamon had confessed after seventeen hours of interrogation, during which Montgomery, Alabama police beat and threatened to shoot him. [FN397]

e. Jury Acquittals

If police fail to detect that a confession is unreliable, prosecutors fail to dismiss charges and the judge fails to suppress the confession, [FN398] the defendant may still be able to persuade a jury of his innocence. Though juries tend to regard confessions as the most probative and damning evidence of guilt possible, [FN399] they sometimes acquit defendants who have confessed falsely. [FN400] For example, in 1986 after almost ten hours of interrogation, [FN401] police in Flagstaff, Arizona extracted a highly probable false confession to a Navajo ritual slaying from George Abney in a recorded interrogation. [FN402] At trial, the defense presented Abney's unimpeachable alibi, identified the likely killer and analyzed the ***477** interrogation for the jury--who acquitted Abney. [FN403] In 1993, Mesa, Arizona police interrogators elicited a highly probable false confession to sexual assault of a minor from Dale Zamarrippa. Zamarrippa was also eventually acquitted by a jury. [FN404] In 1997, a jury in Juneau, Alaska acquitted Richard Bingham of first degree murder and sexual assault. [FN405] Not only did Bingham's confession contradict the facts of the crime, but a spot of blood found on one of Bingham's sneakers was not the victim's and the semen found on the victim's body was not Bingham's. [FN406] In 1989, a Minneapolis, Minnesota jury did not merely acquit Betty Burns of the attempted murder to which she had confessed, but took the additional unusual step of publishing a thirteen page letter denouncing the interrogation of Burns, expressing alarm that the true perpetrator remained at large, calling for reforms both in the police and prosecutors' offices, and requesting that Burns' record be expunged and she be compensated for her ordeal. [FN407]

2. Type II Cases: False Confessions That Lead to Wrongful Conviction and Imprisonment (48%)

a. General

Type II cases are those in which miscarriages have occurred and the justice system has clearly failed: not only have innocent individuals been made to confess to crimes they did not commit, but they have also been wrongly prosecuted, convicted, and imprisoned. False confessions may lead to wrongful conviction either when a suspect pleads guilty to avoid an anticipated harsher punishment or when a judge or jury convicts at trial. The frequency of miscarriages among the sixty false confession cases studied is reported in Table B2. Following Type II errors, some suspects are eventually released and exonerated; some are

released after serving a prison term but are never exonerated; and some false confessors are sentenced to life terms and remain incarcerated to this day. Several false confessors in this ***478** study were sentenced to death, and in one case the defendant was executed.

Confession evidence is sufficient to produce wrongful arrests, convictions and incarceration. In practice, criminal justice officials and lay jurors often treat confession evidence as dispositive, so much so that they often allow it to outweigh even strong evidence of a suspect's factual innocence. All of the police-induced false confessions documented here resulted in some deprivation of liberty. Fifty-two percent of the false confessors' wrongful deprivation of liberty ended before conviction, while 48% of the defendants suffered miscarriages of justice.

Table B2

The Risk of Miscarriage Attributable to False Confession [FN408]

Outcome of Confessor's Decision to go to trial	Number of Cases	Risk of a Miscarriage
Released prior to decision point	23	--
Pled Guilty	7 [FN409]	12%
Acquitted at Trial	8 [FN410]	--
Convicted at Trial	22 [FN411]	36%

b. Plea Bargains

If it seems counter-intuitive that an innocent person would confess falsely, the specter of an innocent false confessor pleading guilty seems fantastic. Yet this is not uncommon. [FN412] As Table B2 indicates, in 12% (7) of the cases reported here, the false ***479** confessor chose to plead guilty to avoid an anticipated harsher punishment--typically the death penalty.

i. Jack Carmen

In 1975 Jack Carmen, a mentally retarded twenty-six-year-old, confessed to the kidnapping, rape and murder of a fourteen-year-old girl in Columbus, Ohio. [FN413] Though there

was no evidence against Carmen and three eyewitnesses placed him elsewhere at the time of murder, Carmen pled guilty to the crime to avoid the death penalty. [FN414] Instead he was sentenced to life in prison. [FN415] Two years later, an appellate court judge nullified Carmen's conviction, and he was subsequently acquitted in a jury trial. [FN416]

ii. David Vasquez

In 1984, David Vasquez, who is also mentally retarded, [FN417] confessed three times [FN418] and subsequently pled guilty to the murder of Carolyn Hamm, for which he was sentenced to thirty-five years in prison. [FN419] In Vasquez's case, the police also subsequently identified the true murderer, a serial killer, [FN420] and Vasquez was released from prison after serving almost five years of his sentence. [FN421]

iii. Johnny Lee Wilson

Vasquez was fortunate compared to Johnny Lee Wilson, another mentally retarded adult. [FN422] In 1986, Aurora, Missouri police induced Wilson to confess to murder and arson. [FN423] Wilson pled guilty to first degree murder to avoid the death penalty and instead was sentenced to life in prison without the possibility of ***480** parole for fifty years. [FN424] Although in 1988 the true killer confessed and provided officials with details of the crime that only the perpetrator would know, Wilson was not released from prison until 1995--more than eight years after his conviction, when the Governor of Missouri pardoned him. [FN425]

iv. Paul Ingram

In 1988, police in Olympia, Washington extracted from Paul Ingram a highly probable false confession to numerous fictitious crimes [FN426]--including sexually molesting his two daughters, [FN427] supervising the gang rape and bondage of his daughters and wife on numerous occasions, [FN428] and being a demon-possessed member of a satanic cult [FN429] that allegedly committed murders, [FN430] performed coathanger abortions, [FN431] signed loyalty oaths in blood, [FN432] engaged in bestiality, [FN433] and dismembered, sacrificed and cannibalized small children. [FN434] The prosecution was able to save face by getting Ingram to enter a guilty plea to six counts of third degree rape. [FN435] Though the sensational and bizarre circumstances of Paul Ingram's case remain unique in the annals of American interrogation history, the outcome of his case is not. Despite compelling evidence that his guilty plea was predicated upon a false confession, [FN436] Ingram remains incarcerated. [FN437]

***481** v. William Kelley

In 1990 William Kelley, a mentally handicapped adult, [FN438]

confessed and then pled guilty to the murder of a twenty-five-year-old woman whose body was found in a landfill. [FN439] He was sentenced to ten to twenty years in prison but was released two years later when the police in Dauphin County, Pennsylvania stumbled upon the true perpetrator, [FN440] a serial killer, [FN441] who confessed to the crime. [FN442]

vi. Christopher Smith and Ralph Jacobs

In 1991 Christopher Smith and Ralph Jacobs, also mentally handicapped adults, both falsely confessed, and pled guilty to, the murder of a New Castle, Indiana drug dealer. [FN443] Smith was sentenced to thirty-eight years and Jacobs to eight. [FN444] Both had served eighteen months in prison when police arrested the true killer, who was linked to the crime by physical evidence (unlike Smith and Jacobs) and eventually convicted. [FN445]

c. Jury Convictions

i. General

The history of criminal justice in America prior to the Miranda decision is replete with instances of juries convicting innocent defendants who were linked to the crime only by a false confession. [FN446] Despite additional safeguards, police continue to elicit false confessions in the post- Miranda era, and juries continue to convict false confessors at an alarmingly high rate. Tables B3 and B4 report the defendant's risk of conviction at trial when police have elicited a false confession. Even an unsupported and disconfirmed confession is often sufficient to lead a trier of fact to judge the defendant guilty beyond a reasonable doubt. As Table B3 indicates, the thirty false confessors ***482** whose cases proceeded to trial had a 73% chance of being convicted. Despite the absence of any physical or other significant credible evidence corroborating a confession, a false confessor was approximately three times more likely to be found guilty at trial than to be acquitted (73% vs. 27%). These data demonstrate that a false confession is an exceptionally dangerous piece of evidence to put before a jury even when the other case evidence weighs heavily in favor of the defendant's innocence.

Tables B4 and B5 reveal the fate of those identified as false confessors while controlling for the basis on which the identification was made. Defendants were identified as false confessors based either on evidence that objectively proved their innocence or supported the inference that they were innocent. While the information reported in Table B4 indicates moderate percentage differences between outcomes for persons proven or classified (i.e., highly probable and probable) as false confessors, the differences are minor in light of the relatively small number of cases presently available for comparison. The false confession cases documented here produce a generally consistent outcome, whether the false confessor's innocence is

proven or classified as highly probable or probable.

Not surprisingly, the false confessors who are ever going to be proven innocent are likely to have this proof come to light shortly after their confession. Slightly over half (53%) of the proven false confessors have charges dismissed prior to trial, while 47% of proven false confessors must make a decision about pleading to an offer of lesser punishment or undergoing trial. The high percentage of pre-trial dismissals is likely due to proof of a confessor's innocence coming to light early in the pre-trial discovery process (e.g., when scientific test results become available) or when the defense establishes the defendant's alibi (e.g., the alibi the police ignored when the defendant offered it during interrogation) or for other strong reasons (e.g., the victim turns up alive).

Absent the discovery of evidence dispositively proving the defendant's innocence, only 19% of defendants classified as highly probable or probable false confessors are spared having to choose to undergo trial or to plead guilty. The vast majority (81%) of these false confessors find themselves having to choose either to plead guilty to a crime they did not commit or go to trial and risk the harshest possible punishment.

***483** Table B3

The Risk of Miscarriage of Justice at Trial Given a False Confession [FN447]

Outcome of Confessor's Decision to go to Trial	Number	Verdict of Innocent	Verdict of Guilt	Verdict of
All False Confessors	30	73% [FN448]	27%	[FN449]

Table B4

The Risk of Miscarriage of Justice Given a Proven False Confession

Proven False Confessors (N=34)	Number (%)	Likelihood of a Guilty Verdict	Risk of

Verdict			Miscarriage
Released Prior to Decision Point	18 [FN450] (53%)		
--	--		
Pled Guilty	5 [FN451] (15%)		1
5%	--		
Acquitted at Trial	1 [FN452] (3%)		
--	--		
Convicted at Trial	10 [FN453] (29%)	29%	9
0%			
Totals	34 (100%)		4
4%			

***484** Table B5

The Risk of Miscarriage of Justice Given Likely False Confession

Proven False Confessors (N=34)	Number (%)	Likelihood of a Miscarriage of Guilty Verdict
Released Prior to Decision Point	5 [FN454] (19%)	-
-	--	
Pled Guilty	2 [FN455] (8%)	8
%	--	
Acquitted at Trial	7 [FN456] (27%)	-
-	37%	
Convicted at Trial	12 [FN457] (46%)	46
%	63%	
Totals	26 (100%)	54
%		

As reported in Table B3, there is a strong likelihood that a miscarriage of justice will occur if a false confessor undergoes a trial. It is alarming that about three-quarters (73%) of all

false confessors who went to trial were convicted. Table 4 reports that when proven and classified confession cases (i.e., highly probable + probable) are separated there is a 27% higher level of risk of conviction at trial for those whose innocence will be proven much later. Further, while 63% of the classified false confessors are convicted at their trials, 90% of the defendants who would someday be proven innocent are convicted when their false confessions are brought into court.

If tried, 37% of those classified as false confessors are acquitted, while only 10% of those belatedly proven innocent are acquitted. It appears that at the time of trial the exculpatory evidence favoring those who were destined to someday be proven innocent was weaker than the exculpatory evidence supporting those who even today can only be classified as false confessors. Some of those who were later proven to be false confessors were only saved from their sentences of execution or life imprisonment ***485** by new scientific developments such as DNA analysis or a true perpetrator's long-delayed decision to confess. [FN458]

ii. Case Illustrations

a. Officially Exonerated After Conviction

The list of false confessors wrongfully convicted by juries is long. After Bradley Cox confessed to two rapes, he was convicted by a jury in 1980 and sentenced to fifty to 200 years in prison based on a now-proven false confession. [FN459] He served nearly two years before the true perpetrator confessed. [FN460] The so-called "dream confession" Chicago, Illinois police obtained from Steven Linscott [FN461] was later proven false. [FN462] Based on this so-called confession, a jury convicted Linscott of murder, and a judge sentenced him to forty years in prison. [FN463] In 1983, Fort Lauderdale, Florida police extracted a false confession to double murder from John Purvis, [FN464] a mentally handicapped adult. [FN465] A jury convicted Purvis, [FN466] and the judge sentenced him to life in prison plus two twenty-year terms. [FN467] When the actual killers were caught, Purvis was released after nine years of incarceration. [FN468]

In 1979 in Saint Joseph, Missouri, Melvin Lee Reynolds, another mentally handicapped adult, [FN469] falsely confessed to the abduction and murder of a four-year-old boy [FN470] after nearly thirteen hours of interrogation. [FN471] A jury convicted Reynolds of second degree murder and sentenced him to life in prison. [FN472] ***486** Reynolds was released from prison four years later when the true perpetrator, a serial murderer who had killed several more victims after Reynolds' erroneous conviction, [FN473] contacted ***487** authorities and confessed to the crime. [FN474] George Parker falsely confessed to Howell Township, New Jersey police in 1980; [FN475] a jury convicted him of aggravated manslaughter, [FN476] and the judge sentenced him to twenty years in prison. [FN477] He was released five years later after his girlfriend was found guilty of the murder. [FN478] Laverne

Pavlinac confessed falsely to capital murder to Oregon State Police in 1991, was convicted by a jury, and sentenced to life in prison; five years later Pavlinac was released from prison after the true killer came forward and confessed to the crime. [FN479]

b. Convicted and Never Officially Exonerated

Some false confessors are not as fortunate as Cox, Linscott, Purvis, Parker, Reynolds, and Pavlinac--all of whom were eventually released and exonerated of their wrongful convictions. Some innocent individuals who confess falsely are convicted by juries and never released from prison. For example, Earl Washington, a mentally retarded adult who confessed to rape and capital murder, was convicted by a jury and sentenced to death. [FN480] Washington spent ten years on Death Row before Virginia's Governor commuted his sentence to life imprisonment. [FN481] The governor refused to pardon Washington even though a DNA test cleared him of the crimes. [FN482] Martin Tankleff, [FN483] Richard Lapointe [FN484] and Jessie Misskelley, Jr. [FN485] were also convicted by juries and sentenced to life imprisonment solely on the basis of confessions that were badly flawed, failed to be corroborated***488** and were surrounded by case evidence that weighed strongly in favor of their innocence.

Like LaPointe, Misskelley, Tankleff, and Washington, there are many individuals who were induced to confess falsely, and in the absence of any other evidence, are convicted by a jury and sentenced to long prison terms. Other false confessors, however, serve their sentences but are never exonerated. Bradley Page was convicted of involuntary manslaughter after two trials and sentenced to six years in state prison. [FN486] Although new evidence identified an already convicted serial murderer as the true killer, the Alameda County, California District Attorney's Office refused to acknowledge that Page (whose record was spotless and whose life had been exemplary) was innocent and refused to reopen the case. [FN487] James Harry Reyos confessed to a murder and was sentenced to thirty-eight years and served twelve years in prison, even though the appellate prosecutor conceded that it was physically impossible for Reyos to have committed the crime. [FN488] Though he was released, Reyos was never exonerated.

In 1973, Phoenix, Arizona police extracted from John Knapp a confession to setting the fire to his home that killed his two small children. [FN489] There was no inculpatory evidence supporting the confession [FN490] and considerable exculpatory evidence supporting Knapp's innocence. [FN491] The first jury hung, but a second jury convicted him of capital murder, and he was sentenced to death. [FN492] Five times warrants were issued for his execution, and once he came within forty hours of being sent to the gas chamber. [FN493] Years later an appellate judge vacated Knapp's capital conviction because the prosecutor had withheld exculpatory scientific evidence indicating that one of his children had set the fire. [FN494] In Knapp's third trial,

the jury hung again. [FN495] Finally, *489 after Knapp spent more then twelve years on death row and fourteen and a half years in maximum security incarceration, [FN496] the state offered to forego a fourth prosecution if Knapp pled no contest to second degree murder in exchange for time served, [FN497] thereby allowing the state to score the Knapp prosecution as a conviction. Immediately after accepting the offer Knapp was released from prison. [FN498]

In 1979, Norfolk, Virginia police extracted five contradictory confessions [FN499] from Joseph Giarratano to the rape and murder of fifteen- year-old Michelle Kline and her forty-four-year-old mother, Toni Kline. [FN500] Sperm, hair samples, [FN501] and bloody shoeprints [FN502] found at the crime scene did not link Giarratano to the crime. [FN503] In addition, Giarratano's confessions were demonstrably inaccurate on significant points: One of the victims died from a severed artery and bled profusely, but police found no blood on Giarratano's clothing; [FN504] the victims were strangled and stabbed by someone who is right-handed, but Giarratano is left-handed [FN505] and has only limited use of his right hand due to neurological damage from childhood; Giarratano confessed to strangling one of his victims with his hands, but an independent pathologist testified that the hallmarks of manual strangulation *490 were not present; [FN506] Giarratano stated that he threw the knife he used into the Kline's backyard, but no weapon was ever found. [FN507] Regardless, Giarratano was convicted of capital murder and sentenced to die. [FN508] On death row for more than a decade, [FN509] Giarratano has twice come within forty-eight hours of being executed. [FN510] Granted conditional clemency in 1991, Giarratano is currently serving a life term. [FN511]

In Waukegan, Illinois in 1993, Juan Rivera, a mentally handicapped twenty- year-old, [FN512] underwent approximately thirty-three hours [FN513] of unrecorded interrogation over four days, [FN514] and signed two police-written confession statements admitting that he raped, stabbed and murdered eleven- year-old Holly Staker. [FN515] The confessions contained the types of corrections of spelling and grammatical errors [FN516] that interrogators are trained to work *491 into written confessions to demonstrate that the suspect reviewed the statement before signing it. [FN517] However, it would have been difficult, if not impossible, for Rivera to have actually detected these errors since he reads at a third grade level. [FN518] The veracity of Rivera's confession was further undermined by the fact that he was wearing an electronic leg monitor that showed he was at home the night of the crime, [FN519] and that none of the 350 pieces of physical evidence linked Rivera to the crime. [FN520] DNA tests of more than a dozen items from the crime scene failed to match Rivera's blood, [FN521] semen, [FN522] fingerprints [FN523] or hairs. [FN524] Nevertheless, a jury convicted Rivera of first-degree murder, [FN525] and a judge sentenced him to life in prison without the possibility of parole. [FN526] In November, 1996, an Illinois Appellate Court reversed Rivera's conviction.

[FN527] However, Rivera remains incarcerated, [FN528] and Lake County, Illinois prosecutors will likely seek the death penalty in his retrial. [FN529]

V. Conclusion

This article has documented that American police continue to elicit false confessions even though the era of third degree interrogation has passed. This study has also demonstrated with field data what Kassin and Wrightsman have established in the laboratory: [FN530] that confession evidence substantially biases the trier of fact's evaluation of the case in favor of prosecution and ***492** conviction, even when the defendant's uncorroborated confession was elicited by coercive methods and the other case evidence strongly supports his innocence. [FN531] With near certainty, false confessions lead to unjust deprivations of liberty. Often they also result in wrongful conviction and incarceration, sometimes even execution.

For those concerned with the proper administration of justice, the important issue is no longer whether contemporary interrogation methods cause innocent suspects to confess. Nor is it to speculate about the rate of police- induced false confession or the annual number of wrongful convictions they cause. [FN532] Rather, the important question is: How can such errors be prevented? If police and prosecutors wish to prevent wrongful deprivations of liberty and miscarriages of justice, they must acknowledge the reality of false confessions, seek to understand their causes and consequences, and work to implement policies that will both reduce the likelihood of eliciting false confessions and increase the likelihood of detecting them.

The sixty false confessions described in this article dispel the myth promoted by interrogation manual authors and police trainers that the psychological interrogation methods they advocate do not cause suspects to confess to crimes they did not commit. [FN533] In fact, the opposite is true. Our analysis almost always reveals evidence of shoddy police practice and/or police criminality. Shoddy police practice derives in large part from poor interrogation training. Influential manuals such as Criminal Interrogation and Confessions [FN534] and Practical Aspects of Interview and Interrogation [FN535] teach police to use tactics that have been shown to be coercive and to produce false confessions. [FN536] Such ***493** texts also mislead interrogators into believing that a suspect's guilt can be inferred on the basis of pseudoscientific claims about the meaning of demeanor and behavior analysis, and they fail to educate police about the social psychology, variety and distinguishing characteristics of interrogation-induced false confessions. [FN537]

Police criminality (e.g., coercing false witness statements, suborning perjured testimony from snitches, perjury at suppression hearings or at trial and/or obstruction of justice by

withholding exculpatory evidence) often stems from ill-conceived efforts to save prosecutions that never should have commenced. The blood sport attitude that often develops in high profile criminal prosecutions--"get the guilty party no matter what"--sometimes causes significant harm to innocent individuals who police and prosecutors have identified as guilty solely because they were coerced or persuaded to make a false confession. During the investigation and prosecution of every wrongful conviction documented in this article, police and prosecutors should have realized that the confession was almost certainly, if not demonstrably, false.

The American criminal justice system has not yet developed adequate safeguards to prevent police-induced false confessions from leading to the wrongful deprivation of liberty and conviction of the innocent. False confessions threaten the quality of criminal justice in America by inflicting significant and unnecessary harms on the innocent. In 52% of the cases reported here, the false confessor suffered, at a minimum, unjust and needless pre-trial deprivations of liberty. [FN538] For these defendants, the safeguards built into the criminal justice system limited the false confessor's harms to pre-trial incarceration, the cost of defending their innocence, and the damage to their careers and reputations. Forty-eight percent of the false confession ***494** cases studied resulted in a miscarriage of justice. [FN539] In these prosecutions, the safeguards built into the criminal justice system failed to prevent lengthy incarceration, years of imprisonment on death row and in one case a wrongful execution.

False confessions are likely to lead to unjust deprivations of liberty and miscarriages of justice because criminal justice officials and lay jurors treat confession evidence with such deference that it outweighs strong evidence of a defendant's innocence. It bears emphasizing that in none of the disputed confessions documented in this article was there any reliable evidence corroborating the defendant's confession, and in most of these cases there was compelling, if not overwhelming, evidence establishing his innocence. Nevertheless, criminal justice officials treated these confession statements as the most probative evidence of the defendant's guilt and permitted the "I did it" statement to override evidence of his innocence. Absent the uncorroborated and unreliable statement, none of these individuals would likely have been arrested, charged, convicted, incarcerated, or executed.

The risk of harm caused by false confessions could be greatly reduced if police were required to video- or audio-record the entirety of their interrogations. Presently, only Alaska [FN540] and Minnesota [FN541] require recording custodial interrogations. [FN542] The practice of recording creates an objective and exact record of the interrogation process that all parties-- police, prosecutors, defense attorneys, judges, juries--can review at any time. The existence of an exact record of the interrogation is

crucial for determining the voluntariness and reliability of any confession statement, especially if the confession is internally inconsistent, is contradicted by some of the case facts, or was elicited by coercive methods or from highly suggestible individuals.

Taping also allows third parties to resolve the courtroom "swearing contests" that arise when the suspect and the police ***495** offer conflicting testimony about what occurred during interrogation. In disputed confession cases the discrepancies between police officers' and defendants' accounts clearly indicate that one of the parties is either lying or mistaken. Of course, interrogators are sometimes falsely accused of deviant conduct. In the usual case, however, the police officer's testimony is treated as far more credible than the citizen's, whose reputability is compromised by his status as a criminal defendant. [FN543] In many of the cases documented in this article, however, the interrogator claimed that the confessor supplied information that only the perpetrator could have known--only to have the suspect subsequently proven innocent and his ignorance of the crime facts revealed. To more accurately resolve whether the interrogator used coercion, whether the suspect knew the facts of the crime, and/or whether he was made to confess falsely, one conclusion is inescapable: interrogations must be recorded in their entirety.

The cases discussed above also illustrate the compelling need for police, prosecutors, judges and juries to carefully scrutinize and evaluate a suspect's post-admission narrative against the known facts of the crime. Confessions should be evaluated on the basis of the quality of the post-admission narratives they produce, and police should be trained to recognize that it is this information--not the words "I did it"--that discriminates between the innocent and the guilty. In investigations in which hard evidence linking a person to a crime is missing, only the analysis of the suspect's post-admission narrative provides a basis for objectively assessing his personal knowledge of a crime (assuming contamination is eliminated). In each of the recorded false confessions studied here, the account the suspect offered after saying the words "I did it" was significantly at odds with the crime facts and indicated that the suspect was ignorant of information the true perpetrator would have known.

When police are trained to seek both independent evidence of a suspect's guilt and internal corroboration for every confession before making an arrest; when state's attorneys demand that "I did it" statements be corroborated by the details of a suspect's post-admission narrative before undertaking a prosecution; ***496** when courts insist on a minimal indicia of reliability before admitting confession statements into evidence; and when legislators mandate the recording of interrogations in their entirety, the damage wrought and the lives ruined by the misuse of psychological interrogation methods will be significantly

reduced. The sixty cases discussed in this article illustrate that when there is no independent evidence against a defendant and only a factually inaccurate confession, the risk of justice miscarrying is so great that the case should never be allowed to proceed to trial.

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FNaaa1. Professor of Sociology, University of California, Berkeley; Ph.D., Stanford University.

FN1. See Saul M. Kassin & Lawrence S. Wrightsman, Confession Evidence, in The Psychology of Confession Evidence & Trial Procedure 67, 67-68 (Saul M. Kassin & Lawrence S. Wrightsman eds., 1985) [hereinafter Kassin & Wrightsman, Confession Evidence]; 3 John Henry Wigmore, Wigmore on Evidence § 815 (1972); David Simon, Homicide: A Year On The Killing Streets (1991); Richard A. Leo, Inside the Interrogation Room, 86 J. Crim. L. & Criminology 266, 298 (1996) [hereinafter Leo, Inside the Interrogation Room].

FN2. See Kassin & Wrightsman, Confession Evidence, supra note 1, at 67; Saul M. Kassin & Lawrence S. Wrightsman, Coerced Confessions, Judicial Instructions, and Mock Juror Verdicts, 11 J. of Applied Social Psychology 489, 489 (1981) [hereinafter Kassin & Wrightsman, Coerced Confessions]; Saul M. Kassin & Lawrence S. Wrightsman, Prior Confessions and Mock Juror Verdicts, 10 J. of Applied Social Psychology 133, 133 (1980) [hereinafter Kassin & Wrightsman, Prior Confessions].

FN3. See Donald S. Connery, Convicting the Innocent: The Struggle of a Murder, A False Confession, and the Struggle to Free a "Wrong Man" ix-xii (1996); C. Ronald Huff et al., Convicted But Innocent: Wrongful Conviction and Public Policy xxi-xxiii (1996); Lawrence S. Wrightsman & Saul M. Kassin, Confessions in the Courtroom 2-3 (1993); Gisli Gudjonsson, The Psychology of Interrogations, Confessions and Testimony (1992); Martin Yant, Presumed Guilty: When Innocent People are Wrongly Convicted 11-14 (1991); Robert Perske, Unequal Justice 11-12 (1991); Jerome Frank & Barbara Frank, Not Guilty (1957); Edward Radin, The Innocents 11-12 (1964); Edwin M. Borchard, Convicting the Innocent: Errors of Criminal Justice vii (1932); National Comm'n on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement 11 (1931) [hereinafter The

Wickersham Comm'n Report]; Welsh S. White, False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions, 32 Harv. C.R.- C.L. L. Rev. 105, 109 (1997); Kassin & Wrightsman, Confession Evidence, supra note 1, at 68; Hugo Adam Bedau & Michael L. Radelet, Miscarriages of Justice in Potentially Capital Cases, 40 Stan. L. Rev. 21, 22 (1987).

FN4. See Edward Connors et al., Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial (1996); Huff et al., supra note 3; Connery, supra note 3; Roger Parloff, Triple Jeopardy: A Story of Law at its Best--and Worst (1996); Kevin Davis, The Wrong Man: A True Story (1996); Jim Fisher, Fall Guys: False Confessions and the Politics of Murder (1996); Paul Mones, Stalking Justice (1995); Steven Linscott, Maximum Security (1994); Gudjonsson, supra note 3; Yant, supra note 3; Robert Mayer, The Dreams of Ada (1991); Perske, supra note 3.
See also Richard J. Ofshe & Richard A. Leo, The Decision to Confess Falsely: Rational Choice and Irrational Action, 74 Denv. U. L. Rev. 979 (1997) [hereinafter Ofshe & Leo, The Decision to Confess Falsely]; Richard J. Ofshe & Richard A. Leo, The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions, 16 Stud. in L., Pol., & Soc'y 189 (1997) [hereinafter Ofshe & Leo, Social Psychology]; Gail Johnson, False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations, 6 B.U. Pub. Int. L.J. 719 (1997); Saul M. Kassin, The Psychology of Confession Evidence, 52 Am. Psychol. 221 (1997); White, supra note 3; Michael Radelet et al., Prisoners Released From Death Rows Since 1970 Because of Doubts About Their Guilt, 13 T.M. Cooley L. Rev. 907 (1996); T.N. Thomas, Polygraphy and Coerced-Compliant False Confession: Serviceman E' Redevivus, 35 Sci. & Just. 133 (1995); Mickey McMahon, False Confessions and Police Deception: The Interrogation, Incarceration and Release of An Innocent Veteran, 13 Am. J. Forensic Psychol. 5 (1995); Paul Hourihan, Earl Washington's Confession: Mental Retardation and the Law of Confessions, 81 Va. L. Rev. 1471 (1995); Wrightsman & Kassin, Confessions in the Courtroom, supra note 3; Richard J. Ofshe, Inadvertent Hypnosis During Interrogation, 40 Int'l J. Clinical & Experimental Hypnosis 125 (1992) [hereinafter Ofshe, Inadvertent Hypnosis].
See generally Lack of Evidence Leads to Sitka Murder Acquittal, Anchorage Daily News, June 25, 1997, at B4 [hereinafter Lack of Evidence]; Tom Held, Justice Gets 2nd Chance in Murder Case: Victims' Son Wants Fair Trial, No Death Penalty Threat for Accused Outlaws, MilwaukeeJ. & Sentinel, June 12, 1997, at 1; Bryan Smith, Suspects' Confessions May Hide Truth, Oregonian, Feb. 23, 1997, at D1; Bob Herbert, Prosecutor's Prize, N.Y. Times, Jan. 29, 1996, at A5; Mike Folks, Man Charged With Murder Released;

Fingerprints Didn't Match Ones Found at Scene, Ft. Lauderdale Sun-Sentinel, Oct. 12, 1996, at B1; Barry Siegel, A Question of Guilt When Taunja Bennett was Killed in 1990; Portland, Oregon Prosecutor Jim McIntyre Thought He Had a Rock-Solid Case Against Laverne Pavlinac and John Sosnovske; Then Someone Started Writing Anonymous Letters Claiming Credit for the Murder, L.A. Times, Sept. 1, 1996 (Magazine), at 15 [hereinafter Siegel, A Question of Guilt]; Mark Sauer, Some Strange Cases Examined of Innocents Who Confess to Murder, San Diego Union & Trib., July 27, 1996, at B10; John Holland, Break Killing Suspect Cleared: Shoup Among 4 Held in Canadian's Death, Daytona News J., July 31, 1996, at 1A; William Booher, Wrongly Imprisoned Man Will Get $605,000, New Castle, Henry County and State Must Pay for 18 Months Behind Bars, Indianapolis Star, Mar. 21, 1995, at C1; Robert P. Sigman, The Tragedy of False Confessions, Kan. City Star, June 19, 1995, at B4; Marc Perrusquia, "Confessor" to Murder Says He Was Coerced, Comm. Appeal, Jan. 16, 1995, at A1; Joseph P. Shapiro, Innocent, But Behind Bars; Another Man Confessed to Murder; Why is this Retarded Man in Prison?, U.S. News & World Rep., Sept. 19, 1994, at 36; Michael Granberry, Charges Dropped in Laguna Arson When "Confession" Is Proved Bogus; Courts: O.C. Prosecutors Admit They Were Duped, Verify Suspect Was in Mexican Jail During Last Year's Firestorm, L.A. Times, Oct. 6, 1994, at A1; Joe Darby, Prosecutors Reject Murder Confession, New Orleans Times-Picayune, Feb. 4, 1994, at B2; June Arney, Joseph M. Giarratano; Bloody Boot Prints Led Him To Doubt His Own Confession, Virginian-Pilot & The Ledger Star, June 26, 1994, at A1; Glen Chase, Expert Picks at Confession Says Errors Suggests Misskelley Lied, Ark. Democrat- Gazette, Feb. 2, 1994, at 1A; Ginny Carroll, True Confessions--Or False?; In 1982 a New Mexico Man Said He Killed a Priest; Now, There's Strong Evidence He Didn't, Newsweek, Sept. 13, 1993, at 41; Pete Shellem, Jailed Man Set Free After False Confession; Proof of Innocence Approved at Hearing, Harrisburg Patriot, Jan. 9, 1993, at A1 [hereinafter Shellem, Jailed Man Set Free]; David Rossmiller & Glen Creno, City to Probe Police on False Confession; Mom's Other Sons Returned to Family, Phoenix Gazette, Mar. 31, 1993, at B4; Roger Parloff, False Confessions: Standard Interrogations by Arizona Law Enforcement Officials Led to Four Matching Confessions to the Murders of Nine People at a Buddhist Temple; But All Four Suspect Were Innocent, Am. Law., May 1993, at 58 [hereinafter Parloff, False Confessions]; Carlos V. Lozano, Ex-Ranch Foreman Acquitted of Murder Despite a Confession Crime: A Jury Official Says the Prosecution Failed to Provide "Separate Evidence to Substantiate" the Charge Stemming from the 1988 Simi Valley Slaying, L.A. Times, July 24, 1992, at B5; Carolyn Colwell, Defense, DA: Scrap Murder Indictment, Newsday, May 1, 1991, at 23; Jolayne Houtz, Murder Confessions False; Man Released, Seattle Times, Apr. 23, 1991, at B1; Rob Warden, Guilty Until Proven Innocent: The Criminal Justice System

Does Not Protect the Innocent, Chi. Times Mag. 34 (1990); Barry Siegel, A Peek at Back Alley Justice, L.A. Times, Aug. 16, 1990, at 1 [hereinafter Siegel, A Peek At Back Alley Justice]; Jim Phillips, Man Who Said He Killed Friend Gets Probation for Scaring Her, Austin Am. Statesman, Nov. 9, 1990, at B3; Mark Paxton, Nightmare of Confession Continues; Two Claimed Responsibility for Murders, Tulsa World, Feb. 11, 1990, at C26; Jack Page, A Question of Justice: A Father's Plea for Bradley Page, East Bay Express, Oct. 12, 1990, at 1; Claire Cooper, False Confessions Ring True Under Questioning, Suspects Fall Victim to Their Own Imaginations, Sacramento Bee, Jan. 7, 1990, at A1.

FN5. See, e.g., Mones, supra note 4; Mayer, supra note 4; Terry J. Ganey, St. Joseph's Children: A True Story of Terror and Justice (1989).

FN6. In their study of 350 miscarriages of justice in capital (and potentially capital) cases in the twentieth century, Bedau and Radelet identified false confession as the leading cause of wrongful convictions attributable to police misconduct. Of the cases they studied, 14% resulted from coerced or persuaded false confessions. See Bedau & Radelet, supra note 3, at 58.

FN7. Borchard, supra note 3.

FN8. See, e.g., Huff et al., supra note 3; Yant, supra note 3; Radin, supra note 3; Frank & Frank, supra note 3; Radelet et al., supra note 4.

FN9. The leading contemporary research in this tradition is Bedau and Radelet's landmark study of miscarriages of justice. See Bedau & Radelet, supra note 3; see also Michael L. Radelet et al., In Spite of Innocence: Erroneous Convictions in Capital Cases (1992). In total, they identified 416 cases since 1900 in which innocent defendants were wrongfully convicted of capital or potentially capital crimes. Id. at ix-x. Recognizing that miscarriages of justice are caused by a wide variety of factors, Bedau and Radelet identified the four main sources of wrongful conviction: (1) police error prior to trial; (2) prosecutorial error before or during trial; (3) witness error during depositions or testimony; and (4) miscellaneous types of system error. Though no one knows the magnitude of harm caused by wrongful convictions or the number of innocent individuals wrongfully executed in this century, Bedau and Radelet's research persuasively demonstrates that "our criminal justice system is fallible and the gravest possible errors in its administration can be documented." Bedau & Radelet, supra note 3, at 46.

FN10. In little more than a half century, American interrogation practices have undergone a remarkable change.

See generally Richard A. Leo, From Coercion to Deception: The Changing Nature of Police Interrogation in America, 18 Crime, L. & Soc. Change 35 (1992) [hereinafter Leo, From Coercion to Deception]. Throughout the first third of the twentieth century, police regularly resorted to physical force and duress to extract confessions. See Wickersham Comm'n Report, supra note 3. Growing public revulsion toward third degree practices, the movement toward police professionalization, and Supreme Court decisions outlawing physical force during interrogation eventually led to a shift to psychological tactics. See Brown v. Mississippi, 297 U.S. 278 (1936); Samuel Walker, A Critical History of Police Reform: The Emergence of Professionalism 132-34 (1977); Ernest Jerome Hopkins, Our Lawless Police: A Study of the Unlawful Enforcement of the Law 3-14 (1931); Emmanuel Lavine, The Third Degree: A Detailed and Appalling Expose of Police Brutality 3-9 (1930). Though American interrogation methods became far less assaultive during the 1940s and 1950s, psychologically coercive practices flourished and police continued to elicit involuntary and unreliable confessions. See Richard A. Leo, Police Interrogation in America: A Study of Violence, Civility and Social Change 53-65 (Ph.D. dissertation, Univ. of Calif. at Berkeley 1994) (on file with author) [hereinafter Leo, Police Interrogation in America]. In response, the Supreme Court turned its attention from constitutional questions raised by physical coercion to the problems raised by psychologically oriented interrogation practices. In a series of decisions between 1940 and 1963, the Court analyzed the conditions under which psychological methods produce involuntary confessions. See, e.g., Haynes v. Washington, 373 U.S. 503 (1963); Lynumn v. Illinois, 372 U.S. 528 (1963); Culombe v. Connecticut, 367 U.S. 568 (1961); Rogers v. Richmond, 365 U.S. 534 (1961); Spano v. New York, 360 U.S. 315 (1959); Fikes v. Alabama, 352 U.S. 191 (1957); Leyra v. Denno, 347 U.S. 556 (1954); Watts v. Indiana, 338 U.S. 49 (1949); Malinski v. New York, 324 U.S. 401 (1945); Ashcraft v. Tennessee, 322 U.S. 143 (1944); Chambers v. Florida, 309 U.S. 227 (1940).

In 1966, in Miranda v. Arizona, the Supreme Court directly addressed the policy problem of psychologically-based methods by mandating that police issue a set of code-like constitutional warnings and elicit a waiver from suspects prior to custodial questioning. 384 U.S. 436 (1966). The fourfold Miranda warnings informed suspects of their constitutional right to refuse and/or terminate custodial questioning, and thereby avoid and/or escape the potentially coercive pressures the Warren Court believed to be present in modern methods of interrogation. Id. at 467. Unable to observe directly what happened in interrogation rooms, the Court turned to police training manuals to assess methods of psychological interrogation and concluded that some of these methods were heavy-handed and oppressive. Id. at 448-55. While the Miranda Court acknowledged that no single tactic was likely to overbear a suspect's will, the

materials--especially in lesser known cases--all social science and legal research on miscarriage of justices relies on both primary and secondary source materials. See, e.g., Yant, supra note 3; Huff et al., supra note 3; Bedau & Radelet, supra note 3. The research reported here is no different. By necessity, we rely on a variety of sources to document our assertions of fact. Where possible, we have tried to draw directly on interviews, police transcripts, and trial records, but in many instances we were only able to obtain newspaper and magazine accounts, appellate court opinions, academic journal articles, and/or books.

FN16. The authors obtained case file materials (either substantial or selected portions) directly from the attorney(s) representing the confessor in 17 cases (nos. 2, 3, 16, 17, 18, 21, 28, 34, 35, 40, 43, 45, 46, 47, 49, 50, 58). See infra Part II.D (describing and numbering the cases studied in this article). The confessors' attorneys typically requested consultation at a suppression hearing and/or criminal trial, during the post-conviction appeal, or in a civil proceeding following the termination of criminal charges. In one case, a governor requested consultation in connection with a pardon under consideration.

FN17. In many of the cases identified in this paper, the suspect supposedly also confessed to so-called "jailhouse snitches"--at the same time that he was busy recanting his uncorroborated confession to everyone else. Because jailhouse snitches stand to gain material concessions and sentence reductions, we do not regard their testimony as credible. See Report of the 1989-90 Los Angeles County Grand Jury, Investigation of the Involvement of Jail House Informants in the Criminal Justice System in Los Angeles County (June 26, 1990); Clifford Zimmerman, Toward A New Vision of Informants: A History of Abuses and Suggestions for Reform, 22 Hastings Const. L.Q. 81, 93-97 (1994); Mark Curriden, No Honor Among Thieves, 75 A.B.A. J. 52, 54-56 (1989).

FN18. The defendant's post-admission narrative of the crime is the actual detailed confession statement that follows the "I did it" admission. See infra notes 26-29 and accompanying text. For a fuller discussion of the post-admission narrative, see Ofshe & Leo, The Decision to Confess Falsely, supra note 4, at 990-97.

FN19. The amount of information on these cases varies. The analysis of some cases was based on access to virtually the entire case file, while the analysis of other cases was limited to journalists' accounts or published appellate court opinions. Based on the available sources, no credible evidence supporting the confessor's guilt was discovered in any of the cases reported in this article. Some investigations, however, involved questionable evidence that

Court recognized that these methods, if used together, could easily overcome a suspect's ability to resist an interrogator's demand for confession and result in an involuntary confession. Id.

Miranda marked the end of third degree interrogations and the establishment of a new era of psychological interrogation techniques and strategies. Even though interrogation practices today are psychologically-oriented, American police sometimes resort to third degree methods. See 20/20: Confession at Gunpoint? (ABC News Television Broadcast, Mar. 29, 1991) [hereinafter Confession at Gunpoint?]. While the Miranda Court noted that police still resorted to violent interrogation methods on occasion, it recognized that American interrogation tactics had become almost entirely psychological in nature. Miranda, 384 U.S. at 448. Recognizing that psychological interrogation methods can produce both involuntary and unreliable confessions, the Court created a bright line rule to more clearly and more effectively regulate the admissibility of psychologically-induced confession statements. See id. at 448-55.

In the 31 years since Miranda, American police have developed, extended, and refined psychological methods of interrogation. As a consequence, interrogation practices have become increasingly subtle and sophisticated. Leo, From Coercion to Deception, supra, at 36-37. Interrogators may have become more effective at obtaining confession statements than they were in the prior era of third degree interrogation. See id. With contemporary psychological methods, police now routinely elicit true confessions from the guilty without resorting to physical or psychological coercion; sometimes coerce false confessions from the innocent without resorting to force; and, less commonly, elicit false confessions from the factually innocent by persuading them they committed crimes about which they have no recollection. See generally Ofshe & Leo, The Decision to Confess Falsely, supra note 4.

FN11. See Ofshe & Leo, Social Psychology, supra note 4, at 191-94.

FN12. For analytic purposes we distinguish between an admission ("I did it") and a confession. The post-admission narrative is the statement the suspect gives to police after making the "I did it" admission. A confession is a full description of a person's participation in a crime.

FN13. See Kassin & Wrightsman, Coerced Confessions, supra note 2, at 492-504; Kassin & Wrightsman, Prior Confessions, supra note 2, at 136-45.

FN14. Kassin, supra note 4, at 221.

FN15. Due to the difficulty of directly obtaining case

later proved to be unreliable.

FN20. See infra text accompanying notes 34-88, 136-80.

FN21. See infra text accompanying notes 89-122, 181-305.

FN22. See infra text accompanying notes 123-35, 306-61.

FN23. See also Bedau & Radelet, supra note 3, at 27-56, for a similar discussion of their method and classification of miscarriages of justice.

FN24. Contamination is the process whereby police suggest facts to the suspect that he did not already know, or the suspect learns facts about the crime from newsmedia or information leaked, rumored or disseminated in the community.

FN25. For an in-depth discussion of the fit between the post-admission narrative and the crime scene facts, see Ofshe & Leo, The Decision to Confess Falsely, supra note 4, at 990-97.

FN26. For example, the answer to a question about whether a body was face up or face down has little value since a guess will be correct half the time. Correctly describing how the victim was bound, however, has more value since there are a large number of possibilities. Finally, assuming there is no contamination, if a defendant's post-admission narrative correctly describes a bedroom crime scene in which the sheet--but not the mattress cover--was stripped off the bed, one panel of a window drape was torn down, and a table lamp was found on the floor in the northeast corner of the room, he has proven his actual knowledge of the crime by accurately describing unusually mundane details of the scene.

FN27. See Michael Dougan, Polly Klaas Case Marked Participants' Lives Forever; A Year After Killer Was Sentenced, Memories of Crime, Trial Remain Fresh, S.F. Examiner, Sept. 26, 1997, at A4.

FN28. See Ofshe & Leo, The Decision to Confess Falsely, supra note 4, at 986- 88, 1088-106, 1114-22; Ofshe & Leo, Social Psychology, supra note 4, at 191-93, 206-07; Gudjonsson, supra note 3, at 47-49, 232-33; Kassin & Wrightsman, Confession Evidence, supra note 1, at 72-76.

FN29. For example, an Illinois special prosecutor recently indicted four DuPage County deputy sheriffs and three former DuPage County prosecutors for conspiracy, perjury and obstruction of justice in the wrongful capital convictions of Rolando Cruz and Alejandro Hernandez. See Don Terry, Ex-Prosecutors and Deputies in Death Row Case are Charged with

Framing Defendant, N.Y. Times, Dec. 13, 1996, at A18. In 1983, DuPage County sheriffs allegedly elicited incriminating statements from Alejandro Hernandez and a "dream-vision" confession from Rolando Cruz to the residential burglary, kidnap, rape and murder of 10-year-old Jeanine Nicarico. See People v. Cruz, 643 N.E.2d 636, 641 (Ill. 1994). Prosecutors charged Hernandez, Cruz and Stephen Buckley (who had been implicated by Hernandez's statements) with the capital crime. See Buckley v. Fitzsimmons, 919 F.2d 1230 (7th Cir. 1990); People v. Cruz, 521 N.E.2d 18 (Ill. 1988); People v. Hernandez, 521 N.E.2d 25 (Ill. 1988). Sheriffs recovered several forms of evidence from the scene of the crime and the victim's body (e.g., blood, handprints, shoeprints, seminal fluid), but could not link any physical evidence to these three suspects. See Cruz, 643 N.E.2d at 643-44; see also American Justice, Presumed Guilty (A&E Television Broadcast, Apr. 16, 1997) [hereinafter A&E, Presumed Guilty]; After 2 Death Sentences, Man Acquitted in 3rd Trial; Courts: Defendant Had Been Imprisoned for 11 Years After Illinois Girl's Murder; No Physical Evidence of Eyewitnesses Linked Him to the Killing, L.A. Times, Nov. 4, 1995, at A27. At the same time, prosecutors failed to provide defense counsel with exculpatory evidence. A&E, Presumed Guilty, supra.

For example, one month prior to trial, Buckley's attorney fortuitously discovered that the County Crime Lab had ruled out Buckley's boots--the primary and only evidence against him--as a match with the boots that had kicked in the Nicarico's door. A&E, Presumed Guilty, supra. Yet the sheriffs had retrieved Buckley's boots from the lab and instructed the laboratory technician not to file a report, causing the County Crime Laboratory Director to resign. Eventually, the FBI conclusively demonstrated that the killer's bootprint left on the Nicarico door did not come from Buckley. Id. Sheriff's Detective John Sam also resigned in protest because of his belief that all three defendants were innocent. See Allan Gray & Courtney Edelhart, Judge Rules Cruz Innocent; Finally "The Whole Case Just Fell Apart," Chi. Trib., Nov. 4, 1995, at 1; Editorial, Injustice in Illinois, Christian Sci. Monitor, Oct. 26, 1995, at 20.

With no evidence against Cruz, Hernandez or Buckley, prosecutors relied on a parade of witnesses to whom they had given reward money or reduced sentences for perjured testimony that Cruz had made self-incriminating statements. See Hernandez, 521 N.E.2d at 30-31; Gera-Lind Kolarik, DNA, Changed Testimony Gain Acquittal: Special Prosecutor, FBI Investigation Controversial Illinois Murder Prosecution, 82 A.B.A. J. 34 (1996). In addition, in 1985, only four days before the trial, prosecutors announced for the first time that sheriff's detectives Dennis Kurzawa and Thomas Vosburgh had elicited a "dream-vision" statement from Hernandez a year and a half earlier in May, 1983, in which Cruz had reported details only known by the police and the

true perpetrator. See Cruz, 521 N.E.2d at 19; Kolarik, supra. Police and prosecutors claimed the "dream-vision" statement was tantamount to a confession. A&E, Presumed Guilty, supra. Yet sheriff's detectives Kurzawa and Vosburgh had not tape-recorded Cruz's alleged "dream-vision" statement, they had not written a report about it at the time it had allegedly been given, and, perhaps most curiously, they had not followed-up on this key piece of evidence the next day in a recorded interview with Cruz. Id. In addition, Deputy John Sam, who had worked alongside Kurzawa and Vosburgh on the Nicarico investigation before resigning in protest, had never heard any mention of Cruz's "dream-vision" statement during that time. See Cruz, 643 N.E.2d at 641; Gray & Edelhart, supra, at 1.

Nevertheless, Kurzawa and Vosburgh testified that they told their boss, Lieutenant James Montesano, about the "dream-vision" statement as proof that it had occurred, and Montesano corroborated their testimony in Court. See Cruz, 643 N.E.2d at 641-42; Jeffrey Bils, Cops Unshaken On Cruz Vision, Chi. Trib., Oct. 28, 1995, at 1. Kurzawa and Vosburgh also testified that former Assistant State's Attorney Thomas Knight had told them not to document the dream-vision statement because he would use it in his summary before the grand jury, though, curiously, Knight had not questioned Cruz about the "dream-vision" statement in grand jury proceedings. See Cruz, 643 N.E.2d at 642; Bils, supra, at 1. The jury convicted Cruz and Hernandez of the capital crimes, and the judge sentenced both men to die by lethal injection. Cruz, 521 N.E.2d at 18-19; Hernandez, 521 N.E.2d at 26; A&E, Presumed Guilty, supra. The jury could not reach a decision on the charges against Buckley, and eventually prosecutors dismissed charges against him. See Cruz, 521 N.E.2d at 19; Terry, supra, at A18; A&E, Presumed Guilty, supra.

Shortly after Cruz's and Hernandez's capital convictions in 1985, Brian Dugan, a convicted child-rapist and murder, confessed that he alone had raped and killed Jeanine Nicarico. Terry, supra. There was considerable evidence implicating Dugan. See Cruz, 643 N.E.2d at 644-52; James Touhy, The DuPage Cover-Up: The Authorities Know That Brian Dugan Killed Jeanine Nicarico; They Know They've Put the Wrong Men on Death Row; They Don't Care, Chi. Lawyer, May 1996, at 9; A&E, Presumed Guilty, supra. First, Dugan had also raped and killed seven-year-old Melissa Ackerman and 27-year-old Donna Schnor, both with the same modus operendi as the perpetrator of the Nicarico crime--abducting the victim, taking her to a remote nature cite, raping and sodomizing her, and then killing her. See Cruz, 643 N.E.2d at 644-52; Touhy, supra; A&E, Presumed Guilty, supra. Second, eyewitnesses placed Dugan in the Nicarico neighborhood on the day of the abduction. See Cruz, 643 N.E.2d at 648; Touhy, supra; A&E, Presumed Guilty, supra. Third, Dugan knew many of the crime details that had not been made public. See Cruz, 643 N.E.2d at 647; Touhy,

supra; A&E, Presumed Guilty, supra. Nevertheless, both police and prosecutors refused to accept the validity of Dugan's confession, insisting that Cruz and Hernandez were guilty. See Cruz, 643 N.E.2d at 644-52; Touhy, supra; A&E, Presumed Guilty, supra. Skeptical observers at the time insisted that prosecutors knew that Dugan had committed the crime but ignored his confession because they could not admit that they had sent two innocent men to death row. See Touhy, supra.

In 1988, the Illinois Supreme Court reversed the convictions against Cruz and Hernandez because the prosecution had deliberately misused both Hernandez's and Cruz's statements against one another. See Cruz, 521 N.E.2d at 23- 24; Hernandez, 521 N.E.2d at 33-35. Based on his alleged "dream-vision" statement and the perjured testimony of numerous questionable witnesses, Cruz was convicted again at his second trial in 1990 of abducting, raping and murdering Nicarico, and resentenced to die by lethal injection. Cruz, 643 N.E.2d at 639; A&E, Presumed Guilty, supra. Hernandez's second trial ended in a hung jury, but at his third trial in 1991 he was convicted and sentenced to 80 years in prison. Jeffrey Bils & Maurice Possley, Judge Rules Cruz Innocent; Nicarico Case Still Open After 12 Years, Chi. Trib., Nov. 4, 1995, at 1; A&E, Presumed Guilty, supra. Illinois State's Attorney Mary Kenney, who had been assigned to defeat Cruz's death row appeal, concluded that both Cruz and Hernandez were innocent and pleaded with then-Illinois State Attorney Roland Burris to dismiss charges against both of them. Radelet et al., supra note 4, at 934; A&E, Presumed Guilty, supra. When Burris pressed forward, Kenney resigned in disgust. See Radelet et al., supra note 4, at 934; Terry, supra; A&E, Presumed Guilty, supra. Though the Illinois Supreme Court initially affirmed Cruz's and Hernandez's convictions in 1992, it vacated both convictions in 1994. See Cruz, 643 N.E.2d at 639.

In 1995 DNA exonerated Cruz, Hernandez and Buckley. See Connors et al., supra note 4, at 44-46. At the same time, DNA testing revealed that there was only a 3/100th of 1% chance (i.e., 3/10,000) that Brian Dugan was not the source of the semen found in Jeanine Nicarico's body. Ted Gregory & Peter Gorner, Cruz Didn't Rape Nicarico, DNA Expert Says; But Prosecutors Not Moved by New Tests, Chi. Trib., Sept. 23, 1995, at 1. Undeterred by this exculpatory evidence, prosecutors in 1995 brought Cruz to trial and sought the death penalty for a third time. A&E, Presumed Guilty, supra. However, this time Lieutenant Montesano recanted his earlier sworn testimony that Detectives Kurzawa and Vosburgh had told him about Cruz's alleged "dream- vision" confession statement immediately after it had been obtained. Kolarik, supra. Admitting that he had lied under oath in his earlier testimony, Montesano testified that he had been in another state the day that Kurzawa and Vosburgh had supposedly phoned him and therefore could not have spoken to them about any "dream-vision" confession statement.

Kolarik, supra. As a result, Judge Ronald Mehling immediately acquitted Cruz and sharply criticized police and prosecutors for their sloppy and unethical conduct, forcing prosecutors to dismiss charges against Hernandez, who had been awaiting his fourth trial. Bils & Possley, supra, at 1. Both Cruz and Hernandez had each spent nearly 12 years in prison. Cruz had spent 10 years on death row, and Hernandez had spent three years on death row. A&E, Presumed Guilty, supra.
In December 1996, an Illinois Special Prosecutor charged four DuPage County sheriffs (including Montesano, Kurzawa and Vosburgh) and three former DuPage County prosecutors (including Knight) with conspiring to withhold evidence and use of false testimony to frame an innocent man for murder. See Terry, supra.

FN30. Police interrogation training courses and seminars (including the introductory and advanced courses put on by the Chicago-based firm Reid & Associates) rarely, if ever, even mention the subject of false confessions. Leo, Police Interrogation in America, supra note 10, at 67-127. American police interrogation training manuals also fail to advise police of the social psychology of false confessions or instruct them how to recognize when their tactics are leading an innocent suspect to falsely confess. In short, police text writers and interrogation trainers demonstrate a studied indifference to the extensive psychological literature on false confession. See, e.g., David Zulawski & Douglas Wicklander, Practical Aspects of Interview and Interrogation (1993); Fred E. Inbau et al., Criminal Interrogation and Confessions (1986); Brian Jayne & Joseph Buckley, Criminal Interrogation Techniques on Trial, 64 Sec. Mgt. (1992); John E. Reid & Assocs, The Reid Technique: Interviewing and Interrogation (1991) (unpublished course booklet, on file with authors) [hereinafter The Reid Technique]; John E. Reid & Assocs., The Reid Technique of Specialized Interrogation Strategies (1991) (unpublished course booklet, on file with authors) [hereinafter Reid Specialized Interrogation].

FN31. See, e.g., Inbau et al., supra note 30, at 147; Jayne & Buckley, supra note 30, at 66.

FN32. See, e.g., Gudjonsson, supra note 3; Ofshe & Leo, Social Psychology, supra note 4; Kassin, supra note 4.

FN33. For example, Portland police detective Kent Perry, who elicited proven false murder confessions from both Rick Nieskens and Christopher Cole, stated that, "[s]hort of physical torture, there isn't anything that's going to get you to say that you did something like that when you didn't." See Smith, supra note 4, at D6. Commenting on Gary Gauger's presumed false murder confession, Debra Glaser, a psychologist with the Los Angeles Police

Department and supposed interrogation expert, stated that "no amount of badgering [would prompt the average, sober person to] admit to doing something that awful--or to admit to any crime." Robert Becker & Andrew Martin, Vicious Killer or Gentle Farmer?; Two Portraits Emerge of Gary Gauger, Chi. Trib., Apr. 18, 1995, at 1. Missouri Sheriff Doug Seneker, who elicited Johnny Lee Wilson's proven false confession, echoes this sentiment: "There is a principle in interrogation. A person will not admit to something they haven't done, short of torture or extreme duress. No matter how long you're grilled, no matter how much you're yelled at, you're not going to admit to something you haven't done." Perske, supra note 3, at 50.

FN34. See Colwell, supra note 4, at 23.

FN35. Tom Demoretchky, Detectives in Murder Transferred; Three Confessions to Crime, Newsday, Oct. 24, 1991, at 7.

FN36. Lack of Evidence, supra note 4, at B4. See also Sitka Murder Suspect Sought Help, Police Say, Anchorage Daily News, June 13, 1997, at B7 [hereinafter Sitka Murder].

FN37. Russ Kimball & Laura Greenberg, Trials and Tribulations, Phoenix Mag., Dec. 1993, at 101 [hereinafter Kimball & Greenberg, Trials and Tribulations]; Russ Kimball & Laura Greenberg, False Confessions, Phoenix Mag., Nov. 1993, at 85 [hereinafter Kimball & Greenberg, False Confessions]. See also Russ Kimball & Laura Greenberg, Revelations From the Temple, Phoenix Mag., Oct. 1993, at 83 [hereinafter Kimball & Greenberg, Revelations].

FN38. Parloff, False Confessions, supra note 4, at 58.

FN39. Radelet et al., supra note 9, at 292.

FN40. Warden, supra note 4, at 34.

FN41. Smith, supra note 4, at D1.

FN42. Huff et al., supra note 3, at 2. See also Cox v. State, 552 N.E.2d 970 (Ohio Ct. Cl. 1988).

FN43. Phillips, supra note 4, at B3.

FN44. Paul Feldman, D.A. Won't Prosecute Detective Accused of Confession Coercion, L.A. Times, Mar. 17, 1987, at B1.

FN45. Terry Pristin, Probe Begun Into Confessions of Two Aliens to Street Killings, L.A. Times, Dec. 10, 1986, at B1.

FN46. Booher, supra note 4, at C1. See also Thompson v. State, 671 N.E.2d 1165 (Ind. 1996); William Booher, Beating Charges, Lawsuits Mounting for New Castle Police,

Indianapolis Star, Feb. 6, 1994, at A1.

FN47. Shellem, supra note 4, at A1.

FN48. Perrusquia, supra note 4, at A1.

FN49. Connors et al., supra note 4, at 65.

FN50. Linscott, supra note 4, at 76, 129, 139.

FN51. Granberry, supra note 4, at A1.

FN52. David Rossmiller, Innocent or Not, Under Right Conditions "Everyone Will Confess," Phoenix Gazette, Mar. 16, 1994, at A1.

FN53. Rossmiller & Creno, supra note 4, at B4.

FN54. Herbert, supra note 4, at A5.

FN55. Jim Dwyer, State's Unjust Blood Lust, N.Y. Daily News, Jan. 30, 1996, at 6 [hereinafter Dwyer, State's Unjust Blood Lust]; Jim Dwyer, Slay Confession is Full of Holes, N.Y. Daily News, Jan. 28, 1996, at 8 [hereinafter Dwyer, Slay Confession].

FN56. Smith, supra note 4, at D1.

FN57. Kimball & Greenberg, False Confessions, supra note 37, at 85.

FN58. Parloff, False Confessions, supra note 4, at 58.

FN59. Ofshe & Leo, Social Psychology, supra note 4, at 226-31.

FN60. Kimball & Greenberg, False Confessions, supra note 37, at 85.

FN61. See Bedau & Radelet, supra note 3, at 150-51.

FN62. David Nathan, New Trial for Man Convicted of Murder, United Press Int'l, Feb. 4, 1986, at 1. See also State v. Parker, No. A-453-83T4 (N.J. Super. Ct. App. Div. Feb. 4, 1986).

FN63. Siegel, A Question of Guilt, supra note 4, at 15.

FN64. McMahon, supra note 4, at 5.

FN65. Kimball & Greenberg, False Confessions, supra note 37, at 85.

FN66. Davis, supra note 4, at 265.

FN67. Yant, supra note 3, at 90-91.

FN68. Paxton, supra note 4, at C26.

FN69. Donald Connery, Guilty Until Proven Innocent 360-77 (1977).

FN70. Joan Barthel, A Death In Canaan 319-28 (1976). See also Reilly v. State, 355 A.2d 324 (Conn. Super. Ct. 1976).

FN71. Man Lied About Sex Killing; He Felt Safer in Jail, San Diego Union Trib., Aug. 15, 1986, at 40.

FN72. Ganey, supra note 5, at 201-03.

FN73. Radelet et al., supra note 4, at 11.

FN74. Carroll, supra note 4, at 41.

FN75. Howard Swindle, Shadows of a Doubt, Prosecutor, Bishop Believe Man Convicted in Priest's '81 Slaying is Not Guilty, Dallas Morning News, July 4, 1993, at 1A.

FN76. Ofshe & Leo, Social Psychology, supra note 4, at 242 n.23.

FN77. Folks, supra note 4, at B1.

FN78. Holland, supra note 4, at 1A.

FN79. Mary Murphy, Donald Shoup: Killer or Victim?, Orlando Sentinel, May 26, 1996, at A1.

FN80. Booher, supra note 4, at C01. See also Thompson v. State, 617 N.E.2d 1165 (Ind. 1996).

FN81. Feldman, supra note 44, at B1.

FN82. Pristin, supra note 45, at B1.

FN83. Mones, supra note 4, at 296.

FN84. John Douglas & Mark Olshaker, Journey Into Darkness 334-35 (1997).

FN85. White, supra note 3, at 121-25.

FN86. Hourihan, supra note 4, at 1471-72, 1494-501. See also Washington v. Murray, 4 F.3d 1285 (4th Cir. 1993).

FN87. Ofshe & Leo, Social Psychology, supra note 4, at 222-26.

FN88. Shapiro, supra note 4, at 36.

FN89. Cooper, supra note 4, at A1.

FN90. Richard J. Ofshe, Coerced Confessions: The Logic of Seemingly Irrational Action, 6 Cultic Stud. J. 1 (1989) [hereinafter Ofshe, Coerced Confessions].

FN91. Radelet et al., supra note 9, at 285.

FN92. Adrienne Drell, Trial to Focus on Police Hypnosis; Bible Student Sues for $10 Million, Chi. Sun Times, Jan. 18, 1988, at 11.

FN93. Siegel, A Peek at Back Alley Justice, supra note 4, at A1; See also Barry Siegel, Outraged Jury Puts Anger to Work in Stabbing Case Courts; Jurors Can't Believe Case Even Went to Trial; Their Stunning Protest Seems to Succeed for a While, L.A. Times, Aug. 17, 1990, at A1 [hereinafter Siegel, Outraged Jury].

FN94. Radelet et al., supra note 9, at 174.

FN95. Harry Franken, Carmen Cleared in Slaying O'Grady: Case Now Closed, Columbus Citizen J., Dec. 20, 1977, at 1. See also State v. Carmen, No. 76 AP-429 (Ohio Ct. App. June 7, 1977).

FN96. Ofshe & Leo, Social Psychology, supra note 4, at 231-34.

FN97. Expose of False Confession Leads to Murder Acquittal, 10 Crim. Prac. Man. (BNA) 8 (1996) [hereinafter BNA Crim. Prac. Man., Expose of False Confession].

FN98. Held, supra note 4, at 1.

FN99. Ray Quintanilla, State Court Won't Review Gauger Case; Murder Conviction to Remain Overturned, Chi. Trib., Apr. 23, 1996, at 1.

FN100. Charles Mount, Doubt Told in Murder Conviction; Confession Coerced, Gauger Lawyer Says, Chi. Trib., Feb. 7, 1996, at 1.

FN101. Arney, supra note 4, at A15.

FN102. Colman McCarthy, More than a Reasonable Doubt, Wash. Post, Feb. 16, 1991, at A27.

FN103. Ofshe, Inadvertent Hypnosis, supra note 4, at 125.

FN104. Lawrence Wright, Remembering Satan: A Case Of Recovered Memory And The Shattering Of An American Family

(1994).

FN105. Parloff, supra note 4, at 392-93.

FN106. Radelet et al., supra note 4, at 946-47.

FN107. Connery, supra note 4, at 1-6.

FN108. Robert Perske, The Battle for Richard Lapointe's Life, in Mental Retardation 323 (1996).

FN109. Richard Ofshe, I'm Guilty if You Say So, in Borchard, supra note 3, at 95, 187 [hereinafter Ofshe, I'm Guilty if You Say So].

FN110. Chase, supra note 4, at 1A.

FN111. Page, supra note 4, at 1.

FN112. Anthony Pratkanis & Elliot Aronson, Age Of Propaganda: The Everyday Use And Abuse Of Persuasion 174 (1991).

FN113. Karen Brandon & Andrew Martin, Rivera the Wrong Man, Jurors Are Told, Chi. Trib., Nov. 17, 1993, at 1.

FN114. Andrew Martin & Christi Parsons, Confession Holds Up in Rivera Cases, Chi. Trib., Nov. 21, 1993, at 1.

FN115. Ofshe & Leo, Social Psychology, supra note 4, at 234-38.

FN116. Ofshe, Coerced Confessions, supra note 90, at 1-2. See also State v. Sawyer, 561 So. 2d 278 (Fla. Dist. Ct. App. 1990).

FN117. Petition of Martin H. Tankleff For A Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (E.D.N.Y. 1996) (No. 96-CV-0507) (on file with authors).

FN118. Habeas Attack Emphasizes Coerced Confession, 10 Crim. Prac. Man. (BNA) 91 (1996) [hereinafter BNA Crim. Prac. Man., Habeas Attack].

FN119. Herbert, supra note 4, at A5.

FN120. Dwyer, State's Unjust Blood Lust, supra note 55, at 6; Dwyer, Slay Confession, supra note 55, at 8.

FN121. Thomas, supra note 4, at 133.

FN122. Pamela Manson, False Confession Suit Filed; Mesa Police Accused of Coercing Man into Admitting Molestation, Ariz. Republic, Mar. 28, 1995, at A1.

FN123. Lozano, supra note 4, at B1.

FN124. Carol Bidwell, Former Ranch Foreman Acquitted of '88 Killing, L.A. Daily News, July 23, 1992, at 1.

FN125. Steve Ginsburg, Byline, United Press Int'l., June 20, 1988.

FN126. Kim Patch, Byline, United Press Int'l., Sept. 30, 1987.

FN127. Confession at Gunpoint?, supra note 10.

FN128. Perske, supra note 3, at 102-03. See also Fairchild v. Lockhart, 744 F. Supp. 1429 (E.D. Ark. 1989), aff'd, 990 F.2d 1292 (8th Cir. 1990).

FN129. William Hart, The Subtle Art of Persuasion, Police Mag., Mar. 1981, at 7-17.

FN130. Houtz, supra note 4, at B1.

FN131. Kate Freedlander, Witness Says Police Used "Brainwashing" to Get Confession, Oregonian, Jan. 16, 1997, at E06. See also Kate Freedlander, Jury Convicts Stangel in Death, Oregonian, Jan. 17, 1997, at A1 [hereinafter Freedlander, Stangel].

FN132. Joe Darby, Prosecutors Reject Murder Confession, New Orleans Times- Picayune, Feb. 4, 1994, at B2.

FN133. Perske, supra note 3, at 93.

FN134. Face to Face with Connie Chung (CBS News Television Broadcast, Feb. 11, 1991) [hereinafter CBS News, Face to Face].

FN135. Cyril Wecht, Cause of Death 238-62 (1993).

FN136. Phillips, supra note 4, at B3.

FN137. Rossmiller & Creno, supra note 4, at B4.

FN138. Id.

FN139. Feldman, supra note 44, at B1.

FN140. Id.

FN141. Granberry, supra note 4, at A1.

FN142. Man Lied About Sex Killing, supra note 71, at 40.

FN143. See Connery, supra note 3, at 20; Barthel, supra note 70; see also Reilly v. State, 355 A.2d 324, 328 (Conn. Super. Ct. 1976).

FN144. Joseph O'Brien, Mother's Killing Still Unresolved, But Peter Reilly Puts Past Behind; 20 Years After Trial, Reilly Puts Past Behind, Hartford Courant, Sept. 23, 1993, at A1. More than 20 years after Reilly's innocence was conclusively established, some Connecticut Police continue to insist that he killed his mother. Id.

FN145. Carroll, supra note 4, at 41.

FN146. Id.

FN147. Id.; see also Swindle, supra note 75, at 1A.

FN148. Swindle, supra note 75, at 1A.

FN149. Id.

FN150. Smith, supra note 4, at D1.

FN151. Id.

FN152. Id.

FN153. Id.

FN154. See Yant, supra note 3, at 90-91; Paxton, supra note 4, at A2.

FN155. See Yant, supra note 3, at 90-91.

FN156. Colwell, supra note 4, at 23; Demoretchky, supra note 35, at 7.

FN157. Demoretchky, supra note 35, at 7.

FN158. Perrusquia, supra note 4, at A1.

FN159. Id.

FN160. Herbert, supra note 4, at A5; Dwyer, State's Unjust Blood Lust, supra note 55, at 6.

FN161. Herbert, supra note 4, at A5; Dwyer, State's Unjust Blood Lust, supra note 55, at 6.

FN162. Holland, supra note 4, at 1A. For a discussion of the characteristics of the mentally handicapped that make them especially vulnerable to police- induced false confession, see Ofshe & Leo, Social Psychology, supra note 4, at 211-14.

FN163. Holland, supra note 4, at 1A.

FN164. See Kimball & Greenberg, False Confessions, supra note 37; see also Kimball & Greenberg, Revelations, supra note 37; Kimball & Greenberg, Trials and Tribulations, supra note 37; Parloff, False Confessions, supra note 4, at 58-62.

FN165. See Kimball & Greenberg, False Confessions, supra note 37.

FN166. Id.

FN167. Id.

FN168. Id.

FN169. Id. Had police done the ballistics test in a timely fashion, Garcia would have been arrested weeks before he killed Cameron.

FN170. Id. See also McMahon, supra note 4, at 5.

FN171. Kimball & Greenberg, False Confessions, supra note 37; see generally Parloff, supra note 4; McMahon, supra note 4.

FN172. See Ofshe & Leo, Social Psychology, supra note 4, at 242; Folks, supra note 4, at B1. After Salazar's case was dismissed, the state eventually located an expert who, contrary to the Florida Department of Law Enforcement, said that while Salazar was not a match, he could not be excluded. The state then re-indicted Salazar. See Grand Jury Indictment of Martin Salazar for First Degree (Palm Beach County Ct., Oct. 7, 1997) (No. 97-11428CFA02).

FN173. See Connors et al., supra note 4, at 64-65; Linscott, supra note 4, at 210.

FN174. During this interrogation, Washington confessed to three other rapes that police subsequently determined he could not have committed. See White, supra note 3, at 121-25; Hourihan, supra note 4, at 1491-501.

FN175. Id.

FN176. Sitka Murder, supra note 36.

FN177. Id.

FN178. Id.

FN179. Id.

FN180. Id.

FN181. Interrogation Transcript of Bradley Page, Oakland, Cal. Police Dep't (Dec. 10, 1984) (on file with authors) [hereinafter Page, Interrogation Transcript].

FN182. Id.

FN183. See Alix Christie, The Strange Confession of Bradley Page: Bibi Lee's Lover Imagined a Crime But Did He Commit It?, 27 Berkeley Monthly 21, 46 (1986) ("[w]hen the laboratory analyses came back from the F.B.I., it became obvious that his 'confession' was all that connected Brad page to the Crime"); see also Melanie Thernstrom, The Dead Girl 247 (1990) ("[t]here was, after all, apart from the confession no evidence at all").

FN184. See generally Page, supra note 4.

FN185. Page, Interrogation Transcript, supra note 181, at 3 (tape #2).

FN186. Id. at 4.

FN187. Page, supra note 4, at 12. See also Thernstom, supra note 183, at 179 ("Found in a hallow grave by search dogs ... nose broken, eye orbit shattered, three separate blows to the head with some heavy sharp-edged instrument, assumed to be a rock ... [was a] skull cracked open").

FN188. Page, Interrogation Transcript, supra note 181.

FN189. Id. at 7 (tape #2).

FN190. Page, supra note 4, at 12; see also Christie, supra note 183, at 46.

FN191. Page, supra note 4, at 12.

FN192. Id. It appeared that the blanket had not even been unfolded almost five years. See Thernstrom, supra note 183, at 237.

FN193. See Page, supra note 4, at 12; see also Thernstrom, supra note 183, at 237 (eight hairs were found on the blanket, none of which matched Bibi Lee's); Christie, supra note 183. Police interrogators at times seem to be obsessed with weird sex. One soft indicator of a false confession is that a suspect who has no known or discoverable history of aberrant sexual obsessions includes in his confession a report of a bizarre sexual act (such as necrophilia as in the Page confession, biting off the victim's nipple as in the Abney confession or anal rape as in the Sawyer case) which turns out not even to be a fact of the crime. If the

confession itself is the result of the interrogator's influence over the suspect, then it is likely that reports of bizarre crime elements that did not happen are also traceable to influence from the interrogator.

FN194. Page, Interrogation Transcript, supra note 181, at 8 (tape #2).

FN195. Page, supra note 4, at 12. See also Thernstrom, supra note 183, at 237; Christie, supra note 183, at 46.

FN196. Page, Interrogation Transcript, supra note 181, at 7-8 (tape #2).

FN197. The pathologist at trial testified that the kind of head injury that the victim sustained would have produced a fair amount of blood. See Thernstrom, supra note 183, at 383.

FN198. See Page, supra note 4, at 12, 14-15; see also Thernstrom, supra note 183, at 81. The massive hunt for the body of the victim, Bibi Lee, began the day after her disappearance, November 5, 1984.

FN199. Page, supra note 4, at 14-15. See also Thernstrom, supra note 183, at 197, 383; see also Eye To Eye with Connie Chung: Confession (CBS News Television Broadcast, Jan. 13, 1994) [hereinafter CBS News, Confession].

FN200. CBS News, Confession, supra note 199. See also Don Martinez, Killer Tied to E. Bay Slaying Authorities also Investigation Convict's Connection to 3 Killings from a Decade Ago, S.F. Examiner, Jan. 11, 1994, at A1.

FN201. Martinez, supra note 200, at A1.

FN202. The jury in the first trial acquitted Page of second degree murder but deadlocked 8-4 on the charge of voluntary manslaughter. The jury in the second trial found Page guilty of voluntary manslaughter after six days of deliberations, and he was sentenced to six years in prison. See Page, supra note 4, at 20-21; Pratkanis & Aronson, supra note 112, at 176-77.

FN203. Page was released after serving two years and eight months of his six year sentence. See Page Free After Doing 2 1/2 Years for 1984 Killing of His Girlfriend, S.F. Examiner, Feb. 11, 1995, at A5.

FN204. Interrogation Transcript of Tom Sawyer, Clearwater, Fla. Police Dep't (Nov. 6-7, 1986) (No. 86-28504) (on file with authors). See also State v. Sawyer, 561 So. 2d 278 (Fla. Dist. Ct. App. 1990); Ofshe & Leo, Social Psychology, supra note 4 at 234-38; Ofshe, Coerced Confessions, supra

note 90, at 6-14.

FN205. Ofshe, Coerced Confessions, supra note 90, at 12.

FN206. Ofshe & Leo, Social Psychology, supra note 4, at 237.

FN207. Interrogation Transcript of Tom Sawyer, supra note 204, at 231.

FN208. Ofshe & Leo, Social Psychology, supra note 4, at 237.

FN209. Id.

FN210. See Sawyer, 561 So. 2d at 297.

FN211. Ofshe & Leo, Social Psychology, supra note 4, at 238.

FN212. BNA Crim. Prac. Man., Habeas Attack, supra note 118, at 92.

FN213. Id.

FN214. Id. at 94.

FN215. Id. at 95.

FN216. Id. at 94.

FN217. Id. at 95.

FN218. Id. at 94-95.

FN219. Id. at 94.

FN220. Id.

FN221. Id.

FN222. Id.

FN223. Id.

FN224. Id.

FN225. Carolyn Colwell, Tankleff's Family: Jury Goofed Relatives Say "Poker Face" Hurt Teen in Murder Trial, Newsday, July 3, 1990, at 6.

FN226. Carolyn Colwell, Tankleff Appeal: Murder Trial Unfair, Newsday, Aug. 16, 1992, at 21. Convicted in June of 1990, Tankleff continues to serve his sentence of fifty years to life at the Clinton Correctional Facility in Dannemora, New York. His conviction is under appeal. See Tankleff v. Senkowski, Nos. 97-2063, 97-2116, 1998 WL 29961

(2d Cir. Jan. 12, 1998).

FN227. See Connery, supra note 3, at 1-2.

FN228. Confession Statements of Richard Lapointe, Manchester, Conn. Police Dep't (July 4, 1989) (in possession of authors). See also Donald S. Connery, Justice Unserved?: Connecticut is About to Witness the Appeal of Another Murder Conviction Based on a Questionable Confession, in Borchard, supra note 3, at 33.

FN229. See Tom Condon, Reasonable Doubt, in Connery, supra note 3, at 28 ("The confession has so many inconsistencies that it is almost as if Lapointe confessed to the wrong crime").

FN230. Connery, supra note 228, at 35.

FN231. Alex Wood, Does Police Lying Compromise Society's Search for Justice, J. Inquirer, Jan. 9, 1995, at 4-5.

FN232. Condon, supra note 229, at 25.

FN233. Id.

FN234. Id.

FN235. Tom Condon, Lapointe Case Pinpoints Need for Reforms, Hartford-Currant, Sept. 19, 1995, at A3.

FN236. Condon, supra note 229, at 29.

FN237. Id.

FN238. Id.

FN239. Autopsy Report of Bernice Martin by Arkady Katsnelson, Medical Examiner, State of Conn., Office of the Chief Medical Examiner (Mar. 9, 1987) (on file with authors).

FN240. Dandy Walker Syndrome is a congenital brain malformation in which cysts form on the brain from a buildup of fluid on the skull. As a result, Lapointe is missing connective tissue between the hemispheres in the cerebella area. See Perske, supra note 108, at 323; see also Stephen Greenspan, There is More to Intelligence than IQ, in Connery, supra note 3, at 136-51.

FN241. Perske, supra note 108, at 323.

FN242. Id.

FN243. 60 Minutes: Richard Lapointe: Did He Do It? (CBS News

Television Broadcast, June 30, 1996).

FN244. Id.

FN245. Id.

FN246. Ofshe, I'm Guilty if You Say So, supra note 109, at 101-02.

FN247. Interrogation Transcript Nos. 1 & 2 of Jessie Misskelley, Jr., West Memphis, Ark. Police Dep't (June 3, 1993) (No. 93-05-0666) (on file with authors).

FN248. Interrogation Transcript No. 1 of Jessie Misskelley, supra note 247, at 17.

FN249. See Bartholomew Sullivan & Marc Perrusquia, Relatives, Lawyers Dispute Account By Misskelley in Slayings of Boys, Com. Appeal, June 8, 1993, at A1. The briefly recorded portion of Misskelley's interrogation revealed that the interrogator manipulated Misskelley to place the killings at the correct time by raising the issue eight times and producing a series of shifts in Misskelley's response. See Interrogation Transcript Nos. 1 & 2 of Jessie Misskelley, supra note 247.

FN250. Interrogation Transcript No. 2 of Jessie Misskelley, supra note 247, at 4.

FN251. Glen Chase, Toss Out Statement on Killing of 3 Boys, Lawyer Asks Judge, Ark. Democrat-Gazette, Jan. 14, 1994, at B1.

FN252. See Marc Perrusquia, "Rowdy Rebel" Says Misskelley Was on Mat, Not at Death Site, Com. Appeal, Feb. 2, 1994, at A6; Glen Chase, Friends Challenged on Misskelley Alibi, Ark. Democrat-Gazette, Feb. 1, 1994, at A1.

FN253. Lynda Natalki, Dropout Found Guilty in Deaths of 3 Boys; Crime: Jessie Lloyd Misskelley Jr., 18 Is Sentenced to Life in Prison for the Brutal Slayings; Two Other Defendants Await Trial in Arkansas, L.A. Times, Feb. 5, 1994, at A21.

FN254. Id.

FN255. Brief for the Appellant at 20, People v. Gauger (Ill. App. Ct. Oct 18, 1994) (No. 2-94-1199).

FN256. Id. at 17.

FN257. Id. at 30-43.

FN258. Id. at 23.

FN259. Id. at 30-43

FN260. Id. at 24.

FN261. Charles Mount, Doubt Told in Murder Conviction; Confession Coerced, Gauger Lawyer Says, Chi. Trib., Feb. 7, 1996, at 1.

FN262. Id.

FN263. Id.

FN264. Appellant's Brief at 17, Gauger (No. 2-94-1199).

FN265. See Becker & Martin, supra note 33, at 1.

FN266. Id.

FN267. Id.

FN268. Id.

FN269. Ray Quintanilla, Son Convicted of Murders Sees Freedom at Cell Door, Chi. Trib., Mar. 13, 1996, at 1.

FN270. Ray Quintanilla, High Court is Asked to Uphold Murder Conviction, Chi. Trib., May 27, 1996, at 1.

FN271. Id.

FN272. Ray Quintanilla, McHenry County Judge Frees Man He Had Sentenced to Die, Chi. Trib., Oct. 5, 1996, at 1.

FN273. See Ray Quintanilla & Meg Murphy, 17 Indicted in Trail of Violence by Biker Gang; Gauger Slayings Linked to Robbery by the Outlaws, Chi. Trib., June 11, 1997, at 1; see also Carolyn Starks, Wisconsin Crime Led to Biker Suspects; Police Saw Similarities Between 1995 Burglary and Richmond Killings, Chi. Trib., June 12, 1997, at 1.

FN274. Interrogation Transcript of Edgar Garrett, Goshen, Ind. Police Dep't (Jan. 27, 1995) (No. 20C01-9502-CF-003) (on file with authors). See also Ofshe & Leo, Social Psychology, supra note 4, at 231-34; BNA Crim. Prac. Man., Expose of False Confession, supra note 97, at 8.

FN275. Ofshe & Leo, Social Psychology, supra note 4, at 231.

FN276. Interrogation Transcript of Edgar Garrett, supra note 274.

FN277. Ofshe & Leo, Social Psychology, supra note 4, at 234.

FN278. Id. See also BNA Crim. Prac. Man., Expose of False

Confession, supra note 97, at 11-12.

FN279. Ofshe & Leo, Social Psychology, supra note 4, at 234. See also BNA Crim. Prac. Man., Expose of False Confession, supra note 97, at 11-12.

FN280. Ofshe & Leo, Social Psychology, supra note 4, at 234

FN281. Id.

FN282. Id.

FN283. Id.

FN284. Id.

FN285. Id.

FN286. Id.

FN287. Id.

FN288. Id. The murder of Michelle Garrett remains unsolved largely because Goshen Indiana police would first have to admit that they caused an innocent man to confess to his daughter's murder. See generally id.

FN289. Dwyer, Slay Confession, supra note 55, at 8.

FN290. Id.

FN291. Dwyer, State's Unjust Blood Lust, supra note 55, at 6.

FN292. Dwyer, Slay Confession, supra note 55, at 8.

FN293. Telephone Interview with William Easton, Attorney, N.Y. Capital State Defender's Office (Apr. 21, 1997).

FN294. Dwyer, Slay Confession, supra note 55, at 8.

FN295. Id.

FN296. Dwyer, State's Unjust Blood Lust, supra note 55, at 6.

FN297. Herbert, supra note 4, at A5.

FN298. Dwyer, Slay Confession, supra note 55, at 8.

FN299. Herbert, supra note 4, at A5.

FN300. Dwyer, State's Unjust Blood Lust, supra note 55, at 6.

FN301. Dwyer, Slay Confession, supra note 55, at 8.

FN302. Id.

FN303. Id.

FN304. Interview with William Easton, supra note 293.

FN305. Man Sentenced for Killing Lover, State News Service, Feb. 28, 1997.

FN306. Hart, supra note 129, at 12-13.

FN307. Id.

FN308. Telephone Interview with Robert C. Hinton, Jr., Attorney (Apr. 15, 1997). See also Hart, supra note 129, at 12-13.

FN309. Hart, supra note 129, at 12-13.

FN310. Id. at 13 ("As she confesses, the girl interjects, 'I am [telling it], but I'm not believing it,' and 'I don't remember it, really. I don't even know if that's right; it's what I think."').

FN311. Id.

FN312. Interview with Robert C. Hinton, Jr., supra note 308.

FN313. Perske, supra note 3, at 102.

FN314. Forensic Evaluation of Professor Ruth Luckasson and Denis W. Keyes at 3 (Feb. 28, 1989) (on file with authors) ("On the Wechsler Adult Intelligence Scale-Revised, Fairchild demonstrated a Full Scale IQ of 61. These scores place him within the lowest 1% of the population. Fairchild has mental retardation.").

FN315. Confession at Gunpoint?, supra note 10.

FN316. Shortly after Fairchild's confession, police retrieved a watch similar to the one owned by the victim from Fairchild's sister. While the state offered this as corroboration of Fairchild's confession (which even the state acknowledged was, in part, not true), Fairchild testified at trial that he bought the watch from someone at a pool hall and sold it to his sister. See Fairchild v. Norris, 21 F.3d 799, 803 (8th Cir. 1994). In the end, the state conceded that without the confession the case against Fairchild simply would have fallen apart. Confession at Gunpoint?, supra note 10.

FN317. See Confession at Gunpoint?, supra note 10. In addition, Fairchild's post-admission narrative contained several glaring errors of fact. For example, Fairchild told officers where he had thrown his gloves away, but they were unable to find them there. See Fairchild v. Lockhart, 744 F. Supp. 1429, 1521 (E.D. Ark. 1989). Fairchild also identified Harold Green as his accomplice, but Green was in Colorado when the crimes took place. See Norris, 21 F.3d at 813.

FN318. Confession at Gunpoint?, supra note 10.

FN319. Id. See also Execution of Retarded Man is Fought, N.Y. Times, Aug. 31, 1995, at B12.

FN320. Confession at Gunpoint?, supra note 10. Despite the absence of the physical evidence that should have linked Fairchild to the crime if he were guilty, despite the factual inaccuracies in Fairchild's confession statements, and despite the highly questionable circumstances under which they were extracted, the courts repeatedly declared that Fairchild's confession was voluntary and reliable. See, e.g., Fairchild v. Norris, 869 F. Supp. 672, 690 (E.D. Ark. 1993) ("Mr. Fairchild's confessions were given voluntarily and the truth of the essential facts stated in those confessions cannot be doubted by any fair and objective person"), rev'd, 21 F.3d 799 (8th Cir. 1994). In fact, many people have doubted the validity of Fairchild's confession. See, e.g., More Questions Than Facts, Ark. Democrat-Gazette, Sept. 8, 1995, at B9; John Brummet, The Fairchild Issues Won't Die, Ark. Democrat-Gazette, Aug. 29, 1995, at B7; "Dear Colleague" Letter from Congressmen John Conyers, Jr. & Don Edwards, Urgent!! Stop The Execution of an Innocent Man (Sept. 21, 1993) (proclaiming Fairchild's innocence) (on file with authors); Confession at Gunpoint?, supra note 10; Perske, supra note 3, at 102-03.

FN321. Confession at Gunpoint?, supra note 10.

FN322. Id. These admissions, in effect, corroborate the testimony of the 13 other African-American men who, like Fairchild, were tortured by Pulaski County Sheriffs in the Mason murder investigation--allegations that the courts had largely dismissed in finding that Fairchild's confessions were voluntary and reliable. See, e.g., Fairchild v. Lockhart, 979 F.2d 636 (8th Cir. 1992).

FN323. Arkansas Executes a Retarded Man for Murder, N.Y. Times, Sept. 2, 1995, at A6.

FN324. Keith Harrison, Bolding: Defendant as Victim; Md. Nurse Tells of Trial, Earlier Traumas, Wash. Post, June 23, 1988, at A1.

FN325. Id.

FN326. Ginsburg, supra note 125.

FN327. Patch, supra note 126.

FN328. Ginsburg, supra note 125.

FN329. Id.

FN330. See Perske, supra note 3, at 88-94; see also Wecht, supra note 135, at 238-62. Delbert Ward has an IQ of 69. See Wecht, supra note 135, at 255.

FN331. Perske, supra note 3, at 90. See also Face to Face with Connie Chung, supra note 134. When asked at trial why he confessed, Ward responded: "They said if I cooperated it would go easier ... so I said yes. It wasn't true. I was nervous and shook up. I hadn't eaten all day. I was tired. My brother had just passed away .... I thought if I said yes, they would let me go home." Wecht, supra note 135, at 255.

FN332. See generally Perske, supra note 3; Wecht, supra note 135.

FN333. Wecht, supra note 135, at 223.

FN334. Id.

FN335. Id. at 245-48.

FN336. As Dr. Cyril Wecht reports:
for one thing, the right lung weighed almost twice as much as the left, while the lower part of the left lung was covered with scar tissue that held it to the chest cavity. Most importantly, both lungs showed 'prominent arteriosclerotic plaques' of the pulmonary arteries--another sign of cardiopulmonary disease. Considered with the enlarged liver and spleen, this was clear evidence of congestion due to an inadequately functioning heart.
Id. at 247.

FN337. Id. at 252-54.

FN338. Id. at 256-60. Dr. Wecht argues that Dr. Germaniuk botched the initial autopsy; that he changed his initial report and the cause of death listed on the death certificate only after he learned that criminal charges would be brought against Delbert Ward (but before receiving results from William Ward's toxicology and microscopic examinations); that during his trial testimony Dr. Germaniuk misrepresented the meaning and significance of certain findings; that he provided factually incorrect

testimony; and that his testimony at trial was "intellectually dishonest." Id. at 249, 253-54.

FN339. Perske, supra note 3, at 93; Wecht, supra note 135, at 260-62.

FN340. Wecht, supra note 135, at 262.

FN341. Lozano, supra note 4, at B5.

FN342. Id.

FN343. Carol Bidwell, Murder Suspect's Bail Upheld; Defense Lawyer Says Confession is False, L.A. Daily News, Apr. 11, 1992, at SV1.

FN344. Carol Bidwell, Judge Rules Man's Murder Confession Can Be Used In Trial, L.A. Daily News, June 25, 1992, at SV5.

FN345. Id.

FN346. Id.

FN347. Suppression Hearing Testimony of Richard J. Ofshe, State v. Stangel, Nov. 12 & Dec. 9, 1996 (No. 96151205) (Clatsop County Cir. Ct., Astoria, Or.) (on file with authors).

FN348. Court TV to Air Live Coverage of Oregon v. Linda Jean Stangel, Bus. Wire (Jan. 7, 1997).

FN349. Report of Detective Hampton of Or. State Police, June 24, 1996, 6-10 (No. 96151205) (on file with authors) [hereinafter Report of Detective Hampton].

FN350. Id. at 12. See also Kate Freedlander, Stangel Says Confessions Coerced, Oregonian, Jan. 15, 1997, at B01.

FN351. Report of Detective Hampton, supra note 349, at 13.

FN352. Id. at 12.

FN353. Freedlander, supra note 350, at B01.

FN354. Report of Detective Hampton, supra note 349, at 13. See also Interview with Linda Stangel, in Astoria, Or. (Oct. 10, 1996).

FN355. The accident scenario technique relies on communicating a promise of leniency for its efficacy and has been demonstrated to elicit false confessions. See Ofshe & Leo, Social Psychology, supra note 4, at 191-93, 206- 07; Saul Kassin & Karyln McNall, Police Interrogations and

Confessions: Communicating Promises and Threats by Pragmatic Implication, 15 Law & Hum. Behav. 233, 247-50 (1991).

FN356. Freedlander, supra note 350, at B01.

FN357. Kate Freedlander, Defendant Found Boyfriend's Scream Annoying, Oregonian, Jan. 11, 1997, at B05.

FN358. The Deputy State Medical Examiner found that the victim's injuries could have been caused either by a vehicle accident or by falling from a high place. See Kate Freedlander, Mother Tells of Loud Arguments Between Son, Girlfriend, Oregonian, Jan. 10, 1997, at D06.

FN359. At the prosecutor's request, Stangel took a polygraph examination administered by a police agency in Minnesota. Although Stangel passed the examination, the judge refused to allow the polygraph result to be used at the suppression hearing. The police officers who elicited Stangel's confession did not take a polygraph examination. See Letter from David E. Knefelkamp, Bureau of Crim. Apprehension, St. Paul, Minn., to Dean Schroeder, Deputy Sheriff, Clatsop County Sheriff's Office, Astoria, Or. (Dec. 13, 1995) (on file with authors).

FN360. Freedlander, Stangel, supra note 131, at A01.

FN361. Woman Sentenced in Fatal Push, Seattle Times, Feb. 11, 1997, at B02.

FN362. ID Nos.: 7, 8, 11, 15, 31.

FN363. ID Nos.: 3, 13, 14, 17, 18, 25, 57, 59.

FN364. ID Nos.: 1, 5, 16, 21, 23, 28, 29, 37, 49, 56.

FN365. ID Nos: 2, 35, 38, 40, 52, 53, 54, 60.

FN366. ID No.: 4.

FN367. In the few cases involving an indeterminate sentence, the upper limit of the sentence was chosen.

FN368. ID Nos.: 9, 47, 58.

FN369. ID Nos.: 10, 12, 19, 24, 27, 30, 32, 36, 43, 51.

FN370. ID Nos.: 6, 20, 22, 26, 34, 39, 41, 45, 46, 48, 50.

FN371. ID Nos.: 33, 42, 44.

FN372. ID No.: 55.

FN373. Phillips, supra note 4, at B3.

FN374. See Feldman, supra note 44, at B1.

FN375. See id.

FN376. See Granberry, supra note 4, at A1.

FN377. See Nathan, supra note 62, at 1.

FN378. See Rossmiller & Creno, supra note 4, at B4.

FN379. Ofshe & Leo, Social Psychology, supra note 3.

FN380. Many miscarriages of justice appear to be discovered by confessions from the true perpetrator. See generally Samuel Gross, The Risks of Death: Why Erroneous Convictions are Common in Capital Cases, 44 Buff. L. Rev. 469 (1996); Samuel Gross, Loss of Innocence: Eyewitness Identification and Proof of Guilt, 16 J. Legal Stud. 395 (1987).

FN381. See generally Yant, supra note 3.

FN382. See Colwell, supra note 4, at 23.

FN383. Perrusquia, supra note 4, at A1.

FN384. Herbert, supra note 4, at A5.

FN385. Holland, supra note 4, at 1A.

FN386. Houtz, supra note 4, at B1.

FN387. Darby, supra note 4, at B2.

FN388. Drell, supra note 92, at 11.

FN389. Id.

FN390. Id.

FN391. See supra notes 204-11 and accompanying text.

FN392. See State v. Sawyer, 561 So. 2d 278 (Fla. Dist. App. Ct. 1990).

FN393. In all sixty cases documented in this article judicial suppression of the confession would almost certainly have caused the prosecutor to dismiss all charges against the defendant because in each of these cases no credible evidence linked the suspect to the crime and varying amounts of evidence indicated that the suspect was factually innocent.

FN394. Warden, supra note 4, at 42-46. See also Radelet et

al., supra note 9, at 292.

FN395. Warden, supra note 4, at 42-46; Radelet et al., supra note 9, at 292.

FN396. Radelet et al. supra note 9, at 292.

FN397. Id.

FN398. In some cases a judge may not be provided with sufficient evidence to warrant suppressing the confession. For example, if the interrogation is not recorded, a defendant may not be able to overcome a police officer's perjured testimony denying the use of coercive interrogation techniques and strategies. See Stephan v. State, 711 P.2d 1156 (Alaska 1985).

FN399. See generally G.R. Miller & F.J. Boster, Three Images of the Trial: Their Implications for Psychological Research, in Psychology in the Legal Process 19 (B. Sales ed., 1977).

FN400. This appears to be especially true if juries are educated about the social psychology of American interrogation practices and are shown precisely how a particular interrogation affected the defendant's decision to confess. See United States v. Hall, 93 F.3d 1337, 1343-44 (7th Cir. 1996) (reversing district court exclusion of expert testimony by Richard Ofshe on the phenomenon of false confessions).

FN401. Interrogation Transcripts of George Abney, Flagstaff, Ariz. Police Dep't (Aug. 28-Sept. 1, 1987) (on file with authors).

FN402. Ofshe, Coerced Confessions, supra note 90, at 6.

FN403. Id.

FN404. See Thomas, supra note 4, at 133.

FN405. Lack of Evidence, supra note 4, at B4.

FN406. Id.

FN407. The victim of this brutal stabbing, as well as three eyewitnesses, testified that Burns did not commit the crime. See Siegel, Outraged Jury, supra note 93, at A1; Siegel, A Peek at Back Alley Justice, supra note 4, at A1.

FN408. These data do not represent a statistically meaningful sample of false confessions since they were not randomly selected from a definable universe of cases. It is likely that these cases overrepresent certain categories: (1) famous cases; (2) recent cases; and (3) cases in which

one or both of the authors have consulted.

FN409. ID Nos.: 9, 10, 30, 32, 34, 39, 43.

FN410. ID Nos.: 2, 35, 38, 40, 52, 53, 54, 60.

FN411. ID Nos.: 4, 6, 12, 19, 20, 22, 24, 26, 27, 33, 36, 41, 42, 44, 45, 46, 47, 48, 50, 51, 55, 58.

FN412. Radelet, Bedau and Putnam document nearly 20 cases in which individuals entered guilty pleas to capital (or potentially capital) crimes of which they were entirely innocent. Radelet et al., supra note 9. See also Hugo Adam Bedau & Constance Putnam, False Confessions and Other Follies, in Connery, supra note 3, at 69.

FN413. Radelet et al., supra note 9, at 173.

FN414. Id. at 173-74.

FN415. Id. at 174.

FN416. Id. The judge found Carmen mentally incompetent to plead or waive his rights prior to trial. See also Harry Franken, Carmen Cleared in Slaying; O'Grady: Case Now Closed, Columbus Citizen-Journal, Dec. 20, 1977, at 1.

FN417. Mones, supra note 4, at 295.

FN418. Id. at 56.

FN419. Id. at 62.

FN420. Douglas & Olshaker, supra note 84, at 327-33.

FN421. See Carolyn Click, General Assembly Compensates Wrongly Jailed Man, United Press Int'l, Mar. 7, 1990.

FN422. See Ofshe & Leo, Social Psychology, supra note 4, at 222-26.

FN423. Id.

FN424. Id. at 225-26.

FN425. Id. at 226.

FN426. Ofshe, Inadvertent Hypnosis, supra note 4.

FN427. Interrogation Transcript of Paul Ingram, Thurston County Wash. Sheriff's Office at 2-12 (Nov. 28, 1988) (on file with authors). See also Ofshe, Inadvertent Hypnosis, supra note 4 at 139-49.

FN428. Interrogation Transcript of Paul Ingram, supra note 427, at 8-81

FN429. Ofshe, Inadvertent Hypnosis, supra note 4, at 139-49.

FN430. Id. at 137-38.

FN431. Id. at 136.

FN432. Lawrence Wright, Remembering Satan: A Case of Recovered Memory and the Shattering of an American Family 104 (1994).

FN433. Id. at 116-17.

FN434. Ofshe, Inadvertent Hypnosis, supra note 4, at 136, 138; see also Wright, supra note 432, at 110-11.

FN435. Wright, supra note 432, at 184.

FN436. See Ofshe, Inadvertent Hypnosis, supra note 4, at 136-39.

FN437. In May, 1990 Ingram was sentenced to twenty years in prison. See id. at 134. State and federal courts have rejected Ingram's appeal to withdraw his guilty plea on five occasions, and the Washington State Clemency and Pardons Board recently rejected Ingram's bid for clemency. See Brad Shannon, Judges Reject Ingram's Guilty Plea Withdrawal, Olympian, July 6, 1995, at C01; Hunter T. George, Ex-Lawman Ingram Hopes for Mercy from Lowry, News Tribune, Dec. 14, 1996, at A1.

FN438. Shellem, Jailed Man Set Free, supra note 4, at A1.

FN439. Id.

FN440. Id.

FN441. Pete Shellem, Miller Pleads Guilty in Rape of City Woman; Attack Led to his Capture, Harrisburg Patriot, Mar. 10, 1993, at B1.

FN442. Shellem, Jailed Man Set Free, supra note 4, at A1.

FN443. Booher, supra note 4, at C1.

FN444. Id.

FN445. Id.

FN446. See Borchard, supra note 3, at 367-78; Frank & Frank, supra note 3, at 199-249; Radin, supra note 3, at 239-56; Radelet et al., supra note 9, at 282- 356.

FN447. It seems likely that in more recent cases, a defendant has a better chance of pre-trial dismissal of charges or acquittal at trial because of advances in scientific technology, the increasing use of audio and video recording during interrogation, and the increasing ability of defense attorneys to explain false confessions at trial.

FN448. ID Nos. 4, 6, 12, 19, 20, 22, 24, 26, 27, 33, 36, 41, 42, 44, 45, 46, 47, 48, 50, 51, 55, 58.

FN449. ID Nos. 2, 35, 38, 40, 52, 53, 54, 60.

FN450. ID Nos. 1, 3, 5, 7, 8, 11, 13, 14, 15, 16, 17, 18, 21, 23, 25, 28, 29, 31.

FN451. ID Nos. 9, 10, 30, 32, 34.

FN452. ID No. 2.

FN453. ID Nos. 4, 6, 12, 19, 20, 22, 24, 26, 27, 33.

FN454. ID Nos. 37, 49, 56, 57, 59.

FN455. ID Nos. 39, 43.

FN456. ID Nos. 35, 38, 40, 52, 53, 54, 60.

FN457. ID Nos. 36, 41, 42, 44, 45, 46, 47, 48, 50, 51, 55, 58.

FN458. See Connors et al., supra note 4, at 34-76.

FN459. Huff et al., supra note 3, at 123, 127, 136-37.

FN460. Id. at 137.

FN461. Interrogation Transcript of Steve Linscott, Oak Park, Ill. Police Dep't (Oct. 8, 1980).

FN462. Connors et al., supra note 4, at 64-65.

FN463. Linscott, supra note 4, at 208.

FN464. Davis, supra note 4, at 79-99.

FN465. Id. at 60.

FN466. Id. at 161.

FN467. Id. at 164.

FN468. Man Imprisoned 9 Years in Killing is Freed as 2 Suspects are Found, N.Y. Times, Jan. 17, 1993, at 26.

FN469. Ganey, supra note 5, at 34.

FN470. Id. at 39-44.

FN471. Id. at 43.

FN472. Id. at 69-70.

FN473. Reynolds's interrogation and prosecution illustrates the potentially tragic consequences of police and prosecutorial negligence in false confession cases. Under considerable pressure to solve the murder of four-year-old Eric Christgen, St. Joseph police relied on a FBI profile of the killer to round up 150 suspects. Id. at 26. One of the suspects they interrogated was Harry Fox, a likeable 64-year-old janitor with no prior record. Id. at 26-27. Thirty minutes into his accusatorial interrogation, Fox experienced convulsions, fell over in his chair, turned colors, collapsed onto the floor and died of a heart attack--killed by interrogation. Id. at 28. There was never any evidence against Fox, and his innocence would later be conclusively established.

St. Joseph police then decided to interrogate Reynolds, even though Reynolds did not match the description eyewitnesses provided of the killer and an alibi witness had seen and spoken to Reynolds at his home at the time of the murder. Undeterred by evidence of Reynolds' innocence and an absence of any basis for suspicion, police interrogated Reynolds nine times between June 2, 1978 and February 14, 1979 (once after hypnotizing him and another time after injecting him with a truth serum). Id. at 37-38. Reynolds finally confessed to accidentally killing Christgen and provided a written statement that parroted back many of the words, terms and phrases that his interrogators had used in their questioning. Id. at 39-41. Not surprisingly, Reynolds got several of the major case facts wrong (e.g., the timing of the child's disappearance, the spot where the body had been found). Id. at 41-44.

Following his confession to the Christgen killing, Reynolds was made to confess to a similar child murder in Kansas City. Id. at 50-51. The Kansas Bureau of Investigation promptly discounted the confession as false because of the factual inconsistencies and errors in Reynolds's account of the crime. Id. at 51. Shortly afterwards, Reynolds recanted his confession to the Christgen murder and declared that he confessed falsely because he was frightened by his interrogators and desperately sought to escape the intolerable pressure of the interrogation. Id. at 51-54. Throughout this entire ordeal, Reynolds maintained his innocence.

Despite the absence of any evidence confirming Reynolds's questionable confession and the presence of evidence disconfirming it (e.g., Reynolds did not match the

description of eyewitnesses), prosecutors brought Reynolds to trial, the judge declared Reynolds's confession voluntary, the jury convicted him of second degree murder and sentenced him to life in prison. Id. at 59- 70. Shortly thereafter, Reynolds was repeatedly gang-raped and beaten by inmates in prison, where he feared for his life. Id. at 71-75. During Reynolds's four years in prison, the real murderer of Eric Christgen, a psychotic serial killer named Charles Hatcher, attempted to abduct, assault, rape and kill on several occasions. Id. at 235-36. Tragically, Hatcher stabbed 38-year-old James Churchill to death in 1981 and in 1982 abducted and killed 11-year-old Michelle Steele, who, like Christgen, lived in St. Joseph. Id. at 236. Eventually Hatcher confessed to many of his crimes, including the abduction and murder of both Christgen and Steele. Id. at 141-201. Though Hatcher's confession included details no one else knew and though Hatcher matched the description of the adult male seen with Christgen shortly before his abduction, Reynolds's prosecutors initially denied that Reynolds could be innocent. Id. at 167-83. Eventually they grudgingly conceded Reynolds's innocence and their wrongful prosecution. Id. at 184. Yet the chief of the St. Joseph Police Department continued to insist that Reynolds killed Christgen. Id. at 185, 207. Hatcher was convicted of Christgen's murder, and Reynolds was eventually declared innocent and released from prison. Id. at 193-205.

If St. Joseph police had not extracted an obviously false confession from a vulnerable individual and if prosecutors had not prosecuted an innocent defendant based on nothing other than his false confession, they might have continued the search for the killer and caught Hatcher before he killed James Churchill and Michelle Steele.

FN474. Id. at 141-201.

FN475. State v. Parker, No. A-453-83T4 (N.J. Super. Ct. App. Div. Feb. 4, 1986). See also Nathan, supra note 62, at 1.

FN476. Bedau & Radelet, supra note 3, at 150.

FN477. Nathan, supra note 62, at 1.

FN478. Id.

FN479. Seigel, A Question of Guilt, supra note 4, at 15.

FN480. White, supra note 3, at 121-22. See also Hourihan, supra note 4, at 1471.

FN481. White, supra note 3, at 122.

FN482. Id. Washington was barred by Virginia state law from attacking his conviction on the basis of the DNA evidence

because it did not meet the strict requirements of after-discovered evidence. In Virginia a convicted criminal has only 21 days after the entry of a final order to move to set aside a verdict. See id. at 122 n.155 (citing Va. Sup. Ct. R. 3A:15(b)).

FN483. See supra text accompanying notes 212-26.

FN484. See supra text accompanying notes 227-45.

FN485. See supra text accompanying notes 246-54.

FN486. See supra text accompanying notes 181-203.

FN487. Id.

FN488. See supra text accompanying notes 145-49.

FN489. Parloff, supra note 4, at 33-41.

FN490. Id. at 71 ("Although Knapp had confessed, every detail of the confession was improbable").

FN491. See id. at 95-104, 116, 130, 140, 270, 280-81, 286, 326-27, 331-32, 393.

FN492. Id. at 137, 152, 137, 154.

FN493. Id. at 186, 164.

FN494. Id. at 234. See also Radelet et al., supra note 4, at 947.

FN495. Parloff, supra note 4, at 393.

FN496. Id. at 395.

FN497. Id. at 402.

FN498. Id.

FN499. Stephen Hooker, The Killing of Joe Giarratano; Death Row Inmate May Not Have Committed Murders He Confessed To, The Nation, Oct. 29, 1990, at 485 ("The five confessions are confused and contradictory, both internally and with one another, and are wildly inconsistent in such fundamental matters as the motive and the date and order of killings.").

FN500. Arney, supra note 4, at A1. The autopsy report was changed after Giarratano's confession to corroborate it. Colman McCarthy, More Than A Reasonable Doubt, Wash. Post, Feb. 16, 1991, at A27.

FN501. Pamela Overstreet, Rally Scheduled on Behalf of

Condemned Killer, U.P.I. Regional News, Feb. 7, 1991, at 1.

FN502. Arney, supra note 4, at A1. Although the blood spot on Giarratano's boots matched Michelle Kline's blood, she died of asphyxiation and thus only bled internally. Jim Clardy, Reasonable Doubt? New Trial Sought for Death Row Prisoner, Wash. Times, May 24, 1990, at A1.

FN503. In addition, 21 distinct fingerprints were found at the crime scene, but only one belonged to Giarratano, and it was found in an area that was unconnected to the crime. Arney, supra note 4, at A1.

FN504. Clardy, supra note 502, at A1. The arresting officer submitted a sworn affidavit stating that Giarratano had no blood, scratches or bruises on him. Hooker, supra note 499, at 485.

FN505. David Kaplan & Bob Cohn, Pardon Me, Governor Wilder, Newsweek, Mar. 4, 1991, at 56.

FN506. Hooker, supra note 499, at 485.

FN507. John Harris, A Widely Watched Date with Death; Virginia Inmate's Plea for Clemency Draws National Attention, Wash. Post, Feb. 17, 1991, at A1.

FN508. Arney, supra note 4, at A1.

FN509. Harris, supra note 507, at A1. Giarratano was convicted of capital murder and sentenced to die in 1979; he was not released from death row until 1991. Arney, supra note 4, at A1.

FN510. In 1980, Giarratano came within 37 hours of being executed. See Phil McCombs, A Long Road Defers the Death Penalty, Wash. Post, June 13, 1982, at A1. In 1981, Giarratano came within 24 hours of being executed. See Harris, supra note 507, at A1.

FN511. Arney, supra note 4, at A1.

FN512. Andrew Martin, Staker Suspect: I Never Touched That Girl, Chi. Trib., Apr. 9, 1993, at 1. See also Martin & Parsons, supra note 114, at 1.

FN513. Eric Zorn, Answer to Justice May be in Videos, Chi. Trib., Nov. 23, 1993, available in 1993 WL 11127007.

FN514. Andrew Martin, Rivera Disoriented After Confession, Nurse Says, Chi. Trib., Nov. 18, 1993, at 1; see also Zorn, supra note 513.

FN515. Zorn, supra note 513. During his four day

interrogation but prior to signing two police-written confessions, Rivera began to hyperventilate and bang his head against the cell wall so violently that he was medicated and his arms and legs were shackled. See Andrew Martin, Interrogation of Coercion?: An Issue of Debate in Staker Slaying Case, Chi. Trib, Mar. 26, 1993, at 2; Martin, supra note 512, at 1. Defense attorneys asserted that Rivera signed the confessions only after suffering an interrogation-induced mental breakdown; Rivera claimed that he lost consciousness during the interrogation ordeal and did not remember signing the confessions. See Martin, supra note 512, at 2; see also Robert Enstad, Rivera Testifies He Can't Recall His Confession, Chi. Trib., Apr. 6, 1993, at 1; Andrew Martin & James Hill, New Man Linked to Staker Murder, Chi. Trib., Feb. 25, 1993, at 1. At Rivera's trial, a former nurse at the Lake County Jail testified that Rivera was so "dazed and incoherent" an hour before he allegedly confessed that she recommended he be placed on suicide watch. Martin, supra note 514, at 1. The jail nurse's testimony contradicted police investigators' earlier and repeated testimony that Rivera was "alert, cooperative and friendly" while confessing to the brutal murder and signing both police-written statements. Id.

FN516. Martin & Parsons, supra note 114, at 1.

FN517. See Inbau et al., supra note 30, at 185.

FN518. Martin & Parsons, supra note 114, at 1.

FN519. See Andrew Martin & Robert Enstad, Rivera Confession Coerced, Defense Says, Chi. Trib., Feb. 18, 1993, at 8.

FN520. See Martin & Parsons, supra note 114, at 1.

FN521. Brandon & Martin, supra note 113, at 1.

FN522. Id.

FN523. Andrew Martin, Rivera Murder Confession Detailed, Chi. Trib., Feb. 23, 1993, at 1.

FN524. Sharon Cotliar, Baby-Sitter Murder Case Hinges on Confessions, Chi. Sun- Times, Nov. 19, 1993, at 12.

FN525. Philip Franchine, No Death Penalty for Baby-Sitter's Killer, Chi. Sun- Times, Nov. 21, 1993, at 6.

FN526. Frank Burgos, Man Sentenced to Life in Baby-Sitter Murder, Chi. Sun- Times, Dec. 22, 1993, at 12.

FN527. See People v. Rivera, No. 2-94-0075 (Ill. App. Ct. Nov. 19, 1996).

FN528. Dennis O'Brien, $3 Million Bond Set in Murder Retrial, Chi. Trib., June 26, 1997, at 3.

FN529. Andrew Buchanon, Death Penalty May Be Sought During Retrial; Jury Had Spared Babysitter's Killer, Chi. Trib., Sept. 16, 1997, at 1.

FN530. See Kassin & Wrightsman, Coerced Confessions, supra note 2, at 494-98; Kassin & Wrightsman, Prior Confessions, supra note 2, at 139-40.

FN531. For a review, see Kassin, supra note 4.

FN532. See Richard A. Leo & Richard Ofshe, Missing the Forrest for the Trees: A Response to Paul Cassell's "Balanced Approach" to the False Confession Problem, 74 Denv. L. Rev. 1135 (1997).

FN533. See, e.g., Inbau et al., supra note 30, at 147; Jayne & Buckley, supra note 30, at 66; The Reid Technique, supra note 30; Reid Specialized Interrogation, supra note 30.

FN534. Inbau et al., supra note 30, at 102-06.

FN535. Zulawski & Wicklander, supra note 30.

FN536. One outstanding example of poor police practice--which contributed to many of the false confessions discussed in this article--is the use of the accident scenario technique (also known as maximization/minimization). See Ofshe & Leo, The Decision to Confess Falsely, supra note 4, at 1088-106. Due to information presented in training manuals, some police interrogators believe that it is legally permissible to offer to accept a suspect's admission to a less serious or non-existent crime, such as an accident or self-defense account of what happened. Id. This offer gives the suspect an "out"--a way to comply with the interrogator's demand for an admission of involvement in the offense while minimizing criminal liability by changing the facts of the crime. Id.; see Inbau et al., supra note 30, at 102-06.

FN537. Leo, Police Interrogation in America, supra note 10, at 67-127; see also supra note 30 and accompanying text.

FN538. See supra Part IV.B.1. In one false confession case not discussed in this paper, the defendant spent nearly four and one-half years in pre-trial incarceration before the confession was suppressed and he was released. See State v. Louis, No. 92-348-C, 92-303-C (Desoto County Ct. 1992).

FN539. See supra Part IV.B.2.

FN540. See Stephan v. State, 711 P.2d 1156, 1159 (Alaska

1985). In Alaska, a defendant has a fundamental right to have his interrogation recorded and police failure to record is considered a violation of state due process. See id.

FN541. See State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994).

FN542. However, many police agencies choose on their own to record interrogations in felony cases. See generally William Geller, U.S. Dep't of Justice, Police Videotaping of Suspect Interrogations and Confessions: A Preliminary Examination of Issues and Practices--Report to the National Institute of Justice (1992).

FN543. See generally Yale Kamisar, Police Interrogation and Confessions: Essays In Law and Policy (1980).

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new or revised [beneficiary] designation in such form as the Plan Administrator shall provide." *Id.* at 311.

Because no special spousal consent form is required by ERISA or the plans, we conclude that Angela's notarized signature of the separation agreement constituted a sufficient spousal consent to a change of beneficiary.

[7] Even so, Angela points out that the evidence does not disclose that her notarized waiver had been filed with the plans' administrator, as required by ERISA. Angela cites no evidence that indicates the plans required a filing of the separation agreement at any particular time before the plans' proceeds were distributed. Nor does she cite any such ERISA provision. Instead, Angela merely notes dicta in *Fox Valley* that "the settlement waiver is effective when it becomes known to the Fund before payment." 897 F.2d at 282. Angela reasons, therefore, that her waiver cannot be effective because there was no evidence that Philip Morris had notice of her waiver.

However, this case is not an interpleader suit brought by a plan administrator to determine its liability for payment of an ERISA plan proceeds to one of two adversary claimants, as in *Fox Valley*. Here, the plan administrator is not a party to the litigation, and we are concerned solely with a dispute between adverse claimants to the plans' proceeds.

Therefore, we do not decide what liability, if any, Philip Morris has for payments that might have been made to Angela before notice of her waiver. We merely conclude that the alleged lack of notice does not alter Angela's obligation to specifically perform her contract by signing the necessary forms to consent to a change of beneficiary. And, if Angela has collected any of the proceeds of Winfree's policies and specific performance cannot be decreed for that reason, the trial court can provide alternate relief by way of a money judgment. *Winston v. Winston*, 144 Va. 848, 859, 130 S.E. 784, 787 (1925).

In sum, we conclude that a proper tender was timely made and that ERISA does not preempt enforcement of Angela's waiver. Accordingly, we will affirm the judgment of the trial court and remand the case for further proceedings consistent with this opinion.

Affirmed and remanded.

Everett Lee MUELLER

v.

COMMONWEALTH of Virginia.

Record Nos. 920287, 920449.

Supreme Court of Virginia.

Sept. 18, 1992.

Defendant was convicted in the Circuit Court, Chesterfield County, William R. Shelton, J., of capital murder, and was sentenced to death. Defendant appealed. The Supreme Court, Keenan, J., held that: (1) defendant's confession was voluntary; (2) defendant was not entitled to change of venue based on extensive media coverage; (3) defendant was sufficiently permitted to inquire during voir dire whether jurors were predisposed toward imposing death penalty; (4) prospective jurors with knowledge of defendant's prior record or confession were not required to be stricken for cause; (5) evidence regarding defendant's parole ineligibility was inadmissible during penalty phase; (6) evidence was sufficient to meet vileness predicate of capital murder statute; and (7) sentence of death was neither excessive nor disproportionate to sentences generally imposed for crimes of similar nature.

Affirmed.

1. Criminal Law ⇐517.2(3), 519(9)

Police officer's response when defendant asked during interrogation whether he

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needed a lawyer, in shrugging his shoulders, shaking his head slightly from side to side and stating "you're just talking to us" did not invalidate earlier *Miranda* warnings given to defendant or make his subsequent confession involuntary; defendant's prior experience with criminal justice system and his previous contacts with interrogating officer indicated that he knew how to ask for counsel and how to exercise his right to terminate police questioning. U.S.C.A. Const.Amends. 5, 6.

2. Criminal Law ⇐412.2(4)

Defendant did not unambiguously request counsel when he asked police officer during police interrogation "do you think I need an attorney here?" U.S.C.A. Const. Amend. 6.

3. Criminal Law ⇐412.1(4)

Defendant's repeated statements that he wanted to be taken to jail did not invoke his right to terminate police questioning, where defendant continued to talk with officers after making each statement with no indication that he wanted to end discussion, and had unambiguously terminated police interrogation during previous interviews. U.S.C.A. Const.Amend. 6.

4. Criminal Law ⇐126(2)

Extensive media coverage of victim's murder, including reports that defendant had previous criminal record and confessed to raping and killing victim, did not require change of venue; there was no indication that reports were inaccurate, and only 9 of 47 venirepersons examined had to be excused because of their predisposition toward belief in defendant's guilt.

5. Criminal Law ⇐134(1)

There is presumption that defendant can receive fair trial from citizens of jurisdiction in which offense occurred; it is burden of defendant to overcome this presumption by demonstrating that feeling of prejudice on part of citizenry is widespread and is such that would be reasonably certain to prevent fair trial.

6. Criminal Law ⇐121, 1150

Decision whether to grant change of venue lies within sound discretion of trial court; therefore, trial court's ruling on this issue will not be disturbed on appeal unless record affirmatively shows abuse of discretion.

7. Criminal Law ⇐126(1)

Extensive media coverage which discloses information about accused, including his or her criminal record, does not, of itself, mandate change of venue.

8. Criminal Law ⇐126(1)

Significant factor in determining whether change of venue because of extensive media coverage is warranted is whether media reports are factual and accurate.

9. Criminal Law ⇐126(1)

Significant factor in determining whether venue of trial should be changed because of media coverage is difficulty encountered in selecting jury.

10. Jury ⇐131(4)

Prospective juror was questioned sufficiently during voir dire in capital murder case to determine whether he would automatically impose death penalty, where, in response to questioning, juror stated he would not vote automatically to impose either sentence and would wait to hear evidence in penalty phase before deciding which penalty to impose.

11. Jury ⇐131(17)

Trial court properly refused to permit defendant to ask prospective juror during voir dire whether he thought death was only appropriate punishment if it was determined that defendant raped and killed ten-year-old girl, since questions were argumentative and provided prospective juror with no basis upon which to express opinion.

12. Jury ⇐133

Prospective juror's statement in jury waiting room that she had "strong feelings" about innocence or guilt of defendant did not require disqualification of entire venire, where jurors' answers to questions posed by trial court, as well as by counsel for both parties, indicated that none of the other prospective jurors were affected by statement.

13. Jury ⇐99(1)

Nine prospective jurors who had knowledge of defendant's prior criminal record or confession were not required to be stricken for cause in capital murder prosecution, where jurors stated that they had not formed opinion regarding defendant's guilt or innocence.

14. Criminal Law ⇐1158(3)

Supreme Court will not disturb trial court's rulings on challenges for cause unless there is manifest error.

15. Criminal Law ⇐1158(3)

In determining whether trial court's ruling on challenge for cause was manifest error, Supreme Court decides whether voir dire as whole shows that juror's performance of his or her duty, in accordance with trial court's instructions and oath taken, would be prevented or substantially impaired.

16. Jury ⇐99(3)

Jurors need not be totally unaware of facts and issues involved in case; this is true even in instances where juror has previous knowledge of defendant's past crimes and of current charge against defendant.

17. Criminal Law ⇐700(3)

Evidence that witness had not made positive identification of defendant when shown photo array was not exculpatory evidence that was required to be disclosed to defendant in capital murder prosecution, absent evidence that witness was shown photograph of defendant or any specifically identified individual.

18. Criminal Law ⇐700(2)

"Exculpatory evidence" is evidence favorable to defendant which must be disclosed by prosecution where it is material to defendant's guilt or punishment.

See publication Words and Phrases for other judicial constructions and definitions.

19. Homicide ⇐358(1)

Evidence of defendant's parole ineligibility was not admissible as mitigation evidence during penalty phase of capital murder trial, although testimony referring to defendant's prior parole history was admitted. Code 1950, § 19.2-264.4.

20. Homicide ⇐358(1)

Trial court did not abuse its discretion during penalty phase of capital murder trial in allowing Commonwealth to question defendant about his prior convictions for sexual offenses and about whether he had learned anything as result of his commission of charged rape and murder, where defendant acknowledged prior convictions during direct testimony, testified about circumstances under which his life deteriorated, and related that he had spent two years in California state hospital. Code 1950, § 19.2-264.4.

21. Witnesses ⇐267

Once defendant has testified as to certain matters, proper scope of cross-examination lies within sound discretion of trial court.

22. Criminal Law ⇐448(2)
Homicide ⇐358(1)

Physician's testimony during penalty phase of capital murder trial describing condition of victim's body as depicted in photographs was not opinion evidence and was properly admitted.

23. Homicide ⇐357(11)

Evidence during penalty phase of capital murder trial concerning rape and murder of ten-year-old girl was sufficient to establish defendant's aggravated battery of victim as well as his depravity of mind, as required to meet vileness predicate of capital murder statute; evidence indicated that victim would have lived for several minutes after defendant cut her throat, that victim was tortured psychologically after being abducted by defendant, and had been sexually mutilated. Code 1950, § 19.2-264.2.

24. Homicide ⇐357(11)

Proof of either torture, depravity of mind or aggravated battery of victim will support finding of vileness under capital murder statute. Code 1950, § 19.2-264.2.

25. Homicide ⇐311

Verdict form submitted to jury during penalty phase of capital murder trial properly informed jury of its sentencing options and did not improperly influence jury to impose death sentence rather than life imprisonment; instruction included option of imposing life sentence, and jury was told it could choose the penalty of life imprisonment even if it found either or both aggravating factors. Code 1950, § 19.2–264.2.

26. Homicide ⇐357(1)

Sentence of death imposed on defendant convicted of raping and murdering ten-year-old girl was neither excessive nor disproportionate to sentence generally imposed by other sentencing bodies in Virginia for crimes of similar nature; evidence indicated that victim suffered exceedingly gruesome and painful death and that defendant had committed several violent sexual assaults on women. Code 1950, § 17–110.1, subds. C, E.

Cary B. Bowen, Christopher J. Collins, Richmond (Bowen and Bowen, on brief), for appellant.

Robert H. Anderson, III, Asst. Atty. Gen. (Mary Sue Terry, Atty. Gen., on brief), for appellee.

Present: All the Justices.

KEENAN, Justice.

Charity Powers, age ten, disappeared in the early morning hours of October 6, 1990. Four months later, her body was recovered from a shallow grave near the home of Everett Lee Mueller. Mueller was arrested and thereafter confessed to her rape and murder.

At the first stage of a bifurcated trial, conducted pursuant to Code §§ 19.2–264.3 and –264.4, a jury found Mueller guilty of capital murder in violation of Code § 18.2–31(5) and –31(8) (murder in the commission of a rape, and murder of a child under 12 in the commission of an abduction). The jury also convicted Mueller of rape and abduction with intent to defile, and it fixed his punishment at life imprisonment on each of those charges. In the penalty phase of the capital murder trial, the jury fixed Mueller's punishment for capital murder at death, based on findings of both vileness and future dangerousness. After the hearing required by Code § 19.2–264.5, the trial court imposed the sentences fixed by the jury.

Mueller is before this Court for automatic review of his death sentence and, pursuant to Code § 17–110.1, we have consolidated that review with his appeal of his capital murder conviction. We have also certified from the Court of Appeals Mueller's appeal of his noncapital convictions. Code § 17–116.06. Further, in accordance with Code § 17–110.2, we have given this matter priority on our docket. We review the evidence and all reasonable inferences fairly deducible therefrom in the light most favorable to the Commonwealth, the prevailing party below. *Cheng v. Commonwealth*, 240 Va. 26, 42, 393 S.E.2d 599, 608 (1990).

I.

THE EVIDENCE

The evidence at trial showed that on the evening of October 5, 1990, Taryn Potts took her daughter, Charity Powers, to a skating rink and left her there for the evening. Potts had arranged to have a friend, Steve Harris, drive Charity home from the rink later that night. However, Harris fell asleep and he did not go to the rink. When Potts arrived home at 3:00 a.m. on October 6, 1990 and discovered that Harris had not brought Charity home, she immediately contacted the police, and they began to look for her daughter.

Kevin H. Speeks, who knew Charity, testified that he saw her at a fast food restaurant near the skating rink about 12:50 a.m. on October 6, 1990. While at the restaurant, Speeks also observed a man with an unkempt appearance, who appeared to be thirty years of age and of medium height, driving a cream-colored station wagon with wood siding through the parking lot several times. As Speeks left the restaurant, he saw that the man was standing on the right

side of the building. Speeks also saw that Charity was sitting on a curb located on the same side of the building. Sergeant Mike Spraker of the Chesterfield County Police Department testified that Mueller customarily drove a cream-colored station wagon which had wood siding.

In conversations with the police on October 8 and 9, 1990, Mueller admitted speaking with a young, white female on the night of October 5, 1990, at a fast food restaurant that might have been near the skating rink. As a result of information gained in their investigation, the police searched for Charity's body near Mueller's home and on February 8, 1991, they found "a clump of hair and what looked like some white bone sticking out of the ground." Thereupon, the police exhumed Charity's body, which had been buried about 900 feet behind Mueller's house. An investigator also found a knife sticking in the ground about 174 feet from the grave.

The police arrested Mueller on February 12, 1991. After being advised of his *Miranda* rights, Mueller agreed to talk with Detective R. Wayne Garber of the Chesterfield County Police Department and John M. Palfi, an FBI special agent. Garber and Palfi interrogated Mueller for approximately four and one-half hours. During this interrogation, Mueller stated several times that he was ready to go to jail and that the police should put him in jail. Mueller did not state at any time that he wished to end the questioning. Approximately two hours into the interrogation, Agent Palfi left the room. Shortly thereafter, Mueller asked Detective Garber, "Do you think I need an attorney here?" Garber shook his head slightly from side to side while holding his arms out and his palms up in a shrug-like manner, stating, "You're just talking to us."

Several minutes later, Mueller confessed to the crime. Mueller stated that he had agreed to give Charity a ride home from the restaurant but that he drove her to his house instead. He admitted that he was thinking about having sex with her and he stated that he thought she was 18 or 19 years old. Charity was approximately 4'8" tall and weighed 90 pounds. Mueller stated that Charity agreed to have sex with him, and she told him that she wanted to go home afterward. Mueller took Charity to the woods behind his house where he had intercourse with her. He stated that although he had a knife nearby, he did not use it.

Mueller stated that he strangled Charity to death because he was afraid that she would report the incident to the police. He also stated that he had been drinking heavily and that, the next morning, he did not know whether he had dreamed about the previous night's events or whether they actually had occurred. When he went to check the woods, he saw Charity's body. He then purchased a shovel from a local store, buried the body, and burned Charity's clothes and jewelry.

After making this confession, Mueller led the police to the site where he had buried the body. He also showed them where he had burned the clothing and jewelry, as well as the area where he had left the knife. This was the same area where the police earlier had found a knife. Additionally, Mueller showed the police the location where he had intercourse with Charity. This area was about 15 feet from where the knife was found.

Dr. Marcella Fierro, who conducted an autopsy on Charity's body, testified that Charity's throat had been cut to the depth of one inch, resulting in a horizontal cut on the epiglottis, which is located on the trachea. She further testified that such a cut would result in the severance of the carotid artery and the jugular vein. According to Dr. Fierro, a person suffering from such an injury would die after several minutes, and there were indications that Charity had bled before her death. Based on these facts, Dr. Fierro testified that the cause of death was an "acute neck injury."

Additionally, Dr. Fierro found that, upon examining the skin over the breast area, there were "irregular holes in the area where each nipple would be." Dr. Fierro testified that she believed this condition to be the result of an injury, but she could not determine its cause or whether it had oc-

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curred before or after death. Dr. Fierro's examination also revealed a "big gash" on the victim's upper left thigh. Dr. Fierro stated that this could be an injury but that she could not determine whether it had occurred before or after Charity's death. However, Dr. Fierro testified that if it were an injury, it would have resulted from application of a "blunt or sharp force." Dr. Fierro also determined that there were three tears to the hymenal ring of the vagina which were consistent with sexual penetration.

II.

ISSUES PREVIOUSLY RESOLVED

Mueller's appeal raises certain legal issues which are resolved by our prior decisions. We reaffirm our previous rejection of these contentions. Therefore, we will not discuss them beyond giving citations to representative cases in which those issues were decided adversely to Mueller's claims. The issues raised here which have been expressly rejected by this Court are:

A. The death penalty violates the United States Constitution's prohibition against cruel and unusual punishment. *See George v. Commonwealth*, 242 Va. 264, 271, 411 S.E.2d 12, 16 (1991), *cert. denied*, 503 U.S. ——, 112 S.Ct. 1591 [118 L.Ed.2d 308] (1992); *Yeatts v. Commonwealth*, 242 Va. 121, 126, 410 S.E.2d 254, 258 (1991), *cert. denied*, — U.S. ——, 112 S.Ct. 1500 [117 L.Ed.2d 639] (1992).

B. The aggravating circumstance of "vileness" set forth in the capital murder statute is unconstitutionally vague. *See Spencer v. Commonwealth*, 238 Va. 563, 569, 385 S.E.2d 850, 853 (1989), *cert. denied*, 493 U.S. 1093 [110 S.Ct. 1171, 107 L.Ed.2d 1073] (1990) (Spencer III); *Gray v. Commonwealth*, 233 Va. 313, 320–21, 356 S.E.2d 157, 161, *cert. denied*, 484 U.S. 873 [108 S.Ct. 207, 98 L.Ed.2d 158] (1987).

C. The verdict form was defective because it did not list the mitigating factors mentioned in the statute. *See Buchanan v. Commonwealth*, 238 Va. 389, 416–17, 384 S.E.2d 757, 773 (1989), *cert. denied*, 493 U.S. 1063 [110 S.Ct. 880, 107 L.Ed.2d 963] (1990); *Watkins v. Commonwealth*, 229 Va. 469, 491, 331 S.E.2d 422, 438 (1985), *cert. denied*, 475 U.S. 1099 [106 S.Ct. 1503, 89 L.Ed.2d 903] (1986); *LeVasseur v. Commonwealth*, 225 Va. 564, 595, 304 S.E.2d 644, 661 (1983), *cert. denied*, 464 U.S. 1063 [104 S.Ct. 744, 79 L.Ed.2d 202] (1984).

III.

ASSIGNMENTS OF ERROR WAIVED

Because Mueller did not address in his brief assignments of error 7, 8, 9, 12, and 16, he is deemed to have waived them.[1] Rule 5:27(e); *see Quesinberry v. Commonwealth*, 241 Va. 364, 370, 402 S.E.2d 218, 222, *cert. denied*, 502 U.S. ——, 112 S.Ct. 113, 116 L.Ed.2d 82 (1991).

IV.

PRE–TRIAL MATTERS

A. Admissibility of Mueller's February 12, 1991 Confession.

[1] Mueller contends that the trial court erred in refusing to suppress his confession of February 12, 1991. He does not contest the adequacy of the *Miranda* warnings given at the outset of the interrogation, nor does he challenge the validity of his initial waiver of these rights. Rather, Mueller asserts only that Detective Garber's response to his question, "Do you think I

1. These assignments of error are:

7. The Court erred in denying Defendant's Motion to Strike as to abduction, rape and capital murder.

8. The Court erred in refusing to give Defendant's instruction regarding intent to rape a person under the age of 13.

9. The Court erred in refusing to set aside the verdicts as to abduction, rape and capital murder.

12. The Court erred in permitting the jury to see a videotape of the excavation of the victim's body.

16. The Court erred in refusing to set aside the verdict.

need an attorney here?", invalidated the earlier *Miranda* warnings given to him. Thus, he contends that his subsequent confession was involuntary.

In assessing the effect of Detective Garber's response on the voluntariness of Mueller's statement, we apply a well-established standard of review. In *Gray v. Commonwealth*, 233 Va. at 324, 356 S.E.2d at 163, we said:

> A defendant's waiver of his *Miranda* rights is valid only if the waiver is made knowingly, voluntarily and intelligently. *Miranda* [*v. Arizona*], 384 U.S. [436] at 475 [86 S.Ct. 1602 at 1628, 16 L.Ed.2d 694 (1966)]. Whether a statement is voluntary is ultimately a legal rather than factual question. *See Miller v. Fenton*, 474 U.S. 104, 110, 106 S.Ct. 445, 450 [88 L.Ed.2d 405] (1985). Subsidiary factual questions, however, are entitled to a presumption of correctness. *Id.* at 112, 106 S.Ct. at 451. The test to be applied in determining voluntariness is whether the statement is the "product of an essentially free and unconstrained choice by its maker," or whether the maker's will "has been overborne and his capacity for self-determination critically impaired." *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 [93 S.Ct. 2041, 2046, 36 L.Ed.2d 854] (1973). In determining whether a defendant's will has been overborne, courts look to "the totality of all the surrounding circumstances," *id.* at 226, including the defendant's background and experience and the conduct of the police, *Correll v. Commonwealth*, 232 Va. 454, 464, 352 S.E.2d 352, 357 (1987); *Stockton* [*v. Commonwealth*], 227 Va. [124] at 140, 314 S.E.2d [371] at 381 [(1984)].

The record shows that Mueller was 42 years old at the time he made this confession and that he had a high school equivalency diploma. Prior to the interrogation, Detective Garber advised Mueller of his rights under *Miranda* and Mueller stated that he understood each of those rights.

Earlier investigative efforts in this case also demonstrate Mueller's experience with police interrogation procedures. On October 9, 1990, Garber read a "Miranda Right Form" to Mueller. After Garber ascertained that Mueller understood the content of the form, Mueller signed a written waiver of his *Miranda* rights. On two occasions after signing this waiver, Mueller exercised his right to terminate police questioning.

In addition, the record shows that several years earlier, Mueller had been informed of and had waived his *Miranda* rights on three occasions. On each of these occasions, he executed a form waiving his *Miranda* rights, and he gave a statement to the police.

We also note that, during the February 12, 1991 interrogation, Mueller made some statements which further demonstrate that he was aware of the consequences of talking to the police. Before confessing, Mueller expressed concern regarding where he would be incarcerated, given the serious nature of the crimes. After confessing to the crimes, he told Detective Garber and Agent Palfi that he had wanted "to get it off his chest." At this time, Mueller further stated, "I got death coming to me. I knew it as soon as I opened my mouth."

We also consider the factual findings made by the trial court concerning Mueller's confession. The trial court found that Mueller knew how to ask for the assistance of legal counsel, as evidenced by his request for such assistance on October 9, 1990, during the course of a prior interview with Detective Garber and Agent Palfi; that the police properly advised Mueller of his *Miranda* rights on February 12, 1992; and that he understood those rights prior to confessing to the crimes. The trial court further found that Mueller's question to Detective Garber on February 12, 1991 was not an expression of a desire for the assistance of counsel.

Mueller does not assert that these factual findings are unsupported by evidence taken at the suppression hearing. Based on our review of this evidence, we conclude that the factual findings of the trial court are supported by the record and, therefore, we accord them substantial weight in our determination whether Mueller's statement

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was voluntary. *See Miller v. Fenton*, 474 U.S. 104, 112, 106 S.Ct. 445, 450, 88 L.Ed.2d 405 (1985).

[2] Based on the above evidence and findings, we hold that Mueller's question, "Do you think I need an attorney here?", and Detective Garber's response, did not invalidate Mueller's earlier waiver of his *Miranda* rights. Initially, we find that Mueller's question to Garber did not constitute a request for counsel. In *Eaton v. Commonwealth*, 240 Va. 236, 253–54, 397 S.E.2d 385, 395–96 (1990), *cert. denied*, 502 U.S. ——, 112 S.Ct. 88, 116 L.Ed.2d 60 (1991), this Court stated that "custodial interrogation must cease, when the accused, having received *Miranda* warnings and having begun to respond to the questions of the authorities, 'has *clearly* asserted his right to counsel.'" (quoting *Edwards v. Arizona*, 451 U.S. 477, 485, 101 S.Ct. 1880, 1885, 68 L.Ed.2d 378 (1981)) (emphasis in original). In *Eaton*, the police had continued to question the defendant after he had asked, "You did say I could have an attorney if I wanted one?" 240 Va. at 250, 397 S.E.2d at 393. This Court held that the defendant's question did not constitute an unambiguous request for counsel so as to invoke the *Edwards* rule. 240 Va. at 254, 397 S.E.2d at 396. Here, we likewise hold that Mueller's question to Detective Garber did not constitute an unambiguous request for counsel.

Mueller contends, however, that even if his question did not constitute a request for the assistance of counsel, Detective Garber's response nevertheless invalidated Mueller's earlier waiver of his *Miranda* rights. We disagree. Based on our review of the videotape of the interrogation, we observe that Garber did not, as contended here by Mueller, respond to Mueller's question by answering "No." Rather, he replied, while shrugging and shaking his head slightly from side to side, "You're just talking to us." Considering the totality of the circumstances detailed above, including Mueller's prior experience in the criminal justice system and his previous contacts with Detective Garber and Agent Palfi, we find that Garber's response to the question at issue did not invalidate Mueller's earlier waiver of his *Miranda* rights. Moreover, since Garber's response to Mueller did not constitute an unambiguously negative reply, the information provided in the initial advisement of *Miranda* rights was not altered by this response.

[3] We also reject Mueller's assertion that his repeated statements that he wanted to be taken to jail constituted an invocation of his right to terminate police questioning. In *Akers v. Commonwealth*, 216 Va. 40, 216 S.E.2d 28 (1975), this Court confronted a similar situation where the defendant, after being advised of his *Miranda* rights, stated, "Do I have to talk about it now?" In response to this question, the police merely continued the interrogation. This Court held that the defendant's question was not an invocation of his right to terminate questioning, stating, "Defendant's inquiry was no more than an impatient gesture on his part. If defendant had desired to end the interrogation, he could have simply said, 'I do not want to answer any more questions.'" 216 Va. at 46, 216 S.E.2d at 32.

Based on our review of the videotape of Mueller's interrogation, we likewise conclude that his statements regarding going to jail were simply impatient gestures and that they did not constitute an invocation of his right to terminate the interrogation. After each such statement, Mueller continued to talk with Garber and Palfi, giving no indication that he wanted to end the discussion. Moreover, when Palfi asked him whether he would rather talk to other officers instead of himself and Garber, Mueller responded, "I've been talking to you for four months. I've established a pretty good relationship with you guys." Finally, the record shows that, during two previous interviews with Garber, Mueller unambiguously had terminated the police interrogation by standing up and stating that he wanted the officers to stop questioning him.

For these reasons, on our independent review of the record, we conclude, as a matter of law, that Mueller's statement of

February 12, 1991 was voluntary and admissible.

B. Change of Venue.

[4] Mueller filed a pretrial motion requesting a change of venue on the ground that extensive media coverage of the murder made it impossible for him to receive a fair trial in Chesterfield County. The articles and television reports he adduced included information that Mueller was charged with the murder of Charity Powers, that Mueller had a previous criminal record which included prior rape convictions, and that Mueller had confessed to raping and killing Charity. Mueller also presented to the trial court affidavits from residents of Chesterfield County stating that, based on what they had seen or heard in the media, they believed that Mueller probably was guilty of raping and killing Charity Powers. The trial court took the motion for change of venue under advisement. Mueller renewed this motion on the day of trial. After the jury was empaneled, the trial court denied the motion, stating that it was satisfied that the jury panel was impartial.

Mueller argues that the trial court erred in denying his motion for a change of venue because the media coverage was inflammatory and contained information regarding his confession and his prior criminal record. Mueller contends that these aspects of the media coverage necessitated a change of venue in order to protect his rights afforded under the Sixth, Eighth, and Fourteenth amendments of the United States Constitution. We disagree.

[5, 6] Initially, we observe that there is a presumption that a defendant can receive a fair trial from the citizens of the jurisdiction in which the offense occurred. It is the burden of the defendant to overcome this presumption by demonstrating that the feeling of prejudice on the part of the citizenry is widespread and is such that would "be reasonably certain to prevent a fair trial." *Stockton v. Commonwealth*, 227 Va. 124, 137, 314 S.E.2d 371, 380, *cert. denied*, 469 U.S. 873, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984) (citation omitted). Further, the decision whether to grant a change of venue lies within the sound discretion of the trial court. *George*, 242 Va. at 274, 411 S.E.2d at 18; *LeVasseur*, 225 Va. at 577, 304 S.E.2d at 651. Therefore, the trial court's ruling on this issue will not be disturbed on appeal unless the record affirmatively shows an abuse of discretion. *Id.*

[7, 8] Extensive media coverage which discloses information about the accused, including his criminal record, does not, of itself, mandate a change of venue. *Buchanan*, 238 Va. at 407, 384 S.E.2d at 767; *Mackall v. Commonwealth*, 236 Va. 240, 250, 372 S.E.2d 759, 766 (1988), *cert. denied*, 492 U.S. 925, 109 S.Ct. 3261, 106 L.Ed.2d 607 (1989). A significant factor in determining whether a change of venue is warranted is whether the media reports are factual and accurate. *Buchanan*, 238 Va. at 407, 384 S.E.2d at 768. Here, Mueller does not challenge the factual nature or accuracy of the media coverage surrounding his case.[2] Moreover, we find no indication in the record that any of the media reports were inaccurate.

[9] Another significant factor in determining whether the venue of a trial should be changed is the difficulty encountered in selecting a jury. *Id.* In the present case, 47 venirepersons were examined. Of this number, only nine had to be excused because of their predisposition toward belief in Mueller's guilt.

As the United States Supreme Court has stated:

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is

2. Mueller argues, however, that an editorial published in the *Richmond Times—Dispatch*, five months before the hearing on his motion for change of venue, was inflammatory. While the editorial did refer to the murder of a child as being "among the sharpest evidence of the utter corruptibility of man," it also stated that Mueller's guilt in the Powers case had yet to be established. Accordingly, we do not view this article as being prejudicial to Mueller's right to receive a fair trial.

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sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin v. Dowd, 366 U.S. 717, 723, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961). Here, given the factual nature of the media coverage and Mueller's tacit acquiescence in the accuracy of its content, as well as the relative ease with which a jury was empaneled, we hold that the trial court did not abuse its discretion in denying Mueller's motion for a change of venue.

V.

JURY SELECTION

A. Refusal to Allow Questions on Voir Dire.

[10] Mueller next argues that the trial court erred in refusing to allow certain questions on voir dire which he contends were necessary to determine whether any prospective jurors were predisposed toward imposing the death penalty. Mueller asserts that he should have been allowed to ask these questions because the Commonwealth was entitled to conduct the opposite line of questioning, *viz.*, whether certain prospective jurors were unalterably opposed to the death penalty. *See Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985); *Adams v. Texas*, 448 U.S. 38, 45–46, 100 S.Ct. 2521, 2526–27, 65 L.Ed.2d 581 (1980); *Witherspoon v. Illinois*, 391 U.S. 510, 522, 88 S.Ct. 1770, 1777, 20 L.Ed.2d 776 (1968).

A total of 47 persons comprised the venire. From this group, 23 persons were struck for cause. Mueller objected to the trial court's qualification of ten of the remaining 24 members. However, he objected to only two members, Ruby Moschler and Max Zoeckler, on the grounds that they were "death prone."

An examination of Mueller's voir dire of Ruby Moschler reveals that the trial court did not reject any question regarding Moschler's ability to impose a life sentence.[3] Since Mueller did not proffer any such question which was rejected by the trial court, he may not claim on appeal that his right to question this prospective juror was violated. *See Morgan v. Illinois*, — U.S. —, —, 112 S.Ct. 2222, 2229, 119 L.Ed.2d 492 (1992); *LeVasseur*, 225 Va. at 585, 304 S.E.2d at 655.

[11] During his voir dire of Max Zoeckler, Mueller sought to ask, "[I]f in sitting in the guilt phase of the trial you conclude beyond a reasonable doubt that Mr. Mueller has raped and killed a 10 year old child, don't you think that death is the only appropriate punishment for that?" The trial court sustained the prosecutor's objection to this question. Counsel for Mueller then attempted to ask Mr. Zoeckler,

> [I]f you sit in the guilt phase of the trial and you determine beyond a reasonable doubt that Mr. Mueller raped and abducted and killed a 10 year old girl, and then you sit in the sentencing phase and listen to the evidence in aggravation and the evidence in mitigation, aren't you going to think the only appropriate sentence is death?

The trial court also sustained the prosecutor's objection to this question.

We hold that the trial court did not err in refusing both of these questions since they were argumentative and provided the prospective juror with no basis upon which to express an opinion. *See Buchanan*, 238 Va. at 402, 384 S.E.2d at 765; *Patterson v. Commonwealth*, 222 Va. 653, 659 n.*, 283 S.E.2d 212, 216 n.* (1981). Further, even if we disregard the argumentative nature of

3. In fact, Mueller was allowed to ask Moschler whether she would be "predisposed towards the death penalty" if she heard facts which showed Mueller to be guilty beyond a reasonable doubt. Moschler replied, "[I]f the evidence in a trial proved to me that he had done all these things, I will be in favor of [the death penalty]." Moschler clarified this answer by stating that she would make this decision only after weighing all the evidence in the penalty phase. She also stated that she could consider imposing a life sentence. Further, in response to a question posed by counsel for Mueller, she stated that there was evidence that could keep her from imposing the death penalty.

these questions, we still find that the trial court's ruling did not violate Mueller's right to a fair and impartial jury.

This Court has held that where the voir dire questioning conducted by the trial court otherwise "assure[s] the removal of those who would invariably impose capital punishment," it is not reversible error for the trial court to deny defense counsel additional questions on this subject. *Turner v. Commonwealth*, 221 Va. 513, 523, 273 S.E.2d 36, 42–43 (1980), *cert. denied*, 451 U.S. 1011, 101 S.Ct. 2347, 68 L.Ed.2d 863 (1981). This approach is in accord with the holding of the United States Supreme Court set forth in *Morgan*, — U.S. at —, 112 S.Ct. at 2232–33.

In *Morgan*, the Court held that the defendant's right to a fair and impartial jury was violated by the trial court's refusal to inquire whether prospective jurors would vote automatically for imposition of the death penalty. The defendant had requested that the trial court ask the jurors: "If you found [the defendant] guilty, would you automatically vote to impose the death penalty no matter what the facts are?" — U.S. at —, 112 S.Ct. at 2226.

In reaching its decision, the Supreme Court noted that the trial court had not asked any questions on this subject. Instead, it had only posed general questions regarding the prospective jurors' ability to be fair and impartial and follow the instructions of the court. The Supreme Court held that such general questions were inadequate because a prospective juror could, in good conscience, respond affirmatively and yet be unaware that certain beliefs about the death penalty would impede his or her performance as a juror. — U.S. at —, 112 S.Ct. at 2226, 2232–33.

In the case before us, the trial court did ask questions which probed whether prospective juror Zoeckler would automatically vote for the death penalty. At the beginning of Zoeckler's individual voir dire, the following dialogue took place:

THE COURT: Do you have any moral or religious convictions that would prevent you from voting for the death penalty?

MR. ZOECKLER: No.

THE COURT: On the other hand of that if the Court instructed you also, and I will instruct you that one of the other penalties, a lesser penalty that you could consider is life imprisonment, could you fairly consider the lesser penalty in deciding on what penalties the defendant should receive, by punishment what he should receive?

MR. ZOECKLER: I could consider it, yes.

THE COURT: If the Court instructed you that it was death or life imprisonment, would you fairly consider life imprisonment as well as the death penalty?

MR. ZOECKLER: I don't know, no.

THE COURT: Let me see if I have got you right. First, if I instructed you that there are two penalties that you could punish the defendant for, one is the death penalty, you say you have no moral or religious convictions that would prevent you from voting for the death penalty?

MR. ZOECKLER: Right.

THE COURT: Also, if the Court instructed you that the life imprisonment was a lesser penalty, would you consider the lesser punishment?

MR. ZOECKLER: Yes, I would consider it.

In responding to the prosecutor's questions, Zoeckler reiterated this position, stating that he would not vote automatically to impose either sentence. In response to questions from Mueller's counsel, Zoeckler stated that he would wait to hear the evidence in the penalty phase before deciding which penalty to impose. Viewing Zoeckler's voir dire as a whole, we find that he was questioned sufficiently to determine whether he would automatically impose the death penalty. Therefore, we cannot say that the trial court abused its discretion in refusing to allow further questions which Mueller proposed. *See Morgan*, — U.S. at —, 112 S.Ct. at 2232–33; *Turner*, 221 Va. at 523, 273 S.E.2d at 43; *LeVasseur*, 225 Va. at 584, 304 S.E.2d at 655.[4]

4. Mueller also contends that the trial court erred in refusing to allow him to ask Theresa

B. Refusal to Disqualify Venire.

[12] Mueller contends that the comments of one venireperson improperly tainted the group and that the trial court erred in failing to disqualify the entire venire for this reason. During the trial court's questioning of the first group of 14 prospective jurors, David Clark told the court that another prospective juror, Helen Blackwell, stated in the jury waiting room that she had "some strong feelings about the innocence or guilt of the defendant." The trial court then asked the entire panel, "[H]ave any of you acquired any information about the alleged offense or the accused from news media or other sources, and if so, would that information affect your impartiality in the case?" The trial court postponed questioning of those who answered in the affirmative until the individual questioning of each prospective juror.[5]

When questioned individually, only Robert Mitchell referred to comments which he had overheard in the waiting room. Mitchell stated that he had heard another prospective juror say that Mueller had confessed. Another prospective juror, Ruby Moschler, stated that she had not overheard any prospective juror making statements in the waiting room.

At the end of the voir dire, the trial court asked the entire venire whether any member had heard anything since being questioned by the court which would change any answer he or she had given previously. No one answered in the affirmative.

Mueller cites no evidence to support his contention that the venire was tainted by the comments of Helen Blackwell. Further, the record reflects that both counsel had ample opportunity to question each prospective juror as to what he or she had heard, in the waiting room and elsewhere, about the case. This questioning revealed no evidence that Blackwell's comment had influenced or prejudiced the prospective jurors in any way. In fact, Mitchell, the only prospective juror who mentioned having heard Blackwell's comment, said that the statement he overheard was "a casual thing" and that it was "not important to me at that time."

The trial court is vested with discretion to determine whether the parties have had a "full and fair" opportunity to determine whether a juror "stands indifferent to the cause." *Buchanan*, 238 Va. at 401, 384 S.E.2d at 764; *LeVasseur*, 225 Va. at 581, 304 S.E.2d at 653. Since the answers to the questions posed by the trial court, as well as by counsel for both parties, indicated that none of the prospective jurors was affected by Helen Blackwell's statement, we hold that the trial court did not abuse its discretion in refusing to disqualify the entire venire.

C. Refusal to Strike Prospective Jurors for Cause.

[13–15] Mueller next argues that nine prospective jurors who had knowledge of his prior record or confession should have been stricken for cause. Our standard of review here is well-settled. Based on the trial court's ability "to observe and evaluate the apparent sincerity, conscientiousness, intelligence, and demeanor of prospective jurors first hand," we will not disturb its rulings on challenges for cause, unless there is manifest error. *Pope v. Commonwealth*, 234 Va. 114, 123–24, 360 S.E.2d 352, 358 (1987), *cert. denied*, 485 U.S. 1015, 108 S.Ct. 1489, 99 L.Ed.2d 716 (1988). In making this determination, we decide whether the voir dire as a whole shows that a juror's performance of his or

Gryder, who was eventually empaneled on the jury, the following question:

> First you decide whether or not the person is guilty or innocent, so given that you have already decided that, okay, and you have determined that he, in fact, did abduct, rape and murder a 10 year old child, don't you feel then that the death sentence would be the only appropriate punishment?

Because Mueller did not object to the trial court's determination that Gryder was qualified to serve on the jury, he has not preserved his right to challenge this determination. *See Morgan*, — U.S. at —, 112 S.Ct. at 2229; Rule 5:25.

5. The trial court excused Helen Blackwell for cause based on its determination that she had already formed an opinion in the case.

her duty, in accordance with the trial court's instructions and the oath taken, would be prevented or substantially impaired. *Adams*, 448 U.S. at 45, 100 S.Ct. at 2526; *Eaton*, 240 Va. at 246, 397 S.E.2d at 391; *George*, 242 Va. at 276, 411 S.E.2d at 19.

[16] Additionally, we observe that jurors need not be totally unaware of the facts and issues involved in the case. *Irvin*, 366 U.S. at 722, 81 S.Ct. at 1642. This is true even in instances where a juror has previous knowledge of a defendant's past crimes and of the current charge against the defendant. *Murphy v. Florida*, 421 U.S. 794, 800, 95 S.Ct. 2031, 2036, 44 L.Ed.2d 589 (1975).

In the case before us, the trial court initially questioned the prospective jurors collectively concerning whether (1) there was anything which would prejudice them against either party, (2) they were aware of any bias or prejudice against either party, and (3) they understood that a defendant is presumed to be innocent until the prosecution proves his guilt beyond a reasonable doubt.[6] Additionally, each prospective juror was questioned individually by the trial court and counsel for both parties to determine whether pre-trial publicity had caused him or her to be biased.

Raymond LaFountain

In response to a question by Mueller's counsel, Raymond LaFountain stated that he had heard from television reports that Mueller had been charged with the crime, that Charity's body had been found near Mueller's home, and that Mueller had made a confession to the police. However, LaFountain stated that he had not formed an opinion as to Mueller's guilt or innocence. LaFountain also noted that he did not "know a whole lot about [the case] other than the fact that the news has said this happened, this gentleman was accused, and so forth." LaFountain was unaware of Mueller's prior criminal record.

Cynthia Woods

Cynthia Woods stated she had seen television reports and read newspaper articles which discussed the crime and Mueller's arrest. She also stated, "I think he had a record," but she did not remember any details. Woods, an eighth grade teacher, also told Mueller's counsel that, to a limited extent, she had discussed the case with her students. Woods stated that she did not know much about the defendant, that she had "not been around this summer," and that she had not formed an opinion regarding Mueller's guilt or innocence.

Max Zoeckler

Max Zoeckler stated he had heard media reports concerning Charity's disappearance and the discovery of her body. He did not recall hearing anything about Mueller's connection with the case, other than "[i]t may been [sic] that he had some prior acquaintanceship with the little girl." Zoeckler further stated that he had not formed an opinion regarding Mueller's guilt or innocence.

Patricia Squire

In response to questioning by the prosecutor, Patricia Squire stated she had heard in media reports that Mueller had been arrested and she recalled "there had been another point in which he had similar charges." Squire also had heard that the victim's body had been dismembered.[7] Upon further questioning by the prosecutor whether she had formed an opinion regarding Mueller's guilt or innocence, based on what she had seen or heard from the media, Squire responded, "I felt like he had evidence that very much swayed towards him being guilty.... In terms of myself deciding whether he is guilty or not, no, I have not made any decision." She then reaffirmed this response by stating, "I haven't formed an opinion." She further stated that she would be able to put

6. Donald Meincke and Dale Morris were questioned individually regarding the presumption of innocence and the prosecution's burden of proof beyond a reasonable doubt.

7. Squire was incorrect in her belief that the body had been dismembered.

aside any information she had learned from the media and base her decision in this case on the evidence presented in court.

In response to a question posed by Mueller's counsel, Squire again stated that, based on the information she had obtained from the media, "it probably weighs heavily in terms of thinking he might be guilty." However, upon further questioning by Mueller's counsel, Squire stated that her previous knowledge of the case would not interfere with her ability to follow the trial court's instructions and that she could put the fact of Mueller's prior criminal convictions out of her mind. She also stated that her previously acquired knowledge would not interfere with her ability to apply a presumption of innocence in the case.

Elizabeth Davis

Responding to a question from the trial court, Elizabeth Davis stated that all she had seen or heard in the media coverage of this case was the fact that Charity Powers had disappeared. Davis later responded to the prosecutor that she understood the presumption of a defendant's innocence, the prosecution's burden of proof of guilt beyond a reasonable doubt, and that she would apply the trial court's instructions to the evidence in making her decision. In response to a question from Mueller's counsel, Davis stated that, in conversations with co-workers about the case, she had heard that Mueller had confessed. However, Davis also stated that she had not formed an opinion regarding Mueller's guilt or innocence.

Donald Meincke

Donald Meincke stated he had heard about the case in television and newspaper coverage, including reports that Mueller had been arrested, had confessed his guilt, and that he previously had been convicted of other crimes. However, Meincke further stated that he could put aside what he had learned from the media, that he had not formed an opinion regarding Mueller's guilt or innocence, that he could base his decision on evidence heard in court, and that he could be impartial.

Dale Morris

Dale Morris stated that he was aware of the case and Mueller's confession of guilt from television news reports. Morris indicated that he had not formed an opinion about Mueller's guilt or innocence and that he felt he could decide the case based entirely on the evidence presented in court.

Robert Mitchell

Robert Mitchell stated he knew, based on media coverage, that Mueller was arrested for the murder of Charity Powers, but he did not "know that much as to what the evidence was that caused his arrest." Although Mitchell initially stated he believed, as a general rule, that a person is usually guilty if arrested, he later stated that he did not know the facts of the present case and had not formed an opinion regarding the guilt or innocence of Mueller.

Ruby Moschler

Ruby Moschler stated she learned from media reports that Mueller had been arrested for the murder of Charity Powers. However, she did not remember anything else about Mueller and she said that she had formed no opinion regarding his guilt or innocence. Moschler further stated that, while she did not already feel that Mueller was guilty, she was "relieved that he ha[d] been arrested." Upon questioning by Mueller's counsel, Moschler responded that she would weigh the evidence presented in the courtroom to determine which penalty to impose, that she would consider both penalties, and that she had no fixed opinion regarding Mueller's guilt.

In our review of the whole voir dire testimony of each of these nine prospective jurors, we find no indication that each could not "lay aside [his or her] impressions or opinions and render a verdict based on the evidence presented in court." *Pope*, 234 Va. at 124, 360 S.E.2d at 358. Accordingly, we find no error in the trial court's refusal to strike each of them for cause. *Id.*

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VI.

GUILT PHASE—MOTION FOR MISTRIAL

[17] Mueller contends that he was entitled to a mistrial based on the prosecutor's failure to inform him that witness Kevin Speeks had not made a positive identification of him when shown a photo array consisting of seven pictures. The record is silent, however, regarding whether Mueller's photograph was among the seven photographs shown to Speeks. Nevertheless, Mueller argues that Speeks's failure to identify him was exculpatory evidence within the meaning of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). We disagree.

[18] Exculpatory evidence is evidence favorable to a defendant which must be disclosed by the prosecution where it is material to the defendant's guilt or punishment. *Id.* at 87, 83 S.Ct. at 1197. The record before us shows that the prosecutor informed the trial court that he had investigated the matter of the photo array upon learning about it for the first time at trial. He was unable to determine which police officer showed Speeks the photographs. Thus, there is no evidence before us that Speeks was shown a photograph of Mueller or of any specifically identified individual. Moreover, since Speeks did not identify any photograph as representing a person he had seen at the fast food restaurant, but merely stated that one photograph *resembled* a man who was there, the trial court correctly determined that this information did not constitute exculpatory evidence. *Townes v. Commonwealth*, 234 Va. 307, 324, 362 S.E.2d 650, 659 (1987), *cert. denied*, 485 U.S. 971, 108 S.Ct. 1249, 99 L.Ed.2d 447 (1988).

VII.

PENALTY PHASE

A. Parole Ineligibility.

[19] Mueller argues that the trial court violated his due process rights by refusing to instruct the jury that, pursuant to Code § 53.1–151(B1), he would not be eligible for parole if convicted of the rape of Charity Powers, since this would be his third rape conviction. He also asserts that he should have been allowed the opportunity to introduce evidence regarding parole ineligibility in mitigation of punishment at the penalty phase of the trial.

We hold that the trial court did not err in its rulings here. This Court has held uniformly and repeatedly that information regarding parole eligibility is not relevant for the jury's consideration. *King v. Commonwealth*, 243 Va. 353, 367–68, 416 S.E.2d 669, 676–77 (1992); *Eaton*, 240 Va. at 248–49, 397 S.E.2d at 392–93; *Watkins v. Commonwealth*, 238 Va. 341, 351, 385 S.E.2d 50, 56 (1989), *cert. denied*, 494 U.S. 1074, 110 S.Ct. 1797, 108 L.Ed.2d 798 (1990). Further, the United States Supreme Court has expressly left the determination of this question to the individual states, as a matter of state law. *California v. Ramos*, 463 U.S. 992, 1013–14, 103 S.Ct. 3446, 3459–60, 77 L.Ed.2d 1171 (1983); *Eaton*, 240 Va. at 249, 397 S.E.2d at 392–93. We perceive no reason in the case before us to depart from our prior rulings on this subject.

We find no merit in Mueller's contention that, notwithstanding the prior rulings of this Court, he should have been permitted to present evidence of parole ineligibility because two of the Commonwealth's witnesses referred to his prior parole history in their testimony during the penalty phase of the trial. In *Pope*, 234 Va. at 126–27, 360 S.E.2d at 360, this Court held that evidence of a defendant's prior parole history is admissible during the penalty phase of a capital murder trial, where the Commonwealth is seeking the death penalty based on the "future dangerousness" predicate. This Court explained that, under Code § 19.2–264.4, the jury is required, prior to imposing the death penalty based on a finding of future dangerousness, to consider the defendant's "prior history." The fact that a defendant has had the benefit of parole supervision is part of this prior history. *See id.* Thus, this Court has drawn a clear distinction between the admissibility

of a defendant's parole history and evidence of his future parole eligibility.

B. Cross-Examination of Mueller.

[20] Mueller argues that the trial court erred in permitting the Commonwealth to question him about his prior convictions for sexual assault, as well as the present offenses against Charity Powers. We disagree. During his direct testimony, Mueller acknowledged that he had prior convictions for sexual offenses and he stated that he was refused parole repeatedly because of these convictions. Mueller also testified on direct examination about the circumstances under which his life had deteriorated and he related the fact that he had spent two years in a California state hospital.

[21] Once a defendant has testified as to certain matters, the proper scope of cross examination lies within the sound discretion of the trial court. *See Savino v. Commonwealth*, 239 Va. 534, 545, 391 S.E.2d 276, 282, *cert. denied*, 498 U.S. ——, 111 S.Ct. 229, 112 L.Ed.2d 184 (1990). Considering the above testimony, we find that the trial court did not abuse its discretion in allowing the Commonwealth to question Mueller about his prior convictions for sexual offenses and about whether he had learned anything as a result of his commission of the present offenses.

C. Admissibility of Dr. Fierro's Testimony.

[22] Mueller contends that portions of the testimony of Dr. Marcella Fierro, who conducted the autopsy of the victim's body, should not have been admitted because they included opinion evidence which was not stated to a reasonable degree of medical certainty. However, Mueller does not identify the portions of Dr. Fierro's testimony which he claims were admitted improperly. Further, the record shows that, during Dr. Fierro's testimony in the guilt phase of the trial, Mueller made no objection to the fact that her opinions were not stated to a reasonable degree of medical certainty.[8] Accordingly, he may not complain on appeal regarding the admission of this opinion evidence. *Spruill v. Commonwealth*, 221 Va. 475, 478–79, 271 S.E.2d 419, 421 (1980); Rule 5:25.

During the penalty phase of the trial, the prosecutor questioned Dr. Fierro regarding certain photographs which depicted the condition of the victim's body. At this point, Mueller did object to Dr. Fierro's testimony. He argued that any opinion on her part regarding the cause of the injuries, as well as the cause of death, would not be admissible since it could not be stated to a reasonable degree of medical certainty.

This objection, however, was wholly inapposite to the testimony which Dr. Fierro gave at the penalty phase of the trial. Here, Dr. Fierro's testimony dealt only with descriptions of the photographs which the prosecution sought to introduce. Dr. Fierro gave no further testimony during the penalty phase of the trial. Since her testimony at this stage of the trial involved only a description of the condition of the body, as depicted in the photographs, it did not constitute opinion evidence and was properly admitted.

D. Sufficiency of Evidence of Vileness.

[23, 24] Mueller asserts that the evidence in this case was insufficient to meet the vileness predicate set forth in Code § 19.2–264.2. We disagree. A finding of vileness must be based on conduct which is "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." Code § 19.2–264.2. Proof of any one of these three components will support a finding of vileness. *Id.; see Poyner v. Commonwealth*, 229 Va. 401, 424, 329 S.E.2d 815, 831, *cert. denied*, 474 U.S. 865, 106 S.Ct. 189, 88 L.Ed.2d 158 (1985). We hold that the testimony here sufficiently

8. Although prior to Dr. Fierro's testimony, Mueller informed the court that the defense was "going to have objections to some of the things we think they are going to try to get in, because we don't think there is a reasonable degree of certainty," Mueller never made a contemporaneous objection based on Dr. Fierro's stated degree of certainty during her testimony in the guilt phase of the trial.

established Mueller's aggravated battery of the victim, as well as his depravity of mind.

First, the record demonstrates that Mueller perpetrated an aggravated battery on Charity Powers within the meaning of Code § 19.2–264.2. This Court has defined "aggravated battery" in this context to mean "a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder." *Smith v. Commonwealth*, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978), *cert. denied*, 441 U.S. 967, 99 S.Ct. 2419, 60 L.Ed.2d 1074 (1979). Mueller stated that he strangled Charity to death after he raped her. Dr. Fierro testified, however, that Charity's throat had been cut and that a person suffering this type of wound would live for several minutes. We find that this evidence from Dr. Fierro is sufficient to establish an aggravated battery because the victim was subjected to "an interval of agony awaiting death." *Stout v. Commonwealth*, 237 Va. 126, 134, 376 S.E.2d 288, 292, *cert. denied*, 492 U.S. 925, 109 S.Ct. 3263, 106 L.Ed.2d 609 (1989); *Edmonds v. Commonwealth*, 229 Va. 303, 313, 329 S.E.2d 807, 814, *cert. denied*, 474 U.S. 975, 106 S.Ct. 339, 88 L.Ed.2d 324 (1985).

The record before us also contains sufficient evidence to establish Mueller's depravity of mind. Depravity of mind can be established by proof of psychological torture of the victim. *Poyner*, 229 Va. at 425, 329 S.E.2d at 832. We find that the jury reasonably could have inferred from the evidence that Charity Powers was tortured psychologically during the sequence of events which culminated in her murder. This ten year old child was alone late at night after being unable to find Steve Harris, who was supposed to have taken her home. Mueller offered to help her out of this frightening situation by telling her that he would take her home. Instead of keeping that promise, he took her into the woods, raped her, and then killed her. This conduct extended over a period of time and under such circumstances as to permit an inference of psychological torture. *See id.*

Further evidence of Mueller's depravity of mind is Dr. Fierro's testimony that there were holes in the breast area where the victim's nipples would have been and that she believed that this condition resulted from an injury inflicted on the victim. Evidence of such sexual mutilation, whether occurring before or after death, evinces a depravity of mind within the meaning of Code § 19.2–264.2. *See Jones v. Commonwealth*, 228 Va. 427, 447–48, 323 S.E.2d 554, 565–66 (1984), *cert. denied*, 472 U.S. 1012, 105 S.Ct. 2713, 86 L.Ed.2d 728 (1985).

E. Verdict Form.

[25] Mueller argues that the verdict form submitted to the jury did not properly inform it of the sentencing options. He contends that the structure of the verdict form influenced the jury to impose the death sentence rather than life imprisonment. We find no merit in this contention.

Instruction A informed the jury that it was required to choose between sentences of death and life imprisonment. This instruction also informed the jury that it could not sentence Mueller to death unless the prosecution proved beyond a reasonable doubt at least one of the two aggravating factors of vileness or future dangerousness. Further, Instruction A directed the jury that, even if the prosecution had proved one or both of these aggravating factors, it was nevertheless free to fix Mueller's punishment at life imprisonment, "if you believe from all the evidence that the death penalty is not justified."

Instruction B set forth four alternative verdicts: (1) a sentence of death based on a finding of both aggravating factors; (2) a sentence of death based on a finding of future dangerousness; (3) a sentence of death based on a finding of vileness; and (4) a life sentence based on all of the evidence in aggravation and mitigation of the offense. To indicate its verdict, the jury was instructed to "[c]ross out any paragraph, word or phrase which you do not find beyond a reasonable doubt."

We hold that this sentencing form, in conjunction with Instruction A, fully apprised the jury of its sentencing options.

The structure of the form did not, as contended by Mueller, favor any of the options presented. Further, since the jury was told in Instruction A that it could choose the penalty of life imprisonment, even if it found either or both aggravating factors, the information concerning the option of life imprisonment was complete. *See Stockton v. Commonwealth*, 241 Va. 192, 215, 402 S.E.2d 196, 209 (1991), *cert. denied*, 502 U.S. ——, 112 S.Ct. 280, 116 L.Ed.2d 231 (1991); *LeVasseur*, 225 Va. at 594–95, 304 S.E.2d at 661.

VIII.

SENTENCE REVIEW

[26] Code § 17–110.1(C) requires us to review the imposition of the death sentence on Mueller, based on the trial record, to determine whether (1) it was imposed under the influence of passion, prejudice, or any other arbitrary factor; or (2) it is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Initially, we note that Mueller does not contend that the death sentence was imposed under the influence of any of the above statutory factors, nor does he contend that the sentence is excessive or disproportionate to the penalty imposed in similar cases. Nevertheless, we have examined the records of all capital murder cases reviewed by this Court, pursuant to Code § 17–110.1(E), giving particular attention to those cases where the death penalty was based upon both the "future dangerousness" and the "vileness" predicates. Those cases are collected in *Spencer v. Commonwealth*, 238 Va. 295, 319–20, 384 S.E.2d 785, 800 (1989), *cert. denied*, 493 U.S. 1093, 110 S.Ct. 1171, 107 L.Ed.2d 1073 (1990) (Spencer II). Since *Spencer II*, we have decided several other capital murder cases where the death penalty was based on both predicates: *George v. Commonwealth*, 242 Va. 264, 411 S.E.2d 12 (1991), *cert. denied*, 503 U.S. ——, 112 S.Ct. 1591, 118 L.Ed.2d 308 (1992); *Strickler v. Commonwealth*, 241 Va. 482, 404 S.E.2d 227, *cert. denied*, 502 U.S. ——, 112 S.Ct. 386, 116 L.Ed.2d 337 (1991); *Quesinberry v. Commonwealth*, 241 Va. 364, 402 S.E.2d 218, *cert. denied*, 502 U.S. ——, 112 S.Ct. 113, 116 L.Ed.2d 82 (1991); *Stockton v. Commonwealth*, 241 Va. 192, 402 S.E.2d 196 (1991), *cert. denied*, 502 U.S. ——, 112 S.Ct. 280, 116 L.Ed.2d 231 (1991); *Spencer v. Commonwealth*, 240 Va. 78, 393 S.E.2d 609, *cert. denied*, 498 U.S. ——, 111 S.Ct. 281, 112 L.Ed.2d 235 (1990) (Spencer IV); *Mu'Min v. Commonwealth*, 239 Va. 433, 389 S.E.2d 886 (1990), *aff'd*, 500 U.S. ——, 111 S.Ct. 1899, 114 L.Ed.2d 493 (1991); *Smith v. Commonwealth*, 239 Va. 243, 389 S.E.2d 871, *cert. denied*, 498 U.S. ——, 111 S.Ct. 221, 112 L.Ed.2d 177 (1990); *Spencer v. Commonwealth*, 238 Va. 563, 385 S.E.2d 850 (1989), *cert. denied*, 493 U.S. 1093, 110 S.Ct. 1171, 107 L.Ed.2d 1073 (1990) (Spencer III); *Watkins v. Commonwealth*, 238 Va. 341, 385 S.E.2d 50 (1989), *cert. denied*, 494 U.S. 1074, 110 S.Ct. 1797, 108 L.Ed.2d 798 (1990).

After reviewing these records, as well as cases in which life imprisonment was imposed, we conclude that Mueller's sentence of death was neither excessive nor disproportionate to sentences generally imposed by other sentencing bodies in Virginia for crimes of a similar nature. In fact, few of these cases equal or exceed both the vileness of this crime or the future dangerousness of this defendant.

As stated above, this case involves the rape, abduction, and murder of a ten year old child. Even under Mueller's account of the events, the victim suffered an exceedingly gruesome and painful death. The evidence of Mueller's future dangerousness was also overwhelming. Prior to these crimes, Mueller had committed several violent sexual assaults on women, including assaults on two of his own sisters. He testified that he did not feel remorse after committing two of those crimes. In addition to the testimony of Dr. Henry Gwaltney, the Commonwealth's expert witness, Mueller's own expert witness, Dr. Mariah Travis, testified that Mueller is an extremely dangerous person.

Finally, based on our review of the record, we find nothing which suggests that Mueller's death sentence was imposed un-

der the influence of passion, prejudice or any other arbitrary factor.

IX.

CONCLUSION

We find no reversible error in the issues presented here. Having reviewed Mueller's sentence of death pursuant to Code § 17-110.1, we decline to commute the sentence. Accordingly, we will affirm the judgments in both cases.

Record No. 920287—*Affirmed.*

Record No. 920449—*Affirmed.*

Bao Quoc DOAN

v.

COMMONWEALTH of Virginia.

Record No. 0280-91-4.

Court of Appeals of Virginia.

Sept. 15, 1992.

Defendant was convicted in the Circuit Court, Fairfax County, Thomas A. Fortkort, J., of burglary, robbery abduction, and use of firearm in commission of a felony, and he appealed. The Court of Appeals, Koontz, C.J., held that: (1) defendant who did not testify at trial could not raise claim of error in limine ruling that prior convictions would be admissible to impeach him; (2) in-court identification was not result of any impermissible suggestiveness; but (3) evidence did not sustain finding of breaking.

Affirmed in part and reversed and dismissed in part.

1. Criminal Law ⇐1035(2)

In order to preserve for review claim of improper impeachment by prior conviction, defendant must testify at trial, and defendant who declined to testify after court ruled in limine that prior convictions were admissible to impeach him could not raise the issue on appeal.

2. Criminal Law ⇐698(1)

Defendant's failure to object to admission of evidence of codefendant's plea agreement waived the issue.

3. Criminal Law ⇐1036.1(1)

Absent ruling in limine, defendant was obligated to object to evidence at trial in order to preserve it for appeal.

4. Criminal Law ⇐1169.1(2)

Admission at sentencing of evidence of codefendant's plea agreement which referred to other offenses which he had committed did not prejudice defendant, as the agreement did not disclose any information which would link defendant to the other crimes.

5. Criminal Law ⇐339.8(2)

Identification of defendant at pretrial hearing was not product of any suggestiveness resulting from discussion on day before hearing when she was in the courtroom with the prosecutor and asked if defendant would be sitting at particular table, to which the prosecutor responded that defendant would not necessarily sit at that table and that there might be somebody else sitting there whom the defense would put in that chair for identification purposes.

6. Criminal Law ⇐339.8(2)

Even if pretrial identification was tainted by some suggestiveness, pretrial identification was not so unreliable as to create substantial likelihood of misidentification where robbers were in victim's house for approximately 45 minutes and she was able to give police description of four men who entered her house.

7. Criminal Law ⇐339.8(1)

Victim's inability to positively identify defendant from photographic array did not render her pretrial identification unreliable.

8. Burglary ⇐9(1)

Breaking, which is essential element of crime of burglary, may be either actual or

is is granted. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied.

1

Robert DORDIES, petitioner,
v. ILLINOIS.

No. 92–1425.

April 19, 1993. Petition for writ of certiorari to the Appellate Court of Illinois, First District, denied.

Justice STEVENS took no part in the consideration or decision of this petition.

2

Everett Lee MUELLER, petitioner,
v. VIRGINIA.

No. 92–7507.

Case below, 244 Va. 386, 422 S.E.2d 380.

On petition for writ of certiorari to the Supreme Court of Virginia.

April 19, 1993. The petition for a writ of certiorari is denied.

Justice WHITE, with whom Justice BLACKMUN and Justice SOUTER join, dissenting.

Under *Edwards v. Arizona*, 451 U.S. 477, 484–485, 101 S.Ct. 1880, 1884–1885, 68 L.Ed.2d 378 (1981), a defendant who invokes the Fifth Amendment right to counsel during custodial interrogation may not be subjected to further interrogation until counsel is made available to him, unless he subsequently initiates communications. "[I]t is inconsistent with *Miranda* and its progeny," the Court concluded, "for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." *Id.* at 485, 101 S.Ct. at 1885. While easily stated, the *Edwards* rule has not always been easy to apply. In particular, the question of how officials conducting an interrogation ought to respond to a defendant's ambiguous or equivocal assertion of the right to counsel has divided the state and federal courts. The Court should take this opportunity to resolve this important constitutional question.

Virginia police arrested petitioner in connection with the abduction, rape, and murder of 10–year–old Charity Powers. Petitioner was advised of his *Miranda* rights and agreed to talk to a detective and an FBI agent. During the interrogation, petitioner asked the detective: " 'Do you think I need an attorney here?' " The detective responded by shaking his head slightly from side to side, shrugging, and stating: " 'You're just talking to us.' " The interrogation continued and petitioner confessed to the crimes. See 244 Va. 386, 391, 422 S.E.2d 380, 384 (1992). Petitioner sought to suppress the confession, claiming, *inter alia*, that the continuation of the interrogation constituted an *Edwards* violation. The trial court denied the motion and petitioner was tried, convicted, and sentenced to death. Relying on its prior decision in *Eaton v. Commonwealth*, 240 Va. 236, 253–254, 397 S.E.2d 385, 395–396 (1990), cert. denied, 502 U.S. ——, 112 S.Ct. 88, 116 L.Ed.2d 60 (1991), which in turn relied on *Edwards'* reference to a defendant who has "clearly asserted" the right to counsel, see *supra*, at 1880, the Virginia Supreme Court affirmed, concluding that petitioner's question "did not constitute an unambiguous request for counsel" and therefore was insufficient to trigger *Edwards*. 244 Va., at 396, 422 S.E.2d at 387. Petitioner now seeks review of this ruling, among others. Pet. for Cert. 11–12.

It has been nearly a decade since the Court acknowledged the existence of three "conflicting standards" used by state and federal courts for determining the consequences of ambiguous or equivocal assertions of the right to counsel. *Smith v. Illinois*, 469 U.S. 91, 95–96, and n. 3, 105 S.Ct. 490, 492–493, and n. 3, 83 L.Ed.2d 488 (1984) (*per curiam*). Thus,

> "[s]ome courts have held that all questioning must cease upon any request for or reference to counsel, however equivocal or ambiguous.... Others have attempted to define a threshold standard of clarity for such requests, and have held that requests falling below this threshold do not trigger the right to counsel.... Still others have adopted a third approach, holding that when an accused makes an equivocal statement that 'arguably' can be construed as a request for counsel, all interrogation must immediately cease except for narrow questions designed to 'clarify' the earlier statement and the accused's desires respecting counsel." *Id.* at 96, n. 3, 105 S.Ct. at 493, n. 3 (citations omitted).

This disagreement has not abated. Although a number of Circuits have since adopted what *Smith* described as the "third approach," see *United States v. Porter*, 776 F.2d 370 (CA1 1985); *United States v. Gotay*, 844 F.2d 971, 975 (CA2 1988); *United States v. Fouche*, 776 F.2d 1398, 1405 (CA9 1985); *Towne v. Dugger*, 899 F.2d 1104 (CA11), cert. denied, 498 U.S. 991–992, 111 S.Ct. 536, 112 L.Ed.2d 546 (1990), the Sixth Circuit apparently adheres to the first approach. See *Maglio v. Jago*, 580 F.2d 202, 205 (CA6 1978) (ambiguous invocation requires cessation of all questioning). State high courts also continue to issue conflicting decisions. Kentucky and Texas, like Virginia, now employ a variant of the second, "threshold standard," approach, see *Dean v. Commonwealth*, 844 S.W.2d 417, 420 (Ky.1992) (endorsing *Eaton v. Commonwealth, supra*); *Russell v. State*, 727 S.W.2d 573, 575 (Tex.Crim.App.) (en banc) (right to counsel invoked if "clearly asserted"), cert. denied, 484 U.S. 856, 108 S.Ct. 164, 98 L.Ed.2d 119 (1987), while other States have embraced the third approach. See *State v. Staatz*, 159 Ariz. 411, 414, 768 P.2d 143, 146 (1988); *People v. Benjamin*, 732 P.2d 1167, 1171 (Colo.1987), *Crawford v. State*, 580 A.2d 571, 576–577 (Del.1990); *Ruffin v. United States*, 524 A.2d 685 (D.C.1987), cert. denied, 486 U.S. 1057, 108 S.Ct. 2827, 100 L.Ed.2d 927 (1988); *Hall v. State*, 255 Ga. 267, 273, 336 S.E.2d 812, 815 (1985); *State v. Robinson*, 427 N.W.2d 217, 223 (Minn.1988).

As it is apparent that a substantial number of criminal defendants who are identically situated in the eyes of the Constitution have received and will continue to receive dissimilar treatment because of the different approaches taken by the lower courts, I would grant certiorari.

Curtis Lee ECHOLS, Jr., petitioner,
v. A.G. THOMAS, Warden.

No. 92–7774.

April 19, 1993. Petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit before judgment is denied.

LACY, Justice, with whom KEENAN, J., joins, concurring.

I write separately because, while the majority's disposition resolves the case, its rationale does not address the principal issue raised by the defendant in this appeal.

Steven Johnson has consistently based his claim that he was denied a speedy trial on his interpretation of the final sentence of Code § 19.2–243, the speedy trial statute. That sentence provides:

> But the time during the pendency of any appeal in any appellate court shall not be included as applying to the provisions of this section.

Johnson asserts that when his first trial began, approximately one month and 14 days of the five-month period prescribed by the statute remained unused. Johnson construes the quoted portion of the statute as "tolling" the running of this unused period until December 14, 1993, when the Court of Appeals reversed his conviction and remanded the case for a new trial. At that point, under Johnson's theory the tolling ceased and the Commonwealth was required to commence his second trial within the unused one month and 14 days. Because his second trial did not commence within that period, he concludes that the speedy trial statute was violated and the charges against him must be dismissed.

The lynchpin of Johnson's argument is that if the time periods established in the speedy trial act only apply to the commencement of his initial trial, as the Court of Appeals concluded, the reference in the statute to time elapsed "during the pendency of any appeal" is meaningless. I disagree with Johnson.

The Court of Appeals construed the sentence in question as applying only to pre-trial appeals. This sentence was added to the speedy trial statute in 1894. Acts of Assembly, 1893–94, p. 464. Although there were no specific statutory procedures for pretrial appeals at that time, defendants nevertheless pursued appeals prior to the commencement of the first trial. *See e.g. Saunders v. Commonwealth*, 79 Va. 522, 523 (1884) (appeal of denial of double jeopardy plea dismissed when case had not "progressed further than the order of the court rejecting the second plea tendered by the defendant"). Furthermore, in its very next session 1895–96, the General Assembly enacted legislation providing statutory procedures for pretrial appeals in certain situations. Acts of Assembly, 1895–96, p. 365–66.

Construing the statute as suggested by Johnson and thereby allowing dismissal of criminal charges under these circumstances is not required in order to provide a defendant with the protection of a speedy trial, and I cannot ascribe such an intent to the General Assembly. The Court of Appeals' interpretation of the statute imposes statutory periods that guarantee a timely commencement of a defendant's first trial, and leaves evaluation of the timeliness of second and subsequent trials to the standards developed under the state and federal constitutions. *See Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

Although this Court has not addressed the specific issue presented in this appeal, we have previously stated that the statutory requirement for a speedy trial is satisfied if the trial is commenced within the requisite period. *Butts v. Commonwealth*, 145 Va. 800, 133 S.E. 764 (1926) (statute satisfied although trial court's final judgment not entered within the statutory period). The Court of Appeals' construction of the last paragraph of the statute is consistent with this statement and is the proper interpretation of § 19.2–243. Therefore, for the reasons stated, I concur in the disposition reached by the majority.

252 Va. 356

Everett Lee MUELLER

v.

Edward W. MURRAY, Director, Virginia Department of Corrections.

Record No. 951874.

Supreme Court of Virginia.

Nov. 1, 1996.

Following affirmance, 244 Va. 386, 422 S.E.2d 380, of petitioner's convictions of capital murder, rape, and abduction, petitioner sought writ of habeas corpus. The Circuit Court, Chesterfield County, William R. Shelton, J., dismissed petition in part and denied petition in part. Petitioner appealed. The Supreme Court, Keenan, J., held that United States Supreme Court's decision in *Simmons v. South Carolina*, in which Court had held that when prosecution seeks death sentence based on defendant's future dangerousness and only alternative sentence is life imprisonment without possibility of parole, defendant has due process right to inform jury that he is parole ineligible, set forth "new rule" that does not apply retroactively.

Affirmed.

1. Courts ⇐100(1)

United States Supreme Court's decision in *Simmons v. South Carolina*, in which Court held that when prosecution seeks death sentence based on defendant's future dangerousness and only alternative sentence is life imprisonment without possibility of parole, defendant has due process right to inform jury that he is parole ineligible, set forth "new rule" that does not apply retroactively. U.S.C.A. Const.Amend. 14.

See publication Words and Phrases for other judicial constructions and definitions.

2. Courts ⇐100(1)

United States Supreme Court decision articulating "new" constitutional rule of criminal procedure generally will not be applied to conviction which has become final before rule is announced.

3. Courts ⇐100(1)

Case announces "new rule" that will not be applied retroactively if result was not dictated by precedent existing at time defendant's conviction became final.

4. Courts ⇐100(1)

Analysis for determining whether decision constitutes a "new rule," for purpose of determining whether decision applies retroactively, requires three steps: first, reviewing court must determine date on which defendant's conviction became final for retroactivity purposes; second, reviewing court must survey the legal landscape as it existed on date defendant's conviction became final to determine whether existing constitutional precedent compelled conclusion which defendant sought; third, if reviewing court determines that defendant seeks the benefit of a new rule, court must decide whether that rule falls within one of the two narrow exceptions to nonretroactivity principle.

5. Courts ⇐100(1)

Petitioner's state conviction and sentence become final, for purposes of determining whether a judicial decision retroactively applies to petitioner's case, when availability of direct appeal to state courts has been exhausted and time for filing petition for writ of certiorari has elapsed or timely filed petition has been finally denied.

6. Courts ⇐100(1)

For purposes of determining whether a judicial decision applies retroactively to petitioner's case, rule announced in decision is not compelled by existing precedent if those decisions merely inform or control analysis of the petitioner's claim; rather, rule is compelled by existing precedent only if contrary conclusion would have been objectively unreasonable.

7. Courts ⇐100(1)

For purposes of determining whether judicial decision announced new rule that does not apply retroactively to petitioner's case, scope of rule under examination is defined as the narrowest principle of law actually applied to resolve issue presented.

8. Habeas Corpus ⇐296

Habeas petitioner's claims that trial court's refusal to allow him to inform jury of his parole ineligibility violated his Eighth Amendment rights and state constitutional right to call for evidence in his favor were procedurally barred, where petitioner did not raise claims on direct appeal. U.S.C.A. Const.Amend. 8; Const. Art. 1, § 8.

Michael HuYoung (Angela D. Whitley, Richmond; Edward D. Barnes, Chesterfield, on brief), for appellant.

Robert H. Anderson, III, Assistant Attorney General (James S. Gilmore, III, Attorney General, on brief), for appellee.

Present: All the Justices.

KEENAN, Justice.

Everett Lee Mueller was convicted by a jury of the capital murder, rape, and abduction of Charity Powers and sentenced to death. We affirmed the judgment of the circuit court in *Mueller v. Commonwealth*, 244 Va. 386, 422 S.E.2d 380 (1992), *cert. denied*, 507 U.S. 1043, 113 S.Ct. 1880, 123 L.Ed.2d 498 (1993).

Mueller filed a petition for habeas corpus in the circuit court alleging, among other things, that his federal and state constitutional rights were violated because "the sentencing jury was not allowed to know of his ineligibility for parole." The circuit court dismissed the petition in part and denied it in part, and we awarded Mueller an appeal limited to that issue.

In considering this question, we determine whether *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), announced a "new rule" within the meaning of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). We conclude that *Simmons* established a "new" rule that does not apply retroactively to Mueller's case.[1]

I.

On the evening of October 5, 1990, Taryn Potts took her ten year old daughter, Charity Powers, to a skating rink. Potts had arranged to have a friend drive Charity home from the rink later that night, but the friend fell asleep and did not go to the rink. When Potts arrived home at 3:00 a.m. on October 6, 1990, and discovered that her friend had not brought Charity home, she immediately contacted the police, who initiated a search for her daughter.

Kevin H. Speeks, who knew Charity, testified that he saw her at a fast food restaurant near the skating rink at about 12:50 a.m. on October 6, 1990. While at the restaurant, Speeks also saw a man who appeared to be thirty years of age and of medium height, driving a cream-colored station wagon with wood siding through the parking lot several times. As Speeks left the restaurant, he saw the man standing on the right side of the building, and he also observed Charity sitting on a curb located on the same side of the building. Sergeant Mike Spraker of the Chesterfield County Police Department testified that Mueller customarily drove a cream-colored station wagon which had wood siding.

When Mueller spoke with the police on October 8 and 9, 1990, he admitted that he had talked to a young female on October 5, 1990, at a fast food restaurant that might have been near the skating rink. Based on information gained over the course of their investigation, the police searched the area near Mueller's home. On February 8, 1991, they found "a clump of hair and what looked like some white bone sticking out of the ground." As a result of this discovery, the police exhumed Charity's body, which had been buried about 900 feet behind Mueller's house. The police found a knife stuck in the ground about 174 feet from the grave.

The police arrested Mueller on February 12, 1991, and advised him of his *Miranda* rights. During an interrogation, Mueller confessed to the crime. He stated that he had agreed to give Charity a ride home from the restaurant but that he drove her to his house instead.

Mueller said that he thought Charity was 18 or 19 years old. Charity was about 4'8" tall and weighed 90 pounds. Mueller told the police that Charity agreed to have sex with him, and that he took her to the woods behind his house where he had sexual intercourse with her. He stated that, although he had a knife nearby, he did not use it.

1. In addressing the merits of Mueller's due process claim, we reject the Commonwealth's argument that the claim is procedurally barred. Mueller substantially raised the issue of his due process right to inform the jury of his parole ineligibility, based on the Commonwealth's argument of future dangerousness, at trial and on direct appeal. (See Appendix from Record Nos. 920287 and 920449, at 93, 319–22, 1260–62, and pp. 38–40 of Mueller's brief on direct appeal to this Court.)

Mueller told the police that he strangled Charity to death because he was afraid that she would report the incident. He later purchased a shovel from a local store, buried her body, and burned her clothes and jewelry. After making this confession, Mueller showed the police the area where he had buried the body, as well as the locations where he had raped her and had left the knife.

The medical examiner who conducted an autopsy on Charity's body testified that Charity's throat had been cut to the depth of one inch, resulting in a horizontal cut on the epiglottis. She stated that such a cut would result in the severance of the carotid artery and the jugular vein. According to the medical examiner, a person suffering from such an injury would die after several minutes, and there were indications that Charity had bled before her death. Based on these facts, the medical examiner concluded that the cause of death was "acute neck injury."

The medical examiner also stated that, on examining the skin over the breast area, there were "irregular holes in the area where each nipple would be." The medical examiner also observed a "big gash" on the victim's upper left thigh. She also determined that there were three tears to the hymenal ring of the vagina which were consistent with sexual penetration.

At the conclusion of this phase of the bifurcated trial, the jury found Mueller guilty of capital murder in violation of Code § 18.2–31(5) and former Code § 18.2–31(8)[2] (murder in the commission of a rape, and murder of a child under 12 in the commission of an abduction). The jury also convicted Mueller of rape and abduction with intent to defile, and it fixed his punishment at life imprisonment on both these charges.

At the penalty phase of the trial, each of four women, including Mueller's sister, testified that Mueller had raped her at knife point. Two of these rapes resulted in criminal convictions. Mueller's expert, Dr. Mariah Travis, a clinical psychologist, acknowledged that Mueller did not have "a working conscience," and that he had "graduated ... a new and even more dangerous level

Mueller testified during the penalty phase. When asked whether he felt any remorse for having raped one particular victim, Mueller replied, "Which one is that? Ha, ha." After completing his testimony, Mueller stated, "Get this God damn shit over with so that I can go smoke a cigarette."

At the conclusion of the penalty phase evidence, the jury fixed Mueller's punishment for capital murder at death, based on findings of both vileness and future dangerousness. After the hearing required by Code § 19.2–264.5, the trial court imposed the sentences fixed by the jury.

II.

In this appeal, Mueller argues that his death sentence should be set aside because the trial court did not allow him to inform the jury that he was ineligible for parole under Code § 53.1–151(B1). That section provides in part that "[a]ny person convicted of three separate felony offenses of (i) murder, rape or (iii) robbery by the presenting of firearms or other deadly weapon ... shall not be eligible for parole."

In support of his argument, Mueller relies on *Simmons*, in which the Supreme Court held that, when the prosecution seeks the death sentence based on the defendant's future dangerousness, and the only alternative sentence is life imprisonment without the possibility of parole, the defendant has a due process right to inform the jury that he is parole ineligible. 512 U.S. at ——, 114 S.Ct. at 2196. Mueller contends that, under *Simmons*, the trial court's ruling denied him due process because he was not able to rebut the Commonwealth's argument of future dangerousness with evidence of his parole ineligibility.

2. Former Code § 18.2–31(8) was replaced by Code § 18.2–31(1), which includes in the definition of capital murder "[t]he willful, deliberate, and premeditated killing of any person in the commission of abduction, as defined in Code § 18.2–48, when such abduction was committed with the intent to extort money or a pecuniary benefit or with the intent to defile the victim of such abduction."

[1] Mueller asserts that the rule articulated in *Simmons* is not a "new" rule, because it was compelled by two United States Supreme Court decisions in effect at the time of his trial and direct appeal, *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), and *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). Thus, Mueller argues that the rule in *Simmons* applies retroactively to his case. We disagree.

III.

[2] In *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334, the Supreme Court stated that, on habeas corpus review, constitutional error must be evaluated together with the interests of comity and finality. *Id.* at 308, 109 S.Ct. at 1074. Based on these multiple considerations, a Supreme Court decision articulating a "new" constitutional rule of criminal procedure generally will not be applied to a conviction which has become final before the rule is announced. *Id.* at 310, 109 S.Ct. at 1075.

[3] "[A] case announces a 'new' rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Id.* at 301, 109 S.Ct. at 1070. Since Mueller seeks the benefit of a rule articulated after his conviction became final on direct appeal, this Court must first determine whether *Simmons* announced a "new" rule under *Teague* before considering the merits of Mueller's claim. *See Caspari v. Bohlen*, 510 U.S. 383, 390, 114 S.Ct. 948, 953, 127 L.Ed.2d 236 (1994); *O'Dell v. Netherland*, 95 F.3d 1214, 1220–21 (4th Cir.1996).

[4] The *Teague* analysis requires three steps. First, the reviewing court must determine the date on which the defendant's conviction became final for retroactivity purposes. *Caspari*, 510 U.S. at 390, 114 S.Ct. at 953. Second, the reviewing court must "survey the legal landscape" as it existed on the date the defendant's conviction became final to determine whether existing constitutional precedent compelled the conclusion which the defendant sought. *Id.* Third, if the reviewing court determines that the defendant seeks the benefit of a "new" rule, the court "must decide whether that rule falls within one of the two narrow exceptions to the nonretroactivity principle." *Id.*

IV.

[5] "A state conviction and sentence become final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." *Id.* We determine the date on which Mueller's convictions became final by the date the United States Supreme Court denied a rehearing on his petition for certiorari on direct review of his conviction and death sentence. *See Penry v. Lynaugh*, 492 U.S. 302, 314, 109 S.Ct. 2934, 2944, 106 L.Ed.2d 256 (1989). Thus, Mueller's convictions became final for retroactivity purposes on June 7, 1993. *See Mueller v. Virginia*, 507 U.S. 1043, 113 S.Ct. 1880, 123 L.Ed.2d 498 (1993).

[6] We next consider whether existing precedent compelled the conclusion advanced by Mueller. A rule is not compelled by existing precedent if those decisions merely inform or control the analysis of the petitioner's claim. *Saffle v. Parks*, 494 U.S. 484, 491, 110 S.Ct. 1257, 1262, 108 L.Ed.2d 415 (1990). Rather, a rule is compelled by existing precedent only if a contrary conclusion would have been *objectively unreasonable*. *O'Dell*, 95 F.3d at 1223–24. Thus, as the Supreme Court explained in *Butler v. McKellar*, 494 U.S. 407, 110 S.Ct. 1212, 108 L.Ed.2d 347 (1990), "[t]he 'new rule' principle ... validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Id.* at 414, 110 S.Ct. at 1217.

[7] For purposes of "new" rule analysis, the scope of the rule under examination is defined as the narrowest principle of law actually applied to resolve the issue presented. *O'Dell*, 95 F.3d at 1222–23. Thus, the "rule" of *Simmons* is "that 'where the State puts the defendant's future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without

parole, due process entitles the defendant to inform the capital sentencing jury—by either argument or instruction—that he is parole ineligible.'" *Townes v. Murray*, 68 F.3d 840, 850 (4th Cir.1995); *cert. denied*, —— U.S. ——, 116 S.Ct. 831, 133 L.Ed.2d 830 (1996) (quoting *Simmons*, 512 U.S. at ——, 114 S.Ct. at 2201).

In June 1993, when Mueller's conviction became final, the "legal landscape" contemplated by *Teague* included the principal cases on which *Simmons* relied, *Gardner* and *Skipper*. In *Gardner*, the defendant was convicted of first degree murder, and the jury recommended that he receive a life sentence. However, the trial court sentenced the defendant to death, relying on a confidential presentence report that the defendant did not have an opportunity to see or rebut. 430 U.S. at 353, 97 S.Ct. at 1202.

The Supreme Court vacated the defendant's death sentence, holding that the defendant's constitutional rights were violated by use of the secret report. The three-justice plurality concluded that the sentencer's use of the report denied the defendant due process, *id.* at 362, 97 S.Ct. at 1206–07, while the two justices concurring in the judgment based their decision on Eighth Amendment grounds. *Id.* at 363–64, 97 S.Ct. at 1207–08.

In *Skipper*, the trial court denied the defendant the right to present the jury with evidence of his good behavior during the seven months he spent in jail awaiting trial. 476 U.S. at 4, 106 S.Ct. at 1671. The Supreme Court held that "evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating," and that under *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), exclusion of such relevant evidence from the sentencer's consideration violates the Eighth Amendment. *Skipper*, 476 U.S. at 5, 106 S.Ct. at 1671; *see also Eddings*, 455 U.S. at 112–13, 102 S.Ct. at 875–76.

Skipper also addressed the defendant's right of due process in a footnote, stating that

> [w]here the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty, it is not only the rule of *Lockett* [*v. Ohio*, 438 U.S. 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)] *Eddings* that requires that the defer be afforded an opportunity to intro evidence on this point; it is also the mental due process requirement th defendant not be sentenced to death the basis of information which he ha opportunity to deny or explain." *Gar v. Florida*, 430 U.S. 349, 362 [97 S 1197, 1207, 51 L.Ed.2d 393] (1977).

Id. at 5 n. 1, 106 S.Ct. at 1671 n. 1.

In addition to *Gardner* and *Skipper*, "legal landscape" of 1993 included *Califo v. Ramos*, 463 U.S. 992, 103 S.Ct. 344 L.Ed.2d 1171 (1983), in which the trial c as required by state law, instructed the that a sentence of life imprisonment wit parole may be commuted by the Governo a sentence providing the possibility of pa *Id.* at 995–96, 103 S.Ct. at 3450–51. defendant argued that basic fairness ent him to inform the jury that the Governor could commute a death sentence, so the would not have the mistaken impression it could guarantee the defendant's perma removal from society by imposing the d sentence. *Id.* at 1010–11, 103 S.Ct. at 3 59.

The Supreme Court held that the Ei and Fourteenth Amendments did not en the defendant to inform the jury of the ernor's power to commute a death sente In explaining its holding, the Court spe cally stated that the challenged proce did not violate the due process rule of *G ner*. *Id.* at 1001, 103 S.Ct. at 3453. Court also emphasized the deference giv state's determination regarding what tencing information the jury will rec The Court stated,

> [W]e defer to the State's identificatio the Governor's power to commute a sentence as a substantive factor to be sented for the sentencing jury's consi ation.

Our conclusion is not intended to o ride the contrary judgment of state legi tures that capital sentencing juries in t States should not be permitted to cons the Governor's power to commute a s

tence.... We sit as judges, not as legislators, and *the wisdom of the decision to permit juror consideration of possible commutation is best left to the States.*

Id. at 1013–14, 103 S.Ct. at 3460 (footnote omitted) (emphasis added). Moreover, in stating this principle of broad deference, the Court noted, with apparent approval, that "[m]any state courts have held it improper for the jury to consider or to be informed—through argument or instruction—of the possibility of commutation, pardon, *or parole.*" *Id.* at 1013 n. 30, 103 S.Ct. at 3460 n.30 (emphasis added).

V.

The precise issue before us, whether the rule in *Simmons* was compelled by *Gardner, Skipper,* and *Ramos,* was considered in *O'Dell* by the United States Court of Appeals for the Fourth Circuit, sitting *en banc.* The defendant in *O'Dell,* like Mueller, was convicted in Virginia of capital murder and sentenced to death by a jury that was not informed of his parole ineligibility. O'Dell argued, among other things, that *Simmons* did not announce a "new" rule and, thus, that *Simmons* applied retroactively to his case, mandating the reversal of his death sentence.

The Court of Appeals disagreed, holding that *Simmons* articulated a "new" rule. The Court stated that, prior to *Simmons,* a reasonable jurist could have concluded under *Ramos* that the Constitution left to the states the decision whether to instruct the jury on the defendant's parole ineligibility. *O'Dell,* 95 F.3d at 1233.

The Court further stated that a jurist reasonably could have distinguished the rule of *Gardner* and *Skipper* regarding the defendant's right to rebut prosecution claims with *factual* evidence, from the rule in *Ramos* regarding the defendant's right to rebut prosecution claims with arguments from state *law.* *Id.* at 1232–33. The Court explained that this distinction was reasonable prior to *Simmons,* because "relevant factual information, like secret sentencing reports or prior good behavior, cannot change with time, but a state's legal standards and post-conviction procedures, like eligibility for commutation or parole can always change long after the sentencing jury renders its verdict." *Id.* at 1233–34 (citation omitted). We agree with the Court of Appeals' analysis.

In Mueller's direct appeal, this Court explicitly relied on *Ramos* in rejecting Mueller's due process argument, stating that

Mueller argues that the trial court violated his due process rights by refusing to instruct the jury that, pursuant to Code § 53.1–151(B1), he would not be eligible for parole.... We hold that the trial court did not err in its rulings here. This Court has held uniformly and repeatedly that information regarding parole eligibility is not relevant for the jury's consideration. *Further, the United States Supreme Court has expressly left the determination of this question to the individual states, as a matter of state law.* *California v. Ramos,* 463 U.S. 992, 1013–14 [103 S.Ct. 3446, 3459–60, 77 L.Ed.2d 1171] (1983).

Mueller, 244 Va. at 408–09, 422 S.E.2d at 394 (emphasis added) (citations omitted).

Prior to *Simmons,* reliance on *Ramos* was objectively reasonable for the proposition that the Constitution permitted the states to decide whether to inform a capital sentencing jury of a defendant's parole ineligibility. The argument rejected by the Court in *Ramos* was, in principle, the same argument successfully advanced in *Simmons,* that the defendant was entitled to inform the sentencing jury whether the death sentence was the only option that would insure the defendant would never return to society.

Before *Simmons,* the Supreme Court had never held that a defendant had a due process right to rebut prosecution arguments of future dangerousness with evidence that was unrelated to the defendant's character and crime. *O'Dell,* 95 F.3d at 1233–34. Moreover, the decision in *Skipper* did not address *Ramos* or its rationale of giving broad deference to the states in determining the information that should be given a capital sentencing jury. Thus, we conclude that *Simmons* announced a "new" rule within the meaning of *Teague.*

VI.

Having concluded that reliance on *Ramos* was objectively reasonable and, thus, that *Simmons* announced a "new" rule, we turn to the third and final step in the *Teague* analysis, assessing whether the "new" rule of *Simmons* falls within one of the two narrow exceptions to the nonretroactivity principle. *See Caspari,* 510 U.S. at 390, 114 S.Ct. at 953–54. The first exception applies to a rule that places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague,* 489 U.S. at 307, 109 S.Ct. at 1073–74 (citation omitted). This exception is inapplicable here, because *Simmons* does not place any conduct outside the scope of the criminal law, nor does it shield a particular class of persons from the imposition of the death penalty. *See O'Dell,* 95 F.3d at 1238.

The second exception under *Teague* applies only to "watershed" rules of criminal procedure, which are so fundamental that they are "implicit in the concept of ordered liberty." *Teague,* 489 U.S. at 311, 109 S.Ct. at 1076 (citations omitted). An often-cited example of such a rule is *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). *See Saffle,* 494 U.S. at 495, 110 S.Ct. at 1263–64. We do not believe that the rule in *Simmons* is such a groundbreaking rule "implicit in the concept of ordered liberty." *See Teague,* 489 U.S. at 311, 109 S. at 1076. Thus, since the rule in *Simm* does not fall within either *Teague* excepti the rule is not applicable retroactively Mueller's case.[3]

VII.

[8] Mueller advances two additional ar ments, stating that the trial court's refusal allow him to inform the jury of his par ineligibility (1) violated his Eighth Ame ment rights, and (2) violated his right un Article I, Section 8 of the Virginia Consti tion "to call for evidence in his favor." H ever, we hold that these arguments are p cedurally barred, because Mueller did raise them on direct appeal. *See Slayton Parrigan,* 215 Va. 27, 30, 205 S.E.2d 680, (1974), *cert. denied sub nom. Parrigan Paderick,* 419 U.S. 1108, 95 S.Ct. 780, L.Ed.2d 804 (1975).[4]

For these reasons, we will affirm the t court's judgment.

Affirmed.

3. Mueller also argues that his due process rights under Article I, Section 11 of the Virginia Constitution were violated, because the jury was not informed of his parole ineligibility. We reject this claim under the analysis detailed above.

4. We also do not consider Mueller's arguments that he received ineffective assistance of counsel and that his rights under Code §§ 19.2–26 and –264.4 were violated, when he was not lowed to inform the jury of his parole ineligil ty. These arguments are outside the scope of appeal awarded in this case.