Eddie Lowery

State:	Kansas
County:	Riley
Most Serious Crime:	Sexual Assault
Additional Convictions:	Assault, Burglary/Unlawful Entry
Reported Crime Date:	1981
Convicted:	1982
Exonerated:	2003
Sentence:	11 to Life
Race:	Caucasian
Sex:	Male
Age:	22
Contributing Factors:	False Confession, False or Misleading Forensic Evidence, Perjury or False Accusation, Official Misconduct
Did DNA evidence contribute to the exoneration?:	Yes

In July 1981, an elderly resident of Ogden, Kansas, was attacked while sleeping in her home. The assailant covered her face with his hand and bed clothing. As the victim struggled, she was struck repeatedly on the head, causing her to bleed. The attacker then raped her vaginally before fleeing. The victim contacted the police and was taken to a hospital, where she was treated for her injuries and a rape kit was collected.

In the early morning hours of the same day, Eddie James Lowery was involved in a traffic accident near the victim's house. Investigators began questioning Lowery that morning. He was questioned all day without food and was told he did not need a lawyer after requesting one. Investigators supplied Lowery with details of the crime - the house, the entry, the weapon, and specifics about the rape. These details were eventually incorporated into his confession.

Although Lowery recanted the statements and his attorney filed to suppress them, the court ruled that the confession was made voluntarily and allowed it into the trial. The confession became the cornerstone of the prosecution's case.

Serological testing was performed on the bedding, the victim's clothing, and specimens from the rape kit. A forensic analyst from the Kansas Bureau of Investigation testified that semen on the crime scene evidence exhibited type A blood group markers, but she testified that this meant the perpetrator was type O, which matched Lowery. Since the victim was type A, her bodily fluid could have masked any evidence of the perpetrator and the analyst could not have definitively determined anything about the perpetrator's blood type. An independent analyst last reviewed the serology findings and could not determine now the original examiner came to her conclusion. Testing on Lowery's pants revealed his own blood type, as he had been bleeding from a cut sustained in the car accident.

Lowery's first trial ended in a hung jury. He was tried again in January 1982. This time the jury convicted him of rape, aggravated burglary, and aggravated battery. Lowery was sentenced to 11 years to life in prison. He served nine years of that sentence and was released on parole in 1991.

Through his attorney, Barry Clark, and with his own money, Lowery was able to procure DNA testing on the biological evidence in 2002. He had been forced to register as a sex offender every year since his parole and wanted to clear his name and reputation. Clark requested an evidence search, which turned up biological evidence from the investigation, including swabs from the rape kit, portions of the bedding, and portions of the victim's nightgown. In September 2002, DNA test results confirmed Lowery's claim of innocence. The semen found on the victim's bedding originated from the same person as the semen found on the vaginal swabs. Lowery was excluded from being the contributor. In April 2003, the District Court of Riley County, Kansas, vacated the judgement and conviction based on these results.

Eddie James Lowery was 22 years old when he was arrested, a soldier stationed at Fort Riley. He waited over twenty-one years to be vindicated.

Summary courtesy of the Innocence Project, http://www.innocenceproject.org/. Reproduced with permission.

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September 15, 2010

Confessing to Crime, but Innocent

By JOHN SCHWARTZ

Published: September 13, 2010

KANSAS CITY, Mo. — Eddie Lowery lost 10 years of his life for a crime he did not commit. There was no physical evidence at his trial for rape, but one overwhelming factor put him away: he confessed.

Eddie Lowery spent 10 years in prison after confessing to a rape he did not commit. He got a $7.5 million settlement.

Jeffrey Deskovic spent 16 years in prison for murder. DNA evidence cleared him before trial, but he was convicted anyway.

At trial, the jury heard details that prosecutors insisted only the rapist could have known, including the fact that the rapist hit the 75-year-old victim in the head with the handle of a silver table knife he found in the house. DNA evidence would later show that another man committed the crime. But that vindication would come only years after Mr. Lowery had served his sentence and was paroled in 1991.

“I beat myself up a lot” about having confessed, Mr. Lowery said in a recent interview. “I thought I was the only dummy who did that.”

But more than 40 others have given confessions since 1976 that DNA evidence later showed were false, according to **records compiled** by Brandon L. Garrett,

a professor at the University of Virginia School of Law. Experts have long known that some kinds of people — including the mentally impaired, the mentally ill, the young and the easily led — are the likeliest to be induced to confess. There are also people like Mr. Lowery, who says he was just pressed beyond endurance by persistent interrogators.

New research shows how people who were apparently uninvolved in a crime could provide such a detailed account of what occurred, allowing prosecutors to claim that only the defendant could have committed the crime.

An **article** by Professor Garrett draws on trial transcripts, recorded confessions and other background materials to show how incriminating facts got into those confessions — by police introducing important facts about the case, whether intentionally or unintentionally, during the interrogation.

To defense lawyers, the new research is eye opening. “In the past, if somebody confessed, that was the end,” said Peter J. Neufeld, a founder of the **Innocence Project**, an organization based in Manhattan. “You couldn’t imagine going forward.”

The notion that such detailed confessions might be deemed voluntary because the defendants were not beaten or coerced suggests that courts should not simply look at whether confessions are voluntary, Mr. Neufeld said. “They should look at whether they are reliable.”

Professor Garrett said he was surprised by the complexity of the confessions he studied. “I expected, and think people intuitively think, that a false confession would look flimsy,” like someone saying simply, “I did it,” he said.

Instead, he said, “almost all of these confessions looked uncannily reliable,” rich in telling detail that almost inevitably had to come from the police. “I had known that in a couple of these cases, contamination could have occurred,” he said, using a term in police circles for introducing facts into the interrogation process. “I didn’t expect to see that almost all of them had been contaminated.”

Of the exonerated defendants in the Garrett study, 26 — more than half — were “mentally disabled,” under 18 at the time or both. Most were subjected to lengthy, high-pressure interrogations, and none had a lawyer present. Thirteen of them were taken to the crime scene.

Mr. Lowery’s case shows how contamination occurs. He had come under suspicion, he now believes, because he had been partying and ran his car into a parked car the night of the rape, generating a police report. Officers grilled him for more than seven hours, insisting from the start that he had committed the crime.

Mr. Lowery took a lie detector test to prove he was innocent, but the officers told him that he had failed it.

“I didn’t know any way out of that, except to tell them what they wanted to hear,” he recalled. “And then get a lawyer to prove my innocence.”

Proving innocence after a confession, however, is rare. Eight of the defendants in Professor Garrett’s study had actually been cleared by DNA evidence before trial, but the courts convicted them anyway.

In one such case involving Jeffrey Deskovic, who spent 16 years in prison for a murder in Poughkeepsie, prosecutors argued that the victim may have been sexually active and so the DNA evidence may have come from another liaison she had. The prosecutors asked the jury to focus on Mr. Deskovic’s highly detailed confession and convict him.

While Professor Garrett suggests that leaking facts during interrogations is sometimes unintentional, Mr. Lowery said that the contamination of his questioning was clearly intentional.

http://www2.ljworld.com/news/2010/feb/11/10-years-later-eddie-lowerys-name-clear-and-man-wh/

Wrongfully Convicted: He spent 10 years in prison for a rape he didn't commit; now he's getting $7.5M

Photo by Richard Gwin. Enlarge photo.
Eddie Lowery, left, walks with his attorney Barry Clark on Seventh Street. Lowery was wrongfully convicted of a rape in the 1980s while he was a soldier at Fort Riley. Decades later, DNA evidence showed he did not commit the crime.

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By Shaun Hittle
February 11, 2010

MAN SPENT 10 YEARS IN PRISON FOR A RAPE HE DIDN'T COMMIT; NOW HE'S GETTING $7.5M

Over the past 30 years, Eddie Lowery has been a soldier, a convicted rapist, an ex-convict, a registered sex offender, a husband and a father. Enlarge video

EDDIE LOWERY DISCUSSES REBUILDING HIS LIFE

Eddie Lowery discusses his wrongful conviction, his 10 years in prison, and his efforts to rebuild his life. Enlarge video

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Man pleads to pair of 1981 rapes that sent Fort Riley soldier to prison

Trial of admitted rapist delayed

Over the past 30 years, Eddie Lowery has been a soldier, a convicted rapist, an ex-convict, a registered sex offender, a husband and a father.

But Lowery, 50, is also an exonerated man who spent 10 years in a Kansas prison for a rape he didn't commit.

After nearly three decades, Lowery's struggle with the criminal justice system is almost complete.

"I feel now that justice is coming full circle," he said in a recent interview.

Lowery has reached a $7.5 million settlement with the Riley County officials who worked to wrongfully convict him. And, last week, officials in the Kansas attorney general's office announced they had arrested the man they believe actually committed the crime.

"Who could ever imagine a story like this?" Lowery said.

It's a story that began in 1981 when Lowery, a U.S. Army soldier stationed at Fort Riley, hit a parked car while on his way to the store. Lowery spoke with police, detailing the accident.

"I thought that'd pretty much be the end of it," said Lowery, who at the time was married with a 3-year-old daughter.

But when he went to the station the next day, police began questioning him about the rape of an elderly Ogden woman that had occurred near the accident.

"It was very disturbing to me," he said. "How could anyone even think I could be part of this crime."

Lowery denied involvement, but the next day, police brought him back in for more questioning.

"I thought I'd tell them what happened and they'd believe me and I'd go back to my normal life," Lowery said.

But police didn't believe him, and the questioning became more heated, as police denied him an attorney and the opportunity to make any phone calls.

Lowery took a lie detector test.

"I wanted to clear my name. I wanted to help," he said.

Police told him he failed the lie detector test. "They started coming down on me real hard," Lowery said. "They just continued to hammer me and threaten me."

READER POLL

Riley County will be paying Eddie Lowery $7.5 million for the 10 years he spent in prison following a wrongful conviction for rape. Is the compensation fair?

- It is too low
- It is fair
- It is too high
- Not sure

Vote or See the results without voting

After hours of questioning, Lowery said he simply broke down.

“I was totally mentally exhausted,” he said. “I didn’t know how to get out of the situation.”

Police began giving Lowery facts of the case, and Lowery repeated them back. The interview was not recorded, but police said they had a “confession.”

“I beat myself up for years for giving them a false confession,” Lowery said. “They had no other evidence. ... Because I wasn’t there.”

Lowery was tried based solely on that confession. His first trial resulted in a hung jury, but during the second trial the jury convicted him of rape, aggravated battery and aggravated assault.

“When they came in and read the guilty verdict, I was stunned,” Lowery said.

Prison

At age 22, Lowery received a sentence of 11 years to life and was sent to Lansing Correctional Facility.

“I thought I’d be in prison forever,” he said.

After six years at Lansing, he was transferred to minimum security and began thinking about the possibility of being released.

He played on prison softball teams and ran 10K races through the streets of Lansing.

Photo by Richard Gwin
A 19 year old Eddie Lowery in his Military garb, and a photo of him with long hair. He spent 10 years in prison for a rape that he didn't commit.
“That made me realize how much I was missing my family,” said Lowery, who didn’t see his daughter while in prison.

Three times, Lowery came before the parole board, and each time he denied involvement in the rape. With the years passing him by, Lowery said he was finally prepared to tell the review board he committed the crime.

Lowery completed a required sex offender course, where he had to lie about being a rapist.

“Basically, I lied to go to prison and I had to lie to get out of prison,” said Lowery, who was paroled in 1991.

After his release, Lowery started patching his life back together. He moved to Kansas City, Mo., remarried, had two children, and got a job working at Ford. But in 1994, he received a letter informing him that because of a new law, he’d be required to register as a sex offender.

“I assumed everyone would find out. It just put me in a deep depression. It was a humiliating time in my life,” Lowery said.

A few years later, Lowery began hearing about how DNA testing was helping exonerate the wrongfully convicted.

“I knew I could prove my innocence,” said Lowery, who started a six-year quest to find a lawyer to assist him. Lowery was referred to Manhattan, Kan., attorney Barry Clark. With the assistance of the New York-based Innocence Project, Clark helped locate the original rape kit, which was still in an envelope in the Riley County records vault.

“You could have knocked me over with a feather,” said Clark, who was doubtful they’d find the evidence after more than 20 years. “I thought, ‘This is providence.’”

Lowery described finding out about the kit as one of the most emotional moments of his life.

“When he (Clark) told me that they found the rape kit, I knew that I was going to be found innocent of this crime,” Lowery said.

In 2003, the kit was sent to a private DNA testing firm, where the results showed Lowery couldn’t have committed the rape. Lowery’s record was expunged and he received apologies from Riley County officials. However, to this day, Lowery said the detectives who pressured him into a false confession have never expressed remorse to him.

“I don’t think the detectives will ever apologize,” he said.

Surviving

Lowery credits his faith with helping him get through the tough years in prison and the struggle of proving his innocence.

“I know that prayers are answered. God has taught me patience,” he said.

And Lowery’s final prayer, that the real perpetrator is caught, also may have been answered.

Last week, Riley County officials and the Kansas attorney general’s office announced the arrest of New York resident Daniel Brewer, 55. Brewer will be extradited to Kansas, where he’ll be charged with two rapes, according to a spokesperson for the attorney general. Few details have been released about the circumstances of the arrest.

Photo by Richard Gwin
Eddie Lowery, who was convicted of rape and spend 10 years in Lansing, talks about his life in prison and the DNA testing that set him free. Lowery has just settled with the State of Kansas for a little over 7 million dollars.

Brewer had been charged with another rape in Kansas in 1981. The case ended with a mistrial. Officials claim Brewer committed the crime Lowery was convicted of a month after the mistrial.

“I prayed for a long time that everything would work out,” Lowery said. “It’s taken a long time, but everything’s worked out perfectly.”

But the years in prison have taken their toll on his relationships with some family members, and to this day trust is difficult for him. Since getting out of prison, Lowery keeps the receipts when he goes to the store so he can always prove his whereabouts.

“I know it sounds kind of crazy, but after you’ve been through something I’ve been through, it doesn’t sound as crazy,” he said.

Lowery is only months away from receiving his $7.5 million settlement, or roughly $2,000 for every day he spent incarcerated. He describes himself as a shy, lifelong blue collar worker and said it will take time to get used to having that amount of money. Some of it will go to pay for college for his son, Joey, who graduates from high school in May, and later for his daughter, Brooke, a high school sophomore. Lowery said he’s grateful the settlement money will help him take care of his family, but no amount of money can ever compensate him.

“Justice would have been never having to go through this,” he said.

Despite the years lost, Lowery isn't bitter or angry about what happened to him, said Nick Brustin, the New York-based attorney who spent seven years working with Lowery on the civil case.

"He has this inner calm despite what he's been through," Brustin said. "He's an amazing guy."

Lowery said he will continue to speak out about wrongful convictions, something he has been doing for years in conjunction with the Innocence Project. By telling his story, he said, he hopes to educate those in the criminal justice system.

"It happened to me and it could happen to anyone," said Lowery, who urges people to be aware of their rights.

Lowery said he isn't sure what he plans to do with the rest of his life, but he's looking forward to focusing on his family and working to repair his relationship with the daughter, who is now 29, that he wasn't able to see grow up.

"I'd just like to take a little vacation and relax and think about my future," he said.

FILED
United States Court of Appeals Tenth Circuit

April 14, 2008
PUBLISH
Elisabeth A. Shumaker Clerk of Court

UNITED STATES COURT OF APPEALS TENTH CIRCUIT

EDDIE JAMES LOWERY; AMANDA MARIE LOWERY, Plaintiffs - Appellees, v. THE COUNTY OF RILEY; RILEY COUNTY BOARD OF COMMISSIONERS; RILEY COUNTY LAW ENFORCEMENT DEPARTMENT, also known as Riley County Police Department; CITY OF MANHATTAN; MANHATTAN BOARD OF CITY COMMISSIONERS; CITY OF OGDEN; OGDEN BOARD OF CITY COMMISSIONERS; JOHN DOES 1-10, police officers and non-uniformed employees of the Riley County Police Department, in their individual capacities; RICHARD ROES 1-10, supervisory police officers of the Riley County Police Department, in their individual capacities; RILEY COUNTY LAW ENFORCEMENT AGENCY, The Law Board; WILLIAM WATSON, Defendants, and HARRY L. MALUGANI; DOUGLASS JOHNSON, in their individual capacities; ALVAN JOHNSON; No. 06-3369

STEVE FRENCH; LARRY WOODYARD, Defendants - Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS (D. Ct. No. 04-CV-3101-JTM-DWB)

Jeffrey A. Bullins, Holbrook & Osborn, P.A., Overland Park, Kansas, appearing for Appellants. Nick Brustin, Cochran Neufeld & Scheck, LLP, New York, New York (Barry A. Clark, Clark & Kellstrom, Chtd., Manhattan, Kansas; Barry Scheck and Monica R. Shah, Cochran Neufeld & Scheck, LLP, New York, New York; and Craig J. Altenhofen, Hornbaker, Altenhofen, McCulley & Alt, Chartered Lawyers, Junction City, Kansas, with him on the brief), appearing for Appellees. Before O'CONNOR , * Associate Justice (Ret.), HENRY , Chief Circuit Judge, and TACHA , Circuit Judge.

TACHA , Circuit Judge.

In 1982, Eddie James Lowery was convicted after a jury trial in the District Court of Riley County, Kansas, of rape, aggravated battery, and aggravated burglary. His convictions were secured primarily on the basis of an unrecorded confession he made to Riley County Police Officers Harry Malugani and The Honorable Sandra Day O'Connor, Associate Justice of the United States Supreme Court (Ret.), sitting by designation pursuant to 28 U.S.C. ? 294(a).
-2*

Douglass Johnson. He served ten years in prison and, upon release, spent another ten years as a registered sex offender. In 2003, however, DNA testing proved that Mr. Lowery did not commit the crimes. Thereafter, the same court vacated each conviction and sentence, declaring him actually innocent of the crimes. Mr. Lowery and his daughter Amanda then filed this action in federal district court under 42 U.S.C. ? 1983 and Kansas state law against many of the individuals and municipal entities responsible for his arrest, conviction, and incarceration. The district court denied the defendants' motion for summary judgment based on qualified immunity, which the defendants now appeal. I. BACKGROUND The following facts are set forth in the light most favorable to Mr. Lowery as the nonmoving party. During the early morning hours of July 26, 1981, Mr. Lowery was involved in a car accident in the vicinity of Arta Kroeplin's house in Ogden, Kansas. At approximately the same time, Ms. Kroeplin reported that a burglar broke into her home and raped her. She knew that she was attacked by a single assailant, but she could not describe him because he covered her face with blankets during the attack. Indeed, she could not even identify the man's race and could only say he had a medium build. She reported that, during the attack, the rapist struck her three times in the head with a knife. An investigation revealed that the perpetrator entered through the back door of Ms. Kroeplin's home by cutting or tearing through the door screen.

The following day, Officer Malugani, who had learned of Mr. Lowery's accident, contacted Mr. Lowery and asked him to come down to the police station to talk. Mr. Lowery believed that Officer Malugani wanted to talk to him about the car accident. Because Mr. Lowery did not have transportation, Officer Malugani and Officer Johnson picked him up at his house at 4:00 p.m. and drove him to the Riley County Police Department. When they arrived at the station, the officers took Mr. Lowery to an interview room and advised him of his Miranda 1 rights. Mr. Lowery was not told whether he was under arrest. He signed a written waiver of rights at approximately 4:30 p.m. The officers then questioned Mr. Lowery about the rape for forty-five minutes. Thereafter, the officers obtained written consent from Mr. Lowery to search his home. The record does not indicate whether the officers uncovered incriminating evidence. After completing the search, the officers asked if Mr. Lowery could return to the station the following day to take a polygraph examination. Mr. Lowery said that he could, although he might need to be picked up again. Officer Malugani picked up Mr. Lowery at approximately 8:20 a.m. on July 28, 1981. Mr. Lowery had not slept much the night before and had not eaten breakfast that morning. When they arrived at the station, the officers again took Mr. Lowery to an interview room where he signed a waiver of his Miranda rights.
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Miranda v. Arizona , 384 U.S. 436 (1966).

The officers again questioned Mr. Lowery about the rape. Mr. Lowery asked for a lawyer. Officer Malugani told Mr. Lowery that because he was not under arrest, he did

not need a lawyer at that time. Mr. Lowery was not provided with a lawyer. From approximately 9:30 a.m. to 12:30 p.m., Mr. Lowery took a polygraph exam administered by Officer Allen Raynor. Mr. Lowery did not admit any involvement in the crime during the examination. The defendants claim the exam results, which have since disappeared, indicated deception on Mr. Lowery's part. Following the polygraph, Officers Malugani and Johnson further interrogated Mr. Lowery. He again denied committing the crimes, but after Officer Malugani loudly and continually insisted that he had, Mr. Lowery became very confused and emotionally upset. He began crying and then responding affirmatively to the officers' suggestive questions in the hope that they would put him in jail and he would finally be able to speak with a lawyer. For example, knowing that the perpetrator had broken the screen door, the officers asked Mr. Lowery: "How did you get into the house? Did you cut the screen door or bust it open and pull the screen back?" Mr. Lowery responded that he busted it open with his hands. Knowing that Ms. Kroeplin had been struck in the head, the officers asked Mr. Lowery if he hit her with a knife or with a vase. Mr. Lowery said he hit her with a knife. Knowing that Ms. Kroeplin's face had been covered during the attack, the officers asked Mr. Lowery whether he covered

her face with a blanket or a pillow. Mr. Lowery said a blanket. According to Mr. Lowery, these are just some of the suggestive and leading questions the officers asked him. At the conclusion of the questioning, Mr. Lowery was arrested and charged with rape, aggravated battery, and aggravated burglary. The officers then prepared their official report describing the confession. Although Mr. Lowery alleges that he largely adopted the officers' suggestions as to how he committed the crime, the officers represented in their contemporaneous report and in their communications with the prosecutor 2 that Mr. Lowery's confession was credible because he revealed, without prompting or suggestion, nonpublic facts that only the perpetrator of the rape could have known. In addition, the report contained other "admissions" that Mr. Lowery did not, in fact, make. For example, Mr. Lowery told the officers that he broke into the house through the front door. The perpetrator, however, gained entry through the back door, and the officers repeatedly maintained that Mr. Lowery told them he broke in through the back. At trial, the prosecution relied heavily on the officers' report and their testimony describing Mr. Lowery's confession. The prosecution also presented evidence that Mr. Lowery, along with thirty-eight percent of the population, had

The officers also testified at Mr. Lowery's trial that he volunteered nonpublic facts during his confession. The officers are, however, absolutely immune from any claim arising out of their testimony at trial, even if that testimony is perjurious. Briscoe v. LaHue , 460 U.S. 325, 328 (1983).

2

the same blood type as the perpetrator. The jury could not reach a unanimous verdict. A second trial was held, and this time the jury convicted Mr. Lowery on all counts. In 2003, the District Court of Riley County, Kansas vacated Mr. Lowery's convictions and

declared him actually innocent of the crimes based on DNA evidence that excluded him as the rapist. Mr. Lowery then filed this action under ? 1983 and Kansas state law. The claims relevant to this appeal include: (1) ? 1983 claims against Officers Malugani and Johnson for violating his right to due process by coercing his confession and by failing to adequately investigate the crimes, and for violating his Fourth and Fourteenth Amendment rights by fabricating evidence and by maliciously prosecuting him; (2) ? 1983 claims against Officers Malugani's and Johnson's supervisors for failing to train police officers and for conspiring to violate Mr. Lowery's constitutional rights; and (3) a ? 1983 claim against all defendants for depriving Mr. Lowery and Amanda of their right to familial association. 3 The defendants filed a motion for summary judgment on the basis of qualified immunity, which the district court denied with respect to all claims. The defendants now appeal. For the reasons that follow, we dismiss for lack of jurisdiction the defendants' appeal of the denial of qualified immunity as to the claims for coercion, failure to investigate, fabrication of Several additional claims raised in the first amended petition have been dropped by the plaintiffs or are otherwise not before the Court in this interlocutory appeal. Those claims are not discussed herein.
-73

evidence, and malicious prosecution. We reverse the district court's denial of qualified immunity on Mr. Lowery's and Amanda's claim for loss of familial association. Finally, we affirm in part and reverse in part the district court's denial of qualified immunity as to the supervisory liability claims. II. DISCUSSION Government officials performing discretionary functions are entitled to qualified immunity from liability for civil damages so long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald , 457 U.S. 800, 818 (1982). In considering whether an official is entitled to qualified immunity, the first question a court must answer is "whether a constitutional right would have been violated on the facts alleged" by the plaintiff. Saucier v. Katz , 533 U.S. 194, 200 (2001). If so, the court must then determine whether the right asserted was clearly established at the time of the alleged violation. See id . In answering this latter question, the relevant inquiry is whether "the right was sufficiently clear that a reasonable officer would understand that what he is doing violates that right." Gross v. Pirtle , 245 F.3d 1151, 1156 (10th Cir. 2001) (alteration and quotations omitted). Our jurisdiction to review an order denying summary judgment on the basis of qualified immunity stems from 28 U.S.C. ? 1291, which permits us to consider appeals from "final decisions" of the district court. Although the denial of
-8-

summary judgment is an interlocutory order not ordinarily subject to immediate appellate review under ? 1291, the Supreme Court has held that the denial of summary judgment based on qualified immunity falls within the collateral-order exception to that statute. See Mitchell v. Forsyth , 472 U.S. 511, 526?27 (1985). Our jurisdiction over such orders, however, is not without limit: we may consider a qualified-immunity appeal only to the extent it turns on a matter of law. See Johnson v. Jones , 515 U.S. 304, 313 (1995). Reviewable issues of law include whether the right the defendant allegedly violated was "clearly established" at the time of the violation, see Behrens v. Pelletier , 516 U.S. 299,

313 (1996), as well as whether the plaintiffs' version of the facts amounts to a constitutional violation, see Garrett v. Stratman , 254 F.3d 946, 952 (10th Cir. 2001) ("[W]hen the plaintiffs' allegations are taken as true, denial of summary judgment on qualified immunity resolves an abstract issue of law and is immediately appealable."); Gross , 245 F.3d at 1156?57. We do not have jurisdiction to resolve disputed issues of fact and have therefore observed that a defendant may not appeal the sufficiency--as opposed to the legal significance--of the plaintiff's evidence. See Garrett , 254 F.3d at 953 ("If we determine the district court's conclusion rests on findings of evidence sufficiency, we must dismiss for lack of jurisdiction." (quotations omitted)); Gross , 245 F.3d at 1156 ("Courts of appeals clearly lack jurisdiction to review summary judgment orders deciding qualified immunity questions solely on the basis of evidence sufficiency--which
-9-

facts a party may, or may not, be able to prove at trial." (quotations omitted)). A. Nonreviewable Questions of Fact: Claims for Coercion, Failure to Investigate, Fabrication of Evidence, and Malicious Prosecution The defendants dispute the factual allegations that support Mr. Lowery's claims for coercion, failure to investigate, fabrication of evidence, and malicious prosecution. Although the defendants claim that they accept Mr. Lowery's allegations as true, the defendants in fact only cite to select portions of the record evidence and ignore the allegations as pleaded in Mr. Lowery's complaint and supported by other record evidence. Specifically, the defendants contest the nature of and circumstances surrounding the questioning that led to Mr. Lowery's confession, as well as the extent--if any--to which Mr. Lowery was in custody during the questioning. This amounts to a challenge to the sufficiency of the evidence, which presents a question of fact that we do not have jurisdiction to consider. See Garrett , 254 F.3d at 953; Gross , 245 F.3d at 1156. We therefore dismiss the defendants' appeal of the district court's denial of qualified immunity as to those claims. B. Reviewable Questions of Law: Claims for Loss of Familial Association and Supervisory Liability 1. Loss of Familial Association

A child has a constitutionally protected liberty interest in a relationship with her parent. See Roberts v. U.S. Jaycees , 468 U.S. 609, 617?18 (1984)
-10-

("[C]hoices to enter into and maintain certain familial human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty."); Trujillo v. Bd. of County Comm'rs , 768 F.2d 1186, 1189 (10th Cir. 1985) (holding that a parental relationship is a constitutionally protected liberty interest). This right to familial association is grounded in the Fourteenth Amendment's Due Process Clause. J.B. v. Wash. County , 127 F.3d 919, 927 (10th Cir. 1997). To determine whether a substantive right protected by the Due Process Clause has been violated, we balance "the individual's interest in liberty against the State's asserted reasons for restraining individual liberty." Youngberg v. Romeo , 457 U.S. 307, 320 (1982). In addition, in Trujillo , we held that "an allegation of intent to interfere with a particular relationship

protected by the freedom of familial association is required to state a claim under section 1983." 768 F.2d at 1190 (emphasis added). As a result, "`[n]ot every statement or act that results in an interference with the rights of familial association is actionable.' The conduct or statement must be directed `at the familial relationship with knowledge that the statements or conduct will adversely affect that relationship.'" J.B. , 127 F.3d at 927 (internal citation omitted) (alteration in original) (quoting Griffin , 983 F.2d at 1548). Here, Mr. Lowery and Amanda conceded during oral argument that,
-11-

because there is no evidence that any of the defendants directed their conduct at the familial relationship, Trujillo forecloses relief. They seek merely to preserve this issue for en banc review, which they claim is justified in light of more recent cases questioning Trujillo 's holding. See, e.g. , Smith v. City of Fontana , 818 F.2d 1411, 1420 & n.12 (9th Cir. 1987) (expressly declining to follow Trujillo and holding that the facts giving rise to a plaintiff's claim for excessive use of force by the police also "give[] the [plaintiff's] children a substantive due process claim based on their loss of his companionship"), overruled on other grounds by Hodgers-Durgins v. de la Vina , 199 F.3d 1037 (9th Cir. 1999) (en banc). Because Trujillo remains the law of this Circuit, however, the defendants are entitled to qualified immunity on Mr. Lowery's and Amanda's claim for loss of familial association. 2. Supervisory Liability

A supervisor may be held liable under ? 1983 for the acts of his subordinate only if the plaintiff shows that the subordinate violated the Constitution and that there is an affirmative link between the supervisor and the violation--"namely the active participation or acquiescence of the supervisor in the constitutional violation by the subordinate[]." Serna v. Colo. Dep't of Corr ., 455 F.3d 1146, 1151 (10th Cir. 2006). The defendants argue that Officers Steven French, Larry Woodyard, and Alvan Johnson are not liable as supervisors or coconspirators under ? 1983 because Mr. Lowery has failed to allege sufficient facts to establish
-12-

that their subordinates, Officers Harry Malugani and Douglass Johnson, violated his constitutional rights. But the district court concluded that Mr. Lowery stated claims against Officers Malugani and Johnson for coercion, failure to investigate, fabrication of evidence, and malicious prosecution. Because we have not disturbed these rulings on appeal, Mr. Lowery's supervisory and conspiracy claims must also survive summary judgment. To the extent the supervisory and conspiracy claims are premised on Mr. Lowery's and Amanda's loss of association claim, however, Mr. Lowery has failed to allege the violation of a constitutional right. Qualified immunity therefore shields the supervisors from liability on the basis of that claim. III. CONCLUSION We DISMISS for lack of jurisdiction the defendants' appeal of the denial of qualified immunity as to the claims for coercion, failure to investigate, fabrication of evidence, and malicious prosecution. We REVERSE the district court's denial of qualified immunity as to Mr. Lowery's and Amanda's claim for loss of familial association. We AFFIRM in part and REVERSE in part the district court's denial of qualified immunity as to the supervisory liability claims. Finally, we GRANT the defendants' motion to supplement the record on

appeal.

THE SUBSTANCE OF FALSE CONFESSIONS

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August 18, 2009

Please cite to this preliminary draft as forthcoming,
62 Stan. L. Rev. __ (2010)

* Associate Professor, University of Virginia School of Law. For their invaluable comments, I thank Kerry Abrams, Rachel Barkow, Tony Barkow, Sara Sun Beale, Stephanos Bibas, Darryl Brown, Steven Drizin, Bernard Harcourt, Saul Kassin, Jennifer Laurin, Richard Leo, Richard McAdams, Thomas Miles, Richard Ofshe, Laura Rosenbury, Stephen Schulhofer, Dan Simon, Colin Starger, and participants at workshops at the UVA Department of Psychology, the NYU School of Law Goldstock Criminal Law Luncheon, and the University of Chicago School of Law Crime and Punishment Workshop. The fine research assistants whose contributions made this study possible are: Catherine Byrd, Christine Chang, Rebecca Ivey, Bradley Justus, Justin Torres, and Kerry Shapleigh. For excellent reference library assistance, I thank Michelle Morris and Kent Olson, who helped to locate many of the trial materials reviewed. I am also grateful to the Center on Wrongful Convictions, the Innocence Project, and Winston & Strawn, LLP for their crucial assistance in locating trial materials. Finally, I thank the Olin Program at University of Virginia Law School for its research support.

THE SUBSTANCE OF FALSE CONFESSIONS

Brandon L. Garrett

ABSTRACT

A puzzle is raised by cases of false confessions: How could an innocent person convincingly confess to a crime? Post-conviction DNA testing has now exonerated 241 convicts, 39 of whom falsely confessed to rapes and murders. As a result, there is a new awareness that innocent people falsely confess, often due to psychological pressure placed upon them during police interrogations. Scholars increasingly examine the psychological techniques that can cause people to falsely confess and document instances of known false confessions. This Article takes a different approach, by examining the substance of false confessions, including what was said during interrogations and how the confession statements were then litigated at trial and post-conviction. Doing so sheds light on the phenomenon of confession contamination. Not only can innocent people falsely confess, but all except one of these exonerees were induced to deliver false confessions with surprisingly rich, detailed, and accurate information. We now know that those details could not have originated with these innocent people, but rather must have been disclosed to them, most likely during the interrogation process. However, our constitutional criminal procedure does not regulate the post-admission interrogation process, nor do courts evaluate the reliability of confessions. This Article outlines a series of reforms that focus on the insidious problem of contamination, particularly through videotaping interrogations in their entirety, but also by reframing police procedures, trial practice, and judicial review. Unless criminal procedure is reoriented towards the reliability of the substance of confessions, contamination of facts may continue to go undetected, resulting in miscarriages of justice.

THE SUBSTANCE OF FALSE CONFESSIONS

Brandon L. Garrett

TABLE OF CONTENTS

THE SUBSTANCE OF FALSE CONFESSIONS

Brandon L. Garrett

INTRODUCTION

False confessions present a puzzle: How could innocent people convincingly confess to crimes they knew nothing about? For decades, commentators doubted that a crime suspect would falsely confess. For example, John Henry Wigmore wrote in his 1923 evidence treatise that false confessions were "scarcely conceivable" and "of the rarest occurrence" and that "[n]o trustworthy figures of authenticated instances exist."[1] That understanding has changed dramatically in recent years, as post-conviction DNA testing has now exonerated 241 convicts, 39 of whom falsely confessed to rapes and murders.[2] As a result, there is a new awareness among scholars, legislators, courts, prosecutors, police departments and the public that innocent people falsely confess, often due to psychological pressure placed upon them during police interrogations.[3] Scholars increasingly study the psychological techniques that can cause people to falsely confess and have documented how such techniques were used in instances of known false confessions.[4]

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[1] 2 John Henry Wigmore, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 835, 867 (2d ed. 1923).

[2] *See* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008); The Innocence Project Home Page, at http://www.innocenceproject.org (providing count of U.S. post-conviction DNA exonerations).

[3] Richard A. Leo, Saul Kassin, Christian A. Meissner, Kimberly D. Richman, Lori H. Colwell, Amy Leach, Dana La Fon, *Police Interviewing and Interrogation: A Self-Report Survey Of Police Practices And B*eliefs, 31 LAW & HUM. BEHAV. 381 (2007) ("Largely as a result of recent DNA exonerations, many of which had contained false confessions in evidence, a spotlight of scrutiny has been cast on the processes of police interviewing and interrogation"). The American Psychology and Law Society issued a landmark "White Paper" on the subject, which began by citing to a new awareness of the problem of false confessions "[i]n this new era of DNA exonerations…" *See* Saul M. Kassin, Steven A. Drizin, Thomas Grisso, Gisli Gudjonsson, Richard A. Leo, Allison D. Redlich, Police-Induced Confessions: Risk Factors and Recommendations, Law & Hum. Behav. (2009) (pre-publication draft on file with author) (hereinafter "White Paper").

[4] *See* Saul Kassin & Lawrence Wrightsman, THE PSYCHOLOGY OF CONFESSION EVIDENCE AND TRIAL PROCEDURE 67-94 (1985); Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM L. & CRIMINOLOGY 429 (1998); Corey J. Ayling, *Corroborating Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions*, 1984 WIS. L. REV. 1121,1186-87 (1984). For experimental work concerning false confessions, *see* Saul Kassin & Katharine Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, PSYCH. SCIENCE (1996); Saul Kassin & Holly Sukel, Coerced Confessions and the Jury: An Experimental Test of the "Harmless Error" Rule, 21 LAW & HUM. BEHAV. 27 (1997); Saul Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?*, 60 AM. PSYCHOL. 215, 223 (2005).

This Article takes a different approach, by examining the substance of false confessions, including what was said during interrogations and how confessions were litigated at trial. Doing so sheds light on the phenomenon of confession contamination.[5] Police may, intentionally or not, prompt the suspect on how the crime happened so that the suspect can then parrot back an accurate-sounding narrative. Scholars have noted that "on occasion, police are suspected of feeding details of a crime to a compliant suspect," and have described several well known examples.[6] However, no one has previously studied the factual statements in a set of false confessions.[7]

The set of 39 cases that this Article examines has important limitations. As will be developed further, false confessions uncovered by DNA testing are not representative of other false confessions, much less confessions more generally. These 39 cases cannot speak to how often people confess falsely. Nor can these examples themselves tell us whether reforms, such as recording interrogations, prevent more false convictions than they discourage true confessions. But these data provide a set of examples of a very troubling problem that deserves further study.

In the cases studied here, innocent people not only falsely confessed, but they also offered surprisingly rich, detailed, and accurate information. Exonerees told police much more than just "I did it." In all cases but one (36 of the 37 exonerees for whom trial or pre-trial records could be obtained) police reported that suspects confessed to a series of specific details concerning how the crime occurred.[8] Often those details included supposedly "inside information" that only the rapist or murderer could have known. We now know that each of these people was innocent and was not at the crime scene. Where did those details, recounted at length at trial and recorded in confession statements, come from? We often can not tell what happened from reading the written records. In many cases, however, police likely disclosed those details during interrogations, by telling exonerees how the crime happened. Police may not have done so intentionally or recklessly; the study materials do not provide definitive information about the state of mind of officers. Police may have been convinced the suspect was guilty and may not have realized that the interrogation had been mishandled.

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[5] Richard A. Leo, Richard Ofshe, The Decision to Confess Falsely: Rational Choice and Irrational Action, 74 Denver U. L. Rev. 979, 1119 (1997) (developing the concept of confession "contamination").

[6] *See* Major Joshua E. Kastenberg, *A Three-Dimensional Model For The Use Of Expert Psychiatric And Psychological Evidence In False Confession Defenses Before The Trier Of Fact*, 26 SEATTLE U. L. REV. 783 (2003).

[7] *See* Richard A. Leo, POLICE INTERROGATION AND AMERICAN JUSTICE ch.5 (2008) (calling on scholars to examine "the postadmission portion of police interrogation" and noting that "it has received far less attention from scholars, lawyers, and the media" than the voluntariness of the admission of guilt).

[8] The characteristics of all 39 cases are summarized in the Appendix, which will be made available online together with relevant portions of exonerees' trial transcripts.

An illustrative case from the false confessions studied is that of Jeffrey Deskovic, a seventeen year-old when convicted of rape and murder. Deskovic was a classmate of the 15-year-old victim, had attended her wake, and was eager to help solve the crime.[9] Deskovic spoke to police many times and was interrogated for hours over multiple sessions, including "a session in which police had a tape recorder, but turned it on and off, only recording 35 minutes."[10] During one discussion, he "supposedly drew an accurate picture of the crime scene," which depicted details concerning "three distinct crime scenes" which were not ever made public.[11] He never actually confessed to raping or murdering the victim, but he offered other details, including that the victim suffered a blow to the temple and that he tore her clothes, struggled with her and held his hand over her mouth, maybe for "a little too long."[12] Particularly telling, in his last statement, which ended with him in a fetal position and crying, he allegedly told police that he had "hit her in the back of the head with a Gatorade bottle that was lying on the path."[13] Police testified that after hearing this, the next day they conducted a careful search and found a Gatorade bottle cap at the crime scene.[14]

The trial transcripts highlight how central these admissions were to the State's case. DNA tests conducted before trial excluded Deskovic and the confession was the only evidence connecting him to the crime. The district attorney emphasized in closing arguments the reliability of Deskovic's statements, noting that after he told police about the Gatorade bottle, "it was found there," and this was a heavy weapon, "not a small little bottle."[15] Detectives "did not disclose any of their observations or any of the evidence they recovered from Jeffrey nor for that matter, to anyone else they interviewed."[16] They kept their investigative work non-public "for the simple reason . . . that [if a suspect] revealed certain intimate details that only the true killer would know, having said those, and be arrested could not then say, 'Hey, they were fed to me by the police, I heard them as rumors, I used my common sense, and it's simply theories.'" [17] The district attorney told the jury to reject the suggestion that Deskovic was fed facts, stating "Ladies and gentlemen, it doesn't wash in this case, it just doesn't wash."[18]

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[9]Trial Transcripts, State of New York v. Jeffrey Deskovic, No. 192-90 (Dec. 4, 1990) at 1207-8 (on file with author); *see also* http://www.innocenceproject.org/Content/44.php.

[10]REPORT ON THE CONVICTION OF JEFF DESKOVIC 2 (2007), at http://www.westchesterda.net/Jeffrey%20Deskovic%20Comm%20Rpt.pdf ("Deskovic Report").

[11]*See* Deskovic Report, *supra*.

[12]*Id.* at 33; Trial Transcripts, *supra* note 7 at 1167, 1185.

[13]Trial Transcripts, *supra* note 7 at 1185.

[14]*Id.* at 1429, 1512-13.

[15]*Id.* at 1513, 1537.

[16]*Id.* at 1504-1505 (Dec. 5, 1990).

[17]*Id.*

[18]*Id.*

Deskovic was convicted of rape and murder and served more than fifteen years of a sentence of 15 years to life. In 2006, new DNA testing again excluded him, but also matched the profile of Steven Cunningham, a murder convict who subsequently confessed and pleaded guilty.[19] Now that we know Deskovic is innocent, how could he have known those "intimate details" concerning the murder? The District Attorney's post-exoneration inquiry noted:

> Much of the prosecution's effort to persuade the jury that Deskovic's statements established his guilt hinged on the argument that Deskovic knew things about the crime that only the killer could know . . . Given Deskovic's innocence, two scenarios are possible: either the police (deliberately or inadvertently) communicated this information directly to Deskovic or their questioning at the high school and elsewhere caused this supposedly secret information to be widely known throughout the community.[20]

This confession was contaminated, either by police leaking facts or feeding them. Given the level of specificity supposedly provided by Deskovic, the first and more troubling possibility, that the officers disclosed facts to him, seems far more likely. Yet during the trial, the police and the prosecutor not only denied having told Deskovic those facts, such as the presence of the Gatorade bottle cap and the depiction of the crime scene, but were emphatic they did not leak those facts to the media or to anyone else, such as high school students interviewed.[21] Whether the police acted inadvertently or intentionally, in hindsight we know that they provided an inaccurate account. Deskovic has commented, "Believing in the criminal justice system and being fearful for myself, I told them what they wanted to hear."[22] Deskovic is currently suing for civil rights violations caused by a "veritable perfect storm of misconduct by virtually every actor at every stage of his investigation and prosecution."[23] The suit alleges that police disclosed facts to him.

The Deskovic case illustrates how false confessions do not happen simply by happenstance. They are carefully constructed during an interrogation and then reconstructed during any criminal trial that follows. Constitutional criminal procedure does not regulate this critical phase of an interrogation. The Constitution requires the provision of initial *Miranda* warnings and then requires that the bare admission of guilt have

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[19] *See* http://www.innocenceproject.org/Content/44.php.

[20] *See* Deskovic Report, *supra* note 9.

[21] Trial Transcripts, *supra* note 7 at 1265-67.

[22] Fernanda Santos, *DNA Evidence Frees a Man Imprisoned for Half of his Life*, N.Y. Times, Sept. 21, 2006, at A1.

[23] Jonathan Bandler, *Deskovic files federal lawsuit over his 15-year wrongful imprisonment*, THE JOURNAL NEWS, Sept. 18, 2007.

been made voluntarily.[24] That admission of guilt, while important, is only a part of the interrogation process. Afterwards, the lengthy "confession-making phase" begins.[25] Much of the power of a confession derives from the lengthy narrative that follows. For a person to confess in a convincing way, he must be able to say more than "I did it." Police are trained to carefully test the suspect's knowledge of how the crime occurred, by assessing whether the suspect can freely volunteer specific details that only the true culprit could know.[26]

That confession-making process was corrupted in the cases studied in this Article. This Article examines the substance of the confession statements, how they were litigated at trial, and then on appeal. Just as in Deskovic's case, in almost all of the cases that resulted in trials, detectives testified that these defendants did far more than say "I did it," but that they had "guilty" or "inside" knowledge. Only one of the 37 exonerees, Travis Hayes, relayed no specific information concerning the crime. Hayes was still convicted, though DNA testing conducted before trial excluded him and his co-defendant. The other 36 exonerees each supposedly volunteered key details about the crime, including facts that matched the crime scene evidence or scientific evidence or accounts by the victim. Detectives further emphasized in 20 cases that the details confessed were non-public or corroborated facts. In 22 cases, detectives claimed to have assiduously avoided contaminating the confessions by not asking leading questions, but rather allowing the suspects to volunteer crucial facts.

The non-public facts contained in confession statements then became the centerpiece of the State's case. Although defense counsel moved to exclude almost all of these confessions from the trial, courts found each to be voluntary and admissible, often citing to the apparent reliability of the confessions. The facts were typically the focus of the State's closing arguments to the jury. Even after DNA testing excluded these people, courts sometimes initially denied relief, citing to the seeming reliability of these confessions. The ironic result is that the public learned about these false confessions in part because of the contaminated facts. These false confessions were so persuasive, detailed and believable that they resulted in convictions which were often repeatedly upheld during appeals and habeas review. After years passed, these convicts had no option but to seek the DNA testing finally proving their confessions false.

Why does constitutional criminal procedure fail to regulate the substance of confessions? Beginning in the 1960's, the Supreme Court's Fifth and Fourteenth Amendment jurisprudence shifted. The Court abandoned its decades-long focus on reliability of confessions. Instead,

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[24] Yale Kamisar, *What Is an "Involuntary" Confession? Some Comments on Inbau and Reid's Criminal Interrogation and Confessions*, 17 RUTGERS L. REV. 728, 732 (1963); Welsh S. White, *What Is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001 (1998).

[25] Leo, *supra* note 6 at ch.5

[26] *See infra* Part I.A.2.

the Court adopted a deferential voluntariness test examining the "totality of the circumstances" of a confession.[27] The Court has since acknowledged "litigation over voluntariness tends to end with the finding of a valid waiver."[28] Almost all of these exonerees moved to suppress their confessions, and courts ruled each confession voluntary. The Court supplemented the voluntariness test with the requirement that police utter the *Miranda* warnings, which if properly provided, as the Court puts it, gives police "a virtual ticket of admissibility."[29] All of these exonerees waived their *Miranda* rights. All lacked counsel before confessing. It is not surprising that many of these innocent people confessed falsely. Most were vulnerable juveniles or mentally disabled individuals. Most were subjected to long and sometimes highly coercive interrogations. Nor is it surprising that they failed to obtain relief under the Court's deferential voluntariness inquiry, especially where the confessions were powerfully – though falsely – corroborated.

The Court has noted that "the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk" of constitutional violations.[30] These false confessions provide examples of a different problem in which the line blurred is that between truth and fiction. When custodial interrogations are not recorded in their entirety, one can not easily discern whether facts were volunteered by the suspect or disclosed by law enforcement. Before they obtained DNA testing and without complete recordings of their interrogations, these exonerees could not prove that they did not volunteer inside knowledge of the crime.

A series of reforms could orient our criminal system towards the substance of confessions. First, constitutional criminal procedure could regulate reliability, though such constitutional change may be unlikely. An understanding of the vulnerability of confessions to contamination can also inform courts reviewing trials post-conviction, particularly in cases involving persons vulnerable to suggestion, such as juveniles and mentally disabled individuals whose false confessions are studied here. Second, unless interrogations are recorded in their entirety, courts may not detect contamination of facts, especially when no DNA testing can be performed. In response to some of these false confessions, state legislatures, police departments, and courts have increasingly required videotaping of entire interrogations.[31] Third, additional police procedures can safeguard reliability, such as procedures intended to assure against contamination, assess suggestibility and to avoid coercion post-admission.

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[27]Dickerson v. United States, 530 U.S. 428, 444 (2000).

[28]Missouri v. Seibert, 542 U.S. 600, 609 (2004) (plurality opinion).

[29]*Id*.

[30]*Dickerson*, 530 U.S. at 435.

[31]*See* Richard Leo, et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479.

This Article begins in Part I by describing the study design and methodology as well as characteristics of the false confessions studied. Part II examines the phenomenon of contaminated facts in these trials. Part III explores how criminal procedure challenges were litigated and how contaminated facts frustrated such efforts. The Article concludes in Part IV by discussing reform of interrogation and criminal procedure.

I. CHARACTERISTICS OF DNA EXONEREES' FALSE CONFESSIONS

A. Study Design

A confession to a crime can occur in many different contexts outside a police interrogation room. A person who committed a crime might admit guilt to friends, family, police informants, or to law enforcement. Criminal procedure rules, however, typically only apply when a person is interrogated while in custody, or after police have determined and conveyed that a person is no longer free to leave.[32] Each of the 39 exonerees studied were interrogated in a custodial setting. Each also delivered self-incriminating statements and admissions of guilt to police, though some, like Deskovic, did not confess to all of the charged acts. Many also admitted guilt before police had probable cause and thus before they were formally placed under arrest and considered to be in custody. A separate group of seven exonerees also allegedly made self-incriminating statements volunteered to police. Those non-custodial self-inculpating remarks, though not full admissions to having committed any crime, played important roles at trial and are discussed separately.

People have long falsely confessed not just in cases involving police torture or the "third degree" but in cases involving psychological techniques commonly used in modern police interrogations. Over the past two decades, scholars, social scientists and writers have documented at least 250 cases in which people likely falsely confessed to crimes and new cases are regularly identified.[33] DNA exonerations, though only a subset of false confessions identified by researchers, provide a unique data set with which to examine how a false confession occurs. These false confession came to light not because of a challenge to the confession, but

[32] *See infra* Part III.

[33] *See, e.g.* Leo, *supra* note 6 at 243 (reviewing literature, and concluding "Since the late 1980's six studies alone have documented approximately 250 interrogation-induced false confessions"). Those six studies are: Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 894-900 (2004) (identifying 125 false confessions); Samuel R. Gross et al., *Exonerations in the United States: 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 543 (2005) (identifying 51 false confessions); Rob Warden, *The Role of False Confessions in Illinois Wrongful Murder Convictions Since 1970*, http://www.law.northwestern.edu/depts/clinic/wrongful/FalseConfessions2.htm (identifying 25 false confessions in Illinois); Garrett, *Judging Innocence*, *supra* note 2 (identifying 31 DNA post-conviction exonerations involving false confessions); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 56-64 (1987) (identifying 49 false confessions).

due to the independent development of DNA technology allowing the convict to convincingly prove innocence years after the conviction. DNA testing may provide particularly probative evidence of innocence due to the precision of the technology. Further, in 26 of these exonerees' cases, post-conviction DNA testing not only excluded the exoneree but also inculpated another person; in at least eight of those cases that person subsequently confessed to the crime and most then pleaded guilty.[34]

These 39 confessions and seven more cases involving non-custodial inculpatory remarks to police are atypical in several respects due to their selection through post-conviction DNA testing. These 39 examples cannot tell us why many criminal suspects falsely confess. Further, there is every reason to think that these cases are unrepresentative even of other false confessions. Few of these cases involved guilty pleas, and one might expect people who confess, even falsely, to plead guilty. These cases proceeded to a trial at which each person was convicted. By definition, since all of these cases involved post-conviction DNA testing, these false confessions all withstood trial scrutiny. Each also withstood appellate or post-conviction scrutiny until the DNA testing was conducted. These cases each had biological evidence later suitable for DNA testing. The study set includes mostly cases involving a rape by a stranger, since in such cases the culprit is likely to leave behind biological evidence, identity can be in doubt, and forensic evidence can be highly probative of the perpetrator's identity. Others who falsely confessed were not convicted, because the problems concerning the confession came to light before trial.[35] Others successfully challenged their conviction post-conviction so they did not need DNA testing. Still others could not benefit from DNA testing, such as where relevant biological evidence was not preserved.

These 39 confessions are also unlike the vast majority of confessions for the obvious reason that we now know they are false. An innocent person would typically confess falsely only due to police pressure or the defendant's susceptibility to police suggestion. However, false confessions that resulted in convictions upheld on appeal and post-conviction might tend not to have indicia of coercion or unreliability. After all, courts found these confessions admissible at trial and post-conviction, such that years later these innocent people had no option but to seek post-conviction DNA testing. These false confessions may have

[34]The 25 cases are those of: M. Bradford, R. Cruz, J. Dean, A. Gray, P. Gray, T. Hayes, A. Hernandez, D. A. Jones, W. Kelly, R. Mathews, A. McCray, R. Miller, C. Ochoa, C. Ollins, K. Richardson, Y. Salaam, R. Santana, D. Shelden, A. Taylor, J. Townsend, D. Vasquez, D. Warney, E. Washington, R. Williamson, T. Winslow, K. Wise. Cases involving confessions of the person inculpated by post-conviction DNA testing are those of Cruz, Hernandez, Ochoa, McCray, Richardson, Salaam, Santana, and Wise.

[35]For example, recent cases have involved DNA testing conducted before trial that excluded defendants who had falsely confessed. *See, e.g.* http://blog.law.northwestern.edu/bluhm/2009/03/another-false-confession-in-new-mexico.html.

survived judicial scrutiny because they appeared to be voluntary and reliable, which may distinguish them from other false confessions.

However, the features that make this set of false confessions unrepresentative also uniquely allow one to critically assess the substance of the confessions. Only in examples of known false confessions can one be confident in retrospect that persons could not before their interrogation have known specific details concerning crimes that they did not commit. That is why exonerees' cases could not be usefully compared to any control group of non-exoneree confessions by presumably guilty individuals. One cannot assess in non-exoneration cases whether the confession was contaminated. Guilty individuals are obviously quite able to volunteer specific details concerning the crimes they commit.

In a prior study of exonerees' appeals and habeas proceedings, I described the set of exonerees who falsely confessed and what claims they raised post-conviction, but did not analyze the substance of their confessions.[36] Data from criminal appeals and habeas proceedings do not shed light on the problem of contaminated confessions. To assess the substance of these false confessions and what claims were made regarding their content, pre-trial materials, trial materials and the confessions themselves were sought for all 39 who falsely confessed and obtained for 37 of the 39 exonerees. Law student researchers initially coded the materials by following a pre-established protocol. Three pleaded guilty and had no trial nor did they testify in a co-defendant's trial, but for one of the three, court files that included preliminary hearings conducted prior to the guilty plea were obtained. For 23 exonerees, the text of a written confession statement was obtained. Those records provided a rich source of material concerning confession statements, how police officers described the interrogation process, how statements were litigated at trial, defense accounts of the interrogations, and any expert review.

B. General Characteristics of Exoneree Confessions

In 34 exonerees' cases, a false confession was introduced at trial.[37] Three additional defendants pleaded guilty, William Kelly, David Vasquez, and Thomas Winslow, for whom documentation of the confession were obtained.[38] For two others who pleaded guilty, Anthony

[36] *See* Garrett, *Judging Innocence*, *supra* note 2 at 89.

[37] M. Bradford, K. Brown, A. Gray, C. Ochoa, J. Townsend, D. Vasquez. Six pleaded guilty, but of those, three had trial materials because they testified in co-defendant's trials or were tried for additional crimes that they did not commit. Townsend was tried for two of the crimes he confessed to, and Bradford and Ochoa testified against others they had implicated.

[38] For David Vasquez, I obtained materials from motions and hearings conducted before his plea. For William Kelly, post-conviction motions to vacate detailed the confession. Thomas Winslow, gave videotaped confession statements before his guilty plea which were obtained.

Gray and Keith Brown, no such materials could be located.[39] Such cases may be more typical of criminal cases, in which the vast majority of those charged plead guilty. Anthony Gray, for example, did make a motion to withdraw his guilty plea, stating that "he is of below average intelligence and is functionally illiterate," and indeed just as in his confession, during the hearing " answered negatively to questions posed by the Court, only to answer them positively once the same questions were rephrased."[40] Gray's letter to the Judge stated: "I has been in jail for five months on a murder that I did not. . . why I say I was in the house the police say that they has proof to say us three was in that Lady house we was not in her house that day or no where around her house I Lie on them because they Lie on me."[41] Providing a window into why he pleaded guilty, he explained, "They were trying to get me the death penalty for something I didn't do," and "Why should I die for something I didn't do?"[42]

These lengthy interrogations often included a range of strategies employed by law enforcement to induce a confession. Many of those strategies were entirely permissible under the U.S. Constitution and recommended by police training on modern psychological interrogation techniques. Unpacking the motive of an innocent person to confess requires a closer examination of what transpired during that interrogation, for which we have only incomplete information. Social scientists have developed several categories for causes of false confessions, beginning with Saul Kassin and Lawrence Wrightsman's work.[43] These exonerees' confessions were likely all what Kassin and Wrightsman term "coerced compliant" confessions, referring to those in which the subject complies with law enforcement pressure during the interrogation process. Many involved the sub-type which Richard Leo and Richard Ofshe term a "stress compliant" false confession, in which the stress of the interrogation process, but not necessarily illegal coercion, secure a confession.[44] In

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[39]Many thanks to Michelle Morris for obtaining the Gray court file, which did not include trial materials, and to Christine Mumma, Director of the North Carolina Center on Actual Innocence, for searching, unsuccessfully, for the Brown materials.

[40] Memorandum of Law, Anthony Gray, Case No. C-91-409, Feb. 20, 1992.

[41]State's Ex. 6, Nov. 25, 1991.

[42]*See* Associated Press, *Wrongly Imprisoned Man Finally Free*, Feb. 9, 1999. "Anthony Gray was sentenced in Calvert County, Maryland, to two concurrent life sentences after pleading guilty in October 1991, to first degree murder and first degree rape. Police officers coaxed a confession out of Gray, who is borderline retarded, by telling him that two other men arrested in connection with the case had told police that Gray was involved. In fact, the co-defendants had neither confessed nor implicated Gray. Later, a defense attorney for one of these other defendants told Gray that all three men would be freed if Gray refused to testify. Gray took the advice and prosecutors abandoned their agreement to recommend a thirty year sentence." http://www.innocenceproject.org/Content/159.php.

[43]*See* Kassin & Wrightsman, *supra* note 2.

[44]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. AND SOC'Y 189, 238 (1997). The other types are the voluntary false confession, in which the suspect approaches law enforcement and volunteers involvement in the

either type of compliant false confession, the suspect confesses chiefly to obtain a gain, such as "being allowed to go home, bringing a lengthy interrogation to an end, or avoiding physical injury."[45]

Social scientists have long documented how pressure combined with repetition of a crime narrative may cause the suspect to internalize that narrative and repeat it, possibly becoming convinced of their own guilt.[46] Only recently, however, have actual instances of such false confessions been documented. Pressures brought to bear on these exonerees ranged from threats combined with offers of leniency, to threats of physical force. Many described harrowing interrogations lasting hours or days. Several described verbal abuse. As will be developed below, twenty-two of the interrogations were recorded, but only partially. Twelve were audiotaped and eleven were videotaped. In eleven cases, the exonerees had signed a typed confession statement. Copies of twenty-three of those written or recorded confession statements were obtained.

Thirteen of those who falsely confessed were mentally ill, mentally retarded or borderline mentally retarded.[47] Thirteen of those who confessed were juveniles (five in the "Central Park Jogger" case).[48] In 22 of these false confession cases, the defendant was either mentally ill, mentally retarded or under eighteen at the time of the offense or both.[49] Mentally disabled individuals and juveniles are both groups long known to be vulnerable to coercion and suggestion.[50] Earl Washington and Jerry

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crime. While three of these exonerees, Jeffrey Deskovic, Eddie Joe Lloyd and Douglas Warney, might appear to be of that type in that they initially approached law enforcement and hoped to assist with the investigation, due to mental illness, fascination with police work, or special interest in the unsolved crime, none of the three confessed until they were interrogated at length. All were interrogation-induced false confessions. Third, in coerced internalized or persuaded confessions, the suspect is convinced that they did something they do not remember doing. None of these cases are of that type. After all, non-existent confessions occur for crimes that did not in fact occur. None of these cases were of that type, where after all, there had to be crime scene evidence with relevant DNA from which testing could exonerate these defendants.

[45]*See* Fred E. Inbau, John E. Reid, Joseph P. Buckley, and Brian C. Jayne, Criminal Interrogation and Confessions 412 (4th ed. 2001) [hereinafter Inbau & Reid).

[46]See Kassin & Kiechel, supra note 3; Bem, When Saying is Believing, Psychology Today, July 1967, at 22-25.

[47]Those exonerees were: A. Gray, P. Gray, B. Halsey, T. Hayes, D. Jones, B. Laughman, E. Lloyd, C. Ollins, L. Rollins, J. Townsend, D. Vasquez, and E. Washington.

[48]*See* People v. Wise, 752 N.Y.S.2d 837 (2002). Those juveniles were: M. Bradford, D. Brown, J. Deskovic, P. Gray, N. Hatchett T. Hayes, A. McCray, C. Ollins, K. Richardson, L. Rollins, Y. Salaam, R. Santana, K. Wise.

[49]*See* Garrett, *Judging Innocence*, *supra* note 2 at II.A.2. This is consistent with data from studies of non-DNA false confessions. *See, e.g.* Gross, *supra* note 31 at 545 ("Thirty-three of the exonerated defendants were under eighteen at the time of the crimes for which they were convicted, and fourteen of these innocent juveniles falsely confessed--42%, compared to 13% of older exonerees. Among the youngest of these juvenile exonerees--those aged twelve to fifteen--69% (9/13) confessed to homicides (and one rape) that they did not commit.")

[50]*See, e.g.* Allison D. Redlich, Alicia Summers & Steven Hoover, Selt-Reported False Confessions and False Guilty Pleas Among Offenders with Mental Illness, Law &

Townsend, for example, both borderline mentally retarded, each readily confessed to every crime that police asked them about. Several later explained that they confessed in order to avoid threats of the death penalty. For example, Chris Ochoa reported that the detective threatened him, "You're going to get the needle. You're going to get the needle for this. We got you."[51]

Studies suggest that "police-induced false confessions appear to occur primarily in the more serious cases, especially homicides and other high-profile felonies," and consistent with those studies, nineteen of these cases were rape-murder cases, three were murder cases and twelve were rape cases.[52] Among exonerees, confessions were obtained more frequently in murder and rape-murder cases than in rape cases, presumably because in rape cases a victim identification of the attacker obviates the need to secure a confession. Six of those who confessed were sentenced to death.

Sixteen exonerees not only falsely inculpated themselves, but they falsely inculpated others, eleven of whom were later also exonerated by post-conviction DNA testing. Thus, false confessions can have a "multiplying" effect, in which additional innocent people are drawn into an investigation. Paula Gray's testimony in the Ford Heights Four case, which implicated Kenneth Adams, Willie Rainge and Dennis Williams, is an example, as are the Central Park youths' confessions, in which each implicated others as the primary assailant, and similarly in the "Beatrice Six" cases, James Dean, Ada JoAnne Taylor, Debra Shelden, and Thomas Winslow variously implicated each other as well as two others who did not confess, Kathy Gonzales and Joseph White.

The confessions were also often the central evidence at trial. Few of the 38 exonerees' cases involved eyewitnesses to the crime. Only eleven involved eyewitnesses, six involved jailhouse informants, seven involved co-defendant testimony, though twenty-one involved some type of forensic evidence. Twenty-three were Black, 12 were White, and 3 were Hispanic. These 38 cases were chiefly in New York (8), and Illinois (8) with additional cases in Nebraska (4), Louisiana (3), Oklahoma (2), Pennsylvania (4), Michigan (2), Virginia (2) and one case each in California, Florida, Kansas, Maryland, New Jersey, and North Carolina.

II. CONTAMINATED CONFESSIONS

Hum. Behav (2009); Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 800 (2003); Richard Bonnie & Thomas Grisso, *Adjudicative Competence and Youthful Offenders*, in YOUTH ON TRIAL, at 87-88; Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495 (2002); Gisli H. Gudjonsson, *Suggestibility and Compliance Among Alleged False Confessors and Resisters in Criminal Trials*, 31 MED. SCI. & L. 147, 148-49 (1991).

[51]Trial Transcript, State of Texas v. Richard Danziger, No. 96,470 at 1006 (on file with author).

[52]*See* Leo, *supra* note 6 at 245; Gross, *supra* note 31 at 544.

This Part turns to the substance of exonerees' confession statements and how each was litigated at trial. The overwhelming majority of these 39 false confession cases were contaminated. Thirty-six of the 37 cases for which transcripts were obtained had confessions that allegedly included specific details about how the crime occurred. The criminal trials of these exonerees then centered on those facts. At trial, law enforcement testified that the suspect had volunteered specific details about how the crime occurred, typically details corroborated by expert evidence or crime scene evidence. In most, the innocent person did not merely guess or repeat one or two facts. Almost all exonerees supposedly provided detailed statements that included facts likely to be known only by the culprit. As the prosecutor in Robert Miller's case put it, "He supplied detail after detail after detail after detail. And details that only but the killer could have known."[53] This Part describes the contamination of these confessions, including the phenomenon of disclosing facts, police training concerning leaking and feeding facts, what the crucial facts were in these cases, how they were described at trial, whether law enforcement admitted to telling the suspect facts, and how the prosecution, defense, and courts handled such statements.

A. Law Enforcement Practices Concerning Contamination of Confessions

Police have long been trained not to contaminate a confession by feeding or leaking crucial facts. The leading manual on police interrogations, originally written by Fred Inbau and John Reid, but now in its Fourth Edition, is emphatic on this point. Feeding facts contaminates a confession because if the suspect is told how the crime happened, then the police cannot ever again properly test the suspect's knowledge. The opportunity to obtain volunteered information is lost. For that reason, when developing the simple admission of guilt into a confession, police are trained to ask open questions, like "What happened next?"[54] Leading questions are not to be asked, at least not as to crucial corroborated details concerning the crime. Inbau and Reid explain that during the interrogation "[w]hat should be sought particularly are facts that would only be known by the guilty person."[55]

Law enforcement has strong practical reasons to test and to safeguard the reliability of a confession. Police are trained to construct a narrative of how the crime occurred, including the motives for committing the crime and a detailed explanation of how it was committed.[56] During a criminal investigation, law enforcement tests the reliability of their work

[53]Trial Transcript, State of Oklahoma v. Robert Lee Miller, Jr., CRF-87-963 (May 15-17, 1988) at 1292 (on file with author).

[54]*Id*. at 367.

[55]*Id*. at 369.

[56]*See* Leo, *supra* note 6 at ch 5.

product, to try to build as strong a case as possible. If the suspect truly lacks knowledge of how the crime occurred, the bare admission of culpability will not be very convincing to a jury. Indeed, police have long known that suspects may admit to crimes that they did not commit, for a range of reasons, including mental illness, desire for attention, desire to protect loved ones, or others.[57] The Inbau and Reid manual cautions that "[t]he truthfulness of a confession should be questioned, however, when the suspect is unable to provide any corroboration beyond the statement, 'I did it.'"[58]

Further, police are trained not to leak facts. Police black-out certain key information so that the public does not learn of it during the investigation. Thus, Inbau and Reid advise that "[w]hen developing corroborative information, the investigator must be certain that the details were not somehow revealed to the suspect through the questioning process, news media, or the viewing of crime scene photographs."[59] Police also know how important it is to document their efforts to keep certain facts confidential, because doing so later enhances the power of the confession, including if there is a subsequent prosecution or trial. Inbau and Reid recommend documenting in the case file which facts are to be kept confidential, "so that all investigators are aware of what information will be withheld."[60] Even more powerful is corroborative evidence evidence that the interrogators did not yet know, termed "independent corroboration."[61] Thus, a suspect could be asked where the murder weapon was hidden, and if the weapon is found at that location, the confession is strongly corroborated. [62] By carefully avoiding contamination of the confession, the officer can at trial "confidently refute" any defense suggestion that facts had been fed to the suspect.[63]

B. Corroborated and Non-Public Facts

In most of these cases in which non-public or corroborating facts were part of the confession, police did "confidently refute" at trial that they disclosed none of those facts and that in fact they were volunteered. Of course, this is what made the confessions particularly powerful, that is, the notion that the defendant freely offered information that only the perpetrator could have known. As police recognize, if the defendant had

[57]Inbau and Reid at 425; *see also* John E. Reid & Associates, *Motives for False Confessions*, PoliceOne.com News, July 2, 2009 (describing causes of false confessions, and recommending that investigators tailor their techniques for particular suspects, as well as assess "credibility" of a confession, including by examining the "extent of corroboration between the confession and the crime).

[58]*Id* at 425.

[59]*Id*. at 369.

[60]*Id*. at 369.

[61]*Id*. at 433.

[62]*Id*. at 369.

[63]*Id*. at 433.

merely agreed to a series of leading questions by the police, then the confession would not appear particularly believable.

An example of the power of specific corroborated facts is in the cases of Marcellius Bradford and Calvin Ollins, two fourteen year-old boys who confessed to the rape and murder of a medical student in Chicago, and who inculpated Calvin's cousin Larry Ollins and Omar Saunders.[64] All four youths were wrongly convicted and served 6.5 to 13.5 years before DNA testing exonerated them.[65] The case revolved around two facts: the existence at the crime scene of a piece of concrete and a bloody footprint on the body of one victim.

Police stopped Larry Ollins on January 24, 1987, near the crime scene.[66] He denied any knowledge of the crime.[67] Three days later police detained his friend Marcellius Bradford.[68] Bradford eventually told the detectives that he committed the murder along with Calvin and Larry Ollins, Saunders and others. The next morning, Calvin Ollins delivered his written confession and appeared to volunteer the crucial detail. When asked what Larry did next, he said "That's when he hit her with a piece of concrete."[69]

Police did not take a formal statement from Bradford until two hours after Ollins signed his statement. A stenographer typed this statement. Bradford initially described Larry Ollins hitting the victim in the face with a brick. After making repeated references to a brick, the Assistant State's attorney Susan Sussman posed a leading question to correct Bradford. She asked:

> Q. Was this brick a piece of concrete from the ground?
> A. Yes.[70]

All of the references to a brick in the typed statement were then crossed out, replaced with the word "concrete," and initialed by Bradford.[71]

Where did that detail regarding the concrete come from? Detective James Mercurio, who was involved in the interrogations, claimed that Bradford had first mentioned the concrete the night before. But that seems unlikely, because the corrections were made in Bradford's written statement, which was elicited only after Calvin Ollins gave a statement.

Regardless where it originated, that detail provided crucial evidence against the two fourteen year-olds. Officers who had been to the

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[64] *See* Maurice Possley & Steve Mills, *DNA Test Rules Out 4 Inmates*, CHI. TRIB, Nov. 14, 2001.

[65] *See* http://www.innocenceproject.org/Content/231.php.

[66] Trial Transcript, Illinois v. Larry Ollins, No. 87-CR-4752 (June 15, 1987) at 65, 76.

[67] *Id.* at 85.

[68] *Id.* at 134 (June 16, 1988).

[69] Statement of Marcellius Bradford, Jan. 28, 1987 at 7 (on file with author).

[70] *Id.* at 11.

[71] Statement of Calvin Ollins, Jan. 28, 1987 at 10 (on file with author).

crime scene later testified at trial that they had found at the scene a piece of concrete; indeed that piece of concrete had been taken into evidence.[72] At trial, Pamela Fish of the Chicago police crime lab described analyzing stains on the piece of concrete and detected human blood that was consistent with the blood type of the victim.[73]

A second crucial detail emerged at trial. The medical examiner, Dr. Joanne Richmond, who conducted the autopsy, described the victim's "multiple blunt injuries that included the face…"[74] Similarly, both boys described the victim being kicked; Calvin Ollins volunteered that "they started kicking her."[75] Dr. Richmond described bloody footprints found on the body. The jury saw a photograph of the bloody footprint.[76]

Bradford pleaded guilty and received a twelve year sentence in exchange for his testimony against the others at trial.[77] At Larry Ollins' trial, Bradford gave a detailed account of the murder, including the kicking. During this trial testimony, Bradford slipped yet again and several times described Larry Ollins picking up a brick; he was again corrected:

Q. Are we talking about a house brick or some other kind of object?

A. Cement out of the ground, like a rock.

Q. Like a chunk of cement?

A. Chunk of cement.[78]

Assistant state attorney George Velcich focused the closing statements on how the confessions were fully consistent with the injuries of the victim: "You will see this photograph and it won't be pleasant. But it shows you how this pointed end of the rock where the blood was . . . matches the injury that's on her face."[79] He added, "So, when Marcellius Bradford told you Larry Ollins did that, it fits the evidence. And you know he was telling the truth."[80] Then he described the footprints and noted that they are "more evidence to show you that Marcellius Bradford accurately truly described to you what happened that day."[81]

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[72]Indeed, a police medical examiner Raymond Lenz performed microscopic analysis of hairs found on this piece of concrete, finding hairs there dissimilar to those of the victim. Trial Transcript, *supra* note 61 at 713, 717 (June 16, 1988).

[73]*Id.* at 131 (June 15, 1987).

[74]*Id.* at 163.

[75]Statement of Calvin Ollins, *supra* note 66 at 8.

[76]Trial Transcripts, *supra* note 61 at 157, 163.

[77]Trial Transcripts, *supra* note 61 at 406-7 (June 14, 1988).

[78]*Id.* at 431.

[79]*Id.* at 69 (June 16, 1988).

[80]*Id. at* 70.

[81]*Id. at* 72. Other false details may have been disclosed to Bradford, for example, the involvement of a "Daniels," who Bradford mentioned only after officer Mercurio told Bradford about such a person, after Calvin Ollins had earlier named a Daniels. *Id.* at 132.

Ofshe and Leo note: "The only time an innocent person will contribute correct information is when he makes an unlucky guess. The likelihood of an unlucky guess diminishes as the number of possible answers to an investigator's questions grows large."[82] Cases involving such unusual, specific or numerous details raise the most troubling questions. The Bradford confession involving such specific crime scene details suggests a very low likelihood that the teenager could possibly have guessed each of those unusual facts on his own. Indeed, Bradford later claimed police beat him and also that he confessed to avoid a life sentence.[83] DNA testing not only exonerated Bradford, Calvin and Larry Ollins, and Saunders, but after their release, police arrested two others whose fingerprints and DNA did match the crime scene evidence.[84] A Chicago Tribune investigation also later found that "the alleged confessions mirrored a scenario that an FBI criminal profiler said he provided before the four teenagers were arrested."[85]

In all but one of these exonerees' cases, police claimed that the defendant had offered a litany of such details, which we now know these innocent people could not have independently known. For example, in Dennis Brown's case, Sgt. Montgomery, who interrogating Brown, testified as follows:

> Q. Sergeant Montgomery, this is a very serious case. You know that.
> A. Yes, sir.
> Q. You're stating under oath you did not know what the victim had on that night, is that correct? You did not know the color of the couch?
> A. No, sir.
> Q. You did not know which arm she was grabbed by?
> A. No sir, I did not.
> Q. And that the defendant confessed to the rape of Diane Talley, correct?
> A. Yes.
> Q. And he gave you specifics as to that rape?
> A. Yes, sir.
> Q. And he told you about the house?
> A. Yes, sir.
> Q. And he told you what color the couch was?
> A. Yes, sir.

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[82]Ofshe & Leo, *supra* note 4, at 993.

[83]Sharon Cohen, *Jailed at 14, Youth Refused to Surrender Hope*, L.A. TIMES, June 9, 2002 at 1.

[84]Maurice Possley, Eric Ferkenhoff & Steve Mills, *Police Arrest 2 in Roscetti Case: Officials Say Tip Led Them to Pair, Who Confessed*, CHI. TRIB., Feb. 8, 2002, §1, at 1.

[85]Maurice Possley & Steve Mills, *DNA Test Rules Out 4 Inmates*, CHI. TRIB., Nov. 14, 2001.

> Q. And he told you how he committed the rape?
> A. Yes, sir.[86]

Thus, Sgt. Montgomery not only testified that Brown knew details regarding the crime, down to the color of the victim's couch, but that the Montgomery himself did not know those crime scene details. The clear implication was not just that Montgomery did not feed those facts, but that it was impossible for him to have fed those facts to Brown. Perhaps Montgomery was not the person who disclosed those facts to Brown. Given such specific information, it is quite likely, however, that in such cases, law enforcement did disclose those facts at some point during their interviews and interrogations. It is in contrast unlikely that the suspect accurately reconstructing the crime wholecloth from his own imagination, or that police improperly leaked each of the crucial details of the crime to the public, which were then accurately recounted by the suspect during an interrogation.

Douglas Warney provides another example of a confession that according to the police included a litany of detailed non-public facts concerning the crime, including: that the victim was wearing a nightshirt; the victim was cooking chicken; the victim was missing money from his wallet; the murder weapon was a knife that was kept in the kitchen, about 12 inches with serrated blade; the victim was stabbed multiple times; the victim owned a pink ring and gold cross; tissue used as a bandage was covered with blood; there was a pornographic tape in the victim's television.[87]

Sgt. Gropp, who interrogated Warney, when questioned about the matter at trial, denied having told Warney during the interrogation that the victim was stabbed over a dozen times. Gropp stated, however that after Warney initially claimed to have stabbed the victim only once, "I says, Doug, how many times did you stab him and he had already indicated to me he stabbed him once. He told me then that he had stabbed him more, eight, not more than fifteen."[88] Gropp admitted that when questioning Warney, he knew that there were multiple stab wounds on the victim.[89] Gropp was emphatic, when asked "did you suggest any answers to him," that he did not.[90]

The prosecutor then argued in the closing statements that the reliability of Warney's confession was corroborated by each of these facts:

> The Defendant says he's cooking dinner, and he's particular about it, cooking chicken . . . Now, who could

[86]Trial Transcript, State of Louisiana v. Dennis P. Brown, No. 128, 634 (April 3, 1985) at 78-79 (on file with author).

[87]Trial Transcript, People of the State of New York v. Douglas Warney, Ind. No. 96-0088 at 563-75 (on file with author).

[88]*Id.* at 117.

[89]*Id.* at 119.

[90]*Id.* at 113.

> possibly know these things if you hadn't been inside that house, inside the kitchen? You heard the Defendant say that he took money . . . You know the wallet was found upstairs, empty, near the closet. . . You will see photographs of it. . . You heard the Defendant say that he stabbed Mr. Beason with a knife taken from the kitchen. Do you recall Mr. Lee's testimony? . . . Regarding the murder weapon, he said that was the knife that they kept in the house. Where did they keep it? They kept it in a drawer under the crockpot where the chicken was cooking. Now, who would know the chicken was cooking? A person who got that knife and used it against Mr. Beason, the killer. The Defendant described the knife as being twelve inches, with ridges. I think Technician Edgett said it was thirteen inches with the serrated blade.[91]

Warney had "a history of delusions, an eighth-grade education and advanced AIDS."[92] Years later, after being exonerated by DNA test results that matched another man, who subsequently confessed, Warney maintained that Sgt. Gropp had told him details including "what was cooking in the hot pot."[93]

In the Beatrice Six case, three of the defendants testified in the trial of Joseph White. Only Joseph White refused to plead guilty (he had requested an attorney during his interrogation and did not confess). The other defendants all pleaded guilty, and four had confessed. The three who testified against White, James Dean, Debra Shelden, and Ada JoAnne Taylor, each admitted at his trial that police had suggested facts to them and that before speaking to police, they could not remember much of what had occurred the night of the crime. Taylor testified as follows at a deposition, which was read into the record at trial:

> Q. Can you actually separate today what you remember from the night this happened and what was suggested to you to help you remember what happened that night?
> A. No. It would almost be impossible to separate.
> Q. So whatever statements you have made recently, I take it, are from your memory but from suggestions that have helped you remember?
> A. There has been parts from my memory as well as the suggestions.
> Q. Tell me what parts you actually remember that you don't have that you didn't have suggested to you.

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[91] *Id.* at 570-71.

[92] Jim Dwyer, *Inmate to be Freed as DNA Tests Upend Murder Confession*, N.Y. TIMES, May 16, 2006.

[93] *Id.*

A. Oh, God.
Q. Is there anything?
A. Not that I can remember offhand...[94]

At trial Taylor stated that police "somewhat" suggested facts to her, and helped her to remember much, but not "all of the information."[95] She explained:

> Well, I have a tendency to believe all officers.
> Q. And so police officers would furnish you information of the crime and you would believe them, wouldn't you?
> A. Somewhat, yes, sir.[96]

Taylor also admitted that police had showed her a video of the crime scene and gave her the statements of the other defendants to read.[97] (She also testified that she was diagnosed with a "personality disorder" and has problems with memory, though she took credit for having some mental telepathy capabilities.[98])

Taylor also admitted that police told her particular facts. She said that police suggested a particularly idiosyncratic fact, an explanation for the presence of a ripped half five dollar bill at the crime scene. On direct, she testified that Joseph White had "a trick that he does with a $5 bill" where he would rip it in half, and recalled asking him after the murder what he had ripped, and he had said a "five," meaning a five dollar bill.[99] When asked to explain the trick, she said "I've never really understood it. I know he pulls a $5 bill out and he does something with it and he ends up with a ripped $5 bill. And he usually tosses part of it away." However, on cross-examination, she admitted that when the deputy sheriff originally asked about the money trick, she told him that Joseph White would make pictures with the money, and finally the deputy had to tell her that he would tear the bill: "Q. Now after the murder, he's the one who explained to you about the $5 bill, was he not? A. Yes, sir."[100]

In several cases, expert evidence corroborated facts in the confession. The primary non-public fact highlighted in the confession of Ron Williamson was his description of the way the victim had been was killed, that he wrapped a cord around her neck to strangle her and that he

[94]White Trial Transcript, *supra* note xxx at 942.
[95]*Id.* at 943.
[96]*Id.* at 962.
[97]*Id.* at 953.
[98]*Id.* at 924, 931, 939.
[99]*Id.* at 918.
[100]*Id.* at 959.

stabbed her.[101] Strangulation as the means of murder was corroborated by Dr. Fred Jordan, the medical examiner.[102]

Perhaps most powerful, in Lafonso Rollins case the prosecutor conducted an unusual "reverse identification." Rollins was asked to select one of the victims from a series of photographs. The prosecutor testified that Rollins selected the victim's photo and then initialed that photograph, which was displayed to the jury at trial.[103] Now that we know Rollins was innocent and was not acquainted with the victim, one suspects that some sort of cue, intended or not, suggested the correct photograph to Rollins.

C. Denying Disclosing Facts

In 22 cases, the police officers testifying under oath at trial denied that they had disclosed facts to the suspect. Some were asked directly whether they had told the suspect key facts, others themselves noted they had not done so, and others carefully described an interrogation in which the suspect had volunteered each of the relevant facts. The question then arises whether officers were testifying falsely and therefore fabricating a confession by claiming that crucial facts were volunteered, where in fact they were disclosed to the defendant by these police officers. Again, this Article does not reach any conclusions regarding state of mind of officers. Nor would state of mind be relevant to the question whether the officers violated exonerees' constitutional rights.[104] These officers most likely believed they were interrogating a guilty person.

Officers may contaminate a confession unintentionally, because during a complex interrogation they later did not recall that as to important subjects they had asked leading questions. A fascinating column by Det. James Trainum describes how he and his colleagues unintentionally secured a false confession.[105] Trainum explained:

> We believed so much in our suspect's guilt that we ignored all evidence to the contrary. To demonstrate the strength of our case, we showed the suspect our evidence, and

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[101]Trial Transcript, State of Oklahoma v. Ronald Keith Williamson, CRF 87-90 (April 21-28, 1988) at 450 (on file with author).

[102]*Id.* at 541-42. However, in a possible inconsistency if Williamson meant he stabbed using a knife, Dr. Jordan also stated that he did not believe the puncture wounds on her body were caused by a knife. *Id.* at 551-52.

[103]Trial Testimony, State of Illinois v. Rollins, at D-169 (on file with author).

[104] In order to violate the constitution rights of the defendants, these officers need not have perjured themselves at trial, so long as they knew they had falsely represented to prosecutors that the defendants volunteered non-public facts. *See, e.g.* Napue v. Illinois, 360 U.S. 264, 269 (1959); Devereaux v. Abbey, 263 F.3d 1070, 1074-76 (9th Cir. 2001).

[105]Jim Trainum, *I Took A False Confession -- So Don't Tell Me It Doesn't Happen!*, http://www.camajorityreport.com/index.php?module=articles&func=display&ptid=9&aid=2306; *see also* Jim Trainum, *The case for videotaping interrogations,* L.A. TIMES, October 24, 2008.

> unintentionally fed her details that she was able to parrot back to us at a later time. Contrary to our operating procedures at the time, my colleagues and I chose to videotape the interrogation. This is what saved me from making a horrible mistake in the long run. It was a classic false confession case and without the video we would never have known.[106]

Similarly, officers who did not testify at trial may have disclosed facts without the knowledge of their colleagues, and recklessly failed to tell their colleagues what transpired. However it occurred, law enforcement mishandled these serious criminal cases.

The trial of Nathaniel Hatchett included a particularly unequivocal denial that any facts were disclosed to him. The detective testified:

> Q. Did you ever supply the Defendant with details, specific details of the offense so that he would be able to recite them back to you when and if he decided to give you a statement about his knowledge and involvement with these crimes?
> A. I didn't.
> Q. You say you didn't, so I will ask the next question: Did you hear anyone else or see anyone else provide him with the kind of details that he eventually later gave you demonstrating his knowledge and involvement in this crime?
> A. No. As a matter of fact, as lead investigator I was the only one privy to such details at this point.[107]

The case of Earl Washington provides another example in which the law enforcement denials that facts were disclosed formed the crucial evidence in the State's case. Washington falsely confessed to a rape and murder in Culpepper, Virginia. He came within nine days of execution, and was in prison for eighteen years before finally being exonerated by DNA testing.[108] A long string of state and federal courts denied his appeals and post-conviction petitions, citing to the reliability of his confession. Although he was borderline mentally retarded, the Fourth Circuit emphasized that: "Washington had supplied without prompting details of the crime that were corroborated by evidence taken from the scene and by the observations of those investigating the [victim's] apartment."[109]

Lt. Harlan Lee Hart and Special Agent Curtis Reese Wilmore told prosecutors and then testified at trial that Washington identified as his a shirt with a torn pocket that was found in the rear bureau of the victim's

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[106] *Id.*
[107] *See* Michigan v. Hatchett, Hearing at 40 (on file with author).
[108] Margaret Edds, AN EXPENDABLE MAN (2003).
[109] Washington v. Murray, 4 F.3d 1285, 1292 (4th Cir. 1993).

bedroom many months after the murder. The typed statement read as follows:

> Hart: Did you leave any of your clothing in the apartment?
> Washington: My shirt.
> Hart: The shirt that has been shown you, it is the one you left in apartment?
> Washington: Yes sir.
> Hart: How do you know it is yours?
> Washington: That is the shirt I wore.
> Hart: What makes it stand out?
> Washington: A patch had been removed from the top of the pocket.
> Hart: Why did you leave the shirt in the apartment.
> Washington: It had blood on it and I didn't want to wear it back out.
> Wilmore: Where did you put it when you left?
> Washington: Laid it on top of dresser drawer in bedroom.[110]

This statement was powerful for several reasons. Washington offers in this statement that he left a shirt – yet the police had not made public that a shirt was found at the crime scene. Further, he knew about an identifying characteristic making that shirt unusual: the torn off patch. He knew precisely where the shirt had been left, in a dresser drawer in the bedroom. Most remarkable, not only did Earl Washington know of the existence of this shirt and appear to volunteer where the shirt had been found, but he said that he left it there because it had blood on it. The shirt that the officers showed Washington no longer had blood on it; the stains had been cut from the shirt for forensic analysis.[111] Thus, this appeared to be no mere lucky guess; Washington appeared to have detailed knowledge concerning this shirt and this crime scene.

The prosecutor emphasized in closing arguments that the police were not "lying" and "didn't suggest to him" how the crime had been committed, but that Washington knew exactly how the crime had been committed.[112] The prosecutor ended the closing statements by discussing the shirt, and noting that Washington knew "the patch was missing over the left top pocket."[113] The prosecutor continued, "Now, how does somebody make all that up, unless they were actually there and actually did it? I would submit to you that there can't be any question in your

[110]Statement of Earl Junior Washington, June 4, 1982 at 6 (on file with author).

[111]Trial Transcripts, Commonwealth of Virginia v. Earl Junior Washington (Jan. 19, 1984) at 527-37, 40, 566 (Officer Buraker testified that "Where these holes were there were reddish stains there at that time. They appeared to be blood stains… At the laboratory these were cut out, these reddish stains…").

[112]*Id.* at 723 (Jan. 20, 1984).

[113]*Id.* at 724.

mind about it, the fact that this happened and the fact that Earl Washington Junior did it."[114]

Now that we know Earl Washington, Jr. did not commit the crime, but rather another man later identified through a DNA database and who has now pleaded guilty, there are limited explanations for how Washington could have uttered those remarks concerning the shirt, together with other details concerning how the crime had been committed. Either the police offered those facts to him, or the police had actually leaked all of that information to the public and somehow Washington, a mentally retarded farmhand living in the next County, heard it all and carefully incorporated it into his confession. Whether or not the officers intended to misrepresent their interrogation of Washington, they had provided a version of events that is demonstrably false as to the most crucial details, in a case where Washington was sentenced to death.

This was precisely the issue in a civil rights lawsuit brought by Washington after his exoneration. It emerged for the first time during discovery in that civil rights suit that almost ten years after the conviction and near the time that Virginia's Governor was considering a clemency petition based on post-conviction DNA testing, Agent Wilmore for the first time expressed doubts concerning the interrogation. He admitted the facts were likely disclosed, telling the Virginia Attorney General "that he felt like either he or Hart must have mentioned the shirt to Washington …, and that his testimony in the record did not accurately reflect that the shirt had first been mentioned by the police."[115] In 2006, a federal jury found that Wilmore fabricated the confession and violated Washington's constitutional rights by at minimum recklessly and falsely claiming that Washington volunteered crucial non-public facts. That jury awarded Earl Washington $2.25 million in compensatory damages.[116]

The Central Park case also involved a striking detail concerning a shirt. The prosecutor emphasized in closing arguments that Antron McCray knew information that only the jogger's assailant could have known:

> You heard in that video Antron McCray was asked about what she was wearing and he describes she was wearing a white shirt. This is the shirt that Patricia Meili was wearing. You saw the photograph of what that shirt looked like. There is no way that he knew that that shirt was white unless he saw it before it became soaked with blood and mud. I submit to you that Antron McCray describes details and describes them in a way that makes you know beyond

[114] *Id.* at 724.

[115] See Edds, supra note 95, at 248.

[116] Jerry Markon, *Wrongfully Jailed Man Wins Suit*, WASH. POST, May 6, 2006 at B01 (describing that jury awarded $2.25 million finding that "Wilmore deliberately falsified evidence, which resulted in Washington's conviction and death sentence").

> any doubt beyond reasonable doubt that he was present, that he helped other people rape her, and that he helped other people beat her and that he left her there to die.[117]

Similarly, at Nicholas Yarris' trial, law enforcement emphasized that he had volunteered two crucial facts: (1) That the victim had been raped, and (2) that the victim's car had a brown landau roof.[118] A suspect eager to assist law enforcement might very well have guessed that a female victim had been raped. The striking detail was the unusual brown landau roof. Police testified at trial that "a conscious decision was made not to release any such information and to safeguard any such information about a rape."[119] Police stated, "The same pertains to the Landau roof. This is one of the things we decided to keep confidential in the investigation from the press."[120]

The Barry Laughman trial provides another example, where law enforcement insisted that no facts had been disclosed to him, and explaining that disclosing facts would be improper by testifying that "We don't use leading questions. I don't. I don't use leading questions."[121]

In the majority of these trials, 19 cases, prosecutors emphasized in their closing arguments that the relevant facts were non-public or corroborated by crime scene evidence. In 17 cases, prosecutors emphasized that facts were non-public and could only have been known by the perpetrator; in ten exonerees' trials, prosecutors specifically denied law enforcement had disclosed any facts.

For example, in Bruce Godschalk's case, the prosecution took the position that "Well, if he were guessing, he was guessing pretty darn good."[122] The prosecutor in an incredulous tone, then told the jury that it was a "mathematical impossibility" that Mr. Godschalk could have guessed correctly on so many non-public facts regarding how the crime was committed.[123] In Robert Miller's case, the prosecutor emphasized that "[h]e described the details … details that only the killer could have known."[124] In response to the defense suggestion that he could have guessed such details, the prosecutor said, "Are you kidding? Are you kidding?" and added "He supplied detail after detail after detail after detail."[125] In the Rolando Cruz and Alejandro Hernandez trial, the

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[117]Trial Transcript, State of New York v. Raymond Santana et. al., No. 4762/89 at Vol. 13: 5291-92 (on file with author).

[118]Trial Transcript, Commonwealth vs. Nicholas Yarris, No. 690-82 (July 1, 1982), at 2-114-15 (on file with author).

[119]*Id.* at 2-115.

[120]*Id.*

[121]Trial Transcript, at 494.

[122]Trial Transcript, Commonwealth of Pennsylvania v. Bruce Donald Godschalk, No. 00934-87 (May 27, 1987) at 22 (on file with author).

[123]*Id.* at 22-23.

[124]Trial Transcript, State of Oklahoma v. Robert Lee Miller, Jr., CRF-87-963 (May 15-17, 1988), at 1292 (on file with author).

[125]*Id.*

prosecutor closed by telling the jury that Cruz had told officers that the victim "was anally assaulted. There's no way to know that information. He knows it because he was there."[126]

This Article does not opine on the state of mind of police or prosecutors. Police may have failed to properly recall what transpired during the interrogation and prosecutors may have sensibly relied on what police officers had told them transpired. Inadvertent or not, the contamination of these confessions had grave consequences, including wrongful convictions and additional crimes committed by the actual perpetrators.[127]

D. Recorded False Interrogations

A surprising number of these false confessions were recorded. Twenty-two were recorded, but only partially. Twelve were audio recorded and eleven had video (some exonerees had more than one type). Five additional confessions or interrogations were at some point transcribed by a stenographer. Thus, there is a record concerning what transpired, at least during selected portions of these interrogations.

Inbau and Reid caution against using leading questions and call it "highly important" to "let the confessor supply the details of the occurrence."[128] Not only does this practice make the confession more convincing by avoiding any suggestion or disclosure of facts, but it allows the investigator to later "evaluate the confession in the light of certain known facts."[129]

In all of these cases, only part of the interrogation or a final confession statement was recorded, and the recording was preceded by interrogation that was not recorded. Thus, four of the five youths in the Central Park Jogger case had their interrogation videotaped, but this recording followed their lengthy initial interrogations. Similarly, four of the Beatrice Six had video statements recorded, but only after multiple interviews and interrogations by police and others. In David Allen Jones' recorded interrogation, when he did not recall the location of a crime, police reminded him that they had earlier showed him photos of the crime scene, asking "You remember yesterday we showed you that picture" and that it was "by the water fountain" and "you remember that gate we showed you right there," finally eliciting only a response from Jones that was transcribed as "This right here (Untranslatable)."[130]

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[126]Trial Transcript, People of the State of Illinois v. Alejandro Hernandez et. al., No. 84-CF-361-01-12 (Feb. 20, 1985) at 146 (on file with author).

[127]Like Earl Washington, several of these exonerees filed civil rights lawsuits and received substantial settlements or verdicts. *See* Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 Wisc. L. Rev. 35.

[128]Inbau and Reid, *supra* note 41 at 381.

[129]*Id.* at 381.

[130]Suppression Hearing, People of the State of California v. David Allen Jones, No. BAO71698, (July 15, 1993) at 33 (on file with author).

Steven Drizin notes that it is "not uncommon" for police to conduct an initial interview in which they "use a gamut of techniques" to secure admissions, but do not tape that interview, because "the kinds of techniques they use are not likely to be understood by juries, who view them as over the top"; rather police tape a second interview only once the admissions have been secured.[131]

Where these innocent people did not know the facts of the crime, often suggestion by police was apparent even in the recorded portions of the interrogation. For example, in the case of Bruce Godschalk, a taped statement was taken only after he had confessed and was placed under arrest.[132] During the suppression hearing and again at trial, Detective Saville read the transcript of the taped statement aloud. In one striking passage, it appeared that Mr. Godschalk volunteers the information about the screen on a kitchen window that the attacker entered as to one of the two rapes he was charged with:

> Q. Okay. What window was this? Do you remember? If you remember, you remember. If you don't, you don't. Just say what you remember.
> A. Kitchen window.
> Q. Okay. You're saying it was the kitchen window.
> A. Yeah.
> Q. Okay. How do you remember entering the window? Was the window open or closed?
> A. Closed, with a screen on it.
> Q. And how did you get through the screen?
> A. Pulling it.
> Q. You pulled the screen?
> A. Yeah.[133]

He added, "am I putting words in your mouth," and Godschalk answered "No."[134] Det. Saville also described that he was speaking to Godschalk for quite some time before turning on the tape, that during this time Godschalk volunteered a series of specific facts, and that before turning on the tape Godschalk was crying.[135]

When he described the conversations before the recording was made, Saville admitted to having disclosed the fact concerning the window – he describes asking Godschalk how he entered the apartment, and Godschalk said, "Though the window."[136] He then admitted asking

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[131]Maura Dolan and Evelyn Larrubia, *Telling Police What They Want to Hear, Even if It's False*, L.A. TIMES, Oct. 30, 2004.

[132]Trial Transcript, Commonwealth of Pennsylvania v. Bruce Donald Godschalk, No. 00934-87 (Feb. 20, 1987) at 86 (on file with author).

[133]*Id.* at 121 (May 27, 1987).

[134]*Id.* at 133.

[135]*Id.* at 143-44.

[136]*Id.* at 70.

Godschalk, "Was there a screen on the window."[137] He then asked Godschalk, "What did you do with that," and Godschalk answered "I removed it."[138] This is very different than the recording in which Godschalk volunteered without prompting to have entered a window, and specifically a kitchen window, and having pulled a screen.

Godschalk testified on the stand that all of the unique facts that he supposedly volunteered had been initially brought up by the detectives.[139] However, Det. Saville denied disclosing any other facts. Indeed, he described that a crucial non-public fact as to that rape, that the victim had a tampon, was volunteered by Godschalk before the recording was made.[140] Similarly, as to the second rape, Det. Saville stated that Godschalk had admitted before being taped a series of facts that the Detective was clear had not been made public, including very unusual facts, such as that a pillow from the victim's son's bedroom was used during the assault.[141]

In Nicholas Yarris' case, law enforcement emphasized that the two crucial facts he volunteered, concerning the rape and that the victim's car had brown landau roof, were offered in "additional conversation that was not part of the normal statement," and therefore not on the tape or transcribed, and indeed, were part of a conversation during which no notes were taken.[142]

In the case of David Vasquez, just as in David Allen Jones' case, even in the portion of the interrogation that was recorded, leading questions were asked about key issues. In that case, the crucial non-public information contained in the confession was the type of cord used to bind the victim and to hang her. The police determined "that the bindings used to secure [the victim's] hands had been cut from the venetian blinds in the sunroom. The noose employed for her execution had been cut from a length of rope wrapped around a carpet in her basement."[143] It was obvious from the recording of the interrogation that Vasquez had no idea what was used to bind and murder the victim:

> Det. 1: Did she tell you to tie her hands behind her back?
> Vasquez: Ah, if she did, I did.
> Det. 2: Whatcha use?
> Vasquez: The ropes?
> Det. 2: No, not the ropes. Whatcha use?
> Vasquez: Only my belt.

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[137] *Id.* at 71.
[138] *Id.*
[139] *Id.* at 129 (May 26, 1987).
[140] *Id.* at 85-86, 144 (May 27, 1987).
[141] *Id.* at 78-80.
[142] Yarris Trial Transcript, *supra* note xxx at 2-133-35
[143] Vasquez State Memo, *supra* note xxx at 1.

> Det. 2: No, not your belt... Remember being out in the sunroom, the room that sits out to the back of the house? ...and what did you cut down? To use?
> Vasquez: That, uh, clothesline?
> Det. 2: No, it wasn't a clothesline, it was something like a clothesline. What was it? By the window? Think about the Venetian blinds, David. Remember cutting the Venetian blind cords?
> Vasquez: Ah, it's the same as rope?
> Det. 2: Yeah.
> Det. 1: Okay, now tell us how it went, David -- tell us how you did it.
> Vasquez: She told me to grab the knife, and, and, stab her, that's all.
> Det. 2: (voice raised) David, no, David.
> Vasquez: If it did happen, and I did it, and my fingerprints were on it...
> Det. 2: (slamming his hand on the table and yelling) You hung her!
> Vasquez: What?
> Det. 2: You hung her!
> Vasquez: Okay, so I hung her.[144]

During Thomas Winslow's videotaped confession, Deputy Sheriff Burdette Searcey repeatedly suggested information to him, such as the way that one would reach the victim's apartment, that others might have discussed a rape to him, and asking the leading question, "did anybody talk about anybody using any kind of apparatus to suffocate her?" At one point Searcey stated, "Let me help you refresh your memory a little bit," and later he shut off the video for 50 minutes to give Winslow time to "remember more" and speak to his attorney.

Chris Ochoa has since his exoneration described blatant abuse of recording, in which the Austin Police Department detective asked Ochoa leading questions concerning how the crime occurred, but none of that questioning was on the tape. According to Ochoa's recounting, the detective would stop the tape each time that Ochoa "came to a detail" and "it was wrong." The officers would "get mad," and show him photographs of the crime scene and the autopsy or tell him the answers, and then "start it, stop it, till they got the details. It took a long time."[145]

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[144]Memorandum in Support of Motion to Suppress, Common wealth of Virginia v. David Vasquez, C-22213-22216, at 16 (on file with author); *see also* http://www.aclu.org/capital/mentalretardation/10435pub20031209.html.

[145]Leo, *supra* note 6 at 261; *see also* Dianne Jennings, *Two Men's DNA Exonerations in '88 Austin Murder Reveal Triumph, Tragedy*, Dallas Morning News, Feb. 24, 2008 ("An Austin Police Department review later found 'strong indications that investigators supplied Ochoa with information…'").

At Richard Danziger's trial when asked "Did anyone in the Police Department tell you the facts of this crime so that you could make these statements?" he had answered "No, they did not."[146]

The other interrogations were not recorded, in some cases despite a police department practice of doing so. In Dennis Brown's case, for example, police testified that they were normally recorded interrogations, but they "chose not to turn it on" in that case because the defendant "just started talking."[147] In Ron Williamson's case, his initial statement following a polygraph examination was videotaped, and he emphatically protested his innocence. That tape was not provided to defense counsel, and in granting Williamson's habeas petition years later, the federal district court emphasized that it called into question why the officer "videotaped the denial but did not videotape the alleged confession."[148]

E. Mistaken Facts

In a few cases, police may have inadvertently suggested mistaken facts due to their incomplete knowledge about the crime scene evidence, which turned out to be inaccurate based on later information in the case. These mistakes provide insight into the limitations of officers' abilities to construct a confession narrative, particularly with a suspect who may have no knowledge of the crime. For example, Bruce Godschalk initially described entering the kitchen window of one victim's apartment. However, that apartment had no kitchen windows. Detective Saville claimed that Mr. Godschalk later changed this statement to say he had entered through a spare bedroom.[149]

In Earl Washington's case, the confession statement included the following interchange:

> Hart: Did you remove any of her clothing?
> Washington: Yes sir.
> Hart: What clothing?
> Washington: The halter top.[150]

That statement was problematic, where the inventory of the clothing from the crime scene included no halter top, but rather a sundress. Further, it was not the sort of term that would be expected from Washington's limited vocabulary. It emerged in civil discovery years later that an initial police report reported that the victim was "Nude except for a halter top," and thus, the officers may have inadvertently simply placed in

[146] TT 1046.

[147] Trial Transcript, State of Louisiana v. Dennis Brown, No. 128,634 (April 12, 1985) at 97 (on file with author).

[148] Williamson v. Reynolds, 904 F.Supp. 1529, 1565 (E.D.Ok. 1995).

[149] *See* Godschalk Transcript, *supra* note xxx at 72.

[150] *See* Washington Statement, *supra* note 97 at 5.

Washington's mouth words that they had mistakenly thought accurately reflected the crime scene evidence.[151]

Similarly, in Lowery's case, the police initially elicited a range of facts, including the location of the victim's house, the layout, what the victim was wearing and how the attack occurred. The interrogating officers, not having been to the scene, elicited and typed in an initial police report that Lowery "busted open" a screen door with his hands and went inside the victim's house. The door had in fact not been broken, but the screen door had been torn and the inside door was unlocked. Officer Johnson later prepared a supplemental report stating in part:

> Upon questioning suspect Lowery indicated that in fact he had torn open the screen door of the victim's residence and pushed open inside door.

Later when each officer testified, they did not mention Lowery saying that he "busted" the screen. At the suppression hearing, Malugani testified:

> I asked Mr. Lowery, I said, 'Did you not cut out the screen' and Mr. Lowery then stated, 'No, I ripped out the screen. I didn't have anything to cut it with. I ripped the screen open and reached through the door and unlocked the door.'
>
> Q. Did you subsequently make any determination about whether the screen was actually cut or ripped out?
>
> A. I did not. Investigator Johnson then contacted Sergeant Myers which is our evidence officer … [and] had learned from Sergeant Myers that, in fact, the screen was ripped and not cut.[152]

In some cases, the exoneree now denies ever having even repeated back some of the statements that law enforcement attributed during the interrogation. Lowery in his civil suit alleged he repeated certain facts that officers had disclosed to him, but that the officers in their testimony at trial, fabricated still additional facts which he did not even utter.[153]

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[151]*See* Edds, *supra* note 95 at 255.

[152]Trial Transcript, State of Kansas v. Eddie James Lowery, No. 81CR 575 (Nov. 12, 1981), at 19 (on file with author).

[153]Those facts included: "a. driving up and parking by the side of a house in Ogden; b. the house was white; c. the house was on a corner; d. entering by using his hand to tear open the screen door and reaching inside and lifting the latch to the screen door; e. picking up a silver table knife, a dinner knife; f. walking down a hallway (or in Malugani's testimony a living room area); g. being frightened that the woman would wake up and see him, so jumping on the bed; h. striking the victim with the handle of the knife in the head several times; i. describing that he "screwed" the victim; j. leaving the same door that he entered." Lower Complaint (on file with author).

Similarly, in the Central Park case, Yusef Salaam denies having uttered the inculpatory remarks reflected in the police report prepared after the interrogation.[154]

F. Guessed or Public Facts

A compliant or willing suspect could have been guessed some details concerning these crimes, such as very general features of a rape or a murder. However, very specific details corroborated by other evidence, were provided in all but one of these cases. In only one of these cases, that of Travis Hayes, there was no allegation that he had provided any non-public facts concerning the incident. The crime was a convenience store robbery that occurred in the open with a number of witnesses. Hayes was 17 years old and interrogated from 10 p.m. until 5 a.m. the next day.[155] His taped interrogation offered few details, and chiefly inculpated co-defendant Ryan Mathews as the shooter. Hayes claimed not to know anything about what happened in the convenience store, and that as merely the getaway driver, he "didn't see a gun or anything else like that."[156] DNA testing at the time of trial on the mask worn by the shooter excluded both Hayes and Mathews, but they were both convicted.[157]

In only one of these cases is there any suggestion after the fact that the suspect learned of a crucial non-public fact in the community because police had leaked information. In the Eddie Joe Lloyd case, a series of facts were likely disclosed to him. However, Lloyd later claimed he had known of one particular striking fact—that the killer left a green bottle at the crime scene. The prosecutor emphasized that the crime scene "area was secured, no one else was allowed in and it wasn't until sometime later when Officer Degalan and the evidence technician, Officer Babcock, went inside that garage and ended up moving the body that the bottle fell out. That was the first time they knew about it, and as Officer Degalan indicated that was not a publicized matter … Aside from the homicide investigators and Evidence Technician Babcock, the only other person who would have know that was the killer, Mr. Lloyd."[158]

After being exonerated by post-conviction DNA testing, Lloyd said he had "overheard someone at a party store mention a bottle, a detail that had not been released to the public but may have been known to those in the search party." Whether that occurred or not, Lloyd described that detectives told him a series of other facts during three interviews conducted while he was involuntarily committed at a mental hospital.

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[154]*See* McCray v. City of New York, 2007 WL 4352748 (S.D.N.Y. 2007) ("Plaintiff Salaam submits only that it is alleged, presumably by Defendants, that he made an inculpatory unsigned statement.").

[155]Dec. 2, 1998 at TT 86.

[156]Trial Transcript, State of Louisiana v. Travis Hayes, No. 97-3780, Dec. 2, 1998, at 64 (on file with author).

[157]*See* http://www.innocenceproject.org/Content/174.php.

[158]Trial Transcripts, Michigan v. Eddie Joe Lloyd, 85-00376 (May 2, 1985) at 40-41 (on file with author).

Det. De Galan, "provided me with quite a bit of information about the case," Mr. Lloyd later recalled. "He said, `What kind of jeans was she wearing?' I said, 'I don't know.' He said, `What kind do you think?' I said, 'Jordache.' He said, 'No, Gloria Vanderbilt.'" Lloyd stated that Det. De Galan "guided him through a sketch of the garage, among other details. "The emphasis was on, 'You want to help us, right?' he said. 'I said, `Sure, I want to help any way I can.'"[159]

During Robert Miller's trial, the defense did not claim facts were disclosed, but that the defendant, in a "dream state," only guessed "correct facts" a small percentage of the time, and happened to be correct with regard to some because of his familiarity with the neighborhood, neighborhood rumors, and his knowledge of public facts.[160] That defense was highly implausible. As the prosecutor emphasized in closings, Miller had confessed with great specificity, providing a series of corroborated details that would not likely have been made public by law enforcement.[161]

G. Crime Scene Visits

In thirteen of these cases, police conducted brought the exonerees to the crime scene. The visits allowed police to test the knowledge of how the crime occurred and gather facts. The visits could also provide a chance to review with the exoneree how the crime occurred. They could also be used to disclose facts. For example, Ronald Jones testified that police used a crime scene visit as an occasion to do so, stating that a detective "was telling me blood stains on the floor and different clothing that was found inside the abandoned building," and that the victim "was killed with a knife, and she was stabbed, three or four times."[162] Debra Shelden noted at Joseph White's trial that she changed her mind about certain facts in her account after being shown the crime scene, or "When I had the tour of the apartment building. When I went on the ride with the cops."[163] Such visits were not recorded. Crime scene visits occurred in the Central Park case, in which all five youths were brought to the scene, as well as in the Paula Gray, David Allen Jones, Ronald Jones, William Kelly, John Kogut, Debra Shelden, Jerry Townsend, and Earl Washington

[159]*See* Jodi Wilgoren, *Confession Had His Signature; DNA Did Not*, N.Y. TIMES, Aug. 26, 2003.

[160]*See* Miller Trial Transcript, *supra* note 48 at 1267-71, 1289.

[161]Those facts included that the victim was (1) attacked in her kitchen; (2) was wearing a nightgown and robe; (3) description of the victim's bedroom and furniture; (4) the victim was stabbed; (5) a second victim was killed in her front bedroom; (6) the electricity to the second victim's house was cut off; (7) that victim was wearing a nightgown; (8) the perpetrator tore his clothes, leaving a piece of his underwear; (9) the second victim was raped more than once; (11) the second victim's hair was pulled; (12) the second victim was covered with her sheets on her bed; (13) the perpetrator wiped bloody hands on the bed sheets. *Id.* at 1055, 1074-1183.

[162]Trial Transcript, State of Illinois v. Ronald Jones, No. 85-12043 (Feb. 24, 1986) at 77, 112 (on file with author).

[163]White Trial Transcript, *supra* note xxx at 787.

cases. Each supposedly identified in person features of the crime scenes that were non-public and corroborated by the investigation.

Most problematic, Earl Washington, Jr. led police to locations all around Culpepper, Virginia, having had no idea where the victim was murdered.[164] Even after being driven right in front of the victim's building several times, he did not identify it. When the police then asked him to point to her building once in the apartment complex he pointed to "the exact opposite end" of the complex, and it was only when Officer Wilmore pointed to her apartment and asked if that was it, he finally answered "yes."[165] In other exonerees' cases, police did not describe such uncertainty, and so it remains quite questionable how absent police prompting innocent suspects could have described on their own what transpired at these crime scenes.

H. Inconsistencies and Lack of Fit

The Inbau and Reid treatise cautions that while "[m]any investigators have the impression that once a confession has been obtained, the investigation is ended," that "seldom, if ever, is this true," where a confession must be substantiated by other evidence to be convincing at trial.[166] In these cases, police often ceased their investigation once they obtained a confession, and in doing so, they not only failed to substantiate the confession, but failed to investigate glaring inconsistencies between the confession and crime scene evidence.

The vast majority of these exonerees made statements in their interrogations that were contradicted by crime scene evidence, victim accounts, or other evidence known to police during their investigation. In Deskovic's case, for example, an inquiry later conducted by the District Attorney's office concluded:

> [A]ll investigation ceased after police obtained Deskovic's purported confession. The prosecution apparently did little or nothing to corroborate the theories it employed to square the scientific evidence with Deskovic's guilt. There is no evidence, for example, that much was done to locate the 'boyfriend' who was the supposed source of semen or even to document [the victim's] movements in the 24 hours before her death.[167]

In Deskovic's case the problem of the source of the semen was particularly glaring, because although the state's theory was that he raped and murdered the victim alone, the DNA results at the time of trial

[164]Washington Trial Transcript, *supra* note 98 at 622-23.
[165]*Id*. at 625.
[166]*Id*. at 390.
[167]*See* Deskovic Report, *supra* note 9.

excluded him.[168] Indeed, eight of these exonerees were excluded by DNA testing conducted at the time of their trial and were only exonerated after post-conviction testing not only excluded them but inculpated another person.[169]

In LaFonso Rollins' case, exculpatory forensic evidence was concealed—apparently because he had confessed. The crime lab technician had found that serology from the rape kit excluded Rollins and had asked his supervisors to send the kit to the F.B.I. for DNA testing, but as he later testified in a deposition, "his request was refused because police said Rollins confessed."[170] In the Beatrice Six case, all of the suspects who confessed had been excluded by conventional serology testing (and a different suspect who was not pursued, but who years later was identified by DNA testing as the actual perpetrator had been mistakenly excluded).[171]

Crucial to assessing the reliability of the post-admission narrative provided during an interrogation is analysis of what suspects say when they are *not* prompted by law enforcement. An innocent person, without prompting, should not be able to volunteer specific crime information. While these innocent suspects had specific facts disclosed to them, most were at times asked to volunteer information, and because they were innocent, they got those facts wrong. As Richard Ofshe and Richard Leo have developed, "the reliability of a confession statement can usually be objectively determined by evaluating the fit between a post-admission narrative and the crime facts."[172]

In at least twenty-eight of these cases, the exoneree supplied facts during the interrogation that were inconsistent with the known facts in the case.[173] Thus, there were clear indicia of unreliability at the time of the investigation. Prosecutors then had to explain these inconsistencies to the jury by downplaying them and emphasizing instead the powerful non-public facts that each had supposedly volunteered.

Earl Washington's case provides a classic example of a lack of fit. Separate stages of the interrogation were later described by police. In the initial stage, whenever he was not asked a leading question, he got the answers wrong. He told police that the victim was black when she was white.[174] He described stabbing the victim a few times when she was

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[168]*See id.*

[169]The eight are: J. Deskovic, T. Hayes, R. Matthews, A. McCray, K. Richardson, R. Santana, Y. Salaam, and K. Wise. *See* Brandon L. Garrett, Claiming Innocence, 92 *Minn. L. Rev*. 1629, 1660-61 (2008).

[170]Maurice Possley, *Lab Didn't Bother with DNA*, CHI. TRIB., Aug. 25, 2006.

[171]*See* Jason Volentine, Stolen Lives: The Story of the Beatrice Six (Part Three), KOLN/KGIN, March 17, 2009.

[172]*See* Leo & Ofshe, *supra* note xxx at 1119.

[173] In other cases, the law enforcement account of the interrogation does not describe any statements made inconsistent with the crime, but absent a complete recording of the interrogation, one can not be confident what transpired.

[174]Washington Trial Transcript, *supra* note 98 at 596.

stabbed dozens of times. He described the victim as short when she was tall. He said he "didn't see" anyone else in the apartment, when the victim's two children were there.[175] It was clear he knew nothing about the crime, but ever compliant, would agree with whatever was posed to him. The prosecution, as described, instead emphasized how Washington had supposedly volunteered how he left his shirt at the crime scene, which we now know he never volunteered.

Earl Washington had, in fact, confessed to four additional crimes; he confessed to every crime he was asked about, but in the other cases the victims were not deceased and told police he was not the assailant, or the confessions were deemed totally inconsistent with how the crimes occurred.[176] Similarly, Jerry Frank Townsend confessed to every unsolved murder they could think of, securing confessions to about twenty murders, most in Florida.[177]

Byron Halsey was also highly compliant with police interrogators. Halsey made multiple incorrect guesses as to the manner in which a gruesome rape and murder of two children occurred. When asked how he put nails into one victim's head, Officer Pfeiffer recounted, "His initial response was crowbar. He grinned at us." "Lieutenant Lynch said to him, 'Now, Byron, you want to give us a truthful statement? You know, a crowbar, is that the truth?' Then he came up and he said, 'Hammer.' He grinned again." "Then he mentioned chair. He grinned again."[178] The perpetrator actually used a brick to put nails into the victim's forehead. Following that interchange, Officer Pfeiffer recalled that "he finally did tell us what he used to drive the nails into [the victim's] head'" and stated "I used the brick." The prosecutor asked, "Any time was it suggested to the defendant what the answer should be?" and Officer Pfeiffer answered "No."[179] The final admission that he "used the brick" was important at trial: "The significance of the device used was that the state ran a laboratory analysis on the brick. A substance found on the head of the nails removed from [the victim] was consistent with the components of the brick."[180]

The prosecution in closings not only denied that any facts were disclosed, but noting inconsistencies, including concerning the type of scissors also used to commit the crime, argued that it was all part of a strategy by Halsey: "You know why, ladies and gentlemen, because he thinks he's just given a sworn statement that's going to let him off."[181]

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[175]*Id.* at 618.

[176]*See, e.g.* Eric M. Freedman, *Earl Washington's Ordeal*, 29 HOFSTRA L. REV. 1091 (2001).

[177]Ardy Friedberg & Jason Smith, *Townsend Released; Judge Cites "An Enormous Tragedy"; Attorneys Say Suspect Was Easily Led to Confess*, SUN-SENTINEL (FT. LAUDERDALE, FLA.), June 16, 2001, at 1A.

[178]Halsey Trial Transcript, *infra* note 213 at 714-715.

[179]*Id.*

[180]State v. Halsey, 748 A.2d 634, 637 (N.J.Super.A.D. 2000).

[181]*Id.* at 371.

The prosecutor added, "he's trying to mislead . . . he's trying to lie his way out of this in that confession in which he is so contrite, and he's so penitent."[182]

Robert Miller's case also involved striking inconsistencies in a long partially taped interrogation, including where he claimed "one of the victims was only a little older than himself. She was eighty-three at the time of her death and Miller was twenty-eight."[183] The prosecutor explained in closings that, the defense attorney:

> [T]alked about all of the inconsistencies that Robert Miller injected into those 13 hours. And he did. He threw in a lot of garbage. Let me ask you a question. The fact that he threw in a lot of garbage, does that explain how he knew all those other little details? He knew the intricate details. How did he know them? . . . if you listened carefully, these detectives never once suggested an answer to him.[184]

In cases in which the exoneree inculpated others, inconsistencies often arose concerning which person committed which acts. For example, Chris Ochoa admitted in Richard Danziger's trial he lied about facts inconsistent with his later accounts of the crime, particularly whether he or Danziger was the shooter.[185]

The Central Park case was replete with inconsistent statements by the five youths convicted; the District Attorney later agreed that their accounts differed on the details of "virtually every major aspect of the crime."[186] Those "major details" included "information regarding who initiated the attack, who knocked [the victim] down, who held her, who undressed her, who struck her, who penetrated her, what weapons were used during the attack, the location of the attack, the time of the attack, and when in the sequence of events the attack took place."[187] Their statements were "also inconsistent with the facts of the crime," and "contradicted the physical evidence."[188] As in the other exonerees' cases, however, those inconsistencies did not prevent a conviction at trial.

I. Litigating Contamination of Confessions at Trial

Although many of these false confessions betrayed indicia of unreliability at the time of trial, the issue was rarely litigated because courts conduct very limited reliability review. The Supreme Court's early voluntariness jurisprudence focused on the question of reliability,

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[182] *Id.* at 377.

[183] http://www.innocenceproject.org/Content/219.php.

[184] Miller Trial Transcript, *supra* note 48 at 1289-90.

[185] State of Texas v. Richard Danziger, No. 96,470 at 1006-9.

[186] McCray v. City of New York, 2007 WL 4352748 *5 (S.D.N.Y. 2007) (quoting District Attorney's Affirmation regarding 2002 motion to vacate convictions).

[187] *Id.* (quoting plaintiffs' complaints).

[188] *Id.*

including whether police demanded that a suspect conform to their account of how a crime occurred.[189] However, by the 1960's, the Court's voluntariness jurisprudence focused instead on the formal question whether police pressure overwhelmed the suspect's will, even in cases where the confession appeared grossly unreliable. The Court has stated that "the circumstance of probable truth or falsity" "is not a permissible standard" under the Due Process Clause, and the proper question instead is whether the confession was "freely self-determined."[190]

Due to the Court's rejection of the consideration of "probable reliability" of a confession,[191] even grossly unreliable confessions may be admitted if found not to have been the product of affirmative police coercion. In *Colorado v. Connelly*, a case in which the schizophrenic defendant thought he was hearing the "voice of God" during his interrogation (he was later medicated for six months before found competent to stand trial for murder),[192] the Court found that where no overt police pressure was applied to him, there was no "essential link between coercive activity of the State, on the one hand, and a resulting confession by a defendant, on the other."[193] The Court summarized the turn in its jurisprudence, stating that though a confession statement "might be proved to be quite unreliable. . . this is a matter to be governed by the evidentiary laws of the forum . . . not by the Due Process Clause of the Fourteenth Amendment."[194]

Looking beyond federal constitutional law, state corpus delicti and corroboration rules require some evidence that the confession is reliable. As one court explains, "there should always be something more than a mere naked confession of one accused, to justify a verdict of guilty."[195] Similarly, the common law corpus delicti requirement seeks to avoid the danger "that an accused may confess to an *imaginary* crime rather than a *real* crime."[196]

However, courts often require only very thin corroboration, such as some evidence of an injury caused by a crime.[197] For example, the court's jury instruction in Bruce Godschalk's case merely informed the jury that in order to consider the confession they must "find that a crime was committed" based on any evidence "apart from the statement itself," and that "[t]he other evidence need not tend to show that the crime was committed by the defendant, only that a crime was committed."[198]

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[189]Culombe v. Connecticut, 367 U.S. 568 (1961); White, *supra* note xxx at 212-13; Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 867 (1981).

[190]Rogers v. Richmond, 365 U.S. 534, 544-44 (1961).

[191]*Id.* at 544.

[192]479 U.S. 157, 161 (1986); id. at 175 (Brennan, J., dissenting).

[193]*Id.* at 165.

[194]*Id.*

[195]People v. Robson, 80 P.3d 912 (Colo. Ct. App. 2003).

[196]People v. Rooks, 40 Misc. 2d 359, 368.

[197]*See* Leo et. al. at 510-11.

[198]Godschalk Trial Transcript, *supra* note xxx at TT 236-37 (May 29, 1987).

Similarly, in the Central Park case, the appellate court found Antron McCray's confession sufficiently corroborated based simply on "the proof that a rape was committed, even if it did not establish defendant's identity."[199] A handful of states and federal courts exclude confessions if there is no indicia of any reliability, based on a "trustworthiness" standard. That standard requires some independent corroborating evidence supporting the confession, but scant evidence satisfies the test. Though courts look at whether the defendant offered facts corroborated by the investigation, they also look generally to the circumstances of the confession and whether it appeared voluntary.[200] Thus, no courts currently conduct a full examination of a confession's reliability.

Less than one third of these defendants, ten, had their attorneys argue at trial that the confession was contaminated, at least in the materials obtained which sometimes omitted pre-trial motions. They typically had no evidence to support an allegation that facts had been disclosed. Some of these exonerees testified that the facts had been fed to them. For example, John Kogut testified, "Nothing was asked of me. Everything was told to me."[201] Attorneys typically did not focus on reliability, as no legal theory typically supported relief for an unreliable confession, but rather on criminal procedure claims concerning the voluntariness of the statements and whether the defendant had the capacity to understand *Miranda* warnings or to be tried. As will be developed below, while gross unreliability typically lacks any legal remedy, courts often emphasized apparent reliability in denying motions to suppress the seeming reliability of these confessions. The next Part turns to those criminal procedure rules.

III. FALSE CONFESSIONS AND CONSTITUTIONAL CRIMINAL PROCEDURE

This Part turns from the substance of false confessions to criminal procedure. At trial, almost all exonerees' defense attorneys tried to suppress the confessions as coerced or involuntary. Perhaps in part because these confessions were bolstered by contaminated facts, despite indicia of involuntariness in many of these cases, courts ruled each of these confessions voluntary and admissible. This Part explores the reasons courts provided when finding these confessions voluntary under the Fifth Amendment, and examining the evidence of coercion presented by exonerees and disputed by the State. The last sections describe how these exonerees fared during appeals and then discusses seven exonerees' cases in which inculpatory statements were volunteered outside the custodial setting.

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[199] People v. McCray, 604 N.Y.S.2d 93 (N.Y.A.D., 1993).

[200] *See* Leo et. al., *supra* note 29 at 508 (citing case law); *see, e.g.* State v. Mauchley, 67 P.3d 477, 488 (Utah 2003).

[201] Kogut Trial Transcript, supra note xxx at TT 803.

A. *Miranda* Warnings

The Court's *Miranda* protections are intended to avoid difficult voluntariness questions by providing notice in the interrogation room of certain rights. All of these exonerees waived their rights under *Miranda v. Arizona.*[202] Scholars have concluded that the vast majority of all suspects similarly waive their rights; these innocence suspects acted no differently than the typical suspect.[203] Not one of these exonerees obtained an attorney before or during their interrogation.[204] Twenty-one exonerees had signed waiver forms and ten waived their rights on video. Many had been interrogated or provided admissions of wrongdoing before law enforcement considered them to be in custody and before any *Miranda* warnings were provided. However, in many of those cases, law enforcement used a "question-first" gambit, by eliciting admissions and then subsequently providing the warnings.[205] The Supreme Court has approved such an approach, though only if the circumstances present "a genuine choice whether to follow up on the earlier admission."[206]

Although the *Miranda* warnings did not benefit any of these innocent suspects, the waiver of those rights severely harmed later efforts to challenge their false confessions. Illustrating the dispositive role that provision of *Miranda* warnings can play, in David Vasquez's case, there was a partially recorded interrogation in which outright feeding of facts was apparent from the recording. The Court excluded initial statements elicit through use of "good guy/bad guy methods of interrogation and the careful use of factual misstatements of the evidence," but despite the audio recording of quite egregious feeding of facts quoted earlier, the Court found the follow-up interrogation admissible, chiefly relying on the

[202]384 U.S. 436 (1966).

[203]Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 276 (1996) (presenting results of study of 122 interrogations and finding that 78 percent involved *Miranda* waivers); *see also* Steven D. Clymer, *Are Police Free to Disregard Miranda?*, 112 YALE L.J. 447, 502-12 (2002); Richard A. Leo, *Questioning the Relevance of* Miranda *in the Twenty-First Century*, 99 MICH. L.REV. 1000, 1010 (2001); Louis Michael Seidman, *Brown and Miranda*, 80 CAL. L. REV. 673, 745 (1992) (noting the Court excluded confessions more often pre-Miranda).

[204]Several defendants in the Beatrice Six case, while interrogated initially absent their attorneys, later made videotaped confession statements with their attorneys present.

[205]The Godschalk and Yarris cases discussed *supra* notes xxx and xxx are examples.

[206]Missouri v. Seibert, 542 U.S. 600, 616; id. at 609 n.2 (2004) ("Most police manuals do not advocate the question-first tactic, because they understand that *Oregon v. Elstad*, 470 U.S. 298 (1985), involved an officer's good-faith failure to warn."); *Elsted*, 470 U.S. at 318 (holding that even if an initial confession was obtained improperly, such as without *Miranda* warnings, a subsequent second confession after properly administered warnings is admissible); *Oregon* v. *Mathiason*, 429 U.S. 492, 495 (1977) (*Miranda* warnings are required "only where there has been such a restriction on a person's freedom as to render him 'in custody.'").

delivery of *Miranda* warnings with no "application of any duress or force" and also based "on the conflicting evidence given by the psychiatrists."[207]

Perhaps most remarkable of the rulings concerning *Miranda* warnings was at the trial of Eddie Joe Lloyd. Just the location of the interrogation should have been glaring evidence of his mental illness and suggestibility. Lloyd had been interviewed while he was involuntarily committed in a mental hospital, with a preliminary diagnosis of bipolar affective disorder.[208] The trial court still ruled his statements voluntary, noting "[a]fter he is advised of his rights, it doesn't make a difference what form [the interrogation] takes."[209] This use of *Miranda* to short-circuit a meaningful inquiry into the voluntariness of a confession supports scholars who question whether *Miranda* remains relevant, and indeed, whether its influence is harmful.[210]

B. Indicia of Involuntariness

The Supreme Court's voluntariness standard examines the "totality of the circumstances" surrounding the confession to assess whether the confession was coerced, focusing on "the characteristics of the accused and the details of the interrogation."[211] The prosecution has the burden to show that no undue coercion was applied to the suspect.[212] The Court has explained that the "ultimate test" focuses on the question whether the confession is "the product of an essentially free and unconstrained choice by its maker . . . If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process."[213] Trial courts conduct pre-trial hearings to examine the question whether the confession was voluntary and should be admitted. All of these false confessions were admitted, and the trial court rulings themselves will be discussed next. This should not be surprising, where the voluntariness standard is notoriously forgiving and vague.[214]

Although courts admitted these exonerees confessions, perhaps sometimes properly, many of these confessions raised significant indicia of involuntariness at the time. The Supreme Court has identified several

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[207]Commonwealth of Virginia v. David Vasquez, C-22213-22216, C22763, Judge William L. Winston, Memorandum, Jan. 25, 1985 (on file with author).

[208]Lloyd Transcript, supra note xxx, at 20.

[209]Lloyd Transcript, supra *note* xxx at 78-79 (May 1, 1985).

[210]*See supra* note 178.

[211]*Arizona v. Fulminante*, 499 U.S. 279 (1991); *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973); Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309, 314-20 , 353 n.53 (1998) ("The task of the Court is to identify the circumstances in which the defendant's will is in fact overborne. Unfortunately, there is no litmus test for determining this question. In each case the relevant factors must be weighed anew.").

[212]*Brown v. Illinois*, 422 U.S. 590, 604 (1975) ("[T]he burden of showing admissibility rests, of course, on the prosecution.")

[213]*Culombe v. Connecticut*, 367 U.S. 568, 602 (1961).

[214]*See, e.g.* Schulhofer, *supra* note xxx at 869.

indicia of involuntariness.[215] One set of factors related to whether the suspect was vulnerable to coercion. Thus, one factor the Court has long taken into account is "the youth of the accused."[216] Thirteen of the exonerees who confessed were juveniles.

A second factor the Court developed was "low intelligence" of the accused.[217] At least thirteen of those who falsely confessed were mentally disabled, many obviously so, but as discussed below, few had experts to develop the issue. Others had clear emotional problems.

A third factor is "the lack of any advice to the accused of his constitutional rights."[218] As noted, none obtained counsel prior to initially confessing. A fourth factor is the "length of detention" together with "the repeated and prolonged nature of the questioning."[219] Inbau and Reid note that "the most common circumstances supporting a claim of duress is the length of the interrogation."[220] Most of these exonerees endured quite lengthy interrogations. Typically, John Kogut was told "you're not going anywhere until we get the truth."[221] Only three were interrogated for less than three hours: Lafonso Rollins and David Vasquez, both of whom were mentally retarded, and Yusef Salaam, a juvenile whose interrogation was halted by the arrival of a family friend and Assistant U.S. Attorney (unlike those of the other four youths in the Central Park case, who were interrogated for many hours).[222] The other exonerees were interrogated for far longer, typically involving multiple interrogations over a period of days, or interrogations lasting for more than a day with interruptions only for meals and sleep. Jerry Townsend was interrogated for 30-40 hours over the course of a week.[223] Just the recorded portions of Robert Miller's interrogation lasted 13-15 hours.[224]

An additional factor includes "use of physical punishment such as the deprivation of food or sleep."[225] In several cases, exonerees alleged, accurately or not we often do not know, that police used physical force. Bradford later claimed that police beat him. Dennis Brown claimed that the officer first unbuckled his gun belt then "put a knife on me."[226] Ronald Jones testified at trial that Detective Hood handcuffed him to the wall and hit him in the head several times with a long black object because

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[215]*Id*.; *see also* Gallegos v. Colorado, 370 U.S. 49 (1962).

[216]*Schneckloth*, 412 U.S. at 226.

[217]*Id*.

[218]*Id*. (citing cases).

[219]*Id*. (citing cases).

[220]Inbau and Reid, *supra* note 41 at 422.

[221]Trial Transcript, People of the State of New York v. John Kogut, Ind. 61029 (May 1986) (on file with author) at 4:26-27.

[222]Barbara Ross and Alice McQuillan, *48 Hours: Twisting Trial to Teens' Confessions*, N.Y. DAILY NEWS, Oct. 20, 2002.

[223]Trial Transcript, State of Florida v. Jerry Frank Townsend, No. 79-7217 (July 16, 1980) (on file with author) at 2160.

[224]Miller Transcript, *supra* note 48 at 1039.

[225]*Schneckloth*, 412 U.S. at 226 (citing cases).

[226]See Brown Trial Transcript, *supra* note 80 at 165.

Jones refused to confess to the murder.[227] According to Jones, a second officer then entered the room and "was surprised" at "the treatment" "and told him, he said no, don't hit him, because he might bruise."[228] That officer proceeded with hitting him the "midsection with his fist" when he would not admit his involvement in a homicide. [229]

Paula Gray was kept at hotels with seven police officers for two days[230] as a "protected custody witness" regarding a double murder investigation.[231] During her custody she made a statement inculpating herself and three other innocent people, in a case that became known as the "Ford Heights Four" case. Gray testified that she was asked, "Did they emphasize what would happen if you did not tell this story?" and answered "That they would kill me."[232] Law enforcement denied engaging in any such conduct in each of these cases and absent any recording of the interrogations, we do not know for sure what transpired.

The demeanor of the defendant during the interrogation may shed light on whether the confession was voluntary. The State admitted that David Vasquez gave a statement that "at times" was "virtually incomprehensible."[233] Byron Halsey, who had a "sixth-grade education and severe learning disabilities,"[234] by the detective's own admission gave a statement that was at times full of "gibberish" in which Halsey was "saying one syllable words, free flowing like a water fall" and at other times appeared to be in a "trance" state in which he "just stopped and looked out into blankness."[235] A series of exonerees described their involvement as something that had come to them in a dream: Rolando Cruz, James Dean, Robert Miller, Debra Shelden, and Ron Williamson. At Joseph White's trial, James Dean expressed confidence that at least he could "pretty much" tell the difference between his dreams and reality, while Debra Shelden admitted that what she had described also came from dreams: "Q. So then everything you've told us today has come to you in a dream. Would that be correct? A. Yes."[236]

Most of these exonerees signed written statements containing boilerplate language stating they had been treated well and mirroring the considerations in the Supreme Court's voluntariness standard. Thus, Lafonso Rollins signed a statement repeating that "he has been treated well by the assistant state's attorney, Caren Armbrust, and the police.

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[227]Trial Transcript, People of the State of Illinois v. Ronald Jones, No. 85-12043 (July 13, 1989) (on file with author) at 125-26.

[228]*Id.*

[229]*Id.*

[230]Trial Transcript, State of Illinois v. Paula Gray, at TT 3572-74.

[231]*Id.* at 2078.

[232]*Id.*

[233]State Memo, supra note xxx at 3.

[234]http://www.innocenceproject.org/Content/583.php

[235]Trial Transcript, State of New Jersey v. Byron Halsey, No. 0063-01-86 (March 11-18, 1988) (on file with author), at 692, 695.

[236]White Trial Transcript, *supra* note xxx at 795, 851.

Lafonso Rollins states he has eaten pizza and a sandwich and has had coffee and cola to drink while he has been at the police station. Lafonso Rollins states that he has not been threatened in any way, nor has he been made any promises for this statement."[237] Similarly, Bruce Godshalk admitted at trial that he had been asked on tape by the detectives, "How have we treated you?" and he answered "Very well."[238]

C. Use of Deceptive Techniques

Where the voluntariness standard does not prohibit any particular psychological techniques, police regularly employ a series of strategies to place pressure on unwilling suspects to confess.[239] These interrogations featured the use of techniques to both threaten negative consequences for not confessing and to reward the confession. Some officers used "Mutt and Jeff" or "Good Cop Bad Cop" techniques, for example, in David Vasquez's case, in which the recordings showed he was variously treated strictly and then told by others "we are the ones that can help you."[240] Several cases involved allegations of threats of conviction or the death penalty combined with offers of leniency should the suspect confess. Ochoa testified that Polanco's interrogation "scared the heck, scared the living daylights out of me."[241] Ochoa testified that Polanco threatened him with the death penalty and said "You're going to get the needle. You're going to get the needle for this. We got you."[242]

The Supreme Court has also held that police misrepresentations, such as that another suspect confessed, do not necessarily render a confession involuntary.[243] Techniques such as the "false evidence ploy," which have been shown to increase the risk of a false confession, were used in several of these exonerees' interrogations.[244] For example, in the Robert Miller case, the detective described the interrogation as follows:

> Q. You told him you had an eye witness that saw him leaving Mrs. Cutler's house and had in fact shown pictures

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[237]Trial Transcript, People of the State of Illinois v. Lafonso Rollins, No. 93 CR 6342, (March 2, 1994), at D-182.

[238]Trial Transcript, *supra* note xxx at 126-7 (May 26, 1987).

[239]*See* Inbau & Reid, *supra* note 41 at Ch. 13 (presenting the Reid "nine steps of interrogation").

[240]Memorandum in Support of Motion to Suppress, Commonwealth of Virginia v. David Vasquez, C-22213-22216, at 16 (on file with author).

[241]Danziger Transcript, *supra* note 46 at 156.

[242]*Id.* at 157. Ochoa pleaded guilty in part to avoid the death penalty, receiving life in prison. *Id.* at 118.

[243]Frazier v. Cupp, 394 U.S. 731, 739 (1969); Laurie Magid, *Deceptive Police Interrogation Practices: How Far is Too Far?*, 99 MICH. L. REV. 1168, 1169 (2001); Inbau & Reid, *supra* note 41 at 486-87 (noting that the Court has approved deceptive techniques, but counseling against their use when they could by "apt to make an innocent person confess").

[244]*See* Kassin, *Psychology of Confessions*, *supra* note 3 at 9-10 (surveying studies).

> – a picture lineup, one of which a picture was Robert, to this witness, and this witness identified Robert's picture, is that right?
> A. Yes.
> Q. And that was in fact not true.
> A. That's correct.
> Q. You were stretching the truth, shall we say, to try to once again elicit information from him; is that right? That was one of your techniques?
> A. Well, I don't know if I could say elicit information. All I could gather – was trying to gather the truth at that point. . . .
> Q. Once again, you were telling him information hoping that he would throw his hands up and say, okay, you've got me, I did it. That was pretty much your plan; is that right?
> A. Yes.[245]

Other exonerees were told—falsely—that forensic evidence connected them to the crime. David Vasquez confessed after he was told that his fingerprints were found at the scene.[246] Similarly, in the Central Park case, Yusef Salaam allegedly confessed after he was told "we have fingerprints on the jogger's pants or her jogging shorts, they're satin, they're a very smooth surface . . . I'm just going to compare your prints to the prints we have on the pants, and if they match up, you don't have to tell me anything. Because you're going down for rape."[247]

Polygraph machines were used as part of efforts to secure confessions in five of these cases. Eddie Lowery was told that he failed a polygraph, as were John Kogut, Byron Halsey and Travis Hayes. Indeed, the court permitted the polygraph results concerning Halsey to be introduced at his trial. Jeff Deskovic, as described, was interrogated while attached to a polygraph device.[248] Scholars have contended that while polygraphs may not be a reliable means to test the truthfulness of a suspect, they can be used to exert pressure of a suspect and secure admissions.[249] In these cases, telling the innocent suspect that they failed a polygraph may have played an important role in their false confessions.

D. Trial Rulings on Suppression of Confessions

Almost all of these exonerees' defense attorneys moved to have the inculpatory statements suppressed, and in each case the confession was

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[245]Miller Trial Transcript, *supra* note 48 at 1020-1022, 1037.

[246]Memo in Opposition to Motion to Suppress at 3.

[247]Sydney H. Schanberg, *A Journey Through the Tangled Case of the Central Park Jogger*, VILL. VOICE, Nov. 20, 2002.

[248]Deskovic Trial Transcript, *supra* note 8 at 1442. Ron Williamson was given polygraph tests twice with inconclusive results, but they preceded his alleged admissions.

[249]*See, e.g.* Leo, *supra* note 6 at ch.3 (describing the evolution in use of polygraphs).

ruled admissible. At least 27 of these exonerees challenged their confessions pre-trial. For 13 exonerees a copy of the suppression hearing was obtained.[250] The only exonerees who we know did *not* challenge their confession at trial were nine who pleaded guilty and had no trial, and one, Rolando Cruz, who was convicted at trial. Cruz' defense attorneys apparently did not challenge his alleged statements regarding a "vision" of the crime because they were non-custodial and also because the defense theory was that police had made those statements up.[251] (The defense may have been right; at Cruz' third trial, an officer testified that his prior testimony corroborating his colleagues recounting of the "vision statement" was false.[252]) Preliminary hearings that include motion practice concerning the confession are not always transcribed; for two cases the available record is not clear whether the exonerees moved to have statements suppressed.[253] In sum, of those 28 exonerees who went to trial and whose available records indicate whether a pretrial challenge to the admission of the confession was made, 27 of them (96%) made such a challenge, and all were unsuccessful.

The rulings provide insight into the role of judicial review in cases of known false confessions. In some cases, a court's ruling can be explained by the lack of any indicia of coercion in the record. Perhaps explaining such cases, research suggests that innocent individuals may be more likely to voluntarily during police interrogations, because they believe that "the truth will come out" later even if they falsely admit their guilt.[254] For example, Eddie Lowery described a long interrogation with verbal pressure and threats, but no physical threats, no congenital susceptibility to suggestion, nor other extreme psychological pressure placed upon him. He testified at trial that "after I was crying and everything and really just couldn't—couldn't handle myself or anything, you know, and finally they wanted to hear a confession and everything so I just made up a confession and told them."[255] The court concluded, "He was not coerced into staying under the circumstances and looking at the totality of the case and all of the facts and circumstances this Court would find that the admissions given by this defendant were voluntarily made and were not a result of coercion, duress or unfairness on the part of the

[250]Four exonerees who pleaded guilty and were not themselves tried did not move to suppress their confessions. A fifth, David Vasquez, moved to suppress his confession before pleading guilty and I obtained motion papers, but the hearing transcript was not in the court file.

[251]According to Steven Drizin of the Center on Wrongful Convictions, there were no motions to suppress Cruz's confession because the defense theory was that the non-custodial confession never happened, but rather that it was a dream statement made up by the police.

[252]*See* Scott Turow, ULTIMATE PUNISHMENT 45 (2003).

[253]Those cases are those of L. Rollins and R. Miller. Efforts are being made to contact their trial attorneys.

[254]Saul M. Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents as Risk*, 60 AMER. PSYCHOL. 215 (2005) (surveying research).

[255]Lowery Trial Transcript, *supra* note xxx at 257.

officers conducting the interrogation."[256] In Douglas Warney's case, though he alleged coercion, the Court relied heavily on how he initially approached police volunteering his knowledge about the crime, noting: "This was information that he volunteered to submit himself to present, and he followed through on that."[257]

Though the Supreme Court has ruled out reliance on reliability as a reason to exclude a confession, judges focused on the perceived reliability of these confessions in admitting confessions and finding them to be voluntary. In the Godschalk case, the Court emphasized that Mr. Godschalk "had given information to the detectives which was not released to the general public," though the judge did not say which specific facts he found convincing.[258] The judge also believed that Godschalk was not in custody for *Miranda* purposes (stating he voluntarily accompanied the police, was free to leave when he wanted, and the door was not locked), and found that Godschalk knowingly, intelligently and voluntarily waived his rights when they were given and denied the motion to suppress his confession statement.[259]

Similarly, in the trial of Paula Gray, the court ruled that where *Miranda* warnings had been properly given once she was in custody, and where "No force, threats or prohibited conduct in police procedures in my judgment occurred in the Homewood Police Department," the confession was voluntary.[260] The Court noted, "Incidentally, the defendant testified with skill, with knowledge, explicitly, extremely clear, made her points well and all it means to me is whether she's in twelfth grade or whatever her educational level is she's a very intelligent person. That's my judgment and those are my findings and my decision."[261]

Ron Williamson's trial counsel raised the issue of voluntariness mid-trial, but the Court reviewed law enforcement testimony and the statement was ruled voluntary, stating "[b]ased on the evidence presented, I find that the burden of the State has been met, and that the statement was voluntarily given for the purpose of being received into evidence and considered by the jury."[262]

In only a few of these trials was the jury charge transcribed and obtained. A typical instruction provided in Bruce Godschalk's case explained the voluntariness inquiry, involving an assessment of "all facts

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[256]Lowery Trial Transcript, *supra* note xxx at 117.

[257]Warney Trial Transcript, *supra* note xxx at 6.

[258]Godschalk Trial Transcript, *supra* note xxx at 154 (May 26, 1987).

[259]*Id.*

[260]Gray Trial Transcript, *supra* note 208 at 1313.

[261]*Id.* at 1314. In contrast, when the issue on appeal was whether co-defendant Dennis Williams' attorney adequately impeached Paula Gray's competency, the Supreme Court of Illinois instead concluded that her mental limitations were obvious to the jury: "the cold record on appeal amply demonstrates Gray's limitations as a witness. Gray's testimony is replete with instances of forgetfulness, feigned or honest, her mental dullness and impeachment, all of which the jury evaluated firsthand." People v. Williams, 147 Ill.2d 173, 239 (Ill. 1991).

[262]Williamson Trial Transcript, *supra* note 88 at 215, 225.

and circumstances surrounding" the confession.[263] In Jeffrey Deskovic's case, the jury was instructed to consider whether the confession statements "are true or false in whole or in part."[264] The Judge explained that the jury should examine not just voluntariness, but reliability, asking: "Are the facts of the statement or statements consistent with or inconsistent with the facts as presented by witnesses? Is the Defendant's statement or statements probable or improbable? Did the Defendant have any motive or did he lack any motive for giving a false statement or statements?"[265]

One of these exonerees, Nathaniel Hatchett, had a bench trial, at the conclusion of which the judge as factfinder explained the reasons supporting the conviction. Though the victim in that case had been raped by a single stranger-assailant, and DNA testing at the time of the trial of rape kit evidence excluded Hatchett, the judge explained that "in light of the overwhelming evidence that the Court has. . . the Court does not find that the laboratory analysis is a fact which would lead to a verdict of acquittal."[266] The Judge emphasized that despite that powerful DNA evidence, "in this case there is an abundance of corroboration for the statements made by Mr. Hatchett to the police after his arrest, about what happened during the assault on [victim] as well as what happened afterwards with the property, the keys, his punching of the ignition and the Court finds the statements, therefore, to be of overwhelming importance in determining the outcome of the trial."[267]

E. Use of Experts

Only three exonerees received assistance from experts, such as psychologists or psychiatrists, concerning their confessions, based on materials obtained The exonerees were David Allen Jones, Jerry Townsend and David Vasquez. In Vasquez' case, the hearing transcripts are not in the court file; the court merely held that there was "conflicting evidence given by the psychiatrists at the evidentiary hearing."[268] David Allen Jones retained a clinic psychologist who testified that he found Jones "mildly mentally retarded."[269] In other cases, only the prosecutor retained an expert.[270]

At Jerry Townsend's suppression hearing, there was a lopsided battle of the experts. What was surprising given a typical lack of defense resources, the contest was weighted in the defense's favor. The defense called seven different clinical psychologists and psychiatrists as experts.

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[263]Deskovic Trial Transcripts, *supra* note 8 at 238-9 (May 29, 1987).

[264]*Id.* at 1599 (Dec. 5, 1990).

[265]*Id.*

[266]Hatchett Trial Transcript, *supra* note 94 at 280.

[267]*Id.* at 276-77.

[268]Commonwealth of Virginia v. David Vasquez, C-22213-22216, C22763, Judge William L. Winston, Memorandum, Jan. 25, 1985.

[269]Jones Suppression Hearing at 6, 25, 33 (on file with author).

[270]The Deskovic and Washington cases discussed next are examples, as is the case of Calvin Ollins. *See* People v. Ollins, 231 Ill.App.3d 243 (Ill.App. 1 Dist. 1992).

All of these doctors agreed that Townsend could not readily understand the *Miranda* warnings or knowingly waive his rights, lacked capacity to be tried, and did not confess voluntarily.[271]

Dr. Jethro W. Toomer described that Townsend was retarded with an I.Q. of 59-61 and the mental development of a 6-9 year-old.[272] Other experts testified that he is "easily led" and "highly suggestible."[273] Dr. Frank Loeffler explained that Townsend not only lacked capacity and had a mental age of a 7-9 year-old, but that he "confabulates all the time," engaging in "unconscious making up of material to fill in for what one doesn't know," like a person who is "senile."[274] Dr. Mario Martinez added that Townsend speaks like a "madman" and in medical terms, "is intellectually limited and functioning at a psychotic level."[275]

The outgunned prosecution called only one expert witness, Leslie Alker, who only had a masters degree in psychology (he was not a doctor).[276] Alker measured Townsend's "social adaptive" ability to be 19 years, despite his IQ "significantly below" average.[277] Alker testified that Townsend would understand his Miranda rights.[278] The State also called one of the detectives that interrogated Townsend, Det. Mark Schlein, who gave his lay opinion that Townsend had a "very severe speech impediment," but had "street smarts" and "made it clear that he understood his rights."[279] The prosecutor then elicited lengthy testimony concerning the "specific facts" that Townsend supposedly knew about how the crimes were committed: "he can remember specific details of each particular crime which we have been able to, of course, corroborate."[280] Indeed, the prosecutor in examining defense experts made the point that Townsend could not have been lead if he volunteered facts that only the culprit could have known.[281]

In the end, Hon. Arthur J. Franza found this battery of defense expert testimony to be "testimony of convenience" and found that "the credibility of it is rather low and the believability of it just as low, so that I

[271]Trial Testimony, Jerry Frank Townsend v. State of Florida, No 79-7217 (April 25, 1980) (on file with author). Those doctors were: Dr. Anastasio Castiello, *id*. at 8; Dr. Jethro W. Toomer, *id*. at 38; Dr. Frank Loeffler, *id*. at 75; Dr. Mario Martinez, *id*. at 98; Dr. Richard H. Carrera, *id.* at TT 107; David Nathanson, *id*. at 133; Dr. Norman Reichenberg, *id*. at 170.

[272]*Id*. at 43, 50.

[273]*Id*. at 14, 46, 58.

[274]*Id*. at 79-80.

[275]*Id*. at 104.

[276]The State apparently also introduced into the record "transcriptions" of expert evaluations they had conducted. *Id*. at 100.

[277]*Id*. at 395-96 (May 8, 1980).

[278]*Id*. at 397-400.

[279]*Id.* at 491, 493-4, 502.

[280]*Id*. at 495-98.

[281]*Id.* at 23-24 (April 25, 1980).

had to really look somewhere else for my decision."[282] Judge Franza never cited what that other source of authority was, but simply ruled: "I find that Mr. Townsend was sufficiently societally, if I may use that word, and functionally intelligent to know – to know his Miranda rights and to significantly and sufficiently waive them…"[283] Judge Franza added that after all, Townsend "had so much knowledge of street parlance."[284] He found it a closer question whether Townsend was deluded and confessed involuntarily, but denied relief, noting "You know, it would be good if all confessions were perfect."[285] The Court explained, "I have yet to see a perfect confession, but I've not been in the criminal area that long. . . I find that the confession even with [the promises and inducements] was voluntarily made and that if you took those to the point where you said to yourself, well, would he or would he not have gone forward had those statements not been made, I come to the conclusion that he would have."[286]

Townsend called the same experts to testify at trial. The jury heard that he was "borderline retarded," and exhibited patterns "consistent with the presence of brain damage," and "psychosis," such that his memory would be totally "confused."[287] Experts described again that Townsend was easily led, could not distinguish right from wrong and did not voluntarily confess.[288] The State argued that Townsend's actions indicated the work of a methodical serial killer. Townsend was convicted.[289] He served 22 years in prison before a Fort Lauderdale police re-investigation ultimately lead to DNA testing that cleared him and inculpated serial killer Eddie Lee Mosley (the DNA testing also linked Mosley to a murder for which Frank Lee Smith was falsely convicted).[290]

The other exonerees, had they obtained experts, might have presented evidence that they lacked capacity or otherwise were susceptible to coercion or suggestion. In the Deskovic case, for example, the District Attorney's inquiry found that "the defense did not attempt to introduce psychiatric evidence that might have persuaded jurors that Deskovic was particularly vulnerable to the police tactics employed against him and that those tactics induced a false confession. In the absence of such evidence, the defense attack on the statements seemed scattershot and unfocused."[291] Ron Williamson's lawyer decided not to raise the issue of his competency, despite "an actual judicial determination of his incompetency in the same

[282]Trial Testimony, Jerry Frank Townsend v. State of Florida, No 79-7217 (May 9, 1980) at 516-17 (on file with author).
[283]*Id*. at 516-17.
[284]*Id*. at 516.
[285]*Id*. at 517.
[286]*Id.* at 108-109
[287]*Id.* at 162-64.
[288]*Id.* at 184-85.
[289]*Id.* at 47.
[290]*See* http://www.innocenceproject.org/Content/274.php
[291]*See* Deskovic Report, *supra* note 9 at 7.

district court in an unrelated case two and one-half years earlier," and treatment many years due to "behavior indicative of schizophrenia, Bipolar Disorder, Borderline Personality Disorder, and Paranoid Personality Disorder…"[292] Williamson's habeas petition was granted in part because the federal court found his trial lawyer ineffective for failing to investigate his mental illness and its relevance to both his competency to stand trial and the voluntariness of his confession.[293]

Earl Washington's counsel never requested funding for an expert, and thus had no independent evidence to counter the evaluation of the state's psychiatrist who readily concluded that Washington understood his *Miranda* rights.[294] However, the court had only asked that he be evaluated for his "present status" and capacity to stand trial. The psychiatrist did not examine his mental capacity at the time of the murder or interrogation nor whether his mental retardation could have impacted the voluntariness of his confession.[295] As the Washington Post later put it, "A judge ruled that the statement was admissible after hearing from a state mental health expert that a man with an IQ of 69 was competent to waive his rights to a lawyer during initial questioning--even though Washington still doesn't know what the words 'waive' and 'provided' mean."[296]

Byron Halsey's defense lawyer, while moving to suppress the confession, did not raise an insanity defense after initially giving notice that they would, due to Halsey's objection that he was not guilty. The Judge made a record of this, stating "And it is your decision--based on consultation with us that you've told us you didn't kill the children, therefore, you didn't want us to produce any evidence of any mental condition or anything like that in this case? The Defendant: Yes." Halsey's lawyer then asked, "And it was your choice that we did this; is that right? The Defendant: Yes. I ain't crazy. . . I didn't do it."[297]

Travis Hayes' attorney did seek to introduce an expert, Dr. Salcedo, to present evidence that Hayes was mentally retarded, that he "had the diminished capacity, and he had the mental condition that would make him more susceptible to extensive interrogation, to being able to say things that were suggested to him, instead of things that were true," but the court rejected the motion, apparently finding that such expert testimony would be irrelevant.[298]

Also remarkable was the role of a psychologist in the Beatrice Six case. Dr. Wayne Price repeatedly spoke to the suspects following their arrest at the jail, and not only did he treat them, but he was also a Deputy

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[292]Williamson v. Reynolds, 904 F.Supp. 1529, 1536-37 (E.D. Ok 1995).

[293]*Id.*

[294]Washington Trial Transcript, *supra* note 98 at 132, 151.

[295]*Id.* at 13. Washington's attorney later stated that he believed that the Court would have denied any request for funding for an expert. Brooke Masters, *Missteps on the Road to Injustice*, WASH. POST, Nov. 30, 2000.

[296]*Id.*

[297]Halsey Trial Testimony at 57-58.

[298]Hayes Trial Transcript, *supra* note xxx at 99-102.

employed by the police department.[299] Debra Shelden testified at Joseph White's trial as follows: "Q. And Dr. Price has been working with you? A. Yes. Q. Working with you on your memory? A. Yes. Q. Because you couldn't remember anything? A. Yes," and then adding that as to the dreams from which she derived much of her account, "Q. And Dr. Price helped you with your memory regarding those dreams, did he not? A. Yes."[300]

F. Inculpatory Statement Cases

Seven additional exonerees supposedly volunteered inculpatory information to police before any custodial interrogation began. Such volunteered statements typically lack any criminal procedure protection if not made while the suspect was deemed to be in custody.[301] Yet many were quite damaging at trial, precisely for the same reason that the false confessions were. That is, law enforcement claimed that the exoneree had freely volunteered non-public information concerning the crime; indeed, they could compellingly point out that the suspect was not in custody and not being formally interrogated, and yet had disclosed involvement in the crime. Now that we know that these people were innocent, there is reason to doubt those assertions by law enforcement.

Five of those seven exonerees allegedly offered police details in their incriminating statements that were corroborated by crime scene evidence and/or were non-public facts in the investigation. For example, in Richard Danziger's trial, Sgt. Boardman claimed that he had stated that the victim "had been shot in the back of the head with a .22 caliber weapon."[302] Very powerful because of the unusual wardrobe choice was Marvin Mitchell's supposed admission that he wore pink pants, where the victim said her attacker was wearing "pinkish pants."[303]

In Walter Snyder's case, Det. Barry Shiftic testified that he "went to Mr. Snyder's place of employment, asked he would come down and talk to me for a few minutes in reference to a burglary. At no time did I mention this was burglary – rape. A pretext, as I wanted to get him to talk to me about a burglary. I brought him into headquarters and said I had information he committed a break in, not mentioning a specific address."[304] Det. Shiftic claimed Snyder knew both that a rape had occurred and the address, stating "I didn't rape that girl across the street."[305] Shiftic suggested to Snyder that the victim made advances on him. Snyder replied incredulously, "she raped me?" Shiftic claimed at trial, as did the prosecutor, that Snyder's expression of surprise instead

[299] *See* Paul Hammel, Psychologist had Dual Role in Confessions of Beatrice 6, Omaha World-Herald, Nov. 29, 2008.

[300] White Trial Transcript, *supra* note xxx at 791-2.

[301] *Oregon v. Elstad*, 470 U.S. 298, 311-14 (1985).

[302] Danziger Trial Transcript, *supra* note 46 at 231.

[303] http://www.innocenceproject.org/Content/221.php.

[304] Snyder Trial Transcript, *supra* note xxx at 56.

[305] *Id.*

constituted an admission. The prosecutor told the jury: "He said the woman raped him, he didn't rape her."[306] Other admissions were even less probative. For example, Frank Lee Smith allegedly told police that where the murder occurred at night, that there was "no way that kid could have seen me, it was too dark in there."[307]

These inculpatory statement cases show how the problem of contamination can extend beyond the interrogation room, highlighting the importance not only of recording complete interrogations, but adopting other reforms to ensure law enforcement assiduously avoid contamination.

G. Post-Conviction Review of False Confessions

The contamination of these confessions often foreclosed appellate and post-conviction relief. As developed in the "Judging Innocence" study, these exonerees who falsely confessed did not always raise constitutional claims challenging the confession, at least as reported in written decisions.[308] Seven of the twenty-two exonerees who falsely confessed and had written decisions during their appeals or post-conviction raised Fifth Amendment claims that their confession was involuntary and three more alleged the confession was obtained in violation of *Miranda*. Thus ten raised constitutional claims directly challenging their confession. None who brought claims regarding *Miranda* or coercion received any relief. Three others raised state law or indirect constitutional claims, and one of them received a reversal on a *Strickland* claim related to failure to challenge the confession at trial.[309] The others, after having failed to exclude the confessions at trial, may have failed to challenge voluntariness on appeal and post-conviction.

When denying relief, courts emphasized in eleven exonerees' cases the apparent reliability of these confessions. Indeed, the only two exonerees who had written decisions and did *not* have courts emphasize confession reliability, were Travis Hayes, who admitted his guilt but few facts of any kind, and Rolando Cruz, who did not challenge voluntariness at trial and thus could not do so on appeal. In all of the other exonerees' cases, those of James Dean, Jeff Deskovic, Bruce Godschalk, Byron Halsey, Alejandro Hernandez, Nathaniel Hatchett, Stephen Linscott, Yusef Salaam, Jerry Townsend, Douglas Warney, Earl Washington, and Ron Williamson, the courts cited to the reliability of the confessions when denying relief post-conviction, often also citing to the "overwhelming" nature of the evidence against them and describing in detail the non-public

[306] *Id.* at 66.

[307] Smith Trial Transcript, *supra* note xxx at 107.

[308] *See* Garrett, Judging Innocence, *supra* note 2 at 90-91.

[309] T. Hayes raised a Sixth Amendment claim that he should have been permitted to challenge his competence and his confession using expert testimony at trial; R. Williamson raised an ineffective assistance of counsel claim relating to failure to challenge his competency and confession; and Y. Salaam raised a state evidence law claim relating to interrogation of a juvenile with parents present.

and "fully corroborative" facts they each supposedly volunteered.[310] For example, the Illinois Supreme Court stated that Alejandro Hernandez "did not present an argument which convinces us that he learned the details of the crime contained in his 'vision' from law enforcement officers, unlike the defendant in *People v. Linscott*, (1985)."[311] The citation to the Illinois Appellate Court decision in Stephen Linscott's case is doubly ironic in retrospect; Linscott was also years later exonerated by post-conviction DNA testing.[312] Similarly, a court denied Jeff Deskovic's appeal stating, "There was overwhelming evidence of the defendant's guilt in the form of the defendant's own multiple inculpatory statements, as corroborated by such physical evidence as the victim's autopsy findings."[313]

Even after obtaining DNA testing, exonerees faced obstacles where courts or other actors relied on the seeming reliability of their confessions. For example, Earl Washington was granted clemency but

[310]*See* State v. Dean, 464 N.W.2d 786 (1991) ("[T]he presentence investigation contained numerous statements made by the defendant to law enforcement officers. Those statements were corroborated not only by the physical evidence found at the crime scene and the scientific examination of that evidence, but also by interviews with other people involved or intimately familiar with some details of the crimes against the deceased as heretofore related."); Godschalk v. Montgomery County Dist. Attorney's Office, 177 F. Supp. 2d 366, 377 (E.D. Pa. 2001) (quoting unpublished state court decision finding "plaintiff's conviction "rests largely on his own confession which contains details of the rapes which were not available to the public."); State v. Halsey, 748 A.2d 634 (N.J.Super.A.D., 2000) (citing to "overwhelming" evidence of his guilt and describing each of the facts he supposedly volunteered in his confession); People v. Hatchett, 2000 WL 33419396 (Mich.App.,2000) ("the prosecution presented overwhelming evidence" and "Officer Williams and Detective Van Sice testified that defendant's statement included information that only the perpetrator of the crimes would know" facts "fully corroborative" of the victim's account); People v. Salaam, 590 N.Y.S.2d 195, 196 (N.Y. App. Div. 1992) ("Details of this statement were corroborated overwhelmingly by substantial physical evidence."); Townsend v. State, 420 So.2d 615 (Fla.App. 4 Dist.,1982) ("Townsend confessed to all of the collateral crimes as well as those for which he was charged, and he took the police to the scene and corroborated facts known to the police which only the killer would know."); People v. Warney, 750 N.Y.S.2d 731 (N.Y.A.D. 4 Dept. 2002) ("Defendant confessed to the crime and gave accurate descriptions of many details of the crime scene."); Washington v. Murray, 4 F.3d 1285, 1292 (4th Cir. 1993) (stating that Washington "had confessed to the crime not in a general manner, but as one who was familiar with the minutiae of its execution"); Williamson v. State, 812 P.2d 384 (Okl.Cr.,1991) ("the Appellant made certain admissions, in addition to a confession, which were corroborated by the extrinsic evidence").

[311]People v. Cruz, 121 Ill.2d 321, 336 (Ill. 1988).

[312]This was not due to the Illinois Supreme Court's recognition of any flaw in Linscott's confession. The Hernandez decision cited the Illinois Appellate Court that had found Linscott's "dream" confession so patently unreliable that they found insufficient evidence to support his confession. However, the Illinois Supreme Court had then reversed, stating that Linscott "voluntarily came forward with an account of a 'dream' that contained many unusual details which correlated with the actual murder." People v. Linscott, 114 Ill.2d 340, 348 (Ill. 1986).

[313]People v. Deskovic, 607 N.Y.S.2d 696, 697 (N.Y. App. Div. 1994).

denied a pardon in 1994 after initial DNA testing excluded him.[314] In some states, post-conviction rules bar access to DNA testing or to a vacatur because courts rule that a confession is such strong evidence of guilt that a showing of innocence would be futile.[315] For example, Byron Halsey was denied access to DNA testing in 2000, with the New Jersey court extensively recounting the confession statements and citing to the "overwhelming" evidence of his guilt.[316]

The experience of these exonerees who falsely confessed suggests that our post-conviction system should not refuse to examine convictions simply because there was a confession, and certainly not by uncritically relying on undocumented assertions that a suspect volunteered "inside information" about a crime.

IV. SUBSTANTIVE REGULATION OF CONFESSIONS

This Article concludes by discussing ways to reorient our criminal system towards regulating the substance of confessions. The sections that follow discuss possible reforms centered in trial courts, police departments and post-conviction courts. Whether the evidence from the small group of exonerated individuals supports the adoption of such wholesale reforms is beyond the scope of this Article. However, the false confessions studied suggest a worrisome problem and it is worth considering solutions. Indeed, even before DNA testing brought false confessions to light, scholars had recommended adopting reforms such as recording entire interrogations. Now that DNA testing has provided powerful examples of false confessions, police departments, courts and legislatures have begun to enact legislation in response to the perceived problem. This Article suggests that to the extent that such efforts are intended to prevent false confessions of the sort examined here, they may be incomplete, due to the insidious nature of confession contamination.

A. Substantive Judicial Review of Confessions

First, constitutional criminal procedure could regulate reliability. As discussed, current constitutional criminal procedure fails to consider reliability, despite early Supreme Court cases that had focused on reliability. One way to understand the evolution of the Court's jurisprudence is in the context of its move away from a concern with torture and physical abuse, towards regulating modern psychological interrogation. A concern with the possible unreliability of coerced confessions has ancient roots. Dating back to Roman and then medieval

[314] *See* Gov. Wilder's Executive Clemency Offer, at http://www.pbs.org/wgbh/pages/frontline/shows/case/cases/washingtonclem.html.

[315] *See, e.g* Commonwealth v. Young, 873 A.2d 720 (Pa. Super. 2005); further, a confession may be access to testing in certain states that specify that testing be limited to those for whom "identity" was an issue at trial. *See* Garrett, *Claiming Innocence*, *supra* note 152 at 1680-81 (listing states with such statutes).

[316] State v. Halsey, 748 A.2d 634 (N.J.Super.A.D., 2000).

law approving torture in certain capital cases, jurists adhered to strict rules prohibiting suggestive questioning, where the "examining magistrate was supposed to elicit evidence, not supply it."[317] Torture was to be used to assess whether the suspect knew crime details that "no innocent person can know," and authorities would seek to verify accuracy of those facts.[318]

The Supreme Court, in its early decisions applying the Due Process Clause to police interrogations, was concerned with physical torture, lynch mobs, and the "third degree." By the 1950's and 1960's, during a time of transition as police adopted modern psychological interrogation techniques, the Court highlighted concerns of reliability, noting in its decisions the suggestibility of certain defendants.[319] However, the concern with reliability gradually dissipated. The apogee of the Court's promotion of voluntariness at the expense of reliability was its decision in *Colorado v. Connelly*. There, as discussed, the Court acknowledged that the confession of a chronic schizophrenic who believed he was hearing the "voice of God" during his interrogation "might be proved to be quite unreliable."[320] Because police applied no undue pressure during the confession, the patent unreliability of the confession statements was not of any constitutional concern. Criminal procedure regulates solely the provision of *Miranda* warnings at the outset of a custodial interrogation and the voluntariness of admissions of guilt. Having found the admission of guilt voluntary, a court does not assess the formation of a confession narrative, no matter how tainted or unreliable.

This constitutional jurisprudence does not recognize that abuse of psychological interrogation methods can generate false confessions through the use of suggestive questioning or disclosure of facts. As discussed, unlike the Court, police training recognizes the dangers of confession contamination and bars the use of leading questions as to crime scene facts. Further, social science research dating back decades has shown that not only can psychological pressure induce confessions, but that innocent suspects may internalize and repeat a crime narrative.[321] The examples discussed here provide new evidence that defendants may be wrongly convicted based on contaminated confessions.

This perverse gap in our constitutional criminal procedure is potentially quite harmful, as the contamination of the substance of these exonerees' confessions suggests. In these false confession cases contamination went undetected for years, until DNA testing independently proved innocence. It is unknown how often such contamination occurs in cases in which no DNA testing exonerates, because interrogations are not routinely recorded so as to document any disclosure of key facts.

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[317] John H. Langbein, TORTURE AND THE LAW OF PROOF 15 (1978).
[318] *Id.* at 5.
[319] *See, e.g.* Culombe v. Connecticut, 367 U.S. 568, 625 (1961).
[320] 479 U.S. 157, 165 (1986).
[321] *See supra* note 42.

This Article contends that our existing criminal procedure not only ignores glaring evidence of unreliability, but it also reinforces dangers of contamination by crediting assertions of "inside knowledge" without assessing whether those facts were truly volunteered and ignoring the risk that those facts could have been disclosed. Courts routinely, as discussed in the last Section, emphasize that there was not coercion by focusing on the apparent reliability of confession statements. Such reasoning may ignore that the apparent reliability could be the product of the very coercion that the defendant challenges. Courts credit evidence of reliability without even asking whether that evidence is sound. In so doing, courts in effect excuse procedurally unconstitutional coercion by crediting the false substantive product of that coercion.

Courts could instead question indicia of reliability absent assurances that law enforcement did not disclose those key facts. They could assess whether crucial facts were actually volunteered by the suspect. Such a hearing could be readily conducted if police produce a complete record of the interrogation, as discussed in the next section. Such an approach is consonant with the Court's focus on reliability outside the interrogation context, particularly in decisions such as *Daubert* that focus on judges as "gatekeepers charged with the responsibility of excluding unreliable evidence."[322] Such an approach also reflects the Court's approach towards eyewitness identifications, recognizing dangers of suggestion and contamination of memory and requiring courts to evaluate reliability inquiry to admitting the identification in court.[323]

A turn from the criminal procedure focus on voluntariness to evaluation of the reliability of the substance of the confession narrative has already begun, in part in response to these false confession cases. Social scientists and legal scholars have recommended that courts evaluate the reliability of entire interrogations rather than simply focus on voluntariness of the custodial admission of guilt.[324] Richard Leo and Richard Ofshe have proposed that courts conduct such hearings and that "the reliability of a suspect's confession can be evaluated by analyzing the fit (or lack thereof) between the descriptions in his post-admission narrative and the crime facts. . ."[325] As discussed, in most of these exonerees' cases there was a lack of fit and non-volunteered details were inconsistent with crime scene evidence. Richard Leo, Steven A. Drizin, Peter J. Neufeld, Bradley R. Hall, and Amy Vatner proposed mechanisms for conducting such hearings, including allocation of burdens of proof in

[322]*See* Leo et al., *supra* note 29 at 487.

[323]Manson v. Brathwaite, 432 U.S. 98, 119 (1977). That *Manson* inquiry has other deficiencies, however, including that eyewitness certainty provides evidence of reliability; for a discussion of those issues, *see* Garrett, *Judging Innocence*, *supra* note 2 at 80-81.

[324]*See, e.g.* Richard A. Leo and Kimberly D. Richman, *Mandate the Electronic Recording of Police Interrogations*, 6 Crime and Pub. Pol'y. 791 (2008).

[325]Ofshe & Leo, *supra* note 4 at 990-91.

order to efficiently marshal the evidence and to assess reliability.[326] Judicial hearings examining reliability might have brought to light inconsistencies in many of these false confessions.

Further, courts could ensure that experts evaluate individuals that possess indicia of suggestibility, such as juveniles and mentally disabled individuals. Few courts, as described, appointed experts in these exonerees' cases. When courts evaluate eyewitness identifications and assess whether the eyewitnesses' account was corrupted by police suggestion, they have elicited testimony by experts who have long conducted social science research on eyewitness memory. Some courts permit such experts to testify to the jury on the problem of eyewitness misidentifications or have instructed the jury on such dangers.[327] Similar approaches could be used in cases raising indicia of suspect suggestibility and dangers of confession contamination. Jury instructions could more clearly identify the danger that facts may be disclosed to a suggestible suspect. Experts could educate the jury on the risks of confession contamination, particularly in cases involving vulnerable individuals like juveniles and the mentally disabled. Unlike in the area of eyewitness identifications, a recorded interrogation could provide a clear record that such experts could interpret. Such social science expert testimony regarding confessions is increasingly common; such experts have testified "in hundreds of criminal and civil trials."[328]

Finally, an understanding of the vulnerability of confessions to contamination can inform courts reviewing trials post-conviction, particularly in cases involving persons vulnerable to suggestion, such as the juveniles and mentally disabled exonerees studied here. Courts may be particularly suspicious of confessions raising such indicia of suggestion, particularly where the interrogation involved deception, threats, or lengthy questioning. The experience of these exonerees who falsely confessed suggests that our post-conviction system should not refuse to examine convictions simply because there was a confession. Courts could alter their consideration of apparent reliability when conducting harmless error review post-conviction, crediting "inside knowledge" only if police have a complete record of the interrogation.

However, some cases will not be suited for reliability review. Some cases involve confession statements that are not reliable but are also not unreliable either; examples include cases in which the suspect confesses to no facts, but merely says they did it, like that of exoneree

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[326] *See* Leo et al., *supra* note 29 at 531-36 (detailing "tripartite" test for assessment of recorded interrogations).

[327] John Monahan & Laurens Walker, SOCIAL SCIENCE IN LAW Ch.5 (6th ed. 2006).

[328] *See* Leo, *supra* note 6 at 314-15. For a study suggesting that such expert testimony can be effective in informing mock-juror decisionmaking, *see* Iris Blandon-Gitlin, Kathryn Sperry, Richard A. Leo, Jurors Believe Interrogation Tactics Are Not Likely to Elicit False Confessions: Will Expert Witness Testimony Inform Them Otherwise?, Psychology, Crime & Law (forthcoming).

Travis Hayes. Confessions involving suspects who are acquainted with the victim or the crime-scene cannot as easily be evaluated for reliability. Take the example of a defendant claiming to have falsely confessed but who was the first to discover the body of the victim. Even if innocent, the suspect would have certain detailed knowledge of the crime scene. Police investigators are trained to examine the scene and uncover information not obvious to an untrained observer but which would have been known to the attacker. Nevertheless, reliability review will likely prove most valuable in cases involving stranger-perpetrators.

The Court is unlikely to reverse a many-decades-long turn in its jurisprudence away from reliability towards coercion. Nor have courts conducted such pre-trial reliability hearings; states have not yet adopted such criminal procedure reforms. On the other hand, courts do increasingly permit expert testimony, and perhaps the experiences of these exonerees will influence post-conviction approaches.

B. Recording Entire Interrogations

One possible reason courts have not previously focused on reliability is that assessing reliability poses great difficulties. Absent a recording of the interrogation, courts were faced with a swearing contest between the defendant alleging coercion and law enforcement denying coercion. A robust reliability review faces a second order problem illuminated by these false confessions. As these exonerees' cases show, to the extent that facts are disclosed to the suspect, the confessions appear uncannily reliable. The courts that ruled in these exonerees' cases thought that the exonerees had uttered information that only the culprit could have know. As a result, had the court conducted a reliability review, the court likely would have found that these false confessions were very reliable.

A complete interrogation record enables meaningful reliability review and could help to prevent the problem of confession contamination through disclosure of key facts. Commentators have advocated that "the clear solution to this problem is: (1) for the police to record the entire interrogation so that the trial judge can determine whether police contamination has occurred; and (2) and for the judge to analyze whether the suspect could have gained knowledge of key details from facts released to the public by the media."[329] If police disclose facts during a recorded interrogation, then any contamination of the confession is documented. As Richard Ofshe explains, "[t]ape recording will prevent police from doing the extraordinary things that need to be done to cause an innocent person to falsely confess."[330] Recording can also help to prevent unintentional contamination, as in the case Det. James Trainum described.

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[329] *See* Leo et al., *supra* note 29, at 523; *see also* Steven A. Drizin & Beth A. Colgan, *Let the Cameras Roll: Mandatory Videotaping of Interrogations Is the Solution to Illinois' Problem of False Confessions*, 32 LOY. U. CHI. L.J. 337, 349-55 (2001).

[330] *See* Dolan and Larrubia, *supra* note 117.

Eight jurisdictions now require videotaping of at least some interrogations by statute, and in five more state supreme courts have either required or encouraged electronic recording of interrogations.[331] An increasing number of police departments voluntarily record interrogations and have reported positive experiences with their recording programs.[332] Additional resources invested in improving the interrogation process may benefit all sides. False negatives, or accurate confessions excluded by courts, may be more common than false confessions. Indeed, recording entire interrogations has been touted by policing professionals because it helps police to show that a confession was voluntary. The Inbau and Reid treatise advocates recording interrogations because it also helps police to counter false recantations by suspects.[333] Scholars have suggested that recording may raise new questions, such as issues of observer bias based on the angle of the camera.[334] Some suggest that the presence of cameras may discourage true confessions and introduce costly false negatives.[335] Studies and surveys of police departments that record interrogations

[331]*See* D.C. CODE ANN. § 5-116.01 (LexisNexis Supp. 2007) (requiring police to record all custodial investigations); 725 ILL. COMP. STAT. ANN. 5/103-2.1 (West 2006) (requiring police to record interrogations in all homicide cases); Md. Code Ann., Crim. Proc. 2-401 (2008) (requiring that law enforcement make "reasonable efforts" to record interrogations); ME. REV. STAT. ANN. TIT. 25, § 2803-B (2007) (mandating recording "interviews of suspects in serious crimes"); N.C. GEN. STAT. § 15A-211 (requiring complete electronic recording of custodial interrogations in homicide cases); N.M. STAT. § 29-1-16 (Supp. 2006) (requiring police to record all custodial investigations); TEX. CODE CRIM. PROC. ANN. ART. 38.22, § 3 (Vernon Supp. 2007) (rendering unrecorded oral statements inadmissible); W.S.A. 968.073, 972.115 (requiring recording of felony interrogations and permitting jury instruction if interrogation not recorded); Stephan v. State, 711 P.2d 1156, 1158 (Alaska 1985) ("[A]n unexcused failure to electronically record a custodial interrogation conducted in a place of detention violates a suspect's right to due process...."); Commonwealth v. DiGiambattista, 813 N.E.2d 516, 535 (Mass. 2004) (allowing defense to point out failure to record interrogation and calling unrecorded admissions "less reliable"); State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994) ("[A]ll questioning shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention."); State v. Cook, 847 A.2d 530, 547 (N.J. 2004) ("[W]e will establish a committee to study and make recommendations on the use of electronic recordation of custodial interrogations."); In re Jerrell C.J., 699 N.W.2d 110, 123 (Wis. 2005) ("[W]e exercise our supervisory power to require that all custodial interrogation of juveniles in future cases be electronically recorded where feasible, and without exception when questioning occurs at a place of detention.").

[332]A recent survey of 631 police investigators found that 81% believed that interrogations should be recorded. *See* Kassin, et. al., *supra* note 3.

[333]*See* Inbau and Reid, *supra* note 41 at 375. However, the treatise does object to mandatory recording requirements. *Id.*

[334]G. Daniel Lassiter et al., *Criminal Confessions on Videotape: Does Camera Perspective Bias Their Perceived Veracity?*, 7 CURRENT RES. IN SOC. PSYCHOL. 7 (2001); Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. IN PUB. INTEREST 33, 61 (2004) (discussing remedies such as an "equal focus" camera angle).

[335]Lawrence Rosenthal, *Against Orthodoxy:* Miranda *is Not Prophylactic and the Constitution is Not Perfect*, 11 CHAPMAN L. REV. 606-7 (2008) (questioning whether videotaping can curb abuses, particularly tactics courts condone).

suggest otherwise, where police can typically record surreptitiously, and where police have found that "they were able to get more incriminating information from suspects on tape than they were in traditional interrogations."[336] Thus, most commentators view videotaping as advantageous to law enforcement, capable of "rendering confessions more convincing, … assisting prosecutors in negotiating more acceptable plea bargaining, . . and helping in securing convictions."[337]

However, further study may shed light on the efficacy recording requirements, particularly as police departments increasingly voluntarily record interrogations. One way that scholars and police departments could further study the effect of recording on the problem of contamination of confessions would simply be to study a set of recorded interrogations to examine whether disclosure of facts is apparent from the recordings.

C. Interrogation Reforms

Third, additional police procedures can safeguard reliability, such as procedures intended to assure against contamination, assess suggestibility and to avoid coercion post-admission. Police practices are a crucial piece of any reform effort. Inbau and Reid have long recommended that police assiduously avoid disclosing key facts to suspects. However, even if a confession is videotaped in its entirely, if crucial facts are disclosed, courts may not suppress the confession statement. The state legislation just described does not require courts, in conducting a reliability review, to exclude recorded interrogations that display extensive feeding of facts. It is most critical that the police in the first instance safeguard the reliability of the entire interrogation.

First, police could ensure that all interrogations are recorded in their entirely, as departments increasingly do. Such recordings should include both the suspect and detectives, so that any non-verbal cues can be observed. Videotaping policies could be bolstered by clear policies and training regarding the non-disclosure of key investigative facts. Such facts should be documented in the investigative file, and as Inbau and Reid recommend, a record should be made that they were not disclosed to the public, including the press, suspects, and witnesses.

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[336] *See* Thomas P. Sullivan & Nw. Univ. Sch. of Law Ctr. on Wrongful Convictions, *Police Experiences with Recording Custodial Interrogations* 22 (2004) (presenting results of survey of over 200 police departments); Nadia Soree, *When the Innocent Speak: False Confessions, Constitutional Safeguards, and the Role of Expert Testimony*, 32 AM. J. CRIM. L. 191, 258-60 (2005) (reviewing literature recommending mandatory videotaping); Leo, *supra* note 6 at 291-305 ("Electronic recording is the most important and compelling policy reform available for the problems of American police interrogation"); Carole F. Willis et al., *The Tape-Recording of Police Interviews with Suspects: A Second Interim Report* 34 -35, 73 (1988) (review of recording requirement in Great Britain).

[337] Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 489 (1996).

Second, additional procedures can structure the interrogation itself to assure that key facts are not disclosed. For example, police can initially use as an interrogator a detective who was not involved in the investigation, in effect adopting a "double blind" technique. Following that "double blind" portion of the interrogation, the lead detective who is familiar with the case could then test the suspect's knowledge of key crime scene facts. Other "double blind" tests could be employed, such as reverse identifications like the one conducted in Rollins' case, but conducted in a double blind fashion to avoid the risk of suggestion.

Third, police can analyze and test the fit between the suspect's narrative and crime scene facts. They can do this not only be examining whether the suspect volunteers key crime scene facts, but also by asking leading questions regarding facts inconsistent with how the crime occurred. Police should be sure to investigate each of the facts offered in the confession to test whether they are corroborated by crime scene evidence. If courts conduct reliability review, police would have a strong incentive to conduct such inquiries in the first instance.

Fourth, police could modify current psychological interrogation techniques to focus not on disclosure of facts, but treatment of populations vulnerable to suggestion and coercion. Police can regulate the interrogations of suggestible and vulnerable individuals, such as juveniles or mentally disabled individuals. Fred Inbau has recommended adoption of "special protections" during such interrogations.[338] Police can be trained to identify such individuals or they may retain experts. Police departments have adopted model policies for interrogating mentally handicapped or mentally ill individuals and for children and juveniles.[339]

Techniques such as the use of fabrications and deception, while permitted by the Supreme Court, may be particularly problematic when dealing with such vulnerable individuals.[340] Lengthy interrogations may similarly be barred when dealing with such vulnerable suspects; some have suggested formally limiting the time permitted for such interrogations.[341] Indeed, police may simply require as a matter of sound policy that such vulnerable individuals retain an attorney before being interrogated, to ensure that inadvertent pressure does not secure a grossly unreliable or false account.[342] More radical, some scholars have

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[338]Fred E. Inbau, *Miranda's Immunization of Low Intelligence Offenders, 24 Prosecutor: J. Nat'l District Att'ys Ass'n*, Spring 1991, at 9-10.

[339]*See* Leo, *supra* note 6 at 312-14.

[340]Commentators have called for barring deception in all interrogations. *See* Miriam S. Gohara, *A Lie For A Lie: False Confessions And The Case For Reconsidering The Legality Of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 791 (2006).

[341]Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 144-45 (1997) ("the police should be allowed to interrogate a suspect for no more than five hours").

[342]Some scholars have recommended that all suspects be provided with an attorney prior to interrogation. Charles J. Ogletree, *Are Confessions Really Good for the Soul? A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826 (1987).

recommended that police could abandon the use of psychological techniques and conduct a hearing in which a judicial officer questions the suspect, particularly in cases involving vulnerable individuals.[343]

As Richard Leo points out, "[t]here is no single law, policy reform, or panacea that will solve all the problems associated with police interrogation and confession evidence in America."[344] The fundamentally adversarial nature of the investigative process may create incentives for law enforcement to bolster confession evidence through disclosure of facts to compliant suspects. Even a mandatory recording regime can be circumvented, perhaps with ease. After all, police may have contact with a suspect outside of the interrogation room, in police vehicles, hallways, and detention cells. There was some suggestion in several exonerees' cases that disclosures took place during crime scene visits. Some scholars propose extending recording requirements to apply to non-custodial questioning.[345] However, as in the case of David Vasquez, even if a recording shows that key facts were fed, that record might not prevent a conviction, even a wrongful conviction. Vasquez nevertheless pleaded guilty, perhaps assuming that the jury would not understand the significance of the confession contamination.

Thus, not only do we not know how often confession contamination occurs, but due to its insidious nature, reforms can at best discourage such contamination. Recordings will make the task easier than ever before, but courts would also need to assess reliability, both at trial and post-conviction, while police develop and implement policies designed to prevent contamination of confessions. So long as criminal cases rely on confession evidence as crucial proof of guilt, the criminal justice system will need to consider precautions against contamination.

CONCLUSION

Decades ago, commentators and courts doubted whether false confessions existed. Post-conviction DNA testing has definitively proved that suspects do falsely confess, and wrongful convictions may result. The set of DNA exonerees provide a unique opportunity to study how false confessions can be constructed. This Article found that all but one of these exoneree confession narratives was constructed so as to appear reliable and corroborated by crime scene evidence. Police and prosecutors then claimed at trial, falsely, that defendants had volunteered crime details and therefore possessed "inside knowledge" of the crime. Such contamination of confessions remained undetected, perhaps explaining why for so long it was believed that a false confession could not occur.

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[343]Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2669 (1996).

[344]*See* Leo, *supra* note 6 at 305.

[345]*See, e.g.* Lisa Lewis, *Rethinking Miranda: Truth, Lies, And Videotape*, 43 GONZ. L. REV. 199 (2007-8).

Due to the contamination of exonerees' confessions, the criminal justice system could not later untangle what transpired. Though many of these confessions displayed indicia of gross unreliability, the confessions all nevertheless passed muster at trial and post-conviction. Indeed, DNA testing excluded eight exonerees at the time of trial, but the confession of guilt was powerful enough to overcome the DNA evidence of innocence. Others had courts deny relief even after they obtained post-conviction DNA testing. These false confessions withstood scrutiny precisely because they were bolstered by disclosed facts. Courts uniformly emphasized that these confessions contained admissions that only the true murderer or rapist could have known. Selective recording of half of these interrogations typically only cemented the contamination, where recording occurred after facts had already been disclosed to the innocent suspect.

Criminal procedure rules regulating confessions can be reoriented towards reliability. Our existing constitutional criminal procedure rules not only ignore the question of confession reliability, but they can reward confession contamination by discounting evidence of coercion based on apparent evidence of reliability. Increasing numbers of local police departments and states have adopted one crucial reform: videotaping entire interrogations. Contaminated false confessions can be inexpensively avoided by requiring recording of entire interrogations. In these false confessions, even the disclosure of a litany of crucial facts remained undetected in an environment where the entire interrogation process was not documented. At minimum, revelation of the contamination of these false confessions supports further study and experimentation with reforms designed to regulate the substance of confessions. Additional reforms could focus on judicial review of confession reliability, use of experts at trial, and restructuring police practices. Confession contamination is a highly insidious problem about which little has previously been known. However, a renewed focus on the reliability and transparency of the interrogation process may improve the accuracy of confessions and safeguard the integrity of the criminal process.

http://cliqueclack.com/tv/2011/12/17/disturbing-case-eddie-lowery/

The disturbing case of Eddie Lowery
by Michael Noble
Eddie Lowery was an innocent man wrongfully convicted of a crime. He paid for it for 30 years.

I had two thoughts after viewing MSNBC's The Disturbing Case of Eddie Lowery. I'm willing to bet if you saw the program you considered them as well:
Why did Eddie Lowery confess to a rape he never committed?
How did two Kansas detectives extract a confession from Lowery for a crime he never committed?
If you watched the program, you know the answer to both those questions: coercion. The detectives who asked Lowery relentlessly about his supposed involvement in the crime — the rape of a 74-year-old woman — wore him into the ground. On his second day of questioning, he was led to admit information that would not only be his undoing but would eventually send him to prison for ten years and ruin his life for many more.
This program was a showcase of travesty in the life of Eddie Lowery and of the justice system which can sometimes be used to twist facts and truth in order for results to emerge which are wanted instead of needed.
Lowery should never have confessed to the rape of the Riley, Kansas woman the night of July 26th, 1981, nor should he ever have been subjected to the grilling he received. In so doing, he mistakenly and naively believed the truth would come out and that he would be exonerated of the charges. It didn't happen that way. The price for his naiveté was 30 years of his life being taken away; 30 years of reflection; the unimaginable shame of having to register as a sex offender and a life of loss because a wrong choice was made.
In the face of overwhelming odds, Lowery was eventually absolved. But it wasn't without a lot of faith, a lot of tears and at an inconceivable expense.
The problem I had with the show was information about the lead prosecutor and the detectives who were on Lowery's case. Questioned himself about Lowery's innocence and eventual dropped charges, the prosecutor still maintained Lowery may have had something to do with the crime, even in light of overwhelmingly exculpatory evidence.
Information on the detectives who grilled Lowery seemed to be lacking in the program with only a short segment about one of them being asked about the case. (Both have since retired from the police department and were not interviewed.)
The rapist, Daniel Brewer, was eventually caught and convicted. On April 3rd, 2003, a judge signed an order Lowery was innocent of the crime based on evidence tediously brought to light. Eddie Lowery was exonerated of the crime. He received 7.5 million dollars by the Riley Police Department in Kansas, but they never admitted wrong doing.
The fact remains: This was a cautionary tale of something that never should have happened.

Photo Credit: MSNBC
Short URL: http://clak.us/t2p8b
Tags: Eddie Lowery was registered as a sex offender, false evidence in the Eddie Lowery case, misleading facts in the Eddie Lowery case, The Disturbing Case of Eddie Lowery

Categories: Episode Reviews, Features, General, News, TV Shows, Videos
Other posts
Does Liz Lemon hate Sarah Silverman? – Monthly Musings
Ringer premieres with a splash, a bang, and many questions
Hawaii Five-0 – Mea culpa (now let's mess it up again)

Clacked by Michael Noble
on Dec 17, 2011 @ 20:57 EST5EDT
3 Responses to "The disturbing case of Eddie Lowery"

Ken
December 18, 2011 at 1:56 PM
Perfect summation. Thank you!
Reply

Ken
December 18, 2011 at 5:37 PM
You have a great way of summing up the essence of a storyline. You nailed it! Thanks for posting this!
Reply

Ken
December 20, 2011 at 11:40 PM
Eddie just got back from the sentencing of the real perpetrator, Daniel Brewer. They just sentenced him to 12 to 20 years. Eddie said finally justice after 30 years to close out this chapter of his life. He says thanks to everyone for their great comments and support.
Reply

http://www.innocenceproject.org/Content/Eddie_James_Lowery.php

Eddie James Lowery
Incident Year: 1981
Jurisdiction: KS
Charge: Rape, Battery, Burglary
Conviction: Rape, Agg. Battery, Agg. Burglary
Sentence: 11 years to lifeYear of Conviction: 1982
Exoneration Year: 2003
Sentence Served: 9.5 Years
Real perpetrator found? Yes
Contributing Causes: False Confessions / Admissions, Unvalidated or Improper Forensic Science
Compensation? Yes

In July 1981, an elderly resident of Ogden, Kansas, was attacked while sleeping in her home. The assailant covered her face with his hand and bed clothing. As the victim struggled, she was struck repeatedly on the head, causing her to bleed. The attacker then raped her vaginally before fleeing. The victim contacted the police and was taken to a hospital, where she was treated for her injuries and a rape kit was collected.

In the early morning hours of the same day, Eddie James Lowery was involved in a traffic accident near the victim's house. Investigators began questioning Lowery that morning. He was questioned all day without food and was told he did not need a lawyer after requesting one. Investigators supplied Lowery with details of the crime - the house, the entry, the weapon, and specifics about the rape. These details were eventually incorporated into his confession.

Although Lowery recanted the statements and his attorney filed to suppress them, the court ruled that the confession was made voluntarily and allowed it into the trial. The confession became the cornerstone of the prosecution's case.
Serological testing was performed on the bedding, the victim's clothing, and specimens from the rape kit. A forensic analyst from the Kansas Bureau of Investigation testified that semen on the crime scene evidence exhibited type A blood group markers, but she testified that this meant the perpetrator was type O, which matched Lowery. Since the victim was type A, her bodily fluid could have masked any evidence of the perpetrator and the analyst could not have definitively determined anything about the perpetrator's blood type. An independent analyst last reviewed the serology findings and could not determine now the original examiner came to her conclusion. Testing on Lowery's pants revealed his own blood type, as he had been bleeding from a cut sustained in the car accident.

Lowery's first trial ended in a hung jury. He was tried again in January 1982. This time the jury convicted him of rape, aggravated burglary, and aggravated battery. Lowery was sentenced to 11 years to life in prison. He served nine years of that sentence and was released on parole in 1991.

Through his attorney, Barry Clark, and with his own money, Lowery was able to procure DNA testing on the biological evidence in 2002. He had been forced to register as a sex offender every year since his parole and wanted to clear his name and reputation. Clark requested an evidence search, which turned up biological evidence from the investigation, including swabs from the rape kit, portions of the bedding, and portions of the victim's nightgown. In September 2002, DNA test results confirmed Lowery's claim of innocence. The semen found on the victim's bedding originated from the same person as the semen found on the vaginal swabs. Lowery was excluded from being the contributor. In April 2003, the District Court of Riley County, Kansas, vacated the judgement and conviction based on these results.

Eddie James Lowery was 22 years old when he was arrested, a soldier stationed at Fort Riley. He waited over twenty-one years to be vindicated.

1. Police Interrogation and American Justice - Google Books Result

books.google.com/books?isbn=0674035313**...**Richard A. Leo - 2009 - Law - 374 pages

Malugani and Johnson asked Lowery to submit to a **polygraph**, telling him that it **...** you to prison as long as we can" (Testimony of **Eddie Lowery**, 1981b: 12).