CONFESSIONS IN CAPITAL CASES

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With multiple Supreme Court rulings in 2002 and Illinois Governor George Ryan's pardons and commutations in 2003, capital punishment in America is receiving a new wave of increased scrutiny. One aspect of this scrutiny deals with wrongfully convicted death row inmates such as Rolando Cruz and Earl Washington. In many of these cases, part of the evidence upon which the defendants were convicted was a police-induced confession. In this article, Professor White proposes safeguards to ensure the reliability of confessions introduced in capital cases. Part II relates to mentally handicapped suspects. White illustrates the need for change in this area by discussing two "DNA-cleared" cases in which mentally handicapped defendants gave false confessions, and then proposes specific recommendations. In part III, White identifies three problematic interrogation practices and proposes safeguards designed to restrict interrogation practices. Part IV argues for steps to improve methods of fact-finding in cases where the reliability of a capital defendant's police-induced confession is an issue. Finally, part V makes six specific recommendations to legislatures or state courts for safeguards relating to police-induced confessions in capital cases.

I. INTRODUCTION

Capital punishment in America is entering a new era. During the latter part of the 1990s, the number of executions accelerated, reaching its highest level since the mid-1950s.[1] Over the past few years, however,

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I would like to thank the Innocence Project at the Benjamin Cardozo School of Law for making materials relating to DNA-cleared defendants available to me, and to Huy Dao, the Assistant Director of the Project, for commenting on an earlier draft of this Article. I would also like to thank Albert Alschuler, Steven Drizin, Richard Leo, Yale Kamisar, and John Parry for commenting on earlier drafts of this Article and Zoe Babe and Melissa Roccia for their excellent research assistance.

1. According to the U.S. Department of Justice, the number of people executed over the period 1996–2000 were as follows:

1996: 45
1997: 74
1998: 68
1999: 98
2000: 85

The average for this five-year period was thus seventy-four executions per year.

concerns about the administration of capital punishment have not only slowed the pace of executions,[2] but also precipitated intensive scrutiny of the procedures employed in capital cases. Although various factors have played a part in producing this change,[3] its most immediate catalyst has been the evidence showing that innocent people have been wrongfully sentenced to death.

Allegations that innocent people have been sentenced to death are not new. Strong empirical support exists for the claim that, throughout the past century, a substantial number of capital defendants were wrongfully convicted and, in some cases, sentenced to death.[4] Over the past few years, however, wrongful convictions in capital cases seem to be not only occurring with increasing frequency, but also attracting a greater degree of attention. Indeed, as Samuel Gross and Phoebe Ellsworth have noted, "[b]y late 1999" stories about death row inmates being exonerated "were becoming regular items on the news."[5] As a result, the public has become increasingly concerned about the extent to which innocent people have been wrongfully sentenced to death.[6]

Over the previous forty years, the second highest five-year period was 1960–64, when executions in each successive year were fifty-six, forty-three, forty-seven, twenty-one, and fifteen, making an average of 36.4 executions per year. U.S. DEP'T. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT 2000 (Dec. 2001), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cp00.pdf (last visited Apr. 18, 2003); *Executions in the U.S. 1608–1987: The Espry File, Executions by Date*, *at* http://www.deathpenaltyinfo.org/ESPYdate.pdf (last visited Mar. 20, 2003); *see also* James S. Leibman et al., *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV. 1839, 1839 n.2 (2000) (observing that the ninety-eight people executed in 1999 was the "most in a single year since 1951").

2. Sixty-six people were executed in 2001, and seventy-one in 2002. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT 2001 (Dec. 2002), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cp01.pdf (last visited Apr. 18, 2003); Death Penalty Info. Ctr., *2002 Report Traces Year of Change in Capital Punishment*, *at* http://deathpenaltyinfo.org/PR-DPICyrend2002.pdf (last visited Mar. 20, 2003).

3. One important factor has been the Columbia University study relating to the "error rate" in capital cases. *See* Leibman et al., *supra* note 1. Among other things, this study documents the large percentage of cases in which death sentences imposed at trial are later vacated and, in most cases, not reimposed. *See id.* at 1847–52. Another factor in producing change has been the strong opposition to the death penalty expressed by religious groups, including the Catholic Church. *E.g.,* Ronald J. Tabak, *Fairness Without Finality: Why We Are Moving Towards Moratoria on Executions, and the Potential Abolition of Capital Punishment*, 33 CONN. L. REV. 733, 742 (2001). Tabak iterates fourteen specific "symptoms" of the public's awareness of capital punishment. *Id.* at 739–43. *But see* John McAdams, *It's Good, and We're Going to Keep It: A Response to Ronald Tabak*, 33 CONN. L. REV. 819, 839–42 (2001) (challenging Tabak's view that the public's awareness of problems with capital punishment is likely to result in a significant decline in our use of capital punishment).

4. *See* Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987) (presenting 350 known wrongful convictions in capital cases that occurred between 1900 and 1985).

5. Samuel R. Gross & Phoebe C. Ellsworth, *Second Thoughts: Americans' Views on the Death Penalty at the Turn of the Century*, *in* BEYOND REPAIR? AMERICA'S DEATH PENALTY 22 (Steven Garvey ed., Duke Univ. Press 2002).

6. *See* James S. Leibman, *The New Death Penalty Debate: What's DNA Got to Do with It?*, 33 COL. HUM. RTS. L. REV. 527, 538 (2002) (observing that "each new death row exoneration" is treated by "the public and press . . . as an occasion for reexamining the [death] penalty"); *id.* at 534–36 (explaining that due to death row exonerations, public support for the death penalty has dropped and "[a]nywhere from forty-five to seventy-five percent of American currently support a temporary pause in executions while the issue is studied").

Although various factors may have contributed to the climate that precipitated this concern, two seem especially significant: first, the large number of capital defendants who have been released from death row over the past three decades; and, second, the fact that some of these defendants have been exonerated through the use of DNA testing. Since the death penalty was reinstated in 1973, at least 102 death-sentenced inmates from twenty-five states have been released on grounds of innocence.[7] In twelve of these cases, death row inmates were cleared in part through the technology of DNA identification of blood or semen.[8] The fact that so many innocent defendants have been wrongfully convicted and sentenced to death appears to provide clear evidence that our system of capital punishment has made and is making a very significant number of mistakes relating to the fundamental question of capital defendants' guilt or innocence.

The smaller number of cases in which defendants sentenced to death were exonerated by DNA testing may have had an even more significant impact on the public's perception of capital punishment, moreover, because of the powerful message communicated by these cases. Since DNA testing is known to be capable of providing indisputable evidence of a person's guilt or innocence, the fact that twelve capital defendants were released from death row on the basis of such testing appears to provide irrefutable evidence that innocent defendants have been sentenced to death after having been wrongfully convicted of capital crimes. When a capital defendant's guilty verdict has been vacated by a court's decision, many people may be receptive to an argument that the defendant's release from death row occurred because of the court's mistake or excessive leniency rather than the defendant's actual innocence; but when a capital defendant's guilty verdict is vacated as a result of DNA testing, most people will believe that the defendant is in fact innocent. The DNA cases thus solidify the perception that innocent people are being wrongfully sentenced to death.

This changing perception of capital punishment has led to some important developments. On January 31, 2000, Illinois Governor George Ryan, a long time supporter of the death penalty, declared a moratorium on Illinois executions because of his "grave concerns about our state's shameful record of convicting innocent people and putting them on Death Row."[9] Eighteen months later, Justice Sandra Day O'Connor,

7. Death Penalty Info. Ctr., *Innocence and the Death Penalty* (2002), *available at* http://www.deathpenaltyinfo.org/innoc.html (last visited Mar. 20, 2003).

8. This number was obtained through examining the 110 DNA-cleared cases reported by the Innocence Project at Cardozo Law School. As of August 29, 2002, twelve of the 110 DNA-cleared cases were cases in which the exonerated defendant was at one point sentenced to death. *See* http://innocenceproject.org/case/index.php (last visited Mar. 20, 2003).

9. "*My Concern Is Saving Lives, Innocent Lives*," CHI. TRIB., Jan. 31, 2000, at 8. Governor Ryan later commuted the sentences of all death row inmates to life sentences. Steve Mills & Maurice Possley, *Decision Day for 156 Inmates, Ryan Poised to Make History After 3 Years of Debate on Death Penalty*, CHI. TRIB., Jan. 12, 2003, at 1.

who during her tenure on the Court has generally voted to uphold death sentences,[10] told a group of lawyers that there were "serious questions" about whether the death penalty was being fairly administered in the United States and that "[i]f statistics are any indication, the system may well be allowing some innocent defendants to be executed."[11] These concerns have precipitated the proposal of reforms designed to decrease the likelihood that innocent defendants will be sentenced to death.[12]

In formulating such proposals, it is necessary to consider recent empirical data relating to miscarriages of justice in capital cases. As several commentators have pointed out,[13] these data are striking not only in that they show that the frequency of such miscarriages of justice is unexpectedly large, but also because they show that a significant number of them have resulted from police-induced false confessions, a source that until recently was viewed as extremely unlikely to produce a wrongful conviction in any case,[14] much less one in which a defendant's life is at stake.

To take one prominent example, Governor Ryan's declaration of Illinois's moratorium on capital punishment was precipitated by the exoneration of thirteen men who had been on Illinois death row.[15] The Commission on Capital Punishment (the Commission) appointed by the

10. *See*, *e.g.*, Weeks v. Angelone, 528 U.S. 225 (2000) (voting with majority in five to four decision upholding death penalty challenged on the ground that the trial judge failed to properly answer jury's question relating to mitigating evidence); Payne v. Tennessee, 501 U.S. 808 (1991) (voting with majority in five-to-four decision upholding the admission of victim impact evidence at the penalty phase of a capital case); Coleman v. Thompson, 501 U.S. 722 (1991) (writing opinion for five-Justice majority in six-to-three decision denying capital defendant the right to seek postconviction relief on the basis of new evidence of actual innocence because the defendant's attorney inadvertently missed a filing deadline by three days); Blystone v. Pennsylvania, 494 U.S. 299 (1990) (voting with majority in five-to-four decision upholding constitutionality of death penalty statute under which jury is required to impose the death penalty upon a finding of one statutorily defined aggravating circumstance and no mitigating circumstances). *See generally* WELSH S. WHITE, THE DEATH PENALTY IN THE NINETIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT 24 (1991) (stating that, as of 1991, Justice O'Connor was one of the "solid five-justice majority that will invariably vote in favor of the government").

11. Maria Elena Baca, *O'Connor Critical of Death Penalty: The First Female Supreme Court Justice Spoke in Minneapolis to a Lawyer's Group*, STAR TRIBUNE (Minneapolis), July 3, 2001, at 1A.

12. *See* COMM'N ON CAPITAL PUNISHMENT, STATE OF ILL., REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT (2002) [hereinafter COMM'N]; JIM DWYER, PETER NEUFELD & BARRY SCHECK, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGFULLY CONVICTED, App. 1: A Short List of Reforms to Protect the Innocent (2000) [hereinafter DWYER ET AL.]; James S. Liebman, Jeffrey Fagan & Valerie West, *A Broken System: Error Rates in Capital Cases*, 1973–1995 (June 12, 2000), *available at* http://justice.policy.net/jpreport/section1.html (last visited Mar. 20, 2003).

13. *See*, *e.g.*, Jim Dwyer, *Cornered Minds, False Confessions*, N.Y. TIMES, Dec. 9, 2001, at 14 (referring to the fact that as of December 9, 2001, false confessions played a part in producing twenty-two of the ninety-eight cases in which wrongful convictions were established through DNA Testing). *See generally* Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFF. L. REV. 469, 485 (1996) (discussing sources of error in capital cases).

14. *See*, *e.g.*, JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 867 (3d ed. 1940) (asserting that police-induced false confessions are rare); Brian C. Jayne & Joseph P. Buckley, *Criminal Interrogation Techniques on Trial*, 25 PROSECUTOR: J. NAT'L DIST. ATT'YS ASS'N, Fall 1991, at 23 (asserting that, when utilized correctly, modern interrogation techniques will not produce false confessions).

15. COMM'N, *supra* note 12, at 4.

Governor to recommend reforms designed to prevent such miscarriages of justice concluded that two of the thirteen exonerated death row defendants were convicted primarily on the basis of police testimony relating to the defendants' incriminating statements.[16] The Commission observed, moreover, that other defendants on Illinois death row who claimed they were innocent[17] were convicted on the basis of police-induced confessions under circumstances where "the confession represented the most significant piece of evidence linking the defendant to the crime."[18] While the Commission declined to consider the merits of these defendants' claims, it pointedly observed that "these cases should be closely scrutinized by the courts, and, if necessary, the Governor, to insure that a just result is reached."[19] On January 10, 2003, Governor Ryan issued complete pardons to four of the "death row ten" defendants, a step he "took because, he said, he is convinced of their innocence."[20]

Data drawn from DNA-cleared cases also support the conclusion that police-induced confessions are a leading cause of wrongful convictions in capital cases. On August 26, 2002, the New York Times recounted the story of Eddie Joe Lloyd who in 1984 "confessed in horrific detail to the rape and murder of 16-year-old Michelle Jackson, solving a case that had terrified [the city of Detroit] after a wave of fatal child abductions in the area."[21] According to the Times, Lloyd's "six-page statement . . . was chillingly accurate," recounting critical details relating to both the victim and the circumstances of the crime.[22] After Lloyd was convicted of first-degree murder in a Michigan state court on the basis of

16. In Gary Gauger's case, the defendant was sentenced to death after being convicted of the double murder of his parents. The primary evidence against Gauger was police testimony relating to statements allegedly made by Gauger during an interrogation that was not recorded. Gauger denied making the statements. Following a federal investigation, two other people were subsequently convicted in Wisconsin of murdering Gauger's parents. *Id*. at 8.

In Ronald Jones's case, the defendant was sentenced following his conviction for rape and murder. Jones later claimed that his confession was coerced by the police. Jones was exonerated after DNA evidence established that he could not have been the source of the semen recovered from the victim. *Id.* at 9.

17. The Commission referred to a group of defendants on death row whom the media called the "Death Row Ten." As the Commission indicated, "The most common characteristic shared by these cases is the allegation of excessive force by police officers to extract a confession." *Id.* at 10. For media reports relating to the "Death Row Ten," see, e.g., Scott Stewart, *Cop Links 10 Capital Cases*, CHI. SUN-TIMES, Feb. 26, 1999, at 6 (reporting that demonstrators in Illinois marched to show support for the Death Row Ten, a group of men who alleged that former Lt. Jon Burge had used torture and other abusive practices to extract their confessions); Cliff Wirth, *Daley Waves Off Dissent, But Then Repents*, CHI. SUN-TIMES, Feb. 14, 1999, at 32 (reporting that Mayor Daley, who was the State's Attorney when the latest Death Row Ten prisoner was convicted, gave protesters some patronizing nods, waived them off sarcastically, and refused to back the idea of a death penalty moratorium in Illinois). For an account of recent developments with respect to the Death Row Ten, see Brian Jackson, *Seeking a Shock to the System*, CHI. SUN-TIMES, Apr. 7, 2000, at 37.

18. COMM'N, *supra* note 12.

19. *Id.*

20. Jodi Wilgoren, *4 Death Row Inmates Are Pardoned*, N.Y. TIMES, Jan. 11, 2003, at A13.

21. Jodi Wilgoren, *Confession Had His Signature; DNA Did Not*, N.Y. TIMES, Aug. 26, 2002, at A1.

22. *Id.*

his confession, the judge who sentenced him "to life in prison in 1985, lament[ed] . . . Michigan's lack of the death penalty."[23] More than seventeen years later, however, that same judge overturned Lloyd's conviction on the basis of a joint request by prosecutors and defense attorneys who agreed that DNA evidence "proved he did not commit the crime."[24] The Innocence Project at the Benjamin N. Cardozo School of Law reported that Lloyd thus became the 110th person "to be exonerated because of DNA evidence."[25] According to Huy Dao, the Assistant Director of the Project, "[o]f the 110 DNA exonerations . . . 35 involve homicide . . . [and] 23 of the 35 murder cases . . . involve a confession or admission."[26] Dao added that in homicide (or potentially capital) cases, it thus "appears . . . that false confessions or admissions are a main, if not the major, cause of wrongful convictions in DNA-exoneration cases."[27]

The cases in which DNA testing exonerated wrongfully convicted defendants provide a uniquely valuable source for examining the role of police-induced false confessions in producing wrongful convictions in capital cases. Although there are other collections of both wrongful convictions in capital cases[28] and wrongful convictions resulting from police-induced false confessions,[29] the cases cleared by DNA-testing differ from these collections[30] in that they include only cases in which there has been

23. *Id.*

24. *DNA Test Frees Man Jailed for 17 Years,* SAN DIEGO UNION TRIB., Aug. 27, 2002, at A3.

25. *Id.*

26. E-mail from Huy Dao, to Welsh S. White (Aug. 25, 2002, 20:41 EST) (on file with author).

27. *Id.*

28. The most comprehensive collection of wrongful convictions in potentially capital cases was published by Hugo Adam Bedau and Michael L. Radelet in 1987. Bedau and Radelet identified 350 potentially capital cases in America in which miscarriages of justice occurred between the years 1900 and 1985. In fourteen cases among their 350 case sample, they concluded that the record was too slender to provide any basis for the wrongful conviction's cause. Of the other 336 cases, they concluded that a police-induced false confession was the primary or contributing cause of the wrongful conviction in forty-nine, or 14.3 percent, of the cases. *See* Bedau & Radelet, *supra* note 4, at 57. For other collections of wrongful convictions, see EDWIN M. BORCHARD, CONVICTING THE INNOCENT (1932); EDWARD CONNORS ET AL., U.S. DEP'T OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996); DWYER ET AL., *supra* note 12; JEROME FRANK & BARBARA FRANK, NOT GUILTY (1957).

29. *See* 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, 430 (1998) [hereinafter Leo & Ofshe, *Consequences*] ("Police elicit false confessions so frequently that social science researchers, legal scholars, and journalists have discovered and documented numerous case examples in this decade alone.").

30. Both Bedau and Radelet's collection of wrongful convictions in potentially capital cases, *see* Bedau & Radelet, *supra* note 4, and Leo and Ofshe's collection of wrongful convictions resulting from police-induced false statements, *see* Leo & Ofshe, *Consequences*, *supra* note 29, included a significant number of cases in which the defendant's conviction had been neither reversed by a court nor pardoned by a Governor. As to some of the cases in each of these collections, Professor Paul Cassell has claimed that the defendants were not in fact wrongfully convicted. *See* Paul G. Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 HARV. J. L. & PUB. POL'Y 523, 537–75 (1999) (arguing that in nine of the sixty cases included in Leo and Ofshe's collection, the defendants were in fact guilty); Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121 (1988) (arguing

an authoritative determination that the defendant was wrongfully convicted.[31] The DNA-cleared cases thus provide a collection in which the undisputed nature of the defendants' wrongful convictions allows conclusions as to the sources of wrongful convictions to be drawn with greater confidence.[32]

The DNA-cleared cases resulting from police-induced false confessions or incriminating statements illuminate the circumstances under which police-induced confessions or incriminating statements are likely to produce wrongful convictions in capital cases, moreover, because nearly all of the wrongful convictions resulting from this source were potentially capital cases. Based on data supplied by the Innocence Project,[33] as of August 26, 2002, statements induced or allegedly induced by police interrogators[34] played some part in producing the defendant's wrongful conviction in at least twenty-three[35] of the 110 cases cleared by DNA testing.[36] Twenty-one of the twenty-three cases were homicide cases,[37] which can lead to convictions for a capital offense for defendants

that in ten of the 350 cases included in the Bedau and Radelet collection, the defendants were in fact guilty).

31. *See infra* note 40.

32. Because the DNA-cleared cases only include those in which there has been an authoritative determination of innocence based on a court decision or a Governor's pardon, *see infra* note 39, no commentator has claimed that the defendants in any of the DNA-cleared cases were in fact guilty. Since it may thus be accepted that these defendants were wrongfully convicted, the causes of these convictions (to the extent they can be established) provide clear evidence of the factors that precipitate wrongful convictions.

33. Dao, Assistant Director of the Cardozo Innocence Project, reported that, as of August 26, 2002, there were 110 DNA-cleared cases and in twenty-eight of these cases, the defendants' admissions or confessions contributed to their convictions. E-mail from Huy Dao, *supra* note 26. Based on my review of these twenty-eight cases, twenty-four of them involved situations in which police or other government agents (including informants) played some part in producing the defendant's alleged statements. *See id.* In a few cases, the defendant claimed that the government agent's testimony as to his statement was false. *Id.*

34. The other government agents were informers who were closely associated with the prosecution either at the time the defendant confessed or when they testified against him at trial. *See infra* note 35.

35. I am not including cases in which defendants allegedly made admissions to "snitches" or government informers. The appendix at the end of the Article identifies twenty-six cases in which the Innocent Project concluded that the defendant's conviction was based on either a confession (C), dream statement (D) (i.e., cases in which the prosecution was able to convict the defendant in part on the basis of a defendant's account of a "dream" that included incriminating details), or admissions (A). As I indicate in the appendix, my examination of these cases shows that in twenty-three of these twenty-six cases, the defendant's confession, dream statement, or admission was police-induced.

36. The names of the defendants and the dates of their convictions were obtained either from the Innocence Project (2002), *see Case Profiles*, *at* http://www.innocenceproject.org/case/index.php (last visited Apr. 18, 2003) or from Huy Dao, Assistant Director of the Project. *See* E-mail from Huy Dao, *supra* note 26. In most cases, additional information relating to the cases was obtained through examining reported cases and secondary sources (such as newspaper stories or law review articles); in a few cases, however, additional information relating to the circumstances under which the wrongful conviction occurred was supplied by Dao. In nearly every case, information supplied by Dao was corroborated by other sources.

37. These twenty-three cases fall into the following categories: in ten cases, an innocent defendant's false confession led to the defendant's conviction or guilty plea. These ten were Ronald Jones, *see* People v. Jones, 620 N.E.2d 325, 332 (Ill. 1993); Alejandro Hernandez, *see* State v. Hernandez, 521 N.E.2d 25, 30–32 (Ill. 1988); Bruce Godschalk, *see* Sara Rimer, *Convict's DNA Sways Lab, Not a De-*

who were over the age of sixteen at the time the crime for which they were convicted occurred in jurisdictions that impose the death penalty.[38] In eight of these twenty-one cases, moreover, an innocent defendant was in fact sentenced to death.[39] Although the wrongful convictions established through DNA testing represent only a small proportion of the total population of wrongfully convicted defendants,[40] the DNA-cleared

termined Prosecutor, N.Y. TIMES, Feb. 6, 2002, at A14; Eddie Joe Lloyd, *see supra* text accompanying notes 21–25; Jerry Frank Townsend, *see infra* text accompanying notes 111–38; Earl Washington, Jr., *see infra* text accompanying notes 141–89; Christopher Ochoa, *see infra* text accompanying note 242; Anthony Gray, *see infra* text accompanying notes 272–90; Calvin Ollins, *see infra* text accompanying notes 369–401; and Marcellius Bradford, *see infra* text accompanying notes 369–402. In three cases, an innocent defendant's false confession led to testimony or evidence that contributed to the conviction of a different innocent defendant. These three were Richard Danzinger, who was convicted after Christopher Ochoa testified against him, see *infra* text accompanying notes 257–72; Larry Ollins, who was convicted after Marcellius Bradford testified against him, *see infra* text accompanying notes 386–402; and Omar Saunders who was convicted after the prosecution introduced evidence that others charged with the crime (i.e., Bradford and Calvin Ollins) had implicated him in their statements to the police, *see infra* note 386. In five cases, an innocent defendant's statement or alleged statement of a dream relating to how the crime occurred led to that defendant's conviction or guilty plea. These five were Ronald Williamson, *see* Williamson v. Ward, 110 F.3d 1508, 1519–20 (10th Cir. 1997); Steven Linscott, *see* People v. Linscott, 482 N.E.2d 403, 405–06 (Ill. App. Ct. 1985); Robert Miller, *see* DWYER ET AL., *supra* note 12, at 80–87; Rolando Cruz, *see* Jennifer Martin, *Former Inmate Combats Death Penalty*, S. BEND TRIB. (Indiana), Aug. 2, 1999, at C1; and David Vasquez, *see infra* text accompanying notes 313–35. In one case, alleged jailhouse confessions contributed to an innocent defendant's conviction. This defendant was Dennis Fritz, who was convicted after Williamson's statement to the police that Fritz was with him at the time of the murder led the police to collect other evidence, including jailhouse informers' testimony, which they obtained through exploiting Williamson's alleged statements. *See* DWYER ET AL., *supra* note 12, at 134–41. In one case, a defendant's statements to the police which appeared to be incriminating contributed to his conviction. This defendant was Walter Snyder. *See* Cody Ellerd, *Books—U.S.: DNA Crusaders Defend the Wrongly Imprisoned*, INTER PRESS SERVICE, Apr. 14, 2000. And in two cases, defendants were convicted after incriminating statements obtained by the police from a witness led to that witness's false testimony against the defendants, which contributed to the defendants' convictions. These defendants were Willie Rainge and Dennis Williams, who were convicted of rape and murder after Paula Gray identified them as the perpetrators and later testified against them at their trials. *See* People v. Williams, 588 N.E.2d 983, 989–90 (Ill. 1991); People v. Rainge, 570 N.E.2d 431, 435–37 (Ill. App. Ct. 1991). The two cases that were not homicide cases were Bruce Godschalk and Walter Snyder, both of whom were charged with and convicted of rape.

38. In jurisdictions with capital punishment, homicide is a potentially capital offense because a defendant accused of homicide (committed when the defendant is over the age of sixteen, see below) can be convicted of a murder charge that carries the death penalty. *See*, *e.g.*, *infra* note 355 (showing that a death sentence may be imposed for conviction of first degree murder in Arizona).

In *Thompson v. Oklahoma*, 487 U.S. 815 (1988), the Court held that the death sentence was cruel and unusual punishment when imposed on a defendant who was under the age of sixteen when the crime for which that sentence was imposed was committed. Of the defendants in the twenty-one DNA-cleared homicide cases, only one (Calvin Ollins) was under the age of sixteen at the time when the crime for which he was convicted was committed.

39. The eight sentenced to death were: Ron Williamson, Ronald Jones, Alejandro Hernandez, Rolando Cruz, Robert Miller, Earl Washington, Charles Fain, and Dennis Williams. *See* Innocence Project (2002), *at* http://www.innocenceproject.org/case/display_cases.php (last visited Jan. 17, 2003).

40. As several commentators have pointed out, in most crimes no biological evidence is available, and DNA testing can only be performed in cases in which biological evidence is available. *See* DWYER ET AL., *supra* note 12, at XV; Tabak, *supra* note 3, at 735. Based on a comprehensive review of death row exonerations, Leibman concludes that, usually, such exonerations are not the result of DNA testing, but rather are due to the "the actual perpetrator's confession, a witness's recanting of critical testimony against the defendant, documentation of an iron-clad alibi, defects in the state's

cases were essentially selected at random from serious cases,[41] and thus would appear to provide a representative sample of wrongful convictions in such cases. The extent to which government-induced confessions or incriminating statements contribute to this sample of wrongful convictions and the fact that the wrongful convictions resulting from this source occur predominantly in potentially capital cases thus provide solid support for the claim that government-induced confessions and incriminating statements produce wrongful convictions in capital cases with disturbing frequency; and the stories of these cases provide insight into the circumstances under which such wrongful convictions are likely to occur.[42]

Because the sample of DNA-cleared cases resulting from government-induced confessions and incriminating statements is relatively small, however, conclusions relating to government interrogation methods likely to produce statements that will lead to wrongful convictions in capital cases cannot be drawn solely from examining these cases. Rather, the cases should be viewed as striking examples of situations in which particular police interrogation practices apparently played a vital role in producing statements that led to one or more wrongful convictions in potential capital cases. I will thus present some of these cases—particularly those dealing with police-induced false confessions—for the purpose of illustrating the need for specific safeguards designed to reduce the likelihood of death sentences resulting from police-induced false confessions.[43] Other empirical data, intuition, and, to some extent, legal authority indicate that these cases are not isolated examples.[44] Rather the police interrogation practices employed in these cases create a significant risk of wrongful convictions in capital cases.[45] In discussing the basis for additional safeguards designed to reduce the likelihood of wrongful death sentences resulting from police-induced false confessions, I will use the DNA-cleared cases as illustrations, but will also draw from a wider body of evidence.[46]

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other forensic evidence, or most often, the overall weakness of the existing evidence of guilt." Leibman, *supra* note 6, at 542.

41. The Innocence Project at Cardozo Law School only considers cases in which biological evidence exists so that DNA testing of evidence can yield conclusive proof of innocence. A case is classified as DNA-cleared only after the defendant's conviction has either been reversed by a court or the defendant has been pardoned by the Governor. Most of their clients are poor and have exhausted all their legal avenues for relief. Before being accepted by the project, all clients go through an extensive screening process to determine if DNA testing could prove their innocence. To submit his/her case for evaluation, a defendant must send a factual history of the case and a list of the evidence introduced against him or her. The Innocence Project does not accept cases where DNA testing has already been performed and provided conclusive results. Thousands of inmates are currently awaiting evaluation of their cases. Innocence Project (2002), *at* http://www.innocenceproject.org/about/index.php (last visited Jan. 17, 2003).

42. *See generally* Liebman et al., *supra* note 12.

43. *See infra* notes 109–89 and accompanying text.

44. *See infra* notes 64–69 and accompanying text.

45. *Id.*

46. *See infra* Part III.

There are several reasons why police-induced false confessions are disproportionately likely to arise in capital cases. First, improper police interrogation practices are most likely to be used in these cases. Over the past half century, it is generally believed that interrogation practices involving threats, physical brutality, and other practices associated with the third degree[47] have "largely disappeared from the American scene."[48] But, while this may be true as a general proposition, there have been some notable exceptions.[49] In Illinois, there are still cases pending in which defendants have presented credible evidence in support of claims that their confessions were coerced through interrogators' employment of various forms of torture, including "suffocation with a typewriter cover, electroshock with a specially constructed black box [likely a field telephone mechanism], hanging by handcuffs for hours, a cattle prod to the testicles, [and] Russian roulette with a gun in the suspect's mouth."[50] In other jurisdictions, there have been at least isolated incidents in which interrogators have been shown to induce confessions through physical force or other abusive interrogation practices.[51] Significantly, nearly all of these cases involved situations in which the defendant was charged with or convicted of a capital offense.[52]

In addition, interrogation practices that are not impermissible in themselves but may be improper or problematic in particular situations also appear to take place disproportionately often in capital cases. Such practices include protracted questioning,[53] misrepresenting the nature of

47. For an account of police interrogation practices involving the "third degree" and related abusive practices, see WELSH S. WHITE, *MIRANDA*'S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER *DICKERSON* 14–24 (2001) [hereinafter WHITE, *MIRANDA*'S WANING PROTECTIONS].

48. CRAIG M. BRADLEY, THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION 37 (1993).

49. *See* Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275 (1999) (discussing numerous allegations relating to police interrogators' extracting confessions through the use of torture during the 1970s and 1980s at a police station on the South Side of Chicago).

50. *Id.* at 1276–77. *See generally* WHITE, *MIRANDA*'S WANING PROTECTIONS, *supra* note 47, at 128–35 (discussing this "pattern of abusive interrogation practices").

51. *See* Leon v. Wainwright, 734 F.2d 770, 771–73 (11th Cir. 1984) (holding confession from suspect in kidnapping case voluntary despite the fact that the police "threatened and physically abused him by twisting his arm behind his back and choking him until he revealed where [the kidnap victim] was being held"); State v. Holland, 520 N.E.2d 270, 275 (Ill. 1987) (holding statements made by defendant inadmissible where defendant's injuries tended to corroborate his testimony that an interrogating detective jabbed him in the ribs for five to ten minutes and then told him he had "better start answering questions or he was going to kick my ass"); *see also* Jackson v. Maryland, 784 A.2d 670, 683 (Md. Ct. Spec. App. 2001) (holding defendant's confession voluntary and admissible despite defendant's unrebutted claim that he was beaten, choked, and hit by a "female officer and the black guy" until he signed a written statement).

52. The Death Row Ten, for example, all involved cases in which Illinois defendants were convicted of first degree murder and sentenced to death. In each of these cases the defendants alleged that their confessions were extracted through torture. For the names of these defendants, see COMM'N, *supra* note 12, at 17 n.27.

53. *See*, *e.g.*, State v. LaPointe, 678 A.2d 942 (Conn. 1996) (holding brain-damaged defendant's confession admissible despite the fact that he was interrogated by the police for nine hours).

forensic evidence,[54] and making illusory promises of leniency.[55] Although post-*Miranda* defendants have found it difficult to exclude confessions resulting from such practices,[56] commentators[57] and some lower courts have recognized that these practices are likely to produce untrustworthy confessions.[58]

Capital defendants' mental problems provide another explanation for the inordinate number of police-induced false confessions in capital cases. A disproportionately large number of capital defendants are mentally retarded[59] or otherwise mentally handicapped.[60] Mental health experts have long been aware of the risk that a mentally retarded suspect's eagerness to please authority figures will lead him to confess falsely.[61] As the *President's Panel on Mental Retardation* explained forty years ago, "[i]t is unlikely that a retarded person will see the implications or consequences of his statements in the way a person of normal intelligence will."[62] As a result of their vulnerabilities or distorted perceptions of reality, suspects with other types of mental problems are also more likely

54. *See*, *e.g.*, State v. Cayward, 552 So. 2d 971 (Fla. Dist. Ct. App. 1989) (excluding confession after police interrogators fabricated forensic evidence purportedly showing the defendant's semen stains were found on the victim).

55. *See*, *e.g.*, Withrow v. Williams, 944 F.2d 284 (6th Cir. 1991), *aff'd in part*, *rev'd in part*, 507 U.S. 680 (1993) (holding that confession induced by an unkept government promise to the effect that the suspect would "walk" if he identified the shooter of the victim was involuntary and, therefore, inadmissible); Miller v. Fenton, 796 F.2d 598, 613 (3d Cir. 1986), *cert. denied*, 479 U.S. 989 (1986) (holding that confession induced by an unkept government promise which suggested that the detective would provide the defendant with the "proper help" for his problem rather than allowing him to be treated as a criminal was voluntary and, therefore, admissible).

56. *See* United States v. Dickerson, 530 U.S. 428, 444 (2000) (observing that when the police have "adhered to the dictates of *Miranda*," a defendant will rarely be able to make even "a colorable argument that [his] self-incriminating statement was compelled" (quoting Berkemer v. McCarty, 468 U.S. 420, 433 n.20 (1984))); *see also* Welsh S. White, Miranda*'s Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1219 n.54 (2001) [hereinafter White, Miranda*'s Failure*] (noting that results of "Westlaw search examining all federal and state cases decided during the years 1999 and 2000 [showed that] of all cases in those years in which the police obtained valid *Miranda* waivers, there were only four cases in 1999 and five in 2000 in which courts held the suspect's post-waiver confession involuntary").

57. *See* Richard J. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 STUD. IN L., POL., & SOC'Y 189, 192–207 (1997) [hereinafter Ofshe & Leo, *Social Psychology*]; White, Miranda*'s Failure*, *supra* note 56, at 1232–46.

58. *See infra* text accompanying notes 231–411.

59. *See* Timothy S. Hall, *Legal Fictions and Moral Reasoning: Capital Punishment and the Mentally Retarded Defendant After* Penry v. Johnson, 35 AKRON L. REV. 327, 327 (2002) (estimating that the proportion of mentally retarded on death row ranges from "4% to as high as 20%"). In contrast, the 1997 U.S. Census Bureau's assessment of the disabilities among individuals fifteen years and over estimated that 1.7% of the total population is mentally retarded. *See Americans with Disabilities: 1997—Table 2*, *available at* http://www.census.gov/hhes/www/disable/sipp/disab97/ds97t2.html (last visited Apr. 18, 2003).

60. *See* Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 322, 338–39 (quoting sources to the effect that most capital defendants suffer from some kind of mental infirmity).

61. *See* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 445–51 (1984).

62. PRESIDENT'S PANEL ON MENTAL RETARDATION, REPORT OF THE TASK FORCE ON LAW 33 (1963).

than suspects drawn from the normal population to respond to police questioning with false statements.[63]

The proliferation of police-induced false confessions in capital cases may also be attributed to society's strong interest in having the police solve capital crimes. When a capital crime is committed, the police are likely to feel extraordinary pressure to find the perpetrator.[64] As a result, they will be inclined to view a suspect as probably guilty even when the evidence they have obtained does not support such a conclusion.[65] Once the police view a suspect as probably guilty, interrogators are advised to use intensive interrogation techniques that would not be used on a suspect who was not believed to be guilty.[66] As Professor Samuel Gross has noted, moreover, when police are investigating a capital case, they are much more likely to conduct lengthy interrogations in which a wide range of interrogation practices are employed than they are in an ordinary criminal case.[67] When such practices are employed, however, there is naturally a greater likelihood that the police will employ tactics that are likely to produce a false confession.[68] When these tactics are employed on a pool of suspects who are disproportionately likely to be innocent, the frequency with which the police obtain false confessions can be expected to increase.[69]

Over the past three decades, the Supreme Court has frequently expressed a concern for ensuring the reliability of verdicts in capital cases.[70] Over that same period, however, the Court's role in monitoring police interrogation practices has become extremely limited. Although *Dickerson v. United States*[71] reaffirmed *Miranda*, the *Dickerson* majority adverted to two phenomena that have reduced the Court's role in restricting police interrogation practices: first, post-*Miranda* decisions have weakened *Miranda*, thereby reducing its impact on law enforcement;[72] second, once it is shown that the police have complied with *Miranda*, the defendant's chances of excluding a confession on the ground that it is in-

63. *See*, *e.g.*, Steven A. Drizen & 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, 373 (2001) (recounting case of Rodney Woidtke, a mentally ill homeless man who was convicted for the 1988 murder of Audrey Cardenasa on the basis of his apparently false confession to the police).

64. *See* Gross, *supra* note 13, at 477–78.

65. *Id.* at 478.

66. *See* FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 212 (4th ed. 2001).

67. *See* Gross, *supra* note 13, at 485.

68. *See, e.g., id.* at 486 (relating the story of Melvin Rhodes, who confessed after multiple extended interrogations but was later freed when another person confessed).

69. *See id.* at 485–86.

70. *See*, *e.g.*, Clemons v. Mississippi, 494 U.S. 738, 748–49 (1990); Beck v. Alabama, 447 U.S. 625, 632–38 (1980); Gardner v. Florida, 430 U.S. 349, 359 (1977). In earlier decades, moreover, the Court made it clear that it was more apt to scrutinize a defendant's constitutional claim when the defendant had been sentenced to death. The Court's pre-*Miranda* due process confession cases, discussed in *infra* note 81, provide the clearest example of this phenomenon.

71. 530 U.S. 428 (2000).

72. *Id.* at 437.

voluntary are extremely remote.[73] In the 1986 case of *Colorado v. Connelly*,[74] moreover, the Court stated that a confession's lack of reliability is not a factor to be considered in determining whether it is involuntary.[75] The Court declared that this issue is to be governed by the "evidentiary laws of the forum" rather than by "the Due Process Clause of the Fourteenth Amendment."[76] Based on these cases, the Court does not appear to be inclined towards providing special safeguards to restrict interrogation practices employed by the police in capital cases or to ensure the reliability of confessions introduced in such cases.[77]

Society, however, has a strong interest in regulating police interrogation practices in capital cases and a paramount interest in preventing the execution of innocent defendants.[78] Based on the data showing that abusive police interrogation practices are more likely to occur in capital cases than in nonserious cases[79] and that police-induced false confessions are one of the leading causes of wrongful convictions in capital cases,[80] safeguards are needed both to restrain the police from employing offensive interrogation practices in capital cases and to reduce the possibility of capital defendants being convicted and possibly executed on the basis of false confessions. If the Supreme Court is unwilling to address this problem, legislatures and state courts should take the initiative.

In addressing the problem, legislatures and state courts could take two approaches: first, they could ensure that special safeguards will apply when the government seeks to obtain or to introduce police-induced statements in capital cases; alternatively or in addition, they could ensure that whenever a defendant's police-induced statement contributed to the defendant's death sentence, the death sentence must be reversed unless the police-induced statement that contributed to it is shown to have complied with special safeguards.[81]

73. *See supra* note 55.

74. 479 U.S. 157 (1986).

75. *See id.* at 168.

76. *Id.* at 167.

77. *See* White, Miranda*'s Failure, supra* note 56, at 1220–21.

78. *See* Leo & Ofshe, *Consequences, supra* note 29, at 492–94.

79. James S. Leibman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2083 n.143 (2000).

80. *See* Bedau & Radelet, *supra* note 4, at 58.

81. In deciding whether confessions were admitted in violation of due process during the pre-*Miranda* era, the Supreme Court appeared to scrutinize confessions more closely in cases where the death penalty was imposed. As of 1959, the Court "applied its coerced confession rule in twenty-eight cases, . . . among which twenty-one were capital." Leibman, *supra* note 79, at 2035 (citing twenty-one cases). In fifteen of these twenty-one cases, the Court ruled that admission of the confession violated due process. *See* Spano v. New York, 360 U.S. 315 (1959); Payne v. Arkansas, 356 U.S. 560 (1958); Fikes v. Alabama, 352 U.S. 191 (1957); Leyra v. Denno, 347 U.S. 556 (1954); Johnson v. Pennsylvania, 340 U.S. 881 (1950); Harris v. South Carolina, 338 U.S. 68 (1949); Turner v. Pennsylvania, 338 U.S. 62 (1949); Watts v. Indiana, 338 U.S. 49 (1949); Malinski v. New York, 324 U.S. 401 (1945); Vernon v. Alabama, 313 U.S. 547 (1941); Lomax v. Texas, 313 U.S. 544 (1941); White v. Texas, 310 U.S. 530 (1940); Canty v. Alabama, 309 U.S. 629 (1940); Chambers v. Florida, 309 U.S. 227 (1940); Brown v. Mississippi, 297 U.S. 278 (1936). In two of them, *Payne* and *Chambers*, the Court expressly ruled that using the defendant's confession to "send [an] accused to his death" violated due process. In one of

As part of its effort to reduce wrongful convictions in capital cases, the Commission recommended safeguards that apply when the government seeks to obtain or to introduce police-induced statements in a capital case.[82] These included procedural safeguards intended to enhance the reliability of fact-finding in interrogation cases.[83] Two of them, moreover, were designed to affect police interrogation practices, specifically addressing issues that arise when police interrogate mentally handicapped suspects or employ interrogation tactics which misrepresent the strength of the evidence against the suspect.[84]

In its most important procedural recommendation, the Commission required that police videotape interrogations in capital cases when practical[85] and that they tape-record such interrogations when videotaping is impractical.[86] If implemented, these recommendations will undoubtedly increase electronic recording of police interrogation in capital cases and thereby enhance the reliability of fact-finding in such cases. Significantly, however, the Commission's recommendation did not provide that failure to comply with these requirements would automatically result in the exclusion of a capital defendant's confession.[87]

In its recommendations relating to police interrogation, the Commission first proposed that the police "be required to make a reasonable attempt to determine a suspect's mental capacity before interrogation . . . ."[88] This recommendation, which was designed to reduce the likelihood of police-induced false confessions from mentally handicapped suspects,[89] also provided that "if a suspect should be determined to be mentally retarded, the police should be limited to asking nonleading questions and prohibited from implying that they believe the suspect is guilty."[90] As in the case of its recommendations relating to electronic recording, however, the Commission observed that it did "not anticipate" the police's failure to comply with this recommendation would "result in the automatic exclusion" of a mentally handicapped suspect's statements.[91]

The Commission's final recommendation relating to interrogation addressed specific police interrogation tactics.[92] It provided that "[i]n capital cases, courts should closely scrutinize any tactic that misleads the

the death penalty confession cases, moreover, Justice Jackson's majority opinion stated, "When the penalty is death, we . . . are tempted to strain the evidence and even, in close cases, the law to give a doubtfully condemned man another chance." Stein v. New York, 346 U.S. 156, 196 (1953).

82. COMM'N, *supra* note 12.
83. *See infra* text accompanying notes 84–86.
84. *See infra* text accompanying notes 87–89.
85. COMM'N, *supra* note 12, at 24.
86. *Id.* at 29.
87. *Id.* at 27.
88. *Id.* at 30.
89. *Id.* at 31.
90. *Id.* at 30.
91. *Id.* at 31.
92. *Id.* at 123.

suspect as to the strength of the evidence against him/her, or the likelihood of his/her guilt, in order to determine whether this tactic would be likely to induce an involuntary or untrustworthy confession."[93] Based on this recommendation, confessions obtained through certain interrogation tactics would be more likely to be excluded as involuntary; as with the Commission's other recommendations, however, this recommendation does not mandate the exclusion of a capital defendant's confession in any particular situation.[94]

The Commission's recommendations are thus designed not only to improve fact-finding in police interrogation cases, but also to restrict police interrogation practices. The Commission's recognition of the need for additional restrictions on interrogation practices is especially significant because other commentators have suggested that procedural safeguards relating to the electronic recording of police interrogations are the only safeguards needed to protect against the introduction of police-induced false confessions in capital cases.[95] The Commission's recognition that substantive restrictions on interrogation practices are also necessary reflects an accurate judgment as to both electronic recording's limitations[96] and the need to regulate police interrogation practices to prevent the police from employing practices that have the potential for producing confessions that typical fact-finders are likely to view as reliable even though they are in fact unreliable.[97]

93. *Id.*

94. *Id.*

95. DWYER ET AL., *supra* note 12, at 256 ("Videotape, or at least audiotape, all interrogations so there is an objective record."); Leibman, *supra* note 79, at 2030, 2147 ("At trial, the prosecution may not introduce inculpatory statements made by the defendant while in custody unless the statements, and all interrogations leading up to them, were videotaped and the videotapes have been turned over to the defense.").

96. Jurors who examine an electronic recording of a defendant's interrogation will have a better understanding of the interrogation techniques employed by the police but may still be unable to assess the effect of these techniques on the defendant. In at least two cases involving proven false confessions, jurors convicted the defendants after hearing electronic recordings of the interrogations leading up to the confessions. *See* DONALD S. CONNERY, GUILTY UNTIL PROVEN INNOCENT 239 (1977) (recounting story of trial and conviction of Peter Reilly after a recording of the interrogation leading to his confession was played to the jury); TERRY GANEY, ST. JOSEPH'S CHILDREN: A TRUE STORY OF TERROR AND JUSTICE 62–69 (1989) (recounting story of trial and conviction of Melvin Lee Reynolds after a recording of the interrogation leading to his confession was played to the jury).

97. Empirical data show that modern jurors are likely to give great weight to suspects' confessions, whether or not they are reliable. *See*, *e.g.*, Gerald R. Miller & F. Joseph Boster, *Three Images of the Trial: Their Implications for Psychological Research*, *in* PSYCHOLOGY IN THE LEGAL PROCESS 19–38 (Bruce Dennis Sales ed., 1977) (discussing empirical data showing that in a mock trial experiment subjects exposed to various sorts of evidence of a suspect's guilt—identification evidence, circumstantial evidence, and the suspect's confession—were "significantly more likely" to view the suspect's confession as establishing the defendant's guilt than either of the other types of evidence); *60 Minutes: Did He Do It?* (CBS television broadcast, June 30, 1996), *available at* LEXIS: CBS News Transcripts [hereinafter *60 Minutes*] (reporting that jurors at trial of Richard LaPointe, a brain damaged man who confessed after nine hours of intensive interrogation, "refused to believe that anyone would confess to a crime he did not commit"). *See generally* MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 148, at 316 (Edward W. Cleary ed., 2d ed. 1972) ("[T]he introduction of a confession makes the other aspects of a trial in court superfluous, and the real trial, for all practical purposes, occurs when the confession is obtained.").

Nevertheless, the Commission's recommendations are insufficient in at least three respects: first, to the extent that the recommendations seek to restrict improper interrogation practices, they do not identify the full range of interrogation practices likely to produce untrustworthy confessions; second, in seeking to improve fact-finding in police interrogation cases, they overlook the need to provide the jury with information that will assist it in assessing interrogation practices' potential for producing false confessions; and, third, the recommendations do not provide adequate remedies for situations in which the police fail to comply with either the procedural or substantive safeguards. Legislatures and state courts seeking to reduce wrongful convictions in capital case should thus use the Illinois Commission's recommendations relating to confessions in capital cases only as a starting point. To provide adequate protection against the introduction of police-induced false confessions in capital cases, legislatures and courts should adopt safeguards addressing a broader range of police interrogation techniques, providing an additional means of enhancing fact-finding in police interrogation cases, and a more effective means of enforcing the restrictions imposed on the police.

This article proposes such safeguards. In part II, I suggest safeguards to be applied when the police interrogate mentally handicapped suspects.[98] To illustrate the context in which police interrogations produce false confessions from this population of suspects, I begin by considering two of the DNA-cleared cases in which such confessions occurred.[99] Then, drawing upon empirical data relating to the circumstances under which mentally handicapped suspects are most likely to give police-induced false confessions, I propose specific recommendations relating to police interrogation of mentally handicapped suspects.[100]

Part III proposes safeguards relating to police interrogation practices.[101] Using empirical data as well as cases, I identify three interrogation practices that are likely to produce false confessions from innocent suspects.[102] To illustrate the context in which these practices produce false confessions, I consider one or more of the DNA-cleared cases in which each of the practices played a part in producing a false confession.[103] As to each practice, I then propose safeguards that can reduce the likelihood that confessions resulting from such practices will produce wrongful convictions in capital cases.[104]

98. *See infra* notes 109–218 and accompanying text.
99. *See infra* notes 111–12 and accompanying text.
100. *See infra* notes 203–18 and accompanying text.
101. *See infra* notes 219–412 and accompanying text.
102. *See infra* notes 228–412 and accompanying text.
103. *See infra* notes 240–91, 312–37, 352–402 and accompanying text.
104. *See infra* notes 294–306, 341–43, 403–12 and accompanying text.

Part IV proposes measures to improve fact-finding in cases where the reliability or admissibility of a police-induced confession is at issue.[105] Drawing upon the experience of other jurisdictions, I consider ways in which the Commission's recommendations relating to electronic recording of police-induced confessions in capital cases could be strengthened to enhance the likelihood that the fact-finder will have an accurate understanding of the circumstances under which the confession was obtained.[106] In addition, after examining the Commission's recommendation relating to the admissibility of expert testimony in eyewitness identification cases, I propose that expert testimony relating to the circumstances under which police interrogation methods are likely to produce untrustworthy confessions should be received in capital cases.[107]

Finally, part V concludes by presenting six safeguards that can provide capital defendants with enhanced protection against wrongful convictions resulting from police-induced false confessions.[108]

II. INTERROGATING MENTALLY HANDICAPPED SUSPECTS

Since it has long been known that mentally handicapped suspects are more likely than other suspects to respond to police questioning with false confessions,[109] it is not surprising that the DNA-cleared cases resulting from police-induced statements include a disproportionate number in which the wrongfully convicted defendants had some type of mental disability.[110] To illustrate the role that suspects' mental disabilities play in

105. *See infra* notes 413–56 and accompanying text.
106. *See infra* notes 418–56 and accompanying text.
107. *See infra* notes 443–56 and accompanying text.
108. *See infra* notes 457–70 and accompanying text.
109. *See supra* text accompanying notes 60–62.
110. Based on secondary sources, it appears that at least eleven of the defendants who were wrongfully convicted on the basis of police-induced statements were mentally handicapped: Jerry Frank Townsend has an I.Q. between fifty and sixty, *Retarded Man Freed on DNA Evidence*, N.Y. TIMES, June 16, 2001, at A11 [hereinafter *Retarded Man Freed*]; Earl Washington has an I.Q. of sixty-nine, Bill Miller & Steve Bates, *DNA Test Could Lead to Man's Release; Death Row Inmate May Be Innocent of '82 Murder, Va. Officials Say*, WASH. POST, Oct. 26, 1993, at A1; Calvin Ollins has an IQ between sixty-five and seventy, Maurice Possley & Steve Mills, *New Evidence Stirs Doubt Over Murder Convictions; DNA, Recantations Suggest Four Inmates Innocent in '86 Case*, CHI. TRIB., May 2, 2001, at N1 [hereinafter Possley & Mills, *New Evidence*]; David Vasquez was described in court as having "'borderline retarded/low normal' intelligence," *see* Dana Priest, *At Each Step, Justice Faltered for Virginia Man*, WASH. POST, July 16, 1989, at A1 [hereinafter Priest, *At Each Step*]; Ron Williamson had a history of serious mental problems, including bipolar disorder, Mick Hinton, *Former Prisoners Plan for Freedom: Attorneys Urge DNA Legislation*, SAT. OKLAHOMAN, Apr. 17, 1999, at 1; Anthony Gray has been described as having a below average I.Q., learning impaired, and borderline retarded, *Trying to Right an Injustice*, BALTIMORE SUN, Feb. 6, 1999, at 1A [hereinafter *Trying to Right an Injustice*]; Alejandro Hernandez has an I.Q. of seventy-six, which places him in the "borderline mentally retarded" range. Tom Pelton, *Turow Trying to Win New Trial for Hernandez in Nicarico Murder,* CHI. TRIB., Jan. 4, 1995, at 1; *see also* Barbara Mahany & Dean Baquet, *A Mystery Solved, Only to Resurface*, CHI. TRIB., Dec. 22, 1985, at C1; Rolando Cruz was admitted to a psychiatric ward in 1982, three years before his conviction, Janan Hanna, *Judges Refuses to Divide DuPage Seven Case*, CHI. TRIB., July 9, 1998, at SW1; Robert Miller is mentally ill, Sandra K. Manning, *The Risk of Executing the Innocent*, 167 N.J. L.J., 611 (2002); Ronald Jones has an I.Q. of seventy, *Time to Vote for Justice Reform*,

producing police-induced false confessions, I present the salient circumstances of two of these cases: Jerry Frank Townsend, who served twenty-two years in prison after his confessions to six murders and one rape led him to plead guilty to some of these offenses and to be convicted of others;[111] and Earl Washington, Jr., who was sentenced to death after his confession to the rape and murder of Rebecca Lynn Williams led to his conviction of rape and first degree murder.[112]

A. Jerry Frank Townsend

Jerry Frank Townsend, whose I.Q. was about fifty-five,[113] was arrested when he was twenty-seven for raping a pregnant woman in daylight in 1979.[114] The complaining witness, who had used sixteen aliases and had had forty-three arrests since 1978, was intoxicated at the time she reported the rape and refused to go to a rape treatment center afterwards.[115] During the investigation, Townsend admitted committing the rape[116] and also confessed to several murders and at least one sexual assault.[117]

Detectives interrogated Townsend for several hours,[118] taping parts of the interrogation, including his confession to the various crimes.[119] During the taped confession, the detectives helped Townsend with details and corrected him when his story was inconsistent.[120] The taped confession was very confused and was interrupted by stops and starts, which indicated that the detectives might have told Townsend what to say or suggested details to him.[121] Even with the detectives' help, Town-

CHI. TRIB., Mar. 29, 2001, at N26; and Eddie Joe Lloyd was in a mental hospital at the time he was arrested for the crime as to which he confessed, Wilgoren, *supra* note 21.

111. Ardy Friedberg & Paula McMahon, *21-Year Inmate to Go Free; Miami-Dade Drops Charges in Two Murders, Rape Case for Mentally Disabled Man*, SUN-SENTINEL (Fort Lauderdale, FL), June 15, 2001, at 1A [hereinafter Friedberg & McMahon, *21-Year Inmate*].

112. *See* Washington v. Commonwealth, 323 S.E.2d 577, 581–83 (Va. 1984).

113. Authorities said that Townsend has an I.Q. between fifty and sixty and the mental capacity of an eight-year-old child. *Retarded Man Freed*, *supra* note 110, at A11; Brendan Farrington, *DNA Clears Man of Two Killings in '70s; Confessions Made to Please Police*, CHI. TRIB., June 16, 2001, at N12.

114. *Man Freed After 22 Years; DNA Evidence Helps Clear Defendant's Murder Conviction*, NEWSDAY (NY), June 16, 2001, at A12 [hereinafter *Man Freed After 22 Years*].

115. Ardy Friedberg & Paula McMahon, *Questions Arise Over 1979 Rape Conviction; Case Revisited as DNA Tests Clear Inmate*, SUN-SENTINEL (Fort Lauderdale, FL), May 18, 2001, at 1B.

116. Paula McMahon & Ardy Friedberg, *Justice Can Elude Mentally Impaired: Validity of Their Confessions Produces More Legal Challenges*, SUN-SENTINEL (Fort Lauderdale, FL), Mar. 24, 2002, at 1A [hereinafter McMahon & Friedberg, *Justice Can Elude*].

117. *Man Freed After 22 Years*, *supra* note 114, at A12.

118. Paula McMahon & Ardy Friedberg, *Evidence Could Free Inmate After 21 Years, Jerry Frank Townsend Will See His Four Broward Convictions Vacated*, SUN-SENTINEL (Fort Lauderdale, FL), May 8, 2001, at 1B [hereinafter McMahon & Friedberg, *Evidence Could Free*].

119. Ardy Friedberg & Jason T. Smith, *Townsend Released; Judge Cites 'an Enormous Tragedy'; Attorneys Say Suspect Was Easily Led to Confess,* SUN-SENTINEL (Fort Lauderdale, FL), June 16, 2001, at 1A.

120. Farrington, *supra* note 113, at N12.

121. Friedberg & Smith, *supra* note 119, at 1A.

send's confession contained many incorrect details: he was mistaken as to some of the dates when the murders occurred; he said one victim was white when she was black; and he incorrectly described the clothes the victims were wearing and the ways in which they were killed.[122]

Nevertheless, Townsend's confession was used to convict him of two murders committed in Broward County, Florida in 1973: the killings through strangulation of Naomi Gamble and Barbara Ann Brown.[123] At his trial for these offenses, the State also introduced Townsend's confessions to six other homicides and two assaults.[124] The victims were all either known prostitutes or had appeared to be walking the street like prostitutes.[125] In one of his confessions, Townsend stated that he had killed the women because he intended to help rid the world of prostitutes.[126]

After his conviction for these two murders, Townsend pleaded guilty to four other Florida murders, two in Broward County[127] and two in Miami-Dade County.[128] The public defender who represented Townsend in the Miami-Dade County cases said, "Townsend only pleaded to those (Miami) cases because of what happened in Broward and because he could have faced the death penalty."[129] In one of the Miami-Dade County cases, Townsend also pleaded guilty to rape because it was part of a package deal offering a life sentence.[130]

Townsend's journey to freedom began when DNA evidence exonerated Frank Lee Smith and showed that Eddie Lee Mosley was probably guilty of a murder committed in 1985.[131] As a result of Smith's exoneration, Mosley became a suspect in several other cases, including the 1979 murder of a thirteen-year-old girl that had been blamed on Townsend.[132] Subsequently, the other cases in which Townsend had been convicted were reopened, and new DNA tests were conducted.[133] After DNA tests exonerated Townsend for two of the four Broward County murders, Broward prosecutors successfully moved to vacate all four convictions.[134] The prosecutors concluded that it would be unfair to keep Townsend in prison for the remaining two murders after the DNA tests

122. Paula McMahon & Ardy Friedberg, *Meeting Sought with Jailed Man*, SUN-SENTINEL (Fort Lauderdale, FL), May 24, 2001, at 1B [hereinafter McMahon & Friedberg, *Meeting Sought*].

123. Townsend v. Florida, 420 So. 2d 615, 616 (Fla. Dist. Ct. App. 1982).

124. *Id.*

125. *Id.* at 617.

126. *Id.*

127. Friedberg & McMahon, *21-Year Inmate*, *supra* note 111, at 1A.

128. *Id.*

129. McMahon & Friedberg, *Meeting Sought*, *supra* note 122, at 1B.

130. *Id.*

131. Paula McMahon & Ardy Friedberg, *Murder Suspect Will Be Evaluated; 54-Year-Old Detained in Hospital Since 1990 Could Face Charges in Slayings*, SUN-SENTINEL (Fort Lauderdale, FL), Mar. 31, 2001, at 1B.

132. *Id.*

133. *Id.*

134. McMahon & Friedberg, *Evidence Could Free*, *supra* note 118, at 1B.

had established that his confessions were unreliable.[135] Soon after, the Miami-Dade County prosecutors successfully moved to vacate his convictions for the two murders and rape committed in Miami to which he had confessed at the same time.[136] After spending almost twenty-two years in prison for the rape and six murders, a judge ordered Townsend's release on June 15, 2001.[137] Townsend finally left the prison at about 12:20 a.m. the next day.[138]

Police involved in Townsend's case eventually recognized that Townsend admitted to crimes he did not commit in order to please the detectives who were interrogating him: "He liked the cops; he wanted to be with the cops. They were his buddies. . . . He was trying to be helpful to them," said Miami Assistant Police Chief James Chambliss, in an interview after DNA testing cleared Townsend of the crimes.[139] Christopher Slobogin, a professor of criminal law and psychology, added that the case provides an example of the problems likely to occur when the police interrogate a mentally retarded suspect: "People with mental retardation are extremely open to suggestion. . . . Their desire to please authority figures and appear normal trumps their sense of self-preservation."[140]

B. Earl Washington, Jr.

On June 4, 1982, police found Rebecca Lynn Williams, a nineteen-year-old wife and mother of three, naked and bleeding from multiple stab wounds in her apartment in Culpeper, Virginia.[141] Before being taken to the hospital where she died at 2:05 p.m., Williams told a police officer that a black man acting alone had raped her.[142] The cause of death was thirty-eight stab wounds to the neck, chest, and abdomen.[143] Vaginal smears uncovered the presence of sperm and male prostates enzyme.[144]

The crime was unsolved until Earl Washington, Jr., was arrested about a year later in a nearby town for unrelated crimes.[145] These crimes arose out of a drunken argument in which Washington allegedly hit his neighbor Hazel Weeks with a chair and shot his brother in the foot.[146] Washington had the mentality of a ten-year-old and an I.Q. of about

135. *Id.*
136. Friedberg & McMahon, *21-Year Inmate*, *supra* note 111, at 1A.
137. Friedberg & Smith, *supra* note 119, at 1A.
138. *Id.*
139. Farrington, *supra* note 113, at N12.
140. McMahon & Friedberg, *Justice Can Elude*, *supra* note 116, at 1A.
141. Washington v. Commonwealth, 323 S.E.2d 577, 581 (Va. 1984).
142. *Id.*
143. *Id.*
144. *Id.*
145. Jim Dwyer, *Testing the Rush to Death Row*, DAILY NEWS (N.Y.), Sept. 7, 2000, at 20 [hereinafter Dwyer, *Testing*].
146. *Id.*

sixty-nine.[147] Detectives gave him his *Miranda* warnings at 9:40 a.m., and then asked him about the attacks on his neighbor and brother.[148] Washington confessed to these crimes, admitting to everything the detectives asked him about them.[149] The interview ended at about noon and Washington was given lunch.[150]

After lunch, the detectives interrogated Washington about other crimes.[151] Before being asked about the Williams rape-murder, Washington confessed to four other crimes,[152] including three rapes that the police later determined he could not have committed.[153] The detectives then decided to ask him about the Williams murder.[154] One of the detectives wrote, '"We decided to ask him about the murder which occurred in Culpeper in 1982. . . . I asked Earl—'Earl, did you kill that girl in Culpeper?' Earl sat there silent for about five seconds and then shook his head yes, and started crying.'"[155] The detectives then asked Washington leading questions about the crime, supplying many of the facts about the case and asking Washington if he agreed.[156] Washington gave affirmative responses.[157]

Despite the detectives' leading questions, Washington's confession contained many incorrect details.[158] He told the police the victim was black; she was white.[159] He described her as short, but she was five feet, eight inches tall.[160] He said that he had stabbed her two or three times, but she had been stabbed thirty-eight times.[161] Moreover, the police drove Washington to several apartment buildings in Culpeper, trying to get him to identify the crime scene.[162] They drove into Williams's apartment complex three times without getting any reaction.[163] On the third

147. Miller & Bates, *supra* note 110, at A1.

148. *Washington*, 323 S.E.2d at 582.

149. Dwyer, *Testing*, *supra* note 145. After getting into a drunken argument with his brother, Washington went next door to get his elderly neighbor's gun. *Id.* She surprised him, and he hit her with a chair. *Id.* He then ran next door and shot his brother in the foot. *Id.* Washington confessed to the attack on his neighbor, Hazel Weeks, and said that he also tried to sexually assault her. *Based on the DNA Evidence, Gilmore Pardons Inmate for Rape, Murder Earl Washington Spent 17 Years in Prison, Partly on Death Row; Lawyer Says He Should Be Paroled,* VIRGINIAN-PILOT, Oct. 3, 2000, at A1 [hereinafter *Gilmore Pardons*]. Prosecutors dropped the sexual assault charge because Weeks said Washington did not try to rape her. *Id.*

150. *Washington*, 323 S.E.2d at 582.

151. *Id.*

152. *Gilmore Pardons*, *supra* note 149, at A1.

153. Paul T. Hourihan, *Earl Washington's Confession: Mental Retardation and the Law of Confessions*, 81 VA. L. REV. 1471, 1472 n.3 (1995).

154. *Washington*, 323 S.E.2d at 582.

155. Dwyer, *Testing*, *supra* note 145, at 20 (emphasis omitted).

156. Eric M. Freedman, *Earl Washington's Ordeal*, 29 HOFSTRA L. REV. 1089, 1092–93 (2001).

157. *Id.*

158. *Id.* at 1093.

159. *Id.*

160. *Id.*

161. Dwyer, *Testing*, *supra* note 145, at 20.

162. Freedman, *supra* note 156, at 1094.

163. *Id.*

try, an officer asked Washington to point to the scene of the crime.[164] Washington chose an apartment on the opposite end from Williams's apartment.[165] Finally, an officer pointed to Williams's apartment and asked directly if that was the one.[166] Washington said it was.[167] The police also asked Washington if a shirt found at the crime scene belonged to him.[168] He said it did.[169]

At Washington's trial, the government's case depended almost entirely on Washington's confession and his statement that the shirt found at the crime scene belonged to him.[170] The police never found any murder weapon, witnesses, or forensic evidence linking Washington to the crime.[171] Although Washington had recanted his confession prior to trial, he had no alibi.[172] The jury found Washington guilty of the rape and murder of Rebecca Lynn Williams and sentenced him to death.[173]

Washington's appeals were rejected, and his execution was scheduled for September 5, 1985.[174] About one week before the execution date, another death row inmate told a visiting New York lawyer about Washington's case.[175] That lawyer contacted her boss, Eric Freedman, and Freedman was able to obtain a stay of Washington's execution.[176]

After Washington had been on death row for about ten years, the Virginia Attorney General ordered a DNA test, which showed that neither Washington, Williams, nor her husband could, individually or in combination, be the contributor of a genetic trait found in the vaginal smear.[177] Washington could have possibly contributed to the mixture if another person containing the genetic trait had also contributed to it.[178] In view of Williams's statement that only one man had attacked her,[179] however, that possibility seemed remote. Nevertheless, Virginia Gover-

164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. William Raspberry, *Full Pardon for Earl Washington, Jr.*, WASH. POST, Jan. 5, 1994, at A19.
171. Miller & Bates, *supra* note 110, at A1.
172. *Id.* At trial, the defense argued that Washington's confession was coerced because of his limited intelligence. *Id.* However, the defense counsel presented "less than a vigorous defense." *The Fate of Earl Washington*, WASH. POST, Jan. 14, 1994, at A22. The defense attorney failed to offer evidence that the seminal fluid found on a blanket at the crime scene could not have come from Washington alone and that it could have come from another suspect, James Pendleton. Freedman, *supra* note 156, at 1094–95. Counsel also failed to point out that hairs found at the crime scene had not been compared with Washington's hair. *Id.* Additionally, counsel failed to present expert testimony to show that Washington was incapable of understanding the *Miranda* warnings. *Id.* Instead, defense counsel put Washington on the stand, where he testified that he had never made the confession. *Id.*
173. Dwyer, *Testing*, *supra* note 145, at 20.
174. *Id.*
175. *Id.*
176. *Id.*
177. Raspberry, *supra* note 170, at A19.
178. *Id.*
179. *See supra* text accompanying note 142.

nor Douglas Wilder refused to grant Washington a full pardon, though in 1993 he did commute his death sentence to a life sentence.[180]

Seven years later, more sophisticated DNA tests proved that the semen found at the crime scene could not have belonged to Washington under any circumstances.[181] Upon learning of these results, Virginia Governor James Gilmore granted Washington a full pardon on October 2, 2000.[182] When the pardon was granted, however, Washington remained in jail, serving a thirty-year sentence for the attack on his neighbor, Hazel Weeks.[183] When he was granted parole for this offense, Washington was finally released from prison in February, 2001.[184]

Although there was some dispute as to the circumstances of Washington's interrogation,[185] Washington never claimed that the detectives coerced him into confessing.[186] Moreover, the interrogation was not lengthy and there was no evidence of police trickery.[187] Why then would Washington confess to a capital crime he did not commit? The simple answer is that he was mentally retarded.[188] Even when no pressure is exerted, a retarded suspect "will make a false confession out of desire to please someone perceived to be an authority figure."[189] Like Townsend's confession, Washington's confession may thus be attributed to his eagerness to please authority figures, a personality trait that is often displayed by mentally retarded defendants.

In *Atkins v. Virginia*,[190] the Supreme Court concluded that "[m]entally retarded defendants in the aggregate face a special risk of wrongful execution."[191] In reaching this conclusion, the Court was concerned not only with the possibility that death sentences would be imposed on defendants whose moral culpability did not justify such a severe penalty,[192] but also that defendants' "mental retardation undermine[s] the strength of . . . procedural protections" designed to protect against

180. Dwyer, *Testing*, *supra* note 145, at 20.

181. Tim McGlone, *The Earl Washington Case. A Chance at Freedom Despite Gilmore's Pardon, the Former Death Row Inmate Will Have to Wait at Least Another Month Before He Finds Out if He's Paroled*, VIRGINIAN-PILOT, Oct. 4, 2000, at A1.

182. *Id.*

183. *Id.*; *see also* Freedman, *supra* note 156, at 1103. In connection with the attack on his neighbor, Washington pled guilty to burglary and malicious wounding and received consecutive fifteen-year prison terms. *Id.* at 1091.

184. Freedman, *supra* note 156, at 1112; Bob Herbert, *In America; The Confession*, N.Y. TIMES, June 21, 2001, at A25.

185. Washington testified that at the time of his arrest he was exhausted because he had been up all night "running through the woods." Washington v. Commonwealth, 323 S.E.2d 577, 582 (Va. 1984). The deputy sheriff who interrogated him testified, however, that Washington did not appear to be "tired or disheveled." *Id.*

186. *Id.* at 584.

187. *Id.* at 584–86.

188. *Id.* at 586.

189. Ellis & Luckasson, *supra* note 61, at 414, 446 n.168 (citing Ford v. State, 21 So. 524, 525–26 (Miss. 1887)).

190. 536 U.S. 304 (2002).

191. *Id.* at 350.

192. *Id.* at 347.

wrongful convictions in capital cases.[193] As I have already indicated, abundant empirical data demonstrate that suspects who are mentally retarded or otherwise mentally handicapped are especially likely to give false confessions in response to police interrogation.[194] At least when the government is seeking to introduce a mentally handicapped defendant's police-induced confession in a capital case, the safeguards designed to protect against the admission of untrustworthy confessions need to be strengthened.

Atkins's holding that execution of a mentally retarded defendant constitutes cruel and unusual punishment appears to eliminate the risk that a mentally retarded defendant will be executed on the basis of a police-induced false confession. In *Atkins*, however, Justice Stevens's majority opinion stated that the states would have "the task of developing appropriate ways to enforce" *Atkins*'s new constitutional prohibition.[195] His opinion also indicated that, while an I.Q. of below seventy is one criterion for identifying the mentally retarded,[196] "clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18."[197] *Atkins* thus opens up the possibility that even a defendant with an I.Q. below seventy might not be able to establish that he was mentally retarded on the basis of a state's permissible criteria. In addition, *Atkins* has no application to defendants whose subnormal intelligence or mental problems make them especially likely to give police-induced false confessions even though their I.Q.s are above the cut-off point for mental retardation.

Citing a proposal I made in an article written in 1997,[198] the Commission recommends that the police "should be required to make a reasonable attempt to determine the suspect's mental capacity before interrogation, and if a suspect is determined to be mentally retarded, the police should be limited to asking nonleading questions and prohibited from implying that they believe the suspect is guilty."[199] Although requiring that the police make a reasonable attempt to determine a suspect's mental condition prior to interrogation is certainly desirable, there are at least two problems with this recommendation. First, as other

193. *Id.* at 348.

194. *See supra* text accompanying notes 61–63.

195. *Atkins*, 536 U.S. at 348.

196. *Id.* at 347–48.

197. *Id.* at 348.

198. *See* Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C. R.-C. L. L. REV. 105, 142–43 (1997) [hereinafter White, *False Confessions*]. This proposal was designed to provide a constitutional safeguard that would not be inconsistent with the Court's decision in *Colorado v. Connelly*, 479 U.S. 157 (1986). Legislatures and state courts are, of course, free to provide safeguards that go beyond *Connelly* in providing protection when police are interrogating mentally handicapped defendants in capital cases.

199. COMM'N, *supra* note 12, at 30.

commentators have pointed out,[200] because mental disabilities are often difficult to recognize, even police officers who make a good faith effort to determine a suspect's mental condition "may fail to identify a suspect's disabilities until long after a confession has been secured."[201] Second, restrictions imposed on police interrogating mentally handicapped suspects in capital cases should apply to all suspects whose mental handicaps make them especially likely to respond with untrustworthy statements, not just those who are mentally retarded.[202]

In seeking to safeguard mentally handicapped suspects from death sentences resulting from police-induced false confessions, it is thus necessary to identify those whose mental problems make them especially likely to respond to police questions with untrustworthy statements. Since mentally handicapped suspects' inability to comprehend the consequences of making incriminating statements to the police plays a major role in producing their false confessions,[203] one reasonable approach is to seek to identify those whose subnormal intelligence or mental problems are likely to make them either unaware of or unconcerned about the consequences of making incriminating statements to the police. For purposes of formulating safeguards relating to police interrogation, defendants in this category may be classified as mentally impaired.[204]

In determining whether a defendant is mentally impaired, criteria relating to I.Q. tests and mental diagnosis would be significant. Based on an empirical study relating to the extent to which people with subnormal intelligence understand the *Miranda* warnings,[205] it appears that defendants with an I.Q. of less than about eighty-eight should be classified as mentally impaired because they are unlikely to understand the consequences of making an incriminating statement to the police.[206] Similarly, defendants who suffer from identifiable mental illnesses such as schizophrenia[207] should ordinarily be classified as mentally impaired because their distorted perceptions of reality make it unlikely that they will be concerned about the consequences of making incriminating statements to

200. *E.g.*, Morgan Cloud et al., *Words Without Meanings: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 573 (2002).

201. *Id.*

202. *See supra* text accompanying notes 61–63.

203. *See supra* text accompanying note 140. *See generally* Ellis & Luckasson, *supra* note 61, at 441, 444–46.

204. *See id.* at 443.

205. *See* Cloud et al., *supra* note 200, at 532–47.

206. *See id.* at 549. After being given the *Miranda* warnings and then asked the question, "If you talk to the police, can they use your story to get you in trouble?" only thirty-seven percent of the "disabled subjects" (including randomly selected people with an I.Q. of eighty-eight or less) answered correctly that they could. *Id.* In contrast, ninety-six percent of the control group (including randomly selected people with an I.Q. of normal or above) gave the correct answer. *Id.*

207. "Schizophrenia is a disturbance that lasts for at least six months and includes at least one month of active-phase symptoms (i.e., two [or more] of the following: delusions, hallucinations, disorganized speech, or grossly disorganized or catatonic behavior . . .)." AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 273 (4th ed. 1994).

the police. The test for whether a defendant is mentally impaired should thus be formulated as follows: a defendant shall be classified as mentally impaired when his prior history, including I.Q. tests, examination by mental health experts, and other relevant information, indicate that there is a substantial likelihood that the defendant will be unable to understand or to be concerned about the consequences of making an incriminating statement to the police.[208]

In dealing with mentally impaired defendants, legislatures and state courts should provide safeguards to bar the admission of mentally impaired defendants' police-induced statements in capital cases or, at the very least, to prevent the imposition of a death sentence resulting from such statements. In formulating safeguards to be applied in capital cases, a legislature or state court should take into account the government's interest in presenting trustworthy confessions to the jury. Even when a defendant's mental disabilities make it unlikely that he will understand or be concerned about the consequences of confessing to the police, the defendant's police-induced statements may still be trustworthy if the police interrogating the defendant take special measures to guard against the possibility of false statements. An appropriate safeguard might thus be formulated as follows: when police conduct a custodial interrogation of a mentally impaired defendant in a capital case,[209] statements made by the mentally impaired defendant will be inadmissible unless the interrogators make special efforts to ensure that his or her statements are trustworthy. Efforts that would ordinarily be sufficient to satisfy this requirement include having a lawyer present to advise the defendant during the interrogation, having a mental health expert explain the purpose of a custodial police interrogation to the defendant prior to the interrogation, or providing clear and convincing evidence[210] that the police conducting the custodial interrogation did not ask the defendant leading questions or employ other interrogation techniques that might lead him or her to provide answers being sought by the police rather than answers he or she believed to be true.

Under this provision, the government would not be able to sustain the admissibility of a confession merely by showing that police interroga-

208. In some cases, meeting certain criteria, such as having an I.Q. below eighty-eight, should be sufficient to establish that the defendant is mentally impaired. In other cases, however, the judge would have to determine whether the defendant was mentally impaired by evaluating expert testimony.

209. A mentally impaired person should be defined as a person whose subnormal intelligence or mental disability renders him or her likely to be either unaware of or unconcerned about the consequences of making a statement to the police. Criteria relating to I.Q. and mental diagnosis would be used to define this population. *See supra* text accompanying notes 205–08.

210. To meet the clear and convincing evidence requirement, the police should ordinarily be required to produce electronically recorded evidence relating to the critical events (e.g., showing that an attorney was present during the interrogation or that the police did not employ interrogation techniques that might lead the mentally impaired person to provide the answers sought by the police rather than the answers he believed to be true). *Cf. infra* text accompanying notes 421–42.

tors reasonably believed the suspect was not mentally impaired. If the defense was able to show that the defendant was mentally impaired, the defendant's confession would be inadmissible unless the police could establish that they adopted special means to protect the trustworthiness of the confession.[211] On the other hand, if the interrogators did take special precautions, such as having a mental health expert confer with the defendant before the interrogation, the defendant's confession would ordinarily be admissible.

If a legislature or state court were to adopt a safeguard that applied only when a police-induced statement contributed to the defendant's death sentence,[212] society's paramount interest in preventing wrongful death sentences would justify a stricter provision. Based on the existing empirical evidence,[213] a mentally impaired defendant's statements made to the police during a custodial interrogation should ordinarily be deemed too untrustworthy to support a sentence of death.[214] Legislatures or state courts opting for a safeguard designed to prevent death sentences resulting from mentally impaired defendants' police-induced false confessions should thus adopt the following safeguard: when the police conduct a custodial interrogation of a mentally impaired defendant,[215] statements made by the mentally impaired defendant during the interrogation may not be used to support the defendant's sentence of death.

Under this provision, the government would not be prevented from introducing mentally impaired defendants' police-induced confessions in criminal cases (including capital cases), so long as the confessions were admissible under existing requirements.[216] Because of the concern relating to such confessions' trustworthiness, however, police-induced confessions obtained during a mentally impaired defendant's custodial interrogation could not be used to support a sentence of death.[217] If the

211. *See supra* text accompanying notes 209–10.

212. *See supra* text accompanying notes 76–77.

213. *See supra* text accompanying notes 205–06.

214. The most recent empirical study relating to suspects' capacity to understand the *Miranda* warnings indicates that a mentally impaired suspect's "mental limitations prevent him from understanding the warnings." Cloud et al., *supra* note 200, at 584. A defendant who lacks the capacity to understand the *Miranda* warnings will not be able to respond to custodial interrogation with a statement that is sufficiently trustworthy to support a sentence of death. No matter what special precautions are taken, there is simply too much risk that a mentally impaired defendant will make an untrustworthy statement because he does not realize the consequences of making an incriminating statement to the police. *Cf. id.* at 575 (observing that there is no "perfect" means of ensuring that "confessions by mentally retarded suspects satisfy constitutional standards").

215. For the definition of a mentally impaired defendant, see *supra* note 209.

216. The government would have to show, for example, that the defendant's statements were not obtained in violation of *Miranda*.

217. For cases applying a stricter standard for the admissibility of confessions resulting in death sentences, see *supra* note 81.

prosecution introduced such a statement in a capital case resulting in a death sentence, the death sentence would have to be vacated.[218]

III. RESTRICTIONS ON POLICE INTERROGATION PRACTICES

The Illinois Commission's recommendation that courts should closely scrutinize police interrogation tactics that mislead suspects as to the strength of evidence against them or the likelihood of their guilt[219] is potentially far-reaching. Once an interrogator has determined that a suspect is probably guilty, the interrogator's basic strategy will be to try to convince the suspect that the authorities know he is guilty, to cut off the suspect's denials of guilt, and to try to provide the suspect with a motive for the crime that will appear to lessen his blame.[220] In following this strategy, the interrogator will often employ tactics that are designed to mislead the suspect as to the strength of the evidence against him and the likelihood of his conviction.[221] The Commission's recommendation will have the effect of requiring that courts closely scrutinize many interrogations conducted after the police have concluded that the suspect is probably guilty.

Requiring close scrutiny of confessions produced through the standard interrogation practices employed when a suspect is believed to be guilty may be desirable. Through providing notice that standard interrogation practices in themselves have the potential for producing untrustworthy confessions, this recommendation alerts judges to the need for examining whether either the specific interrogation tactics employed or other factors relating to the interrogation would be likely to produce an untrustworthy confession.[222] Nevertheless, to provide guidance to police interrogators as well as meaningful protection for capital suspects,[223] recommendations prohibiting specific interrogation tactics and excluding confessions obtained as a result of such tactics should be added.

218. The prosecution would then presumably have the option of having the defendant sentenced to a lesser punishment such as life imprisonment or vacating the defendant's conviction, so that the prosecution could seek a new conviction and death sentence.

219. *See supra* text accompanying note 93.

220. INBAU ET AL., *supra* note 66, at 213.

221. *See*, *e.g.*, *id.* at 221–22 (positing that at the beginning of the interrogation, interrogator should finger through the case folder to create the impression that it contains incriminating evidence against the suspect and should inform the suspect there is "no doubt" that he committed the crime); *id.* at 327–28 (suggesting that when suspect asks about proof that he committed the crime, interrogator should say to him, "Down the road, . . . [o]ur attorneys will lay out physical, forensic, and circumstantial evidence that will directly tie you to this thing").

222. *See, e.g., infra* notes 336–43 and accompanying text.

223. Since the requirement that courts closely scrutinize confessions obtained by standard interrogation practices does not require the exclusion of a defendant's confession in any particular situation, the requirement would be likely to have little effect in practice. After closely scrutinizing the circumstances under which a defendant's confession was obtained, courts might be inclined to conclude that the confession was voluntary and, therefore, admissible.

In applying the voluntariness test, courts' belief that police interrogation is indispensable to law enforcement[224] has made them understandably reluctant to prohibit specific interrogation practices. Even if an interrogation tactic has the potential for producing untrustworthy confessions, a court may believe that a total ban on that practice will have a deleterious effect on law enforcement, preventing interrogators from employing the full range of psychologically oriented tactics that are sometimes needed to obtain reliable confessions.[225] In striking a balance between preventing practices likely to produce untrustworthy confessions and protecting law enforcement's interest in obtaining reliable confessions, courts have tended to apply a totality of the circumstances test under which the use of tactics likely to produce untrustworthy confessions is viewed as a factor to be weighed against admitting the confession rather than a per se basis for excluding it.[226]

A different balance, however, should be struck in capital cases. State courts and legislatures should endeavor to identify interrogation practices that have a significant potential for producing false confessions when the police are interrogating a suspect who has been arrested or charged with a capital offense. They should then provide that confessions induced by such interrogation practices may not be introduced into evidence or, at a minimum, that a defendant's death sentence will not be permitted to stand when a confession induced by such practices contributed to the death sentence.[227]

If this approach is adopted, there are at least three types of interrogation practices that the police should not be allowed to use in capital cases: threats or promises relating to whether the suspect will be sentenced to death or executed; deception relating to the nature of the forensic evidence against the suspect; and continuous or cumulative interrogations that exceed a specified length of time.[228] In dealing with each of these practices, I will first present one or more of the DNA-cleared

224. *See*, *e.g.*, Culombe v. Connecticut, 367 U.S. 568, 578–80 (1961) (Frankfurter, J., announcing the judgment of the Court); *see also* White, *False Confessions*, *supra* note 198, at 136–37 (citing sources asserting that suspects' confessions are necessary to solve crimes and to enhance the government's proof of suspects' guilt).

225. *See generally* Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—and from* Miranda, 88 J. CRIM. L. & CRIMINOLOGY 497, 499–500 (1998) (arguing that in deciding whether to impose new restrictions on police interrogation, courts should balance the extent to which a police practice produces factually accurate confessions against the extent to which it produces false confessions). For a criticism of Cassell's position, see Welsh S. White, *What is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2029–39 (1998).

226. *See*, *e.g.*, Frazier v. Cupp, 394 U.S. 731, 739 (1969) (stating that interrogating officer's false statement that defendant's friend had confessed, while relevant to the determination of whether defendant's confession was voluntary, was insufficient in itself to render the confession involuntary); Spano v. New York, 360 U.S. 315, 323 (1959) (finding that the interrogation tactic of falsely suggesting to a defendant that his "childhood friend" would lose his job if he did not confess was a "factor" which, taken in conjunction with other circumstances surrounding the interrogation, lends to the conclusion that the defendant's confession was involuntary).

227. *See supra* note 81.

228. *See infra* text accompanying notes 231–41, 307–12, 344–68.

false confession cases to illustrate the context in which the practice has played a part in producing a false confession;[229] then, drawing upon additional empirical data as well as state and Supreme Court cases, I will explain the basis for the proposed prohibitions.[230]

A. Threats or Promises Relating to Whether the Suspect Will Be Sentenced to Death or Executed

At common law, confessions induced by any threat or promise were excluded as unreliable.[231] During the nineteenth century, American courts adopted this exclusionary principle.[232] Indeed, in *Bram v. United States*,[233] the Supreme Court held that the admission of a confession induced by "any direct or implied promise, however slight," violated the Fifth Amendment.[234] By the end of the twentieth century, however, Judge Easterbrook accurately characterized *Bram* as a "derelict" on the constitutional landscape.[235] In applying the due process voluntariness test, the Court never clearly invoked *Bram* to exclude a confession.[236] And in *Arizona v. Fulminante*,[237] decided in 1991, the Court expressly repudiated *Bram* stating that its rule prohibiting the admission of confessions induced by any promises "does not state the standard for determining the voluntariness of a confession . . . ."[238]

Despite the Court's repudiation of *Bram*, lower courts and legislatures should recognize that, at least in capital cases, the premise underlying *Bram*'s prohibition has considerable validity. In a significant number of proven police-induced false confession cases, interrogators' threats or promises relating to whether the death penalty will be imposed or whether the defendant will be executed appear to have played a significant part in inducing the defendant's false confession.[239] To illustrate the

229. *See infra* text accompanying notes 242–90, 313–35, 370–402.

230. *See infra* Part IV.

231. *See* 3 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 836 (3d ed. 1970).

232. *See, e.g.,* 3 WILLIAM OLDNALL RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 478 (Horace Smith & A.P. Perceval Keep eds., 6th ed. 1896) [hereinafter RUSSELL ON CRIMES] (stating that, to be admissible, a confession could not be obtained by any direct or implied promise).

233. 168 U.S. 532 (1897).

234. *Id.* at 542–43 (quoting RUSSELL ON CRIMES, *supra* note 232, at 478).

235. United States v. Long, 852 F.2d 975, 980 (7th Cir. 1988) (Easterbrook, J., concurring).

236. In *Stein v. New York*, 346 U.S. 156, 185 (1953), the Court held that a confession that occurred after the defendant negotiated "a bargain with the police and parole officers" was valid. In *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963) and *Leyra v. Denno*, 347 U.S. 556, 561 (1954), the Court held that confessions induced by threats of harsh punishment and express or implied promises of significant leniency were involuntary; in so holding, however, it neither cited *Bram* nor specified that the threats or promises were sufficient to render either confession involuntary.

237. 499 U.S. 279 (1991).

238. *Id.* at 285.

239. *See*, *e.g.*, WHITE, *MIRANDA*'S WANING PROTECTIONS, *supra* note 47, at 169–71 (recounting case in which Dante Parker falsely confessed to murder after police interrogator first told him that statements he made to the police at this time could affect the judge's attitude at sentencing, and then said, "What if he might send you to the gas chamber, and I don't say that to scare you, Dante, but in this situation that's a real possibility . . . ."); Leo & Ofshe, *Consequences*, *supra* note 29, at 466 (re-

psychological dynamics involved in producing such confessions, I will describe two of the DNA-cleared false confession cases: Christopher Ochoa, who pleaded guilty to second degree murder in Texas in 1986,[240] and Anthony Gray, who pleaded guilty to rape and first-degree murder in Maryland in 1991.[241]

1. Christopher Ochoa

On October 24, 1988, Nancy DePriest, a twenty-year-old wife and mother, was found raped and murdered in a Pizza Hut in Austin, Texas.[242] DePriest, an assistant manager at the Pizza Hut, was tied up, raped, and shot in the back of the head with a .22-caliber gun.[243] Her killer took a currency bag from the restaurant filled with money.[244]

A few weeks later, twenty-two-year-old Christopher Ochoa and eighteen-tear-old Richard Danzinger, roommates and employees at a different Pizza Hut, drank a beer at the Pizza Hut where the killing occurred.[245] Afterwards, they chatted with a security guard, asking him questions about the crime.[246] The guard thought their inquiries were suspicious and reported the conversation to homicide detectives, who then questioned Ochoa about the killing.[247]

Ochoa's interrogation was not electronically recorded and Austin law enforcement officials have declined to comment on the details of the case.[248] According to Ochoa, however, the police interrogated him for more than twelve hours.[249] After asserting that they had convincing evidence of his guilt,[250] the interrogating detectives "threatened him with a capital-murder prosecution if he did not cooperate, showing him photos of death row and even pointing out the spot on his left arm where the needle would be inserted."[251] Ochoa said that the detectives also promised him he would not die if he admitted what he had done.[252] In addi-

counting case in which a seventeen-year-old suspect falsely confessed to stabbing her mother after an interrogator told her she would die in the electric chair if she maintained her innocence).

240. Tom Kertscher, *UW Professors Confident Texas Inmate Will Be Freed, in Strike at Death Penalty, DNA May Reverse Murder Case*, MILWAUKEE J. SENTINEL, Oct. 7, 2000, at 01A.

241. Attorney Grievance Comm'n v. Kent, 653 A.2d 909, 912 (Md. 1995).

242. Theotis Robinson, Jr., *Innocent Inmates Pay Price in Texas Murder*, KNOXVILLE NEWS-SENTINEL, Oct. 23, 2000, at A12.

243. Kertscher, *supra* note 240, at 01A.

244. Barry Scheck, *Innocence Project: Cooley Innocence Project Kick-Off*, 18 T.M. COOLEY L. REV. 167, 175 (2001).

245. Kertscher, *supra* note 240, at 01A.

246. Robinson, *supra* note 242, at A12.

247. *Id.*

248. Scheck, *supra* note 244, at 177–78.

249. Robinson, *supra* note 242, at A12.

250. Paul Duggan, *Murder Case Review Stirs Doubts about Texas Process*, WASH. POST, Oct. 17, 2000, at A02 [hereinafter Duggan, *Murder Case*].

251. *Id.*; *Forensic Files: Episode #103—Forever Hold Your Peace* (Medstar Television) (2002) [hereinafter *Forensic Files*].

252. *2 Cases Plead for Life*, USA TODAY, Jan. 23, 2001, at 14A.

tion, the police employed other tactics that exerted pressure on Ochoa to confess.[253] Among other things, they "falsely told him that Danzinger was in another interrogation room, blaming the grisly crime on Ochoa."[254]

According to Ochoa's present lawyer, William Allison, Ochoa has "average intelligence," but is "meek and mild-mannered" and easily manipulated.[255] So, in response to the interrogators' threats and other tactics, he agreed to a deal.[256] He would avoid the death penalty by pleading guilty to second degree murder and providing "truthful" testimony against Danzinger.[257]

At Danzinger's trial, Ochoa's detailed testimony seemed to provide convincing evidence that he and his friend had committed the crime.[258] He testified that he and Danzinger raped DePriest eight times before he shot her in the back of the head.[259] As Allison explained, however, the reason Ochoa was able to testify in such convincing detail was because of the information his interrogators communicated to him during his interrogation.[260] According to Allison, the interrogators "showed him crime-scene photos, they showed him autopsy photos, they showed him everything. . . . Every fact that Ochoa had came from the police, because he had nothing himself."[261] Nevertheless, Ochoa's testimony was convincing to the jury. They convicted Danzinger of aggravated rape and sentenced him to ninety-nine years in prison.[262] A few years after his conviction, Danzinger was beaten by other prisoners, causing head injuries that left him permanently mentally disabled.[263]

In a series of letters from 1996 to 1998, Achim Josef Marino—who did not know either Ochoa or Danzinger—confessed to DePriest's murder, including details that would lead authorities to keys and money bags that he said he stole from the Pizza Hut.[264] Nevertheless, the police were not convinced that Ochoa and Danzinger were innocent.[265] Instead, they suspected that the two had acted with Marino, and they spent the next four years trying to find some connection between the three men.[266]

253. Duggan, *Murder Case*, *supra* note 250, at A02.
254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.*
259. Laylan Copelin & David Hafetz, *Police Conduct Is Facing Review: Rangers, Others Asked to Help Study*, AUSTIN AM-STATESMAN, Dec. 22, 2000, at A1 [hereinafter Copelin & Hafetz, *Police Conduct*].
260. Duggan, *Murder Case*, *supra* note 250, at A02.
261. *Id*.
262. Scheck, *supra* note 244, at 175–76.
263. Duggan, *Murder Case*, *supra* note 250, at A02.
264. *Id.*
265. Copelin & Hafetz, *Police Conduct, supra* note 259, at A1.
266. Laylan Copelin, *Difficult Task Ahead in Police Inquiry*, AUSTIN AM.-STATESMAN, Dec. 23, 2000, at A1.

When an investigator visited Ochoa in 1998 and asked him about his confession, Ochoa maintained that it was true.[267] According to his attorney, Ochoa continued to insist on his guilt because he believed his chances for parole would be lost if he claimed he was innocent.[268] After hearing rumors that someone else had confessed to the crime, however, Ochoa recanted his confession and wrote a letter to the Innocence Project, asking for their help.[269] Subsequently, DNA tests determined that neither Ochoa nor Danzinger could have been the source of the semen found in DePriest.[270] In January, 2001, a judge vacated Ochoa's guilty plea and he was released from prison after serving more than twelve years.[271] Danzinger was released a few months later.[272]

2. Anthony Gray

On May 13, 1991, Linda Mae Pellicano was found raped and murdered in Calvert County, Maryland.[273] The police department's initial investigation indicated that the perpetrator was a young white male.[274] Later, however, the police received a tip that three black men, Anthony Gray, Paul Marcello Holland, and Leonard Anthony Long had been involved.[275]

The police arrested Anthony Gray, who was learning impaired and borderline retarded, and interrogated him without an attorney present.[276] Gray did not allege that the police physically abused him, but did claim that they lied to him about the evidence against him, telling him that the other two suspects were pinning the murder of Pellicano on him.[277] His interrogators also told him that, if he confessed, pleaded guilty, and testified against the others, he would avoid the death penalty.[278] According to Joel Katz, a lawyer who later represented Gray, Gray "confessed to the crime because he was confused and believed it was the only way he could escape the death penalty."[279] Subsequently, Gray and his lawyer struck a deal with the prosecutors: Gray would plead guilty and be sentenced to life imprisonment; after he testified truthfully against the oth-

267. *Id.*
268. *Id.*
269. Scheck, *supra* note 244, at 177.
270. Duggan, *Murder Case*, *supra* note 250, at A02. The DNA tests showed that Marino was the sole source of the semen in DePriest's body. *See* David Hafetz, *DNA Evidence Clears Two in 1988 Rape at Pizza Hut*, AUSTIN AM.-STATESMAN, Nov. 10, 2000, at B1.
271. Paul Duggan, *Falsely Accused Texas Man Freed from Life Term*, WASH. POST, Jan. 17, 2001, at A3.
272. *Forensic Files*, *supra* note 251 (reporting that two months after Ochoa's release, Danzinger was released to the care of his family).
273. Attorney Grievance Comm'n v. Kent, 653 A.2d 909, 911 (Md. 1995).
274. *Id.* at 911–12.
275. *Trying to Right an Injustice*, *supra* note 110, at 1A.
276. *Id.*
277. *Compensation Unlikely For Falsely Jailed Man*, BALT. SUN, Feb. 12, 1999, at 1A.
278. *Id.*
279. *Update on the News*, WASH. POST, Dec. 27, 1999, at B02.

ers, the prosecutor would not oppose reducing his life sentence so that he would serve no more than thirty years.[280]

After Gray pleaded guilty, an attorney for one of the other two suspects approached Gray and, without Gray's attorney's permission, talked to him about the case.[281] Gray then changed his mind about testifying against the other two suspects and the two were acquitted of all charges against them.[282] Gray later moved to withdraw his guilty plea.[283] The judge denied this motion, however, and sentenced Gray to two life sentences.[284] The attorney who improperly approached Gray was later disbarred as a result of his improper communication with Gray.[285]

Six years later, police arrested Anthony Fleming for an unrelated burglary charge.[286] When police questioned Fleming about Pellicano's murder, he not only implicated himself but told investigators details that only the perpetrator could have known.[287] Forensic evidence, including DNA evidence showing that Fleming's semen was in the victim's body, also established Fleming's guilt.[288] After Fleming was convicted for the crime and sentenced to life, the State's Attorney, along with Gray's newest attorney, requested that the court free Gray.[289] The court granted this request, invalidating Gray's guilty plea on the ground that he had not received effective assistance of counsel at the time he entered the plea.[290]

These cases illustrate that, as Barry Scheck has said, the presence of the death penalty can have a "uniquely corruptive" effect on a suspect.[291] In explaining the basis for *Bram*'s prohibition on confessions induced by threats or promises, Justice Byron White stated that when defendants are in custody unrepresented by counsel, "even a mild promise of leniency was deemed sufficient to bar the confession, not because the promise was an illegal act as such, but because defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess."[292] While *Bram*'s assumption that even a mild threat or promise has the potential for exerting excessive pressure on all suspects subjected to custodial interrogation has been discarded,[293] the premise that police threats or promises will be likely to have "too great"

280. *Trying to Right an Injustice*, *supra* note 110, at 1A.
281. Attorney Grievance Comm'n v. Kent, 653 A.2d 909, 911–12 (Md. 1995).
282. *Id.* at 912–13.
283. *Id.* at 913.
284. *Id*.
285. *Id.* at 922.
286. Annie Gowen, *Murder Convict One Step Away from Freedom*, WASH. POST, Feb. 6, 1999, at B01.
287. *Id.*
288. *Id.*
289. Annie Gowen, *Maryland Man Freed in 1991 Rape and Murder*, WASH. POST, Feb. 9, 1999, at B01.
290. *Id.*
291. Duggan, *Murder Case*, *supra* note 250, at A02.
292. Brady v. United States, 397 U.S. 742, 754 (1970).
293. *See supra* text accompanying notes 237–38.

an effect on a suspect is valid when the suspect is charged with a capital offense and the interrogator's threat or promise relates to whether the suspect will be sentenced to death or executed. Because of a suspect's possible fear of execution, these types of threats or promises have the potential for producing the kind of terror that can lead to a false confession.

Based on this analysis, when a suspect is charged with a capital offense, police-induced confessions produced by any threat or promise relating to whether the suspect will be sentenced to death or executed should be automatically inadmissible.[294] At present, state court decisions provide only modest support for this safeguard. The majority of states hold that, in determining whether a confession is involuntary under the totality of the circumstances test, the fact that interrogators made a promise of leniency is simply one factor to be considered.[295] In applying this test, no state appears to have given weight to the fact that the interrogator's threat or promise of leniency related to whether the death penalty would be imposed.[296] A few states, however, hold that a confession induced by any promise of leniency is inadmissible;[297] and several others hold that confessions induced by promises that would be likely to cause an innocent person to confess are inadmissible.[298] The disturbing number of cases in which threats or promises relating to whether the death penalty will be imposed appear to have played a part in producing false confessions[299] provides support for the view that these types of threats or promises are in fact likely to cause an innocent person to confess, and thus justify imposing a stronger safeguard in this area.

294. In determining whether a threat or promise produced a confession, the focus should be on whether the threat or promise played any part in precipitating the confession. Barring unusual circumstances, a confession following a threat or promise relating to whether the death penalty will be imposed should be viewed as induced by the threat or promise and therefore inadmissible. *See generally* George E. Dix, *Promises, Confessions, and Wayne LaFave's Bright Line Analysis*, 1993 U. ILL. L. REV. 207, 259 (advocating a similar rule for confessions induced by any promises).

295. *See*, *e.g.*, Cole v. State, 923 P.2d 820 (Alaska Ct. App. 1996); People v. Flores, 192 Cal. Rptr. 772 (Cal. Ct. App. 1983); State v. Janice, 565 A.2d 553 (Conn. App. Ct. 1989); State v. Kelekolio, 849 P.2d 58 (Haw. 1993); Johnson v. State, 703 A.2d 1267 (Md. 1998); State v. Pippenger, 708 S.W.2d 256 (Mo. Ct. App. 1986); State v. Corley, 311 S.E.2d 540 (N.C. 1984); State v. Arrington, 470 N.E.2d 211 (Ohio Ct. App. 1984).

296. *See*, *e.g.*, Nelson v. State, 688 So. 2d 971 (Fla. Dist. Ct. App. 1997) (noting that informing the defendant of realistic penalties, including the death penalty, does not make the confession involuntary); Dixon v. State, 174 S.E.2d 683 (N.C. Ct. App. 1970) (same). *But see* Green v. State, 605 A.2d 1001 (Md. Ct. Spec. App. 1992) (stating that incorrectly informing the minor defendant that he might be subject to the death penalty amounted to undue influence, rendering the confession inadmissible).

297. *See Flores*, 192 Cal. Rptr. 772; State v. Hiassen, 716 P.2d 1380 (Idaho Ct. App. 1986); Hein Quoc Thai v. State, No. 0-749/00-491, 2001 Iowa App. LEXIS 31 (Jan. 10, 2001); State v. Leonard, 605 So. 2d 697 (La. Ct. App. 1992); State v. Strain, 779 P.2d 221 (Utah 1989).

298. *See* State v. Kanive, 558 P.2d 1075 (Kan. 1976); State v. Hippler, c2-08-1038, 1999 Minn. App. LEXIS 68 (Jan. 26, 1999); Taylor v. State, 789 So. 2d 787 (Miss. 2001); Dryman v. State, 361 P.2d 959 (Mont. 1961); Purser v. State, 902 S.W.2d 641 (Tex. Ct. App. 1995).

299. *See supra* note 239, *supra* text accompanying notes 242–90.

Although prohibiting the police from employing this tactic in all capital cases seems preferable,[300] a narrower safeguard could also be adopted. Drawing from pre-*Miranda* cases invalidating defendants' death sentences on the ground that their confessions were introduced in violation of due process,[301] state courts or legislatures could provide that confessions induced by police interrogators' express or implied threats or promises relating to whether the death penalty would be imposed or the defendant executed could not be used to support a sentence of death. Based on this safeguard, confessions induced by such threats or promises would not automatically be excluded in all cases in which defendants are arrested or charged with capital offenses; if such a confession contributed to the defendant's sentence of death, however, the death sentence would have to be vacated.

A state court or legislature that declined to adopt the broader safeguard could adopt the narrower one on the ground that a higher standard of reliability should be required when the government is defending not only a conviction but also the imposition of a death sentence.[302] An additional basis for adopting this safeguard, moreover, would be that confessions induced by broken government promises should be inadmissible. In most situations in which a defendant's confession is induced by a threat or a promise relating to whether the defendant will be sentenced to death or executed, the interrogator's inducement will lead the suspect to reasonably believe that by confessing he can avoid the death pen-

300. Through structuring the safeguard in this way, legislatures and state courts would provide additional protection against wrongful convictions resulting in wrongful death sentences. Otherwise, there is a risk that in capital cases an interrogator's promise to an innocent suspect that he can avoid the death penalty by confessing may lead that suspect not only to give a false confession but also to provide false testimony against another innocent suspect, as Ochoa did against Danzinger. *See supra* text accompanying notes 242–71. In such cases there is thus a risk that one suspect's false testimony derived from a false confession may result in another suspect's wrongful conviction and death penalty.

301. In at least one of the pre-*Miranda* death penalty cases invalidating defendants' confessions as involuntary, threats and promises of leniency relating to whether the death penalty should be imposed played an important part in precipitating the defendant's confession. In *Leyra v. Denno*, the interrogator told the suspect he would have "a much better chance" if he "play[ed] ball" with the police, and that "[t]hese people are going to throw the book at you unless you show that in a fit of temper, you got so angry that you did it. Otherwise, they toss premeditation in and it's premeditation." 347 U.S. 556, 583–84 (1954) (Appendix to Opinion of the Court). In holding the defendant's confession involuntary, the Court referred to the interrogator's "threat[s]" and "promise[s] of leniency." *Id.* at 559–60.

302. For Supreme Court cases stating that a higher standard of reliability should be required for convictions that lead to a death sentence, see *supra* note 81. For state courts adopting this principle, see, e.g., People v. Williams, 125 P.2d 9, 16 (Cal. 1942) (holding that in a case where the defendant's claims that the police obtained his confession by physically mistreating him were denied but not convincingly rebutted by the police, due process "commands that no such practice as that disclosed by this record shall send any accused to his death" (citing to Chamber v. Florida, 309 U.S. 227, 241 (1940)); State v. Butts, 159 S.W.2d 790, 792–93 (Mo. 1942) (relying on the same authority in reversing a death sentence based on a confession that was obtained after twelve police officers, who at times had their clubs out to protect the handcuffed defendant from a mob of 500 people, interrogated the defendant for eighteen hours); Fitzpatrick v. State, 638 P.2d 1002, 1019–20 (Mont. 1981) (holding that testimony of "one accomplice telling another accomplice what yet another accomplice did, is so inherently unreliable that a death penalty should not be imposed where such evidence has been admitted").

alty.[303] From the defendant's point of view, the interrogator's express or implied promise of leniency is thus false or at least illusory.[304] A handful of state courts have held that all confessions induced by false government promises are inadmissible.[305] Drawing upon the principles of fairness that underlie the Court's prohibition on guilty pleas induced by unkept government promises,[306] a state court or legislature could properly conclude that fundamental fairness requires invalidating death sentences when the conviction on which the sentence was based resulted in whole or in part from a confession produced by a false or illusory promise that the defendant could avoid the death penalty.

B. Confessions Induced by Misrepresenting Forensic Evidence

As the Commission recognized, in the context of an intense psychologically oriented interrogation, "any tactic that misleads the suspect as to the strength of the evidence against him/her, or the likelihood of his/her guilt" will be likely to exert substantial pressure on a suspect to confess.[307] When confronted with an interrogator's claim that the evidence overwhelmingly establishes her guilt, even an innocent suspect may be inclined to believe either that continued resistance is futile (because the police have evidence that will convict her despite her innocence) or that she is in fact guilty.[308] Empirical data indicate, moreover, that one variation of this tactic is likely to have a particularly powerful effect on an innocent suspect.[309] Based on their examination of police-induced false confession cases,[310] Professors Richard J. Ofshe and Richard A. Leo report that "false evidence ploys based on scientific proce-

303. In some cases, of course, an interrogator could threaten that the death penalty will be imposed if the suspect does not confess without suggesting that it will not be imposed if she does. In *Ochoa*, for example, when the interrogator showed the suspect where the needle would be placed if he were executed, *see supra* text accompanying note 251, he did not indicate to the suspect that he could avoid the possibility of execution by confessing. Nevertheless, in most cases, a threat that the death penalty will be imposed if the defendant does not confess carries with it an implied suggestion that he has a better chance of avoiding the death penalty if he does confess.

304. For an argument that courts should exclude confessions induced by false or illusory government promises in all cases, see Welsh S. White, *Confessions Induced by Broken Government Promises*, 43 DUKE L.J. 947 (1994).

305. *See* Cox v. State, 47 S.W.3d 244, 251 (Ark. 2001); *see also* People v. Flores, 192 Cal. Rptr. 772, 778 (Cal. Ct. App. 1983) (stating that interrogator must conduct the interview without dishonesty and trickery that amounts to false promises); People v. Louzon, 61 N.W.2d 52, 56 (Mich. 1953) (holding that confessions are inadmissible when secured by false promises).

306. In *Santobello v. New York*, the Court held that "when a [defendant's guilty] plea rests in any significant degree on a promise or agreement of the prosecutor," the prosecutor's failure to honor the promise makes the defendant's plea constitutionally invalid. 404 U.S. 257, 262 (1971). As subsequent cases make clear, the defendant in such cases has the right to withdraw his guilty plea. *See*, *e.g.*, Jordan v. Commonwealth, 225 S.E.2d 661, 664 (Va. 1976) (holding that upon a showing that government breached the plea bargain, defendant is entitled to vacate guilty plea but not to specific performance of government's promise).

307. *See supra* text accompanying note 93.

308. *See, e.g., supra* text accompanying notes 219–21.

309. *See* Ofshe & Leo, *Social Psychology*, *supra* note 57, at 189.

310. *Id.*

dures" are more likely to induce an innocent person to confess falsely than "[f]alse evidence ploys based on eyewitness reports."[311]

In at least one of the DNA-cleared false confession cases, the police interrogation tactic of misrepresenting forensic evidence appeared to play a substantial part in inducing the defendant's false confession.[312] To show the context in which this occurred, I will set forth some of the circumstances of that case.

David Vasquez

In 1984, Carolyn Hamm's nude body was found in her basement garage in Arlington, Virginia.[313] Twelve days later, the police brought David Vasquez to the police station for questioning.[314] Two of Hamm's neighbors told police they had seen Vasquez near Hamm's home: one on the day of the murder, the other two days later when the body was found.[315] During the first interrogation, a ninety-minute session, the police did not inform Vasquez of his *Miranda* rights.[316] During this interrogation, the detectives told Vasquez, who was described as having "borderline retarded/low normal" intelligence, that they had found his fingerprints at the crime scene, even though the detectives later testified that this was not true.[317] They also yelled at him and insisted on his guilt, in the process of feeding him details of the crime.[318] At one point, for example, the following occurred:

> Shelton: Okay, now tell us how it went, David . . . tell us how you did it.
>
> Vasquez: [S]he told me to grab the knife and, and, stab her, that's all.
>
> Carrig (raising his voice): David, no, David.
>
> Vasquez: If it did happen, and I did it, and my fingerprints were on it . . . .
>
> Carrig (slamming his hand on the table and yelling): You hung her!
>
> Vasquez: What?
>
> Carrig (shouting): You hung her!

311. *Id.* at 202. As the authors state, "[f]alse scientific evidence can be presented so as to leave little opportunity for counters. Interrogators represent positive results of fingerprint, hair or DNA tests as error free and therefore unimpeachable." *Id.* Effective use of this ploy diminishes the suspect's ability to resist the interrogator's insistence on his guilt.

312. *See infra* text accompanying notes 325–27.

313. Brook A. Masters, *Lucky Release from a Life Behind Bars*, WASH. POST, Apr. 28, 2000, at A3.

314. Priest, *At Each Step*, *supra* note 110, at A1. *See generally* PAUL A. MONES, STALKING JUSTICE (Pocket Books 1995) (providing a full account of the investigation of both Carolyn Hamm's case and the other cases for which Timothy Spencer, the killer of Carolyn Hamm, was convicted).

315. Priest, *At Each Step*, *supra* note 110, at A1.

316. *Id.*

317. *Id.*

318. *Id.*

Vasquez: Okay, so I hung her.[319]

"Before the first interrogation ended, Vasquez, trying to speak through sobs, said once more that he had not been in Arlington, much less in Hamm's home, but that he 'had to say this because you tell me my fingerprints were there.'"[320]

The police interrogated Vasquez two more times.[321] Towards the end of the second interrogation, Vasquez told his interrogators about a terrible dream he had that paralleled the facts of the murder.[322] During the third interrogation, Vasquez recounted a shorter version of the same dream.[323] Prior to trial, Vasquez's attorney moved to suppress incriminating statements made by Vasquez during the three interrogations.[324] The judge ruled that statements made during the first two interrogations were inadmissible, but the "dream confession" made during the third interrogation would be admissible.[325] The police also compared Vasquez's hair with hair found at the scene of the crime and determined that it was consistent with Vasquez's hair type.[326] Confronted with the likelihood that Vasquez's "dream confession" would have a powerful effect on the jury, Vasquez's attorney encouraged his client to plead guilty to second degree murder, thereby avoiding the death penalty.[327]

In 1987, three years after Vasquez entered his guilty plea, Susan Tucker, a forty-four-year-old writer who lived in the same neighborhood as Hamm, was found dead in circumstances that "seemed eerily reminiscent of the earlier murder."[328] An Arlington detective commented about the similarity between this crime and the one to which Vasquez had pled guilty, stating, "It's Carolyn Hamm all over again."[329] DNA evidence proved that Timothy Spencer was responsible for Tucker's murder and Spencer was convicted of this crime.[330] Faced with numerous similarities between the two killings, the police decided to reexamine the Hamm

319. *Id.* (quoting from a transcript of the interrogation obtained by the *Washington Post*).

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.*

325. Dana Priest, *Trickery Can Be Part of Police Arsenal in Investigation, Experts Say*, WASH. POST, July 16, 1989, at A16. The judge suppressed statements obtained during the first interrogation because Vasquez had not been read his *Miranda* rights. *Id.* He suppressed statements obtained during the second interrogation, even though the *Miranda* warnings had been given, because the prosecutor stated during oral argument that "the first and second interviews . . . would stand or fall together." *Id.* Statements obtained during the third interrogation were admitted. *Id.* The judge stated that, as to these statements, the taint of illegality had been removed "by reason of *Miranda* warnings, the passage of time and Vasquez's court appearance before his third meeting with the police." *Id.*

326. Priest, *At Each Step*, *supra* note 110, at A1.

327. *Id.* Vasquez received a sentence of twenty years for second-degree murder and fifteen years for burglary. *Id.*

328. Kenneth B. Noble, *At the Bar; After Researching a Book About DNA Evidence, a Lawyer Has New Respect for the Police*, N.Y. TIMES, Aug. 11, 1995, at B16.

329. Dana Priest, *Wrongly Jailed Man Endures Ordeal by Fear*, WASH. POST, July 17, 1989, at A1.

330. *Id.*

murder.[331] After reexamining all of the evidence, the police and FBI investigators concluded "that whoever committed the Tucker homicide committed the Hamm homicide."[332] The FBI report also concluded that the attacks "were perpetrated by an organized type personality of prior criminal sophistication who acted alone when he perpetrated these killings," a conclusion that appeared to negate the possibility that Vaquez could have been Spencer's accomplice in the Hamm murder.[333] Based on a comprehensive review of the evidence, the Arlington State's Attorney requested that the Virginia Governor pardon Vasquez.[334] On January 4, 1989, the governor granted Vasquez a complete pardon.[335]

Although one state court has condemned the interrogation tactic of *fabricating* forensic evidence to induce a confession,[336] lower court decisions have generally held that the tactic of misrepresenting forensic evidence will not in itself be sufficient to render a resulting confession involuntary.[337] Drawing from the Court's pre-*Miranda* decisions in *Leyra v. Denno*[338] and *Spano v. New York*,[339] some state courts, however, have held that confessions induced by interrogation methods likely to produce untrustworthy confessions are inadmissible.[340] The empirical data showing that misrepresenting forensic evidence sometimes produces false confessions from innocent suspects[341] thus provide a strong basis for adopting an additional safeguard. Legislatures and state courts should provide that police interrogating a suspect in a capital case are prohibited from

331. *Id.*

332. Dana Priest, *Pardon Urged for Man Convicted of Va. Murder; New Evidence in 1984 Arlington Slayings Points to Richmond Felon*, WASH. POST, Oct. 12, 1988, at A1.

333. MONES, *supra* note 314, at 294.

334. Dana Priest, *Arlington Detective's Hunch Pays Off in Circumstantial Murder Case,* WASH. POST, Oct. 13, 1988, at D1.

335. Priest, *supra* note 329, at A1.

336. In *State v. Cayward*, 552 So. 2d 971, 972 (Fla. Ct. App. 1989), the interrogator showed the defendant a fabricated laboratory report indicating that the defendant's semen stains were found on the victim's underwear. The court held that admitting the defendant's resulting confession violated due process, basing its holding on the ground that "the presentation of the falsely contrived scientific documents," *id.* at 973, constituted police conduct that was so improper that it should have "no place in our criminal justice system," *id.* at 974. For a discussion of implications of the court's opinion in *Cayward*, see Jerome H. Skolnick & Richard A. Leo, *The Ethics of Deceptive Interrogation*, 11 CRIM. JUST. ETHICS 3, 7–10 (1992).

337. *See*, *e.g.*, Beasley v. United States, 512 A.2d 1007, 1010 (D.C. 1986) (admitting confession obtained after interrogators falsely told defendant his fingerprints were found at the scene of the crime); State v. Jackson, 304 S.E.2d 134, 143 (N.C. 1983) (admitting confession obtained after interrogators falsely told defendant his shoes matched the tracks left by the perpetrator). *See generally* White, Miranda*'s Failure*, *supra* note 56, at 1242–46 (discussing these and other cases in which interrogators misrepresented the evidence against the suspect).

338. 347 U.S. 556 (1954).

339. 360 U.S. 315 (1959).

340. *See*, *e.g.*, Commonwealth v. Dupree, 275 A.2d 326, 327 (Pa. 1971) (holding that confession would be involuntary and therefore inadmissible if induced by interrogator's false statement that the suspect's wife would be arrested and prosecuted unless he confessed). *See generally* Yale Kamisar, *On the Fruits of* Miranda *Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929, 937 (1995) (citing authorities showing that, until about the 1950s, state courts held that "a confession was admissible so long as it was free of influence that made it unreliable or 'probably untrue'").

341. *See supra* text accompanying notes 307–35.

misrepresenting the nature of the forensic evidence,[342] and that confessions produced as a result of this tactic are inadmissible or, at the very least, may not be used to support a sentence of death.[343]

C. Protracted Interrogations

In *Ashcraft v. Tennessee*,[344] the Supreme Court held that thirty-six hours of virtually continuous interrogation was "inherently coercive."[345] Although some suspects could presumably withstand police questioning for more than thirty-six hours,[346] most would be likely to succumb to the pressure and feel forced to make a statement. In holding that confessions produced by some undetermined length of virtually continuous interrogation are involuntary,[347] *Ashcraft* belongs to the class of cases, which, as Yale Kamisar said, prohibits an interrogation technique that "renders a resulting confession 'unreliable' or 'too untrustworthy to be received.'"[348] At some point during a lengthy interrogation, exhaustion and the desire to have the interrogation end may lead almost any suspect to say whatever the police want him to say, regardless of his own belief in the truth of the statement.[349]

Aside from *Ashcraft*, however, the Supreme Court has never clarified the point at which an interrogation becomes so protracted as to be inherently coercive. Moreover, lower court cases have not filled this gap.[350] In most states, confessions obtained after quite lengthy interrogations have been held to be voluntary and admissible.[351]

342. If this proposal is adopted, courts or legislatures would have to determine what constitutes "misrepresenting the forensic evidence." Since the goal is to prevent misrepresentations that would be likely to convince suspects that they may as well confess because further resistance is futile, the focus should be on whether a reasonable person in the suspect's position would be led by the interrogator's statements to believe that forensic evidence establishes his guilt. Under this test, a statement such as, "What if I tell you your fingerprints were found on the murder weapon," should be sufficient to render the confession inadmissible. On the other hand, a false statement to the effect that the defendant has flunked a polygraph test would not necessarily be sufficient.

343. *See supra* note 81.

344. 322 U.S. 143 (1944).

345. *Id.* at 154.

346. *Id.* at 162 (Jackson, J., dissenting).

347. *Id.* at 158–59 (Jackson, J., dissenting) (observing that the Court did not specify how long was sufficient to be "inherently coercive").

348. YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS; ESSAYS IN LAW AND POLICY 23 (Univ. of Michigan Press 1980) [hereinafter KAMISAR, ESSAYS] (quoting Stein v. New York, 346 U.S. 156, 182 (1953)).

349. *See infra* text accompanying notes 353–65.

350. At least one state court provides that if the police fail to bring an arrested suspect before a magistrate within a reasonable time, statements made by the suspect to the police will be suppressed. *See* Webster v. State, 213 A.2d 298, 301–02 (Del. 1965) (holding that confession obtained after unreasonable delay in bringing defendant before magistrate for arraignment must be suppressed, regardless of whether it was voluntary). Although several states used to apply such rules, the trend is away from providing a strict rule of exclusion when the police fail to bring the defendant before the magistrate within a prescribed period. *See*, *e.g.*, MD. CODE ANN. [Courts and Judicial Proceedings] § 10-912 (West 2002) (providing that a confession cannot be excluded solely because the defendant was not taken before a magistrate within the statutorily prescribed period; the police's failure to bring the de-

Empirical data drawn from probable and proven false confessions indicate that interrogations extending considerably less than thirty-six hours are in fact capable of producing untrustworthy confessions.[352] Two particularly striking examples involve the confessions of Leo Bruce and Richard LaPointe. After being questioned almost continuously for nearly thirteen hours,[353] Bruce falsely confessed to murdering nine people at the Wat Promkunarum Buddhist Temple west of Phoenix, Arizona.[354] When asked why he would falsely confess to crimes carrying possible death sentences,[355] Bruce, who had no apparent mental or psychological problems, replied, "I just wanted it to end right there. I wanted to sleep. I was exhausted."[356] After being questioned by the police for nine hours, LaPointe, who was brain-damaged, confessed to the rape and murder of his wife's grandmother.[357] Although LaPointe was convicted and remains incarcerated on the basis of his confession,[358] commentators who have examined his confession and the other evidence in the case are convinced that his confession is false.[359] LaPointe himself insists he is innocent.[360] In explaining his reason for confessing, he said, "I just wanted to leave the police station. I was there long enough."[361]

fendant before the magistrate within that time is only one factor to be considered in determining the voluntariness of the defendant's confession), *overruling* Johnson v. State, 384 A.2d 709 (Md. 1978) (holding that any confession obtained after the statutory period for presenting defendant to the magistrate is inadmissible); State v. Cipriano, 429 N.W.2d 781, 790 (Mich. 1988) (noting that unnecessary delay in bringing defendant before the magistrate is only one factor to consider in determining the voluntariness of defendant's confession); Commonwealth v. Duncan, 525 A.2d 1177, 1182–83 (Pa. 1987) (holding that if the accused was not arraigned before a magistrate within six hours of his arrest, any statement obtained between the arrest and arraignment is inadmissible), *overruling* Commonwealth v. Davenport, 370 A.2d 301 (Pa. 1977). *See generally* Note, *The Ill-Advised State Court Revival of the McNabb-Mallory Rule*, 72 J. CRIM. L. & CRIMINOLOGY 204, 209–24 (1981) (showing rules in various states).

351. *See*, *e.g.*, State v. LaPointe, 678 A.2d 942, 959–60 (Conn. 1996) (holding that nine hour interrogation of brain damaged defendant did not render the defendant's resulting confession involuntary); State v. White, No. 19930, 2001 Ohio App. LEXIS 626, at *6–7 (Feb. 21, 2001) (holding that six hour interrogation of a sixteen-year-old boy with an I.Q. of fifty-one was reasonable because officers stated that there were several breaks during the interrogation); State v. Schofield, No. 23038-1-II, 1999 Wash. App. LEXIS 1924, at *8–12 (Nov. 12, 1999) (holding that confession obtained after twelve hour interrogation was properly admitted); Burk v. State, 848 P.2d 225, 233 (Wyo. 1993) (holding that statements obtained from defendant who was questioned from 8:50 a.m. through the entire day and night were properly admitted).

352. *See* Leo & Ofshe, *Consequences, supra* note 29, at 449–91.

353. *See* Roger Parloff, *False Confessions*, AM. LAW., May 1993, at 58–60.

354. *Id.*

355. Intentionally shooting a person in the head could be found to be a premeditated murder, which is first degree murder in Arizona. *See* ARIZ. REV. STAT. § 13-1105A.–C. (2001). In Arizona, first degree murder is punishable by death or life imprisonment. *Id.* § 13-703A.

356. Parloff, *supra* note 353, at 60.

357. *See* State v. LaPointe, 678 A.2d 942, 949–52 (Conn. 1996).

358. *See id.* at 943–44.

359. *See* CONVICTING THE INNOCENT: THE STORY OF A MURDER, A FALSE CONFESSION AND THE STRUGGLE TO FREE A "WRONG MAN" (Donald S. Connery ed., 1996).

360. *See 60 Minutes*, *supra* note 97.

361. *Id.*

In other false confession cases, the suspect's desire to end a protracted interrogation has undoubtedly been a factor in producing the false confession. In fifteen of the sixteen proven or probable false confession cases in which Leo and Ofshe specify the length of the interrogation, the police interrogated the suspect for more than six hours.[362] In Michael Crowe's case, which is not included in Leo and Ofshe's collection,[363] the fourteen-year-old defendant falsely confessed after being interrogated in two sessions, the first one lasting about three and one-half hours and the second lasting about six hours.[364] A social worker who observed Crowe shortly after the first session ended, later recalled that he was "emotionally drained, so tired he could barely walk."[365]

The DNA-cleared false confession cases provide further insight into the risk that a protracted interrogation will produce a false confession. In the cases from this collection in which it is possible to determine the length of interrogation,[366] the police generally appear to have interrogated the suspect for at least five hours.[367] And while there is no Bruce case in which the length of the interrogation was clearly the primary catalyst of the defendant's false confession, there is at least one case in which the defendant's desire to end a protracted interrogation played an important role in producing his statement to the police.[368]

362. *See* Leo & Ofshe, *Consequences*, *supra* note 29, at 449–91. In the majority of these cases, the interrogation was virtually continuous. *See*, *e.g.*, *id.* at 459 (Richard LaPointe confessed after being interrogated at the police station for more than nine hours.); *id.* at 476 (George Abney confessed after being interrogated for ten hours.). In some cases, however, the interrogation was spread over a period of time. *See*, *e.g.*, *id.* at 490 (Juan Rivera confessed after being interrogated for thirty-three hours over a period of four days.); *id.* at 452 (Robert Moore confessed after being subjected to several interrogation sessions lasting a total of twenty-five hours.).

363. For an account of the two police interrogations which produced Michael Crowe's false confession, see WHITE, *MIRANDA*'S WANING PROTECTIONS, *supra* note 47, at 172–75. For a full account of the circumstances producing Crowe and Joshua Treadway's false confessions to the murder of Crowe's sister Stephanie Crowe, see Mark Sauer & John Wilkens, *Haunting Questions*, SAN DIEGO UNION-TRIB., May 11–16, 1999.

364. *See* WHITE, *MIRANDA*'S WANING PROTECTIONS, *supra* note 47, at 174.

365. *Id.*

366. In most cases, the length of interrogation was determined from secondary sources. In the case of Alejandro Hernandez, however, the length of interrogation (ten to fifteen minutes) was stated in the court's opinion. *See* Hernandez v. State, 521 N.E.2d 25, 29 (Ill. 1988).

367. Based on newspaper accounts, the following defendants were interrogated for five hours or more: Christopher Ochoa, who was interrogated for twelve hours, *see* Mitch Albom, *When Confession Doesn't Mean Guilt*, THE RECORD (Bergen County, NJ), Jan. 23, 2001, at L15; Calvin Ollins, who was interrogated for five hours, *see* Hugh Dellios, *Youth Guilty in Assault, Murder of Med Student*, CHI. TRIB., Feb. 10, 1988, at C1 [hereinafter *Youth Guilty in Assault*]; Robert Miller, who was interrogated for eight and a half hours, *see* Jan Hoffman, *Police Refine Methods So Potent, Even the Innocent Have Confessed*, N.Y. TIMES, Mar. 30, 1998, at A1; Ronald Jones, who was interrogated for eight hours, *see No More Excuses. Go to the Tape*, CHI. TRIB., Apr. 21, 2002, at C6; Steven Linscott, who gave the police more than six hours of tape-recorded statements over several days, *see* Joseph R. Tybor, *Oak Park Murder Retrial Set*, CHI. TRIB., July 30, 1987, at C1; and Marcellius Bradford, who was interrogated for fifteen hours, *see* Possley & Mills, *New Evidence*, *supra* note 110.

368. *See infra* notes 369–81 and accompanying text.

Calvin Ollins

In the early morning of October 18, 1986, Lori Roscetti, a Rush University medical student, was found dead on a desolate access road by ABLA Home public housing development in Chicago.[369] The cause of death was multiple blunt trauma injury, indicating that she had probably been beaten to death.[370]

After investigating the crime for several weeks without success, the police solicited the input of Robert Ressler, a criminal profiler.[371] Ressler reviewed the police reports and crime scene photos and then gave the police an account of how he believed the crime might have occurred.[372] He also told the police to look for three to six young black males, who had previously been in jail and lived near the scene of the crime.[373] Following this advice, the police brought Marcellius Bradford and Larry Ollins to the police station for questioning on January 27, 1987.[374]

More than fifteen hours after he was brought to the station, Bradford confessed to the killing and implicated Larry Ollins and his fourteen-year-old cousin Calvin Ollins.[375] Bradford implicated Calvin just after midnight.[376] Immediately after this, the police went to Calvin's house, woke him up, and brought him down to the police station.[377] Defense attorneys described Calvin as emotionally disturbed and mentally handicapped with an I.Q. of between sixty-five and seventy.[378]

The police interrogated Calvin Ollins from 2 a.m. to 7 a.m.[379] According to Calvin,

> The police kept asking me whether or not I knew anything about a crime that took place. I kept telling them, "No, I didn't." They kept telling me my cousin said I was there when the crime take [sic] place. I told them he couldn't be telling the truth because I wasn't there. So they took me out to another room . . . and showed me that they had him. So I was convinced in my mind that he was telling them that I was there—but at the same time, I was wondering how could that be, because I didn't commit no crime like that. But [the police] kept telling me . . . we'll let you go home if you sign a statement.[380]

Eventually, Calvin signed a confession.[381]

369. *See* People v. Ollins, 606 N.E.2d 192, 196 (Ill. App. Ct. 1992).
370. *Id.*
371. Possley & Mills, *New Evidence*, *supra* note 110, at N1.
372. *Id.*
373. *Id.*
374. *Id.*
375. *Id.*
376. *Id.*
377. *Id.*
378. *Youth Guilty in Assault*, *supra* note 367, at C1.
379. *Id.*
380. Possley & Mills, *New Evidence*, *supra* note 110, at N1.
381. *Id.*

The confessions of Bradford and Calvin Ollins were not only very similar to each other but also strikingly similar to Ressler's hypothetical account of the crime.[382] According to the confessions, the motive for the crime was robbery so that Calvin could have bus money to get home.[383] When Roscetti stopped her car, the youths jumped into it.[384] They then took her to the railroad, where they repeatedly sexually assaulted her, kicked her, stomped her, and beat her with a concrete brick.[385] Even though the police sought to exploit the confessions obtained from Bradford and Calvin Ollins, Larry Ollins and Omar Saunders maintained their innocence.[386]

Unlike Bradford who pleaded guilty and agreed to testify for the prosecution,[387] Calvin Ollins pleaded not guilty and sought unsuccessfully to suppress his confession.[388] At his trial, Calvin testified that Officer McHugh threatened to "smack me in the mouth."[389] He also testified, however, that he only confessed because the police promised that he would then be allowed to go home.[390] After hearing his confession, the jury convicted Calvin Ollins of murder, aggravated sexual assault, and aggravated kidnapping.[391] Omar Saunders and Larry Ollins were convicted of these charges and also of armed robbery.[392] On appeal, all three convictions were affirmed.[393]

During the defendants' trials, the prosecution had offered expert testimony relating to semen found at the scene of the crime.[394] Pamela

382. *Id.*

383. *Id.*

384. Linnet Myers, *15-Year Old Gets Life Sentence for Rape, Murder*, CHI. TRIB., Mar. 11, 1988, at C1.

385. *Id.*

386. *See* Matt O'Connor, *3d Youth Convicted in Student's Murder*, CHI. TRIB., June 21, 1988, at C2 (stating that the police did not obtain a confession from Larry Ollins) [hereinafter O'Connor, *3d Youth Convicted*]; Matt O'Connor, *2d Youth Gets Life for Student's Murder*, CHI. TRIB., July 12, 1988, at C3 (stating that Saunders denied involvement in crime). At Larry Ollins's trial, however, Bradford testified that all four of them (including Saunders) were present and participated in the crime. *See* Matt O'Connor, *4th Man Sentenced in Medical Student's Murder*, CHI. TRIB., Sept. 20, 1988, at C7. At Saunder's trial, moreover, the prosecution introduced evidence showing "that he was sought by the police after being implicated by the pretrial statements of his codefendants." People v. Saunders, 603 N.E.2d 32, 33–34 (Ill. App. Ct. 1992). Bradford and Calvin Ollins's confessions thus also contributed to the convictions of Larry Ollins and Saunders.

387. Bradford pled guilty to a kidnapping charge and testified against Larry Ollins. As part of a plea agreement, he received a sentence of twelve years imprisonment. Possley & Mills, *New Evidence*, *supra* note 110, at N1.

388. *Id*.

389. *Youth Guilty in Assault*, *supra* note 367, at C1.

390. Ken Armstrong et al., *Coercive and Illegal Tactics Torpedo Scores of Cook County Murder Cases*, CHI. TRIB., Dec. 16, 2001, at C1.

391. *Youth Guilty in Assault*, *supra* note 367, at C1.

392. *See* O'Connor, *3d Youth Convicted, supra* note 386, at C2.

393. *See* People v. Calvin Ollins, 606 N.E.2d 192, 202 (Ill. App. Ct. 1992) (affirming Calvin Ollins's convictions); People v. Saunders, 603 N.E.2d 32, 37 (Ill. App. Ct. 1992) (affirming Saunders's convictions); People v. Larry Ollins, 601 N.E.2d 922, 927 (Ill. App. Ct. 1992) (affirming Larry Ollins's convictions).

394. *See, e.g., Saunders,* 603 N.E.2d at 34.

Fish, a crime analyst, testified that the semen could have come from the four defendants, even though the defendants were nonsecretors and the semen seemed to have come from secretors.[395] In April, 2000, Omar Saunders sent a letter to attorney Kathleen Zellner asking that she try to establish his innocence based on scientific evidence.[396] Zellner contacted Dr. Edward Blake, a DNA expert.[397] Subsequently, Blake wrote a report which alleged that Fish's testimony relating to the semen's source had been "scientific fraud."[398] New DNA tests were conducted on the semen and hairs found at the crime scene and all four men were excluded by the results.[399] On December 5, 2001, a judge vacated the three defendants' convictions.[400] Larry Ollins, Calvin Ollins, and Omar Saunders each spent more than fourteen years in prison.[401] Bradford, who had testified against Larry Ollins, had been released after serving six and a half years of a twelve-year sentence.[402]

Courts' reluctance to place a limit on the permissible length of a police interrogation undoubtedly stems from a concern for safeguarding law enforcement's interest in conducting effective interrogations.[403] Although the leading interrogation manual states that four hours will generally be sufficient to conduct a successful interrogation,[404] police may legitimately believe that in particular situations a longer interrogation will be needed either to produce a truthful statement or to produce the fullest possible disclosure of relevant information.[405] Moreover, even when interrogations are quite protracted, courts may believe that whether they would exert enough coercive effect to produce an untrustworthy statement can best be resolved on a case-by-case basis.[406] It is thus not surprising that the length of an interrogation is generally considered simply a factor to be weighed in determining the admissibility of a defendant's confession.[407]

395. Possley & Mills, *New Evidence*, *supra* note 110, at N1 (a "secretor").

396. Margaret Cronin Fisk, *Lawyer Frees Chicago Trio After Retesting of Lab Samples*, NAT'L L.J., Dec. 17, 2001, at A6.

397. *Id.*

398. Steve Mills & Maurice Possley, *Final Roscetti DNA Test Clears 4*, CHI. TRIB., Dec. 4, 2001, at N1.

399. Fisk, *supra* note 396, at A6.

400. Kim Barker, *1 of 4 in Roscetti Case Gets a New Sentence*, CHI. TRIB., Dec. 21, 2001, at 12.

401. Mike Robinson, *DNA Tests Free 3 Men After 14 Years in Prison*, THE RECORD (Bergen County, N.J.), Dec. 6, 2001, at A18.

402. *Id.*

403. *See infra* notes 404–06 and accompanying text.

404. INBAU ET AL., *supra* note 66, at 597 (noting that "rarely will a competent interrogator require more than approximately four hours to obtain a confession from an offender, even in cases of a very serious nature").

405. In interrogating Abu Zubaydah, a former lieutenant to Osama Bin Laden, for example, interrogators were able to obtain valuable information during the "course of nearly 100 interviews [conducted] after he was captured in Pakistan." Eric Schmitt, *There Are Ways to Make Them Talk*, N.Y. TIMES, June 16, 2002, at 1.

406. *See* cases cited *supra* notes 350–51.

407. *Id*.

In capital cases, however, the balance should be struck differently. While law enforcement's interest in obtaining truthful confessions that will solve potentially capital cases is strong, society's interest in avoiding death sentences resulting from police-induced false confessions is even stronger.[408] To safeguard the latter interest, state courts or legislatures should provide that in capital cases police interrogators are prohibited from interrogating suspects continuously for more than five hours,[409] or cumulatively for more than ten hours,[410] and that confessions produced as a result of such protracted interrogations are inadmissible[411] or, at the very least, may not be used to support a sentence of death.[412]

IV. REFORMS DESIGNED TO IMPROVE FACT-FINDING

As Justice Harlan recognized in his *Miranda* dissent, police who are willing to employ unlawful interrogation practices during a secret interrogation will probably also be willing to lie about their conduct in court.[413] Even when the police testify truthfully, determining interrogation tactics' impact on suspects may be difficult because the fact-finder lacks a full comprehension of either the context in which the interrogation tactics occur or the effect that a combination of psychologically oriented interrogation tactics are likely to have on a particular suspect.[414] Restrictions on police interrogation practices designed to protect the innocent will thus ultimately be ineffective in the absence of procedural safeguards that ensure adequate fact-finding in cases where the admissibility or truthfulness of a defendant's police-induced confession is at issue.

As many commentators have recognized, one way to improve fact-finding in police interrogation cases is to provide rules designed to encourage the police to electronically record their interrogations of sus-

408. Bedau & Radelet, *supra* note 4, at 22. "Few errors made by governmental officials can compare with the horror of executing a person wrongly convicted of a capital crime."

409. A continuous interrogation should be defined as one that is essentially uninterrupted. Even if there are short interruptions in police questioning or momentary respites for the defendant, the interrogation should be considered continuous so long as the defendant remains in a police dominated atmosphere. *See* Ashcraft v. Tennessee, 322 U.S. 143, 154 (1944) (viewing interrogation as "continuous" despite unrefuted police testimony that there were breaks in the interrogation so that the defendant could have food and so that police could confront the defendant with the person he named as the perpetrator). On the other hand, if the defendant is allowed a substantial break to meet with non-police personnel or to rest, the interrogation should not be considered continuous.

410. Cumulative interrogations should be measured by the total time interrogators questioned the defendant. Thus, police questioning of more than ten hours over three days would exceed the permissible limit even if each interrogation lasted no more than three and a half hours.

411. Because some suspects might be inclined to give police interrogators whatever statements they are seeking because of their belief that the interrogation will continue indefinitely if they continue resisting, "interrogators should be required at the outset [of an interrogation] to inform a suspect as to the maximum permissible length of the questioning." White, *False Confessions*, *supra* note 198, at 144.

412. *See supra* note 81 and accompanying text.

413. Miranda v. Arizona, 384 U.S. 436, 505 (1966) (Harlan, J., dissenting).

414. *See* White, *False Confessions*, *supra* note 198, at 154.

pects.[415] In its fourth recommendation, the Illinois Commission's Report proposed a safeguard of this type, providing that in "[c]ustodial interrogations of a suspect in a police facility," police should be required to videotape "the entire interrogation process."[416] In its sixth recommendation, the Report proposed that audiotaping or some other means of tape recording should be required when videotaping "may not be practical."[417] In its comments, however, the Report made it clear that the Commission did not believe that a police failure to comply with these requirements would necessarily lead to the exclusion of a defendant's confession.[418] Aside from its recommendations relating to recording interrogations, the Report did not make any proposals designed to enhance fact-finding in cases involving police-induced confessions.

In this part, I will first consider the Commission's recommendation relating to recording police interrogations, addressing specifically the question whether this recommendation should be strengthened so that the police's failure to comply with the recording requirement would ordinarily result in the exclusion of the confession.[419] I will then consider the separate question of whether, as an additional aid to fact-finding in police interrogation cases, a state court or legislature should provide that expert testimony relating to the circumstances under which police interrogation practices are likely to produce untrustworthy confessions should be admissible in appropriate cases.[420]

A. Electronic Recording of Police Interrogations

If adopted, the Commission's recommendations relating to electronic recording would undoubtedly increase the extent to which police interrogators videotape or audiotape their interrogations.[421] Neverthe-

415. *See*, *e.g.*, Richard A. Leo, *Questioning the Relevance of* Miranda *in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1028 (2001); Wayne T. Westling & Vicki Waye, *Videotaping Police Interrogations: Lessons from Australia*, 25 AM. J. CRIM. L. 493, 509–12 (1998). *See* KAMISAR, ESSAYS, *supra* note 348, at 135 (advocating "recording" of interrogations and recounting similar proposals made by other commentators, including the American Law Institute and the National Conference of Commissioners on Uniform State Laws).

416. COMM'N, *supra* note 12, at 24.

417. *Id.* at 28.

418. The Commission did not clarify the circumstances under which interrogators' failure to videotape the interrogation would result in exclusion of the defendant's confession. After stating that it "has not suggested that confessions obtained during an untaped interrogation be automatically excluded," it went on to say that, "[w]hile the Commission believes that videotaping of the entire process should be required, the failure to videotape the interrogation session should not be the sole test of admissibility." *Id.* at 27. These cryptic comments indicate that, if the Commission's recommendation is adopted, the Illinois courts would have to decide what effect, if any, interrogators' failure to comply with the mandatory videotaping requirement would have on the admissibility of a defendant's confession.

419. *See infra* Part IV.A.

420. *See infra* Part IV.B.

421. Recommendation 58 provides that, if the police fail to record the defendant's statement, the judge should give a jury instruction which, among other things, informs the jury that "[g]enerally, an electronic recording that contains the defendant's actual voice or a statement written by the defendant

less, the Commission's failure to mandate the exclusion of police-induced confessions obtained in violation of the electronic recording requirements clearly weakens the force of the Commission's recommendation. Since the government apparently would be able to admit confessions obtained through custodial interrogation even when the police offered no excuse for their failure to comply with the recording requirements,[422] police interrogators seeking to shield their interrogation tactics from scrutiny might believe they could ignore the requirement.[423] In assessing the merits of the Commission's electronic recording requirements, the critical question is thus whether the Commission should have provided that the police's failure to comply with the requirements mandates exclusion of statements made by the defendant during the interrogation.

In concluding that exclusion of the defendant's statements should not be mandated, the Commission seemed to be concerned with minimizing the recording requirement's burden on law enforcement.[424] In capital cases, however, law enforcement's interest in avoiding the burdens imposed by a strict electronic recording requirement does not outweigh capital defendants' interest in enhanced fact-finding.[425] As the Commission recognized,[426] the legitimate burdens that the electronic recording requirement impose on law enforcement relate entirely to the recording's costs and possible inconvenience.[427] Law enforcement's experience with electronic recording indicates that when interrogators' questioning of suspects complies with legal requirements, electronic recording of the interrogations enhances law enforcements' legitimate interests by providing records that will rebut defendants' claims of improper interro-

is more reliable than a non-recorded summary." COMM'N, *supra* note 12, at 133. If adopted, this recommendation would provide the police with a strong incentive to record the defendant's confession or incriminating statements. To be sure, they record all defendants' incriminating statements. Moreover, police interrogators might develop a practice of recording the entire interrogation.

422. *Cf.* State v. Scales, 518 N.W.2d 587, 592 n.5 (Minn. 1994) (requiring exclusion of statements made in violation of the recording requirement whenever the violation is "substantial," which is decided on the basis of such factors as whether the violation was gross, willful, and prejudicial to the accused). Under the Minnesota rule, police would have a strong incentive to comply with recording requirement because of their concern that a court might determine that their failure to comply with the requirement was "substantial."

423. In many cases, interrogators could avoid the effect of the jury instruction required when the police fail to record the defendant's statement, *see supra* note 416, by electronically recording the defendant's confession without recording all or part of the interrogation leading up to the confession.

424. *See* COMM'N, *supra* note 12, at 27 (observing that Commission members were "sensitive" to law enforcement concerns relating to cost and logistics "as well as concerns expressed by various police officials that videotaping the entire interrogation process might inhibit the police from vigorously pursuing interrogations, or reveal techniques"); *id.* at 28 (observing that a minority of the Commission members "expressed the view that mandatory videotaping of suspects puts an unacceptable burden on law enforcement and would significantly lower the successful clearance rate in investigations of serious cases").

425. *Id.* at 27–28.

426. *See supra* note 424.

427. In response to the claim that "videotaping is not feasible . . . because of space, personnel and funding limitations," the Commission "separately recommended that in conjunction with requiring videotaping of interrogations, the State should provide funding to address these concerns." COMM'N, *supra* note 12, at 27.

gation practices and making their incriminating statements even more powerful evidence of their guilt.[428]

Alaska's experience, moreover, indicates that excluding statements obtained in violation of an electronic recording requirement is the best means of enforcing the recording requirement. Unlike Minnesota, the only other jurisdiction that requires electronic recording,[429] Alaska's state court decisions provide that, if the government seeks to introduce a confession obtained under circumstances where the police failed to comply with its electronic recording rule,[430] the defendant's statements will be excluded so long as the statements are incriminating and the defense presents testimony showing either a dispute as to their accuracy or a challenge to their admissibility.[431] Although Alaska courts have strictly enforced this exclusionary rule,[432] there are apparently very few cases in which confessions have been excluded because of police interrogators' failure to comply with the recording requirements.[433] In addition, neither reported cases nor the literature provide any indication that interrogators' compliance with the recording requirements has imposed burdens on law enforcement.[434] On the contrary, interrogators' compliance with

428. *See* Drizin & Colgan, *supra* note 63, at 337, 393–97 (iterating benefits such as "provid[ing] indisputable evidence in court," *id.* at 394, "protect[ing] law enforcement from fabricated claims of abuse," *id.*, and "improving the ability of police to gather . . . information involving a particular crime," *id.* at 395).

429. *See* Daniel Donovan & John Rhodes, *Comes a Time: The Case for Recording Interrogations*, 61 MONT. L. REV. 223, 230–31 (2000) (noting that Alaska and Minnesota are the only two states that require electronic recording of police interrogations). For the extent to which Minnesota courts exclude statements upon a showing that police violated the recording requirement, see *supra* note 422.

430. *See* Stephan v. State, 711 P.2d 1156, 1158 (Alaska 1985) (holding that Due Process Clause of Alaska Constitution requires law enforcement to electronically record custodial interrogation conducted at the place of detention).

431. *See id.* at 1165.

432. There are some cases in which statements not electronically recorded were admitted because an exception to Alaska's recording requirement applied. *See*, *e.g.*, Lewellyn v. State, No. A-6927, 1999 Alas. App. LEXIS 25, at *16–17 (May 26, 1999) (declining to extend recording of custodial interrogation at the place of detention to interrogation conducted at a hospital emergency room). The only case holding defendants' statements admissible despite law enforcement's failure to comply with the recording requirement was one in which the defendant failed to present testimony that the statement obtained was inaccurate or was obtained improperly, apart from violation of the electronic recording rule. *See* Fermin v. State, No. A-6138, 1997 Alas. App. LEXIS 62, at *6 (May 7, 1997); *see also* Bright v. State, 826 P.2d 765, 774–75 (Alaska Ct. App. 1992) (rejecting defendant's claim of a violation because law enforcement's failure to preserve part of the tape of electronically recorded interrogation did not result in prejudice to the defendant).

433. A LexisNexis Terms and Connectors search of all Alaska cases after the *Stephan* decision searching for the terms [confession/10 record!] and also [confession and excluded or exclude or failure to record or inadmissible or record! or Stephan] resulted in no findings of cases where the court excluded confessions on the ground that the police failed to comply with the recording requirement.

434. *See generally* Paul G. Cassell & Bret S. Hayman, *Dialogue on* Miranda*: Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839, 897 (1996) (interpreting empirical data to indicate that recording interrogations does not inhibit confessions); Mandy DeFilippo, *You Have the Right to Better Safeguards: Looking Beyond* Miranda *in the New Millennium*, 34 J. MARSHALL L. REV. 637, 709 (2001) (observing that videotaping requirement "would not greatly impair police from obtaining confessions from guilty suspects").

the requirement has enhanced the quality of evidence presented to juries[435] and, arguably, increased the conviction rate.[436]

Alaska's experience demonstrates that, even in ordinary criminal cases, a mandatory electronic recording requirement, which excludes confessions obtained in violation of the requirement, provides a valuable mechanism for enhancing fact-finding as to critical issues without interfering with any legitimate law enforcement interests.[437] In capital cases, where enhanced fact-finding as to the critical issues has the potential for preventing a wrongful sentence of death, the arguments in favor of attaching a strict exclusionary rule to the police's failure to comply with the recording requirement are even stronger.[438] Instead of the Commission's recommendations relating to electronic recording,[439] state courts and legislatures should provide first, that, in the absence of a showing that electronic recording of a capital defendant's interrogation is not feasible,[440] police are *required* to electronically record custodial interrogations of capital defendants; and second, that, if the police fail to comply with this requirement, the defendant's police-induced confession either cannot be

435. Drizin & Colgan, *supra* note 63, at 395.

436. *See* DeFilippo, *supra* note 434, at 703 (observing that jurors "may put even more weight on videotaped confessions" than they do on written confessions "since actually seeing the defendant confessing on tape would have more impact than paper testimony"); Christopher Slobogin, *An Empirically Based Comparison of American and European Regulatory Approaches to Police Investigation*, 22 MICH. J. INT'L L. 423, 450 (2001) (observing that analysis of empirical data supports the conclusion that "taping *improves* confession and conviction rates").

437. *See, e.g.,* Stephan v. State, 711 P.2d 1156, 1161 (Alaska 1985) (stating that recording of custodial interrogation not only protects the accused, but it also "protects the public's interest in honest and effective law enforcement").

438. See Drizin & Colgan, *supra* note 63, at 345.

439. *See supra* text accompanying notes 84–86.

440. In *Stephan v. State*, the Alaska Supreme Court indicated that electronic recording would be excused in the case of "an unavoidable power or equipment failure, or a situation where the suspect refused to answer any questions if the conversation is being recorded." 711 P.2d at 1162. It added that additional exceptions could be established if the government was able to prove by "a preponderance of the evidence that recording was not feasible under the circumstances." *Id.*

introduced into evidence[441] or, at least, cannot be used to support a sentence of death.[442]

B. Expert Testimony Relating to Circumstances Likely to Produce Police-Induced False Confessions

Although the Commission recommends that the trial judge be given discretion to admit expert testimony relating to eyewitness testimony in appropriate cases,[443] it makes no similar recommendation with respect to expert testimony relating to false confessions. The Commission's stated reason for allowing expert testimony relating to eyewitness testimony is that in some cases expert testimony would assist the jury in weighing the reliability of witnesses' eyewitness testimony.[444] The Commission's failure to recommend the admission of expert testimony relating to false confessions can thus probably be attributed to its belief that the jury does not need expert testimony to assist it in determining the circumstances under which police interrogation tactics are likely to produce a false confession.[445] The Commission apparently believed that, at least when the

441. In administering the electronic recording requirement, the Alaska courts impose two additional limitations: first, the requirement only applies when the custodial interrogation occurs at the "place of detention," *id.* at 1158; second, confessions obtained in violation of the recording requirement are to be excluded only if the testimony is presented to show either a dispute as to the statements' accuracy or that statements were obtained improperly apart from the recording violation, *id.* at 165.

In establishing an electronic recording requirement, however, legislatures or state courts should not adopt either of these limitations. As the Illinois Commission recognized, police may be required to "carry tape recorders for use when interviewing suspects in homicide cases outside the station," COMM'N, *supra* note 12, at 29, and audio taping of custodial interrogations conducted outside the station house should thus be feasible in most cases. In capital cases, moreover, the Alaska courts' requirement that a defendant challenge her confession in some additional way before being allowed to exclude it on the basis of an interrogator's failure to comply with the recording requirements seems meaningless. A capital defendant may always plausibly dispute the accuracy of her unrecorded statement in the sense that police testimony as to the defendant's words cannot accurately capture nuances that the jury would be able to grasp if they heard the defendant's voice and thus would be better able to evaluate the meaning of her statement.

442. *See supra* note 81.

443. COMM'N, *supra* note 12, at 127.

444. *Id.* at 129 ("The Commission recognizes the potential for problems associated with eyewitness testimony and that there may be circumstances where expert testimony with respect to such problems might be helpful to the jury.").

445. A few state courts have held that expert testimony relating to police-induced false confessions is inadmissible because it has not been shown to be sufficiently reliable to meet the tests for admitting expert testimony relating to a new technique or principle. *See* State v. Free, 798 A.2d 83, 95 (N.J. Super. Ct. App. Div. 2002) (excluding expert testimony under the test established in *Frye v. United States*, 293 F. 1013 (9th Cir. 1923), because the technique of detecting interrogation methods likely to result in false confessions is not generally accepted in the field of social psychology); People v. Philips, 692 N.Y.S.2d 915, 919 (N.Y. Sup. Ct. 1999) (excluding expert testimony in part on the ground that there is no "strong scientific basis" for the testimony); Kolb v. State, 930 P.2d 1238, 1242 (Wyo. 1996) (holding that trial court did not abuse its discretion in excluding expert testimony on the ground that the "false confession syndrome" was scientifically unreliable). As at least one commentator has intimated, however, the principles employed by experts to identify police-induced false confessions do in fact meet the standards of reliability required for the admission of expert testimony by most courts. *See* Major James R. Agar, II, *The Admissibility of False Confession Expert Testimony*, 1999 ARMY

jury is fully informed as to the circumstances under which the defendant's confession occurred (as it will be when an electronic recording of the interrogation is introduced into evidence), the jury is able to draw upon its general knowledge to determine the circumstances under which police-induced confessions are likely to be false.[446]

In fact, however, expert testimony relating to the circumstances under which police-induced false confessions are likely to occur will be at least as helpful to the jury as expert testimony relating to the circumstances under which eyewitness testimony will be mistaken.[447] The principles relating to the circumstances under which interrogation techniques will produce untrustworthy confessions—like the principles relating to the circumstances under which eyewitness testimony will be unreliable[448]—are counterintuitive. Most lay people would not realize, for example, that people with compliant personalities may be so eager to gain approval of authority figures that they will confess to crimes that they did not commit to please police interrogators;[449] similarly, most lay people do not understand the powerful effect of specific interrogation tactics, such as promising the suspect leniency[450] or misrepresenting forensic evidence,[451] much less the effect that a skillful combination of these tactics could have in the emotionally charged atmosphere of the interrogation room; and most lay people clearly do not believe that several hours of

LAW. 26, 40 (stating that "much of the theory of false confessions passes the 'general acceptance' part of *Daubert* and possibly the *Frye* test too"). Since at least the early 1980s, social psychologists have identified theories for identifying and classifying police-induced false confessions. *See* Saul M. Kassin & Lawrence S. Wrightsman, *Confession Evidence*, *in* PSYCHOLOGY OF EVIDENCE AND TRIAL PROCRRDINGS 67 (Saul M. Kassin & Lawrence S. Wrightsman eds., 1985); Ofshe & Leo, *Social Psychology*, *supra* note 57, at 239. At present, "[n]o scholar on the subject debates whether false confessions exist," Agar, *supra*, at 40, and while experts in the field of social psychology differ as to how false confessions should be classified, *compare* Kassin & Wrightsman, *supra*, at 67 (classifying police-induced false confessions into three categories: voluntary, coerced-compliant and coerced-internalized), *with* Ofshe & Leo, *Social Psychology*, *supra* note 57, at 209–20 (criticizing Kassin & Wrightsman's categories as incomplete and classifying police-induced confessions into five categories: voluntary, stress-compliant, coerced-compliant, noncoerced persuaded and coerced persuaded), they are in general agreement as to the circumstances under which police-induced false confessions are likely to occur. *See* Kassin & Wrightsman, *supra*, at 70–73; Ofshe & Leo, *Social Psychology*, *supra* note 57, at 191–207. Accordingly, courts that have considered this issue have generally concluded that this type of expert testimony is sufficiently reliable to meet the prevailing standards for the admission of expert testimony. *See* People v. Lopez, 946 P.2d 478, 482–83 (Colo. Ct. App. 1997); Reilly v. State, 355 A.2d 324, 336–37(Conn. Super. Ct. 1976); Callis v. State, 684 N.E.2d 233, 239 (Ind. Ct. App. 1997); State v. Wells, No. 93, CA 9, 1994 Ohio App. LEXIS 4122, at *6–8 (Sept. 8, 1994).

446. *See* COMM'N, *supra* note 12, at 25.

447. *See id*. at 127–29; *see also supra* note 444 and accompanying text.

448. *See*, *e.g.*, ELIZABETH F. LOFTUS & JAMES M. DOYLE, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL 3 (Lexis Law Publishing 3d ed. 1997) (stating that a witness's confidence in eyewitness testimony is not a good predictor of testimony's accuracy); *id.* at 4 (arguing that a witness's ability to recount details relating to an incident is not a good predictor of witness's ability to make an accurate identification); *id.* at 6 (stating that a witness's memory as to violent events is generally less good than their memory as to nonviolent ones).

449. *See supra* text accompanying note 139.

450. *See supra* text accompanying notes 231–72.

451. *See supra* text accompanying notes 310–43.

continuous police interrogation can lead even a normal person to give a false confession to end the interrogation.[452]

Enhancing accurate fact-finding in capital cases is obviously of paramount importance.[453] Although providing rules that will lead to increased electronic recording of police interrogations will improve fact-finding in the sense that it will enable the jury to have a more accurate understanding of what took place during the interrogation, a jury's accurate knowledge of the facts relating to the circumstances under which the defendant's confession occurred will not necessarily lead them to make an accurate determination as to the confession's trustworthiness.[454] Legislatures and state courts should thus provide that, when the government has introduced a capital defendant's police-induced confession, the trial judge should in appropriate cases[455] allow the defendant to introduce expert testimony relating to the circumstances under which police interrogation practices are likely to produce untrustworthy confessions.[456]

V. PROPOSED RECOMMENDATIONS

This article has proposed safeguards for legislatures and state courts to adopt to reduce the likelihood that police-induced false confessions will result in wrongful death sentences. In proposing specific safeguards, two preliminary issues relating to the safeguards' scope need to be addressed: First, in what cases should they apply? Second, when the government fails to comply with the safeguards, what remedy should be imposed?

As I have indicated throughout the article, the safeguards could apply in all capital cases or they could apply only when a defendant's police-induced statement has contributed to his death sentence.[457] When the broader approach is adopted, a legislature or state court must decide whether the safeguards should apply only when a defendant is being prosecuted for a capital offense or also in cases in which the police inter-

452. *See supra* text accompanying note 97.

453. *See, e.g.*, Beck v. Alabama, 447 U.S. 625, 632–38 (1980).

454. *See supra* note 96 and accompanying text.

455. As in other cases involving the admissibility of expert testimony, the judge should not allow a defense witness to testify as an expert relating to false confessions unless she first finds that the witness is qualified to testify as an expert in that field. *See*, *e.g.*, Ruckman v. State, No. 12-99-00388-CR, 2000 Tex. App. LEXIS 8708, at *10 (Nov. 29, 2000) (excluding properly a defense expert testimony relating to police-induced false confessions on the ground that defense failed to show reliability of expert's testimony); State v. Falk, No. 99-0350-CR, 2000 Wisc. App. LEXIS 614, at *45 (June 29, 2000) (holding that a defense witness was not allowed to testify as an expert on the subject of false confession in child abuse cases because she did not establish her expertise in that field).

456. In jurisdictions that permit expert testimony relating to false confessions, the expert is invariably limited to testifying as to the circumstances under which false confessions are likely to occur and is not permitted to express to an opinion as to whether the particular confession before the jury is false. *See*, *e.g.*, Callis v. State, 684 N.E.2d 233, 239 (Ind. App. 1997); State v. Wells, No. 93 CA 9, 1994 Ohio App. LEXIS 4122, at *6–8 (Sept. 8, 1994); Lenormand v. State, No. 09-97-150 CR, 1998 Tex. App. LEXIS 7612, at *11–12 (Dec. 9, 1998).

457. *See, e.g., supra* text accompanying note 81.

rogate a suspect for a capital offense (even though the suspect may ultimately be charged only with a lesser offense).

On balance, the broader approach seems preferable. Even though the narrower approach could be justified on the ground that courts should provide a defendant with extraordinary protections when the "penalty is death,"[458] providing safeguards to be applied in all capital cases is more likely to have an impact on the police because it provides them with a clear incentive to follow the guidelines in all capital cases, not merely those in which they believe a death penalty is likely. Providing safeguards that will apply whenever a defendant is interrogated for a capital offense will further reduce the likelihood of wrongful death penalties because, as the accounts of some of the DNA-cleared cases show,[459] when a suspect responds to police interrogation by falsely confessing to a capital offense, even if that suspect is never charged with a capital offense, there is a risk that he or she will be induced to testify falsely against another defendant with the result that the other defendant may be wrongfully convicted of a capital offense and sentenced to death. I therefore recommend that the proposed safeguards apply in all cases in which the police interrogate a suspect with respect to a capital offense.[460]

Assuming the safeguards apply whenever the police are interrogating a person suspected of a capital offense, should all of the safeguards be mandatory in the sense that failure to comply will automatically result in exclusion of the defendant's confession? The Commission employed an alternative approach under which failure to comply would not necessarily mandate exclusion but, apparently, would be a factor to be considered in determining the confession's admissibility.[461] In one case, moreover, the Commission provided that courts should more closely scrutinize confessions in capital cases obtained through specific interrogation practices.[462] As I have indicated,[463] this approach could have some beneficial effects. In particular, it might be reasonable to provide some mandatory safeguards, violation of which require exclusion of a capital defendant's statement, and some nonmandatory ones that direct judges to closely

458. *See* Justice Jackson's statement to this effect quoted in *supra* note 81.

459. *See supra* text accompanying notes 242–90.

460. Determining when the police are interrogating a suspect will be difficult in some cases. When the suspect is in custody (so that *Miranda* warnings are required), the police are clearly interrogating a suspect when they question him or engage in conduct likely to elicit a response. *See* Rhode Island v. Innis, 446 U.S. 291, 301 (1980). A more difficult question arises, however, when the police question a suspect who is not in custody. If the police are merely interviewing the suspect as a potential witness, the interview should not ordinarily be viewed as an interrogation. On the other hand, if the police questioning the suspect are employing the same techniques that they would employ in a custodial interrogation, the questioning should be viewed as an interrogation. In formulating safeguards, legislatures and state courts could specify that the safeguards apply to situations in which suspects in capital cases are subjected to custodial interrogation or police questioning that should be viewed as the equivalent of custodial interrogation.

461. *See supra* text accompanying note 94.

462. *See supra* text accompanying notes 92–93.

463. *See supra* text accompanying notes 219–23.

scrutinize certain interrogation practices in capital cases. On balance, however, legislatures or state courts' safeguards relating to police interrogation practices in capital cases should be entirely mandatory; that is, they should be formulated so that a failure to comply results in exclusion of the defendant's confession. Through taking this approach, legislatures and state courts will be more likely to affect police conduct and to provide clearer guidelines for judges.

The safeguards that a legislature or state court should adopt are:

1. When police interrogate a mentally impaired defendant[464] in a capital case, statements obtained during the interrogation should not be admissible against the defendant unless the police make special efforts to ensure that the defendant's statements would be trustworthy. Efforts that would ordinarily be sufficient to satisfy this requirement include having a lawyer present to advise the mentally impaired person during the interrogation, having a mental health expert explain the purpose of a custodial police interrogation to the mentally impaired person prior to the interrogation, or providing clear and convincing evidence that the police conducting the custodial interrogation did not ask the mentally impaired person leading questions or engage in other practices that might lead this person to provide the answers being sought by the police rather than the answers he or she believed to be true.[465]

2. When the police interrogate a suspect in a capital case, statements obtained following threats or promises relating to whether the death penalty will be imposed or the suspect executed should not be admissible.[466]

3. When the police interrogate a suspect in a capital case, statements obtained by misrepresenting the forensic evidence against the suspect should not be admissible.[467]

4. When police interrogate a suspect in a capital case, statements obtained from the suspect following a continuous interrogation of more than five hours or cumulative interrogations of more than ten hours should not be admissible.[468]

5. When police conduct a custodial interrogation of a suspect in a capital case, they must electronically record the interrogation unless it is shown by clear and convincing evidence that making such a recording is not feasible. Failure to comply with this requirement mandates the exclusion of statements made by the defendant during the interrogation.[469]

6. When a capital defendant's confession has been introduced into evidence, the trial judge should, in appropriate cases, allow the defen-

464. For the definition of a mentally impaired person, see *supra* note 209.
465. For an explanation of this proposal, see *supra* text accompanying notes 209–11.
466. For an explanation of this proposal, see *supra* text accompanying notes 294–306.
467. For an explanation of this proposal, see *supra* text accompanying notes 336–43.
468. For an explanation of this proposal, see *supra* notes 409–11 and accompanying text.
469. For an explanation of this proposal, see *supra* text accompanying notes 421–41.

dant to introduce expert testimony relating to the circumstances under which police interrogation practices are likely to produce untrustworthy confessions.[470]

By adopting these proposals, a state court or legislature would reduce one significant source of error in capital cases: police-induced false confessions would be substantially less likely to lead to innocent defendants' death sentences or executions.

470. For an explanation of this proposal, see *supra* text accompanying notes 443–56.

APPENDIX

Name of Defendant	State	Number of State-ments	Type	Police Induced?
1. Charles, Clyde	LA	1	A	no
2. Cruz, Rolando*	IL	3	D	yes
3. Gray, Anthony	MD	1	A	yes
4. Godschalk, Bruce	PA	1	C	yes
5. Hernandez, Alejandro*	IL	3	A	yes
6. Jones, Ronald*	IL	1	C	yes
7. Linscott, Steven	IL	1	D	yes
8. Lloyd, Eddie Joe	MI		C	yes
9. Miller, Robert*	OK	1	D	yes
10. Saecker, Fredric	WI	4	A	no
11. Snyder, Walter	VA	1	C	yes
12. Townsend, Jerry Frank	FL	1	C	yes
13. Vasquez, David	VA	1	D	yes
14. Washington, Earl*	VA	1	C	yes
The following defendants were convicted using the confession or dream statement of one or more individuals.				
15. Ochoa, Christopher	TX	1	C	yes
16. Danzinger, Richard	TX	1	Ochoa's Confession	yes
17. Bradford, Marcellius	IL	1	C	yes
18. Ollins, Calvin	IL	1	Bradford's Confession	yes
19. Ollins, Larry	IL	1	Bradford's Confession	yes
20. Saunders, Omar	IL	1	Bradford's Confession	yes
21. Williamson, Ron*	OK	4	D	yes
22. Fritz, Dennis	OK	3	Williamson's Confession	yes
23. Adams, Kenneth	IL			no
24. Jimerson, Verneal*	IL		Testimony	Yes
25. Rainge, Willie	IL	1	Testimony	Yes
26. Williams, Dennis	IL	1	Testimony	Yes

A = Admission
D = Dream Statement
C = Confession
Defendants with a * after their names were sentenced to death.