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**The Truth about False Confessions,
Research and Advocacy Scholarship¹**

By

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The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confessions⁴ is a gross distortion and incompetent attack on the research we reported in *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation⁵* (hereinafter, *Consequences*). On four counts Paul Cassell demonstrates serious intellectual or methodological errors. First, Cassell misrepresents the subject of the research and policy recommendations reported in *Consequences*.⁶ Second,

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⁴Paul Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 HARV. J.L. & PUB. POL'Y (1999) [Hereinafter Cassell, *The Guilty and the Innocent*].

⁵Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998) [Hereinafter Leo & Ofshe, *Consequences*].

⁶See *Infra* [cite first to last page in Section I].

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Cassell's commentary is logically irrelevant and trivial.⁷ Third, Cassell's factual challenges fail because his distorted case summaries selectively gloss over the holes in the state's cases and omit essential exculpatory evidence.⁸ Fourth, rather than adhering to the standards of scholarship he advocates, Cassell relies on artifice and rhetorical tricks, substituting opinions and innuendo for facts.⁹

Paul Cassell has succeeded once again in publishing a fatally flawed tract that serves no other purpose than to express his by now well-recognized ideological bias.¹⁰ In the limited time and space the editors of this journal have permitted us to respond to Cassell's screed, we will demonstrate why his comments are unworthy of serious attention.

⁷See *Infra*, Pp. [Cite first to last page in Section II]

⁸See *Infra*, Pp. [Cite first to last page in Section III].

⁹See *Infra*, Pp. [Cite first to last page in Section IV].

¹⁰See e.g., Hugo Adam Bedau & Michael Radelet, *The Myth of Infallibility: A Reply to Markman and Cassell*, 41 STAN. L. REV. 161, 169 (1988) (observing that Markman and Cassell's "efforts appear to spring largely from unacknowledged political roots; as a result, they either obfuscate the issues or merely trumpet the limits of our research as if we failed to state them in the first place.") [Hereinafter Bedau & Radelet, *The Myth of Infallibility*]; see also Stephen J. Schulhofer, *Miranda and Clearance Rates*, 91 Nw. U.L. REV. 278, 278-279 (1996) ("Yet once again, [Cassell's] arguments rest on selective descriptions of the data--and I am sorry to say--indefensibly partisan characterizations of the underlying material."); see also George C. Thomas III, *Telling Half Truths*, LEGAL TIMES, Aug. 12, 1996 at 20 ("While *Miranda* is not immune from questioning, advocacy cannot replace careful scholarship"); *id.* at 24 ("[S]cholars have a duty to describe all the evidence and to acknowledge contrary interpretations if they are widely held. Professor Cassell draws a one-sided picture of the evidence against *Miranda*."); and Richard A. Leo and Richard J. Ofshe, *Using the Innocent to Scapegoat Miranda: Another Reply to Paul Cassell*, 88 J. CRIM. L. & CRIMINOLOGY, 557 ("Paul Cassell advances several logically flawed and empirically erroneous propositions. These propositions appear to stem from Cassell's ideological commitments.") [Hereinafter Leo & Ofshe, *Using the Innocent to Scapegoat Miranda*]; and Charles Weisselberg, *Saving Miranda*, 84 CORN. L. REV. 109, 176, ft 332 (suggesting that "one may question Cassell's motives" and pointing out that "Cassell has presented his views as an advocate in litigation" and does not acknowledge "critiques of his work or otherwise acknowledge that his empirical analyses are much disputed.").

I. Cassell Misrepresents the Research Reported in *Consequences*

The principal reason that we undertook the study reported in *Consequences* was to contribute to the methodologically difficult problem of estimating how much influence a true or false confession exerts on the key decision makers -- from investigators to jurors to appellate judges -- who control prosecutions and convictions in the American criminal justice system. The research had two specific goals: (1) To examine the fate in the criminal justice system of a cohort of innocent persons who had in common only that police interrogators coerced from them false confessions to major felonies (typically murder); and (2) To extend one component of Bedau and Radelet's seminal study of miscarriages of justice¹¹ forward into the era of psychological interrogation by documenting 60 cases of police-induced false confession in the last third of the twentieth century.¹²

Any reader of Cassell's essay who had not first read *Consequences* would have no way of knowing the study's purpose since Cassell misrepresents the research and arbitrarily focuses on one minor element of the research design to justify expressing his ideological objections to the research findings.¹³ Further, Cassell invents a policy spin for his critique by attributing to us the motive of seeking to force "dramatic changes" on the justice system.¹⁴ This charge is

¹¹Hugo Adam Bedau & Michael Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987) [Hereinafter Bedau & Radelet, *Miscarriages of Justice*].

¹²Hence, we limited our case choices to only false confessions occurring in the post-Miranda era (i.e., after June 13, 1966). See Leo & Ofshe, *Consequences*, *Supra* Note __ at 433.

¹³Elsewhere Cassell has done the same thing. See Richard A. Leo & Richard J. Ofshe, *Missing the Forest for the Trees: A Response to Paul Cassell's "Balanced Approach" to the False Confession Problem*, 74 DENV. L. REV. (1997) at 1135 ("In his Comment, Paul Cassell ignores what our article is about: the development and illustration of a decision model that analyzes and explains how modern methods of psychologically-based interrogation lead both to true confessions from the guilty and false confessions from the innocent.") [Hereinafter, Leo & Ofshe, *Missing the Forest*].

¹⁴Paul Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confessions* at 1 ("These assertions are not advanced in an effort to right wrongs in individual cases, but rather to justify a series of dramatic changes to the way in which the justice system handles interrogations and confessions.").

false and misleading. Cassell fails to understand the difference between our discussion of the policy implications of a data-driven research project and his political advocacy of a set of policy preferences.

Consequences started with the observation that while virtually everyone knowledgeable about criminal investigations and prosecutions recognizes that confession evidence is powerful, no empirical study had ever examined a cohort of false confession cases to assess the strength of such evidence on the decision-making of criminal justice officials and triers of fact. Prior to the publication of *Consequences*, no research had attempted to refine the general presumption about the strength of confession evidence such that a quantitative estimate of its impact could be attached.

The common assumption about confession evidence appears to arise largely from cases in which defendants who are very probably guilty confess and in which there are multiple co-varying sources of evidence pointing to the defendant. For example, a true confession case will likely include some circumstantial, eyewitness and/or forensic evidence which, along with the confession, implicates the defendant. Therefore, estimating how much of an effect any one of these factors exerts on the decision-making of triers of fact and criminal justice officials is impossible without relying on a technical solution. Even the superficial review of a large collection of non-systematic case observations will not offer up this information.

The assumption that confession evidence is the pivotal fact in a case might, for example, be masking a true causal structure in which the confession made the conclusion that the defendant is guilty *easier* to reach but did not materially change a result that would have occurred anyway solely because of the other case evidence. Or perhaps the true impact of a confession is that it makes a pivotal contribution, but only when the other case evidence is borderline, and would have been viewed as too weak to permit a firm conclusion until it was coupled with the defendant's admission of guilt. Or, perhaps the power of confession is so great that its presence makes all the difference – that when coupled with even the weakest of circumstantial evidence, its presence nearly always leads to the conclusion that the defendant did it.

The problem of assessing the power of false confession evidence is at least as complicated, but for different reasons. If a person is factually innocent, there will likely be no valid forensic evidence tying him or her to the crime and any circumstantial evidence is likely

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to be weak (since it is, in fact, merely coincidental).¹⁵ It has generally been presumed that a false confession is highly prejudicial for at least the reason that people find it difficult to accept the idea that an innocent person would ever confess.¹⁶ The facts available to the evaluator of a false confession case will likely include knowledge of the defendant's admission, knowledge of the specifics of the confession, perhaps some erroneous circumstantial evidence, some prejudicial background information and some evidence tending to support the suspect's innocence. Since the confession is only one piece of the puzzle, it is not possible to directly assess how strong a prejudicial effect the false confession might be having.

To estimate the impact of confession evidence one must devise a way to isolate and measure the influence of the confession separate and apart from the contribution of the other circumstantial or confirming and disconfirming evidence known to an evaluator. The usual methodological solution to the problem of estimating the variance attributable to one factor out of many is to collect a large number of observations, measure the strength of all of the factors involved and derive an estimate of each variable's contribution by carrying out the statistical procedure of multiple regression analysis. Another, less elegant and less precise (but also less time consuming and costly) approach is to make observations of situations in which the factor of interest has been isolated by naturally occurring circumstances. This is what we sought to do

¹⁵Even Cassell's challenge to a few of the cases we studied demonstrates why the research we undertook is necessary. *Consequences* studied the biasing effect of an evaluator's knowledge that a defendant has confessed. Therefore, we sought to assess the evidence for guilt and innocence absent the presence of the confession, and we evaluated the cases on the basis of whether any evidence confirmed a suspect's guilt or whether the confession confirmed the suspect's innocence and contradicted the confession. Cassell fails to recognize that the influence effect of the confession must be removed from consideration before it is possible to obtain a baseline assessment of the case evidence against which the confession's impact can be estimated. A careful reader of Cassell's diatribe will have already noticed that in all nine cases he challenges, once the confession is removed from consideration, the state could claim nothing more than strained circumstantial evidence in support of the defendant's guilt. For readers who have not already noticed this obvious analytic error on Cassell's part, the problem will be discussed in detail in section III. See Cassell, *The Guilty and The Innocent*, *Supra* Note ___ at (pages discussing the nine cases).

¹⁶See *United States v. Hall*, 974 F. Supp. 1198 (1997); and *United States v. Hall*, 93 F.3d 1337 (1996).

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to analyze the prejudicial effect of false confessions.

Based on the strength of the evidence that supported the defendant's factual innocence, all 60 cases were classified into three categories: *proven*, *highly probable* and *probable* false confessors.¹⁷ Our sources of information about the cases ranged from extensive case files, including police reports, pre-trial and trial transcripts, interviews with defendants, to academic journal articles book length studies, and press reports.¹⁸ The investigations and prosecutions we studied had in common the following conditions: no physical or other significant and credible evidence indicated the suspect's guilt; the state's evidence consisted of little or nothing more than the suspect's statement "I did it"; and the suspect's factual innocence was supported by a variable amount of evidence--often substantial and compelling--including exculpatory evidence from the suspect's post-admission narrative.¹⁹

The research design sought to identify essentially pure false confession cases so that we might assess the power of the information that a suspect had confessed, unsupported by any

¹⁷For the 34 (57%) defendants classified as *proven* false confessors, the confessor's innocence was established by at least one dispositive piece of independent evidence that came to light during pre-trial or post-conviction proceedings (e.g. the murder victim turned up alive, the true killer was apprehended or confessed and could be proven guilty, a DNA analysis excluded the defendant from being the rape/murderer). For the 18 (30%) defendants classified as *highly probable* false confessors, the evidence overwhelmingly or very strongly indicated that the defendant's confession was false but never reached the standard necessary for the defendant to be classified as proven innocent. The evidence led to the conclusion that the defendant's innocence was established to *beyond a reasonable doubt*. For the 8 (13%) defendants classified as *probable* false confessors, there was evidence supporting the conclusion that the confession was false, and the confession lacked any internal indicia of reliability. The evidence led to the conclusion that the defendant's evidence was established by a *preponderance of the evidence*. See Leo & Ofshe, *Consequences*, Supra Note ___ at 435-438.

¹⁸Cassell misinforms the reader when he reports that *Consequences* was based largely on secondary sources and media accounts at that, his research is based on "an examination of original trial court records and similar sources." Cassell, *The Guilty and the Innocent*, Supra Note ___ at 2. The reported sources for *Consequences* were varied. See Leo & Ofshe, *Consequences*, Supra Note ___ at 435. For convenience, often facts known to us directly from case files were referenced to publications more readily available to law review editors and readers.

¹⁹Leo & Ofshe, *Consequences*, Supra Note ___ at 436.

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significant evidence, to overcome even strong affirmative evidence of innocence. Almost the only thing on which the state's case rested was that police interrogators elicited from a suspect a vague general admission to having committed the crime. In addition to assessing the inculpatory evidence in each case, an independent evaluation of the exculpatory evidence supporting the defendant's factual innocence was undertaken.²⁰

Other than obtaining one or more "I did it" statements, the interrogation failed to yield any significant or credible evidence of the defendant's guilt.²¹ The defendant's actual confession (the full statement describing participation in the crime) failed to demonstrate his or her guilt. In fact, absent contamination by the police, the media and/or community gossip, the specifics of the statement demonstrated the defendant's ignorance of the crime facts. Fully and fairly analyzed, the defendant's confession constituted evidence of innocence rather than evidence of guilt.

In two different ways, the confession invariably failed to demonstrate that the suspect knew objectively demonstrable facts that could be known only by the perpetrator or an accomplice. First, the confessions did not yield information that led police to something otherwise unknown to them (e.g. the whereabouts of physical evidence such as the location of a missing murder weapon or of missing loot). Second, the confessions failed to demonstrate that the defendant had knowledge of the crime that the perpetrator could reasonably be expected to know (e.g., the method of killing, the specific location where the crime was committed, specific details about the crime scene such as the method of entry into a residence, or knowledge of an unusual aspect of the crime that had been deliberately withheld from the public, etc.).²²

²⁰This was done in part to make it possible to divide the 60 cases into two sub-groups in order to check for consistency in our findings about the fate of false confessors as they are processed by the criminal justice system.

²¹For a discussion of the process of interrogation and the two step process of motivating a suspect to make an admission and eliciting a post-admission narrative that can yield specific evidence of guilt or innocence, Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. L. REV. 979 (1997).

²²In his nine case challenges, Cassell frequently and mistakenly imputes actual knowledge to a confessor who was contaminated either by the police, the media, or community gossip. [Cites].

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Consequences demonstrated that false confessions have a very substantial prejudicial effect on a defendant at every step along the road that leads from arrest to imprisonment or execution. All of the defendants in the cohort of false confessors that we studied spent an unjustified and usually a long period of time in pre-trial detention.²³ They were obliged to either spend substantial sums to defend themselves or substantial public funds were expended on their behalf.²⁴ Some entered guilty pleas to avoid a death penalty or the harshest possible prison sentence because everyone knew that the risk of conviction was great if they went to trial.²⁵ Others were convicted at trial and sentenced to long prison terms.²⁶ One was executed.²⁷

Consequences established that for all the defendants studied, the likelihood of conviction for a false confessor who elected to risk trial was 73%.²⁸ For the subset of defendants whose false confession was subsequently proven to a certainty (*proven* false confessors),²⁹ the probability of being convicted at trial was .91.³⁰ For the subset of defendants for whom there existed overwhelming or strong evidence of innocence (*highly probable* and *probable* false confessors)³¹ that did not rise to the level of absolute certainty, the probability of being

²³See Leo & Ofshe, *Consequences*, Supra Note ___ at 472-491.

²⁴*Id.*

²⁵*Id.* at 478-481.

²⁶*Id.* at 481-491.

²⁷*Id.* at 466-468.

²⁸*Id.* at 483.

²⁹See *Infra* Text at ___ (the text below that defines proven false confessors).

³⁰Our earlier article misprinted the risk of a guilty verdict at trial for those false confessors whose innocence was subsequently proven beyond any doubt as .90. See Leo & Ofshe, *Consequences*, Supra Note ___ at 483. The correct figure (10/11) is .91.

³¹See *Infra* Text at ___ (the text below that defines probable and highly probable false confessors).

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convicted at trial was .63.³²

Based on the study's findings, we offered some obvious suggestions for improving the quality of contemporary interrogation practices and better separating the innocent from the guilty prior to trial: Police should be better trained about the power of psychological interrogation to elicit false confessions; police should be trained how to improve the quality of any confession they obtain and thereby learn how to discriminate between a true and false confession as it is being elicited; and due to the substantial prejudicial effect of admitting into evidence a false confession, some minimum standard of reliability should be required of a confession before a judge deems it to have probative value that exceeds its prejudicial effect.³³

Cassell invents a significant policy spin to increase the marketability of his article by deliberately misstating our recommendations. Cassell asserts:

...Leo and Ofshe propose sweeping changes to confession law. Among other things, Leo and Ofshe suggest that courts should "carefully scrutinize" a confessor's "post admission narrative" against the known facts of the case. In their view "[t]he fit between the specifics of a confession and the crime facts determines whether the "I did it" statement admission should be judged as reliable or unreliable evidence. They further argue that, if discrepancies are substantial enough, courts should conclude that the confession is unreliable and suppress it.³⁴

and

The Leo and Ofshe's proposal, however, would go further and require courts to make specific determinations about "fit," with that determination governing the admissibility of defendant's statements.³⁵

After reading our minds and concluding that we distinguish between the admissibility of

³²The assessment of factual innocence was independent of the weaknesses in the states case - it was based on the standard of proving "beyond a reasonable doubt" or "by a preponderance of the evidence" that the defendant was innocent. See *Id.* at 435-438.

³³Leo & Ofshe, *Consequences*, *Supra* Note ___ at 491-496.

³⁴Cassell p.41

³⁵Cassell page 41

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admissions and confessions, Cassell concludes that our position on the admissibility of confessions is:

On the second theory -- that the statement while deviating slightly from the truth, is a "confession" but nevertheless is admissible because it *is sufficiently close to the facts...*³⁶ (emphasis added).

Having created the false impression that we advocate a standard that measures the difference between the crime facts and a perfectly fitting confession -- one which covers every point of fact that defines the crime scene -- Cassell proceeds to attack his straw man:

The problems only mount when we realize that guilty suspects, even if "confessing" to all the charged crimes (murder, kidnap, and rape) might provide a post admission narrative that deviates from the crime facts.³⁷

We begin undoing Cassell's deceptions by pointing out what we actually wrote in *Consequences* on the issue of how courts might utilize the information our research generated and control the prejudicial effect of false confessions. In a passage that Cassell cites but distorts, we wrote about the need for all evaluators to be attentive to the quality of confession evidence (there "is a compelling need for police, prosecutors, judges and juries to carefully scrutinize and evaluate a suspect's post admission narrative against the known facts of the crime.").³⁸ This recommendation advocates nothing more than that serious intellectual attention be paid to this problem. The only time in *Consequences* we say anything about what courts should do appears nine lines from the end of the article (in a passage Cassell avoids). There we wrote that we believe that courts should demand "a minimal indicia of reliability before admitting confession statements into evidence."³⁹

³⁶Cassell at 43

³⁷Cassell at 43

³⁸Consequences at 495

³⁹Leo & Ofshe, *Consequences*, Supra Note ___ at 496

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Since there is precious little in *Consequences* about recommendations following from the research, and because nothing we have ever written would by any stretch of the imagination of a rational person constitute a the suggestion for sweeping changes in the law, Cassell is forced to build his false claim by distorting what we wrote in our earlier paper, *The Decision to Confess Falsely: Rational Choice and Irrational Action*.⁴⁰ All of Cassell's citations to our earlier paper on this issue come from three paragraphs which we quote in their entirety:

Both admission and confession statements are nothing more than two pieces of proposed evidence that, correctly interpreted, point either to a suspect's guilt or innocence. No piece of evidence really speaks for itself, and even a photograph can be doctored. Answering the question of whether a piece of evidence is valid and appropriate for the purpose for which it will be used by a juror is fundamental to the reasoning behind rules governing the exclusion of potential evidence. A judge would never knowingly admit into evidence a doctored photograph that is the product of modern computer graphic techniques and depicts a scene that never happened. A false confession is analogous to a doctored photograph. The mechanism for creating it is the ancient technology of human influence carried forward into the interrogation room.

It is possible to establish a standard of minimum reliability for a confession so that true confessions, like real photographs, can be separated from the doctored frauds constructed through the techniques of psychological interrogation. Police can be better trained to obtain statements that satisfy the legal definition of the word confession. Most investigators currently operate within legal constraints, but all could be trained to elicit more reliable confessions. A confession that fully describes the circumstances of a crime should and could be crafted to always permit the confession to be corroborated. Corroboration is the key to erecting a standard of minimum reliability for confession evidence.⁴¹

and

By contrast, the innocent false confessor lacks personal knowledge

⁴⁰Richard J. Ofshe and Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. L. REV. 979 (1997). [Hereinafter Ofshe & Leo, *The Decision to Confess*].

⁴¹Ofshe & Leo, *The Decision to Confess*, at 1118 and 1119

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of the crime facts. As a result, he can only repeat information given to him or provide guesses to the interrogators' questions. A well-developed post-admission narrative by a false confessor is likely to be riddled with demonstrable factual errors, and thus casts substantial doubt on the validity of the confession. If a suspect's post-admission narrative fits poorly with facts of the crime, produces no corroboration, and is disconfirmed by the suspect's wrong answers to questions about major issues (such as the weapon used, how the victim was kept silent, etc.), the confession should be considered inadmissible because it lacks sufficient indicia of reliability. By focusing on the substantive accuracy of the suspect's statement rather than exclusively on the procedural fairness of the interrogation process courts can test for a minimum standard of reliability before admitting a confession into evidence.⁴²

We suggest above that if a statement is entirely wrong on every factual point raised in the interrogation it should be barred. Beyond this, all that we have ever advocated is that a minimum standard of evaluation be established as a consideration in the decision to admit confession evidence -- not for the near perfect corroboration Cassell attempts to make us out to desire. What then might a minimum standard of corroboration entail? We have never presumed to offer specific rules to be implemented, but rather have focused on the general principle. However, we have already expressed our conclusion about what it takes for a post-admission narrative to demonstrate a suspect's guilt or innocence, which should indicate at which end of the continuum -- from 0 to 100 percent corroboration of the suspect's statement about the crime facts -- we would likely suggest that a minimum standard would be found.

In the *Decision to Confess* we pointed out that an innocent suspect can never prove his innocence even by getting all of his statements about the crime facts wrong, since errors can only demonstrate consistency with a lack of actual knowledge, not the fact of it.⁴³ We also pointed out that the only time that an innocent suspect should get an objectively demonstrable crime scene fact correct is when he has been contaminated by information given to him or makes a

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⁴³Ofshe & Leo, *The Decision To Confess*, *Supra* Note ___ at 994

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lucky guess.⁴⁴ The likelihood of making lucky guesses decreases with the number of possible answers to the question. No one should be impressed with a correct answer to the question "was the body face up or face down" since the probability of a correct guess is .50. We are all impressed, however, with the contribution of information that leads police to a missing murder weapon since the number of possible hiding places might run to the tens of millions or billions within a mile of the crime scene.

At minimum, it only takes one objectively correct answer to a question that has a large number of possible answers to demonstrate that someone probably has actual knowledge of the crime. From a decision theory perspective, it would take very little to establish a basis of reliability before admitting a confession statement into evidence.

It is now well-established that false confessions occur in America with troubling regularity,⁴⁵ even though no one is presently able to estimate the frequency or rate with which they occur.⁴⁶ Paul Cassell ignores evidence that false confessions happen with regularity in

⁴⁴In any discussion of the evaluating of the fit between a suspect's statement and the crime scene facts, only statements that can be objectively evaluated have any value. A suspect's contribution of a story with lots of details about what he and the murder victim talked about in private before she was killed, has no value since it can never be verified. An accurate description of a number of related, or even one highly improbable established facts is what is needed. For example if a suspect volunteered an accurate description of the crime scene — that the lace from one of the victim's boots was removed and used to tie her hands to a post, that a single boot and a single sock were removed and the sock was filled with sand and used as a gag and the victim's eyes were covered with a man's Calvin Kline scarf, the likelihood of correctly guessing all, or even a subset of these facts is vanishingly small.

⁴⁵See Leo & Ofshe, *Consequences*, Supra Note ___ at 430, Footnotes 3 & 4 (documenting the numerous social science researchers, legal scholars and journalists who have discovered and documented numerous case examples of false confessions during this decade alone).

⁴⁶See Saul Kassin, *The Psychology of Confession Evidence*, 52 AM. PSYCHOL., 221, 224 (1997) ("To be sure, nobody knows the rate of false confessions or has devised an adequate method for calculating their prevalence."); Richard A. Leo & Richard J. Ofshe, *Missing the Forest for the Trees: A Response to Paul Cassell's "Balanced Approach" to the False Confession Problem*, 74 DENV. L. REV. 1135, 1136-1137 (1997) ("There are at least three reasons why at present it is not possible to devise an empirical study to measure, quantify or estimate with any reasonable degree of certainty the incidence of police-induced false confessions or the number of wrongful convictions they cause. First, American police typically do not record interrogations in their entirety...Second, because no criminal justice agency keeps records or

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America and maintains that false confessions occur rarely. Cassell's position is that interrogation-induced false confession is not a significant problem, preferring to explain away its occurrence as the fault of real or supposed mental impairments of false confessors.⁴⁷ Even this phenomenon is, according to Cassell, vanishingly rare. In an earlier tract Cassell erected a series of speculative assumptions and derived the staggering conclusion that as few as 10 but no more than 394 wrongful convictions from false confession occur in America each year.⁴⁸ Since Cassell chooses to believe that false confessions rarely occur, it is not surprising that he is unable to admit that *The Consequences of False Confessions* is about how false confessors fare in the

collects statistics on the number or frequency of interrogations in America, no one knows how often suspects are interrogated or how often they confess, whether truthfully or falsely... Third, many cases of false confession are likely to go entirely unreported and therefore unacknowledged and unnoticed.").

⁴⁷See Cassell, *The Guilty and the Innocent*, Supra Note __ at [Page]. Cassell's speculation that victims of interrogation-induced false confession are only the mentally handicapped is plainly disingenuous. Cassell advances this speculation based on 9 of our 60 cases in which Cassell declares that an innocent suspect was wrongfully convicted. See Cassell, *The Guilty and the Innocent*, Supra Note __ at [Page]. However, in doing so, Cassell ignores 31 of our 60 cases in which the false confessor was *not* convicted, most of which did not involve mentally handicapped defendants. In other words, Cassell willfully ignores the majority of our false confession cases to mount his defense of the justice system -- that interrogation-induced false confession is not the product of poor police practice but is limited to the mentally handicapped (who no doubt deserve their fate since they inflicted their false confessions on police officers, prosecutors, judges and juries).

The larger problem here is not that Cassell marshals only that evidence that supports his speculation and selectively ignores evidence that contradicts his speculation. Rather, it is that Cassell perpetuates the myth that contemporary American police interrogators do not elicit false confessions from intellectually and cognitively normal individuals. In his zeal to defend law enforcement, here, as elsewhere, Cassell seeks to minimize, if not ignore, the false confession problem in America, despite the abundant social science documentation and evidence to the contrary. This myth contributes to the ultimate wrongful conviction of innocent people based who were dragged into harms way by police interrogators who coerced from them false confessions.

⁴⁸Paul Cassell, *Protecting the Innocent From False Confessions and Lost Confessions--And From Miranda*, 88 J. CRIM. L. & CRIMINOLOGY 497, 520 (1998). For a critique of Cassell, see's grand speculations, see Richard A. Leo & Richard J. Ofshe, *Using the Innocent to Scapegoat Miranda: Another Reply to Paul Cassell*, 88 J. CRIM. L. & CRIMINOLOGY 557 (1998) [Hereinafter Leo & Ofshe, *Using the Innocent to Scapegoat Miranda*].

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system.

We believe that Cassell has chosen to misunderstand, misrepresent and challenge our study because it calls into question his presumption that the operations of the state are virtually error free. For example, in a previous publication Cassell launched what is now recognized as a failed attack on Bedau and Radelet for suggesting that the state had ever executed an innocent person.⁴⁸ In this instance, Cassell attacks us for doing research investigating the consequences of confessions which the police coerced from innocent suspects, who the state's prosecutors forced to trial, which juries impaneled by the state convicted, and which the state's appellate apparatus regularly failed to overturn, condemning innocent citizens to prison and even execution.

II. Cassell's Critique is Trivial and Not Relevant To the Study Reported in *Consequences*

In his response to our paper, Cassell ignores the problem our work addresses, disregards how we investigated this problem, and, instead, goes off on a tangent reflecting his own ideological biases.⁵⁰ Cassell offers no contribution to an understanding either of the causes of the false confession problem or its consequences on decision-makers in the criminal justice process. Instead, Cassell makes the arbitrary, misleading and the ultimately unsuccessful claim that a different methodological approach should have been used.⁵¹ Based on this claim, Cassell

⁴⁸See Stephen Markman and Paul Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121 (1988); See also Bedau and Radelet, *The Myth of Infallibility*, Supra Note ___. See also Infra Note ___ [The footnote below citing the Acker et al. study].

⁵⁰Markman and Cassell's critique of Bedau & Radelet suffers from the same flaw. See Bedau & Radelet, *The Myth of Infallibility*, Supra Note ___ at 169 ("Their efforts appear to spring largely from unacknowledged political roots; as a result, they either obfuscate the issues of merely trumpet the limits of our research as though we had failed to state them in the first place.").

⁵¹Cassell, *The Guilty and the Innocent*, at 2.

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then floats the non-sequitur that if 15% (9/60) of the cases that we studied were misclassified, the problem of interrogation-induced false confession from innocents somehow vanishes and, instead, becomes a problem limited to "the mentally infirm."⁵²

Cassell's critique is irrelevant to our study of the impact of false confessions on the decision-making of triers of fact.⁵³ Cassell shifts the reader's attention away from our question by inaccurately claiming that we relied largely on media sources for our information and thus that we misclassified defendants. Cassell suggests that relying on news stories is problematic because, in the best traditions of yellow journalism, reporters deliberately make criminal defendants out to be innocent.⁵⁴ Cassell attempts to mislead the reader into presuming that our research entailed little more than culling the *National Inquirer* and the *New York Times*. Cassell further suggests that the other secondary sources cited in our footnotes were also inferior to the trial transcripts and primary sources upon which he claims to base his critique and thus taint the results of our research.

Despite Cassell's arbitrary and unproven assertion that our methodology was defective, he implicitly grants our conclusion that defendants falsely confessed in 85% (51/60) of the cases that we studied. Cassell avoids explicitly admitting to the fact of a false confession in so high a percentage of the cases we studied by conveniently adopting the position that only cases that resulted in conviction are worthy of his consideration (N=29) and then directing the reader's attention to a subset of those cases (N=9). Even after granting our analysis in 52% (31/60) of the sample, Cassell is only able to mount challenges to 31% (9/29) of the remaining cases 29

⁵²Cassell, *The Guilty and the Innocent*, Supra Note ___ at 39 ("[T]he high concentration of the mentally infirm among the undisputed cases suggests that, for the most part, false confessions are caused not by police questioning techniques in general but rather by the application of those techniques to certain narrow, mentally limited populations."). See Infra/Supra Note ___ [cite footnote where we discuss why this is disingenuous].

⁵³If Cassell's substantive points were correct, we would seek to incorporate his contribution, drop any cases that were mis-classified, and re-calculate our tables to determine how much, if at all, our findings would be changed.

⁵⁴Cassell, *The Guilty and the Innocent*, Supra Note ___ at 2 ("Journalists will all too often slant their reports in the direction of discovering 'news' by finding that an innocent person has been wrongfully convicted.").

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cases.⁵⁵ Even after ignoring more than half of the cases we studied Cassell implicitly concedes that 69% (20/29) of the remaining defendants were false confessors.

As social scientists, we are well aware that the choice of the methodology with which to conduct research involves, among other things, a trade-off between level of effort and willingness to tolerate error. We had no reason to believe that our decision to sometimes rely, in part or principally, on reports published in the press introduced a significant likelihood of misclassifying a case. Nevertheless, we acknowledged in *Consequences* that there exists a margin of error in all empirical research and, due to the nature of our research and despite our best efforts, it was certainly possible that one or more of the cases included in the study may have been involved a guilty defendant.⁵⁶

While we sometimes relied on the press, we did so to a far lesser extent than it might seem from our referenced sources. In fact, for many of the cases we had extensive files of police reports, pre-trial and trial transcripts, depositions and other materials but sometimes chose to cite a readily available published source for the *same facts* we knew from other places because it was easier for the law review cite checkers to verify sources directly available to them online.⁵⁷ Whether we cited press reports or any other source as the basis for a fact, Cassell's carping

⁵⁵As we will demonstrate in section III, Cassell's challenges to even the nine cases fail and so we remain unaware of any reason to drop any case from the study.

⁵⁶Leo & Ofshe, *Consequences*, Supra Note ___ at 437-438 ("We recognize that for any case that could not be classified as a proven false confession, there is a possibility that our classification of the case might be in error. Despite strong evidence supporting the conclusion that the confession is false, it remains theoretically possible that one or more of the defendants we classify as false confessors may have committed the crime. Nevertheless, we believe that the disputed confessions discussed in this article would be judged false by an overwhelming majority of neutral observers with access to the evidence we reviewed.").

However, as we will demonstrate in Section III, Cassell's challenges in each of the nine cases distorts the underlying case facts, relies on errors, omissions and distortions, and, in some instances, willfully misleads the reader. In every instance, Cassell did little more than re-state the prosecution's case, conveniently ignoring some or all of the exculpatory and inconsistent evidence that suggests the defendant's innocence in each case. See Text Infra [citing pages in Section III].

⁵⁷This became especially important in light of the number of footnotes in our original article (543!). See Leo & Ofshe, *Consequences*, Supra Note ___.

criticism is vacuous unless he can show both that our sources were wrong in their statement of facts and that as a result we misclassified cases. Cassell is never able to satisfy either criteria.

How much of a benefit would it have conferred if we had used only the sorts of sources Cassell claims to have relied upon? Can anyone take seriously the suggestion that we ran a significant risk of misclassification by accepting the information which led us to conclude, for example, that Billy Gene Davis and Steven Linscott's prosecutions were based on false confessions?

We learned about the case of Billy Gene Davis entirely from the press.⁵⁸ The Austin American Statesman reported that the prosecution of Davis for murdering his girlfriend was dismissed despite the fact that he had confessed because the victim turned up alive.⁵⁹ How much of a risk of error did we run by failing to obtain a certified copy of the prosecution's motion to dismiss charges and traveling to Texas to personally verify that the victim was indeed alive?

Similarly, we learned from multiple sources that although Steven Linscott had confessed and was convicted of murder, he was exonerated many years later and his conviction was overturned. One of the sources we relied on was a United States Department of Justice Publication -- *Convicted by Juries, Exonerated by Science*.⁶⁰ What risk did we run by not verifying from transcripts of Linscott's trial and inspection of the DNA test reports the same facts that were reported in the press,⁶¹ in Linscott's book,⁶² and by the Justice Department?⁶³

⁵⁸Leo & Ofshe, *Consequences*, Supra Note ___ at 449-450.

⁵⁹Jim Phillips, *Man Who Said He Killed Friend Gets Probation for Scaring Her*, AUSTIN AM. STATESMAN, Nov. 9, 1990, at B3.

⁶⁰Edward Connors Et. Al. CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996).

⁶¹Sharon Cohen, *Dream Leads To a Prison Term Until DNA Evidence Frees Him; Slaying: Police Called Steven Linscott's Account a Confession, Not a Vision. Now, 12 Years Later, He Examines Lessons Painfully Learned*, L.A. TIMES, September 18, 1994 at A1.

⁶²Steven Linscott, MAXIMUM SECURITY (1994).

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Cassell never demonstrates any significant errors due to the sources we cited. But, assuming for the sake of argument that we had erred and misclassified a case, what impact would this have had on our appraisal of the biasing effect of a false confession? If we were wrong on one or two cases and they were dropped from the analysis, the effect on the rates and probabilities of the outcomes we report for the *cohort of persons* we were studying would be de minimis.

If one classification was wrong and one case was dropped from our sample, the reduction of the study's base from 60 to 59 cases would have had a quite small impact on its final figures. With a 60 case base, the contribution of each case to the final outcome is .0167th of the result. With a base of 59 cases the weight of each case increases to a factor of an .0169, a less than staggering increase of .0002. If we were wrong about two cases, the impact would have been to distort the effect on each of the 58 properly included cases by a factor by .0005

What happens to the study's results if we address only the restricted number of cases Cassell deems significant -- those that produced convictions?⁶⁴ If we assume that all nine of Cassell's challenges are correct and if all of the disputed cases were dropped, what difference would it make to the final estimate of the impact of a false confession on the fate of an innocent defendant in front of a jury? Table 1 reports the study's finding about the fate of the 30 false confessors who went to trial and also the result that follows if Cassell's 8 disputed jury trial cases are dropped. Even if Cassell's criticisms were correct, our published estimate of the risk of false confessors being wrongfully convicted at trial reduces only from 73% to 64%.

⁶³Connors et. al. Supra Note ____.

⁶⁴One of the confessors whose cases Cassell challenges, Paul Ingram, did not go to trial but rather entered a guilty plea to avoid harsher punishment. See Text Supra at [pages discussing the Ingram case].

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TABLE 1
THE RISK OF MISCARRIAGE OF JUSTICE
AT TRIAL GIVEN A FALSE CONFESSION

<u>Outcome of Confessor's</u> <u>Decision to go to Trial</u>	<u>Number</u>	<u>Verdict</u> <u>of Guilt</u>	<u>Verdict</u> <u>of Innocent</u>
Leo and Ofshe's Result All False Confessors	30	73%	27%
Cassell's Cases Eliminated All False Confessors	22	64%	36%

The small effect of Cassell's disputed cases on our conclusions can be further refined because the ability to carry out an internal consistency check was built into the research design. As mentioned in Section I, each case was evaluated for the strength of the evidence of the defendant's factual innocence and allocated among three coding categories: *Proven*, *Highly Probable* and *Probable* false confessions.⁶⁸ This coding allowed us to analyze the biasing effect of a false confession while simultaneously controlling for our certainty of a suspect's innocence. In the published tables, the categories of *Highly Probable* and *Probable* false confession were usually collapsed into a single classification: *Likely* false confession.

Tables 2 and 3 report our original figures and the change caused by dropping all of the cases Cassell disputes while at the same time controlling for the certainty of a defendant's innocence. Seven of the eight cases disputed by Cassell that went to a jury trial were in the *Likely* false confession category, while one was in the *Proven* false confession category.

Granting Cassell's objections, the effect on cases in which the defendant's guilt was eventually proven changes from a probability of being falsely convicted of .91 (the original sample) to .90 (granting Cassell's challenge). For defendants who were classified as having given

⁶⁸See Text Infra (cite pages in Section I discussing this).

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a *likely* false confession but were acquitted at trial, there is no change in our analysis because Cassell did not challenge any cases in this category. Almost all of Cassell's complaints fall into the category of cases involving the conviction of persons that our analysis concludes were likely innocent, but for which the strength of the evidence for factual innocence was less than proven. Considering all of the defendants who could not be classified as having been proven innocent based on the exculpatory evidence, the probability of being unjustly convicted due to having been made to confess drops from .63 to .28 (if Cassell's is correct).

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TABLE 2

**THE RISK OF MISCARRIAGE OF JUSTICE
BY CERTAINTY OF GUILT FROM
LEO AND OFSHE'S ORIGINAL ARTICLE**

<u>Proven False Confessors N=34</u>	<u>Number /%</u>	<u>Likelihood of Miscarriage</u>	<u>Risk of a Guilty Verdict</u>
Released Prior to Decision Point	18 (53%)	---	---
Pled Guilty	5 (15%)	15%	---
Acquitted at Trial	1 (3%)	---	---
Convicted at Trial	10 (29%)	29%	90%
<u>Totals</u>	<u>34 (100%)</u>	<u>44%</u>	

<u>Highly Probable & Probable False Confessors N=26</u>	<u>Number (%)</u>	<u>Likelihood of Miscarriage</u>	<u>Risk of A Guilty Verdict</u>
Released prior to decision point	5 (19%)	---	---
Pled Guilty	2 ^s (8%)	8%	---
Acquitted at Trial	7 ^s (27%)	37%	
Convicted at Trial	12 ^t (46%)	46%	63%
<u>Totals</u>	<u>26 (100%)</u>	<u>54%</u>	

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TABLE 3
THE RISK OF MISCARRIAGE OF JUSTICE
BY CERTAINTY OF GUILT DROPPING THOSE
CASES CHALLENGED BY CASELL

Proven False Confessors N=33	Number / %	Likelihood of Miscarriage	Risk of a Guilty Verdict
Released Prior to Decision Point	18 (55%)	---	---
Pled Guilty	5 ^a (15%)	15%	---
Acquitted at Trial	1 ^b (3%)	---	---
Convicted at Trial	9 ^c (27%)	27%	90%
Totals	33 (100%)	42%	

Highly Probable & Probable False Confessors N=18	Number (%)	Likelihood of Miscarriage	Risk of A Guilty Verdict
Released prior to decision point	5 (28%)	---	---
Pled Guilty	1 ^d (6%)	6%	---
Acquitted at Trial	7 ^e (39%)	---	
Convicted at Trial	5 ^f (28%)	28%	42%
Totals	18 (100%)	34%	

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The findings relating to false confessors whose innocence is proven at any time (either pre-trial or post-conviction) by at least one dispositive fact tells the most uncompromised story of the fate of false confessors in the American criminal justice system.⁶⁶

Eighteen (55%) of the proven false confessors were discovered to be innocent prior to conviction and the state was obliged to dismiss charges. These false confessors were released from their unjust confinements prior to having to decide whether to undergo trial or to enter a guilty plea. Although Cassell considers what happened to innocent citizens who were coerced to falsely confess by police and prosecuted until there was no hope of conviction by agents of the state to stand as a demonstration that the justice system works as it should⁶⁷ -- we regard them as cases that document beyond doubt a serious problem that could be remedied if police were effectively prevented from using coercive interrogation tactics by the simple requirement of interrogation recordation.⁶⁸ Whether these 18 individuals are seen as poster children for how well the system works or examples of its imperfections, the fact remains that they all spent an unjustified, and sometimes lengthy, period of time deprived of their liberty by the state.

Five (15%) of the proven false confessors elected to enter a guilty plea in advance of trial, which we can only believe was due to a combination of the factors that are usually in play in plea negotiations -- the state's threat to seek maximum punishment and offer of lesser time or not to seek death in exchange for a plea of guilty, and the defendant's assessment of the likelihood of conviction or acquittal. Although we know now that these defendants faced a .91 probability of being convicted and they did not know this number, we can probably safely assume that they estimated their risk to be very high. Cassell's moral standard -- that the system worked for these innocent defendant's and such cases need not be considered when assessing the impact false confessions have on the operations of the justice system -- is

⁶⁶Even Cassell challenges only one of these cases -- but since his challenge fails, as documented below, we will ignore Cassell's attempted dispute and discuss our results as they were published.

⁶⁷Cite

⁶⁸Cite Alaska and Minnesota.

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unacceptable to us.

Consider the 33 false confessors who Cassell implicitly acknowledges were eventually proven innocent.⁶⁶ All suffered inexcusably only because they were made to falsely confess by police. Eighteen (54%) of these individuals were simply lucky, and the fact of their innocence was established before they had to decide whether to accept a plea bargain or risk trial. They were spared, sometimes by the merest chance, the fate of their less fortunate peers. Twenty-four (72%) of the innocent false confessors we studied had either rejected plea bargains or were never offered any deal. Whether they elected to avoid the risk of trial, gambled or were forced to trial, 23 (96%) innocent individuals were condemned to prison or death based on nothing more than the fact that they said "I did it," even when neither the specifics of their confessions nor any significant evidence confirmed their guilt.

III. Cassell's Challenges are Wrong and His Analysis Demonstrates Advocacy not Scholarship

The controlled analysis discussed in section II reveals a peculiarity in the distribution of the cases Cassell elected to challenge. They are almost exclusively cases in which our independent analysis of the exculpatory evidence supporting the defendant's innocence is least strong, high profile cases resting on strongly disputed prosecutions and/or disproportionately cases in which one or the other of the authors of *Consequences* was or is involved as a consultant (facts we made known in the report of the study). These oddities lead us to suspect that Paul Cassell created an opportunity to dispute *Consequences* merely by picking a handful of convenient cases -- cases in which he could rely on the trial or appellate prosecutors to lead him, in person or by briefs, through the state's conclusion of guilt -- and then uncritically parroting the state's position.⁷⁰

⁶⁶We remove James Harry Reyos' case here purely for the sake of argument.

⁷⁰In one of his 9 cases (James Harry Reyos), Cassell had to choose between the position of the trial-level prosecution (that Reyos was guilty) and the position of the appellate level prosecutor (that Reyos could not possibly have committed the crime and therefore confessed

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As we will demonstrate, Cassell's attack is invariably based on a selective presentation of the case facts and customarily fails even to *acknowledge* (and certainly never credits) any evidence contrary to the state's conclusion of guilt. In his distorted case summaries, Cassell repeats the same flawed formula for generating unfounded criticisms that he and Markman⁷¹ first used in their now discredited critique⁷² of Bedau and Radelet's landmark research⁷³ on

falsely). Not surprisingly, Cassell sided with the trial-level prosecution and parroted their selective and misleading arguments about Reyos' guilt. See *Infra Text* at [Pages discussing Reyos]. However, Cassell failed to mention that at least one of the two trial level prosecutors has substantial doubts about Reyos' guilt. See Dennis Cadra letter to Governor Ann Richards, December 31, 1991 at Pp. 6-7 ("Two weeks ago I discussed this case with Anthony Foster, one of the two assistant district attorneys who had participated in the trial (who had subsequently left and then rejoined the district attorneys' staff). He told me, in no uncertain terms, that he is not sure Mr. Reyos is guilty, and he has never been sure). (In possession of authors).

⁷¹Cassell's criticism of Bedau and Radelet speaks volumes about the partisan nature of his scholarship. For example, Cassell states that Bedau and Radelet's research, "ignores physical evidence of guilt, miscites sources that in fact indicated defendants were guilty, includes works of fiction as proving innocence, and contains other serious flaws." Cassell, *The Guilty and the Innocence*, *Supra Note* ___ at 4-5. However, Cassell fails to mention that Bedau and Radelet wrote a response to Cassell refuting each of these false allegations. See Bedau & Radelet, *The Myth of Infallibility*, *Supra Note* ___. However, Bedau and Radelet point out the following: (1) Cassell and Markman distort their case summaries. *Id.* at 163, Ft 14; (2) Cassell and Markman merely reiterate the prosecution's case -- as though that impeaches Bedau and Radelet's judgement-- and treat the fact that a judge or jury convicted as if the trial court is the final authority on the factual question of the defendant's guilt. *Id.* at 163; (3) Bedau and Radelet did not ignore compelling evidence of physical guilt, but instead point out that Cassell's charge is false and misleading. *Id.* at 162; (4) Bedau and Radelet did not miscite sources as Cassell claims, but, unlike Cassell, "attempted to refer readers to all major sources where information could be obtained, not simply to those sources that buttress out conclusions." *Id.* at 163.

⁷²It is not surprising that the distorted case summaries and flawed conclusions in Cassell and Markman's critique of Bedau and Radelet do not stand up to scrutiny. Acker et al. recently studied the cases of 8 (all New Yorkers) of the 23 individuals who in Bedau and Radelet's judgment were factually innocent of the crimes for which they were convicted and executed during the 20th century, but who in Markman and Cassell's judgment were rightfully convicted and executed. See James Acker, Eamon Cunningham, Patricia Donovan, Allison Fitzgerald, Jamie Flexon, Julie Lombard, Barbara Ryn, and Bivette Stodghill, *Gone But Not Forgotten: Investigating Cases of Eight New Yorkers (1914-1939) Who May Have Been Innocent* at 137. Paper presented at the Annual Meetings of the American Society of Criminology. November 11-14, 1998. Washington, D.C. In addition to describing these cases, Acker et. al. set out to "accept Bedau and Radelet's implicit invitation to have neutral observers independently examine the available evidence supporting the guilt or innocence of these eight New Yorkers and form

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miscarriages of justice in capital and potentially capital cases.⁷⁴

In their critique of Bedau and Radelet, Cassell and Markman selectively restated the prosecution's case,⁷⁵ while omitting any exculpatory evidence that undermined, contradicted or entirely discredited the state's case. Cassell and Markman treated the trial court as if it was the final authority on the factual question of the defendant's guilt,⁷⁶ and, as Cassell does in his critique of *Consequences*, then treated the fact that a trial court judged the defendant to be guilty "beyond a reasonable doubt" as somehow constituting further evidence of the defendant's guilt.⁷⁷ In both his critiques of Bedau and Radelet and *Consequences*, Cassell's

a judgment about whether that evidence supports the conclusion that those men were executed for crimes they did not commit." *Id.* at 7. After carefully reviewing the totality of the case facts in each of these executions, Acker et al. conclude that:

Our Review thus leads us to concur with Bedau and Radelet (1987) in all eight cases--Frank Cirofici, Charles Becker, Thomas Bambrick, Stephen Grzechowiak, Max Rybarczyk, Edward Applegate, George Chew Wing, and Charles Sberna--that "a majority of neutral observers, given the evidence at our disposal, would judge the defendant in question to be innocent." We additionally are convinced that the claims of innocence are even more persuasive in some of these cases. *Id.* at 137.

⁷³See Bedau & Radelet, *Miscarriages of Justice*, Supra Note ____.

⁷⁴See also Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 Nw. U.L. REV. 500, 543 FT 175 (1996) ("It is also disappointing in this connection to see Cassell repeat, as an example of *Miranda's* cost, the Office of Legal Policy's emotionally inflammatory but misleading example of Ronnie Gaspard, a Texan accused of a brutal murder, who was set free because of what Cassell calls "a *Miranda* technicality." In fact, *Miranda* was irrelevant to Gaspard's release...Equally misleading is Cassell's use of *Edwards v. Arizona* as an example of a defendant who received a favorable plea bargain because of *Miranda*."). [citations omitted].

⁷⁵Bedau & Radelet, *The Myth of Infallibility*, Supra Note ____ at 163 (Markman and Cassell "prefer instead simply to restate the case for the prosecution, as though that by itself impeaches our judgment.").

⁷⁶Bedau & Radelet, *The Myth of Infallibility*, Supra Note __ at 162 ("Markman and Cassell write as if the trial court is the final authority on the factual question of the defendant's guilt.").

⁷⁷Bedau & Radelet, *The Myth of Infallibility*, Supra Note ____ at 163 (Markman and Cassell "write as if part of the evidence against the defendant is the fact that a trial court judged the

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strategy for attacking a claim of error appears to be simply to deny that the error happened because police, prosecutors, judges, juries and appellate panels rarely, if ever, make mistakes.⁷⁸

For several reasons, nothing Cassell has written creates a genuine question about our case analyses. First, Cassell utterly fails to comprehend that the research problem we undertook was to estimate the influence effect of the knowledge that a defendant confessed on an evaluator or trier of fact's decision about innocence or guilt. Instead, Cassell routinely tries to fob off as establishing the fact of the defendant's guilt the opinions of the very people whose judgements we were studying. For Cassell to cite (as he routinely does) a prosecutor or judge's opinion that the defendant is guilty, or the fact that a jury found the defendant guilty, however, is completely irrelevant to understanding the biasing effect of confession evidence on an evaluator or trier of fact's judgment of innocence or guilt.

Second, because Cassell merely mimics the state's case, he fails to introduce any evidence of the defendant's guilt that was not previously known. Since the state's cases invariably lacked strong evidence of guilt, as we recognized in our analysis, Cassell's presentations do not strengthen the state's impossibly weak cases (controlling for the uncorroborated and/or disconfirmed confession). Therefore, to the extent that Cassell's distorted commentaries are accurate, they emphasize a variety of weak circumstantial assertions that were introduced for the obvious purpose of prejudicing the reader.

Third, in his presentation of cases Cassell fails to mention any evidence that contradicts the state's case or exculpates the defendant, and thus demonstrates that he either never learned of such evidence or that he never attempted a genuine analysis of the evidence for guilt or innocence independent of the knowledge that the defendant said "I did it." Cassell

defendant to be guilty 'beyond a reasonable doubt.').

⁷⁸Bedau and Radelet noticed the same flaw in Markman and Cassell ("The basic problem with Markman and Cassell's response is that it seems bent on defending the criminal justice system in every regard that bears on the death penalty and its administration. This inflexible stance requires our critics to deny that anyone actually innocent has ever been executed, lest the criminal justice system itself be charged with such an error."). Bedau & Radelet, *The Myth of Infallibility*, *Supra* Note ___ at 169.

simply never addresses the facts of the exculpatory evidence (sometimes considerable) in the cases he challenges. It bears emphasizing that in many of these cases it was beyond dispute that the true perpetrator left substantial physical evidence (fingerprints, blood, hair, saliva, etc.) behind at the scene of the crime. Yet in none of the cases does any of this undisputed forensic evidence match the confessor. Cassell never explains why exculpatory physical evidence, *linking the perpetrator to the crime but not matching the confessor*, should be ignored.

Fourth, Cassell never addresses the criteria we used to evaluate a case. Cassell never demonstrates that the defendant's confession is corroborated by the factual record, that it leads to the discovery of new evidence, that it explains any existing anomalies or facts previously unknown to law enforcement, or (once contamination is considered) that it reveals any knowledge deliberately withheld from the public and not discussed in the interrogation.

Absent the psychological center of the state's evidence - the confession - Cassell's case summaries boil down to nothing more than rehashing an unrebutted version of the state's exceptionally weak circumstantial evidence. Cassell seems utterly oblivious to the realization that once the confession is removed from consideration he is left where we began -- with a case containing no compelling evidence of guilt and strong to indisputable evidence of innocence. No matter how often Cassell repeats his mantra that the defendants were found guilty, this refrain does not substitute for a showing of why such a judgement was sound. Cassell simply never deals with the question of the prejudice introduced by a false confession.

(1) Barry Lee Fairchild

(a) Voluntariness⁷⁹

Cassell ignores substantial evidence that Barry Fairchild, along with thirteen other African American men, were threatened, abused, physically assaulted and tortured by Pulaski

⁷⁹Due to the complicated history of Fairchild's case, we divide our response to Cassell into two parts, one analyzing the facts and issues surrounding the likely voluntariness of Fairchild's confession, and the other analyzing the evidence surrounding its likely reliability.

County, Arkansas Sheriffs in the murder investigation of Marjorie Mason.⁸⁰ Instead, Cassell is content to repeat Federal District Court Judge Thomas G. Eisele's opinion, and the Court of Appeals' affirmation, that Barry Fairchild's confession was voluntary, as if these legal opinions, merely because they were issued by the state,⁸¹ resolve the factual dispute and undermine the multiple allegations of abuse that Fairchild's attorneys,⁸² scholars⁸³ and journalists⁸⁴ have thoroughly documented.

While a full review of the Fairchild case facts is beyond the scope of this response,⁸⁵ the task of adjudicating these multiple allegations of coercion and abuse is more complicated than Cassell admits. Cassell's utterly self-serving practice of privileging one secondary source over another and fobbing the source off to the reader as if it were evidence rather than opinion does not resolve the issue.⁸⁶ Because the interrogation of Barry Fairchild was neither audio nor video recorded,⁸⁷ no one can ever know with complete certainty what

⁸⁰These thirteen men were: Michael Martindale, Ronald Henderson, Nolan McCoy, Randy Mitchell, Frank Webb, Donald Lewis, Willie Washington, Ezekiel Williams, Robert Johnson, Michael Johnson, John Walker, Frank King and Leon Williams. See Brief for Appellant.

⁸¹It has been well-established in the research literature on miscarriages of justice in the 20th century that judges and juries sometimes mistakenly convict innocent defendants. The mere fact that a judge issues a legal opinion is not evidence of its factual accuracy. See Bedau and Radelet, 1987;

⁸²Brief for Appellant

⁸³See Sheri Lynn Johnson, "The Color of Truth: Race and the Assessment of Credibility," 1 Mich. J. Race & L., 261, 280-292 (1996);

⁸⁴See Lynne Duke, "In Arkansas, a Death Row Struggle and Doubt," The Washington Post, A1 (January 9, 1994).

⁸⁵One evidentiary hearing alone, which occurred over 17 days in December, 1990, January 1991, and February 1991, involved 100 witnesses, 1000 pages of exhibits, and 4,300 pages of testimony. Brief for Appellant. P. 1.

⁸⁶Cassell treats court opinions as if they are primary sources of evidence. They are not. In the context of an independent review of guilt or innocence, a judge's conclusion is the opinion of a secondary source.

⁸⁷Mention that confession statement was videorecorded

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actually transpired. However, we found substantial and credible *evidence* that Fairchild was physically and psychologically coerced into confessing to being an accessory in the Mason murder, we found no credible independent evidence corroborating Fairchild's confession, and we found some credible independent evidence discrediting it.⁸⁸ As a result, we classified the Fairchild confession as a *probable* false confession. Nothing Cassell has written undermines this conclusion.

There are two contradictory versions of what occurred during the interrogations in the Marjorie Mason murder investigation. According to Fairchild, Major Larry Dill repeatedly kicked him in the stomach; Sheriff Tommy Robinson⁸⁹ threatened him with a shotgun, striking him in the chest and arm with it several times; and Robinson threatened to kill Fairchild if he did not confess.⁹⁰ In addition, Fairchild identified two other officers (Bobby Woodward and Wayne Chaney) who participated in, or were present during, the abuse.⁹¹ After the dismissal of their third petition for post-conviction relief in August 1990,⁹² Fairchild's appellate attorneys discovered that the Pulaski County Sheriff's department systematically picked up a number of suspects in the Mason murder investigation against whom they used coercive methods of interrogation in an effort to obtain a confession. The

⁸⁸Blood, hair and semen failed to positively link Fairchild to the crime. Footnote 319 in Leo/Ofshe. In addition, Fairchild's post-admission narrative contained several errors of fact. For example, Fairchild told officers where he had thrown his gloves away, but they were unable to find them. Fairchild also identified Harold Green as his accomplice, but Green was incarcerated in Colorado when the Mason murder occurred. *Id.*

⁸⁹Sheriff Tommy Robinson had a reputation for using abusive law enforcement techniques. A1 of Lynne Duke story, January 9, 1994.

⁹⁰In addition, Fairchild "asserted that the officers coached him over and over about details of the crime, even wrote some key words on a piece of paper so he would remember specifics..." Cite.

⁹¹Fairchild said three or four other officers, whom he could not identify, were also present during the abuse. (P. 372, Vol. II)

⁹²Johnson, P. 281. As Johnson points out, "News of this report was carried in the Little Rock press, and other Black men who had been similarly treated by the sheriff and his deputies came forward."

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officers not only denied threatening, coercing or abusing Fairchild, but the state also argued Barry Fairchild was the only real suspect,⁵³ that the sheriffs did not engage in any accusatorial or coercive questioning of other persons who were asked to come to the sheriff's office, and that the techniques of interrogation used on all suspects, including Mr. Fairchild, were simply straightforward, open-ended requests for relevant information.⁵⁴

In a videotape of the confession statement, Fairchild has swollen eyes and a bandage around his head. Sheriff Robinson and Pulaski County Deputies denied beating Fairchild, claiming instead that his injuries were due to a police dog's attack during his arrest.⁵⁵

There is compelling direct, indirect and circumstantial evidence supporting Fairchild's allegations of abuse and contradicting the state's denials. At a 1987 hearing, former Russellville police officer Larry Dalton testified that he witnessed an unidentified Pulaski County deputy slap Fairchild, cause him to hit his head against a wall, and that a police dog was ordered to attack Fairchild *after* he was brought into custody.⁵⁶ In 1990, Frank Gibson, a former Pulaski County deputy, testified that it was common knowledge at the sheriff's office that Fairchild was beaten into confessing.⁵⁷ By 1991, three more witnesses, including

⁵³Sheriff Tommy Robinson and Pulaski County deputies had misrepresented at trial that Fairchild was the prime suspect at the time of his arrest, withholding the names of the other suspects who had been interrogated as part of the Mason murder investigation. Johnson, Pp. 280-281. Sheri Johnson points out, "as it later turned out, the sheriff's office also withheld evidence suggesting that Mason was abducted far from the site which Fairchild's confession identified as the abduction site and investigative notes that two of Mason's co-workers recalled her wearing a shiny metallic watch on the day of the crime, not the Black-banded watch Fairchild admitted taking and selling to his sister." Johnson, P. 281, Footnote 113.

⁵⁴(32-33, volume 1).

⁵⁵Johnson, P. 280.

⁵⁶Duke article. See also P. 5 of volume 1

⁵⁷Gibson, an ex-deputy with the Pulaski County sheriff's office, also testified that he witnessed the beating of Robert Fairchild, Barry Fairchild's brother, who had also been interrogated by Pulaski County sheriffs in the Mason murder investigation. See volume 2, P. 7.

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Pulaski County Deputy Sheriff Calvin Rollins,⁹⁸ testified that they heard Fairchild being physically and verbally abused.⁹⁹

In addition, thirteen African American men other than Fairchild allege that they were rounded up by Pulaski County sheriffs, accused of committing the Mason murder, and subjected to at least one, but usually multiple, physically and psychologically coercive interrogation procedures.¹⁰⁰ If we credit the account of these thirteen other African

⁹⁸Cite Duke article or volume 1] He said he heard Pulaski County Major Larry Dill yelling at Fairchild, using racial epithets. He said he heard what sounded like open-handed blows hitting skin. One of the officers operating the video camera for the confession that night called Rollins into a room to help fix a problem with the equipment. Rollins said when he looked through the viewfinder, he zoomed in on Fairchild's face and clearly saw that his lips were swollen. The swelling was not visible without the zoom, he said. Volume 2, P. 85 -- Rollins testified that he heard Major Dill raise his voice and heard the sounds of someone being slapped or struck. Pp. 85-86, volume 2. The slapped around a bit and lips swelling cite: P. 89.

⁹⁹Volume 1, P. 6 See also Pp. 8-32. Deputy Sheriff Calvin Rollins heard Major Dill raise his voice and strike someone (whom Rollins believes was Fairchild) with a fist or an open hand. Id at 9. Rollins also viewed what appeared to be physical injuries (swelling on the lips, welts behind the ears, and a cut on the inside of a bottom lip) that Fairchild appeared to sustain as a result of being slapped around. Id. at 10. Donald Price overheard Larry Dill and Tommy Robinson verbally abuse a person he reasonably believed to be Barry Fairchild. Id. at 22-26. Michael Johnson, who had been a suspect in the Mason murder investigation, saw a bloodied Fairchild and subsequently heard Officers in the CID area yelling at and beating Fairchild, as if hitting him with a gun in the stomach. Id at 26-31.

¹⁰⁰As Sheri Johnson notes, "Each testified that he had been picked up and accused of involvement in the Mason murder. Eleven of the men were verbally threatened. Of the two who were not verbally threatened, Donald Lewis was slapped, choked and punched in the stomach, and Ezekiel Williams was slapped and stomped upon. Of those who were verbally threatened, on, Nolan McCoy, was also threatened with a gun. Five more were verbally threatened, threatened with guns and physically abused; Randy Mitchell was beaten with clubs and fists through a telephone book; Frank Webb was hit with two telephone books; John Walker was hit with a blackjack through a telephone book; Robert Fairchild, the brother of Barry Lee Fairchild, was hit in the head with a nightstick and kicked; and Frank King testified that the sheriff had come into the room in which King was being interrogated and said to his deputies, "You all ain't hit him yet?" after which King was slapped so hard that he was forced out of his chair. Four of the suspects testified that they were pressed to admit abducting and raping Mason only and to blame a friend for the shooting, just as Fairchild had done in his confession. In addition to the thirteen Mason case suspects, two suspects from contemporaneous cases testified to brutal treatment by the Pulaski County Sheriffs's office. Racial slurs were prominent in the

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American men, then it stands to reason that Fairchild too was likely coerced and abused during his interrogation.

There is good reason to credit the truthfulness of their testimony. First, contrary to what Pulaski County sheriff's interrogators testified to at trial, each of these thirteen men was confirmed -- either from the state's own records or from undisputed circumstantial evidence - - to be a suspect in the Mason murder investigation.¹⁰¹ Second, these thirteen men, who mostly had no connection to one another, provide remarkably consistent accounts (including similar abuse tactics and abusive vulgarities that were not public knowledge) of their coercion at the hands of Pulaski County sheriff's interrogators.¹⁰² Third, none of the thirteen suspects stood to gain personally from their testimony¹⁰³ nor did they have any apparent motive to lie,¹⁰⁴ unlike the police officers who denied abusing them.¹⁰⁵ Fourth, many

course of these interrogations." Johnson, P. 282.

¹⁰¹P. 33, volume 2. "The universal experience of all thirteen men of being accused of involvement in the Mason murder was directly corroborated for nine of the thirteen men by the state's own evidence. Five of these nine were given Miranda warnings and were advised in writing that each was a "suspect in a capital murder."... Three more were of the nine had hair samples taken from them for comparison to unidentified hair fragments found at the crime scene...The suspect status of the ninth person, Willie Washing was established by a state crime lab memo "advis[ing] that s suspect Willie James Washington needs to [have his fingerprints] compared to latents developed in this [the Mason] murder case."...

"The testimony of the other four men...that they were also accused of involvement in the murder of Ms. Mason was not established directly by the state's witnesses or documents. However, for each, there were state documents or testimony from state witnesses establishing that they were picked up and interrogated by the sheriff's office on the dates they alleged, that their interrogations were conducted in the midst of ongoing investigative efforts in the Mason case, and/or that they were questioned in relation to a search for physical evidence relevant to the Mason case." Pp. 35-36, Volume 1.

¹⁰²P. 3, Volume 2.

¹⁰³The statute of limitations had long since passed on any claim for damages that any of these men might have made. P. 38, volume 1.

¹⁰⁴Johnson article, P. 290.

¹⁰⁵(Johnson, P. 290).

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witnesses testified about what they observed or heard being done to various suspects,¹⁰⁶ and many friends and relatives testified about the contemporaneous accounts many of the suspects provided of their abuse shortly after their release from the sheriff's office.¹⁰⁷ The details in

¹⁰⁶Nolan McCoy testified that when he arrived at CID, he saw Randall Mitchell there with uncharacteristically messy hair and puffy, teary eyes. Ronald Henderson testified that toward the end of the time he was at CID, he heard someone being beaten, crying out in response, and finally say, "Stop! I'm gonna talk." Randy Mitchell and Nolan McCoy were both in CID interview rooms at that time. Thelma Bradford testified that when she was in an interview room at CID in the evening of March 2, she heard Robert Fairchild being abused, with officers saying, "Fuck him in the ass." Ezekiel Williams heard someone moaning in a room near him when he was at CID at the time that Robert Fairchild was still there. Willie Washing testified that when he was at CID, Robert Fairchild was presented to him as a way of illustrating the fate that awaited him if he was uncooperative, and Ezekiel Williams was overheard complaining about being abused. Mr. Washington, Mr. Robert Fairchild and Mr. Williams all appear to have been at CID at overlapping times. Finally, Michael Johnson, Frank King, and Leon Williams were also all at CID at overlapping times. Mr. Walker overheard the frightened voices and outcries of Frank King and Michael Johnson. Michael Johnson heard the beating, outcries, and protestations of Frank King, and not long thereafter, saw Mr. King face-to-face, with tears running down his cheeks. Before this meeting, Frank King heard Michael Johnson "hollering." And finally, Leon Williams heard John Walker being struck and crying out at about the same time he heard striking sounds and outcries from two other people whose voices he did not recognize." Pp. 39-40, volume 1.

¹⁰⁷Susan Givens testified that she remembered Nolan McCoy's account of sheriff's personnel trying to make him sign a confession and putting a gun to his head. Richard Washington testified that he remembered Nolan McCoy's account of a gun being pulled on him and his fighting for it once he saw it was empty. Arthurene Mitchell testified that she remembered Randall Mitchell's account of sheriff's department personnel beating him to try to make him admit being involved in the murder. Charles Pennington testified that he remembered Randy Mitchell's account of sheriff's personnel "whipping [his] ass". Merdine Fairchild testified that she remembered Robert Fairchild told her the sheriff and his deputies beat him badly, took him to the scene of the murder, put a gun in his mouth, kneed him, and choked him until he passed out. Lena Thompson testified that she remembered that Ezekiel Williams told her that the police beat him up. Rose Hammonds testified that she remembered that John Walker told her that the sheriff's "whipped" him by putting a book on his head and hitting him through it. Kinley Chapman testified that he remembered that John Walker told him about the sheriff's putting a book on his head and beating him down on it with a blackjack. Delois Cullins testified that Frank King told her about being slapped onto the floor at the sheriff's office and having an officer put his foot on Mr. King's chest, pull him up, put a gun in his mouth, and threaten to blow his head off. Mary Johnson testified that upon arriving home from the Sheriff's office, Michael Johnson told her that sheriff's had put a gun in his mouth and pulled the trigger. Pp. 40-41,

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these accounts matched the details that the suspects had recounted in their own testimony.¹⁰⁸ Fifth, witnesses observed signs of physical coercion and manifestations of psychological abuse on a number of the more severely mistreated suspects.¹⁰⁹ The evidence of injuries from two victims -- who had been suspects in other contemporaneous cases in the Pulaski County sheriff's office -- of police brutality was documented by medical personnel.¹¹⁰ Finally, a number of the suspects reported facts covered in their interrogations that had been known only to the sheriff's office at the time, revealing that the interrogators were using the disclosure of such facts as part of their questioning strategy.¹¹¹

Predictably, the state assailed the credibility of these witnesses, and, predictably, each

volume 1.

¹⁰⁸Sheri Johnson, P. 283.

¹⁰⁹"Thus Charles Pennington observed that Randy Mitchell was "bruised, skuffy, [had] puffy areas around the head, [and had] splotches of blood here and there" Arthurene Mitchell observed that Randy's "face was very swollen [and] puffy." that he "had little knots in his head," that his head was hurting and bruised, and that he was "withdrawn" and not his "normal self" for a while. Merdine Fairchild reported that when Robert Fairchild returned from the sheriff's office, he was real upset because he thought he was going to be killed, and he returned in a jail jumpsuit, with his clothes in a bag, because he had "BM'd and wetted" in his clothes. McKinley Chaptman reported that when he saw John E. Walker, his face was puffy and bruised like he had been in a fight, and he was "not the regular John" he knew because he was so stressed. Delois Cullins remembered that when Frank King returned from the sheriff's office, his eyes were red and he had been crying, and he was so mad and upset that it took him a few minutes to calm down. Finally, Mary Johnson reported that when Michael Johnson told her about what happened to him, his eyes were "full of water" and he was very upset. Further, "Michael's been on a nervous pace ever since." Pp. 41-42, volume 1.

¹¹⁰Sheri Johnson, P. 283.

¹¹¹As the Brief for Appellant notes, "For example, no suspect who was questioned before March 4, 1983 reported that he was shown post-mortem photographs of the victim. However, after these photographs were available, on March 3, 1983, every person who was subsequently interrogated, from March 4 on (Michael Johnson, Frank King, John Walker, Leon Williams, and Barry Fairchild) was shown the photographs... Two suspects were shown photographs of a man with a tattoo of a cross on his forehead and were asked if they knew whether this man was involved. And finally, three suspects were asked about being in the McCain Mall area on February 26, 1983: Michael Johnson, Frank King, and Willie Washington." (Citations omitted). Brief for Appellant. September 4, 1990. P. 15.

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of the twelve officers accused of assaulting and mistreating Fairchild and the thirteen other African-American suspects denied using any coercion, often denying even any recollection of any contact with the suspects.¹¹² Judge Eisele's determination of the voluntariness of Fairchild's confession therefore boiled down to a choice between the testimony of one white witness (a former deputy sheriff) and thirty black witnesses (who "testified that officers of the Pulaski County Sheriff's Department verbally and physically brutalized Black suspects during a murder investigation") versus fourteen white officers (who all denied these charges).¹¹³ Judge Eisele declared none of the African American's primary witnesses entirely credible and, instead, credited the "vague and generalized testimony" of all of the state's witnesses who claimed they did not abuse Barry Fairchild.¹¹⁴ Although Eisele ruled that Fairchild's confession was voluntary, he credited some of the accounts that the officers were coercive,¹¹⁵ and implicitly conceded that some of the officers lied about abusing some of

¹¹²Johnson, P.284.

¹¹³As Sheri Johnson notes, "The issue of race tainted the investigation, prosecution and habeas corpus review of Fairchild's case from the outset...As the Chief Judge of the Eighth Circuit noted, "The Evidence also unmistakably show a current of racism in the Sheriff's Department of 1983." Johnson, P. 287.

¹¹⁴Sheri Johnson, P. 286

¹¹⁵For example, Judge Eisele generally credited Ezekiel Williams' testimony: "The Court generally credits Mr. Williams' testimony that he was slapped once and his foot was stepped on once by a Pulaski County Sheriff's Department officer." Findings of Fact and Conclusions of Law, P. 360. Judge Eisele also credited some of Randy Mitchell's testimony. "On the difficult issues of his abuse at the Pulaski County Sheriff's office, the Court finds that it is more likely true than not true that Mr. Mitchell was the victim of verbal intimidation and some physical abuse by one or more officers...The Court credits his testimony that he was slapped and mistreated." Findings of Fact and Conclusions of Law, P. 199. Another example is the testimony of Frank King: "The Court finds that it is more likely true than not that an unidentified officer slapped Mr. King so hard that he fell to the floor." *Id.* at P. 292. The judge expressed ambivalence about others' testimony. For example, regarding Robert Fairchild, Barry Fairchild's brother, Judge Eisele wrote, "Some of Mr. Robert Fairchild's testimony that he was abused...may be true." P. 59. Regarding John Walker, Judge Eisele wrote, "He may have experienced some physical coercion and intimidation by one or more officers, but it is as likely that he did not." P. 265

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Fairchild's witnesses.¹¹⁶ Evaluating Judge Eisele's performance, law professor Sheri Johnson has argued that he repeatedly applied different standards in assessing the credibility of the Black and white witnesses in Fairchild's case,¹¹⁷ while demonstrating a "condescending and biased attitude towards Fairchild's Black witnesses."¹¹⁸

Viewed as a whole, then, the evidence supporting the allegations of coercion and abuse in Fairchild's case is far more compelling than the state's categorical denials of even having any contact with any of the thirteen suspects.¹¹⁹

(b) Reliability

If the first issue is whether Fairchild's confession was coerced, the next is whether it is reliable. While the weight of the evidence supports the conclusion that Fairchild's confession was physically coerced, it does not necessarily follow that the confession is unreliable. Cassell alleges that several important facts corroborate Fairchild's confession. We will review each of Cassell's allegations and demonstrate why they are wrong. Since there is no direct or credible evidence corroborating Fairchild's coerced confession (and there is other evidence disconfirming it), Barry Lee Fairchild's coerced confession was, in all likelihood, false, and the State of Arkansas probably executed an innocent man in 1995.¹²⁰

(1) Cassell states that during a failed chase of the suspects, police discovered a baseball cap that several witnesses reported seeing Fairchild wear at the time of the murder.¹²¹ Cassell is wrong. The baseball cap was not found at the scene but *may* have

¹¹⁶Johnson, P. 286.

¹¹⁷Johnson, Pp. 287-289

¹¹⁸Johnson, P. 289. Fairchild's appellate attorneys went further: "With respect to the fact-finding process in its entirety, the court has improperly discredited petitioner's witnesses by ignoring material evidence, inconsistently applying impeachment rules and ignoring contradictory testimony by respondent's witnesses, and refusing to consider the evidence as a whole." Brief for Appellant, Pp. 18-19.

¹¹⁹P. 44, volume 1.

¹²⁰Cite from original article.

¹²¹(Cassell, P. 5)

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been dropped by the unidentified suspects who fled Ms. Mason's car. The police officer who chased them found the cap in a driveway where the suspects had fled and assumed that the suspects dropped it. Later, to build a case around Fairchild, the police showed the cap to one individual, who said that Barry Fairchild, along with many truckers in Arkansas, had such a cap.¹²² Since the cap was an extremely common one in and around Little Rock at the time and since the police officer who found it failed to see it fall off of anyone's head, it does not constitute evidence of Fairchild's guilt, much less that he had even been at the scene from which the two suspects had fled.

(2) Cassell seeks to prejudice readers by reporting that police received a tip that Fairchild and his brother had raped several women in the past.¹²³ Fairchild had no documented history of such crimes.¹²⁴ Nor did the prosecution ever allege any such history, either at trial or in the penalty phase where, if it such a history had existed, it would have constituted classic aggravating evidence in a rape-murder case such as this one. Clearly, not even the prosecution regarded this allegation as credible enough to be presented as evidence at trial. As Cassell ought to know, this kind of speculative secondhand street talk does not provide evidence of anything, and it is irresponsible, if not deceptive, for Cassell to insinuate that it somehow provides evidence of Fairchild's guilt.

(3) Cassell states that an informant told police that Fairchild and his brother escaped the police on foot after the victim's car was stopped, an account that Cassell alleges was consistent with events occurring during the police chase.¹²⁵ Once again, however, Cassell is merely repeating speculative secondhand street talk that even the prosecution did not attempt to present at trial and that ultimately proves nothing.

(4) Cassell states that Fairchild "acted guilty" after he was caught hiding in the woods

¹²²Interview with Steven Hawkins, February 19, 1998.

¹²³(Cassell, P. 5)

¹²⁴Interview with Steven Hawkins, February 19, 1998.

¹²⁵(Cassell, P. 6).

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for several days.¹²⁶ This is an insupportable speculation. Fairchild was an intellectually limited black man who had some trouble with police in the past, who believed that police were brutal to black people, and who knew that the police were after him. When Fairchild was arrested, he was surrounded by as many as 50 officers and shoved out the front door of a house in which he asked to use a phone, then attacked by a dog. There is no way of knowing whether his reaction to the police represented fear, which would have been reasonable for someone in his position, or the behavior of someone who was guilty. As a logical matter, then, his demeanor cannot be treated as evidence of guilt. Once again, Cassell is merely substituting flimsy speculations for fact and then inferring guilt.

(5) Cassell disputes our claim that the videotape shows Fairchild looking away from the camera and responding to the promptings of others in the room. Instead, Cassell quotes Judge Eisele's opinion that Fairchild's "statements give the feeling of truth",¹²⁷ does not "give me the impression that it had been rehearsed"¹²⁸ and "seems to have the indicia of spontaneity and truth."¹²⁹ Others disagree. For example, after viewing the taped confession, journalist Lynne Duke writes that Fairchild "glances off camera and listens to the whispered voice of someone else who seems to be directing the proceedings in the room."¹³⁰ Cassell repeats the judge's feeling that Fairchild was not instructed or coached, but once again Cassell merely privileges the state's interpretation. That does not resolve the matter. We believe that any fairminded person who views the videotape can see Fairchild looking away and responding to the promptings of others. Furthermore, the mere fact that the

¹²⁶(Cassell, P. 6)

¹²⁷Page Cite

¹²⁸Page cite. Of course, if Fairchild was physically abused and coerced, as the record suggests, then his willingness to confess was the product of terror, and he likely believed that he had to perform well if he was going to save his life. Thus, he would have been extraordinarily motivated to give the appearance of cooperation, spontaneity and accurate recall.

¹²⁹Page cite

¹³⁰Page cite

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confession statement itself (rather than the coercive interrogation that produced it) was video recorded does not "cast doubt" on the coercion claim, as Cassell contends.¹³¹ As Cassell should know, the mere act of taping the product of an interrogation does not, by itself, logically imply that the interrogation that produced the statement was either coercive or non-coercive. The only way to resolve this issue is to have an objective record of exactly what transpired during the interrogation. The Pulaski County sheriffs failed to record the interrogation in this case, even though the technology was available to them.

(6) Cassell quotes Judge Eisele's conclusion that "no reasonable person could listen to the evidence presented at the two-day hearing and view the videotaped confessions and still have any doubt about the involvement of Mr. Fairchild in the rape and murder of Ms. Mason."¹³² Cassell's use of this quote at this late date is highly problematic for two reasons. First, Judge Eisele's conclusion here was made at a two day hearing -- well before the subsequent 17 day hearing in 1990-1991 on the same subject, at which Fairchild's appellate attorneys introduced a great deal of new evidence casting doubt on the voluntariness and reliability of his confession. That Cassell quotes Judge Eisele's initial opinion based on the earlier two-day hearing rather than after the subsequent 17 day hearing -- when Fairchild's case had become far more complex and Judge Eisele's observations were no longer so quotable to Cassell's cause -- belies Cassell's willingness to disregard most of what happened in this case.

Second, Judge Eisele's quote is transparently false. In fact, a number of reasonable people have expressed grave doubts about Fairchild's guilt, including writer Robert Perske,¹³³ Congressman Don Conyers,¹³⁴ Congressman Don Edwards,¹³⁵ and the State

¹³¹Page cite where Cassell contends this

¹³²Cite.

¹³³Cite

¹³⁴Flyer on Congress of the United States Letterhead dated September 21, 1993 (in possession of authors).

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NAACP in Arkansas.¹³⁶ Since there is no evidence corroborating Fairchild's coerced confession and since there is evidence disconfirming it, it is hardly surprising that outside observers who have looked closely at the Fairchild case have been troubled by it. Yet Cassell cites Judge Eisele's initial view on the matter as if it is dispositive. It is not.

(7) Cassell states that details in Fairchild's confession were corroborated, such as that the gun that killed the victim was a .22.¹³⁷ To the contrary, the details in Fairchild's confession were never corroborated. For example, Fairchild told officers where he had thrown his gloves away, but the officers were unable to find the gloves there.¹³⁸ Fairchild also identified Harold Green as his accomplice, but Green was in Colorado when the crimes took place.¹³⁹ Fairchild also inaccurately reported the site of the victim's abduction.¹⁴⁰

(8) Contrary to common sense and contrary to his earlier position that the details in Fairchild's confession were corroborated,¹⁴¹ Cassell states that inaccuracies in Fairchild's confession somehow make the confession more believable. In particular, Cassell suggests that Fairchild lied about Harold Green (whom Fairchild identified as his accomplice, but who

¹³⁵*Id.* In addition to Conyers and Edwards, Fourteen other congressmen and congresswomen, as well as Senator Carol Mosely-Braun, sent a letter to President Clinton demanding that the Department of Justice resume their abandoned investigation into the Fairchild case. Flyer, "Rally for Justice" (In possession of authors). [See footnote 320 of our original article for cites on this]

¹³⁶Interview with Dick Burr.

¹³⁷(Cassell, P.7);

¹³⁸The Consequences, Footnote 317.

¹³⁹*Id.*

¹⁴⁰Fairchild confessed that the site of the abduction occurred in the vicinity of the furniture stores on 600 East Washington Avenue of North Little Rock, but the overwhelming weight of the evidence suggested it occurred in the McCain Mall area, several miles away from the 600 block of East Washington Avenue. Brief for Appellant. Cite section.

¹⁴¹Point out that Cassell wants it both ways: First he says that the details in Fairchild's confession are corroborated, then he says the ones that are not corroborated but actual mistakes make the confession more believable.

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was in prison in another state at the time of the offense) to cover for his brother, Robert Fairchild. Cassell is repeating the state's theory here, a theory which was based on the trial testimony of Sheriff Tommy Robinson that it was Fairchild, not Pulaski County sheriffs, who first mentioned Harold Green's name as the second participant in the homicide. However, long after the trial, Fairchild's appellate attorneys obtained the Mason homicide investigation file maintained by the Pulaski County sheriff's Office, and discovered a wealth of information in the investigation file concerning Harold Green as a suspect prior to the questioning of Barry Fairchild.¹⁴² This information suggests that at the time of Fairchild's interrogation, Pulaski County sheriffs suspected that Harold Green was involved in the Mason murder -- they had not yet discovered that Green was in another state when Marjorie Mason was murdered. It is therefore not surprising that Green's name appears in Fairchild's confession statement.¹⁴³

(9) Cassell states that Fairchild guided the officers on a crime scene tour between his first and second confession statement and directed police to where Ms. Mason's body had

¹⁴²As Fairchild's appellate attorneys write, "In that file, Harold Green is mentioned numerous times prior to March 4, the day that Barry Fairchild allegedly confessed. An information note written by John Hale states that on February 27, 1983, one day after Ms. Mason's body is discovered, an informant indicated that he had cashed a check made out to Harold Green. On February 28, 1983, Brad Bennett obtained information Harold Green "was in trouble again and that he was upsetting their mother" and that Barry Fairchild was "running" with him. On March 2, 1983, an Arkansas computer criminal history report was generated. In addition, the files contained numerous "jail cards" for Harold Green, which sheriff's deputies commonly use to locate potential suspects or witnesses. Moreover, Dwight Rushin testified that deputies were investigating Harold Green's possible involvement in the case sometime between February 28 and March 4, 1983, prior to the arrest of Barry Fairchild. Tom Waggoner also testified that Harold Green was mentioned during the investigation prior to Barry Fairchild's arrest." Pp. 57-58.

¹⁴³One of the techniques that Pulaski County Sheriffs used on a number of the suspects in the Mason murder investigation was to accuse the suspect of the murder, then to accuse the suspect of being an accomplice, and, finally, to pressure the suspect to name someone else as the triggerperson. That Fairchild named Harold Green, who the police had already suspected of being involved in the Mason murder (but had not yet discovered that he could not possibly have been involved in the crime) suggests that they fed Fairchild Green's name and that he regurgitated it in his confession.

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been found.¹⁴⁴ The evidence, however, suggests that the officers directed the tour, not Fairchild, and that they took Fairchild on two tours (not one) -- one tour before the first videotaped statement (the concealed tour) and another tour between the first and second videotaped statements.¹⁴⁵ This is significant because Fairchild's ability to provide some accurate information about the crime prior to his first confession has been taken as evidence of his guilt. However, if Fairchild was taken on a tour of the relevant sites prior to the first videotaped confession statement -- as the evidence from the discrepancies in the officers' accounts suggests¹⁴⁶ -- then he was taught the necessary details about the crime scene before giving his first confession on videotape.

(10) Cassell asserts that victim's watch, which police found in the possession of Fairchild's sister, corroborates Fairchild's confession, in which Fairchild stated that he took the victim's watch and sold it to his sister.¹⁴⁷ It is true that Fairchild sold his sister a black-banded watch *two months* before Ms. Mason's death that resembled a black-banded watch belonging to the victim.¹⁴⁸ However, the state could prove only that these were similar watches -- not that they were the same, identical one. More importantly, years after the jury trial, Fairchild's appellate attorneys discovered that the Pulaski County sheriff's office had withheld investigative notes stating that two of Ms. Mason's co-workers recalled her wearing a shiny metallic watch on the day she disappeared, unlike the black-banded watch that Fairchild admitted selling to his sister months earlier.¹⁴⁹ But at trial, the Lonoke County Circuit Court jury that convicted Fairchild never heard about this evidence. In the post-conviction appellate proceedings, the state eventually conceded that Ms. Mason owned a second watch when the defense produced a picture of her in dress uniform with the shiny

¹⁴⁴(P. 7)

¹⁴⁵Brief for Appellant. Pp. 93-115.

¹⁴⁶Id.

¹⁴⁷Need cite

¹⁴⁸Cite to Brief for Appellant

¹⁴⁹Johnson, P. 281, Footnote 113.

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platinum gold watch described by her co-workers.¹⁵⁰ If, as the evidence suggests, Ms. Mason was wearing this shiny gold watch on the day of the murder (not the other, black-banded watch that she owned), then the fact that Fairchild had sold his sister a black-banded watch two months prior to Ms. Mason's death is entirely irrelevant to the issue of Fairchild's guilt or innocence.

(11) Relying solely on Judge Eisele's legal opinion and discounting the findings of the well-known and reputable experts in the case, Cassell declares that Fairchild was not mentally retarded.¹⁵¹ In fact, five of the six experts who testified in a 1989 hearing found Fairchild to be mentally retarded. Eisele's ruling that Fairchild was not mentally retarded was based on the testimony of the one expert at that hearing who disputed Fairchild's mental retardation.¹⁵² Acknowledging that Fairchild was below normal intelligence (his IQ scores had always fallen in or near the range of mental retardation),¹⁵³ functionally illiterate and had a disastrous academic experience (he had been recommended for special education in school and never finished high school), Eisele simply dismissed the claim that Fairchild was mentally retarded. In light of the overwhelming evidence of Fairchild's mental retardation

¹⁵⁰Cite-- see Duke article

¹⁵¹Cite

¹⁵²Duke, 9/22/93 article. This so-called expert, Judy Johnson, may not even be competent to render an opinion about intelligence quotient. For example, she administered the Stanford-Binet Intelligence Scale, Fourth Edition, to Fairchild -- who was 36 at the time -- even though this test is normed on people who are ages 2 through 23. Accordingly, this test is invalid for Fairchild. In addition, rather than administer a recognized, standardized instrument, such as the Scales of Behavior, to judge Fairchild's adaptive behavior, Ms. Johnson came relied merely on her subjective impressions of his verbal and social skills. Finally, Ms. Johnson asserted that Fairchild is not retarded based on his uneven performance within particular subtests in the Weschler Adult Intelligence Scale-Revised, yet such scatter within subtests is typical of both the mentally retarded and non mentally retarded alike and therefore is an inappropriate basis for judging mental retardation, as the standards promulgated by the American Association on Mental Retardation make clear. See Letter from Candace Burns to Richard Burr dated August 30, 1990.

¹⁵³Duke article

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that Eisele simply ignored, however, it is hard to credit Cassell's assertion here.¹⁵⁴

In sum, the only evidence against Barry Fairchild was a confession that the weight of the evidence strongly suggests was physically coerced. There was no independent evidence connecting Fairchild to the crime; in fact, as we pointed out in our original article, blood, hair and semen failed to link Fairchild to the crime. There was no evidence corroborating Fairchild's questionable confession, yet there was evidence disconfirming it, including a number of inaccuracies in the confession statement itself. We contend that any fairminded reading of the Fairchild case record will arrive at the conclusion that Barry Lee Fairchild's confession is almost certainly false, and that, therefore, the State of Arkansas almost certainly executed an innocent man in 1995.

(2) Joseph Giarratano

Joseph Giarratano gave five police-written confessions over a period of several days to the murder of forty-four year old Barbara Kline and the sexual assault and murder of her fifteen year old daughter, Michelle Kline, whose bodies were discovered in their apartment in Norfolk, Virginia on February 5, 1979. The first four police-written confession statements he gave to police in Jacksonville, Florida, who had no independent knowledge of the details of the murders;¹⁵⁵ the final police-written confession statement was subsequently elicited by police detectives in Norfolk, Virginia, who knew the crime scene facts.¹⁵⁶ Giarratano's

¹⁵⁴Yet if the overwhelming evidence of coercion established by the record in this case is true, it doesn't much matter whether Fairchild is mentally retarded: Pulaski County Sheriffs could have -- and likely did -- coerce a false confession from Fairchild.

¹⁵⁵Gudjonsson, *THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY* (1992) at 317 ("No knowledge about the crime could possibly have been communicated to Giarratano by the Jacksonville officers as they had no details of the crime before the confession statements were made.")

¹⁵⁶One of the Norfolk Officers interrogating Giarratano testified that they "confronted [Giarratano] [with the] facts and circumstances' known to them, on at least some occasions using that information to suggest to Mr. Giarratano that he was not revealing what really happened." Petition For Conditional Pardon, P. 46.

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police-written confessions were internally inconsistent,¹⁵⁷ contradicted one another,¹⁵⁸ and

¹⁵⁷As noted in Giarratano's Supplemental Petition for Conditional Pardon, "Mr. Giarratano's confessions can be divided into two categories. One, given in several statements to officers in Jacksonville, Florida where he turned himself in, had Mr. Giarratano killing Barbara Kline first in an argument over money, then killing Michelle Kline to remove her as a witness. In this category, there was no harm done to Michelle -- i.e., she was not sexually assaulted -- before she was killed. The second category, given to Norfolk officers two days later, did an about face on these facts. In this confession, Mr. Giarratano said he first raped, then killed Michelle Kline, and upon being discovered in the apartment thereafter by Barbara Kline, killed her. Just a week after giving this version of events to the Norfolk officers, Mr. Giarratano was sent to Central State Hospital for evaluation of his competence to stand. While at Central State, he lapsed into his original version of the crime, asserting that Barbara Kline was killed first, Michelle Kline thereafter, and that he had not raped Michelle." See Petition for Supplemental Pardon, Pp. 30-31. Following this, Giarratano was committed to Central State Hospital and provided another account of the offense, which reverted to his original version and thus contradicted the account he had given to the Norfolk, Virginia police. *Id.* at 52.

¹⁵⁸For example, Giarratano's erroneously reported to the Jacksonville, Florida Police that Barbara Kline was killed first and mentioned nothing about Michelle Kline's rape. After his subsequent interrogation with the Norfolk, Virginia Police, Giarratano's confession correctly recounted that Michelle Kline's murder preceded Barbara Kline's and that Michelle Kline was raped prior to her murder. Petition, P. 43. Quoting a state psychiatrist, Cassell appears to attribute the multiple inconsistencies and contradictions between Giarratano's confession(s) to Jacksonville, Florida police and his confession to Norfolk, Virginia police to "a combination of drugs." [Cite to Cassell article]. Cassell then quotes a defense psychiatrist's *post-conviction opinion* that Giarratano was "very credible in his description [of the crime]," and that "the murders were symbolic acts by which the defendant's hatred was discharged against persons he identified in his mind with his mother and father," as if this somehow constitutes evidence of Giarratano's guilt. [Cite to Cassell article].

A more reasonable explanation for the inconsistencies and contradictions in Giarratano's multiple police-written statements is that Giarratano was ignorant of some key crime scene facts when he first spoke to Jacksonville, Florida interrogations and thus mis-stated them; that Norfolk, Virginia police interrogators suggested the correct crime scene facts to Giarratano, who then corrected his earlier statements to conform to the facts that they provided him. See Petition, Pp. 38-53. See also Gudjonsson, *Supra* note ___ at 317 ("Two days later Giarratano gave a totally different account to Norfolk detectives. He now claimed to have raped Michelle before murdering her, and then killed her mother to cover up the crime. This account was consistent with what the Norfolk detectives had told Giarratano, prior to interviewing him, about their knowledge of the murders"). See also Report of Dr. James MacKeith, June 15, 1990 at 25 ("In their trial testimony, the police officers indicated that they had not even considered the possibility that a homicide suspect might give a fabricated confession, and they admitted that Mr. Giarratano had been presented with detailed information about the scene of the crime before his testimony

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contradicted the physical evidence in the case.¹⁵⁹ None of Giarratano's police-written confessions demonstrated any actual knowledge of the crime scene that would have been known only to the true killer, but instead demonstrated the kind of ignorance¹⁶⁰ of the underlying crime facts that one would expect from an innocent, false confessor.¹⁶¹ Not a

was later taken down in writing"). Since Norfolk, Virginia Police failed to tape record Giarratano's interrogation, however, there is no definitive way to determine what information the interrogators provided to Giarratano and what information he generated independently. However, Cassell fails to mention the psychological and psychiatric evaluations of Giarratano that concluded he was highly vulnerable to suggestion and confabulations, thus casting doubt on the reliability of his confession statements. See Gudjonsson ID ___ at P. 319 ("There was no doubt in my mind that Giarratano's confabulation and suggestibility tendencies seriously challenged the reliability of the confessions he made to the police in 1979."). See also MacKeith, ID at 29 ("I conclude that no confidence can be placed in the reliability of Mr. Giarratano's pre-trial self-incriminating statements").

¹⁵⁹Cite to the footnote containing the seven points; or put it here and cite to this footnote later.

¹⁶⁰Giarratano's confession statements did not reveal complete ignorance of the crime scene facts because Giarratano had seen police videos of the scene and photographs prior to his confession to Norfolk, Virginia police interrogators. Gisli Gudjonsson, *THE PSYCHOLOGY OF INTERROGATION, CONFESSIONS AND TESTIMONY* (1992) at 320.

¹⁶¹There are at least seven inconsistencies between Giarratano's statements and the physical and crime scene evidence supporting the conclusion that Giarratano's confession statements were false. First, Giarratano confessed to strangling Michelle Kline with his hands, but an independent review by the Chief Medical Examiner of the State of Maryland, as well as a review by Cyril Wecht, conclude that it is unlikely that Michelle Kline was strangled manually. See Petition, P. 53; See Wecht Report, July 30, 1990. P. 7. The state's medical examiner, Dr. Presswalla, had originally diagnosed the strangulation of Michelle Kline as having been done by "partial ligature" (an object rather than the hands), but changed his findings *following* the interrogation of Giarratano by the Norfolk officers apparently for no other reason than to conform to Giarratano's confession. Petition, Footnote 12, Pp. 53-54; Appendix, P. 10. Second, Giarratano confessed to stabbing Barbara Kline in the hallway between the living room and the door, but the crime scene evidence clearly indicated that the entire assault upon Barbara Kline occurred in the bathroom. Petition, P. 54-55. Third, Giarratano confessed to killing Barbara Kline with a kitchen knife approximately seven inches long, but none of Kline's three stab wounds were deeper than three and a half inches. Considering the force with which these wounds were inflicted, a 7-inch knife would likely have inflicted deeper wounds. Petition, P. 55. Fourth, Giarratano confessed to throwing the knife into a location adjacent to the apartment house, but no knife was found there or anywhere else. Petition, P. 55. Fifth, Giarratano confessed that

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single piece of independent evidence connects Giarratano to the crime.¹⁶²

Cassell disingenuously asserts that "opponents of the death penalty have distorted the record on Giarratano's guilt for their own purposes"¹⁶³ and suggests that we relied on their intentionally distorted accounts of the Giarratano case facts. Both of Cassell's assertions are false. Cassell's suggestion that Giarratano is a poster boy for anti-death penalty crusaders is yet another one of Cassell's purely ideological attempts to smear opponents of the death penalty,¹⁶⁴ not a serious argument about the merits of the Giarratano case.¹⁶⁵ Not surprisingly, Cassell fails to mention that many conservative supporters of the death penalty have rallied behind Giarratano's innocence.¹⁶⁶ More importantly, Cassell's claim that we

Michelle Kline entered his bedroom voluntarily, but police investigating the crime scene noted the presence of "drag marks" indicating that she had been forcibly dragged into the bedroom. Petition, P. 55. Sixth, Giarratano confessed to pulling Michelle Kline's clothes off and raping her. The physical evidence indicates that she died with her clothes on. Petition, Pp. 55-56. Seventh, Giarratano confessed that he locked the bottom door of the apartment after the rape, but the landlord, who first discovered the bodies, reported that the apartment of the bottom door had been unlocked. Petition, P. 56.

¹⁶²See Pp. 5-8 of TEXT below.

¹⁶³Page cite in Cassell

¹⁶⁴For an example of Cassell's commitment to political advocacy over truth in the death penalty debate, see his ideologically driven critique of Bedau and Radelet's classic study of miscarriages of justice in capital and potentially capital cases in the twentieth century. See Bedau and Radelet article; Cassell and Markman; Bedau and Radelet response.

¹⁶⁵Cassell asserts that the Giarratano case facts were spoon-fed to the media by opponents of the death penalty, but he offers no evidence to support this speculation. If, as our original article demonstrated, virtually everyone begins with a reflexive presumption of guilt once a confession has been elicited, then it is far more likely that the media began their evaluations of Giarratano's case with a bias toward believing in his guilt. There is no reason to believe, nor any evidence to support the conclusion that, journalists or opponents of the death penalty carry a different presumption once someone has confessed to police.

¹⁶⁶For example, Joseph Giarratano's conservative supporters include James J. Kilpatrick, former Maryland Attorney General Stephen H. Sachs, and Richard Viguereie. See Jim Clardy, Reasonable Doubt? New Trial Sought for Death Row Prisoner., The Washington Times, May 24, 1990 at A1 ("Many people, including such ardent proponents of capital punishment as conservative columnist James J. Kilpatrick and former Maryland Attorney General Stephen H.

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rely on inaccurate descriptions of the Giarratano case facts is false. In fact, Cassell, not us, relies on citations that are factually inaccurate.¹⁶⁷

Cassell's attempt to corroborate Giarratano's dubious confessions, like the prosecution's earlier attempts (which he repeats), is insupportable. First, Cassell misreports that seventeen fingerprints matching Giarratano's were found at the crime scene, when, in fact, only one matching fingerprint was found in a part of the apartment unrelated to where the crime occurred¹⁶⁸ -- despite the fact that police lifted twenty-one fingerprints from various areas of the Kline apartment that were sufficiently distinct to permit identification.¹⁶⁹ Twenty did not match Giarratano's. The single fingerprint that did is insignificant both because it was not found in or around the actual crime scenes and because Giarratano had lived with the Klins for several weeks¹⁷⁰ (and thus one would naturally expect to find his fingerprints somewhere inside the apartment).

Second, Cassell suggests that hair samples link Giarratano to the crime because "one of the pubic hairs found on Michelle's left hand, stomach and pubic area was consistent in

Sachs, say Giarratano is at least entitled to a new trial, if not an outright pardon."). See also David A. Kaplan and Bob Cohn, "Did Politics Help Joe Giarratano Escape the Chair?" *Newsweek* (March 4, 1991) at 56 ("Support came in from Tories like direct mail wizard Richard Viguereie..."). Other conservative, supporters of the Death Penalty who questioned Giarratano's conviction included: Virginia Delegate Samuel Glasscock and Senator Thomas Michie, Jr., Virginia Senators Colgan Stallings and Kevin Miller, and former Virginia Commonwealth Attorney Douglas Baumgardner. *Petition for Conditional Pardon*, P. 22.

¹⁶⁷For example, Cassell states that we mistakenly report that one fingerprint at the scene of the crime matched Giarratano's, when seventeen matching prints were found. [Cassell Page Cite]. As a matter of established fact, Cassell is wrong: there was one, not seventeen, of fingerprints matching Giarratano's found in a bedroom of the apartment unrelated to where the crime took place. See *Petition*, P. 58. Many of Cassell's errors are attributable to his heavy reliance on the rendition of facts set forth in the Virginia Supreme Court opinion on Giarratano's direct appeal, which was rendered years before his case was reevaluated and reinvestigated.

¹⁶⁸*Id.* See *Petition*, P. 37.

¹⁶⁹*Petition*, P. 37.

¹⁷⁰*Petition*, P. 58.

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race, color and microscopic characteristics with one of [Giarratano's] pubic hairs.¹⁷¹ In fact, there was a single hair, of the thirty-four¹⁷² human hairs found in the apartment, to be "consistent" with Giarratano's.¹⁷³ This does not mean that it was his hair or even likely his hair; no one identified that single pubic hair with any certainty as Giarratano's.¹⁷⁴ Even if the single pubic hair mentioned by Cassell was Giarratano's, it is insignificant since he had lived with the Klines. More importantly, there were many other pubic and head hairs found on or near Michelle Kline's body were not found to be consistent with either Giarratano's or Michelle Kline's.¹⁷⁵

Third, Cassell states that human blood type O ("the same one as the victim's"¹⁷⁶) was found on the front and side of one of Giarratano's boots,¹⁷⁷ but he fails to mention that these two minute specks of blood did not originate from walking in the blood of Barbara

¹⁷¹Cite to Cassell article.

¹⁷²As noted in the Petition, "A total of twenty-four (24) human hairs, including head hairs and pubic hairs, were recovered from Michelle Kline's clothing, from the Afghan which covered her body, and from her body or immediately next to her body. Fourteen (14) of these hairs were identified as Michelle's head hairs. Six (6) of these hairs were identified as human pubic hairs, but none of them was consistent with the pubic hair sample submitted by Mr. Giarratano. The only pubic hair that was found to be consistent with Mr. Giarratano's hair was among three pubic hairs found on Michelle Kline's left hand, stomach, and pubic area.' No one identified in which of these three places this hair was found." Petition for Conditional Pardon, Pp. 36-37 (citations and footnotes omitted). The remaining ten hairs were found near Barbara Kline's purse, and they were all hers. Supplemental Petition for Conditional Pardon. P. 19.

¹⁷³Supplemental Petition, Page 19.

¹⁷⁴Petition, P. 58. As Cyril Wecht notes in his report, "The one hair sample consistent with Mr. Giarratano's pubic hair does not provide personal identification." Wecht's Report, P. 10.

¹⁷⁵Petition, P. 58; Supplemental Petition, P. 19.

¹⁷⁶Cassell page cite. Cassell fails to mention that 45% of the population has type "O" blood. Appendix, P. 2.

¹⁷⁷Cassell Page Cite

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Kline, as the prosecution tried to imply at trial,¹⁷⁸ and that Michelle Kline did not bleed externally from any injury, including her vaginal lacerations, in sufficient quantity or manner to have accounted for the blood on Giarratano's boot.¹⁷⁹ Thus, given the crime scene evidence, there is no basis in fact to suggest or imply that the minute specks of blood on Giarratano's shoe came from either of the two victims.¹⁸⁰

¹⁷⁸At trial, the prosecution submitted as direct evidence, "(1) Photographs and a videotape of the crime scene, which revealed shoeprints in and emerging from a pool of blood near Barbara (Toni) Kline's body; (2) A pair of Joe Giarratano's boots, one of which had two drops of type 'O=' human blood on the top and side; and (3) A forensic report identifying the blood type of Michelle Kline as O+." Supplemental Petition for Conditional Pardon, P. 2 (Citations and footnotes omitted). See also Petition, P. 58, Appendix to Petition, P. 2, 7.

Notwithstanding Cassell's claim that the prosecution never claimed the bloody shoeprints matched Giarratano's boots (see Cassell, footnote 84), clearly the prosecution's purpose in introducing these three items of evidence was to imply that the blood on Giarratano's boots matched the blood of one of the victims. Supplemental Petition for Conditional Pardon, P. 2.

¹⁷⁹Petition, P. 59. Moreover, June Browne Tillman, the state's serologist and expert witness at trial, subsequently submitted an affidavit indicating that: June Tillman's affidavit:

"It is my opinion that the footwear which produced the bloody footprints would have blood on the soles, in areas of stitching, around the heels, and possibly the edge of the sole and in the welt. A forensic examination would have shown visual, microscopic or chemical traces of blood, even if the footwear had been washed. When I examined Mr. Giarratano's boots, no traces of blood were found in these areas. Blood was only found on the front and right side of the left boot.

Had I been shown these photographs in connection with my examination of Mr. Giarratano's boots, I would have recommended that the police obtain the shoes of other possible suspects for examination for the presence of human blood and that a physical comparison be made between the suspected footwear and sealed photographs of the bloody footprints." Affidavit of June Browne Tillman, March 20, 1989, P.2.

See also Report of Cyril Wecht, Supra Note __ at 10 ("The absence of blood on the soles of Mr. Giarratano's boots indicate that the bloody shoe prints leaving the bathroom where Mrs. Kline's body was found were not left by him.").

¹⁸⁰As noted in the Supplemental Petition for Conditional Pardon, "No evidence was presented that Giarratano's boots made the shoeprints in the photographs. No comparative measurements were taken and no other evidence suggested that the prints matched his boots...The Commonwealth's own serologist has eliminated Giarratano's boots as those which made the shoe prints. The arresting officer states that Giarratano had no blood on him or his clothes when he was arrested, so the blood probably did not come from the crime scene at all." Supplemental Petition for Conditional Pardon. Pp. 3, 7-8.

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Fourth, Cassell misunderstands simple medical facts and overreaches when he challenges our assertion that Giarratano was left-handed with only limited use of his right hand due to childhood neurological damage, stating instead that Giarratano's "own medical materials confirm that right upper extremity sensory deficit was attributable to a wrist laceration associated with his 1983 suicide attempt (some four years after the murder)"¹⁸¹ and that "at the time of the murders, it should be noted, Giarratano was sufficiently dexterous to work on a scallop boat."¹⁸² In fact, far from confirming anything, the medical report by Dr. Jeffrey Barth to which Cassell cites states only that Giarratano's right upper extremity deficit *may* be due to a 1983 suicide attempt.¹⁸³ And, as a matter of fact, Giarratano is left-handed.¹⁸⁴ As we stated in our original article, Giarratano has only limited use of his right hand due to childhood neurological damage.¹⁸⁵ Cassell fails to understand this fact because, in his rush to demonize Giarratano, he did not properly read Dr. Barth's neurological evaluation, which determined *only* that Giarratano's right-sided sensory deficits were probably caused by his 1983 suicide attempt.¹⁸⁶ But Giarratano also had right-sided motor speed and coordination deficits,¹⁸⁷ which Dr. Barth did not attribute to the 1983 suicide attempt, and which almost certainly pre-date the crime.¹⁸⁸ Finally, Cassell's statement that

¹⁸¹Cassell page cite

¹⁸²Cassell page cite.

¹⁸³Dr. Barth's report, at 3. "It is my understanding that this patient has been deaf in his left ear since birth and his right upper extremity sensory deficit may be due to the wrist laceration associate with his 1983 suicide attempt." Cassell fails to mention that it also reveals that Giarratano attempted suicide two to three times prior to the crime. Dr. Barth's report, P. 2.

¹⁸⁴Supplemental Petition, P. 23.

¹⁸⁵Leo & Ofshe, *Consequences*, Supra Note ___ at 489.

¹⁸⁶See Report of Dr. Jeffrey Barth (December 1, 1986)

¹⁸⁷Report of Dr. Jeffrey Barth (December 1, 1986) at 3 ("Deficits were noted in right upper extremity motor speed and coordination in relationship to the left (dominant), and his motor strength appeared essentially intact bilaterally.

¹⁸⁸Supplemental Petition for Conditional Pardon, Pp. 23-25.

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Giarratano was "sufficiently dexterous to work on a scallop boat" is utterly disingenuous since Giarratano worked as a cook, not a dredge handler or winch hand, on the boat.¹⁸⁹

In sum, there is not a shred of significant or credible physical evidence supporting the conclusion that Joseph Giarratano's contradictory and inconsistent police-written confessions are reliable or link him to the deaths of Barbara and Michelle Kline.¹⁹⁰ Yet there is considerable evidence supporting the conclusion that his confessions are false.¹⁹¹ Cassell's factual errors, mischaracterizations, half-truths, selective reporting of the case record and unwarranted inferences only strengthen our conclusion that Joseph Giarratano is in all likelihood an innocent man who was wrongfully convicted of a capital crime.¹⁹²

(3) Richard Lapointe

Cassell's attempt to make Richard Lapointe's confession appear to be both truthful and corroborated by the record is unsuccessful. Virtually every one of Cassell's claims about the Lapointe case is either factually inaccurate, misleading, omits key facts or relies on innuendo.¹⁹³ Despite the claims of the prosecution at trial (and Cassell's mechanical

¹⁸⁹Phone interview with Marie Deans, February 3, 1998.

¹⁹⁰Gudjonsson at 317 "No tangible evidence has ever emerged that clearly indicates that Giarratano committed the two murders."

¹⁹¹See Footnote 7.

¹⁹²Description of commutation.

¹⁹³Rather than go to the trial record itself (although Cassell criticizes us for failing to go to the trial record when it suits his purposes), Cassell relies almost entirely on the Connecticut Supreme Court statement of facts. However, Cassell does not mention that this decision has been the subject of considerable criticism in the Connecticut legal community. [Cite Dissent and Connecticut Law Tribune characterization of the decision as the worst of 1996]. At the same time, Cassell criticizes us for "citing a tract prepared by a group called "The Friends of Richard Lapointe," but none of the facts we cited in our original article were incorrect.

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repetition of those claims in his article),¹⁹⁴ there is no evidence of any significance linking Richard Lapointe to the murder and rape of his wife's grandmother, Bernice Martin. Moreover, Cassell's repetition of the prosecution's case against Richard Lapointe is based on circular reasoning: One has to presume Richard Lapointe guilty for any of the trivial, misleading or irrelevant details that Cassell seizes on to somehow serve as "evidence" of Lapointe's guilt.

It is true that a stain on the victim's bedspread came from a person who is a Type A secretor, as is Lapointe. However, this hardly qualifies as significant physical evidence given that at least 28% of the male population in the United States population are also Type A secretors.¹⁹⁵

Cassell asserts that the same semen stain was aspermatic, arguably consistent with Lapointe's vasectomy. However, Cassell fails to mention that Beryl Novitch, the lead criminalist for the Connecticut State Police Forensic Sciences Laboratory, testified for the state at Lapointe's trial that she couldn't be certain that the entire stain was aspermatic.¹⁹⁶

Cassell asserts that Lapointe's wife "falsely told" police early in the investigation, in the presence of Lapointe, that his blood was Type O.¹⁹⁷ While Karen Lapointe did tell the police that she thought Richard Lapointe had type O blood, this was almost certainly an innocent mistake. How many people know their own blood type, let along their spouse's? Moreover, if Richard Lapointe was present when this mistake was made, it is of little import because his hearing is so wretched that he has hearing aids in both ears, and thus it is possible that he did not even hear the comment. It is also quite possible that Richard

¹⁹⁴In all nine of the cases Cassell chose to challenge, he merely repeats the claims of the prosecution and slants the facts in an advocacy manner to argue for the guilt of the confessor. Cassell's portrayal of the facts in each case amounts to advocacy, not scholarship.

¹⁹⁵60 Minutes Cite.

¹⁹⁶See Trial testimony of Beryl Novich, 6/17-6/20, 6/22-6/23. May 13, 1992. P. 617.

¹⁹⁷By using the word "falsely" rather than "incorrectly," Cassell necessarily implies that Karen Lapointe was an accomplice to the crime, which is inconsistent with Cassell's apparent concern for the welfare of the Martin family.

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Lapointe would not have known his own blood type anyway.

Cassell then asserts that "other evidence also pointed to Lapointe. When a relative called Lapointe's wife to express concern about the victim on the night of the murder, Lapointe picked up another phone (without being asked to join the conversation) and volunteered to check on the victim himself."¹⁹⁸ As Cassell either knows or should know, this is not evidence of anything, and it is irresponsible for Cassell to suggest otherwise. It's Lapointe's home and his phone. Cassell seems to suggest there is something sinister in Lapointe's volunteering to check on his wife's grandmother, but isn't that what any of us would have done? Despite Cassell's insinuations, Lapointe's actions here are normal and reasonable.

Cassell believes that further evidence of Lapointe's guilt is that he "took a less-than-direct route to her apartment,"¹⁹⁹ where he discovered the fire, implying sinister behavior from Lapointe's supposed route to the crime scene. Lapointe was aware of the shortcut and may have taken it once or twice, but did not habitually take it to the Martin residence and did not recall taking it on the evening of the crime.²⁰⁰ However, even if Lapointe did take a less-than-direct route, the difference would only have been, at most, less than a minute. The prosecution tried to imply, as does Cassell, that Lapointe was trying to delay discovery of, and therefore cover up, the crime. But given the minimal time difference, this suggestion is utterly preposterous. Moreover, the inference of Lapointe's guilt here is based on circular reasoning: the only way it would make sense for Richard Lapointe to take one of the alternate routes that was suggested by police and prosecutors, cutting through the back yards of people's houses at night, is if he knew or had a strong suspicion that something was very wrong. In other words, one has to assume Lapointe's guilt for this "evidence" of his guilt to make any sense.

Cassell states that "although unable to gain access, he [Lapointe] telephoned the

¹⁹⁸P. 16 in Cassell draft.

¹⁹⁹Page cite in Cassell

²⁰⁰Trial Transcript of June 5, 1992. Pp. 2291-2295. Richard Lapointe's testimony.

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relative from a neighboring apartment to report everything was fine,"²⁰¹ again attributing sinister motives to Lapointe. Mrs. Howard's testimony at trial, however, was much more matter of fact and less sinister: "He said he had gone to my mother's door, and it was locked. And he couldn't get in. And he said the curtains were drawn so Nana must be in bed."²⁰² In other words, Lapointe was merely describing what he had found.

Cassell asserts that after Mrs. Howard said she was going to check herself, Lapointe returned to the victim's apartment to "discover" the fire.²⁰³ However, Cassell misstates the facts. Lapointe did not go back to Mrs. Martin's apartment because Mrs. Howard said she was coming right over. Rather, he went back because he called his wife and she said maybe Mrs. Martin was sleeping.²⁰⁴ When he went back to check again, he noticed smoke and called 911.

Cassell asserts that after the murder Lapointe knew that the victim had been sexually assaulted, even though no medical personnel could recall anything being said about this.²⁰⁵ Cassell fails to mention that Mrs. Martin was pulled out of her apartment by paramedics with barely a shred of clothing on her and bleeding from a significant wound in her abdomen. She was placed on the ground where attempts were made to revive her. This area was milling with dozens of police, firemen and bystanders, including neighbors and relatives of the victim's family. Richard Lapointe was standing nearby. The idea that no one said or observed anything at the crime scene about the possibility of a sexual assault is not only wrong, but it is absurd under the circumstances.²⁰⁶ It is also absurd to believe that no one

²⁰¹Page cite in Cassell

²⁰²Trial transcript of May 13, 1992. P. 664. Testimony of Natalie Howard.

²⁰³Page cite in Cassell.

²⁰⁴Trial Transcript of June 4, 1992. P. 2224. Testimony of Richard Lapointe.

²⁰⁵Page cite in Cassell

²⁰⁶Elizabeth Martin, the victim's daughter-in-law, testified at trial that she spoke to Captain Joseph Brooks of the Manchester Police department on the telephone the morning after the murder and that he told her that her mother-in-law had been raped (Trial Transcript, June 15-26, 1992, Pp. 186-189).

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said or observed anything about the possibility of a sexual assault at the hospital, where the victim was transported and where, once again, many people were milling around. Under such conditions, it is simply not possible for the prosecutor, the medical personnel, or Cassell to know everything that was *not* said to Lapointe at both locations. At the very least, it is plausible -- if not highly likely -- that Richard Lapointe found out about the sexual assault as a result of his observations or conversations at the crime scene and/or the hospital.

Cassell asserts that Lapointe exhibited "considerable curiosity" about the results of the autopsy at his initial police interview on March 9, 1987,²⁰⁷ as if this somehow constitutes evidence of Lapointe's guilt. Unlike Lapointe's July 4, 1989 interrogation, however, the Manchester Police chose to tape-record this interview, and nothing about it is unusual. It hardly seems out of place that a family member would be curious about the details a day after the murder. Once again, Cassell relies on insinuation to smear Lapointe rather than on any facts pointing to Lapointe's guilt.

Cassell makes much of the court's opinion (which was based on a single test) that Lapointe has an IQ of 92, which, if true, would place Lapointe within the average range of intelligence. Whether Lapointe has an IQ of 92 is open to question, however: Lapointe's IQ tests reflected in his school records were consistently lower than that.²⁰⁸ Regardless of which tests we credit, the issue of mental retardation is ultimately irrelevant to understanding Lapointe's case because Lapointe indisputably suffers from severe, neurological brain-damage as a result of childhood hydrocephalus. This brain-damage, which is related to Dandy Walker Syndrome, imposes serious limitations on his cognitive and motor skills.²⁰⁹ As a result, Lapointe is extremely limited in his ability to process and respond to information intellectually.²¹⁰ Therefore, a highly stressful, manipulative and lengthy accusatorial

²⁰⁷Page cite in Cassell.

²⁰⁸The actual school record was introduced evidence at trial. Hartford Schools General Information Record, Defense Exhibit F. Introduced at Penalty Phase of Trial.

²⁰⁹Cite to recent Habeas petition. This will be a central theme of an anticipated habeas hearing.

²¹⁰Cite to recent Habeas petition.

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interrogation could have easily confused Lapointe and led him to sign a police-written "confession" to a crime he did not commit.

Cassell suggests that it was possible for Lapointe to have committed the murder in the time frame available, despite his wife's alibi that gave him virtually no time to commit such a crime. Cassell writes that, "the police re-interviewed Lapointe's wife on the day he confessed. She conceded that Lapointe left their house around the time of the murder, contrary to the story both she and Lapointe previously gave police."²¹¹ Cassell's report is false. Karen Lapointe "conceded" only that Richard Lapointe had gone out to walk the dog shortly after they returned from an after-church visit to Mrs. Martin and that he was back home for dinner long before 5:45 p.m. when Mrs. Martin was seen alive by her daughter Nathalie Howard.²¹² In other words, Karen Lapointe's alibi did not contradict Richard Lapointe's alibi. Rather, she said that Richard Lapointe was home with her the whole night, giving Richard Lapointe an absolute alibi (a fact that Cassell fails to mention).

Contrary to Cassell's speculations, there isn't any clear testimony supporting the theory that Lapointe had any reasonable window of opportunity to commit the murder and rape. In her tape-recorded interrogation, Karen Lapointe said Richard Lapointe could not have committed the crime because she said he was with her during the entire evening.²¹³ She later acknowledged that he went out early to walk the dog, but this occurred well before the murder: both Richard and Karen Lapointe agree that he walked the dog between 4:15 and 4:30 p.m., and that he was only out walking the dog for 1/2 hour -- but Ms. Martin was seen alive by her daughter at 5:45 p.m, well after Lapointe returned from walking the dog. After Richard Lapointe returned from walking the dog, the Lapointes had dinner, they washed the dishes together, and at approximately 6:15-6:30 p.m., Karen Lapointe went

²¹¹Casell cite

²¹²Transcript of July 4, 1989. Taped Interview between detective Michael Morrissey and Karen Lapointe. introduced as defendant's exhibit C at the penalty phase. P. 27.

²¹³Two reference. Transcript from previous footnote, same exhibit. Pp. 10, 27. specific quote (10) "[H]e did not leave the house[.]". 27: "If he did [walk the dog], that was the only time he left his house because he didn't leave after." Might put these quotes directly into the text right before footnote 23.

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upstairs to give their son Sean a bath and get him ready for bed, returning downstairs at or around 7:00 p.m., when the three Lapointes watched a television show together.²¹⁴ So there is a possible time frame of approximately 25-45 minutes²¹⁵ in which Richard Lapointe was out of his wife's presence while she was upstairs. To have committed the crime during this period (the only time frame available to him), Richard Lapointe would have had to walk over to Ms. Martin's apartment (5-10 minutes away), have coffee and tea with her (which presumably she had to first prepare), attack her with a knife, stab her 11 times in the back and abdomen, bound clothing around her legs and her hands around her neck, bound her neck tightly with knots and ligatures, partially strangle her (apparently with a blunt instrument), sexually assault her, attempt to set a fire and then return to back home (another 5-10 minute walk) without appearing dishevelled, sweaty or nervous. It is hard to imagine how anyone -- especially the brain-damaged and clumsy Lapointe -- could have possibly done all of this in the brief time available. Neither the prosecution nor Paul Cassell offer a coherent explanation for this problem because no such explanation is possible. The evidence about the time frames from the night of the crime supports the conclusion that Lapointe could not have committed this crime.

Relying again on opinions based on no specifiable evidence, Cassell repeats what two policemen said at trial that Lapointe's supposed demeanor and body language during part of his nine and one half hour interrogation somehow prove his guilt. It is astounding that Cassell regards the self-serving *opinions* of two police officers' about a suspect's body language and demeanor as constituting evidence of guilt. Like so much of Cassell's case against Lapointe (and the other eight false confessors), this is simply nonsense that is not worthy of consideration.

Cassell asserts that another detective (Michael Morrissey) then destroyed Lapointe's

²¹⁴See Karen Lapointe transcript. Pp. 15-17 and 27. See also generally Richard Lapointe's trial testimony.

²¹⁵Common sense suggests that it is likely that they came down a few minutes early to watch the 7:00 show.

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alibi.²¹⁶ This is false. Once again, Cassell misstates the case facts. Moreover, Cassell fails to mention that Richard Lapointe testified that Detective Morrissey threatened to arrest Lapointe's wife and make his son a ward of the state if he did not confess.²¹⁷ In his testimony at trial, Detective Morrissey, of course, denied issuing these threats during Richard Lapointe's interrogation,²¹⁸ but the undisputed record shows that he made the very same threats during his interrogation of Karen Lapointe earlier in the same day -- an interview that was secretly recorded.²¹⁹ Cassell is apparently willing to believe that Morrissey would use a coercive interrogation technique against a witness (or potential accomplice), but would not employ it with the primary suspect. Morrissey's denial that he used coercive tactics is contradicted by the objective record.

Cassell suggests that Lapointe's guilt is corroborated by the "highly detailed" account of the crime that Lapointe signed in the three police-written confession statements. Of course, these statements did get some of the details right -- exactly as one would expect from a suspect complying with the demands of interrogators who were writing down what they believed to be the case facts. However, Cassell fails to mention that the details of the confession that the police wrote down is full of errors: Lapointe's statement admitted to killing the victim at the location in her apartment where the police believed she had been stabbed, on the couch.²²⁰ However, virtually all of the evidence of the crime was found in the bedroom, and there is no evidence in the record, or anywhere, that she was ever on the couch during the commission of the crime.²²¹ The confession the police wrote down

²¹⁶Cite in Cassell

²¹⁷Trial transcript of June 5, 1992. P. 2381. Testimony of Richard Lapointe

²¹⁸Trial Transcript of May 26, 1992. P. 1688. Testimony of Detective Michael Morrissey.

²¹⁹Transcript of Karen Lapointe tape recording mentioned earlier. Pp. 41-42.

²²⁰Cite to his statement

²²¹Cassell asserts that "there is no discernable inconsistency between medical testimony and the confession on this issue," but this argument is simply off the wall. Significant quantities of blood were found on the bed, and that's clearly where most of the crime occurred. No blood was found on the couch. There is no evidence that Mrs. Martin was ever on the couch during

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admitted to an erroneous police theory of the victim's death, manual strangulation with both hands,²²² but the medical examiner reported that the victim appeared to die from strangulation by compression (a blunt object had been pushed against the right side of her neck).²²³ The third statement that the police wrote down admits to the sexual assault theory of the crime held by the police -- rape with his penis.²²⁴ However, detective Lombardo testified that the medical examiner felt the vaginal trauma "was the result of a foreign object, and not intercourse."²²⁵ Clearly, the confession the police wrote down gets wrong many of the details that one would expect to be correct if they were being contributed by someone with actual knowledge of the crime facts. The numerous errors in the statement authored by Detective Morrissey are explained by the fact that this was not Morrissey's case and thus he was unfamiliar with many of the exact case details at the time of the interrogation.²²⁶²⁷

In sum, there is no reason to credit Cassell's re-statement of the prosecution's case against Richard Lapointe because it fails to establish any significant evidence corroborating Lapointe's confession or any significant evidence pointing to Lapointe's guilt. Like the prosecution, Cassell distorts the factual record in a strained attempt to make it fit Richard

the commission of the crime. Cassell, *The Guilty and the Innocent*, Supra Note __ at __.

²²²In one of Lapointe's statements, he supposedly said that he strangled her; Michael Morrissey said that when they were talking about that Lapointe made a wringing the neck kind of gesture with both hands -- trial transcript, May 22nd, 1992, P. 1516.

²²³Trial testimony of May, 1992. P. 85. Dr. Arcady Katsnelson.

²²⁴Cite the third statement.

²²⁵Lombardo's trial testimony of May 20, 1992. Pp. 1312-1313.

²²⁶Moreover, it is at best ambiguous from the evidence how much of these statements actually came from Lapointe and, if so, to what extent they were coached or suggested.

²²⁷Cassell reports that Manchester Police investigated the possibility that a man who was involved in a hit and run accident at the same time as the Martin murder may have been involved in it, but were able to clear him through blood typing. However, eyewitnesses saw a large man, not matching Lapointe, running away from the crime scene. Cite to 60 Minutes.

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Lapointe, while ignoring all the exculpatory evidence of Lapointe's innocence.²²⁸ Contrary to the collection of mis-statements, half-truths, omissions, and innuendo that Cassell takes as evidence, Richard Lapointe's police-written confession is demonstrably wrong and very probably false. There is substantial case evidence demonstrating that he could not possibly have murdered Bernice Martin and that he lacked the actual knowledge of the crime facts that would be expected from the true perpetrator. As a result, we stand by our conclusion Richard Lapointe is in all likelihood innocent, and that only the state's claim that he confessed could explain why a jury found him guilty beyond a reasonable doubt.

(4) James Harry Reyos

Father Patrick Ryan was brutally murdered between 6 p.m. and 12 p.m.²²⁹ on December 21, 1981 at the Sage and Sand Motel in Odessa, Texas.²³⁰ Viciously beaten with an unidentified heavy object,²³¹ Ryan's body was found nude with a bloody sock tying his hands behind him.²³² In November, 1982, James Harry Reyos confessed to the murder of the popular priest.²³³ None of the extensive physical evidence left at the crime scene -- the

²²⁸For example, Cassell simply ignores the pair of men's gloves found at the crime scene that almost certainly belonged to the perpetrator. At trial, the prosecution put these gloves into evidence, thereby acknowledging that they had significance. However, the prosecutor never linked them to Lapointe. Not surprisingly, these gloves appear far too large for Lapointe's hands. Cite 60 Minutes.

²²⁹Cite Coroner's report or testimony

²³⁰Cite

²³¹The coroner ruled that the blows were so severe that they caused his heart to stop.

²³²In addition, the sheet rock near the door was caved in and drenched with blood as an air conditioner's wires dangled. Interview: hellacious fight. bed's busted down. radiator cover that's busted off. gaping hole in the sheet rock of room, blood all over the place. ryan has been tossed like a rag doll.

²³³Cite

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blood stains that filled the room, the fingerprints,²³⁴ palm prints, head and pubic hairs, saliva, and traces of semen²³⁵ -- could be matched to Reyos.^{236,237} Despite the fact that none of the physical evidence left at the crime scene matched Reyos or corroborated his questionable confession, a jury convicted him of murder after a four day trial in 1983,²³⁸ and he was subsequently sentenced to 38 years in prison.²³⁹

In 1991, Dennis Cadra, the Ector County, Texas prosecutor assigned to Reyos' appeal,²⁴⁰ "came to the firm conclusion that it was physically impossible for Mr. Reyos to

²³⁴the latent prints that were taken at the crime scene were thrown out around by Odessa police in 1992-1993 in violation of their own policies. there is a policy on murder cases written that those are archived -- all the evidence and information is archived. in this particular case is it was destroyed. they think the latent prints, left on a card, with widespread fingerprint technology, thought they could run it.

²³⁵Advocate article. One of the sources should be the Supplementary investigation report; Burgess Cooke letter dated December 22, 1982.

²³⁶Need to describe at some point: the latent prints that were taken at the crime scene were thrown out around by Odessa police in 1992-1993 in violation of their own policies. there is a policy on murder cases written that those are archived -- all the evidence and information is archived. in this particular case is it was destroyed. they think the latent prints, left on a card, with widespread fingerprint technology, thought they could run it

²³⁷[Would have been physically impossible for the perpetrator not to have left the room without blood on him. Not one piece of evidence ever showed that Reyos had been in that room].

²³⁸This appears to have happened on the strength of the confession alone. discuss eyewitness error].

²³⁹Reyos was released from prison in 1995 after serving 12 years of the 38 year sentence. Dean Stephens, Released Convict Works To Clear Name; Man Wants Pardon for Murder of Priest That He Says He Did Not Commit, AUSTIN-AMERICAN STATESMAN at B3. (August 3, 1995).

²⁴⁰Mention that he also worked on the prosecution at the trial level; need to make clear why he didn't realize Reyos was innocent then. "Dennis Cadra, a career prosecutor who wrote the appellate brief in 1984 that helped uphold Mr. Reyos' conviction, happened onto the prosecutor's file and transcript last year just as the district clerk was about to destroy it along with other old cases." He says he had never read the entire file or the transcript

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have committed the crime,²⁴¹ and outlined the factual basis for this conclusion in a letter to then Texas-governor Ann Richards.²⁴² Based on date-stamped gasoline credit-card receipts,²⁴³ time-stamped towing and repair receipts,²⁴⁴ a traffic ticket issued by the New Mexico Highway Patrol²⁴⁵ (all made out to, and signed by, Reyos) as well as the testimony of David Myers,²⁴⁶ Cadra explained that Reyos was in Roswell, New Mexico until at least 8 p.m. Texas time on December 21st (some 200 miles from Odessa, Texas), and that he was 15 miles West of in Roswell, New Mexico at 12:15 a.m. Texas time on December 22nd.²⁴⁷ As Cadra stated in his letter:²⁴⁸

For Mr. Reyos to have killed the priest, he had to have left Roswell immediately upon leaving Mr. Myer's home (no sooner than 8:00 p.m. Texas time on December 21), driven over two hundred (200) miles to Odessa, met the priest and murdered him,²⁴⁹ driven over two hundred and fifteen (215) miles to a point at least fifteen miles west of Roswell, turned around, and then got a speeding ticket at 12:15 a.m. Texas time - a total time span of not more than 4 1/2 hours. Even assuming it took as little as

²⁴¹Letter, page 2.

²⁴²Cite letter

²⁴³Cite

²⁴⁴Cite

²⁴⁵Cite

²⁴⁶Cite

²⁴⁷Cite to the letter

²⁴⁸Letter, Page 6

²⁴⁹Cadra's letter fails to mention that Ryan, a heavy-set man who weighed over 200 pounds, had approximately an 80 pound advantage over the slender and slight Reyos, who weighed approximately 125 pounds. Given the extremely violent nature of the crime, it is hard to imagine that Reyos could have surmounted these differences to...Phone interview with Howard Swindle and Tim Wyatt. January, 27, 1998. In addition: by the 26 Denver city police talked to James Harry -- not a mark on him, not a sign he had been in any struggle. On December 26, 1981 Reyos is checked for cuts and bruises on his arms -- which was one would expect if in fact he had killed Ryan -- and none are found.

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thirty minutes (a very conservative estimate) to meet up with the priest, get into a fight, strip him, bind his hands behind his back and murder him Mr. Reyos would have had to have averaged a driving speed of over 111 miles per hour.²⁵⁰

Cassell's attempt to assert the guilt of James Harry Reyos is both misleading and facile. Cassell is misleading for three reasons when he suggests that Cadra's conclusion "rests on a foundation of sand,"²⁵¹ merely because David Myers could not pinpoint the precise date in late December of 1981 on which Mr. Reyos had been with him. First, Cassell fails to mention that multiple sources of evidence (including a date stamped gasoline receipt in Tatum, New Mexico) supporting Cadra's conclusion that Reyos was with Myers on December 21, 1981 until 8 p.m. Second, Cassell fails to mention those factors that lend credibility to Myers testimony.²⁵² And third, Cassell fails to mention that part of Cadra's letter which, anticipating Cassell's criticism (not surprisingly, since Cassell merely parrots the state's attempt to rebut Myers' alibi testimony) describes why "the undisputed facts demonstrate that Mr. Reyos could have been with Mr. Myers only on the evening of

²⁵⁰[Mention somewhere that this is a treacherous drive] Dennis Cadra's letter admit of another impossibility: "The only other possibility is for Mr. Reyos to have gone to Odessa and murdered the priest after he got the speeding ticket at 12:15 a.m. Texas time. However, since he called a wrecker to tow his truck in Roswell at 4:00 a.m. Texas time (stamped wrecker receipt with time was admitted into evidence) this would have required him to average over 127 miles per hour driving speed (again assuming he spent as little as thirty minutes in Odessa).

²⁵¹Page cite in Cassell

²⁵²Dennis Cadra described these in the letter to Governor Richards.

"According to Mr. Myer's testimony Mr. Reyos was at his apartment in Roswell until at least 8:00 p.m. Texas time on the December 21. There are several factors which lend credibility to Mr. Myers' testimony. First, he and Mr. Reyos were not close friends in college, having merely lived in the same dormitory. Second, Mr. Myers was not located by the defense until some two months before trial since, in the interim, he had got married and moved to Texas. Third, Mr. Myers could not positively say that Mr. Reyos had been with him on December 21, saying it could have been any time between the 19th and the 22nd. Under these circumstances it is hard to dispute Mr. Myers' credibility." Letter at P. 5.

December 21.²⁵³

Cassell is facile when he writes that "the most compelling fact supporting Reyos' guilt is that *all* of the alleged exculpatory evidence -- including the alleged alibi -- was capably presented to the jury. No good reason is offered to believe the presumptively conscientious jurors found Reyos guilty beyond a reasonable doubt when he was innocent."²⁵⁴ Clearly Cassell missed the central point of our article: that a confession statement -- even when it is contradicted by the all the existing physical evidence and supported by no other credible or significant evidence -- so prejudices a trier of fact that it is, nevertheless, highly likely to lead to a conviction.²⁵⁵ It is quite telling that Cassell regards the jury's verdict -- rather than any piece of evidence -- as the most compelling fact supporting his assertion of Reyos' guilt. This is because other than Reyos' confession there simply is no credible evidence supporting

²⁵³Letter, P. 6. As Cadra writes,

"The state made no intimation that Mr. Myers was lying for Mr. Reyos, and attempted to rebut his alibi testimony by merely referring to the fact that Mr. Myers could not pinpoint (one and a half years after the fact) the exact date on which Mr. Reyos had been with him. The kindest way to characterize this rebuttal argument is misleading.

Mr. Reyos and Mr. Myers could not have been together on either the 19th or the 20th since Mr. Myers testified that Mr. Reyos had his pick-up when they met and, according the bondsman in Hobbs, the pick-up was in the bondsman's custody until noon of the 21st. Similarly, Mr. Reyos and Mr. Myers could not have been together on the 22nd since, by documented receipts and other testimony, Mr. Reyos already drunk and at a garage until after 6:00 on that date and was later arrested and spent the night of the 22nd in Roswell jail.

In short, the undisputed facts demonstrate that Mr. Reyos could have been with Mr. Myers only on the evening of December 21. In fact, the state never really contended that they weren't, they merely attempted to blur Mr. Myers honesty by emphasizing his inability to pinpoint the exact date." Id. at 5-6.

²⁵⁴Page cite in Cassell.

²⁵⁵Cite to page in consequences article. Also quote advocate article, p. 40: "One juror told me that when they got back in the jury room, they started on the assumption that Reyos did it because he confessed to it."

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his guilt.²⁵⁶

In short, the undisputed facts demonstrate that it was not physically possible for James Harry Reyos to have killed Patrick Ryan, for exactly those reasons that prosecutor Dennis Cadra articulated in his letter of December 31, 1991. Cassell's selective repetition of the trial prosecutor's unsupported assertions does not cast doubt on the validity of this conclusion.²⁵⁷ James Harry Reyos was innocent of the crime for which he was convicted and served 12 years.

(5) Martin Tankleff

Cassell parrots the prosecution's argument that Martin Tankleff -- a happy, well-adjusted 17 year old with no prior criminal history and from an affluent family -- would brutally murder both of his parents because he wanted a new car. In support of this remarkably thin motive theory, Cassell notes that Tankleff had an "ugly, public" argument with his father a few days before his parents were fatally attacked. However, the very testimony regarding the argument on which Cassell relies negates his theory of motive. Mr. Peter Cherouvis, the individual who testified that he overheard Tankleff have an argument

²⁵⁶Cassell points out the trial testimony of Olivia Gonzales, who asserted that she saw Reyos driving the victim's car by himself the day after the murder, but this testimony simply was not credible. However, it is highly unlikely that Gonzalez made an accurate identification. [Olivia Gonzalez supposedly sees Reyos (whom she had not seen before) backing out of Rectory driveway in Ryan's car; she states that he waves at her as she and her husband pass him; she also later testifies that she tells this to Denver City police a week later (12/26) after learning of Ryan's death and that they interviewed her; but at the trial Rosado tells the judge that Angel Perez brought her in to the trial and informed he and Foster and that these never appeared on the investigation listing of those interviewed after Ryan's death.] However, on December 22, 1981 from 3-5 p.m. Reyos was having his truck towed into the Chevron station in Roswell and the owner testified that it was almost dark by the time the tire was put on; weather records establish that the sunset in Roswell, NM on that date was 4:55 p.m.

²⁵⁷Cassell suggests that the fit between Reyos's post-admission narrative and the unknown crime scene facts establishes his guilt. Page 26 of Cassell article. It does not. The facts that Reyos reported in his confession statement were already publicly available -- cite pre-confession newspaper articles.

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with his father, also testified that he heard Tankleff's father inform Tankleff in that very same conversation that he would buy Tankleff a new car.²⁵⁸

Cassell notes that when police responded to "a 9-1-1 call," they found Tankleff alone at home, "soiled with blood." Cassell neglects to state that Tankleff was the one who called "9-1-1" (upon finding his parents' bodies when he awoke at approximately 6:00 a.m.). Nor was Tankleff "soiled in blood." Tankleff did have a few spots of blood on him, but this was because he followed the "9-1-1" operator's instructions as to how to render first aid to his father (who was severely wounded, but still alive).²⁵⁹ Calling for the police and rendering first-aid to a still living victim is hardly conduct consistent with a person who supposedly wanted to murder the victims.

Next, Cassell discussed Tankleff's "confession" to the attacks on his parents. There is no doubt that Tankleff gave an inculpatory statement to the police on the day of the attacks -- a statement that Tankleff subsequently has repeatedly and consistently disavowed. Tankleff presented at trial, and has subsequently presented on direct appeal and habeas review, substantial evidence demonstrating that Tankleff's statement was given under tremendous coercion and was in fact false.

Cassell claims that the statement was given little more than two hours after the police questioning of Tankleff commenced. In fact, the statement was made after the traumatized youngster had been subjected to more than five hours of increasingly hostile and accusatory questioning.²⁶⁰ The interrogating detectives lied to Tankleff and made it clear to him that any answer to their questions other than answers admitting guilt were simple unacceptable. The detectives falsely told him that his own father had identified him as the perpetrator of the attack. Tankleff, thoroughly confused by this incomprehensible assertion, came to accept the officers' suggestion that he must have committed the crime, even though he had no memory of doing so. Although Tankleff attempted to provide the detectives with the facts

²⁵⁸Trial Transcript at 4670-72.

²⁵⁹Trial Transcript at 3441.

²⁶⁰Trial Transcript at 387, 2888-89, 3488.

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surrounding his supposed attack on his parents (facts in most critical instances supplied by the detectives who had already visited the crime scene), subsequent forensics testimony demonstrated that Tankleff's story to the detectives was just that, a story.

While Cassell acknowledges that the knife and the barbell Tankleff claimed to have used²⁶¹ showed no traces of blood when subjected to exacting forensics tests, he attempts to explain this by noting that Tankleff claimed to have cleaned these weapons in his shower. However, no cleaning would have removed every trace of blood, even between the blade of the knife and its handle²⁶² and within the treads of the screws of the barbells.²⁶³ Further, there was no trace of blood in Tankleff's shower drain (or in any other drain in the house).²⁶⁴ Plainly, Tankleff's "confession" that he used these weapons and then cleaned them in the shower is not to be believed.

In what is probably his most egregious distortion of the record, Cassell asserts that following Tankleff's confession to the police, one of the detectives overheard Tankleff admit to his sister (actually a half-sister) that he committed the crimes. While the detective did testify that Tankleff admitted to his sister that he committed the crimes, Tankleff testified that he had told his sister that he had confessed to the crimes. When asked why he did so, Tankleff told his sister that he did so because the police made him do so.²⁶⁵ Tankleff's half-sister testified under oath prior to trial that Tankleff's version of this critical conversation, not the detective's, was in fact what actually transpired.²⁶⁶ Unfortunately, Tankleff's half-sister was never called at trial, and the jury never learned of this critical testimony corroborating Tankleff and raising serious doubts about the detective's credibility. Worse yet, the trial

²⁶¹Tankleff's father's treating physician found it more likely that the murder weapon was a hammer than a barbell. Trial Transcript at 4347 and 4351.

²⁶²Trial transcript at 2237, 2309-2310, 2280-2282, 2306.

²⁶³Trial Transcript at 2313-2315.

²⁶⁴Trial Transcript at 1967-1968, 2046-2048, 3700-3702.

²⁶⁵Trial Transcript at 4166-4167.

²⁶⁶3/28/89 Suppression Hearing Testimony of Shari Rother at P. 11.

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judge allowed the prosecutor falsely to suggest to the jury in his closing argument that if only the half-sister had been called at trial, she would have supported the detective's version of this telephone call.²⁶⁷

Further, Cassell suggests that the forensics evidence was consistent with Tankleff's "confession" that he attacked his parents after waking at approximately 5:30 a.m. However, this emergency technician, responding to the scene around 6:15 a.m., found dried, coagulated blood that suggested that the murders took place hours earlier.²⁶⁸

That the attacks occurred hours earlier than the time Tankleff "confessed" to committing them is vitally important. Cassell ignores altogether the fact that hours earlier Tankleff's father's business partner was alone in the house. This individual owed Tankleff's father substantial sums of money and his relationship with Tankleff's father had been rapidly deteriorating.²⁶⁹ Following the attacks, with Tankleff's father still in a coma, his business partner feigned his own death and fled the jurisdiction.²⁷⁰ He was subsequently found living under an assumed name, having changed his appearance, in California. Remarkably, rather than focus their attention on someone who engaged in this highly suspicious conduct and had a credible motive, the detectives brought this individual back to Long Island so that he could testify as a witness against Tankleff.²⁷¹

The combination of the paper thin motive ascribed to Tankleff, the highly coercive nature of Tankleff's interrogation, the failure of any physical evidence to corroborate that "confession," the large respects in which the forensics evidence affirmatively contradicts

²⁶⁷Trial Transcript at 4897.

²⁶⁸Trial Transcript at 471-472. Indeed, even the lead interrogating detective did not believe Tankleff's "confession" that he awoke around 5:30 a.m. and, in the next forty-five minutes, attacked his parents and cleaned the entire crime scene. Transcript at 3845.

²⁶⁹Trial Transcript at 894-896.

²⁷⁰Trial Transcript at 1190-1194.

²⁷¹Perhaps, their decision to use this witness reflected merely the fact that having coerced a confession and initiated the prosecution of Martin Tankleff neither the detectives nor the prosecutor were in a mood to admit that they had made a mistake.

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that "confession," and the motive, opportunity and subsequent behavior of a likely alternative suspect lead to only one reasonable conclusion: That Martin Tankleff's "confession" is in all likelihood false, and that his conviction can only be explained by the fact that the jury knew he had confessed.

The remaining four cases that Cassell challenges are ones that we knew the best, having studied them in connection with either pre-trial or post-conviction proceedings. We thus chose to respond to them last (initially directing our efforts to those cases we knew less well). In his case presentations, Cassell frequently chose to attack points involving Richard Ofshe's testimony at the trial, even though these points are not central to a fair evaluation of the defendant's guilt or innocence. Cassell's snide comments and cheap shots thus ignore and distort the real question at issue. Perhaps Cassell has chosen this tactic in three of the remaining four cases to divert us and the reader from the insupportability of his position. Given the time and space limits imposed on us by the editors of this journal, however, we were not able to respond to every one of Cassell's distortions and errors in these four cases and, instead, briefly go to the heart of each of Cassell's comments and ignore his diversionary rhetoric.

(6) Paul Ingram

Cassell relies entirely on the *opinions* of persons knowledgeable that Paul Ingram had confessed (rather than any actual *evidence*) to support his conclusion that Ingram had committed the crimes to which he pleaded guilty. Failing to understand *Consequences*, Cassell relied on the opinion of a judge who made no bones that he could not imagine that a person with law enforcement experience would ever give a false confession.²⁷²

Although Cassell makes much of the fact that Richard Ofshe testified that hypnosis explained the fantasies that Paul Ingram produced during the months that he was being interrogated, Cassell fails to inform readers that the Judge who denied Ingram's motion to

²⁷²Cite to Cassell's paper

withdraw his guilty plea based his decision only on the statements Ingram made at the one interrogation session that preceded the introduction of hypnotic procedures. The Judge specifically excluded from consideration anything that Ingram said in any session for which Ofshe testified that Ingram's statements were elicited while he was under hypnosis.²⁷³

Cassell suggests that Ofshe's conclusion about the use of hypnosis was wrong by quoting the hearing Judge's comment that he wondered if a determination as to whether or not someone is under hypnosis can be made from a transcript.²⁷⁴ Relying on trickery rather than substance to support his position, Cassell fails to mention that Ofshe submitted the transcripts of Ingram's hypnotic sessions to the reviewers for the *International Journal of Clinical and Experimental Hypnosis* (the world's most respected scientific journal on hypnosis) who concurred with his conclusion that Ingram was hypnotized and published his paper on the case.²⁷⁵

In an attempt to trick readers into assuming that there was actually some evidence against Ingram, Cassell relies on the hearing Judge's view that in the first session Ingram "essentially" confessed.²⁷⁶ Cassell cites the Judge's belief that Ingram's confession contained "virtually incontestable evidence of guilt"²⁷⁷ because Ingram described sex practices with his supposed victim and one daughter's abortion at a clinic in the small town of Shelton, Washington. Although Ingram's supposed first session confession was analyzed in Ofshe's published paper and the transcript of the session was available, Cassell avoids dealing directly with Ingram's first interrogation and thereby withholds from the reader the fact that Ingram never made a confession in his first session. Instead, after being told by his interrogator's that it was common for sexual abusers to repress knowledge of their acts, Ingram agreed on 16

²⁷³Personal knowledge -- Ofshe was in the courtroom when this judge made this election

²⁷⁴Page cite in Cassell

²⁷⁵Richard J. Ofshe, *Inadvertent Hypnosis During Interrogation*, 40 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 125 (1992) [Hereinafter Ofshe, *Inadvertent Hypnosis*].

²⁷⁶Page cite in Cassell.

²⁷⁷Page cite in Cassell

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separate occasions that if his daughters said he sexually abused them, then he must have done so, but he had no memory of any improper act.²⁷⁸

Since Cassell did not examine Ingram's so-called confession directly, he failed to inform readers that the incontestable evidence that the Judge thought he found did not exist. One component of this incontestable evidence was nothing more than that Ingram verbalized *guesses about how he would have had a sexual encounter with one of his daughters if such an event had happened*. Cassell also floats as evidence of Ingram's guilt that he talked about an abortion clinic in a small town at which one of Ingram's daughters had a pregnancy terminated. While Ingram agreed that if his daughter reported this it must be true, the existence of the clinic could never be established because neither Ingram nor the daughter who supposedly underwent the abortion knew where it to find it in the small town of Shelton. Further, no abortion clinic in the area surrounding Olympia, Washington had any record of ever performing an abortion for Ingram's daughter. Had Cassell analyzed Ingram's so-called confession he would have found that it was nothing more than a set of compliant response to interrogators' tactics that never attained the status of a report of actual knowledge of an event and that it never produced any corroboration. Ingram's so-called confession during his first interrogation were statements of opinions that were created in the mind of Paul Ingram by the evidence claims and tactics used by the interrogators.²⁷⁹

Cassell also fails to inform readers of the medical evidence that contradicted the Ingram daughters' reports of torture by a Satanic cult, a backyard abortion done with a sword, a pregnancy culminating in the live birth of a fetus that was killed and eaten, and more than a decade of repeated rapes by cult members. Erika Ingram and her sister Julie were court ordered to undergo physical examinations. Unbeknownst to the Judge hearing Ingram's motion to withdraw his guilty plea, the examination results established that there was no evidence of torture, much less that *either of Ingram's daughters had ever been*

²⁷⁸Ofshe, *Inadvertent Hypnosis*, Supra Note ____.

²⁷⁹Cite to transcript

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*sexually active.*²⁸⁰

Ericka Ingram accused her father of murder and claimed that there was a conspiracy between him and other police officers to cover it up. Julie Ingram accused her father and all of the police officers with whom he played poker on Saturday nights of taking their turns raping her each weekend. Ericka Ingram eventually claimed that 30 local doctors, lawyers and judges were members of the Satanic cult that had abused her for 17 years. When the Thurston County Sheriffs department failed to arrest these villains, Ericka filed suit against the county claiming that the Sheriffs department was controlled by Satanists, including some of the officers who worked on the prosecution of her father. She alleged that this Satanic cult conspiracy was the cause of her suffering.²⁸¹

(7) Jessie Misskelley

Cassell's treatment of the Misskelley case is a *tour de force* of misrepresentation, backwards logic and arguing guilt by association. We will address only Cassell's core argument, his analysis of the confession and mention a few other points. Cassell argues that because Misskelley's confession included the names of Damien Echols and Jason Baldwin and because they were convicted, Misskelley's confession is true. Not only is this argument illogical, Cassell is deceptive in his presentation of the specific facts he cites to promote it.

Cassell claims that Misskelley's confession "was proved beyond a reasonable doubt to be consistent in its most important respect: the identity of the main killers."²⁸² He writes that a month after the crime "the police were struggling to solve the case when they asked Misskelley to come to the stationhouse to answer some questions. Misskelley admitted that he

²⁸⁰Ofshe, *Inadvertent Hypnosis*, Supra Note ____.

²⁸¹Ofshe, *Inadvertent Hypnosis*, Supra Note ____; See also Ericka's Sally Jessie Raphael appearance

²⁸²Cassell, *The Guilty and the Innocent*, Supra Note ____ at 19.

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watched as two of his acquaintances -- Damien Echols and Jason Baldwin...²⁸³ abused the boys but left before they were killed. Cassell attempts to trick readers into presuming that Misskelley led the police to Eccols and Baldwin. Nothing could be further from the truth, Damion Echols was the main target of police interest from almost the start of the investigation.²⁸⁴ Misskelley was asked to come to the station because the police hoped to get from him information that would confirm that Echols was a member of a Satanic cult, since almost from day one the killings of the boys were presumed to be Satanic cult inspired ritual murders.²⁸⁵

Although police did not record Misskelley's interrogation, his confession statement was memorialized on audio tape. Misskelley, a seventeen year borderline retarded young man,²⁸⁶ was threatened that he would be treated as one of the bad guys unless he cooperated with the police and told them what they were sure he knew, how Echols and Baldwin killed the boys.²⁸⁷ Once Misskelley broke and began complying with whatever suggestions were given by the police and the story they wanted was rehearsed several times, the interrogators decided to record Misskelley's statement.

One of the problems caused by the refusal of some police agencies to record their interrogations is that they make it almost impossible for any independent evaluator to determine how much the police contaminated the suspect by revealing crime facts and what the defendant actually knew about the crime. If contamination cannot be ruled out or precisely determined by reviewing a complete record of the interrogation, anything that the defendant says that is accurate that is also known to the police becomes valueless for

²⁸³Id.

²⁸⁴The day after the bodies were discovered, Police interviewed Echols because he was believed to be involved in the Occult. Echols denied any involvement in the murders and voluntarily gave blood and hair samples (Letter and notes from Dan Stidham 1/25/99).

²⁸⁵Stidham letter and notes

²⁸⁶Stidham letter and notes

²⁸⁷(Cite to R.O. interview and Gitchel's admission that the in the circle/out of the circle technique was used).

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assessing whether the defendant possesses actual knowledge of the crime or is ignorant of things the perpetrator would likely know. If contamination is a problem, as it was in the Misskelley confession, there are only two classes of information that remain useful for evaluating the question of whether or not the defendant had actual knowledge of the crime. The first is information contributed by the defendant that was not known to the police (hence eliminating possible contamination) that can be objectively proven correct or incorrect. The second source of information are errors that the suspect makes about subjects that the perpetrator would certainly know, since such errors would be consistent with a lack of actual knowledge of the crime.

Cassell's claim that Misskelley's confession contained details consistent with the crime facts -- that the Byers' boy was already dead before he was dumped in the river, that the Byers' boy's body had been mutilated, and that one boy had a facial laceration -- were all facts well known to the investigators when Misskelley was interrogated a month after the date of the killings. Misskelley reports that during the interrogation the police told him what happened at the crime scene.²⁸⁸ The failure of the police to record the interrogation makes the statements Cassell wishes to use as indicators of actual knowledge beyond impartial evaluation and of no use in assessing Misskelley's likely guilt or innocence.

It often happens that when police coerce a false confession, deliberately contaminate a suspect and then finally decide to make a record of their handiwork, they make the mistake of asking about something that they have not prepared the innocent (and therefore ignorant) suspect to answer. This may happen because the police believe that the suspect is guilty and so presume he can answer questions not previously explored, or because they are sloppy in their attempt to frame the defendant. The Misskelley interrogation is a prime example of this problem.

During the taking of the recorded confession statement, Misskelley was asked about the time that the killings happened. In his first answer he describes the killings as happening

²⁸⁸Cite to Ofshe interview of Misskelley

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at noon.²⁸⁹ This answer created a problem for the prosecutor, Mr. Fogelman (now Judge Fogelman), who was supervising the interrogation and Detective Gitchel, who was conducting it. Both of them, but not Jessie Misskelley, knew that the boys did not get out of school until after three P.M. and did not disappear until after 6:30 P.M.²⁹⁰

It took Gitchel, under Fogelman's direction, five revisittings of this subject and appropriate pressure and suggestions to progressively move Misskelley's wrong answer to a point late enough in the day that it was after the boys had left school, finished playing on their street and were last seen.

Misskelley' confession also included the wrong facts that:

1. Misskelley said that the victims skipped school the day they were killed when in fact they were at school²⁹¹
2. Misskelley said that the victims were sodomized when in fact there was no trauma to the anuses of the victims according to the medical examiners testimony at trial²⁹²
3. Misskelley said the victims were bound with a big brown rope when they were tied with their own shoelaces²⁹³
4. Misskelley said that the victims were choked by Echols with a big stick but the medical examiner testified at trial that there were no injuries to the victims' throats.²⁹⁴
5. Misskelley said that the victims were killed on the dirt bank where they were found when in fact no blood was found there, indicating that the victims were killer elsewhere.²⁹⁵

Cassell brings up developments after the trial that he wrongly suggests confirm the accuracy of Misskelley's conviction. However, Cassell presents a very distorted picture of

²⁸⁹Citation to Misskelley confession transcript

²⁹⁰Stidham letter and notes

²⁹¹Stidham letter and notes

²⁹²Stidham letter and notes

²⁹³Stidham letter and notes

²⁹⁴Stidham letter and notes

²⁹⁵Stidham letter and notes

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what was in fact a desperate attempt on the prosecutor's part to coerce Misskelley into testifying against Echols and Baldwin. Misskelley's so-called two additional confessions were the result of the prosecutor's defying Misskelley's attorney's instruction that he not communicate with Misskelley. The statements Cassell cites were coerced from Misskelley, by the guards who transported him to prison and the prosecutor, in five separate sessions. Misskelley recanted the statements when he finally refused to commit the perjury that the prosecutor was willing to trade for leniency.²⁹⁶

A post-trial development that Cassell avoids mentioning is that Misskelley's attorney continued to investigate the case even after his client's conviction and eventually discovered previously unknown forensic evidence that strongly suggests that the victims were murdered by someone other than the three convicted teens. This evidence is a bite mark located above the eye of victim Steve Branch. Analysis by a Board Certified forensic odontologist has excluded all three of the convicted murderers as being the source of the bite mark.²⁹⁷

(8) Linda Stangel

In his treatment of Linda Stangel's case, as in the other cases, Cassell once again ignores the absence of any evidence proving the defendant's guilt. Instead, Cassell simply repeats his mantra that the defendant must be guilty because triers of fact and/or criminal justice officials, (even if prejudiced by the influence effect of a confession), have judged the defendant guilty. Cassell treats the trial judge's choice at a voluntariness hearing to believe police officers' account of what happened during an unrecorded interrogation, rather than the defendant's, as evidence of the defendant's guilt.²⁹⁸ Cassell treats a verdict of guilty reached by jurors as evidence of the defendant's guilt rather than as evidence of the persuasive effect of knowledge that a suspect has confessed. Further, Cassell not only ignores

²⁹⁶Stidham letter and notes.

²⁹⁷Stidham letter and notes

²⁹⁸Cassell's paper p-30

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evidence exculpating Stangel, but also evidence that the interrogators employed one of the most widely recognized coercive interrogation tactics in use in America today.

No one knows or probably ever will know how David Wahl died. The prosecutor's claim in his closing argument that the injuries to Wahl's body were caused by a sudden impact such as falling from an extreme height is simply absurd.²⁹⁹ David Wahl's body was washed up fifty miles from where he disappeared on the Oregon coast after spending six weeks in the ocean along the rough and rocky Oregon/Washington coast. When it washed up, Wahl's skull, except for the lower jaw, was missing. While it might have been possible to rule out a gunshot wound to the body as the cause of Wahl's death, both the prosecutor (Josh Marquis) and Cassell are less than honest in suggesting that there was evidence that he died in a fall.

The two primary questions surrounding Linda Stangel's confession are whether it was voluntary and whether it was true. The senior Oregon State Police detective (Alan Corson) who was training the detective (Travis Hampton) who took the lead in Linda Stangel's interrogation has a record of poor police work that had already produced a celebrated false confession case³⁰⁰ and has led to Corson's being successfully sued for coercing a false statement from a witness.³⁰¹

At the suppression hearing, Hampton admitted that during Stangel's interrogation there was some discussion of David Wahl dying by accident.³⁰² Linda Stangel described the techniques that Corson and Hampton used as suggesting that she knew more than she was telling and that if Wahl's death was accidental it would not be a "crime." If his suppression hearing testimony about the exchange is credited, Hampton said that it would not be

²⁹⁹Cassell's paper p-28

³⁰⁰Cite to Pavlinac in Consequences

³⁰¹Cite to civil suit.

³⁰² Personal observation -- Ofshe was in the courtroom -- when manuscript was made of the suppression hearing

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"murder."³⁰³ Even if Hampton's memory is correct and the word used was ~~murder~~ "murder" not "crime," it would not be surprising that Linda Stangel, a young high school educated woman from rural Minnesota, understood this to mean that she had nothing to fear legally if Wahl's death had been an accident. The important point is that Hampton's admission and Stangel's detailed description of the interrogation³⁰⁴ confirm that an interrogation tactic known as maximization/ minimization (or the accident scenario technique) was in play. This technique is recognized as inherently coercive³⁰⁵ because it is designed to communicate to suspects the threat of maximum punishment if they remain silent and the promise of little or no punishment if they agree to the interrogator's (accident or self-defense) description of the crime.³⁰⁶

Linda Stangel's account of the interrogation is simple. She was pressured to change the account of what happened from the version she had recounted since the day of Wahl's disappearance -- that he went for a walk alone and never returned. Next, the detectives, who knew of her fear of heights, pressed her to agree to go up the narrow bluff trail they thought Wahl probably took on his walk. Stangel agreed to go because the detectives were insistent. As they mounted the steep, cliffside trail, Stangel's and the detective's reports agree³⁰⁷ that she began to be overcome by her fear of heights. After she broke down in fear, the detectives assured her that she would be all right and urged her up the trail. At this point she began to consider whether to agree to their suggested accident story so as to escape the distress of being on the trail. Eventually she complied and agreed that David had died by accident. The police allowed her to retire from the trail at this point.³⁰⁸

Having coerced agreement from Stangel, the detectives had her tell the story several

³⁰³cite suppression hearing - Ofshe present

³⁰⁴cite Ofshe interview

³⁰⁵See Ofshe & Leo, *The Decision to Confess*, Supra Note ___; Cite Kassir

³⁰⁶Id.

³⁰⁷cite Hampton's report

³⁰⁸cite Ofshe interview

times, each time making notes of what she said. Hampton's memorialization of Stangel's account of the accident was contained in his report of the interrogation.³⁰⁹ Stangel told the accident story several times, each time describing what happened in slightly, but significantly, different ways. The accounts always included a description of Wahl coming up to her and giving her a "fake push" to scare her (as he had done earlier that day when they were on a jetty). Supposedly, her panic response was to push back and for Wahl to accidentally fall off the cliff.

Apparently, neither Corson nor Hampton noticed that none of the accounts Stangel gave would have resulted in Wahl's falling off the cliff. In all of the accounts, Stangel was standing closer to the cliff than was Wahl, and all of her descriptions have him being pushed backwards, away from the cliff and towards the bluffside. Richard Ofshe discovered this discrepancy in Stangel's account, and testified about it as one of the points of evidence supporting Stangel's version of the interrogation and her lack of knowledge of how Wahl died. The trial judge did not care that the confession, even as selectively recorded by the police, was on its face inconsistent with the police theory that Wahl had fallen from the cliff.

The police detectives and the prosecutor were more concerned about these little details than was the judge, and so at trial Hampton testified to a version of the accident³¹⁰ that neither appeared in his notes nor in his testimony at the suppression hearing.³¹¹

In another way, Linda Stangel's confession contradicts the assertion that she knew that David Wahl was dead when she left the area. The prosecutor sent the detectives to obtain a recorded version of the confession statement after administering Miranda (which they had neglected to do before coercing the accident story from Stangel).³¹² In her recorded statement Stangel tells an accident story and then continues to relate the events which happened after the invented trip up the bluff with Wahl. Stangel relates that she eventually

³⁰⁹Cite report of Hampton

³¹⁰Cite the version quotes

³¹¹Cite notes and personal observation -- Ofshe at hearing

³¹²Dateline and hearing - Ofshe present

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left the park, drove home and upon entering her residence noticed that her answering machine indicated a waiting message. Stangel relates that she went to the phone hoping that it was a message from Wahl (who she had previously said she thought had not returned because he was angry with her). In making this remark as part of her account of the day's events, Stangel appears to be relying on her memory of the day, which does not include having killed David Wahl and does include hoping to hear from him.

We will offer one piece of opinion evidence. The prosecutor, Marquis, got his 15 seconds of fame when *Dateline* aired an hour long story on the Stangel case.³¹³ In his air time, Marquis volunteered that he didn't believe that Linda Stangel's confession was true, therefore admitting that he prosecuted Stangel based entirely on a confession he acknowledged was factually false. Marquis went on to opine that he did believe that the true story was worse than the one admitted in Stangel's confession, but that charging and trying her as he did was the best he could do. Marquis' comment illustrates the point of our research. It is only if Marquis assumes that an innocent person would never confess falsely that it is possible for him both to recognize that the accident story is nonsense and to presume that the truth is worse. But if Linda Stangel is a diabolical murder, cool enough to stick to an airtight story for months, one wonders how Marquis explains why it was so easy for him to trick her into returning from Minnesota to Portland, Oregon by secretly funding a plane ticket and getting Wahl's family to invite Stangel to attend a memorial service?³¹⁴ How does Marquis imagine that detectives Corson and Hampton got the diabolical murderer Stangel to admit to any involvement in Wahl's death if they did not coerce her as she describes?

Finally, Marquis and Cassell have another problem in arguing the case that Stangel was guilty to anyone not already prejudiced by the confession. Cassell acknowledges that Linda Stangel took a polygraph examination but suggests this is insignificant because under Oregon law the prosecutor was able to keep its result away from the jury. While this may

³¹³Cite.

³¹⁴Dateline

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have contributed to the jury's verdict, there is no law that prohibits fair minded investigators from considering evidence on its merits. After Stangel had given her accident confession but before she was charged, at Marquis' instruction, Stangel agreed to a polygraph examination by a police examiner in Minnesota, passed the polygraph and was thereby judged by police as being truthful in her claim that she did not kill David Wahl.³¹⁵

(9) Bradley Page

Cassell largely ignores what actually happened in Bradley Page's 16 hour long, selectively recorded, interrogation, mentioning it in only a few lines, although it is central to understanding this case. Further, Cassell addresses very little of the exculpatory evidence cited in *Consequences* that demonstrates Bradley Page's probable innocence of Bibi Lee's murder. Instead, he offers up facts that can immediately be seen as trivial by anyone familiar with the interrogation. Finally, Cassell chooses to accept the word of a serial killer as credible because, in this instance, it serves his purpose.

Shortly after Bibi Lee's body was found, two Oakland police detectives, Ralph Lacer and Jerry Harris, requested an interview with Bradley Page, a University of California at Berkeley undergraduate and Ms. Lee's boyfriend.³¹⁶ The police had no reason to suspect

³¹⁵Cassell attempts to gloss over this exculpatory evidence by claiming that our willingness to acknowledge Stangel's polygraph result is inconsistent with our rejection of other polygraph evidence. Cassell misses the point that the police polygraphs we criticize and reject as meaningless are those that are taken of an agitated suspect in the context of an accusatory interrogation. We recognize that there is research demonstrating that under appropriate conditions and properly administered, polygraph tests can perform with a certain level of error and within these limits these are results that should be considered by investigators (whether or not polygraph evidence is admitted in court). We also recognize that research has demonstrated that polygraph tests have a significantly higher rate of incorrectly classifying someone as deceptive who is being truthful than of classifying someone who truthful who is being deceptive. Linda Stangel's result offered evidence of her truthfulness, in an examination utterly separate from her interrogation - conditions most conducive to a reliable test result. See David Lykken, *A TREMOR IN THE BLOOD: USES AND ABUSES OF THE LIE DETECTOR* (1998)

³¹⁶cite transcripts

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Page or anyone else of the crime. Unfortunately for Page, they decided to do what police without any evidence sometimes do -- interrogate someone close to the victim and try to get a confession. The simple fact is that unless someone connected with the victim turns out to be the killer, or the stranger/perpetrator leaves his wallet or his DNA at the scene (and happens to be in a sex offender data bank), the police stand almost no chance of finding the killer. Hence, as Detective Lacer admitted on national television, when desperate, start with the husband, boyfriend or neighbor.³¹⁷ In this case, the unfortunate target of Lacer's investigative strategy was Bradley Page.

The police started by interviewing Page about the events of the day Lee disappeared with a tape recorder running at 11:50 am and turned the tape off at 1:10 pm.³¹⁸ The interview produced no information that should have made Page a suspect. Once the tape was turned off, the interrogating detectives were free to go to work with no fear that they might be held accountable for what they did. For the next 6 hours they interrogated and threatened Page until he was willing to give them a statement that satisfied their desire to close the case.

During the interrogation, Page was lied to and told that there were witnesses who placed him at the scene of Lee's death,³¹⁹ and that his fingerprints were found at Lee's burial site.³²⁰ As part of this accusatory interrogation, Page was also given a polygraph and was falsely told that he failed it.³²¹ When Page protested that he had no memory of killing Lee, he was told that there was a reason he did not remember what the objective evidence

³¹⁷Cite to CBS News Show

³¹⁸cite to transcripts

³¹⁹cite to the later Page quote

³²⁰Cite to Page article

³²¹Cassell accuses us of incorrectly reporting that Page was falsely told that he failed the polygraph. Not only was Page's interrogation done in connection with an accusatory interrogation which is sufficient to invalidate its results, but had Cassell actually relied on the trial transcript he would have discovered that the well known polygraph expert Clive Baxter reviewed the charts done by an in-house Oakland police polygraph operator and concluded that they showed no deception and were at most inconclusive. Cite to Page article.

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and his subconscious knowledge (as measured by the polygraph) proved he had done: Page had repressed his knowledge of killing Lee.³²²

The police claimed that the evidence would, if accepted, lead anyone to conclude that the person it pointed to was the perpetrator -- even if it pointed to you. Telling Page that he had repressed his knowledge of what the bogus evidence appeared to prove made it impossible for him to mount an effective defense against his interrogator's claims. Once the interrogation stripped Page of his ability to rely on his memory and to logically resist the interrogator's lies, they added coercion into the mix and threatened him into complying with their demands by telling him that he would spend the rest of his life in prison if he did not co-operate at this point.³²³

The detectives then rehearsed Page, walked him through the story, and according to Page, told him everything that Cassell cites as Page's supposed knowledge of the crime. Having been lied to, confused, coerced and rehearsed, Page was now ready to give the confession the detectives wanted. At 7:10 that evening they turned the tape recorder back on and recorded Page's confession.

Lacer and Harris' decision to prevent anyone from ever knowing with certainty what tactics they used, as well as what information came from Page and what information came from the detectives during the interrogation, makes analyzing to what extent Page was contaminated impossible to objectively settle. Again, the only evidence of value that can be obtained from the interrogation would have to be new information unknown to the police or errors in the suspect's description of the crime.

Page contributes no information that leads the police to new evidence, but does, as we reported in the *Consequences*, make numerous provable errors in his description of the events of the crime. For example, in Page's account of what happened, Lee was slapped backhandedly once and fell -- which is grossly inconsistent with the fact that she had three

³²²cite to Page article and Page's post statement

³²³cite to Page quote infra

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large breaks at the base of her skull.³²⁴ Page also incorporates into the final story the element that he made love to Lee's corpse on a blanket he took from his car – but there was no blood from Lee massive head wounds on the blanket that was still in his car.³²⁵ When asked how he buried Lee, Page first said that he used his hands to dig the grave. When this answer was not accepted by the detectives, he said that he used a hubcap that was also, like the blanket, being carted around in his car. But the fiber and soil residue in the hubcap were not from the area where Lee was found nor from her clothing.³²⁶

As with the 34 *proven* false confession cases we studied, evidence finally came to light that should have proven Bradley Page's innocence. In this instance, however, the Alameda County District Attorney's Office was unimpressed with Ihde's admission and simply disregarded it. When Michael Ihde, a convicted multiple murderer bragged to prison buddies that he had killed several women in the San Francisco Bay Area, he told them that one of the women was non-white. When word of this got back to the Alameda county Sheriffs department, they looked into open files and were able to match Ihde's DNA with DNA in semen found in a woman who had been kidnapped (as was Lee if the witness who reported seeing an Asian woman being hustled into a car is to be credited), murdered (as was Lee) and raped (as Lee might have been). However, unlike Lee, this woman's body was discovered within a day of her disappearance rather than five weeks later, making any

³²⁴Cite as in Consequences

³²⁵Cite as in Consequences. Cassell attempts to counter this point by opining that Page would have had five weeks to dispose of the blanket and so one should not expect to find the evidence. See Cassell, *The Guilty and the Innocent*, Supra Note ___ at ___. But Cassell can't have it both ways: if Page was the same sort of diabolical killer as Linda Stangel, then why did he confess? And if he confessed truly, why didn't he simply tell the police that he disposed of the blanket if this is what actually happened? Page's identification of the blanket was probably in response to some question asked by the detectives during the unrecorded portion of the interrogation, was probably nothing more than a guess and so Page drew on his knowledge that a blanket had been laying around in the back of his car for several years. When confronted with problems such as this, a common way out of those who refuse to admit that a false confession has been created is to suggest that an immensely clever criminal has chosen to confess to hold off the police and has also decided to build into the confession errors that will make him appear innocent.

³²⁶cite as in Consequences

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possibility of a biological evidence link to Lee's killer impossible. Ken Burr, the prosecutor who convicted Page, interviewed Ihde and discovered that what Ihde meant was that the woman was black. Based on this, Cassell credits Burr's dismissal of the possibility that Ihde, who resembled the man seen hustling the Asian woman into a van, could have been Bibi Lee's killer and the possibility that he had succeeded in convicting an innocent man who only had a few months left to serve of his prison sentence. Oddly, Ihde was never charged with the murder of any black woman in the San Francisco, East Bay. In fact, no one seems to have discovered if there was even a missing young black woman who's body had never been found or a suitable open file to credit to Ihde.

IV. Cassell's False Claim to Rely on Trial Transcripts and Primary Sources When He Routinely Employs Artifice and Rhetorical Tricks to Substitute Opinions and Innuendo For Facts

Cassell's critique of *Consequences* repeats a formula that he used in his politically motivated attack on Bedau and Radelet's research into miscarriages of justice in capital cases,³²⁷ but also in some of his one-sided writings on *Miranda*.³²⁸ However, Cassell's attempt to undermine 9 of the 60 cases in *Consequences* goes beyond his standard formulas and relies on additional rhetorical tricks.

(1) Cassell Hypocritically Relies on News Accounts When It Suits His Interests

Cassell criticizes us for "relying on news media accounts of trials to determine 'innocence',³²⁹ which he claims "is dangerous, because of the media's considerable interest

³²⁷Cite to earlier footnotes

³²⁸Cite to footnote with Schulhofer article

³²⁹*Id.* at 34.

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in discovering "news" by finding that the system malfunctioned."³³⁰ Cassell further criticizes us for relying on other "secondary sources,"³³¹ some of which "were draped in red warning flags that should have been heeded."³³² In contrast to courts and juries who "are legally required to be impartial,"³³³ journalists are engaged in "slighting evidence of guilt"³³⁴ because "the fact remains that it is only 'news' if an innocent person is convicted."³³⁵ Cassell further charges that "particularly egregious misrepresentations [are] found in second-hand descriptions in cases in which a death penalty was possible,"³³⁶ because "the normal checks and balances found in other areas of journalism may operate less effectively here."³³⁷ "All of this suggests that relying on second-hand media accounts is not a reliable means of determining when innocents have been convicted, as well as that the media will inevitably discover more 'innocents' who have been convicted than is in fact the case."³³⁸ Cassell further charges that "there is reason to believe, however, the media not only enlarges the number of miscarriages but also changes their nature. For all the reasons just given, the media's great interest is in depicting wrongful convictions in a dramatic 'it could happen to you' fashion."³³⁹

Cassell's charge that the news media intentionally distort true cases of guilt and invent false cases of innocence is simply empty rhetoric. Because of his ideological pre-disposition

³³⁰Id. at 34.

³³¹Id. at 35.

³³²Id. at 35.

³³³Id. at 35.

³³⁴Id. at 35.

³³⁵Id. at 35.

³³⁶Id. at 35.

³³⁷Id. at 36.

³³⁸Id. at 36.

³³⁹Id. at 37.

to zealously defend law enforcement, and the state more generally, against even well-documented charges of error³⁴⁰ – whether the error involves a coerced false confession, the wrongful conviction of an innocent, or a miscarriage of justice in a capital case – Cassell would have readers believe that the media has conspired to deliberately create and distort cases of wrongful conviction, especially in death penalty cases. Yet Cassell offers no evidence to support his speculations, which he tries to pass off as some kind of reasoned argument. Therefore, it is a rhetorical trick for Cassell to suggest some fraction of our classifications must be in error merely because we documented case facts by citing to some news stories in our footnotes – case facts which Cassell does not challenge.

Even if there was evidence supporting Cassell's media conspiracy theories, he misleads readers about how we undertook our study. We did not "rely on" news stories to determine whether someone was innocent or guilty. As we documented in *Consequences*, we first identified a criteria for inclusion in our study – that there was no credible evidence supporting a confession's veracity³⁴¹ and at least some evidence disconfirming it. We then set out to evaluate cases as a whole and classify defendants, *based on the totality of sources available to us*, based on the certainty of our judgment of their likely or proven innocence.³⁴² In many of the cases, we had primary documents and knew the case well, because we had reviewed some of the case records (e.g., files of police reports, pre-trial and trial transcripts, depositions and other materials), but we chose to cite to news stories for established facts because it was easier for law review cite-checkers to verify our massively

³⁴⁰Cassell's commitment to state authority is so strong that he suggest that the standard from which scholars should judge whether a miscarriage of justice occurred is whether the original prosecuting authority who charged the defendant believes the defendant is guilty, failing to appreciate the significance of the fact that in several of the *proven* false confessions in our sample (Lavale Burt, Earl Washington, Steven Linscott, George Parker, and James Harry Reyos, for example) the original prosecuting authorities still regard the exonerated defendant as guilty! See Cassell, *The Guilty and the Innocent*, Supra Note ___ at 37.

³⁴¹Cassell's claim that "credible evidence corroborating the defendant's guilt existed in all nine cases" is false. Cassell, *The Guilty and the Innocent*, Supra Note ___ at 35. See Text Supra at [cite pages in Section III].

³⁴²Need cite to section I where we discuss this.

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footnoted article with the sources directly available to them online.

Cassell further suggests that the other secondary sources cited in our footnotes were also inferior to the trial transcripts and primary sources upon which he claims to base his critique and thus taint the results of our research. Again, Cassell's criticism is false and misleading. Cassell fails to understand the very nature of some of the "secondary" sources for which he criticizes us – such as "a habeas designed to win a defendant's release from prison"³⁴³ in the Tankleff case, which itself was based on an Affidavit filed by Richard Ofshe, a consultant in the case.³⁴⁴ More importantly, it bears emphasizing that while Cassell issues criticisms based entirely on his theory of press conspiracy, he does not challenge the accuracy either of our use of these materials or the facts reported in our citations.

Perhaps the most troubling aspect of Cassell's spurious criticism of our choice of citations to news stories to document undisputed case facts is Cassell's hypocrisy. Despite his pretense about the methodological superiority of trial transcripts and the dangers of citing to news stories, Cassell himself cites to news stories 29 times when it suits his interests.³⁴⁵

³⁴³Cassell at 35.

³⁴⁴Cite to Affidavit

³⁴⁵Cassell relies on news stories (or newspaper writers' opinions) in the following footnotes, sometimes more than once: 27, 71, 106, 122, 155, 167, 171, 230, 278, 286, 289, 294, 295, 299, 300, 301, 303, 304, 305, 306, 307, 308, 310, 312, 344 (?), 364, 365, 366, 367. Cassell, *The Guilty and the Innocent*, Supra Note _____. One of the clearance instances of Cassell's hypocrisy is his criticism of our citation to journalist Lawrence Wright's book, REMEMBERING SATAN, while relying himself on journalist Guy Reel (and coauthors) book THE BLOOD OF INNOCENTS. Compare Cassell *Id.* at ____ with Cassell *Id.* at _____. In Footnote 173, Cassell offers a partial defense when citing the Reel et. al. book ("I rely on a secondary source for the description of this confession (and the next confession, discussed below) because the official police reports describing it are apparently unavailable."). *Id.* at 21, Ftn. 173. However, this fails to explain why Cassell previously cited to the Reel et. al. book in Footnotes 169 and 171. *Id.* at 20, Ftns. 169 & 171.

[Use?] Cassell is content not only to rely on media reports of cases when it suits him, but even to rely on an out-of-context quotation from a discredited psychiatrist speaking on a topic different from the one Cassell portrays her to be speaking (*Id.* at ____); to credit a denial of culpability made by a convicted serial killer, against whom there is evidence involving him in a crime, merely because we classified the college student convicted of that crime as almost certainly innocent (*Id.* at ____); and to treat as evidence of a defendant's guilt the opinions of

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(2) Cassell Substitutes Opinions for Facts

Though Cassell chides us for citing to news stories and claims that his work is based on trial records, he apparently does not know that a prosecutor's, psychiatrist's, judge's or juror's *opinion* about the guilt of a defendant is not independent *evidence* of the defendant's guilt. Throughout his case challenges, Cassell repeatedly quotes the *opinions* of third parties as if these opinions somehow constitute *evidence*, or establish the *fact*, of the defendant's guilt.³⁴⁶ Cassell engages in this rhetorical trick either because he believes that opinions

prosecutors who succeeded in convicting persons defendants we classified as innocent (*Id.* at ___). Cassell is even so bold as to distort a comment made by one of the authors of *Consequences* [page 3; need to quote comment and explain how he distorts it].

³⁴⁶For example, in Barry Lee Fairchild's case, Cassell quotes Judge Eisele's opinion as if it establishes the fact of the voluntariness of Fairchild's confession. Cassell, *The Guilty and The Innocent* at 6 ("The Court specifically finds that [Fairchild] was not instructed or coached regarding the content of his confessions.") Cassell treated other opinions in the Fairchild case if they established facts ("Reviewing this and other evidence, Judge Eisele concluded that the evidence that the watch was the victim's was 'very strong, indeed, overwhelming.'). *Id.* at 8. ("The court thoroughly reviewed all of the evidence concerning Fairchild's mental abilities...reaching the conclusion that Fairchild was 'clearly not 'mentally retarded'.") *Id.* at 8. In Joseph Giarratano's case, Cassell quotes the opinion of a defense psychiatrist to establish the validity of Giarratano's confession ("Giarratano said he killed the daughter when she infuriated him by resisting his attempt to have intercourse and then killed the mother. The psychiatrist concluded: 'Mr. Giarratano was very credible in his description [of the crime] during the Clinic interview.'). *Id.* at 11. In the case of Paul Ingram, Cassell quotes the judge's opinion to establish the proposition that Ingram's confession must have been true and to discredit the conclusions of Richard Ofshe, a consultant in the case. ("After six days of testimony, the trial judge noted the obvious -- that he was a 'neutral person in the controversy.'...The judge...found the confession to be true...The judge also found it was 'highly, highly unlikely that he would be convinced to confess unless he were guilty'...The trial judge further found that the 'three state's witnesses are more credible than Dr. Ofshe.'...The judge also concluded that Ingram's new claims were incredible...The judge further observed that the two daughters had each accused their father of abuse and that 'there is no real reason that's been given to me here in this courtroom why they have or would falsely accuse their father.'.. 'I just find that he did it,' the trial judge concluded."). *Id.* at 12-15. In the case of Richard Lapointe, Cassell strings together a series of opinions and speculations to impute sinister motives to Lapointe and which Cassell apparently believes aggregates into evidence of Lapointe's guilt. See Text Supra at [cite pages in section on Lapointe]. Perhaps most egregiously, Cassell cites the opinions of two detectives about Lapointe body language during interrogation as somehow constituting evidence

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supporting his position are to be given as much evidentiary weight as facts or because he has no other significant or credible evidence with which to argue for the defendant's guilt in his case challenges.

This is an elementary methodological error. Some third party's opinion about the veracity of a confession does not establish it as truthful. In making this methodological error, Cassell reveals that he failed to realize or is unwilling to admit the fundamental purpose of our research: to study the biasing effect of the defendant's "I did it" statements on the decision-making of triers of fact and criminal justice officials. To do so, we analyzed the case's evidence *independent of the confession* that either supported or undermined the likely reliability of the confession. For Cassell to then suggest that the opinions of third parties who have been exposed to the confession somehow supports the veracity of the confession is not only tautological, but also highlights the very point that our research sought to make: that confession evidence is highly prejudicial on the decision-making of triers of fact despite their legal obligation to entertain a presumption of innocence and despite the existence of varying amounts of exculpatory evidence casting grave doubt on the reliability of the confession.

Perhaps Cassell's most outrageous substitution of opinion for fact is his willingness to

of Lapointe's guilt! *Id.* at [cite to specific pages in our discussion of Lapointe]. In the case of Jessie Misskelley, Cassell treats the opinions of jurors in two other cases -- Damien Echols and Jason Balwin -- as establishing the accuracy of Misskelley's confession. Cassell, *Supra*, at 19 ("The accuracy of Misskelley's identification of Baldwin and Echols as the killers was established by guilty verdicts at a separate trial..."). In the case of Bradley Page, Cassell's entire challenge is based on opinions which he presents as if they establish facts, including the appellate court's opinion that Page's confession must have been true ("The Court of Appeals also noted that Page's explanation at trial for the confession `strained the jury's credulity to the breaking point. His explanation was rife with internal inconsistencies, and was also inconsistent with the explanation he gave the officers in his final taped statement." *Id.* at 24. In the case of James Harry Reyos, Cassell is content to endorse the jury's verdict of guilt, and the appellate court's upholding of that verdict, as the most probative evidence of Reyos's guilt ("The most compelling fact supporting Reyos' guilt is that *all* of the alleged exculpatory evidence -- including the alleged alibi -- was capably presented to the jury. No good reason is offered to believe the presumptively conscientious jurors found Reyos guilty beyond a reasonable doubt when he was innocent. The jury's verdict was upheld in a unanimous opinion from the Texas Court of Appeals, which noted that the `alibi was certainly not established as a matter of law.'" *Id.* at 27. These are merely some of the examples from Cassell's case challenges in which he treats third parties' opinions as if either they constitute overwhelming evidence for a fact or establish that fact.

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rely of the opinion that Bradley Page is guilty offered by prosecutor Ken Burr (now a judge) who maintained a shrine in his office to his victory in the Page case.³⁴⁷ Cassell's lack of standards and willingness to go to virtually any lengths to claim that the state almost never makes mistakes is perhaps best documented by his willingness to rely on Burr's acceptance of the mere word of a proven serial killer that he did not kill Bibi Lee -- even though he had the opportunity to kill Lee and fit the description of a man seen forcing an Asian woman into a van near where Lee was last seen and has been convicted for a similar murder in the same area and during the same time period that Lee was killed.³⁴⁸

The combination of Burr's easy acceptance of Ihde's clarification that the murder victim he had in mind was black and Cassell's endorsement of Ihde's report is remarkable. How often do two former prosecutors get in bed with a proven serial killer and publicly claim to accept his denial of committing a murder because it allows one of them to maintain that he did not preside over the conviction of an innocent man and the other to maintain the belief that the state almost never causes the conviction of an innocent man?

(3) Cassell Misleads Readers by Taking Statements Out of Context

Cassell repeatedly misleads readers by taking statements out of context and thus altering or misrepresenting their meaning. Due to space limitations we offer only one example.

In the case of Bradley Page, Cassell claims that Page recanted to the DA because he felt "guilty" for leaving Lee behind.³⁴⁹ This is false and misleading. Page confessed falsely because his interrogators terrorized him by threatening life in prison if he did not provide an account of how he could have murdered Lee that conformed to their expectations. He recanted to the District Attorneys who subsequently interrogated him not because he was

³⁴⁷Cite Leo personal observation

³⁴⁸cite Cassell reference

³⁴⁹Cite page in Cassell article.

feeling "guilty," but, as he explains below, because he realized that his coerced confession to police had been purely the product of confabulation:

Page: Well, what's happened is that after the first tape and talking, that was everything that I knew and then they said that they had reports of me being, talking to her that afternoon and they convinced me that I was there. And so they said that if I didn't come up with the truth convincing enough to let them believe that I had actually been confronted her, when I had left Robin at the gate and came back to look for BiBi and drove around the parking lot, since I did drive around the parking lots, but I do not remember going further -- they said that the only place that the only place that amnesia could start is after the shock... Am I, am I going to get myself hung for this? I mean because I--the part they said finally that I was going to go to jail as a murderer, and that the only way that I would have a chance and that I could continue my life to do those things that I find worthwhile, is if I could recall the section before when I saw BiBi and the time that I would actually have struck her, and I mean, there's none of that. Everything they said is just because they leaned on me until -- I mean they scared me to death. They said that I was going to spend the rest of my life

DA: Okay

Page: in jail-in prison, and I had no concept of what that was, and I don't unless I came up with something. So I turned my imagination on--and that--those things--anything that is on that second tape, and the whole thing is my imagination turned on to its fullest, and if they have sightings of me confronting her and stuff, then maybe that's what I all I can recall, then that's what it is. That is my imagination.³⁵⁰

V. Conclusion

We have documented that Paul Cassell's critique of the research we reported in *The Consequences of False Confessions* is trivial, misleading and at times utterly disingenuous. Cassell misunderstands the fundamental purpose of the research and ends up misrepresenting both the content and import of its findings. Cassell elects to challenge our classification of

³⁵⁰Interrogation Transcript #3, Page 3.

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the confession as false in 9 of the 60 cases in our sample, but rather than mount meaningful challenges his grossly distorted case summaries reveals the low level of his ideologically motivated scholarship. In his nine case challenges, Cassell does no more than parrot portions of the prosecution's case at trial while selectively glossing over evidentiary problems with the cases and failing to consider essential exculpatory evidence. He offers opinions rather than facts because, once the confession evidence is isolated, there is little or nothing left except evidence of the defendant's innocence. Cassell's nine case challenges thus amount to no more than a restatement of the state's case and a strained attempt to reintroduce the confession by offering the opinions of third parties who, because of the confession, became convinced of the defendant's guilt. Our point is that these prosecutors, judges, jurors and appellate judges came to easily conclude that the defendant was guilty precisely because they were presented with the state's trivial, circumstantial evidence in the context of first knowing that the defendant had confessed. Cassell fails to reveal any evidence that would convince anyone of any of the defendants' guilt if the confession did not exist, and he fails to explain away the considerable exculpatory evidence that, if the confession did not exist, probably would have led to an acquittal.

Determined to defend law enforcement against any charge of factual error in its case processing or against any reform that might restrict its investigative freedom and oblige police to work within the law, Cassell also misunderstands, mischaracterizes and misrepresents the policy implications of our research. In *Consequences*, after demonstrating the enormous prejudicial effect that confession evidence exerts on the decision-making of triers of fact and criminal justice officials, we advocated establishing a minimum standard of reliability with which to evaluate the admissibility of a defendant's confession statement. We did not, as Cassell states, seek to "justify a series of dramatic changes to the way in which the justice system handles interrogations and confessions."³⁵¹ Rather we sought to reaffirm the importance of one of the most fundamental principles of all investigatory police work: that a confession should be corroborated by objective evidence, independent of the "I did it statement," to establish its veracity.

³⁵¹Cassell, *The Guilty and the Innocent*, Supra Note ___ at 1.

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We argued further that police and prosecutors should evaluate the fit between a suspect's uncontaminated post-admission narrative and the crime facts to determine whether to go forward with a case -- since their mission is, after all, to catch and prosecute the guilty and not merely to close files. It is commonplace for police to seek corroboration of a confession because, as everyone knows, this make for a stronger case. We did not suggest specific procedures for improving the quality of confessions in *Consequences* or anywhere else, although we could. We believe that if police become more sophisticated in their approach to confession and if prosecutors would demand higher quality police work in confession cases, fewer false confessions will be acted upon by police and prosecutors because they will be able to judge the weakness of the case at the start rather than months, years or decades later.

As we have shown, Cassell simply invents the claim that we recommend "dramatic changes" in courtroom procedures. Our analysis is that guilt can essentially be proven by a post-admission narrative analysis but the most that can be said about a suspect's failure to contribute accurate information is that it is consistent with innocence.³⁵² In light of the substantial prejudicial impact of confession evidence, we do not think it revolutionary to recommend that a minimum threshold of reliability be established to keep false confessions out of courtrooms. The presence of a minimum corroboration requirement would oblige police to learn how to obtain better confessions and recognize a false confession before acting upon it. Our suggestion to more rigorously evaluate a suspect's post-admission narrative and to establish a minimal standard of reliability is politically neutral because, once implemented, it would advantage neither the prosecution nor the defense.

Having studied hundreds of confession cases, we recognize that police interrogation is an essential and legitimate investigatory tool in a democratic society. We also recognize that interrogation is a highly strategic and goal-directed activity whose purpose is to elicit confessions of guilt. In *Consequences*, we sought to evaluate the biasing effect of confession evidence on official decision-makers and triers of fact in order to better understand the sources of the false confession problem in America. We discussed the policy implications of

³⁵²Cite

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our findings in order to recommend simple reforms to help law enforcement better achieve its goal of separating the innocent from the guilty and thus preventing the wrongful conviction of any innocent person.

Rather than acknowledge the false confession problem in America, or attempt to provide any data or analysis that would help solve it, Paul Cassell once again perpetuates the myth that people do not confess to crimes they did not commit unless they are tortured, mentally ill, or mentally retarded. Rather than attempting any serious scholarship on the topic, Cassell seeks merely to advance his professional and political self-interest by acting not as a contributor to this literature, but simply as a spoiler whose ideologically-motivated writings on false confessions are an affront to the standards of objective, fair-minded and reasoned inquiry and so should be ignored.

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