

CR 08-1493

THIS IS A CAPITAL CASE

IN THE SUPREME COURT OF ARKANSAS

DAMIEN WAYNE ECHOLS

APPELLANT

v.

STATE OF ARKANSAS

APPELLEE

An Appeal From
CRAIGHEAD COUNTY CIRCUIT COURT
ON CHANGE OF VENUE FROM CRITTENDEN COUNTY CIRCUIT COURT
Circuit Court No. CR 93-450a
Hon. David Burnett, *Judge*

BRIEF OF AMICI CURIAE
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ARGUMENT

Introduction

In 1994, Damien Echols was convicted and sentenced to death for the murders of three eight-year-old boys. Newly discovered evidence demonstrates that his conviction was based primarily on evidence that was never introduced against him at trial: the widely publicized confession of his alleged co-perpetrator, a mentally retarded seventeen-year-old named Jessie Misskelley. Not only was that confession inadmissible against Echols under the Confrontation Clause of the United States Constitution, but when a witness referred to it during trial, the judge also explicitly admonished the jury not to consider it. It is now known that Echols' jury violated the Constitution and the judge's instructions by discussing Misskelley's confession during deliberations, not long after the jury foreman told an outside attorney that he was growing frustrated by the State's "weak" collection of "circumstantial" evidence and that if prosecutors did not present something powerful soon, it would be up to him to secure a conviction.

Because this confession was never introduced against him, Echols never had an opportunity to confront Misskelley in open court. Had he been afforded such an opportunity, Echols could have exposed the confession's palpable unreliability. Misskelley's confession bears many all-too-familiar hallmarks of falsity: he could not recount the facts of the crime accurately, for instance, but instead claimed repeatedly that he and his friends had killed the three boys at a time when all three victims were safely in

school. Nonetheless, this muddled and dubious confession became, in one juror's words, the "primary and deciding factor" in the jury's decision to convict Echols.

Because of these errors, Echols' capital conviction is founded not only on an extraordinary instance of juror misconduct – led by the jury foreman – but also on a confession that is unworthy of reliance. Indeed, in the opinion of Amici, these facts strike at the heart of Echols' request for a new trial. As Echols argues, this Court should grant relief if, considering petitioner's new DNA evidence together with all other evidence in the case, a reasonable juror would more likely than not find him not guilty were he tried today. The fact that Echols was previously convicted cannot support a finding that a reasonable juror would again find him guilty, as Echols' previous jurors relied impermissibly on an unadmitted and highly prejudicial confession. Further, a reasonable juror considering all evidence now available – including evidence bearing on the unreliability of the Misskelley confession – would be compelled to conclude that there simply is not sufficient reliable evidence to support a conviction. In light of these realities, Amici ask this Court to grant Echols' motion for a new trial. To hold otherwise will be to stamp with this Court's approval an unthinkable tragedy: the wrongful conviction and execution of Damien Echols.

- I. DUE TO THE POTENT NATURE OF CONFESSION EVIDENCE, THE MISSELLEY CONFESSION STRONGLY INFLUENCED THE JURY'S VERDICT, EVEN THOUGH IT WAS NOT ADMITTED AT TRIAL.

Like any American jury, Damien Echols' jury was instructed to render a verdict based on the evidence introduced at trial. *See Turner v. Louisiana*, 379 U.S. 466, 472 (1965) (declaring that “[t]he requirement that a jury’s verdict must be based upon the evidence developed at the trial goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury”) (internal quotations omitted). Unlike most juries, however, Echols’ jury strayed from this constitutionally mandated principle by considering a piece of evidence that was never admitted at trial: the highly publicized confession of Echols’ co-defendant, Jessie Misskelley. (Add. 578-592; 593-600; 601-645)

This was no minor error. The Echols jury could hardly have allowed a more prejudicial piece of evidence into the jury room. As the United States Supreme Court has long understood, confessions wield an enormous degree of persuasive power over the minds of jurors. *See Hopt v. Utah*, 110 U.S. 574, 584-85 (1884) (recognizing that a “voluntary confession of guilt is among the most effectual proofs in the law”); *Miranda v. Arizona*, 384 U.S. 436, 466 (1966) (explaining that a confession is “the most compelling possible evidence of guilt”) (citing *Mapp v. Ohio*, 367 U.S. 643, 685 (1961) (Harlan, J., dissenting)); *Colorado v. Connelly*, 479 U.S. 157, 182 (1986) (citing E. Cleary, *McCormick on Evidence* 316 (2d ed. 1972)) (observing that “[t]rials of fact accord confessions such heavy weight in their determinations that the introduction of a confession makes the other aspects of a trial in court superfluous”). The Arkansas Supreme Court, too, has similarly recognized how uniquely persuasive confession

evidence can be. *See Sparkman v. State*, 373 Ark. 45, 51-52 (2008) (deeming a confession “probably the most probative and damaging evidence” that can be offered against a defendant and concluding that because confessions are so persuasive, the mere introduction of a confession is enough to determine the outcome of a jury’s verdict) (internal quotations omitted).

Psychological scholars also agree that confession evidence is “uniquely potent.” Saul M. Kassin and Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 L. & Hum. Behav. 469 (1997). In one particularly revealing study, researchers presented mock jurors with one of the following three types of evidence: (1) circumstantial evidence; (2) eyewitness testimony from either a stranger or an acquaintance; or (3) testimony that the accused had confessed to the police. Gerald R. Miller and F. Joseph Boster, *Three Images of the Trial: Their Implications for Psychological Research*, in Bruce Dennis Sales (ed.), *Psychology in the Legal Process* 19, 20-21 (1977). Those who heard the confession evidence were significantly more likely to find the defendant guilty than those who heard only the other types of evidence. *Id.* Confessions can be so prejudicial, in fact, that they can persuade jurors to convict despite the existence of significant exculpatory evidence, such as conflicting physical evidence, contradictory accounts of witnesses, and alibis. *See* Lisa E. Hasel & Saul M. Kassin, *On the Presumption of Evidentiary Independence: Can Confessions Corrupt Eyewitness Identifications?*, 20 Psychol. Sci. 122 (Jan. 2009). In this sense, a confession – even one contradicted by other evidence – can be “more

dispositive of a defendant's guilt than any other form of evidence.” Richard A. Leo, *Police Interrogation and Social Control*, 3 Soc. & Legal Stud. 93, 99 (1994).

These findings are borne out by the real-world experience of the Echols jury. Jessie Misskelley's confession was not admitted at Damien Echols' trial. Due to saturated media coverage, however, Jurors Four, Six, and Seven were familiar with the Misskelley confession prior to trial. (Add. 578-592; 593-600; 601-645; 646-649) The remaining jurors were educated about the confession when Detective Bryn Ridge testified at trial that “I didn't take this stick into evidence until the statement of Jessie Misskelley” – a reference that implied not only that Misskelley had given police a statement, but also that Misskelley knew enough about the murders to direct the police to specific pieces of evidence. (Ab. 57) Noting during sidebar that it would “certainly” be “prejudicial” if the contents of the statement were put before the jury (Ab. 58), the trial judge instructed jurors to disregard the Misskelley confession. (Ab. 58)

The damage, however, was done. As trial continued to unfold, that confession became the proverbial elephant in the courtroom, an unacknowledged but compelling piece of evidence that every juror knew existed and past which no juror could see. Despite the judge's instructions to the contrary, it was freely discussed during deliberations and even made its way onto a large chart depicting the pros and cons of Echols' case that jurors created to help themselves reach a verdict. (Add. 603, 606) Juror Number Four, who served as the foreman, has since provided firsthand insight into the confession's impact on the jury, telling petitioner's counsel that he found the judge's

instruction to ignore the confession “unreasonable.” (Add. 583) In his view, the jury simply could not ignore the fact that Damien Echols’ alleged co-perpetrator had given a confession, which he described as a “known event.” (Add. 584) This juror went on to state that the unadmitted confession became the “primary and deciding factor” in his decision to convict Echols. (*Id.*) He found the confession to be far more persuasive than the evidence that the State had actually introduced in court, which he considered “scanty” and “extremely circumstantial.” (*Id.*)

The experience of the Echols jury thus underscores the power of confession evidence. The Misskelley confession evidently seemed so unforgettably damning that the Echols jurors were unable to prevent themselves from considering it. *See Bruton v. United States*, 391 U.S. 123, 129 (1968) (noting that “the effect of...a nonadmissible declaration cannot be wiped from the brains of jurors” even when a judge explicitly instructs them to disregard it) (internal quotations omitted). Indeed, the confession’s persuasive power caused at least one juror to overlook the tenuous nature of the evidence that the State actually admitted at trial and return a judgment of conviction. The jury’s improper consideration of the disallowed confession, accordingly, profoundly prejudiced the outcome of the trial. *See Colorado v. Connelly*, 479 U.S. 157, 182 (1986) (observing that because confessions are so persuasive, “the real trial, for all practical purposes, occurs when the confession is obtained”). Even as the jurors followed this evidentiary Pied Piper, however, they were led farther and farther from the truth.

II. STANDARD POLICE INTERROGATION TACTICS HAVE BEEN SHOWN TO INDUCE FALSE CONFESSIONS, PARTICULARLY IN JUVENILES AND THE MENTALLY IMPAIRED.

Confessions exert such a strong persuasive pull over factfinders because most people believe that “one who is innocent will not imperil his safety or prejudice his interests by an untrue statement.” *Hopt v. Utah*, 110 U.S. 574, 585 (1884); *see also* Lisa E. Hasel and Saul M. Kassin, *On the Presumption of Evidentiary Independence: Can Confessions Corrupt Eyewitness Identifications?*, 20 Psychol. Sci. 122, 122 (Jan. 2009) (noting that “people reflexively trust confessions, as they do other statements against self-interest”). Once considered a near-universal truth, this view has been exposed as a myth in recent years. *See, e.g., Corley v. United States*, 129 S. Ct. 1558 (2009) (citing Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 907 (2004), for the proposition that “mounting empirical evidence” shows that “a frighteningly high percentage of people” falsely confess). To date, 242 individuals have been exonerated on the basis of DNA testing after having been convicted of crimes that they did not commit; approximately one-quarter of those individuals falsely confessed to the crimes in question.¹ *See* The Innocence Project,

¹ This statistic does not include false confessors who have been exonerated on the basis of non-DNA evidence or false confessors who have yet to be exonerated. To date, scholars have uncovered at least 250 false confessions made over the last twenty years, and there are likely a great many more individuals who have falsely confessed whose

<http://www.innocenceproject.org/understand/False-Confessions.php> (last checked Sept. 14, 2009). False confessions, however, are still poorly understood among the general populace. Many find it extraordinarily difficult to understand why an innocent person would ever confess to a crime. *See, e.g.,* Danielle E. Chojnacki et al., *An Empirical Basis for the Admission of Expert Testimony on False Confessions*, 40 Ariz. St. L. J. 1, 40 (2008). Thus, confession evidence retains its dangerously persuasive nature, despite the fact that some confessions are simply not worthy of a jury's reliance. *See* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891 (2004) (examining 125 proven false confessions in the United States and concluding that 81% of false confessors whose cases went to trial were wrongfully convicted).

False confessions generally occur as a result of a police interrogator's use of common and well-intended – but pressure-filled and psychologically coercive – interrogation techniques. *See* Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, L. & Hum. Behav. (2009) (available online at

stories are simply not known. *See* Richard A. Leo, *Police Interrogation and American Justice* 243 (2008). In a 2007 survey, law enforcement officers estimated that about 10% of all interrogations result in false confessions. Jessica R. Meyer & N. Dickon Reppucci, *Police Practices and Perceptions Regarding Juvenile Interrogation and Interrogative Suggestibility*, 25 Behav. Sci. & L. 757, 770 (2007).

http://www.springerlink.com/content/85vh322_j085784t0/fulltext.pdf). Most police departments follow a standardized set of interrogation procedures known as the Reid Technique, named after the firm that markets the procedures to police departments around the country. See Fred E. Inbau, John E. Reid, Joseph P. Buckley, & Brian C. Jayne, *Criminal Interrogation and Confessions* (4th ed. 2004). The Reid Technique can be extraordinarily effective in causing a suspect to produce self-incriminating information – perhaps too much so. Its psychological tricks and subtle coercion have been proven to cause not only the guilty, but also the innocent, to confess. See *Corley v. United States* 129 S. Ct. 1559, 1570 (2009) (noting that custodial interrogation has been shown to cause false confessions because “by its very nature, [it] isolates and pressures the individual”).

Under the Reid Technique, police interrogators begin by separating the suspect from his family and friends, often isolating the suspect in a small interrogation room specially designed to increase his anxiety and incentive to escape. See Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, L. & Hum. Behav. (2009) (available online at http://www.springerlink.com/content/85vh322_j085784t0/fulltext.pdf). In the first stage of the interrogation, the questioners deploy a series of tools intended to shake the suspect’s adherence to his claim of innocence. They repeatedly accuse the suspect of lying, refuse to listen to his claims of innocence, and exude unwavering confidence in his guilt. See Richard J. Ofshe and Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 Denv. U. L. Rev. 979, 990 (1997). Police interrogators also often inform a suspect that they possess

physical evidence implicating him – fingerprints on a murder weapon, for example, or the statement of an eyewitness – even if such evidence does not actually exist. *See id.* This stage continues until the suspect feels thoroughly hopeless and trapped.

After this is accomplished, police interrogators then switch to the second stage of interrogation by offering the suspect a way out of his predicament: confession. To communicate this message, they indicate that the benefits of confessing will outweigh the costs of continued resistance and denial. *See id.* Interrogators frequently minimize or rationalize the suspect's involvement in the crime, for instance, by telling the suspect that he must have been merely a witness or that the criminal act must have been unintentional, a mere accident, or an act of justifiable self-defense, all in an effort to make confessing seem less damaging. *See Drizin & Leo, 82 N.C. L. Rev. at 916.* They also assure the suspect that confessing is in his best interest and imply that he will receive leniency if he confesses. *See id.* Over the course of an hours-long interrogation, these tactics overwhelm many suspects and cause them to confess, whether guilty or not.

These police interrogation tactics pose a particular risk to youthful suspects. *See In re Gault, 387 U.S. 1, 52 (1967)* (“Authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of ‘confessions’ by children”). One well-known study that analyzed 125 proven false confessions in the United States found that 63% of false confessors were under the age of twenty-five and 32% were under eighteen. *See Drizin & Leo, 82 N.C. L. Rev. at 945.* By way of comparison, juveniles make up only 8% of individuals arrested for murder and 16% of individuals arrested for rape in the

United States. See H. Snyder, Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, *Juvenile Arrests 2004* (Dec. 2006). In another respected study of 340 exonerations that have taken place since 1989, researchers found that juveniles were three times as likely to falsely confess as adults; a full 42% of juvenile exonerees had falsely confessed, compared to only 13% of wrongfully convicted adults. S. R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. Crim. L. & Criminology 523-53 (2005). A third study revealed that juveniles between the ages of twelve and sixteen years old were far more likely to falsely confess than young adults between the ages of eighteen and twenty-six years. See A. D. Redlich & G. S. Goodman, *Taking Responsibility For an Act Not Committed: Influence of Age and Suggestibility*, 27 L. & Hum. Behav. 141 (2003). Astonishingly, a majority of the juvenile participants in that study complied with a request to sign a false confession without uttering a word of protest. See *id.*

Juveniles' particular susceptibility to false confessions can be largely attributed to the stage of psychological development in which they find themselves. See *Roper v. Simmons*, 543 U.S. 551 (2005) (finding it unconstitutional to execute juveniles because children under the age of 18 are "categorically" different from adults). The cognitive and social immaturity of children and adolescents makes them much more vulnerable than adults to police interrogation tactics. For example, youth frequently engage in impulsive decision-making that is focused more on short-term gain than on long-term risk. See Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, L. &

Hum. Behav. (2009) (available online at <http://www.springerlink.com/content/85vh322j085784t0/fulltext.pdf>). This type of short-sighted decision-making can lead juveniles to falsely confess in a naïve belief that police will stop questioning them and let them go home after they admit to wrongdoing. Similarly, juveniles also tend to exhibit high levels of suggestibility and obedience to authority. *See id.* These particular traits make them more likely to succumb to the pressures applied by adult interrogators and more willing to adopt and repeat their interrogators' theory of guilt, even though it may not be true. These facts about adolescent development ring so true that even the proponents of the Reid Technique have conceded that minors are at special risk for false confession. *See* Investigator Tips, John E. Reid & Associates, Inc., http://www.reid.com/educational_info/r_tips.html?serial=1080839438473936 (last checked Sept. 14, 2009) (calling for "extreme caution" when interrogating juveniles and "extreme diligence" when verifying the truth of a juvenile confession).

The problems of youthful immaturity and inexperience, of course, are compounded when the youth being interrogated also has cognitive or intellectual disabilities. *See Atkins v. Virginia*, 536 U.S. 304, 320 (2002) (finding unconstitutional the practice of executing people with mental retardation, in part because those individuals are particularly prone to make false confessions). In very general terms, people with mental impairments tend to rely on authority figures for solutions to problems, to want to please persons in authority, to seek out friends, to feign competence or knowledge, to exhibit a short attention span, to experience memory gaps, to lack impulse control, and to

accept blame for negative outcomes. See R. Perske, *Understanding Persons With Intellectual Disabilities in the Criminal Justice System: Indicators of Progress?*, 42 *Mental Retardation* 484 (2004). It is not difficult to understand why someone with a combination of these traits is likely to confess falsely. One certainly need not be mentally impaired, though, in order to be vulnerable to overbearing police interrogation techniques. It is enough simply to be young and scared.

III. EVEN WHILE THE MISSELLEY CONFESSION STRONGLY INFLUENCED THE JURY'S DECISION TO CONVICT, IT BEARS ALL THE HALLMARKS OF A FALSE CONFESSION.

When the Echols jurors improperly considered evidence of the unadmitted Misskelley confession – and, indeed, when they relied on it to convict Damien Echols notwithstanding the State's "scanty" and "highly circumstantial" case (Add. 584) – they entrusted both their verdict and Echols' life to a wholly unreliable piece of evidence. Seventeen-year-old Jessie Misskelley gave an inculpatory statement to police after several hours of interrogation on June 3, 1993. (Ab. 399, 400, 404, 4007, 413, 420) Both the circumstances under which he made the statement and the contents of the statement itself strongly indicate that his admission of guilt – in which he implicated not only himself but also Damien Echols and Jason Baldwin in three brutal murders – was simply not true.

As an initial matter, Misskelley's status as a mentally impaired juvenile rendered him particularly vulnerable to police interrogation tactics. Misskelley was only seventeen

years old when police interrogated him about his possible involvement in the three murders. At his own trial, further, expert psychological testimony established that Misskelley had been diagnosed as mentally retarded, as had his brother. (Ab. 20, 21) He tended to think like a six- or seven-year-old child (Ab. 21), and his psychological test scores revealed that his view and understanding of the world matched that of a five- to seven-year-old. (*Id.*) His academic skills in the areas of arithmetic and spelling had accordingly advanced only to the second- or third-grade level. (*Id.*) His ability to remember events – both in the long and short terms – was similarly limited. (*Id.*) Perhaps most tellingly, however, a psychologist found that Misskelley’s impairments were such that he “at times can’t tell the difference between fantasy and reality,” particularly when he was under stress. (*Id.*) In stressful circumstances, in fact, he would rapidly revert to daydreaming. (*Id.*) Despite these limitations, Misskelley – the mental equivalent of a six- or seven-year-old child – was taken from his friends and family and subjected alone to a full-blown police interrogation.

The ensuing interrogation would have been difficult for even the most mentally robust of adults to endure. While the average interrogation lasts only 1.6 hours, Richard A. Leo et al., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 L. & Hum. Behav. 381 (2007), Misskelley’s interrogation appears to have lasted over twelve hours. (Ab. 399, 400, 404, 407, 413, 420) He made his first inculpatory statements after four hours in police custody. (Ab. 426) This type of prolonged interrogation is strongly associated with false confessions; more than 80% of

those interrogations that produced proven false confessions lasted for at least four hours, and half of those interrogations lasted twelve hours or longer. Drizin & Leo, 82 N.C. L. Rev. at 948; *see also* J. P. Blair, *A Test of the Unusual False Confession Perspective*, 41 Crim. L. Bull. 127, 135 (2005) (classifying as coercive those interrogations lasting over six hours). This association is a matter of common sense. After hours of interrogation, stress and exhaustion will take their natural toll on any suspect. *See* Fred E. Inbau et al., *Criminal Interrogation and Confessions* 597 (advising against interrogations that last more than four hours).

During that lengthy interrogation, Misskelley's questioners used at least one technique that made it even more likely that the already vulnerable Misskelley would falsely confess.² The police began the interrogation by administering a polygraph

² Many false confessions are also the product of an interrogation tactic known as minimization. Minimization comes in many forms, but usually it occurs when the interrogator suggests that the crime is less serious than it appears, that the criminal act was morally or legally excusable, or that the suspect's role was peripheral. Minimization can have a coercive effect on suspects because an interrogator who makes minimizing statements implies that if the suspect confesses, he will receive lenient treatment. Because the interrogation of Jessie Misskelley was largely unrecorded and undocumented (Ab. 403, 408, 410, 414), it is impossible to know the full extent of the interrogation techniques that were used on Misskelley. Amici can only say with certainty that

examination to him over the course of an hour. *See Misskelley v. State*, 915 S.W.2d 702, 710-11 (Ark. 1996) (setting forth the facts of the polygraph examination). At the conclusion of the examination, they informed him that he had failed it. This was not true; as a polygraph expert later testified, he had actually passed the polygraph. Misskelley's interrogators had simply manufactured this incriminating "evidence" in an effort to frighten him.

While such deceptive tactics are generally lawful, *see Frazier v. Cupp*, 394 U.S. 731 (1969), an interrogator's use of deception can undermine the reliability of the confession that he seeks to produce. When individuals are fed misinformation, their perceptions of the world change in ways that render them profoundly vulnerable to outside influence and manipulation. *See* Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, L. & Hum. Behav. (2009) (available online at <http://www.springerlink.com/content/85vh322j085784t0/fulltext.pdf>) (noting that subjects who are presented with false information will substantially alter their

Misskelley's interrogators confronted him with false evidence of his guilt. Misskelley's confession, however, does portray him as playing only a minimal role in the murders – the role of a passive observer rather than that of an active participant – which may suggest that minimization was used to induce his confession.

beliefs, their behavior toward other people, and even their memories of observed and experienced events in order to account for the false information). In the specific context of an interrogation, police use false evidence in order to alter a suspect's perception of his ability to convince the authorities of his innocence. This tactic, however, can entrap both the guilty and the innocent; in particular, it can lead some innocent suspects to eventually abandon all hope of convincing their interrogators that they were uninvolved in the crimes being investigated. Once all such hope is lost, a suspect may simply decide to falsely confess in an effort to salvage as much of his future as possible.

The presentation of false polygraph results in particular has been linked to numerous proven false confessions, including several from juvenile suspects. In 1998, for example, fourteen-year-old Michael Crowe falsely confessed to murdering his sister after he was told by police during interrogation that he had failed a lie detector test similar to the polygraph known as a voice stress analysis test. Michael, who was later proven innocent, came to believe that he had developed a split personality and that "bad Michael" had committed the murder. In a letter that his interrogators told him to write to his dead sister, he explained, "I never ment [sic] to hurt you and the only way I know I did is because they told me I did." See Rob Warden & Steven A. Drizin (eds.), *True Stories of False Confessions* 5-18 (2009). Similarly, eighteen-year-old Peter Reilly confessed to killing his mother after police told him that he failed a polygraph, even though he did not understand "if I did do it, why don't I remember it?" Reilly's conviction was later vacated by a judge who called his case a "grave injustice." See

Warden & Drizin (eds.), *True Stories of False Confessions* 47-70; *see also* Saul M. Kassin, *Confession Evidence: Commonsense Myths and Misconceptions*, 35 *Crim. Just. & Beh.* 1309, 1314 (2008) (citing, among others, the cases of Jeffrey Deskovic and Marcellus Bradford, both of whom were juveniles who falsely confessed after police confronted them with false polygraph evidence).

These false confessions occur because police officers frequently portray polygraph machines as infallible, and many suspects place their faith in the power of the polygraph to clear them of suspicion. When suspects are told that they have failed such an all-important test, they tend to become hopeless, give up, and confess. The use of false polygraph evidence is so dangerous, in fact, that the prestigious National Research Council has warned of the risk of polygraph-induced false confessions. Committee to Review the Scientific Evidence on the Polygraph, National Research Council, *The Polygraph and Lie Detection* 28 (2003); *see also* Kassin, 35 *Crim. Just. & Beh.* at 1314.

On a more general level, psychological research has also identified a clear relationship between the use of false evidence and false confessions. In one notable study, researchers accused college students typing on a keyboard of causing the computer to crash by pressing a key that they had been instructed to avoid – even though the students had not actually pressed the forbidden key. Some innocent subjects were confronted by a witness who falsely told them that she saw them hitting the particular key. The researchers found that those subjects who were presented with false evidence were almost twice as likely to sign a written confession, despite their actual innocence.

See S. M. Kassin & K. L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 Psychol. Sci. 125 (1996). Subsequent studies have found similar effects, even when subjects were told that confessing would result in adverse financial consequences. See, e.g., R. Horselenberg, H. Merckelbach, & S. Josephs, *Individual Differences and False Confessions: A Conceptual Replication of Kassin and Kiechel*, 9 Psychol. Crime & L. 1 (1996). The evidence is plain: innocent suspects who are confronted with false evidence of their own guilt, particularly false polygraph results, are more likely to confess, even when confessing carries with it serious consequences.

By using this tactic on the young and mentally impaired Misskelley during an extraordinarily prolonged interrogation, the West Memphis Police Department created a set of conditions that were ripe for false confession. Tragically, those conditions were fulfilled when Jessie Misskelley falsely confessed to three horrific murders. In so doing, he also falsely implicated his two young friends, Damien Echols and Jason Baldwin.

Like most false confessions, the Misskelley confession contains several indicators of its own untruth. Generally speaking, in order to assess the reliability of a confession, one must analyze whether the suspect's confession narrative matches the objectively knowable facts about the crime. See Drizin & Leo, 82 N.C. L. Rev. at 1003. A reliable confession will contain accurate information about the crime that could only have been known by the true perpetrator. See *id.* Optimally, such a confession should lead the

police to evidence that they did not previously know about, such as a hidden murder weapon.³

Misskelley's statements to police fail to meet this standard. His confession contains at least seven claims that simply do not match the physical evidence about how the crime occurred. One of the most vivid and shocking facts concerning the murders, for example, was that the three victims' hands and feet were hog-tied with their own black and white shoelaces (Ab. 17-18) – a gruesome detail that the real perpetrator would be hard pressed to forget. Jessie Misskelley, however, got this fact completely wrong in his confession. He claimed that the victims' hands were bound with brown rope and that they were otherwise unrestrained. (Ab. 414, 432, 434) One of the police interrogators, evidently puzzled by Misskelley's statement, even tried to telegraph the right answer to Misskelley during his interrogation by asking him whether the victims' "hands [were] tied in a fashion that they couldn't have run, you tell me?" The hint was lost on Misskelley, however, who stuck to his erroneous story: "Only their hands were tied; they couldn't run off because they were beat up so bad they could hardly move." (Ab. 430)

³ There is absolutely no evidence that the "stick" about which Detective Bryn Ridge testified was involved in any crime or, indeed, that it ever was anything other than one of many ordinary sticks located at the wooded crime scene.

The only logical explanation for his inaccuracy is that he simply did not know how the boys were actually tied, because he was not involved in the crime.

Similarly, Misskelley was totally unable to pinpoint the time of the crimes. State experts determined that the killings occurred between 6:30 PM on May 5 and the early morning of May 6, 1993. (Ab. 425) In contrast, Misskelley told police that the murders occurred on the morning of May 5. He gave a detailed and utterly false description of a scene in which he, Damien Echols, and Jason Baldwin accosted the three victims while “they’s going to catch their bus and stuff, and they’s on their bikes” and murdered them in time for Misskelley to be home by noon. (Ab. 428, 429) Understandably, the detectives – who knew that the three victims were in school on the morning of May 5 (Ab. 425) – were “shocked” when Misskelley gave this inaccurate timeline, but they did not challenge his account for fear that he would “stop talking.” (*Id.*)

After Misskelley finished telling police this story shortly after 3:00 PM, the police attempted to obtain a warrant based on his recorded statement. (Ab. 17) The issuing magistrate, however, told them the obvious: the timeline in Misskelley’s story was not believable. (*Id.*) The police returned to Misskelley’s interrogation room and began the process of revising Misskelley’s story to reflect a more accurate timeline. At 5:00 PM, they turned the tape recorder back on, but Misskelley still could not get the timeline right; this time, he claimed that the killings began between 5:00 and 6:00 PM. (Ab. 432) Doubtlessly frustrated, the police told him (falsely) that he had previously said that the killings took place between 7:00 and 8:00 PM, at which point Misskelley finally adopted

this statement. (Ab. 409) Left to his own devices, however, Misskelley was unable to name even the time of day that the killings occurred, let alone the specific hour.

Misskelley got many other significant facts wrong, too. He claimed, for instance, that the victims had skipped school on May 5, even though it could be proven that the boys were in class that day. (Ab. 409) He claimed that one victim was choked with a stick, but there was no forensic evidence of such an injury. (Ab. 89) He told the police that the victims were beat up “real bad” before their clothing was removed, but no rips or bloodstains were found on their clothing. (Ab. 430) He claimed that the victims had been sodomized, but the victim’s bodies bore no marks of rape. (Ab. 91) And he claimed that Jason Baldwin called him at noon to report that the murders had been concluded, but Baldwin was provably in school at that time. (Ab. 433) Under the weight of all these mistaken claims, the reliability of Jessie Misskelley’s confession crumbles. Plainly, his statement to police was not an accurate record of reality. Instead, his confession was the product of “adolescent fantasy, fright, [and] despair” – or, more accurately, the fantasy, fright and despair felt by someone with the mental capabilities of a small child. *See In re Gault*, 387 U.S. 1, 55 (1967).

Unfortunately, the jury never heard all this evidence of unreliability. If the Misskelley confession had been properly admitted into evidence, of course, the Constitution would have required the trial court to give Echols an opportunity to challenge it in open court. U.S. Const. Am. VI (“In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him”). In that event,

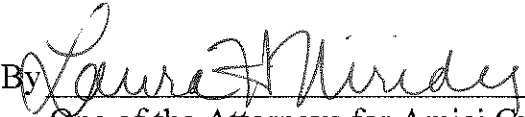
Echols would have been given a chance to cross-examine Jessie Misskelley, to contrast his story against the physical evidence, and to persuade the jury of the confession's falsity. *See Crawford v. Washington*, 541 U.S. 36, 61-62 (2004) (rejecting under the Confrontation Clause the notion of "allow[ing] a jury to hear evidence, untested by the adversary process"). Indeed, per the United States Supreme Court's ruling in *Bruton v. United States*, Misskelley's trial was severed from the Echols-Baldwin trial precisely in order to avoid a scenario in which Misskelley's confession was used against two codefendants who did not have the ability to cross-examine Misskelley. 391 U.S. 123 (1968).

Because the Misskelley confession was not introduced into evidence, however, Echols was never given an opportunity to rebut it. He was never permitted to challenge the interrogation techniques that police used on Misskelley, to highlight how juveniles are especially vulnerable to police interrogation, or to educate the jury about the ways in which Misskelley was repeatedly unable to describe the crime scene accurately. Instead, the jurors were only aware of the unchallenged confession. Their one-sided knowledge, in turn, led them to convict Damien Echols and sentence him to death based on a confession emblematic of the very type of unreliable, untested evidence upon which capital convictions should never be founded.

Conclusion

As the United States Supreme Court has instructed, “[t]he government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds.” *Bruton*, 391 U.S. at 129 (internal citations omitted). The undeniable truth of this statement is amplified a hundredfold in a capital case, such as that of Damien Echols. Echols’ conviction and death sentence have been gravely tainted by the jury’s improper consideration of the extraordinarily prejudicial – and extraordinarily unreliable – confession of Jessie Misskelley. If any reasonable juror were confronted today with evidence of the Misskelley confession’s unreliability, along with petitioner’s DNA evidence that excludes Echols as a source, he would surely conclude that Echols is not guilty. Accordingly, Amici hereby request this Court to grant petitioner Damien Echols a new trial. Failure to do so could bring about a terrible injustice: the execution of an innocent man.

RESPECTFULLY SUBMITTED this 17th day of September, 2009.

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I, Deborah R. Sallings, certify that on September 17, 2009, a true and accurate copy of the foregoing Brief of Amici Curiae was served on the other parties by causing a copy to be placed in the Attorney General's box in the Supreme Court Clerk's Office for this purpose and by placing a copy in the United States mail, first class postage pre-paid and addressed to the following:

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