

STATE OF WISCONSIN
IN SUPREME COURT
Case No. 2018AP2220-CR

STATE OF WISCONSIN

Plaintiff-Appellant-Petitioner,

v.

ADAM W. VICE,

Defendant-Respondent.

On Review of a Decision of the Court of Appeals, District III,
Affirming an Order Suppressing Evidence, Entered in the Circuit
Court for Washburn County, the Hon. John P. Anderson, Presiding

**BRIEF OF *AMICI CURIAE* THE INNOCENCE PROJECT,
INC., THE CENTER ON WRONGFUL CONVICTIONS OF
YOUTH, AND THE WISCONSIN INNOCENCE PROJECT**

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ARGUMENT

I. Certain Interrogation Practices Place Innocent Suspects at Risk of False Confession and, Consequently, Wrongful Conviction.

False confessions are a leading cause of wrongful convictions, accounting for nearly one-third of all known DNA exonerations, *see* INNOCENCE PROJECT, *DNA Exonerations in the United States* <<https://www.innocenceproject.org/dna-exonerations-in-the-united-states/>> (accessed Nov. 19, 2020), and approximately twelve percent of all known exonerations nationwide, *see* NATIONAL REGISTRY OF EXONERATIONS, *Exoneration Detail List* <https://www.law.umich.edu/special/exoneration/Pages/detail_list.aspx> (accessed Nov. 19, 2020).¹

A robust canon of scientific research has identified the psychological principles that create the risk of false confession. These risk factors are categorized broadly into “dispositional” characteristics of the confessor, and “situational” circumstances of the interrogation itself, such as police conduct and the environment in which the interrogation occurred. *See* Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 *LAW & HUM. BEHAV.* 3 (2009). In this case, the interrogating officers’ tactics involved two “situational” risk factors: the “false-evidence ploy” and “minimization.”² Amici will focus primarily on the false-evidence ploy.

¹ The Innocence Project tracks only cases in which DNA testing was central to the exoneration, while the National Registry of Exonerations maintains data of all known exonerations, regardless of the type of exculpatory evidence that led to the exoneration.

² “[D]esigned to provide the suspect with moral justification and face-saving excuses for having committed the crime in question[,]” minimization

False-evidence ploys have been used in the majority of known false confession cases. Kassir et al., *Risk Factors and Recommendations*, at 12. The tactic exacerbates the stress of the interrogators' accusations by misleading suspects about evidence against them, for example, by fabricating a positive eyewitness identification. *Id.* at 28. After learning of the (false) evidence, many suspects feel "trapped" based on the perceived "inevitability of evidence against them" and, consequently, view compliance with officers' suggestions and admission of guilt as the only option, risking a "coerced-compliant" false confession. *Id.* For other suspects, the false-evidence ploy produces "coerced-internalized" false confessions—incriminating admissions by innocent suspects who, persuaded by the interrogators' misrepresentation of the evidence, begin to wrongfully believe in their own guilt. *Id.* at 16. Experts regard the presentation of false or misleading evidence as a "controversial tactic," especially in light of the outsized role it has played in inducing innocent suspects to falsely confess. *Id.* at 12. Because of the inherent unreliability of polygraph testing, discussed below, presenting suspects with evidence that they "failed" a polygraph test—as if it were scientific fact—is a particularly "potent" false-evidence ploy. *Accord* Richard A. Leo, *Police Interrogations and American Justice*, FIRST HARVARD UNIVERSITY PRESS, 217 (2008).

In fact, nearly *twenty percent* of individuals who falsely confessed and were later exonerated by post-conviction DNA testing were administered a polygraph examination.³ In addition, amici are, collectively, aware of at least forty-four other known instances of innocent people that

tactics may involve an interrogator offering "sympathy and understanding; normaliz[ing] and minimiz[ing] the crime, ... and offer[ing] the suspect a choice of alternative explanations[.]" *See* Kassir, *Risk Factors and Recommendations*, at 10.

³ Data was obtained from internal records on file with the Innocence Project, Inc. This statistic is under-inclusive, as the Innocence Project is without access to specific details about the interrogation tactics used in most DNA-exoneration cases involving false confessions.

were given a polygraph examination and then falsely confessed. *See, e.g., Exoneration Detail List.*

By way of example, Frank Sterling falsely confessed to a murder after being told he failed a polygraph examination, which he volunteered to take, thinking it would clear his name. *See* Robert Kolker, *Why Do People Confess to Crimes they Didn't Commit?*, NEW YORK MAGAZINE, Oct 1, 2010. Sterling, who was twenty-eight years old at the time of his false confession, was wrongfully convicted and spent over seventeen years in prison until he was ultimately exonerated in 2010. *See* INNOCENCE PROJECT, Frank Sterling, <<https://innocenceproject.org/cases/frank-sterling/>> (accessed Nov. 19, 2020). The true perpetrator of the murder for which Sterling spent years wrongfully imprisoned, *passed* a polygraph examination, yet DNA evidence and an eventual confession ultimately demonstrated his guilt. *Id.* While Sterling was wrongfully incarcerated, this true perpetrator committed a second murder, this time of a four-year-old child. *Supra* Kolker. Tragically, this case is not an anomaly. *See DNA Exonerations in the United States* (noting that 48 additional crimes, including 25 murders, were committed by the true perpetrators of crimes for which innocent false confessors were wrongly convicted). False confessions thus present a distressingly high risk of injustice for the innocent confessor, the crime victim, and the local community.

II. Polygraph Testing has Inherent Flaws that Render Results Inconclusive and Unreliable; Confronting a Suspect with Results as Conclusive Evidence of Guilt is a Potent False-Evidence Ploy that Risks Involuntary, False Confessions.

Polygraph examinations are “intrinsically susceptible to producing erroneous results.” National Research Council, *The Polygraph and Lie Detection*, THE NATIONAL ACADEMICS PRESS, at 2, *available at* <https://doi.org/10.17226/10420> (2003). While a polygraph examiner asks the test subject a series of questions, the

polygraph instrument generates charts displaying a subject's physiological responses that are associated with the psychological states presumed to be caused by deception—elevated heart rate, blood pressure, breathing rate, and sweat levels. *Id.* at 1, 32, 70. Based on an examiner's subjective assessment of those charts, the examiner "infer[s] a psychological state, namely, whether a person is telling the truth or lying." *Id.* at 1.

The fundamental problem with polygraph testing is that, while "psychological states often associated with deception ... do tend to affect the physiological responses that the polygraph measures, *these same states can arise in the absence of deception*[,] ... [because] many other psychological and physiological factors (e.g., anxiety about being tested) also affect those responses." *Id.* at 2 (emphasis added). In other words, deception is not the only explanation for a test subject's change in heart rate, blood pressure, sweat levels, or breathing rate during a polygraph examination. *Id.* (noting the "ambiguity of the physiological measures used in the polygraph"). Accordingly, an innocent, truthful person experiencing negative stress, may produce a chart which "mimic[s] the physiological signs of deception." *Id.* at 74-75. Moreover, research has demonstrated that a stressor "can have profoundly different effects on physiological activation across individuals or circumstances." *Id.* at 82. Thus, "there is considerable lack of correspondence between the physiological data the polygraph provides and the underlying constructs that polygraph examiners believe them to measure." *Id.* at 83.

Furthermore, the polygraph test is administered and analyzed by an examiner—a human who is necessarily informed by personal prior experiences, knowledge, and implicit biases, which can impact the outcome of a polygraph test in two ways—"[b]y influencing the way examiners conduct their interviews and the questions they ask, and by influencing the conclusions they draw from the test results." Saul M. Kassin, Itiel E. Dror, & Jeff Kukucka, *The forensic*

confirmation bias: problems, perspectives, and proposed solutions, 2 J. of Appl. Res. in Mem. and Cogn. 42, 46 (2013). As a recent scientific review of polygraph examinations aptly explained, “[t]here is no objective lie detection device; ultimately, the examiner is the lie detector.” William G. Iacono & Gershon Ben-Shakhar, *Current Status of Forensic Lie Detection With the Comparison Question Technique: An Update of the 2003 National Academy of Sciences Report on Polygraph Testing*, 43 LAW & HUM. BEHAV. 86, 91 (2019). Indeed, this Court acknowledged this problem with polygraph testing decades ago. *State v. Dean*, 103 Wis. 2d 228, 237 (1981) (“[T]he result of the polygraph is dependent on the opinion of the examiner, and that opinion is drawn from a process which is almost completely in the control of the examiner”). An officer with knowledge of the crime under investigation—like the examiner in this case—will necessarily administer and score the exam with “forensic confirmation bias;” meaning the officer’s “preexisting beliefs, expectations, motives, and situational context [will] influence the collection, perception, and interpretation of evidence[.]” Kassin, Dror, & Kukucka, at 45. Accordingly, “it is unclear the extent to which the results of the [polygraph] reflect psychophysiological detection as opposed to the influence of extraneous information and resulting examiner confirmation bias on the way the physiological data are collected and interpreted.” Iacono & Gershon Ben-Shakhar, at 91.

There are additional, alarming problems with polygraph testing that require more in-depth analyses than amici’s brief allows for. By way of example, the methodology used in most polygraph testing—the “Control Question test”⁴—rests upon various theoretical assumptions that have

⁴ The “Control Question Test (CQT)”, also known as the “comparison question test,” “compares [the subject’s physiological] responses to ‘relevant’ questions (e.g., ‘Did you shoot your wife?’), with those of ‘control’ questions.” *The Truth About Lie Detectors (aka Polygraph Tests)*, AMERICAN PSYCHOLOGICAL ASSOCIATION (Aug. 5, 2004), *available at* <https://www.apa.org/research/action/polygraph>. An innocent person, who would

not been empirically proven, and which are placed into doubt by some scientific studies. National Research Council, at 80-81; 287 (explaining a study that “call[s] into question assumptions about cardiovascular signals of arousal”). Additionally, studies indicate that marginalized populations will have “heightened cardiovascular threat responses in situations in which negative stereotypes ... are likely to exist[,]” which may impact polygraph results among such populations. *Id.* at 88-89.

Because of the inherent ambiguity and subjectivity of modern polygraph testing, a polygraph examiner cannot conclude with scientific certainty that a test subject is in fact deceitful. *See, e.g.,* Iacono & Gershon Ben-Shakhar, at 91 (warning that polygraph “results should be treated with great caution”). Thus, when interrogators inform a suspect that the polygraph result is irrefutable evidence of the suspect’s deception and guilt, they are using a false-evidence ploy—regardless of whether the examiner honestly believed that the subject “failed” the exam. Indeed, “numerous studies and case anecdotes support the fact that innocent people can be induced to confess by the *true or false* presentation of . . . [a] failed polygraph[.]” Kassin, Dror, & Kukucka, at 48 (emphasis added).

III. This Court Should Adopt a Rule that Protects Against Wrongful Convictions Produced by Interrogations that Involve Misleading a Suspect About Polygraph Results.

To “protect the integrity” of criminal trials, this Court has precluded the admission of polygraph test results. *See Dean*, 103 Wis. 2d at 279. This Court has also acknowledged that an interrogator’s mere reference to a polygraph examination during a post-polygraph interrogation is an “important inquiry” in the totality-of-the-circumstances

truthfully deny the “relevant” questions, is presumed to generate a “[g]reater response to control questions” than relevant questions. *Id.*

voluntariness analysis. *State v. Davis*, 310 Wis. 2d 583, 607 (2008).

As Courts around the country are beginning to acknowledge, misrepresenting polygraph results during an interrogation is highly coercive and risks eliciting an involuntary, false confession. Significantly, one state Supreme Court has ruled that use of falsified polygraph results to elicit confessions renders subsequent statements involuntary *per se*. *State v. Matsumoto*, 145 Haw. 313, 326 (2019) (reasoning that “[e]xtensive scientific literature and numerous documented cases have demonstrated the coercive nature of falsified polygraph test results; they can change a suspect’s beliefs, pressure a suspect to confess, and even cause the suspect to believe they committed the crime when they did not”). Likewise, other courts have acknowledged that confronting a suspect with polygraph results injects a high degree of coercion into the interrogation. *See e.g., State v. Valero*, 153 Idaho 910, 914 (Ct. App. 2012) (finding a confession involuntary where “[o]n more than one occasion, the detective conveyed to [defendant] that, from the polygraph, there was no question what [defendant] had done and, in essence, that the polygraph was determinative of his guilt”); *United States v. Coriz*, No. CR 17-1105 JCH, 2018 WL 4222383, at *10 (D.N.M. Sept. 5, 2018) (suppressing a post-polygraph statement as involuntary, noting that “the use of the polygraph test added to the pressure of the interrogation” as the interrogator “repeatedly and misleadingly told [defendant] he failed the polygraph test”).

Relatedly, the Seventh Circuit found impermissible coercion when police falsely led a suspect to believe they were in possession of forensic evidence that objectively and conclusively established the suspect’s guilt. *Aleman v. Vill. of Hanover Park*, 662 F.3d 897, 906 (7th Cir. 2011). The *Aleman* Court reasoned that false presentation of evidence by an interrogator may “destroy the information required for a rational choice.” *Id.* Particularly, when interrogators’ misrepresentation of evidence “foreclose[s] any other conclusion” but that the suspect committed the offense, and the misrepresentation is such that a layperson would not be

able to challenge the evidence presented, the suspect's choice—and, potentially, perception of reality—may be “seriously distort[ed].” *Id.* (quoting *United States v. Rutledge*, 900 F.2d 1127, 1130–31 (7th Cir. 1990)). Thus, confronting suspects with failed polygraph results as if the suspect's guilt and deceit are “foregone conclusions” seriously risks an involuntary, false confession. *Id.*

In light of the inherent unreliability of polygraph examinations and the known instances of false confessions elicited from innocent suspects confronted with “failed” polygraph results, this Court should hold that misleading a suspect about polygraph results during interrogation—either by knowingly lying to the suspect or by convincing the suspect that the failed result is incontrovertible evidence of guilt—renders a confession involuntary. Amici contend that a finding of involuntariness must always follow when police mislead a suspect about polygraph results. *Accord Matsumoto*, 145 Haw. at 326. Alternatively, if this Court declines to adopt a *per se* rule, such use of polygraph results should at least be deemed a significant factor in the voluntariness analysis that heavily militates towards a finding that the statement was involuntarily provided. Without such guidance from this Court, lower courts are likely to discount the coercive nature of this interrogation tactic, and innocent Wisconsin citizens will be at an increased risk of false confession and wrongful conviction.

In this case, interrogators repeatedly informed Mr. Vice that he failed a polygraph test, suggesting throughout that the polygraph was an infallible machine that *proved* he was lying when he denied committing the sexual assault at issue, *and* that he necessarily remembered the assault, despite his insistence that he had no memory of it. When first informed that he failed the polygraph, Mr. Vice offered to take the test again, and sought clarification from the officers about whether or not it was possible something was “wrong” or that he “somehow” “blacked out” and didn't remember the crime. R.4:19. Detective Lambeseder responded, “no,” and

claimed that Mr. Vice must have remembered committing the offense, “otherwise you wouldn’t react the way you did on the exam[.]” (R.5:1-4, 8:24-25).

Tellingly, Mr. Vice was clear during the interrogation that he (wrongly) believed the polygraph result was scientific, objective, and necessarily accurate. *See* (R.13:8-9) (saying “I’ll admit that I must have did it *because obviously the test says that I did it*, but I don’t physically remember”) (emphasis added).

The officers stressed that the polygraph proved Mr. Vice’s guilt and deceit *eight times* before Mr. Vice ever uttered an inculpatory word. (R.1-10). After the initial, vague admission from Mr. Vice, the officers expressed, *an additional eight times* that, because of the polygraph, they knew he lied, before Mr. Vice stated, “I must have done it,” and then answered affirmatively when the officers asked him leading questions about the offense. (R.11–18).

It is evident from the record that, “not being a [polygraph or legal] expert, [Mr. Vice] could not contradict what was represented to him as settled”—that the polygraph proved, without a doubt, that he committed this crime and lied when he denied remembering it, thereby “destroy[ing] the information required for a rational choice.” *Aleman*, 662 F.3d at 906. Misleading Mr. Vice in this manner, “seriously distorted” his perception of his choices and, seemingly, of his own memory. *Id.* This tactic is precisely the sort of ploy that leaves suspects feeling “trapped” into compliance, and even has the potential to persuade an innocent suspect of their own guilt. *See, e.g.,* Frances E. Chapman, *Coerced Internalized False Confessions and Police Interrogations: The Power of Coercion*, 37 LAW & PSYCHOL. REV. 159, 175 (2013). This coercive tactic should render the confession involuntary, *per se*.

Alternatively, this tactic must militate heavily towards a finding that Mr. Vice’s confession was involuntary. A review of the totality-of-the-circumstances provides further

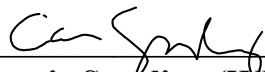
support for such a conclusion. As noted, throughout the interrogation, the officers employed “minimization” tactics—another “situational” risk factor for false confession, which, although presented in a calm and even reassuring manner, can have a powerfully manipulative and coercive effect. Mr. Vice was urged to confess to the assault so as to distinguish himself from the “guy [who] is going to do this to everybody,” (R.6:17-18), and to admit guilt so that the police could help him, (R.7), help the victim, (R.18, 25), and give him a chance to remain in the community, (R.10). “Research has shown that this tactic communicates by implication that leniency in punishment is forthcoming upon confession[.]” and may “lead innocent people who feel trapped to confess.” Kassin, *Risk Factors and Recommendations*, at 18.

CONCLUSION

Besides being unreliable, the use of polygraph results in false-evidence plays increase the risk of false confession and wrongful conviction. For these reasons, amici respectfully urge this Court to affirm the lower court’s suppression ruling, and hold that misleading suspects during interrogation about the polygraph evidence against them, as was done in this case, renders the confessions involuntary *per se*, or, at a minimum, the confession should be subjected to careful scrutiny—viewing the coercive use of the polygraph result as a significant factor in the analysis, heavily militating towards a finding of involuntariness.

Dated this 19th day of November, 2020.

Respectfully submitted,



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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 10 pages and 2,904 words.

Dated this 19th day of November, 2020.

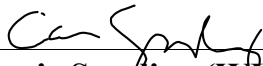


Carrie Sperling

**CERTIFICATION REGARDING ELECTRONIC
BRIEF PURSUANT TO SECTION 809.19(12)(f), STATS.**

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of section 809.19(12), Stats. I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all parties.

Dated this 19th day of November, 2020.



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