IN THE SUPREME COURT OF ARKANSAS

KIRK EDWARD OTIS

APPELLANT

VS. NO. CR-04-01323

STATE OF ARKANSAS

APPELLEE

APPEAL FROM THE CIRCUIT COURT OF
ARKANSAS COUNTY, ARKANSAS

HONORABLE DAVID G. HENRY, CIRCUIT JUDGE

AMICI CURIAE BRIEF ON BEHALF OF APPELLANT, KIRK EDWARD OTIS

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POINTS ON APPEAL

I. **This Court should overturn Kirk Otis's conviction because he did not knowingly and intelligently waive his *Miranda* rights, and because his confessions were not voluntary.**

II. **The inconsistencies in Kirk Otis's varied and confused statements to the police combined with the total lack of corroborating evidence strongly suggest that Kirk's confession was not only involuntary, but may well be false.**

III. **In assessing the voluntariness and reliability of Kirk's statements, this Court should consider the failure of the police to fully record the custodial interrogation of Kirk Otis.**

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INTRODUCTION

The United States Supreme Court has long recognized that children and the mentally retarded are especially vulnerable to coercive police interrogation tactics. *See Haley v. Ohio*, 332 U.S. 596, 599 (1948) (recognizing a distinction between a fifteen-year-old and an adult and reasoning that "that which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens"); *In re Gault*, 387 U.S. 1, 52 (1967) (noting, in a case involving a fifteen-year-old, that "authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children"); *Atkins v. Virginia*, 536 U.S. 304, 306-07 (2002) (holding that executions of the mentally retarded violate the Eighth Amendment's prohibition on cruel and unusual punishment, in part because impairments in "reasoning, judgment, and control of ... impulses" may "jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants").

Although the Court has held that the voluntariness of juvenile confessions must be judged by the same "totality of the circumstances test" that applies to adults, *Fare v. Michael C.*, 442 U.S. 707, 725 (1979), the Court's admonition in *Gault* for courts to take "the greatest care" in scrutinizing juvenile confessions to ensure that these confessions are not "the product of ignorance of rights or of adolescent fantasy, fright or despair" is still the law of the land and the law in Arkansas. 387 U.S. at 55; *See Shelton v. State*, 699 S.W.2d 728, 732 (Ark. 1985). The same concerns require great care in analyzing confessions elicited from the mentally retarded.

Developments over the last fifteen years underscore the importance of close judicial scrutiny of confessions taken from juvenile and mentally retarded suspects. First, research suggests that when psychological interrogation techniques are applied to children and the

mentally retarded, the risk of false or involuntary confessions is magnified. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 944-45, 968-70 (2004) (finding that out of sample of 125 proven false confession cases, forty defendants were juveniles and at least twenty-eight defendants were mentally disabled). Second, numerous studies have shown that the mentally retarded and children under the age of fifteen are particularly vulnerable to police coercion and especially ill-equipped to understand both the meaning of their *Miranda* warnings and the consequences of waiver. *See, e.g.*, Morgan Cloud, et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. Chi. L. Rev. 495 (2002) (arguing that mentally retarded people do not understand *Miranda* warnings, nor do they understand the context in which interrogation occurs and the consequences of confessing).

These new understandings heighten the need for Arkansas courts to carefully scrutinize confessions taken from juveniles and the mentally retarded, not only to prevent violations of their constitutional rights, but also to safeguard against wrongful convictions.

After reviewing the trial record in Kirk Otis's case, The Center on Wrongful Convictions of Northwestern University School of Law ("CWC") has grave concerns about the reliability of Kirk's confessions. All of the factors that make children and the mentally retarded susceptible to police coercion are present in Kirk's case; the record offers a veritable recipe for a false confession. Kirk was questioned by several police officers over a period of days, with the bulk of the questioning occurring in late evening/early morning hours. Out of this interrogation emerged a convoluted series of confessions that contradicted each other, were not corroborated by independent evidence, did not contain any facts that the police did not already know, and failed to lead police to any new evidence.

In light of these concerns, the CWC urges this Court to overturn Kirk Otis's conviction on two independent grounds: 1) that he did not knowingly and intelligently waive his *Miranda* warnings; and 2) that his confessions were involuntary. The CWC also urges this Court to consider the police officers' failure to record the entire interrogation as a factor in its voluntariness inquiry. In this era of wrongful convictions, we urge this Court to join the growing number of jurisdictions around the country that are not only affirming the value of recording as a much-needed protection against involuntary and false confessions, but are also imposing some consequences where there is an inexcusable failure to record.

ARGUMENT

I. THIS COURT SHOULD OVERTURN KIRK OTIS'S CONVICTION BECAUSE HE DID NOT KNOWINGLY AND INTELLIGENTLY WAIVE HIS *MIRANDA* RIGHTS, AND BECAUSE HIS CONFESSIONS WERE NOT VOLUNTARY.

A. Under the totality of the circumstances, Kirk Otis's inculpatory statements did not result from a knowing and intelligent waiver of his rights.

Since Kirk made inculpatory statements during a police interrogation without the presence of an attorney, the statements are presumed to be involuntary and "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Miranda v. Arizona*, 384 U.S. 436, 475 (1966); *Riggs v. State*, 3 S.W.3d 309, 310 (Ark. 1999) (explaining that Arkansas courts look at whether the statement was the result of "free and deliberate choice rather than coercion, intimidation, and deception"). In examining whether Kirk waived his *Miranda* rights knowingly and intelligently, the Court must examine the totality of the circumstances, including the "age, experience, education, background, and intelligence of the defendant." *Sanford v. State*, 962 S.W.2d 335, 342 (Ark.

1998).

The mere fact that Kirk signed a document waiving his rights is not sufficient to establish a knowing and voluntary waiver. As the United States Supreme Court has held, for a juvenile's signed waiver to be valid, one must assume "that a boy of fifteen, without aid of counsel, would have a full appreciation" of the waiver. *Haley*, 332 U.S. at 601. The Supreme Court explained its inability to "indulge" that assumption:

> We cannot give any weight to recitals which merely formalize constitutional requirements. Formulas of respect for constitutional safeguards cannot prevail over the facts of life which contradict them. They may not become a cloak for inquisitorial practices and make an empty form of the due process of law for which free men fought and died to obtain.

Id.

Thus, although his signature may appear on a *Miranda* rights waiver form, Kirk's youth, lack of education, mental retardation, inexperience with the police, and background caused him to unknowingly and involuntarily waive his constitutional rights to counsel and to remain silent.

1. Age

Kirk was fourteen years old at the time of his interrogation. Courts have consistently found that young adolescents have great difficulty in making an informed waiver of their *Miranda* rights. The United States Supreme Court, in describing the situation of a fourteen-year-old suspect in a murder investigation, wrote:

> He cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions. He would have no way of knowing what the consequences of his confession were without advice as to his rights -- from someone concerned with securing him those rights -- and without the aid of more mature judgment as to the steps he should take in the predicament in which he found himself.

Gallegos v. Colorado, 370 U.S. 49, 54 (1962); *See also Hardaway v. Young*, 302 F.3d 757, 764-65 (7th Cir. 2002) (stating that "[t]he difficulty a vulnerable child of 14 would have in making a critical decision about waiving his *Miranda* rights and voluntarily confessing cannot be understated").

That fourteen-year-olds are less capable of knowingly and intelligently waiving their *Miranda* rights than adults has also been proved through empirical research. As a class, juveniles younger than fifteen years old "failed to exhibit the minimum level of understanding required" to make their waivers "meaningful." Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: an Empirical Analysis*, 68 Cal. L. Rev. 1134, 1160-61 (1980). Professor Grisso's research showed that only 20.9 percent of juveniles under age fifteen understood all four of the standard *Miranda* warnings. Grisso, 68 Cal. L. Rev. at 1153. Juveniles with low I.Q.'s had even less understanding. Another study of youths aged fifteen to nineteen with I.Q.'s below 70 found that their comprehension of *Miranda* rights was poorer than that of ten- to twelve-year-olds of normal intelligence. Thomas Grisso, *What We Know about Youths' Capacities as Trial Defendants, in Youth on Trial: A Developmental Perspective on Juvenile Justice* 151-52 (Thomas. Grisso & Robert G.. Schwartz eds., 2000).

Adolescents are also less likely to waive their *Miranda* warnings knowingly and intelligently because they tend to focus more on the short-term consequences and less on the long-term impact of a decision or behavior. *See* Elizabeth S. Scott, et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 Law & Hum. Behav. 221, 231 (1995) ("In general, adolescents seem to discount the future more than adults and to weigh more heavily the short-term consequences of decisions -- both risks and benefits -- a response that in some

settings contributes to risky behavior.") (*citation omitted*). This focus on the immediate makes intuitive sense: adolescents have less experience with long-term consequences and they may be uncertain about what the future holds for them. But in the interrogation context, this foreshortened perspective can lead an adolescent to discount the gravity of giving up his rights.

Additionally, although Kirk was fourteen years old when he was interrogated by the police, Dr. Christopher Lamps testified that Kirk' functional age was in the range of a nine- to twelve-year-old. [Ab. 22]. Kirk's young age strongly suggests that he was incapable of understanding his *Miranda* warnings and the consequences of waiver.

2. Education and Intelligence

Kirk's low intelligence and lack of education also made it more difficult for him to understand *Miranda* warnings. In fact, an individual's intelligence may correlate more strongly than his age to understanding of the warnings. In a replica of Professor Grisso's *Miranda*-waiver study, mentally retarded defendants fared worse than juveniles. Solomon M. Fulero & Caroline Everington, *Assessing Competency to Waive Miranda Rights in Defendants with Mental Retardation*, 19 Law & Hum. Behav. 533, 533-43 (1995).

At the trial, Dr. Lamps offered unrebutted testimony that the *Miranda* form is intended for someone who can read and comprehend at a seventh-grade level. [Ab. 218]. Yet, he found that in July 2001, Kirk could not understand at a seventh-grade level. [Ab. 218]. In fact, while attending seventh grade for the second time in 2001, Kirk dropped out of school. [Ab. 85]. Kirk had also been held back in kindergarten. [Adm. 91].

In addition to his failure to complete the seventh grade, Kirk's intelligence level and history of mental retardation prevented him from fully understanding his *Miranda* rights.

Kirk's intelligence was tested twice -- once at ten and once at fifteen years of age. Both tests found Kirk to have a full scale I.Q. of either sixty-eight or sixty-nine, placing him in the "mildly mentally retarded" range. [Ab. 206]. Kirk's ability to anticipate the long-term consequences of his actions is limited by his mental retardation. [Ab. 208]. His low intelligence quotient suggests that the *Miranda* warnings were incomprehensible to Kirk.

Testimony offered by numerous witnesses (both prosecution and defense) reinforces Dr. Lamps' assertion that Kirk could not understand his *Miranda* rights. Officer Kenneth Whitmore testified that Kirk appeared "slow" when he first interrogated him. [Ab. 168]. Agent Whitmore stated that Kirk's mental inability was particularly noticeable when he administered Kirk his *Miranda* rights. According to Agent Whitmore, Kirk had great difficulty reading the *Miranda* form and required definitions for many of the words.

Joseph Cummings, Kirk's previous attorney, also testified about Kirk's problems with processing information. [Ab. 230]. He explained that Kirk's difficulty understanding information was exacerbated by the fact that although Kirk would nod along and agree with information as if he understood, he was completely unable to repeat the information back to the speaker if asked. [Ab. 230]. Therefore, because the police officers did not have Kirk explain the rights back to them, this trait may have led the police officers to believe that Kirk understood the warnings, when, in fact, he was incapable of doing so. [Ab. 173].

3. Lack of Special Care in Reading the Rights

In order to ensure that a juvenile understands his rights, police officers should have the juvenile explain back to them what the rights mean in their own words. *See, e.g.*, *Hardaway*, 302 F.3d at 767 (noting that Hardaway accurately explained his *Miranda* rights to the prosecuting attorney before making his admission). Even John E. Reid & Associates, one

of the leading trainers of law enforcement, suggests that greater care must be taken when Mirandizing the mentally retarded and juveniles:

> When a juvenile younger than fifteen, who has not had any prior experience with the police, is advised of his *Miranda* rights, the investigator should carefully discuss and talk about those rights with the subject (not just recite them) to make sure that he understands them. If it is apparent that the suspect does not understand his rights, no interrogation should be conducted at that time. The same is true for a person who is mentally or psychologically impaired.

John E. Reid & Associates, Inc., *False Confession Cases – The Issues*, Monthly Investigator's Tips (April 2004), *at* http://www.reid.com/educational_info/r_tips.html?serial=1080839438473936.

Here, the police officers did not ask Kirk to explain back to them what he thought the rights meant. [Ab. 173]. This failure to exercise the care necessary to ensure that Kirk understood his *Miranda* warnings resulted in an invalid waiver.

4. Experience

Courts occasionally find that prior criminal experience can allay the debilitating effects of age and mental retardation in understanding of *Miranda* rights. For example, in *Fare v. Michael C.*, the United States Supreme Court cited Michael C.'s record of previous offenses, his more than four years on probation, and his term in a youth corrections camp to support its conclusion that he understood his *Miranda* rights. 442 U.S. at 710. See also , *Wright v. State,* 335 Ark. 395, 404 (Ark. 1998) (fact that suspect with I.Q. of 81 had waived his rights only two weeks earlier meant he was no "stranger to the system"). Kirk Otis, however, had little previous experience with the criminal justice system. His only involvement with law enforcement had been in the juvenile justice system, and he had never actually been adjudicated delinquent for any act. There is no evidence that he had ever been

interrogated by the police [Ab. 98], nor was there evidence that he had ever waived his rights. [Ab. 128]. His prior contacts with the law did nothing to enhance his understanding of his *Miranda* rights.

5. Parental Presence

Kirk's mother, Teresa Racy, was present for part of his interrogation. [Ab. 260]. In theory, the presence of a parent should mitigate some of the coercion inherent in the interrogation process. A parent should also be able to enhance a child's understanding of his *Miranda* rights and assist the child in deciding whether to assert his rights or speak with the police.[1] Unfortunately, Kirk's mother offered him no such assistance during the interrogation. Teresa was fourteen when Kirk was born, and Kirk soon went to live with his grandmother. [Ab. 259]. Kirk's mother used drugs, including crack, and had a full scale I.Q. of 64. [Ab. 208, 219]. She testified that she did not understand the *Miranda* warnings, and that she believed Kirk was obligated to sign the *Miranda* waiver form. [Ab. 260] She also testified that she signed the *Miranda* form solely because Agent Newton told her to sign it. [Ab. 260]. If anything, her presence only made Kirk's "waiver" less knowing and intelligent, for she believed he had to sign the form, she did not understand the concept of *Miranda* rights, and as an authority figure for Kirk, she encouraged him to cooperate by speaking with the police.

6. Prior Abuse and Neglect

Further, Kirk's history of severe neglect and abuse as a child likely contributed to his

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[1] In practice, however, most parents do little to assist their children. Instead of advising their children not to talk (2%), many parents encourage their children to talk (16%), and the overwhelming majority of parents do absolutely nothing (71%). *See* Barbara Kaban & Ann E. Tobey, *When Police Question Children: Are Protections Adequate?*, J. Center of Children and the Courts 151, 151-58 (1999).

propensity to agree and cooperate with his interrogators, despite his lack of understanding of his *Miranda* rights. [Ab. 207]. Dr. Lamps testified that neglect and abuse tend to lower a person's self-esteem, making him more passive and, therefore, more vulnerable to follow along when an authority figure asks something of him. [Ab. 207].

In sum, each individual factor in the Arkansas totality of the circumstances test -- age, experience, education, intelligence, and background -- evidences that Kirk did not knowingly and intelligently waive his *Miranda* rights. Since the State has failed to meet its "heavy burden of proof" this Court should reverse Kirk's conviction.

B. This court should overturn Kirk Otis's conviction because, under the totality of the circumstances, his confession was involuntary.

As a fourteen-year-old mentally retarded juvenile, Kirk was no match for the seasoned police officers who questioned him repeatedly over several days. For a confession to be voluntary, the statement must be "the result of free and deliberate choice." *Riggs*, 3 S.W.3d at 310. Relevant factors in determining the voluntariness of a confession include "age, education, and the intelligence of the accused as well as the lack of advice as to his constitutional rights, the length of detention, the repeated and prolonged nature of questioning, and the use of mental or physical punishment." *Cox v. State*, 47 S.W.3d 244, 250 (Ark. 2001). When these factors are analyzed in Kirk's case it is apparent that his confession was not voluntary.

1. Age, education and intelligence

Arkansas courts have long recognized the particular vulnerability of children to coercion from interrogators and have taken a child's age and life experience into account when determining the voluntariness of a confession. *See, e.g.*, *Shelton*, 699 S.W.2d 728, 732

(Ark. 1985) (finding that a juvenile's age "heavily influence[d]" the court's decision to suppress his confession on the basis of being involuntary); *Little v. State*, 554 S.W.2d 312, 318 (Ark. 1977) (noting that age is an important consideration in determining the voluntariness of a statement). Education and intelligence function similarly to age, and courts have consistently held that a child's mental ability – and likewise evidence of mental retardation – are factors to be considered in analyzing whether a child's confession was voluntary or the product of coercion. *Wright*, 335 Ark. at 403-04.

In fact, research has shown that age and intelligence correlate to the voluntariness of a confession in similar ways. Juveniles' low social status vis-à-vis their adult interrogators, societal expectations that they respect authority, and their naiveté in believing that police officers would not deceive them also may make them more likely to comply with the demands of their interrogators. *See* Barry C. Feld, *Competence, Culpability, and Punishment: Implications of* Atkins *for Executing and Sentencing Adolescents*, 32 Hofstra L. Rev. 463 (2003); *See also* Gerald Robin, *Juvenile Interrogation and Confessions*, 10 J. Pol. Sci. & Admin. 224, 225 (1982). Moreover, lack of mental development -- a trait present in all children, yet magnified in those who are mentally retarded -- gives children immature decision-making abilities. *See* Thomas Grisso & Laurence Steinberg et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents and Adults' Capacities as Trial Defendants*, 27 Law & Hum. Behav. 333, 353-56 (2003). When combined with a limited time perspective and emphasis on short-term benefits rather than long-term benefits, it becomes apparent that children are ill-suited to engage in the high stakes risk-benefit analysis that is called for in modern psychological interrogation. *See id*.

Children, especially young children, have been shown to be more suggestible than

adults. Gisli H. Gudjonsson, *The Psychology of Interrogations and Confessions: A Handbook* 381 (Graham Davies & Ray Bull eds., 2003) (summarizing two studies showing that younger children are more suggestible than older children and adults in terms of succumbing to leading questions and interrogative pressures). This can have disastrous consequences for juveniles in the interrogation setting. A recent study of 1,393 juveniles found that children under sixteen are far more likely than young adults to make choices reflecting a propensity to comply with adult authority figures, such as confessing to police rather than remaining silent. Thomas Grisso et al., *Juvenile's Competence to Stand Trial: A Comparison of Adolescents and Adults Capacities as Trial Defendants*, 25, 30, *at* http://www.jcpr.org/wpfiles/steinberg_juvenile.pdf. This conclusion reinforces earlier studies which found that youths between the ages of eleven and sixteen were prone to offer untrustworthy information when pressured and provided negative feedback by their interrogators. Gisli H. Gudjonsson & K.K. Singh, *Interrogative Suggestibility and Delinquent Boys, An Empirical Validation Study*, 5 Personality and Individual Differences 425-30 (1984).

Studies have also found that intelligence is negatively related to suggestibility – the lower a suspect's intelligence quotient, the more likely he will be to surrender to the will of an interrogator and give an involuntary or even false confession. *Id.* at 381-82 (citing numerous studies proving that "subjects with I.Q.'s well below average, such as those who are borderline or mentally handicapped, tend to be markedly more suggestible").

Kirk's youth and mental retardation, consequently, made him highly suggestible and therefore susceptible to rendering an involuntary confession during his prolonged interrogation.

2. Lack of advice as to his constitutional rights

Courts also must look at the "lack of advice as to [the suspect's] constitutional rights" as another factor in determining whether a confession was voluntary. *Cox*, 47 S.W.3d at 250. Kirk was never told that he did not have to accompany the officers to the police station when they arrived at his house [Ab. 3, 45], nor was he told that he was not required to speak with the police officers. Kirk was not read his *Miranda* rights until after he allegedly made an incriminating statement. [Adm. 27]. Kirk testified that he did not understand his rights when they were read to him. [Ab. 89]. Additionally, the record demonstrates that Kirk's mother failed to understand his rights, and was "just told I had to sign" the waiver form. [Ab. 260]. Even Agent Whitmore, when first questioned by defense counsel, testified that he did not believe Kirk understood his rights. [Ab. 260].

3. Length of detention, repeated and prolonged nature of questioning, and sleep deprivation

The length of Kirk's detention and interrogation also leads to the inference that his statements were involuntary. *See Cox*, 47 S.W.3d at 250. One study reported that seventy percent of interrogations lasted less than an hour; only eight percent lasted more than two hours. Richard A. Leo, *Inside the Interrogation Room*, 86 J. Crim. L. & Criminology 266, 279 (1996). A leading interrogation manual agrees that "rarely will a competent interrogator require more than approximately four hours to obtain a confession from an offender, even in cases of a very serious nature." Fred E. Inbau, et al., *Criminal Interrogation and Confessions* 212 (4th ed. 2001).

Kirk's interrogation, however, was much longer than most interrogations. On July 25, 2001, Kirk was picked up by the police in the early evening, sometime between 7:30 and

8:30 p.m. [Ab. 2, 37]. Kirk was taken to the police station, held in an office, and repeatedly questioned until approximately 2:30 a.m. [Ab. 176]. Thus, Kirk was detained on the first night for as long as seven hours. On the second night, Kirk was picked up at 9:00 p.m., questioned, and released at 2:30 a.m. [Adm. 29, 30]. During these detentions, Kirk was repeatedly and constantly questioned by the police.

Finally, it is well established that sleep deprivation increases suggestibility, particularly after negative feedback, and that the longer the sleep deprivation, the more suggestible people become. Gudjonsson, *The Psychology of Interrogations and Confessions*, at 389-90. On the night before police picked up Kirk for questioning, he had been up until 6:30 a.m. playing video games. [Ab. 87]. He was also suffering from a cold and had taken medication. [Ab. 87]. On both the first and the second night of his interrogations, police questioned him during the time frame that he would have normally been asleep.

Thus, the fact that police officers questioned Kirk repeatedly over two separate evenings and into the early morning hours, for a total of twelve and a half hours, supports the conclusion that Kirk's statements were involuntary.

4. Use of mental or physical punishment

When assessing whether police used "mental or physical punishment," *see Cox*, 47 S.W.3d at 250, the Court should keep in mind that the totality of the circumstances analysis is an attempt to determine whether the statement was "the result of free and deliberate choice rather than coercion, intimidation, and deception." *Pilcher v. State*, 136 S.W.3d 766, 768 (Ark. 2003). Because his interrogators only selectively recorded portions of his interrogation, it is difficult to discern the full extent of the coercion he endured. There is evidence, however, that Kirk was heavily influenced by the tactics of the police, resulting in

statements that were not the product of his free choice.

Kirk was isolated and physically constrained during his interrogation. The office where Kirk was questioned is very small, without enough room even to bring in an additional chair. The experience was so frightening that Kirk imagined there were bars on the windows of the office. [Ab. 88]. Agent Whitmore kept his hand on Kirk's arm during the interrogation and gripped his arm tight every time Kirk tried to move. [Ab. 88]. For much of the time that Kirk was detained, he was separated from his family. Finally, almost every witness who saw Kirk during his detention testified that Kirk seemed scared, confused, tired, and intimidated. [Ab. 182, 208, 225, 231, 256, 260].

As far as tactics are concerned, the record is filled with testimony from other suspects in this case that the police used aggressive tactics to try to get them to confess. [Ab. 233, 236, 237, 239]. If such tactics were used on other suspects, it is likely that they were used on Kirk.

The record also reveals that Officer Beall subjected Kirk to a polygraph test and showed him the results on a computer screen. [Ab. 66]. Beall testified that after the examination, he rebuffed Kirk's denials and told him that he believed Kirk was involved. [Ab. 66]. Police officers know that the results of polygraph tests are generally inadmissible in courts; it is highly unlikely that a mentally retarded juvenile like Kirk knew this. Moreover, vulnerable suspects may believe the tests are foolproof and leave them with no alternative but to confess. In Kirk's case, the results "proved" to Kirk that he must be lying about his innocence and this "proof" triggered another inculpatory statement.[2]

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[2] The use of polygraph results to induce confessions has been linked to several false confessions involving juveniles and the mentally retarded. For example, Michael Gayles, an eighteen-year-old mentally

Close scrutiny of the statements also suggests that police used "minimization tactics" to obtain Kirk's confession – tactics which are designed to lull a suspect into believing that the magnitude of his crime and the seriousness of the charges will be lessened if he confesses to an account of the crime that contains a legal or moral excuse. See Drizin & Leo, 82 N. C. L. Rev. at 911-17. Several of Kirk's statements contain language which seems to excuse or mitigate his guilt. For example, in his first, third, eighth and tenth statements, he claimed he was drunk (intoxication). [Adm. 27-31]. In his second and fourth statements, he claimed he was a witness who later shared some of the proceeds of the robbery (an accomplice after the fact), in his eighth statement he claimed that the hammer on the gun slid forward (accident), and in his seventh and tenth statements, Kirk purportedly said he shot the victim because the victim called him a "nigger" (provocation).[3] [Adm. 27-31]. Although it is impossible to know whether police officers suggested these excuses or if he came up with them himself -- since the interrogation was not recorded -- Kirk's age, mental retardation, and suggestibility make it unlikely that he would have been able to generate so many legal and moral excuses without help.

In sum, Kirk's youth, inexperience, and lack of education, combined with his inability to grasp his constitutional rights, the length of his detention, the repeated and prolonged

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retarded person, falsely confessed to murdering a little girl when told he had failed a polygraph. *See* Drizin & Leo, 82 N.C. L. Rev. at 971-73. In another highly publicized case, Michael Crowe, a highly intelligent fifteen-year-old, falsely confessed to killing his sister shortly after he was told that he had failed a Voice Stress Analyzer Test, a related "truth telling" device. Steven A. Drizin & Beth A. Colgan, *Tales From The Juvenile Confession Front, in Interrogations, Confessions, and Entrapment* 127-161 (G. Daniel Lassiter ed., 2004).

[3] In a case with striking similarities to Otis's case, Chicago police officers claimed that an eleven year old boy, with no prior history of violence, confessed to slitting his 83 year old white neighbor's throat because she called him a "nigger almost every day." Finding the boy's uncorroborated and unrecorded statements to be involuntary and possibly false, the Seventh Circuit affirmed the district court's decision vacating the boy's conviction. *A.M. v. Butler*, 360 F.3d 787, 794 n.6 (7th Cir. 2004).

nature of his questioning, and the mental coercion he endured, all attest to the involuntary nature of Kirk's statements. Accordingly, this Court should reverse Kirk's conviction.

II. THE INCONSISTENCIES IN KIRK OTIS'S VARIED AND CONFUSED STATEMENTS TO THE POLICE COMBINED WITH THE TOTAL LACK OF CORROBORATING EVIDENCE STRONGLY SUGGEST THAT KIRK'S CONFESSION WAS NOT ONLY INVOLUNTARY, BUT MAY WELL BE FALSE.

Young adolescents, especially those with developmental problems, are generally unable to withstand the pressure applied by adult interrogators. Subjecting these teenagers to interrogation not only increases the risk of an involuntary confession, but also increases the risk of a false confession. The Supreme Court was aware of this fact over half a century ago, when it stated that "authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children." *In re Gault*, 387 U.S. at 52. The *Gault* court cited specific cases in which juvenile confessions were found untrustworthy, including one in which two boys, ages thirteen and fifteen, confessed to a murder "with vivid detail and some inconsistencies." *Id.* at 53. The boys had been interrogated for protracted periods, and discrepancies appeared within their various statements and when the statements were compared to the objective evidence of the crime. *Id.* at 53-54.

Once again, the Supreme Court's earlier assertions have been reinforced with evidence. Recent studies suggest that juveniles may be at a higher risk than adults of falsely confessing when pressured by police. *See* Drizin & Leo, 82 N.C. L. Rev. at 944 (documenting forty proven false juvenile confessions, including five from the infamous "Central Park Jogger" case); Samuel R. Gross et al., *Exonerations in the United States: 1989 through 2003* (April 19, 2004), *available at* http://www.law.umich.edu/NewsAndInfo/exonerations-in-us.pdf (finding that 55% of all

false confessions studied were from defendants who were under eighteen, mentally disabled, or both).

The dangers of obtaining false confessions from juveniles have even been documented by the leading trainer of law enforcement in psychological interrogation techniques, John E. Reid & Associates. In a recent memo, Reid notes that juveniles "appear with some regularity in false confession cases" and urges graduates of its interrogation training to "exercise extreme caution and care" when interrogating juveniles and administering their *Miranda* rights. John E. Reid & Associates, Inc., *False Confession Cases – The Issues*, Monthly Investigator Tips, (April 2004), *at* http://www.reid.com/educational_info/r_tips.html?serial=1080839438473936.

Experts who study false confessions have constructed frameworks for analyzing the likely truth of a suspect's initial admission of guilt. One such framework, the "fit" standard, is utilized by law enforcement to verify an admission and involves comparing the details in a suspect's confession to the known facts of the crime. Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 Denv. U. L. Rev. 979, 991-92 (1979). If the confessor's post-admission narrative "fits" with the crime facts and is consistent with the physical evidence, the confessor likely possesses personal knowledge that only the true perpetrator would know. *Id.* Thus, "[t]he more verifiable information elicited from a suspect during the post-admission period and the better it fits with the crime facts, the more clearly the suspect demonstrates his responsibility for the crime." *Id.* at 992.

Dr. Saul Kassin, a psychology professor at Williams College and a recognized expert on false confessions, has developed a four-part inquiry in evaluating the truth of a

defendant's confession. Saul Kassin, *How to Evaluate a Defendant's Statement: A Four-Step Inquiry* (2003), *at* http://www.williams.edu/Psychology/Faculty/Kassin/files/confessions.checklist.howto.pdf. First, the more that a statement is "internally consistent," (i.e., unwavering from one telling to the next), the more likely that the statement is true. *Id.* Second, the more that a defendant's statement matches up with crime facts and accounts offered by others, the more likely that the confession is true. *Id.* Third, if the confession has generative value (i.e., it leads investigators to discover new evidence), the probability of the veracity of a confession increases. *Id.*[4] Finally, a confession is more likely to be true if it contains details of the crime only known to the actual perpetrator. *Id.*

Over the course of his detention from July 25 to July 30, Kirk made ten statements to the police; five were inculpatory.[5] An analysis of Kirk's statements under either the "fit" standard or the Kassin methodology leads to the conclusion that Kirk's confessions are highly unreliable. His admissions varied from one telling to the next, failed to match up with the crime facts and accounts offered by others, failed to lead investigators to discover any corroborating evidence at all, and failed to contain any details of the crime that were unknown to the police at the time of the investigation.

The drastic inconsistency between statements is the first warning sign that Kirk Otis falsely confessed. The statements were both inconsistent in that some admitted guilt while

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[4] Courts have long recognized the danger in relying on an uncorroborated confession in convicting a suspect of a crime. In *Escobedo v. Illinois*, the United States Supreme Court warned of the "inclination . . . to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources." 378 U.S. 478, 488-89 (1964) (*internal citation omitted*).

[5] For purposes of this analysis, *Amicus* rely on the details of the statements described in the main party brief at 2-4.

others claimed innocence, and also because the details in the inculpatory statements changed significantly between statements. The inculpatory statements ranged from Kirk claiming that he shot the victim because he was drunk, [Adm. 27] to asserting that he shot the victim and stole eighty dollars from his wallet because the victim called him a "nigger," [Adm. 29], and finally, to maintaining that the hammer of the gun slid forward by accident when he was pointing the gun at the victim. [Adm. 30]. Agent Whitmore admitted that there were a lot of discrepancies and that he found Kirk to be untruthful. [Ab. 176]. These internal inconsistencies suggest that Kirk's confession was likely false.

Kirk's statements also failed to match up to the crime facts and the testimony of others. Sara Murry, the victim's daughter, testified that she never heard her father use the term "nigger" and that he had too much respect for humans as a whole to use that word. [Ab. 194]. Similarly, Gary Moore testified that Kirk did not owe him eighty dollars and did not pay him eighty dollars in July 2001. [Ab. 223]. Additionally, in one confession Kirk stated that he carried the gun with which he shot the victim because he was supposed to go shooting with his father on that day. [Ab. 247]. However, Kirk's father did not even possess a gun, was at work during the time that Kirk stated they were supposed to shoot together, and denied ever having shot a gun with Kirk. [Ab. 247]. Kirk's father also denied spending forty dollars with Kirk at the store on Saturday, as Kirk had claimed in one of the statements. [Ab. 247]. Cedric Sims, who, according to one of Kirk's statements, had supplied Kirk with Wild Irish Rose on the day of the shooting, denied ever giving Kirk alcohol. [Ab. 235]. The details in Kirk's confession fail to match up with the testimony of others and the physical evidence in the case, seriously undermining the truth of Kirk's incriminating statements.

Moreover, Kirk's statements failed to lead to any new evidence, further reinforcing

the conclusion that Kirk confessed falsely. Officer McLemore led nine police officers in a search of places that Kirk claimed contained the murder weapon; the officers found nothing. [Ab. 188]. Officer Whitmore testified that none of the leads Kirk provided panned out to be true upon investigation by the police. [Ab. 177]. In fact, on the first night of his interrogation, Kirk himself led police on a search for the gun. [Ab. 178]. The search was futile. [Ab. 178].

Some of Kirk's statements are unclear as to whether they are inculpatory or exculpatory. For example, Kirk told Doug Manchester, an employee at the Arkansas County Juvenile Detention Center, that he told the polygrapher the truth, but Manchester was unsure if that meant Kirk claimed innocence or guilt. [Ab. 191]. The statements do not clarify this confusion, since Kirk denied involvement during the polygraph test, but confessed to the murder after the test was over. Finally, none of the incriminating statements made by Kirk contained verifiable details that were not available from a secondary source, such as the police.

Kirk Otis was convicted solely on the basis of varied, inconsistent, and uncorroborated statements he made over a period of five days in which he was exhausted confused, sad, and withdrawn. The factors for evaluating the truth of confessions point to the likelihood that Kirk's confession was false, and, therefore, to the strong possibility that Kirk was wrongfully convicted. [6]

[6] The fact that the authorities continued to send jailers to question Kirk after he had confessed and even tried to recruit a probation officer whom Kirk trusted, Fonda Sherm, to get Kirk to confess, speaks volumes about their lack of faith in the veracity of Kirk's statements. [Ab. 126, 192].

III. IN ASSESSING THE VOLUNTARINESS AND RELIABILITY OF KIRK'S STATEMENTS, THIS COURT SHOULD CONSIDER THE FAILURE OF THE POLICE TO FULLY RECORD THE CUSTODIAL INTERROGATION OF KIRK OTIS.

The failure to fully electronically record an interrogation raises serious doubts as to the voluntariness of any confession. Although Agent Whitmore could have recorded Kirk's interrogation in its entirety [Ab. 11], he and the other officers chose instead to selectively record only parts of Kirk's interrogation. Worse yet, the record is clear that the officers repeatedly turned off the tape recorder and then turned it in on again only after Kirk made changes in or additions to his story. Kirk's mother, Theresa Racy and her husband, Theodis Racy, both testified that when the tape was turned off the officers coached Kirk with the details. [Ab. 256, 257, 261]. By turning the tape recorder on and off, the police deprived the Court of the ability to make an accurate determination of the reliability and voluntariness of Kirk's confession. Under these circumstances, this failure to record should be accorded great weight in this Court's *de novo* review of the voluntariness of Kirk's confession.

In its voluntariness jurisprudence, the United States Supreme Court has instructed federal and state courts to assess voluntariness by evaluating police interrogation methods and their effect on a particular suspect, and by looking at the totality of the circumstances. Because most interrogations are not recorded, however, judges must rely on credibility contests between police officers and the suspects for information about the "totality of the circumstances." In practice, this means that judges and juries almost always side with the police. Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. Crim. L. & Criminology 429, 495 (1998). The net result is that the

police have largely been able to define the totality of the circumstances by controlling the historical facts that are used by courts to determine if a confession is voluntary. This practice ensures that courts and juries will make mistakes in assessing the voluntariness of a confession. This is not because police officers are prone to lie, but because human memory is frail and biased. Yale Kamisar, *Limit Police Secrecy*, Nat'l L.J., June 9, 2003, at 43.

Much of the difficulty in assessing the voluntariness of Kirk's confession stems from the fact that it is impossible to reconstruct accurately the dynamics of what happened during Kirk's interrogation. This need for historical accuracy led Supreme Courts in Alaska and Minnesota to require that all custodial interrogations of suspects be recorded. *Stephan v. State*, 711 P.2d 1156, 1159-60 (Alaska 1985) (requiring electronic recording under the due process clause of state constitution when the interrogation occurs in a place of detention and recording is feasible, because "recording, in such circumstances, is now a reasonable and necessary safeguard, essential to the adequate protection of the accused's right to counsel, his right against self incrimination and, ultimately, his right to a fair trial"); *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994) (exercising its "supervisory power to insure the fair administration of justice" to require electronic recording of all questioning "where feasible" and without exception "when questioning occurs at a place of detention").

In the post-DNA age, and particularly in the past decade as the number of wrongful convictions based on false confessions has continued to climb, concerns about the voluntariness and reliability of confession evidence have led courts to revisit the need for a recording requirement. The New Jersey Supreme Court held that "[t]he proverbial 'time has arrived' for this Court to evaluate fully the protections that electronic recordation affords to both the State and to criminal defendants" and established a committee to study the use of

electronic recording of custodial interrogations. *State v. Cook*, 847 A.2d 530, 546-47 (N.J. 2003). Recently, the Massachusetts Supreme Court strongly encouraged the recording of custodial interrogations by stating that the absence of a video recording will be given great weight in determining voluntariness and holding that "the admission in evidence of any confession or statement of the defendant that is the product of an unrecorded custodial interrogation, or an unrecorded interrogation conducted at a place of detention, will entitle the defendant, on request, to a jury instruction. . . ." *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 518 (Mass. 2004). The Wisconsin Supreme Court recently accepted a juvenile confession case from an appellate court which stated that "some suggest that the 'totality of the circumstances' analysis works best when it is based on a videotape of the interrogation" and that it is necessary for the courts to "take appropriate action so that the youth of our state are protected from confessing to crimes they did not commit." *In re C.J.*, 674 N.W.2d 607, 616 (Wis. App. 2003), *review granted*, *State v. Jerrell*, 679 N.W.2d 544 (Wis. 2004).

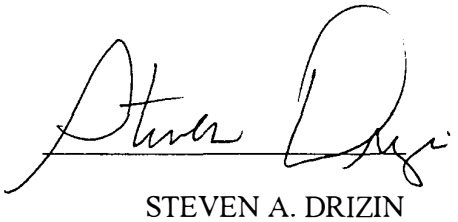
The Arkansas judicial system already requires recording of depositions, motion hearings, and trials. Custodial interrogations are at least as important as these proceedings, given that the outcome of a case is usually sealed once police obtain a confession. *Cf.*, *United States v. Wade*, 388 U.S. 218, 224 (1967) (stating that "today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality"). Whether it be by asking the Arkansas Supreme Court to require a jury instruction in cases where there is an unexcused failure to record, or simply by holding that the failure to record is an important factor in assessing the voluntariness of a confession, the time has come for Arkansas to address the need for electronic recording of interrogations.

CONCLUSION

For the reasons stated herein, this Court should overturn Kirk Otis' conviction because he did not make a knowing and intelligent waiver of his *Miranda* rights, and because his confession was involuntary.

DATED THIS 17TH DAY OF FEBRUARY, 2005.

RESPECTFULLY SUBMITTED,



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CERTIFICATE OF SERVICE AND MERIT

I, Steven A. Drizin, hereby certify that a true and correct copy of the foregoing *Amicus* Brief and Motion for Leave to File *Amicus* Brief have been served on:

The Office of the Attorney General
For the State of Arkansas
by depositing same in his depository slot at the
Office of the Arkansas Supreme Court Clerk

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on this 17th day of February, 2005. I further certify that there is merit to this appeal and it is not being filed for the purpose of delay.

Steven A. Drizin