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IN SUPREME COURT

**CLERK OF SUPREME COURT
OF WISCONSIN**

Appeal No. 2010AP001952

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

BRIAN K. AVERY,

Defendant-Appellant.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS,
DISTRICT I, REVERSING AN ORDER OF THE CIRCUIT
COURT FOR MILWAUKEE COUNTY,
HON. DENNIS R. CIMPL, PRESIDING

NON-PARTY BRIEF OF THE INNOCENCE NETWORK

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INTRODUCTION

Nineteen-year old Brian Avery was convicted of two robberies he did not commit. Both Avery and the State agree that newly discovered photogrammetric evidence indicates Avery is significantly taller than the man who actually committed both crimes. As the Court of Appeals correctly found, this evidence not only bolsters Avery's already-powerful alibi, which includes testimony and telephone records placing him far from both crime scenes, but also undermines the reliability of the evidence used to convict him.

The trial court refused to grant a new trial because, it found, the new evidence was outweighed by his supposed confession and two eyewitness identifications. But specific problems with the evidence against Avery critically undermine its reliability. Moreover, false confessions and eyewitness misidentifications occur with alarming regularity, often resulting in wrongful convictions.

The evidence against another Wisconsin defendant, Francis Hemauer, seemed compelling. But, as here, two key pieces of evidence at trial—Hemauer's confession and the victim's identification—were false. A teenage girl, who had been abducted, raped, and stabbed nearly to death in Milwaukee, identified Hemauer as her attacker. Hemauer admitted under questioning that he had probably raped her but could not remember because he sometimes blacked out from heavy drinking. Although Hemauer

subsequently disavowed his statements and called several alibi witnesses at trial, the jury convicted him. He served eight years before newly available testing exonerated him. Collins, *Improving Eyewitness Evidence Collection Procedures in Wisconsin*, 2003 Wis. L. Rev. 529, 534-35 (2003).

Hemauer's case is not an isolated incident. Nationally, hundreds of wrongfully convicted inmates have been exonerated. Many of these convictions, like Avery's, were based on both false confessions and mistaken eyewitnesses. See, e.g., *The Innocence Project*, at <http://www.innocenceproject.org>.

Post-conviction DNA analysis alone has led to nearly 300 recent exonerations, of which more than a quarter involved false confessions and a staggering three-quarters involved eyewitness misidentification. *Id.* at <http://www.innocenceproject.org/Content/351.php>. Indeed, false confessions and eyewitness misidentification are leading causes of wrongful convictions. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 Law & Hum. Behav. 3, 4 (Feb. 2010). Mock jury studies show that jurors "discount the possibility of false confessions as unthinkable, if not impossible." *Id.* Thus, approximately 80% of false confessors who went to trial were wrongfully convicted. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 Wis. L. Rev. 479, 485 (2006). Similarly, eyewitness experiments demonstrate that jurors

“believe eyewitnesses, even when they are wrong, and find [their] testimony so persuasive that it may well color their view of all of the other evidence in the case.” O’Toole & Shay, *Manson v. Brathwaite Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures*, 41 Val. U.L. Rev. 109, 134-35 (Fall 2006). Eyewitness confidence is a better predictor of conviction than eyewitness accuracy: in one study, eyewitnesses who wrongly identified an innocent suspect convinced 70% of mock jurors to convict. *Id.*

Innocent people falsely confess, and eyewitnesses mistakenly identify the innocent. In contrast, Avery and the State agree that photogrammetric evidence is reliable, and both parties’ expert analyses show that Avery is too tall to have committed the crimes of which he was convicted. The Court of Appeals correctly remanded for a new trial.

ARGUMENT

I. FALSE CONFESSIONS

“[A] confession is like no other evidence,” *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991), and has “profound impact on the jury, so much so that we may justifiably doubt its ability to put [the confession] out of mind even if told to do so.” *Bruton v. United States*, 391 U.S. 123, 139-40 (1968) (White, J., dissenting). Many cannot fathom how a person ever would confess to a crime he did not commit, especially when the confession is detailed. The trial court, for example, rejected Avery’s claim

that the details in his confession resulted from the police feeding him information. (Appx. at 183.) The court's conclusion was simply erroneous. False confessions, even detailed ones, happen with unnerving regularity and often result from information the police provide to the accused. Drizin & Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 982-83 (2004).

A. Several of the main causes of false confessions apply here.

Scholars have delved into the psychology of false confessions to determine precisely how and why innocent people admit to crimes they did not commit. Of the key factors that have emerged, several apply to Avery's case. He was a teenager held in custody for 15 hours (at times handcuffed to a wall) and who was fed lies during the interrogation (including being told his parents had implicated him in the crime).

Age. False confessions occur much more frequently with the young, as law enforcement authorities increasingly recognize. Tepfer et al., *Arresting Development: Convictions of Innocent Youth*, 62 Rutgers L. Rev. 887, 894 & n.40 (Summer 2010). Nearly two-thirds of the false confessors in one study were under 25. Drizin at 945-46. People under age 21 are more impressionable and less able to withstand pressure, rendering them especially prone to confess falsely—particularly when subjected to prolonged questioning, as Avery was. Tepfer at 891, 904-07; Leo, *Bringing Reliability Back In*, at 518-19. For instance, an 18-year-old

admitted to matricide after grueling questioning in which, he “underwent a chilling transformation from denial to confusion, self-doubt, conversion . . . and finally a full confession” Kassin & Gudjonsson, *True Crimes, False Confessions*, *Scientific Am. Mind* 24, 30 (May 2005). He was later exonerated. *Id.*

Isolation. A key interrogation tactic involves isolating the suspect to create a suffocating environment from which he desperately wants to escape. Kassin, *Psychology of Confessions*, *Am. Psychol.* 215, 221 (April 2005). The individual may be held in special interrogation rooms for protracted periods to amplify the anxiety of police questioning. *Id.* Denying the suspect food and sleep inhibits cognitive reasoning and makes the suspect more likely to confess. *Id.* at 221, 224.

These isolating tactics, however, break down the innocent as well as the guilty. By creating an intense desire to escape the anxiety of custodial interrogation, such tactics create an incentive for the accused to confess, even falsely. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 *Fordham Urban L.J.* 791, 818-19 n.158 (2006). This is especially true for youth. “One of the most common reasons cited by teenage false confessors is the belief that by confessing, they would be able to go home.” Drizin, at 969 (footnote omitted). For the 19-year-old Avery, who expressed this very desire, the incentive to confess was overwhelming. Interrogated for

hours, handcuffed at times to a wall, exhausted and hungry, Avery was primed to confess in the hope that he might return home. (75:72-73, 79-84, 87.)

Claims of Incriminating Evidence. Once the suspect has been isolated, police may then confront him with claims of incriminating evidence, Kassir, *Psychology of Confessions*, at 221, because one of the most critical motivations of those who confess is belief in the strength of the evidence against them. Kassir, *True Crimes*, at 29. Police employ interrogation tactics that “elicit the decision to confess from the guilty by leading them to believe that the evidence against them is overwhelming.” Ofshe & Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 *Denv. U. L. Rev.* 979, 985-86 (1997) (citing psychological studies).

This tactic is effective, but also ensnares the innocent, particularly when interrogators present false evidence. For this reason, false evidence “has been implicated in the vast majority of documented police-induced false confessions,” and is controversial even among interrogation trainers. Kassir, *Police-Induced Confessions*, at 12.

In one experiment, participants were wrongly blamed for crashing the experimenter’s computer by hitting a key they had been warned to avoid. Kassir, *Psychology of Confessions*, at 221. When a disguised researcher lied about observing the participant press the forbidden key, the

percentage of innocent participants who signed a false confession that they crashed the computer increased from 48% to 94%. *Id.* Confronted with strong (but false) evidence, nearly every participant confessed to something he had not done. *Id.* As study after study proves, innocent people voluntarily confess to crimes they did not commit when they are “likely to believe that any reasonable jury, viewing the [false] evidence, will be convinced of [their] guilt.” Gohara, at 818-19. As such, the innocent may conclude that the benefits of confessing outweigh the costs. *Id.*

In the notorious Central Park jogger case, five teenagers falsely confessed to rape when police claimed their fellow suspects had confessed and implicated the others. Gohara, at 792. Similarly, the police told Avery of strong evidence that did not exist: that his parents had viewed a videotape of the robbery and positively identified him. This extraordinary falsehood readily factored into Avery’s false confession, because Avery no longer had reason to think his truthful claims of innocence could prevail.

Length of interrogation. “[I]nterrogation-induced false confessions tend to be correlated with lengthy interrogations in which the innocent suspect’s resistance is worn down, coercive techniques are used, and the suspect is made to feel hopeless, regardless of his innocence.” Drizin, at 946. Felony interrogations take less than an hour on average, and fewer than 10% take more than two hours. Leo, *Inside the Interrogation Room*, 86 J. Crim. L. and Criminology 266, 279 (Winter 1996). False confessions,

however, typically involve much longer periods of interrogation. More than 80% of false confessors were interrogated for over six hours—a length one former investigator defined as “coercive.” Drizin, at 948; Kassin, *Police-Induced Confessions*, at 16. Avery is in this group.

Police questioned Katrina French, a Milwaukee woman, for eight hours until she falsely confessed to strangling a three-month-old to death. Doege, *Prosecution Backs Taping Interrogations*, Milwaukee J.-Sentinel (May 6, 2002) at <http://www.jsonline.com/story/index.aspx?id=41209>. Similarly, the fifteen hours of police custody and seven hours of interrogation Avery endured certainly contributed to his false confession.¹

B. Wisconsin recognizes the dangers of false confessions and has moved to reduce them.

In the years since Avery’s trial, Wisconsin has been at the forefront of addressing the causes of wrongful convictions. In 2005, this Court acknowledged the reality of false confessions and mandated videotaped interrogations of juveniles. *In re Jerrell C.J.*, 2005 WI 105, ¶¶ 55-59, 283 Wis. 2d 145, 699 N.W.2d 110.

Wisconsin’s legislature, recognizing the problem, extended *Jerrell* to adult felony interrogations. Wis. Stat. § 968.073. And in 2005, the legislature mandated that law enforcement agencies adopt policies

¹ Innocent individuals, believing the truth will become transparent to investigators, are more likely to waive their *Miranda* rights (as Avery did) and make themselves vulnerable to prolonged interrogation without an attorney—thereby increasing the likelihood of a false confession. Kassin & Norwick, *Why People Waive Their Miranda Rights: The Power of Innocence*, 28 L. & Human Behavior 211, 215-16 (April 2004).

“designed to reduce the potential for erroneous identifications by eyewitnesses in criminal cases.” Wis. Stat. § 175.50(2).

Similarly, in 2010, the Wisconsin Department of Justice developed procedures to reduce the risk of eyewitness identification error. *See Model Policy and Procedure for Eyewitness Identification*, <http://www.doj.state.wi.us/dles/tns/eyewitnesspublic.pdf>. Moreover, the Wisconsin Criminal Justice Study Commission, comprised of law enforcement, the attorney general’s office, and others, issued a position paper on false confessions, highlighting the factors listed above as facilitating false confessions. *Position Paper on False Confessions*, http://www.wcjsc.org/Position_Paper_on_False_Confessions.pdf.

In sum, since Avery’s conviction, Wisconsin has manifested an abiding concern with false confessions.

II. EYEWITNESS MISIDENTIFICATION

As with false confessions, eyewitness misidentification also plays a leading role in wrongful convictions. In fact, it is “widely known” to be “the leading cause of wrongful convictions across the country.” *State v. Henderson*, 27 A.3d 872, 878 (N.J. 2011). The identifications in Avery’s case bear many of the hallmarks of misidentifications; they were made under stressful conditions by witnesses whose memories were impaired by youth or the passage of time.

A. Several hallmarks of eyewitness misidentification were present in Avery’s case.

Decades of research reveal specific factors that contribute to eyewitness misidentification. In *Henderson*, the New Jersey Supreme Court comprehensively reviewed that research, considering 200 published scientific studies. *Id.* at 884. The unanimous Court, noting the “consistency and importance of the comprehensive scientific research” and the broad expert “consensus,” concluded that the state’s police and judicial procedures must be revised to better account for misidentification. *Id.* at 890, 916, 919-920. That same comprehensive research illustrates that numerous hallmarks of eyewitness misidentification apply to the identifications procured from Alcherie Simmons² and Mueen Hamdan, including four in particular:

Personal Needs and Biases. Personal needs and biases may result in eyewitness misidentification. “Witnesses tend to see what they *want* to see. Thus, the need and desire to produce a complete description of an assailant may foster perception that is more the product of an unconscious imagination than a keen eye.” Woocher, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 Stan. L. Rev. 969, 981 (May 1977).

² At trial, Simmons denied ever having identified Avery as a perpetrator. (See, e.g., 72:23, 25; 73:6, 19-20.) This *amicus* does not address that factual dispute, but rather assesses the reliability of the alleged identification if it occurred.

Police told Simmons that they thought she may have been involved in the robbery she witnessed, and that if she had any additional information, “now’s the time for her to tell [them].” (73:67.) Simmons understood this as a threat that she would be charged with a crime if she did not “go along with their program.” (73:12-13.) If Simmons identified Avery, it was under extremely stressful circumstances. Police interviewed Simmons 30 times (73:12), surrounded her house with dogs (73:17), and took her away in handcuffs (73:22-26). Even in less intimidating circumstances, youthful witnesses are substantially more likely to make false identifications. Tepfer, *Arresting Development*, at 909-10. Considering the mounting pressure on this 15-year-old girl, and her fear of being treated as a conspirator, the reliability of her alleged identification is highly suspect.

Passage of Time. It is well established that memory fades quickly over time. In one study, 85 convenience store clerks were asked to identify (from target-present or target-absent photo arrays) a previously encountered customer either two hours or 24 hours after the encounter. False identifications from target-absent photo arrays occurred far more frequently after 24 hours (52.4%) than after two (15%). Cutler, *A Sample of Witness, Crime, and Perpetrator Characteristics Affecting Eye-Witness Identification Accuracy*, 4 *Cardozo Pub. L. Pol’y & Ethics J.* 327, 336 (April 2006).

When Hamdan made his identification, almost three weeks had passed since the robbery. (71:27.) At trial, he acknowledged his fading memory, testifying that he found it difficult to describe the other suspects, as it “ha[d] been a while.” (71:35.)

Poor Observation Conditions. Poor or distracting observation conditions also reduce the reliability of a witness’s identification. Woocher, at 978.

When the robbers entered Atari Foods, they ordered Hamdan to the ground and struck him in the head. (71:9.) During the robbery, he remained on the floor, was shot in the neck, and eventually lost consciousness. (71:25, 26, 32.) That he did not have a clear look at the perpetrators is further underscored by another witness’s testimony that all of the robbers were wearing masks, and “you could not see their face[s].” (71:15-16.)

Unintentional Suggestion. Research shows that lineup administrators may “inadvertently communicate their knowledge about which lineup member is the suspect and which members are merely fillers to the eyewitness through various verbal and nonverbal means.” Wells & Olson, *Eyewitness Testimony*, 54 Annual Rev. of Psychology 277, 289 (2003).

According to Detective Kraft, Simmons identified Avery when Kraft showed her several photographs. (73:45-46.) Kraft, who knew that Avery was a suspect, administered the lineup. (73:50.) Similarly, detectives who

understood Avery to be a suspect administered the process by which Hamdan purported to identify Avery. (69:72.) Thus, the officers may have unintentionally cued the witnesses and influenced their identifications.

B. Wisconsin acknowledges the fallibility of eyewitness identifications.

Considering the factors that result in eyewitness misidentification, the Wisconsin Department of Justice, in its *Model Policy and Procedure for Eyewitness Identification*, provides six major recommendations “designed to ensure that the highest quality evidence possible is obtained from eyewitnesses.” *Id.* at 1, 3. The recommended safeguards include using a “double blind” procedure in which the lineup’s administrator is not aware of the suspect’s identity, to avoid giving unintentional cues. This safeguard, among others, was not in place at the time of Simmons’s and Hamdan’s identifications, further calling into question their reliability.

This Court has recognized the fallibility of eyewitness identification. In *State v. Dubose*, the Court concluded that “eyewitness testimony is often ‘hopelessly unreliable.’ The research strongly supports the conclusion that eyewitness misidentification is now the single greatest source of wrongful convictions in the United States, and responsible for more wrongful convictions than all other causes combined.” 2005 WI 126, ¶ 30, 285 Wis. 2d 143, 699 N.W.2d 582 (citations omitted); *see also State v. Shomberg*, 2006 WI 9, ¶ 43, 288 Wis. 2d 1, 709 N.W.2d 370 (acknowledging

importance of recent reforms and “growing appreciation for the difficulties inherent in eyewitness identification”).

Wisconsin courts have overturned convictions and granted new trials despite eyewitness identifications. For example, in *Garcia v. State*, this Court granted a new trial in the interest of justice, noting “[t]here is nothing in the record to in any way indicate [the eyewitness] was not telling the truth as she believed it to be,” but in light of the new evidence, “she could have been mistaken.” 73 Wis. 2d 651, 655, 245 N.W.2d 654 (1976); *see also State v. Hicks*, 202 Wis. 2d 150, 154, 172, 549 N.W.2d 435 (1996) (granting new trial despite victim’s identification of defendant). Thus, despite the best of intentions, eyewitnesses make mistakes that lead to the conviction of innocent individuals.

CONCLUSION

Given the factors contributing to both Avery’s false confession and the unreliability of the eyewitness identifications, this Court should affirm the Court of Appeals and remand for a new trial.

Dated this 6th day of June, 2012.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wisconsin Statutes § 809.19(8)(b) and (c)(2) for a brief produced with a proportional serif font. The length of this brief is 3,000 words.

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. § 809.19(12). 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 opposing parties.

Dated: June 6, 2012.

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