

No. 11-5987

IN THE
Supreme Court of the United States

JOHN D. FLOYD,

Petitioner,

v.

BURL CAIN, WARDEN,

Respondent.

On Petition for a Writ of Certiorari
To the Orleans Parish Criminal District Court
of Louisiana

BRIEF OF THE ARC OF THE UNITED STATES
AND THE ARC OF LOUISIANA AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*¹

The *amici curiae* are organizations devoted to serving people, like Petitioner, with mental retardation and other developmental disabilities. The Arc of the United States is a non-profit organization and the world's largest community based group for people with intellectual and developmental disabilities. With over 140,000 members and over 700 chapters nationwide, The Arc is devoted to "promot[ing] and protect[ing] the human rights of people with intellectual and developmental disabilities" when those rights are threatened.²

The Arc of Louisiana is a Louisiana non-profit corporation and is the Louisiana-affiliated State Chapter of The Arc of the United States, with 6,000 members in 22 local chapters across Louisiana dedicated to providing advocacy, human rights protection and direct services to persons in Louisiana with intellectual and related developmental disabilities and their families.³

Amici feel compelled to support certiorari here in light of the Louisiana Supreme Court's decision not to review the Louisiana trial court's conviction of Petitioner, where that conviction was based in large part on a supposedly voluntary confession. Petitioner here is a

¹ No counsel for any party has authored this brief in whole or in part, and no person other than amici and their counsel have made any monetary contribution intended to fund the preparation or submission of this brief. All counsel of record for all parties received timely notice of amici's intent to file this brief and all parties have consented to its filing.

² TheArc.org, Mission Statement, <http://www.thearc.org/NetCommunity/Page.aspx?pid=266>.

³ TheArcLA.org, Who We Are, <http://www.thearca.org/about-us/who-we-are/>.

man with an intellectual disability who seeks relief from a murder conviction. As Mr. Floyd's Petition for a Writ of Certiorari makes clear, there are substantial questions raised as to the reliability of his criminal trial, in which virtually the only evidence linking Mr. Floyd to the crime was his confession. Mr. Floyd, who has mental retardation, swears that confession to be false. As outlined further in *Amici's* Motion for Leave to File, *Amici* have a strong interest in ensuring that the challenges and vulnerabilities faced by persons with disabilities such as Petitioner – including the vulnerability to give false confessions under interrogation – do not lead to miscarriages of justice of the kind alleged here. Accordingly, *Amici* wish to bring to this Court's attention information vital for a fully informed analysis of the issues raised by the Petition in this case.

SUMMARY OF ARGUMENT

In *Atkins v. Virginia*, 536 U.S. 304 (2002), this Court ruled that the Eighth Amendment prohibits the imposition of the death penalty on mentally retarded offenders. This Court explained its decision by noting that individuals with mental retardation often possess “significant limitations in adaptive skills,” so that such individuals “have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.” *Id.* at 318. Indeed, the Court went on to note, explicitly, that these mental limitations create a grave risk that mentally retarded defendants may be particularly susceptible to false confessions: “Despite the heavy burden that the prosecution must shoulder in capital cases, we cannot ignore the fact that in recent years a disturbing number of inmates on death row have been exonerated. As two recent high-profile cases demonstrate,

these exonerations include mentally retarded persons who unwittingly confessed to crimes that they did not commit.” *Id.* at 320-21, n. 25 (citations omitted).

Unfortunately, a growing body of research – and a depressingly long list of cases involving wrongful convictions based on confessions – confirms the danger of false confessions identified in *Atkins*. It is now apparent that some groups of people are at a higher risk of falsely confessing than others, and perhaps no group is at a higher risk than people with mental retardation, such as Petitioner.⁴ Mr. Floyd contends that he was convicted for murder largely because he falsely confessed under intense pressure years ago to a crime he did not commit. There are many recent examples of cases in which false confessions led to wrongful connections.

- In 1984, a woman named Carolyn Hamm was sexually assaulted and hanged to death in Arlington County, Virginia. Police obtained

⁴ For the purposes of this brief, “persons with mental retardation” are those who fit the American Association on Intellectual and Developmental Disabilities’ definition of “intellectual disability,” which is generally characterized by significant limitations in intellectual functioning and adaptive behavior as expressed in conceptual, social and practical skills, originating before the age of 18. Robert L. Schalock, et al., *Intellectual Disability: Definition, Classification, and Systems of Supports* (AAIDD 2010); see AAIDD.org, Frequently Asked Questions, http://www.aaidd.org/intellectualdisabilitybook/content_2678.cfm?navID=282. Amici note some hesitation in using the term “mental retardation” throughout this brief, given that the term “intellectual disability” is currently preferred among persons in the relevant fields. See Robert L. Schalock et al., *The Renaming of “Mental Retardation:” Understanding the Change to the Term “Intellectual Disability,”* 45 *Intellectual & Developmental Disabilities* 116 (2007). Nevertheless, the term “mental retardation” is used because it mirrors the language found in many of the cases and resources cited by Amici.

three confessions from a man with mental retardation named David Vasquez, who was then convicted and sentenced to thirty-five years in prison. Five years into Mr. Vasquez's sentence, DNA evidence identified the true murderer: a serial killer who had been convicted of two other rape/murders. In light of this development, Vasquez was released from prison, an exonerated man.⁵

- In 1986, a Missouri man with mental retardation named John Lee Wilson confessed under interrogation to murder and arson and was sentenced to life in prison without the possibility of parole. The true culprit later came forward and provided details of the crime that only the perpetrator could have known. After spending eight years in prison, Mr. Wilson was eventually granted a full pardon by the Governor of Missouri.⁶
- In 2000, three people with mental retardation were convicted in Alabama of killing an infant that never existed. Victoria Banks and her friend Diane Tucker confessed to the death of Banks' infant and were sentenced to 15 years for manslaughter. Banks' husband – another person with mental retardation – was also charged and convicted. No physical evidence

⁵ 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, 480 (1998); ACLU.org, *Mentally Retarded Death Row Exonerations* (Dec. 9, 2003), <http://www.aclu.org/capital-punishment/mentally-retarded-death-row-exonerations>.

⁶ Leo & Ofshe, *supra*, at 480.

at trial showed that Banks ever had a child, and a 2001 medical examination showed that, due to a tubal ligation, Banks was physically incapable of becoming pregnant. The conviction of Banks' husband was then reversed due to actual innocence, but Banks and Tucker were not released until almost ten years after giving their false confessions.⁷

The cases noted above are merely examples from a much longer list of similar cases.⁸ Also, any such list is undoubtedly under-inclusive, as it only reflects those cases that have been uncovered and reported. In light of these cases, and the need to preserve the integrity of the criminal justice system, *Amici* present the most current research and evidence on the issue of confessions by those with mental retardation. *Amici* argue that overwhelming evidence establishes that people with mental retardation are greatly at risk of making false confessions during police interrogation. Furthermore, many documented false confessions share characteristics that collectively serve as warning signs of an increased likelihood that a

⁷ Samuel R. Gross, et al., *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 538 (2005); Juniper Russo Tarascio, *Wrongful Conviction: The Choctaw Three of Alabama*, (Feb. 19, 2009), http://www.associatedcontent.com/article/1475124/wrongful_conviction_the_choctaw_three.html?cat=17; Forjustice.org, Wrongly Convicted Database Record, <http://forejustice.org/db/fc/Banks--Victoria-Bell.html>.

⁸ See, e.g., Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 919-925 (2004); Leo & Ofshe, *supra*, at 480; Gross, et al., *supra*, at 539, 546; Saul M. Kassin, et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 Law Hum. Behav. 3, 21 (2010); ACLU.org, Mentally Retarded Death Row Exonerations (Dec. 9, 2003), <http://www.aclu.org/capital-punishment/mentally-retarded-death-row-exonerations>.

confession has been falsely given, and a significant number of those warning signs are present in the record here.

Given the special vulnerability of people with mental retardation to give false confessions, and the particular areas of concern surrounding Petitioner's confession in this case, *Amici* respectfully urge this Court that the presence of this important issue in Mr. Floyd's case provides a compelling reason to grant his Petition.

ARGUMENT

I. INDIVIDUALS WITH MENTAL RETARDATION ARE AT AN INCREASED RISK OF FALSELY CONFESSING DURING INTERROGATION.

Two related components must be examined to understand the high incidence of false confessions among people with mental retardation. *First*, the incidence rate itself must be examined to establish, objectively, that the problem exists in the first place. *Second*, the all-important "why?" must be answered by setting forth the explanations for the observed phenomenon that people with mental retardation are more at risk for confessing falsely – for behaving in a way that is exactly the opposite of how most people would behave when interrogated for a crime they did not commit. Below, *Amici* address both of these components.

A. Recent Empirical Data On Wrongful Convictions Demonstrates That Many Documented False Confessions Involve Individuals With Mental Retardation.

Before much research had been conducted on the issue, people could argue over whether individuals with mental retardation truly were more vulnerable to false confessions, or whether that was just an assumption – as logical an assumption as it might be. However, thanks to the work of a number of scholars and researchers, cold, hard data now exists on this subject, and it “seems beyond legitimate debate that mentally retarded suspects are likely to confess falsely . . . far more frequently than do suspects of average and above-average intelligence.”⁹

One of the most recent and comprehensive studies on this point examined all of the exonerations in the United States from 1989 to 2003.¹⁰ The authors reported that out of 340 exonerations, fifty-one exonerees (15%) “confessed to crimes they had not committed.”¹¹ The authors found that 80% of those false confessions were

⁹ Morgan Cloud, George B. Shepherd, Alison Nodvin Barkoff & Justin V. Shur, *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. Chi. L. Rev. 495, 503 (2002). Even before this wealth of research was available, “courts have long recognized that confessions by mentally retarded persons are somewhat suspect” Solomon M. Fulero & Caroline Everington, *Assessing Competency to Waive Miranda Rights in Defendants with Mental Retardation*, 19 Law & Hum. Behav., 533, 534 (1995) (citing *Ford v. State*, 21 So. 524, 525 (Miss. 1897), which threw out the confession of an individual described as “not bright” when the individual’s employer testified that “he is going to give you the answer you desire. If you want a ‘yes,’ he will give it to you; and if you want a ‘no,’ he will give you that.”). Indeed, this Court took note of this fact when it held that capital punishment for the individuals with mental retardation is unconstitutional because, *inter alia*, that group is particularly at risk “to the possibility of false confessions.” *Atkins*, 536 U.S. at 320-21, n.25.

¹⁰ Gross et al., *supra*, at 523-24 (defining “exoneration” as “an official act declaring a defendant not guilty of a crime for which he or she had previously been convicted.”).

¹¹ *Id.* at 544.

obtained in murder cases,¹² which is not surprising given that such cases are likely to garner the most public attention and create the most pressure on law enforcement for a conviction. The most shocking statistic, which is also the most relevant for the Petition, is that of the sixteen exonerees who had some form of mental retardation, *69% of them had falsely confessed to crimes they did not commit*, compared to only *11%* of the exonerees without mental retardation.¹³

This alarmingly high percentage of false confessions among people with mental retardation led the authors to conclude that “[f]alse confessions are heavily concentrated among the most vulnerable groups of innocent defendants.”¹⁴

These results buttressed those of another study that analyzed “the largest cohort of interrogation-induced false confession cases ever identified and studied in the research literature,” a pool consisting of 125 *proven* false confessions.¹⁵ The authors discovered a disturbing trend: at least twenty-eight of the proven false confessions (22%)

¹² *Id.* at 542, 544.

¹³ *Id.* at 545 (noting that another ten exonerees were identified to have a mental illness, and that 70% of them gave false confessions).

¹⁴ *Id.* Indeed, more than half of the false confessions examined came from suspects who were under eighteen, had some form of mental retardation, or both, *id.*, which is consistent with other studies that have concluded “much of what is true of juveniles is similarly true for persons with intellectual disabilities” when it comes to their ability (or inability) to resist falsely confessing during interrogation. Kassin, et al., *supra*, at 20; Fulero & Everington, *supra*, at 536 (“[J]uvenile populations have been found to display many of the same characteristics of increased suggestibility and susceptibility to coercion as persons with mental retardation . . .”).

¹⁵ Drizin & Leo, *supra*, at 891.

involved defendants with mental retardation,¹⁶ even though it has been estimated that such individuals comprise only 1-2% of the United States population.¹⁷

This increased tendency to confess falsely among people with mental retardation is troubling because “a confession is universally treated as damning and compelling evidence of guilt, [and so] it is likely to dominate all other case evidence and lead a trier of fact to convict the defendant.”¹⁸ This likely explains why two separate studies both concluded that over 70% of all false confessors who went to trial were convicted,¹⁹ an astounding majority given the innocence of the defendants.

The above data make it difficult to ignore that people with mental retardation face an elevated risk of falsely confessing during interrogation. A number of scholars have tried to make sense of this phenomenon by

¹⁶ *Id.* at 970-71.

¹⁷ Michael J. O’Connell, William Garmoe & Naomi E. Sevin Goldstein, *Miranda Comprehension in Adults with Mental Retardation and the Effects of Feedback Style on Suggestibility*, 29 *L. & Hum. Behav.*, 359 (2005). Before this data was available, even authors who expressed uncertainty as to the number of overall false confessions nonetheless readily conceded that people with mental retardation are perhaps the most at risk group for giving false confessions. Paul G. Cassell, *The Guilty and the “Innocent”: An Examination of Alleged Cases of Wrongful Conviction From False Confessions*, 22 *Harv. J. L. & Pub. Pol’y* 523, 583 (1999).

¹⁸ Leo & Ofshe, *supra*, at 439. Accord Drizin & Leo, *supra*, at 922 (“Once police obtain a confession, they typically close the investigation, clear the case as solved, and make no effort to pursue other possible leads . . .”).

¹⁹ Drizin & Leo, *supra*, at 961 (finding 81% of false confessors who went to trial were convicted); Leo & Ofshe, *supra*, at 484 (an earlier study that found 73% of false confessors who went to trial were convicted).

exploring why it exists in the first place, and the answer seems to lie in a combination of two factors: *first*, many persons with mental retardation share certain personality traits by virtue of their condition that make them especially vulnerable to suggestion and willing to accept blame; and *second*, the pressures of police interrogation, which are intended to break the will of people with normal intelligence, exploit these pre-existing weaknesses to a dangerous degree.

B. Individuals With Mental Retardation Share Common Personality Traits That Make Them Especially Vulnerable To The Coercive Nature Of Police Interrogation, Increasing The Odds Of A False Confession.

1. Individuals with mental retardation often possess psychological traits that make them submissive, unsure, and suggestible, which overall makes them easy prey for false confessions.

In 1963, a legal task force appointed by President Kennedy published a report concerning a number of areas affecting the future welfare of Americans with mental retardation. One such area was criminal confessions, about which the task force cautioned:

[People with mental retardation] are characterized by a desire to please authority: if a confession will please, it may be gladly given. 'Cheating to lose,' allowing others to place blame on him so that they will not be angry with him, is a common pattern among the submissive retarded. It is unlikely that a retarded person will see the implications or

consequences of his statements in the way a person of normal intelligence will.²⁰

In the decades that followed, study after study agreed with the task force's conclusion that people with mental retardation have unique difficulties in resisting the kinds of pressures that can lead someone to falsely confess,²¹ and *Amici* have located virtually no resource that refutes that position. Indeed, the American Bar Association has noted this reality and adopted an official Standard acknowledging that "[M]ental illness or mental retardation may make it more likely that some suspects will be willing to make a confession."²² As recently as 2002, this Court in *Atkins* raised the same concern as justification for holding that the execution of persons with mental retardation is unconstitutional.²³

This increased tendency to give false confessions stems from specific psychological traits that have been identified in many people with mental retardation.²⁴

²⁰ The President's Panel on Mental Retardation, Report of the Task Force on Law, at Section VI (1963).

²¹ See, e.g., Drizin & Leo, *supra*, at 919-20 ("[T]he mentally retarded . . . are more vulnerable to the pressures of interrogation and therefore less likely to possess or be able to muster the psychological resources or perspective necessary to withstand accusatorial police questioning."); Fulero & Everington, *supra*, at 353 ("The bias toward providing a 'socially desirable' response is so strong that many individuals with mental retardation will literally tell the questioner whatever they perceive that he or she wants to hear.").

²² ABA Criminal Justice Mental Health Standards, Competence and Confessions, Section 7-5.8 (1988) (instructing courts to exclude statements by people with mental retardation if the statements have "been significantly impaired by a person's mental illness or mental retardation.").

²³ *Atkins v. Virginia*, 536 U.S. at 320-21, n.25.

²⁴ Cloud, et al., *supra*, at 511-513.

These traits make such individuals more susceptible to the pressures of interrogation, and they include the following:

- “[M]entally retarded people are unusually susceptible to the perceived wishes of authority figures. Even when no direct pressure is exerted on them, they may be inclined to make false statements out of a desire to please”²⁵
- “[M]entally retarded people often are unable to discern when they are in an adversarial situation, especially with police officers,” who are traditionally presented and thought of as helpful authority figures.²⁶
- “[M]entally retarded people often appear to be impulsive or have poor impulse control. [This might] cause mentally retarded people to answer a question without giving any consideration to the consequences.”²⁷
- “A disabled person may feel compelled to answer a question even if the question exceeds his ability to answer it.”²⁸

²⁵ *Id.* (citing James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 *Geo. Wash. L. Rev.* 414, 430 (1985) (“[S]ome people with mental retardation will eagerly assume blame in an attempt to please or curry favor with an accuser.”)).

²⁶ *Id.* at 511-512.

²⁷ *Id.* at 512. (citing Herbert J. Grossman, *Classification in Mental Retardation*, 98-99 (Herbert J. Grossman ed., American Association of Mental Deficiency 1983)).

²⁸ *Id.* (citing Paul Hourihan, *Earl Washington’s Confession: Mental Retardation and the Law of Confessions*, 81 *Va. L. Rev.* 1471, 1493

In light of these characteristics, it is no surprise that a number of researchers have found that people with mental retardation can be easily influenced by leading questions or subtle cues by an interrogator. For example, one telling study involving persons with mental retardation in Texas found that 73% of the subjects answered “yes” when asked “Does it snow here in the summer?” and 44% answered “yes” to “Are you Chinese?”²⁹ Such findings support the commonly held view that “[w]hen asked yes or no questions, a person with mental retardation is more likely to answer with ‘yes’ whether or not this is the appropriate answer”³⁰

(1995)). While troubling in their own right, the negative impacts of these traits can be “compounded by [a person with mental retardation’s] tendency not to identify [himself] as disabled” out of an embarrassment or shame in doing so. *Id.* at 513. Indeed, sometimes a suspect’s mental retardation may not be readily apparent until after his or her confession is obtained, meaning officers who might otherwise have taken greater care in obtaining the confession unintentionally fail to do so.

²⁹ Carol K. Sigelman, et al., *When In Doubt Say Yes: Acquiescence In Interviews with Mentally Retarded Persons*, 19 *Mental Retardation* 53, 56 (1981). Other researchers discovered that individuals with mental retardation were likely to answer yes – the socially desirable answer – to the question “Did you make your bed this morning?” and answer no – the socially desirable answer – to the question “Do you ever forget to brush your teeth?” despite the actual underlying facts. See Janine A. Shaw & Edward C. Budd, *Determinants of Acquiescence and Naysaying of Mentally Retarded Persons*, 87 *Am. J. of Mental Deficiency*, 108, 109 (1982).

³⁰ Fulero & Everington, *supra*, at 335; accord Stanley L. Brodsky, Allyson D. Bennett, *Psychological Assessments of Confessions and Suggestibility in Mentally Retarded Suspects*, 33 *J. of Psychiatry & L.* 359 (2005); William M.L. Finlay & Evanthia Lyons, *Acquiescence in Interviews with People Who Have Mental Retardation*, 40 *Mental Retardation* 14, 20 (2002) (“[Y]ea-saying when one does not know the answer or when one does not understand the question is more likely if a person has an underlying tendency towards compliance or submissiveness or if the situation is one in which power relations are

Evidence similarly shows that people with mental retardation have a “stronger proclivit[y] to change their answers in response to friendly feedback,”³¹ and it has long been supported that “[people’s] tendencies to be tricked by leading questions” is significantly correlated to a person’s IQ.³²

It is not hard to see why these characteristics – especially the predisposition to say “yes” in difficult situations – are a recipe for disaster inside an interrogation room. Indeed, it is inside interrogation rooms where such traits can do the most damage, as they leave individuals with mental retardation ill-prepared to handle interrogation techniques that are effective at dominating even people of average intelligence.

unequal.”); Brodsky & Bennett, *supra*, at 363 (“When leading questions are asked, and indeed, they are virtually always asked in interrogations, retarded persons frequently seek to conform to the perceived desires of the interrogator. They seek to please.”).

³¹ O’Connell, Garmoe & Goldstein, *supra*, at 367; *see also* Caroline Everington & Solomon M. Fulero, *Competence to Confess: Measuring Understanding and Suggestibility of Defendants with Mental Retardation*, 37 *Mental Retardation* 212, 218 (1999) (finding that “persons with mental retardation are significantly more likely to respond to leading questions and to coercion in an interrogation setting than [other] individuals . . . [and that] defendants with mental retardation are much more likely to change or ‘shift’ their answers when mild disapproval is given.”). Both these studies confirm that individuals with mental retardation are much more likely to change their answer based on interrogator feedback, be it positive or negative (both of which would be present in the classic “good cop, bad cop” scenario).

³² O’Connell, Garmoe & Goldstein, *supra*, at 367, *accord* Everington & Fulero, *supra*, at 212 (“as mental capacity decreases, suggestibility to leading questions and false information supplied by others increases”); Gisli H. Gudjonsson, *The Psychology of Interrogations and Confessions: A Handbook*, 320-27 (Graham Davies & Ray Bull ed., Wiley 2003) (determining that suggestibility is significantly correlated with intelligence).

2. Modern methods of interrogation use psychologically coercive techniques meant to overcome even people of average intelligence, and are thus especially effective at exploiting the weaknesses of people with mental retardation.

If recognizing the vulnerability of people with mental retardation to give false confessions is the “big picture,” then the final piece of the puzzle is understanding the purpose and methods of modern police interrogation. This is because interrogative methods commonly used today, while undoubtedly effective in many cases, exacerbate the inherent weaknesses of people with mental retardation that make such individuals more prone to give false confessions.

Put simply, “[t]he single minded objective [of interrogation] is to increase the anxiety and despair associated with denial and reduce the anxiety associated with confession.”³³ Interrogators typically do not bother with a suspect unless guilt is already presumed, and so instead of going on a neutral fact-finding expedition, an interrogation is solely meant to “elicit incriminating statements, admissions and/or confessions” in an effort to secure a conviction.³⁴

³³ Kassin, et al., *supra*, at 14; Cloud, et al., *supra*, at 515 (“Even a cursory look at the interrogation techniques described in [police manuals] reveals why mentally retarded suspects are particularly vulnerable [to interrogation tactics]. For example, the leading text instructs that every suspect has weaknesses and recommends interrogation techniques designed to exploit those weaknesses.”).

³⁴ Drizin & Leo, *supra*, at 911.

To accomplish this goal, police have perfected a litany of psychological tactics meant to break down a subject's defenses and cajole a confession.³⁵ One method frequently used is "maximization and minimization," whereby interrogators relentlessly convey to the subject their absolute belief in the suspect's guilt, while simultaneously offering the subject moral justification, face-saving excuses and feigned understanding for commission of the crime, thereby making it easier to confess.³⁶ Other times, confessions are obtained by falsely telling the subject that overwhelming evidence of his guilt has been found when no such evidence exists.³⁷ Regardless of the method used, subjects are almost always isolated in an attempt to increase anxiety, while the subject's pleas of innocence, alibis, and other exculpatory offerings are unwaveringly rejected.³⁸ These tactics, which are merely the tip of the iceberg of interrogation techniques, illustrate that police interrogations are "inherently compelling, if not coercive, to the extent that

³⁵ *Amici* do not propose to pass ultimate judgment on the propriety of current police interrogation techniques, and this brief is *not* meant to be a critique of police interrogation as a whole. Instead, the only point is that current interrogation methods, *combined with the diminished capacity of people with mental retardation*, raise the coercive atmosphere in an interrogation room to a problematic level.

³⁶ See, e.g., Kassin, et al., *supra*, at 12.

³⁷ *Id.* at 12-13; Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 *Fordham Urb. L. J.*, 791, 792-93 (2006) (indicating that a teenager's false confession to his parents' murder was obtained by falsely telling the teenager that his father had awoken at the hospital and identified the youth as the killer, causing the suspect to believe he may have committed the crime while blacked-out).

³⁸ Kassin, *supra*, at 18; accord Cloud, et al., *supra*, at 516 ("A suspect who tries to explain his innocence will . . . experience anxiety [] arguing with a strong authority figure who adamantly refuses to accept, or even listen, to his position.").

[they] rel[y] on sustained pressure, manipulation, [and sometimes outright] deceit.”³⁹

Given the personality traits of people with mental retardation discussed in the previous section, it is not surprising that these techniques work only *too well* on such individuals, thereby increasing the risk of false confessions. Modern psychological interrogation is undoubtedly better than the “third degree” of beatings and torture that it replaced, but even those who are not per se troubled by today’s interrogation tactics are willing to admit that “for the most part, false confessions are caused not by police questioning techniques in general *but rather by the application of those techniques to certain narrow, mentally limited populations.*”⁴⁰

Because of all this, there is a groundswell of support for video recording of all police interrogations to validate the reliability of confessions.⁴¹ Indeed, authors

³⁹ Kassin, et al., *supra*, at 14; Gohara, *supra*, at 808-816 (giving a comprehensive analysis of modern police interrogation techniques, with reference to leading interrogation manuals).

⁴⁰ Cassell, *supra*, at 584. While not an issue needing direct resolution in Mr. Floyd’s case, it is useful to remember when considering the subject of confessions by those with mental retardation that many such individuals lack an appreciation of their *Miranda* rights, which leaves them at an even greater disadvantage to combat the inherently coercive nature of police interrogations. *See, e.g.*, Fulero & Everington, *supra*, at 536-41 (noting that between 68% and 83% of subjects with mental retardation did not understand at least one of their *Miranda* rights); Cloud, et al., *supra*, at 3, 20-24 (finding, among other disturbing results, that only 10% of subjects with mental disabilities understood they could have a lawyer during interrogation); *see also Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (“[W]ithout proper safeguards . . . in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures . . .”).

⁴¹ Drizin & Leo, *supra*, at 997 (“taping interrogations creates an objective, comprehensive, and reviewable record of the

who discuss documented false confessions of suspects with mental retardation often express frustration at not knowing what occurred in the interrogation room that made the suspect accept blame for something he or she did not do, and the lack of such transparency makes it difficult to identify problematic interrogation techniques in the future.⁴²

II. THE FACTS OF THIS CASE INVOLVE MANY OF THE FACTORS THAT CREATE AN INCREASED RISK OF FALSE CONFESSIONS.

The record here indicates that Mr. Floyd's confession involves a number of surrounding facts that raise immediate and specific concern in light of what is known about false confessions, particularly from suspects with mental retardation. *Amici* do not propose that any of these red flags are conclusive on their own, but in the *aggregate*, they are alarming and strongly suggest that prudence and skepticism is warranted. These warning signs include:

- A wealth of literature explains that individuals with mental retardation are perhaps at the greatest risk of offering false confessions during police interrogation.⁴³ Mr. Floyd has an IQ of 59 and demonstrates significant limitations in his intellectual functioning, appropriately

interrogation.”); Kassin, et al., *supra*, at 25 (“Without equivocation, our most essential recommendation is to lift the veil of secrecy from the interrogation process in favor of the principle of transparency.”)

⁴² See, e.g., Leo & Ofshe, *supra*, at 460 (discussing the false confession of a person with mental retardation during an “unrecorded nine and one-half hour interrogation . . .”).

⁴³ See Section I, *supra*.

designating him as a person with mental retardation.⁴⁴

- Studies have shown that a subject's suggestibility, which tends to be high in people with mental retardation, is directly related to the inability to avoid coercion and the likelihood of making false confessions.⁴⁵ Mr. Floyd recently underwent a professional examination, and his suggestibility level is significantly higher than found in the general adult population.⁴⁶
- In the past, false confessions have been used to close cases by pinning unsolved, related crimes on the suspect.⁴⁷ Here, not long after confessing to the murder he is incarcerated for, police obtained another confession from Mr. Floyd for a related murder that he was acquitted of – despite his confession – *and that DNA evidence now shows he did not commit.*⁴⁸
- 81% of false confessions have occurred in murder cases, undoubtedly because of the increased publicity and pressure to convict

⁴⁴ Gregory DeClue, Report of Psychological Assessment of John Floyd, at 1-5.

⁴⁵ See Section I.B.1, *supra*.

⁴⁶ Gregory DeClue, *supra*, at 4.

⁴⁷ Drizin & Leo, *supra*, at 985-91 (reciting the judicially declared “enormous tragedy” of a father with mental retardation who spent twenty-two years in jail after falsely confessing to murder and then being blamed for a string of killings committed by a later-identified serial killer).

⁴⁸ See Petition, at 7-8.

associated with such crimes.⁴⁹ Mr. Floyd's confession was obtained in a highly publicized murder investigation – where one of the victims worked for the local newspaper.⁵⁰

- Researchers have stressed the need to record interrogations because many false confessions from people with mental retardation were obtained in unrecorded interrogations where there is no telling what kind of tactics were used on the suspect.⁵¹ All of Mr. Floyd's interrogations, including when his confession was obtained, were unrecorded, so there is no way for a court to be certain about the kind of interaction that led to Mr. Floyd's confession or the propriety of the tactics used.
- The largest study ever conducted found that most people who falsely confessed were in their twenties or thirties at the time.⁵² Mr. Floyd was 30 when he confessed, and possessed the mental capacity of someone much younger.⁵³

⁴⁹ Drizin & Leo, *supra*, at 946.

⁵⁰ Brendan McCarthy, Evidence of Innocence Insufficient to Merit a New Murder Trial, Judge Decides, *The Time-Picayune*, Feb. 19, 2010, available at http://www.nola.com/crime/index.ssf/2010/02/evidence_of_innocence_insuffic.html (noting that the murders which Mr. Floyd confessed to “put the tourist-rich Quarter community on edge and garnered significant media attention.”) (emphasis added).

⁵¹ See Section I.B.2, *supra*.

⁵² Drizin & Leo, *supra*, at 945.

⁵³ See Gregory DeClue, *supra*, at 1-5.

Despite all of this, Mr. Floyd's conviction rests solely on his confession.⁵⁴

⁵⁴ See Petition at 25-26.

CONCLUSION

Given the nearly unanimous concern from scholars and researchers over the potential for people with mental retardation to falsely confess, and in light of the particular facts of this case that raise doubt about the reliability of Mr. Floyd's confession, *Amici* respectfully urge this Court to grant Mr. Floyd's Petition and address the level of scrutiny necessary for courts considering confessions by defendants with mental retardation.

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