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COMMENT

From False Evidence Ploy to False Guilty Plea: An Unjustified Path to Securing Convictions

INTRODUCTION

On June 20, 1991, two police officers brought an African American man named Anthony Gray into custody for questioning related to the unsolved rape and murder of a woman in Calvert County, Maryland.[1] During the interrogation, the detectives lied to Mr. Gray about the evidence police held against him. They told him that two other men had confessed to involvement in the crime and had named Mr. Gray as the killer.[2] They told him that he had failed two hour-long polygraph tests.[3] And they told him that they "*knew*" he had committed the crime.[4]

In reality, no one had confessed to the crime or identified Anthony Gray as the perpetrator.[5] Mr. Gray did not fail the polygraph tests.[6] Instead, the police had gathered "a substantial amount of exculpating evidence" during the period of time when Mr. Gray was being interrogated.[7] Witnesses reported having seen a lone white man driving from the crime scene in the victim's car, and the hair evidence that police recovered could have only come from a Caucasian

1. Gray v. Maryland, No. CIV.CCB-02-0385, 2004 WL 2191705, at *2 (D. Md. Sept. 24, 2004). This account of Anthony Gray's case is based on judicial opinions that present the factual record in the light most favorable to the defendant.
2. Gray v. Maryland, 228 F. Supp. 2d 628, 632 (D. Md. 2002).
3. *Gray*, 2004 WL 2191705, at *3.
4. *Id.* (emphasis added).
5. *Anthony Gray*, INNOCENCE PROJECT, http://www.innocenceproject.org/cases-false-imprisonment/anthony-gray [http://perma.cc/3HCE-AP2E].
6. *Gray*, 2004 WL 2191705, at *3.
7. *Gray*, 228 F. Supp. 2d at 633.

man.[8] But after a series of interrogations in which he was repeatedly confronted with the fabricated evidence against him, Mr. Gray pled guilty.[9] The court imposed two concurrent life sentences.[10] Anthony Gray spent more than seven years behind bars before he was exonerated on the basis of DNA evidence.[11]

With the benefit of hindsight, Anthony Gray's ordeal appears to be an unambiguous miscarriage of justice. Nevertheless, current law sanctions the practice of confronting suspects with false evidence against them during interrogations—a practice social scientists have termed "the false evidence ploy"[12]—and the Supreme Court has imposed no requirements for disclosure of false evidence during plea negotiations.[13] The circumstances that led to Mr. Gray's wrongful conviction are not an anomaly; the law is bereft of safeguards to prevent suspects from making plea decisions based on inaccurate information about their likelihood of conviction at trial.

This Comment draws attention to the false evidence ploy's danger of triggering false guilty pleas. To date, legal scholarship addressing this type of police trickery[14] has focused on its risk of producing false confessions,[15] and with good reason: more than ten percent of the nearly two thousand American exonerees falsely confessed to the crime for which they were wrongfully convict-

8. *Id.*

9. *Gray*, 2004 WL 2191705, at *3; Attorney Grievance Comm'n v. Kent, 653 A.2d 909, 912, 913 (Md. 1995).

10. *Anthony Gray*, *supra* note 5.

11. *Id.*

12. Sociologist Richard J. Ofshe and criminologist Richard A. Leo appear to have coined the term in a 1997 article. *See* Richard J. Ofshe & Richard A. Leo, *The Decision To Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 1030-31, 1041-42, 1050 (1997).

13. *Cf.* United States v. Ruiz, 536 U.S. 622, 629 (2002) (holding that a defendant does not have the right to access impeachment evidence prior to entering a guilty plea).

14. Literature discussing the false evidence ploy falls within a broader category of scholarship on "police trickery"—the notion that deceptive interrogation practices can have a coercive effect on a suspect's decision to accept responsibility for criminal wrongdoing. *E.g.*, Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581, 602-28 (1979) (discussing additional methods that include "deceiv[ing] a suspect about whether an interrogation is taking place," "misrepresent[ing] the seriousness of the charge," and "assum[ing] a nonadversarial role"); Daniel W. Sasaki, Note, *Guarding the Guardians: Police Trickery and Confessions*, 40 STAN. L. REV. 1593, 1595 (1988) (defining police trickery and arguing against its use).

15. *E.g.*, 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, 817 (2006); Saul M. Kassin, *Inside Interrogation: Why Innocent People Confess*, 32 AM. J. TRIAL ADVOC. 525, 534 (2009); Welsh S. White, *What Is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2053 (1998).

ed.[16] But these statistics fail to capture the bigger picture. Approximately ninety-four percent of state convictions and ninety-seven percent of federal convictions result from guilty pleas.[17] Indeed, a guilty plea—as opposed to a confession—constitutes a larger victory for law enforcement officers who believe, rightly or wrongly, that a suspect committed a crime.[18] After a guilty plea is entered, there will be no trial, and barriers to appeal are nearly insurmountable.[19] Reversals of convictions resulting from guilty pleas are therefore extremely rare.[20] Accordingly, there is a dearth of false guilty plea exonerations and associated case law[21] to fuel wrongful convictions literature, particularly on the topic

16. *% Exonerations by Contributing Factor*, NAT'L REGISTRY EXONERATIONS (Aug. 28, 2016), http://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx [http://perma.cc/JB36-8VVD] (reporting that twelve percent of exonerees had falsely confessed); *see also False Confessions or Admissions*, INNOCENCE PROJECT, http://www.innocenceproject.org/causes/false-confessions-admissions [http://perma.cc/EF2M-MKGS] (noting that more than one out of every four people exonerated by DNA evidence had made a false confession or incriminating statement). As of October 16, 2016, there were 1,900 exoneration cases recorded in the National Registry; 234 of them involved a false confession. NAT'L REGISTRY EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/browse.aspx?View={B8342AE7-6520-4A32-8A06-4B326208BAF8}&FilterField1=Contributing%5Fx0020%5FFactors%5Fx0020&FilterValue1=False%20Confession [http://perma.cc/WB33-5TTN].

17. Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) (citing data from the Bureau of Justice Statistics).

18. *See* Mark A. Godsey, *Shining the Bright Light on Police Interrogation in America*, 6 OHIO ST. J. CRIM. L. 711, 714 (2009) ("[T]he interrogation process is aimed not simply to obtain an 'I did it' confession, but to manipulate from the suspect a police-orchestrated narrative designed to ensure a conviction, and *even better, a conviction by guilty plea*." (emphasis added)) (reviewing RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE (2008)).

19. *See* Nancy J. King, *Judicial Review: Appeals and Postconviction Proceedings*, *in* EXAMINING WRONGFUL CONVICTIONS: STEPPING BACK, MOVING FORWARD 217, 218 (Allison D. Redlich et al. eds., 2014) ("[A]ppeals are essentially useless to a person who seeks to overturn his conviction after pleading guilty to a crime he did not commit."). In their analysis of data from 971 randomly selected federal cases, Nancy J. King and Michael E. O'Neill found that defendants waived their rights to appellate review in nearly two-thirds of the cases settled by plea agreement. Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 209 (2005). State systems vary widely in terms of access to the courts following a guilty plea, but "most state laws do not adequately address either the issue of wrongful convictions of those who plead guilty or that of constitutional violations in the context of guilty pleas." Rebecca Stephens, Comment, *Disparities in Postconviction Remedies for Those Who Plead Guilty and Those Convicted at Trial: A Survey of State Statutes and Recommendations for Reform*, 103 J. CRIM. L. & CRIMINOLOGY 309, 340-41 (2013).

20. *See* sources cited *supra* note 19.

21. The small amount of research that has been published on this topic indicates that false guilty pleas occur with substantially greater frequency than their share of known wrongful conviction cases would suggest. *See* Allison D. Redlich, *False Confessions, False Guilty Pleas: Similarities and Differences*, *in* POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RE-

of the false evidence ploy. This Comment aims to fill that gap. In a country where more than two million people are incarcerated,[22] even a marginally heightened risk of false guilty pleas translates into a number of unwarranted person-years behind bars that is difficult to contemplate and impossible to justify.

The Comment proceeds in two Parts. Part I argues that the legal and theoretical justifications for police trickery as a means to secure confessions do not remain viable in the context of plea bargaining. Courts apply the legal standard articulated in *Frazier v. Cupp*[23] only when suspects do *not* plead guilty and instead exercise their right to a trial, and the criminal justice system provides few tools to ameliorate the coercive effects of the false evidence ploy during the plea-bargaining process. Part II proposes two doctrinal routes for courts to mitigate the damaging effects of the false evidence ploy in plea-bargaining outcomes without overruling Supreme Court precedent.

SEARCH, PRACTICE, AND POLICY RECOMMENDATIONS 49, 56 (G. Daniel Lassiter & Christian A. Meissner eds., 2010) (referring to identified cases of false guilty pleas as "likely to represent the tip of the iceberg" and "most probably a gross underestimation of the extent of the problem"); *see also* Samuel R. Gross, *Convicting the Innocent*, 2008 ANN. REV. L. & SOC. SCI. 173, 180-81 (discussing the effects of choosing a plea deal, rather than going to trial, on innocent defendants who pled guilty); Allison D. Redlich et al., *Self-Reported False Confessions and False Guilty Pleas Among Offenders with Mental Illness*, 34 LAW & HUM. BEHAV. 79, 83-84, 88-89 (2010) (finding in the first prevalence study of false guilty pleas that more than one-third of the 1,249 offenders with mental illnesses who were interviewed claimed to have falsely pled guilty in their lifetime). Allison Redlich et al. also point to the fact that while the majority of identified wrongful convictions are for serious violent crimes, the opportunity to falsely plead guilty is greater for crimes that are less serious because they occur more frequently. *Id.* at 84. However, the percentage of exonerations in cases where the defendant pled guilty has recently increased. *Exonerations in 2015*, NAT'L REGISTRY EXONERATIONS 8 (Feb. 3, 2016), http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2015.pdf [http://perma.cc/SV78-32WC] ("In 2015, 44% of exonerations (65/148) were in guilty plea cases, more than any previous year.").

22. Lauren E. Glaze & Danielle Kaeble, *Correctional Populations in the United States, 2013*, U.S. DEP'T JUST. 2 (Dec. 2014), http://www.bjs.gov/content/pub/pdf/cpus13.pdf [http://perma.cc/ANA5-FXC3].

23. 394 U.S. 731 (1969).

I. THE FALSE EVIDENCE PLOY PRESSURES INNOCENT SUSPECTS TO PLEAD GUILTY

A. Interrogation Methods Capitalize on the Supreme Court's Permissive Standard for Police Trickery

The Reid Technique is the "most influential and widely used" interrogation protocol in the United States.[24] An organization called John E. Reid & Associates developed the method in the mid-twentieth century and has since trained more interrogators than any other organization in the world.[25] The Reid Technique is codified in *Criminal Interrogation and Confessions* (otherwise known as the "*Reid Manual*"),[26] a handbook that is frequently termed "the bible of modern police interrogation training."[27] Over the past several decades,[28] the *Reid Manual*'s approach to interrogation has shaped "nearly every aspect of modern police interrogations, from the setup of the interview room to the behavior of detectives."[29] Detectives' use of fabricated evidence is no exception.

The *Reid Manual* teaches law enforcement to carry out the false evidence ploy because it is "clearly the most persuasive" interrogation tactic "[w]ithin

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24. Timothy E. Moore & C. Lindsay Fitzsimmons, *Justice Imperiled: False Confessions and the Reid Technique*, 57 CRIM. L.Q. 509, 510 (2011). It is also worth noting that the Reid Technique has helped shape the law surrounding police interrogations. For example, the Supreme Court's landmark decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), cites the *Reid Manual* several times and refers to the authors' expertise, gleaned from their "extensive experience in writing, lecturing, and speaking to law enforcement authorities." 384 U.S. at 449 nn.9-10, 450 nn.12-13, 452 nn.15-17, 454 nn.20-22, 455 n.23 (1966); *id.* at 499 n.1 (Clark, J., dissenting in part and concurring in part).

25. *See* Douglas Starr, *The Interview: Do Police Interrogation Techniques Produce False Confessions?*, NEW YORKER (Dec. 9, 2013), http://www.newyorker.com/magazine/2013/12/09/the-interview-7 [http://perma.cc/5DE8-6YJW].

26. FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS (5th ed. 2013) [hereinafter REID MANUAL].

27. 2 ENCYCLOPEDIA OF CRIME AND PUNISHMENT 928 (David Levinson ed., 2002) (characterizing the *Reid Manual* as having "virtually defined the teaching and practice of interrogation in America"); *Company Information*, JOHN E. REID & ASSOCIATES, INC., http://www.reid.com/r_about.html [http://perma.cc/XLX3-FYCB]; *see also* Brian C. Jayne & Joseph P. Buckley, *The Reid Technique of Interrogation*, JOHN E. REID & ASSOCIATES, INC., http://www.reid.com/educational_info/canada.html [http://perma.cc/SXJ9-8QRJ] ("*Criminal Interrogation and Confessions* is considered by investigators and courts to be the authoritative text describing [t]he Reid Technique.").

28. 2 ENCYCLOPEDIA OF CRIME AND PUNISHMENT, *supra* note 27, at 928. The manual's first edition was published in 1962, and revised editions have been published approximately every decade. *Id.*

29. Starr, *supra* note 25.

the area of deception."[30] It instructs detectives to, for example, bring "visual props" into the interview room, including "a DVD disc, CD-ROM, audio tape, a fingerprint card, an evidence bag containing hair or other fibers, spent shell casings, [and] vials of colored liquid."[31] It also announces a "clear position" that "merely introducing fictitious evidence during an interrogation" cannot lead to false admissions of guilt.[32] Contradicting decades of social science evidence[33] and scores of DNA exonerations,[34] the *Reid Manual* states that "[i]t is absurd to believe that a suspect who knows he did not commit a crime would place greater weight and credibility on alleged evidence than his own knowledge of innocence."[35]

The *Reid Manual* also defends the use of "outright lies concerning the existence of evidence"[36] by assuring law enforcement that the practice is legal and "routinely uph[e]ld"[37] under the Supreme Court's "totality of the circumstances" standard.[38] It cites[39] the foundational case addressing the permissibility of the false evidence ploy, *Frazier v. Cupp*, in which the defendant brought a habe-

30. REID MANUAL, *supra* note 26, at 255.

31. *Id.* at 192; *see also id.* at 174 (noting that additional "[e]xamples of fictitious evidence would include such things as high-resolution photographs from spy satellites, laser technology to identify fingerprints even though a person wore gloves, or sophisticated blood tests involving electrophoresis to identify ratios of hormones to determine whether or not sexual intercourse was consensual or forced").

32. *Id.* at 352.

33. *See, e.g.*, Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 15 (2010).

34. *See, e.g.*, NAT'L REGISTRY EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/browse.aspx?View={b8342ae7-6520-4a32-8a06-4b326208baf8}&FilterField1=Contributing_x0020_Factors_x0020&FilterValue1=False%20Confession&SortField=DNA&SortDir=Asc&FilterField2=DNA&FilterValue2=8_DNA [http://perma.cc/CH6E-42RE] (noting that, as of September 17, 2016, there were ninety-six DNA exonerations in cases where the exoneree had falsely confessed).

35. REID MANUAL, *supra* note 26, at 352; *see also id.* at 351 ("Consider an innocent rape suspect who is falsely told that DNA evidence positively identifies him as the rapist. Would this false statement cause an innocent person to suddenly shrink in his chair and decide that it would be in his best interest to confess? Would a suspect, innocent of homicide, bury his head in his hands and confess, because he was told that the murder weapon was found during a search of his home? Of course not!").

36. *Id.* at 351.

37. *Id.* at 255.

38. *Id.* at 426, 440 n.207; *see also id.* at 255 (noting that "[c]ourts routinely uphold the use of deception during interrogation of adult suspects," including the tactic of "introducing fictitious evidence which implicates the suspect in the crime").

39. *Id.* at 423, 440 n.207.

as corpus action to challenge his murder conviction in Oregon.[40] Frazier's attorneys made a variety of arguments, including the claim that Frazier's confession was involuntary because the police falsely told him that they had secured a confession from his companion.[41] The Court devoted little space to this claim in its opinion, merely noting, "The fact that the police misrepresented the statements that [Frazier's companion] had made is, while relevant, insufficient in our view to make this otherwise voluntary confession inadmissible. These cases must be decided by viewing the 'totality of the circumstances.'"[42]

In the decades since *Frazier* was published, lower courts have consistently deployed the opinion as legal cover for far more coercive uses of the false evidence ploy than the fabricated codefendant confession at play in *Frazier* itself. For example, the North Carolina Supreme Court cited *Frazier* in support of its decision to uphold a confession generated after police presented the suspect with a bloody knife and falsely asserted that it was found at the scene of the crime with the suspect's fingerprints on it.[43] Lower courts also have cited *Frazier* in support of decisions to admit confessions obtained after police falsely told a suspect that his fingerprints had been found at the scene of the crime[44] or on the murder weapon;[45] that they possessed DNA evidence proving his guilt;[46] that his hair[47] or shoe-prints[48] were found at the location of the crime; that his semen was recovered from the crime scene;[49] that he failed a polygraph

40. 394 U.S. 731, 732 (1969).

41. *Id.* at 737. In reality, the defendant's companion had not been apprehended at the time of Frazier's interrogation, but he ultimately was arrested and pled guilty. Brief for the Petitioner at 7, 31, *Frazier*, 394 U.S. 731 (No. 643).

42. *Frazier*, 394 U.S. at 739.

43. State v. Jackson, 304 S.E.2d 134, 144, 147-48, 152 (N.C. 1983).

44. *See, e.g.*, Luciero v. Kerby, 133 F.3d 1299, 1307, 1311 (10th Cir. 1998); Ledbetter v. Edwards, 35 F.3d 1062, 1066, 1068 (6th Cir. 1994).

45. *See* State v. Lapointe, 678 A.2d 942, 961 (Conn. 1996); *see also* H. Morley Swingle & Lane P. Thomasson, *Big Lies and Prosecutorial Ethics*, 69 J. MO. B. 84, 84 (2013) ("One tried-and-true lie in the interrogator's arsenal is to falsely tell a suspect that his fingerprints were found at the crime scene or on a murder weapon.").

46. *See, e.g.*, State v. Register, 476 S.E.2d 153, 158 (S.C. 1996).

47. *See, e.g.*, State v. Moore, 530 So. 2d 349, 350-51 (Fla. Dist. Ct. App. 1998).

48. *See, e.g.*, *Register*, 476 S.E.2d at 158.

49. *See*, *e.g.*, Sherriff v. Bessey, 914 P.2d 618, 619 (Nev. 1996).

test[50] or gunshot residue test;[51] and that eyewitnesses identified him as the perpetrator.[52] Further examples abound.

Crucially, courts have occasion to apply the *Frazier* standard only in instances where the suspect exposed to the false evidence ploy confesses, *does not plead guilty*, and then argues that the confession should not be used as evidence against her. But this mode of police deception is not designed to induce only confessions. Rather, the false evidence ploy may motivate a suspect to inculpate herself by (1) confessing, (2) pleading guilty, or (3) both.[53] Only the first category of cases is likely to access meaningful judicial review,[54] but existing social science evidence can be read to suggest that innocent suspects are more likely to fall into the latter two categories.

Psychologists have teased out two causal mechanisms by which the false evidence ploy may give rise to false confessions. Both apply with equal force to guilty pleas. First, suspects may falsely confess "as an act of compliance when they perceive that there is strong evidence against them."[55] Second, innocent suspects confronted with evidence that law enforcement claims to prove their guilt as an "incontrovertible fact" may falsely confess because they have "come to internalize the belief that [they] committed the crime without awareness."[56]

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50. *See, e.g.*, Burch v. State, 343 So. 2d 831, 832-33 (Fla. 1977); McGee v. State, 451 S.W.2d 709, 712 (Tenn. Crim. App. 1969).

51. *See, e.g.*, Whittington v. State, 809 A.2d 721, 725, 736, 739 (Md. Ct. Spec. App. 2002).

52. *See*, *e.g.*, Ledbetter v. Edwards, 35 F.3d 1062, 1066, 1068 (6th Cir. 1994).

53. *See* Robert J. Norris & Allison D. Redlich, *Seeking Justice, Compromising Truth? Criminal Admissions and the Prisoner's Dilemma*, 77 ALB. L. REV. 1005, 1013 (2014) ("A suspect who confesses during interrogation will often plead guilty; having already admitted involvement in a criminal act, he or she has little incentive to go to trial and attempt to prove innocence, while risking a harsher conviction and sentence. Even *false* confessions serve to induce plea bargains.").

54. *See* sources cited *supra* note 19. Additionally, "[B]ecause many individuals who plead guilty do so in return for a reduced sentence, it is highly likely that innocent defendants who plead guilty have little incentive or insufficient time to pursue exoneration." Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1, 21 (2013).

55. Saul M. Kassin, *Confession Evidence: Commonsense Myths and Misconceptions*, 35 CRIM. JUST. & BEHAV. 1309, 1314 (2008) [hereinafter Kassin, *Confession Evidence*]; *see also* Gohara, *supra* note 15, at 798, 817-20 (describing how the "rational choice" model explains why false confessions occur); Saul M. Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?*, 60 AM. PSYCHOLOGIST 215, 221 (2005) [hereinafter Kassin, *Psychology of Confessions*] (explaining why the "Reid technique" might induce false confessions).

56. Kassin, *Confession Evidence*, *supra* note 55, at 1314; *see also* GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS 233-42 (2003) (detailing "[f]ive cases of pressured-internalized false confession[s]").

The key factor underlying each of these psychological processes is the defendant's perception that his or her likelihood of conviction at trial is high—a perception that has been found to be particularly important in plea decision making.[57] The false evidence ploy enables interrogators to artificially inflate an innocent suspect's estimated likelihood of conviction and thereby make a plea bargain appear "rational."[58] Innocent suspects who were not at the crime scene may not know whether there were witnesses or physical evidence left behind; they also may be uncertain of whether they committed the crime if, for example, they were intoxicated or are mentally handicapped.[59] In light of research indicating that innocent defendants are "on average more risk averse" than guilty ones,[60] it is not difficult to recognize the possibility that an innocent defendant would accept a relatively small punishment by pleading guilty in order to avoid risking a greater one after trial. Further pressures to plead guilty when facing a substantial probability of conviction exacerbate this effect. These include the financial cost of a trial, the stress of waiting for a court date and preparing for an uncertain result, and—for defendants whose plea offers do not involve incarceration—the ability to return home.[61] Even though the number of innocents who have pleaded guilty is "inherently unknowable,"[62] the literature makes clear that "plea bargaining has an innocence problem."[63]

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57. Greg M. Kramer et al., *Plea Bargaining Recommendations by Criminal Defense Attorneys: Evidence Strength, Potential Sentence, and Defendant Preference*, 25 BEHAV. SCI. & L. 573, 575 (2007).

58. *See* Melanie D. Wilson, *An Exclusionary Rule for Police Lies*, 47 AM. CRIM. L. REV. 1, 20-21 (2010); Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), http://www.nybooks.com/articles/archives/2014/nov/20/why-innocent-people-plead-guilty [http://perma.cc/YXC9-3P6S].

59. Samuel R. Wiseman, *Waiving Innocence*, 96 MINN. L. REV. 952, 1005-06 (2012).

60. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2495 (2004).

61. Christopher Sherrin, *Guilty Pleas from the Innocent*, 30 WINDSOR REV. LEGAL & SOC. ISSUES 1, 8-9 (2011).

62. Frances E. Chapman, *Coerced Internalized False Confessions and Police Interrogations: The Power of Coercion*, 37 LAW & PSYCHOL. REV. 159, 166 (2013) (citing Gisli H. Gudjonsson, *The Psychology of False Confessions: A Review of the Current Evidence*, *in* POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS, *supra* note 21, at 31, 34.

63. Dervan & Edkins, *supra* note 54, at 17 & n.95.

B. Diminished Safeguards in the Plea-Bargaining System for Those Subjected to the False Evidence Ploy

The plea-bargaining system also enables the state to circumvent many of the barriers to wrongful conviction that trials provide. Perhaps most important to the issue at hand, the plea-bargaining process strips suspects of their opportunity to learn whether they were subjected to the false evidence ploy in the first place. While the Federal Rules of Criminal Procedure require judges to ensure that guilty pleas are "voluntary,"[64] the legal standard of voluntariness in the plea context does not entitle defendants to information about the strength of the state's evidence against them, including whether or not false evidence was presented in the interrogation.[65] There is reason to believe that this lack of obligated disclosure disproportionately harms innocent defendants because they know less about the crime for which they are charged and therefore are less capable of evaluating the strength of the prosecution's purported evidence and seeking exculpatory evidence.[66]

This lack of disclosure obligations prevents defense attorneys from offering sound legal advice to offset the effects of the false evidence ploy. Because prosecutors are not obligated to disclose the use of a false evidence ploy during the plea-bargaining process, defense attorneys can only discover such information through their own resource-intensive fact-finding missions. Even under the atypical circumstances where criminal defense attorneys do have the time and funding to engage in thorough investigations, prosecutors are permitted to present defendants with plea offers that expire before their attorneys can shed enough light on the strength of the state's case to counteract the false information presented by police.[67] The state is thereby authorized to require de-

64. FED. R. CRIM. P. 11(b)(2).

65. *See* United States v. Ruiz, 536 U.S. 622, 629 (2002) (holding that a defendant does not have a right to access impeachment evidence prior to entering a guilty plea).

66. *See* John G. Douglass, *Can Prosecutors Bluff?* Brady v. Maryland *and Plea Bargaining*, 57 CASE W. RESERVE L. REV. 581, 582 (2007) (noting that "nondisclosure disproportionately harms the innocent since, almost by definition, guilty defendants know more about the facts surrounding a crime than do those who are factually innocent").

67. *See* ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 57-58 (2007); Cynthia Alkon, *The U.S. Supreme Court's Failure To Fix Plea Bargaining: The Impact of* Lafler *and* Frye, 41 HASTINGS CONST. L.Q. 561, 597 (2014) (observing the commonality of plea-offer "time limits" and "'exploding offers' . . . as prosecutors will regularly say, 'If your client doesn't take this deal today, I will add that prior and he will be looking at double the time'"); Rakoff, *supra* note 58 ("If, however, the defendant wants to plead guilty, the prosecutor will offer him a considerably reduced charge—but only if the plea is agreed to promptly (thus saving the prosecutor valuable resources). Otherwise, he will charge the maximum, and, while he will not close the door to any later plea bargain, it will be to a higher-level offense than the one offered at the outset of the case.").

fendants and their attorneys to evaluate plea offers almost exclusively based on the perceived likelihood of conviction that they glean during interrogations. Thus, by conveying to law enforcement that no type of false evidence is presumptively off-limits in their interrogations, the permissive *Frazier* standard transforms innocent suspects' interactions with police from a valuable source of information to a venue for deceit. And the plea-bargaining system enables this process to result in wrongful convictions without the opportunity for judicial scrutiny or public review.[68]

II. POTENTIAL JUDICIAL CORRECTIVES

In response to these risks, scholars disagree about whether the false evidence ploy should be banned entirely. Some argue that it should be outlawed because it raises an unacceptable risk of wrongful convictions and runs counter to the value of "rel[ying] on truth to discover the truth."[69] Others contend that the false evidence ploy is necessary to convict some guilty suspects, so banning the practice risks forfeiting the social good that those convictions bring.[70] This Comment does not engage in this debate, as stare decisis makes judicial prohibition of the false evidence ploy highly unlikely, at least in the near future. Instead, it offers recommendations aimed at mitigating the harms discussed in Part I while remaining faithful to current Supreme Court precedent. The first is

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68. *See* sources cited *supra* note 19.

69. Gohara, *supra* note 15, at 834-35 ("In light of the scientific findings and actual wrongful conviction cases demonstrating that false evidence ploys . . . produce false confessions, and in light of the fact that allowing police to lie to suspects undermines our justice system's reliance on truth to discover the truth, courts and lawmakers should outlaw the deliberate deception of suspects by police." (footnote omitted)); *see also* Kassin, *Psychology of Confessions*, *supra* note 55, at 225 ("[T]he Court should revisit the wisdom of its prior ruling [in *Frazier v. Cupp*] and declare 'Thou shalt not lie.'"); White, *supra* note 14, at 624-25 (arguing that "impressing the suspect with the interrogators' certainty of his guilt . . . should be forbidden per se.").

70. For example, to the extent that the false evidence ploy increases the likelihood that guilty suspects will choose to plead guilty, retaining its use in limited instances may "free the courts to move quickly to resolve other cases, spare trauma to the victim, and avoid the financial drain on judicial and prosecutorial resources that would be consumed by a trial." Laurie Magid, *Deceptive Police Interrogation Practices: How Far Is Too Far?*, 99 MICH. L. REV. 1168, 1200 (2001); *see also* Godsey, *supra* note 18, at 734 ("I am not yet convinced that false evidence ploys do not result in a net gain in the pursuit of truth."); Magid, *supra*, at 1205 ("The loss of true confessions, which translates into lost convictions, imposes substantial costs on both existing and potential victims. Unconvicted criminals have the opportunity to commit additional crimes."). However, data in this area is lacking. See Godsey, *supra* note 18, at 734, for an example of an opponent of abolishing the false evidence ploy conceding that he "lack[s] data to back . . . up" his argument supporting the false evidence ploy's crime-solving utility.

to give shape to the *Frazier* standard by introducing subsidiary rules that render the most coercive forms of the false evidence ploy unlawful. The second is to require the state to disclose any false evidence conveyed to defendants before plea deals may be made.

A. Giving Shape to Frazier's Totality-of-the-Circumstances Test

Further doctrinal specification of *Frazier*'s totality-of-the-circumstances approach would be particularly beneficial in the plea-bargaining context. *Frazier*'s flexible standard is designed to be enforced by *judges* when they evaluate all of the evidence presented at trial. While judicial review has largely failed to prevent innocent defendants from being convicted even after courts review the "totality of the circumstances" surrounding police interrogations,[71] the standard relies on the defensible assumption that judges are well situated to engage in this type of holistic analysis after an adversarial adjudication process. But such an assumption certainly does not apply in the plea-bargaining context, where there is no trial at which the "totality of the circumstances" may be reviewed. In a system where the vast majority of convictions are secured via plea bargaining, clearer rules are needed to guide police before interrogations begin.

As the *Reid Manual* illustrates, judge-made doctrine in false confession cases shapes the interrogation techniques that lead to guilty pleas by changing incentives for law enforcement.[72] Interrogators presenting suspects with false evidence do not yet know if the case will go to trial, be dropped or dismissed, or—most likely of all[73]—result in a plea bargain. If the false evidence ploy could jeopardize convictions in cases where the suspect confesses but does not plead guilty, it would no longer make sense for interrogators to use the technique in the first place. In this manner, modifying the way courts apply the *Frazier* standard would affect the likelihood of both false confessions and false guilty pleas.

Frazier's totality-of-the-circumstances standard leaves ample room for further doctrinal specification. The false evidence ploy at issue in that case was relatively benign in comparison with the types of false evidence used in modern-day interrogations.[74] Unlike the police-created forensic evidence and falsified

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71. *See, e.g.*, Gohara, *supra* note 15, at 835 (analyzing the "ample evidence that false law enforcement claims about the availability and nature of incriminating evidence induce false confessions and consequently wrongful convictions" under the *Frazier* standard).

72. *See supra* Section I.A.

73. See Rakoff, *supra* note 58 (noting that eight percent of all federal criminal charges in 2013 were dismissed, and more than ninety-seven percent of the remainder were resolved through plea deals).

74. *See supra* notes 42-51 and accompanying text.

lab reports that have been used since the advent of DNA testing, the defendant in *Frazier* was simply told that his codefendant had confessed.[75] (In fact, the briefing in the case suggests that the evidence with which Frazier was confronted during his interrogation was not false at all; it was merely misattributed.[76]) This fact pattern, in addition to the Supreme Court's concise treatment of the issue,[77] belies the oft-cited claim in the scholarship and subsequent case law that the Court has endorsed the legality of the false evidence ploy as a whole.[78]

Without overturning *Frazier v. Cupp*, the Supreme Court could create a bright-line rule that certain forms of the false evidence ploy are always sufficient to render a resulting confession involuntary. Such an opinion would retain *Frazier*'s totality-of-the-circumstances standard generally, but clarify that certain false evidence ploys tip the scales too strongly for the balancing test to permit. And even if the Supreme Court does not hear a case regarding police trickery in the foreseeable future, state and federal appellate courts could adopt a similar rule for their respective jurisdictions while remaining faithful to *Frazier*'s holding. This line-drawing exercise would allow courts to translate the social science evidence regarding the circumstances that lead innocent suspects to plead guilty[79] into doctrinal safeguards.

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75. Frazier v. Cupp, 394 U.S. 731, 737 (1969).

76. Brief for the Petitioner, *supra* note 41, at 31 ("The police quickly assumed a more aggressive tack, confronting Frazier with a series of 'facts.' . . . [T]he 'facts' related to Frazier were actually obtained from a tip given by a member of [the family of Frazier's companion] and from various other witnesses." (citations omitted)).

77. See *supra* text accompanying notes 41-42. The Court's entire discussion of the false evidence ploy in *Frazier* spanned only two sentences within an opinion mostly devoted to unrelated topics.

78. *See, e.g.*, Philip S. Gutierrez, *You Have the Right To [Plead Guilty]: How We Can Stop Police Interrogators from Inducing False Confessions*, 20 S. CAL. REV. L. & SOC. JUST. 317, 339 (2011) (citing *Frazier v. Cupp* to support the proposition that "the Supreme Court officially sanctioned this deception and made it permissible for police to outright lie to suspects about the evidence"); Dorothy Heyl, *The Limits of Deception: An End to the Use of Lies and Trickery in Custodial Interrogations To Elicit the "Truth"?*, 77 ALB. L. REV. 931, 941 (2014) ("A decades-old Supreme Court case, *Frazier v. Cupp*, is often cited for the proposition that police can use deception in custodial interrogations." (footnote omitted)); Kassin, *Psychology of Confessions*, *supra* note 55, at 221 (citing *Frazier v. Cupp* to support the proposition that "the presentation of allegedly incontrovertible evidence (e.g., a fingerprint, blood or hair sample, eyewitness identification, or failed polygraph)—regardless of whether such evidence exists . . . is permissible" in the United States); Sasaki, *supra* note 14, at 1608 (noting that, even though "*Frazier* was a particularly unfavorable opportunity to proscribe police trickery," "[l]ater courts have nevertheless interpreted it as definitively ruling that police trickery is a mere factor to be included in a court's assessment of a confession's voluntariness under a totality of the circumstances analysis").

79. *See supra* notes 55-61 and accompanying text.

Courts might determine which false evidence ploys are presumptively invalid based on a variety of factors. For example, one way courts might "rulify"[80] *Frazier*'s totality-of-the-circumstances standard would be to draw a line between "*verbal* assertions to a suspect,"[81] which were permitted in *Frazier*, and the physical act of presenting suspects with tangible evidence manufactured by the state itself. This rule would protect innocent suspects from being confronted with doctored video evidence,[82] falsified transcripts of eyewitness interviews, fake polygraph results,[83] and physical evidence like the police-created "bloody knife" that the North Carolina courts allow.[84] As empirical research demonstrates, "seeing is believing: in both legal and everyday decision-making tasks people are more persuaded by visual than by verbal evidence."[85] Alternatively, in response to studies whose participants perceived lies about different types of evidence to be "deceptive and coercive to different degrees,"[86] courts could classify particular kinds of evidence as either permissible or impermissible to fabricate. Such a rule could be fashioned to reflect social scientists' observations that while suspects "can counter . . . eyewitness evidence by claiming it is in error, and co-perpetrators' evidence by asserting it is a lie,"[87] innocent sus-

80. *See generally* Michael Coenen, *Rules Against Rulification*, 124 YALE L.J. 644 (2014) (describing the process by which courts develop subsidiary rules to facilitate the application of a Supreme Court standard).

81. State v. Cayward, 552 So. 2d 971, 973 (Fla. Dist. Ct. App. 1989). *Cayward* established a rule for its jurisdiction that "the manufacturing of false documents by police officials" violates due process under the Florida and federal constitutions. *Id.* at 974. However, the case does not address other kinds of police-created evidence, like the "bloody knife" at issue in *State v. Jackson*, 304 S.E.2d 134, 144 (N.C. 1983).

82. Robert Nash and Kimberley Wade's recent study demonstrates the coercive effect of viewing falsified video evidence in an interrogation. Robert A. Nash & Kimberley A. Wade, *Innocent but Proven Guilty: Eliciting Internalized False Confessions Using Doctored-Video Evidence*, 23 APPLIED COGNITIVE PSYCHOL. 624, 633 (2009) (finding that nearly 100% of subjects who viewed "fake-video evidence" falsely confessed to an act that they did not commit). Moreover, the subjects who viewed doctored video evidence were more likely to confess earlier than those who were merely told that video evidence existed. *Id.* at 632.

83. *See* George C. Thomas III, *Regulating Police Deception During Interrogation*, 39 TEX. TECH. L. REV. 1293, 1313 (2007) (describing interrogators' "photocopier as [a] polygraph trick").

84. *See Jackson*, 304 S.E.2d at 144.

85. Nash & Wade, *supra* note 82, at 625 (citing supporting studies). *But see* K. D. Forrest et al., *False-Evidence Ploys and Interrogations: Mock Jurors' Perceptions of False-Evidence Ploy Type, Deception, Coercion, and Justification*, 30 BEHAV. SCI. & L. 342, 358 (2012) (noting that study "[p]articipants consistently rated the testimonial [false evidence ploy] as significantly more coercive than other FEPs").

86. Forrest et al., *supra* note 85, at 358 (adding that "[t]hese perceptual differences suggest that the use of a FEP [false evidence ploy] may not be the issue, but rather the type of FEP").

87. Ofshe & Leo, *supra* note 12, at 1023.

pects "have a harder time explaining away evidence that is allegedly derived from scientific technologies."[88] This type of doctrinal specification might, then, allow lies about witness identification but prohibit lies about DNA evidence.[89]

Both of these examples offer the benefit of administrability; it would be relatively easy to give police (and the organizations that train them) clear guidance about what kinds of lies interrogators are allowed to tell. They would also provide signaling value to suspects by giving them a measure of confidence that police are telling the truth when they make certain claims in an interrogation, enabling defendants to evaluate their likelihood of conviction more accurately during the crucial time when they must decide whether to plead guilty. And to the extent that innocent suspects are more risk-averse than guilty ones,[90] eliminating the most convincing forms of the false evidence ploy is likely to reduce the number of innocents who plead guilty without a corresponding reduction in convictions of the guilty. But these examples are not exhaustive, and a few state courts have begun to experiment with other dividing lines.[91] This Comment does not purport to identify a superior line-drawing test because a body of empirical work that definitively identifies which forms of the false evidence ploy are most coercive does not yet exist. But if judges signaled a willingness to incorporate social science evidence into their application of the *Frazier* standard, social scientists might respond by conducting additional research in this area. Given the reality that there are more and less coercive forms of lies, courts should be willing to adapt *Frazier* accordingly.

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88. *Id*. Ofshe and Leo also provide the memorable interrogation transcript of a suspect believing evidence from an investigator-invented "Neutron Proton Negligence Intelligence Test." *Id*. at 1033-35.

89. Indeed, experts have suggested that "scientific" false evidence ploys are "the most deceptive and coercive" false evidence ploys of all. Forrest et al., *supra* note 85, at 344.

90. Bibas, *supra* note 60, at 2495; Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1981 (1992); Wiseman, *supra* note 59, at 1006.

91. *See, e.g.*, State v. Cayward, 552 So. 2d 971, 973-74 (Fla. Dist. Ct. App. 1989) (holding that "the manufacturing of false documents by police officials offends our traditional notions of due process of law under both the federal and state constitutions" and drawing a "bright line by saying that the type of deception engaged in here has no place in our criminal justice system"); State v. Patton, 826 A.2d 783, 794-95, 804 (N.J. Super. Ct. App. Div. 2003) (adopting a "'bright-line' rule precluding the use of police-fabricated evidence"); *see also* State v. Chirokovskcic, 860 A.2d 986 (N.J. Super. Ct. App. Div. 2004) (holding that police violated the defendant's constitutional rights by using a fabricated laboratory report purporting to show that DNA from both the defendant and the victim had been deposited on a glove near the time of the murder). *Patton* also discusses West Virginia, Hawaii, and Nevada state courts' apparent agreement with the principle set out in *Cayward*. *See* 826 A.2d at 795-97,

B. Required Disclosure of False Evidence Before Plea Agreements Can Be Made

Although the Supreme Court has held that prosecutors are not required to disclose exculpatory evidence in the plea-bargaining process,[92] it has never squarely addressed prosecutors' burden of disclosure with respect to evidence the state itself has falsified. Existing case law, therefore, leaves room for courts to introduce heightened disclosure requirements. And in an era in which electronic recording of custodial interrogations has become pervasive nationwide,[93] prosecutors are usually well equipped to determine whether the false evidence ploy was used in an interrogation without sacrificing the efficiency gains that plea bargaining is meant to provide.[94]

Accordingly, the Court could expand upon recent doctrinal developments in the plea-bargaining context to require the state to reveal the misinformation it has fed to suspects before plea agreements may be made. In *Missouri v. Frye*, for example, the Court held that the Sixth Amendment right to effective assistance of counsel extends to plea-bargaining negotiations.[95] And in an opinion issued on the same day, the Court in *Lafler v. Cooper* reaffirmed that defendants' "Sixth Amendment right to counsel . . . extends to the plea-bargaining process."[96] The majority's reasoning in both cases rested on the crucial recognition that "[i]n today's criminal justice system . . . , the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant."[97] While the facts of *Frye* and *Lafler* did not involve false evidence presented during an interrogation,[98] the Court's decisions offer important implications for defendants who enter into plea negotiations with a distorted sense of their likelihood of conviction at trial.

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92. United States v. Ruiz, 536 U.S. 622, 633 (2002).

93. *See* Thomas Sullivan, *Compendium: Electronic Recording of Custodial Interrogations*, NAT'L ASS'N CRIM. DEF. L. (July 11, 2014), http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=33287&libID=33256 [http://perma.cc/GW99-GWRB].

94. *See* Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 1138 (1998) (describing "efficiency-oriented" justifications for plea bargaining).

95. 132 S. Ct. 1399, 1407-08 (2012).

96. 132 S. Ct. 1376, 1384 (2012).

97. *Frye*, 132 S. Ct. at 1407; *see also Lafler*, 132 S. Ct. at 1388 ("[T]he right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences.").

98. The facts in *Frye* centered on an attorney's failure to tell his client about a plea offer before it expired. 132 S. Ct. at 1404. In *Lafler*, the defendant rejected a plea offer because of his attorney's "deficient performance" (incorrectly informing the defendant that "the prosecution would be unable to establish his intent . . . because [the victim] had been shot below the waist"). 132 S. Ct. at 1383-84.

More specifically, it stands to reason that a defense attorney's effectiveness during plea negotiations is diminished when the state has artificially inflated the defendant's perceived likelihood of conviction at trial by using the false evidence ploy. "[T]he Constitution insists . . . that the defendant enter a guilty plea that is 'voluntary' and . . . make related waivers 'knowing[ly], intelligent[ly], [and] with sufficient awareness of the circumstances and likely consequences,'"[99] but as the law currently stands, defense attorneys are not legally entitled to the time necessary to discover whether evidence was falsified before plea offers expire.[100] In a criminal justice system where defense attorneys are given a limited amount of time to advise clients about whether to plead guilty, with their judgment of the strength of the state's case skewed by false evidence presented in an interrogation, defendants' "right to effective assistance of counsel in considering whether to accept [a plea offer]"[101] has come to look more like an aspiration than a constitutional guarantee. Even if this type of ineffectiveness does not fit neatly into the *Strickland* framework,[102] a system that takes seriously the notion that defendants have a constitutional right to effective assistance of counsel in deciding whether to accept a plea offer—and that guilty

99. United States v. Ruiz, 536 U.S. 622, 629 (2002) (quoting Brady v. United States, 397 U.S. 742, 748 (1970)).

100. Some plea offers come with an explicit expiration date, *see, e.g.*, *Frye*, 132 S. Ct. at 1404 ("On November 15, the prosecutor sent a letter to Frye's counsel offering a choice of two plea bargains . . . stat[ing that] both offers would expire on December 28."); *Plea Bargain Offer Form*, *in* 10 DAVID LOUIS RAYBIN, TENNESSEE PRACTICE SERIES: CRIMINAL PRACTICE AND PROCEDURE § 22:33 (2015) (prompting prosecutors to fill in a blank space labeled "EXPIRATION DATE OF OFFER"), but prosecutors are also legally entitled to withdraw a plea offer at any time before the defendant accepts it, *see* United States v. Gonzalez-Vasquez, 219 F.3d 37, 42 (1st Cir. 2000) ("It is axiomatic that a prosecutor may withdraw a plea offer before a defendant accepts it."); *see also* DAVIS, *supra* note 67, at 57-58.

101. *Lafler*, 132 S. Ct. at 1387; *see also* Laurie L. Levenson, *Peeking Behind the Plea Bargaining Process:* Missouri v. Frye *&* Lafler v. Cooper, 46 LOY. L.A. L. REV. 457, 480 (2013) (summarizing *Lafler* as issuing the following command to defense attorneys: "Thou Shalt Give Your Client Accurate Information in Deciding Whether To Accept a Plea Bargain").

102. Strickland v. Washington, 466 U.S. 668 (1984). The *Strickland* standard (which requires defendants to show deficient performance by counsel and resulting prejudice) was developed in response to allegations that the defense attorney made "unprofessional errors." *Id.* at 687, 694. In other words, defendants raising *Strickland* claims are almost always asserting that their attorneys were to blame for their convictions. My claim here is not that defense attorneys are at fault for providing unsound legal advice to innocent defendants subjected to the false evidence ploy; it is that the plea-bargaining system does not afford these attorneys the opportunity to provide effective assistance in a practical sense.

pleas "must be intelligent and voluntary"[103]—should not tolerate plea agreements predicated on incriminating evidence that does not actually exist.

Requiring the state to disclose its use of the false evidence ploy in the plea-bargaining process offers the added benefit of attaching a reputational cost to this form of police trickery. Under such a regime, police would be obligated to tell prosecutors that they confronted the suspect with fabricated evidence of guilt, and prosecutors would be obligated to turn over that information to defense counsel. This disclosure could result in great enough reputational harm to both law enforcement agencies focused on earning their community's trust[104] and elected prosecutors[105] to disincentivize the state from engaging in forms of the false evidence ploy that undermine public confidence.

CONCLUSION

This Comment contends that interrogators' use of the false evidence ploy exacerbates the problem of wrongful convictions in a criminal justice system where most convictions are secured through plea agreements. Courts' expansive readings of *Frazier* give police the green light to deliberately mislead suspects about their probability of conviction at trial. And once an innocent suspect is convinced that law enforcement possesses inculpating evidence that is likely to persuade a jury, entering a guilty plea may appear rational in a plea-bargaining system that does not obligate the state to disclose its use of falsified evidence. While the false evidence ploy is merely one of many risk factors for wrongful conviction, reducing interrogators' reliance on this mode of deception would move the ball forward in protecting the innocent from criminal sanction. For people like Anthony Gray, such a change could have made all the difference.

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103. *Brady*, 397 U.S. at 747 n.4; *see also* Boykin v. Alabama, 395 U.S. 238, 242 (1969) ("It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary.").

104. *See, e.g.*, Jeffrey M. Jones, *In U.S., Confidence in Police Lowest in 22 Years*, GALLUP (June 19, 2015), http://www.gallup.com/poll/183704/confidence-police-lowest-years.aspx [http://perma.cc/MY4P-QTUY]; *Rebuilding Public Trust the Top Priority for Chicago Police in 2016: Interim Superintendent*, CBS NEWS CHI. (Dec. 31, 2015), http://chicago.cbslocal.com/2015/12/31/rebuilding-public-trust-the-top-priority-for-chicago-police-in-2016-interim-superintendent [http://perma.cc/EYN4-29ZE].

105. *See, e.g.*, Julekya Lantigua-Williams, *Are Prosecutors the Key to Justice Reform?*, ATLANTIC (May 18, 2016), http://www.theatlantic.com/politics/archive/2016/05/are-prosecutors-the-key-to-justice-reform/483252 [http://perma.cc/S8XK-Y8KC] ("In all but four states, prosecutors are elected to office—about 2,400 of them . . . .").

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