The Inadequacy of Constitutional and Evidentiary Protections in Screening False Confessions: How Risk Factors Provide Potential for Reform

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The admission of a criminal defendant's confession into evidence is almost always fatal to a defendant's case. And this is no surprise: common sense advises that a confession is particularly incriminating and definitive in establishing a defendant's guilt. But while a confession's persuasiveness is not inherently problematic, its unique ability to convey guilt poses a problem when a confession happens to be false. This problem is wrongful conviction. In fact, false confessions are one of the leading causes of wrongful conviction, and individuals who are at risk due to their age, intellectual disability, and/or mental health are especially susceptible.

While the admission of confessions into evidence is governed by constitutional and evidentiary protections, these protections are insufficient to screen for the admissibility of false confessions as they do not govern a confession's reliability. Accordingly, a new evidence rule is necessary, one that accounts for the confession's reliability prior to its admission into evidence. This rule must specifically account for the factors known to heighten an individual's risk of false confession, as these factors may call a confession's reliability into question. This Note proposes one possible formulation for this new evidence rule and discusses foundations in the current legal landscape that support the proposed framework.

* J.D., University of California, Irvine School of Law, 2023. I would like to thank Professor Katie Tinto for her guidance, feedback, comments, and her encouragement of this project. I would also like to thank Joanna Yam, Ryan Ghassemi, and the other editors of the *UC Irvine Law Review* for their exceptional edits and dedication.

INTRODUCTION

On October 25, 1984, brothers Leon Brown and Henry McCollum were convicted after confessing to the brutal rape and murder of an eleven-year-old girl.[1] They were sentenced to death, and they would spend nearly thirty-one years in prison prior to being exonerated by DNA evidence.[2]

McCollum was interrogated at the police station for four hours prior to confessing.[3] In his confession, he implicated Brown, who was interrogated and confessed not long after McCollum.[4] McCollum and Brown were each mentally challenged, with IQ testing at 51 and 49, respectively.[5]

In their trial, the prosecution relied heavily on the signed confessions of both Brown and McCollum.[6] No physical or forensic evidence, including fingerprints

1. Maurice Possley, *Henry McCollum*, THE NAT'L REGISTRY OF EXONERATIONS (Mar. 14, 2023), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4492 [https://perma.cc/ZH27-DR8V].
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*

lifted from beer cans found at the scene of the crime, linked either McCollum or Brown to the crime.[7]

Finally, in 2004, DNA testing was ordered on a cigarette butt found at the scene of the crime.[8] The DNA profile did not match the profiles of either Brown or McCollum.[9] In 2010, the North Carolina Innocence Inquiry Commission started investigating the case.[10] At the request of the Commission, the DNA profile from the cigarette butt was submitted to state police, and the profile matched that of Roscoe Artis, who was, at that point, serving a life sentence for another crime.[11] The defense later learned that Artis repeatedly told other inmates that he knew McCollum and Brown were innocent.[12] Artis also "knew a lot about the victim. He knew some obscure facts about the crime, including the color of the victim's underwear and how she was killed."[13] It was not until September 2, 2014, that the charges against McCollum and Brown were dropped, and they were released based on this new evidence.[14]

Sadly, McCollum and Brown's story is not an isolated one. Many have heard of the most infamous false confessions[15]: the Central Park Five, the West Memphis Three, and most recently, the confession of Steven Avery, the subject of the new Netflix docuseries *Making a Murderer*.[16] But the list goes on—and on, and on. As of October 2023, the National Registry of Exonerations reports that 425 of the total 3,400 reported exonerations involved a defendant who falsely confessed.[17] And these are just the ones that we know about.

In short, false confessions are a leading cause of wrongful convictions.[18]

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7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. A false confession is defined as a confession by an individual who is factually innocent of the crime to which they confessed. *E.g.*, Eugene R. Milhizer, *Confessions After* Connelly*: An Evidentiary Solution for Excluding Unreliable Confessions*, 81 TEMP. L. REV. 1, 1 n.1 (2008).
16. *Coerced Confessions & False Testimony*, MONT. INNOCENCE PROJECT, https://mtinnocenceproject.org/coerced-confessions/ [https://perma.cc/7SFS-PBZX] (last visited Mar. 21, 2024); *False Confessions and the West Memphis Three*, INNOCENCE PROJECT (Aug. 23, 2011), https://innocenceproject.org/false-confessions-and-the-west-memphis-three/ [https://perma.cc/92WH-WEN3]; Jethro Nededog, *Everything You Need to Know from 'Making a Murderer' If You Don't Want to Spend 10 Hours Watching*, BUSINESS INSIDER (Jan. 14, 2016, 12:01PM PST), https://www.businessinsider.com/netflix-making-a-murderer-recap-2016-1 [https://perma.cc/C6L6-MK7T].
17. Registry Search Tool of Exonerations, THE NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=FC&FilterValue1=8%5FFC [https://perma.cc/RL8X-WJU3] (last visited Mar. 21, 2024) (filter registry to show only false confession entries by clicking the down arrow next to "FC" and then selecting "FC").
18. *See False Confessions*, INNOCENCE PROJECT, https://innocenceproject.org/false-confessions/ [https://perma.cc/V4VP-MSHW] (last visited Mar. 21, 2024).

Research suggests a few reasons for this correlation. To start, confessions are uniquely persuasive.[19] Most jurors, faced with confession evidence, find it difficult to conduct an independent assessment of the confession's reliability.[20] And usually, that is the end of the inquiry—if the defendant confessed and the confession is reliable, then the defendant must be guilty.[21] Moreover, distinguishing a true confession from a false one is no simple task,[22] and current law is ill-equipped to aid in this assessment.[23] Reliability assessments are notably lacking under the current constitutional framework governing the admission of confessions.[24] In fact, the Supreme Court has explicitly held that due process does not inquire into a confession's reliability.[25] Thus, once a confession has been deemed "voluntary"—which, under current jurisprudence, is not a difficult standard to meet—it is admissible as far as the Constitution is concerned.[26] Furthermore, evidence rules have yet to adapt to the Court's decision to exclude reliability from the calculation. Rather, most confessions are routinely admitted under the hearsay exception for opposing party statements, and this exception is not grounded in any assessment of the statement's reliability.[27]

In light of the lackluster constitutional and evidentiary protections governing confessions, a new evidence rule is necessary to screen confessions for reliability before they are admitted into evidence. This rule must specifically account for risk factors known to increase the likelihood that a confession is false. In particular, it must account for age, intellectual disability, and mental health status/mental illness, as these risk factors are demonstrably linked to false confessions and are not adequately mitigated by current constitutional and evidentiary protections governing the admission of confessions.[28]

In practice, judges will implement the proposed rule by conducting pretrial reliability assessments (i.e., pretrial hearings to consider the admissibility of a confession under the proposed rule). Judges are well-equipped to conduct pretrial assessments—they often do so, for example, when considering the admissibility of expert testimony.[29] Thus, the foundation for the proposed rule and corresponding

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19. *See generally* Saul M. Kassin & Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 LAW & HUM. BEHAV. 469, 469 (1997); Saul M. Kassin & Holly Sukel, *Coerced Confessions and the Jury: An Experimental Test of the "Harmless Error" Rule*, 21 LAW & HUM. BEHAV. 27, 27 (1997).

20. *See generally* Kassin & Neumann, *supra* note 19; Kassin & Sukel, *supra* note 19.

21. *See* Richard A. Leo, Peter J. Neufeld, Steven A. Drizin & Andrew E. Taslitz, *Promoting Accuracy in the Use of Confession Evidence: An Argument for Pretrial Reliability Assessments to Prevent Wrongful Convictions*, 85 TEMP. L. REV. 759, 773–74 (2013).

22. *See* Leo et al., *supra* note 21, at 774–75; Milhizer, *supra* note 15, at 4–8.

23. Milhizer, *supra* note 15, at 32.

24. *See* Colorado v. Connelly, 479 U.S. 157, 167 (1986).

25. *Id.*

26. Milhizer, *supra* note 15, at 29–30.

27. *Id.* at 32–33.

28. *See* INNOCENCE PROJECT, *supra* note 18.

29. Leo et al., *supra* note 21, at 808–16 (describing the various contexts in which judges conduct

reliability assessments already exists, allowing these assessments to be seamlessly integrated into the current pretrial framework and increasing reliability without compromising the workings of the judicial system.

Part I of this Note discusses the prevalence of false confessions and their connection to wrongful convictions. It explains the unique nature of confession evidence and how that uniqueness poses potential problems in the context of false confessions. Part II discusses the various risk factors for false confessions and explores reasons why the identified factors might make an individual uniquely susceptible to falsely confessing. Part III explains the current state of the law as it relates to the admission of confession evidence. It begins by exploring the inadequacy of constitutional protections in governing confession reliability and then turns to explaining the deficiencies in evidence rules. Part IV proposes a new rule of evidence in light of the issues discussed in the previous parts. It explains the components of this rule and how it might work in practice. Part IV ends by demonstrating that the foundations of the proposed rule are already present in current law, and it justifies the proposed rule in light of those already-existing foundations.

I. THE PROBLEM OF FALSE CONFESSIONS

False confessions pose a significant problem for the criminal justice system as a result of their link to wrongful convictions.[30] Because it is difficult to distinguish between a false confession and a true one, the risk of admitting a false confession into evidence is significant.[31] And a jury presented with confession evidence is likely to return a guilty verdict.[32]

In large part, this correlation is due to the particularly compelling nature of confession evidence.[33] A confession is perceived as one of the most incriminating pieces of evidence demonstrating a criminal defendant's guilt, and understandably so—a confession comes straight from the proverbial horse's mouth.[34] It is exceedingly difficult to acquit a defendant when the defendant has said that they are guilty.[35]

This Part will first address why confessions are especially persuasive as evidence of a defendant's guilt, and it will present studies demonstrating that jurors find confession evidence more compelling than other common forms of evidence, such as eyewitness testimony or character evidence. This Part will next discuss the

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pretrial reliability assessments).

30. *See* THE INNOCENCE PROJECT, *supra* note 18.

31. *Id.*; *see also* Amelia Hritz, Michal Blau & Sara Tomezsko, Project, *False Confessions*, CORNELL UNIV. L. SCH., https://courses2.cit.cornell.edu/sociallaw/student_projects/FalseConfessions.html#_edn18 [https://perma.cc/NVB8-SDW8] (last visited Mar. 21, 2024) (describing the prevalence of false confessions and noting that age, cognitive or intellectual disability, and personality disorders and psychopathology are factors that make an individual more likely to confess falsely).

32. Leo et al., *supra* note 21.

33. *Id.* at 774; Milhizer, *supra* note 15, at 4–8.

34. Leo et al., *supra* note 21, at 481. *See generally* Kassin & Neumann, *supra* note 19; Kassin & Sukel, *supra* note 19.

35. Leo et al., *supra* note 21.

link between false confessions and wrongful convictions and why distinguishing between truthful confessions and false confessions presents a challenge that the criminal justice system has yet to solve.

A. Confessions Are Uniquely Persuasive

Falsely confessing is perceived as contrary to human nature.[36] Most people prioritize their interest in self-preservation, and common sense advises that falsely confessing directly contradicts that interest.[37] Accordingly, most people believe that they would never confess to a crime they did not commit, and they have difficulty understanding how anyone ever would.[38] So, the inference goes, an individual who confesses must be telling the truth since falsely confessing would be irrational—plain and simple.[39]

Yet common sense is not the only factor governing an individual's decision to confess to a crime, and in fact, it may not even be the most influential factor.[40] Rather, factors such as a defendant's age, intellectual abilities, and mental health may play a significant role in their decision to confess.[41] And these factors may be further aggravated by intense coercion or police pressure. But for an individual who is not disadvantaged due to their age or intellectual abilities and has never experienced intense coercion or other external pressures, it can be difficult to imagine a scenario in which the pressure would be so significant that the most palatable option is falsely confessing.[42]

Various studies demonstrate the palpability of this coercive pressure in three experiments. In Experiment 1, participants read summaries of four criminal trials: murder, rape, assault, and theft.[43] Each of these trials contained limited circumstantial evidence as well as either a confession, eyewitness identification, character witness, or no additional evidence.[44] In three out of four of the Experiment 1 trials, confession evidence was found to be more incriminating than the other types of evidence.[45] In Experiments 2 and 3, participants were presented with a case summary that contained a confession, an eyewitness, and character testimony.[46] They were instructed to turn a dial up or down at various points

36. *Id.* at 774.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Age and Mental Status of Exonerated Defendants Who Confessed*, THE NAT'L REGISTRY OF EXONERATIONS (Apr. 10, 2022) [hereinafter *Status of Exonerated Defendants*], https://www.law.umich.edu/special/exoneration/Documents/Age%20and%20Mental%20Status%20FINAL%20CHART.pdf [https://perma.cc/TQA2-2NCY] (documenting the prevalence of false confessions based on certain risk factors).
41. *Id.*
42. *See* Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 985–86 (1997).
43. Kassin & Neumann, *supra* note 19, at 472, 475–76.
44. *Id.* at 472.
45. *Id.*
46. *Id.* at 476, 480.

midtrial to indicate whether the evidence presented led them to believe the defendant was guilty or not guilty.[47] Again, in each of these experiments, participants deemed confessions to be the most persuasive evidence presented.[48]

The uniqueness of confession evidence likely stems from jurors' inability to evaluate each piece of evidence independently and dismiss evidence that they believe to be unreliable, even if they can accurately identify that evidence, such as a confession, as unreliable. Two mock jury studies demonstrate this concept. Participants were instructed to read either a low-pressure or high-pressure version of a murder trial.[49] In the low-pressure version, the defendant in the trial immediately confessed.[50] In the high-pressure version, the defendant confessed only after a painful interrogation in which the detective also waved his gun at the defendant.[51] In each version, the judge ruled the confession either inadmissible or admissible.[52] The last group was a control group with no confession.[53] Though participants reported legally correct conclusions when asked about inadmissible testimony (i.e., that the inadmissible testimony did not affect their decision) these reports did not track verdict results.[54] Rather, all groups who read that the defendant confessed—regardless of the confession's admissibility or the details surrounding the confession—were more likely to return a guilty verdict, even if they had correctly identified that the confession should not be considered.[55]

Thus, it is no wonder that when a suspect confesses, everything changes—the police close their investigation and decline to follow up on outstanding leads, the prosecution centers its case around the confession and charges defendants with more offenses than it otherwise would, and defense attorneys pressure suspects into guilty pleas that seem more palatable than an inevitable jury conviction.[56] One way or another, admitting a confession into evidence is "virtually outcome determinative."[57] And sometimes that outcome is a wrongful conviction.[58]

B. Correlation Between False Confessions and Wrongful Convictions

Because confession evidence is demonstrably unique, it is not surprising that false confessions are one of the leading causes of wrongful conviction.[59] Studies show that defendants who falsely confessed and took their case to trial were

47. *Id.* at 476–78.
48. *Id.* at 481.
49. Kassin & Sukel, *supra* note 19, at 30–31.
50. *Id.* at 32.
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* at 42.
55. *Id.*
56. Leo et al., *supra* note 21, at 771–72.
57. *Id.* at 774.
58. *Id.* at 765–66.
59. *Id.* at 771.

convicted 73% to 81% of the time.[60] And the National Registry of Exonerations reports that a staggering 12% of 3,060 defendants who were later exonerated had confessed to the crime of which they were falsely accused.[61]

Psychological experiments have also mirrored these statistics. In one notable study, participants were told that they were participating in a reaction-time study consisting of computer tasks.[62] The participants were instructed to avoid touching the ALT-key and that doing so would cause the computer to crash, resulting in data loss.[63] During the tasks, the researchers would cause the computer to crash and accuse the participant of having touched the ALT-key.[64] Conditions for the participants varied: some were under time pressure while others were not.[65] Additionally, participants were sometimes told that a confederate of the experimenter had witnessed the participant touching the ALT-key.[66] Across all variables, 69% of participants indicated they were willing to sign a statement that they had touched the ALT-key and were responsible for the computer crash and loss of data.[67]

The persuasiveness of confession evidence is concerning in the context of false confessions as distinguishing a true confession from a false one is no simple task.[68] In fact, a false confession might be just as compelling, perhaps even more so, than a true one.[69] False confessions can be remarkably detailed and convincing, containing not only nonpublic crime facts, [sic] but a coherent and compelling storyline, motives and explanations, detailed and vivid crime knowledge, displays of emotion (including crying), description of the confessor's thoughts and feelings (both before and after supposedly committing the crime), displays of catharsis and remorse, requests for forgiveness, and even expressions of voluntariness.[70]

As a result, a false confession can be practically indistinguishable from a true one on its face, so false confessions have been admitted into evidence, despite their falsity.[71] And thus, defendants who falsely confess have been convicted, despite their innocence.[72]

II. RISK FACTORS FOR FALSE CONFESSIONS

Though it is impossible to always definitively and accurately distinguish between a false confession and a true one—absent some intervening or objective

60. *Id.* at 773.
61. *Status of Exonerated Defendants*, *supra* note 40.
62. Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCH. SCI. 125, 126–27 (1996).
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* at 127.
68. Leo et al., *supra* note 21, at 775.
69. *Id.*
70. *Id.* at 776.
71. *See id.* at 775.
72. *Id.* at 777.

evidence, such as the existence of DNA evidence—previous research shows that there are a number of risk factors that heighten an individual's susceptibility to falsely confessing.[73] These factors include the defendant's age, cognitive or intellectual disability, and mental health/mental illness.[74] Accordingly, these factors can aid in distinguishing reliable confessions from unreliable ones and, as a result, can significantly decrease the number of false confessions admitted into evidence. This Part will discuss each of these risk factors in turn.

A. Age

Minor defendants falsely confess at higher rates than nonminor defendants, making age a significant risk factor for false confessions.[75] In one study, researchers examined 125 proven false confessions that occurred between 1971 and 2002.[76] In examining their sample, the authors discovered that 63% were under the age of twenty-five and that juveniles, mostly aged between fourteen and seventeen, comprised approximately one-third of the sample.[77] Data collected and released by the National Registry of Exonerations bolsters these observations. In fact, the National Registry of Exonerations reports that 34% of exonerated juvenile defendants falsely confessed to the crime for which they were wrongly convicted.[78] In contrast, only 10% of exonerated adult defendants falsely confessed.[79]

Research conducted on interviewing child witnesses may demonstrate why children are especially susceptible to falsely confessing.[80] To start, children are less aware of legal concepts and terminology than adults, meaning their comprehension of a confession's consequences is significantly diminished.[81] Additionally, children lack maturity and exhibit heightened impulsivity.[82] These characteristics make children more likely to comply with authority figures and less likely to focus on the long-term consequences of their decisions.[83] In an interrogation setting, these characteristics may diminish a juvenile's ability to understand their *Miranda* rights and the consequences of waiving them and may make them more susceptible to police interrogation tactics intended to elicit confessions.[84]

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73. *See generally* Hritz et al., *supra* note 31.
74. *Id.*
75. Christine S. Scott-Hayward, *Explaining Juvenile False Confessions: Adolescent Development and Police Interrogation*, 31 LAW & PSYCH. REV. 53, 56 (2007); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 963–69 (2004).
76. Drizin & Leo, *supra* note 75.
77. *Id.*
78. *Status of Exonerated Defendants*, *supra* note 40.
79. *Id.*
80. Scott-Hayward, *supra* note 75, at 62.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 62–63.

B. Intellectual Disability

The risk of false confession is significantly heightened for those with intellectual disabilities.[85] An intellectual disability is defined by the *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (DSM-5)—the primary handbook used by healthcare professionals to diagnose mental disorders—as a "disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains."[86] These deficits may affect an individual's ability to reason, problem solve, and engage in critical thinking, as demonstrated by performance on IQ tests and other similar standardized tests.[87] In contrast to a mental illness, which may impact an individual's thought processes and emotions, an intellectual disability impacts an individual's capability to learn.[88]

In the study described above, out of 125 false confessions, approximately 22% of the sample demonstrated some type of intellectual disability.[89] And the National Registry of Exonerations reports that 69% of mentally ill or intellectually disabled exonerees falsely confessed to the crime of which they were exonerated.[90]

The heightened risk of false confession for individuals with intellectual disabilities is likely a result of various factors, with a significant factor being the officer's impression or awareness of the individual's disability.[91] Though officers are instructed to adjust their tactics when interrogating individuals with intellectual disabilities, this requires that the officer actually be aware that the individual has an intellectual disability prior to interrogation, a fact which may or may not be apparent based on the officer's initial interactions with the individual.[92] And thus, an officer may unknowingly—or knowingly—use leading questions and other suggestive techniques on an intellectually disabled individual who is unequipped to combat those techniques.[93] Moreover, individuals with intellectual disabilities may face similar challenges as children do in regards to comprehension and understanding of their legal rights, only further heightening their vulnerability to falsely confessing.[94]

C. Mental Illness/Mental Health Status

An individual's mental health status can present various risks for false

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85. *See Status of Exonerated Defendants*, *supra* note 40.

86. Samson J. Schatz, Note, *Interrogated with Intellectual Disabilities: The Risks of False Confession*, 70 STAN. L. REV. 643, 655–56 (2018).

87. *Id.*

88. *Id.* at 658.

89. Drizin & Leo, *supra* note 75, at 791.

90. *Status of Exonerated Defendants*, *supra* note 40. Note that this statistic does not distinguish between mentally ill and intellectually disabled defendants, which are two distinct categories. *Infra* notes 98–100 and accompanying text.

91. Schatz, *supra* note 86, at 659–60.

92. *Id.*

93. *Id.*

94. *Id.* at 660–62.

confession.[95] A mental illness is defined by the American Psychiatric Association as a "health condition[] involving changes in emotion, thinking or behavior (or a combination of these)."[96] Thus, mental illness refers collectively to various mental disorders and health conditions that may be associated with distress or problems functioning in social, work, or family settings.[97] Mental illness can be distinguished from intellectual disability primarily in terms of respective treatment options and respective impacts.[98] Generally speaking, mental illnesses are mostly treatable through therapy while intellectual disabilities are more permanent.[99] And while mental illnesses primarily affect an individual's emotion, thinking, or behavior, intellectual disabilities primarily affect an individual's cognitive and learning capacity.[100]

As a result of the conditions described above, individuals with mental illness may experience difficulty understanding and invoking their *Miranda* rights and may be targeted by interrogators due to their extreme vulnerability and susceptibility.[101] Notably, mental illness can affect not only an individual's capacity for understanding their rights but also their willingness or motivation to fend off provoking or aggressive questioning.[102] In other words, mental illness may make an individual more likely to "give up" and falsely confess in pursuit of relief from constant interrogation.[103]

D. Aggravating and Mitigating Factors

The false confession risk factors do not work alone—they can be aggravated or mitigated by an individual's identity or other external influences. A child with a mental illness or an intellectual disability, for instance, likely experiences pressure and coercion in an exponentially heightened capacity.[104] Further, each risk factor works in conjunction with other circumstances surrounding the confession.[105] For example, the presence of counsel, the types of police tactics used during interrogation, and other external influences can affect whether an individual falsely confesses, regardless of whether the risk factors are present.[106]

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95. William C. Follette, Deborah Davis & Richard A. Leo, *Mental Health Status and Vulnerability to Police Interrogation Tactics*, 22 CRIM. JUST. 42, 44 (2007).

96. Ihuoma Noku, *What Is Mental Illness?*, AM. PSYCHIATRIC ASS'N, https://www.psychiatry.org/patients-families/what-is-mental-illness [https://perma.cc/665S-5WYZ] (last visited Mar. 21, 2024).

97. *Id.*

98. *Id.*; *see also* Schatz, *supra* note 86, at 655, 658.

99. Njoku, *supra* note 96; Schatz, *supra* note 86, at 655–56, 658.

100. *See* sources cited *supra* note 99. The distinctions separating intellectual disability and mental illness are greatly oversimplified for purposes of this Note. While a complete analysis of the differences is beyond this Note's scope, it is worth mentioning that the line dividing these two risk factors is blurrier than it may seem. *See* Schatz, *supra* note 86, at 655–56, 658.

101. Follette et al., *supra* note 95, at 43–44.

102. *Id.*

103. *Id.*

104. *See* Laurel LaMontagne, *Children Under Pressure: The Problem of Juvenile False Confessions and Potential Solutions*, 41 W. ST. U. L. REV. 29, 39–45 (2013); Schatz, *supra* note 86, at 659–71; Follette et al., *supra* note 95, at 44–49.

105. *See* sources cited *supra* note 104.

106. Blakely Lloyd, *Making an Involuntary Confession: An Analysis of Improper Interrogation*

Age, intellectual disability, and mental health status are consistently identified, however, as risk factors that are demonstrably linked to false confessions.[107] Accordingly, the identified risk factors form the basis for the proposed evidence rule discussed below. The proposed rule also accounts for other influences that might mitigate the risks.

III. THE INSUFFICIENCY OF CONSTITUTIONAL AND EVIDENTIARY PROTECTIONS IN SCREENING FOR FALSE CONFESSIONS

The Constitution and evidence rules provide some protection in preventing the admissibility of confessions, but these sources of law are nevertheless insufficient to screen for false confessions—as demonstrated by the wrongful conviction statistics cited above. In fact, neither the Constitution nor the rules of evidence currently govern the reliability of a confession.[108] And neither of these sources explicitly allow for consideration of the demonstrated false confession risk factors.[109]

The first barriers to admission of confession evidence stem from the Constitution. To pass constitutional muster, a confession admitted into evidence must comply with (1) the requirements of due process mandating a confession be voluntary under the Fourteenth Amendment and (2) the requirements for custodial interrogations stemming from the Fifth Amendment as articulated in *Miranda v. Arizona*.[110] Yet as this Part will discuss, these constitutional protections have been consistently narrowed and, as they stand, are insufficient to protect against the admission of false confessions.[111]

Once a confession passes constitutional requirements, it must be admitted under the evidence rules of the forum.[112] In a criminal case, this is almost always an easy task: the admission of a confession will be admitted under the hearsay exception for opposing party statements.[113] This exception does not consider the reliability of the underlying statement. Rather, it admits statements made by a party to the case (i.e., the defendant) automatically and without regard to the statement's reliability or the declarant's personal knowledge.[114] This Part discusses the inadequacy of the opposing-party statement rule in protecting against the admission of false confessions.

Tactics Used on Intellectually Impaired Individuals and Their Role in Obtaining Involuntary Confessions, 42 LAW & PSYCH. REV. 117, 127–29 (2018); Follette, et al., *supra* note 95, at 44–49.

107. *E.g.*, *Status of Exonerated Defendants*, *supra* note 40.

108. *See* Colorado v. Connelly, 479 U.S. 157, 167 (1986); Miranda v. Arizona, 384 U.S. 436, 444 (1966); FED. R. EVID. 801(d)(2).

109. *Connelly*, 479 U.S. at 167; *Miranda*, 384 U.S. at 444; FED. R. EVID. 801(d)(2).

110. *Connelly*, 479 U.S. at 167; *Miranda*, 384 U.S. at 444; FED. R. EVID. 801(d)(2); George E. Dix, *Federal Constitutional Confession Law: The 1986 and 1987 Supreme Court Terms*, 67 TEX. L. REV. 231, 234 (1988).

111. Leo et al., *supra* note 21, at 777–90.

112. *See, e.g.*, *Connelly*, 479 U.S. at 167; FED. R. EVID. 101.

113. *See, e.g.*, FED. R. EVID. 801(d)(2).

114. *Id.*

A. The Inapplicability of Constitutional Protections

Under the Fourteenth and Fifth Amendments, confessions admitted into evidence must be both voluntary and comply with the "prophylactic" requirements announced by the Supreme Court in *Miranda v. Arizona*.[115] Yet the level of protection actually afforded by these inquiries is limited: neither actually regulates the reliability of a confession prior to admitting it into evidence.[116] Accordingly, this Section will demonstrate that though the protections afforded by these two requirements are necessary, they are insufficient to fully protect against the admission of false confessions.

1. Voluntariness Requirements and the Impact of Colorado v. Connelly

As it stands, the voluntariness inquiry—the first constitutional restraint governing the admission of confessions—is inadequate to protect against the admission of false confessions. The analysis considers whether a confession was elicited in a manner that demonstrates that it is the product of the defendant's free will.[117] In essence, the inquiry demands only the bare minimum: that law enforcement officials did not "overbear" the defendant to the point that their confession is not the product of his own decision-making.[118] Absent such a drastic showing, the confession may be used against the defendant.[119] The voluntariness inquiry is thus uninterested in the reliability of the confession's content.[120] As long as it was the defendant's decision to confess, the confession is admissible under due process.[121]

But courts did not always construe voluntariness so literally. The inquiry, stemming from an early common law exclusionary rule for involuntary confessions, started as a way to exclude unreliable evidence from admission.[122] Under the common-law voluntariness rule, courts would exclude confessions as involuntary

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115. *E.g.*, *Connelly*, 479 U.S. at 163 ("The Court has retained this due process focus, even after holding, in *Malloy v. Hogan*, that the Fifth Amendment privilege against compulsory self-incrimination applies to the States." (citations omitted)); Malloy v. Hogan, 378 U.S. 1, 6 (1964) ("We hold today that the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgement by the States."); *Miranda*, 384 U.S. at 467 ("Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves."); U.S. CONST. amend. V ("No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."); U.S. CONST. amend XIV ("Nor shall any State deprive any person of life, liberty, or property without due process of law.").

116. Leo et al., *supra* note 21, at 782–86.

117. *Id.*

118. *Id.*; Rogers v. Richmond, 365 U.S. 534, 544 (1961); Culombe v. Connecticut, 367 U.S. 568, 602 (1961) ("Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.").

119. Milhizer, *supra* note 15, at 29–31.

120. *Id.*

121. *Id.*

122. Leo et al., *supra* note 21, at 779–80.

when there was evidence, such as threats or other forms of intimidation, that the confession was untrustworthy.[123] In fact, it was not until *Brown v. Mississippi* in 1936 that the court declared due process as governing the voluntariness of confessions.[124]

Enter *Colorado v. Connelly*. Defendant Connelly stopped a police officer and spontaneously confessed to the murder of a young girl "without any prompting."[125] The officer immediately advised Connelly of his *Miranda* rights.[126] At the time of his confession, Connelly appeared lucid to the officer.[127] The following morning, however, Connelly became "visibly disoriented" and stated that the "voice of God" told him to confess.[128] In fact, he suffered from chronic schizophrenia and was in a psychotic state at least the day before he confessed.[129] Connelly nevertheless was determined competent to stand trial, where a state psychiatrist testified that Connelly was experiencing hallucinations and diminished volitional abilities, though his cognitive abilities remained intact, and that in his opinion, Connelly's psychosis motivated his confession.[130]

Despite this testimony, the *Connelly* Court explicitly held that coercion by law enforcement is a necessary predicate to a finding that a confession is involuntary and therefore inadmissible.[131] In other words, Connelly's confession was voluntary because it was spontaneous and not provoked by law enforcement, regardless of his state of mind at the time or his history of mental illness.[132] The Court remarked:

> A statement rendered by one in the condition of respondent might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum, see, *e.g.*, Fed. Rule. Evid. 601, and not by the Due Process Clause of the Fourteenth Amendment. "The aim of the requirements of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false."[133]

And thus, the Court closed and locked the door on considerations of broader reliability issues in the due process analysis, opting instead for a framework in which the reliability of a confession is governed by the evidence laws of the forum.[134] Reliability is no longer one of the circumstances that may be considered in the voluntariness framework—that task is left to the evidence rules of the forum.[135]

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123. *Id.* at 780.
124. *Id.*; *see also* Dix, *supra* note 110, at 234–35.
125. *Connelly*, 479 U.S. at 160.
126. *Id.*
127. *Id.*
128. *Id.* at 161.
129. *Id.*
130. *Id.* at 161–62.
131. *Id.* at 164.
132. *Id.*
133. *Id.* at 167 (quoting Lisenba v. California, 314 U.S. 219, 236 (1941)).
134. *Id.*
135. *Id.*

2. The Irrelevance of Miranda v. Arizona *to False Confessions*

The second constitutional restraint on the admission of confessions, the *Miranda* doctrine, is also insufficient to protect against the admission of false confessions into evidence.[136] More specifically, *Miranda*'s protections are largely irrelevant to the false confessions issue.[137] *Miranda* merely requires that a certain set of warnings be recited to a defendant in custody prior to the defendant providing a statement.[138] It does little to protect the reliability of statements made once those warnings are provided.[139]

Rather than replacing the due process voluntariness test, *Miranda*'s requirements function separately as a protection of the right to be free from involuntary confessions under the Fifth Amendment.[140] In *Miranda*, the Supreme Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."[141] The defendant must be advised that (1) he has the right to remain silent, (2) anything he says can and will be used against him in a court of law, (3) he has the right to an attorney, and (4) if he cannot afford an attorney, one will be provided to him.[142]

Despite *Miranda*'s lofty goals, many commenters have noted that *Miranda* does very little to protect against the admission of false confessions.[143] *Miranda*'s core purpose is protecting defendants from the pressures and coercion inherent in police interrogations.[144] Any reliability screening is merely a secondary effect.[145] *Miranda* arguments are usually centered around procedural issues: either whether law enforcement was required to recite the defendant's *Miranda* rights in the particular case or whether the defendant invoked or waived his *Miranda* rights.[146] Arguments about the content or circumstances of the confession in question are thus largely irrelevant in *Miranda* debates, and *Miranda* is accordingly largely irrelevant to the problem of false confessions.[147]

Finally, and perhaps most significantly, *Miranda* rights must be explicitly invoked and can be waived by a suspect in custody.[148] Notably, the factors that

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136. Leo et al., *supra* note 21, at 788–89.
137. *Id.*
138. *Miranda*, 384 U.S. at 444–45.
139. Leo et al., *supra* note 21, at 788–89.
140. *Id.*
141. *Miranda*, 384 U.S. at 444.
142. *Id.*
143. Leo et al., *supra* note 21, at 788–89.
144. *Id.*
145. *Id.*
146. *See, e.g.*, *Miranda*, 384 U.S. at 444; North Carolina v. Butler, 441 U.S. 369, 373 (1979); Berghuis v. Thompkins, 560 U.S. 370, 380 (2010).
147. Leo et al., *supra* note 21, at 788–89.
148. Milhizer, *supra* note 15, at 27–28.

make a false confession more likely also make it more likely that a suspect will waive *Miranda* rights inadvertently or not understand their *Miranda* rights.[149] Consequently, *Miranda*'s effectiveness in screening for false confessions for at-risk individuals may be limited, as the vulnerable individuals that *Miranda* is intended to protect are more likely to waive those protections.

3. Arizona v. Fulminante *and the Harmless Error Doctrine*

At the appellate level, protections for defendants who have falsely confessed are lacking. In *Arizona v. Fulminante*, the Supreme Court, in a 5-4 majority, applied the harmless error rule when considering the admission of an involuntary confession into evidence.[150] Thus, under *Fulminante*, an involuntary confession can be admitted into evidence erroneously, and on appeal, a court may decide that the confession's admittance did not prejudice the defendant.[151] The remaining four justices disagreed with the application of this standard, keenly noting that "a confession is like no other evidence" and that it is "probably the most probative and damaging evidence" for a defendant.[152]

As a result of the court's decision in *Fulminante*, defendants who have falsely confessed and are challenging the admission of their confession on appeal are faced with another hurdle. Not only must they convince the appellate court that their confession was in fact involuntary but they must also demonstrate that their confession was not harmless. And though, as noted above, confession evidence is uniquely persuasive and clearly not harmless, it is still yet another hurdle false confessors must face to convince the court of that fact.

Thus, constitutional protections are lacking for defendants who may have falsely confessed at every step of the way—from interrogation to trial to appeal. These gaps place a significant burden on the evidence rules of the forum to police for reliability. Evidence rules, however, are not up to the daunting task of governing reliability.

B. The Problem with Current Evidence Rules

Once a confession has passed the constitutional tests, it still must be admissible under the forum's evidence rules—in particular, the forum's evidence rules that guide the admission of hearsay evidence.[153] In a criminal case, this almost always means that the opposing-party statement rule will apply because the defendant is the opposing party.[154] This exemption generally goes as follows: any statement by a party is exempt from the ban against hearsay evidence when it is

149. *See supra* notes 84, 94, 101–03, and accompanying text.

150. Arizona v. Fulminante, 499 U.S. 279, 295 (1991).

151. *Id.*

152. *Id.* at 296. These comments are reinforced by the studies described in Part I demonstrating the uniquely damaging nature of confessions to a defendant's case. *See supra* notes 43–55 and accompanying text.

153. *See, e.g.*, *Connelly*, 479 U.S. at 167; FED. R. EVID. 801(d)(2).

154. *E.g.*, FED. R. EVID. 801(d)(2).

offered against that party.[155] Thus, a defendant in a criminal case cannot object to the admission of his own statement—including a confession—on hearsay grounds.[156]

Therein lies the problem. Opposing party statements are admitted immediately and without second thought.[157] And yet, unlike other hearsay exceptions, the exemption for opposing party statements, including confessions, is not grounded in any reliability predetermination but in the foundations of an adversarial litigation system.[158] It is based on the apparent contradiction that would occur should a defendant claim that his own hearsay statements cannot be admitted for lack of opportunity to confront or cross-examine himself—the defendant could choose to take the stand and testify in his own defense.[159]

These justifications, however, are problematic at best. Relatively few defendants choose to testify at their own trial for fear that it would open the door to the admission of impeachment evidence, such as any previous convictions, that would otherwise be inadmissible.[160] And in fact, their right to forgo testifying is protected by the Self-Incrimination Clause.[161] Thus, admitting confessions under this rule and then expecting the defendant to simply take the stand and explain their statement greatly oversimplifies the issue.

IV. PROPOSED RULE IN FORM AND PRACTICE

In light of the inadequacies of current law governing confessions, a new evidence rule is necessary to screen confessions for reliability before they are admitted into evidence. This rule must specifically account for characteristics known to heighten the risk of a false confession, as these risk factors inherently call reliability into question.[162] And these risk factors are not adequately accounted for in other areas of the law governing the admission of confessions.[163] The voluntariness inquiry and *Miranda* warnings regulate law enforcement behavior before and during the defendant's statement, and the hearsay exception for opposing party statements does not regulate the circumstances or content of the statement at all.[164] Hence, there is a gap in the law that a new evidence rule needs to fill. One possible formulation for this new evidence rule is written below:

(a) In a criminal proceeding, a defendant's confession is admissible only if

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155. *Id.*

156. *Id.*

157. Ronald J. Rychlak, *Using the Rules of Evidence to Control Criminal Confessions*, 54 TEX. TECH. L. REV. 39, 53–54 (2021).

158. *Id.*; Leo et. al, *supra* note 21, at 816.

159. Rychlak, *supra* note 157, at 54.

160. *Id.* at 55–56.

161. U.S. CONST. amend. V.

162. This Note is not the first to suggest a new rule of evidence to govern the admission of false confessions. *See generally* Leo et al., *supra* note 21; Milhizer, *supra* note 15. Notably, however, an explicit mention of false confession risk factors is missing from previous proposals. This Note attempts to remedy this significant gap.

163. *See supra* notes 108–52 and accompanying text.

164. *See Connelly*, 479 U.S. at 167; *Miranda*, 384 U.S. at 444; FED. R. EVID. 801(d)(2).

the judge makes the factual determination that the confession is reliable.

(b) If any of the following factors are present, the confession is presumed to be unreliable and inadmissible:
    (1) The defendant is under eighteen years old;
    (2) The defendant has an intellectual disability; or
    (3) The defendant has a mental illness or a history of mental illness.

(c) A presumption of unreliability may be rebutted by other evidence that indicates the confession is reliable. This other evidence may include:
    (1) Evidence that counsel was present for the entire duration of the defendant's interrogation;
    (2) Evidence that corroborates the defendant's guilt other than the defendant's confession or evidence discovered as a result of that confession;
    (3) Evidence that coercive interrogation tactics, including but not limited to durationally long interrogations or lying about the existence of corroborating evidence, were not used to interrogate the defendant; or
    (4) Evidence of any other circumstances that tend to demonstrate the reliability of the defendant's confession. Evidence that the defendant was provided or waived their *Miranda* rights is not sufficient on its own to rebut the presumption.

(d) For purposes of this rule, a "confession" is a statement in which the defendant admits guilt to some or all of the present charges against him.

(e) If a defendant's statement qualifies as a confession under this rule, that statement may not be admitted under any other rule as evidence of the defendant's guilt unless it also may be admitted under this rule for such purpose.

Formulated as such, the rule accounts for the various issues that arise when determining the admissibility of confessions into evidence. Each of the proposed rule's components will be discussed in turn.

A. Preliminary Matters

As a preliminary matter, the rule defines the term "confession" in section (d) to mean an admission of guilt to *some or all* of the charges facing the defendant. The rule accordingly applies even if the defendant only admits to some of the conduct of which he is accused. As long as the statement, if true, is sufficient to convict the defendant of at least one of the charges against him, the statement must be admitted under this rule.

The rule also limits and defines its scope. Section (a) specifies that the rule applies only in criminal cases, as it is in these cases that issues relating to false

confessions arise. Section (e) clarifies that the rule is not simply another hearsay exception—it is the exclusive evidentiary authority governing the admission of confessions into evidence. Thus, any statements that are confessions as defined by the proposed rule must be admitted into evidence only after the judge considers the statement's reliability under sections (a)-(c). Section (e) does not, however, preempt analysis under any of the constitutional protections governing confessions.

B. Judicial Reliability Determinations

The first section of the proposed rule, section (a), lays out the general statement that confessions are only admissible if they are reliable. In so doing, it presents the purpose and subject of the rule (i.e., the reliability of confessions). Thus, though the rule goes on to discuss the presumptions relating to the presence of risk factors in sections (b) and (c) of the rule, the rule acknowledges that there are reasons a confession would be unreliable besides the presence of false confession risk factors. A confession may be unreliable because, for example, the defendant experienced physical torture. And while this example would likely raise voluntariness considerations under due process, the rule does not close the door on an additional reliability discussion in these cases.

Section (a) also indicates that the reliability determination is a finding of fact that should be decided by a judge prior to trial. If the judge determines the confession to be reliable, it is admitted so that the jury has an opportunity to consider it. If the judge determines the confession to be unreliable, it is not admitted into evidence, and the jury will never be aware that the confession exists. The justification for this framework is twofold: first, a judge is well-equipped to make these types of determinations as they regularly perform a gatekeeping function for the admission of evidence;[165] second, and more importantly, a pretrial screening prevents a jury from deciding that a confession is unreliable and nevertheless considering it—albeit improperly.[166]

Judges are no strangers to pretrial reliability assessments.[167] In fact, they conduct them in various contexts quite frequently, for example, when considering the admission of expert testimony.[168] In *Daubert*, the Supreme Court set forth a list of factors for judges to consider in determining the admissibility of expert testimony pursuant to Federal Rule of Evidence 702.[169] Judges have discretion in determining whether the expert's testimony should be admitted based on these factors, which include (1) whether the theory or technique in question can be and has been tested, (2) whether the theory has been subjected to peer review and publication, (3) the theory or technique's known or potential error rate, (4) whether there are standards and controls,

165. Leo et al., *supra* note 21, at 813–14.
166. *See supra* notes 49–55 and accompanying text.
167. Leo et al., *supra* note 21, at 813–14.
168. *Id.*; *see also* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).
169. *Daubert*, 509 U.S. at 593–94.

and (5) whether the theory has been generally accepted in the scientific community.[170]

Th *Daubert* factors require judges to answer a variety of questions: What constitutes sufficient peer review? When is an error rate too high for the testimony to be admitted? What counts as a control? How much disagreement or discourse within the scientific community is allowed before the theory is not "generally accepted"? Fundamentally, however, each of these discretionary questions are intended to answer one ultimate question: Is the testimony reliable?

Judges, therefore, are already conducting pretrial reliability assessments in the context of expert testimony.[171] As a result, they are already equipped with the skills and expertise to conduct expert reliability assessments, so it is not unreasonable to assume that they could conduct similar pretrial reliability assessments before admitting confessions.[172] And this is exactly what the proposed rule asks of judges: to assess reliability based on predetermined factors and presumptions. Further, because judges regularly conduct pretrial hearings already, the burden on the judicial system would be minimal, and arguments under the proposed rule could be heard simultaneously with other motions in limine.

C. Presumption of Unreliability When Risk Factors Are Present

Section (b) of the proposed rule expands on one instance—albeit a significant instance—when a confession is presumed unreliable: the presence of risk factors. The rule specifically identifies age, intellectual disability, and mental illness as the factors that result in a presumption of unreliability, as these factors are demonstrably linked to an individual's likelihood of falsely confessing.

The concept of accounting for various risk factors or individual characteristics in the context of witness statements is not new.[173] In fact, age and mental capacity are regularly considered in both constitutional law and evidentiary law schemas.[174] Accordingly, accounting for reliability in confessions by using the false-confession risk factors is a concept already embedded in current law.

In *JDB v. North Carolina*, the Supreme Court opened the door to considering age within the realm of witness statements. The Court held that, in determining whether a child defendant is in custody for the purposes of *Miranda*, the age of the child is a relevant factor that a court may consider.[175] In so holding, the Court paid special attention to children's lack of maturity as it relates to their perception of the consequences, noting that they "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."[176] The

170. *Id.*

171. Leo et al., *supra* note 21, at 813–14.

172. *Id.*

173. *E.g.*, J.D.B. v. North Carolina, 564 U.S. 261, 273 (2011); Atkins v. Virginia, 536 U.S. 304, 320–21 (2002).

174. *J.D.B.*, 564 U.S. at 273; *Atkins*, 536 U.S. at 320–21.

175. *J.D.B.*, 564 U.S. at 271–72.

176. *Id.* at 272.

Court further remarked:

> The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them. Like this Court's own generalizations, the legal disqualifications placed on children as a class—*e.g.*, limitations on their ability to alienate property, enter a binding contract enforceable against them, and marry without parental consent—exhibit the settled understanding that the differentiating characteristics of youth are universal.[177]

Thus, in *J.D.B.*, the Court specifically acknowledged and endorsed consideration of age as a factor to consider in the context of a confession's admissibility, albeit indirectly. Though the issue in this case was not technically the confession's admissibility, the Court's opinion opened the door for J.D.B.'s confession to be ruled inadmissible on remand as a result of his age. Accordingly, the Court's opinion in *J.D.B.* can be considered akin to the proposed rule's consideration of age as a factor in admitting a confession into evidence.

The Supreme Court has also acknowledged that in some contexts it is appropriate to treat individuals with mental impairments differently to avoid injustice.[178] For example, in *Atkins v. Virginia*, the Court held that individuals with intellectual disabilities may not be sentenced to death because they "face a special risk of wrongful execution."[179] The Court further remarked that this risk results from an increased possibility of false confession:

> The reduced capacity of mentally retarded offenders provides a second justification for a categorical rule making such offenders ineligible for the death penalty. The risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty" is enhanced, not only by the possibility of false confessions, [sic] but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors.[180]

Though the Court's acknowledgement of mental impairment as a risk factor is a step in the right direction, the *Atkins* opinion nevertheless begs the obvious question: Why is the increased risk of false confession factored into the cruel and unusual punishment inquiry but completely neglected when determining the admissibility of those confessions directly?[181] The answer, simply, is that this should not be the case. The increased risk that individuals with mental impairments face in relation to false confessions should be considered at the admissibility stage rather than at sentencing. Accounting for these risks in the proposed rule above attempts

177. *Id.* at 273 (citations omitted).
178. *Atkins*, 536 U.S. 304.
179. *Id.* at 321.
180. *Id.* at 320.
181. In fact, the *Connelly* Court shut the door to considering mental illness within the due process framework for admission of confessions. Colorado v. Connelly, 479 U.S. 157, 164–65 (1986).

to rectify this contradiction.

More generally, consideration of individual characteristics in determining the reliability of a statement has also been accepted in determining witness competency. Every forum requires a witness testifying at trial to maintain a minimum level of competency.[182] Though the exact rules and language may differ slightly, courts are generally agreed that a witness, in order to testify at trial, must be able to sufficiently understand the difference between the truth and falsehood.[183] In conducting this inquiry, courts look to whether the witness understands their oath to tell the truth, is responsive to questioning, and provides answers that are logical and internally consistent.[184] The easy assumption then is that courts care about a witness's competency because they care about the accuracy and reliability of the witness's statements.

A confession, at its core, is no different from a witness's trial testimony. Each is a statement, and a confession is simply a statement that admits guilt usually spoken by a particular person: the defendant. Each is often admitted to prove the defendant's guilt. The same goals of accuracy and reliability desired in witness testimony are therefore assumably present for confessions, yet the latter is currently lacking adequate protections. Further, an assessment of risk factors when admitting a confession into evidence functions equivalently to an assessment of witness competency prior to admitting evidence: each attempt to ensure that the admitted statement is reliable. The proposed rule accordingly extends the competency and reliability assessments that already occur for in-court statements to out-of-court confessions.

The foundations for considering false-confession risk factors are already present in the law governing witness statements—these factors are indirectly considered in the context of *Miranda* rights, the death penalty, and witness competency requirements. Nowhere in the law, however, are the risk factors considered in direct relation to the reliability of a confession. The proposed rule remedies this gap.

D. Rebutting an Unreliability Finding

Section (c) of the proposed rule specifies how a presumption of unreliability as a result of the presence of risk factors may be rebutted. The presence of a risk factor, or even multiple risk factors, does not make a confession automatically false—it makes it presumptively unreliable. Thus, the types of evidence listed in section (c) are those that tend to demonstrate that the confession is in fact reliable: the presence of counsel, the presence of corroborating evidence not discovered as a result of the confession, and the absence of coercive interrogation tactics.[185]

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182. *E.g.*, FED. R. EVID. 601.

183. *Id.*

184. *E.g.*, United States v. Jones, 482 F.2d 747, 752 (D.C. Cir. 1973); United States v. Hardin, 443 F.2d 735, 737 (D.C. Cir. 1970).

185. *See* Lloyd, *supra* note 106 (proposing solutions to the pressure that individuals face as a result of age, intellectual disability, and mentally illness in police interrogations, including requirements that counsel is present and that coercive tactics are not used); Follette, et al., *supra* note 95, at 44–49

Lastly, section (c)(4) provides a catchall for other unlisted circumstances that indicate reliability.

As an exception or clarification to the catchall, the proposed rule specifies that evidence about the defendant's understanding or waiver of *Miranda* rights is insufficient to rebut the presumption. To start, issues regarding the defendant's understanding or waiver of *Miranda* rights will be considered under *Miranda* and subsequent jurisprudence.[186] And *Miranda* issues are tangential at best to the problem of false confessions and wrongful conviction as *Miranda* is not concerned with the content of the defendant's statement, merely the surrounding procedures.[187] Secondly, and most importantly, individuals exhibiting risk factors for false confession are more likely to misunderstand or inadvertently waive their *Miranda* rights.[188] Thus, an at-risk individual's waiver of *Miranda* rights might actually be caused by their age, intellectual disability, or mental illness, so allowing their waiver to rebut the presumption would render the rule's purpose moot.

CONCLUSION

False confessions are demonstrably linked to wrongful conviction, and so far, the law has failed to meaningfully respond.[189] Reliability assessments are completely lacking under the constitutional framework governing the admission of confessions, and evidence rules have yet to fill this significant gap.[190] Thus, a new evidence rule is needed—one that adequately accounts for an at-risk defendant's age, intellectual disability, and mental health prior to admitting a confession into evidence.[191] This Note has proposed one such rule that would close the gap and has presented the foundations in the current legal framework that justify this proposal.

Leon Brown and Henry McCollum confessed to the rape and murder of an eleven-year-old girl and were sentenced to death, spending nearly thirty-one years in prison prior to their exoneration.[192] Each of their confessions was riddled with potential reliability issues that were ignored. Significantly, Brown and McCollum both exhibited at least one factor, mental impairment, that heightens the risk of false confession.[193] Had a pretrial reliability screening like the type proposed in this Note occurred, Brown and McCollum might have never lost their thirty-one years.

(discussing the various reasons that intellectually disabled or mentally ill individuals are especially susceptible to police interrogation tactics); Leo, et. al, *supra* note 21, at 790 (describing the various corroboration rules that states have adopted to mitigate false confessions).

186. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966).

187. *See supra* notes 143–47 and accompanying text.

188. Scott-Hayward, *supra* note 75, at 62–63; Schatz, *supra* note 86, at 660–62; Follette, et al., *supra* note 95, at 43–44.

189. Leo et al., *supra* note 21, at 777–79; Milhizer, *supra* note 15, at 4–8.

190. Leo et al., *supra* note 21, at 779–90.

191. *See id.*; *Status of Exonerated Defendants*, *supra* note 40.

192. Possley, *supra* note 1.

193. *Id.*