

Winter 2013

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Recommended Citation

Sydney Schneider, *When Innocent Defendants Falsely Confess: Analyzing the Ramifications of Entering Alford Pleas in the Context of the Burgeoning Innocence Movement*, 103 J. CRIM. L. & CRIMINOLOGY 279 (2013).
<https://scholarlycommons.law.northwestern.edu/jclc/vol103/iss1/6>

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COMMENTS

WHEN INNOCENT DEFENDANTS FALSELY CONFESS: ANALYZING THE RAMIFICATIONS OF ENTERING ALFORD PLEAS IN THE CONTEXT OF THE BURGEONING INNOCENCE MOVEMENT

Sydney Schneider*

I. INTRODUCTION

On August 19, 2011, Damien Echols left death row and faced the world for the first time in seventeen years.¹ Dubbed the “West Memphis Three,” Echols, Jessie Misskelley, and Jason Baldwin were convicted of the brutal murders of three children in West Memphis in 1994 based on Misskelley’s confession.² They were released from prison after serving seventeen years pursuant to plea agreements reached with prosecutors: the three defendants entered “Alford pleas,” in which they maintained their innocence but agreed that prosecutors had enough evidence to convict.³

In Virginia, meanwhile, twenty-seven-year-old Robert Davis has been

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¹ See *48 Hours: West Memphis 3: Free* (CBS television broadcast Sept. 17, 2011), available at <http://www.cbsnews.com/video/watch/?id=7381432n> [hereinafter *West Memphis 3*].

² *Id.*

³ See *‘West Memphis Three’ Plea Deal? Men Controversially Convicted of Killing Boy Scouts Might Be Released*, HUFFINGTON POST (Aug. 19, 2011, 9:43 AM), http://www.huffingtonpost.com/2011/08/19/west-memphis-three-plea-deal_n_931171.html.

sitting in a prison cell for the past eight years. Charged with arson and the murder of a woman and her son, Davis entered an Alford plea in 2004.⁴ He was sentenced to twenty-three years in prison.⁵ Davis and his attorney maintain that his confession back in 2003 was coerced and Davis never committed these crimes.⁶ Because Virginia bars defendants who enter Alford pleas from seeking postconviction relief, Davis's only hope for release rests in the hands of Virginia Governor Robert F. McDonnell, who has the power to grant executive clemency.⁷

While the defendants in these cases currently find themselves in very different predicaments, these two cases share one common theme: both feature defendants who were charged with murder and falsely confessed. Thus, each case serves as an excellent lens through which to view the issues surrounding Alford pleas in today's justice system. Specifically, this Comment will analyze the use of Alford pleas in cases where the only substantial piece of evidence linking the defendant to a crime is a confession.

The advent of plea bargaining in the legal system in the past century has rendered the classic "trial" virtually obsolete. From 1976 through 2002, in terms of percentage of dispositions, state court criminal trials declined from 8.5% to 3.3%, bench trials as a percentage of dispositions fell from 5.0% to 2.0%, and jury trials declined from 3.4% to 1.3%.⁸ While the guilty plea "represent[s] the largest share of adjudicated cases in . . . federal criminal justice" (95.2%),⁹ the Alford plea has evolved to encompass a small share of adjudicated cases in the United States.¹⁰ This plea arrangement derives from *North Carolina v. Alford*, in which the United States Supreme Court held that guilty pleas by defendants who maintain their innocence do not violate due process.¹¹

Numerous scholarly articles have been written about Alford pleas, addressing their constitutionality, their place in relation to the traditional

⁴ See Lisa Provence, *Case Not Closed: Special Prosecutor Named in Crozet Murders*, THE HOOK (July 9, 2011, 2:31 PM), <http://www.readthehook.com/98888/clemency-petition-special-prosecutor-named-davis-case>.

⁵ *Id.*

⁶ *Id.*

⁷ Davis's clemency petition is pending as of the writing of this Comment.

⁸ ROBERT BURNS, *THE DEATH OF THE AMERICAN TRIAL* 86 (2009).

⁹ Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 90 (2005).

¹⁰ Allison D. Redlich & Asil Ali Özdoğru, *Alford Pleas in the Age of Innocence*, 27 BEHAV. SCI. & L. 467, 474 (2009).

¹¹ See *North Carolina v. Alford*, 400 U.S. 25, 39 (1970). I will discuss this case in great detail in Part II of this Comment.

justifications for punishment, and their perceived accuracy.¹² This Comment will focus specifically on the practical aspects of the Alford plea. It will provide insight into the circumstances in which attorneys should *not* recommend that their clients utilize the plea.

Part II of this Comment provides the history of the Alford plea and the recent scholarship and case law surrounding false confessions. Part III discusses the factors leading to false confessions. It also looks at the advent of the Innocence Movement, which has been characterized by growing numbers of exonerations of defendants who have falsely confessed. Part IV analyzes the two aforementioned case studies—Echols and Davis. Through the analysis of these cases, it argues that given the strength of the Innocence Movement, innocent defendants should not enter Alford pleas in cases where the sole piece of evidence is a confession. Part V summarizes major points and provides an overall conclusion to the Comment.

II. BACKGROUND: THE ALFORD PLEA

A. NORTH CAROLINA V. ALFORD

The Alford plea received its name from the 1970 Supreme Court case *North Carolina v. Alford*.¹³ Henry Alford was indicted for first-degree murder on December 2, 1963.¹⁴ Throughout his trial preparations, Alford's attorney interviewed several witnesses who led him to believe Alford was guilty and that he would probably be convicted at trial.¹⁵ While there were no eyewitnesses to the actual murder, there were witnesses who swore under oath that Alford had taken his gun from his house and stated that he was going to kill the victim.¹⁶ These witnesses said that Alford told them that he had killed the victim.¹⁷ Although Alford maintained his innocence, faced with these witness statements and no evidentiary support for his innocence claim, Alford's attorney recommended that he plead guilty to a

¹² See, e.g., Albert W. Alschuler, *Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas*, 88 CORNELL L. REV. 1412 (2003) (critiquing Bibas's rejection of Alford pleas and his stance on plea bargaining in general); Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361 (2003); Jenny Elayne Ronis, Comment, *The Pragmatic Plea: Expanding Use of the Alford Plea to Promote Traditionally Conflicting Interests of the Criminal Justice System*, 82 TEMP. L. REV. 1389 (2010).

¹³ 400 U.S. 25 (1970).

¹⁴ *Id.* at 26–27.

¹⁵ *Id.* at 27.

¹⁶ *Id.* at 28.

¹⁷ *Id.*

lesser charge of second-degree murder.¹⁸ Alford pleaded guilty to second-degree murder but stated to the court that he was in fact innocent and that he was pleading guilty only to avoid the death penalty.¹⁹ The judge sentenced him to the maximum sentence for second-degree murder—thirty years in prison—and Alford appealed on the constitutional ground that his plea was “the product of fear and coercion” and in violation of his constitutional rights.²⁰

In 1965, the state court found that the plea was entered into “willingly, knowingly and understandingly” and “made on the advice of competent counsel and in the face of a strong prosecution case.”²¹ Alford petitioned for a writ of habeas corpus, first in the United States District Court for the Middle District of North Carolina,²² which denied the writ based on its findings that Alford had “voluntarily and knowingly agreed to plead guilty,” and then in the U.S. Court of Appeals for the Fourth Circuit.²³ A divided panel of the Fourth Circuit reversed and held that his plea was involuntary because it was motivated by fear of the death sentence.²⁴

The Supreme Court held that there are no constitutional barriers in place to prevent a judge from accepting a guilty plea from a defendant who wants to plead guilty while still protesting his innocence.²⁵ The Court stated, “An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.”²⁶ The Court also held that a judge can accept the plea only if “strong evidence of actual guilt” exists.²⁷ The Court also noted that the defendant in this case was represented and advised by competent counsel and that there was substantial evidence that tended to demonstrate guilt;²⁸ thus, the defendant “intelligently” concluded that it would be to his advantage to plead guilty in order to avoid the death penalty.²⁹

It is also important to note that in its holding, the Court did not give all

¹⁸ *Id.* at 27.

¹⁹ *Id.* at 28.

²⁰ *Id.* at 29.

²¹ *Id.* (internal quotation marks omitted).

²² *Id.*

²³ *Id.* at 29–30.

²⁴ *Id.* at 30.

²⁵ *Id.* at 25.

²⁶ *Id.* at 37.

²⁷ *Id.* at 37–38.

²⁸ *Id.* at 31, 37.

²⁹ *Id.* at 37.

defendants a legal right to enter Alford pleas; rather, the Court left it to individual states and judges to decide whether they want to accept Alford pleas.³⁰ The Court stated:

A criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the court . . . although the States may by statute or otherwise confer such a right. Likewise, the States may bar their courts from accepting guilty pleas from any defendants who assert their innocence . . . which gives a trial judge discretion to “refuse to accept a plea of guilty” We need not now delineate the scope of that discretion.³¹

Justice Brennan, joined by Justices Douglas and Marshall, dissented, focusing on the death penalty aspect of the case. He stated that Alford’s guilty plea was not made voluntarily because he was “so gripped by fear of the death penalty.”³²

B. THE ALFORD PLEA ACROSS THE STATES

The *Alford* opinion explicitly noted that judges have the right to accept this plea, just as they have discretion to accept guilty pleas under Rule 11 of the Federal Rules of Criminal Procedure.³³ Currently forty-seven states and the District of Columbia accept Alford pleas.³⁴ Defendants in Louisiana, Mississippi, Missouri, Pennsylvania, and Ohio frequently use the Alford plea.³⁵ But courts in Indiana, Michigan, and New Jersey have rejected the plea.³⁶ Even in states that have explicitly accepted Alford pleas, judges still maintain discretion to reject the plea.³⁷ For example, states such as North Carolina, Washington, Rhode Island, and Wisconsin construed Alford pleas

³⁰ See Curtis J. Shipley, Note, *The Alford Plea: A Necessary but Unpredictable Tool for the Criminal Defendant*, 72 IOWA L. REV. 1063, 1063 (1987).

³¹ *Alford*, 400 U.S. at 38 n.11 (citing FED. R. CRIM. P. 11; *Lynch v. Overholser*, 369 U.S. 705, 719 (1962)).

³² *Id.* at 40 (internal quotation marks omitted).

³³ *Id.* at 38 n.11.

³⁴ See Bibas, *supra* note 12, at n.52.

³⁵ *Id.* at 1377. Bibas conducted a series of Westlaw searches to determine the number of cases involving Alford pleas.

³⁶ See, e.g., *Ross v. State*, 456 N.E.2d 420, 423 (Ind. 1983) (holding, “as a matter of law, that a judge may not accept a plea of guilty when the defendant both pleads guilty and maintains his innocence at the same time,” and suggesting that Alford pleas offend public policy); *People v. Butler*, 204 N.W.2d 325, 330 (Mich. Ct. App. 1972) (stating courts must look to the “ultimate guilt or innocence of the pleaders” when accepting a guilty plea); *State v. Korzenowski*, 303 A.2d 596, 597 n.1 (N.J. Super. Ct. App. Div. 1973) (citing with approval a New Jersey Supreme Court directive providing that “notwithstanding the recent decision in *North Carolina v. Alford* . . . , except in capital cases, a plea shall not be accepted from a defendant who does not admit commission of the offense”).

³⁷ See Shipley, *supra* note 30, at 1063.

very narrowly.³⁸

Federal courts have consistently discouraged Alford pleas,³⁹ and federal prosecutors are reluctant to encourage Alford pleas because the policy of the U.S. Department of Justice discourages them.⁴⁰ In its sentencing instructions, the Justice Department observes that the public may not approve of prosecutors pushing a defendant who claims innocence to plead guilty.⁴¹ This discouragement is reflected in statistics showing that state defendants utilize the Alford plea much more frequently than federal defendants.⁴²

C. CHARACTERISTICS OF DEFENDANTS WHO ENTER ALFORD PLEAS

In general, defendants use Alford pleas much less frequently than traditional guilty or not-guilty pleas.⁴³ A 1997 survey of inmates in state and federal correctional facilities found that approximately 3% of inmates had entered Alford pleas.⁴⁴ When looking only at inmates in state facilities, the percentage was significantly higher (6.5%).⁴⁵

In 2002, Professor Stephen Bibas conducted a Westlaw search for cases involving this plea.⁴⁶ He found 2,500 cases that involved Alford pleas; 27% of these cases involved sex offenses, 27% involved other violent offenses, and 12% involved white-collar offenses.⁴⁷

From 2003 through May 2004, the Department of Justice conducted a

³⁸ Ronis, *supra* note 12, at 1400 (“North Carolina interprets the *Alford* plea to be a species of *nolo contendere*, in which the defendant makes no admission of guilt at sentencing. Wisconsin finds that the assertion of an *Alford* plea is relevant only during sentencing, becoming indistinguishable from a guilty plea in later proceedings. In Rhode Island, trial judges are permitted discretion to accept the plea, which results in criminal conviction and may be used later as a distinct sentencing factor, or to estop relitigation of the criminal case in collateral proceedings. Washington only accepts the plea for certain crimes—for example, Seattle bans the plea’s application in sexual assault cases except in extraordinary circumstances.” (citations omitted)).

³⁹ *Id.* at 1399.

⁴⁰ Bibas, *supra* note 12, at 1380 (quoting U.S. DEP’T OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION (1980), as excerpted in 6 FED. SENT’G REP. 317, 328–29 (1994)).

⁴¹ *Id.*

⁴² See Redlich & Özdoğru, *supra* note 10, at 469.

⁴³ See CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 179023, DEFENSE COUNSEL IN CRIMINAL CASES 1, 8 tbl.17 (Nov. 2000), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/dccc.pdf>.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See Bibas, *supra* note 12, at 1376.

⁴⁷ *Id.*

survey of inmates in state correctional facilities.⁴⁸ Researchers sampled 16,152 state inmates; the U.S. Census Bureau interviewed inmates in person.⁴⁹ This study found that 949 of these inmates, or 6.5%, had entered Alford pleas.⁵⁰ Within the three types of guilty pleas (guilty, Alford, and *nolo contendere*), Alford pleas accounted for 8.5%.⁵¹ This percentage was essentially identical to the percentage of state inmates who had entered Alford pleas in 1997.⁵² With this data, two researchers estimated population rates and concluded that approximately 76,000 individuals in state prison in 2004 entered Alford pleas.⁵³ This data also showed that approximately 50% of inmates who had used Alford pleas were incarcerated for violent crimes, such as murder, sexual offense, and assault; about 25% were incarcerated for property crime; 20% were incarcerated for drug-related crimes; and 4% were incarcerated for public-order crimes.⁵⁴ The breakdown is important because it shows that defendants who are charged with more serious offenses, and therefore are facing more prison time, use Alford pleas at a much higher rate than the average defendant. Violent crimes yield lengthier sentences; thus, it is logical to think that defendants who are faced with the threat of longer sentences might be more apt to plea bargain. It is also possible that defendants who are charged with serious—and oftentimes more heinous crimes—would want to proclaim innocence to the court by entering an Alford plea, rather than admit guilt as required by a standard guilty plea.

Moreover, the 2004 Department of Justice study cited above specifically analyzed the pleas of inmates who were convicted of murder.⁵⁵ Of these inmates, 8.5% entered Alford pleas (two percentage points higher than the total inmate population).⁵⁶ In the study, out of those convicted of murder who entered Alford pleas, 17.6% were released before trial, 20.9% received life sentences, and none were sentenced to death.⁵⁷ In contrast, 12% of those convicted of murder who pleaded guilty were released before trial, 24.9% received life sentences, and 0.40% were sentenced to death.⁵⁸

⁴⁸ See Redlich & Özdoğru, *supra* note 10, at 474.

⁴⁹ *Id.*

⁵⁰ *Id.* at 475.

⁵¹ *Id.* at 476.

⁵² *Id.*

⁵³ *Id.* at 484.

⁵⁴ *Id.*

⁵⁵ *Id.* at 473–74.

⁵⁶ *Id.* at 476.

⁵⁷ *Id.* at 477.

⁵⁸ *Id.*

For those who pleaded not guilty, 13.9% were released before trial, 45.7% received life sentences, and 3.2% were sentenced to death.⁵⁹

As illustrated in the seminal case of *North Carolina v. Alford*, the Alford plea provides an avenue by which defendants can avoid the death sentence;⁶⁰ clearly, some defendants choose this route rather than risking entering a plea of “not guilty” and facing harsher sentences and possibly death.

III. THE PHENOMENON OF FALSE CONFESSIONS AND THE ADVENT OF THE INNOCENCE MOVEMENT

It is clear why attorneys whose clients have confessed would seek a plea bargain: most people cannot understand why someone would confess to a crime that he did not commit. The United States Supreme Court has recognized the power of confessions as evidence of guilt.⁶¹ And psychologists have also commented on the persuasive power of confessions. For example, in one study, researchers presented mock jurors with various types of evidence: circumstantial evidence, eyewitness testimony, and testimony that the accused had confessed to the crime.⁶² The study found that jurors who heard the confession evidence were significantly more likely to find the defendant guilty than jurors who heard the other types of evidence.⁶³

Because confessions are so powerful in the minds of triers of fact, it is no wonder that innocent defendants—and their attorneys—may jump at the chance to enter Alford pleas in exchange for a reduced sentence when the defendants have falsely confessed. However, attorneys who represent defendants who have falsely confessed must understand the phenomenon of false confessions when they consider their plea-bargaining options. The two cases studies presented in this Comment illustrate the problem with false confessions. Both cases concern teenagers whose convictions were based in large part on confessions without any corroborating physical evidence.

Why would someone confess to a crime that he did not commit? It

⁵⁹ *Id.*

⁶⁰ *See* 400 U.S. 25, 39 (1970).

⁶¹ *See, e.g.*, *Miranda v. Arizona*, 384 U.S. 436, 466 (1966) (characterizing a confession as “the most compelling possible evidence of guilt” (citations omitted) (internal quotation marks omitted)); *Hopt v. Utah*, 110 U.S. 574, 584–85 (1884) (recognizing that a “voluntary confession of guilt is among the most effectual proofs in the law”).

⁶² Gerald R. Miller & F. Joseph Boster, *Three Images of the Trial: Their Implications for Psychological Research*, in *PSYCHOLOGY IN THE LEGAL PROCESS* 19, 20–21 (Bruce Dennis Sales ed., 1977).

⁶³ *Id.*

seems illogical that someone would utter words of guilt when he is in fact innocent. However, false confessions are an all-too-common reality in today's criminal justice system. Recent studies indicate that false confessions play a role in anywhere from 14% to 25% of wrongful convictions.⁶⁴

In general, false confessions arise from specific police interrogation tactics.⁶⁵ False confessions generally occur as a result of a police interrogator's use of common and well-intended—but pressure-filled and psychologically coercive—interrogation techniques.⁶⁶ In the United States, the Reid Technique is the most widely implemented police interrogation training tool;⁶⁷ in fact, “over 300,000 professionals in law enforcement have been trained to use the Reid Technique over the previous three decades”⁶⁸ This technique instructs the police “to use coercive and deceptive techniques to obtain a confession,” such as “presenting false evidence, preventing the suspect from speaking unless he/she is making a confession, tricking the suspect into a confession by offering an understanding and sympathetic attitude, and minimizing the moral seriousness of the crime.”⁶⁹ These tactics have not only led to guilty defendants confessing, but also have been far too effective in eliciting confessions from innocent defendants. For example, scholars have uncovered at least 250 interrogation-induced false confessions over the last thirty years, and there are likely many more individuals yet unknown who have falsely confessed.⁷⁰ In a 2007 survey, law enforcement officers estimated that about 10% of all interrogations result in false confessions.⁷¹

The U.S. Supreme Court has also recognized that sophisticated police interrogation techniques can produce false confessions. In 2009, the Court found that “there is mounting empirical evidence that these pressures [associated with custodial police interrogation] can induce a frighteningly high percentage of people to confess to crimes they never committed.”⁷²

⁶⁴ Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 902 (2004).

⁶⁵ *Id.* at 908–09.

⁶⁶ See Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 6 (2010).

⁶⁷ Jessica R. Meyer & N. Dickon Reppucci, *Police Practices and Perceptions Regarding Juvenile Interrogation and Interrogative Suggestibility*, 25 BEHAV. SCI. & L. 757, 760 (2007).

⁶⁸ *Id.*

⁶⁹ *Id.* at 760–61.

⁷⁰ See RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 243–45 (2008).

⁷¹ Meyer & Reppucci, *supra* note 67, at 770.

⁷² *Corley v. United States*, 556 U.S. 303, 320–21 (2009) (citing Drizin & Leo, *supra* note

It is safe to assume that the Reid Technique, which is designed to wear down and encourage adults to confess, is even more effective on young, inexperienced, and highly susceptible defendants such as the ones featured in this Comment—especially given the fact that children and adolescents “have significant neurological deficiencies [compared to adults] that result in stark limitations of judgment.”⁷³ Data on false confessions support the idea that young people falsely confess at a much higher rate than adults. In 2004, leading experts on juvenile false confession, Steven A. Drizin and Richard A. Leo, examined 125 proven false confessions taken between 1971 and 2002.⁷⁴ They analyzed their sample by age and found that young people were significantly overrepresented: 63% of people sampled were under the age of twenty-five at the time of their confessions.⁷⁵ Another study analyzed the rate of false confessions by age, examining the percentage of exonerees who had falsely confessed.⁷⁶ As a general matter, the study found that youth are far more likely to falsely confess than adults, and that younger children are more likely to falsely confess than older children.⁷⁷

The movement concerning acknowledgement of the relationship between false confessions and actual innocence has gained traction over the last decade.⁷⁸ The “Innocence Movement,” which came to the foreground in the 1980s and 1990s with the advent of DNA testing and exonerations and took hold in the 2000s, “has generally focused on one question: How can we maximize the chances of getting the ‘right guy,’ that is, of convicting the guilty while acquitting the innocent?”⁷⁹ The Innocence Movement has been characterized by an increase in the number of innocence projects, the average number of annual DNA exonerations,⁸⁰

64, at 906–07).

⁷³ See JUVENILE JUSTICE CTR., AM. BAR ASS’N, ADOLESCENCE, BRAIN DEVELOPMENT AND LEGAL CULPABILITY 3 (Jan. 2004), available at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_juvjus_Adolescence.authcheckdam.pdf.

⁷⁴ See Drizin & Leo, *supra* note 64, at 932.

⁷⁵ *Id.* at 945.

⁷⁶ Joshua A. Tepfer et al., *Arresting Development: Convictions of Innocent Youth*, 62 RUTGERS L. REV. 887, 904–05 (2010).

⁷⁷ *Id.*

⁷⁸ See Marvin Zalman, *An Integrated Justice Model of Wrongful Convictions*, 74 ALB. L. REV. 1465, 1484 (2010–2011).

⁷⁹ See Andrew E. Taslitz, *Sentencing Lessons from the Innocence Movement*, 21 CRIM. JUST. 6, 6 (2006).

⁸⁰ Zalman, *supra* note 78, at 1499 (explaining that the average number of annual DNA exonerations “grew from 6 per year between 1989 and 1999, to 18.1 per year from 2000 to 2009”).

scholarship relating to the field, and media and pop culture featuring more stories about wrongfully convicted defendants.⁸¹ And with the advent of DNA testing has come the understanding that people do falsely confess at alarmingly high rates. In fact, the Innocence Project found that false confessions have figured into 27% of the approximately 301 convictions reversed by DNA evidence.⁸²

Acknowledging the unique role that false confessions—particularly those given by young people—play in the overall phenomenon of wrongful convictions, Northwestern University School of Law launched a separate clinic to represent and advocate for wrongfully convicted youth.⁸³ In 2011 alone, the Center on Wrongful Convictions of Youth, in conjunction with its partners at the Innocence Movement and the Exoneration Project, as well as several private attorneys, played a role in two monumental cases. Five men, dubbed the “Dixmoor 5,” were exonerated after DNA linked other men to the crime.⁸⁴ Based on false confessions, these men were convicted of rape and murder when they were teenagers and served nearly two decades in prison.⁸⁵ Two weeks after the Dixmoor 5 convictions were vacated, an Illinois judge vacated the convictions of four defendants, known as the “Englewood 4,” who had also falsely confessed to a rape and murder when they were juveniles in 1994; recent DNA testing linked the rape and murder to a previously convicted rapist and murderer.⁸⁶ In fact, from November 2011 to January 2012, Northwestern Law’s renowned Center on Wrongful Convictions and its sister project, the Center on Wrongful Convictions of Youth, played a role in eleven exonerations—the single largest collection of exonerations in any three-month period in the history of the Innocence Movement.⁸⁷ The majority of these cases featured false

⁸¹ *Id.* at 1491.

⁸² *Facts on Post-Conviction DNA Exonerations*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (last visited Nov. 9, 2012).

⁸³ Steve Drizin, *Why Young People Falsely Confess to Police*, HUFFINGTON POST (Oct. 2, 2009, 11:23 AM), http://www.huffingtonpost.com/steve-drizin/why-young-people-falsely_b_307236.html.

⁸⁴ See NORTHWESTERN LAW: CENTER ON WRONGFUL CONVICTIONS OF YOUTH, <http://www.cwcy.org/> (last visited Nov. 7, 2012).

⁸⁵ See Sophia Tareen, *Convictions Vacated Against 3 in 1991 Dixmoor Rape, Murder*, HUFFINGTON POST (Nov. 3, 2011, 6:04 PM), http://www.huffingtonpost.com/2011/11/03/convictions-vacated-again_0_n_1074763.html.

⁸⁶ See Steve Mills, *DNA Upends 4 Convictions*, CHI. TRIB., Nov. 17, 2011, § 1, at 4.

⁸⁷ *News and Events: Center on Wrongful Convictions Celebrates a Banner Year*, NORTHWESTERN LAW (Feb. 3, 2012), <http://www.law.northwestern.edu/news/newsdisplay.cfm?ID=565>.

confessions.⁸⁸

As the Innocence Movement gains traction, media outlets across the country are spreading the idea of false confessions to the general population.⁸⁹ The increase in press on the subject has presumably informed the public that people do in fact falsely confess and, thus, potential jurors are likely to be better informed about the issue. While confessions will undoubtedly still hold weight in the eyes of juries, the Innocence Movement has spread awareness and knowledge of the unreliability of confessions lacking any corroborating physical evidence.

IV. DISCUSSION

This Part presents the facts of the cases of the “West Memphis Three” and Robert Davis. It outlines the background of each case and the events that led up to the defendants entering Alford pleas. It then analyzes the ways in which the Alford plea has affected each defendant, focusing primarily on postconviction remedies and other ramifications for an innocent defendant who has essentially pleaded guilty.

It concludes that Alford pleas should not be used in cases where a confession is the primary piece of evidence linking the defendant to the alleged crime. The advent of the Innocence Movement has shed light on the unreliability of confessions that lack corroborating physical evidence. Given the changing perceptions of false confessions within the mainstream media and the general population, it is in the best interest of these defendants to plead “not guilty” and preserve their postconviction options in the event that they are convicted.

A. THE WEST MEMPHIS THREE

On May 6, 1993, the bodies of eight-year-olds Steven Branch, Michael Moore, and Christopher Byers were found submerged in a creek in a strip

⁸⁸ *Id.*

⁸⁹ See, e.g., John S. Adams, ‘Speeding Train’ Interrogations Can Fuel False Confessions, USA TODAY (Dec. 26, 2011, 9:39 PM), <http://usatoday30.usatoday.com/news/nation/story/2011-12-26/false-confessions-interrogation/52236364/1>; Lisa Black & Steve Mills, *Why Do People Falsely Confess?*, CHI. TRIB., July 11, 2010, §1, at 1; *False Confessions: Silence is Golden*, ECONOMIST, Aug. 13, 2011, at 75; Robert Kolker, “I Did It”: *Why Do People Confess to Crimes They Didn’t Commit?*, N.Y. MAG., Oct. 11, 2010, at 22; David K. Shipler, Op-Ed, *Why Do Innocent People Confess?*, N.Y. TIMES, Feb. 26, 2012, at 6; *The Dr. Phil Show: False Confessions* (CBS television broadcast Jan. 9, 2007), available at <http://drphil.com/shows/show/819/>; *The Oprah Winfrey Show: Coerced Confessions* (CBS television broadcast June 9, 2009), available at <http://www.oprah.com/oprahshow/Marty-Tankleffs-Wrongful-Conviction/2>; Katy Welter, *The Truth About False Confessions*, HUFFINGTON POST (May 23, 2011, 5:46 PM), http://www.huffingtonpost.com/katy-welter/the-truthaboutfalseconfessions_b_865702.html.

of woods next to a highway in an area of West Memphis, Arkansas, known as “Robin Hood Hills.”⁹⁰ The boys had been reported missing the night before around 8:00 p.m. by Byers’s adoptive father, John Mark Byers.⁹¹ The bodies were found nude, their hands and feet had been hog-tied with their own shoelaces, and it was evident that they had been beaten and mutilated.⁹² The cause of death was ruled as drowning.⁹³ With no other leads, the police began to explore the theory that the murders were a result of satanic cult activity.⁹⁴ This led them to focus their attention on Damien Echols, an eighteen-year-old high school dropout, who wore a lot of black and was rumored to engage in satanic rituals.⁹⁵

A witness named Vicki Hutcherson, the mother of a young boy, Aaron, who had claimed to witness the murders, led the police to the door of seventeen-year-old Jessie Misskelley.⁹⁶ Aaron’s statements were clearly unreliable, as he told various versions of his story that featured many inconsistencies.⁹⁷ Misskelley had a very low IQ, and his mental state and age made him extremely susceptible to police interrogation techniques.⁹⁸ Over the course of several hours (transcripts of the interrogation are unavailable, although transcripts of the confessions themselves are available), Misskelley confessed to seeing Damien Echols and his friend, Jason Baldwin, rape and kill the three boys.⁹⁹ However, Misskelley’s confession featured many characteristics that experts have identified as indicative of a false confession. For one thing, Misskelley got many of the facts of the crime wrong.¹⁰⁰ For instance, Jessie claimed that he, Damien, and Jason had picked up the boys and killed them around noon;¹⁰¹ however,

⁹⁰ See *Misskelley v. State*, 915 S.W.2d 702, 706 (Ark. 1996).

⁹¹ MARA LEVERITT, *DEVIL’S KNOT: THE TRUE STORY OF THE WEST MEMPHIS THREE* 6 (2002).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See *West Memphis 3*, *supra* note 1.

⁹⁵ *Id.*

⁹⁶ Fiona Steel, *The West Memphis Three*, TRUTV CRIME LIBR., ch. 5 http://www.trutv.com/library/crime/notorious_murders/famous/memphis/index_1.html (last visited Oct. 26, 2012).

⁹⁷ Tim Hackler, ‘They Messed with My Words’: Today, Aaron Hutcherson Isn’t Sure What He Saw, *ARK. TIMES*, Oct. 7, 2004, at 14.

⁹⁸ *West Memphis 3*, *supra* note 1.

⁹⁹ See *Jessie Misskelley’s False Confession*, FREE WEST MEMPHIS 3 BLOG, http://freewestmemphis3.org/index.php?option=com_content&view=article&id=60&Itemid=75 (last visited Feb. 8, 2013).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

witnesses proved that the boys were in school all day and the murder did not occur until that evening. He also told police that the three teenagers used rope to hog-tie the boys; however, shoelaces were used.¹⁰²

Jessie Misskelley refused to testify against Jason Baldwin and Damien Echols, so prosecutors could not use Misskelley's confession at Baldwin and Echols's joint trial.¹⁰³ Defense attorneys later learned that one juror had actually read about Misskelley's confession and told the other jury members during deliberations.¹⁰⁴ Echols and Baldwin were both found guilty of first-degree murder.¹⁰⁵ Baldwin was sentenced to life in prison without the possibility of parole and Echols received the death sentence.¹⁰⁶

During the investigation and trial, HBO began filming a documentary about the murders that came to be titled *Paradise Lost*.¹⁰⁷ This documentary galvanized supporters of the West Memphis Three into action. Experienced appellate attorneys were brought into the case.¹⁰⁸ The three defendants petitioned for a new trial on the basis of newly discovered evidence, including DNA-testing results that excluded Misskelley, Baldwin, and Echols as donors of genetic material recovered from the crime scene.¹⁰⁹ Lower court judges repeatedly denied these petitions.¹¹⁰ Finally, in November 2010, more than fifteen years after their convictions, the Supreme Court of Arkansas granted the petitioners' request for an evidentiary hearing to determine whether a new trial was in order; the hearing was to take place in October 2011.¹¹¹ However, it was clear that there was a great deal of delay built into this process and the West Memphis Three would have to languish for years in prison while they awaited the outcome of the hearing and a possible new trial.

In a surprising move, defense attorney Steven Braga contacted the State and made an intriguing proposal: the defendants would enter an

¹⁰² See LEVERITT, *supra* note 91, at 11; *Misskelley Clarification Statement, June 3*, FREE WEST MEMPHIS 3 BLOG, http://freewestmemphis3.org/index.php?option=com_content&view=article&id=66&Itemid=80 (last visited Jan. 7, 2012).

¹⁰³ See *West Memphis 3*, *supra* note 1.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ See Petitioner Damien Echols's Reply in Support of Motion for a New Trial at 2, *Echols v. State*, No. CR 93-450A (Ark. Cir. Ct. Aug. 12, 2008).

¹¹⁰ See *West Memphis 3*, *supra* note 1.

¹¹¹ See *Timeline of Events in the West Memphis Three Case*, ARK. TIMES (Aug. 24, 2011), <http://www.arktimes.com/arkansas/timeline-of-events-in-the-west-memphis-three-case/Content?oid=1888406>.

Alford plea; in exchange, all three would be released from prison.¹¹² The State agreed to the deal.¹¹³

The decision to accept the deal was not an easy one for the West Memphis Three, and particularly for Jason Baldwin, who wanted to fight for his innocence and seek a full exoneration.¹¹⁴ Damien Echols, on the other hand, had been in solitary confinement for most of his prison stay on death row; his emotional and physical health were waning.¹¹⁵ Therefore, he readily accepted the agreement as a means to get out of prison as quickly as possible.¹¹⁶ Understanding the toll that his stay on death row was having on Echols, Baldwin reluctantly agreed to the deal.¹¹⁷ On August 19, 2011, the three men were freed.¹¹⁸

B. ROBERT DAVIS

On February 19, 2003, around 8:40 a.m., a neighbor saw smoke coming from Nola Charles's house on Cling Lane in Crozet, Virginia, a small suburban town located near Charlottesville.¹¹⁹ Upon entering the house, firefighters found the charred body of Nola Charles tied to the bottom of a bunk bed.¹²⁰ In the upstairs bedroom, they found her three-year-old son lying dead on the floor.¹²¹ The medical examiner later found that Nola Charles had been stabbed prior to the fire and that she died from multiple stab wounds and blunt force trauma to her skull.¹²² Charles's son, Thomas, died from asphyxiation caused by smoke inhalation.¹²³

The subsequent murder investigation led police to nineteen-year-old Rocky Fugett and his sister, fifteen-year-old Jessica Fugett, who lived across the street from the Charles house.¹²⁴ They ultimately confessed and

¹¹² See Lindsey-Shannon Lee, *The West Memphis Three and Their Alford Plea*, THE JEFFERSONIAN (Sept. 27, 2011), <http://www.tjssl.edu/the-jeffersonian/news/2011/09/west-memphis-three-and-their-alford-plea>.

¹¹³ *Id.*

¹¹⁴ See *West Memphis 3*, *supra* note 1.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See Lisa Provence, *Double Recantation: Is an Innocent Man in Jail for the Crozet Murders?*, THE HOOK (June 9, 2011, 3:00 PM), <http://www.readthehook.com/90677/cling-lane-confession-fugett-says-innocent-man-jailed-murder>.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ See *id.*

¹²⁴ *Id.*

falsely implicated seventeen-year-old Tygue Herrmann and eighteen-year-old Robert Davis, who lived on the same street as the Fugetts and Nola Charles.¹²⁵

Davis was arrested just after midnight, on February 22, 2003, following the interrogations of Rocky and Jessica Fugett three days earlier.¹²⁶ Davis's confession is one of the most egregious examples of a false confession, specifically because of the coercive tactics used by police, the contamination of facts, and Davis's repeated denials and statements of inaccurate facts.¹²⁷ Davis's confession featured classic signs associated with false confessions: Robert Davis asserted his innocence seventy-eight times during the six-hour interrogation during which police officers threatened the death penalty if he did not confess, implied leniency if he did confess, fed him key facts of the crime, and made Robert feel entirely hopeless.¹²⁸ Moreover, nationally recognized experts on false confessions and police interrogation tactics, including Joseph Buckley of Reid & Associates, have deemed the confession suspect.¹²⁹

Rocky Fugett decided that he would not testify against Jessica or Davis and entered a guilty plea to two counts of first-degree murder.¹³⁰ In November 2005, he was sentenced to seventy-five years in prison.¹³¹ His sister Jessica was initially found incompetent to stand trial but was restored to competency.¹³² Jessica went to trial and was found guilty of two counts of first-degree murder, arson, and breaking and entering.¹³³

Prosecutors approached Robert Davis's defense attorneys with a plea agreement that stated that the Commonwealth would drop all of the remaining charges if Davis would agree to plead guilty to one first-degree

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ According to Northwestern University Clinical Professor, Steven Drizin, who is one of the country's leading experts on juvenile false confessions and has written extensively on the topic, Davis's confession is one of the most obvious cases of a juvenile false confession that he has ever studied in his decades of research on the subject.

¹²⁸ See Lisa Provence, *Innocent Kid? Davis Clemency Petition Inches Toward Governor*, THE HOOK (Mar. 29, 2012, 3:04 AM), <http://www.readthehook.com/103091/false-confession-davis-clemency-petition-heads-governor>; Courteney Stuart, *McDonnell's Desk: Governor Gets Clemency Plea in Crozet Killings*, THE HOOK (Sept. 29, 2012, 5:06 AM), <http://www.readthehook.com/105326/fugetts-regrets-no-new-charges-2003-slayings-clemency-davis-still-possible>.

¹²⁹ Stuart, *supra* note 128.

¹³⁰ Provence, *supra* note 119.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

murder charge of killing Nola Charles and one second-degree murder charge of killing Thomas Charles.¹³⁴ Davis accepted the agreement and on April 19, 2004, he entered an Alford plea to the two murder charges.¹³⁵ The Court imposed a twenty-three-year sentence.¹³⁶

Rocky Fugett currently resides at Sussex II State Prison. He has signed an affidavit stating that Davis was never involved in the crime, recanting his initial statements to the police.¹³⁷

C. RAMIFICATIONS OF ALFORD PLEAS FOR THE WEST MEMPHIS THREE AND ROBERT DAVIS

These two cases present powerful and thought-provoking scenarios in which defendants and attorneys must weigh various factors when deciding if they should enter Alford pleas. The defendants and their attorneys had to balance the practical benefits of Alford pleas—freedom in the case of the West Memphis Three and a reduced sentence in the case of Robert Davis—against the legal ramifications of essentially pleading guilty to crimes that they did not commit.

While each defendant made the choice that he felt best served his immediate needs at the time of the plea, it is important that innocent defendants and their attorneys understand the harsh ramifications of Alford pleas as they pertain to postconviction remedies or hopes of proving “actual innocence.” This Part outlines the considerations that attorneys and defendants make when deciding whether to enter into an Alford plea. After analyzing the potential benefits and negative consequences of using the plea, Part IV argues that, given the recent success of the Innocence Movement in spreading awareness about the phenomenon of false confessions, a defendant should not enter an Alford plea if the State’s case against him rests on a confession lacking any corroborating evidence, such as was the case with Robert Davis and the West Memphis Three.

1. *Potential Benefits for Defendants Who Enter Alford Pleas*

Before outlining the specific negative consequences an Alford plea can have on defendants, it is important to address the possible benefits that could make this plea appealing. While I argue that defendants should not enter Alford pleas in cases featuring false confessions, it is important to examine why defendants might feel compelled to do so.

¹³⁴ See Plea Agreement, *Commonwealth v. Davis*, No. 16,742-16,748 (Va. Cir. Ct. Sept. 22, 2004) [hereinafter *Davis Plea Agreement*].

¹³⁵ *Id.* at 5.

¹³⁶ *Id.* at 6.

¹³⁷ See *Provence*, *supra* note 119.

i. Reduced Sentence

The possibility of a reduced sentence makes the Alford plea attractive to defendants like Robert Davis. As discussed in Part II of this Comment, defendants who are charged with murder and plead guilty or enter an Alford plea tend to receive reduced sentences and avoid the death penalty as compared to those who plead not guilty.¹³⁸ Innocent defendants and their attorneys must weigh the promise of a reduced sentence via plea bargaining against the risks associated with pleading “not guilty” and leaving their fates in the hands of a judge or jury. As previously discussed, courts and psychologists have found that jurors have historically placed extraordinary weight on a confession as evidence of guilt.¹³⁹

Davis’s sentence, compared to the sentences of the two other codefendants who faced similar charges, is illustrative. Jessica Fugett pleaded not guilty and went to trial where she was found guilty of two counts of first-degree murder; she was sentenced to 100 years in prison.¹⁴⁰ Rocky Fugett entered a guilty plea to two counts of first-degree murder; he was sentenced to seventy-five years in prison.¹⁴¹ Davis, who was initially charged with the same crimes as Rocky and Jessica, entered an Alford plea; by the terms of that plea, he was sentenced to only twenty-three years in prison.¹⁴² Clearly, Davis’s Alford plea allowed him to escape a harsher sentence.

Multiple circumstances surrounding this case could have contributed to Davis receiving a much lower sentence, even though he was initially charged with the same crimes as the Fugetts. For example, prosecutors may have understood that their case rested solely on Davis’s confession, which contained factual inaccuracies, and which one expert deemed unreliable.¹⁴³ Thus, they could have been looking for a way to ensure that Davis was convicted without risking a trial. In contrast, Jessica led police to evidence that corroborated her confession; for example, she directed officers to the hiding spot of an iron pipe, which was consistent with Nola Charles’s injuries.¹⁴⁴ The plea agreement stated that Davis’s original sentence of eighty years had been reduced by fifty-seven years when he entered his Alford plea, as the plea agreement stipulated that the Commonwealth would

¹³⁸ See Redlich & Özdoğru, *supra* note 10, at 474.

¹³⁹ See Miller & Boster, *supra* note 62, at 20–21.

¹⁴⁰ See Provence, *supra* note 119.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

nol-pros every charge except the two counts of murder.¹⁴⁵ If Davis had pleaded not guilty and been convicted, the prosecution may have asked for eighty years during the sentencing phase of the trial.

Davis's case presents an interesting conundrum, particularly for innocent defendants who have falsely confessed. Davis quickly recanted his confession, and his attorney even tried and failed to suppress the confession before trial.¹⁴⁶ Thus, Davis and his attorney were faced with a situation in which—if the case had gone to trial—the fact finder would have heard Davis's own admission of guilt. Even with no physical evidence linking Davis to the crime, confessions are extremely persuasive. Having entered his Alford plea, Davis will be out of prison by the time he is forty-one years old. While an innocent defendant spending any time in prison is an extreme miscarriage of justice, Davis will still have half of his life in front of him. Had he gone to trial, pleaded "not guilty," and been convicted, he could have faced the prospect of spending his entire life in a jail cell. Thus, it is not shocking that Davis and his attorney decided to take the plea deal. However, as previously discussed, much has changed between 2003, when this case was tried, and 2012. The Innocence Movement has gained traction, exonerations are happening at a record pace, and the mainstream media has alerted citizens to the phenomenon of false confessions.¹⁴⁷ Given the advent of the Innocence Movement, a plea of "not guilty" may not pose the same risk today as it did for Davis and his attorney.

ii. Attorney–Client Relationship and Legal Strategy

The Alford plea also allows a defendant to garner the practical benefits of a plea bargain without putting his lawyer in the difficult position of asking an innocent client to lie about being guilty.

Because the defendants in these cases were not only innocent but also susceptible teenagers at the time of their arrests, they may have placed even more weight on having their attorneys "on their side." Trust in the attorney–client relationship is of the utmost importance.¹⁴⁸ Courts have

¹⁴⁵ See Davis Plea Agreement, *supra* note 134, at 3, 5–6.

¹⁴⁶ See Provence, *supra* note 119.

¹⁴⁷ See *supra* Part III.

¹⁴⁸ See, e.g., Anne Bowen Poulin, *Strengthening the Criminal Defendant's Right to Counsel*, 28 CARDOZO L. REV. 1213, 1250 (2006) ("Counsel's view of the defendant, as well as the defendant's trust or mistrust of counsel, plays a role in determining the course of the defendant's representation."); Laurie Shanks, *Whose Story Is It, Anyway?—Guiding Students to Client-Centered Interviewing Through Storytelling*, 14 CLINICAL L. REV. 509, 511 (2008) ("Experienced lawyers tend to state their goal as 'establishing rapport' by 'gaining the trust' of the client. They understand that making a personal connection with the client is essential

recognized the importance of trust in the attorney–client relationship, especially in criminal cases.¹⁴⁹ For example, the Ninth Circuit stated:

It is unlikely that a criminal defendant will have a legal education. He, therefore, will have to rely on his attorney’s advice for the most basic decisions in a criminal trial—whether to plead guilty, whether to testify, whether to present a defense, and which witnesses to call. If the defendant does not trust his attorney, he may be unwilling to follow his attorney’s advice in these important areas.¹⁵⁰

It is clear that the attorney–client relationship played an important role in Jessie Misskelley’s case, for example.¹⁵¹ Over the course of the investigation into the boys’ murders and even after trial, police tried numerous techniques to elicit statements from Misskelley and to persuade him to testify against the other defendants.¹⁵² They would “transport” him without his attorney’s knowledge and, during the car ride, question him in an attempt to elicit inculpatory statements.¹⁵³ Dan Stidham, Misskelley’s attorney, stated that police were able to obtain a second confession from Misskelley by visiting him without Stidham’s knowledge or consent and that this action represented “a conscious, calculated and ongoing attempt by the Prosecution to interfere with the attorney/client relationship between Jessie Lloyd Misskelley, Jr. and his Court appointed attorneys.”¹⁵⁴ At one point, after prosecutors had repeatedly visited Misskelley and tried to persuade him to testify, Misskelley stood up in a conference room and announced that he wished to make a statement in spite of the advice and counsel of his attorney.¹⁵⁵ He then exited the conference room and refused

if they are to be successful in the subsequent representation.”)

¹⁴⁹ See, e.g., *McKinnon v. State*, 526 P.2d 18, 22 (Alaska 1974) (“Often, the outcome of a criminal trial may hinge upon the extent to which the defendant is able to communicate to his attorney the most intimate and embarrassing details of his personal life. Complete candor in attorney-client consultations may disclose defenses or mitigating circumstances that defense counsel would not otherwise have uncovered.”); *Smith v. Superior Court of Los Angeles Cnty.*, 440 P.2d 65, 74 (Cal. 1968) (“[T]he attorney-client relationship is not that elementary: it involves not just the causal assistance of a member of the bar, but an intimate process of consultation and planning which culminates in a state of trust and confidence between the client and his attorney.”).

¹⁵⁰ *Slappy v. Morris*, 649 F.2d 718, 720–21 (9th Cir. 1981).

¹⁵¹ See Motion to Dismiss Based Upon Prosecutorial Conduct ¶ 6, *State v. Baldwin & Echols*, Nos. CR93-50 and CR93-450A (Ark. Cir. Ct. Feb. 1994) [hereinafter *Baldwin & Echols Mot. to Dismiss*], available at http://callahan.8k.com/wm3/motions/de_jb_motion_to_dismiss.html.

¹⁵² See *id.* ¶ 13.

¹⁵³ See *id.*

¹⁵⁴ *Id.* ¶ 15.

¹⁵⁵ Brief in Support of Baldwin & Echols Mot. to Dismiss, *supra* note 151.

to talk with his attorneys.¹⁵⁶

Clearly, Misskelley was an uninformed, scared defendant who struggled to understand that his attorney was looking out for his best interests. His tumultuous relationship with his attorney had a real impact on the criminal investigation and the trial.

The relationship between Robert Davis and his attorney also exemplifies the importance of trust in the relationship between a defendant and his attorney. Although Davis confessed, he immediately told his attorney that the confession was a lie.¹⁵⁷ If Davis's attorney had questioned his client's innocence by demanding that he admit guilt, it could have seriously undermined their relationship. For example, if Davis felt that his attorney presumed his guilt, Davis may not have been willing to open up and candidly share information with his attorney. Such information could have included important details about his confession, his relationship with his codefendants, or his overall state of mind throughout the legal process. Thus, the Alford plea allowed Davis's attorney to reach a plea deal that resulted in a reduced sentence for his client. It also allowed the attorney to convey to his client that he believed in his innocence.

Alford pleas also help stem any potential ethical dilemmas that attorneys might face if they advise their clients to lie about their innocence in court. Before *Alford*, many attorneys believed it unethical to permit clients to plead guilty when these clients told their lawyers they were innocent.¹⁵⁸ Moreover, the Alford plea permits defendants to assert their innocence freely rather than admitting guilt solely to obtain a plea agreement. Therefore, attorneys are in a better position to determine the appropriate legal strategy of the case. This "full disclosure" assures that clients will not have to lie and leave room for the attorney to face unexpected surprises at trial.¹⁵⁹ Moreover, if a defendant is able to maintain his innocence, his attorney is in a better position to consider strategically the long-term ramifications of accepting a plea agreement. An attorney with an innocent client might have different considerations in mind than an attorney with a guilty client; specifically, attorneys with innocent clients will have to understand the postconviction ramifications of entering an

¹⁵⁶ *Id.*

¹⁵⁷ See Provence, *supra* note 119.

¹⁵⁸ See Shipley, *supra* note 30, at 1073–74 (citing Bruce v. United States, 379 F.2d 113, 119 n.17 (D.C. Cir. 1967) (“[A]n attorney . . . may not counsel or practice such a deliberate deception”); United States v. Rogers, 289 F. Supp. 726, 730 (D. Conn. 1968) (“[D]efense attorneys . . . must exercise scrupulous care to see to it that an innocent man does not plead guilty.”)).

¹⁵⁹ Shipley, *supra* note 30, at 1074.

Alford plea.

2. Negative Consequences of Entering an Alford Plea

i. Limits on Direct Appeal

Even before defendants attempt to pursue postconviction remedies, entering Alford pleas may impede defendants' access to direct appellate review of their sentences. The Supreme Court has held that defendants can enter into a plea bargain in which they waive their right to appeal.¹⁶⁰ Consistent with this principle, the courts of appeal have upheld the general validity of a sentencing-appeal waiver in a plea agreement.¹⁶¹

Robert Davis did not have a waiver stipulation in his plea agreement.¹⁶² However, Virginia courts have held that, generally, by entering a plea of guilty, an accused waives the right to appeal.¹⁶³ The rationale behind this notion is that "[a] voluntary and intelligent plea of guilty by an accused is . . . a waiver of all defenses other than those jurisdictional Where a conviction is rendered upon such a plea and the punishment fixed by law is in fact imposed in a proceeding free of jurisdictional defect, there is nothing to appeal."¹⁶⁴ Most states treat Alford pleas the same as guilty pleas,¹⁶⁵ which limits the ability of defendants who enter Alford pleas in those states to appeal their cases on the merits.

ii. Postconviction Remedies

While the benefits discussed above might look appealing to defendants and their attorneys, it is essential that both groups understand the harsh

¹⁶⁰ See, e.g., *United States v. Mezzanatto*, 513 U.S. 196, 203–04 (1995); *Tollett v. Henderson*, 411 U.S. 258, 267 (1973).

¹⁶¹ See, e.g., *United States v. Allison*, 59 F.3d 43, 46 (6th Cir. 1995) (citations omitted); *United States v. Schmidt*, 47 F.3d 188, 190, 192 (7th Cir. 1995).

¹⁶² See *Davis Plea Agreement*, *supra* note 134.

¹⁶³ See, e.g., *Clauson v. Commonwealth*, 511 S.E.2d 449, 455 (Va. Ct. App. 1999).

¹⁶⁴ *Dowell v. Commonwealth*, 408 S.E.2d 263, 265 (Va. Ct. App. 1991) (quoting *Savino v. Commonwealth*, 391 S.E.2d 276, 278 (1990)), *aff'd on reh'g en banc*, 414 S.E.2d 440 (1992) (mem.); see also *Tollett*, 411 U.S. at 267 (holding that when defendant has admitted in open court that he is guilty of the offense charged, he may not thereafter raise independent claims regarding deprivation of constitutional rights that occurred prior to entry of guilty plea); *Stout v. Commonwealth*, 376 S.E.2d 288, 291 (Va. 1989) (holding that when accused knowingly and voluntarily pleaded guilty, assignments of error challenging constitutionality of death penalty were not cognizable on appeal); *Beaver v. Commonwealth*, 352 S.E.2d 342, 345 (Va. 1987) (holding that accused appealing death sentence may not complain of nonjurisdictional defects that occurred prior to guilty plea).

¹⁶⁵ See *Ronis*, *supra* note 12, at 1414 (citing *Burrell v. United States*, 384 F.3d 22 (2d Cir. 2004)).

ramifications that Alford pleas have on the available postconviction remedies for innocent defendants. As previously stated, most states treat Alford pleas the same as guilty pleas when it comes to postconviction remedies.¹⁶⁶ And many states do not allow a defendant who entered a guilty plea or an Alford plea to seek postconviction DNA testing, for example.¹⁶⁷ Moreover, even if a state does not explicitly preclude someone who entered an Alford plea or a guilty plea from seeking postconviction relief, a judge may be more skeptical when evaluating an actual innocence claim from someone who has pleaded guilty, even if that person has maintained his innocence.

Therefore, if any new DNA evidence is found in the case of the West Memphis Three, for example, the defendants cannot use this newly discovered evidence to seek a new trial or a full exoneration by a judge. Rather, after the West Memphis Three entered their Alford pleas, prosecutors “declar[ed] the case closed.”¹⁶⁸ This also has ramifications for the victims’ families. Assuming that the West Memphis Three are in fact innocent, as so many have to come to believe, the true perpetrator(s) of the crime will likely never be brought to justice. No more public investigations will be done and no new leads will be explored. Echols, Baldwin, and Misskelley will remain the convicted killers of Christopher Byers, Michael Moore, and Steven Branch unless the Governor of Arkansas grants them clemency. As previously mentioned, the West Memphis Three’s cases are procedurally unique because their Alford pleas were entered years after their convictions as a means of securing release for the defendants. However, while the West Memphis Three are currently out of prison, they are not fully exonerated in a legal sense.

Regarding the case of Robert Davis, under Virginia Code § 19.2-327.2, a defendant who has pleaded “not guilty” and who has acquired newly discovered evidence not reasonably known to him at the time of trial could seek relief upon a claim of actual innocence.¹⁶⁹ However, Virginia treats Alford pleas as identical to guilty pleas when it comes to the available

¹⁶⁶ See *id.* (citing *Burrell*, 384 F.3d 22).

¹⁶⁷ See JH Dingfelder Stone, *Facing the Uncomfortable Truth: The Illogic of Post-Conviction DNA Testing for Individuals Who Pleaded Guilty*, 45 U.S.F. L. REV. 47, 50–51 (2010) (“Fifteen jurisdictions (either through the statutory language itself or through a court decision interpreting the statute) appear to allow individuals who pleaded guilty to file post-conviction DNA motions, while only a handful of states expressly deny access to plea bargain defendants. However, the majority of statutes neither explicitly include nor exclude plea bargain defendants.”).

¹⁶⁸ Campbell Robertson, *Rare Deal Frees 3 in '93 Arkansas Child Killings*, N.Y. TIMES, Aug. 20, 2011, at A1.

¹⁶⁹ See VA. CODE ANN. § 19.2-327.2 (2008).

postconviction remedies for defendants who enter this plea. Therefore, Davis cannot seek relief upon a claim of actual innocence. His only chance for relief rests in the clemency process and is consequently solely in the hands of Virginia Governor Bob McDonnell.¹⁷⁰ Given Virginia's track record with clemency, as exemplified by the "Norfolk Four" case,¹⁷¹ Davis's path to freedom will be very difficult.

Generally speaking, the clemency process is a bit of a mystery to legal scholars, as "[s]urprisingly little is known about how clemency is used in practice."¹⁷² In fact, very few states have developed clear statutory or administrative guidelines that pertain to the clemency process,¹⁷³ leading to the view that the clemency process is "arbitrary" and a "flawed vehicle for achieving justice."¹⁷⁴ Davis's likelihood of receiving clemency looks even bleaker given the data surrounding executive pardons at the state level.¹⁷⁵ The number of state pardons has fallen in recent decades, with most states averaging fewer than one hundred commutations per state between 1995 and 2003.¹⁷⁶ As mentioned above, the arbitrary nature of the clemency process stems in part from the inherent political nature of the process. Many politicians "remain afraid of soft-on-crime accusations . . . should an individual on the receiving end of a pardon or commutation go on to commit another crime."¹⁷⁷ A real-world example of clemency's effect on politics came in the 2008 Republican presidential primary when a television advertisement for Mitt Romney stated:

Two good men. But who is ready to make tough decisions? Mike Huckabee? Soft

¹⁷⁰ *Id.* §§ 53.1-229–53.1-231; see also *Pardons*, VIRGINIA.GOV, <http://www.comwealth.virginia.gov/JudicialSystem/Clemency/pardons.cfm> (last visited Nov. 10, 2012).

¹⁷¹ See, e.g., *Pardons in "Norfolk Four" Case Fall Short*, INNOCENCE BLOG (Aug. 6, 2009 5:47 PM), http://www.innocenceproject.org/Content/Pardons_in_Norfolk_Four_Case_Fall_Short.php.

¹⁷² Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and Its Structure*, 89 VA. L. REV. 239, 241 (2003).

¹⁷³ See Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 604–11 (1991).

¹⁷⁴ See Daniel Kobil, *Chance and the Constitution in Capital Clemency Cases*, 28 CAP. U. L. REV. 567, 567 (2000).

¹⁷⁵ See Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1365 n.146 (2008).

¹⁷⁶ See *id.* at 1349 n.79 (citing Daniel T. Kobil, *Should Mercy Have a Place in Clemency Decisions?*, in FORGIVENESS, MERCY, AND CLEMENCY 16, 36–37 (Austin Sarat & Nasser Hussain eds., 2007) (referencing a survey of all commutations from 1995 to 2003 that found that "most states averaged fewer than one hundred commutations per state, with thirty-four states . . . having dispensed twenty or fewer").

¹⁷⁷ Rachel E. Barkow, *The Politics of Forgiveness: Reconceptualizing Clemency*, 21 FED. SENT'G REP. 153, 153 (2009).

on government spending. He grew a \$6 billion government into a \$16 billion government. Backed in-state tuition benefits for illegals, and granted 1,033 pardons and commutations, including 12 murderers. His foreign policy? “Ludicrous,” says Condoleezza Rice. Mitt Romney held spending down below inflation. Cut taxes. *Zero pardons*. The difference? Strong leadership.¹⁷⁸

Given the trends regarding clemency and the possible negative political ramifications, it is no wonder that Obama has granted clemency on fewer occasions than any modern president, pardoning just 22 individuals while denying 1,019 petitions.¹⁷⁹

iii. Collateral Estoppel (Civil Suits)

Another negative ramification of entering an Alford plea is that a defendant’s Alford plea “generally forecloses him from relitigating the issue of his guilt in subsequent civil cases arising from the same facts”¹⁸⁰ In contrast to a *nolo contendere* plea, in which collateral estoppel will not apply because the defendant accepted punishment without charges being litigated or determined, an Alford plea has been properly pleaded and determined.¹⁸¹ As discussed above, the limitations on postconviction remedies make exoneration difficult for defendants who enter Alford pleas, thus making civil suits extraordinarily unlikely in these cases.

The West Memphis Three and Robert Davis are now precluded from bringing civil suits against the government. In fact, prosecutors in the West Memphis Three case, when discussing why they decided to enter into the plea agreements actually cited the concern that if the men were exonerated at trial they could potentially sue the state for millions.¹⁸²

Furthermore, twenty-seven states and the District of Columbia have laws that allow exonerated defendants who have proven their actual innocence to recover money from the state automatically.¹⁸³ Virginia, where Robert Davis’s case is set, has a statute in place that would have

¹⁷⁸ Anthony C. Thompson, *Clemency for Our Children*, 32 CARDOZO L. REV. 2641, 2689 (2011) (citing Michael Luo, . . . *And Romney Fires One of His Own*, N.Y. TIMES (Dec. 31, 2007), <http://www.nytimes.com/2007/12/31/us/politics/31radbox.html> (emphasis added) (quoting an Iowa television advertisement for Mitt Romney)).

¹⁷⁹ Dafna Linzer, *Obama Has Granted Clemency More Rarely Than Any Modern President*, PROPUBLICA (Nov. 2, 2012, 8:00 AM), <http://www.propublica.org/article/obama-has-granted-clemency-more-rarely-than-any-modern-president>.

¹⁸⁰ See Ronis, *supra* note 12, at 1404.

¹⁸¹ *Id.* at 1405.

¹⁸² See Robertson, *supra* note 168, at A12.

¹⁸³ See *Compensation for the Wrongly Convicted*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/fix/Compensation.php> (last visited Oct. 26, 2012).

allowed Davis to file a petition for a certificate of innocence and receive compensation from the state.¹⁸⁴ Conversely, the West Memphis Three would not have been able to petition for a writ of actual innocence—even if they had been exonerated—because Arkansas does not have a state compensation law in place.¹⁸⁵

iv. Effects on Sentencing and Parole Decisions

“Sentencing, probation, and parole decisions often hinge on whether a transgressor accepts responsibility and expresses contrition for his crimes.”¹⁸⁶ In fact, when issuing a sentence, a court can actually view expressions of remorse as evidence that the lawbreaker is less deserving of harsh punishment and less likely to reoffend.¹⁸⁷ Five states specifically address remorse as a mitigating factor,¹⁸⁸ and other states actually view lack of remorse as an aggravating factor at sentencing.¹⁸⁹ Defendants who enter Alford pleas by definition do not show remorse because the pleas revolve around defendants’ assertions of innocence. Courts across the country have nonetheless refused to exempt defendants who enter Alford pleas from an assessment of remorse during their sentencing. For example, courts in Georgia, Idaho, Tennessee, Virginia, and Wisconsin all treat Alford defendants the same as those who plead guilty or not guilty during the sentencing phase of the trial.¹⁹⁰ By the very nature of the plea, a defendant

¹⁸⁴ See VA. CODE ANN. § 8.01-195.11 (2008) (providing that if his conviction has been vacated, a wrongfully convicted person is entitled to 90% of the Virginia per capita personal income for up to 20 years, plus a tuition award worth \$10,000 in the Virginia community college system).

¹⁸⁵ See *Compensation for the Wrongly Convicted*, *supra* note 183.

¹⁸⁶ See Peg Schultz, *The Alford Plea in Juvenile Court*, 32 OHIO N.U. L. REV. 187, 192 (2006).

¹⁸⁷ See Bryan H. Ward, *A Plea Best Not Taken: Why Criminal Defendants Should Avoid the Alford Plea*, 68 MO. L. REV. 913, 921 (2003).

¹⁸⁸ *Id.* at 921 n.43 (citing CAL. PENAL CODE § 502(k)(2) (West 1999); FLA. STAT. ANN. § 921.0026(2)(J) (West 2001); N.C. GEN. STAT. § 15A-1340.16(e)(11), (15) (2001); OKLA. STAT. ANN. tit. 22, § 982(B) (West Supp. 2003); R.I. CT. RULES ANN. SUPER. CT. SENT’G BENCHMARKS 1(i) (2002)). For case law indicating the appropriateness of considering remorse as a mitigating factor at sentencing, see, e.g., *State v. McKinney*, 946 P.2d 456, 458 (Alaska Ct. App. 1997); *Commonwealth v. Mills*, 764 N.E.2d 854, 866 n.9 (Mass. App. Ct. 2002); *State v. Buttrey*, 756 S.W.2d 718, 722 (Tenn. Crim. App. 1988).

¹⁸⁹ See Ward, *supra* note 187, at 922 n.44 (noting that Ohio is the only state that statutorily defines “lack of remorse” as an aggravating factor at sentencing); see also OHIO REV. CODE ANN. § 2929.12(D)(5) (West 2006).

¹⁹⁰ See, e.g., *Clark v. State*, 366 S.E.2d 361 (Ga. Ct. App. 1988); *State v. Howry*, 896 P.2d 1002 (Idaho Ct. App. 1995); *State v. Philpot*, No. M2000-01999-CCA-R3-CD, 2001 WL 473842 (Tenn. Crim. App. May 2, 2001); *Smith v. Commonwealth*, 499 S.E.2d 11 (Va. Ct. App. 1998); *State v. Westcott*, No. 97-0419-CR, 1998 WL 692827 (Wis. Ct. App. Oct. 7,

who has entered an Alford plea has failed to show remorse because he is professing his innocence.

Moreover, expressions of innocence in front of a parole board will most likely have a deleterious effect on the prisoner's chance of getting paroled.¹⁹¹ For example, Daniel Medwed found that “surveying state parole release decisions demonstrates that a prisoner's willingness to ‘own up’ to his misdeeds—to acknowledge culpability and express remorse for the crime for which he is currently incarcerated—is a vital part of the parole decision-making calculus.”¹⁹²

v. Alford Pleas Undermine the Credibility of the Justice System

Accepting a plea of guilty from someone who maintains his innocence undermines the credibility of the justice system.¹⁹³ The criminal justice system is designed to punish only those who are morally blameworthy, and, therefore, the conviction of an innocent defendant threatens the very foundation of our system of justice.¹⁹⁴ This critique of the Alford plea came to the fore in the case of the West Memphis Three. The State entered into this plea agreement and agreed to the release of these three men from prison even though the State still maintained that the West Memphis Three were guilty.¹⁹⁵ Dan Stidham, Jessie Misskelley's former attorney and current Arkansas State District Court Judge, reflected on the plea agreement, stating, “[w]hile this Alford plea allowed justice to happen, there's no honor in it.”¹⁹⁶ Stidham faults the state of Arkansas for taking eighteen years to “correct [its] mistake,” and notes that when it finally did, it did so “in a cowardly fashion with no honor.”¹⁹⁷ Stidham, one of Jessie Misskelley's closest confidants—a man who spent eighteen years fighting for Jessie's

1998); *State v. Weaver*, 485 N.W.2d 840 (Wis. Ct. App. 1992).

¹⁹¹ See Daniel S. Medwed, *The Innocent Prisoner's Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, 93 IOWA L. REV. 491, 495 n.11 (2008) (citing *Hicks v. Parole Bd.*, No. 224807, 2001 WL 792153, at *1 (Mich. Ct. App. Jan. 9, 2001) (per curiam) (“[C]iting findings by the Michigan parole board that an inmate's ‘likelihood for recidivism was difficult to determine because he ‘does not take responsibility for the offense’ and remains in ‘denial’”)); see also *State ex rel. Bergmann v. Faust*, 595 N.W.2d 75, 78 (Wis. Ct. App. 1999) (noting the Wisconsin parole commission's characterization of an inmate as high-risk, in part because of his assertion of innocence, and its decision to deny parole).

¹⁹² Medwed, *supra* note 191, at 493.

¹⁹³ See Shipley, *supra* note 30, at 1073–74.

¹⁹⁴ *Id.* at 1074.

¹⁹⁵ See Robertson, *supra* note 168, at A12.

¹⁹⁶ Chad Miller, *Stidham Recalls West Memphis 3 Case*, PARAGOULD DAILY PRESS (Sept. 10, 2011, 12:07 PM), http://www.paragoulddailypress.com/articles/2011/09/10/local_news/doc4e6ac3ec09170031632611.txt.

¹⁹⁷ *Id.*

freedom—is “happy [Misskelley and the others are free],” but he would “rather have won the case in the courtroom.”¹⁹⁸

In the same vein, the use of the Alford plea can also cause the public to lose confidence in the criminal justice system because “[t]he public may not understand how a party can proclaim innocence in a courtroom, yet be convicted on a guilty plea.”¹⁹⁹ People may fear that there is inherent corruption in a system that seems to place little importance on seeking truth or justice.²⁰⁰ The West Memphis Three case exemplifies this potential effect of the Alford plea; many members of the public may have wondered why these men were set free even though they were still considered guilty by the state of Arkansas. People who believe in the men’s guilt expressed outrage that these so-called child murderers were being set free²⁰¹ while people who believe in their innocence expressed outrage that they were not being exonerated.²⁰² For many citizens, the use of the Alford plea in this case and in general made “the coercion and injustice [of the criminal justice system] too obvious to deny.”²⁰³

Conversely, it could be argued that Alford pleas actually benefit the criminal justice system, rather than undermine it, because they shed light on potential misconduct within the system. For example, in accepting Alford pleas from the West Memphis Three, prosecutors may have actually caused the public to lose more confidence in the State, rather than to lose confidence in the innocence of the defendants. Maybe allowing, or even encouraging, Alford pleas will have the somewhat perverse result of actually strengthening the justice system by highlighting its inherent flaws and inefficiencies to a public that cannot understand why our system would allow an innocent person to plead guilty.

Inherent in this overall point on justice is the tragic injustice done to the innocent defendant who enters an Alford plea and goes to prison for a crime he did not commit. This potential result requires all participants in the justice system—judges, lawyers, and defendants—to examine critically a system that would let a person who actively professes innocence plead guilty. In this Comment, I have discussed some of the pros and cons of

¹⁹⁸ *Id.*

¹⁹⁹ Shipley, *supra* note 30, at 1075.

²⁰⁰ *Id.*

²⁰¹ Martha Neil, ‘West Memphis 3’ Win Release from Prison by Taking Alford Plea in 1993 Murder of 3 Boys, A.B.A. J. (Aug. 19, 2011, 2:08 PM), http://www.abajournal.com/news/article/3_men_win_release_from_prison_today_by_taking_alford_plea_in_1993_murder_of/.

²⁰² *Id.*

²⁰³ Alschuler, *supra* note 12, at 1418.

allowing and encouraging this type of plea, but at the heart of the matter rests one of the underlying principles of our criminal justice system: “it is better that ten guilty persons escape than that one innocent suffer.”²⁰⁴

V. CONCLUSION

When determining how best to advise their clients, attorneys must carefully balance the consequences of their innocent clients pleading not guilty—and the related prospects of a risky trial and a possible higher sentence—against the negative postconviction consequences of entering an Alford plea. Ten years ago, innocent defendants who had confessed might have been reluctant to plead “not guilty”—and with good reason—given the persuasive power confessions had over juries. However, the Innocence Movement has changed the way society views confessions that lack corroborating evidence. The mainstream media has latched onto this issue and disseminated information about DNA exonerations and false confessions to the public. People are finally starting to understand how someone could confess to a crime he did not commit. It is in this context that defendants and attorneys must now analyze their plea-bargaining strategies.

There are many avenues by which defense attorneys can persuade juries that—in this age of innocence—a defendant who has confessed is in fact innocent. The smartest strategy for a defense attorney would be to get the confession thrown out pretrial based on voluntariness. Some scholars have argued that judges should also take into consideration the reliability of the confession during the suppression hearing by examining factors such as:

- 1) [W]hether the confession contains nonpublic information that can be independently verified, would only be known by the true perpetrator or an accomplice, and cannot likely be guessed by chance; 2) whether the suspect’s confession led the police to new evidence about the crime; and 3) whether the suspect’s postadmission narrative “fits” (or fails to fit) with the crime facts and existing objective evidence.²⁰⁵

Another option would be for defense counsel to call an expert on false confessions to testify during the trial. Dan Stidham actually employed this technique during Jessie Misskelley’s trial; he called Richard Ofshe, an expert on false confessions, to testify to jurors about why Misskelley’s statement was likely coerced. However, Dr. Ofshe was not permitted to testify to his opinion that the confession was involuntary because such testimony would contradict the judge’s previous ruling that Misskelley’s

²⁰⁴ 4 WILLIAM BLACKSTONE, COMMENTARIES *358.

²⁰⁵ Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 531.

confession was voluntary.²⁰⁶

Cases such as those of Robert Davis and the West Memphis Three contained unique circumstances that affected the attorneys' plea-bargaining decisions. However, these cases, and cases featuring false confessions in general, shed light on the harmful effects of an innocent defendant pleading guilty. The West Memphis Three will never get to contest their innocence in court; they will remain convicted felons and carry this label with them on every job interview, every loan application, and every media appearance. Moreover, Robert Davis sits in prison; his only hope of freedom lies in the volatile clemency process. While this Comment argues that lawyers who represent an innocent defendant should not counsel their client to enter this plea in a case where a confession is the sole piece of evidence, the difficulty and enormity of this decision must be acknowledged. Although the Innocence Movement has educated many people on the reality of false confessions, there is a real possibility that if Robert Davis or Jessie Misskelley were on trial today solely on the basis on their confessions, a jury could find them guilty. How do you tell your client that you are essentially rolling the dice with his life because you think you can convince a jury that his confession is false? As has been discussed in this Comment, the better bet for most lawyers who represent clients in these types of cases is to enter a plea of not guilty and allow the case to play out in the system, rather than enter an Alford plea and potentially limit a client's postconviction remedies. However, there is no guarantee that justice will be done for an innocent defendant who enters a plea of not guilty.

A better solution could lie in the judicial system itself. Maybe judges should refrain from accepting such pleas when the evidence of guilt is based solely on a confession, instead of leaving this important decision up to an attorney. Or maybe as educated citizens, we should place more political pressure on prosecutors to refrain from bringing a case against a defendant based solely on a confession that exhibits classic signs of coercion and contamination. No matter the solution, one thing is clear: it is an utter travesty for our justice system to allow innocent defendants to sit in prison or to fail to give a defendant who has been released on an Alford plea the ability to clear his name.

²⁰⁶ Steel, *supra* note 96, at ch. 6.