

No. 141932

**STATE OF MICHIGAN
IN THE SUPREME COURT**

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v.

JEROME WALTER KOWALSKI,
Defendant-Appellant.

On Appeal from the Court of Appeals, No. 294054
Livingston Circuit Court, 08-017643-FC

**BRIEF FOR AMICUS CURIAE AMERICAN PSYCHOLOGICAL
ASSOCIATION IN SUPPORT OF APPELLANT**

Nathalie F.P. Gilfoyle
AMERICAN PSYCHOLOGICAL ASSOCIATION
750 First Street N.E.
Washington, D.C. 20002
(202) 336-5500

David W. Ogden, *pro hac vice*
Daniel S. Volchok
Sonya L. Lebsack
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue N.W.
Washington, D.C. 20006
(202) 663-6000

September 1, 2011

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. EXPERT TESTIMONY REGARDING FALSE CONFESSIONS IS RELEVANT BECAUSE IT ASSISTS JURORS IN UNDERSTANDING CRITICAL EVIDENCE	4
A. Jurors Are Not Commonly Aware That People Confess To Crimes They Did Not Commit	5
B. Expert Testimony Would Educate Jurors About The Specific Identifiable Factors That Can Lead To False Confessions	9
1. Lawful Police Interrogation Processes And Tactics Can Produce False Confessions	9
2. Dispositional Factors Can Produce False Confessions	14
3. Most Jurors Do Not Understand The Connection Between False Confessions And These Interrogation And Dispositional Factors	17
C. The Court Of Appeals' Other Grounds For Deeming Irrelevant The Experts' Testimony Here Are Also Infirm	18
1. That Certain Factors May Lead To True As Well As False Confessions Does Not Render Expert Testimony About Those Factors Irrelevant	19
2. Allowing Jurors To View The Interrogation Is Not An Adequate Substitute Because Such Observations Do Not Inform Jurors About The Fact Of False Confessions Or The Relevant Risk Factors	21

II.	EXPERT TESTIMONY REGARDING FALSE CONFESSIONS IS RELIABLE BECAUSE IT IS BASED ON ESTABLISHED SCIENTIFIC RESEARCH	22
A.	Expert Testimony On False Confessions Bears Multiple Hallmarks Of Reliability, Including General Acceptance In The Field Of Psychology	23
1.	Consistency With Other Research	23
2.	Accepted Research Methods	24
3.	Publication And Peer Review	26
4.	Other Indicia Of Reliability	27
B.	<i>Daubert</i> Requires Only That An Expert Use Reliable Principles And Methodologies Within The Relevant Field, Not That There Be An Experimental Or Predictive Model	27
III.	THE PROBATIVE VALUE OF EXPERT TESTIMONY ABOUT FALSE CONFESSIONS OUTWEIGHS ANY UNFAIR PREJUDICE	31
A.	Expert Testimony Is Critical To The Defense Because Confessions Are Potent Evidence	31
B.	Any Danger Of Unfair Prejudice Can Be Managed Because The Prosecution Can Both Offer Contrary Expert Testimony And Cross-Examine The Defense’s Experts About Any Perceived Shortcomings In Their Opinions.....	32
	CONCLUSION.....	33
	CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

CASES

	Page
<i>Arcoren v. United States</i> , 929 F.2d 1235 (8th Cir. 1991)	8
<i>Arizona v. Fulminante</i> , 499 U.S. 279 (1991).....	3
<i>Atkins v. Virginia</i> , 536 U.S. 304 (2002)	1
<i>Bitler v. A.O. Smith Corp.</i> , 400 F.3d 1227 (10th Cir. 2004).....	28
<i>Commonwealth v. Wright</i> , 14 A.3d 798 (Pa. 2011)	1
<i>Crane v. Kentucky</i> , 476 U.S. 683 (1986)	22
<i>Daubert v. Merrell Dow Pharmaceuticals, Inc.</i> , 509 U.S. 579 (1993).....	4, 22, 25, 32
<i>Edry v. Adelman</i> , 486 Mich. 634 (2010).....	4, 26
<i>Florida Department of Children & Families v. X.X.G.</i> , 45 So. 3d 79 (Fla. Dist. Ct. App. 2010)	1
<i>General Electric Co. v. Joiner</i> , 522 U.S. 136 (1997)	30
<i>Graham v. Florida</i> , 130 S. Ct. 2011 (2010).....	1
<i>In re Marriage Cases</i> , 183 P.3d 384 (Cal. 2008).....	1
<i>In re TMI Litigation</i> , 193 F.3d 613 (3d Cir. 1999)	23
<i>Kopf v. Skyrms</i> , 993 F.2d 374 (4th Cir. 1993).....	23
<i>Kumho Tire Co. v. Carmichael</i> , 526 U.S. 137 (1999)	22, 27, 29
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966)	5, 13
<i>Morales v. American Honda Motor Co.</i> , 151 F.3d 500 (6th Cir. 1998)	23
<i>Old Chief v. United States</i> , 519 U.S. 172 (1997).....	33
<i>Panetti v. Quarterman</i> , 551 U.S. 930 (2007).....	1
<i>People v. Beckley</i> , 434 Mich. 691 (1990)	7, 8
<i>People v. Christel</i> , 449 Mich. 578 (1995).....	7, 20, 23, 28
<i>People v. Crawford</i> , 458 Mich. 376 (1998)	32

<i>People v. Kowalski</i> , No. 294054, 2010 WL 3389741 (Mich. Ct. App. Aug. 26, 2010)	<i>passim</i>
<i>People v. Mills</i> , 450 Mich. 61 (1995)	33
<i>People v. Peterson</i> , 450 Mich. 349 (1995)	20
<i>Tyus v. Urban Search Management</i> , 102 F.3d 256 (7th Cir. 1996).....	29
<i>United States v. Aman</i> , 748 F. Supp. 2d 531 (E.D. Va. 2010).....	28
<i>United States v. Amuso</i> , 21 F.3d 1251 (2d Cir. 1994)	8
<i>United States v. Batton</i> , 602 F.3d 1191 (10th Cir. 2010).....	8
<i>United States v. Brown</i> , 776 F.2d 397 (2d Cir. 1985).....	8
<i>United States v. Dukagjini</i> , 326 F.3d 45 (2d Cir. 2003)	8
<i>United States v. Hall</i> , 93 F.3d 1337 (7th Cir. 1996)	7, 8
<i>United States v. Hall</i> , 974 F. Supp. 1198 (C.D. Ill. 1997)	29
<i>United States v. Norris</i> , 217 F.3d 262 (5th Cir. 2000).....	28
<i>United States v. Shay</i> , 57 F.3d 126 (1st Cir. 1995).....	6
<i>United States v. Simmons</i> , 470 F.3d 1115 (5th Cir. 2006).....	30
<i>United States v. Smithers</i> , 212 F.3d 306 (6th Cir. 2000)	8

RULES

Fed. R. Evid. 702	4, 22
Mich. R. Evid.	
403	31
702.....	3, 19

OTHER AUTHORITIES

Appleby, Sara C., et al., <i>Police-Induced Confessions: An Empirical Analysis of Their Content and Impact</i> , Psychol. Crime & L. (forthcoming 2011).....	7
Blagrove, Mark, <i>Effects of Length of Sleep Deprivation on Interrogative Suggestibility</i> , 2 J. of Experimental Psychol. Applied 48 (1996).....	17
Blair, J.P., <i>A Test of the Unusual False Confession Perspective: Using Cases of Proven False Confessions</i> , 41 Crim. L. Bull. 127 (2005)	14

Blandón-Gitlin, Iris, et al., <i>Jurors Believe Interrogation Tactics Are Not Likely To Elicit False Confessions: Will Expert Witness Testimony Inform Them Otherwise?</i> , Psychol. Crime & L. 1 (2010)	17, 18
Borchard, Edwin M., <i>Convicting The Innocent</i> (1932)	23
Cauffman, Elizabeth & Laurence Steinberg, <i>(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults</i> , 18 Behav. Sci. & L. 741 (2000)	15
Chojnacki, Danielle E., et al., <i>An Empirical Basis for the Admission of Expert Testimony on False Confessions</i> , 40 Ariz. St. L.J. 1 (2008)	5
Davis, Deborah & Richard A. Leo, <i>Commentary: Overcoming Judicial Preferences for Person- Versus Situation-Based Analyses of Interrogation-Induced Confessions</i> , 38 J. Am. Acad. Psychiatry L. 187 (2010)	10, 11
Drizin, Steven A. & Richard A. Leo, <i>The Problem of False Confessions in the Post-DNA World</i> , 82 N.C. L. Rev. 891 (2004)	13, 14, 18, 24, 31
Editorial, <i>False Confessions</i> , N.Y. Times, Mar. 21, 2011, at A24	3
Feld, Barry C., <i>Police Interrogation of Juveniles: An Empirical Study of Policy and Practice</i> , 97 J. Crim. L. & Criminology 219 (2006)	14
Finlay, W.M.L. & E. Lyons, <i>Acquiescence in Interviews With People Who Have Mental Retardation</i> , 40 Mental Retardation 14 (2002)	16
Garrett, Brandon L., <i>Judging Innocence</i> , 108 Colum. L. Rev. 55 (2008)	3
Garrett, Brandon L., <i>The Substance of False Confessions</i> , 62 Stan. L. Rev. 1051 (2010)	7, 20
Gross, Samuel R., et al., <i>Exonerations in the United States, 1989 Through 2003</i> , 95 J. Crim. L. & Criminology 523 (2005)	15
Gudjonsson, Gisli H., <i>The Psychology of Interrogations and Confessions</i> (2003)	passim
Gudjonsson, Gisli H., <i>The Psychology of Interrogations, Confessions and Testimony</i> (1992)	9, 26
Gudjonsson, Gisli H. & John Pearse, <i>Suspect Interviews and False Confessions</i> , 20 Current Directions Psychol. Sci. 33 (2011)	9
Gudjonsson, Gisli H., et al., <i>The Relationship of Alcohol Withdrawal Symptoms to Suggestibility and Compliance</i> , 10 Psychol. Crime & L. 169 (2004)	17

Henkel, Linda A., et al., <i>A Survey of People's Attitudes and Beliefs About False Confessions</i> , 26 Behav. Sci. & L. 555 (2008).....	17
Hill, Carol, et al., <i>The Role of Confirmation Bias in Suspect Interviews: A Systematic Evaluation</i> , 13 Legal & Criminological Psychol. 357 (2008)	10
Horselenberg, Robert, et al., <i>Individual Differences and False Confessions: A Conceptual Replication of Kassin and Kiechel (1996)</i> , 9 Psychol. Crime & L. 1 (2003)	12
Inbau, Fred E., et al., <i>Criminal Interrogation and Confessions</i> (4th ed. 2004).....	9, 13
Kassin, Saul M., <i>A Critical Appraisal of Modern Police Interrogations</i> , in <i>Investigative Interviewing: Rights, Research, Regulation</i> 207 (Tom Williamson ed., 2006)	10
Kassin, Saul M., <i>Expert Testimony on the Psychology of Confessions: A Pyramidal Framework of the Relevant Science</i> , in <i>Beyond Common Sense</i> 195 (Eugene Borgida & Susan T. Fiske eds., 2008)	23
Kassin, Saul M., <i>The Psychology of Confessions</i> , 4 Ann. Rev. L. Soc. Sci. 193 (2008).....	15
Kassin, Saul M. & Gisli H. Gudjonsson, <i>The Psychology of Confessions: A Review of the Literature and Issues</i> , 5 Psychol. Sci. Pub. Int. 33 (2004).....	<i>passim</i>
Kassin, Saul M. & Holly Sukel, <i>Coerced Confessions and the Jury: An Experimental Test of the "Harmless Error" Rule</i> , 21 Law & Hum. Behav. 27 (1997).....	17, 31
Kassin, Saul M. & Karlyn McNall, <i>Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication</i> , 15 Law & Hum. Behav. 233 (1991).....	13
Kassin, Saul M. & Katherine L. Kiechel, <i>The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation</i> , 7 Psychol. Sci. 125 (1996).....	11, 12, 25
Kassin, Saul M. & Katherine Neumann, <i>On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis</i> , 21 Law & Hum. Behav. 469 (1997).....	17, 31
Kassin, Saul M., et al., <i>Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt</i> , 27 Law & Hum. Behav. 187 (2003)	10
Kassin, Saul M., et al., <i>"I'd Know a False Confession If I Saw One": A Comparative Study of College Students and Police Investigators</i> , 29 Law & Hum. Behav. 211 (2005)	6

Kassin, Saul M., et al., <i>Police-Induced Confessions: Risk Factors and Recommendations</i> , 34 Law & Hum. Behav. 3 (2010), available at http://web.williams.edu/Psychology/Faculty/Kassin/files/White%20Paper%20-%20LHB%20(2010).pdf (last visited Sept. 1, 2011).....	<i>passim</i>
Kassin, Saul M., et al., <i>Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs</i> , 31 Law & Hum. Behav. 381 (2007).....	9, 10
Lambert, Bruce, <i>No Retrial in '88 Double Killing on Long Island</i> , N.Y. Times, July 1, 2008, http://www.nytimes.com/2008/07/01/nyregion/01tangleff.html (last visited Sept. 1, 2011)	12
Leo, Richard A., <i>Inside the Interrogation Room</i> , 86 J. Crim. L. & Criminology 266 (1996).....	13, 14, 24
Leo, Richard A., <i>Police Interrogation and American Justice</i> (2008).....	6
Leo, Richard A. & Brittany Liu, <i>What Do Potential Jurors Know About Police Interrogation Techniques and False Confessions?</i> , 27 Behav. Sci. & L. 381 (2009).....	17
Leo, Richard A. & Richard J. Ofshe, <i>The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation</i> , 88 J. Crim. L. & Criminology 429 (1998).....	24
Leo, Richard A., et al., <i>Psychological and Cultural Aspects of Interrogations and False Confessions: Using Research to Inform Legal Decision-Making</i> , in <i>Psychological Expertise in Court</i> 25 (Daniel A. Krauss & Joel D. Lieberman eds., 2009).....	11
Levine, Timothy R., et al., <i>(In)accuracy at Detecting True and False Confessions and Denials: An Initial Test of a Projected Motive Model of Veracity Judgments</i> , 36 Hum. Comm. Res. 82 (2010).....	6
Monahan, John & Laurens Walker, <i>Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law</i> , 134 U. Pa. L. Rev. 477 (1986).....	26
Monahan, John & Laurens Walker, <i>Social Frameworks</i> , 73 Va. L. Rev. 559 (1987).....	29
Münsterberg, Hugo, <i>On the Witness Stand: Essays on Psychology and Crime</i> (1908).....	23
Narchet, Fadia M., et al., <i>Modeling the Influence of Investigator Bias on the Elicitation of True and False Confessions</i> , Law & Hum. Behav. (forthcoming 2011).....	10

Nash, Robert A. & Kimberley A. Wade, <i>Innocent But Proven Guilty: Eliciting Internalized False Confessions Using Doctored-Video Evidence</i> , 23 <i>Applied Cognitive Psychol.</i> 624 (2009).....	12
Ofshe, Richard J. & Richard A. Leo, <i>The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions</i> , 16 <i>Stud. L. Pol. & Soc'y</i> 189 (1997).....	30
Owen-Kostelnik, Jessica, et al., <i>Testimony and Interrogation of Minors: Assumptions About Maturity and Morality</i> , 61 <i>Am. Psychologist</i> 286 (2006).....	15
Perillo, Jennifer T. & Saul M. Kassin, <i>Inside Interrogation: The Lie, The Bluff, and False Confessions</i> , 35 <i>Law & Hum. Behav.</i> 327 (2011).....	12
<i>Police Interrogations and False Confessions: Current Research, Practice, and Policy Recommendations</i> (G. Daniel Lassiter & Christian A. Meissner eds., 2010).....	26
Redlich, Allison D. & Gail S. Goodman, <i>Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility</i> , 27 <i>Law & Hum. Behav.</i> 141 (2003).....	12
Redlich, Allison D., et al., <i>Self-Reported False Confessions and False Guilty Pleas among Offenders with Mental Illness</i> , 34 <i>Law & Hum. Behav.</i> 79 (2010).....	16
Russano, Melissa B., et al., <i>Investigating True and False Confessions Within a Novel Experimental Paradigm</i> , 16 <i>Psychol. Sci.</i> 481 (2005)	13, 25
Vrij, Aldert, et al., <i>Pitfalls and Opportunities in Nonverbal and Verbal Lie Detection</i> , 11 <i>Psychol. Sci. Pub. Int.</i> 89 (2010).....	6
White, Welsh S., <i>False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions</i> , 32 <i>Harv. C.R.-C.L. L. Rev.</i> 105 (1997).....	6, 9

INTEREST OF AMICUS CURIAE

The American Psychological Association (“APA”) is the leading association of psychologists in the United States. A nonprofit scientific and professional organization, it has approximately 155,000 members and affiliates. Among APA’s major purposes are to increase and disseminate knowledge regarding human behavior, and to foster the application of psychological learning to important human concerns.

Division 41 of APA, the American Psychology-Law Society, focuses on the intersection of law and psychology. Among its purposes are to inform the legal community of current research in the field of law and psychology. After intensive peer review, Division 41 recently published a white paper in the Society’s flagship journal that summarizes the robust body of research regarding the phenomenon of false confessions. See Kassin et al., *Police-Induced Confessions*, 34 Law & Hum. Behav. 3 (2010).¹

APA has filed more than 135 amicus briefs in state and federal courts around the country, including briefs regarding research on false confessions. APA’s briefs have been cited frequently by courts over the years, including the U.S. Supreme Court. See, e.g., *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010); *Panetti v. Quarterman*, 551 U.S. 930, 962 (2007); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002); *Commonwealth v. Wright*, 14 A.3d 798, 816 n.16 (Pa. 2011); *In re Marriage Cases*, 183 P.3d 384, 441 n.59 (Cal. 2008); *Fla. Dep’t of Children & Families v. X.X.G.*, 45 So. 3d 79, 87 n.10 (Fla. Dist. Ct. App. 2010).

APA has a rigorous approval process for amicus briefs, the touchstone of which is an assessment of whether there is sufficient scientific research, data, and literature on a question

¹ Available at [http://web.williams.edu/Psychology/Faculty/Kassin/files/White%20Paper%20-%20LHB%20\(2010\).pdf](http://web.williams.edu/Psychology/Faculty/Kassin/files/White%20Paper%20-%20LHB%20(2010).pdf) (last visited Sept. 1, 2011).

before a court that APA can usefully contribute to the court's understanding and resolution of that question. APA regards this as one of those cases.

The issue here is the reliability and relevance of expert testimony on false confessions, i.e., whether false-confession research is well-established and widely accepted, and whether the jury would benefit from expert testimony that explains both that false confessions exist and that aspects of the police-interrogation process are associated with those confessions, particularly when applied to individuals with certain known dispositions. APA submits this brief to present the psychological and sociological knowledge relevant to that issue. APA's conclusion is that this body of research warrants the admission of the proffered testimony.²

SUMMARY OF ARGUMENT

The robust and widely accepted body of scientific research on false confessions provides a strong empirical foundation for the admission of expert testimony on the subject. *First*, such testimony is relevant because it assists jurors in evaluating confession evidence, by explaining that some people confess falsely and that certain known situational and dispositional factors create particular risks of false confessions. Contrary to the assertion of the Court of Appeals in this case, research has shown that these subjects are outside of jurors' common knowledge and experience. Accordingly, the presentation of specialized knowledge will assist the trier of fact. *Second*, expert testimony about the research on false confessions has a reliable basis in the knowledge and experience of the relevant discipline. It is grounded in and builds on a century of psychological research—and the resulting voluminous literature—that examines the cognitive, motivational, and behavioral foundations of authority and influence. The research uses valid methods, is published in respected peer-reviewed journals, and is generally accepted in the field.

² APA gratefully acknowledges the assistance of Saul Kassin, Ph.D.; Joel Dvoskin, Ph.D.; and Michael Jenuwine, J.D., Ph.D. in the preparation of this brief.

The Court of Appeals' determination that there is no way to "test or quantify" the methodologies used not only misunderstands the relevant research and literature, but also misapprehends the purpose of the expert testimony, which is not to predict the truth or falsity of the particular defendant's confession, but rather to educate the jury about factors that research has shown to be relevant to evaluating confession evidence. *Finally*, the probative value of such expert testimony generally outweighs any unfair prejudice. Given the high impact of any confession, the value of testimony that puts a confession in the context of scientific understanding about circumstances that would promote or undermine its likely truthfulness is not outweighed by any purported prejudice that would result.

ARGUMENT

As the U.S. Supreme Court has recognized, a defendant's confession "is probably the most probative and damaging evidence that can be admitted against him." *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991); *see also id.* ("[C]onfessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so."). Many confessions are true, and play a critical role in obtaining valid and appropriate convictions. Sometimes, however, a defendant's confession is false. In recent years, it has been demonstrated that individuals have been convicted and incarcerated for serious crimes they did not commit, based largely or exclusively on false confessions. *See, e.g.*, Editorial, *False Confessions*, N.Y. Times, Mar. 21, 2011, at A24. And academic research has documented the phenomenon of false confessions. *See, e.g.*, Gudjonsson, *The Psychology of Interrogations and Confessions* 217-243 (2003); Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 88-91 (2008). Moreover, several categories of cases where there is potential for false confessions, such as those involving confessions to minor crimes that result in guilty pleas and confidential juvenile proceedings, are extremely unlikely to come to light. This reinforces the conclusion that "a

small but significant minority of innocent people confess under interrogation.” Kassin et al., *Police-Induced Confessions* at 5.

In this case, the State seeks to convict Jerome Kowalski of a crime that could carry a life sentence, based almost exclusively on a confession he gave during twelve hours of police interrogation over two days. He contends that his confession is false, while the prosecution’s case depends almost entirely on persuading the jury to conclude beyond a reasonable doubt that the confession is true. APA is not in a position to know whether Mr. Kowalski’s confession is true or false. But in connection with his defense, Mr. Kowalski seeks to present expert testimony about false confessions. APA submits that such testimony is reliable and relevant: It flows from a robust body of generally accepted scientific research, and it would educate the jury about false confessions and thus assist jurors in understanding and evaluating Mr. Kowalski’s confession.

I. EXPERT TESTIMONY REGARDING FALSE CONFESSIONS IS RELEVANT BECAUSE IT ASSISTS JURORS IN UNDERSTANDING CRITICAL EVIDENCE

Michigan Rule of Evidence 702 requires that expert testimony “assist the trier of fact to understand the evidence *or* to determine a fact in issue” (emphasis added); *accord Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591 (1993).³ The expert testimony proffered here would assist the jurors in understanding the significance of Mr. Kowalski’s confession. With such testimony, they can make a more informed—and hence likely more accurate—assessment of both the prosecution’s claim that the confession is true and Mr. Kowalski’s claim that it is false. The testimony would inform the jury that some people do confess falsely and also explain many circumstances in which they do so, including a discussion of both the processes of police interrogation and the dispositional factors that may make a person more susceptible to confessing

³ “MRE 702 incorporates the standards of reliability that the United States Supreme Court described to interpret the equivalent federal rule of evidence in *Daubert*.” *Edry v. Adelman*, 486 Mich. 634, 639 (2010).

falsely. Research has shown that these subjects are outside of most jurors' common knowledge and experience. The expert testimony is therefore relevant.

A. Jurors Are Not Commonly Aware That People Confess To Crimes They Did Not Commit

The Court of Appeals' first reason for upholding the exclusion of Dr. Leo's testimony was the assertion that the testimony "would not have involved a proposition that was outside the common knowledge of a layperson." *People v. Kowalski*, No. 294054, 2010 WL 3389741, at *3 (Mich. Ct. App. Aug. 26, 2010). Empirical research demonstrates that that assertion, for which the court offered no support, is incorrect.

The phenomenon of false confessions is both well documented by researchers, *see supra* pp. 3-4, and long recognized by courts, *see, e.g., Miranda v. Arizona*, 384 U.S. 436, 455 & n.24, 467 (1966) ("Interrogation procedures may ... give rise to a false confession" because they entail "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely."). Nonetheless, to many lay people the notion of a false confession remains highly counterintuitive. In particular, people commonly find it difficult to understand why an innocent suspect, absent mental illness or physical force, would confess to a crime he did not commit, particularly a felony that carries the possibility of a lengthy prison sentence or even death. *See Chojnacki et al., An Empirical Basis for the Admission of Expert Testimony on False Confessions*, 40 Ariz. St. L.J. 1, 3-4 (2008) (survey results show that "the body of knowledge on false confessions is ... well outside of the common knowledge of jury-eligible citizens" (emphasis omitted)); Kassin & Gudjonsson, *The Psychology of Confessions*, 5 Psychol. Sci. Pub. Int. 33, 59 (2004) (a "voluminous" body of psychological research shows that people generally do not account for situational pressures when evaluating behavior). Courts and commentators have noted the consequent widespread belief that virtually all

confessions are genuine and particularly probative of guilt. See Chojnacki et al., *An Empirical Basis for the Admission of Expert Testimony on False Confessions* at 40 (“[T]here is now [empirical] evidence that a significant proportion of jurors do generally assume that suspects who confess to crimes are guilty.” (emphasis omitted)); *United States v. Shay*, 57 F.3d 126, 133 (1st Cir. 1995) (“Common understanding conforms to the notion that a person ordinarily does not make untruthful inculpatory statements.”).⁴ That belief is also expressed by prosecutors, law enforcement officers, and others in the criminal justice system. See Leo, *Police Interrogation and American Justice* 196-197 (2008). Indeed, common sense leads people to believe a suspect’s confession far more than his or her denials. See Levine et al., *(In)accuracy at Detecting True and False Confessions and Denials*, 36 Hum. Comm. Res. 82, 91 (2010). If left unaddressed, this predisposition to view any confession as conclusive of guilt prevents jurors from fairly considering the possibility that a particular defendant confessed falsely.

There are additional reasons to believe that juries on their own will not identify false confessions. Research shows that neither lay people nor experienced professionals distinguish truths from lies with high levels of accuracy. See Kassin et al., *Police-Induced Confessions* at 6; Vrij et al., *Pitfalls and Opportunities in Nonverbal and Verbal Lie Detection*, 11 Psychol. Sci. Pub. Int. 89, 101-102 (2010); Kassin et al., “I’d Know a False Confession if I Saw One”: A Comparative Study of College Students and Police Investigators, 29 Law & Hum. Behav. 211, 216 (2005) (overall accuracy rate for participants who reviewed taped confessions was “nonsignificant relative to chance”). And analysis of actual cases suggests that false confessions can be particularly challenging to identify because the confessions often contain signals of veracity, such as references to the confessors’ thoughts, feelings, and motives, or facts about the crime that were not in the public

⁴ See also White, *False Confessions and the Constitution*, 32 Harv. C.R.-C.L. L. Rev. 105, 108 (1997); Leo, *False Confessions*, 37 J. Am. Acad. Psychiatry & L. 332, 333 (2009).

domain but were given to the defendant by interrogators, a phenomenon known as “confession contamination.” See Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. 1051, 1053 (2010) (discussing confession contamination); Appleby et al., *Police-Induced Confessions: An Empirical Analysis of Their Content and Impact*, Psychol. Crime & L. (forthcoming 2011).⁵

Expert testimony on false confessions addresses these various issues through the use of empirically grounded information about the phenomenon of false confessions and the circumstances under which those confessions may occur. As this Court’s cases show, that is a quintessential example of assisting the trier of fact to understand the evidence. See *People v. Christel*, 449 Mich. 578, 592 (1995) (“[E]xpert testimony is needed when a [defendant’s] actions or responses are incomprehensible to average people.”); *People v. Beckley*, 434 Mich. 691, 717 (1990) (plurality opinion) (“Given the possibility of these misconceptions [involving human behavior], it would be helpful and appropriate to allow expert testimony[.]”).

Other appellate courts have agreed, in regard to the very type of testimony involved here. The Seventh Circuit, for example, in reversing a defendant’s conviction based on the exclusion of false-confession expert testimony, stated that the testimony “would have let the jury know that a phenomenon known as false confessions exists, how to recognize it, and how to decide whether it fit the facts of the case being tried.” *United States v. Hall*, 93 F.3d 1337, 1345 (7th Cir. 1996);

⁵ Such contamination is quite often inadvertent. See Garrett, *The Substance of False Confessions* at 1054. For example:

[Washington D.C. Police] Detective James Trainum ... recounted a case in which a suspect who had confessed to him was later exonerated: “Years later, during a review of the videotapes, we discovered our mistake. We had fallen into a classic trap. We believed so much in our suspect’s guilt that we ignored all evidence to the contrary. To demonstrate the strength of our case, we showed the suspect our evidence, and unintentionally fed her details that she was able to parrot back to us at a later time. It was a classic false confession case and without the video we would never have known[.]”

Kassin et al., *Police-Induced Confessions* at 26; see also *id.* (citing studies).

see also id. (“It would have been up to the jury, of course, to decide how much weight to attach to [the expert’s] theory, and to decide whether they believed his explanation of Hall’s behavior or the more commonplace explanation that the confession was true. But the jury here may have been deprived of critical information it should have had in evaluating Hall’s case.” (citation omitted)); *State v. King*, 904 A.2d 808, 817-818 (N.J. Super. Ct. App. Div. 2006) (citing and following cases from several jurisdictions).⁶

Even jurors who have some awareness of false confessions will benefit from expert testimony on the subject. Rule 702 “declares that even if the jury has some knowledge of the matter, expert opinion may be admitted whenever it would assist the jury. It will be excluded only when it would add *nothing at all* to the jury’s common fund of information.” *Beckley*, 434 Mich. at 715 n.32 (plurality opinion) (internal quotation marks and other emphasis omitted); *accord* Fed. R. Evid. 702 advisory committee’s note (best test for admissibility is whether the “untrained layman would be qualified to determine intelligently *and to the best possible degree* the particular issue without enlightenment from those having a specialized understanding of the subject” (emphasis added)). Here, few jurors will know what that research has revealed about the phenomenon of false confessions.

⁶ Courts have likewise allowed expert testimony that educates the jury in a wide variety of other contexts. *See United States v. Smithers*, 212 F.3d 306, 316 (6th Cir. 2000) (eyewitness expert testimony: “many aspects of perception and memory are not within the common experience of most jurors, and in fact, many factors that affect memory are counter-intuitive”); *United States v. Amuso*, 21 F.3d 1251, 1264 (2d Cir. 1994) (organized crime testimony: “the operational methods of organized crime families are still beyond the knowledge of the average citizen”); *United States v. Dukagjini*, 326 F.3d 45, 52 (2d Cir. 2003) (coded meaning that words spoken on tapes have in a particular context); *United States v. Batton*, 602 F.3d 1191, 1201 (10th Cir. 2010) (modus operandi of child molesters); *Arcoren v. United States*, 929 F.2d 1235, 1240 (8th Cir. 1991) (battered woman’s syndrome); *United States v. Brown*, 776 F.2d 397, 400 (2d Cir. 1985) (terms and practices generally used in street drug sales).

B. Expert Testimony Would Educate Jurors About The Specific Identifiable Factors That Can Lead To False Confessions

Expert testimony about false confessions would also help jurors evaluate the evidence by educating them about the documented risk factors that can yield a false confession, including interrogation tactics police use to elicit confessions and dispositional traits that can render a person particularly prone to confess falsely. Researchers have systematically observed these factors—about which jurors typically have little knowledge—and studied their effects. *See, e.g.,* Gudjonsson, *The Psychology of Interrogations and Confessions* 141-151 (2003); Kassin et al., *Police Interviewing and Interrogation*, 31 *Law & Hum. Behav.* 381, 389-390 (2007); Kassin et al., *Police-Induced Confessions* at 27-30; Gudjonsson & Pearce, *Suspect Interviews and False Confessions*, 20 *Current Directions Psychol. Sci.* 33, 33-37 (2011). Educating jurors about the results of this research is another appropriate role for expert testimony.

1. Lawful Police Interrogation Processes And Tactics Can Produce False Confessions

Based on converging evidence from actual false-confession cases, from basic principles of psychology, and from forensic research, the pertinent scientific literature demonstrates that specific, identifiable police interrogation tactics are risk factors for eliciting a false confession.

a. American police interrogation is a psychologically oriented and largely standardized process of influence. Many police departments follow a set of interrogation procedures, commonly referred to as the “Reid Technique,” that dates to the 1960s. *See* Inbau et al., *Criminal Interrogation and Confessions* 209-397 (4th ed. 2004) (explaining the technique).⁷

As elaborated below, this technique involves the use of both positive and negative incentives,

⁷ *See also* Gudjonsson, *The Psychology of Interrogations, Confessions and Testimony* 31 (1992) (“Although many police interrogation manuals have been produced ..., undoubtedly the most authoritative and influential manual is the one written by Inbau [et al.].”); White, *False Confessions and the Constitution* at 118 (similar).

incentives that “incorporate many of the most powerful, empirically supported, scientifically based techniques ... used to convey [the] message ... to confess.” Davis & Leo, *Commentary: Overcoming Judicial Preferences for Person- Versus Situation-Based Analyses of Interrogation-Induced Confessions*, 38 J. Am. Acad. Psychiatry L. 187, 188 (2010); see also Kassin, *A Critical Appraisal of Modern Police Interrogations*, in *Investigative Interviewing* 207-228 (Williamson ed., 2006).

Using this technique, police begin an interrogation by confronting a suspect whom they believe to be guilty with strong accusations, and without providing an opportunity for denial.⁸ They may also bolster these accusations by citing incriminating evidence, either real or manufactured. As the suspect is led to feel trapped—a feeling usually heightened by the isolation of the suspect throughout the interrogation—interrogators may then offer sympathy and moral justification, normalizing and minimizing the crime so as to lead the suspect to see confession as an expedient exit strategy. Observational studies and self-report surveys of police confirm that these techniques are routinely employed. See, e.g., Kassin et al., *Police Interviewing and Interrogation* at 389-390. And experimental psychologists have demonstrated the powerful impact of these techniques. See Kassin et al., *Police-Induced Confessions* at 27-30; Davis & Leo,

⁸ This presumption of guilt may—“without any conscious attempt on the part of police”—influence the way investigators interact with suspects and conduct the interrogation. Kassin & Gudjonsson, *The Psychology of Confessions* at 42; see also *id.* (discussing how “behavioral confirmation effects” may “corrupt ... interrogations through the presumption of guilt on which they are based”). Controlled studies have replicated this phenomenon. See Kassin et al., *Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt*, 27 Law & Hum. Behav. 187, 199 (2003) (subjects who were led to believe that a suspect was guilty asked more guilt-presumptive questions and pressured the suspect more intently for a confession; neutral observers who later listened to a recording of the interrogation also perceived suspects in the guilt-presumptive interrogation as more likely to have committed the mock-crime); see also Hill et al., *The Role of Confirmation Bias in Suspect Interviews*, 13 Legal & Criminological Psychol. 357 (2008); Narchet et al., *Modeling the Influence of Investigator Bias on the Elicitation of True and False Confessions*, Law & Hum. Behav. (forthcoming 2011).

Commentary at 188 (citing “wide[] agree[ment] that the decision to confess falsely is typically the result of the inability to bear up under the continuing stresses of detention and the interrogation”).

b. At least three techniques sometimes employed in this interrogation process are known risk factors for false confessions. First is the use of false evidence, whereby interrogators confront suspects with powerful but false evidence of their guilt, such as a fingerprint, an accomplice confession, eyewitness identification, or a failed polygraph. See, e.g., Leo et al., *Psychological and Cultural Aspects of Interrogations and False Confessions*, in *Psychological Expertise in Court* 25, 37-38 (Krauss & Lieberman eds., 2009). More than a century of empirical psychological research demonstrates the powerful influence and risks this tactic poses. See Kassin et al., *Police-Induced Confessions* at 28 (arguing that this research—by establishing “that misinformation can substantially alter people’s ... perceptions, beliefs, motivations, emotions, attitudes, ... self-assessments, and even certain physiological outcomes”—creates “strong support for the proposition that outright lies can put innocents at risk to confess by leading them to feel trapped by the inevitability of evidence against them”). Notably, although the presentation of false evidence is far from universally employed, it is present in many proven false confession cases. *Id.* at 29.

Experimental studies confirm the risk that the presentation of false evidence may lead to a false confession. In one study, subjects typing on a computer keyboard were accused of causing the computer to crash by pressing a key they had been instructed to avoid. See Kassin & Kiechel, *The Social Psychology of False Confessions*, 7 Psychol. Sci. 125, 126-127 (1996). Despite their innocence and initial denials, subjects were asked to sign a confession. Where a confederate falsely said that she saw the subject hit the forbidden key, the percentage of innocent subjects who signed nearly doubled, from 35 percent to 89 percent. *Id.* at 127. Subsequent studies have

replicated that effect, even where confession seemingly bore concrete negative consequences. See Horselenberg et al., *Individual Differences and False Confessions*, 9 Psychol. Crime & L. 1, 6 (2003); Redlich & Goodman, *Taking Responsibility for an Act Not Committed*, 27 Law & Hum. Behav. 141, 151 (2003). In another controlled experiment, researchers used digital editing equipment to fabricate video evidence of subjects taking money that did not belong to them. Nash & Wade, *Innocent But Proven Guilty*, 23 Applied Cognitive Psychol. 624, 625 (2009). Presented with this doctored evidence, all subjects confessed, and most internalized the belief in their guilt. *Id.* at 629. Even a mere bluff or pretense of having evidence yet to be examined—such as a record of keystrokes or surveillance tape—increases the incidence of false confessions. Perillo & Kassin, *Inside Interrogation*, 35 Law & Hum. Behav. 327, 335 (2011). In short, the scientific evidence of human susceptibility to influence in the face of misinformation is broad and pervasive.⁹

A second interrogation tactic pertinent to false confessions is the “minimization” technique, whereby a seemingly sympathetic investigator normalizes the crime in question by suggesting to the suspect that it was spontaneous, provoked, drug-induced, peer-pressured, an accident, or

⁹ Real-life cases illustrate the potent—and tragic—effect that the presentation of false evidence inside the interrogation room can have. For example:

[I]n 1989, 17-year-old Marty Tankleff was accused of murdering his parents despite the complete absence of evidence against him. Tankleff vehemently denied the charges for several hours—until his interrogator told him that his hair was found within his mother’s grasp, that a “humidity test” indicated he had showered (hence, the presence of only one spot of blood on his shoulder), and that his hospitalized father had emerged from his coma to say that Marty was his assailant—all of which were untrue.... Following these lies, Tankleff became disoriented and confessed. Solely on the basis of that confession, Tankleff was convicted, only to have his conviction vacated ... 19 years later.

Kassin et al., *Police-Induced Confessions* at 17-18. Prosecutors declined to re-try Tankleff, on the ground that they lacked sufficient evidence. See, e.g., Lambert, *No Retrial in '88 Double Killing on Long Island*, N.Y. Times, July 1, 2008, <http://www.nytimes.com/2008/07/01/nyregion/01tankleff.html> (last visited Sept. 1, 2011).

otherwise minimizable or even excusable. See Kassin & Gudjonsson, *The Psychology of Confessions* at 55; see also *Miranda*, 384 U.S. at 450 (“[O]fficers are instructed to minimize the moral seriousness of the offense, to cast blame on the victim or on society.”). The leading training manual advocates this technique, see Inbau et al., *Criminal Interrogation and Confessions* 232-303, and analyses of scores of interrogations demonstrate that police frequently employ this tactic, see Drizin & Leo, *The Problem of False Confessions* at 916-917.

Research has shown, however, that even where no explicit promises are made, suspects perceive minimization as implying what would otherwise be an impermissible offer of leniency. See Kassin & McNall, *Police Interrogations and Confessions*, 15 Law & Hum. Behav. 233, 234-235 (1991). And in a controlled experiment, minimization tactics made college students more likely to confess falsely that they had cheated on a problem they were supposed to solve alone—a possible violation of the university honor code. Russano et al., *Investigating True and False Confessions Within a Novel Experimental Paradigm*, 16 Psychol. Sci. 481, 484 (2005). Indeed minimization tactics tripled the rate of false confessions. *Id.* By communicating leniency through a process of pragmatic implication, minimization induced confessions from those who were innocent. See *id.* at 485 (“[U]se of pragmatic implication ... yield[s] the same results” as an explicit offer of leniency.); see also Kassin et al., *Police-Induced Confessions* at 29-30 (reviewing literature).

Finally, the length of interrogation is a risk factor. Observational studies consistently report that most interrogations last from thirty minutes to two hours. See Leo, *Inside the Interrogation Room* at 279 (Table 6) (officers concluded 92 percent of felony interrogations in

two hours or less).¹⁰ These figures stand in sharp contrast to an analysis of forty-four proven false-confession cases, in which the “average length of interrogation was 16.3 hours, and the median ... was twelve hours.” Drizin & Leo, *The Problem of False Confessions* at 948; see also *id.* (“[I]nterrogation-induced false confessions tend to be correlated with lengthy interrogations in which the innocent suspect’s resistance is worn down.”); Kassin et al., *Police-Induced Confessions* at 16 (drawing comparison and citing studies). In light of a wealth of empirical knowledge that protracted interrogation can impair judgment by causing fatigue, uncertainty, and despair, it is unsurprising that false confessions routinely exceed normative time frames. See Kassin & Gudjonsson, *The Psychology of Confessions* at 53-54 (reviewing literature). Researchers have accordingly identified interrogations that exceed six hours as inherently problematic. See Blair, *A Test of the Unusual False Confession Perspective*, 41 *Crim. L. Bull.* 127, 135 (2005); Feld, *Police Interrogation of Juveniles*, 97 *J. Crim. L. & Criminology* 219, 308-309 (2006); Leo, *Inside the Interrogation Room* at 282.

2. *Dispositional Factors Can Produce False Confessions*

Psychological research on false confessions and a review of actual cases involving false confessions make clear that some suspects are more vulnerable to influence and hence at greater risk for false confessions. See Kassin & Gudjonsson, *The Psychology of Confessions* at 51 (“[I]n terms of how people react to the pressures inside the interrogation room, all suspects are not created equal.”); Gudjonsson, *The Psychology of Interrogations and Confessions* (2003). Three individual characteristics, youth, intellectual disability, and mental illness, are known risk factors, as are two personality traits, suggestibility and compliance.

¹⁰ See also Feld, *Police Interrogation of Juveniles* at 308 (75 percent of interrogations of juveniles lasted less than thirty minutes); Kassin et al., *Police Interviewing and Interrogation*, 31 *Law & Hum. Behav.* at 392 (police self-reported that the mean length of a typical interrogation is 1.6 hours).

As suggested by the disproportionate number of juveniles in the population of known false confessors, youth is a particularly significant risk factor. See Kassin et al., *Police-Induced Confessions* at 19 (noting “strong evidence that juveniles are at risk for involuntary and false confessions”). In a database of proven false confessions, 35 percent involved juveniles, even though only 8 percent and 16 percent of persons arrested for murder and rape, respectively, are juveniles. Kassin, *The Psychology of Confessions*, 4 Ann. Rev. L. Soc. Sci. 193, 204 (2008); see also Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 545 (2005) (in a study of 340 exonerations, 42 percent of juveniles falsely confessed compared with 13 percent of adults). Research in developmental psychology indicates not only that adolescents are more compliant and suggestible than adults, but also that their decision making is characterized by “immaturity of judgment,” meaning impulsivity, a focus on immediate gratification, and a diminished ability to perceive risk. To an adolescent insufficiently focused on long-term consequences, confessing may serve as an expedient way out of a stressful interrogation. See Owen-Kostelnik et al., *Testimony and Interrogation of Minors*, 61 Am. Psychologist 286 (2006); Cauffman & Steinberg, *(Im)maturity of Judgment in Adolescence*, 18 Behav. Sci. & L. 741 (2000).

Persons who are intellectually disabled are also more susceptible to influence in an interrogation. In the database of false confessions noted above, at least 22 percent of false confessors—a clear overrepresentation—were diagnosed with mental retardation. See Kassin et al., *Police-Induced Confessions* at 5; see also *id.* at 20-21. This overrepresentation is explained by the fact that intellectually disabled people often exhibit both a high need for approval, particularly in the presence of authority figures, and an “acquiescence response bias” whereby they answer “yes” to questions even if that response is incorrect, inappropriate, or absurd. See generally

Finlay & Lyons, *Acquiescence in Interviews With People Who Have Mental Retardation*, 40 *Mental Retardation* 14, 15 (2002). Mentally retarded people are also susceptible to leading and misleading questions. See Kassin et al., *Police-Induced Confessions* at 21 (reviewing literature).

Individuals with a history of serious mental health problems are also overrepresented in the population of false confessors. See Redlich et al., *Self-Reported False Confessions and False Guilty Pleas Among Offenders with Mental Illness*, 34 *Law & Hum. Behav.* 79, 81 (2010). Although there is little research on how specific disorders such as anxiety, depression, and schizophrenia impair an innocent person's ability to withstand interrogation, psychopathology often involves such symptoms as distorted perceptions of reality, a proneness to confusion, anxiety, mood disturbances, and lack of assertiveness—all of which may put these individuals at risk. See Kassin & Gudjonsson, *The Psychology of Confessions* at 53 (“[T]hese symptoms may lead people to offer misleading information, including false confessions.”); Kassin et al., *Police-Induced Confessions* at 21-22. Among prisoners who had been interrogated by police, those with diagnosed mental illness self-report a 22 percent lifetime false confession rate, a percentage higher than has been found in other populations. Redlich et al., *Self-Reported False Confessions and False Guilty Pleas Among Offenders with Mental Illness* at 87, 89.

Finally, personality traits may render certain individuals particularly susceptible to interrogative pressure. See Kassin & Gudjonsson, *The Psychology of Confessions* at 51-52 (citing studies). Compliant individuals tend to be conflict-avoidant, acquiescent, and eager to please authority figures. See generally Gudjonsson, *The Psychology of Interrogations and Confessions* 370-376 (2003). Individuals who are highly suggestible tend to internalize and repeat back information that is suggested to them, and also tend to have poor memories, higher levels of anxiety, and tend to be less assertive. See *id.* at 370; see also Kassin & Gudjonsson, *The*

Psychology of Confessions at 51-52. Experimental research shows that these traits are especially relevant when a subject is sleep-deprived or suffering from drug or alcohol withdrawal. See, e.g., Gudjonsson et al., *The Relationship of Alcohol Withdrawal Symptoms to Suggestibility and Compliance*, 10 Psychol. Crime & L. 169, 169-177 (2004); Blagrove, *Effects of Length of Sleep Deprivation on Interrogative Suggestibility*, 2 J. of Experimental Psychol.: Applied 48-59 (1996).

3. *Most Jurors Do Not Understand The Connection Between False Confessions And These Interrogation And Dispositional Factors*

Although research regarding police interrogation tactics, specific dispositional factors, and false confessions is extensive, many jurors are not aware of the risk that these tactics and factors will yield a false confession. To the contrary, research shows that lay people have only a rudimentary understanding of the factors that can elicit a false confession. See Henkel et al., *A Survey of People's Attitudes and Beliefs About False Confessions*, 26 Behav. Sci. & L. 555, 577-580 (2008). Even those who recognize certain interrogation tactics as psychologically coercive do not have a corresponding belief that those techniques are likely to elicit false confessions. See Blandón-Gitlin et al., *Jurors Believe Interrogation Tactics Are Not Likely To Elicit False Confessions*, Psychol. Crime & L. 1, 19 (2010) (“[P]otential jurors do not appear to understand the link between psychologically coercive interrogation and false confessions.”); Leo & Liu, *What Do Potential Jurors Know About Police Interrogation Techniques and False Confessions?*, 27 Behav. Sci. & L. 381, 395 (2009). And experimental research demonstrates that “the presence of any confession powerfully increased the conviction rate—even when it was seen as coerced.” Kassin & Sukel, *Coerced Confessions and the Jury*, 21 Law & Hum. Behav. 27, 44 (1997); see also Kassin & Neumann, *On the Power of Confession Evidence*, 21 Law & Hum. Behav. 469, 481 (1997) (confession evidence more powerful among those who voted to convict).

That jurors have little understanding of these realities is not surprising. Police interrogations are simply not a process with which the average citizen is familiar. Nor would jurors have any reason to know that police officers receive specialized training in particular interrogation tactics, let alone understand the effect on behavior and decision making that these tactics may have on an innocent person in the interrogation room. To the contrary, research has demonstrated the prevalence of what psychologists have called “fundamental attribution error,” the tendency for people in general to assume that behavior is fundamentally voluntary, even in coercive environments. See Kassin & Gudjonsson, *The Psychology of Confessions* at 59 (noting a “voluminous body of research” on the subject).

Finally, expert testimony about false confessions may advance the truth-seeking process because it “may effectively inform jurors about how and why interrogation techniques can lead to false confessions from the innocent.” Blandón-Gitlin et al., *Jurors Believe Interrogation Tactics Are Not Likely To Elicit False Confessions* at 19; see also Drizin & Leo, *The Problem of False Confessions* at 918-919 (“Although the phenomenon of ... false confessions is counter-intuitive, it can be easily understood once the techniques, logic, and effect of modern interrogation are methodically analyzed and explained.”). With this body of knowledge, a jury is far better equipped to evaluate confession evidence.

C. The Court Of Appeals’ Other Grounds For Deeming Irrelevant The Experts’ Testimony Here Are Also Infirm

In addition to incorrectly asserting that the proffered expert testimony involved matters within the knowledge of most jurors, the Court of Appeals gave two reasons for excluding the expert testimony: First, it stated that the same interrogation tactics and dispositional factors that elicit false confessions also elicit true confessions. See *Kowalski*, 2010 WL 3389741, at *3.

Second, it noted that the jurors will be able to view the video recording of the interrogation for themselves. *See id.* Neither rationale is tenable.

1. *That Certain Factors May Lead To True As Well As False Confessions Does Not Render Expert Testimony About Those Factors Irrelevant*

The Court of Appeals stated several times that interrogation tactics and dispositional factors can lead to true as well as false confessions. *See Kowalski*, 2010 WL 3389741, at *1, *3-5. While this emphasis suggests that the court viewed that proposition as central to the analysis, it actually does not provide a basis for exclusion.

To begin with, interrogation tactics and dispositional factors do not increase *equally* the risk of a true confession and a false confession. In one controlled experiment, for example, minimization techniques sharply reduced the ratio of true confessions to false confessions, by tripling the percentage of false confessions while less than doubling the percentage of true confessions. *See Kassin et al., Police-Induced Confessions* at 18-19. In a case where that technique was employed, the fact that it can have this effect is surely pertinent to a jury's evaluation of the defendant's confession.

More fundamentally, the point of such testimony is not to suggest that all confessions obtained in such circumstances are false. The prosecution is of course free to make sure that the jury appreciates this, through cross-examination or the presentation of additional experts. Indeed, the possibility of such additional education is further reason to allow the expert testimony. The adversarial process will ensure that a balanced presentation informs the jury's evaluation of what is often—as here—the single most important piece of evidence regarding a defendant's guilt or innocence.¹¹

¹¹ The Court of Appeals itself recognized the value of cross-examination, upholding the exclusion of Dr. Wendt's testimony partly on the ground that "the police witnesses will be

The Court of Appeals likewise erred in asserting that the fact that certain interrogation tactics and personality traits can yield true as well as false confessions distinguishes this case from those in which this Court has upheld the use of expert testimony regarding battered women's syndrome and child sexual abuse. See *Kowalski*, 2010 WL 3389741, at *6 (citing *Christel*, 449 Mich. at 591-592, and *People v. Peterson*, 450 Mich. 349, 373 (1995), amended, 450 Mich. 1212 (1995)). The Court of Appeals stated that “[u]nlike expert testimony on battered women's syndrome, where an expert can link specific behavioral traits of a female witness to the specific, widely known and accepted syndrome, neither of defendant's proposed experts could link police interrogation techniques or personality traits to false confessions.” *Kowalski*, 2010 WL 3389741, at *6. To the contrary, the experts here could “link police interrogation techniques or personality traits to false confessions.” *Id.* They could not suggest that in *every* case they are linked to false confessions. But the same is true with battered women's and child sex abuse syndromes. Not every woman who recants an accusation of abuse was in fact battered. Similarly, not every child who makes a very belated report of sexual abuse was in fact abused. Yet this Court held that expert testimony on both subjects is permissible to “explain[] a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an abuse victim or to rebut an attack on the victim's credibility.” *Peterson*, 450 Mich. at 373 (emphasis omitted); accord *Christel*, 449 Mich. at 600. Likewise, in this context, the expert testimony should be admitted both to explain that a defendant's act of confession is not necessarily inconsistent with his innocence and to rebut the prosecution's defense of the confession's credibility.

subject to cross-examination regarding the techniques they use during interrogation.” *Kowalski*, 2010 WL 3389741, at *4. That confidence in the adversarial process is equally applicable regarding the defense's witnesses.

2. *Allowing Jurors To View The Interrogation Is Not An Adequate Substitute Because Such Observations Do Not Inform Jurors About The Fact Of False Confessions Or The Relevant Risk Factors*

The Court of Appeals also reasoned that the testimony was irrelevant because the jurors could see the videotaped confession for themselves. *See Kowalski*, 2010 WL 3389741, at *4. First, in this case, only part of the interrogation was recorded, thus the jurors could not know what was said (or done) before the video camera was turned on. This could be highly significant because police may, even unintentionally, provide details of the crime to the suspect. *See Garrett, The Substance of False Confessions* at 1053 (discussing the “phenomenon of confession contamination”); Kassin et al., *Police-Induced Confessions* at 25-27 (recommending that “all custodial interviews and interrogations of felony suspects should be videotaped in their entirety”). More fundamentally, the tape cannot substitute for testimony regarding the fact of false confessions and the risk factors associated with them. The expert’s specialized knowledge is not drawn from the recording itself, but is based on a diverse and voluminous literature. *See supra* Part. II.A. The Court of Appeals’ reasoning to the contrary could only be persuasive where an expert would merely describe what occurred during the interrogation, i.e., to state which interrogators were there at which points, who said what to whom, in what order, and so on. Such testimony would indeed add nothing to what the jury could see for itself (again, if the entire interrogation had been recorded). But that is not the typical substance of expert testimony on false confessions, which explains the meaning and import of what the jurors would see by drawing on the relevant research on human decision making, reconstructive memory, social influence, and other core principles that define more than a century of psychological science. Simply viewing the videotape of the interrogation will in no way help the jury to apprehend this important information. Finally, on the Court of Appeals’ reasoning, expert testimony in a wide variety of circumstances should be excluded because jurors can always review the evidence

themselves. In fact, however, as explained above it is a well-recognized role of testifying experts to help jurors understand the context and significance of the evidence they review.

* * *

Mr. Kowalski's confession is the heart of the prosecution's case. The defense's case depends on persuading the jury to doubt its truthfulness. Expert testimony about the counterintuitive phenomenon of false confessions, and about the specific risk factors that extensive psychological research has shown can produce such confessions, is thus directly relevant. See generally *Crane v. Kentucky*, 476 U.S. 683, 688-689 (1986) (“[E]vidence about the manner in which a confession was secured will often be germane to its probative weight” and “the physical and psychological environment that yielded the confession can also be of *substantial relevance* to the ultimate factual issue of the defendant's guilt or innocence” (emphasis added)).

II. EXPERT TESTIMONY REGARDING FALSE CONFESSIONS IS RELIABLE BECAUSE IT IS BASED ON ESTABLISHED SCIENTIFIC RESEARCH

To be admissible, expert testimony must be reliable as well as relevant. See *Daubert*, 509 U.S. at 589-590; Mich. R. Evid. 702. Reliability of an expert's opinions is determined by a non-exhaustive list of guideposts, including whether the theory has been tested and subjected to peer review and publication, and whether it is generally accepted in the relevant scientific or technical community. See *Daubert*, 509 U.S. at 593-594. The “list of [*Daubert*] factors was meant to be helpful, not definitive.” *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 151 (1999); see also *id.* at 141 (“*Daubert*’s list of specific factors neither necessarily nor exclusively applies to all experts or in every case.”). All a judge need do is “determine whether the testimony has a reliable basis in the knowledge and experience of [the relevant] discipline.” *Id.* at 149 (alteration in original)

(internal quotation marks omitted). Such a reliable basis plainly exists here—particularly given “Michigan’s liberal application of expert qualification,” *Christel*, 449 Mich. at 592 n.25.¹²

A. Expert Testimony On False Confessions Bears Multiple Hallmarks Of Reliability, Including General Acceptance In The Field Of Psychology

The reliability of social-science research is established through various, sometimes-overlapping factors. These include: consistency with related research, the use of accepted research methods, critical peer review in the relevant scientific community, publication in respected journals, and general acceptance in the field. False-confession research satisfies these criteria.

1. Consistency With Other Research

Beginning with psychologist Hugo Munsterberg’s *On the Witness Stand* (1908), and inspired by a pioneering treatise on miscarriages of justice, see Borchard, *Convicting The Innocent* (1932), research on false confessions has been an integral and growing part of a voluminous literature of psychological science that examines the cognitive, motivational, and behavioral foundations of authority and influence. This literature demonstrates that people are responsive to reinforcement and conditioning, that they are influenced more by perceptions of immediate consequences than delayed ones, and that they are vulnerable to influence by trained professionals (particularly authority figures) who use specific strategies to induce acts of compliance. See Kassin, *Expert Testimony on the Psychology of Confessions*, in *Beyond Common Sense*, 195, 201-203 (Borgida & Fiske eds., 2008). Forensic research in recent decades has built on this literature to define the problem of false confessions and to systematically address the

¹² Federal courts interpreting Federal Rule of Evidence 702 take the same view. See *Kopf v. Skyrn*, 993 F.2d 374, 377 (4th Cir. 1993) (“The witness’ qualifications to render an expert opinion are also liberally judged by Rule 702.... Where the expert’s qualifications are challenged, the test for exclusion is a strict one[.]”); accord, e.g., *In re TMI Litig.*, 193 F.3d 613, 664 (3d Cir. 1999); *Morales v. Am. Honda Motor Co.*, 151 F.3d 500, 516 (6th Cir. 1998).

processes of interrogation and the psychological mechanisms by which interrogations elicit confessions. Psychologists from the clinical, personality, developmental, cognitive, and social areas have all contributed to this cross-cutting body of research.

2. *Accepted Research Methods*

The body of research is also based on a variety of accepted research methods. One method commonly employed is the individual or aggregated case study, i.e., review of one or more actual false-confession cases. *See, e.g.,* Gudjonsson, *The Psychology of Interrogations and Confessions* 217-243 (2003); Drizin & Leo, *The Problem of False Confessions* at 906-907; Leo & Ofshe, *The Consequences of False Confessions*, 88 J. Crim. L. & Criminology 429, 444-449 (1998). Drawing on principles of rational decision making, perception, and interpersonal influence, these studies have identified two types of interrogation-induced false confessions: (1) those in which the suspect confesses to escape a stressful situation, avoid punishment, or gain a promised or implied reward (“coerced-compliant confessions”); and (2) those in which the suspect develops a profound distrust of his own memory and becomes vulnerable to influence from external sources (“coerced-internalized confessions”). *See* Kassin et al., *Police-Induced Confessions* at 14-15 (noting that the “classification scheme has provided a useful framework for the study of false confessions and has since been used, critiqued, extended, and refined by others”). Case studies also reveal factors common to documented false confessions, which provides researchers with hypotheses that can be tested in a variety of forensic contexts.

Researchers in this field also engage in systematic observation of police interrogation tactics and related contextual factors. *See, e.g.,* Leo, *Inside the Interrogation Room* at 266. Data collected through such observation are subject to quantitative analysis as well as scrutiny and replication by others in the field. In addition, researchers use self-report methods to examine

correlations between various personal characteristics—such as interrogative compliance and suggestibility—and the tendency to confess or resist confession. See, e.g., Gudjonsson, *The Psychology of Interrogations and Confessions* at 151-156. Finally, through controlled laboratory and field experiments involving individual and situational vulnerability, researchers test specific causal hypotheses about interrogation tactics. See, e.g., Kassin & Kiechel, *The Social Psychology of False Confessions* at 126; Russano et al., *Investigating True and False Confessions Within a Novel Experimental Paradigm* at 484. These controlled studies test falsifiable propositions and produce error rates in the form of statistical probabilities.

This research is authoritative. It employs methods that rule out, or control for, competing hypotheses, and the conclusions drawn can be generalized across different people, different settings, and over time. The more often a study confirms prior research or is confirmed by subsequent research, and the more often a body of research with different methodologies supports a common proposition, the less likely it is that the findings can be explained by chance fluctuations in the data, overlooked variables, or methodological anomalies. That is the situation here: The relevant research yields consistent findings about false confessions, how they are obtained, and why certain interrogation tactics and personality traits lead innocent people to confess. This research “amply support[s]” the testimony of experts in this field. See Kassin & Gudjonsson, *The Psychology of Confessions* at 59. The diverse research methods themselves, meanwhile—case studies, observational analysis, controlled experiments—are well established in the field and unquestionably robust.

3. *Publication And Peer Review*

The relevant body of research is also extensively published and peer-reviewed, further supporting its reliability. See *Daubert*, 509 U.S. at 593 (“[S]ubmission to the scrutiny of the

scientific community is a component of ‘good science,’ in part because it increases the likelihood that substantive flaws in methodology will be detected.”); *Edry v. Adelman*, 486 Mich. 634, 640 (2010) (“while not dispositive,” the existence of a supporting literature “is an important factor in determining the admissibility of expert witness testimony”). To be accepted for publication in a peer-reviewed journal, researchers must employ generally accepted methods of data collection, analyze results using generally accepted statistical analyses, and draw conclusions that their data support. See Monahan & Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. Pa. L. Rev. 477, 500 (1986) (peer review “goes far in screening out empirical assertions unsupported by the data”). By defending a methodology in writing, scholars open up their techniques to criticism by others—criticism that may, and often does, uncover flaws.

Publication also invites other scientists to replicate and extend the published results. Publication in a premier peer-reviewed journal represents validation of the author’s methods and the soundness of the conclusions that have been drawn. Here, the publication of numerous articles in journals of scientific psychology—including those cited throughout this brief—shows that the study of false confessions is generally accepted by the community of psychologists. Books and literature reviews in the field, which synthesize the field for other researchers, confirm this consensus. See, e.g., Gudjonsson, *The Psychology of Interrogations, Confessions, and Testimony* (1992); Kassin & Gudjonsson, *The Psychology of Confessions* at 33-67; *Police Interrogations and False Confessions: Current Research, Practice, and Policy Recommendations* (Lassiter & Meissner eds., 2010).

4. *Other Indicia Of Reliability*

Finally, research regarding the phenomenon of false confessions has other hallmarks of general acceptance within the scientific community. It has been presented by experts at scientific meetings and by professional organizations to courts. It has also been accepted by major institutions within the field of psychology. In addition to APA—and specifically Division 41—the Association for Psychological Science (“APS”) has demonstrated by its favorable editorial decisions and editorially-commissioned work that this research is generally accepted. In 2004, APS devoted an entire issue of its flagship publication, *Psychological Science in the Public Interest*, to a peer-reviewed article reviewing the relevant literature. See Kassin & Gudjonsson, *The Psychology of Confessions* at 33.

As the U.S. Supreme Court has instructed, courts must perform their gatekeeping under Rule 702 using measures of reliability that are appropriate to the particular testimony in question. See *Kumho Tire*, 526 U.S. at 153. Where, as here, the experts’ testimony is consistent with other related research and is based on valid and diverse research methods that are scrutinized through critical peer review and subsequent publication in the relevant scientific community, there should be no serious question that the testimony is reliable.

B. *Daubert* Requires Only That An Expert Use Reliable Principles And Methodologies Within The Relevant Field, Not That There Be An Experimental Or Predictive Model

The Court of Appeals deemed Dr. Leo’s testimony unreliable largely on the ground that “there is no way to test or quantify Dr. Leo’s methodologies or to decipher a known error rate.”

Kowalski, 2010 WL 3389741, at *3. Particularly in light of “Michigan’s liberal application of expert qualification,” *Christel*, 449 Mich. at 592 n.25, that reasoning fails.¹³

To begin with, controlled experiments, as discussed, *are* part of the field of study of false confessions. In these experiments, data are analyzed using generally accepted statistical tests, and differences and effects are reported as statistically significant to a specific level of certainty, with an accompanying margin of error. Experiments that yield significant results are often published; others then seek to retest, replicate, and extend the results. In this way, psychological scientists establish error rates for various effects, enabling conclusions concerning the extent to which various dispositional and situational factors may lead to a false confession. These error rates pertain to the effect of various factors in general—not to the reliability of a particular confession.

The fact that the field is not based *wholly* on an experimental model that would produce an error rate or be subject to easy testing does not mean that the subject matter lacks the requisite reliability. “[A] known error rate is not strictly required under *Daubert*.” *United States v. Aman*, 748 F. Supp. 2d 531, 536 (E.D. Va. 2010); *accord, e.g., United States v. Norris*, 217 F.3d 262, 269 (5th Cir. 2000) (rejecting argument that expert testimony should have been excluded in part because “no error rate was known”); *see also Bitler v. A.O. Smith Corp.*, 400 F.3d 1227, 1236 (10th Cir. 2004) (“[T]esting is not necessary in all instances to establish reliability under *Daubert*.”). Indeed, in some disciplines, as here, there is simply no way to assign an error rate because of the nature of what is being studied. Unlike in the physical sciences, where direct

¹³ The court also stated that “Dr. Leo admitted ... that the same interrogation tactics that produce false confessions also produce true confessions.” *Kowalski*, 2010 WL 3389741, at *3. As already explained, this admission does not render the testimony irrelevant. Nor does it have any bearing on reliability, i.e., on whether the testimony is based on proper principles and methodologies.

controlled experimentation is possible, “[t]he primary method for analyzing and comparing real-world experiences [in the social sciences] is systematic observation and analysis.” *United States v. Hall*, 974 F. Supp. 1198, 1203 (C.D. Ill. 1997); *see also id.* at 1205 (concluding that “observational, as opposed to experimental, techniques ... [are] wholly acceptable in the established field of social psychology”); *Tyus v. Urban Search Mgmt.*, 102 F.3d 256, 263 (7th Cir. 1996) (noting that the *Daubert* factors do not neatly apply to expert testimony from a sociologist). A court’s inquiry must be tailored to the type of testimony examined. *See Kumho Tire*, 526 U.S. at 150 (“[T]here are many different kinds of experts, and many different kinds of expertise.”).

Furthermore, the Court of Appeals’ discussion of error rate appears to have been based on a misunderstanding of the proffered expert testimony. The experts would in no way assess the truth or falsity of Mr. Kowalski’s confession. Rather, as explained above, their testimony would educate the jury about factors that research has shown to be relevant in general to evaluating that evidence. *See Monahan & Walker, Social Frameworks*, 73 Va. L. Rev. 559, 560 (1987) (social-science testimony presents “general conclusions from social science research [as a means of helping a jury] in determining factual issues in a specific case”). *Daubert* and its progeny do not require that expert testimony be held to causation-relevant criteria where the testimony makes no claim that it is establishing causation. All they require is that the testimony have a “reliable basis in the knowledge and experience of [the relevant] discipline” and be reliably applied to the case at hand. *Kumho Tire*, 526 U.S. at 149 (alteration in original). That standard is met here.

Similarly, although it is not possible to quantify the precise risk that an interrogation technique poses for eliciting a particular false confession, it *is* a well-established empirical

finding, across a variety of methodologies, that psychologically coercive interrogation methods, when applied to the innocent, can and do elicit false confessions. See Kassin & Gudjonsson, *The Psychology of Confessions* at 59; Ofshe & Leo, *The Social Psychology of Police Interrogation*, 16 Stud. L. Pol. & Soc’y 189, 190 (1997). This finding is amply “connected to existing data” in the field of psychology. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

* * *

Social psychology is the study of influence and of how external social pressures can shape decision making. The social psychology of police interrogations and false confessions is an area of specialized knowledge that draws from a body of empirical research, case study data, and controlled experiments in areas of social persuasion, obedience to authority, and the effects of suggestive techniques on certain individuals. The fact that such an approach has certain “methodological limitations,” *United States v. Simmons*, 470 F.3d 1115, 1123 (5th Cir. 2006), does not render the resulting testimony unreliable. The critical question in conducting the flexible—and liberal—*Daubert* analysis is whether a proffered expert has applied accepted principles of social psychology to identify a false confession or to identify various factors, situational or psychological, that may influence a person to confess falsely. To the extent that the courts below determined that the testimony adduced here was “not based on reliable methods and principles,” *Kowalski*, 2010 WL 3389741, at *3, that view is fundamentally at odds with an established body of research and the judgment of those most experienced and knowledgeable in the social-psychology discipline.

III. THE PROBATIVE VALUE OF EXPERT TESTIMONY ABOUT FALSE CONFESSIONS OUTWEIGHS ANY UNFAIR PREJUDICE

The Court of Appeals stated that even if the expert testimony were admissible under Rule 702, it would be properly excluded under Rule 403 because “the danger of unfair prejudice outweighed any probative value.” *Kowalski*, 2010 WL 3389741, at *4. That is also erroneous.¹⁴

A. Expert Testimony Is Critical To The Defense Because Confessions Are Potent Evidence

The probative value of the proffered expert testimony is high because it would greatly bolster the defense’s effort to rebut what may otherwise be all-but-conclusive evidence of guilt. “[A] confession sets in motion a virtually irrefutable presumption of guilt among criminal justice officials, the media, the public and lay jurors.” Drizin & Leo, *The Problem of False Confessions* at 921-922. Mock jury studies show that confessions have more impact than eyewitness and character testimony, and that a confession significantly increases the conviction rate, even when it is perceived as coerced. See Kassin & Neumann, *On the Power of Confession Evidence* at 481; Kassin & Sukel, *Coerced Confessions and the Jury* at 44. Criminal justice statistics corroborate these results: Although those who confess falsely are (by definition) innocent of the charge or charges, juries convict them roughly 75 percent of the time. Kassin & Gudjonsson, *The Psychology of Confessions* at 59; Drizin & Leo, *The Problem of False Confessions* at 960.

Without the proffered expert testimony, the jury would lack context crucial to Mr. Kowalski’s claim that he confessed falsely. With the testimony, by contrast, the jury would have a scientific basis to evaluate his conduct and his claim that his confession is false. Expert evidence that supports a significant—and scientifically legitimate—basis for acquittal when conviction would otherwise seem all but certain necessarily has a high probative value.

¹⁴ The court misstated what Rule 403 requires for exclusion. The rule requires not simply that “the danger of unfair prejudice outweigh[] any probative value,” *Kowalski*, 2010 WL 3389741, at *4, but that the danger *substantially* outweigh the probative value.

B. Any Danger Of Unfair Prejudice Can Be Managed Because The Prosecution Can Both Offer Contrary Expert Testimony And Cross-Examine The Defense's Experts About Any Perceived Shortcomings In Their Opinions

The danger of unfair prejudice exists where “marginally probative evidence will be given undue or preemptive weight by the jury.” *People v. Crawford*, 458 Mich. 376, 398 (1998). The Court of Appeals concluded here that even though neither of defendant’s experts would offer an opinion on whether Mr. Kowalski’s confession was false, such a conclusion was “implicit” in their testimony, and that conclusion would “interfere with the jury’s role in determining the credibility and weight of the confession.” *Kowalski*, 2010 WL 3389741, at *4. This analysis does not withstand scrutiny.

It is in fact not “implicit” in the experts’ testimony that Mr. Kowalski’s confession is false. As the experts would undoubtedly acknowledge before the jury, many (perhaps most) confessions are true—and some confessions are true even when various risk factors are present. The message the experts would convey to the jurors is not that the confession is false, but rather that not all confessions are true and that various factors are of particular concern in terms of eliciting false confessions. The fact that the testimony would give the jurors information with which to better evaluate whether the confession is false does not mean that the experts are telling them that it is.¹⁵

Moreover, as the U.S. Supreme Court explained in *Daubert*, “vigorous cross examination [and] presentation of contrary evidence”—not outright exclusion—are the proper way to address any perceived shortcomings in the quality of expert testimony. 509 U.S. at 596. Here, in addition to cross-examining defendant’s experts, the prosecution may put forward its own experts or other contrary evidence. In light of these alternatives to exclusion, there is no basis to

¹⁵ Even if there were some implicit message, that seems no more objectionable than the contrary implicit message that will be conveyed by the prosecution witnesses who will discuss the confession.

conclude that it would be unfairly prejudicial—let alone so prejudicial as to substantially outweigh the probative value—to permit the defense to mount a robust, scientific challenge to what is the prosecution’s principal evidence of guilt.¹⁶

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted.

Nathalie F.P. Gilfoyle
AMERICAN PSYCHOLOGICAL ASSOCIATION
750 First Street N.E.
Washington, D.C. 20002
(202) 336-5500

/s/ David W. Ogden
David W. Ogden, *pro hac vice*
Daniel S. Volchok
Sonya L. Lebsack
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue N.W.
Washington, D.C. 20006
(202) 663-6000

September 1, 2011

¹⁶ Nor—to the extent that this evidence is indeed unfairly prejudicial—is there a “less prejudicial means by which the substance of this evidence can be admitted.” *People v. Mills*, 450 Mich. 61, 76 (1995), *modified*, 450 Mich. 1212 (1995); *see also Old Chief v. United States*, 519 U.S. 172, 184 (1997) (“[W]hen a court considers whether to exclude on grounds of unfair prejudice, the availability of other means of proof may ... be an appropriate factor.” (omission in original) (internal quotation marks omitted)).

CERTIFICATE OF SERVICE

I certify that on this 1st day of September, 2011, I caused a copy of the foregoing brief to be sent via first-class mail to each of the following:

Walter J. Piszczatowski
Michael J. Rex
Hertz Schram PC
1760 South Telegraph, Suite 300
Bloomfield Hills, Michigan 48302
(248) 335-5000
Counsel for Appellant

William J. Vaillencourt, Jr. (P39115)
Livingston County Prosecutor's Office
210 South Highlander Way
Howell, Michigan 48843
(517) 546-1850
Counsel for Appellee

John J. Bursch
Solicitor General of Michigan
G. Mennen Williams Building, 7th Floor
525 West Ottawa Street
Lansing, Michigan 48909
(517) 373-1110
Counsel for the Attorney General of Michigan

/s/ David W. Ogden

David W. Ogden, *pro hac vice*

WILMER CUTLER PICKERING

HALE AND DORR LLP

1875 Pennsylvania Avenue N.W.

Washington, D.C. 20006

(202) 663-6000