

**STATE OF MICHIGAN
IN THE SUPREME COURT**

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

DAMON EARL WARNER,

Defendant-Appellant.

Supreme Court No. 163805

COA No. 351791

Eaton CC No. 2016-20296-FC

**BRIEF AMICUS CURIAE OF THE AMERICAN
PSYCHOLOGICAL ASSOCIATION**

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February 1, 2023

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INTERESTS OF AMICUS CURIAE¹

The American Psychological Association (APA) is the leading association of psychologists in the United States. A non-profit scientific and professional organization, it has approximately 135,000 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.

APA has filed more than 180 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*, 560 U.S. 48, 68 (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); *Florida Department of Children & Families v. In re Adoption of X.X.G. & N.R.G.*, 45 So.3d 79, 87 n.10 (Fla. Dist. Ct. App. 2010); *In re Marriage Cases*, 183 P.3d 384, 441 n.59 (Cal. 2008).

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 in a particular case that APA can usefully contribute to the court's understanding and resolution of that question. APA regards this as one of those cases: The issues here include expert testimony related to an allegedly false confession. There is substantial psychological research bearing on that issue, including research on the existence of false confessions and the police-interrogation techniques associated with such confessions, particularly when applied to individuals with certain characteristics.

¹ No counsel for a party authored this brief in whole or in part, nor did any person other than amicus, its members, and its counsel make a monetary contribution intended to fund the preparation or submission of the brief.

QUESTIONS PRESENTED

- I. May a trial court amend an information, over objection and without beginning the proceedings anew, to add a charge that was dismissed pursuant to a *nolle prosequi* order, provided the proposed amendment would not unfairly surprise the defendant?
 - Defendant Damon Warner answers: No.
 - The People answer: Yes.
 - Court of appeals answered: Yes.
 - APA does not take a position on this question.
- II. Did the trial court err by amending the information over Mr. Warner's objection to add a charge that was dismissed pursuant to a *nolle prosequi* order where the prosecutor had not obtained an indictment or bindover on that charge following entry of the order?
 - Mr. Warner answers: Yes.
 - The People answer: No.
 - Court of appeals answered: No.
 - APA does not take a position on this question.
- III. Was any error in amending the information over objection harmless?
 - Mr. Warner answers: Any error is not subject to review for harmlessness.
 - The People answer: Yes.
 - Court of appeals did not answer.
 - APA does not take a position on this question.
- IV. Did the trial court abuse its discretion when it denied Mr. Warner's motion to appoint an expert in false confessions?
 - Mr. Stewart answers: Yes.
 - The People answer: No.
 - Court of appeals answered that the trial court's denial was based on a mistake of law, but the denial of the motion did not violate Mr. Warner's right to due process under *Ake v. Oklahoma*, 470 U.S. 68 (1985), and *People v. Kennedy*, 502 Mich. 206 (2018).
 - APA does not take a position on this question.

INTRODUCTION AND SUMMARY OF ARGUMENT

Most jurors greatly underestimate the prevalence of false confessions. As this Court recognized in *People v. Kowalski*, 492 Mich. 106 (2012), confessing to a crime that one did not commit often seems like an incomprehensible act to the average juror, *see id.* at 141-142. A confession is thus typically viewed as potent—if not insurmountable—evidence of guilt. A robust and widely accepted body of scientific research, however, establishes that confessions should not be so viewed because people can and do confess falsely.

This research, which incorporates substantial empirical work, has also identified specific interrogation techniques and dispositional factors that correlate with a higher probability of a false confession. Expert testimony that draws on this research into false confessions constitutes reliable evidence, because the research includes testable, scientific findings that have been replicated, subjected to peer review, and scrutinized not only by professional organizations such as APA but also state and federal courts around the country. The research therefore allows experts to reliably conclude that certain interrogation techniques and personal characteristics are associated with a higher risk of false confessions.

This Court explained in *Kowalski* that expert testimony on the phenomenon of false confessions, including the research regarding that phenomenon, can provide jurors critical information about this counterintuitive phenomenon. Such information can include descriptions of police-interrogation techniques that correlate with false confessions, including protracted interrogations as well as “minimization,” in which interrogators downplay the seriousness of an offense through reassurance or excuses. Both types of techniques increase the risk of a false confession—and both were used in the interrogation of Mr. Warner. Expert presentation of this scientific research is a critical means to educate jurors (without intruding on their fact-finding prerogative) about the counterintuitive possibility that a criminal defendant like Mr. Warner could confess to a crime he did not commit.

STATEMENT OF FACTS AND PROCEEDINGS

APA adopts the facts statement in Mr. Warner’s brief.

ARGUMENT

I. EXPERT TESTIMONY ON FALSE CONFESSIONS IS RELIABLE BECAUSE IT IS ROOTED IN SOUND AND BROADLY ACCEPTED SCIENTIFIC RESEARCH

This Court has made clear that false-confession research is admissible if it is based on scientific methods. That description applies to the expert testimony Mr. Warner sought to introduce at trial, which would have explained to jurors the interrogation techniques and personal attributes associated with a greater risk of false confessions. Such testimony is based on research that is not only well grounded in reliable methods, but also is peer reviewed, falsifiable, generally accepted, and routinely admitted in courts throughout the country. It is therefore admissible under Michigan law.²

A. The Trial Court Misunderstood This Court's Precedent As Banning Expert Testimony On False Confessions

The trial court denied Mr. Warner's request for a false-confession expert because it read this Court's decision in *Kowalski* as "creat[ing] a categorical ban on false-confession testimony and literature." (1515a). As the court of appeals recognized, that is wrong. In fact, the trial court's view gets *Kowalski*'s holding backwards. *Kowalski* confirmed that expert testimony on false confessions *can* be admitted if it comports with Michigan Rule of Evidence (MRE) 702. This Court held that "because the claim of a false confession is beyond the common knowledge of the ordinary person, expert testimony about this phenomenon is admissible under MRE 702 when it meets the other requirements of MRE 702." 492 Mich. at 129. *Kowalski* thus left the door wide open to expert testimony on false confessions, requiring only that such testimony be grounded in "testable results consistent with an objective, scientific process," and "subjected to the rigorous standards of scientific peer review." *Id.* At 133.

As to the specific testimony at issue in *Kowalski*, this Court determined that the trial court had acted within its discretion in ruling that the proffered expert testimony used a methodology

² The broadly accepted research that false confessions occur and that certain situational and dispositional factors enhance risks of their occurrence has led to other related research findings, such as the adverse effects of confessions on witnesses' testimony, forensic experts' opinions, and increased likelihood of guilty pleas without an opportunity to challenge the validity of a confession. This brief addresses the areas of false-confession research relevant to the expert testimony that was excluded.

that was insufficiently reliable under MRE 702 (which incorporates the standard articulated in *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579, 589-594 (1993)). In particular, this Court agreed with the trial court's criticism of the methods that one expert used for identifying false confessions. *Kowalski*, 492 Mich. at 132-133. That expert was proffered to "testify regarding police interrogation techniques and the existence of false confessions," *id.* at 111-112, but not to opine on the falsity of the defendant's particular confession. This Court stated that, in compiling and analyzing a sample of confessions, the expert had classified particular confessions as "proven," "highly probable," or "probable" false confessions based on sources that "were prone to inaccuracy or bias" and that "had not been subjected to the rigorous standards of scientific peer-review," *id.* at 112, 133, and it credited the trial court's conclusion that the expert had not "determined a reliable means to have a study group consist of innocent people who wrongfully confess," *id.* at 115. This Court also took issue (as had the trial court) with the expert's methods for attributing false confessions to particular interrogation tactics, stating that the expert had not "compare[d] true and false confessions and identif[ied] factors that contribute to false confessions but not true confessions." *Id.* at 116. Finally, this Court expressed concern that the expert in *Kowalski* intended to testify based on other scholars' research even though only some of that research had undergone peer review. *Id.* at 114.

But in questioning the reliability of these specific methods and the conclusions that could be drawn from them, *Kowalski* did not rule out all expert testimony on false confessions. This Court merely laid down certain requirements for such testimony, including "testable results consistent with an objective, scientific process," and "scientific peer-review." 492 Mich. at 133. As the balance of Part I explains, modern false-confession research meets that standard. Such research is both grounded in reliable methods and subject to peer review. For that reason, it is regularly admitted in courts across the country.

B. False-Confession Research Is Grounded In Reliable Methods

Empirical research on confessions is based on a range of rigorous quantitative and qualitative methods. Although these findings run counter to the assumptions of many lay people, they are widely accepted among psychologists and leading organizations in psychological science. And critically, this research has used testable methods to identify particular interrogation techniques and personal characteristics that increase the likelihood of a confession being false.

Research on false confessions is an integral, established, and growing part of psychological science that examines the cognitive, motivational, and behavioral foundations of authority and influence. It rests on a number of broadly accepted core principles, including: that people are responsive to reinforcement and conditioning, that they are influenced by perceptions of immediate consequences more than delayed ones, that memory can be altered by misinformation, and that people are vulnerable to influence by trained professionals who use specific strategies to induce acts of compliance. See Kassin, *Expert Testimony on the Psychology of Confessions: A Pyramidal Framework of the Relevant Science*, in *Beyond Common Sense* 195, 201-203 (Borgida & Fiske eds., 2008). Over many decades, research has defined the problem of false confessions and systematically addressed both the types of suspects who are vulnerable and the processes of interrogation that increase the risk of inducing a false confession. Psychologists from the clinical, personality, developmental, cognitive, and social areas of specialization have all contributed to this cross-cutting body of research, which addresses a wide range of topics related to false confessions.

False-confession research is also based on accepted methods. Researchers test their theories using sophisticated quantitative and qualitative approaches, including rigorous use of the experimental method. For example, researchers have engaged in systematic observation of police-interrogation tactics and related contextual factors. See, e.g., Kelly et al., *On the Road (to Admission): Engaging Suspects with Minimization*, 25 Psych., Pub. Pol'y & L. 166, 169-170 (2019); Cleary, *Police Interviewing and Interrogation of Juvenile Suspects: A Descriptive Examination of Actual Cases*, 38 L. & Hum. Behav. 271, 272-273 (2014); Leo, *Inside the Interrogation Room*, 86 J. Crim. L. & Criminology 266, 266 (1996). 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 suspects' self-reporting 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 False Confessions: Forty Years of Science and Practice* 88-96 (2018). Lastly, through controlled laboratory and field experiments in which individual suspect characteristics are measured or situational interrogation tactics are systematically varied, researchers test specific causal hypotheses about the effects on false confessions. See, e.g., Kassin & Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 Psych. Sci.

125, 126 (1996); Russano et al., *Investigating True and False Confessions Within a Novel Experimental Paradigm*, 16 Psych. Sci. 481, 484 (2005). These controlled studies examine falsifiable propositions and produce error rates in the form of statistical probabilities.

False-confession research is also authoritative. Researchers in this area employ methods that rule out, or control for, competing hypotheses, and the conclusions they draw can be generalized across different people, different settings, and over time. The more often a study replicates prior research or is replicated 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 dispositional characteristics lead innocent people to confess. This research “amply support[s]” the testimony of experts in the field of false confessions. Kassin & Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 Psych. Sci. Pub. Int. 33, 59 (2004). The diverse research methods themselves, meanwhile—controlled laboratory and field experiments, observational analysis, archival analysis, and well-designed case studies—are established and unquestionably robust.

Some examples demonstrate how false-confession research allows experts to draw sound conclusions about the existence of and risk factors that contribute to false confessions—without resting on the methods deemed problematic in *Kowalski*.

In one study, students participated in a typing exercise, with each student instructed not to strike a particular keyboard key. Kassin & Kiechel, *The Social Psychology of False Confessions* at 125. Later, when a participant’s computer shut down (as it was programmed automatically to do), the participant was accused of having caused the crash by striking the forbidden key. Despite their innocence and initial denials, subjects were asked to sign a confession. Where a confederate (an actor working for the researcher) falsely said she saw the subject hit the forbidden key, the number of innocent subjects who signed more than doubled, increasing from 35% of the participants to a staggering 89%. *Id.* at 127. Subsequent studies in labs around the world have replicated this effect, even where confession bore concrete negative consequences. See Horselenberg et al., *Individual Differences and False Confessions: A Conceptual Replication of Kassin and Kiechel (1996)*, 9 Psych., Crime & L. 1, 5 (2003) (explaining that 82% of

participants signed a false confession despite being told they would lose their \$10 participation payment); Redlich & Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 L. & Hum. Behav. 141, 151 (2003). Other experimental methods have generated similar conclusions, for example, by analyzing the likelihood that students falsely accused of cheating would falsely confess, even after they were reminded that cheating was a violation of the academic honor code. See Perillo & Kassir, *Inside Interrogation: The Lie, the Bluff, and False Confessions*, 35 L. & Hum. Behav. 327, 335 (2011); Russano et al., *Investigating True and False Confessions Within a Novel Experimental Paradigm* at 484. Other examples establishing effects of this type are described elsewhere in this brief. And as explained, the studies discussed in the robust body of false-confession literature examine testable and falsifiable hypotheses, subject them to robust experimental inquiry, produce error rates in the form of statistical probabilities, provide consistent results across many contexts, and—as elaborated in the next subsection—have been published in leading, peer-reviewed journals.

C. Peer Review And Public Scrutiny Promote The Reliability Of False-Confession Research

False-confession research is regularly subjected to the rigors of publication and peer review, as well as scrutiny by professional organizations. This review and scrutiny underscore the reliability of that research; as the U.S. Supreme Court has explained, “submission 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.” *Daubert*, 509 U.S. at 593. As a recent survey study published in APA’s flagship journal has observed, the publications in which false-confession research appear “are not only peer- and blind-reviewed but selective (as measured by rejection rates) and are high in impact (as measured by citation metrics).” Kassir, et al., *On the General Acceptance of Confessions Research: Opinions of the Scientific Community*, 73 Am. Psych. 63, 66-67 (2018). To be accepted for publication in a peer-reviewed journal, researchers must employ generally accepted methods of data collection, analyze results using widely accepted statistical analyses, and draw conclusions supported by the data. See Monahan & Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. Pa. L. Rev. 477, 500 (1986). By defending a methodology in writing, scholars open their techniques to criticism by others—criticism that may, and often does, uncover flaws. As one article put it, peer review “goes far in screening out empirical assertions

unsupported by the data.” *Id.* Publication in a premier peer-reviewed journal, moreover, not only represents validation of the author’s (or authors’) methods and the soundness of the conclusions drawn, but also invites other scientists to replicate and extend the published results.

Due in part to its rigorous methods, the study of false confessions has achieved general acceptance within the scientific community. Books and literature reviews in the field, which synthesize the field for other researchers, confirm as much. *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* (Lassiter & Meissner eds. 2010). The research has also been presented by experts at scientific meetings and by professional organizations to courts. And it has been accepted by major institutions within the field of psychology. Just last year, an APA resolution outlined the scholarly consensus surrounding the existence of false confessions and the personal characteristics and interrogation techniques that often correlate with false confessions. *See* American Psychological Association, *APA Resolution on Interrogations of Criminal Suspects* (2022). This resolution followed the 2010 publication of a scientific position paper on false confessions in one of APA’s major, peer-reviewed journals. *See* Kassin et al., *Police-Induced Confessions*, 34 L. & Hum. Behav. 3, 27-30 (2010). The four-year approval and publication process for this paper included consultation with a scientific advisory board consisting of three world-renowned and independent research psychologists, as well as peer-review by four anonymous experts in the field. *See* Thompson, *An American Psychology-Law Society Scientific Review Paper on Police Interrogation and Confession*, 34 L. & Hum. Behav. 1, 1-2 (2010) (describing the vetting process). In 2004, the Association for Psychological Science (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 reflected by the numerous articles cited in this brief and in the APA Resolution noted above, decades of research have produced consistent findings about the reality of, and risk factors associated with, false confessions. *See* *APA Resolution on Interrogations of Criminal Suspects* (citing dozens of research studies reflecting consensus on false confessions). In a survey of 87 confession experts with doctoral degrees, over 90% agreed that the effects of techniques such as misinformation, minimization, and false evidence ploys on false confessions

are sufficiently reliable to be presented to a jury. Kassir et al., *On the General Acceptance* at 67-70, 72.

D. Courts In Other Jurisdictions Routinely Admit Expert Testimony On False Confessions

Given the foregoing, it is no surprise that many courts have held expert testimony on false confessions admissible under *Daubert*. See, e.g., *United States v. West*, 813 F.3d 619, 624-625 (7th Cir. 2015); *United States v. Belyea*, 159 F.App'x 525, 529-531 (4th Cir. 2005); *United States v. Shay*, 57 F.3d 126, 133-134 (1st Cir. 1995). As one court explained, “numerous federal courts [have] conclud[ed] that the science of psychology in relation to police coercion in interrogations is sufficiently developed to constitute a reliable body of specialized knowledge.” *Harris v. City of Chicago*, 2017 WL 2436316, at *7 (N.D. Ill. June 5, 2017). These courts have recognized that the work of false-confession experts is embedded in core principles of psychology—“not the sort of ‘misleading junk science’ that *Daubert* seeks to exclude,” but rather “an established field of scholarship with consensus methods and findings.” *United States v. Jacobs*, 2022 WL 1651847, at *7 (S.D. Ohio May 24, 2022); accord *Washington v. Boudreau*, 2022 WL 4599708, at *6-14 (N.D. Ill. Sept. 30, 2022); *Anderson v. City of Chicago*, 2020 WL 1848081, at *3 (N.D. Ill. Apr. 23, 2020); *Hurt v. Vantlin*, 2019 WL 8267074, at *5-6 (S.D. Ind. Sept. 26, 2019); *Tobias v. City of Los Angeles*, 2018 WL 9669923, at *1-3 (C.D. Cal. Dec. 7, 2018).

Where courts have held that confession-related testimony was properly excluded as insufficiently reliable under *Daubert*, they have typically rested their conclusions on the particular shortcomings of the precise testimony at issue. For example, in *United States v. Sammons*, 55 F.4th 1062 (6th Cir. 2022), the court held that the proffered expert opinion was based on methods lacking any “empirical scale” or “way to measure falsifiability,” *id.* at 1074. In other cases, courts have determined that an expert’s methods were not reliably applied in the case at hand—in one instance because an expert “did not reasonably point to any evidence in the record or other factors or data reasonably relied on by experts in his field showing that the FBI gave [the defendant] an implied promise of leniency in exchange for his confession or used any other coercive interrogation method that may have [led] to a false confession,” *United States v. Redlightning*, 624 F.3d 1090, 1112 (9th Cir. 2010), and in another because the expert’s “reasoning and methodology as applied to [the defendant] in particular lacked scientific

validity,” *United States v. Mazzeo*, 2000 U.S. App. LEXIS 818, at *5 (2d Cir. Jan. 21, 2000). As demonstrated, however, these cases are the exception; “courts regularly have admitted expert testimony about factors that can precipitate a false confession, where the expert is able sufficiently to relate those factors to the circumstances of the particular interrogation at issue.” *Sanford v. Russell*, 387 F.Supp.3d 774, 781 (E.D. Mich. 2019) (collecting cases).

II. EXPERT TESTIMONY CAN INFORM JURORS ABOUT THE COUNTERINTUITIVE PHENOMENON OF FALSE CONFESSIONS

Expert testimony on false confessions is admissible because it offers the jury critical insights into behavior that the average person often does not comprehend, thus allowing jurors to assess more capably whether and how particular factors—such as the police-interrogation techniques and dispositional factors present in this case—could have produced a false confession. By declining to appoint a false-confession expert, therefore, the trial court here deprived Mr. Warner of the opportunity to present to the jury key evidence outlining “the attributes associated with false confessions.” (1516a.) Mr. Warner, as a result, could not draw on the robust body of scientific research on false confessions to “explain that the confession obtained ... displayed attributes of coercion” (829a), or “explain to the jury why somebody could be coerced into making a confession when they were worn down” (870a-871a).

A. The Typical Juror Does Not Understand Why A Person Would Confess To A Crime The Person Did Not Commit

As this Court recognized more than a decade ago, a “claim of a false confession is beyond the common knowledge of the ordinary person.” *Kowalski*, 492 Mich. at 129. Because “a purported false confession ... constitutes counterintuitive behavior that is not within the ordinary person’s common understanding,” this Court rightly concluded that “expert assistance can help jurors understand how and why a defendant might confess falsely.” *Id.* at 126-127. The exclusion of expert testimony, by contrast, can “hinder the jury in its task.” *Id.* at 127. “[W]ithout the enlightenment of expert opinion” on false confessions, “the jury’s ultimate determination may not be arrived at intelligently.” *Id.*

Kowalski grounded its holding that “a purported false confession constitutes behavior contrary to common sense” in a “longstanding presumption deeply rooted in our country’s legal system: A person does not ordinarily make untruthful incriminating statements.” 492 Mich. at 127. The U.S. Supreme Court has likewise acknowledged the grip this presumption may have

over factfinders, noting that 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). Indeed, "confessions have [a] 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." *Id.* Scholars have also routinely found that confessions are seen as particularly compelling evidence because many judges and jurors believe that "innocent individuals do not falsely confess." Blandón-Gitlin et al., *Jurors Believe Interrogation Tactics Are Not Likely To Elicit False Confessions: Will Expert Witness Testimony Inform Them Otherwise?*, 17 Psych., Crime & L. 239, 256 (2011); see also Chojnacki et al., *An Empirical Basis for the Admission of Expert Testimony on False Confessions*, 40 Ariz. St. L.J. 1, 32 tbl. 4 (2008); Henkel et al., *A Survey of People's Attitudes and Beliefs About False Confessions*, 26 Behav. Sci. & L. 555, 578 (2008); Kassin & Gudjonsson, *The Psychology of Confessions* at 56-57. Jurors typically assume, in other words, that confessions are truthful.

But while many confessions *are* true—and those confessions play a critical role in obtaining valid and appropriate convictions—it has been demonstrated beyond reasonable dispute not only that people are induced to confess falsely, but also that many individuals have been wrongly convicted and incarcerated based largely or exclusively on false confessions. Real-world data corroborate the authoritative findings regarding false confessions that have emerged through the controlled experiments described above. See *supra* Part I. Indeed, the increasing use of DNA evidence in recent decades has confirmed how widespread the phenomenon of false confessions is among the wrongfully convicted. In the Innocence Project's database of 375 DNA exonerations in the United States, false confessions contributed to nearly a third (29%) of those wrongful convictions. Innocence Project, *DNA Exonerations in the United States*, <https://innocenceproject.org/dna-exonerations-in-the-united-states/> (visited Feb. 1, 2023). Among the more than 3,000 wrongful convictions archived by the National Registry of Exonerations, 13% of those wrongfully convicted had falsely confessed and 27% had falsely pled guilty. National Registry of Exonerations, (Cases), <https://www.law.umich.edu/special/exoneration/Pages/browse.aspx> (visited Feb. 1, 2023). Exonerations data, moreover, may *underrepresent* the prevalence of false confessions, because those who confess falsely may also be more likely to plead guilty than others wrongfully convicted, thereby increasing barriers to appeal and official exoneration. See Wynbrandt, Comment, *From False Evidence Ploy to False*

Guilty Plea: An Unjustified Path to Securing Convictions, 126 Yale L.J. 545, 553 (2016); see also Scherr et al., *Cumulative Disadvantage: A Psychological Framework for Understanding How Innocence Can Lead to Confession, Wrongful Conviction, and Beyond*, 15 Perspectives on Psych. Sci. 353, 366-367 (2020).

B. Expert Testimony Can Educate Jurors About Identifiable Factors That Are Statistically Linked To False Confessions

This Court recognized in *Kowalski* that false confessions involve “counterintuitive behavior” that may “require the aid of expertise to explain.” 492 Mich. at 143. The court of appeals, by contrast, upheld the trial court’s denial of Mr. Warner’s motion to appoint an expert on false confessions only by improperly discounting the value of expert testimony that could inform the jury about the factors that have been shown empirically to be linked to false confessions. Researchers have identified and systematically studied various risk factors that tend to yield such confessions, including interrogation tactics that police use to elicit confessions and dispositional traits that can render a person particularly prone to confess falsely. See, e.g., Gudjonsson, *The Psychology of False Confessions* at 114-117; Kassin et al., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 L. & Hum. Behav. 381, 389-390 (2007); Kassin et al., *Police-Induced Confessions* at 27-30; Gudjonsson & Pearse, *Suspect Interviews and False Confessions*, 20 Current Directions Psych. Sci. 33, 33-37 (2011). Educating jurors about these factors—and the rigorous research that has been devoted to each one—is a critical and appropriate function of expert testimony. Studies examining the relative knowledge of confession experts, see Kassin et al., *On the General Acceptance* at 74, and laypersons, see Alceste et al., *The Psychology of Confessions: A Comparison of Expert and Lay Opinions*, 35 Applied Cognitive Psych. 39, 48 (2020), make clear that laypersons do not typically understand the scientific consensus concerning false confessions, and therefore demonstrate the need for expert education.

1. Lawful Police-Interrogation Processes And Tactics Can Lead To False Confessions

Decades of research show that certain psychologically coercive interrogation techniques make false confessions more likely and that these techniques are used by police in this country. In particular, 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 187-190 (5th ed. 2013) (explaining the technique). The Reid technique involves the use of powerful social-influence tactics (including both positive and negative incentives) aimed at producing compliance. 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: Rights, Research, Regulation* 207, 215-218 (Williamson ed., 2006).

Police using this technique begin an interrogation by confronting a suspect with strong accusations, while interrupting efforts at objection and denial. Police may also bolster their 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 in order 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, *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”).

There is broad acceptance among psychologists that some of the common features of the Reid technique are known risk factors for false confessions. For example, research derived from the cognitive psychology of pragmatic implication shows that certain “minimization” tactics lead suspects to infer leniency, and hence are associated with false confessions. Luke & Alceste, *The Mechanisms of Minimization: How Interrogation Tactics Suggest Lenient Sentencing Through Pragmatic Implication*, 44 L. & Human Behav. 266, 268 (2020). In effect, implied statements of leniency are understood as explicit statements of leniency, statements which are disallowed because of the increased risk of false confession. *Id.* at 281-282. Through these tactics, interrogators frequently “offer[] sympathy and understanding.” Kassin, *Police-Induced Confessions* at 12. Such “minimization tactics are designed to provide the suspect with moral justification and face-saving excuses for having committed the crime,” normalizing and downplaying the crime to lead the suspect to see confession (for the downplayed offense) as an

expedient exit strategy. *Id.* Minimization frequently also implies a promise of leniency, one that “may well lead innocent people who feel trapped to confess.” *Id.* at 18. In the survey of 87 academics mentioned earlier, 91% agreed that “[m]inimization tactics that communicate sympathy and moral justification for a crime lead people to infer leniency upon confession.” Kassin et al., *On the General Acceptance* at 69; *see also id.* at 70, 72. Indeed, “25 years of laboratory experiments have shown the power of minimization in shaping suspects’ perceptions and producing confessions.” Kelly et al., *Engaging Suspects with Minimization* at 170. And APA’s resolution discussed above specifically warns of “the risks of eliciting a false confession [by interrogations] that involve minimization ‘themes’ that communicate promises of leniency.” *See APA Resolution.*

Numerous empirical studies document these risks. For instance, one study examined minimization in the context of a computer-crash paradigm. Klaver et al., *Effects of Personality, Interrogation Techniques and Plausibility in an Experimental False Confession Paradigm*, 13 *Legal & Criminological Psych.* 71 (2008). Participants were falsely accused of causing their computers to crash by hitting a forbidden key, then prompted to sign a written confession. But for some participants, the researcher blamed the incident on overly sensitive keys, or told the participants not to “worry” because “[i]t was just an accident.” *Id.* at 77-78. The participants subjected to these minimization techniques were more likely to confess falsely. *Id.* at 81.

Another study reached the same basic result using a different model. Students who were partnered for purposes of a problem-solving activity with a confederate were told that for some parts of the activity, the students and confederates were to work alone. *See* Russano et al., *Investigating True and False Confessions* at 483. Some confederates, however (acting at the researcher’s secret instruction), asked their partners for help on the parts designated as individual work, i.e., tried to induce the participant to break the rules. Later, the researcher claimed that the pair had suspiciously arrived at the same wrong answer and accused the participant of cheating—an act with serious consequences in the university setting. The participant was then confronted with (1) an explicit offer of leniency (“things could probably be settled pretty quickly”); (2) minimization (a combination of sympathy and face-saving excuses); (3) neither; or (4) both. *Id.* The explicit promise and the minimization each increased the rate of false confessions. *Id.* at 484.

Finally, in a study on how minimization communicates leniency, participants read transcripts of interrogations. See Kassin & McNall, *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 L. & Hum. Behav. 233, 240 (1991). In some of the transcribed cases, interrogators promised suspects they would receive a lighter sentence if they confessed. In others, interrogators used minimization techniques, such as blaming the victim or morally excusing the crime. After reviewing the transcripts, participants were asked how severe they expected the suspect's sentence to be in the event of a confession. *Id.* at 241. Overall, "subjects expected more lenient sentencing in both the minimization and promise conditions" as compared to the control group. In other words, both minimization and promises communicated leniency. *Id.*; see also Luke & Alceste, *The Mechanisms of Minimization* at 268.

The length of interrogation is also a risk factor for false confessions. Observational studies consistently report that most interrogations last from thirty minutes to two hours, with a mean duration of 1.6 hours. See Kassin et al., *Police-Induced Confessions* at 16; see also Leo, *Inside the Interrogation Room* at 279 (tbl. 6) (officers concluded 92% of felony interrogations in two hours or less). And experts in police interrogations have cautioned "against exceeding 4 hours in a single session." Kassin et al., *Police-Induced Confessions* at 16. Given extensive empirical findings that protracted interrogation can impair judgment by causing fatigue, uncertainty, and despair, it is unsurprising that false confessions routinely occur during interrogations that exceed average timeframes. See Kassin & Gudjonsson, *The Psychology of Confessions* at 53-54 (reviewing literature). APA has specifically warned that "interrogations that are excessive in length ... create an incentive to escape the situation ... and thereby increase the risk of false confessions." *APA Resolution*. APA accordingly "recommends[] recognizing that the risk of false confession is increased with extended interrogation times" and suggests "that law enforcement agencies consider placing limits on the length of time that suspects are interrogated." *Id.*

In this case, the police used minimization techniques while interrogating Mr. Warner, and interrogated him at great length. As to the former, Detective James Maltby testified that he sought to build rapport with Mr. Warner during the interview by "try[ing] to sexualize the victim" (451a), while Detective Sergeant Jordan used the approach of "blaming the victim" (388a). Detective Jordan testified that he told Mr. Warner "things like[:] I knew the victim liked

him, I knew the victim was promiscuous, I knew the victim was sexually active.” (388a-389a.) The prosecutor likewise acknowledged in closing arguments that Detective Jordan “uses these techniques of victim blaming,” “being on the same level as the defendant,” and communicating to the defendant, “I’m gonna help you out.” (650a-651a.) These minimization themes serve to reduce perceived culpability and thereby increase perceptions of forthcoming leniency.

As for the length of the interrogation, Mr. Warner’s inculpatory statements were made only after several hours of police questioning, beyond the mean duration of 1.6 hours, *see* Kassin et al., *Police-Induced Confessions* at 16. And in seeking the appointment of an expert, Mr. Warner’s counsel emphasized the toll of lengthy interrogations, arguing to the trial court that an expert was needed “to explain to the jury why somebody could be coerced into making a confession when they were worn down.” (870a-871a.)

2. *Dispositional Factors Can Produce False Confessions*

Psychological research on false confessions and a review of actual cases involving such confessions make clear that some suspects are more vulnerable to influence and hence at greater risk of confessing falsely. As one article put it, “in terms of how people react to the pressures inside the interrogation room, all suspects are not created equal.” Kassin & Gudjonsson, *The Psychology of Confessions* at 51. In particular, certain individual characteristics, including personality traits such as suggestibility and compliance, are known risk factors.

Compliant individuals tend to be conflict-avoidant, acquiescent, and eager to please authority figures. *See generally* Gudjonsson, *The Psychology of False Confessions* at 125-127. 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 less assertiveness. *See id.* at 59-61, 79, 114-115. These personality traits may also render individuals particularly susceptible to the types of interrogative pressure that are associated with false confessions. *See* Kassin & Gudjonsson, *The Psychology of Confessions* at 51-52 (citing studies).

In this case, an expert who conducts a psychological examination of Mr. Warner could assess whether Mr. Warner has an especially compliant or suggestible personality, such that he was disproportionately vulnerable to the pressures of the unusually long police interrogations to which he was subjected. *Cf.* Warner Supp. Br. 51.

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

Although the 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. See Kaplan et al., *Perceptions of Coercion in Interrogation: Comparing Expert and Lay Opinions*, 26 Psych., Crime, & L. 384, 391-392 (2020). Indeed, research shows that lay people cannot intuitively distinguish between true and false confessions. See Kassin et al., “I’d Know a False Confession if I Saw One”: A Comparative Study of College Students and Police Investigators, 29 L. & Hum. Behav. 211, 216-218 (2005). In the survey described above, scholars considered “lay perceptions of confessions” and “exhibited little confidence in the notion that people can evaluate confession evidence.” Kassin et al., *On the General Acceptance* at 72. Research further 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* at 577-580. In the same survey of experts, “relatively few respondents believed that jurors were aware of” the salience of these risk factors, or that they understood a number of “high-consensus propositions” among confessions psychologists, such as that “people in general are more responsive to consequences that are immediate rather than delayed,” “that authority figures can produce illicit obedience,” “that misinformation can alter a person’s memory,” or that “the risk of false confessions is increased by minimization ... explicit promises ... and the presentation of false evidence.” Kassin et al., *On the General Acceptance* at 74.

Notably, even those lay observers 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* at 256; 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: An Experimental Test of the “Harmless Error” Rule*, 21 L. & Hum. Behav. 27, 44 (1997); see also Kassin & Neumann, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 L. & Hum. Behav. 469, 481

(1997) (confession evidence is more powerful among those who voted to convict). This was true even where the confession was reported secondhand by an incentivized informant. Neuschatz et al., *The Effects of Accomplice Witness and Jailhouse Informants on Jury Decision Making*, 32 L. & Hum. Behav. 137, 142 (2008); Wetmore et al., *On the Power of Secondary Confession Evidence*, 20 Psych., Crime & L. 339, 354 (2014). Confessions can even increase the conviction rate in the face of exculpatory DNA evidence. Appleby & Kassin, *When Self-Report Trumps Science: Effects of Confessions, DNA, and Prosecutorial Theories on Perceptions of Guilt*, 22 Psych., Pub. Pol’y & L. 127, 136 (2016).

That jurors have little understanding of these realities is not surprising; the average citizen is simply unfamiliar with police interrogation processes, a fact demonstrated by several empirical studies. *E.g.*, Henkel et al., *A Survey of People’s Attitudes and Beliefs About False Confessions* at 578. Nor would jurors have any reason to know that police officers receive specialized training in particular interrogation tactics, let alone understand the effects on behavior and decision-making that these tactics may have on an innocent person in the interrogation room. To the contrary, research in other contexts has demonstrated the prevalence and strength of what psychologists call the “fundamental attribution error,” the tendency for people in general to assume, even in coercive environments, that an actor’s behavior accurately reflects the actor’s disposition—including guilt. *See* Kassin & Gudjonsson, *The Psychology of Confessions* at 59 (noting a “voluminous body of research” on the subject).

Expert testimony about false confessions speaks directly to these key gaps in lay understanding, calibrating jurors’ views on the reliability of confessions by providing empirically grounded information about the phenomenon of false confessions and the circumstances under which they may occur. Such testimony undoubtedly aids the factfinding process because it “effectively inform[s] 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 257. With this body of knowledge, a jury is far better equipped to evaluate confession evidence.

C. The Usefulness Of Expert Testimony On False Confessions Does Not Depend On Whether An Expert Opines On The Truth Or Falsity Of The Defendant's Confession

The court of appeals held that Mr. Warner “did not show that a reasonable probability existed ‘that denial of expert assistance would result in a fundamentally unfair trial’” in part because in the trial court he “indicated that the proposed false-confession experts ‘would not speak to the fact that the defendant made a false confession but instead would speak to the attributes associated with false confessions and the interview bias of Det. Derrick Jordan.’” (1516a.)

Kowalski, however, prohibits the very type of testimony that the court of appeals faulted Mr. Warner for not adducing. “An expert explaining the situational or psychological factors that might lead to a false confession,” this Court held, “may not ‘comment on the ... truthfulness’ of a defendant’s confession ... or ‘give an opinion as to whether [the] defendant was telling the truth when he made statements to the police.’” 492 Mich. at 129. It was an improper catch-22 for the court of appeals to hold that the trial court did not err in denying Mr. Warner funds for an expert because he did not seek to adduce expert testimony that this Court has forbidden.

The expert testimony that Mr. Warner did seek to introduce would have conveyed to jurors that not all confessions are true and that various factors are of particular concern in terms of eliciting false confessions. Even without an opinion on the falsity of a particular confession, such testimony would have aided the jury by educating jurors about factors that research has shown to be relevant in general to evaluating that evidence—factors that jurors do not know as a matter of common sense. *See Blandón-Gitlin et al., Jurors Believe Interrogation Tactics Are Not Likely To Elicit False Confessions* at 256; Kassin et al., *On the General Acceptance* at 74-76. Although it is not possible to quantify the precise risk that any particular interrogation technique poses for eliciting a false confession, an expert can present well-established empirical findings that certain 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: The Theory and Classification of True and False Confessions*, 16 Stud. L. Pol. & Soc’y 189, 190 (1997). Such expert testimony is admissible.

CONCLUSION AND PRAYER

In resolving this appeal, this Court should take account of the robust body of rigorous scientific research regarding false confessions discussed herein. The Court should also make clear that a criminal defendant cannot be barred from receiving funds for expert testimony regarding false confessions on the ground that the defendant's proffered testimony would not include an opinion on the actual truth or falsity of the defendant's confession.

February 1, 2023

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief contains 7,714 countable words.

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On February 1, 2023, the foregoing was served via electronic filing on the counsel of record for all parties in this case.

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