

APL 2012-00306

**COURT OF APPEALS
STATE OF NEW YORK**

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

ADRIAN P. THOMAS,

Appellant.

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

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November 20, 2013

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INTEREST OF AMICUS CURIAE

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.¹

Division 41 of APA, the American Psychology-Law Society, focuses on the intersection of law and psychology. Among its purposes is to inform the legal community of current research in the field of law and psychology. After rigorous peer review, Division 41 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).²

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

¹ Attached as Exhibit A to this brief is the disclosure statement required by 22 NYCRR § 500.1(f).

² 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).

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); *In re Marriage Cases*, 183 P.3d 384, 441 n.59 (Cal. 2008); *Florida Dep't of Children & Families v. X.X.G. & N.R.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 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 sufficiently established to have gained general acceptance in the relevant field, 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.³

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.

I. Expert testimony about false confessions 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 Appellate Division, research has consistently shown that these subjects are outside of jurors' common knowledge and experience. Accordingly, the presentation of specialized knowledge will assist the trier of fact.

II. 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. The

³ APA gratefully acknowledges the assistance of Therese Hall, Saul Kassin, and Marc Pearce in the preparation of this brief.

Appellate Division’s contrary conclusion—and in particular its statement that “current research fails to establish either a consensus connecting specific interrogation techniques to the occurrence of false confessions or a reliable basis for distinguishing false confessions from truthful ones”—misunderstands both the relevant literature and the purpose of the expert testimony. The purpose 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. As this Court has recently instructed, “experts in such disciplines as psychiatry and psychology or the social sciences may offer valuable testimony to educate a jury about those factors of personality and situation that the relevant scientific community considers to be associated with false confessions.” *People v. Bedessie*, 19 N.Y.3d 147, 161 (2012).

III. Given the powerful impact of any confession (impact that has been empirically demonstrated in numerous experiments), expert testimony on false confessions is particularly critical where there is a lack of corroborating evidence. Testimony that puts a confession in the context of scientific understanding about circumstances that would promote or undermine its likely truthfulness is critical to preventing wrongful convictions.

ARGUMENT

As this Court has recognized, “[f]alse confessions that precipitate a wrongful conviction manifestly harm the defendant, the crime victim, society and the criminal justice system.” *People v. Bedessie*, 19 N.Y.3d 147, 161 (2012). 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 [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.’”).

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; *White v. Smith*, 696 F.3d 740, 743 (8th Cir. 2012) (explaining that Joseph White, who was convicted of felony murder “primarily on the testimony and confessions of White’s co-defendants,” served 18 years in prison before DNA evidence cleared him). 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, in several categories of cases, such as those involving confessions to minor crimes that result in guilty pleas and confidential juvenile proceedings, false confessions are extremely unlikely to come to light. This reinforces the conclusion that “a small but significant minority of innocent people confess under interrogation.” See Kassin et al., *Police-Induced Confessions*, 34 Law & Hum. Behav. 5 (2010).

In this case, the People seek to convict Adrian Thomas of a crime that could carry a life sentence, based almost exclusively on a confession he gave during nine-and-a-half hours of police interrogation conducted in two sessions over little more than 24 hours. See People’s Br. 5-7. Mr. Thomas 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. Thomas’s confession is true or false. But in connection with his defense, Mr. Thomas seeks to present expert testimony about false confessions. APA submits that such testimony flows from a robust body of generally accepted scientific research, and that it would educate the jury about false confessions and thus assist jurors in understanding and evaluating Mr. Thomas’s confession.

I. EXPERT TESTIMONY REGARDING FALSE CONFESSIONS ASSISTS JURORS IN UNDERSTANDING CRITICAL EVIDENCE

Expert testimony must be relevant to the issue in the case and “on a topic beyond the ken of the average juror.” *People v. LeGrand*, 8 N.Y.3d 449, 452 (2007).⁴ The expert testimony proffered here would assist the jurors in assigning appropriate weight to Mr. Thomas’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. Thomas’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 falsely. Research has shown that these subjects are outside of most jurors’ common knowledge and experience.

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

The Appellate Division’s first reason for upholding the exclusion of Dr. Ofshe’s testimony was the assertion that the testimony did not “concern[] a subject matter outside of the ken of the average juror.” *People v. Thomas*, 93 A.D.3d

⁴ There is no dispute before this Court that appellant’s proffered expert, Dr. Richard Ofshe, has the requisite scientific background and knowledge to testify as an expert in the use of influence in conducting police interrogations and the phenomenon of coerced and false confessions.

1019, 1031 (3d Dept. 2012). Empirical research demonstrates that assertion is incorrect. Indeed, the opposite is true.

The phenomenon of false confessions is unquestionably both well documented by researchers, *see supra* pp. 5-6, and long recognized by courts, *see, e.g., Miranda v. Arizona*, 384 U.S. 436, 455 & n.24, 467 (1966). 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* 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.”).⁵ 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’n 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 will not recognize false confessions using their common knowledge about human behavior. 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*,” 29 Law & Hum. Behav. 211, 216 (2005) (overall accuracy rate for participants who reviewed taped confessions was “nonsignificant relative to chance”). And

⁵ 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).

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; apologies and expressions of remorse; explicit pronouncements that the statement is voluntary; or accurate details about the crime that were not in the public 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); Appleby et al., *Police-Induced Confessions*, 19 Psychol., Crime & L. 111 (2013).⁶

Expert testimony on false confessions addresses these issues through the use of empirically grounded information about the phenomenon of false confessions and the circumstances under which those confessions may occur. That is a quintessential example of assisting the trier of fact to understand the evidence. See, e.g., *People v. Lee*, 96 N.Y.2d 157, 162 (2001) ("Despite the fact that jurors may be familiar from their own experience with factors relevant to the reliability of

⁶ Such contamination is 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).

eyewitness observation and identification, it cannot be said that psychological studies regarding the accuracy of an identification are within the ken of the typical juror.” (citation omitted)); *People v. Cronin*, 60 N.Y.2d 430, 433 (1983) (“While jurors might be familiar with the effects of alcohol on one’s mental state, the combined impact of a case of beer, several marihuana cigarettes and 5 to 10 Valium tablets on a person’s ability to act purposefully cannot be said as a matter of law to be within the ken of the typical juror.”); *People v. Carroll*, 95 N.Y.2d 375, 387 (2000) (“We have long held that expert testimony regarding rape trauma syndrome, abused child syndrome or similar conditions may be admitted to explain behavior of a victim that might appear unusual or that jurors may not be expected to understand.”). Indeed, in *Bedessie*, this Court stated that “there is *no doubt* that experts in such disciplines as psychiatry and psychology or the social sciences may offer valuable testimony to educate a jury about those factors of personality and situation that the relevant scientific community considers to be associated with false confessions.” 19 N.Y.3d at 161 (emphasis added).

Other appellate courts, applying a substantially similar standard, have concluded that the very type of testimony involved here should be presented to the trier of fact. For example, in reversing a defendant’s conviction based on the exclusion of false-confession expert testimony, the Seventh Circuit 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); 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); *United States v. Belyea*, 159 F. App’x 525, 529 (4th Cir. 2005) (per curiam) (“Jurors may know that people lie in everyday life or even sometimes under oath, particularly when they believe lying to be advantageous. Jurors may not know, however, that people lie on occasion to their own detriment by falsely confessing to crimes that they did not commit. The phenomenon of false confessions is counter-intuitive and is not necessarily explained by the general proposition that ‘jurors know people lie.’”).

Jurors who have some awareness of false confessions will also benefit from expert testimony on the subject. Expert testimony “is admissible where the conclusions to be drawn from the facts depend upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence.” *Cronin*, 60 N.Y.2d at 432 (internal quotation marks omitted). Even if jurors are

aware in the abstract that there is such a thing as a false confession, few jurors will be familiar either with the psychological principles relevant to the cognitive, motivational, and behavioral foundations of authority and influence, or with research findings about the phenomenon of false confessions. The proffered expert testimony accordingly “aid[s] a lay jury in reaching a verdict.” *Lee*, 96 N.Y.2d at 162.

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

Expert testimony about false confessions can do more than educate jurors generally about the existence of the phenomenon—because psychologists and other scientists have done more than simply document it. Researchers have identified and systematically studied various 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. *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 & Pearse, *Suspect Interviews and False Confessions*, 20 *Current Directions Psychol. Sci.* 33, 33-37 (2011). Educating jurors about these factors, and research findings about them, is another appropriate role for expert testimony. *See Bedessie*, 19 N.Y.3d at 156

(“expert evidence on those factors that the scientific community has determined may contribute to a false confession” may be admissible).

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 exercising influence in order to obtain information. 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, 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*

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.”); White, *False Confessions and the Constitution* at 118 (similar).

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).

Police using this technique begin an interrogation by confronting a suspect whom they believe to be guilty with strong accusations, while interrupting opportunities for objection and denial.⁸ 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 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

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*, 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*, 35 Law & Hum. Behav. 452 (2011).

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”).

b. There is widespread acceptance that certain 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 employed sparingly, it is present in numerous 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 more than 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 (e.g., to cheating, a violation of the university honor code). Perillo & Kassin, *Inside Interrogation*, 35

Law & Hum. Behav. 327, 335 (2011). In short, there is ample scientific evidence that people are surprisingly susceptible to being influenced by misinformation about their own conduct.

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. See Leo, *Inside the Interrogation Room* at 279 (tbl. 6) (officers concluded 92 percent of felony interrogations in two hours or less).⁹ 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

⁹ See also Feld, *Police Interrogation of Juveniles* at 308 (three-quarters 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).

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.

Finally, certain types of “minimization” tactics are also associated with false confessions. Using minimization, 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 otherwise understandable 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.”) (footnote omitted). 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 (“use 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).

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 of confessing falsely. *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). In particular, three individual characteristics—youth, intellectual disability, and mental illness—as well as two personality traits—suggestibility and compliance—are known risk factors.

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 an intellectual disability. 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 challenged individuals are also acutely 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 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). 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 less assertiveness. 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. Experimental Psychol.: Applied 48-59 (1996).

3. *Most Jurors Do Not Understand The Connection Between False Confessions And These 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. On the contrary, 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,"* at 216-218. Research also 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); 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; the average citizen is simply unfamiliar with police-interrogation processes. 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 in other contexts has demonstrated the prevalence of what psychologists call “fundamental attribution error,” the tendency for people in general to assume, even in coercive environments, that an actor’s behavior accurately reflects his disposition—including guilt. 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 “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 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 Appellate Division's Other Grounds For Deeming The Expert's Testimony Here Irrelevant Are Also Infirm

In addition to incorrectly asserting that the proffered expert testimony involved matters within the knowledge of most jurors, the Appellate Division gave two reasons for excluding the expert testimony. First, it ruled that the proffered testimony did not offer a “reliable basis for distinguishing false confessions from truthful ones.” *Thomas*, 93 A.D.3d at 1031. Second, it noted that the jury was “perfectly capable of assessing whether it believes that the [d]efendant’s statements were true” because they would be able to view the video recording of the interrogation for themselves. *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 Appellate Division reasoned that the interrogation tactics that would have been the subject of the expert testimony can lead to true as well as false confessions. *See Thomas*, 93 A.D.3d at 1031. That reasoning does not provide a sound basis for exclusion.

To begin with, it is not the case that certain interrogation tactics (and dispositional factors) increase *equally* the risk of a true confession and a false confession. In one controlled experiment, for example, minimization techniques (such as suggesting that the crime was “spontaneous, accidental, ... or otherwise justifiable”) 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—as apparently it was here, see, e.g., People’s Br. 11-13 (Thomas was told “many times he would not be arrested” if the injuries to his child were an accident)—the foregoing research is 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. Just as with expert testimony on rape trauma or child abuse syndromes, where an expert can link specific behavioral traits of a witness to the specific, widely-known and accepted syndrome, see, e.g., *Carroll*, 95 N.Y.2d at 387, the testimony here merely links certain police interrogation techniques and other factors to the phenomenon of false confessions. This in no way suggests that in *every* case those circumstances make confessions false—just as expert testimony about rape trauma and child sex-abuse syndromes does not mean that, e.g., every child who makes a very belated report of sexual abuse was in fact abused. Yet this Court held that expert testimony on these latter subjects is permissible to “explain behavior of a victim that might appear unusual or that jurors may not be expected to understand.” *Id.*; see also *People v. Taylor*, 75 N.Y.2d 277, 289 (1990). There is no reason to treat the testimony here any differently.

Moreover, the prosecution is free to make sure, through cross-examination or the presentation of its own expert, that the jury appreciates that not all confessions obtained in such circumstances are false. Indeed, the possibility of such additional education is further reason to allow the expert testimony. The adversarial process will ensure that the jury receives a balanced presentation of what is often the most important piece of evidence regarding a defendant's guilt or innocence. As this Court has emphasized, 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. *Cronin*, 60 N.Y.2d at 432 (“Both sides may of course cross-examine and impeach the opposition’s experts, and adduce different opinions through their own experts.”). Expert testimony should thus 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.

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

The Appellate Division also reasoned that the defense’s proffered expert testimony was irrelevant because the jury could see the videotaped confession for itself. *See Thomas*, 93 A.D.3d at 1031. The fact that there is a videotape is certainly laudable. *See 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”). But such a 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 from a diverse and voluminous literature. *See infra* Part II.A. The Appellate Division’s reasoning 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 Appellate Division’s 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. Thomas's confession is the heart of the prosecution's case. The defense's case therefore 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 and beyond the ken of the average juror. *See generally Crane v. Kentucky*, 476 U.S. 683, 688, 689 (1986) ("evidence 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

In addition to addressing subjects beyond the ken of most jurors, expert testimony must be reliable. Reliability is determined by whether the expert's opinion is based on "scientific principles or procedures" that have been "sufficiently established to have gained general acceptance in the particular field in which [they] belong[]." *People v. Wesley*, 83 N.Y.2d 417, 422, 423 (1994) (quoting *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923)) (emphasis omitted). The particular principles "need not be unanimously [e]ndorsed by the scientific community but must be generally acceptable as reliable." *Id.* at 423

(internal quotation marks omitted). As this Court suggested in *Bedessie*, 19 N.Y.3d at 161, such a reliable basis plainly exists here.

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

The *Frye* standard is “general acceptance in the particular field in which it belongs.” *Frye*, 293 F. at 1014. “[G]eneral acceptance” is amply demonstrated here by the field’s 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. *See LeGrand*, 8 N.Y.3d at 455 (crediting as relevant factors that the findings are “published in scholarly journals and subjected to peer review”).

1. Consistency With Other Research

Research on false confessions flows from, builds on, and is consistent with other research. Beginning with psychologist Hugo Münsterberg’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 methods of social influence 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 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*

Research on false confessions also rests 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 provide 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 dispositional characteristics 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 published and has been peer-reviewed, which further supports its reliability. See *LeGrand*, 8 N.Y.3d at 455; cf. *Daubert v.*

Merrell Dow Pharm. Inc., 509 U.S. 579, 593 (1993) (“[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.”). 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* (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, which produced an official white paper on the subject in 2010, only the second in its history—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.

“Expert testimony is admissible provided that the principles and methodology relied upon by the expert have gained general acceptance as being reliable within the scientific community.” *Parker v. Mobil Oil Corp.*, 793 N.Y.S.2d 434, 436 (App. Div. 2005) (citing *Frye* and *Wesley*). Where, as here, the expert’s testimony is consistent with other related research and is based on valid

and diverse research methods that are scrutinized through peer review and subsequent publication in the relevant scientific community, there should be no serious question that the testimony is reliable.

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

The Appellate Division deemed Dr. Ofshe's testimony unreliable largely on the ground that "current research fails to establish ... a reliable basis for distinguishing false confessions from truthful ones." *Thomas*, 93 A.D.3d at 1031. In other words, the court rejected Dr. Ofshe's testimony because he could not testify to a method that would *predict* which confessions are false. That reasoning fails.¹⁰

To begin with, controlled experiments that have predictive power *are* part of the field of study of false confessions, as discussed above. 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

¹⁰ The court also stated that "current research fails to establish ... a consensus connecting specific interrogation techniques to the occurrence of false confessions." *Thomas*, 93 A.D.3d at 1031. As already explained, even if this were true (and it is not), that has no bearing on reliability, i.e., on whether the testimony is based on proper principles and methodologies.

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. Consistent with the purpose of expert testimony—to educate the jury about the phenomenon and probabilistic risk factors—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 predict whether a confession is false does not mean that the subject matter lacks the requisite reliability. Indeed, in some disciplines, as here, there is no way to make such predictions because of the nature of what is being studied. Unlike in the physical sciences, where direct 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”); *cf. State v. Copeland*, 922 P.2d 1304, 1320 (Wash. 1996) (en banc) (“laboratory error is a matter of weight and not admissibility under *Frye*”). A court’s inquiry must be tailored to the type of testimony examined. *See Kumho Tire Co. v. Carmichael*,

526 U.S. 137, 150 (1999) (“[T]here are many different kinds of experts, and many different kinds of expertise.”).

More fundamentally, the Appellate Division’s discussion appears to have been based on a misunderstanding of the proffered expert testimony. As Dr. Ofshe acknowledged, *see* Appellant’s Br. 137 (citing A2212-2213), he would not assess the truth or falsity of Mr. Thomas’s confession. The proffered testimony would simply convey to the jurors that not all confessions are true and that various factors are of particular concern in terms of eliciting false confessions. The 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”). *Frye* nowhere requires that expert testimony be held to causation-relevant criteria where the testimony makes no claim that it is establishing causation. All that is required is that “the principles and methodology relied upon by the expert have gained general acceptance as being reliable within the scientific community.” *Parker*, 793 N.Y.S.2d at 436. That standard is met here.¹¹

¹¹ Even if there were some implicit message that the confession was false, that is no more objectionable than the contrary implicit message that will be conveyed by the prosecution witnesses who will discuss the confession.

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 samples and methodologies, 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*, 16 Stud. L. Pol. & Soc’y 189, 190 (1997). This finding is amply “connected to existing data” in the field of psychology as a whole. *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997); cf. *Taylor*, 75 N.Y.2d at 286 (“We are satisfied ... that the relevant scientific community has generally accepted that rape is a highly traumatic event that will in many women trigger the onset of certain identifiable symptoms.” (citation omitted)).

* * *

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 influence, persuasion, obedience to authority, and the effects of suggestive techniques on certain individuals. The fact that such an approach cannot predict which confessions are false and which are true does not render the

resulting testimony unreliable. The critical question under *Frye* is instead whether a proffered expert has applied the relevant principles in a way that is generally accepted as reliable within the relevant scientific community. To the extent that the courts below determined that the testimony adduced here was not based on “principles ... accepted within the relevant scientific community,” *Thomas*, 93 A.D.3d at 1031, 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. EXPERT TESTIMONY ABOUT FALSE CONFESSIONS IS PARTICULARLY CRITICAL WHERE THERE IS A LACK OF CORROBORATING EVIDENCE

This Court has stated that the admission of expert testimony should be weighed against factors such as “the centrality of the [evidence being discussed] and the existence of corroborating evidence.” *LeGrand*, 8 N.Y.3d at 456 (internal quotation marks omitted). That instruction takes on particular significance here. *First*, the power of confession evidence cannot reasonably be disputed. “[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; *see also Fulminante*, 499 U.S. at 296 (confessions are “‘probably the most probative and damaging evidence that can be admitted against [a defendant]’”); Kassin, *Why Confessions Trump Innocence*, 67 *Am. Psychol.* 431 (2012).

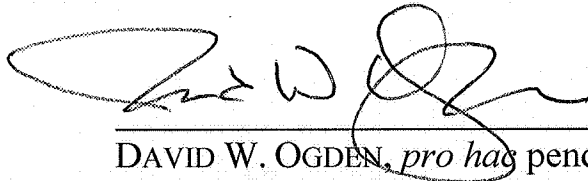
Mock jury studies show that confessions have more of an impact than eyewitness and character testimony, and that a confession significantly increases the conviction rate. This is true even if the confession is perceived as coerced or it is communicated secondhand by someone of dubious credibility. See Kassin & Neumann, *On the Power of Confession Evidence* at 481; Kassin & Sukel, *Coerced Confessions and the Jury* at 44; Neuschatz et al., *The Effects of Accomplice Witnesses and Jailhouse Informants on Jury Decision-Making*, 32 Law & Hum. Behavior 137, 142 (2008). 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. *Second*, because there is a lack of corroborating evidence here, Mr. Thomas's admissions are undeniably "central" to the likelihood of his conviction and the defense should therefore be permitted to mount a robust, scientific challenge to the prosecution's principal (if not sole) evidence of his guilt. Without the proffered expert testimony, the jury would lack context crucial to assessing the case. With the testimony, by contrast, the jury would have a scientific basis to evaluate the defendant's conduct and his claim that his confession is false. Expert evidence that supports a significant—and scientifically legitimate—basis for acquittal weighs overwhelmingly in favor of admissibility,

particularly because such evidence can be scrutinized by the prosecution in its presentation. Indeed, in this context—and in light of the significant number of exonerations related to false confessions—the admissibility of expert testimony is integral to preventing wrongful convictions.

CONCLUSION

The judgment of the Appellate Division should be reversed.

Respectfully submitted.



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November 20, 2013

EXHIBIT A
CORPORATE DISCLOSURE STATEMENT

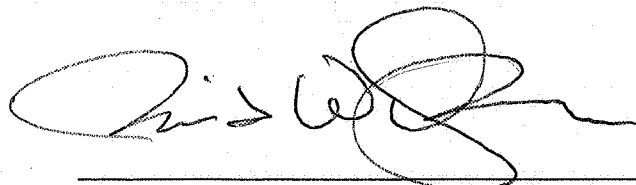
Pursuant to New York Court Rule 500.1(f), the American Psychological Association (APA) provides the following corporate disclosure statement:

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Dated: November 20, 2013

Respectfully submitted.

A handwritten signature in black ink, appearing to read "David W. Ogden", written over a horizontal line.

David W. Ogden, *pro hac* pending