

STATE OF MICHIGAN  
IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS  
Honorable Bandstra, P.J., and Fort Hood and Davis, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs.

JEROME WALTER KOWALSKI,

Defendant-Appellant.

Supreme Court No. 141932

Court of Appeals No. 294054

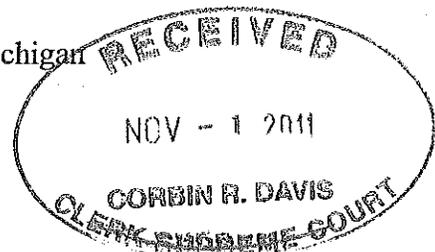
Lower Court No. 08-017643-FC

BRIEF OF THE CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN  
AS *AMICUS CURIAE* IN SUPPORT OF  
DEFENDANT-APPELLANT JEROME WALTER KOWALSKI

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**TABLE OF CONTENTS**

**INDEX OF AUTHORITIES** ..... ii

**STATEMENT OF QUESTION PRESENTED** ..... 1

**STATEMENT OF FACTS** ..... 1

**ARGUMENT**

**I. THE MICHIGAN COURT OF APPEALS' DECISION  
AFFIRMING THE LIVINGSTON COUNTY CIRCUIT  
COURT'S ORDER EXCLUDING THE PROFERRED EXPERT  
TESTIMONY DENIES MR. KOWALSKI HIS  
CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE** ..... 1

**RELIEF REQUESTED** ..... 11

**PROOF OF SERVICE** ..... 12

## INDEX OF AUTHORITIES

### CASES

<i>Arizona v. Fulminante</i> , 499 U.S. 279 (1991) .....	7, 10
<i>Callis v. State</i> , 684 N.E.2d 233 (Ind Ct App 1997) .....	8
<i>Carew v. State</i> , 817 N.E.2d 281 (Ind Ct App.2004) .....	8
<i>Chambers v. Mississippi</i> , 410 U.S. 284 (1973) .....	4, 6
<i>Crane v. Kentucky</i> , 476 U.S. 683 (1986) .....	<i>passim</i>
<i>Davis v. Alaska</i> , 415 U.S. 308 (1974) .....	5
<i>Green v. Georgia</i> , 442 U.S. 95 (1979) .....	4
<i>Holmes v. South Carolina</i> , 547 U.S. 319 (2006) .....	5
<i>Miller v. Indiana</i> , 770 N.E.2d 763 (Ind 2002) .....	8
<i>Montana v. Egelhoff</i> , 518 U.S. 37 (1996) .....	6
<i>Olden v. Kentucky</i> , 488 U.S. 227 (1988) .....	5
<i>Pennsylvania v. Ritchie</i> , 480 U.S. 39 (1987) .....	6
<i>People v. Hayes</i> , 421 Mich. 271 (1985) .....	7
<i>State v. Cope</i> , 684 S.E.2d 177 (SC Ct App 2009) .....	8
<i>State v. Myers</i> , 596 S.E.2d 488 (SC 2009) .....	8
<i>Terry v. Commonwealth</i> , 332 S.W.3d 56 (Ky. 2010) .....	8
<i>Tice v. Johnson</i> , ___ F. 3d ___, 2011 WL 1491063 (4 <sup>th</sup> Cir. Docket No. 09-8245, decided April 20, 2011.) .....	10
<i>United States v. Agurs</i> , 427 U.S. 97 (1976) .....	6
<i>Washington v. Texas</i> , 388 U.S. 14 (1967) .....	3, 6, 7

**CONSTITUTIONAL PROVISIONS**

Mich Const 1963 art 1 § 20 ..... 2

US Const Am VI ..... *passim*

US Const Am XIV ..... 2

**STATUTES AND COURT RULES**

MCL 763.1 ..... 2

**LITERATURE**

Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 76 (2008) ..... 9

Samuel R. Gross, *et al.*, *Exonerations in the United States: 1989 Through 2003*,  
95 J. Crim. L. & Criminology 523, 529 (2005) ..... 9

## STATEMENT OF QUESTION INVOLVED

**DOES THE MICHIGAN COURT OF APPEALS' DECISION AFFIRMING THE LIVINGSTON COUNTY CIRCUIT COURT'S ORDER EXCLUDING THE PROFERRED EXPERT TESTIMONY DENY MR. KOWALSKI HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE?**

Amicus Curiae Criminal Defense Attorneys of Michigan says "Yes."

## STATEMENT OF FACTS

Amicus defers to the statement of facts as set forth by Defendant-Appellant in this case.

## ARGUMENT

**I. THE MICHIGAN COURT OF APPEALS' DECISION AFFIRMING THE LIVINGSTON COUNTY CIRCUIT COURT'S ORDER EXCLUDING THE PROFERRED EXPERT TESTIMONY DENIES MR. KOWALSKI HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE.**

This case involves an interlocutory appeal taken by Defendant-Appellant Jerome Walter Kowalski from a Livingston County Circuit Court's Order (after an evidentiary hearing) that precludes Mr. Kowalski from calling experts to testify at trial to support part of his defense theory, that he falsely confessed to the crimes charged. Defendant-Appellant maintains that the testimony of Dr. Richard Leo and Dr. Jeffrey Wendt would enable the jury to properly assess the reliability and credibility of Mr. Kowalski's statements and to rebut the prosecution theory that Mr. Kowalski would not have made incriminating statements unless they were true.

In an unpublished opinion, the Michigan Court of Appeals agreed with the Circuit Court and Plaintiff-Appellee that the testimony of Dr. Leo and Dr. Wendt was inadmissible. *People v Jerome Walter Kowalski*, Michigan Court of Appeals Docket No. 294054 (August 26, 2010). On March 25, 2011, this Court granted leave to appeal and directed the parties to include among the issues to be briefed:

(1) Whether the defendant's proffered expert testimony regarding the existence of false confessions, and the interrogation techniques and psychological factors that tend to generate false confessions, is admissible under MRE 702;

(2) whether the probative value of the proffered expert testimony is substantially outweighed by the danger of unfair prejudice;

and (3) whether the Livingston Circuit Court's order excluding the defendant's proffered expert testimony denies the defendant his constitutional right to present a defense. *People v Kowalski*, 489 Mich. 858 (2011).

The Criminal Defense Attorneys of Michigan were among those invited to file briefs amicus curiae, and does so herein in support of Defendant-Appellant. The Innocence Network and the American Psychological Association have also filed briefs in support of Defendant-Appellant. The Criminal Defense Attorneys of Michigan respond specifically to the third question posed, namely, whether the trial court order interferes with the right to present a defense.

It is clearly established that a person accused of a crime has a constitutional right to present a defense. This right is protected by both the state and federal constitutions and by Michigan statute. US Const Am VI, XIV; Mich Const 1963 art 1 § 20; MCL 763.1.<sup>1</sup> The right to present a defense,

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<sup>1</sup> The Sixth Amendment compulsory process clause provides in relevant part:

In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . .

The Michigan Constitution 1963, Article 1, § 20 similarly provides:

In every criminal prosecution, the accused shall have the right . . . to have compulsory process for obtaining witnesses in his or her favor . . . .

MCL 763.1 provides:

763.1. Rights of accused; hearing by counsel, defense, confronting witnesses  
Sec. 1. On the trial of every indictment or other criminal accusation, the party accused shall be allowed to be heard by counsel and may defend himself, *and he shall have a right to produce witnesses and proofs in his favor*, and meet the

included in the Sixth Amendment and the Michigan Constitution, is a specific constitutional rule. Each of the right's components, particularly the right to present evidence, is specific.

The Supreme Court has held that the right to present a defense, or "the defendant's version of the facts," is a key part of the Sixth Amendment right to compulsory process. In *Washington v Texas*, 388 US 14, 19 (1967), the defendant challenged a state evidentiary rule that prohibited him from offering accomplice testimony. Washington's co-conspirator, Fuller, was prepared to testify that Washington tried to convince Fuller not to shoot the victim, and that Washington fled before Fuller fired the fatal shot. 388 U.S. at 16-17. The trial court excluded Fuller's testimony under a rule that an accomplice could only testify *against*, not *for*, a defendant. *Id.* at 17. The Supreme Court held:

***The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.*** Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law. 388 U.S. at 19. (Emphasis added).

Based upon the history of the Sixth Amendment and the reasons for its inclusion in the Bill of Rights, the Court found that ". . . the Sixth Amendment was designed in part to make the testimony of a defendant's witnesses admissible on his behalf in court[.]" *Id.* at 22. The Court held that it violates the Constitution for states to enforce evidentiary rules excluding "whole categories of defense witnesses from testifying on the basis of a priori categories." *Id.* Moreover, the Court held that the rule would be unconstitutional even if it had not discriminated against defendants. The

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witnesses who are produced against him face to face. (Emphasis added.)

Court held that the rule could not be rendered constitutional by placing the same restriction on the prosecution. 388 U.S. at 24-25 (Harlan, J., concurring). Instead, the defendant's right to present a defense requires that he be permitted to introduce certain evidence without regard to whether the same evidence would be admissible by the prosecution. *Id.*

The Supreme Court again upheld the particular right to present a defense in *Chambers v. Mississippi*, 410 U.S. 284, 302-03 (1973). The Court held that a defendant was entitled to a new trial because the state court had excluded, as hearsay, evidence of another person's confession. *Id.* The trial court permitted Chambers to call the confessor, McDonald, and admitted McDonald's prior written confession. *Id.* at 291. The state examined McDonald, who repudiated the confession, gave an explanation, and offered his own version of events. *Id.* But the trial court would not allow Chambers to impeach him, and it refused to permit Chambers to call three other witnesses who would have impeached McDonald's testimony and further testified that McDonald confessed to them on various occasions. *Id.* at 291-93. The Supreme Court held that the other witnesses should have been permitted to testify in Chambers' defense even in the face of a correct application of the hearsay rules. *See* 410 U.S. at 294-95, 302 ("[W]here constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice."). *Accord Green v. Georgia*, 442 U.S. 95, 97 (1979).

In *Crane v. Kentucky*, 476 U.S. 683 (1986), the Court held that a defendant entitled to admission of circumstances of prior confession when defense was that confession was false. The Court said "the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Id.* at 690. (Internal citations and quotations omitted.)

In subsequent cases, the Supreme Court has consistently protected this aspect of the right to

present a defense. *E.g.*, *Holmes v. South Carolina*, 547 U.S. 319, 328-31 (2006) (holding that the right to present a defense prevails over a state rule barring the evidence ); *Olden v. Kentucky*, 488 U.S. 227, 233 (1988) (holding that a rape complainant's current relationship with defendant's half-brother must be admitted because it was relevant to the consent defense, even where the trial court excluded it based on the prejudice that the interracial nature of the relationship might engender); *Green, supra*, 442 U.S. at 97 (defendant entitled to present testimony about co-conspirator's confession despite hearsay exclusion); *Davis v. Alaska*, 415 U.S. 308, 317 (1974) (defendant entitled to introduce witness's juvenile criminal record despite confidentiality rule protecting juvenile records).

The right to present a defense clearly includes a defendant's right to introduce his own testimony or exhibits. *Holmes*, 547 U.S. at 324. The Sixth Amendment also guarantees a defendant the right to present evidence that tends to disprove the prosecution's case. *Holmes*, 547 U.S. at 324; *Olden*, 488 U.S. at 232. The Sixth Amendment serves as a clear limit on the discretion of trial courts to exclude such evidence, even where it might be cumulative or confusing. *Holmes*, 547 U.S. at 326 ("the Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote"); *cf.* *Davis*, 415 U.S. at 319 ("the right of confrontation is paramount to the State's policy of protecting a juvenile offender"). When the evidence is "highly relevant" to an element of the crime, the court *must* allow the introduction of such evidence. *Holmes*, 547 U.S. 324-25; *Crane*, 476 U.S. at 691.

These Supreme Court precedents establish that a defendant's Sixth Amendment right to present a defense is violated unless he is permitted to introduce all "relevant" evidence, excepting only that which would not fairly permit a rational juror to find reasonable doubt. *Crane*, 476 U.S.

at 691 (“... we have never questioned the power of States to exclude evidence through the *application of evidentiary rules that themselves serve the interests of fairness and reliability* - even if the defendant would prefer to see that evidence admitted.”). *See also, e.g., Washington v. Texas*, 388 U.S. at 23; *Chambers*, 410 U.S. at 291. Even an otherwise legitimate evidentiary rule must yield to the right to present a defense when evidence is sufficiently reliable for jurors to weigh for themselves. *Crane*, 476 U.S. at 691.

The standard used in *Chambers*, and the basis for reversal, was that:

Chambers’ defense was far less persuasive than it might have been had he been given an opportunity to subject McDonald’s statements to cross-examination or had the other confessions been admitted. 410 U.S. at 294.

Unless the evidence provides no basis for creating reasonable doubt, it should be admitted.

As the Supreme Court said in *United States v. Agurs*, 427 U.S. 97, 112-113 (1976), regarding the materiality of evidence:

The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. ***It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed.*** (Emphasis added).

*Accord, Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987) (“Our cases establish, at a minimum, that criminal defendants have . . . the right to put before a jury evidence that might influence the determination of guilt.”).

It is not the trial court’s role to pass on the merits of a defense theory; that is the exclusive province of the jury. *Holmes, supra; Crane v. Kentucky, supra* at 691. If a theory is relevant and supported by the evidence, the right to present a defense allows a defendant to present his view of the facts. *Montana v. Egelhoff*, 518 U.S. 37, 42 (1996). To be sure, “the right to present the

defendant's version of the facts as well as the prosecutor's to the jury so it may decide where the truth lies" is in fact at the very heart of the right. *Washington v. Texas, supra*, 388 U.S. at 19, quoted in *People v. Hayes*, 421 Mich. 271, 278-279 (1985).

The defense does not seek to introduce testimony that Kowalski's statements are, in fact, false or that the jury should not believe them. Defendant-Appellant's brief at page 12. That determination properly remains with the jury, as it would when presented with any other expert witness testimony. But just as the prosecutor seeks to introduce the evidence of the credibility of the confession itself through officers' testimony, and argues that the defense is free to make the argument that the confession is unreliable through cross examination of those witnesses (Plaintiff-Appellee's Brief at page 49), the prosecution would logically have that same ability to cross-examine Drs. Leo and Wendt.

Without the testimony of the experts, the defense is forced to make an otherwise uncorroborated argument regarding how and why false confessions occur. Cross examination alone of the police officers is insufficient to present the defense theory. Evidence about the circumstances of a confession is vital to the defense because "a confession is like no other evidence. Indeed the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him." *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991).

A defendant has the constitutional right to introduce "competent, reliable evidence bearing on the credibility of his confession." *Crane v. Kentucky, supra* at, 690 (exclusion of evidence as to length and manner of interrogation violated fundamental constitutional right to fair opportunity to present defense). In *Crane, supra*, the Supreme Court explained that "the physical and psychological environment that yielded the confession can be of substantial relevance to the ultimate factual issue

of the defendant's guilt or innocence," not just the issue of voluntariness. *Id.* at 689. In addition, the Court recognized that evidence regarding the circumstances of a confession is essential to the defense: "Indeed, stripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?" *Id.*

The right to produce such evidence includes the right to present expert testimony concerning the circumstances of the purported confession. *See, e.g., Terry v. Commonwealth*, 332 S.W.3d 56, 61 (Ky. 2010) (holding reversible error to exclude testimony of Dr. Solomon Fulero because it did not constitute opinion about reliability of defendant's testimony but rather provided scientific evidence about police interrogation techniques that would assist the jury in assessing reliability of defendant's confession); *State v. Myers*, 596 S.E.2d 488, 493–94 (SC 2009) (because trial court had allowed Dr. Kassin to testify about false confessions generally, role of Innocence Project, detail present in some false confessions, and his assessment of techniques used in the defendant's case, not necessary for Dr. Kassin also to testify about specific anecdotes of false confessions); *State v. Cope*, 684 S.E.2d 177, 185 (SC Ct App 2009) (because Dr. Kassin testified regarding study of false confessions, techniques present in false confessions, and "innumerable actual cases" of such confessions, not necessary for Dr. Kassin to testify about specific anecdotes); *Miller v. Indiana*, 770 N.E.2d 763, 774 (Ind 2002) (finding Dr. Ofshe's testimony would have assisted jury in understanding issues outside their common knowledge and experience and would have preserved defendant's right to challenge weight and reliability of primary evidence against him); *Callis v. State*, 684 N.E.2d 233, 239 (Ind Ct App 1997) (finding "the trial court properly admitted Ofshe's testimony regarding the phenomenon of coerced confessions"). *See also Carew v. State*, 817 N.E.2d 281 (Ind

Ct App.2004) (granting postconviction relief and ordering new trial for defendant whose appellate counsel failed to challenge exclusion of false confession expert on ground that such experts are admissible and valuable).

False confessions occur frequently and with devastating consequences for defendants, especially those facing serious charges.<sup>2</sup> Although there is substantial empirical evidence of the phenomenon of false confessions, much of the pertinent research is recent and unfamiliar to potential jurors. In 2008, for example, an analysis of the first 200 individuals exonerated by DNA evidence revealed that 31 (16%) of them had falsely confessed to the crimes of which they were eventually convicted.<sup>3</sup> False confessions are especially implicated in capital cases: of the 14 exonerees in the analysis who had been sentenced to death, 7 (50%) had falsely confessed to the crimes for which they faced execution.<sup>4</sup> Similarly, in an earlier study documenting the root causes of wrongful convictions, 51 (15%) of 340 exonerated individuals had falsely confessed to the crimes of which they were convicted.<sup>5</sup> Of the 51 defendants who falsely confessed, 41 (80%) falsely confessed to murder.<sup>6</sup>

It is impossible to overstate the value of an expert witness on the subject of false confessions

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<sup>2</sup> The infamous “Central Park jogger” case is a particularly vivid example of the catastrophic results of false confessions. All five defendants confessed to the crime; all five served their full sentences. DNA testing subsequently revealed that all five confessions were false, and that they had been wrongly convicted and sentenced.

<sup>3</sup> Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 76 (2008).

<sup>4</sup> *Id.* at 88–89.

<sup>5</sup> Samuel R. Gross, *et al.*, *Exonerations in the United States: 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 529 (2005).

<sup>6</sup> *Id.*

when the false confession is the primary evidence against the accused. Without such experts, the right to present a defense is arbitrarily frustrated and the accused can not receive a fair trial.

The state's argument in the case of Derek Tice, one of the "Norfolk Four" demonstrates a typical state argument in a confession case. The Norfolk Four were pressured to confess to a murder they did not commit. All were subsequently exonerated. In *Tice v. Johnson*, \_\_\_ F. 3d \_\_\_, 2011 WL 1491063 (4<sup>th</sup> Cir. Docket No. 09-8245, decided April 20, 2011), the Fourth Circuit affirmed the grant of a writ of habeas corpus and quoted portions of the prosecutor's argument regarding Tice's confession to demonstrate its devastating effect:

What it comes down to in this case, ladies and gentlemen, is the confession given by the Defendant. Ladies and gentlemen, people confess because they are guilty. They want to get something off their chest. That's as simple as that, that's a perfectly reasonable explanation why somebody confesses.

\* \* \*

*People just do not confess, particularly, to something of this magnitude, this heinous, this vicious, without having participated in it. It's just not natural, it's just not reasonable. People just don't do this, ladies and gentlemen.*

\* \* \*

*[F]or somebody to confess to a crime that the defense alleged in their opening that he didn't commit is just not reasonable....* No, ladies and gentlemen, he confessed because he thought he did it, because he knew he had done it. That's why he told them that he did it... [Y]ou have no reason put before you from this trial that this man was going to confess to this, other than the fact that he did it ... he gave his statement.

\* \* \*

[L]adies and gentlemen, if you don't believe that Omar Ballard did this by himself, then you have to believe that the Defendant was there, and his confession tells you that he was there. There's no other reasonable conclusion to reach in this case, you can't disregard his confession. *Id.* at \*6. (Emphasis added.)

As this sample argument illustrates, without expert testimony a defendant's confession is truly like no other evidence and is likely to be viewed by a jury as the most probative and damaging evidence. *Arizona v. Fulminante, supra.*

The Michigan and federal constitutional rights to compulsory process and to present a defense, and the state statutory right to produce witnesses and proofs in defendant's favor, in a case where the defense maintains a confession was false, includes the right to rebut the prosecution theory and argument that people do not confess to things they have not done, a fact outside the experience and knowledge of a typical juror, through relevant expert testimony.

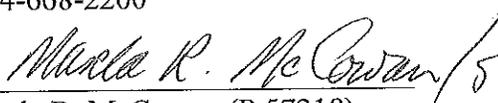
**RELIEF REQUESTED**

For all of the reasons stated herein, Amicus respectfully requests that this Court **REVERSE** the Michigan Court of Appeals' decision and Livingston County Circuit Court Order which precludes Defendant-Appellant from calling Dr. Leo and Dr. Wendt to testify at trial. The experts must be allowed to testify consistent with Mr. Kowalski's right to present a defense at trial and with the rules of evidence.

Dated: October 28, 2011



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