

STATE OF MICHIGAN  
IN THE MICHIGAN SUPREME COURT

Appeal from the Court of Appeals  
Bandstra, P.J., Fort Hood and Davis, JJ.

PEOPLE OF THE STATE OF  
MICHIGAN,

Plaintiff/Appellee,

Michigan Supreme Court Docket No.  
141932

vs.

COA No. 294054

JEROME KOWALSKI,

Livingston CC: 08-017643-FC

Defendant/Appellant.

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**DEFENDANT/APPELLANT'S BRIEF ON APPEAL**

**ORAL ARGUMENT REQUESTED**



TABLE OF CONTENTS

INDEX OF AUTHORITIES..... iii

STATEMENT OF JURISDICTIONAL BASIS..... vii

QUESTIONS PRESENTED ..... viii

I. STATEMENT OF MATERIAL PROCEEDINGS AND FACTS..... 1

    A. BACKGROUND FACTS..... 1

    B. PROCEDURAL FACTS..... 3

II. SUMMARY OF THE ARGUMENT..... 4

III. STANDARD OF REVIEW..... 5

IV. ARGUMENT..... 5

    A) **There is No Dispute That Both Defense Witnesses are Qualified by Knowledge, Skill, Experience, Training and Education to Provide Expert Testimony** ..... 6

    B) **The Testimony of Both Experts is Relevant Because it Will Assist the Jury in Determining Whether Mr. Kowalski’s Statements are Credible**..... 7

        1. **Federal and state precedent clearly establish the relevancy of the proffered evidence** ..... 8

        2. **Dr. Leo’s Testimony will Assist the Jury in Understanding a Phenomenon that is Highly Counterintuitive**..... 9

        3. **Dr. Leo’s Testimony Will Educate the Jury that Police are Trained in Specialized Interrogation Techniques and that Studies Show a Correlation Between these Techniques and False Confessions** ..... 16

4.	<b>At a Minimum Dr. Leo is Qualified to Testify as an Expert on Police Interrogation Techniques .....</b>	<b>18</b>
5.	<b>Dr. Wendt’s Testimony is Relevant to the Weight and Credibility that Should be Accorded By the Jury to Mr. Kowalski’s Statements .....</b>	<b>19</b>
C)	<b>Dr. Leo’s Testimony Meets the Daubert Standards for Reliability ..</b>	<b>23</b>
1.	<b>Dr. Leo’s Testimony is Based on Sufficient Facts or Data.....</b>	<b>24</b>
2.	<b>Dr. Leo’s Testimony is a Product of Reliable Principles and Methods .....</b>	<b>26</b>
D)	<b>Dr. Leo’s Testimony Applies Principles and Methods Concerning Police Interrogation and False Confessions Which are Relevant and Reliable to the Facts of this Case .....</b>	<b>34</b>
E)	<b>The Probative Value of the Expert’s Testimony is not Substantially Outweighed by any Prejudicial Impact.....</b>	<b>36</b>
V.	<b>ARGUMENT.....</b>	<b>39</b>
	<b>CONCLUSION AND REQUEST FOR RELIEF.....</b>	<b>49</b>

## INDEX OF AUTHORITIES

### Cases

<i>Arizona v Fulminante</i> , 499 US 279, 296 (1991).....	9, 49
<i>Bradbury v Ford Motor Company</i> , 123 Mich App 179 (1983) .....	36
<i>California v Trombetta</i> , 467 US 479 (1984).....	45
<i>Callis v State</i> , 684 NE2d 233 (Ind Ct App 1997) .....	20
<i>Chambers v Mississippi</i> , 410 US 284 (1973).....	42, 46, 48
<i>Chapin v A &amp; L Parts, Inc.</i> , 274 Mich App 122 (2007) .....	24, 46
<i>Colorado v Connelley</i> , 479 US 157 (1986) .....	9
<i>Corey v United States</i> , _____ US _____; 129 S Ct 1558 (2009) .....	10, 25
<i>Crane v Kentucky</i> , 476 US 683 (1986) .....	passim
<i>Daubert v Merrell Dow Pharmaceuticals, Inc.</i> , 519 US 579 (1993).....	passim
<i>Gilbert v Daimler Chrysler Inc.</i> , 470 Mich 749 (2004) .....	24, 28, 46
<i>Green v Texas</i> , 55 SW3d 633 (Tex App 2001) .....	30
<i>Holmes v South Carolina</i> , 547 US 319 (2006).....	45
<i>Hopp v Utah</i> , 110 US 574 (1884) .....	9
<i>Larabee v M &amp; M L Int'l Corp.</i> , 896 F.2d 1112 (8 <sup>th</sup> Cir 1990) .....	14
<i>Miranda v Arizona</i> , 384 US 436 (1966).....	16
<i>Miskel v Karnes</i> , 397 F3d 446 (6th Cir 2005).....	49
<i>People v Bahoda</i> , 448 Mich 261 1995).....	40
<i>People v Beckley</i> , 434 Mich 691 (1990) .....	28
<i>People v Christel</i> , 449 Mich 578 (1995) .....	12
<i>People v Daoust</i> , 228 Mich App 1 (1998).....	13
<i>People v Hamilton</i> , 163 Mich App 661 (1987) .....	passim

<i>People v Lukity</i> , 460 Mich 484 (1999).....	13
<i>People v Martin</i> , 271 Mich App 280 (2006).....	5
<i>People v Mills</i> , 450 Mich 61 (1995).....	36
<i>People v Peterson</i> , 450 Mich 349 (1995).....	12
<i>People v Smith</i> , 425 Mich 98 (1986) .....	6, 19
<i>People v Unger</i> , 278 Mich App 210 (2008) .....	46
<i>People v Washington</i> , 468 Mich 667 (2003) .....	5
<i>People v Watkins</i> , 438 Mich 627, 684 (1991).....	10
<i>People v Wilson</i> , 194 Mich App 599 (1992).....	13
<i>People v Young</i> , 276 Mich App 446 (2007) .....	5
<i>Rock v Arkansas</i> , 483 US 44 (1987).....	44, 46, 48
<i>Rosen v United States</i> , 245 US 467 (1918).....	42
<i>State v Buechler</i> , 572 NW2d 65 (1998) .....	21
<i>State v King</i> , 387 NJ Super, 522 .....	21
<i>State v Oliver</i> , 280 Kan 681 .....	20
<i>Tolksdorf v Griffith</i> , 464 Mich 1 (2001).....	5
<i>Tyus v Urban Search Management</i> , 102 F3d 256 (7 <sup>th</sup> Cir 1996) .....	31
<i>United States v 14.38 Aces of Land Situated in LeFlore County, Mississippi</i> , 80 F 3d 1074 (5 <sup>th</sup> Cir 1996) .....	24
<i>United States v Beylea</i> , 159 F. App'x 525 (4 <sup>th</sup> Cir 2005) .....	11
<i>United States v Blackwell</i> , 459 F3d 739 (6 <sup>th</sup> Cir 2006) .....	49
<i>United States v Hall</i> , 93 F 3d 1137 (7 <sup>th</sup> Cir 1996) .....	passim
<i>United States v Jones</i> , 107 F 3d 1147 (6 <sup>th</sup> Cir 1997).....	33
<i>United States v Roark</i> , 753 F 2d 991 (11 <sup>th</sup> Cir 1985).....	20

<i>United States v Scheffer</i> , 523 US 303 (1998).....	48, 49
<i>United States v Shay</i> , 57 F.3d 126 (1 <sup>st</sup> Cir 1995).....	11, 20
<i>Washington v Schriver</i> , 255 F 3d 45 (2d Cir 2001) .....	49
<i>Washington v Texas</i> , 388 US 14 (1967).....	passim
<i>Yaldo v Northpointe Ins Co</i> 217 Mich App 617 (1996).....	5
<b>Statutes</b>	
MCL 750.227b.....	1
MCL 750.316.....	v, 1
<b>Other Authorities</b>	
<i>Chojnacki, Cicchini and White</i> , An Empirical Basis for Admission of Expert Testimony and False Confessions, 40 Arz St LJ 1, (2008).....	17
CJI2d 20.29.....	38
CJI2d 5.10 .....	38
<i>Danielle E. Chojnacki, et al.</i> , An Empirical Basis for Admission of Expert Testimony and False Confessions, 40 Arz St LJ 1 (2008) .....	11
<i>Inbau &amp; Reid Criminal Interrogation and Confessions</i> (1962).....	17
J. Weinstein & M. Berger, Weinstein’s Evidence §702 (02) (1988).....	14
Jessica R. Meyer & N. Dikon Reppucci, Police Practices and Perceptions Regarding Juvenile Interrogation and Interrogative Suggestibility, 25 Behav Sci. & L., 757 (2007).....	10
<i>Judging Science After Daubert: Issues, Assumptions, Models</i> , Sheila Jasanoff, <i>MTLA Quarterly</i> , Spring 1998.....	32
<i>Ladd</i> , Expert Testimony, 5 Van L Rev 414 (1952) .....	8
Mark J. Mahoney, The Right to Present a Defense (November 29 rev) .....	48
<i>McCormick</i> , Evidence (3 <sup>d</sup> ed) .....	6
Moore’s Federal Practice §804.01[12.6].....	10

<i>People v Ball</i> , unpublished opinion per curium of the Court of Appeals issued September 23, 2008, Docket No. 280601 .....	13
<i>People v Barnard</i> , unpublished opinion per curium of the Court of Appeals, issued April 19, 2007 Docket No. 265068.....	13
<i>People v Hensley</i> , unpublished opinion per curium of the Court of Appeals issued July 22, 2008, Docket No. 272688 .....	13
Police Induced Confessions: Risk Factors and Recommendations .....	25
Psychology of Confessions: A Review of the Literature and Issues, by Sal Kassin and Gisli Gudjonsson.....	25
Richard A. Leo, <i>Police Interrogation and American Justice</i> , Harvard University Press (2008).....	10
Saul M. Kassin, <i>Expert Testimony on the Psychology of Confessions: A Pyramidal Framework of the Relevant Science, in Borgida &amp; Fiske's Beyond Common Sense: Psychological Science in the Courtroom</i> (2008) .....	28
Steven A. Drizin & Richard A. Leo, the Problem of False Confessions in the Post DNA World, 82 N.C.L. Rev 891 (2004).....	10, 25
Westen, <i>The Compulsory Clause</i> , 73 Mich L R 71 .....	41
<b>Rules</b>	
FRE 403 .....	20
FRE 702 .....	7, 24, 31, 35
FRE 804(b)(3).....	10
MCR 7.301(A)(2) .....	v
MRE 401-402.....	36
MRE 403 .....	36, 37
MRE 702 .....	passim
MRE 804(b)(3).....	10
<b>Constitutional Provisions</b>	
Const 1963, art 1, § 17 .....	18, 39
Fourteenth Amendment .....	43, 49
Sixth Amendment .....	passim
US Const, Amend VI .....	39

## STATEMENT OF JURISDICTIONAL BASIS

This Court has jurisdiction over this appeal pursuant to MCR 7.301(A)(2).

This is an interlocutory appeal. Defendant-Appellant, Jerome Kowalski, is charged in a criminal Information with two counts of murder in violation of MCL 750.316. On August 24, 2009, the trial court entered an order granting the prosecution's motion to strike defendant's proposed expert witnesses. (53a) Defendant brought an Application for Leave to Appeal in the Court of Appeals and for Stay of Proceedings. Both the stay and application requests were granted. On August 26, 2010, the Court of Appeals issued an unpublished Opinion affirming the order entered by the trial court. (54a).

Defendant then brought an Application for Leave to Appeal from the Court of Appeals decision, and by order dated March 25, 2011, this Court granted Defendant's Application for Leave to Appeal. Defendant-Appellant requests this Court to reverse the Court of Appeals decision and order that the trial court permit Defendant to call Drs. Wendt and Leo as witnesses on his behalf at the trial in this matter.

**QUESTIONS PRESENTED.**

IS DEFENDANT'S PROFFERED EXPERT TESTIMONY REGARDING THE EXISTENCE OF FALSE CONFESSIONS, THE INTERROGATION TECHNIQUES THAT TEND TO GENERATE THEM, AND DEFENDANT'S PSYCHOLOGICAL FACTORS THAT MAKE HIM SUSCEPTIBLE TO THOSE TECHNIQUES, ADMISSIBLE UNDER MRE 702?

WILL DEFENDANT'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE BE VIOLATED IF HE IS PRECLUDED FROM CALLING TWO EXPERT WITNESSES AT HIS MURDER TRIAL: ONE TO DISPEL THE COMMON MISPERCEPTION THAT A PERSON WOULD NOT CONFESS TO A CRIME HE OR SHE DID NOT COMMIT, AND THE SECOND TO EXPLAIN THE PSYCHOLOGICAL FACTORS THAT MADE HIM MORE COMPLIANT AND SUSCEPTIBLE TO SUGGESTIVE POLICE QUESTIONING?

**I. STATEMENT OF MATERIAL PROCEEDINGS AND FACTS**

**A. BACKGROUND FACTS**

Jerome Kowalski (Mr. Kowalski) is charged by way of Criminal Information with two counts of murder, MCL 750.316, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. The charges relate to the deaths of his brother, Richard Kowalski, and his sister-in-law, Brenda Kowalski. Both died of multiple gunshot wounds. They were found in their home by Brenda Kowalski's son, Michael Reilly ("Reilly"), on May 1, 2008. (130-131a, 164a, 166a)

Immediately after Reilly's discovery, the police commenced an investigation. (201a) They first questioned Mr. Kowalski at his home on May 1, 2008. Four days later, they requested him to come to the station for follow up questioning. (64a) Mr. Kowalski went to the Brighton Police Station on May 6, 2008 where police officers questioned him for approximately two hours, after which they informed him that they wanted him to take a polygraph examination so they could confirm that he had nothing to do with the killings, and to "clear him of this for our knowledge so we're not wasting any more time". (73a) Mr. Kowalski agreed to take the polygraph. (73-74a)

He was transported to the Ann Arbor Police Department for the test. Two officers observed the pre-test process from an observation room. Initially they only listened, but approximately one hour into the pre-test interview they decided to audio record the procedure after Mr. Kowalski made statements that one of the officers found "concerning." (77-78a) (84-86a) Mr. Kowalski told the polygrapher that he had a dream that he shot his brother. According to the polygrapher, "Mr. Kowalski opened the door by mentioning that." (97a) This disclosure was not recorded.

The results of the polygraph were inconclusive. (81a) Afterward, the two officers questioned Mr. Kowalski for another hour and a half, then arrested him. (89-92a) He was transported to the jail and lodged. (100a) The next day, Detectives Furlong and Poulson, two officers who had not participated in any of the prior interrogations, questioned him for another five and one half hours.<sup>1</sup> (101a, 117a)

On May 8, 2008, Mr. Kowalski was arraigned on the charges. A Preliminary Examination was held on September 11, 2008. At the exam, the prosecution called three witnesses: Reilly, who testified that he discovered the bodies in the kitchen of the home; the Medical Examiner, who described the cause of both deaths as multiple gunshot wounds; and Detective Furlong, who summarized incriminating statements made by Mr. Kowalski during the course of the five and one-half hour interrogation. (224-229a) There was no physical evidence introduced at the Preliminary Examination linking Mr. Kowalski to the homicide scene. The case was bound over based entirely on Mr. Kowalski's statements as testified to by Det. Furlong.

Mr. Kowalski filed a Motion to Suppress Statements which the trial court denied after an evidentiary hearing. Pursuant to the trial court's Scheduling Order, Defendant filed a Notice of Proposed Expert Witness Testimony. (1a) The notice identified two expert witnesses: (1) Dr. Richard Leo, a social psychologist, who would testify that false confessions occur, that certain police interrogation techniques are associated with them, and that some of those techniques were used in this case; and, (2) Dr. Jeffrey Wendt, a clinical psychologist, who would testify that he conducted a psychological evaluation of Mr. Kowalski and determined his mental state and personality factors, and that these left him abnormally vulnerable and suggestive to police questioning.

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<sup>1</sup> Videotapes of over twelve hours of interrogation were admitted as an exhibit at the "Walker Hearing" held on April 2, 2009. (109-110a)

At the prosecution's request, the trial court conducted a "*Daubert* hearing", at which Drs. Leo and Wendt both testified. The prosecution called no witnesses. The court concluded that the methodology underlying Dr. Leo's research was unreliable and that his testimony was not helpful or relevant. The trial court further determined that since Dr. Leo would not be allowed to testify, Dr. Wendt's testimony was not relevant. The testimony from the *Daubert* hearing is included in the argument where relevant.

**B. PROCEDURAL FACTS**

On August 6 and 10, 2009, the trial court held a "*Daubert*" hearing" at which Mr. Kowalski's expert witnesses testified. On July 27, 2009, the trial judge read her opinion granting the People's motion to exclude the testimony of both witnesses. The order granting the People's Motion was entered on August 24, 2009. (53a)

On September 14, 2009, Defendant filed an Emergency Application for Leave to Appeal along with a Motion for Stay of Proceedings and Motion for Immediate Consideration in the Michigan Court of Appeals. Plaintiff filed its response on October 2, 2009. On October 12, 2009 the Court of Appeals granted the Motion for Immediate Consideration, the Application for Leave to Appeal and the Motion for Stay Pending Appeal. The parties submitted their briefs on appeal and The Innocence Network filed an *amicus curie* brief in support of Mr. Kowalski.

On August 26, 2010 the Court of Appeals issued an unpublished per curium opinion affirming the trial court order striking defendant's witnesses. Judge Alton Davis filed a separate opinion concurring in part and dissenting in part, holding that Dr. Leo should be allowed to give limited testimony and to testify that contrary to general knowledge and belief, people do confess falsely even in the absence of torture or mental illness, and that Dr. Wendt's testimony should be

admitted independent of Dr. Leo's. On March 25, 2011 this Court entered its Order granting Mr. Kowalski's Application for Leave to Appeal.

## **II. SUMMARY OF THE ARGUMENT**

Mr. Kowalski faces two charges of murder. His defense is that he did not commit the killings and that there is no physical or scientific evidence proving that he did. The strength of the prosecution's case hinges on incriminating statements he made in response to questioning by police.

A confession that may be considered "voluntary," and therefore admissible into evidence, does not conclusively establish actual guilt. Psychologists and sociologists have conducted extensive research and studies concerning the phenomenon of false confessions and although the precise prevalence rate is unknown, it is clear that they occur with some degree of regularity. Still the common misperception amongst jurors is that a person would not falsely confess to a crime if he were innocent.

The defense intends to call two expert witnesses to help explain why the instant statements should not be believed; (1) Dr. Richard Leo, a social psychologist and researcher to explain that, counter to the common belief that no innocent person confesses to a crime he did not commit, sometimes people do make false confessions, and that research shows a number of police interrogation techniques are associated with false confessions; and, (2) Dr. Jeffrey Wendt, a licensed clinical psychologist, who conducted a standard psychological evaluation of Mr. Kowalski and determined that his personality characteristics and mental state made him particularly vulnerable to police questioning and suggestion. This evidence will enable the jury to better assess the reliability and credibility of his statements and is necessary to rebut the claim that the defendant would not have made the statements unless they were true.

### III. STANDARD OF REVIEW

Constitutional issues are reviewed *de novo*. See, e.g. *Tolksdorf v Griffith*, 464 Mich 1, 5; 626 NW2d 163 (2001); *Yaldo v Northpointe Ins Co*, 217 Mich App 617, 623; 552 NW2d 657 (1996).

A trial court's evidentiary decisions are reviewed for an abuse of discretion. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006). A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes. *People v Young*, 276 Mich App 446, 448; 740 NW2d, 347 (2007). If, however, this court's inquiry into the admissibility of evidence entails a preliminary question of law, such as whether the Michigan Rules of Evidence or statutory provisions preclude admissibility, or an issue concerning construction of an underlying evidentiary rule or statute, this court reviews the matter *de novo*. *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003). The determination of whether the opinion of the expert is properly the subject of scientific technical or other specialized knowledge is a question of law that this court should review *de novo*. Additionally, the gate-keeping function under Rule 702; i.e., whether the testimony offered, possesses the necessary "reasoning or methodology" should likewise be reviewed *de novo*.

### IV. ARGUMENT

**DEFENDANT'S PROFFERED EXPERT TESTIMONY REGARDING THE EXISTENCE OF FALSE CONFESSIONS, THE INTERROGATION TECHNIQUES THAT TEND TO GENERATE THEM, AND DEFENDANT'S PSYCHOLOGICAL FACTORS THAT MAKE HIM SUSCEPTIBLE TO THOSE TECHNIQUES, IS ADMISSIBLE UNDER MRE 702**

The admissibility of expert witness testimony is governed by MRE 702, which states:

If the court determines that scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by

knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The determination of when such testimony is admissible lies within the discretion of the trial court and will vary according to the area at issue and the particular facts of the case. *People v Smith*, 425 Mich 98, 106; 387 NW2d 814 (1986). “Generally, the testimony must assist the jury in understanding the evidence or factual issues, and the witness must have sufficient qualifications ‘as to make it appear that his opinion or inference would probably aid the trier in the search for truth’.” *Id.* at 106 citing *McCormick*, Evidence (3<sup>d</sup> ed), §13, page 33.

MRE 702 identifies three necessary prongs for admissibility of expert testimony: the expert must be qualified and his or her testimony must be relevant and reliable.

A) **There is No Dispute That Both Defense Witnesses are Qualified by Knowledge, Skill, Experience, Training and Education to Provide Expert Testimony**

The trial court concluded both defense experts qualify as experts. Their credentials are impeccable. Dr. Leo’s qualifications are obvious and uncontroverted – a fact the trial court acknowledged: “I don’t really believe that there is a dispute as to his qualifications as someone who is knowledgeable in the field of police interrogation techniques or in the field of confessions.” (642-643a) Dr. Leo is a professor of law at the University of San Francisco. He possesses a Bachelor’s Degree in Sociology from University of California at Berkley; a Master’s Degree in Sociology from University of California at Berkley; a Master’s Degree in Sociology from the University of Chicago; a Ph.D. in the interdisciplinary law and social science program at University of California at Berkley; and a Juris Doctorate from the University of California at Berkley. (268a)

Over the course of his career, Dr. Leo studied between 2,000 – 3,000 police interrogations. (273a) He wrote his doctoral dissertation on Police Interrogation in America in the 20<sup>th</sup> Century, for which he viewed approximately 122 live or recorded police interrogations. (273a) He also attended and participated in numerous police interrogation training programs-- introductory and advanced -- and has given lectures to, and conducted training sessions for numerous police departments. (375-376a) He has published over 55 articles on the subject of police interrogation techniques and false confessions and has received numerous professional awards for his work. He has far more interviewing and interrogation training than most police detectives. (375a) From 1997 to present, he has testified as an expert approximately 182 times, in 26 different states. Two-thirds of his appearances were before juries or at bench trials. The remainder involved pretrial motions and post-conviction proceedings. (331-332a)

Similarly well-qualified, Dr. Wendt is a practicing, licensed clinical psychologist and was previously employed by the State of Michigan at the Center for Forensic Psychiatry in Ann Arbor. Through his work at the Center and his private practice, he has evaluated over one thousand criminal defendants for competency and responsibility. (481a)

**B) The Testimony of Both Experts is Relevant Because it Will Assist the Jury in Determining Whether Mr. Kowalski's Statements are Credible**

In determining whether an expert's opinion will assist the trier of fact, the Advisory Committee Note to Federal Rule of Evidence ("FRE") 702<sup>2</sup> states:

Whether the situation is a proper one for use of expert testimony is to be determined on the basis of assisting the trier. "There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be

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<sup>2</sup> The staff comment to the 2003 amendment to MRE 702 states that it conforms to Rule 702 of the FRE, as amended effective December 1, 2000, except that the Michigan rule retains the words "If the court determines that " at the outset of the rule.

qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having specialized understanding on the subject involved in the dispute.” *Ladd*, Expert Testimony, 5 Van L Rev 414, 418 (1952).

1. **Federal and state precedent clearly establish the relevancy of the proffered evidence**

Both federal and state courts have held that where the prosecution relies on a confession, expert testimony about the circumstances of the confession, and the psychological makeup of the confessor, are relevant. In *Crane v Kentucky*, 476 US 683, 106 S Ct 2142, 90 L Ed 2d 636 (1986) the defendant sought to introduce testimony regarding the psychological impact of the length of his interrogation and the manner in which it was conducted. The trial court had denied the defendant’s motion to suppress the statement, and at trial, excluded evidence the defendant attempted to introduce to show the confession was unworthy of belief. A unanimous Supreme Court reversed the defendant’s conviction, holding that the exclusion of this evidence deprived the defendant his fundamental constitutional right to present a defense. 476 US at 687. The Court held that while the issue of the voluntariness of a confession is a question of law for the court, the jury was entitled to hear the excluded testimony in order to make a factual determination as to whether the manner in which the confession was obtained cast doubts on its credibility. *Id* at 689. It had no hesitation in finding that the evidence had the utmost relevance to a pivotal issue at trial.

The manner in which the statement was extracted is . . . relevant to the purely legal question of its voluntariness, a question most, but not all, states assign to the trial judge alone to resolve. But the physical and psychological environment that yielded the confession can also be of substantial relevance to the ultimate fact issue of the defendant’s guilt or innocence. Confessions, even those that have been found to be voluntary, are not conclusive of guilt. And, as with any other part of the prosecutor’s case, a confession may be shown to be insufficiently corroborated or otherwise unworthy of belief. *Id.* at 668.

Michigan has explicitly applied the principle of *Crane* to permit expert testimony about a defendant's psychological makeup and internal psychological characteristics impacting on the reliability of the confession. In *People v Hamilton*, 163 Mich App 661; 415 NW2d 653 (1987), a case on all fours with the instant case as to the admissibility of Dr. Wendt's testimony, the Court of Appeals reversed a murder conviction because the trial court excluded testimony by a clinical psychologist about the defendant's psychological makeup and how it might have influenced his making a statement to the police. The court stated, "*Crane* did not concern evidence of the defendant's psychological makeup, but focused instead on the physical and psychological aspects of an interrogation. Nonetheless, we believe the United States Supreme Court's reasoning is equally applicable to other admissible expert testimony." *Id* at 655. The evidence was relevant in *Crane* and *Hamilton*, and it is equally relevant and admissible here.

2. **Dr. Leo's Testimony will Assist the Jury in Understanding a Phenomenon that is Highly Counterintuitive.**

"[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 US 279, 296; 111 S Ct 1246; 113 L Ed 2d 302 (1991). Confessions exert a strong persuasive hold over fact finders because most people believe that "one who is innocent will not imperil his safety or prejudice his interest by an untrue statement." *Hopp v Utah*, 110 US 574, 585; 4 S Ct 202; 28 L Ed 262 (1884). Triers of fact accord confessions such heavy weight in their determinations that "the introduction of a confession makes other aspects of a trial in court superfluous, and the real trial, for all practical purposes, occurs when a confession is obtained." *Colorado v Connelley*, 479 US 157, 182; 107 S Ct 515; 93 L Ed 2d 473 (1986) (Justice Brennan dissenting).

So well entrenched is this concept, that the rules of evidence include, as an exception to the hearsay rule, a statement against penal interest. See, MRE 804(b)(3). As explained in the Advisory Committee Notes to FRE 804(b)(3), “the circumstantial guarantee of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for a good reason that they are true.” *People v Watkins*, 438 Mich 627, 684; 475 NW2d 727 (1991) citing notes of Advisory Committee, as reported in Moore’s Federal Practice §804.01[12.6].

Once considered a near universal truth, this belief has been exposed as a myth in recent years. See, e.g., *Corey v United States*, \_\_\_\_\_ US \_\_\_\_; 129 S Ct 1558, 1570; 173 L Ed 2d 443 (2009) citing Steven A. Drizin & Richard A. Leo, the Problem of False Confessions in the Post DNA World, 82 N.C.L. Rev 891, 907 (2004) for the proposition that “mounting empirical evidence” shows that “a frighteningly high percentage of people” falsely confess. To date, 242 individuals have been exonerated on the basis of DNA testing after having been convicted of crimes they did not commit; approximately one-quarter of those individuals falsely confessed to the crimes in question.<sup>3</sup> See, the Innocence Project, <http://www.innocenceproject.org/understand/falseconfessions.php>.

False confessions, however, are still poorly understood by the general populous. People find it extraordinarily difficult to understand why an innocent person would ever confess to a

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<sup>3</sup> This statistic does not include false confessors who had been exonerated on the basis of non DNA evidence or false confessors who have yet to be exonerated. To date, scholars have uncovered at least 250 false confessions made over the last 20 years, and there are likely many more individuals who have falsely confessed whose stories are simply not known. See Richard A. Leo, *Police Interrogation and American Justice*, Harvard University Press (2008) p. 243. In a 2007 survey, law enforcement officers estimated that about 10% of all interrogations result in false confessions. Jessica R. Meyer & N. Dikon Reppucci, *Police Practices and Perceptions Regarding Juvenile Interrogation and Interrogative Suggestibility*, 25 Behav Sci. & L., 757, 770 (2007).

crime. See, e.g., *Danielle E. Chojnacki, et al.*, An Empirical Basis for Admission of Expert Testimony and False Confessions, 40 *Arz St LJ* 1 (2008). False confessions are counterintuitive because, “[C]ommon understanding conforms to the notion that a person ordinarily does not make untruthful inculpatory statements.” *United States v Shay*, 57 F 3d 126, 133 (1<sup>st</sup> Cir 1995).

As one federal court explained:

Jurors may not know, however, that people lie on occasion to their own detriment by falsely confessing to crimes they did not commit. The phenomenon of false confessions is counterintuitive. It is not necessarily explained by the general proposition that “jurors know people lie”. *United States v Beylea*, 159 F. App’x 525, 529 (4<sup>th</sup> Cir 2005).

While the proposition that people do not lie to get themselves into trouble may be generally true, the occasions on which it does happen are frequent enough, and the ramifications so significant, that testimony explaining this fact as well as the subtle, and not-so-subtle, coercive pressures built into the interrogation process will be helpful to a jury. Dr. Leo explained:

First, it’s counterintuitive that an innocent person who isn’t being tortured or isn’t mentally ill would falsely confess. Empirical studies have shown that most people are very skeptical when they hear that. They don’t believe that they themselves would falsely confess and therefore, they don’t believe that others would falsely confess unless they were tortured or mentally ill. But another piece of this is that they don’t know that police are trained in interrogation, psychological interrogation methods. They don’t know what those methods are. They don’t know how those methods are designed to work. They don’t know what the research shows about how those methods work. They don’t know what the research shows about which methods are coercive and why, and how and why some of those methods can lead innocent individuals to falsely confess. They don’t know about the research on false confessions, but also on personality traits that we discussed earlier. So, so one piece of this is that it’s a very counterintuitive phenomena that people are skeptical about and they, they aren’t aware of how frequently it occurs, or at least that it occurs, and the other piece of it is that they’re not aware of research that analyzes and explains this and they’re not aware of the causes: police interrogation methods or the personality factors that can predispose someone during an interrogation to falsely confess. (296-297a)

The prosecution will undoubtedly argue to the jury a notion that is widely held: that people do not lie to get themselves into trouble. To counter the argument, Dr. Leo will provide information to dispel the common misperception that people simply do not confess to a crime they did not commit. He will also identify for the jury a number of risk factors, including police interrogation techniques and psychological factors, associated with false confessions. He will not testify that Mr. Kowalski's statements are false or that that the jury is not to believe them. Rather, that determination will remain solely and fully in the jury's domain.

The testimony offered is no different than that routinely offered in abuse cases for the purpose of explaining a victim's behavior that might otherwise be incorrectly construed by the jury as inconsistent with that of an abuse victim or, to rebut an attack on a victim's credibility. See, *People v Peterson*, 450 Mich 349, 537 NW 2d 857 (1995). In *Peterson*, this Court recognized that "in child sexual abuse cases, we have previously determined that expert testimony concerning syndrome evidence is sometimes necessary to explain behavioral signs that may confuse a jury so that it believes that the victim's behavior is inconsistent with that of an ordinary victim of child sexual abuse." *Id* at 362. "It is undisputed that the expert witness' testimony in each of these cases 'assisted the trier of fact to understand the evidence or to determine a fact in issue' in accordance with MRE 702." *Id* at 363. The Court reasoned that because there was a common misconception among lay jurors that a victim of sexual abuse would immediately report the incident, the prosecutor may present limited expert testimony dealing with the misperception. *Id* at 379. The exact same rationale applies here.

Similarly, this Court has held that the introduction of expert testimony regarding battered woman syndrome as it applied to the complainant is admissible. *People v Christel*, 449 Mich 578, 537 NW 2d 194 (1995):

Generally, battered woman syndrome is relevant and helpful when needed to explain a complainant's actions, such as prolonged endurance of physical abuse accompanied by attempts at hiding or minimizing the abuse, delays in reporting the abuse, or recanting allegations of abuse.

As stated in MRE 702 the issue is merely whether the proposed expert testimony "will assist the trier of fact". Dr Leo's testimony serves the very same purpose as the expert testimony in all the above cases; to explain behavior that a jury might otherwise misinterpret. See also, *People v Lukity*, 460 Mich 484, 500-502, 596 NW 2d 607 (1999) (clinical director of child adolescent unit of psychiatric facility testified about characteristics that fit within a sexual abuse victim profile); *People v Daoust*, 228 Mich App 1, 577 NW 2d 179 (1998) (testimony from executive director of domestic violence center regarding battered woman syndrome found relevant and helpful to explain why mother might have initially sought to deflect blame for daughter's injuries away from defendant); *People v Wilson*, 194 Mich App 599, 487 NW 2d 822 (1992) (affirming trial court's interlocutory order permitting introduction of expert testimony regarding a description of battered spouse syndrome).<sup>4</sup>

The Court of Appeals rejected the comparison to testimony offered in abuse cases because "Unlike expert testimony on battered women syndrome, where an expert can link specific behavioral traits of a female witness to the specific, widely known and accepted syndrome, neither of defendant's proposed experts could link police interrogation techniques or personality traits to false confessions." (60a) In truth, the court's criticism was not that

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<sup>4</sup> See also, *People v Ball*, unpublished opinion per curium of the Court of Appeals issued September 23, 2008, Docket No. 280601 (limited license social worker allowed to testify concerning delays in reporting sexual assaults, as it explained behavior that a jury might otherwise misinterpret); *People v Hensley*, unpublished opinion per curium of the Court of Appeals issued July 22, 2008, Docket No. 272688 (clinical social worker allowed to testify to typical and relevant symptoms of child sexual abuse); *People v Barnard*, unpublished opinion per curium of the Court of Appeals, issued April 19, 2007 Docket No. 265068 (social worker allowed to testify that delayed reporting is a common trait among victims of child abuse.)

Defendant's experts could not link police interrogation techniques to false confessions, but that they could not do so to the exclusion of true confessions. In other words, because Dr. Leo cannot predict what interrogation techniques will cause false confessions, his testimony has no value. Interestingly, experts on battered women syndrome and on symptoms of child sexual abuse have never been held to such a stringent standard.

The Court of Appeals also assumed – in the face of contradictory evidence – that Dr. Leo's testimony would not assist the jury because it “would not have involved the proposition that was outside the common knowledge of a lay person.” (56a) Not only was the court's assumption wrong, but even if the subject of the proposed testimony overlaps with the common knowledge or understanding of the jury, the court is not compelled by the rule to preclude the testimony. *United States v Hall*, 93 F 3d 1137, 1342 (7<sup>th</sup> Cir 1996). Evidence on matters about which jurors have common knowledge, may be helpful in establishing that those beliefs are unfounded. *Id* at 1345. Even if the trial court doubts the usefulness of the proffered expert testimony, the issue, “should generally be resolved in favor of admissibility.” *Larabee v M & M L Int'l Corp.*, 896 F 2d 1112, 1116 n.6 (8<sup>th</sup> Cir 1990) (quoting J. Weinstein & M. Berger, Weinstein's Evidence §702 (02) at 702-730 (1988)).

The Court of Appeals also found that Dr. Leo's testimony would not assist the jury because “the interrogation was recorded and the jury will be able to review the recordings at trial.” (57a) The court apparently adopted the trial court's finding that because a video tape exists, the jury would have before it all that it needed to “determine whether the confession is reliable” (674a). This finding assumes that seeing the video tape will automatically and magically diffuse what is known to be counterintuitive. Realistically, an average juror viewing an actual interrogation (undoubtedly for the first time) cannot readily discern a false confession

from a true one, or recognize the techniques being employed by the police absent some expert guidance. Dr. Leo cited a study that specifically addressed these issues:

. . . Number forty-seven: I'd Know a False Confession if I Saw One: A Comparative Study of College Students and Police Investigators – even though it doesn't say testing in the title, what it is testing is the common belief that people, that people think they could recognize a false confession, which turns out to be false. They studied both college students and police investigators and found that if you show them both true and false confessions, they basically can't tell the difference and often will say the ones that are false are true. So they don't know a false confession if they see one. (342a)

Moreover, it is always the case that the jury can review the evidence. That is not a reason to exclude expert testimony. Rather, the expert testimony helps the jurors understand what they are reviewing. By way of example, a court could not exclude an expert's testimony about the intricacies and meaning of complex financial statements on the ground that the jurors could just review the statements themselves. Here, the significant point is that jurors will not fully understand what they are viewing on the videotape without hearing from defendant's experts.

Additionally, however, not all of Mr. Kowalski's statements to the police were recorded. While most of the interrogations are either video or audio taped, his initial dream disclosure, or the "I did it" portion, was not. It was during this most crucial unrecorded moment of the "pre-test interview" that Mr. Kowalski stated he woke up and thought he had a dream that he killed his brother and sister-in-law. (12a, 97a) Only after this revelation, which was approximately a full hour into the pre-test interview procedure, did any officer decide to begin recording. (86a) Thus, contrary in part to the trial court's finding, the jury will not be able to see or hear the single most important portion of the entire interrogation process, which ultimately spanned two days.

3. **Dr. Leo's Testimony Will Educate the Jury that Police are Trained in Specialized Interrogation Techniques and that Studies Show a Correlation Between these Techniques and False Confessions**

In addition to assisting jurors understand that false confessions, while counter-intuitive, do occur, Dr. Leo's testimony is also necessary because jurors typically know very little about false confessions, how and why they occur or how interrogation techniques can lead to them. (351-352a) A study published in the Journal of Empirical Legal Studies specifically found that false confessions are counterintuitive and the beliefs that lay people maintain about interrogation and confessions are not at all consistent with the scientific literature. In fact, this study showed that about 75% of surveyed potential jurors indicated that expert testimony in the area would be helpful, and only 11% - 13% thought that it would not. (465a) Thus, the proffered testimony is something potential jurors themselves already deem useful.

Most people are unaware police are trained in specialized interrogation methods, how those methods are designed to work as a psychological process, how or why they could be psychologically coercive and more importantly, how and why they can lead to false confessions. (296a) Dr. Leo has written about jurors' knowledge of police interrogation techniques and false confessions and has personally conducted two published and peer reviewed survey studies. Both find that jurors are unaware of the link between interrogation techniques and false confessions and in fact are skeptical about the idea of false confessions. (297-298a) Jurors believe that false confessions do not occur unless someone is physically tortured or mentally ill and tend to assume all confessions in the absence of torture or mental illness are therefore true. (296a)

As early as 1966, in *Miranda v Arizona*, 384 US 436, 86 S Ct (1966) the Supreme Court recognized that "the modern practice of in-custody interrogation is psychologically rather than

physically oriented.” *Id.* at 448 The court noted that the methods described in *Inbau & Reid Criminal Interrogation and Confessions* (1962) reflected, what were believed at the time, to be the most effective psychological stratagems to employ during interrogation. *Id.* at 449 fn 9. The “*Reid Technique*” which includes a nine-step interrogation process is a registered trademark of John E. Reid & Associates, a firm that offers training courses in its methods to police departments throughout the United States. The current Michigan State Police website lists the Basic and Advanced Reid courses as training programs provided to Michigan State Police officers as recently as February of 2011. See, [http://www.michigan.gov/msp/0,1607,7-123-1599\\_30536-82049--,00.html](http://www.michigan.gov/msp/0,1607,7-123-1599_30536-82049--,00.html). The site also notes that “more than 150,000 professionals in law enforcement and government have attended the program since it was first offered in 1974.” Officer Christopher Fitzpatrick, one of the officers who questioned Mr. Kowalski and obtained the unrecorded initial disclosure, acknowledged that he had been trained in the Reid interview and interrogation methods and that he had attended the advanced Reid school. (95-96a)

It is highly unlikely that law enforcement would spend significant time developing and training in such techniques, and research psychologists would spend time studying the impact of such techniques, if the subject matter – psychology of interrogation and confession – was already within the common knowledge of the average citizen. *Chojnacki, Cicchini and White, An Empirical Basis for Admission of Expert Testimony and False Confessions*, 40 *Arz St LJ* 1, (2008). It is equally unlikely that they would do so unless they believed the interrogation techniques were effective in getting people to confess; which is why there is additional reason to believe that, on occasion, they also lead people to confess falsely.

4. **At a Minimum Dr. Leo is Qualified to Testify as an Expert on Police Interrogation Techniques**

In spite of a specific defense request to do so, both lower courts not only excluded defense expert testimony regarding interrogation techniques associated with false confessions, they even refused to allow any testimony concerning the interrogation techniques used by the police. The trial court ruled that the issue could be dealt with by defense counsel on cross examination; “if it is true that jurors don’t know about police techniques” – and the un-rebutted testimony from Dr. Leo is that they do not – “then the police officer can be examined about training and police techniques that they have been trained in.” (672-673a) Similarly, the Court of Appeals noted “[A]dditionally, the police officers will be subject to cross-examination with respect to specialized training in the art of interrogation and techniques they may use to pressure a defendant into confessing to a crime.”(57a) Thus, both courts expressly recognized that evidence concerning police interrogation techniques is relevant, yet they refused to let Mr. Kowalski call his own witnesses on the subject. Instead, they relegated presentation of his defense to cross examination of the prosecution’s witnesses, a dubious proposition with little chance of success, not to mention one that flies in the face of his constitutional right to call “witnesses in his favor”. US Const, Amend VI; Const. 1963, art 1, sec 17. It is also striking how both lower courts have such confidence in the power of cross-examination by the defense, but apparently lack any confidence in the effectiveness of cross-examination by the prosecution of the proffered experts (even though *Daubert, infra* holds that cross-examination and presentation of contrary evidence is generally preferable to exclusion). The evidence is certainly relevant, the only question is whether the defense can call its own witness or must be relegated to using the prosecution’s.

5. **Dr. Wendt's Testimony is Relevant to the Weight and Credibility that Should be Accorded By the Jury to Mr. Kowalski's Statements**

Dr. Wendt, a certified clinical psychologist, performed a psychological evaluation of Mr. Kowalski that included the administration of a number of recognized, standard psychological tests, including the Minnesota Multi Phasic Personality Inventory (MMPI-2), the Personality Assessment Inventory (PAI), and the Substance Abuse Subtle Screening Inventory (SASSI). (488a) Based on his psychological testing evaluation and interviews, he found that Mr. Kowalski's psychological/personality factors made him more vulnerable to suggestibility, that he is a person of low self esteem, lacks assertiveness and is prone to anxiety. He also found that Mr. Kowalski suffers from thoughts of worthlessness, hopelessness and failure and is, by nature, compliant, conflict-avoidant, acquiescent and eager to please. It was his opinion that the totality of circumstances surrounding Mr. Kowalski's interaction with law enforcement resulted in conditions that increase the likelihood that he would want to please law enforcement. (511-513a) Dr. Wendt's testimony gives insight into Mr. Kowalski and why he might say something to his detriment that is not true. Despite the obvious import of this evidence the trial court excluded it on relevancy grounds. Its reliability was never called into question.

In, *Hamilton, supra* the Court of Appeals expressly held that the expert's testimony concerning the defendant's psychological makeup was relevant, noting that, "[T]he critical inquiry is whether such testimony will aid the fact finder in making the ultimate decision in the case." 163 Mich App at 656, citing *People v Smith*, 425 Mich 98, 105; 387 NW2d 814 (1986). The court explicitly held that it met this test "as it would help the jury understand the circumstances surrounding defendant's statements to the police and how those circumstances

affected the reliability and credibility of defendant's statements." 163 Mich. App. at 656. "Such an understanding is central to the jury's determination of defendant's guilt or innocence." *Id.*

The Court of Appeals affirmed the trial court ruling that Dr. Wendt's testimony would not assist the jury because, "Dr. Wendt's proposed testimony related to the credibility of defendant's confession to the police." (58a). The ruling cannot be reconciled with long established precedent where the same type of testimony was offered for the same reason it is offered here. *See, Hamilton, supra.* Other courts have also held the same type of testimony relevant. *See, United States v Roark*, 753 F 2d 991 (11<sup>th</sup> Cir 1985) (Court held the trial court erred in excluding the testimony of a psychiatrist who would have testified that defendant was extremely susceptible to suggestion and that someone with her psychological makeup (level of suggestibility) could be led into making up untrue stories; and further that the probative value of the evidence was not outweighed by unfair prejudice under FRE 403); *United States v Shay*, 57 F 3d 126 (1<sup>st</sup> Cir 1995), (the appellate court remanded the case to the trial court finding that defendant should have been allowed to present evidence through his expert witness, a psychiatrist, who would have testified that he suffered from "pseudologia fantastica," which caused him to make up false and grandiose statements without regard to the consequences); *Callis v State*, 684 NE2d 233 (Ind Ct App 1997) (where defendant sought to present testimony of a social psychological expert in the field of police interrogation and the phenomenon of false or coerced confessions testimony the trial court properly admitted the testimony regarding the phenomenon of coerced confession, but also properly precluded the expert from expressing an opinion regarding the reliability of the accused's confession); *State v Oliver*, 280 Kan 681, 124 P3d 493, 505-509 (2005), (a psychologist's testimony about defendant's post-traumatic stress disorder and dependent personality disorder was admissible as part of the psychological

environment under *Crane*, bearing on defendant's ability to respond reliably to interrogation); *State v Buechler*, 253 Neb 727; 572 NW 2d 65, 71-74 (1998), (under *Crane*, a clinical psychologist should have been allowed to testify concerning the defendant's drug withdrawal and psychological disorders as such testimony pertained to the psychological circumstances under which the defendant confessed and had a bearing on the reliability of the confession.)

In *State v King*, 387 NJ Super, 522, 904 A2d 808 (App Div 2006), the New Jersey Appellate Court, drawing heavily from *Crane*, ruled that the defendant should have been allowed to introduce testimony from a forensic psychologist who performed a clinical evaluation on the defendant and diagnosed him as having a narcissistic personality disorder and anti-social personality disorder at the time of his interrogation. The court determined that the defendant's proffer provided the jury with evidence that has the capacity to reasonably rebut the natural inference that an individual would not be likely to make a statement to law enforcement officials contrary to his or her penal interest unless it were true. The *King* court specifically held:

The proffered evidence provides a psychologically-based reason other than truth for the jury's consideration, namely that the defendant's confession was related to and consistent with his narcissistic and anti-social personality disorders. If the jury finds this reason persuasive, it might harbor a reasonable doubt as to the reliability of defendant's confession. *King* at 539.

The Court of Appeals stated that Dr. Wendt's testimony would not assist the jury because he "could not identify a specific psychological fact that distinguishes a person that makes a false confession from one who makes a true confession," (56a, 57a, 58a) and attempted to distinguish Dr. Wendt's testimony from that offered in *Hamilton* on the basis that "Dr. Wendt asserted that he would testify that defendant's personality traits were similar to the traits possessed by others who made false confessions." (59a) In both instances the court insisted on coupling Dr. Wendt's testimony about Mr. Kowalski's mental state at the time of his statements with false

confession testimony generally, despite the fact--as noted by Judge Davis in his dissent-- Dr. Wendt's testimony as to defendant's state of mind during his confession was "capable of standing alone."

The defense's intent to have Dr. Wendt testify as to the defendant's psychological state, independent of the research on false confessions, is unmistakable. Defense counsel explicitly argued that Dr. Wendt's testimony about his psychological examination and resultant findings of Mr. Kowalski is admissible under *People v Hamilton* regardless of whether or not he or Dr. Leo are allowed to testify as to the issue of false confessions. The trial court clearly understood defendant's position and specifically asked the assistant prosecuting attorney why Dr. Wendt's testimony wasn't admissible independent of Dr. Leo's. The prosecutor had no explanation, and merely offered: "then it is not relevant under 403. It's not relevant. It's a simple relevance answer." (636a) *Crane* and *Hamilton* hold otherwise.

The Court of Appeals also attempted to distinguish *Hamilton* on the basis that the two witnesses were offering different testimony. "[I]n *Hamilton*, the expert merely proposed to testify the defendant had a psychological maturity level of a 15-year old. Here, Dr. Wendt proposed to testify that defendant had personality traits that would allow him to be easily influenced by police interrogators, thus directly implying, at least, that the police influenced him into making a false confession." (59a) It is a distinction without a difference. Both cases address psychological evidence that a jury must be able to consider in evaluating the reliability of statements made in response to police questioning; in *Hamilton* it was maturity level. Dr. Abramsky testified that the defendant had the psychological level of a 15-year old and went on to state that "he had a strong need to impress people and say what people wanted to hear." Here the issue is the defendant's compliant personality. Dr. Wendt will testify that Mr. Kowalski suffers

from thoughts of worthlessness, hopelessness and failure and is, by nature, compliant, conflict avoidant, and acquiescent and eager to please.

The distinction drawn by the Court of Appeals appears concerned with the fact that the defense will fault the police, as if police interrogation techniques are not to be questioned. If, as the Court of Appeals suggests, Dr. Wendt's testimony implies that the police influenced him to make a false confession, it is all the more relevant. Both lower courts acknowledge that police witnesses are properly subject to cross-examination with respect to their specialized training in the art of interrogation and the techniques used to obtain confessions. On the one hand, they agree this line of questioning is relevant (because it may help explain why Mr. Kowalski confessed to police); yet, on the other hand they conclude that personality characteristics that show him to be conflict avoidant in the face of psychologically coercive interrogation techniques, are irrelevant. The rationale is internally inconsistent and the conclusion is at odds with common sense, basic fairness, and established and long-standing precedent.

C) **Dr. Leo's Testimony Meets the Daubert Standards for Reliability**

The Court of Appeals ruled that the "principles and methodologies used by Dr. Leo to arrive at his opinion that certain interrogation techniques correlate with false confessions were not shown to be reliable." (57a) In doing so, it accepted the trial court's findings that attempted to critique the field of social science as a whole, using a set of inquiries inapplicable to this field of study.<sup>5</sup>

MRE 702 incorporates the standards of reliability that the United States Supreme Court described to interpret the corollary Federal Rule of Evidence, in *Daubert v Merrell Dow Pharm*,

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<sup>5</sup> The reliability of Dr. Wendt's testimony which was based on standard, well-recognized psychological tests was never at issue.

*Inc.*, 509 U.S. 579, 125 L.Ed. 2d 469, 113 S.Ct. 2786 (1993); *Gilbert v Daimler Chrysler Inc.*, 470 Mich 749, 780; 685 NW 2d 391 (2004). Under *Daubert*, "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert, supra*. The inquiry is whether the opinion is rationally derived from a sound foundation, not whether an expert's opinion is necessarily correct or universally accepted. *Chapin v A & L Parts, Inc.*, 274 Mich App 122, 139; 732 NW 2d 578 (2007) (Davis, J.), "An expert's opinion is admissible if it is based on the methods and procedures of science rather than subjective belief or unsupported speculation." *Daubert, supra*, at 590. This standard was clearly and easily satisfied here.

The Advisory Committee note to FRE 702 recognized that case law after *Daubert* shows that "the rejection of expert testimony is the exception rather than the rule." *Daubert* did not work "a seachange over federal evidence law" and "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system". *United States v 14.38 Acres of Land Situated in LeFlore County, Mississippi*, 80 F 3d 1074, 1078 (5<sup>th</sup> Cir 1996).

1. **Dr. Leo's Testimony is Based on Sufficient Facts or Data**

Dr. Leo testified that the study of interrogations and confessions dates back over one hundred years. There are literally hundreds of articles, books and chapters as well as empirical studies in the field that have been published and peer reviewed in both social science and psychology journals. (278a). This area of study is broad and referenced in encyclopedias in the field of psychology and criminology and is taught at many research universities across the country. (277-279a)<sup>6</sup>

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<sup>6</sup> At the *Daubert* hearing, the defense introduced several exhibits containing articles published by social scientists, psychologists and other researchers – authoritative, peer-reviewed articles and writings supporting the principles expressed by Dr. Leo and the methodologies by which they were obtained:

Dr. Leo is a highly-regarded social scientist and a prolific contributor to the field. His testimony is based not only on the published works of others, but on studies which he has conducted alone, or in conjunction with other researchers. He published four articles utilizing data sets of his own research with Dr. Richard Ofshe; two in 1997, one in 1998, and another in 2001. (368-369a) One set of data involved 150 cases of true and false confessions for the two articles published in 1997, and another data set utilized 60 confessions: 34 “proven” false, 18 “highly probable” false, and 8 “probable” false confessions (407-408a) for the articles published in 1998 and 2001. The two 1997 studies analyzed the psychological process of the interrogation and how it leads to both true and false confessions. (411a) He also conducted a study with Dr. Steven Drizin that resulted in the publication of an article entitled “The Problem of False Confessions in the Post-DNA World”, which was cited by the U.S. Supreme Court in *Corey v. United States, supra*. The study analyzed 125 “proven” false confessions and focused on why

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Exhibit “B” is an article entitled Psychology of Confessions: A Review of the Literature and Issues, by Sal Kassin and Gisli Gudjonsson. It comprises a comprehensive analysis of the literature and issues in the field of false confessions published in a peer-reviewed psychology journal written by two leading authorities.

Exhibit “C” is a disc and accompanying index containing 11 articles authored by Dr. Leo; five additional articles involved jury studies concerning false confessions; 40 additional articles authored by other researchers and experts in the field of police interrogation techniques and false confessions; and two bibliographies listing hundreds of additional articles cited and recognized by scholars as authoritative publications. The disc is included in Appellant’s Appendix. (571a)

Exhibit “D” is a list of 36 articles, chapters and other publications authored by Dr. Leo.

Exhibit “G” is an article entitled, “Police Induced Confessions: Risk Factors and Recommendations” commissioned by the American Psychological Association as the most recent authoritative publication on the general status of police interrogation and police induced confessions. The trial court refused to admit or consider the article.

those false confessions occurred. (365-366a, 408-409a) Dr. Leo's own research is extensive but he is only part of the field of expertise; he is not the entire field.

Dr. Leo's testimony concerning his research which is founded on, and furthers the research of other social scientists, provides an ample basis for the conclusion that there is substantial evidence that the field of study has reached the state of scientific acceptability in the social sciences, primarily the fields of psychology, criminology and sociology. (278-279a)

## 2. **Dr. Leo's Testimony is a Product of Reliable Principles and Methods**

The Court of Appeals found Dr. Leo's testimony to be something other than the product of reliable principles and methodologies stating, "the evidence showed Dr. Leo's conclusions were based on the study of confessions that he subjectively determined, without definitive evidence, were false." (57a) The ruling is based on a fundamental misunderstanding of how the research of false confessions is conducted.

Dr. Leo identified the five empirical methodologies used in social science: field observations, interviews, surveys, experiments and archival or documentary research. The study of false confessions generally involves an observational study of real world interrogations. In his research on the study of police interrogation methods and false confessions, he utilized each empirical methodology except for the experimental and survey methods. (270a) The experimental method cannot be used because of ethical constraints which prevent researchers from recreating in the laboratory what happens in the police interrogation room. (281-282a)

To study false confessions, researchers first have to isolate them, and in order to do so, they gather cases, and then apply certain criteria to weed out those cases in which the confessions are not demonstrably false. (365a) There are four criteria for determining whether a confession is false: (1) showing the crime did not occur e.g. a murder victim shows up alive; (2)

establishing it was physically impossible for the person to have committed a crime e.g. where they were in another state or on a video tape elsewhere at the time of the crime; (3) scientific evidence such as DNA exonerations; and, (4) the true perpetrator is exposed. (290-291a, 402a) Cases that fit within these criteria are “proven” false confessions. If the confession does not fit within these well-defined criteria, researchers also look secondarily at the fit between the suspect’s narrative account of how and why the crime was committed and then compare it to the crime facts themselves; i.e., whether the suspect knows unique non-public details that are not likely guessed by chance. They will also look at the suspect’s account to see whether it fits the physical, medical or other credible evidence. (291-292a) Depending on the fit, the confession may be considered for further study and if it is, will be characterized as either highly probable or probably false. In this manner researchers identify confessions as “probable”, “highly probable” or “proven” false confessions. (395a)

Confessions are characterized as “proven” false only when they meet one of the four specific criteria. It is only when a case does not fit within any of those four criteria that researchers may look at them secondarily to determine whether a suspect’s narrative account is consistent with the unique non-public details of the offense, (291a) to classify it as, by way of example, a highly probable false confession. Both the Court of Appeals and the trial court either ignored or dismissed the distinction in the methodology employed, and concluded the study of false confessions was based on confessions that Dr. Leo subjectively determined were false without definitive evidence. In actuality, the studies conducted by him and fellow researchers, are based on a sound, not a subjective, methodology, and on “a body of proven false confessions in the real world through DNA and other means that have been extensively studied. There is no question they are false.” (283a) In any event, the body of research on false confessions extends

far beyond the study at issue. See, Saul M. Kassin, *Expert Testimony on the Psychology of Confessions: A Pyramidal Framework of the Relevant Science*, in Borgida & Fiske's *Beyond Common Sense: Psychological Science in the Courtroom* (2008).

The Court of Appeals also deemed Dr. Leo's testimony unreliable because he admitted that the same interrogation techniques that produce false confessions can also produce true confessions. The court's criticism is not so much with the principles and methodologies but with Dr. Leo's conclusions. Although the court must carefully examine the proffered testimony to exclude what appears to be "junk science"<sup>7</sup>, the court must not bar the door to well accepted, well established research methods. A *Daubert* inquiry focuses on the "principles and methodology behind the expert's conclusion, not the court's agreement with that conclusion." *Daubert*, 509 US at 594-95.

One cannot predict when a confession is going to be false any more than one can predict when a victim of abuse is going to delay reporting it. Dr. Leo explained, "[i]n the social sciences, there's very few things that you can predict mathematically. Behavior is too probabilistic." (444-445a) Likewise, in *People v Beckley*, 434 Mich 691; 456 NW 2d 391 (1990) this Court recognized that when evaluating the methods experts use to explain the possible array of behaviors a child might exhibit following sexual abuse, "syndrome evidence is not a technique or principle which can predict abuse and it is merely to explain behavior." *Beckley, supra*. In such a case, the court held, "the evidence is only an expert's opinion which explains and describes probable responses to a traumatic event." *Id.* Here, defendant's proffered testimony does nothing more.

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<sup>7</sup> This is not a case like *Gilbert v Daimler Chrysler*, *supra*, where a social worker testified that harassment experienced by the plaintiff caused irreversible change in brain chemistry that could cause a relapse into alcoholism. There it was apparent to the court that a witness was testifying about a subject matter well outside their field of expertise in drawing, unfounded conclusions.

When one studies false confessions, certain patterns emerge. (445-446a) Researchers study these patterns in an attempt to identify what factors may elicit such confessions. In particular, researchers have recognized that the interview process has different phases and divided the interrogation process into pre-admission and post-admission phases. They search for the techniques, if any, that were used prior to the “I did it,” or, admission phase. Once the admission is made, they study the post-admission process; i.e., what interrogation techniques were used and how they can lead to persuaded, but false confessions. (318-319a)

Certain specific interrogation techniques have been found to induce or persuade individuals to feel that it is in their best interest to stop denying and start confessing, including implicit and express promises or threats, attacks on memory and lies about evidence. (446-447a) The interrogation process involves many techniques and some are associated with false confessions. Frequently, one can detect a cluster of techniques including accusing someone of committing a crime, accusing them of lying, challenging and attacking their denial, confronting them with evidence and lying about non-existent evidence, using time pressure in various ways to make suspects think it is their only opportunity to confess, or using a whole range of inducements to persuade someone that it is in their best interest to stop denying and start confessing. (445-447a)

The Court of Appeals could not look past Dr. Leo’s acknowledgment that the same police interrogation techniques that are associated with false confessions are also associated with true confessions. The point of Dr. Leo’s testimony is to rebut the prosecution’s inevitable argument that the statements had to be true because people do not confess falsely by explaining that, indeed, they do and to educate the jury as to some of the factors that are associated with such confessions. The fact that the same factors may also be associated with true confessions is

immaterial to the rebuttal point. The prosecution is certainly free to elicit from Dr. Leo on cross examination that interrogation techniques are also associated with true confessions, but his testimony cannot be excluded altogether because it does not provide the definitive explanation for an infrequent, and very perplexing, type of human behavior.

Also, it is hard to imagine a technique that would cause *only* false confessions. Surely, physical torture, which can cause false confessions, can also cause true confessions. Would evidence of physical torture be excluded because a witness could not state with certainty that torture only produces false confessions?

Dr. Leo explained that he safeguards against errors in research by the use of empirical methods and statistical procedures and by utilizing trained researchers. The research is vetted through the peer review process and published primarily in peer reviewed journals. (274-275a) Significantly, it was undisputed that experts in the field agree with his analysis for evaluating the reliability of a confession and that the process he utilized for identifying false confessions for study is the standard employed by social psychologists and researchers. (292a, 294a)

The Court of Appeals also faulted Dr. Leo's methodologies since he was unable to provide a known error rate. Although error rate is one *Daubert* factor, *Daubert* does not require error rates for all fields of study – and for good reason. In some scientific fields, there is simply no way of assigning an error rate because of the nature of what is being studied. See, *Green v Texas*, 55 SW3d 633, 640 (Tex App 2001) (“hard science methods of validation such as assessing the potential rate of error . . . may often be inappropriate for testing the reliability of fields of expertise outside the hard sciences”). The social psychology of false confessions is recognized as one such field. *United States v Hall*, 974 F Supp 1198, 1200-1202 (CD Ill 1997).

The Advisory Committee notes to FRE 702 specifically recognize that “not all specific *Daubert* factors can apply to every type of expert”, and specifically note that the factors mentioned in *Daubert* “do not neatly apply to expert testimony from a sociologist”. *Tyus v Urban Search Management*, 102 F 3d 256 (7<sup>th</sup> Cir 1996). *Daubert* merely set forth an *illustrative, non-exhaustive* list of factors that a trial court can consider when determining whether to admit scientific testimony, including whether the theory or technique that forms the basis of the expert’s testimony (1) has been or can be tested, (2) has been subjected to peer review and publication, (3) has a known or potential rate of error, and (4) has a general acceptance within the scientific community. *Id.* at 593-595.

Nevertheless, consideration of the second and fourth *Daubert* factors still compels admission of Dr. Leo’s testimony. Dr. Leo’s testimony established that the methods upon which he relies are subject to extensive peer review and publication. Peer review is a significant *Daubert* factor because “scrutiny of the scientific community is a component of ‘good science’, in part because it increases the likelihood that substantive flaws in methodology would be detected.” *Daubert*, 509 US at 593. Moreover, Dr. Leo’s proffered testimony does not grow out of an opinion that was developed solely for purposes of testifying. Rather, it stems from years of social scientific research, specifically focusing on the subject of police interrogation techniques and their association with false confessions, and has resulted in the publication of numerous articles in scientific and law journals and papers.

The “general acceptance within the scientific community” factor has likewise been met and is, in fact, a by-product of the extensive peer review and publication process. As a result, a general consensus has been reached within the social science community regarding the correlation between interrogation techniques and false confessions.

The remaining two factors, testability and error rate are but two means of analyzing a scientific method. They are not well suited for consideration in the area of the social sciences. To rely on them in order to exclude evidence without taking into account the science or expertise at issue oversimplifies the diversity of approaches and methods that characterize contemporary science. As one author stated:

To be “scientific”, a theory does not necessarily have to be subjected to experimental testing. The Darwinian theory of natural selection is one very widely accepted scientific theory that does not easily lend itself to such tests. Many theories in the human sciences – including psychology, psychiatry, anthropology and sociology – are also generally accepted as valid although they cannot be tested through conventional experimentation. Moreover, some types of scientific claims, such as theories of disease causation, cannot be experimentally tested for ethical and practical reasons. These examples indicate at the very least that scientific validity cannot be assessed in court in terms of a single, universal set of criteria. *Judging Science After Daubert: Issues, Assumptions, Models*, Sheila Jasanoff, *MTLA Quarterly*, Spring 1998.

Simply stated, not all fields of scientific study are susceptible to verification through the use of laboratory experiments. In *Hall, supra*, the court recognized that observational, as opposed to experimental, techniques are “wholly acceptable in the established field of social psychology”. 974 FSupp at 1205. The reason laboratory studies cannot be conducted is that this area of scientific study involves real life human situations, not laboratory rats. Dr. Leo explained:

The experimental method is a great method if you can replicate in the laboratory what is occurring in the real world and if you want to isolate the effect of one causal variable on another or one variable on another and see if there’s a causal relationship. The problem in this area, as in some other areas, is that for ethical reasons we cannot recreate in the laboratory what goes on in police interrogation rooms. It simply wouldn’t get past a human subjects board at a university and researchers could be sued. So, I’m very skeptical of our ability to include false confessions in the laboratory because the kinds of experiments that are done are very

different from most of what occurs in the studies, in real world false confession cases. (281-282a)

As *Daubert* itself made very clear, not every one of the factors the court suggested for consideration in a determination of reliability i.e. whether the theory has been tested, subject to peer review, error rate, apply in every instance.<sup>8</sup> Rather, they are to be regarded as part of a flexible multi-pronged analysis. *Daubert* at 593-594. The Sixth Circuit noted that application of each of the *Daubert* reliability factors to non-scientific evidence would “turn *Daubert*, a case intended to relax the admissibility requirements for expert’s scientific evidence, on its head.” *United States v Jones*, 107 F 3d 1147, 1157-1158 (6<sup>th</sup> Cir) cert den’d 521 US 1127; 138 L Ed 2d 1027 (1997). Yet, this is exactly what the lower courts’ opinions do here.

It is precisely because the areas of scientific and other expertise are so vast and varied that *Daubert* factors are regarded as “illustrative and non-exhaustive.” *Daubert* is applicable only “in the general sense that all expert testimony must be subjected to the strictures of Rule 702 to be sure that the person possesses genuine expertise in a field and that her court testimony adheres to the same standards for intellectual rigor that are demanded in [her] professional work.” *Hall*, 974 F Supp at 1202. As the court in *Hall* further explained:

To sum up, the four factors laid out in *Daubert* must be applied when an expert bases his testimony on scientific hypothesis which are capable of being refuted by controlled experimentation. However, these factors may be applied in differing degrees when it comes to non-Newtonian science or “other specialized knowledge.” The only thing that remains constant for all forms of expert testimony is that there must be some degree of reliability of the expert and the methods by which he has arrived at his conclusions. The criteria for admissibility derives from Rule 702

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<sup>8</sup> By way of example, expert testimony concerning delayed reporting of child abuse is not concerned with the error rate in determining how often delayed reporting occurred or with predictability, and simply establishes that there is an explanation for the delay, or that a correlation exists between child abuse and delayed reporting.

itself as well as the implications of the *Daubert* opinion. *Hall* 974 FSupp at 1202.<sup>9</sup>

*Daubert* provides a broad definition of “scientific” as “a grounding in the methods and procedures of science . . . and that a scientific expert’s knowledge means more than a subject’s belief or unsupported speculations.” Dr. Leo’s work fits comfortably within this requirement, as does Dr. Wendt’s.

D) **Dr. Leo’s Testimony Applies Principles and Methods Concerning Police Interrogation and False Confessions Which are Relevant and Reliable to the Facts of this Case**

Other courts have allowed Dr. Leo to testify “generally,” or “specifically,” and sometimes both. When it is “general” the testimony is educational and discusses police interrogation techniques and the study of the psychology of interrogations, how and why interrogations can lead to false confessions, and what the risk factors are for false confessions with respect to interrogation. (339-340a) When the testimony is “specific,” he analyzes the specific aspects of an interrogation, the interrogation techniques, or some aspect of the confessor’s statements or narrative. (346-347a)

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<sup>9</sup> The *Hall* court considered the following factors when evaluating whether to admit expert “social science” testimony: (1) determine the reliability of the methods that the scientists in that field use to make their findings; (2) whether the expert published and/or relied upon scholarly articles subject to peer review; (3) the longevity of the particular field, the amount of literature and peer review on the topic, and the general consensus as to what the data means; and (4) the expert’s contribution to the field about which he or she is testifying. *Hall*, 974 F Supp at 1203. Without reiterating the argument set forth in the body of this brief, it is clear that Dr. Leo’s testimony satisfied each of these factors. He explained and offered supporting articles and publications regarding the methods of social science research concerning police interrogation and false confessions and the principles derived. He has published extensively over the course of many years, has been cited by other experts on the subject, has been peer reviewed and has served as a peer reviewer himself. Importantly, there is a general consensus in the field that certain interrogation techniques are associated with false confessions.

Here, Dr. Leo is prepared to testify to either or both; the general: that false confessions occur and that certain police interrogation techniques are associated with false confessions; and/or the specific: that certain of those interrogation techniques were used in this case.

With respect to the general, the Advisory Committee notes to FRE 702 provide that “if the expert purports to apply principles and methods to the facts of the case, it is important that this application be conducted reliably. Yet it might also be important in some cases for an expert to educate the fact finder about general principles, without ever attempting to apply these principles to the specific facts of the case.”

Dr. Leo’s testimony will serve to educate the jury on police interrogation techniques and to provide an appropriate tool for the jury to utilize in assessing the statements. Simply put, the jury can then apply the factors to the interrogations conducted by the police officers and determine whether Mr. Kowalski’s incriminating statements are credible or not. Dr. Leo’s testimony would be limited to educating the jury on the processes generally employed by police officers during the interrogations and the methods that may lead to false confessions. It will then be up to the prosecution and the defense to examine the specific questioning that occurred and to establish whether the techniques described by Dr. Leo led to the inculpatory statements, and whether they were or were not truthful. The jury will always retain the credibility-determination function throughout.

On the “specific” level Dr. Leo, who has viewed and listened to the video and audio recorded portions of Mr. Kowalski’s statements (401a) will discuss and articulate the specific instances in which certain interrogation techniques were employed by the police. The fact that they were employed was conceded by Michigan State Police Trooper Craig Felix, one of the officers who participated in the interrogation process.

Q: Did you utilize any interrogation techniques by way of example?

A: I'm sure we probably did, yeah.

Q: You specifically remember which ones you used?

A: No, I don't. No.

Q: But you were doing whatever you could to get him talking and talk about this incident, fair enough?

A: Absolutely. (83a)

**E) The Probative Value of the Expert's Testimony is not Substantially Outweighed by any Prejudicial Impact**

The Court of Appeals agreed with the trial court that the proposed expert testimony was inadmissible pursuant to MRE 403. As a general rule, all relevant evidence is admissible. MRE 401-402. Rule 403 on the other hand, stands as the "general" rule of exclusion and excludes the introduction of evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time or needless presentation of cumulative evidence." MRE 403.

The Court of Appeals found exclusion under 403 appropriate because there is a "significant danger of unfair prejudice" due to the fact that "although both experts testified they would not offer an opinion regarding whether defendant made a false confession, that conclusion was implicit in both of their proposed testimony".

"Unfair prejudice" does not mean "damaging." *People v Mills*, 450 Mich 61, 75, 537 NW2d 909 (1995) citing *Bradbury v Ford Motor Company*, 123 Mich App 179, 185; 333 NW2d 214 (1983). Any relevant testimony will be damaging to one side to some extent. In *Mills*, this court explained the notion of "unfair prejudice": "The idea of prejudice denotes the situation whereby there exists a danger that marginally probative evidence will be given undue or

preemptive weight by the jury.” *Id.* The Court of Appeals did not express concern about the jury giving “preemptive weight” to the testimony of Drs. Leo and Wendt but rather that their testimony would imply that Mr. Kowalski made a false confession. Indeed, the sole purpose of their respective testimony is to dispel misconceptions about false confessions and to educate the jury about factors associated with those confessions, and to offer insight into defendant’s psychological state at the time he made his statements. It is from this evidence (and the lack of physical evidence connecting the defendant with the crime) from which the defense will explicitly argue that Mr. Kowalski made a false confession. Any evidence produced by the defendant is aimed at furthering his defense that the confession was a false one. It is, therefore, fair to assume that the jury will imply that each witness called by the defense is intended to further that cause.

If the Court of Appeals’ concern is that the defense will imply that both experts *believe* the confession to be a false one and that implication somehow invades the province of the jury, it is a needless concern. Neither will be asked to offer their opinion on the falsity of Mr. Kowalski’s statements. The prosecution will have available to it all the traditional means of challenging the testimony including cross examination. However, even if the jury does infer that defense witnesses believe Mr. Kowalski’s statements are false, there is no “unfair prejudice” and certainly nothing that “substantially outweighs the probative value” of the testimony, as MRE 403 requires. It cannot be overlooked that Mr. Kowalski’s statements will be introduced by the police officers who performed the interrogation. The officers will not be asked whether or not they believe the incriminating statements to be true or false. Nevertheless, it is equally likely that the jury will imply that they believe his statements are true. Can Mr. Kowalski claim “unfair prejudice” and exclude the evidence pursuant to MRE 403 because the implication works in

favor of the prosecution? Common sense dictates that a party is not going to call a witness whose testimony supports a proposition that the witness disagrees with. Neither party will interfere with the jury's responsibility to weigh the reliability and credibility of the confession by virtue of the testimony offered by their respective witnesses.

The danger of "unfair prejudice" will be further tempered by the standard criminal jury instruction regarding expert witness testimony. CJI2d 5.10 informs jurors that they are not simply to adopt the testimony of expert witnesses, but to carefully evaluate it and how to do so:

\* \* \*

- (2) However, you do not have to believe an expert's opinion. Instead, you should decide whether you believe it and how important you think it is. When you decide whether you believe an expert's opinion, think carefully about the reasons and the facts he gave you for his opinion, and whether those facts are true. You should also think about the expert's qualifications, and whether his opinion makes sense when you think about the other evidence in the case.<sup>10</sup> CJI2d 5.10

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<sup>10</sup> It should be noted that the Use Note to the Standard Jury Instruction provides that this instruction is not to be used where the expert testifies regarding the characteristics of sexually abused children and about whether the complainant's behavior is consistent with those characteristics. In such cases, CJI2d 20.29 is to be used instead. CJI2d 20.29 provides:

- (1) You have heard [name expert]'s opinion about the behavior of sexually abused children.
- (2) You should consider that evidence only for the limited purpose of deciding whether [name complainant]'s acts and words after the alleged crime were consistent with those of sexually abused children.
- (3) That evidence cannot be used to show that the crime charged here was committed or that the defendant committed it. Nor can it be considered an opinion by [name expert] that [name complainant] is telling the truth.

Defendant contends the proffered expert testimony is relevant for the same purpose as testimony regarding the characteristics of sexually abused children. Consequently, a limiting instruction similar to CJI2d 20.29 may be appropriate in this case.

V. ARGUMENT

**DEFENDANT'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE WILL BE VIOLATED IF HE IS PRECLUDED FROM CALLING HIS TWO EXPERT WITNESSES AT TRIAL: ONE OFFERED TO DISPEL THE COMMON MISPERCEPTION THAT A PERSON WOULD NOT CONFESS TO A CRIME HE OR SHE DID NOT COMMIT, AND THE SECOND TO SPECIFICALLY EXPLAIN THE PSYCHOLOGICAL AND PERSONALITY FACTORS THAT MADE HIM MORE COMPLIANT AND SUSCEPTIBLE TO SUGGESTIVE POLICE QUESTIONING.**

An accused in our system of criminal justice is guaranteed both the right to challenge evidence brought against him in a criminal prosecution and the right to affirmatively present a defense:

In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. US Const, Amend VI,

In every criminal prosecution, the accused shall have the right.....to be confronted with the witnesses against him or her; to have compulsory process for obtaining witnesses in his or her favor; to have the assistance of counsel for his or her defense; Const 1963, art 1, § 17

Clearly established precedent of the United States Supreme Court holds that a defendant has a constitutional right to present a defense to a jury. This includes the right to admit relevant evidence notwithstanding evidentiary rules under which it might otherwise be excluded. Beginning with *Washington v Texas*, 388 US 14, 19; 87 S Ct 1920; 18 L Ed 2d 1019 (1967), the Court held that, "The right to offer testimony of witnesses and to compel their attendance, if necessary, is in plain terms a right to present a defense. The right to present the defendant's version of facts as well as the prosecution's to the jury so that it may decide where the truth lies." The Supreme Court ruled that the right of an accused to have compulsory process for obtaining

witnesses in his favor stands on no lesser footing than other *Sixth Amendment* rights applicable to the states. 388 US at 18. It further held:

“Just as an accused has the right to confront prosecution witnesses for 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 US at 18.

Mr. Kowalski’s defense is that he did not commit the murders. There are no eyewitnesses to the crime, no DNA blood-type evidence, no fingerprint or other scientific evidence linking him to the murders. Instead, the critical piece of evidence against him is a number of incriminating statements he made to the police during the course of four interrogations over a two-day period spanning 12 hours. The defense can show the inconsistencies between the statements and the physical evidence but is left with the one question that the jury needs to have answered – if he did not commit these crimes, why did he make incriminating statements saying he did? The testimony of Drs. Leo and Wendt will help answer this question. From their testimony the defense can argue that Mr. Kowalski’s statements to the police are not credible, and why this is so. Without it, defense counsel can only *argue* that the statements are not credible, but without evidence, the impact of the argument will immediately dissipate when the trial court instructs the jury that statements and arguments of the attorneys are not evidence. See, *People v Bahoda*, 448 Mich 261, 281, 531 NW 2d 659 (1995).

Defendant recognizes that the constitutional right to present a defense does not authorize a defendant carte blanche to introduce any and all evidence in trial. On the other hand, in certain situations a mechanical application of the rules of evidence does not provide the necessary deference to the constitutional right. Clearly established precedent of the United States Supreme Court guarantees a defendant’s right to present a defense to a jury and this includes the right to admit relevant evidence notwithstanding evidentiary rules which might otherwise exclude it. As

Professor Westen—one of the earliest and most authoritative commentators on the compulsory Process Clause ---has described the standard:

The accused in a criminal proceeding has a constitutional right to introduce any favorable evidence, unless the state can demonstrate that it is so inherently unreliable than to leave the trier of fact no rational basis for evaluating its truth. Westen, *The Compulsory Clause*, 73 Mich L R 71, 151-152, 155, 159.

In *Washington v Texas*, supra, the Supreme Court found a violation of the compulsory process clause when the defendant was arbitrarily denied the right to put on the stand a witness whose testimony “would have been *relevant and material* to the defense”. 388 US at 23 (emphasis added). There, the defendant and an alleged co-participant were charged with a fatal shooting. The co-participant was tried first and convicted of murder. At defendant’s trial for the same murder, the defendant attempted to call the co-participant who would have testified that the defendant had attempted to get him to leave prior to the shooting and who would also have admitted to firing the fatal shot. The testimony was excluded under a state law that prohibited persons charged as co-participants in the same crime from testifying for one another. Without the testimony, the defendant was convicted.

The Supreme Court reversed the defendant’s conviction finding, as a practical matter, that the rule allowing an accomplice to testify *against* a defendant but not *for* him overlooked the fact that in many cases, the accomplice would have as much interest in lying in favor of the prosecution especially if he was awaiting his own trial or sentencing. Consequently, the defendant was denied his constitutional right to call witnesses on his behalf by an arbitrary rule that prevented whole categories of defense witnesses from testifying because it presumed them unworthy of belief. The rationale underlying the Sixth Amendment is that “the truth is more likely to be arrived at by hearing the testimony of all persons with competent understanding who

may seem to have knowledge of the facts involved in the case, leaving the credit and weight of such testimony to be determined by the jury or by the court . . .” 388 US at 22, citing *Rosen v United States*, 245 US 467, 471 (1918).

In *Chambers v Mississippi*, 410 US 284, 93 S Ct 1028, 35 L Ed 2d 297 (1973) the court again upheld the defendant’s right to present witnesses in his own defense. There the defendant called as a witness, an individual who had previously confessed to the crime for which the defendant was charged. When the witness repudiated his confession, the defendant attempted to impeach him with his prior statements and by calling additional witnesses who had heard the witness previously confess. The testimony was excluded under Mississippi’s hearsay rule, which at the time, did not include an exception for statements against penal interest. The Supreme Court reversed holding that because the testimony rejected by the trial court “bore persuasive assurances of trustworthiness” and was “critical” to an accused’s defense, it must be admitted notwithstanding a state rule of evidence to the contrary. 410 US at 302. In other words, the Court focused on whether the evidence was actually reliable as opposed to whether or not the evidentiary rule declared it to be and, the need of the defendant to admit the evidence. “[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.” *Id* at 302

In *Crane v Kentucky*, the Court found that the defendant was deprived of the basic right to have the prosecutor’s case encounter and “survive the crucible of meaningful adversary testing,” when the trial court excluded testimony offered by the defense to show the “physical and psychological environment, of his interrogation which, the defendant argued, would have cast doubt on the credibility of the confession. *Id* at 689-690.

As it did in *Washington v Texas*, the court in *Crane v Kentucky*, reiterated that it did not “question the power of states to exclude evidence through the application of evidentiary rules that themselves serve the interest of fairness and reliability – even if the defendant would prefer to see that evidence admitted.” *Crane*, 476 U.S. at 691. Yet again, it held that even an otherwise legitimate evidentiary rule must yield to the right to present a defense when the evidence is sufficiently reliable for jurors to weigh for themselves, particularly when, as here, the evidence goes directly to the heart of the defense case.

What troubled the court most was the fact that, “[S]tripped 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 rationale juror needs answered: if the defendant is innocent, why did he previously admit guilt?” *Crane* at 689. Since “a defendant’s case may stand or fall on his ability to convince a jury that the manner in which the confession was obtained casts doubt on its credibility” the opportunity to present a defense “would be an empty one if the state were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant’s claim of innocence.” *Id.* at 689-690.

As a result, the Court had “little trouble” concluding that Kentucky’s rule that prevented a defendant from re-litigating the credibility of the confession once a trial court determined it to be voluntary, deprived the defendant of a fair trial. It specifically found that under both the Sixth and Fourteenth Amendments of the U.S. Constitution a criminal defendant is entitled to present to a jury competent, reliable evidence bearing on the credibility of his confession, particularly when such evidence is central to his claim of innocence and in the absence of a valid state justification for its exclusion:

Whether rooted directly in the due process clause of the Fourteenth Amendment or in the compulsory process or confrontation clauses

of the Sixth Amendment, the constitution guarantees criminal defendants a “meaningful opportunity to present a complete defense. We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. 476 US at 690.

*Crane* is particularly instructive in this case because it focused on the instant issue, the admissibility of evidence concerning the credibility of the defendant’s statements. While *Crane* did not specifically address the counterintuitive aspect of false confessions, it certainly recognized the importance a jury attaches to a confession as well as the need to have answered the question, “why it was made if it were not true?”

What is clear is that evidentiary rules which, on their face or in their application, exclude relevant evidence on the basis of some supposed unreliability implicate a defendant’s constitutional right to have the “right to present a complete defense.” *Crane*, at 690. In, *Rock v Arkansas*, 483 US 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987), the Court determined that a jury was capable of considering, and should have even been permitted to hear testimony that the Court recognized was of dubious reliability. In *Rock*, the defendant was accused of a murder to which she was the only eye witness. However, she was only able to remember the facts of the killing after her memory was hypnotically refreshed. Because *Arkansas* excluded hypnotically-refreshed testimony, the defendant was precluded from testifying about relevant facts including whether the killing had been accidental. The Court held that the rule prohibiting the testimony was unconstitutional because “wholesale inadmissibility of a defendant’s testimony is an arbitrary restriction on the right to testify in the absence of clear evidence by the state repudiating the validity of all post hypnosis recollections.” 483 US at 61. In its analysis, the court recognized that the reliability of hypnotically-refreshed testimony was of questionable reliability, but noted that the traditional means of assessing the accuracy of testimony remained including

cross examination and by educating a jury to the risks of hypnosis through expert testimony and cautionary instructions. *Id.* at 59-61. These same mechanisms are available here.

In *Holmes v South Carolina*, 547 US 319, 126 SCt 1727, 164 LEd2d 503 (2006), defendant was on trial for murder. The prosecution's case relied heavily on forensic evidence supporting the defendant's guilt. The defendant, however, sought to undermine the forensic evidence through expert testimony suggesting that the state's evidence had been contaminated and that the police had engaged in a plot to frame him. He also attempted to introduce testimony from another man who had been in the victim's neighborhood on the morning of the assault and had either acknowledged the defendant's innocence or admitted to committing the crimes himself. The trial court, however, excluded the defendant's third party guilt evidence based on a state supreme court decision holding that such evidence is only admissible if it raises a reasonable inference as to the defendant's own innocence, but is otherwise inadmissible if it merely casts a bare suspicion or raises a conjectural inference as to another's guilt.

In applying the right to present a defense, *Holmes* reversed the conviction finding that the rationale underlying the rule was flawed. "[B]y evaluating the strength of one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt". *Id.* at 331. The Court held that while "state and federal rule makers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials...[t]his latitude has limits....the constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense'". 547 US at 324 (quoting *California v Trombetta*, 467 US 479-485; 104 S Ct 2528, 81 L Ed 2d 413 (1984)). That right trumps rules which "infringe on the weighty interest of the accused" and are "arbitrary or disproportionate" to the purposes they are designed to serve. *Id.*

Several principles can be distilled from this line of cases. The first is that the Constitution prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or are disproportionate to the end they are asserted to promote. A rule may be “disproportionate” when it does not call for an even-handed application, e.g., *Washington v Texas*, (accomplice testimony admissible against the defendant but not for him) or, “arbitrary” where it excludes a broad category of evidence without allowing for individualized determination, e.g., *Chambers v Mississippi* (mechanistic application of hearsay rule that does not include exception for statements against penal interest); *Rock v Arkansas* (per se exclusion of hypnotically refreshed testimony).

Here, the courts below excluded defendant’s expert witnesses based on application of an evidentiary rule, MRE 702, which on its face is neither arbitrary nor disproportionate, but was applied that way. An evidentiary hearing under MRE 702 is designed to be a threshold inquiry to ensure that the trier of fact is not called on to rely in whole or in part on an expert opinion that is only masquerading as science. *Chapin v A&L Parts, Inc*, 247 Mich App 122, 139; 732 NW 2d 578 (2007). The trial court’s role as gatekeeper does not require it to search for absolute truth, to admit only uncontested evidence, or to resolve genuine scientific disputes. *People v Unger*, 278 Mich App 210, 217, 749 NW 2d 272 (2008), *citing*, *Chapin*, at 127. Its proper role is to filter out expert evidence that is unreliable, see *Gilbert*, *supra*, not to admit only evidence that is unassailable.<sup>11</sup> *Id.* Yet here, the trial court arbitrarily excluded Dr. Leo’s testimony by

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<sup>11</sup> Defendant is not advocating an “anything goes” application of MRE 702 with respect to expert testimony. Far from it. But, under the approach taken by the trial court in this case, the plaintiff’s evidence offered in *Daubert* (which at the time it was decided involved a novel scientific principle) would never have seen the light of day. Here, the trial court’s analysis assumed that juries are incapable of any rational assessment of expert testimony. In *Daubert*, the Supreme Court gave juries more credit. It felt that the rules regulating expert testimony should promote the search for truth while preserving the jury’s traditional powers to weigh evidence

condemning the entire body of research that was conducted by experts in the fields of sociology and psychology based on her personal notion of how it should be done.

Not only was the trial court's exclusion of the experts an arbitrary application of an evidentiary rule, it results in a disproportionate application as well. As discussed above, experts that are routinely allowed to testify in abuse cases have never been required to demonstrate that they could predict when a battered spouse, or an abused child, would delay reporting the abuse. Nor, have any of those experts ever been required to establish as a precursor to admissibility, the frequency with which an individual characteristic of the syndrome is exhibited. Nor, have they ever been required to prove to a factual certainty that a particular individual was in fact a victim of abuse. Children and battered women may delay reporting abuse for a host of reasons that jurors are capable of understanding, yet syndrome evidence testimony is routinely offered by the prosecution to dispel the notion that someone who is abused will report the abuse sooner rather than later. Some victims report it immediately, some do not; but, testimony about victims of abuse that sometimes delay reporting is not precluded merely because the particular expert cannot predict when a victim will delay reporting and when they will not. By holding the defense

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and determine witness credibility:

Respondent expresses apprehension that abandonment of 'general acceptance' as the exclusive requirement for admission will result in a 'free for all' in which the befuddled juries are confounded by absurd and irrational pseudoscientific assertion. In this regard, respondent seems to be overly pessimistic about the capabilities of the jury, and the adversary system generally. Vigorous cross examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence . . . these conventional devices, rather than wholesale exclusion under an uncompromising 'general acceptance' test, are the appropriate safeguards where basic scientific testimony meets the standard of Rule 702. *Daubert* at 595-596.

experts in this case to a different standard (requiring the ability to predict when a false confession will occur before a jury is allowed to consider testimony), the court engaged in a disproportionate application of MRE 702.

Moreover, the right to present a defense guarantees a defendant more than the trial court's discretionary application of a non-arbitrary rule. As one author has plainly stated:

If it is true that there is a fundamental right to present a defense, and therefore evidence favorable to the defense, that right must afford the accused something more than the right she would already have under the rules of evidence. A judge is already required to apply the rules of evidence in a fair not arbitrary manner. Therefore the right to present a defense can be violated even though rules of evidence are not being violated or arbitrarily applied. Mark J. Mahoney, *The Right to Present a Defense* at 43 (November 29 rev) available at [www.harringtonmahoney.com](http://www.harringtonmahoney.com)

The second, and an equally important consideration in balancing evidentiary rules against the Constitutional right to present a defense, is the defendant's need for the evidence. The exclusion of evidence in *Rock, Washington v Texas, and Chambers* was declared unconstitutional in large measure because in each case the exclusion of evidence "significantly undermined fundamental elements of the accused's defense." *United States v Scheffer*, 523 US 303, 315; 118 S Ct. 1261; 140 L Ed 2d 413 (1998). Thus, the focus is not simply on whether a rule has a neutral application or the state can articulate some justification for its existence, the court must also consider the impact the exclusion of the evidence has on a defendant's ability to present a defense.

To constitute a denial of the right to present a defense, a trial court's exclusion of evidence must "infringe upon a weighty interest of the accused." *Scheffer*, 523 at 30. A "weighty interest of the accused" is infringed where "the exclusion of evidence seriously undermined 'fundamental elements of the defendant's defense against the crime charged.'" *Miskel v Karnes*,

397 F 3d 446, 455 (6th Cir 2005) (quoting *Scheffer* 523 US at 315). “[W]hether the exclusion of witnesses' testimony violated defendant's right to present a defense depends upon whether the omitted evidence [evaluated in the context of the entire record] creates a reasonable doubt that did not otherwise exist." *United States v Blackwell*, 459 F 3d 739, 753 (6th Cir 2006) (quoting *Washington v Schriver*, 255 F 3d 45, 47 (2d Cir 2001))

Clearly, a defendant's need for the evidence is an important factor in the 'right to present a defense' calculus. The rules of evidence do not 'trump' the constitutional right to present a defense as the trial court seemed to find: "I understand the defense is honest about the fact this is the only defense. I can't just stop at the Sixth and Fourteenth Amendment. I have to go to the appropriate rules of evidence..."(659a) It is in fact the converse. As Supreme Court decisions repeatedly illustrate, an accused is often entitled to admission of evidence which may otherwise be properly excluded under evidentiary rules.

Dr. Leo's testimony describing how interrogation tactics "create a psychology that move suspects from denial to admission" (439a) and Dr. Wendt's testimony that Mr. Kowalski's "cognitive factors, in terms of his anxiety and depression and his interpersonal factors, in terms of his low assertiveness, which leave him particularly vulnerable to suggestion and influence by others, particularly people who are in positions of authority" (521a), in combination, address the singular most important issue the jury will be called on to decide: Why did Mr. Kowalski make the statements that he did?

#### **CONCLUSION AND REQUEST FOR RELIEF**

As the Supreme Court has recognized, a defendant's own confession "is probably the most probative and damaging evidence that can be admitted against him." *Fulminante*, 499 U.S. at 296. Sometimes, however, that confession is false. Here, Jerome Kowalski has been charged

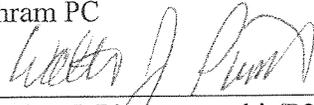
with two counts of open murder and faces life imprisonment on the strength of incriminating statements he made to police. He is entitled to put forward a defense as to those statements and, specifically, through expert testimony, to help the jury understand and evaluate them. The trial court not only erred in excluding the testimony of Drs. Wendt and Leo on an evidentiary basis as irrelevant and unreliable, but has also assured that Mr. Kowalski will be deprived of his constitutional right to present a defense as guaranteed by the United States and State of Michigan Constitutions.

For these reasons, Defendant-Appellant, Jerome Kowalski, prays that this Honorable Court reverse the Court of Appeals' decision and order that the trial court permit defendant to call Drs. Wendt and Leo as witnesses on his behalf at the trial in this matter.

Respectfully submitted,

Hertz Schram PC

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