

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

DAMON EARL WARNER,

Defendant-Appellant.

Michigan Supreme Court No. 163805

Court of Appeals No. 351791

Eaton County No. 2016-020296-FC

BRIEF FOR AMICUS CURIAE THE INNOCENCE PROJECT
IN SUPPORT OF DEFENDANT-APPELLANT

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INTERESTS OF AMICUS CURIAE

Amicus curiae is the Innocence Project, Inc.,¹ a non-profit organization dedicated to providing pro bono legal services to incarcerated people whose innocence may be established through the development of a post-conviction record. The Innocence Project has served as counsel or provided assistance in hundreds of successful post-conviction exonerations of innocent persons nationwide. The Innocence Project also seeks to prevent wrongful convictions by researching the causes of wrongful conviction and pursuing legislative, administrative, and judicial reform initiatives designed to enhance the truth-seeking functions of the criminal justice system, and to prevent the admission of unreliable evidence in courts around the country. Such reforms include those designed to assure that factfinders have the necessary tools with which to assess the reliability of police-induced confessions, including, when relevant, expert testimony. Without expert testimony regarding the often-counterintuitive science surrounding the phenomenon of false confessions—a primary cause of wrongful convictions—factfinders assessing confession evidence are not well equipped to assess the reliability of the evidence before them and, consequently, may wrongfully convict an innocent person who falsely incriminated themselves.

At issue here is whether the trial court abused its discretion when it denied Defendant-Appellant Damon Earl Warner’s (hereinafter “Warner”) motion for appointment of a false confession expert, reasoning that such testimony is categorically inadmissible pursuant to *People v Kowalski*, 492 Mich 106 ; 821 NW 2d 14 (2012) (holding that the phenomenon of false confessions is “not within the average person’s understanding of human behavior” and thus potentially admissible, but upholding the trial court’s preclusion of such testimony, finding that

¹ No part of this brief was drafted by counsel for either party, nor did either party or their counsel contribute financially to its preparation. No entity contributed, financially or otherwise, to the preparation of this brief other than amicus curiae and counsel for amicus curiae.

the trial court had a reasonable basis from which to conclude that the proffered testimony was based on unreliable data and methodologies).

To the extent this Court's holding in *Kowalski* can be interpreted as this Court's endorsement of a conclusion that false confession science is inherently unreliable and thus inadmissible under Michigan Rule of Evidence ("MRE") 702, amicus urges the Court to reconsider and overrule this aspect of *Kowalski*. As explored below, modern scientific consensus compels the conclusion that false confession expert testimony, if proffered by a qualified expert, is founded upon reliable data and methodologies and is admissible under the requisite evidentiary standards. Accordingly, to prevent against future wrongful convictions caused by false confessions that factfinders may mistake as true evidence of guilt, amicus urges this Court to hold that expert testimony regarding false confessions is admissible if the proffered testimony concerns at least one "risk factor" associated with false confessions that is generally accepted by the relevant scientific community and that is relevant to the specific defendant or interrogation at issue.

INTRODUCTION

False confessions are a primary cause of wrongful convictions, contributing to approximately one-third of all known convictions that were later overturned through DNA evidence. See Innocence Project, *DNA Exonerations in the United States* <<https://www.innocenceproject.org/dna-exonerations-in-the-united-states/>> (accessed Dec. 22, 2022). In Michigan alone, in the last two decades, at least 11 innocent people have been exonerated after having been wrongfully convicted based on their own false confessions. See University of Michigan Law School, *The National Registry of Exonerations* <<https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx>> (accessed Dec. 22, 2022). Collectively, these Michigan residents spent approximately 240 years wrongfully imprisoned, *id.*, while the actual perpetrators remained free to commit additional crimes.

This Court, in *People v Kowalski*,² acknowledged the phenomenon of false confessions and the reality that false confessions are “contrary to common sense[,]” and “not within the average person’s understanding of human behavior.”³ The *Kowalski* Court held that “expert testimony bearing on the manner in which a confession is obtained and how a defendant’s psychological makeup may have affected the defendant’s statements . . . is admissible . . . when it meets the [] requirements of MRE 702.”⁴ However, the Court also upheld the trial court’s preclusion of the expert testimony proffered by the defendant in that case, affirming the trial court’s conclusion that the confession expert’s testimony was founded upon unreliable data and methodologies.⁵

Here, the trial court, in reliance on *Kowalski*, concluded that expert testimony on false confessions is *categorically* inadmissible under Michigan law and, accordingly, denied Warner’s motion for the appointment of funds to retain such an expert.⁶ On direct appeal, the appellate court held that the trial court misinterpreted *Kowalski* as a per se prohibition of such testimony, but nonetheless upheld the ruling below that precluded Warner from obtaining funds to consult with or proffer the relevant expert testimony.⁷

As explored below, today, there is overwhelming evidence to demonstrate that expert testimony regarding false confessions meets all of the dictates of Michigan’s evidentiary rules in that it is beyond the ken of the average juror and is founded upon reliable, evidence-based methodologies that have produced decades of scientific literature that is generally accepted by the

² *People v Kowalski*, 492 Mich 106; 821 NW 2d 14 (2012).

³ *Id.* at 124.

⁴ *Id.*

⁵ *Id.* at 131–35.

⁶ Transcript of Final Pretrial and Motions Hearing, Sept. 3, 2019, at 50:17–24.

⁷ *People v Warner*, 339 Mich App 125, 147; 981 NW2d 733 (2021).

relevant scientific community. Accordingly, amicus urges this Court to seize the opportunity presented here to revisit and overrule the language in *Kowalski* that may be interpreted as denouncing the reliability of the social science regarding false confessions. Amicus additionally urges this Court to provide guidance to lower courts assessing the admissibility of false confession expert testimony under MRE 702, and to hold that whenever a generally accepted “risk factor” for false confession—such as, for example, a confessor’s intellectual impairment or an interrogating officer’s promise of leniency—is implicated in a case, the expert testimony—if proffered by a qualified expert is admissible. The adoption of such a standard, which is aligned with the relevant science, will help assure that juries have the necessary tools with which to render “intelligent”⁸ conclusions as to the reliability of confession evidence before them. Without such expert testimony, juries may be—and, as demonstrated by the many exonerations involving false confession, have been⁹—led astray.

BACKGROUND

In 2016, Damon Earl Warner was interrogated multiple times by law enforcement officers regarding allegations that Warner had sexually assaulted his stepdaughter in December of 2015.¹⁰

⁸ *Kowalski*, 492 Mich at 127 (“The exclusion of [false confession] expert testimony when it meets all the requirements of our evidentiary rules could, in some instances, hinder the jury in its task because without the enlightenment of expert opinion the jury’s ultimate determination may not be arrived at intelligently.”)

⁹ The vast majority of proven false confessions that led to wrongful convictions were assessed by factfinders without the benefit of expert testimony. A 2015 analysis of sixty-six known false confession cases, revealed that only eight (8) of the 66 exonerees who had falsely confessed and were later exonerated by DNA evidence, had experts presented at their trials, even though many had dispositional risk factors, such as youth and intellectual impairment, and nearly all had at least one known situational risk factor. *See* Brandon Garrett 2015, *Contaminated Confessions Revisited*, 101 Va L Rev 395, 425 (2015). Although expert testimony is not a panacea for the problem of false confessions, it is critical insofar as it helps jurors better assess the reliability of the evidence before them and, in turn, will help safeguard against factfinders wrongfully crediting confession evidence and convicting the innocent.

¹⁰ *People v Warner*, 339 Mich App 125, 130–31; 981 NW2d 733, 739 (2021).

Only select portions of the interrogation were recorded.¹¹ Ultimately, Warner confessed to the allegations.¹²

In August 2016, Warner was arrested and charged with first-degree criminal sexual conduct (“CSC”).¹³ Prior to trial, Warner moved the trial court to appoint a false confessions expert to “speak to the attributes associated with false confessions.”¹⁴ Warner’s motion alleged that the testimony was relevant because officers interrogated him for approximately six hours, and made promises of leniency and “emotional threats” to induce a confession.¹⁵ The prosecution opposed the motion, arguing that false confession expert testimony was inadmissible under *People v Kowalski*.¹⁶ After a hearing, the trial court ultimately denied Warner’s motion, holding that *Kowalski* stood for a categorical prohibition of expert testimony on false confessions.¹⁷

On October 31, 2019, following a jury trial, Warner was convicted and sentenced to 20 to 40 years in prison for first-degree CSC. Warner appealed, and on October 7, 2021, the Court of Appeals affirmed his conviction.¹⁸ The appellate court agreed with Warner that the trial court had misinterpreted *Kowalski*, reasoning that “*Kowalski* . . . did not hold as a matter of law that false-

¹¹ Defendant’s Motion Requesting the Court to Appoint a False Confession Expert, Aug. 21, 2019, at 2.

¹² *Warner*, 339 Mich App at 131.

¹³ Initially, Warner was charged with both first and second degree CSC. At his first trial, he was convicted of second-degree CSC, but the jury was deadlocked on the first-degree CSC charge. During the appeal, the prosecutor dismissed the deadlocked charge, and the Court of Appeals ordered a new trial. In response, the prosecutor filed a motion to amend the pending Information to reinstate the first-degree charge. *See* Plaintiff-Appellee’s Brief Opposing Defendant-Appellant’s Appeal, Apr. 30, 2021, at 1.

¹⁴ Defendant’s Motion Requesting the Court to Appoint a False Confession Expert, Aug. 21, 2019, at 1.

¹⁵ *Id.* at 2–3.

¹⁶ People’s Response to Defendant’s Motion Requesting the Court to Appoint a False Confession Expert, Aug. 30, 2019; Final Pretrial and Motions Transcript, Sept. 3, 2019, at 34–36.

¹⁷ *Id.* at 50:17–24 (holding that “*Kowalski* is very clear that what the defendant has asked for is that—what are the attributes associated with false confessions and interviewer bias. . . . That is not allowed by the decision of our Supreme Court in the *Kowalski* case. And that’s binding.”).

¹⁸ *People v Warner*, 339 Mich App 125; 981 NW2d 733 (2021).

confession testimony is universally inadmissible[.]”¹⁹ Nevertheless, the court held that “the trial court did not abuse its discretion by denying the motion [to admit expert testimony] because defendant did not show that a reasonable probability existed ‘that denial of expert assistance would result in a fundamentally unfair trial.’”²⁰ The appellate court reasoned that, *inter alia*, Warner was able to present evidence and argument to contest the reliability of his confession even without expert testimony, noting that Warner’s counsel elicited testimony from the interrogating officers that they were “aggressive” during the interview, blamed the victim, and that the confession occurred “closer to the end” of the interrogation, which lasted for a “couple of hours.”²¹

Warner filed an application for leave to appeal the October 7, 2021 decision of the Court of Appeals. On September 23, 2022, this Court scheduled oral argument on the application with regard to three issues, only one of which will be addressed by amicus: whether the trial court abused its discretion by denying Warner’s motion to appoint an expert in false confessions.²²

This Court now has the opportunity to revisit its holding in *Kowalski* and announce a clear test for assessing the admissibility of false confession expert testimony which—as confirmed by decades of reliable, yet often-counterintuitive, scientific evidence—is founded upon reliable data and valid methodologies and should be admissible when proffered by a qualified expert in a relevant case.

ARGUMENT

I. Expert Testimony Regarding False Confessions Safeguards Against the Injustice of Wrongful Conviction.

¹⁹ *Id.* at 146.

²⁰ *Id.* (citing *People v Kennedy*, 502 Mich 206, 227; 917 NW2d 355, 366 (2018)).

²¹ *Id.* at 148–49.

²² *People v Warner*, 979 NW2d 337 (Mem) (Mich, 2022).

A. False Confessions—a Leading Cause of Wrongful Convictions—Are Highly Prejudicial and Difficult for Factfinders to Detect.

False confessions are “recognized as one of the leading sources of erroneous convictions of innocent individuals.” Klaver et al, *Effects of Personality, Interrogation Techniques and Plausibility in an Experimental False Confession Paradigm*, 13 *Legal & Crim Psych* 71, 72 (2008) (citations omitted). False confessions have been a contributing factor in the wrongful convictions underlying nearly one-third of all known DNA exonerations and about one in eight of all exonerations nationwide, as tracked by the National Registry of Exonerations. See University of Michigan Law School, *The National Registry of Exonerations* <<https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx>> (accessed Nov. 2, 2022). In Michigan alone, since the year 2000, there have been at least 11 exonerations where the defendant falsely confessed. *Id.* As experts have explained, these proven false confessions “most surely represent the tip of an iceberg,” as known false confessions necessarily account for only a fraction of the actual confessions given by innocent people. Kassin et al, *Police-Induced Confessions: Risk Factors and Recommendations*, 34 *L & Hum Behav* 3 (2010). The known dataset of cases necessarily excludes “false confessions that are disproved before trial, many that result in guilty pleas, those in which DNA evidence is not available, those given to minor crimes that receive no post-conviction scrutiny, and those in juvenile proceedings that contain confidentiality provisions.” *Id.*

Since the 1980’s, social scientists have studied the phenomenon of false confessions by, *inter alia*, analyzing the archives of wrongful convictions based on false confession evidence, conducting laboratory experiments to test the psychological impact of various interrogation tactics, and conducting systematic reviews of police interrogations. As a result of decades of scientific research, experts have identified various factors that are associated with an increased risk that innocent people will falsely inculcate themselves in response to police interrogation. These risk

factors are categorized broadly into the “dispositional” characteristics of the confessor (such as youth or cognitive disability) and the “situational” circumstances of the interrogation itself (such as the police interrogation tactics or the environment in which the interrogation occurred). *See Police-Induced Confessions*, 34 L & Hum Behav at 3, 4.²³

Many of the recognized “situational” risk factors are interrogation tactics associated with the “Reid Technique” of interrogation. *See id.* at 7. Named after one of its founders, John Reid, the Reid Technique has been the “most widely publicized and probably most widely used” interrogation method in the United States since its inception in the 1960s. Gohara, *Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 Fordham Urb L J 791, 808 (2006). The Reid Technique instructs officers to isolate the suspect in a “small private room, which increases his or her anxiety and incentive to escape.” *Police-Induced Confessions*, 34 L & Hum Behav at 7. Interrogating officers then engage in a nine-step process that is intended to “lead suspects to see confession as an expedient means of escape.” *Id.* Although the Reid Technique is effective in eliciting confessions, it relies on interrogation tactics that pose a risk of “the ultimate failure of the suspect interview process—a false confession from an innocent suspect,” and in fact the method’s guilt-presumptive, psychologically manipulative tactics have coerced many innocent people to falsely confess. Eastwood & Watkins, *Psychological Persuasion in Suspect Interviews*, 11 Investigative Interviewing Rsch & Prac J 54, 57 (2021) (noting that “[t]he propensity for Reid-style approaches to create false confessions has been demonstrated within both laboratory paradigms and real-world

²³ Saul Kassin, whose work is cited throughout this brief, is a Distinguished Professor of Psychology at the John Jay College of Criminal Justice in New York and Professor Emeritus at Williams College in Massachusetts. Dr. Kassin is one of the pioneers of the scientific study of false confessions and has received a Presidential Citation Award from the American Psychology-Law Society, in addition to other awards in recognition of his work. Williams College, Department of Psychology, Saul Kassin Biography <<https://web.williams.edu/Psychology/Faculty/Kassin/biography/index.html>> (accessed Dec. 18, 2022).

cases”) (citation omitted).²⁴ For example, scientific research has found that “minimization” tactics—a term referring to a category of techniques “designed to provide the suspect with moral justification and face-saving excuses for having committed the crime in question”—increase the risk of false confession because such tactics have been shown to communicate “by implication that leniency in punishment is forthcoming upon confession.” See *Police-Induced Confessions*, 34 L & Hum Behav at 3, 12. Despite its demonstrated risk of eliciting false confessions, minimization is a critical aspect of the Reid Technique, which instructs officers to “develop a ‘minimizing theme’ that, among other things, downplays the moral seriousness of the offense.”²⁵ Luke & Alceste, *The Mechanisms of Minimization: How Interrogation Tactics Suggest Lenient Sentencing Through Pragmatic Implication*, 44 L & Hum Behav 266, 267 (2020).

When such coercive interrogation methods produce a false confession, the confession typically functions as the catalyst to a chain of events that ends in wrongful conviction, as the confession tends to bias the investigative process, resulting in the premature termination of the investigation or the accumulation of additional false evidence of guilt. Following a confession, police often “close the investigation, deem the case solved, and overlook exculpatory information—even if the confession is internally inconsistent, contradicted by external evidence, or the product of coercive interrogation.”

²⁴ Due to its role in eliciting false confessions, the Reid Technique is today regarded as so controversial that “a consulting group that . . . has worked with a majority of U.S. police departments, said . . . it will stop training detectives in the method” and will now “use the Reid technique only to educate police on the risk and reality of false confessions.” Hager, The Marshall Project, *The Seismic Change in Police Interrogations* <<https://tinyurl.com/5zxfybru>> (accessed Dec. 12, 2022).

²⁵ Officers are instructed to propose a binary choice to their suspects—either they committed the crime for an inexcusable or repulsive reason, or simply because of a mistake or lapse in judgment that reflects only basic human nature. See Reid, *Selecting the Proper Alternative Question* (Sept. 1, 2004), available at <<https://reid.com/resources/investigator-tips/selecting-the-proper-alternative-question>> (accessed Feb. 1, 2023); Inbau et al, *Criminal Interrogations and Confessions* (Chicago: Jones & Bartlett Learning, 2013), pp. 293–303 (instructing officers on how to utilize the “alternative question” technique to “weaken the suspect’s resistance” to confession and to “impl[y] a rather sympathetic attitude on the part of the investigator”).

Kassin, *Why Confessions Trump Innocence*, 67 Am Psych 431, 433 (2012) (citations omitted); see also Leo, *False Confessions: Causes, Consequences, and Implications*, 37 J Am Acad Psychiatry L 332, 340 (2009) (stating that “no other class of evidence is so profoundly prejudicial” as the false confession, which has a “strong biasing effect on the perceptions and decision-making of criminal justice officials”) (citation omitted). Various studies have shown that confessions are “potent enough to corrupt other evidence in a case, such as the judgments of experienced polygraph examiners, eyewitnesses, and individuals judging handwriting samples, often resulting in an array of [inaccurate conclusions] and creating the appearance of corroboration.” See Appleby & Kassin, *When Self-Report Trumps Science: Effects of Confessions, DNA, and Prosecutorial Theories on Perceptions of Guilt*, 22 Psych, Pub Pol’y, & L 127, 137 (2016) (citations omitted); see also *Why Confessions Trump Innocence*, 67 Am Psych at 436–38 (noting the high prevalence of additional evidentiary errors, such as mistaken eyewitness identification, when a false confession is involved, given a false confession’s power to “taint[] the perceptions of eyewitnesses, forensic experts, and others”); *Police-Induced Confessions*, 34 L & Hum Behav at 23–24 (describing a study in which fingerprint experts changed 17% of their previously correct matches or exclusions when presented with a false confession).

Moreover, as discussed further *infra* Section I(B), false confessions are inherently counterintuitive and have an overwhelmingly prejudicial impact on factfinders. Accordingly, if a false confession is admitted into evidence, the innocent confessor is at grave risk of wrongful conviction *even in the face of compelling evidence of innocence*. See Appleby & Kassin, *When Self-Report Trumps Science*, 22 Psych, Pub Pol’y, & L at 127–29 (noting the “unequivocal” evidence that “confessions have more impact on verdicts” than most other forms of evidence, including eyewitness identification evidence) (citation omitted). In fact, 22% of exonerees whose wrongful convictions

were based on confession evidence now known to be false were convicted *despite* the availability of exculpatory DNA evidence at the time of trial. *See* Innocence Project, *DNA Exonerations in the United States* <<https://www.innocenceproject.org/dna-exonerations-in-the-united-states/>> (accessed Dec. 12, 2022); *see also* *When Self-Report Trumps Science*, 22 *Psych, Pub Pol’y, & L* at 127–28 (discussing a report analyzing 19 cases in which innocent confessors to rape and/or murder were tried and convicted despite having been exculpated by DNA tests).

The significant weight that factfinders give false confession evidence may be amplified when the confession is “contaminated,” meaning the innocent suspect adopts detailed crime facts which are suggested to them by interrogating officers. *See* Garrett, *The Substance of False Confessions*, 62 *Stan L Rev* 1051, 1079–83 (2010) (detailing instances in which suggestion by police was apparent in recordings of analyzed false confessions). As a result of contamination—which may occur when, for example, police use leading questions or show photographs of the crime scene or victim to the suspect during the interrogation—many proven false confessions contain detailed factual narratives that the innocent suspect had no knowledge of, but which were suggested, sometimes inadvertently, to the innocent confessor by the interrogating officers. *See* Appleby et al, *Police-Induced Confessions: An Empirical Analysis of Their Content and Impact*, 19 *Psych, Crime, & L* 111, 124–25 (2013). Analyses of cases involving false confessions suggest that false confessions can be particularly challenging for factfinders to identify when, as a result of contamination, they also contain “a coherent and compelling storyline, motives and explanations.” *See* Leo et al, *Promoting Accuracy in the Use of Confession Evidence: An Argument for Pretrial Reliability Assessments to Prevent Wrongful Convictions*, 85 *Temp L Rev* 759, 775–76 (2013); Garrett, *Contaminated Confessions Revisited*, 101 *Va L Rev* 395, 396 (2015) (nearly all false confessions established through DNA contained non-public facts relating to the crime).

The tendency of law enforcement to truncate its investigation after a confession is elicited and the inclination of factfinders to credit confession evidence not only make wrongful convictions of innocent confessors very likely but may also allow the actual perpetrators to remain at large without accountability. *Promoting Accuracy in the Use of Confession Evidence*, 86 Temp L Rev at 771–73; see Innocence Project, *DNA Exonerations in the United States* <<https://www.innocenceproject.org/dna-exonerations-in-the-united-states/>> (accessed Dec. 12, 2022) (noting that, since the first DNA exoneration in 1989, there were 48 additional crimes, including 25 murders, that were committed by the true perpetrators of crimes for which innocent false confessors were wrongfully convicted). The admission into evidence of false confessions—particularly without the admission of a relevant expert who can assist the jury with evaluating the reliability of the confession—thus presents a high risk of injustice not only for innocent suspects, but also for crime victims and the local community.

B. The Phenomenon of False Confessions Is Counterintuitive; Expert Testimony Is a Critical Tool for Factfinders Assessing Confession Evidence.

As this Court has recognized, “a claim of a false confession is beyond the common knowledge of the ordinary person[.]” *Kowalski*, 492 Mich at 142. Indeed, research has repeatedly demonstrated that people do not believe they would themselves ever confess to a crime they did not commit²⁶ and, therefore, when someone “admits to wrongdoing, in light of the adverse consequences that will follow, people trust that confession.”²⁷ As a result, “confessions have more impact on verdicts than do other potent forms of evidence[.]” to such an extent that “people do not

²⁶ Costanzo et al, *Juror Beliefs About Police Interrogations, False Confessions, and Expert Testimony*, 7 J Empirical Legal Studies 231, 238–39 (2010) (over 91% of mock jurors disagreed that they would be likely to confess to a minor crime if interrogated by police; over 93% disagreed that they were likely to confess to a serious crime).

²⁷ Kassir, *False Confessions: How Can Psychology So Basic Be So Counterintuitive?* 72(9) Am Psych 951, 956 (2017).

adequately discount confessions—even when they are retracted and judged to be the result of coercion.”²⁸

Moreover, the science regarding the risk factors associated with an increased risk of false confession is not well understood by jurors and, consequently, without expert guidance, jurors tend to underappreciate the impact of various risk factors. Despite growing public knowledge that people can and do falsely confess under certain circumstances, an “average layperson’s common knowledge does not correspond to findings provided by the rich, complex, and vast literature about criminal interrogations and confessions.”²⁹ For example, most eligible jurors discount how much young age impacts a person’s susceptibility to coercion. Grove & Kukucka, *Do laypeople recognize youth as a risk factor for false confession? A test of the ‘common sense’ hypothesis*, 28(2) *Psychiatry, Psych, & L* 185 (2021) (jurors “may have some intuitive understanding of youth as a risk factor for false confession . . . [but] their understanding appears limited at best.”); see also Mindthoff et al, *A Survey of Potential Jurors’ Perceptions of Interrogations and Confessions*, 24(4) *Psych, Pub Pol’y, & L* 430 (2019) (revealing that jurors have evolved in their understanding that false confessions do occur, but because “potential jurors do not fully comprehend the detrimental impact youth can have on confession behaviors, jurors may not be effective safeguards against negative impacts of juvenile false confessions”). Jurors are also much less likely, without expert testimony as a guide, to understand how, for example, police deception and explicit promises of leniency increase the risk of false confession. Alceste et al, *The Psychology of*

²⁸ Kassir, *Why Confessions Trump Innocence*, 67 *Am Psych Ass’n* 431, 433–34 (2012) (internal citations omitted); see also Costanzo et al, *Juror Beliefs about Police Interrogations, False Confessions, and Expert Testimony*, 7 *J Empirical Legal Studies* 231, 238–39 (2010); Kassir, *False Confessions: How Can Psychology So Basic Be So Counterintuitive?*, 72 *Am Psych* 951, 956 (2017).

²⁹ Alceste et al, *The Psychology of Confessions: A Comparison of Expert and Lay Opinions*, 35 *Applied Cognitive Psych* 39 (2021).

Confessions: A Comparison of Expert and Lay Opinions, 35 Applied Cognitive Psych 39 (2021) (finding that “only 56% of participants believed that [police deception about evidence] puts innocent people at risk to confess—in contrast to 94% of experts” and that “only 65% believed that explicit promises can have that same effect—in contrast to 99% of experts”).

Additionally, the psychological impact of certain interrogation tactics, such as the “bluff technique,” is inherently counterintuitive and thus unlikely to be identified as coercive without expert guidance. See Perillo & Kassin, *Inside Interrogation: The Lie, The Bluff, and False Confessions*, 35 L & Hum Behav 327, 327 (2011). The “bluff” tactic refers to a technique in which interrogators pretend to or imply that they have “evidence without [] asserting that this evidence necessarily implicates the suspect.” *Id.* For example, if officers tell a suspect that blood or other forensic evidence was collected from the scene and will be tested—thus raising the specter that such evidence *may* incriminate the suspect—when such evidence either does not exist or will not or cannot be subjected to forensic testing, officers are engaging in the “bluff” technique. Using a laboratory paradigm designed to test an innocent person’s willingness to falsely confess in response to deceptive police tactics, experts have determined that such “bluff” tactics can increase the rates of false confessions by as much as 60%—a rate comparable with that of false confessions provided in response to more explicitly deceptive tactics. *Id.* at 335. Yet, experts predict that “bluff-induced false confessions are particularly likely to be misperceived to be voluntary and [be perceived] as true because of the apparently benign nature of the deception involved.” *Id.* Indeed, an average person is unlikely to understand that an officer’s lie that forensic evidence *could* or *might* incriminate the suspect, functions to incentivize an innocent person to confess because, for the innocent, the “tactic serve[s] not as a threat of inculcation but rather as a promise of future exoneration which, paradoxically, ma[k]e[s] it easier to confess.” *Id.* at 335.

In sum, research demonstrates that “‘social science experts’ [also known as ‘confession experts’ in disputed confession cases] [a]re significantly more aware of the interrogation tactics and personal vulnerabilities as risk factors in disputed confessions than laypeople.” Gudjonsson, *The Science-Based Pathways to Understanding False Confessions and Wrongful Convictions*, 12 *Frontier Psych* 633936 (2021). As such, without expert testimony, “jurors do not provide adequate safeguards when evaluating the veracity of confessions.” Woody et al, *Comparing the effects of explicit and implicit false-evidence ploys on Mock Jurors’ verdicts, sentencing recommendations, and perceptions of police interrogation*, (20)(6) *Psych, Crime, & L* (2014). Therefore, the admission of expert testimony is crucial to obtain a reliable outcome in any case involving false confession “risk factors.”

II. To Help Prevent Wrongful Convictions Based on False Confessions, *Kowalski* Should be Revisited and The Standard for The Admission of False Confession Expert Testimony Should Be Aligned with the Relevant Social Science.

This Court has, consistent with the social science explored above, properly recognized that expert testimony regarding the phenomenon of false confession is “beyond the common knowledge of the ordinary person and . . . [thus, is] admissible under MRE 702 [] if it meets the other requirements of MRE 702.” *Kowalski*, 492 Mich at 142. This Court in *Kowalski*, however, also held that it was not an abuse of discretion to preclude the expert testimony proffered in that case because the trial court had a reasonable basis upon which to find that the expert testimony was founded upon unreliable data and methodology and thus was inadmissible pursuant to MRE 702. The Court’s reasoning in this regard—which, arguably, endorses a finding that false confession social science is based on unreliable data and methodologies—directly contravenes the vast, reliable evidence and modern scientific consensus regarding the causes or “risk factors” of false confessions. As discussed *infra* Section II(A), courts across the country have recognized the

reliability of the science on false confessions and admitted such expert testimony in relevant cases. See e.g., *State v Perea*, 2013 UT 68, ¶ 69; 322 P3d 624, 640 (2013).

In the decade since *Kowalski* was decided, false confession science has advanced, and additional evidence of the scientific consensus regarding various risk factors for false confession has emerged. The new scientific research compels reconsideration of any aspect of the *Kowalski* Court’s ruling that suggests that the science regarding false confessions is premised upon unreliable “data, principles, and methodologies” and is thus inadmissible under MRE 702. Indeed, what has become abundantly clear in recent years is that there is “currently a solid scientific evidence base for understanding the processes involved in cases of false confession, identifying risk factors, and the evaluation of real-life cases for judicial purposes.” Gudjonsson, *The Science-Based Pathways to Understanding False Confessions and Wrongful Convictions*, 12 *Frontier Psych* 633936 (2021); see also Kassin, *False Confessions: How Can Psychology So Basic Be So Counterintuitive?*, 72 *Am Psych* 951, 956 (2017) (“[T]he scientific study of false confessions has become a mature subdiscipline of psychology[.]”).

Because, as explored below, expert testimony regarding false confessions is beyond the ken of the average juror, and is based upon reliable data and decades of valid, evidence-based methodologies that have produced robust, peer-reviewed scientific literature that is generally accepted by the relevant scientific community, amicus urges this Court to reconsider and overrule the aspects of its holding in *Kowalski* that are inconsistent with the modern science on false confessions and provide necessary guidance to lower courts assessing the admissibility of false confession expert testimony under MRE 702. More specifically, amicus urges this Court to hold that in the appropriate case—*i.e.*, a case in which a generally accepted dispositional or situational risk factor (or factors) for false confession is implicated and the testimony is proffered by a

qualified expert—expert testimony regarding false confessions is admissible under MRE 702. Under this standard, trial courts would retain significant discretion to entertain *Daubert*³⁰ hearings to determine whether to permit expert testimony regarding risk factors where the general acceptance of a factor is in dispute and preclude—in full or in part—any proffered expert testimony that the court finds does not adhere to the scientific consensus regarding interrogations and confessions. Trial courts would, of course, additionally retain discretion to exclude false confession expert testimony as irrelevant, if the court finds that, in light of the particular facts presented, no dispositional or situational risk factors are involved, or the testimony is not proffered by a sufficiently qualified expert.

A. As the *Kowalski* Court Held, False Confession Expert Testimony Will Assist the Trier of Fact by Providing Evidence that Is Beyond the Ken of an Average Juror.

As noted, the Court in *Kowalski* held that “because the claim of a false confession is beyond the common knowledge of the ordinary person, expert testimony about this phenomenon is admissible under MRE 702 when it meets the other requirements of MRE 702.”³¹ Further, the Court held that “[t]he exclusion of such expert testimony when it meets all the requirements of [the relevant] evidentiary rules could . . . hinder the jury in its task because without the enlightenment of expert opinion the jury’s ultimate determination may not be arrived at intelligently.”³² The Court, in 2012, relied primarily on the concept of the hearsay rule regarding statements against penal interest—and “the common-sense intuition that a reasonable person would be expected to lie, if at all, only in his own favor, and would not harm himself by his own

³⁰ *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

³¹ *Kowalski*, 492 Mich at 129.

³² *Id.* at 127

words”’—to conclude that false confessions are counterintuitive.³³ Today, as discussed above, *see supra* Section I(B), the counterintuitive nature of the science of false confessions, as well as lay people’s misapprehension of the relevant risk factors, has been empirically established by social science research. *See e.g.*, Alceste et al, *The Psychology of Confessions: A Comparison of Expert and Lay Opinions*, 35 *Applied Cognitive Psych* 39 (2021); Kassin, *False Confessions: How Can Psychology So Basic Be So Counterintuitive?*, 72 *Am Psych* 951, 956 (2017). Indeed, false confessions are so counterintuitive and difficult to detect without expert assistance, that factfinders have repeatedly wrongfully convicted innocent confessors even in the face of exculpatory DNA evidence. *See* Innocence Project, *DNA Exonerations in the United States* <<https://www.innocenceproject.org/dna-exonerations-in-the-united-states/>> (accessed Dec. 12, 2022); *see also* *When Self-Report Trumps Science*, 22 *Psych, Pub Pol’y, & L* at 127–28 (discussing a report analyzing 19 cases in which innocent confessors to rape and/or murder were tried and convicted despite having been exculpated by DNA tests).

Consequently, many courts throughout the nation have, like this Court, recognized the counterintuitive nature of the phenomenon of false confessions and the usefulness of expert testimony on the subject. *See, e.g., McCloud v State*, 208 So3d 668, 680 (Fla, 2016) (“False confessions are not commonly understood, so a false confession expert can play an important role in explaining to the jury that ‘a phenomenon that causes innocent people to confess to a criminal offense’ exists, and ‘the parameters within which one can evaluate a confession to determine its

³³ *Kowalski*, 492 Mich at 128–29 (noting that “[t]he premise underlying [the hearsay exception permitting the admission of statements against interest] is ‘the common-sense intuition that a reasonable person would be expected to lie, if at all, only in his own favor, and would not harm himself by his own words.’ Despite this well-established, commonsense presumption, embodied in our evidentiary rules, that a person does not make false incriminating statements, both the Court of Appeals and the circuit court simply presumed that the average juror possessed the knowledge to evaluate factors that might lead to a false confession. This conclusion is not grounded in the necessary commonsense inquiry and lacks any legal basis.”).

veracity.”); *Perea*, 2013 UT at ¶ 69 (“[E]xpert testimony about factors leading to a false confession assists a trier of fact to understand the evidence or to determine a fact in issue”); *Miller v Indiana*, 770 NE2d 763 (Ind, 2002) (finding that the “substance of [the false confession expert’s] testimony would have assisted the jury regarding the psychology of relevant aspects of police interrogation and the interrogation of mentally retarded persons, topics outside common knowledge and experience”); *United States v Roubideaux*, unpublished order of the United States District Court for the District of South Dakota, entered November 16, 2022 (Case No. 4:22-CR-40033-LLP) p 4. (“The phenomenon of false confessions is counterintuitive. The Court finds that it is not within the common knowledge of jurors that people sometimes lie on occasion to their own detriment by falsely confessing to a crime they did not commit. Nor do jurors commonly have knowledge of specific factors that may correlate to false confessions.”) (internal citation omitted). *See also Tigue v. Kentucky*, 600 SW3d 140, 162 (Ky, 2018) (“[W]hen relevant indicia [of a false confession] are present, and the proffered testimony is reliable, a defendant should be allowed to present expert testimony” regarding the phenomena of false confession); *Terry v Kentucky*, 332 SW3d 56, 63 (Ky, 2010) (finding reversible error where the trial court precluded the defense’s expert witness regarding coercive interrogations and false confessions); *Hannon v Wyoming*, 2004 WY 8, ¶¶ 81, 84; P3d 320 (2004) (holding that the constitutional right to present a defense is denied “where competent reliable evidence bearing on the voluntariness of a confession is excluded, particularly where the defendant’s only avenue of defense is to show the confession is false”).³⁴

³⁴ *See also United States v West*, 813 F3d 619 (CA 7, 2015); *Vermont v Kolts*, 2018 VT 131, ¶ 38; 209 Vt 351; 205 A3d 504 (2018); *Jackson v Virginia*, 266 Va 423, 438; 587 SE2d 532 (2003); *New Jersey v Hreha*, 217 NJ 368, 386; 89 A3d 1223 (2014); *South Carolina v Cope*, 405 SC 317; 748 SE2d 194 (2013); *New York v Bedessie*, 19 NY3d 147, 161; 970 NE2d 380; 947 NYS2d 357 (2012); *Illinois v Burgund*, 2016 IL App (5th) 130119, ¶ 1; 66 NE3d 553, 557 (2016); *People v Lopez*, 492 Mich 106 ; 821 NW 2d 14 (2012) *Kansas v Lansford*, unpublished per curiam opinion of the Court of Appeals of Kansas, issued October 11,

Consistent with the relevant social science and precedent from courts around the country, this Court should reaffirm what it correctly recognized in *Kowalski*—that expert testimony regarding the existence of the phenomenon of false confessions and the relevant risk factors, is beyond the ken of the average juror.

B. False Confession Expert Testimony Is Founded Upon Decades of Research based on Reliable Data, Methods, and Principles, and—as Conclusively Demonstrated in Recent Years—Is Generally Accepted in the Relevant Scientific Community.

The science regarding the phenomenon of false confessions and interrogation coercion is grounded in over a century of psychological research examining human behavior and social influence. Kassir, *False Confessions: How Can Psychology So Basic Be So Counterintuitive?*, 72 *Am Psych* 951, 956 (2017).³⁵ Building upon that scientific foundation, and as the prevalence of false confessions was uncovered through the advent of DNA testing, social scientists have developed various reliable mechanisms with which to study false confessions. Gudjonsson, *The Science-Based Pathways to Understanding False Confessions and Wrongful Convictions*, 12 *Frontier Psych* 633936 (2021). As a result of decades of scientific study, the “body of literature now encompasses experimental research and meta-analyses, surveys of expert populations, observational and archival studies, and review papers authored by psychologists.” Kaplan, *Development of the Interview and Interrogation Assessment Instrument*, *Psych, Pub Pol’y, & L* (2022) (internal citations omitted). As a leading expert on false confessions has explained, “[i]t is the combination of *real-life case studies* of false confession, *experimental research* emerging in

2013 (Case No. 107,918); 310 P3d 1079 (Table) ; *Oregon v Romero*, 191 Or App 164; 81 P3d 714 (2003); *Delaware v Fana-Ruiz*, 2019 WL 3764580, at *5 (Del Super, 2019); *United States v Belyea*, 159 F Appx 525 (CA4, 2005).

³⁵ For example, hundreds of classic studies demonstrate the “law of effect”—meaning the principle that “people are highly responsive to reinforcement and subject to the laws of conditioning.” *Id.* The law of effect studies bear upon the “ways in which interrogators shape suspects throughout reinforcement . . . to confess to increasingly detailed narrative accounts of crime.” *Id.*

the 1990s, and *community studies* that have advanced the scientific basis of the psychology of false confessions.” Gudjonsson, *The Science Based Pathways* (emphasis in original).

Significantly, the emergence of laboratory studies has repeatedly and empirically demonstrated that certain interrogation tactics can induce innocent people to make false admissions of guilt. In a groundbreaking study that has come to be known as the “computer crash paradigm,” college students volunteered to participate in a controlled experiment in which they were falsely accused of crashing a computer system by pressing a key they had been instructed to avoid. *Id.* at 17. Despite not having done so, nearly all students who were presented with false evidence—namely, that a research confederate in the room said they witnessed the student hit the forbidden key—falsely admitted to hitting the relevant key and crashing the system, demonstrating the power of misinformation to induce false admissions of guilt. *Id.*; see also Kassin & Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 *Am Psych Soc* 125 (1996). This result has since been replicated in a variety of additional studies “using vastly different methods, [all] leading innocent subjects to confess” to various forms of misconduct, including violent acts. Snook et al, *Urgent Issues and Prospects in Reforming Interrogation Practices in the United States and Canada*, 26 *Legal & Criminological Psych* 1, 10 (2021) (describing a variety of experiments demonstrating that the presentation of false evidence can lead innocent people to confess to “cheating, in violation of a university honour code[,] . . . stealing money from the ‘bank’ in a computerized gambling experiment . . . and recalling past transgressions, including acts of violence”) (citations omitted).

In 2018, a meta-analysis of the laboratory experiments regarding false confessions was conducted and published in a peer-reviewed journal. See Stewart et al, *The prevalence of false confessions in experimental laboratory simulations: A meta-analysis*, 36(1) *Behav Sci & L* 12

(2018). The study concluded that “laboratory false confession research is no longer a fledgling field or specialized research paradigm, but rather an established and growing body of tested, reliable, peer-reviewed experimental research accepted by relevant scientific communities[.]” *Id.* at 26 (internal citations omitted). And, significantly, the study demonstrated that false confession social science is “a research literature that is characterized by eclectic methods that have produced convergent results” regarding the fact that certain “interrogation strategies increase the likelihood of false confession.” *Id.* (internal citations and quotation marks omitted). This “convergen[ce]” of results—meaning that various studies using different scientific methodologies have produced similar results—adds to the reliability of research the findings.

Another recent and significant development in the scientific literature is a 2018 survey of experts in the scientific community of confession psychology,³⁶ which found that various dispositional and situational risk factors are widely and generally accepted and deemed by the scientific community to be sufficiently reliable to present in court. *See Kassin et al, On the General Acceptance of Confessions Research: Opinions of the Scientific Community*, 73 *Am Psych* 63 (2018). This survey demonstrated that “there is a strong degree of agreement between experts on risk factors for false confession, although much of this knowledge remains outside of the ken of jurors.” *Development of the Interview and Interrogation Assessment Instrument*, *Psych, Pub Pol’y, & L* at 2.

Specifically, with regard to dispositional risks factors, the vast majority of experts surveyed concluded that there is reliable evidence to support testimony in court that “adolescents who are interrogated are at greater risk to confess to a crime they did not commit.” *On the General*

³⁶ Survey participants (1) held a Ph.D. in psychology, sociology, criminology, criminal justice, or another empirical social science, and (2) published, within the last 15 years and in a peer-reviewed journal, at least one article relating to interrogations and/or confessions; or (3) testified as an expert witness in court on the issue of police interrogations and confessions.

Acceptance of Confessions Research: Opinions of the Scientific Community, 73 Am Psych 63. Likewise, experts overwhelmingly agreed that there is sufficiently reliable evidence to support testimony that individuals with compliant or suggestible personalities, individuals with diagnosed psychological disorders, and those with intellectual impairments, are “particularly vulnerable” to influence or pressures during interrogation. *Id.* at 72.

Likewise, with regard to situational risk factors of false confession, 94% of experts surveyed believed that there is sufficiently reliable evidence to support expert testimony that deceiving a suspect about the incriminating evidence against the accused—a controversial technique known as the false evidence ploy—increases the risk of false confession. *Id.* Additionally, 91% of the experts agreed that there is sufficient evidence to support testimony that interrogation tactics which communicate sympathy to the suspect and suggest that the suspect’s actions were morally justified—a commonly used technique known as “minimization,” seemingly used by the detectives in this case³⁷—lead suspects to infer that they will receive leniency if they confess. *Id.* The experts were also nearly unanimous in their agreement that there is sufficiently reliable evidence to support testimony that sleep deprivation impacts decision making (98% agreed), that “explicit promises of leniency or immunity during interrogation can lead an innocent person to confess to a crime he or she did not commit,” (99% agreed), and that “threats of physical violence and punishment during interrogation can lead an innocent person to confess to a crime he or she did not commit” (95% agreed). *Id.* Additionally, experts agreed that there is reliable evidence to support testimony that

³⁷ As noted above, there is evidence that the interrogating officers here “blamed the victim” for the alleged offense. Such a tactic is consistent with “minimization” tactics of shifting blame to the victim, to minimize the moral culpability of the accused. See *Police-Induced Confessions*, 34 L & Hum Behav at 3, 12; see also *infra* Section I(A).

torture “can lead an innocent person to confess or otherwise provide unreliable information” (92% agreed). *Id.*

The widespread accord among the leading experts in the field regarding these dispositional and situational risk factors for false confession—founded upon reliable, well-established, peer-reviewed research—establishes general acceptance by the relevant scientific community. *Cf. New York v Boone*, 30 N.Y.3d 521, 528-29, 91 N.E.3d 1194 (2017) (reasoning, in the context of eyewitness identification evidence that the “cross-race effect is ‘generally accepted’ by experts in the fields of cognitive and social psychology,” in part because, “in a survey of psychologists with expertise in eyewitness identification, 90% of the experts believed that empirical evidence of the cross-race effect was sufficiently reliable to be presented in court”) (internal citation omitted); *New Jersey v Henderson*, 208 NJ 208, 27; 27 A3d 872 (2011) (finding general consensus in the scientific community based in part on a “2001 survey of sixty-four experts, mostly cognitive and social psychologists,” also authored by Saul Kassin); *Tillman v Texas*, 354 SW3d 425, 436 (Tex Crim App, 2011) (“[T]hose involved in the field are able to establish a consensus through peer review articles and surveys of experts.”). This evidence, which clearly demonstrates expert consensus and general acceptance of the relevant science, was not available to the Court in *Kowalski*.

In addition to the expert consensus, the canon of scientific research on false confessions—including research that continues to emerge in recent years—has been published in respected, peer-reviewed journals. Amicus has not listed herein all of the peer-reviewed journals that house the vast literature regarding false confession research. By way of example, various research studies demonstrating the capacity for coercive interrogation tactics to produce false confessions have been published in the “Law and Human Behavior”³⁸ Journal of the American Psychological

³⁸ See e.g., Luke & Alceste, *The Mechanisms of Minimization: How Interrogation Tactics Suggest Lenient*

Association (APA), which is the “official journal of APA Division 41 (American Psychology-Law Society)” and is a peer-reviewed, “multidisciplinary forum for empirical manuscripts examining the interface between human behavior and the law, the criminal justice and legal system, and the legal process.”³⁹ And, “the American Psychology-Law Society (AP-LS), published . . . a scientific review or ‘white paper’ titled ‘Police-Induced Confessions: Risk Factors and Recommendations’ (Kassin et al, 2010)—*only the second such article authorized and approved by AP-LS[.]*” *How Can Psychology So Basic Be So Counterintuitive?*, 72 Am Psych at 955 (emphasis added). As the United States Supreme Court has explained, such “submission to the scrutiny of the scientific community is a component of ‘good science,’ in part because it increases the likelihood that substantive flaws in methodology will be detected.” *See Daubert*, 509 US at 593.

Lastly, amicus additionally urges the court to reconsider the aspects of the *Kowalski* decision that may be interpreted as endorsing the trial court’s concern regarding the lack of a known error rate in the false confession research. *Kowalski*, 492 Mich at 131. As several courts have concluded in the years since the *Kowalski* decision, false confession expert testimony is

Sentencing Through Pragmatic Implication, 44 L & Hum Behav 266, 282 (2020); Perillo & Kassin, *Inside Interrogation: The Lie, The Bluff, and False Confessions*, 35 L & Hum Behav 327, 327 (2011); Madon, et al, *Temporal Discounting: The Differential Effect of Proximal and Distal Consequences on Confession Decisions*, L & Hum Behav (2011); Redlich et al, *Self-Reported False Confessions & False Guilty Please among Offenders with Mental Illness*, L & Hum Behav (2009); Swanner et al, *Snitching, Lies & Computer Crashes: An Experimental Investigation of Secondary Confessions*, L & Hum Behav (2009). This journal is just one example of various peer-reviewed journals that have published relevant scientific research on false confessions. Another example is the “Applied Cognitive Psychology” Journal, which “seeks to publish the best papers dealing with psychological analyses of memory, learning, thinking, problem solving, language, and consciousness as they occur in real-world contexts.” Available at <<https://onlinelibrary.wiley.com/journal/10990720>> (accessed Feb. 1, 2023). Applied Cognitive Psychology Journal has published several critical research studies relevant to the study of false confessions. *See e.g.*, Otgaar et al, *The link between suggestibility, compliance, and false confessions: A review using experimental and field studies*, 35 Applied Cognitive Psych 445 (2021); Nash & Wade, *Innocent But Proven Guilty: Eliciting Internalized False Confessions Using Doctored-Video Evidence*, 23 Applied Cognitive Psych 624 (2009); Henkel & Coffman, *Memory Distortions in Coerced False Confessions: A Source Monitoring Framework Analysis*, 18 Applied Cognitive Psych 567 (2004).

³⁹ McAuliff, *Law and Human Behavior*, APA Division 41 (American Psychology-Law Society), available at <<https://www.apa.org/pubs/journals/lhb>> (accessed Feb. 1, 2023).

reliable and admissible under *Daubert* despite the unavailability of an error rate—a metric that is not reasonably applicable to the social science of false confessions. For example, in *United States v Begay*, the United States District Court for the District of New Mexico reasoned that

Daubert makes clear that the factors it mentions do not constitute a definitive checklist or test. And *Daubert* adds that the gatekeeping inquiry must be tied to the facts of a particular case. . . . The error-rate and existence-of-standards *Daubert* factors are not appropriate to use regarding [false confession expert]’s testimony about police interrogation tactics generally, because such testimony does not involve conducting any experiment that would have standards and an error rate.

310 F Supp. 3d 1318 (DNM, 2018). Consequently, the *Begay* court concluded “that [false confession expert]’s testimony regarding general police interrogation tactics [met] the *Daubert* standard even though there [was] not an applicable error rate or standards.” *Id.*

Similarly, in *Harris v City of Chicago*, the United States District Court for the Northern District of Illinois rejected arguments that false confession expert testimony was unreliable because it was “based upon unacceptable rates of error and unacceptably small sample sizes, and that [those] problems are compounded by the fact that [false confession expert] did not randomly select the case studies he used.” Case No 14 C 4391; 103 F R Evid Serv 795; 2017 WL 2436316 (N.D. Ill. June 5, 2017) at *7. And, in *Kluppelberg v. Burge*, the Northern District of Illinois rejected similar arguments and held that the lack of an error rate “merely identif[ies] limitations of [false confession expert]’s methodology, not that it is unreliable” and held that the expert’s inability to identify the rate at which coerced confessions occur does not render the opinion as unreliable.” Case No 13 C 3963; 2016 WL 6821138 (N.D. Ill. Sept. 16, 2016) at *4.

* * *

Given the grave risk of wrongful conviction presented by false confessions—as demonstrated by simple scientific research and decades of DNA exonerations—it is critical that defendants be permitted to present expert testimony that assures a jury has the tools necessary to

evaluate complex confession evidence. Because false confession expert testimony is founded upon robust, reliable evidentiary support—which has only expanded over the last decade—such testimony is able to satisfy the requirements of MRE 702. Accordingly, the Court should revisit and overrule aspects of *Kowalski* that are inconsistent with the modern science, and hold that expert witness testimony is admissible when a generally-accepted risk factor or factors for false confessions are present.⁴⁰ Such a holding would provide clarity for lower courts that false confession risk factors are properly the subject of expert testimony, while leaving significant discretion with trial courts to evaluate whether a particular expert’s testimony satisfies MRE 702, and to assess the proper scope of such testimony. Without such guidance, factfinders may be left without the necessary tools to properly assess confession evidence, thereby increasing the risk that an unreliable, false confession will be credited by the factfinder and an innocent “confessor” will be wrongfully convicted. *Accord* Leo & Liu, *What Do Potential Jurors Know About Police Interrogation Techniques and False Confessions?*, 27 *Behav Sci & L* 381, 397 (2009) (“If we cannot be sure that what potential jurors believe about false confessions is accurate, then we cannot be sure that real jurors will make an accurate determination of the reliability of confession evidence without the additional assistance provided in the testimony of an expert witness.”).

⁴⁰ As demonstrated by the social science discussed *supra* Section II(B), the following “dispositional” risk factors (characteristics of the confessor that are associated with an increased risk of false confession) have been conclusively demonstrated to be generally accepted by the relevant scientific community: adolescence; intellectual impairment; compliant or suggestive personalities; and psychological disorders. *See* Kassin et al, *On the General Acceptance of Confessions Research: Opinions of the Scientific Community*, 73 *Am Psych* 1, 63–80 (2018). The following “situational” risk factors have likewise been clearly demonstrated to be generally accepted by the relevant scientific community: sleep deprivation; explicit promises of leniency or immunity; explicit threats of physical violence and punishment; deception about evidence (the “false evidence ploy”); minimization (tactics that communicate sympathy or moral justification for the offense); and torture. *Id.* This is not meant to serve as an exhaustive list of all risk factors that are generally accepted by the relevant scientific community, but is offered here to aid the Court in identifying the factors in which general acceptance has been conclusively established in recent years.

CONCLUSION

For all the reasons explained above, in order to protect its residents against wrongful convictions cause by false confessions, this Court should hold that expert testimony regarding false confessions is admissible if the testimony concerns at least one generally accepted dispositional or situational risk factor for false confessions that is applicable to the specific defendant or interrogation at issue. Such a holding will ensure that trial courts provide fact finders with the adequate tools needed to assess powerful, yet potentially unreliable, confession evidence and, in turn, would reduce the risk of future wrongful convictions in Michigan.

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Respectfully submitted,

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