

RECEIVED

11-16-2015

STATE OF WISCONSIN
COURT OF APPEALS

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT IV

Case No. 2015AP001366 - CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

ARMIN G. WAND, III,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF
OF CONVICTION AND SENTENCE AND ORDER
DENYING POSTCONVICTION RELIEF
ENTERED IN THE CIRCUIT COURT FOR
LAFAYETTE COUNTY, THE HONORABLE
THOMAS J. VALE, PRESIDING

**BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT**

Patricia A. FitzGerald
State Bar Number 1015179
229 North Grove Street
Mt. Horeb, WI 53572
(608) 437-4859

Attorney for Armin G. Wand, III

Table of Contents

ISSUE PRESENTED	1
POSITION ON ORAL ARGUMENT AND PUBLICATION	2
STATEMENT OF CASE	2
FACTS	3
ARGUMENT	16
I. Confession should have been suppressed because it was involuntary ..	16
A. Standard of Review	16
B. The statement made on September 9, 2012, was involuntary and should have been suppressed.	16
C. Totality of circumstances shows that Wand’s confession was not product of a free and unconstrained will.	18
1. Wand is a vulnerable and unsophisticated individual not equal to police tactics.	18
2. Statement given on September 9, was coerced.	20
3. The Involuntary confession extracted on September 8 th induced Wand to give inculpatory statement on September 9.	22
4. The September 9 th statement should have been suppressed because Agents did not scrupulously honor Wand’s invocation	

silence.	23
B. The statement made on September 9, 2012, was unreliable and should have been suppressed.	24
1. Many of the risk factors that make a false confession more likely were present when Armin gave his September 9 th statement.	25
2. Interrogation tactics used were likely produce a false confession.	26
3. Armin’s statement does not meet reliability criteria.	28
II. Armin alleged sufficient basis for withdrawal of his guilty pleas.	31
A. Armin Wand’s confession was coerced and unreliable.	31
B. The fact that the trial court admitted Armin’s September 9 th statement, induced Armin to plead.	32
C. Other jurisdictions have held that an unreliable confession is grounds for withdrawal of a plea.	35
CONCLUSION	37
CERTIFICATIONS	38
APPENDIX	101

Table of Cases

<i>Arizona v. Fulminante</i> , 499 U.S. 279(1991)	16,33
<i>Chapman v. State</i> , 282 Minn. 13, 162 N.W.2d 698 (Minn., 1968)	35
<i>Colorado v. Connelly</i> , 479 U.S. 157(1986).	17
<i>Dickerson v. United States</i> , 530 U.S. 428(2000)	17
<i>Griffin v. State</i> , 43 Wis.2d 385, 168 N.W.2d 571, 573 (1969)	32
<i>Harney v. United States</i> , 407 F 2d. 586,(5th Cir 1969)	22
<i>Pennsylvania ex rel. Herman v. Claudy</i> , 350 U.S. 116(1956)	32
<i>People v. Davis</i> , 582 N.E.2d 714, 145 Ill.2d 240, 164 Ill.Dec. 151 (Ill., 1991)	35
<i>People v. Jamison</i> , 197 Ill. 2d 135, 756 N.E.2d 788, (2001)	35
<i>People v. Pullen</i> , 192 Ill. 2d 36, 733 N.E.2d 1235, 248 Ill.Dec. 237 (Ill., 2000)	35
<i>State ex rel. Goodchild v. Burke</i> , 27 Wis.2d 244, 133 N.W.2d 753(1965)	16

<i>State of Ohio v Glenn W. Tinney</i> , case no 1992-CR-239 H (July 10, 2014)	35
<i>State v. Clappes</i> , 136 Wis. 2d 222, 401 N.W.2d 759 (1987)	16
<i>State v. Cumber</i> , 130 Wis.2d 327, 387 N.W.2d 291 (Ct. App., 1986)	17
<i>State v. Dicks</i> , 57 Haw. 46, 549 P.2d 727 (Hawaii, 1976)	35
<i>State v. George</i> , 109 N.H. 531, 257 A.2d 19(1969)	24
<i>State v. Hoppe</i> , 2003 WI 43, 261 Wis. 2d 294, 661 N.W.2d 407	17
<i>State v. Jerrell C.J.</i> , 2005 WI 105, 283 Wis. 2d 145, 699 N.W.2d 110.	17
<i>State v. Krieger</i> , 163 Wis.2d 241, 471 N.W.2d 599 (Ct. App., 1991)	32
<i>State v. Mauchley</i> , 2003 UT 10, 67 P.3d 477 (2003).	24,25
<i>State v. Schlise</i> , 86 Wis.2d 26, 271 N.W.2d 619(1978).	22
<i>State v. Tinney</i> , 2014-Ohio-3053	35
<i>State v. Ward</i> , 2009 WI 60, 767 N.W.2d 236, 318 Wis. 2d 301	18

<i>State v. Xiong</i> , 178 Wis. 2d 525, 504 N.W.2d 428 (Ct. App. 1993).	24
<i>United States v. Dickerson</i> , 163 F.3d 639(D.C.Cir.1999)	24
<i>United States v. Singleterry</i> , 29 F.3d 733(1st Cir.1994)	24

Other Authorities

Richard A. Leo & Richard J. Ofshe, <i>The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation</i> , 88 J. Crim L. & CRIMINOLOGY 429, (1998).	28, 33
Saul M. Kassin, <i>Why Confessions Trump Innocence</i> , American Psychologist, 431, (September 2012).	33
Saul M. Kassin, <i>On the Psychology of Confessions: Does Innocence Put Innocents at Risk?</i> , 60 AM. PSYCHOLOGIST 215 (2005).	33
Brian Cutler, Keith A. Findley, and Danielle Loney, <i>Expert Testimony On Interrogation And False Confession</i> , 82 UMKC L. Rev. 589(2013-2014).	34
Richard A. Leo et al, <i>Bringing Reliability Back In: False Confessions And Legal Safeguards In The Twenty-First Century</i> , 2006 Wis. L. Rev. 479.	34

STATE OF WISCONSIN
COURT OF APPEALS

DISTRICT IV

Case No. 2015AP001366 - CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

ARMIN G. WAND, III,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF
CONVICTION AND SENTENCE AND ORDER
DENYING POSTCONVICTION RELIEF
ENTERED IN THE CIRCUIT FOR
LAFAYETTE COUNTY THE HONORABLE
THOMAS J. VALE, PRESIDING

ISSUES PRESENTED

I. Should Armin Wand's September 9th
statement have been suppressed?

The trial court answered: No.

II. Does the coerced and unreliable
confession provide a manifest injustice for
withdrawing Armin Wand's plea?

The trial court answered: No.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The defendant-appellant does not believe oral argument is necessary.

Publication may be warranted because this case raises new issues regarding admission of unreliable confessions.

STATEMENT OF CASE

September 11, 2012 -the state charged Armin G. Wand, III, with three counts first degree intentional homicide, three counts of attempted first degree intentional homicide, and one count of arson.(2).

November 15, 2012, the State filed an amended information adding a charge of first degree homicide of an unborn child.(57).

December 5, 2012, Wand stood mute to all charges.(145:3-6).

December 13, 2012, Wand filed a motion to suppress his statements.(72).

February 13, 2012, Court suppressed Wand's statement made on September 8, 2012,(146:51) but found the statement made on September 9, 2012, voluntary and admissible.(146:53).

February 15, 2013 - Wand pled guilty, as party to a crime of three counts first degree intentional homicide, one count of attempted first degree intentional homicide, one count of arson and one count of felony murder. (138:10-13).

April 17, 2013 - the circuit court sentenced Wand to three consecutive terms of life in prison without the possibility of parole on the first degree intentional homicides, a consecutive term of forty years confinement and twenty years extended supervision on the attempted first degree intentional homicide, a concurrent term of twenty-five years confinement and fifteen years extended supervision on the arson and a concurrent term of twenty-five years confinement and fifteen years extended supervision on the felony murder. (144:44-45;135).

January 12, 2015 - Wand moved to withdraw his plea. (165).

June 10, 2015 - the circuit court denied Wand's motion.(184).

June 26, 2015 - Wand filed a notice of appeal.(185).

FACTS

At about 3:10 a.m. on September 7, 2012, a fire was discovered at Armin Wand's home.(2:4). It was mainly in the living room where Armin, his wife Sharon, and their three year old son, Joseph, slept and in the northwest bedroom, just off the living room where sons Allen, age 7, and Jeffrey, age 5, slept.(2:5). Two year old J.W. was asleep in a second bedroom.(2.5).

All three of Armin's sons died in the fire.(2:4). Sharon, who was pregnant, was severely injured(2:4,5); her fetus did not survive.(57). Armin and J.W. were uninjured.(2:5, 100:6: line 966)

Armin Wand, who is cognitively disabled and legally blind, was interviewed by police six times in the

three days following the fire.(168:3:3; 168:4:15). The first interview was conducted by a local police officer.(Id.) The remaining five interviews were conducted by seven different special agents from the Department of Justice. The special agents always worked in teams of two.(Id.)

In the first three interviews on September 7th, Armin said he was awakened by his wife Sharon's screams. (168:4:16). There was a fire at the foot of the futon bed. (Id.). Armin went to the kitchen four times to fill a cup with water that he tossed on the fire.(Id.). He told Sharon to get their daughter J.W. and then he went outside, where he broke the window to the boys' room.(Id.). Sharon grabbed J.W. and went to the neighbors.(Id.) Armin's younger brother Jeremy had gone home many hours before and was not at Armin's house when the fire broke out.(Id.).

Later on September 7, 2012, Special Agents Jesse Crowe and Lisa Wilson questioned Armin from 9:38 p.m until 2:24 a.m. on September 8th in a conference room at University of Wisconsin Hospital.(197:27, 41;100:1,2). It started out as an investigative interview but became accusatory.(100:1:57. 168:4: 16). Special agents accused Armin of lying about having his daughter J.W outside the house during the fire and claimed that Sharon said he had J.W..(100:2:63). The agents also accused him of lying about his brother not being at the house at the time the fire started, claiming that witnesses saw them together. (100:2:61, 62). They asserted that Jeremy told them he was there.(Id.)

Finally, Armin said that Jeremy did come to the house. (100:2: line 4332-4334). Agents took Armin to the conference room where Jeremy was being interrogated to repeat that Jeremy had come to the

house.(100:4: line 3356).

On September 8th, Agents Brad Montgomery and Jim Sielehr interrogated Armin for 3.5 hours in the conference room. (197:63).

The agents rejected Armin's claims of innocence. (100:5:line469-485). They repeatedly said Armin was lying and told him witnesses saw Jeremy and him talking outside the house during the fire(Id: line 615, 922, 1048). They offered him inducements to tell them about his involvement in the fire.

Listen, they're interviewing Jeremy right now. There's a saying that first one on the bus gets the best seat. We don't think you started the fire, but we think you knew about it. (100: 6 lines 640-42)

He [Jeremy] is looking at three murders. ... And do you understand that you're also looking at that same thing. Unless you start telling us what happened. (Id. lines 858-69)

Jeremy is talking about what happened last night. Cuz he wants to get the best deal for himself. He wants to not have to go to jail. ... Which is what I think you need to start recognizing right now. (Id. lines 928-33)

This is the time to tell me what happened. ... You have my word that Brad and I will do everything in our power to help you to make sure that this doesn't get painted in a way that makes you out to look like you did this to kill your family. (Id. lines 947-50)

Give me your version of what happened so that I can explain it and fight for you, otherwise when I go to see the prosecutor about this case and request charges, I'm gonna tell it the way I think it happened. And you ain't gonna like that. (Id. lines 1036-39)

There's like a tension right in your chest. ... Do you feel that in your back? Do you feel that in your shoulders? ...

I guarantee you sit down right there and you talk to us.
You tell us the truth, that will go away. I guarantee it.
(Id. lines 1071-78).

They also tried to minimize Armin's culpability.

I personally believe you were having some very trying
difficulties with Sharon. (Id.lines 646- 47)

You're a decent man that is struggling ... you've got all
these pressures building on you. (Id.lines 940-44)

Things didn't play out the way you planned. ... I get it.
It doesn't make you a bad guy. (Id. lines 970-72)

It doesn't make you a bad guy that you're trying to help
your brother. (Id. lines 1241-42)

Finally, Armin said he was complicit in Jeremy
starting the fire. (Id. lines 3335-3342).

The agents arrested Armin and read him his
Miranda Rights. (Id lines 1883-1885 Armin said he did
not want to talk any more.(Id.: 1895 Lines 188-192) .

Agents, then, told Armin that Jeremy claimed
Armin kissed a woman other than his wife.(197: 91).
Montgomery also said, "I think it's kind of strange that
you come in that night of the fire buddy buddy with the
guy that you know just murdered your family."(Id.
105). He told Armin to think about that.(Id. 106). They
gave him their contact information and told him if he
wanted to talk to them, he had to contact them.(Id.)

On September 9, 2012, Special Agents Lourdes
Fernandez and Michael T. Reimer interrogated Armin for
6.6 hours long with a 15 minute break at the Lafayette
County Jail .(168:4:22;100:11:1). Armin had nothing to
eat during this time but did drink from a bottle of
water.(168:4:22; 100:10).

Earlier that morning, Armin had attempted to reach the SA's Montgomery and Sielehr, "to set them straight about what Brad said."(197: 239). Before talking to Armin, SA Reimer introduced the Miranda Rights Form as "a formality" (100:11: 2, line 67). The agents then asked Armin why he had called agents Montgomery and Sielehr.(Id. line206). Wand explained it was untrue that he had kissed a girl in Necedah.(Id. line 214-215). He also said that he was walking with Jeremy at the hospital because Jeremy was helping him because he could not see.(Id. line 572-574).

At the suppression hearing, Agent Fernandez admitted that Armin had not call the agents in to talk to them about the fire.(197:136).

However, once Armin said his piece about the kiss and being with Jeremy, the agents asked Armin if they could ask him some questions.(100:11:line 619-620). Armin agreed.(Id. line 622).

Again, Armin started out claiming that Jeremy was not at his home at the time of the fire.

Armin: Well, just like yesterday when I was talking to the other two, everything that I tried telling them, they said I was lying about.

SA Reimer: We weren't here yesterday, Armin, okay, can you tell me in your own words, tell us about this fire. What happened?

Armin: Well, like I told the other two, Jeremy and all wasn't there. He went home, and they said people seen Jeremy there.

(Id. lines 2116-2123).

The agents did not accept that story.

After 18 hours questioning, nearly 7 hours of which happened while Armin was in custody, Armin, confessed to colluding with his brother, Jeremy, to start the fire and kill his family.

On the same day, after over 8 hours of interrogation, over 5 hours while in custody, Jeremy, who also had little sleep and little to eat, gave a statement confessing to assisting in starting the fire.(169:1, 3, 5, 8, 9, 11,12)

Subsequently, Special Agent William Boswell filed a fire scene report concluding “that this fire was the result of an intentional human act,” based on Armin Wand’s confession and Boswell’s analysis of the fire scene.(166:15). Boswell concluded that the fire had two separate areas of origin – in the living room and in the northwest bedroom.(166: 11).

Armin moved to suppress his statements.(72). At the suppression hearing, Armin testified to having about four or five hours sleep between the fire and when he gave his final statement on September 9th. (197:240).

Dr. Kent M. Berney, a licensed psychologist, testified that he evaluated Armin and administered a variety of psychological tests.(Id:175).

Dr. Berney found that Armin’s verbal comprehension index score was 72, placing him in the third percentile.(Id.:176). He was in the impaired range with a perceptual reasoning score of 65 and a processing index score of 56.(Id.176, 177). He had a working memory score of 100, placing him in the 50th percentile.

His full scale IQ was 67, placing him in the impaired range of the first percentile.(Id.).

Dr. Berney opined that - taking Armin's intellectual capacity, his limitations in deductive reasoning, and his visual impairment(Id.:180-181) - that,

[He] was substantially compromised at the time of his interrogation in terms of his ability to make a rational, informed decision regarding proceeding with the interrogation.

(Id.:181).

The circuit court ruled that Armin's statement given on September 8, 2012, would be suppressed because the agents induced him to give a statement with promises of leniency(146:48-51), but that the statement given on September 9, 2012, when he was in the custody of the Lafayette County Jail was voluntary and would not be suppressed.(146: 52-53).

Armin pled guilty to the above charges on February 15, 2013.(138: 10-13).

Armin filed a postconviction motion asking the circuit court to allow him to withdraw his plea.(165:1).

With his motion, Armin filed reports from Dr. Lawrence White, Dr, David Thompson and Robert Paul Bieber.(167;168).

Robert Paul Bieber, a fire and explosion investigator (CFEI), certified by the National Association of Fire and Explosion Investigators, reviewed the discovery file relative to the fire investigation (167:2) and came to the following conclusions:

Due to flashover and full room-involvement conditions, Fire Investigator Boswell was unable to determine the area of origin of the fire in the living room.

Boswell's conclusion that the irregular burn patterns to the floor and bedding in the bedroom constitute a separate and distinct area or origin does not withstand careful scrutiny. The burn patterns he referred to are more likely to have been the result of radiant heat from a hot gas layer of smoke generated from a fully involved fire in the adjacent living room, typical burn damage from the melting and burning of common items found in the bedroom, or some combination of the two.

The presence of a nearly identical burn pattern on the floor of the dining room – a burn pattern not found to be suspicious by Fire Investigator Boswell – provides further support that burn patterns of this type are a common occurrence in building fires where the hot smoke and gases of combustion migrate to adjacent rooms.

Fire Investigator Boswell's conclusions were made several weeks prior to the interviews of Sharon Wand, the first eyewitness to the fire and the only person to have seen the fire from inside the house at its earliest stages. During those interviews she said that the fire had only one area of origin (in the living room) and that the door between the living room and the bedroom was open. Fire Investigator Boswell was also unaware that the small burn pattern on the floor east of the plastic bed frame may have predated the fire in question and was possibly created during an earlier fire incident involving a child relative playing with a lighter.

As a result, Fire Boswell's conclusion that the fire had multiple areas of origin was not based on an objective application of the scientific method; was not in compliance with NFPA 921¹; was not in keeping with generally accepted techniques and methodologies within

¹ *Guide for Fire and Explosion Investigation* (2011 and 2014 editions),

the field of fire investigation; and is not supported by the evidence currently known.

Fire Investigator Boswell's final report fails to identify an ignition source or a first fuel ignited. His elimination of accidental ignition sources fails to consider or analyze several common potential ignition sources known to have been present at this fire scene, specifically discarded smoking materials or children playing with matches or a lighter. The circumstances bringing the unknown ignition source in contact with the unidentified first fuel ignited are similarly absent.

Fire Investigator Boswell's ultimate conclusion that "this fire was the result of an intentional human act" was directly based on these two previous determinations – that the fire had multiple areas of origin and that all accidental ignition sources in the living room had been examined and eliminated.

Additional examination and new evidence has shown that his conclusion of multiple areas of origin was premature and incorrect, and his examination and elimination of potential ignition sources was insufficient.

Under the circumstances described in the written report, photographs and witness statements, the only conclusion regarding origin, cause or classification of the cause of this fire which is in compliance with NFPA 921 and the standards of generally accepted techniques and methodologies within the field of fire investigation is "undetermined".

(165:5-7;167:17-18).

Dr. David W. Thompson, Ph.D., ABPP, a licensed Clinical and Forensic Psychologist, performed a forensic evaluation on Armin in September, 2014. He administered a number of psychological tests to Armin.(168: 1). Thompson also talked on the telephone with Armin's father, Armin Wand II, and reviewed several documents.(Id:2). Thompson concluded,

Mr. Wand is an individual with a long and well-documented history of developmental motor, speech, cognitive, and visual problems. ...Mr. Wand... possesses a number of personality characteristics that may have made him very susceptible to

inappropriate interrogation techniques. Mr. Wand's performance on the MMPI-2-RF suggests that his suggestibility scores on the GSS-2 were not an anomaly. He is a very suggestible individual, appears to be quite acquiescent, and describes characteristics that are often seen with individuals who are very compliant with persons in authority over them even when they are aware of the inaccuracy of statements that they make.

(165:7; 168:3:8-9).

Dr Lawrence White, Professor of Psychology and Legal Studies at Beloit College, Beloit, Wisconsin, also reviewed the several documents and audio and video recordings of Armin and Jeremy Wand's statements (168:4:12-13), to form an opinion about the reliability of Wand's statement to police. Dr. White concluded,

A. There is widespread agreement among legal scholars and prominent researchers that (1) innocent suspects sometimes confess to crimes they did not commit, (2) false confessions happen more often than most people realize, and (3) the interrogation techniques used by police to extract true confessions can also induce an innocent suspect to confess falsely.

B. Armin Wand III possesses low intelligence and is borderline mentally retarded. He is unusually suggestible to leading questions and compliant to authority figures. These risk factors make an innocent person vulnerable to giving a false confession.

C. Department of Justice special agents interrogated Armin Wand on three days and for approximately 15 hours in total, well beyond the length of a typical interrogation (1-2 hours). Mr. Wand appeared to be physically and emotionally exhausted. Lengthy interrogations, sleep deprivation, and exhaustion are risk factors for obtaining a false confession.

D. Department of Justice special agents used interrogation techniques associated with the Reid School. These techniques— isolation, confrontation, refusal to honor claims of innocence, theme development, minimization, and offering inducements—are psychologically sophisticated and effective means to persuade guilty suspects to confess. Unfortunately, the techniques

are so powerful that they sometimes induce innocent suspects to confess falsely.

E. Armin Wand often made incriminating statements that were inconsistent with crime scene evidence, with what his brother Jeremy said, and with what the special agents believed about the origins of the fire. The special agents intentionally or unintentionally, leaked key information to Mr. Wand and shaped his account so that it eventually conformed to the evidence obtained by investigators. As a result, it is not possible to determine if Mr. Wand's inculpatory statements were based on guilty knowledge or information fed to him by investigators.

F. There are many reasons to be concerned about the reliability of Mr. Wand's inculpatory statements. His statements may have been concocted so as to appease investigators and bring an end to lengthy questioning in a stressful environment. He may have felt helpless and hopeless while in custody. He may have mistakenly believed that a confession would be looked upon favorably by the authorities, that he would receive lenient punishment, and that his innocence would eventually be established in court. There is no reliable evidence that independently corroborates the inculpatory portions of Mr. Wand's alleged confession. In short, Armin Wand's confession *per se* appears to have little, if any, evidentiary value.

G. In Dr. White's professional opinion Armin Wand's inculpatory statements were psychologically coerced. The investigators refused to accept his account of what happened, even though he often returned to that account. The investigators isolated Wand and questioned or interrogated him for 18 hours over three days, at a time when he was trying to cope emotionally with the death of his three sons. The DOJ special agents wore Wand down, making him feel helpless and hopeless. At the end, Wand was exhausted and confused. He then became extremely compliant and answered investigators' questions almost mechanically.

(165: 7-9; 168:4:27-28).

Because Jeremy Wand implicated Armin in his statement to police, Armin also included Dr. White's notes on his review of Jeremy's statements. Armin alleged that Dr. White would testify to the following,

A. Individuals who have poor memories or who distrust their memory capabilities are generally more suggestible. As a result, they are more likely to make unreliable statements. When persons doubt their own memories of an event, they often rely on cues from others to help them construct a plausible account of what actually happened.

B. Juvenile suspects, such as Jeremy, generally confess more readily than adult suspects because juveniles are less likely to have prior experience with law enforcement, more likely to waive their Miranda rights, and more likely to comply with the demands of authority figures. In the Drizin and Leo (2004) sample of 125 false confessors, 32% were under the age of 18, and 63% were under the age of 25.

C. During the second interview of Jeremy which lasted 2 hours and 40 minutes, a handful of interrogators put Jeremy through the emotional wringer, intimidated him, pressured him, refused to accept his account (from which he strays not all until he seems to accept the possibility that maybe he did something but doesn't remember it). Jeremy had not slept for nearly 24 hours. Apparently had eaten little or nothing and said he was tired. The interrogators appeared to be frustrated, and they interrogate him really intensely. This is one of the most intense, psychologically coercive interrogations Dr. White has heard. Special Agents Pertzborn and Boswell in particular show signs of extreme tunnel vision, convinced that Jeremy is guilty and willing to wring it out of him.

D. The third interview occurred 14 hours after the second interview while Jeremy was in custody and lasted 3 hours and 3 minutes. The special agents engaged in a lot of what might be called "black-and-white thinking," i.e., either Armin and the neighbors are lying (their words) or Jeremy is lying. The special agents do not appear to consider the possibility that a witness was mistaken and Armin was pressured into making up a story. This is a Reid tactic (the evidence ploy), but there is no indication that the investigative team as a whole seriously considered the possibility that the witness who "saw" Jeremy at the garage was mistaken. Special agents try to get Jeremy to accept story that extra money would have been helpful, there were financial struggles, maybe there was an accident, the fire was supposed to be limited (theme development, Reid Technique).

E. Agents also suggested, "Accidents happen. Accidents are okay if they are accidents, right?" This is an instance of minimization and

also implies leniency; there would be no serious consequences for Jeremy if he said it was an accident.

F. Agents suggest that Jeremy may have blocked out his involvement because it was a traumatic experience. This “black out” ploy is used frequently by interrogators. This is a dangerous tactic because it sounds plausible and an innocent suspect who is genuinely confused may embrace this “theory” as a way to make sense of what the police are telling him happened.

G. In this interview, Jeremy maintains his original story. He says he wasn’t there, but he tries to come up with some explanation for why witnesses say he was there and he doesn’t remember it. Jeremy slowly constructs an account of what happened during the first moments of the fire, using conditional language like “would have been.” But, SA Lehmann tells Jeremy that none of that makes sense. So Jeremy must now construct a different account that is more plausible. If Jeremy was really there, why would he admit guilt yet tell a story that doesn’t square with the physical evidence? His statements are more consistent with innocence (and ignorance of what actually happened) than with admitting guilt and knowing what happened.

H. The fourth interview happened 8 hours after the third interview ended. It lasted 2 hours and 20 minutes.

I. When Jeremy said something the agents wanted to hear (that confirmed their hypothesis), they would often repeat it, reinforce it. When Jeremy said something they didn’t fit their theory of what happened, they would ignore it or challenge it. In this way, the agents subtly shaped Jeremy’s statements and account. Jeremy’s statements in this interview are often of the guessing/infering type. “That’s what I’m guessing.” The agents are steering him toward giving an account that matches what they believe happened.

J. Special agents told Jeremy that things will go better for him if he is “truthful,” it will be much worse for him if he pretends he had nothing to do with it. It will be better for Jeremy if he says he did it, that he made a mistake, everything spun out of control. High-end inducements, when offered to an innocent suspect, increase the likelihood of obtaining a false confession.

K. S.A.Freymiller tells Jeremy that when she says “Really?” that it’s a clue that what he’s saying isn’t “right.” This is an explicit acknowledgment that she’s shaping Jeremy’s account.

L. Jail staff said Jeremy has not been eating. Jeremy said he eats small amounts but had no breakfast that day. His voice sounds like he's worn down, beat down, tired, emotionally exhausted, feeling powerless. These are risk factors for false confession.

M. By the end of the interview, it sounds like Jeremy has come to believe that he may have been involved with the fire. It reminiscent of accounts of people who were "brainwashed"

(165: 9-12; 169)

The court denied Armin's postconviction motion without a hearing, and Armin Wand now appeals.(184).

ARGUMENT

I. Confession should have been suppressed because it was involuntary

A. Standard of Review

The question of voluntariness involves the application of constitutional principles to historical facts. This court gives deference to the circuit court's findings regarding the factual circumstances that surrounded the making of the statements. *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991); *State v. Clappes*, 136 Wis. 2d 222, 235, 401 N.W.2d 759 (1987). However, the application of the constitutional principles to those facts is subject to independent appellate review. *Fulminante*, 499 U.S. at 287; *Clappes*, 136 Wis. 2d at 235.

B. The statement made on September 9, 2012, was involuntary and should have been suppressed.

When, as here, the voluntariness of a statement was challenged, the state was required to prove beyond a reasonable doubt that it was voluntarily. *State ex rel. Goodchild v. Burke*, 27

Wis.2d 244, 264-65, 133 N.W.2d 753 (1965), cert. denied, 384 U.S. 1017 (1966).

The Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article 1, Section 8, of the Wisconsin Constitution prohibit the admission at trial of involuntary statements. *State v. Jerrell C.J.*, 2005 WI 105, ¶17, 283 Wis. 2d 145, 699 N.W.2d 110. The due process test of voluntariness "takes into consideration the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Dickerson v. United States*, 530 U.S.428, 434 (2000) (citations omitted). These two factors are balanced against each other to determine whether the defendant's statements were voluntary. See *State v. Hoppe*, 2003 WI 43, ¶39-40, 261 Wis. 2d 294, 661 N.W.2d 407.

Hoppe holds that a defendant's statements are voluntary "if they are the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant's ability to resist." *Id.*, ¶36.

Police conduct does not need to be egregious or outrageous in order to be coercive; subtle pressures are coercive if they exceed the defendant's ability to resist. *Hoppe*, 261 Wis. 2d 294, ¶ 46. If a defendant's condition renders him or her uncommonly susceptible to police pressures, those pressures may be coercive even though under another set of circumstances, they might not be coercive. *Id.* "[A]s interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the voluntariness calculus." *Colorado v. Connelly*, 479 U.S. 157, 164, (1986).

Subnormal intelligence of the defendant is important factor in suppression of inculpatory statement. *State v. Cumber*, 130 Wis.2d 327, 332, 387 N.W.2d 291 (Ct. App., 1986).The less

sophisticated and more vulnerable the suspect is, the more likely his or her statements were involuntary. *State v. Ward*, 2009 WI 60, ¶ 19, 767 N.W.2d 236, 318 Wis. 2d 301.

**C. Totality of circumstances shows that
Wand's confession was not product of
a free and unconstrained will.**

**1. Wand is a vulnerable
and unsophisticated
individual not equal to
police tactics.**

The evidence presented at the suppression motion, the postconviction motion and supporting documents show that Armin was 32 years old and had a Full Scale IQ score of 67 (which falls within the Mildly Cognitively Disabled to Borderline ranges of intelligence). He had little or no sleep between the time of the fire on September 7th and the evening of September 9th, when he gave his final inculpatory statement. In addition, he was dealing with the emotional trauma of the loss of his home and three of his children and his wife's severe injury. Armin had had some prior experience with law enforcement. He had six misdemeanor and one felony(forgery) conviction.(125). But there is no suggestion that he had any prior experience with an intense police interrogation.

Dr. Lawrence White pointed out ,

Armin's school and test records document poor achievement and low levels of intelligence from the beginning and throughout his educational career. The pattern is consistent, long-standing, and impossible to explain in terms of lack of motivation or malingering.

In November 2012, licensed psychologist Kent Berney administered the Wechsler Adult Intelligence Scale IV (WAIS-IV) to Armin. The WAIS is a widely-used, standardized measure of intelligence. Armin scored at the 3rd percentile on the Verbal Comprehension portion of the test. This portion measures one's ability to understand and use language, engage in abstract reasoning, and form concepts. A score at the 3rd percentile is borderline mentally retarded.

(168:4:13).

Dr. Berney found that Armin 's Full Scale IQ score on the WAIS was 67, 3 points lower than the conventional cut-off score for mental retardation.(197 :177; 168:4:14). He also concluded with Armin's limited psychological resources made it difficult for him to make "an informed decision regarding whether to voluntarily proceed with an interview."(100:19:3).

Dr. Thompson found that Armin scored very high on both the Gudjonsson Suggestibility Scale and the Gudjonsson Compliance Scale. He also determined that Armin was not malingering.(168:3:6,7).

According to Thompson those high scores,

"suggests that he possesses a very high level of eagerness to please and tendency to avoid conflict and confrontation in the presence of authority figures, and suggests that under such circumstances he may be prone to comply with requests and obey instructions that he would ordinarily reject."

(Id.:7)

Thompson further concluded that ,

"[Armin] is a very suggestible individual, appears to be quite acquiescent, and describes characteristics that are often seen with individuals who are very compliant with persons in authority over them even when they are aware of the inaccuracy of statements that they make."

(Id.:9)

Dr White summed it up well.

[T]here is ample evidence that Armin Wand III possesses low intelligence, is borderline mentally retarded, is highly suggestible and acquiescent, and is unusually compliant to authority.²

² One clear example that reflects Armin 's suggestibility and compliance occurred during the middle of Armin 's September 9th statement.

(168:4:14).

In addition, Dr. Berney noted, “Mr. Wand is legally blind and not having his glasses results in substantial sensory deprivation.”(100:19:3). Berney believed that made Armin even more vulnerable to coercive interrogation.(Id.)

By the time of the September 9th interrogation, Armin had already endured over 11 hours of questioning and had; just the night before following a highly aggressive interrogation been induced into giving an involuntary statement inculcating himself and his brother.

By the end of September 9th interrogation, Armin appeared exhausted and confused. He became extremely compliant and answered investigators’ questions almost mechanically.(See 100:Ex 10; 168: Ex 4:28).

2. Statement given on September 9, was coerced.

Dr. White describes the tactics used by the Special Agents toward the end of the six and-one-half-hour interrogation.

When the agent told Armin that the fire in the living room could not have grown in the way Armin said it did (100: Ex 11: 4384-4387). Armin, then, gave a detailed account about pouring gasoline on the fire to get it going. (Id.4391-4716). When the agent realized that the way Armin said he poured the gasoline would have resulted in Armin being burned (Id.5181), he asked Armin if he really grabbed a gas can.(Id.4719). Armin responded, “Not really. I mean, I don’t know what to say. Because when I said I never did, you guys said that I’m lying.” Armin went on to explain why he said he got a gas can, “B-b-b-because when I said I never did, well, then you, you said it’s kind of hard to start the fire just with paper and carpet.”(Id.4767-4768). When the agents said they just wanted him to tell them the truth, Armin said, “Well, the, the truth is Jeremy never started the fire. He was not there, and I was, um, sleeping.”(Id.4810-4811). The agents told Armin that was not the truth and continued to question him based on the assumption that he and Jeremy started the fire.

Near the end of this 6.5-hour interview, the SAs worked in tandem, increased the pressure, and relied heavily on standard Reid School techniques: confrontation, minimization, implied leniency, and theme development.

- Tell me how that couch got on fire. Now is your time. Here's the deal. Look at me. They're dead. (page 120, line 5596)
- Tell me how this couch got on fire. (page 121, line 5624)
- Here's the deal. You need to wake up because this is serious. Okay? We're being very decent here, but it's getting to be quarter to eight at night, and you're just kind of hanging here like this. You're hard to hear. Okay? We need to know what happened to these kids. (Page 135, at line 6307)
- You were stressed out and you didn't know how to get out of it. (page 137, at line 6386)
- What you're telling me right now, Armin, there's nothing about it that makes sense. (page 137, at line 6397)
- I know what stress does to people. It makes them do things that they would never do otherwise. (page 139, at line 6478)
- I think at the time you were so stressed out that you thought it was better that they were dead ... You're under a huge amount of stress ... It's all over your face. I can see it. (page 142, at line 6612)
- Armin, did you want to start fresh? Was this your way? Have a different life? (page 142, line 6651)
- Sometimes people are a victim of the circumstances that they're in by no fault of their own and it gets to the point where in their life they just kind of snap and they make poor decisions. (page 143, at line 6678)

During this phase of the interrogation, Armin's account became almost incoherent. He seemed confused. He spoke slowly and quietly. In my opinion, Armin's demeanor and behavior were consistent with the behavior of an innocent person who is extremely tired and confused, has been told different things by different investigators, and is trying to placate his interrogators so as to bring an end to lengthy, stressful questioning. In fact, beginning on page 143, Armin appeared to give up. He sat nearly motionless, looking dazed and tired. He no longer resisted the implicit demands of his interrogators. At this time, the SAs asked many leading questions about the fire and Armin gave the expected "yes" answers, over and over and over.

During the final phase of the interrogation, Armin was highly compliant and parroted back the reasons for his crime, using words that had first been used by the SAs. For example, at line 7342 on page 157, SA Fernandez asked Armin, “What were you going to do with the [insurance] money you were going to get?” Armin said, “Start fresh.” This exact same phrase had been used in earlier interviews by SAs (and in this interview, at line 6651, by Fernandez herself) when they suggested to Armin that he was stressed, struggling financially, and wanted to start over without a wife and kids.

(168:4: 25-26).

3. The Involuntary confession extracted on September 8th induced Wand to give inculpatory statement on September 9.

Where the first involuntary confession induces a second confession, the second confession is also inadmissible. *Harney v. United States*, 407 F 2d. 586, 590(5th Cir 1969), *State v. Schlise*, 86 Wis.2d 26, 271 N.W.2d 619(1978).

[W]here a confession has been obtained under circumstances rendering it involuntary and inadmissible, a **presumption exists that any subsequent confession arose from a continuance of the prior influence**, and this presumption must be overcome before the subsequent confession can be received in evidence. The controlling influence which produced the prior confession is presumed to continue until its cessation is affirmatively shown, and evidence to overcome or to rebut this presumption must be very clear, strong, and satisfactory; if there is any doubt on this point the confession must be excluded.

Schlise, 86 Wis.2d at 47.(Cite and quote omitted)(Emphasis supplied).

The trial court found that the agents induced Armin into giving an inculpatory statement by suggesting that things would go better for him if he gave a statement.(146:48-51)

There is absolutely no reason to suppose that those same inducements did not play into his willingness to talk to the agents on September 9th.

Indeed, Armin testified at the suppression hearing that he believed he promises made to him, that if he talked he wouldn't go to prison, and that belief continued as motivation for Armin to talk the next day. (197:233-234, 239).

Further, the agents implied of leniency again on September 9th, by suggesting that Armin set the fire because he was overwhelmed with stress, in order inducing him into believing that if he admitted he started the fire for reasons the agents seemed to sympathize with, he might have a better outcome.(100:11:lines 6386, 6478, 6612).

4. The September 9th statement should have been suppressed because Agents did not scrupulously honor Wand's invocation of silence.

Once Armin invoked his right to silence, law enforcement had duty to scrupulously honor that right. *Michigan v. Mosley*, 423 U.S. 96, 104 (1975); see also *State v. Hartwig*, 123 Wis. 2d 278, 285, 366 N.W.2d 866 (1985) ("The essential issue is whether, under the circumstances, the defendant's right to silence was scrupulously honored.").

However, as a parting shot at the end of the September 8th interrogation - after Armin said he did not want to talk to the agents anymore - the agents claimed that Jeremy said that Armin cheated on Sharon by kissing another women³ and one of the agents ended

³ As pointed out by Dr. White, "...Jeremy reported what Sharon had told him, but Jeremy did not say directly that Armin had kissed a girl."(168: 4: 22).

up saying, “I think it’s kind of strange that you come in that night of the fire buddy buddy with the guy that you know just murdered your family.”(197:105). And told Armin to think about that.(Id.106). Then, they gave Armin their cards and said that if he wanted to talk to them, he had to call them.(Id.).

The next day, Armin requested the agents visit him so he could dispute those matters. Agent Fernandez admitted that Armin did not call them to talk about the fire.(197: 136).

Nevertheless, the agents questioned Armin for over six hours about the fire.

The agents made their closing comments on September 8th , with the intent that Armin stew over them, which, in fact, he did. As Dr. White observed, “Armin’s concern over an inconsequential matter makes one wonder if he fully [understood] the seriousness of his situation.”(168: 4: 22).

Here the agents were “ taking subtle advantage of a [Armin’s] personal characteristics.” See *State v. Xiong*, 178 Wis. 2d 525, 534, 504 N.W.2d 428 (Ct. App. 1993). It was “a form of coercion.”Id.

B. The statement made on September 9, 2012, was unreliable and should have been suppressed.

Many jurisdictions recognize that it is the responsibility of the trial judge to determine as a matter of law whether a defendant's confession is sufficiently trustworthy or reliable to be admitted into evidence. *United States v. Dickerson*, 163 F.3d 639, 642 (D.C.Cir.1999); *United States v. Singleterry*, 29 F.3d 733, 737 (1st Cir.1994); *State v. George*, 109 N.H. 531, 257 A.2d 19, 21 (1969), *State v. Mauchley*, 2003 UT 10, ¶ 58, 67 P.3d 477 (Utah, 2003).

This gatekeeping function is akin to a trial court's responsibilities when making a determination about the

voluntariness of a confession. *State v. Mauchley*, 2003 UT 10, ¶ 58 n.6.

1. Many of the risk factors that make a false confession more likely were present when Armin gave his September 9th statement.

As Dr. White pointed out,

Some individuals are more likely than others to capitulate to interrogation pressures and confess. Risk factors internal to the person include youth, low intelligence, poor memory, drug addiction, mental illness, compliance and suggestibility, low self-esteem, and sleep deprivation.

(168:4:5).

Armin is the type of vulnerable person who is more at risk to give a false confession.

Dr White indicated intellectually impaired persons are more likely to falsely confess,

Intellectually impaired individuals are more likely to give unreliable statements and false confessions.² Drizin and Leo (2004) identified at least 28 mentally retarded defendants in their sample of 125 false confessors—and this figure is probably an underestimate because intelligence test scores were not available in most cases. Mentally retarded persons are less likely to understand their Miranda rights (Fulero & Everington, 1995) and often exhibit a strong tendency to say “yes” to even absurd questions (Finlay & Lyons, 2002).

As reflected in Dr. Berney’s report and Armin’s school records, Armin is intellectually impaired.

Further, highly compliant persons are more likely to falsely confess.

Several studies indicate that highly compliant individuals are more likely to confess to police (Gudjonsson, 2003). In this context, compliance refers to “an eagerness to please ...and a desire to avoid

confrontation and conflict with others, particularly those in positions of perceived authority” (Kassin & Gudjonsson, 2004, p. 51).

(168:4:6).

As Dr. Thompson stated, based upon the Gudjonsson Scales, Armin is highly compliant and highly suggestible. Indeed, he is in the top 1% on compliance.(168:4:14). He is similar to individuals who are “very compliant with persons in authority over them even when they are aware of the inaccuracy of statements that they make.”(168:3:9).

Finally, sleep deprivation increases the likelihood that one will confess falsely.

Laboratory experiments show that sleep deprivation and fatigue can interfere with short term memory, heighten susceptibility to influence, and impair one’s ability to cope with interrogation pressures (Blagrove, 1996; Chee & Choo, 2004; Harrison & Horne, 2000). The longer the sleep deprivation, the greater the effects on suggestibility. Even one night without sleep can impair executive functioning in the part of the brain called the prefrontal cortex (Nilsson, Söderström, Karlsson, Lekander, Åkerstedt, Lindroth, & Axelsson, 2005).Executive functioning refers to the brain’s ability to absorb information, interpret information, and make decisions based upon information. In short, sleep-deprived individuals are more suggestible and more prone to making poor decisions.

(168:4:6).

As pointed out above, Armin was sleep deprived throughout the interrogation process.⁴

2. Interrogation tactics used were likely produce a false confession.

⁴ Further, As Dr. White indicated, “ On page 143, line 6688, SA Reimer said to Armin,“I’m tired. You’re tired.” At the end of the interview, Armin looked wobbly when he left the room and a police officer took his arm.”(168:4:15).

The primary goal of interrogation is to extract a confession. “In social psychological terms, interrogation is ‘a guilt-presumptive process, a theory-driven social interaction led by an authority figure who holds a strong *a priori* belief about the target and who measures success by the ability to extract an admission from that target’” (Kassin & Gudjonsson, 2004, p. 41).”

Interrogators typically use techniques designed to (1) create a psychologically stressful situation and (2) increase suggestibility and compliance to the demands of authority figures. These techniques—which include social isolation and lengthy, persistent questioning—are associated with high rates of confession and a heightened risk of false confession.

(168:4:7).

As pointed out above, Armin is a highly compliant person. During each of his interrogations he was isolated in either the conference room at the burn unit at UW hospital or, in the case of his September 9th, statement, in the Lafayette County Jail. He had had no contact with outside persons from about 6:30 the night of September 8th until the end of his interrogation after 9:00 p.m. on September 9th.

The length of questioning Armin endured in the 48 hours after the fire substantially exceeded the normal length for questioning. Armin was questioned over 18 hours from the time of the fire until his final inculpatory statement. Fifteen of those hours were full scale interrogation, Six and-a-half hours of interrogation occurred while he was in custody on September 9th.

In the United States, the vast majority (90%) of police interrogations are completed within 2 hours (Leo, 1996). The authors of a widely-used interrogation manual believe that most interrogations can be completed within 3-4 hours (Inbau, Reid, Buckley, & Jayne, 2004). These statistics stand in sharp contrast to a recent analysis of proven false confession cases in which 34% of interrogations lasted 6–12 hours, 39% lasted 12–24 hours, and the median length was 12 hours (Drizin & Leo, 2004). In a lengthy interrogation, an innocent suspect’s resistance is worn down and police investigators, frustrated by their inability to secure a confession, are likely to apply more pressure

(168:4:7).

Here, although Armin reverted back to the original story that he told during the first three interviews immediately after the fire - that he was asleep and awakened by Sharon to find a fire at the end of the bed - the agents would not accept his assertions of innocence.

The agents kept insisting that he admit to his role in starting the fires. They used minimization to lure Armin into thinking that starting a fire was understandable given all of the stress he was under and so admitting to it would not result in extremely adverse consequences. Further, as Dr White observed, by the end of the interrogation, Armin was answering leading questions automatically and parroting back what the agents had suggested to him.

Armin is an extremely compliant mentally retarded man, who had endured isolation, sleep deprivation, sensory deprivation, and hours of interrogation. It is not surprising that by the end of the ordeal he said whatever agents wanted him to say.

3. Armin's statement does not meet reliability criteria

There are at least three indicia of reliability that can be evaluated to reach a conclusion about the trustworthiness of a confession. Does the statement (1) lead to the discovery of evidence unknown to the police? (e.g., location of a missing weapon that can be proven to have been used in the crime, location of missing loot that can be proven to have been taken from the crime scene, etc.); (2) include identification of highly unusual elements of the crime that have not been made public? (e.g., an unlikely method of killing, mutilation of a certain type, use of a particular device to silence the victim, etc.); or (3) include an accurate description of the mundane details of the crime which are not easily guessed and have not been reported publicly? (e.g., how the victim was clothed, disarray of certain furniture pieces, presence or absence of particular objects at the crime scene, etc.).

Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in*

the Age of Psychological Interrogation, 88 J. Crim L. & CRIMINOLOGY 429, 438-39 (1998).

Armin's statements did not fulfill any of the reliability criteria. His statement led to the discovery of no new confirming evidence, nor did his statement include information, already known to the police, which had not been disclosed to him or to the public. As Dr. White pointed out,

To my knowledge, in the course of six interviews over three days, Armin Wand did not produce, on his own accord, a single piece of information that demonstrated his actual guilt. He never provided the police with factual information about the fire that the police had not told him first.

(168:4:26).

Since the police did not know how the fire started, one could assume that to the degree to which Armin's and Jeremy's statements agreed that might be confirming evidence.

In his postconviction motion, Armin pointed out that where the statements of Armin and Jeremy's were consistent they were cross contaminated and in other important areas they were inconsistent with each other and with other evidence.

23. Armin Wand's and Jeremy Wand's confession are consistent only where they have been contaminated.

A. Both men said that Jeremy was present in the house when the fires started. Originally, both men strenuously denied that Jeremy was there. However, Special Agents told both Armin and Jeremy that they had several witnesses who could identify Jeremy say they saw Jeremy and Armin talking together near the garage. In fact, one 10 year old neighbor said he saw someone who looked like Jeremy only taller run down the driveway and another neighbor said he heard voices that seemed to come from around the garage.

B. Both men said Jeremy started a fire between the TV and the futon. This is the where Armin originally

said he saw the fire when Sharon woke him up. In his initial interview, Jeremy said that Armin had told him about the fire near the futon. On the afternoon of September 8, 2012, Jeremy also mentioned that “they said yesterday, it was on the base of the futon, on the floor though by the TV.”

C. Both men eventually said that Jeremy arrived at the house at around 11:45 pm, as Armin was locking up. Armin first said that only after special agents repeatedly told him he was lying when he denied Jeremy had been there. Agents repeated Armin’s story that Jeremy arrived at around 11:45 p.m., and Jeremy eventually incorporated that information into his account.

D. Both men said that Armin got water in a tumbler to put the fire out. This was also part of Armin’s original story that Jeremy said he told Jeremy the morning of the fire.

E. Both men said they committed the arson to collect insurance money, however, in the cases of both men, the insurance motive was repeatedly suggested by the Special Agents before either incorporated it into their statements. Further, Jeremy was told that Armin said Jeremy was to receive \$300 for starting the fire - a fact which Jeremy then included in his story.

24. Armin Wand’s confession is inconsistent with Jeremy’s confession and other evidence in major aspects.

A. To explain the time gap between the time Jeremy supposedly first arrived at the house at around midnight, and the time of the fire around 3:00 a.m., Armin said that he and Jeremy sat at the dining room table and talked about how they would set fire. They talked until nearly 3 a.m..

B. Jeremy said that when he arrive, he sat in the recliner in the living room and Armin sat on the futon while Armin tried to convince him to start the fire until around 2 a.m.

C. Armin said that Jeremy started the first fire between the futon and the TV, the second fire at the computer, Armin started a third fire on the futon

and Jeremy started a fire on the couch. See Exhibit 6.(170). Armin said they moved the fire around with a stick taken from the fire pit outside. They passed the stick back and forth. Armin moved the fire from the TV to the futon with a stick.

D. Jeremy said the only fires he started were at the TV and the computer. He said Armin might have started a fire near the chair and end table in the living room. See Exhibit 7.(171). He did not mention using any stick. He did not mention starting any fires on the couch or futon.

E. Neither men mention starting a fire in the northwest bedroom where Fire Inspector Boswell believed a second fire was started.

F. On September 9, 2012, Armin confessed to trying to put [J.W.] back in the house through the window in the northwest bedroom. During the first interviews Armin denied ever having [J.W.] Special Agents insisted he was lying because they said a neighbor saw him taking [J.W.] out of the window in the northwest bedroom. Armin pointed out that [J.W.] had not been in that room. However, after agents kept insisting he did have [J.W.] and suggested that he might be lying because he was really trying to put [J.W.] back into the house, Armin finally said that his wife, Sharon, handed [J.W.] to him and he handed her to a neighbor. During his last interview, he said he tried to put [J.W.] into the window. However, on October 25, 2012, Sharon Wand said that she carried [J.W.] out of the house and handed her to the neighbor, she denied that she ever gave [J.W.] to Armin.

(165: 12-14)(footnote omitted)

Armin's and Jeremy's statements did not confirm each other.

II. Armin alleged sufficient basis for withdrawal of his guilty pleas.

A. Armin Wand's confession was coerced and unreliable.

A "manifest injustice" for purposes of a plea withdrawal can be found on the merits or in the process which led to conviction. *State v. Krieger*, 163 Wis.2d 241, 471 N.W.2d 599 (Ct. App., 1991) citing *Griffin v. State*, 43 Wis.2d 385, 388-89, 168 N.W.2d 571, 573 (1969). One such flaw in the process is a confession given in violation of the defendant's constitutional rights. *Griffin*, 43 Wis.2d at 389, 168 N.W.2d at 573.

As pointed out above, Armin's September 9th statement was coerced - a violation of due process.

In *Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116, 118(1956), the Supreme Court held:

A defendant who seeks to overturn his guilty plea must therefore demonstrate the existence of a sufficient interrelationship or nexus between the plea and the antecedent confession so that the plea may be said to be infected by the State's prior illegal action. Thus to invalidate a guilty plea more must be shown than the mere existence of a coerced.

B. The fact that the trial court admitted Armin's September 9th statement, induced Armin to plead.

Armin entered pleas of guilty on three counts first degree intentional homicide, attempted first degree intentional homicide, arson and felony murder, only two days after the trial court ruled that Wand's September 9th statement was admissible. Thus, had he not pled, Armin would have faced the prospect of a trial where his coerced admissions to the most horrendous crimes would have been broadcast to the jury.

It is not surprising that Armin pled to the charges rather than face trial.

Using the Innocence Project database, Redlich (2010) found that exonerees who had falsely confessed were four times more likely to plead guilty than were those in the same population who had not confessed. Although based on a small number of guilty pleas, this

pattern has continued. Out of 289 DNA exonerations posted by the Innocence Project (E. West, personal communication, March 30, 2012), false confession cases were significantly more likely to be resolved by a guilty plea (25.97%) than were nonconfession cases (3.78%). This difference suggests that many innocents who confess ultimately surrender rather than assert a defense.

Saul M. Kassin, *Why Confessions Trump Innocence*, *American Psychologist*, 431, 439, September 2012.

Once there has been a confession - even if false - the chances of conviction are drastically increased.

Confession evidence has more impact in court proceedings than eyewitness testimony, alibis, and other forms of evidence. See Saul M. Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?*, 60 *AM. PSYCHOLOGIST* 215, 222 (2005).

Even when it is logical and appropriate to discount a confession, jurors tend to be overwhelmed by the presence of a confession in their deliberations regarding guilt or innocence. *Id.* In one study of defendants who went to trial with confession evidence that was later proven false, 73% were wrongfully convicted. See Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 *J. CRIM. L. & CRIMINOLOGY* 429, 481–82. (1998).

As the U.S. Supreme Court stated in *Arizona v. Fulminante*, 499 U.S. 279, at 296,

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. . . [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so. While some statements by a defendant may concern isolated aspects of the crime or may be incriminating only when linked to other evidence, a full confession in which the defendant discloses the motive for and

means of the crime may tempt the jury to rely upon that evidence alone in reaching its decision.

(Cites and quotes omitted).

False confessions are particularly dangerous because confession evidence is a uniquely potent type of evidence. As former Supreme Court Justice William Brennan observed, "no other class of evidence is so profoundly prejudicial" as a confession. Confessions "tend to obscure, contaminate, divert attention from, and overwhelm evidence of coercion and innocence; to promote and maintain perceptions that the confession was voluntary and true; and to result in harsher legal outcomes at all levels as the case proceeds through the justice system." A confession is viewed as the end of the inquiry for virtually everyone in the criminal justice system-including often defense attorneys, even when their clients insist the confession was false. Importantly, survey data show that potential jurors do not believe false confessions are much of a concern. Even when jurors recognize that a suspect has been subjected to psychologically coercive interrogation tactics, they do not believe such tactics are likely to induce a false confession."In other words, the popular belief is that people do not falsely confess unless they are tortured or mentally ill. And when false confessors subsequently retract their confessions, the retractions are rarely credited; to the contrary, retractions are often perceived as further evidence of the defendants' deceptiveness and hence guilt.

Brian Cutler, Keith A. Findley, and Danielle Loney, *Expert Testimony On Interrogation And False Confession*, 82 UMKC L. Rev. 589, 593, 2013-2014.(footnotes omitted).

Thus, even where a confession is shown to be unreliable,

When courts fail to dismiss these false confession cases at the pretrial stage, the overwhelming majority of defendants will be wrongfully convicted.

RICHARD A. LEO et al, *Bringing Reliability Back In: False Confessions And Legal Safeguards In The Twenty-First Century*, 2006 Wis. L. Rev. 479, 484.

With these odds, it makes sense for one to believe that if the confession has been found admissible, he or she has a better chance

of a lesser sentence if he or she takes “responsibility” by pleading RICHARD A. LEO et al, *Bringing Reliability Back In: False Confessions And Legal Safeguards In The Twenty-First Century*, 2006 Wis. L. Rev. 479, 484.

With these odds, it makes sense for one to believe that if the confession has been found admissible, he or she has a better chance of a lesser sentence if he or she takes “responsibility” by pleading rather than taking the chance of going to trial and being almost certainly found guilty and facing a harsher sentence.

C. Other jurisdictions have held that an unreliable confession is grounds for withdrawal of a plea

In *State of Ohio v Glenn W. Tinney* case no 1992-CR-239 H (Affirmed *State v. Tinney*, 2014-Ohio-3053, July 10, 2014), held that“...while it is not possible to determine whether Mr. Tinney is innocent, his confessions do not provide any serious support for his conviction for murder, suggest that he is not guilty, and make it manifestly unjust to deny the withdrawal of his guilty plea. The correction of manifest injustice consequently justified allowing Mr. Tinney to withdraw his guilty plea.”.

People v. Jamison, 197 Ill. 2d 135, 163, 756 N.E.2d 788, (2001), holds that the trial court's decision on whether a defendant is to be allowed to withdraw his or her plea will not be disturbed on appeal "unless it appears that the guilty plea was entered through a misapprehension of the facts or of the law, or **that there is doubt of the guilt of the accused** and the ends of justice would better be served by submitting the case to a trial." (Emphasis supplied).

While *Jamison* did not deal specifically with withdrawal of the plea on the ground that there was doubt of Jamison’s guilt, the principle has been affirmed repeatedly by the Illinois courts. See *People v. Pullen*, 192 Ill. 2d 36, 733 N.E.2d 1235, 248 Ill.Dec. 237 (Ill., 2000); *People v. Davis*, 582 N.E.2d 714, 145 Ill.2d 240, 164 Ill.Dec. 151 (Ill., 1991).

Here, not only does Armin's confession does not meet reliability criteria, there is other reason to doubt his guilt. It is questionable whether the fire was an arson in the first stance. R. Paul Bieber concluded,

the only conclusion regarding origin, cause or classification of the cause of this fire which is in compliance with NFPA 921 and the standards of generally accepted techniques and methodologies within the field of fire investigation is "undetermined".

(167: 18).

The state's conclusion that there was an arson is based, in part, on Armin's statement. Secondly, it was based upon the belief that there had been a second fire started in the boys' bedroom. To reach that conclusion, the state had to assume that the door to the boys' room was closed. Indeed, the state alleged that Jeremy locked that door.(2:6.)

In considering the potential of room-to-room extension from the fire in the living room into the bedroom, the position of the bedroom door (open or closed) during the fire is a critical factor. In other words, if the bedroom door was open during most or all of the fire, fire extension from the living room into the bedroom cannot reasonably be excluded as the cause of the burn patterns Fire Investigator Boswell is attributing to a "separate and independent" area of origin. Only if the door dividing the living room from the bedroom was in the closed position can a conclusion of multiple areas of origin be sustained.

(167: 10).

However, as R. Paul Bieber points out in his report, the door to the boys room was observed by fire fighters at the scene to be open.

[The]statement of Fire Chief Randy Martin (the first firefighter on the scene) who was able to look through the west window of the bedroom, through the open doorway to the living room, and see fire burning in the living room. Had the door between the bedroom and living room been closed this would not have been possible.

(Id.10-11).

Bieber also noted,

Later in the fire's progression, the first eye-witness to observe flames in the bedroom (Firefighter Cody Stamm) saw burning in the area of the bedroom closet, immediately adjacent to the door leading to the living room, and not in the area of the room identified by Fire Investigator Boswell as the separate area of origin of the fire in the bedroom. Firefighter Stamm extinguished the fire burning in the closet, but did not encounter any other flames in the bedroom.

(Id. 11).

Sharon Wand's statement supports the conclusion that the door was open.

Approximately seven weeks after the fire and after Fire Investigator Boswell completed his final report, the first eyewitness to the fire, Sharon Wand, was interviewed in her hospital room. During the first of two interviews "Sharon Wand indicated that the door to the boy's room...was open and that there was no fire in the boy's room..."

(Id.).

Clearly, where Armin's statement is unreliable, where it is not confirmed by Jeremy's statement and where the state's other basis for claiming that the fire was deliberately set was that there had been a second fire set in the boy's room is not supported by eye-witness statements, there is doubt that Armin is guilty of the charges to which he pled and "the ends of justice would better be served by submitting the case to a trial."

CONCLUSION

Armin G. Wand, III, asks this court to reverse the trial courts determination that his September 9th statement is admissible and remand for a trial. In the alternative, Armin Wand asks this court to remand for an evidentiary hearing on his motion to withdraw his plea.

Dated: November 16, 2015

Patricia A. FitzGerald
State Bar Number 1015179
229 North Grove Street
Mt. Horeb, WI 53572
(608) 437-4859
Attorney for Armin G. Wand, III

cc: Wisconsin Department of Justice
Armin G. Wand, III

CERTIFICATIONS

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is proportional serif font, minimum printing resolution of 200 dots per inch, 14 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of the brief is 10754 words.

Patricia A. FitzGerald

I hereby certify that with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19 (2)(a) and that contains at a minimum : (1) a table of contents; (2) the findings or opinion of the trial court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, an final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Patricia A. FitzGerald

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stats. § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date .A copy of the certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Patricia A. FitzGerald

