

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2016AP1965-CR

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SETH Z. LEHRKE,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING
POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR CHIPPEWA
COUNTY, THE HONORABLE STEVEN CRAY, PRESIDING.

BRIEF OF AMICUS CURIAE THE INNOCENCE NETWORK

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INTEREST OF AMICUS

The Innocence Network is an affiliation of organizations from around the world dedicated to providing pro bono legal and investigative services to individuals seeking to prove their innocence, and working to redress the causes of wrongful convictions. To date, 350 wrongfully convicted individuals have been exonerated through DNA testing, many based on proven false confessions. Amicus thus has an interest in the consideration and treatment of confession evidence that is consistent with the social science research.

SUMMARY OF ARGUMENT

The Wisconsin Supreme Court has long recognized the danger of false confessions, particularly among youth and the intellectually disabled. *See, e.g., In re Jerrell C.J.*, 2005 WI 105, ¶ 21, 283 Wis. 2d 145, 157–58, 699 N.W.2d 110, 116.¹ This recognition is well-placed. A robust and widely accepted body of scientific research explains why false

¹ The Seventh Circuit recently affirmed habeas corpus relief for Brendan Dassey, recognizing the dangers of psychologically coercive interrogations on youth and the intellectually disabled and clarifying the proper mode for analyzing a confession's voluntariness. *Dassey v. Dittmann*, No. 16-3397 at 32-53.

confessions occur. This research offers important guidance to fact-finders evaluating confessions. In order to prevent future wrongful convictions based on false confessions, this research should be incorporated into judicial decisionmaking. Had the court below done so, it would have reached different conclusions concerning the confession evidence. This Court should now reverse and clarify the proper role of scientific research in evaluating confession evidence.

ARGUMENT

I. Innocent People Falsely Confess

False confessions occur with disturbing regularity.

West & Meterko, *DNA Exonerations, 1989-2014: Review of Data and Findings from the First 25 Years*, 79 Alb. L. Rev. 717 (2016). Among the first 347 DNA exonerations, 28% involved false confessions or admissions; in all of these cases, the innocent confessor waived *Miranda*.² Garrett, *Contaminated Confessions Revisited*, 101 Va. L. Rev. 395, 396 (2015) (hereinafter “Garrett”). These cases represent the tip of the iceberg, because probative DNA evidence is

² Most of the research described herein applies with equal force to a suspect’s ability to understand and voluntarily waive *Miranda*.

unavailable in most cases.³

The young and intellectually disabled are disproportionately represented among known false confessors: 35% were 18 or younger and at least 10% had known intellectual disabilities⁴ at the time they confessed.⁵ The leading study of 125 proven false confessions found that 27% were between the ages of 18 and 24 and at least twenty-eight were intellectually disabled at the time they confessed. Drizin & Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 945, 971(2004). Accord Tepfer et al., *Arresting Development: Convictions of Innocent Youth*, 62 Rutgers L. Rev. 887, 904 (2010) (false confessions contributed to almost twice as many wrongful conviction cases for those under twenty years old).

Proven false confessions show that innocent people can and do falsely confess to heinous crimes, usually due to the intense pressures of modern psychological interrogation.

³ The National Registry of Exonerations (NRE) has identified an additional 147 non-DNA false confession exonerations and 19 false confession exonerations involving DNA and other evidence of innocence. *See* <http://www.law.umich.edu/special/exoneration/Pages/detailist.aspx>.

⁴ Reliable data about the intellectual capacity of most DNA exonerees does not exist.

⁵ Innocence Project (IP), <https://www.innocenceproject.org/dna-exonerations-in-the-united-states/>.

Nearly all (94%) of the known false confessions were contaminated with “inside” information leaked by law enforcement during interrogation, resulting in detail-rich confessions that – while false – sound plausible. Garrett at 410. The majority (76%) also contained information inconsistent with, or contradicted by, the real evidence of the crime. *Id.* at 414-15 n.90.

II. Scientific Research Explains Why People Falsely Confess

A robust body of scientific research on the psychology of interrogations and confessions does much to explain the frequency of false confessions, as well as the unique vulnerability of youth and the intellectually disabled in interrogations.

A. Psychological Interrogation Tactics Can Produce False Confessions⁶

Most police departments follow standardized interrogation tactics.⁷ Police interrogators generally begin

⁶ For a discussion of these tactics and their effect on youth and the intellectually disabled, see *Dassey* at 43-48.

⁷ Detective Kleinhans, who interrogated Mr. Lehrke, testified that he had been trained in the Reid Technique (R.238:12-13) which incorporates the interrogation tactics described herein. See Inbau et al., Criminal Interrogations and Confessions (5th ed. 2011).

by separating the suspect from his family and friends, often isolating him in a small interrogation room designed to increase anxiety. *See* Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 *Law & Hum. Behav.* 3, 12 (2010) (“White Paper”). After a brief period of rapport-building, the interrogator deploys a series of tactics intended to shake the suspect’s adherence to his claim of innocence. *Id.* at 11-12. It is at this time the interrogation often shifts into confrontation mode, as the questioner directly and repeatedly accuses the suspect of lying, refuses to listen to his claims of innocence, and exudes unwavering confidence in his guilt. *See* Ofshe & Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 *Denv. U. L. Rev.* 979, 990 (1997). To convey the message that the suspect is guilty and nothing will change the interrogator’s mind about this “fact,” the interrogator may claim he knows precisely what occurred, or that police possess inculpatory evidence even if such evidence does not exist. *See id.* These techniques are designed to make the suspect feel thoroughly hopeless and trapped. White Paper at 27-28.

After this is accomplished, police interrogators then switch to the next stage of interrogation by offering the suspect a way out: confession. To communicate this, they indicate that the benefits of confessing will outweigh the costs of continued resistance and denial. Ofshe & Leo at 990. Interrogators frequently minimize or rationalize the suspect's supposed involvement in the crime to make confessing seem less damaging, while assuring him that confessing is in his best interest and often implying that he will receive leniency if he confesses. Drizin & Leo at 916. By deploying these tactics at the right psychological pressure points, experienced interrogators can be extraordinarily effective in causing a suspect to produce self-incriminating information. It is now beyond dispute that these tactics can be so potent that they can cause even the innocent to confess. *See Corley v. United States*, 556 U.S. 303, 321 (2009).

B. Personal Characteristics Can Enhance the Risk of Confessing Falsely

Some suspects' personal characteristics place them at greater risk of confessing falsely. *See Kassin & Gudjonsson, The Psychology of Confessions: A Review of the Literature and Issues*, 5 Psychol. Sci. Pub. Int. 33, 51 (2004). Those at

greater risk include the young and those with limited intellectual capacity.⁸ See White Paper at 19. The U.S. Supreme Court has recognized the particular vulnerability of juveniles and the intellectually disabled to falsely confessing. *J.D.B. v. North Carolina*, 564 U.S. 261, 269 (2011) (“risk [of confessing falsely] is all the more troubling—and recent studies suggest, all the more acute—when the subject of custodial interrogation is a juvenile.”); *Atkins v. Virginia*, 536 U.S. 304, 320 (2002) (risk of false confession reason to exclude the intellectually disabled from capital punishment.)

Adolescents are more compliant and suggestible, more impulsive, tend to focus on immediate gratification, and have a diminished perception of risk.⁹ See Owen-Kostelnik et al., *Testimony and Interrogation of Minors: Assumptions About Maturity and Morality*, 61 Am. Psychol. 286 (2006). The intellectually disabled are also more vulnerable to influence, are highly suggestible, and are susceptible to leading and misleading questions. See White Paper at 21. Often the intellectually disabled exhibit a high need for approval,

⁸ See *Dassey* at 32-34.

⁹ See *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 567 U.S. 460 (2012).

particularly in the presence of authority figures. They also exhibit an acquiescence response bias in which they respond “yes” to a wide range of questions – even when an affirmative response is incorrect, inappropriate or absurd. Finlay & Lyons, *Acquiescence in Interviews with People Who Have Mental Retardation*, 40 *Mental Retardation* 14 (2002).

These traits place youth and the intellectually disabled at greater risk of falsely confessing. As compared with adults of normal intelligence, they have a diminished ability to weigh long-term risks and consequences. Psychologically coercive interrogation techniques – designed for adults of normal intelligence – purposely distort the consequences of confessing. As a result, they further impair the already reduced ability of youth and intellectually disabled to evaluate risks and consequences and directly exploit their intellectual and developmental weaknesses.

C. Confessions are Counterintuitive and Highly Persuasive

False confessions are quintessentially counterintuitive and “beyond the ken” of the average juror. *See* Chojnacki et al., *An Empirical Basis for the Admission of Expert Testimony on False Confessions*, 40 *Ariz. St. L.J.* 1, 3-4 (2008).

Laypeople find it difficult to believe that an innocent suspect (absent mental illness or physical force) would confess to a crime he did not commit. *Id.* See also Henkel et al., *A Survey of People's Attitudes and Beliefs About False Confessions*, 26 *Behav. Sci. & L.* 555, 577-580 (2008). “[C]onfessions have more impact than other potent forms of evidence and that people do not fully discount confessions—even when they are judged to be coerced” or otherwise compromised, including by exculpatory DNA evidence. White Paper at 24. *Accord* Garrett at 396 (19 false confession cases had exculpatory DNA at trial). While mock jurors recognize certain interrogation techniques as psychologically coercive, they nevertheless believe they are unlikely to elicit false confessions. Leo & Liu, *What Do Potential Jurors Know About Police Interrogation Techniques and False Confessions?*, 27 *Behav. Sci. & Law* 381, 381 (2009).

Jurors also tend to believe that virtually all confessions are genuine and probative of guilt, Kassin & Gudjonsson, *supra*, at 56-57, and so are far more likely to believe a suspect's confessions than his denials. Levine et al., *(In)accuracy at Detecting True and False Confessions and*

Denials, 36 Hum. Comm. Res. 82, 91 (2010). This pre-disposition may prevent jurors – absent expert testimony – from considering the possibility that a defendant confessed falsely.

Finally, neither laypeople nor experienced professionals distinguish truths from lies with high levels of accuracy. See White Paper at 6; Kassin et al., *I'd Know a False Confession if I Saw One*, 29 Law & Hum. Behav. 211, 216 (2005). False confessions can be particularly challenging to identify because they often contain signals of veracity, such as references to the confessors' thoughts, feelings, and motives, apologies or supposedly non-public facts. See Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. 1051, 1053 (2010).

**D. This Research is Generally Accepted,
Scientifically Valid, and Peer-Reviewed**

Over many decades, researchers who study psychological influence in the interrogation room have used qualitative and quantitative methods to build a body of empirical findings that are widely accepted among psychologists. The American Psychological Association's false confession white paper is the endorsement of that

research by the nation's leading professional organization of psychological scientists. White Paper at 4.

Confession research is premised on broadly accepted core principles of social psychology: people are responsive to reinforcement and conditioning, are influenced more by perceptions of immediate consequences than delayed ones, and are vulnerable to influence by trained professionals (particularly authority figures) who use specific strategies to induce acts of compliance. *See generally* Kassin, *Expert Testimony on the Psychology of Confessions: A Pyramidal Framework of the Relevant Science*, in Beyond Common Sense: Psychological Science in the Courtroom 195, 201-203 (Borgida & Fiske eds., 2008). Building on these findings, social scientists have focused systematically on evaluating the potency of those highly-structured, carefully sequenced psychological mechanisms by which interrogators elicit confessions.

This research is based on accepted methods. Through controlled laboratory and field experiments, researchers have tested causal hypotheses about the cognitive and

psychological effects of particular interrogation tactics.¹⁰ See, e.g., Kassin & Kiechel, *The Social Psychology of False Confessions*, 7 Psychol. Sci. 125, 126 (1996); Russano et al., *Investigating True and False Confessions Within a Novel Experimental Paradigm*, 16 Psychol. Sci. 481, 484 (2005). These methods rule out, or control for, competing hypotheses, and yield conclusions that can be generalized across different people, different settings, and over time.

III. Social Science Research Should Inform Fact-finding About Confessions

These research findings should guide judges in decision making about *Miranda* waivers, confessions and expert testimony on interrogations and confessions. More reliable analyses can be achieved through the use of a “social framework” model in which generally accepted scientific research findings are used to determine facts in issue. See Walker & Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 Va. L. Rev. 559 (1987); Monahan

¹⁰ Other techniques used in this field include individual and aggregated case studies, see, e.g., Gudjonsson, The Psychology of Interrogations and Confessions: A Handbook 217-243 (2003) and systematic observation of police interrogation tactics and related contextual factors, see, e.g., Leo, *Inside the Interrogation Room*, 86 J. Crim. L. & Criminology 266 (1996). These research methods are established in the field and valid.

& Walker, *A Judges' Guide to Using Social Science*, 43 Ct. Rev. 156 (2007). This analysis yields the robust, holistic consideration endorsed by *Dassey*, while avoiding the superficial, factor-by-factor consideration condemned there and present in this case. *Dassey, supra*, at 21-22, 29-53.

Had the trial court in this case incorporated the social science research into its analyses, it would have reached different conclusions. For example:

- The court dismissed Mr. Lehrke's significant intellectual impairments¹¹ but the research would have contextualized his behavior;¹²
- The court found that the "pressure tactics that are commonly associated with coercion are not present at all" (App. 118-19). However, a review of the confession in light of the research shows the frequent use of coercive techniques

¹¹ See App. 117 ("Well, not everyone is blessed as a genius.")

¹² Research would have explained Mr. Lehrke's not asking follow up questions after the *Miranda* warning not as evidence of understanding (App. 116) but rather as acquiescence typical of intellectually disabled people.

(minimization;¹³ promises of leniency/threats;¹⁴ omniscience;¹⁵ deception;¹⁶ and contamination¹⁷) that enhance the risk of false confessions, particularly among youth and the intellectually disabled.

- The court found that expert testimony would not assist the jury¹⁸ because the matters were within their common understanding, a conclusion roundly contradicted by the research.¹⁹

¹³ See, e.g., Tr. at 40, ll.22-25 (“be honest and we’ll get through it and move on and move out.”); *id.* at 48, ll. 14-15 (“Seth made a poor choice and – and he’s really sorry”).

¹⁴ See, e.g., *id.* at 48, ll.6-26 (can tell the district attorney that Lehrke was cooperative and told the truth or was not cooperative); *id.* at 49, ll. 4-5 (“I’m not even saying you’re going to prison... cooperation goes a long way.”).

¹⁵ See, e.g., *id.* at 42, ll. 8-9 (“you know there’s more to it and I know there’s more to it”).

¹⁶ See, e.g., *id.* at 42, 18-19 (“a kid can’t make some of this stuff up”);

¹⁷ See, e.g., *id.* at 43, 3-4 (“And started in the living room, she was watching Pretty Pony.”)

¹⁸ Compare *United States v. Whittle*, No. 3:13-CV-00170-JHM, 2016 WL 4433685, at *4 (W.D. Ky. Aug. 18, 2016).

¹⁹ While the court stated that it might have admitted the expert had Lehrke been of average intelligence (R.249:47; App. 123-124) reasoning that jurors understand that those with lower IQs are more likely to confess falsely, research shows that laypeople do not understand the limitations and behaviors of the intellectually disabled. See, e.g., Boccaccini et al., *Jury Pool Members’ Beliefs About the Relation Between Potential Impairments in Functioning and Mental Retardation: Implications for Atkins-Type Cases*, 34 Law & Psychol. Rev. 1 (2010).

- The court excluded the expert testimony because it did not have “predictive value.” (R.249:50). But the proper role of expert testimony is not to comment on the ultimate issue of fact (i.e., the truth of a particular confession), a question exclusively for the jury, but rather to give jurors the tools necessary to answer this question.
- The conclusion that the expert testimony’s prejudicial effect would outweigh its probative value was also in error. (App. 128) Given the high impact of any confession, the value of testimony that puts it in the context of scientific understanding is not outweighed by any purported prejudice that would result.

The trial court’s findings underlying the confession-related holdings are against the weight of the social science research.

CONCLUSION

Amicus respectfully requests that the Court reverse the trial court's findings regarding the voluntariness of the *Miranda* waiver and the confession and the admissibility of expert's testimony. Further, amicus requests that the Court clarify the proper role of scientific research concerning interrogations and confessions in judicial decisionmaking.

Dated this 26th day of June, 2017.

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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, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,753 words.

Signed:

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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