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Supreme Court of Wisconsin

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

TIMOTHY E. DOBBS,
Defendant-Appellant-Petitioner.

Appeal No. 2018AP319
Dane County Circuit Court Case No. 2015CF1938

**BRIEF OF *AMICI CURIAE* THE INNOCENCE PROJECT, INC.,
AND THE WISCONSIN INNOCENCE PROJECT**

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INTRODUCTION

The Innocence Project, Inc. (IP) and the Wisconsin Innocence Project (WIP) provide pro bono services to indigent prisoners whose innocence may be established with new evidence, including post-conviction DNA testing. They are also dedicated to preventing future wrongful convictions. False confessions are a leading cause of wrongful conviction, contributing to about 25% of the about 350 wrongful convictions proven by post-conviction DNA evidence.¹

Amici thus have an interest in judicial consideration of confession evidence that is consistent with the social-science research and provides fact finders with reliable information and context to evaluate this highly persuasive evidence. *Amici* do not opine on the merits of this particular case and instead write to highlight the general reliability of expert testimony about false confessions and to propose a framework for lower courts to evaluate its relevance.

Research about risk factors associated with false confessions is widely accepted, and a court should admit expert testimony on false

¹ Innocence Project, <https://www.innocenceproject.org/false-confessions-happen-more-than-we-think/>.

confessions under § 907.02 of the Wisconsin Statutes and the Supreme Court's test in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), if the case presents at least one of the known risk factors for a false confession. Social scientists and psychologists have spent more than three decades researching interrogations and confessions. Through research using valid methods, published in respected peer-reviewed journals and generally accepted in the field, the scientific community has identified eight risk factors for false confessions.

When a case presents at least one of those established risk factors, testimony explaining the underlying scientific principles meets *Daubert's* relevance test. Such testimony will help the jury determine a "fact in issue": the weight to give confession evidence. Because research shows that most jurors cannot comprehend anyone confessing to a crime they did not commit, the risk of false confessions is outside the average layperson's common knowledge. Thus, expert testimony will assist jurors in evaluating confession evidence. Importantly, *Daubert* does not require an expert to opine whether a particular confession is false.

Finally, a court does not have discretion to exclude expert testimony that clears *Daubert's* threshold.

Thus, this Court should make clear that courts should admit expert testimony on false confessions when one of the known risk factors appears in the case.

ANALYSIS

I. Courts should admit expert testimony on false confessions if a risk factor associated with false confession arises in the case.

Wisconsin applies the *Daubert* standard to the admissibility of expert testimony. See Wis. Stat. § 907.02; *In re Commitment of Jones*, 2018 WI 44, ¶ 8, 381 Wis.2d 284, 911 N.W.2d 97. The statute provides that “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue,” a qualified witness “may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.”

Circuit courts must determine whether (1) “the scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue,” (2) “the expert is qualified,” (3) “the testimony is based upon sufficient facts or data,” (4) “the testimony is the product of reliable principles and methods,” and (5) “the witness has

applied the principles and methods reliably to the facts of the case.” *Id.*

¶ 29.

Testimony from a qualified witness about false confessions and associated risk factors readily meets these requirements when one of the established risk factors applies in the case.

A. Knowledge about false confessions will assist the jury in understanding and assigning weight to confession evidence.

The test for when expert testimony would assist the factfinder is whether “the untrained layman would be qualified to determine intelligently and *to the best possible degree* the particular issue without enlightenment from those having a specialized understanding of the subject.” *State v. Swope*, 2008 WI App 175, ¶ 27, 315 Wis.2d 120, 762 N.W.2d 725 (emphasis added). In other words, “the proper standard is helpfulness, not absolute necessity.” *Id.*; *see also Myers v. Ill. Cent. R.R. Co.*, 629 F.3d 639, 643 (7th Cir. 2010) (helpful when not “obvious to a layman”).

As wrongful convictions predicated on false confessions demonstrate, the “untrained layman” is not qualified “to the best possible degree” to determine what weight to give confession evidence or to assess

whether a particular confession might be false. *Swope*, 2008 WI App 175, ¶27. Researchers and the courts have long recognized that false confessions occur. *See, e.g., Miranda v. Arizona*, 384 U.S. 436, 455 & n.24, 467 (1966). But the average person vastly underestimates the incidence of false confessions. “Most people believe they would never confess to a crime they did not commit, do not understand police interrogation practices, and have only a rudimentary grasp of the person[al] and situation[al] factors that would lead someone innocent to confess.” Saul Kassin, *False Confessions: How Can Psychology So Basic Be So Counterintuitive?*, 72 *Am. Psychologist* 951, 956 (2017); *see In re Jerrell C.J.*, 2005 WI 105, ¶ 103, 283 Wis.2d 145, 699 N.W.2d 110 (Abrahamson, C.J., concurring). “[C]onfession evidence has a potent, if not irrevocable, effect on juries.” Sara Appleby et al., *Police-induced confessions: An empirical analysis of their content and impact*, 19 *Psychol., Crime & L.* 111, 124 (2013).

Recent high-profile cases involving false or coerced confessions have not changed the status quo. In a 2019 survey, “laypeople substantially underestimated the coerciveness of prohibited tactics,” such as promises of leniency, “relative to social science experts specializing in interrogation.” Jeffrey Kaplan, et al., *Perceptions of coercion in interrogation: comparing*

expert and lay opinions, Psychol., Crime & L. 1, 11-12 (2019). So even if some jurors are aware that false confessions occur, they remain unfamiliar with situational and personal risk factors that can lead an innocent person to falsely confess.

B. Researchers have used reliable principles and methods to reveal widely recognized risk factors for false confessions.

Courts consider several non-exclusive factors to determine reliability of expert evidence: “whether the evidence can be (and has been) tested; whether the theory or technique has been subjected to peer review and publication; the known or potential rate of error; the existence and maintenance of standards controlling the technique’s operation; and the degree of acceptance within the relevant scientific community.” *Jones*, 2018 WI 44, ¶29 (citing *Daubert*). Those factors were “meant to be helpful, not definitive.” *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 151 (1999). The court need only “determine whether the testimony has a reliable basis in the knowledge and experience of [the relevant] discipline.” *Id.* at 149 (internal quotation marks omitted).

Here, the social science on false confessions and associated risk factors rests on generally accepted research methods, has been peer-reviewed and published in respected journals, and has reached internally

consistent conclusions. For example, in 2010 the prestigious American Psychology-Law Society (AP-LS) published a heavily peer-reviewed “Scientific Review Paper” on the subject—only the second such paper approved in AP-LS’s 42-year history. *See* Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & Hum. Behav. 3 (2010). “Scientific Review Papers are not merely the opinions of their authors, they are vetted and reviewed to assure they reflect the best research and analysis the Society has to offer.” *Id.* at 1-2. That paper arose after the principal author learned that false confessions had occurred in 20% of post-conviction DNA exonerations. *Id.* at 2. That figure has since risen to 25%.

Consistent with the AP-LS’s views, the scientific community has coalesced around eight situational and personal risk factors that contribute to false confessions: minimization, use of false evidence, lengthy interrogation, youth, intellectual disability, mental illness, suggestibility, and compliance. *See* Am. Psychol. Assoc., *Resolution on Interrogations of Criminal Suspects* (2014); *see, e.g.*, Gilsa H. Gudjonsson, *The Psychology of Interrogations and Confessions* 141-151 (2003); Saul M. Kassin et al.,

Police Interviewing and Interrogation, 31 L. & Hum. Behav. 381, 389-90 (2007).

1. Situational risk factors

Not infrequently, the situational risk factors overlap with interrogation techniques. First is “minimization,” whereby a seemingly sympathetic investigator normalizes the crime in question by suggesting to the suspect that it was spontaneous, provoked, drug-induced, peer-pressured, accidental, or otherwise minimizable or even excusable. *See* Kassin & Gudjonsson, *supra*, at 55; *see also* *Miranda*, 384 U.S. at 450 (“[O]fficers are instructed to minimize the moral seriousness of the offense, to cast blame on the victim or on society.”). In a controlled experiment, minimization tactics made college students more likely to confess falsely that they had cheated on a problem they were supposed to solve alone, a possible violation of the university honor code. Melissa B. Russano et al., *Investigating True and False Confessions Within a Novel Experimental Paradigm*, 16 Psychol. Sci. 481, 484 (2005).

Second is the use of false evidence, where interrogators confront suspects with powerful but false evidence of their guilt, such as a fingerprint, accomplice confession, eyewitness identification, or failed

polygraph. *See, e.g.,* Richard A. Leo et al., *Psychological and Cultural Aspects of Interrogations and False Confessions*, in *Psychological Expertise in Court* 25, 37-38 (Krauss & Lieberman eds., 2009). “Outright lies can put innocent people at risk to confess by leading them to feel trapped by the inevitability of evidence against them.” *See* Kassin, *Police-Induced Confessions*, *supra*, at 28. In one study, subjects typing on a computer keyboard were accused of causing the computer to crash by pressing a key they had been instructed to avoid. *See* Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions*, 7 *Psychol. Sci.* 125, 126-127 (1996). Despite their innocence and initial denials, subjects were asked to sign a confession. Where a confederate lied that she saw the subject hit the forbidden key, the percentage of innocent subjects who signed nearly doubled from 35% to 69%. *Id.* at 127.

Lengthy interrogation (typically, more than six hours) is a third situational risk factor. Most interrogations last from thirty minutes to two hours. Richard A. Leo, *Inside the Interrogation Room*, 86 *J. Crim. L. & Criminology* 266, 279 (1995-96) (Table 6). But in 44 proven false-confession cases, the “average length of interrogation was 16.3 hours, and the median ... was twelve hours.” Steven A. Drizin & Richard A. Leo, *The*

Problem of False Confessions in the Post-DNA World, 82 N.C. L. Rev. 891, 948 (2004). Researchers agree that interrogations exceeding six hours are inherently problematic. *See, e.g.*, J.P. Blair, *A Test of the Unusual False Confession Perspective*, 41 Crim. L. Bull. 127, 135 (2005); Leo, *Inside the Interrogation Room*, *supra*, at 282.

2. Personal risk factors

In addition to situational risk factors, personal attributes make some individuals more vulnerable to influence and hence at greater risk for false confessions. *See* Saul Kassin & Gilsi Gudjonsson, *The Psychology of Confessions* 51 (2003). Recognized personal risk factors include three characteristics (youth, intellectual disability, and mental illness) and two personality traits (suggestibility and compliance).

For example, empirical research on proven false confessions has revealed that juveniles falsely confess at rates far higher than adults. Saul M. Kassin, *The Psychology of Confessions*, 4 Ann. Rev. L. Soc. Sci. 193, 204 (2008). In a study of 340 exonerations, 42% of juveniles falsely confessed compared with 13% of adults. Samuel R. Gross et al., *Exonerations in the U.S. 1989 through 2003*, 95 J. Crim. L. & Criminology 523, 545 (2005).

Similarly, at least 22% of false confessors had intellectual disabilities. *See* Kassin, *Police-Induced Confessions, supra*, at 5, 20-21. Intellectually disabled people are susceptible to leading and misleading questions and often exhibit both a need for approval, particularly in the presence of authority figures, and an “acquiescence response bias” to answer “yes” to questions even if that response is incorrect, inappropriate, or absurd. *See* William M. Finlay & Evanthia Lyons, *Acquiescence in Interviews with People Who Have Mental Retardation*, 40 *Mental Retardation* 14, 15 (2002); *see* Kassin, *Police-Induced Confessions, supra*, at 21.

Individuals with serious mental-health problems are also overrepresented among false confessors. *See* Allison D. Redlich et al., *Self-Reported False Confessions and False Guilty Pleas Among Offenders with Mental Illness*, 34 *Law & Hum. Behav.* 79, 81, 87, 89 (2010).

Certain personality traits also correlate with increased susceptibility to interrogative pressure: compliance and suggestibility. *See* Kassin & Gudjonsson, *The Psychology of Confessions, supra*, at 51-52 (citing studies). Compliant individuals tend to be conflict-avoidant, acquiescent, and eager to please authority figures. *See generally* Gudjonsson, *The*

Psychology of Interrogations and Confessions, supra, at 370-76.

Suggestibility includes a tendency to internalize and repeat back suggested information and is associated with poor memory, high anxiety, and low assertiveness. *See id.* at 370; *see also* Kassin & Gudjonsson, *The Psychology of Confessions, supra*, at 51-52. These traits are especially relevant when a subject is sleep-deprived or suffering from drug or alcohol withdrawal. *See, e.g.*, Gisli H. Gudjonsson et al., *The Relationship of Alcohol Withdrawal Symptoms to Suggestibility and Compliance*, 10 *Psychol. Crime & L.* 169, 169-77 (2004).

The relevant scientific community has deemed the research behind these risk factors sufficiently reliable for expert testimony in court. Saul Kassin et al., *On the General Acceptance of Confessions Research: Opinions of the Scientific Community*, 73 *Am. Psychologist* 63, 72-75 (2018) (Table 4).

C. Scientific knowledge regarding false confessions satisfies *Daubert* when at least one risk factor for false confessions applies.

Daubert's requirement for applying expert testimony reliably to the facts of the case is "essentially a relevance inquiry" under Federal Rule of

Evidence 401 or Wis. Stat. § 904.01. *United States v. Hall*, 93 F.3d 1337, 1342 (7th Cir. 1996); *see also* State’s Response Br. at 20.

Hall held that expert testimony on false confessions is relevant when one of the risk factors is present in the case. There, the court reversed a conviction because proffered expert testimony “would have let the jury know that a phenomenon known as false confessions exists, how to recognize it, and *how to decide whether it fit the facts of the case being tried.*” *Id.* at 1345 (emphasis added). At least one known risk factor was present in that case. Specifically, there was evidence about the defendant’s compliance and suggestibility. *Id.* at 1341.

Wisconsin courts have applied this principle. In *Smith*, the Court of Appeals allowed expert testimony about the “reactive” behaviors “common among” child-abuse victims in general, including “delayed disclosure,” without reference to the specific alleged victim. *State v. Smith*, 2016 WI App 8, ¶¶ 3, 6, 10, 366 Wis.2d 613, 874 N.W.2d 610. Because there was evidence that the victim exhibited at least one of those behaviors, this testimony was undisputedly helpful to the jury. *Id.* ¶¶ 9-11.

Likewise, one can easily imagine how expert testimony on false confessions would be helpful to a jury weighing a confession elicited after

an 8-hour interrogation. Jurors would learn that, despite their intuition that no one would confess to a crime that they did not commit, false confessions do occur and are more likely if the suspect has been interrogated for over six hours. The expert could also explain why: protracted interrogation impairs judgment by causing fatigue, uncertainty, and despair. *See* Kassin & Gudjonsson, *The Psychology of Confessions*, *supra*, at 53-54. So informed, the jury could better evaluate confession evidence. *See* Drizin & Leo, *The Problem of False Confessions*, *supra*, at 918-19 (“Although the phenomenon of ... false confessions is counter-intuitive, it can be easily understood once the techniques, logic, and effect of modern interrogation are ... explained.”).

Importantly, an expert need not opine whether the defendant’s confession is false to provide the jury with helpful, relevant, and reliable information in a case where one of the known risk factors applies. The experts in *Hall* and *Smith* did not opine, respectively, whether the defendant’s confession was false or the complainant had been abused. 93 F.3d at 1341, 1345; 2016 WI App 8, ¶ 6; *see also Bayer ex rel. Petrucelli v. Dobbins*, 2016 WI App 65, ¶ 21, 371 Wis.2d 428, 885 N.W.2d 173 (Daubert’s focus is not on the “conclusion generated”).

II. Courts lack discretion to exclude expert testimony that clears *Daubert*'s threshold.

A court cannot exclude an expert who meets the baseline requirements of Wis. Stat. § 907.02. Although courts may admit expert testimony that does not fit or falls below the *Daubert* standard, *see* State's Response Br. at 19-20; *Kumho Tire*, 526 U.S. at 152, "the court's role is to admit evidence that meets the prescribed standards" of the Legislature, *Jones*, 2018 WI 44, ¶33; *see also In re Termination of Parental Rights to Daniel R.S.*, 2005 WI 160, ¶37, 286 Wis.2d 278, 706 N.W.2d 269.

Daubert's standards are "not exceedingly high"—the court's role as gatekeeper is to ensure only "that the courtroom door remains closed to junk science." *Jones*, 2018 WI 44, ¶33. The legislative notes encourage "an affirmative approach" under which "expert testimony will usually be admissible and will only be excluded if superfluous and a waste of time." Wis. Stat. § 907.02 (Judicial Council Comm. Note (1974)); *see* Fed. R. Evid. 702 advisory committee's note to 2000 amendment; *Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748, 758 (8th Cir. 2006) ("resolve doubts [about] usefulness of [expert] testimony in favor of admissibility"). Indeed, "*Daubert*'s reliability inquiry 'is not intended to supplant the adversarial process.'" *Bayer*, 2016 WI App 65, ¶30 (quoting *Bielskis v. Louisville*

Ladder, Inc., 663 F.3d 887, 894 (7th Cir. 2011)). As this Court recognized, and “[a]s Justice Scalia explained, the judiciary is not in a good position to judge ... social science.” *State v. Roberson*, 2019 WI 102, ¶38, 389 Wis.2d 190, 935 N.W.2d 813.

Expert testimony about false confessions is widely accepted by scientists and courts and meets the Legislature’s prescribed standard in § 907.02. *See Jones*, 2018 WI 44, ¶33.

CONCLUSION

Thus, this Court should make clear that expert testimony on established risk factors for false confessions ordinarily will be admissible if one of the known risk factors is present in the case.

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FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a non-party brief produced with a proportional serif font. The length of this brief is 2,991 words.

Dated: March 17, 2020

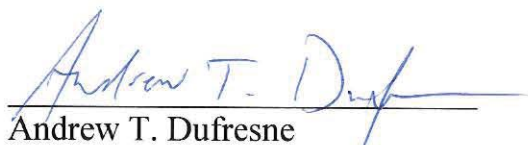


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CERTIFICATION REGARDING ELECTRONIC BRIEF

I certify that I have submitted an electronic copy of this brief in compliance with the requirements of Wis. Stat. § 809.19(12). I further certify that the electronic copy of this brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all parties.

Dated: March 17, 2020



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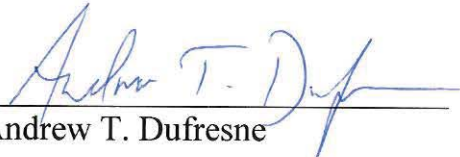
I certify that on this 17th day of March, 2020, I caused a copy of this brief to be served upon counsel for each of the parties via e-mail or U.S.

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