2014

I Did it! Or at Least that's What they Told me to Say!

Kevin Lawrence Cornel

I DID IT! OR AT LEAST THAT'S WHAT THEY TOLD ME TO SAY!

Kevin Cornel

Seton Hall University School of Law

Abstract

This article seeks to demonstrate that while torture or physical coercion may be an obvious cause of an involuntary confession, psychological-coercive techniques can be just effective at eliciting an involuntary and thus unreliable confession. Through the use of false confession experts, defendants are able to demonstrate to juries that false confessions do exist and that they can be the product of psychological interrogation techniques. By highlighting the history of the Supreme Court case Miranda v. Arizona, discussing the research done on the area of false confession experts, and discussing cases in which false confession experts were allowed to testify in, I hope to show that there is a need for such an expert and that they should be admitted into a trial to testify.

I. INTRODUCTION

"A confession, if freely and voluntarily made, is evidence of the most satisfactory character."[1] The evidentiary value of a confession cannot be stressed enough at is undoubtedly one of the most damning pieces of evidence that can be used against someone in a trial. The most important words in the above quote are "freely and voluntary" and goes to the heart of the Fifth Amendment's protection against self-incrimination.[2] However, an involuntary confession obtained through coercive measures can have just as much of a damaging effect as one that is freely and voluntarily made if not excluded or discredited. Furthermore such a confession is at

[1] *Hopt v. People*, 110 U.S. 574, 584 (1884).
[2] U.S. Const. amend. V (nor shall [a person] be compelled in any criminal case to be a witness against himself).

odds with the American accusatorial system of law.[3] The coercive measures used by authorities to obtain such incriminating states are not limited to physical tactics, but psychological as well and the Supreme Court is not blind to that fact as evidenced by its language in *Blackburn v. State of Alabama* in which it stated "this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition."[4] Due to the impact a confession obtained through the use of psychological-coercive tactics can have, purported experts have appeared on the subject of false confessions.[5]

This article explores what false confession experts are and why they are needed in a trial in which a defendant claims to have been the subject of psychological coercive tactics. Defendants in such a case see to have their admissions and/or incriminating statements deemed inadmissible or at least attacked as reliability. While people many readily believe that admissions could be coerced by physical means, others are skeptical of how dangerous involuntary confessions are to society, how egregious such tactics actually are, and call into question the admission of false confession experts.[6] However, such experts "may be able to show that commonly accepted explanations for [false confessions] are, when studied more closely,

---

[3] *Rogers v. Richmond*, 365 U.S. 534, 540 (1961) (Justice Frankfurter stating that an involuntary confession offends the underlying principles in the enforcement of U.S. criminal law).
[4] *Blackburn v. State of Ala.*, 361 U.S. 199, 206 (1960).
[5] *See* Nadia Soree, *When the Innocent Speak: False Confessions, Constitutional Safeguards, and the Role of Expert Testimony*, 32 AM. J. CRIM. L. 191 (2005); 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 (1998); Richard A. Leo & Richard J. Ofshe, *Missing the Forest for the Trees: A Response to Paul Cassell's "Balanced Approach" to the False Confession Problem*, 74 DENV. U. L. REV. 1135 (1997); Richard A. Leo & Richard J. Ofshe, *Using the Innocent to Scapegoat Miranda: Another Reply to Paul Cassell*, 88 J. CRIM. L. & CRIMINOLOGY 557 (1998).
[6] *See* Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions-And From Miranda*, 88 J. CRIM. L. & CRIMINOLOGY 497 (1998); Paul G. Cassel, *Balanced Approaches to the False Confession Problem: A Brief Comment on Ofshe, Leo, and Alschuler*, 74 DENV. U. L. REV. 1123 (1997).

inaccurate."[7]

Part II discusses the history of the Supreme Court case *Miranda v. Arizona*[8] to shed light on the problems the Court was attempting to prevent. As mentioned above, the Court has voiced its concerns over the admission of involuntary confessions and that it stands at opposite ends of our accusatorial system of law. [9] The motive and purpose of false confession experts can be shown the dicta and holdings of pre-*Miranda* jurisprudence.

Part III discusses the role of expert witness and the requirements they must meet in order to be admitted to testify in trial. By calling on their expertise and knowledge, an expert must ultimately be able to assist the trier of fact; otherwise, there would be no need to admit the experts in.[10] This paper argues that by attacking the commonly accepted thoughts of how involuntary confessions are made, i.e. torture, that false confession experts can assist the trier of fact.

Part IV explains what a false confession expert is and some of the research of psychologists in the field. It also discusses the various psychological techniques that false confession experts have found to be correlated with false confessions as well as the methods the experts use to analyze false confessions. Part IV also discusses the argument critics have of false confession experts and why their admission into a trial might be inappropriate.

---

[7] *United States v. Hall*, 974 F. Supp. 1198 (C.D. Ill. 1997) *aff'd,* 165 F.3d 1095 (7th Cir. 1999).
[8] *Miranda v. Arizona*, 384 U.S. 436 (1966).
[9] *Rogers*, 365 U.S. at 540.
[10] *U.S. v. Shay*, 57 F.3d 126, 132 (1995) (stating that if a untrained layperson could reach the same conclusion using their own knowledge, then an expert is not necessary to assist the trier of fact).

Part V analyzes the admission of false confession experts through the facts of 7th Circuit and Central District of Illinois cases.[11] These cases, which consist of an appeal and remand of the same case, layout the ideal scenario for a false confession expert to be admitted into to testify.[12] Also included in this section are a few cases in which false confession experts were denied and why there were not admitted into trial.

Part VI concludes, and summarizes the role of the false confession expert and what problems need to be addressed to better ensure that they are admitted into a trial. Ultimately the question comes down to, "will a false confession expert assist a trier of fact?" Based on the content of this paper and the materials cited herein, there is a strong argument for their admission.

II. UNRELIABILITY OF CONFESSIONS IN PRE-MIRANDA CASES

Confessions are the most important pieces of evidence that can be used against a defendant in any trial and because of that, the Supreme Court has worked to establish on what grounds admissions should be admitted or not admitted. In light of the consequences admissions can have in any trial, experts have come forward and sought admission into trials to testify as to whether or not the admissions/statements of defendants were there the results of psychological coercion. The purported importance of a false confession expert can be seen in the history of *Miranda*. The Supreme Court has been weary of confessions obtained through coercive tactics since they could lead even an innocent man to confess to something he did not do and thus yield unreliable confessions.[13] The Court has held that it is necessary for courts to look at the surrounding circumstances in which a confession was obtained in cases that involve not only

[11] *See United States v. Hall*, 93 F.3d 1337 (7th Cir. 1996); *Hall*, 974 F. Supp. at 1198 (C.D. Ill. 1997) *aff'd*, 165 F.3d 1095 (7th Cir. 1999).
[12] *Id.*
[13] *Id.* at 585.

physical coercion, but psychological because "it is impossible for this Court, in enforcing the Fourteenth Amendment, to attempt precisely to delimit, or to surround with specific, all-inclusive restrictions, the power of interrogation allowed in state law enforcement officers in obtaining confessions."[14] Language such as this indicates that the Supreme Court realizes the possible dangers inherent in psychological-coercive tactics and that there is not a one-size-fits-all analysis in determining whether or not such tactics are enough to cause an involuntary confession.

In 1897, the Supreme Court in *Bram v. United States*, the Supreme Court used the Fifth Amendment of the Constitution in its analysis of the admissibility of confessions and centered its reasoning around the concept of "free and voluntary."[15] The Court looked at the circumstances under which the confession was made and found that confession was involuntary and thus inadmissible.[16] The confession in question was obtained from the defendant while he was alone and naked in the interrogators office which led the Court to state "when all the surrounding circumstances are considered in their true relations, not only is the claim that the statement was voluntary overthrown, but the impression is irresistibly produced that it must necessarily have been the result of either hope or fear, or both, operating on the mind."[17] While the tactics used were not the most egregious the Court would see interrogators use to obtain confessions,[18] this case illustrates that the Court appreciated the consequences of psychological tactics. The Court extended the protections of the Fifth Amendment to states through the use of the Fourteenth

[14] *Culomb v. Connecticut*, 367 U.S. 568, 601 (1961).
[15] *Bram v. United States*, 168 U.S. 532, 557 (1897).
[16] *Id.* at 565.
[17] *Id.* at 562.
[18] See *Brown v. Mississippi*, 297 U.S. 278, 281-282 (1964) (holding that the confession obtained by the police from defendant were inadmissible because the police interrogators had hung and whipped the defendant until he confessed)

Amendment.[19] The coercive tactics used in this case were not the most egregious the Court would encounter.

In *Ashcraft v. Tennessee*, the defendant was subjected to a thirty-six hour examination with only 5-minute respite.[20] During the course of the interrogation, which the police admit consisted of a barrage of question in which they accused the defendant of killing his wife, the defendant allegedly confessed. There was a dispute in the case over whether or not the defendant actually confessed but the Court stated, "if Ashcraft made a confession it was not voluntary but compelled."[21] The Court further stated:

> We think a situation such as that here shown by uncontradicted evidence is so inherently coercive that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear.[9] It is inconceivable that any court of justice in the land, conducted as our courts are, open to the public, would permit prosecutors serving in relays to keep a defendant witness under continuous cross examination for thirty-six hours without rest or sleep in an effort to extract a 'voluntary' confession. Nor can we, consistently with Constitutional due process of law, hold voluntary a confession where prosecutors do the same thing away from the restraining influences of a public trial in an open court room[22]

The Court noted the defendant's mental state showing it appreciated the effects of nonphysical-coercive tactics and held any alleged confession was inadmissible and remanded the case.

In 1949, the Court again addressed a situation in which nonphysical coercive tactics were used to elicit incriminating statements from a defendant.[23] In *Watts v. State of Indiana*, the defendant was subjected to five night interrogations, which began at 6 pm and continued until the 3 am the following morning.[24] The defendant was also confined to a cell called "the hole" denied

[19] *Malloy v Hogan*, 378 U.S. 1, 6 (1964)
[20] *Ashcraft v. State of Tenn.*, 322 U.S. 143, 151-152 (1944).
[21] *Id.* at 153.
[22] *Id.* at 154.
[23] *Watts v. State of Ind.*, 338 U.S. 49, 53 (1949).
[24] *Id.* at 53.

a "decent food allowance."[25] In his opinion, Justice Frankfurter stated "when a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or a mental ordeal" and that use such tactics implied to the defendant that it was better for him to comply than to refuse disclosing information "which is his constitutional right."[26]

In following with this line of cases, the Court was called to address yet another situation in which a defendant was subjected to a possibly more overbearing form of psychological coercion than that of the defendant in the previous cases mentioned.[27] In *Spano*, after shooting a man who beat him, defendant called and informed his "friend," a fledging police officer, about what happened.[28] Defendant subsequently turned himself into the police and was interrogated for eight hours despite telling the authorities that he would not speak without his lawyer present.[29] During the interrogation, the police used the defendant's friend to play on his emotions by having this "friend" tell the defendant that his "call had gotten him into trouble, that his job was in jeopardy, and that loss of his job would be disastrous to his three children, his wife and his unborn child."[30] These along "official pressure [and] fatigue" from the late into early morning interrogation were held to have overcome defendant's will and thus, the admission was deemed inadmissible.[31] The Court reasoned it's holding on many notions, including the notion that involuntary confessions are inherently untrustworthy. [32] It also took note that the methods used

[25] *Id.*
[26] *Id.* at 54.
[27] *Spano v New York*, 360 U.S. 315, 323 (1959).
[28] *Id.* at 317.
[29] *Id.* at 322.
[30] *Id.* at 323.
[31] *Id.*
[32] *Id.* at 320.

to extract information from suspects have become "sophisticated" and that the Court's judgment must be based on the surrounding facts to "enforce federal constitutional protections."[33]

It is important to note that while the Court voiced its concern that involuntary confessions could yield unreliable confessions, it also stated that "convictions following the admission into evidence of confessions which are involuntary, i.e., the product of [physical or psychological coercion], cannot stand. This is not so because the confessions are unlikely to be true but because the methods used to extract them offend an underlying principle [that our criminal law is accusatorial system not an inquisitorial system]."[34] According to some, in the cases prior to Miranda, one of the Court's major concerns with involuntary confessions dealt with the unreliability of those said confessions.[35]

In 1966, the Court released it decision on *Miranda v. Arizona*, a case of great significance in American law.[36] Using the Fifth Amendment, the Court held that the incriminating statements made by defendants were inadmissible, relying heavily on the fact that the defendants were not read their rights prior to being interrogated since the record did not "evince overt physical coercion or patent psychological ploys."[37] The Court did however take note that the "modern practice of in-custody interrogation is psychologically rather than physically oriented" but is "equally destructive of human dignity."[38]

---

[33] *Id.* at 321.
[34] *Rogers*, 365 U.S. at 540.
[35] M.K.B. Darmer, *Beyond Bin Laden and Lindh: Confessions Law in an Age of Terrorism*, 12 CORNELL J.L. & PUB. POL'Y 319, 336 (2003) (*citing* Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 310, 313 (1998)).
[36] *Miranda*, 384 U.S. at 436 (1966) (This opinion is a combination of four cases in which four defendants were subjected to "incommunicado interrogation … in a police-dominated atmosphere, [that resulted] in self-incriminating statements without full warnings of constitutional rights").
[37] *Miranda*, 348 U.S. at 457.
[38] *Id.* at 458.

While the Court may not have touched on the unreliableness involuntary confessions may possess in its later cases, the history of *Miranda* shows that it was very much a concern to the Court and thus in a sense validates the motivation of false confession experts to testify on behalf of defendants, to show that psychological coercive techniques could cause defendants to involuntarily confess. If the Supreme Court can appreciate the dangers of psychological interrogation techniques, then the general public should be on alert that such a thing as psychological-coerced involuntary confession exisits. Despite availability of the Supreme Court's cases and language, the public might not be aware and thus the need for a false confession expert is made apparent. However, before a false confession expert can testify, he or she must meet the requirements of Rule 702 of the Federal Rules of Evidence.

III. RULE 702 AND THE ADMISSIBILITY OF EXPERT TESTIMONY

Before an expert is allowed to testify, the expert must meet the standards of Rule 702 of the Federal Rules of Evidence, as well as the supplemental Supreme Court cases that further explain the requirements of that rule.[39] In Daubert, the Supreme Court dismissed the "general acceptance" test of *Frye* for determining the admissibility of expert testimony and instead stated that that the *Frye* test was "superseded by the adoption of the Federal Rules of Evidence."[40] Prior to the application of Rule 702, a judge must determine whether the expert is testifying to scientific knowledge and whether it "will assist the trier of fact to understand or determine a fact in issue."[41] Factors to consider in making such a determination are whether the scientific theory or technique is or can be tested, whether the theory has been subjected to peer review, the rate of error associated with theory/technique, and whether there is widespread acceptance of the

[39] *See Daubert v. Merrell Dow Pharmaceuticals*, Inc., 509 U.S. 579 (1993); *Kumho Tire Co., Ltd. V. Carmichael*, 526 U.S. 137 (1999); Fed. R. Evid. 702.
[40] *Daubert*, 509 U.S. at 586.
[41] *Id.* at 592 (*citing* Fed. R. Evid.104).

technique/theory.[42] If an untrained layperson could, without the help of an expert, intelligently determine to the best degree the fact in issue, then the expert's testimony will not be deemed admissible since it is unnecessary to assist the trier of fact.[43] After this initial inquiry, the judge then applies Rule 702, which states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> **(a)** the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> **(b)** the testimony is based on sufficient facts or data;
> **(c)** the testimony is the product of reliable principles and methods; and
> **(d)** the expert has reliably applied the principles and methods to the facts of the case.[44]

Using Rule 702, it is a judge's job to ensure that all expert testimony admitted it relevant and reliable.[45] "The subject of the testimony must be 'scientific … knowledge."[46] Scientific meaning that the method used by the professor is grounded in science and knowledge meaning more than a personal belief, but knowledge does not mean that the testimony be known with 100% certainty.[47] As the Court noted, "arguably, there are no certainties in science."[48] Furthermore, the testimony must "fit" the facts of the case and thus "requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility."[49]

Shortly after the decision in *Daubert*, the Supreme Court expanded a judge's "gatekeeping" obligation by requiring a relevancy and reliability inquiry into all expert testimony, including testimony that is technical or specialized in nature, not just scientific

---

[42] *Id.* at 593-594.
[43] *Shay*, 57 F.3d at 132 (1995).
[44] Fed. R. Evid. 702.
[45] *Daubert*, 509 U.S. at 589.
[46] *Id.* at 590.
[47] *Id.*
[48] *Id.*
[49] *Id.* at 591.

testimony.[50] The ultimate determination by a trial judge of whether or not admit expert testimony is subject to an abuse of discretion standard.[51]

IV: THE FALSE CONFESSION EXPERT

The admissibility of false confession experts varies, as the Supreme Court has not ruled on the admissibility of said experts.[52] In the jurisdictions that have allowed them, what the experts are allowed to testify to also varies.[53] An observer of false confession experts categorizes experts three (3) groups: "a psychiatrist/clinical psychologist who has examined the particular makeup of [a] defendant (medical model), a clinical psychologist/social scientist who has examined the techniques used by police in obtaining the confession (social science model), or a combination of both."[54] A typically people falsely confesses for three reasons according to experts.[55] The person either voluntarily confesses despite not being coerced, a person confesses due to psychological coercion so it will end, or because the person ends up believing he or she is guilty due to the effects of the psychological coercion.[56]

To test the theory of false confessions, a pair of psychologists did an experiment to see if they could get people to confess to something they did not do.[57] The test involved getting college students to type what they were told on computers.[58] The psychologists leading the experiment

---

[50] *Kumho*, 526 U.S. at 137.
[51] General Elec. Co. v. Joiner, 552 U.S. 136, 141 (1997).
[52] David A. Perez, *Comment: The (In)Admissibility of False Confession Expert Testimony*, 26 TOURO L. REV. 23, 36 (2010).
[53] *See United States v. Hall*, 93 F.3d 1337 (7th Cir. 1996); *Hall*, 974 F. Supp. at 1198 (C.D. Ill. 1997) *aff'd*, 165 F.3d 1095 (7th Cir. 1999); *United States v. Adams*, 271 F.3d 1236 (10th Cir. 2001); *United States v. Mamah*, 332 F.3d 475 (7th Cir. 2003).
[54] Soree, *supra* note 5, at 227.
[55] *Id.* at 196.
[56] *Id.*
[57] *Id.* at 197-198 (*citing* Saul M. Kassin & Katherine L. Keichel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCHOL. SCI. 125 (1996)).
[58] *Id.*

told the students not to hit the ALT key otherwise the computer would crash.[59] Unknown the college students, the computers were forced to crash even though the students did not hit the ALT key.[60] The students were confronted by people leading the experiment and were accused to hitting the key.[61] The results of the experiment showed that sixty-nine percent (69%) signed a confession stating that they hit the key, twenty-eight percent (28%) actually believed they hit the key, and nine percent (9%) made up facts that supported the accusation.[62]

While such an accusation and the form of psychological coercive techniques used here are as benign as possible, the study showed that people could be convinced to confess despite being educated. What's more impressive if that it also demonstrated that some of the students were actually led to believe that they had in fact hit the ALT key and that some went even further and made up supporting facts. If someone could be convinced by the mildest form psychology coercion, imagine what someone could be convinced or coerced into saying by trained investigators.

False confessions in an interrogation setting occur "when a suspect's resistance to confession is broken down as a result of poor police practice, overzealousness, criminal misconduct, and/or misdirected training."[63] Some of the techniques investigators use to coerce confessions from suspects are: "misrepresenting the factual gravity" of the alleged crime, "lull[ing] suspects into a false sense of security," "role-playing to appeal to the suspect's conscience," "downplaying the moral seriousness" of the alleged crime, suggesting the victim is

---

[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] Richard A. Leo & Richard J Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, *supra* note 5 at 440.

responsible for their fate, and vague and implied promises.[64] Also, according to Soree, the two most "blatantly deceptive" techniques police use are misrepresenting their identity and fabricating evidence.[65] These types of techniques bring to mind the pre-*Miranda* cases in which the Supreme Court found confessions obtained by such techniques to be involuntary and possibly unreliable.[66]

Although there is not precise number of how many false confessions occur in the United States, false confession experts have developed methods to analyze the interrogations of suspects in cases in which the suspects were ultimately found innocent after providing a false confession.[67] In their study, Leo & Ofshe analyzed sixty (60) cases with the common characteristic that they centered around an individual being arrested primarily because police obtained an inculpatory statement that later turned out to be a proven, or highly likely, false confession."[68] It is important to note that these cases are not representative of cases generally in the United States because they were selected based on their common characteristic.[69] Also, out of the cases chosen, only thirty-four (34) were actually proven false confessions.[70] This demonstrates that the occurrence of innocent false confessions being obtained via psychological

---

[64] Soree, *supra* note 5, at 199-200.
[65] *Id.* (stating various forms of fabricated evidence include accomplice identification, fake fingerprints and/or blood samples, nonexistent eyewitnesses, false polygraph tests, and staged lineups).
[66] *See Spano v New York*, 360 U.S. 315 (1959).
[67] Richard A. Leo & Richard J Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, *supra* note 5 at 431, 433 (Leo & Ofshe report that the reason there is not proximate number of false confessions because "(1) no organization collects statistics on the annual number of interrogations and confessions or evaluates the reliability of confession statements; (2) most interrogations leading to disputed confessions are not recorded; and (3) the ground truth (what really happened) may remain in genuine dispute even after a defendant has pled guilty or been convicted).
[68] *Id.* at 436.
[69] *Id.* (stating that the cases "do not constitute a statistically adequate sample of false confession cases).
[70] *Id.*

coercive tactics might be incredibly unlikely. The proven false confessions in the study fell into four (4) categories: the confessor confessed to something that did not happen; the evidence shows the confessor could not have committed the alleged crime; the real criminal was found and his guilt determined; or the confessor was exonerated by scientific evidence.[71] To analyze the cases, Leo & Ofshe used the "post-admission narrative analysis" which looks for "a fit-or lack thereof- between the contents of the narrative and the crime scene facts."[72] If there's a match then the confessor probably committed the crime. If there are a lot of discrepancies, then the confessor is probably innocent.[73]

After publication of Leo & Ofshe's research, it was subjected to peer review and called into question. One of the major criticisms is over how Leo & Ofshe obtained the cases to analyze.[74] In his article in response to Leo & Ofshe, Cassell states that the actual number false confessions is incredibly small and represents only a small fraction of actual convictions countrywide.[75] In doing his own research on the issue, Cassell interviewed a judge in Ohio and asked him how many wrongful convictions he thought occurred in the state of Ohio.[76] He subsequently generalized it for the United States as a whole and came up with a total of 330 wrongful convictions are year, 29 of which are attributable to false confessions. Cassell calculated this to be about 0.006%.[77] He uses this small number to show that "the screens in the system have … worked to prevent the ultimate miscarriage of justice: the conviction of innocent

[71] *Id.* at 499.
[72] *Id.* at 438.
[73] *Id.*
[74] Cassell, *supra* note 6, at 500.
[75] *Id.* at 517-518.
[76] *Id.*
[77] *Id.* at 518.

[people]."[78] He further uses this number to demonstrate that researchers of false confessions, specifically those that voice the dangers of coercive interrogation techniques, are screaming fire when there is no fire and that by doing so researchers such as Leo & Ofshe are actually hurting innocent people.[79] Cassell states, "The innocent are at risk not only when police extract untruthful confessions-the false confession problem-but also when police fail to obtain truthful confessions from criminals-the lost confession problem."[80] Cassell claims the legal system has adequate screens to deal with confessions that are involuntary and that false confession experts creating a problem from nothing and preventing police from using techniques that actually work, techniques that obtain confessions from the true perpetrator.[81] "The failure to obtain a confession from the real perpetrator can deny evidence needed to prevent a wrongful conviction or to exonerate an innocent person who has already been wrongfully convicted."[82] This type of logic is flawed in that what it seems like he's saying is that police should be able to correct a mistake they made by using psychological techniques they possibly used on an innocent person to obtain a confession from possibly the real perpetrator.

Following the publication and release of Cassell's paper, the peer review process continued with Leo & Ofshe's response. Leo & Ofshe responded to Cassell's attack of their cherry-picking of cases by stating the problem with reporting and analyzing false confession cases, mainly that they're hard to find because police interrogations are not typically recorded, "statistics on the number or frequency of interrogations in America," and that "many cases of false confession[s] are likely to go entirely unreported and therefore unacknowledged and

[78] *Id.* at 504.
[79] *Id.* at 498.
[80] *Id.*
[81] *Id.*
[82] *Id.*

unnoticed."[83] They also attacked Cassell's downplaying of the number false confessions by attacking his calculation of false confession convictions on the opinion of a judge in Ohio.[84] They claim that using the state of Ohio to represent all of America made no sense.[85] Leo & Ofshe also stated that even if the "screens" do prevent an innocent confessor from being convicted, they still suffer harms. Harms such as "wrongful (and sometimes lengthy) pretrial deprivation of liberty, the stigma associated with criminal charges, the irrevocable loss of reputation, the stress of standing trial and the sometimes bankrupting financial burdens of defending oneself in costly and drawn out proceedings."[86] Leo & Ofshe's listing of the harms associated with false confessions support the notion that false confession experts are needed and should be admitted in applicable trials. Even if the numbers of cases of wrongful convictions due to involuntary confessions are low, the harms can be tremendous as illustrated above.

As discussed in the next section, the analysis and research used by Leo & Ofshe can meet the standards announced in *Daubert* and comply with Rule 702 of the Federal Rules of evidence. The tests are observational and are used on actual cases of false confessions to help create a link between the techniques used by interrogators, all psychological, and false confessions. Also, the back and forth between Leo/Ofshe and Cassell demonstrates that the field is subject to peer review, something that judges take into account to determine if an expert is qualified to testify in trial. It is important to remember too that false confessions can be admitted into a trial because

[83] Richard A. Leo & Richard J Ofshe, *Missing the Forest for the Trees: A Response to Paul Cassel's "Balanced Approach" to The False Confession Problem*, *supra* note 5 at 1137.
[84] Richard A. Leo & Richard J Ofshe, *Using the Innocent to Scapegoat Miranda: Another Reply to Paul Cassell*, *supra* note 5 at 570-571.
[85] *Id.* at 571.
[86] *Id.* at 564.

the test, as announced by the Supreme Court, on the admissibility of confessions is whether they are voluntary not on their reliability.[87]

V: THE MODEL OF ADMISSIBILITY OF FALSE CONFESSION EXPERTS VIA HALL AND CASES OF EXCLUSION

In a series of cases bouncing between the 7th Circuit and the Central District of Illinois, a false confession expert in *U.S. v Hall* was found to have met the requirements of *Daubert*.[88] The defendant (Hall) in this series of cases was convicted for the kidnapping and murder of a girl in 1993.[89] As part of its case, the prosecution introduced a confession obtained by the defendant to the murder of the girl.[90] In the district court, the defendant sought to have an expert on false confessions, a form of social science grounded in social psychology, as well as a psychiatrist admitted to testify as to the reliability of the confession to show that it was false.[91] The district court allowed the psychiatrist to "testify about Hall's mental condition (e.g. his attention-seeking behavior and his high level of suggestibility) and to opine that one of the problems for someone interrogating [defendant] … was that [defendant] could easily be led to give the type of response [defendant] believed the questioner was seeking."[92] The court excluded the false confession expert and prevented the psychiatrist from testifying specifically about defendant's susceptibility

[87] *See Rogers v. Richmond*, 365 U.S. 534 (1961) (Court stated "convictions following the admission into evidence of confessions which are involuntary, i.e., the product of [physical or psychological coercion], cannot stand. This is not so because the confessions are unlikely to be true but because the methods used to extract them offend an underlying principle [that our criminal law is accusatorial system not an inquisitorial system].")
[88] *Hall*, 974 F. Supp. 1102-1126 *aff'd* 165 F.3d 1095 (7th Cir. 1999).
[89] *Hall*, 93 F.3d at 1341.
[90] *Id.*
[91] *Id.*
[92] *Id.*

to some interrogation techniques and defendant's "capability of confessing to a crime he did not commit," reasoning that such testimony would invade the role of the jury.[93]

On appeal, the 7th circuit found that the district court had failed to properly apply *Daubert* in its exclusion of false confession expert Dr. Richard Ofshe.[94] The appellate court found that social sciences were important parts to several types of litigation, that the rules of evidence should be applied to them, and that since the field of social sciences qualified for expert testimony, the district court must determine that the testimony being offered was based on the expert's particular skillset.[95] It thus stated that "experts in psychiatry and psychology can meet both these hurdles: real science, and testimony," that there was "no categorical reason to exclude expert testimony that bears on truthfulness in the Federal Rules of Evidence," and that the Federal Rules of Evidence instead "contemplate that truthful or untruthful character may be proven by expert testimony."[96] Thus, expert testimony can in some cases overlap with the role assigned to the jury if it will assist the jury. It cannot replicate the jury's knowledge and cannot unduly influence the jury's ultimate decision. [97]

The appellate court ended its decision by stating that when the district held that the proffered testimony of the expert was not useful because the jury was capable of making the some conclusions based on their knowledge, the district court "missed the point."[98] "Even though the jury may have had beliefs about the subject, the question is whether those beliefs were correct. Properly conducted social science research often shows that commonly held beliefs

[93] *Id.*
[94] *Id.* at 1346.
[95] *Id.* at 1342-43.
[96] *Id.* at 1343.
[97] *Id.* at 1344.
[98] *Id.* at 1345.

are in error."[99] The proffered testimony would have informed the jury that such a thing as false confessions does exist, what its identifying characteristics are, and "how to decide whether [the theory] fit the facts of the case being tried."[100]

Hall Remanded

On remand, the district court applied the *Daubert* factors ("falsifiability, peer review, rate of error and general acceptance) in determining the admissibility of defendant Hall's proffered false confession expert.[101] In its analysis, it further noted that when applying *Daubert*, the four factors would be applied in differing degrees when applied to social sciences than how they are applied to scientific based testimony. "The only thing that remains constant for all forms of expert testimony is that there must be some degree of reliability of the expert and the methods by which he has arrived at his conclusions."[102]

> In any field of social science, an expert should have to testify, at a minimum, to the longevity of that particular field, the amount of literature written about the subject, the methods of peer review among its scholarly journals, the quantity of observational or other studies conducted in that field, the comparative similarity of observations obtained, the reasons why those studies are deemed valid and reliable, and the general consensus or debate as to what the raw data means. In addition, the particular expert who wishes to testify must establish that he is sufficiently familiar with the topics mentioned above to render an informed opinion about them. It would also be helpful, but not necessary, to show that the proposed expert personally contributed to the field about which he is testifying, either through personal observation or by publication of an article, book or treatise on the subject.[103]

---

[99] *Id.*
[100] *Id.* (Leo & Ofshe state "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? …; (2) include identification of highly unusual elements of the crime that have not been made public? …; or (3) include an accurate description of the mundane details of the crime scene which are not easily guessed and have not been reported publicly?).
[101] *Hall*, 974 F.Supp. at 1200-1206 *aff'd* 165 F.3d 1095 (7th Cir. 1999).
[102] *Id.* at 1202.
[103] *Id.*

The district court found that the false confession expert, Dr. Ofshe, had a doctorate degree in social psychology from Stanford University and had taught psychological methods.[104] He was also found to have been apart of numerous peer reviews on articles dealing with sociology and social psychology and had served editorial boards for such topics.[105] The court also found that throughout his long academic career, he had researched the issue of influence on decision-making, had written several articles on the subject, evaluated 126 interrogations, and testified on the subject of influence on interrogations in at least 68 state and federal trials.[106]

After investigating his background and continuing with the *Daubert* analysis, the court, in the Rule 104(a) hearing, heard about the field of false confessions within the social psychology field from Dr. Ofshe.[107] He stated that it was a mix of sociology and psychology, presented numerous articles and presentations on coerced confessions, and stated "there is no dispute in the scientific community that false confessions do exist."[108] During the hearing, Ofshe explained that the study of false confessions is based on systematic observations of actual documented interrogations of innocent people who had confessed to a crime.[109] The court noted that "[t]his is a method generally accepted as reliable by the community of social psychologists."[110] Ofshe then stated that the generally accepted/used analytical method for determining whether or not a confession is false, is through "post-admission narrative statement."[111] This method involves

[104] *Id.* at 1203.
[105] *Id.* (stating that he also served as a consultant for federal and state law enforcement agencies on the topic of the influence of interrogations).
[106] *Id.*
[107] *Id.*
[108] *Id.* at 1203-1204.
[109] *Id.* at 1203.
[110] *Id.*
[111] *Id.* at 1204.

comparing what the confessor reveals about the details of the crime.[112] If what the confessor matches the actual details, then he is probably guilty. If what the confessor said is inconsistent with the actual details of the crime, he is probably falsely confessing.[113] Again, it is important to note that this form of analysis is different from a scientific-experimental model in that it's based on observations and systematic analysis and does not involve the manipulation of variables.[114]

Once it has been determined that there is a false confession, "the research analyzes the interrogation process, either by reviewing it on audio or videotape or by having the parties recall the details of the interrogation" to look for factors that are correlated with the presence of false confessions.[115] "Dr. Ofshe testified that no one factor or combination of factors could guarantee a false confession but that some factors might heighten the likelihood of one."[116] One of the most important factors associated with false confessions is interrogators use of consistent false accusations and/or false promises. [117]

Ofshe admitted that the "low-level experimentations conducted in the field alone are not sufficiently reliable to support his findings" but that the psychologist community subjects the studies, prior to publication, to peer review.[118] Furthermore, after his elaboration on the field and techniques used to study the phenomena of false confessions stated the methods used were proper for analyzing whether and why they happen.[119]

---

[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.* (Dr. Ofshe states that authors of studies on false confessions typically respond to the criticisms of their peers prior to publishing their work).
[119] *Id.*

The court ultimately found that Ofshe was a qualified expert in false confessions and allowed him to testify.[120] However, Ofshe opted not to give an ultimate opinion on whether or not the defendant in this case was actually coerced, instead he decided to only discuss the existence of false confessions and the factors that have been correlated with false confessions.

Cases of Exclusion

While some courts like the one *Hall* have allowed the testimony of false confession experts, others have not. In *U.S. v Mamah*, the court was not satisfied facts developed from the expert witnesses, one of them Ofshe, seeking permission.[121] This case was in the 7th Circuit, the same that allowed Ofshe in to testify in *Hall*. The court stated, "The problem with the proposed testimony in this case does not lie in the quality of [the expert's] research. Rather the problem is the absence of an empirical link between that research and the opinion that [defendant] likely gave a false confession."[122] Ofshe would have been permitted to testify had he been able to connect his research to the defendant without a showing that defendant was susceptible to interrogation.[123] "Had Dr. Ofshe been able to testify that an individual who, like [defendant], is subjected to coercive interrogation tactics on one occasion will give a false confession on a second occasion when he is not subjected to coercive interrogation tactics, then perhaps his proffered testimony would have survived Rule 702."[124]

[120] *Id.* at 1205 (court found that field of social psychology dealing with false confessions "is sufficiently developed in its methods to constitute a reliable body of specialized knowledge under Rule 702").
[121] *Mamah*, 332 F.3d at 478.
[122] *Id.*
[123] *Id.*
[124] *Id.*

Also, in a factually different case than that of *Hall*, defendant sought to have a false confession expert testify as to the reliability of his confession.[125] He claimed that he had lied to the police to protect his girlfriend and thus incriminated himself.[126] The court found that such information was "precisely the type of explanation that a jury is capable of resolving without expert testimony."[127] The court distinguished it from *Hall* by stating that defendant was not claiming to have susceptible to coercive tactics or claim that the tactics in any way coerced him. Therefore no expert was needed, as he or she would not have been able to assist the trier of fact.[128]

The psychology field, specifically the part dealing with false confessions has released publications explaining their method for analyzing the phenomenon and finds of their research. It's also being subjected to peer review, which helps researchers in the field further refine their opinions and results of their observations. The biggest obstacle for a false confession expert does not appear to be from their qualifications or doubts about the field itself, but from the defendants themselves and how well their situations are applied to the results of the experts' tests.

Based on these two cases and the *Hall* decisions, if a defendant wants a false confession expert in to testify, he must show that their research somehow links to their research. The defendant cannot simply allege that they intentionally lied. Such an example is not a situation of an involuntary confession obtained through psychological coercive tactics. It is an example of a voluntary confession made under their own volition for their own personal reason. Examples of the types of interrogation techniques correlated with false confessions and/or a demonstration that the defendant is susceptible to influence should be alleged. Without such an allegation, a

[125] *Adams*, 271 F.3d at 1240.
[126] *Id.* at 1246.
[127] *Id.*
[128] *Id.*

court is likely to find that a layperson, using his or her own knowledge, is able to reach the reach the same conclusion as the expert. As stated, the ultimate question that a judge asks when determining the admissibility of an expert witness is if the expert's testimony is not too prejudicial and will assist the trier of fact.[129] A recommendation drawn from the above-cited cases is that the expert should testify only to the fact that false confessions occur and that their research, based on observational studies, has shown that certain interrogation techniques have been correlated with false involuntary confessions.

VI. CONCLUSION

The occurrence of false confessions may be hard to estimate, but they do occur and the damage to the false confessor is very real. The research of false confession experts have revealed that certain interrogation techniques have been linked involuntary and false confessions. As noted above, the effects of a false confession can economic, psychological, and societal effects.[130] Through pre-*Miranda* cases, the Supreme Court has been a witness to the evolution of interrogation. Interrogators no longer use physical means to obtain information, incriminating statements, and/or confessions. They have developed and use techniques that bear on the mind of the individual are likely to elicit responses if applied with enough pressure and consistency.[131] The testimony of false confession experts stands for something more than just attacking the

---

[129] *Shay*, 57 F.3d at 132 (stating that if a untrained layperson could reach the same conclusion using their own knowledge, then an expert is not necessary to assist the trier of fact).

[130] Richard A. Leo & Richard J Ofshe, *Using the Innocent to Scapegoat Miranda: Another Reply to Paul Cassell*, *supra* note 5 at 564 (stating examples like "wrongful (and sometimes lengthy) pretrial deprivation of liberty, the stigma associated with criminal charges, the irrevocable loss of reputation, the stress of standing trial and the sometimes bankrupting financial burdens of defending oneself in costly and drawn out proceedings").

[131] Soree, *supra* note 5, at 199-200 (techniques used include misrepresenting the factual gravity" of the alleged crime, "lull[ing] suspects into a false sense of security," "role-playing to appeal to the suspect's conscience," "downplaying the moral seriousness" of the alleged crime, suggesting the victim is responsible for their fate, and vague and implied promises, police misrepresenting their identity, and fabricating evidence).

reliability of confessions, but also the protection of an accused's Fifth Amendment right against self-incrimination.

An overlooked and important part of a false confession case is the individual. In *Reilly v. State*, a boy was convicted of brutally killing his mother.[132] There was no physical evidence tying him to the scene and he had witnesses who testified that he was somewhere else when the murder was committed.[133] The boy came home to find is mother's body and proceeded to call for help.[134] When the authorities arrived they took him in for questioning and interrogated him about the murder of his mother.[135] The police subjected him to a polygraph test during which he confessed to having killed his mother despite the fact that his alibi matched up and that there was no physical evidence linking him to the murder.[136] Why would someone do that? The boy sought to have expert testimony introduced to testify that he was the type of person to be susceptible to confess during an interrogation and the state fought to have him excluded.[137] The superior court of Connecticut ultimately remanded the case for a new trial and stated that the expert should be admitted and that "[t]he confessions and admissions went totally unexplained except in the testimony of the plaintiff himself."[138]

It is easy to lose sight of the person for the issues involved. Imagine being convicted and blamed for the murder of your mother because you were unable to be confused by an assertion and accept it as fact through no fault of your own. The danger of false confessions is there and the people who are the subject of psychological coercive techniques are real. The field of false

---

[132] *Reilly v. State*, 32 Conn.Supp. 349 at 350 (1976).
[133] *Id.* at 353.
[134] *Id.* at 351.
[135] *Id.* at 352.
[136] *Id.*
[137] *Id.* at 368-370.
[138] *Id.* at 371, 377.

confessions is established and populated by qualified individuals who publish their research and subject it to peer review. The studies have provided results that some courts have found to be credible and thus ultimately allow the admission of these experts. False confession experts have been and should continue to be admitted into trials. The paper argues that these experts meet the requirements of *Daubert* and Rule 702 and should thus be permitted when their admissions conform with the other applicable Federal Rules of Evidence.