Received 02/16/2016 Supreme Court Middle District

Filed 02/16/2016 Supreme Court Middle District
80 MAP 2015

SUPREME COURT OF PENNSYLVANIA

No. 80 MAP 2015

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

ROBERT LEE DUVALL,

Appellant.

BRIEF OF *AMICI CURIAE* PENNSYLVANIA INNOCENCE PROJECT AND INNOCENCE NETWORK

Appeal From the Order of The Superior Court of Pennsylvania dated March 9, 2015, No. 1900 MDA 2013, affirming the Order dated July 15, 2013 of the York County Court of Common Pleas, Criminal Division, No. CP-67-CR-0001394-2012

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INTEREST OF AMICI CURIAE

The Pennsylvania Innocence Project (the "Project") and the Innocence Network ("the Network") work to exonerate innocent people who have been accused and convicted of crimes they did not commit. Often the exonerations involve persons who have falsely confessed to a crime, only for later obtained evidence – such as DNA analyses – to conclusively prove their innocence. In many instances, the only evidence available against the innocent accused is a false confession given under circumstances of duress or misrepresentation.

The Project is a Pennsylvania non-profit corporation, supported by Temple University Beasley School of Law. The Project's staff lawyers work with a cadre of students, volunteers, and pro bono counsel to exonerate innocent people. The Network is an association of organizations that provide pro bono legal and investigative services to prisoners for whom post-conviction discovered evidence conclusively proves innocence. Drawing on its experience with wrongful convictions, the Network also advocates for reforms in the criminal justice system to prevent future wrongful convictions. The fifty-two members of the network represent hundreds of prisoners in their innocence claims throughout the fifty states and the District of Columbia, as well as internationally.[1]

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[1] The member organizations include the New England Innocence Project (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont), Alaska Innocence Project, Arizona Justice Project, Association in the Defense of the Wrongfully Convicted (Canada), California & Hawaii Innocence Project, Center on Wrongful Convictions,

STATEMENT OF QUESTIONS INVOLVED

This Court granted Defendant Robert Lee Duvall's Petition for Allowance of Appeal on the following issue:

1. Did the trial court err when it denied Mr. Duvall's motion to suppress as involuntary his confession during a non-custodial interrogation where (a) the trooper repeatedly – and admittedly – lied about DNA evidence and proof of penetration, (b) Mr. Duvall repeatedly denied engaging in sex with his accuser, (c) the interrogating trooper told Mr. Duvall that a jury would not believe him, and (d) the confession did not fit the accusation beyond the act of sex?

Connecticut Innocence Project, Cooley Law School Innocence Project (Michigan), Delaware Office of the Public Defender, Downstate Illinois Innocence Project, Georgia Innocence Project, Griffith University Innocence Project (Australia), Idaho Innocence Project (Idaho, Eastern Oregon), Indiana University School of Law Wrongful Conviction Clinic, Innocence Network-UK, The Innocence Project, Innocence Project at UVA School of Law, Innocence Project Arkansas, Innocence Project New Orleans (Louisiana and South Mississippi), Innocence Project New Zealand, Innocence Project Northwest Clinic (Washington), Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Minnesota, Innocence Project of South Dakota, Innocence Project of Texas, Kentucky Innocence Project, Maryland Office of the Public Defender, Medill Justice Project (all states), Michigan Innocence Clinic, Mid-Atlantic Innocence Project (Washington, D.C., Maryland, Virginia), Midwest Innocence Project (Missouri, Kansas, Iowa, Arkansas, Nebraska), Mississippi Innocence Project, Montana Innocence Project, Nebraska Innocence Project, North Carolina Center on Actual Innocence, Northern Arizona Justice Project, Northern California Innocence Project, Office of the Public Defender (Delaware), Ohio Innocence Project, Osgoode Hall Innocence Project (Canada), Pace-Post Conviction Project (New York), Pennsylvania Innocence Project, Rocky Mountain Innocence Center, Shuster Institute for Investigative Journalism at Brandeis University, Justice Brandeis Innocence Project (Massachusetts), The Sellenger Centre (Australia), Texas Center for Actual Innocence, Texas Innocence Network, Reinvestigation Project of the New York Office of the Appellate Defender, University of British Columbia Law Innocence Project (Canada), University of Leeds Innocence Project (Great Britain), Wesleyan Innocence Project, and Wisconsin Innocence Project.

SUMMARY OF ARGUMENT

False confessions are a serious problem in the administration of criminal justice in the United States. According to the National Registry of Exonerations run by the University of Michigan Law School, a record number of 149 exonerations occurred in 2015 alone.[2] Since 2011, the number of exonerations has doubled.[3] Ten percent of the exonerations involved crimes of sexual assault against an adult or child.[4] A record 27 of the cataloged exonerations in 2015 involved false confessions.[5]

Far too often the purpose of a criminal interrogation is not to investigate the factual truth behind a crime, but rather to provide evidence of guilt for use at trial or to leverage a guilty plea. Interrogation practices – such as the Reid Technique – that permit and even endorse intentional misrepresentations for the greater good of obtaining a confession are particularly prone to result in false confessions. This Court need not delve far into the recent past to find legions of wrongful convictions resulting from false confessions. From the "Central Park Five" to Ada JoAnn Taylor of the "Beatrice Six," these interrogation practices have indisputably

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2 National Registry of Exonerations, Exonerations in 2015 (Feb. 3, 2016) at 1.

3 *Id.* at 3.

4 *Id.* at 6.

5 *Id.* at 7.

increased the risk of false confessions and thus should be subject to increased judicial oversight.

This appeal presents the opportunity to examine and provide heightened judicial scrutiny for two types of deceit in criminal interrogations: Extrinsic lies – lies about matters dehors the criminal investigation, such as the legal parameters or consequences of criminal activity – and intrinsic lies – lies about the investigation itself, such as misrepresentations about scientific test results.

During the interrogation of Mr. Duvall, the State Troopers made "extrinsic" misrepresentations about the criminal culpability of the conduct for which they sought Mr. Duvall's confession. They stated repeatedly that Mr. Duvall did not commit the crime of rape because: 1) the alleged victim had reached the age of her majority; 2) she was not a blood relative of Mr. Duvall; and 3) there was no forced sexual act. Emphasizing these factors, the Troopers expressly misrepresented the law and Mr. Duvall's criminal culpability thereunder.

The Troopers also made "intrinsic" misrepresentations about scientific test results they purported to have implicating Mr. Duvall. They falsely claimed that the scientific rape kit tests had proven penetration with a "male penis" and that the alleged victim had Mr. Duvall's DNA inside of her person. In truth, the physical examination showed that it was equally likely that no assault had taken place as it

was that an assault had occurred. The Troopers also knew that no DNA had been found on the alleged victim's person, let alone Mr. Duvall's DNA.

This Court should use its supervisory powers to establish a conclusive presumption that "extrinsic" misrepresentations and "intrinsic" misrepresentations relating to scientific test results made during a criminal interrogation are coercive *per se*, and any resulting confession is *per se* involuntary. Alternatively, this Court should establish a rebuttable presumption that extrinsic and intrinsic misrepresentations are coercive and require a heightened "reasonable doubt" standard of proof for the prosecution in any motion to suppress the confession.

STATEMENT OF FACTS RELEVANT TO *AMICI* ARGUMENT

On October 7, 2011, Robert Lee Duvall[6] was interrogated by Pennsylvania State Troopers Neal J. Navitsky and Jeffrey M. Gotwals about an alleged sexual assault of Priscilla Bittner, the adoptive daughter of Mr. Duvall's common law wife, Joan Bittner. The assault allegedly occurred on September 3, 2011. Priscilla Bittner – then a twenty-six year old woman – has developmental disabilities from Downs Syndrome. The interrogation of Mr. Duvall started at 5:27 pm and lasted through the dinner hour until 7:00 pm. The interrogation resulted in a "confession" signed by Mr. Duvall.

[6] Mr. Duvall at the time was well into his 60s, and suffered from a prostate condition that impeded sexual activity. Interrogation Transcript at 50, 90, 92, 114.

It is undisputed that the Troopers lied to Mr. Duvall during the course of that interrogation. The lies took two forms that objectively would lead an interrogation subject to believe that there was "no way out" – or as Mr. Duvall put it – "to get you off my back." *Id*. at 74.[7] First, the Troopers' "extrinsic" lies were intended to convince Mr. Duvall that he had committed no crime, and thus no legal consequence could result from confessing in the form of an "apology." The Troopers repeatedly told Mr. Duvall that Ms. Bittner was not underage (and thus she could consent), was not his blood relative and that the alleged sexual act had not been forced – thereby suggesting that no crime had been committed. This type of extrinsic misrepresentation encourages false confessions because the suspect believes there is nothing to lose by agreeing with police interrogators and that, indeed, a statement could lead to his release. The "confession" was couched as an apology. *See, e.g., id.* at 104 ("if you ever want to write an apology, . . ., I think that goes a long way").[8]

Second the Troopers told "intrinsic" lies about the results of forensic scientific DNA testing – informing Mr. Duvall that male penetration had been "proven" and that his DNA was found "inside" of Ms. Bittner. The Troopers

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[7] *See also id*. at 79 (Mr. Duvall suggests he would agree that he had sex with Ms. Bittner "if that's what you want.").

[8] *See also id.* at 104 Trooper Navitsky explained "[I]f you're sorry about doing something, this is the place to write it out. All right? Get it off your chest. Get it out there."

reinforced the conclusive impact of this lie with the "extrinsic" misrepresentation that there was "no way" that a jury would disregard such scientific proof.

A. Lies about the Criminality and Consequences of the Confession

The Troopers falsely represented the potential legal consequences of Ms. Bittner's age, consent and lack of familial relationship in order to induce Mr. Duvall's confession. Trooper Navitsky admitted at trial that he lied to Mr. Duvall for the specific purpose of inducing Mr. Duvall to believe that his alleged acts were neither criminal nor illegal.[9] Trial Transcript at 469. Those lies and misrepresentations include the following:

- Trooper Navitsky gave a "guarantee" that he would have arrested Mr. Duvall "that evening"[10] if "she was a minor," "was your biological daughter," or if "you did force yourself" on Ms. Bittner. Interrogation Transcript at 38-39.[11]
- Trooper Navitsky described the activity as a "mistake," but suggested it might have been a crime "if she was six years old, she was your biological daughter, and you force [sic] yourself to do it." *Id*. at 64.
- Trooper Navitsky falsely affirmed that Ms. Bittner could legally consent to sexual activity, since she had reached the age of majority:

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9 Trooper Navitsky testified at trial that he personally did not believe that these misrepresentations would negate the crime of rape. Trial Transcript at 437. He conceded that during the interrogation: "I tried to make it look like it - it wasn't as if we would say a rape or forcible rape." *Id.*

10 "That evening" meant September 3, 2011, more than a full month earlier. Trial Transcript at 240.

11 Trooper Navitsky implied an arrest and prison if Mr. Duvall did not confess: "I don't know if you're afraid that I'm going to arrest you and take you down to prison if you're not honest with me." Interrogation Transcript at 59.

"Looking at the law, is she under 18?" *Id*. at 33 (underscoring repeatedly that "she's not under 18").[12]

- The Trooper suggested that the sexual contact could not be incest, since there was no familial relationship between Ms. Bittner and Mr. Duvall: "She's not your biological daughter." *Id*. at 29. "It's not like you're her – you, know, she's your offspring." *Id*.[13]

- Troopers suggested that no forcible sexual act had taken place that would constitute the crime of rape. Trooper Navitsky stated: "And I guarantee, just like we asked her, that did at any point was this a forcible thing or was it – did she say no or anything like that. None of those things came up. All right? We're not saying that you pinned her down and you forced yourself on her. *Id*. at 30.[14]

The Troopers reinforced the legality of Mr. Duvall's alleged acts by describing the confession as an "apology:" Trooper Navitsky asked Mr. Duvall to fill out a "Noncustodial Statement Form." *Id*. at 104. As Trooper Navitsky

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12 The Troopers went much further, repeatedly drilling Mr. Duvall on Ms. Bittner's age: "[s]he's not a young girl. She's 26 years old," *id*. at 29, adding "what I am saying is that she's a 26-year-old girl." *Id*. at 30. Trooper Navitsky confided: "I will say, Bob, is that I know that she's 26." *Id*. *See also id*. at 34 ("all right, after she's an adult – 'cause we're not even back in the time where she was a juvenile."); *id*. at 38 ("if she was underage," "if she was a little girl," and "if she was a minor."); *id*. at 65-66 ("if I were to say that you did something bad, it would be because she would be a younger girl . . .. That's not the case."); *id*. at 88 ("she was 26 years old, she wasn't a minor"); *id*. at 92 (noting "[w]hen she was 26 and you guys had sex"); *id.* at 95 ("Well, she's not a kid; you didn't rape her."); *id*. at 111 ("She's 26. For me in my mindset right now, 18 and o - 18 and over is an adult.").

13 This extrinsic lie also was repeated throughout the interrogation. *See, e.g., id.* at 31 ("I know that she's not your biological daughter"); *id*. ("[S]he's living in your house not as your daughter. She's basically a roommate."); *id*. at 33 ("Is she your biological daughter?"); *id*. at 38 ("if she was your kid –").

14 This extrinsic misrepresentation also recurred throughout the interrogation: *Id*. at 33 ("Did you ever force her physically by holding her down and forcing yourself upon her to do anything"); *id*. at 76 ("A rapist is somebody who holds somebody down against their will. . .. Bob, you're not a rapist.")("[y]ou didn't physically hold her down and – and have your way with her when she was screaming no. . .").

described it, "[t]his gives you a chance to – if you ever want to write an apology, all right, I think that goes a long way." *Id*. Mr. Duvall responded: "Apology to – who am I writing this to now?" The Trooper explained that, "[y]ou don't have to apologize to me; but if you're sorry about doing something, this is the place to write it out." *Id*.

B. The State's Lies about the Results of Forensic Scientific Testing

The Troopers also told "intrinsic" lies about test results of the State's forensic evidence for the express purpose of obtaining Mr. Duvall's confession. The Troopers first asked Mr. Duvall if he watched *Law and Order* or other "true crimes" television shows, then relied on those televisions shows to explain how DNA testing is used to identify the perpetrator of a crime:

> Right. So when a little fiber or a little hair or a little semen that's not even the pre-ejaculation, all right, when those things come back – and condoms are not. Yeah, you know, you can stop most of it with a condom but you're not stopping everything. So when the results come back that indicate that someone's responsible for that, what's their defense?

Id. at 35. The Troopers then engaged in a series of lies about the results of allegedly indisputable scientific testing:

- The Troopers represented that Ms. Bittner had been taken to the hospital to have "a rape kit done," *id*. at 27, but did not reveal that the

testing was inconclusive. Trial Transcript at 262, *see also id*. at 250 (noting that the physical examination was not "atypical").[15]

- Trooper Navitsky falsely represented to Mr. Duvall that he "ha[d] the results of the rape kit," Interrogation Transcript at 27, the initial observation results were "positive," *id*. at 28,[16] and the test results showed that Mr. Duvall "did have a relation with her at some point." *Id.* at 34.

- Trooper Navitsky informed Mr. Duvall that "the sexual assault kit can determine whether or not a finger has been used or penetration by a male penis has been used," and that "[p]enetration has been proven [sic] to be a male penis inside of Pricilla [sic]." *Id*. at 50.[17] *See also* Trial Transcript at 454.

- The Troopers lied by misrepresenting that Mr. Duvall's semen and DNA were found "inside" of Ms. Bittner, Interrogation Transcript at 50-51 ("Compound that with your DNA being inside of her"), repeatedly asked Mr. Duvall "[w]hy would your DNA be inside of her," *id*. at 50, and projected the confirmation "that's your DNA inside of her with the penetration of the male penis." *Id*. at 51.

Trooper Navitsky informed Mr. Duvall during the interrogation that his semen and DNA were found on Ms. Bittner's person:

> Q: I'm just saying that there's a male penis inside of her with your DNA also inside of her.
>
> A: My DNA is in her is what you're saying?

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15 There was no evidence of contusions or damage to the vaginal wall that could have resulted from intercourse and no semen was found on Ms. Bittner's person. There was no DNA found in the vaginal canal. Trial Transcript at 262, 250. In other words, the testing performed revealed nothing, *i.e*., it was equally likely that no intercourse occurred as it was that Mr. Duvall had engaged in sexual activity with Ms. Bittner.

16 The police also misrepresented that the results of the rape kit were positive to Ms. Bittner's social worker. Trial Transcript at 212-13.

17 It is highly unlikely that a rape kit could provide such a result in the absence of semen found in the vagina.

Q: Do you want me to say yes?

A: Yes. Yes, sir –

Q: I mean, how many times do you want me to say it?

Id. at 52. Trooper Navitsky admitted at trial that he intentionally misrepresented to Mr. Duvall that the scientific test results were so compelling that it would be impossible for a jury to disregard. Trial Transcript at 465.

C. The Implied Threat about Ms. Bittner's Return to the Household

Against the backdrop of the interrogation was the implied promise that Ms. Bittner would not return to the house unless Mr. Duvall confessed. Over one month had elapsed between the date of the alleged incident on September 3, 2011 and the interrogation of Mr. Duvall on October 7, 2011. On September 6, 2011, Ms. Bittner was taken to live at Penn-Mar group home and the State Troopers instructed both Mr. Duvall and his wife to have no contact with Ms. Bittner until they gave their approval. Trial Transcript at 394-95, 538.

Mr. Duvall advised the Troopers that "this has devastated the whole family." Interrogation Transcript at 64. Mr. Duvall repeatedly pronounced to the Troopers that "we want her [Ms. Bittner] back." *Id*. at 55; *see also id*. at 70 ("I'm just saying we need her back" and "[h]er mother needs her back."); *id*. at 71 ("I want her back. And I don't understand why – see, they told us –"). He went so far as to say that he would leave the family house "to get her [Ms. Bittner] back." *Id*. at 68;

see also id. at 71 ("I would still leave before it upset her . . .."). At another point, Mr. Duvall asked the Troopers point blank: "Are we going to get her ba—are we going to get her back?" *Id*. at 84.

Combined with the misrepresentations by the Troopers, the return of Ms. Bittner to the family home for the benefit of his common law wife presented a powerful incentive for Mr. Duvall to falsely confess to the sexual activity.

ARGUMENT

I.

THE ETIOLOGY OF FALSE CONFESSIONS AND CRIMINAL CONVICTIONS IN OUR SYSTEM OF JUSTICE

It is not subject to reasoned debate that false confessions do occur and do result in the conviction of actually innocent people. Indeed "there is mounting empirical evidence that [the pressures of custodial interrogation] can induce a frighteningly high percentage of people to confess to crimes they never committed." *Corley v. United States*, 556 U.S. 303, 320-21 (2009);[18] *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2401 (2011).

The presumption of innocence itself is "undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U.S. 432, 453 (1895). Yet that very

[18] *Citing* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C.L. Rev. 891, 906-07 (2004).

presumption can be at odds with the nature of an advocacy system that obligates the prosecution – with the assistance of police interrogators – to develop proof of guilt, including through confessions. Indeed, confessions are "'probably the most probative and damaging evidence that can be admitted'" against a defendant. *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991).

Social scientists have identified a number of reasons that actually innocent people confess to brutal crimes. In addition to an accused's subjective vulnerabilities, police interrogation techniques can increase the risk of eliciting false confessions. Two techniques used in the interrogation of Mr. Duvall should be examined in this appeal: 1) the use of "extrinsic" lies about the criminal or legal consequences of an admission; and 2) "intrinsic" deception with regard to the results of scientific forensic evidence, such as DNA test results. Experienced by the accused as a "game changer," these lies create the perception of an inevitable outcome to which the suspect has no choice but to submit. Because of their uniquely coercive quality, confessions induced through such misrepresentations have an increased risk of being false. The voluntariness of a confession obtained through such deception is particularly suspect, and accordingly should be subjected to heightened judicial review and scrutiny.

A. Police Interrogation Techniques Can Lead An Actually Innocent Person to Confess

While it may seem incomprehensible that anyone would confess to a crime that he or she did not commit, the data examining post-conviction DNA exonerations show that false confessions occur with disturbing regularity.[19] To date, post-conviction DNA testing has exonerated more than 337 innocent people.[20] Astonishingly, of the first 325 exonerations, eighty-eight of these wrongly convicted defendants had falsely confessed to the crimes for which they were subsequently exonerated. These eighty-eight represent just the tip of the iceberg, however, as the DNA exonerations are a unique subset of cases in which: (1) conclusive DNA evidence happened to be available; (2) the crimes were serious enough to merit close scrutiny; and (3) those convicted were fortunate enough to have public interest organizations and attorneys track down physical evidence to prove their innocence. Thus, while DNA exonerations reveal a

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19 The Innocence Project Home Page, http://www.innocenceproject.org/ (providing tally of post-conviction DNA exonerations in the United States).

20 The Innocence Project, "The Causes of Wrongful Conviction," http://www.innocenceproject.org/causes-wrongful-conviction (providing chart showing the causes of the first 325 DNA exonerations, and that false confessions comprise 27% of those cases).

surprisingly high number of false confessions, the actual number is undoubtedly much higher.[21]

To understand why police lies during interrogation are uniquely powerful, it is important to examine those lies in the context of a typical police interrogation.[22] Police use a range of psychological techniques specifically aimed at inducing severe stress in the suspect during the interrogation in the hope of overcoming his or her defenses[23] and procuring a confession.[24] The majority of interrogations in the United States employ some form of the "Reid Technique" ("Reid"),[25] a method pioneered in the 1940s.[26] Now a registered trademark of the for-profit firm, John

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21 Take for example *United States v. Bagola*, 796 F.3d 903 (8th Cir. 2015), in which the Eighth Circuit recounted the father that was a suspect in the rape and murder of his children. He was interviewed for seven hours, denied involvement during a polygraph, but later confessed to the crime. Forensic evidence led investigators to a different suspect who was ultimately convicted.

22 One study found that generally police interrogators view their role as "obtaining some kind of statement to present to the prosecutor . . ." Wald, Ayres, Hess, Schantz, Whitebread, *Interrogations in New Haven: The Impact of Miranda*, 76 Yale L. J. 1519, 1554 (1967).

23 Indeed, Trooper Navitsky testified that his techniques with Mr. Duvall were intended to "break down barriers." Trial Transcript at 453.

24 FRED INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 105 (2nd ed. 2013).

25 Incredibly, John Reid made his name on a 1955 case involving Darrel Parker. Reid performed a nine-hour interrogation, which resulted in Mr. Parker's confession to brutally raping and killing his wife, which turned out to be a false confession. *See* "Beyond Good Cop/Bad Cop: A Look At Real-Life Interrogations," www.npr.org (December 5, 2013).

E. Reid and Associates, the technique is practiced by law enforcement throughout the United States. Reid also has been criticized as an interrogation method that can cause innocent people to confess to crimes they did not commit.[27] Indeed, Reid markets its interrogation instruction seminars on the boast that they result in a greater number of confessions and convictions.[28] It is troubling that the very purpose of the technique is self-incrimination.

Reid teaches investigators two distinct stages of interrogation: the Behavior Analysis Interview ("BAI") and a Nine Step Interrogation process.[29] According to

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26 *See* Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 Denv. U. L. Rev. 979, 983 n.20 (1997) (noting influence of Reid Technique); Saul M. Kassin, *The Psychology of Confession Evidence*, 52 AM. PSYCHOL. 221, 222 (1997) (same).

27 *See* Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. 1051, 1053 (2010) (noting that studies have shown that psychological techniques can cause people to falsely confess and how such techniques were used in instances of known false confessions); Saul M. Kassin & Lawrence S. Wrightsman, *Confession Evidence,* in THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE, 73-75 (Saul M. Kassin & Lawrence S. Wrightsman eds., 1985); *see also* Douglas Starr, *The Interview*, The New Yorker, (Dec. 9, 2013) (noting that of the 311 persons exonerated through post-conviction DNA testing, more than one-quarter had given false confessions—including such notorious cases as the Central Park Five). Brent Snook, Joseph Eastwood & W. Todd Barron, *The Next Stage in the Evolution of Interrogations: The PEACE Model*," 18 Can. Crim. L. Rev. 219, 224 (2014)(noting two concerns with the Reid Technique are "the use of unreliable behaviorally-based deception detection methods and the use of tactics that are known to elicit confessions from innocent people").

28 The primary objective of Reid is a confession leading to a conviction. Reid markets its seminars with the following data: "95% of the respondents to a survey of 2,000 Reid students reported that using The Reid Technique helped them to improve their confession rate" and "[t]he majority of the respondents said they increased their confession rate by more than 25%; almost a quarter of the respondents said they increased their confession rates as much as 50%." *See* www.reid.com, "Satisfaction."

29 INBAU, *supra* at 65-84, 97-103.

Reid, only guilty individuals should be subjected to interrogation. Thus, BAI purports to enable interrogators to decide whether the suspect is guilty.[30] The interrogator evaluates the suspect's non-verbal cues to determine whether or not the suspect is lying.[31] For example, investigators are instructed in the subjective evaluation of the accused's hand movements.[32] Reid advocates that if a suspect gestures with his hands, he is giving truthful answers. If he touches his body, however, the answers are deceptive.[33]

Police officers also are counseled to evaluate posture:

> The truthful subject's posture will be upright in the chair, and he will align his body with the interviewer so as to assure direct communication. . . . A deceptive subject, on the other hand, may slouch in the chair and appear somewhat distant and disinterested in interviewing process [and] may cross his arms or legs in a tight fashion in which muscles are contracted.[34]

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30 *Id.* at 65-84.

31 *Id.* at 85 (summarizing that the "[p]hysical activities of the lying suspect" include "significant body movements, grooming gestures and cosmetic adjustments, and supportive gestures").

32 *Id.* at 81.

33 *Id.* at 81-82. As noted, *infra*, there is widespread criticism of the so-called "science" of determining the ability of people to judge whether a person is truthful or deceptive. Academic, and non-academics alike should be troubled about this technique when the more scientific method of polygraph testing has been debunked and is generally inadmissible in criminal trials. *See United States v. Scheffer*, 523 U.S. 303, 310 (1998) (noting studies finding polygraphs were roughly equivalent to flipping a coin).

34 *Id.* at 79-80.

The Reid manual concedes that "[b]oth truthful and deceptive subjects can exhibit reticence, nervousness, impertinence, and anger," but concludes without scientific or psychological support that "[s]igns of despair and resignation are more common in guilty subjects."[35] Reid's training lasts only a few days. With no psychological training and Reid's broad-based unsupported conclusions, police officers are expected to determine conclusively whether an accused is guilty. In fact, Reid claims that BAI can detect deception at rates far above chance, and cites studies showing that detectives trained in BAI can detect deception at between 85%[36] to 91%[37] accuracy. Social science has demonstrated the inherent unreliability of the subjective evaluation of determining guilt or innocence.[38]

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35 *Id.* at 96.

36 Christian A. Meissner & Saul M. Kassin, "*He's Guilty:" Investigator Bias in Judgments of Truth and Deception*, 26 Law and Human Behavior 469, 470 (2002).

37 http://reid.com/educational_info/r_tips.html?serial=20140701&print=%5Bprint *citing* Buckley, D., "The Validity of Factual Analysis in the Detection of Deception," Master's Thesis, Reid College of Detection of Deception (1987).

38 Indeed, Reid's numbers, *supra* notes 36 and 37 and accompanying text, have been criticized because the actual guilt or innocence of the suspects was uncertain. Masip & Herrero, '*What would you Say if You were Guilty?' Suspects' Strategies During a Hypothetical Behavior Analysis Interview Concerning a Serious Crime*, 27 Applied Cognitive Psychology 60, 60 (2013). Moreover, empirical data does not support the conclusion that police are able to distinguish between the denials of guilty and innocent suspects with a high degree of accuracy. Snook, Eastwood & Barron, *The Next Stage in the Evolution of Interrogations: The Peace Model*, 18 Can. Crim. L. Rev. 219, 224-25 (2014); Vrij, Mann & Fisher, An Empirical Test of the Behaviour Analysis Interview, 30 Law and Human Behavior 329 (2006); Kassim, Goldstein & Savitsky, *Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt*, 27 Law and Human Behavior 187, 188 (2003).

The preliminary determination of truthfulness is critical because only suspects whom the police have "determined" are dishonest and therefore guilty are subjected to the next phase of the Reid Technique: the Nine Steps of Interrogation.[39]

Reid acknowledges that many of its interrogation techniques involve "duplicity and pretense."[40] Reid admits that to get a suspect to confess, investigators may have to falsely exaggerate confidence in the suspect's guilt. Indeed, Reid does not condemn the practice of presenting "incontrovertible" evidence of the suspect's guilt, even if that evidence does not exist – or worse still – is diametrically opposed to the actual evidence or test results.[41] In fact "[f]alse

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39 These steps are: 1) direct and positive confrontation of the suspect with his guilt; 2) development of a rationale for the commission of the crime; 3) deflection of the initial denials of guilt; 4) overcoming the detainee's explanation for why he could not have committed the crime; 5) keeping the suspect's attention and displaying sincerity towards the suspect; 6) sympathy and moral justification to minimize the crime; 7) alternative questioning—a suggestion of a choice to be made by the suspect concerning some aspect of the crime; 8) identifying evidentiary details of the crime that will be used to establish guilt; and 9) conversion of an oral confession into a written statement. INBAU, *supra* at 101-02. ("These nine steps are presented in the context of the interrogation of suspects whose guilt seems definite or reasonably certain. It must be remembered that none of the steps is apt to make an innocent person confess and that all of the steps are legally as well as morally justifiable."). *Id*. at 100-01.

40 http://www.reid.com/educational_info/r_tips.html?serial=1086208648124137 (noting that "an investigator often must rely on duplicity and pretense in an effort to develop evidence against the guilty suspect.").

41 Gishli H. Gudjonsson, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS – A HANDBOOK 10 (Graham Davies et al. Eds., 2003).

evidence ploys" are accepted as a method of rebutting an accused's explanation for why he or she did not commit a crime.[42]

Scientific research demonstrates that "misinformation renders people vulnerable to manipulation."[43] An innocent person who has consistently and strongly denied committing a crime may be confronted with evidence that – if believed – conclusively establishes the suspect's guilt.[44] Once a suspect envisions a bad outcome as inevitable he or she is more likely to accept, comply with, and even approve of the outcome.[45] In the self-report studies examining why false confessions occur, suspects admit that the reason they falsely confessed was because they believed themselves to be trapped by the weight of the evidence.[46]

Actual false confession cases, psychological research into the effect of misinformation on a person's memories and beliefs, and experiments examining whether the presentation of false evidence increases the rate at which actually

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42 False forensic evidence is just one type of false evidence ploy used by the police during an interrogation. Other false evidence ploys include: 1) general claims of strong evidence; 2) demeanor evidence; 3) eyewitness evidence; and 4) co-perpetrator witness evidence. Ofshe & Leo, *supra*, at 1008, 1014, 1015, 1018.

43 *See* Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 Law & Hum. Behav. 3, 17 (2010).

44 *See* Simon Cox, *The Reykjavik Confessions*, http://www.bbc.co.uk/news/special/2014/newsspec-7617/index.html (May 15, 2014).

45 *See, e.g.*, Drizin & Leo, *supra*, at 910-11.

46 *See* Kassin et al, *supra*, at 17.

innocent people confess all support the finding that "outright lies can put innocents at risk to confess by leading them to feel trapped by the inevitability of evidence against them," particularly where the suspect sees the possibility of leniency in exchange.[47]

B. False Descriptions of the Law and What Constitutes a Crime Increases the Risk of False Confessions

There is something unsettling about police misrepresentations concerning legal outcomes or the legal system in interrogations. Police officers are viewed by lay people as particularly knowledgeable about the administration of criminal justice, and therefore less likely to intentionally lie about what will or will not happen if the accused does or does not confess. Courts additionally have noted that "[i]f one were to accept such behavior, real concerns surface about sabotaging of the entire system."[48]

Police deception as to the legal consequences of particular actions or a confession can create a type of false confession, known as the "compliant false confession." Compliant false confessions occur as a result of physical or psychological coercion in order to terminate or escape the interrogation, to take advantage of a perceived suggestion or promise of leniency, or to avoid an

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47 *See* Kassin et al, Police Induced Confessions *supra*, at 28.

48 Paul Marcus, *It's Not Just about Miranda: Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 Val. U. L. Rev. 601, 615 (2006).

anticipated harsh punishment.[49] A strong psychological inducement to a compliant false confession is the suggestion of leniency if the interrogation suspect confesses.[50]

Deception in interrogations about the legality or criminal culpability of particular conduct is viewed as potentially coercive by both psychology and the law. In fact, deception that is extrinsic to the investigation is not an encouraged police practice.[51] As pointed out by Leo,

> It is not hard to understand why such threats and promises in combination with standard interrogation techniques, such as repeated accusations, attacks on a suspect's denials, lies about non-existent evidence, pressure, and inducements, may cause a suspect to confess knowingly to a crime he did not commit. Put simply, the suspect comes to perceive that the benefits of confessing (e.g., release from custody, mitigated punishment) outweigh the costs of denial (e.g., arrest, aggravated punishment). This may be especially true for those suspects who naively believe that the fact of their innocence will, in the end, exonerate them.[52]

The law therefore looks quite closely at misrepresentations about the law and threats or promises of possible punishment or leniency resulting from

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49 Richard A. Leo, *False Confessions: Causes, Consequences, and Implications*, 37 J. Am. Acad. Psychiatry & Law 332, 338 (2009).

50 Leo, *supra*, at 339.

51 *See* http://www.reid.com/educationalinfo/r_tips.html?serial=1193844626665261 (Reid recommends against promises of leniency and other extrinsic incidents.)

52 Leo, *supra* at 339.

particular conduct. A promise of leniency by a police officer during an interrogation so that a family can stay together constitutes coercion that renders a defendant's statements involuntary. *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963). Similarly, threats that invoking fifth amendment rights would adversely affect an interrogated person's interests are not permissible. *Garrity v. New Jers*ey, 385 U.S. 493, 497-98 (1967).

State supreme courts recently have held that this type of interrogation can be psychologically coercive, particularly when the misrepresentations relate to the accused's family members. *See, e.g., Commonwealth v. Monroe*, 35 N.E.3d 677, 682-83 (Mass. 2015) (Detective suggested to defendant confessing would help, he had one opportunity to talk, and suggested that defendant's daughter would be taken away and defendant would not see her for a long time, with the defendant confessing for his baby daughter); *People v. Thomas*, 8 N.E.3d 308, 316 (N.Y. App. 2014) (officers impermissibly assured "that whatever had happened was an accident, that he could be helped if he disclosed all, and that, once he had done so, he would not be arrested, but would be permitted to return home.").

As noted, Reid recognizes that threats or promises that address "real consequences" like those described above may be improper and condemns the use of interrogation themes that "absolve the suspect from legal consequences

associated with the crime."[53] Such misrepresentations about legal consequences go well beyond promises of leniency, suggesting that if the suspect accepts the detective's misrepresentations, then the suspect will avoid prosecution.

C. False Forensic Evidence Ploys Also Enhance the Risk of Eliciting False Confessions

While any sort of police deception increases the likelihood that an innocent person will falsely confess, false forensic test results put innocents at even greater risk because the evidence is presented as incontrovertible, sufficient as a basis for prosecution and impossible to overcome.[54] Investigators may represent positive results of fingerprint, hair, or DNA tests as "error-free and therefore unimpeachable: '[T]he DNA doesn't lie. That's the only thing that doesn't lie,' or 'This thing is a scientific test. These things won't lie.'"[55] False evidence ploys based on scientific data or tests leave the suspect with little opportunity to counter.[56] Unlike misrepresenting that a witness has implicated the subject in a crime, DNA cannot be cross-examined and – unlike witnesses – has no motivation

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53 INBAU, *supra* at 219; www.Reid.com Investigator Techniques, responding to criticism by stating we do not "make promises of leniency."

54 Kassin et al, Police Induced Confession *supra* at 29.

55 *See* Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 Denv. U. L. Rev. 979, 1031 (1997) (quoting the Interrogation Transcript of Stephen Lamont Williams, San Mateo County, Cal, Sheriff's Detective Bureau Office 5-6 (July 6, 1992) and the Interrogation Transcript of Robert Smith, Richmond, Cal., Police Dep't 17 (Mar. 26, 1991)).

56 *Id.* at 1031.

to lie. For that reason, the use of false or fabricated scientific evidence is more likely to elicit a false confession than other types of deception.[57]

One of Reid's own marketing papers premises the use of false evidence to obtain a confession on the impossibility of falsely confessing to a crime that the suspect did not commit:

> Consider an innocent rape suspect who is falsely told that DNA evidence positively identifies him as the rapist. Would this false statement cause an innocent person to suddenly shrink in the chair and decide that it would be in his best interest to confess? Would a suspect, innocent of a homicide, bury his head in his hands and confess, because he was told that the murder weapon was found during a search of his home? Of course not![58]

In fact, lies about "objective" scientific evidence are particularly likely to bring a suspect to a point of hopelessness, so that it becomes easy to manipulate a suspect into giving a false confession. A few concrete examples help to demonstrate this point. The use of false medical evidence can be so overwhelming that it can lead an accused to misidentify a natural or accidental death as a murder, and falsely confess.[59] Judge Richard Posner of the Seventh Circuit encountered just such a case in *Aleman v. Village of Hanover Park,* 662 F.3d 897 (7th Cir.

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57 *Id.* at 1023.

58 INBAU, *supra* at 352; *see also* http://www.cbc.ca/thenational/includes/pdf/reidresponse.pdf.

59 Kassin, et al., *Police-Induced Confessions, supra* at 27-28.

2011). In *Aleman*, a day care provider was interrogated in the death of an infant who was under his care. The infant was alert but sluggish when he arrived, but soon thereafter lost consciousness. *Id.* at 901. Aleman shook the infant in an attempt to rouse him. *Id.*

During the interrogation, the investigator repeatedly told Aleman that three doctors had determined that the shaking caused the baby's injury. *Id.* at 902. After hearing this fabricated account, Aleman stated, "'I know in my heart that if the only way to cause [the injuries] is to shake that baby, then, when I shook that baby, I hurt that baby . . . . I admit it. I did shake the baby too hard.'" *Id.* However, Aleman continued to deny that he caused injury.

Judge Posner examined the interrogator's misrepresentation and concluded that if the government feeds a suspect false information that distorts choice, the false statement destroys information necessary for rational choice. *Id.* at 906.

> Not being a medical expert, Aleman could not contradict what was represented to him as settled medical opinion. He had shaken Joshua, albeit gently; but if medical opinion excluded any other possible cause of the child's death, then, gentle as the shaking was, and innocently intended, it *must* have been the cause of death. Aleman had no rational basis, given his ignorance of medical science, to deny that he had to have been the cause.

Id. The court concluded that the "lies convinced Aleman that he must have been the cause" of the baby's death because the doctors had excluded any other

possibility. *Id.* The crucial word in the confession was "if:" "[b]y lying about the medical reports, [the officer] changed 'if' to 'because' and thereby forced on Aleman a premise that led inexorably to the conclusion that he must have been responsible for [the baby's] death. . . ; the lie if believed foreclosed any other conclusion." *Id.*

In a similar case, a father was pressured to admit that he had shaken his baby in response to being told about false medical evidence:

> Interrogator: There's medical evidence and what you're telling us does not match the medical evidence. The medical evidence only happens one way and one way only. You shook your baby whether you meant to or not very, very hard. Very hard. She can't get bloodshot eyes and hemorrhaging in her eyes from just doing what you just showed us. It's a violent shaking whether you lost control, lost your temper, whatever reason. And you just can't sit here and tell us that didn't happen.
>
> These doctors are gonna testify it's a violent shaking. You know what retinas are in the eyes? They're quite possibly detached. That means pulled away. That means it's a violent shaking. And we don't think you did that on purpose. But we know you did it and you did it quite hard. So you need to tell us how you did it. Your baby is now dead. And this is very serious. What you told us today needs to be the truth.[60]

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[60] *See* Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 Denv. U. L. Rev. 979, 1025 (1997) (quoting the Interrogation Transcript of Jason Albritton, San Diego, Cal., Police Dep't 76 (July 20, 1995).

These examples demonstrate the "malleability of people's perceptions, decisions, and behavior when confronted with misinformation."[61] False forensic evidence has an overwhelmingly powerful effect on a suspect who otherwise would trust his knowledge and memory of the events he participated in and/or witnessed.

D. Other Advanced Legal Systems Prohibit Deceptive and False Evidence Ploys in Interrogations

In light of the particular risks posed by false evidence ploys, a number of nations explicitly prohibit criminal investigators from deceiving suspects about the evidence against them. The point of differentiation is the treatment of interrogation as an information-gathering or fact-finding tool, as opposed to the approach of law enforcement in the United States, which is accusatory in nature and used as a vehicle for obtaining confessions. The accusatory interrogation approach followed in the United States – including the Reid Technique – results in a significantly higher rate of false confessions.[62]

In response to the public outcry over a large number of false confessions, Great Britain enacted the Police and Criminal Evidence Act of 1984 ("PACE").

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61 Kassin, et al., Police-Induced Confessions *supra* at 27-28. *See, e.g.*, National Research Council Committee to Review the Scientific Evidence in the Polygraph (2003) (expressing concern over the risk of false confessions produced by telling suspects they had failed the polygraph).

62 Christian A. Meissner, et al., *Interview and Interrogation Methods and Their Effects on True and False Confessions* at 30 (The Campbell Collaboration June 25, 2012).

PACE prohibited the use of psychologically manipulative interrogation techniques and mandated recorded custodian interrogations. After PACE was adopted, the Royal Commission on Crime and Justice reviewed British police interrogation methods and adopted the PEACE method. PEACE stands for preparation and planning, engage and explain, account, closure, evaluate. The PEACE method – unlike accusatory methods like Reid – focuses on developing rapport with the subject, explaining the allegation and the seriousness of the offense, emphasizing honesty and requesting the subject's version of the events. The subject is asked to explain events without interruption and investigators are expected to be active listeners. Only then can investigators challenge the suspect's version of events, but only with legitimate evidence.

Other countries have followed this approach. Most Western European Countries – including both adversarial and non-adversarial judicial systems – follow the British model. In Norway, as a result of a notorious false confession,[63] police adopted a variant of the PEACE strategy, called "Tactical Interview Model," which eliminates confession as the objective of an interrogation. New Zealand adopted the PEACE method after its success in Great Britain. PEACE has been

[63] In 1995, 17 year-old Birgitte Tengs was found murdered by ten blunt blows to the head in Norway. The accused – her cousin – admitted being responsible for the murder, although he had no memory of it. The accused even admitted to his lawyer that he killed her. When the lawyer asked if he remembered the act, the accused replied "No I don't remember it, but it must have been me because everyone says so." Gudjonsson, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS – A HANDBOOK 591, *et seq.* (2003).

integrated into police training throughout Europe and in Ontario and British Columbia.

Statistically assessing the impact of differing interrogation methods on producing false confessions is rife with difficulties.[64] One meta-analysis of interrogation methods concluded that accusatory methods of interrogation – such as Reid – do result in an increase in confessions. However, accusatory methods of interrogation also significantly increase the rate of false confessions when compared with investigatory interrogation methods.[65]

The criminal justice system must protect against methods of interrogation that result in false confessions. Courts must be ever-vigilant where interrogation is employed using false evidence and misrepresentations to procure confessions. Courts should be particularly concerned where, as here, interrogators use tactics that even Reid suggests are problematic. Heightened judicial scrutiny is required to ensure that false confessions are not admissible and result in wrongful convictions.

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64 Meissner, *supra* at 30 (noting the significantly greater incidence of true confessions and reduced false confessions using information gathering interrogation techniques).

65 *Id.*

II.

THE LEGAL PROTECTIONS AGAINST CONFESSIONS RESULTING FROM MISREPRESENTATIONS IN INTERROGATIONS

Both the United States Supreme Court and state supreme courts throughout the nation have grappled with constitutional and evidentiary protections relating to the manner in which confessions are obtained. In general, "voluntary" confessions – admissions that are not coerced by the state – are admissible against a criminal accused. Precisely what constitutes state "coercion" continues to evolve – and it can include both physically and psychologically coercive techniques, such as extrinsic and intrinsic lies during interrogation.

A. The "Voluntariness" Standard for Confessions under the United States Constitution

It is a fundamental constitutional tenet that only voluntary confessions are admissible against a criminal defendant. Indeed, where an involuntary confession is admitted and conviction obtained, the conviction must be reversed even though there is ample other evidence to support the conviction. *Jackson v. Denno*, 378 U.S. 368 (1964).

There are two constitutional bases for the requirement that a confession be voluntary: the fifth amendment right against self-incrimination and the due process clause of the fourteenth amendment. *See, e. g., Bram v. United States*, 168 U.S. 532, 542 (1897) (voluntariness "is controlled by that portion of the Fifth

Amendment . . . commanding that no person 'shall be compelled in any criminal case to be a witness against himself'"); and *Brown v. Mississippi*, 297 U.S. 278 (1936) (criminal conviction reversed based on due process clause of the fourteenth amendment where the confession was obtained by physical coercion).

Although the fourteenth amendment incorporates the fifth amendment privilege against self-incrimination in state courts, *Malloy v. Hogan*, 378 U.S. 1 (1964), the voluntariness of confessions in state court is determined by whether a confession was "'made freely, voluntarily and without compulsion or inducement of any sort'" and thus complies with due process of law. *Haynes v. Washington*, 373 U.S. 503, 513 (1963). The query is "whether a defendant's will was over-borne" by the circumstances surrounding the giving of a confession. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). Courts assess "the totality of all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation." *Id. See also Reck v. Pate*, 367 U.S. 433, 440 (1961) ("[A]ll the circumstances attendant upon the confession must be taken into account").

The rationale for the totality of circumstances test is well established:

> It is now inescapably clear that the *Fourteenth Amendment* forbids the use of involuntary confessions not only because of the probable unreliability of confessions that are obtained in a manner deemed coercive, but also because of the "strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of

> securing a conviction, wrings a confession out of an accused against his will," *Blackburn v. Alabama*, 361 U.S. 199, 206-207, and because of "the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." *Spano v. New York*, 360 U.S. 315, 320-321.

Jackson v. Denno, 378 U.S. 368, 385-86 (1964).

Fundamentally unfair police interrogation techniques can result in an involuntary confession where they act "to overbear [the subject's] will to resist and bring about confessions not freely self-determined – a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth." *Rogers v. Richmond*, 365 U.S. 534, 544 (1961).

Police trickery and deceit in interrogations can amount to fundamentally unfair interrogation methods. To be sure, the United States Supreme Court has found that not all police deception – by itself– will render a confession involuntary. *See Frazier v. Cupp,* 394 U.S. 731, 739 (1969) (police lying to defendant that co-defendant had implicated him in the crime). Trickery and deceit by interrogators, however, certainly is one factor to be considered in the totality of the circumstances analysis.

B. Pennsylvania's Protections Against Involuntary Confessions

Pennsylvania's constitutional protections against coerced confessions are co-extensive with those under the United States Constitution. As this Court has held,

"the requirements of Article I, Section I of the Pennsylvania Constitution are not distinguishable from those of the 14th Amendment." *Pa. Game Comm'n v. Marich*, 666 A.2d 253, 255 (Pa. 1995); *R. v. Com., Dept. of Public Welfare*, 636 A.2d 142, 152-53 (Pa. 1994). As such, Pennsylvania courts follow the same analysis as employed under the United States Constitution. *Id.* at 153 (adopting the *Matthews* methodology to assess due process claims brought under Article I, Section 1, of the Pennsylvania Constitution).

The touchstone inquiry in Pennsylvania – as under the United States Constitution – is whether the confession is voluntary, as determined by the totality of the circumstances surrounding the confession. *Arizona v. Fulminante*, 499 U.S. 279 (1991); *Commonwealth v. Jones*, 683 A.2d 1181 (Pa. 1996). An involuntary confession is one resulting from an interrogation that was manipulative or coercive such that it "deprived the defendant of his ability to make a free and unconstrained decision to confess." *Commonwealth v. Mitchell*, 105 A.3d 1257, 1268 (Pa. 2014), *citing Commonwealth v. Sepulveda*, 55 A.3d 1108, 1136-37 (Pa. 2012).

On a motion to suppress a confession as involuntary, the Commonwealth has the burden of proving by a preponderance of the evidence that the defendant confessed voluntarily. *Commonwealth v. Watts*, 465 A.2d 1288 (Pa. Super. 1983), *aff'd*, 489 A.2d 747 (Pa. 1985). This standard applies equally in custodial and non-custodial interrogations. *Commonwealth v. Nester*, 709 A.2d 879, 882 (Pa. 1998).

Pennsylvania – like other jurisdictions – has permitted some degree of police deception in criminal interrogations, although it is less tolerant of confessions induced by extrinsic misrepresentations. Therefore, a confession induced by implications that psychological help would only be available if the accused confessed and false assurances that the accused would not be prosecuted resulted in an involuntary confession. *Commonwealth v. DiStefano*, 782 A.2d 574 (Pa. Super. 2001). Similarly, a confession induced by police misrepresentation that the results of a polygraph test would be admissible at trial is subject to suppression as involuntary. *Commonwealth v. Starr*, 406 A.2d 1017 (Pa. 1979); *Commonwealth v. Watts*, 465 A.2d 1288 (Pa. Super. 1983), *aff'd,* 489 A.2d 747 (Pa. 1985).

At present, Pennsylvania employs a totality of the circumstances test where intrinsic misrepresentations are made by interrogators. *See, e.g., Commonwealth v. Williams*, 640 A.2d 1251, 1259 (Pa. 1994) (police misrepresented that gun was of the same caliber used in the crime); *Commonwealth v. Jones*, 322 A.2d 119 (Pa. 1974) (detective's false claim that a co-conspirator had implicated the accused). *Commonwealth v. Hughes*, 555 A.2d 1264 (Pa. 1989)(false statement that the accused had failed polygraph, but police reasonably believed that the representation was true).

C. The Approach of States Other Than Pennsylvania

As in Pennsylvania, other states have found that confessions resulting from police deception intended to produce truthful confessions can be voluntary and admissible. Some sorts of police misrepresentations, however, are so likely to result in false confessions and thus inherently offensive as to require suppression of the confession. Police deception inducing confessions include extrinsic lies – lies about aspects of the legal or criminal justice system – and intrinsic lies – lies about the evidence intrinsic to the criminal investigation at issue. Courts have been particularly vigilant about penalizing investigators engaging in extrinsic deceit by suppressing confessions induced thereby.

1. Lies about the Legal Implications of Conduct or the Legal System

States tend to treat extrinsic lies that induce confessions with heightened judicial scrutiny. In *State v. Kelekolio*, 849 P.2d 58, 73 (Haw. 1993), for example, the Hawaii Supreme Court acknowledged that confessions resulting from police deliberate falsehoods extrinsic to the facts of the case are *per se* coercive and thus involuntary. By contrast, intrinsic lies inducing confessions are subject to a "totality of the circumstances" test.

Misrepresenting the applicable law or legal standards applicable to a criminal proceeding is one such extrinsic misrepresentation that can result in an involuntary confession. In *Young v. State*, 670 P.2d 591 (Okla. 1983), by way of

example, circumstances including a polygraph administrator's comments that if an accused confessed, the administrator would get the detectives on his side, would garner sympathy and forgiveness, together with his misrepresentation that the defendant had the burden of proof, resulted in an involuntary confession. In *State v. Setzer,* 579 P.2d 957 (Wash. App. 1978), a confession induced by a police promise of immunity from prosecution was a factor that rendered the confession involuntary.

Similarly, state courts have determined that a confession may be suppressed where an officer represents either explicitly or by implication – that the suspect has not committed a crime, will not be charged or that the crime is not as serious as it might appear to the accused. *See, e.g., State v. Ritter*, 485 S.E.2d 492 (Ga. 1997); *Mitchell v. State*, 508 So. 2d 1196 (Ala. Crim. App. 1986). An official representation that an accused would suffer adverse consequences if he insisted on consulting counsel, dubious legal advice and minimizing the gravity of the accused's crimes were found improper in *Dorsey v. United States*, 60 A.3d 1171, 1204 (D.C. App. 2013). These types of extrinsic misrepresentations are particularly likely to produce unreliable false confessions.

2. <u>Lies about the Results of Forensic Scientific Testing.</u>

Deceit about the results of scientific testing intrinsic to a police investigation is far more likely than other types of lies to cause a false confession. This is

especially true for lies about DNA testing, since DNA tests are considered by many to be the "gold standard" and thus irrefutable. State courts have addressed official misrepresentation relating to intrinsic evidence differently – either through a coercion *per se* route or through a totality of the circumstances route.

By way of example, a Florida court was sufficiently troubled by official misrepresentation inducing a confession to affirm partial suppression of a confession in *State v. Cayward*, 552 So. 2d 971, 972 (Fla. Dist. Ct. App. 1989). In *Cayward*, police suspected a nineteen-year old man of sexually assaulting his five-year old niece, but the police lacked enough evidence for charges. The police fabricated scientific test results, indicating that the accused's semen was on the girl's underwear, and presented them to the accused during the interrogation. They also suggested they would seek the death penalty. The trial court suppressed the part of confession that occurred after the misrepresented test result. On appeal, the Court of Appeal ruled that this was not coercion *per se*, but rather entailed an evaluation of the totality of the circumstances. Based on the totality of circumstances, it agreed with the trial court that partial suppression was appropriate, noting:

> [T]he built-in adversariness of police interrogations do not encompass the notion that the police will knowingly fabricate tangible documentation or physical evidence against an individual. Such an idea brings to mind the horrors of less advanced centuries in our civilization

> when magistrates at times schemed with sovereigns to frame political rivals. This is precisely one of the parade of horrors civics teachers have long taught their pupils that our modern judicial system was designed to correct. Thus we think the manufacturing of false documents by police officials offends our traditional notions of due process of law under both the federal and state constitutions.

552 So. 2d at 974.

A similar result occurred in Tennessee in *State v. Phillips*, 30 S.W.3d 372 (Tenn. Crim. App. 2000). *Phillips* involved allegations of the accused's sexual misconduct with his step-daughters. The non-custodial interrogation was performed by members of the Child Protective Team. The Team advised the suspect that his step-daughters had accused him of sexual misconduct and that his wife informed the Team that he had admitted the sexual misconduct. The Team misrepresented that the defendant's DNA was found in the victim's vagina. Specifically, they stated that "['y]our time in prison is being written because we have got a D & A (sic) smear of male ejaculate in this child's vagina . . .." In truth, the investigator conceded she did not have a DNA test and did not even know whether there was a DNA test. 30 S.W.3d at 375. Additionally, the interrogators asked the accused to confess to avoid the intervention of law enforcement. For most of the interview the suspect steadfastly denied any sexual misconduct. Later, he became equivocal and stated it could have happened while he was in an intoxicated state.

Although the confession in *Phillips* was analyzed under Tennessee's Constitution, *Phillips* acknowledged Supreme Court jurisprudence – "whether the behavior of the state's officials was 'such as to overbear petitioner's will to resist and bring about confessions not freely self-determined.'" 30 S.W.3d at 377. It concluded that the investigatorial misrepresentations, numerous steadfast denials by the defendant, statements that law enforcement would be involved if the defendant did not confess, and promises of certain treatment if the defendant confessed crossed the line and affirmed the trial court's suppression order.

Texas also takes a firm stand on confessions induced through police deception involving scientific evidence. In *Wilson v. State*, 311 S.W.3d 452 (Tex. Crim. App. 2010), the detective admitted he lied to an accused stating that he had a lab report showing the accused's fingerprints on a pistol's magazine clip, when in fact no legible prints were found. The detective's conduct violated a section of the penal code prohibiting the fabrication of evidence, and therefore the confession was ruled inadmissible. S*ee also State v. Chirokovskcic*, 860 A.2d 986 (N.J. Super. App. Div. 2004) (suppressing confession where detectives used a police fabricated lab report purporting to show that the suspect's DNA had been found on the inside of the victim's glove).

The use of lies misrepresenting scientific tests significantly increases the likelihood of a coerced – and thus involuntary – confession. Put simply, people

who believe the evidence (and thus the odds) are overwhelmingly against them may falsely confess to a crime they did not commit.

III.

THIS COURT SHOULD REQUIRE HEIGHTENED JUDICIAL SCRUTINY FOR CRIMINAL CONFESSIONS OBTAINED THROUGH MISREPRESENTATIONS BY INTERROGATORS

Contemporary criminal justice cannot countenance convictions based upon false confessions. State deception and misrepresentation particularly is troubling because we expect persons charged with enforcing the law to scrupulously follow it.

> The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.

Spano v. New York, 360 U.S. 315, 320-21 (1959). Indeed, "[w]hen the officers who question a suspect by using trickery demonstrate an 'undeviating intent . . . to extract a confession . . . the confession obtained must be examined with the most careful scrutiny. . .." *Brisbon v. United*

States, 957 A.2d 931, 945 (D.C. App. 2008), *quoting Spano*, 360 U.S. at 324.[66]

Given the importance of the decision to admit a confession into evidence,[67] and the lack of guidance as to how courts should weigh the factors of the totality of the circumstances test for voluntariness,[68] *Amici* propose three modifications that will provide greater protection to the innocent and improve the success rate of our criminal justice system. To be sure, these proposals are more protective than

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66 *See also Beasley v. United States*, 512 A.2d 1007, 1015 (D.C. 1986) (similarly noting that "[t]he use of deception or trickery by police during an interrogation" is "subject to close scrutiny.")

67 Empirical evidence strongly suggests that if the confession is admitted into evidence the jury will almost invariably convict the defendant of whatever crime he or she is charged with, even if the confessions is largely uncorroborated and the weight of the evidence suggests that the defendant is innocent. Leo & 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, 476 (1998) ("juries tend to regard confessions as the most probatie and damning evidence of guilt possible"); *see also Colorado v. Connelly*, 479 U.S. 157, 182 (1986) (Brennan, J., dissenting) ("[t]riers of fact accord confessions such heavy weight in their determinations that the introduction of a confession makes the other aspects of a trial in court superfluous, and the real trial, for all practical purposes, occurs when the confession is obtained") (internal quotations and citations omitted); *Miranda v. Arizona*, 384 U.S. 436, 466 (1966) (characterizing a confession as "the most compelling possible evidence of guilt").

68 Paul Marcus, *It's Not Just About Miranda: Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 Val. L. Rev. 601, 643-44 (2006) (reviewing "thousands of opinions on confessions from the past two decades" and finding that the due process rules applied to assessing the voluntariness of confessions "are just as poorly and inconsistently applied as they were in the 1950s and 1960s"); Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 Harv. C.R.-C.L. L. Rev. 105, 117 (1997) ("the due process test provides few safeguards against the admission of untrustworthy confessions").

required by the United States Constitution. This Court, however, has broad supervisory powers to ensure the fair administration of justice. These supervisory powers can be employed to adopt rules relating to the admissibility of statements of the accused, *see Commonwealth v. Davenport*, 370 A.2d 301 (Pa. 1977), and to clarify or modify burdens of proof in motions to suppress under Pa. R. Crim. P. 581. *See Commonwealth ex rel. Butler v. Rundle*, 239 A.2d 426 (Pa. 1968).

These three alternatives represent a spectrum of available options, and *Amici* present them with the hope that the Court will adopt the response it sees as most appropriate in light of the empirical research presented here.

A. This Court should Establish a Conclusive Presumption that a Confession is Coercive and Involuntary when Induced by Extrinsic Lies or Intrinsic Lies Relating to Scientific Testing by the State

First, *Amici* propose that the Court, under its supervisory powers, create a conclusive presumption of coercion. Specifically, extrinsic lies and intrinsic lies relating to scientific test results during an interrogation are *per se* coercive, and the resulting confession is thereby involuntary and the confession is inadmissible. Numerous courts – including the United States Supreme Court – have voiced concerns about lies related to the legal impact of a confession. And, lies relating to test results are viewed as incontestable. These types of deception significantly increase the risk of false confessions and thus should be *per se* inadmissible.

A mandatory presumption prescribes that a factfinder find the elemental fact upon proof of the basic fact. *Commonwealth v. Kelly*, 724 A.2d 909, 911 (Pa. 1999). Mandatory presumptions come in two forms: conclusive and rebuttable. A mandatory conclusive presumption – such as the rule proposed by the *Amici* – removes the presumed element from the case once the predicate facts giving rise to the presumption have been proven. Thus, for the *Amici*'s proposal, once evidence has been presented of material extrinsic falsehoods or material intrinsic falsehoods relating to the results of forensic scientific testing, the conclusive presumption is established as coercive *per se* and the confession is inadmissible.

Conclusive legal presumptions are not a new area of jurisprudence. The United States Supreme Court prescribed a presumption of coercion where a confession is obtained through a violation of *Miranda*. *Edwards v. Arizona*, 451 U.S. 477 (1981). In *Oregon v. Elstad*, 470 U.S. 298, 307 n.1 (1985) the Court explained that: "[a] *Miranda* violation does not *constitute* coercion but rather affords a bright-line, legal presumption of coercion, requiring suppression of all unwarned statements."

As noted, courts have acknowledged this rule in the context of extrinsic misrepresentations. By way of example, the Hawaii Supreme Court in *State v. Kelekolio*, 849 P.2d 58, 73 (Haw. 1993) prescribed a *per se* rule for extrinsic misrepresentations resulting in confessions. The *Kelekolio* court explained that

unlike falsehoods from the state relating to facts intrinsic to the investigation, "deliberate falsehoods *extrinsic* to the facts of the alleged offense, which are of a type reasonably likely to procure an untrue statement or to influence an accused to make a confession regardless of guilt" are regarded as "coercive *per se*" and thus obviate the need for an examination of the totality of circumstances to determine the voluntariness of the confession.

Similarly in *State v. Nelson*, 321 P.2d 202 (N.M. 1958), a confession was induced by the representation that New Mexico law provided that if the accused "'copped a plea he wouldn't fry.'" *Id*. at 206. The misrepresentation of New Mexico law by the chief police officer rendered the confession *per se* inadmissible. *See also People v. Hogan*, 647 P.2d 93 (Ca. 1982) (confession procured through extrinsic promise of mental health treatment held *per se* inadmissible).

New Jersey has extended *per se* coercion rule into the arena of intrinsic deceit. In *State v. Patton*, 826 A.2d 783, 802 (N.J. Super. App. Div. 2003), police stopped, searched, and arrested defendant for the murder of a woman in a Camden alley. *Id.* at 784. While the defendant was in custody, the police fabricated an audiotape of an alleged "eyewitness" to the murder being interviewed. *Id.* The purpose in creating this fabricated audiotape was "'[t]o let [defendant] think there was an individual who saw him do what we [thought] he did.'" *Id.* at 785. After Patton heard the audiotape, he confessed to the murder and agreed to give a taped

statement. *Id.* at 789. Patton was convicted of murder. *Id.* at 784. The Appellate Division concluded that "[c]ertain interrogation techniques are so inappropriate that application of a totality of the circumstances test is inadequate to assure that the resultant confession was voluntary, and the use of the technique renders the confession *per se* inadmissible." *Id*. at 802.

This Court should adopt such a conclusive presumption for extrinsic misrepresentations and intrinsic misrepresentations relating to the results of scientific testing. As noted, *passim*, confessions induced by these techniques are inherently unreliable. As such, in these instances, the confession is *per se* coerced, involuntary and inadmissible.

B. This Court Alternatively Should Establish a Presumption of Coercion when a Confession is Obtained by Interrogators through Extrinsic Misrepresentations or Misrepresentations about the Results of Scientific Testing

Second, *Amici* alternatively propose that this Court should create a rebuttable presumption of coercion when confessions are induced by extrinsic lies or intrinsic police lies about the results of scientific testing. Without doubt, the impact of these types of lies on confessions is worthy of heightened judicial scrutiny.

A mandatory rebuttable presumption is a "means by which a rule of substantive law is invoked to force the trier of the fact to reach a given conclusion, once the facts constituting its hypothesis are established, absent contrary

evidence." *Commonwealth v. Shaffer*, 288 A.2d 727, 735 (Pa. 1972), *citing* 9 Wigmore, Evidence, § 2491 (3rd ed. 1940). A rebuttable presumption forces the party with the burden "to come forth or suffer inevitable defeat on the issue in controversy." *Id.* Accordingly, the fact finder is required to find the presumed element if the basic fact is proven, unless the defendant comes forward with some evidence to rebut the presumed connection between the two facts. *Commonwealth v. MacPherson*, 752 A.2d 384, 390 (Pa. 2000). In the context of the *Amici*'s proposal, a rebuttable presumption would require a finding of an involuntary confession unless the state is able to come forward with evidence to show that the misrepresentations were not material to the confession.

Pennsylvania has created – and modified – presumptions relating to motions to suppress confessions to address societal concerns related to the fairness of confessions. This Court in *Commonwealth v. McCutchen*, 343 A.2d 669 (Pa. 1975) established a *per se* rule that no person under the age of eighteen years could waive his or her rights to remain silent and to the assistance of counsel without the opportunity to consult with an interested adult. In *Commonwealth v. Christmas*, 465 A.2d 989 (Pa. 1983) this Court eliminated the *McCutchen per se* rule, establishing in its place a rebuttable presumption that confessions by a juvenile absent counsel and/or an interested adult were involuntary. The *Christmas*

presumption was again modified in *Commonwealth v. Williams*, 475 A.2d 1283 (Pa. 1984).

Amici request that this Court consider the studies assessing the effect of extrinsic misrepresentations and intrinsic misrepresentations relating to scientific testing on false confessions. *Amici* also request that this Court acknowledge the high number of persons whose false confessions resulted in convictions, and who were subsequently exonerated. Given the causal nexus between deception and false confessions, *Amici* request the creation of a rebuttable presumption of coercion when confessions are induced by such misrepresentations.

C. This Court should Establish a Reasonable Doubt Burden in Motions to Suppress Confessions Induced by Interrogator Misrepresentations

Finally, *Amici* propose that the Court raise the evidentiary burden for the state to reasonable doubt at the motion to suppress stage. Under this new rule, where a confession was obtained via extrinsic misrepresentations or deception about the results of scientific testing, the Commonwealth would have the burden of showing the voluntariness of a confession beyond a reasonable doubt.

The motion to suppress is litigated at a hearing, which the Supreme Court itself has noted is "often [] as important as the trial itself." *Waller v. Georgia*, 467 U.S. 39, 46 (1984). These hearings are critical to the protection of constitutional

rights because they give substance to the guarantees that protect those fundamental rights. *See United States v. Jenkins*, 728 F.2d 396, 399 (6th Cir. 1984).

The rules governing these hearings differ from those governing criminal trials, though the format strongly resembles a bench trial. Accordingly, the evidence presented at a suppression hearing usually consists of the live testimony of witnesses who are more often than not law enforcement agents.[69] In the case of challenges to the constitutionality of a written confession, usually the only witness present when the confession was made was a police officer. If the defendant chooses not to testify, either to invoke his fifth amendment right or for strategic reasons, the police officer's testimony at suppression hearings will be unrebutted and virtually dispositive.[70] After the close of evidence, the trial judge must determine whether the prosecution has proven the absence of a violation of the defendant's constitutional rights.

At present, Pennsylvania only requires the Commonwealth to sustain its burden at a motion to suppress hearing by a preponderance of the evidence that the

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69 *See* Charles L. Becton, *The Drug Courier Profile: "All Seems Infected that Th'Infected Spy, As All Looks Yellow to the Jaundic'd Eye,"* 65 N.C.L. Rev. 417, 469 (1987) (noting that "defendants rarely testify at suppression hearings").

70 *See, e.g.*, Welsh S. White, *MIRANDA'S* WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER DICKERSON 192 (2001) (noting that "[w]hile empirical data relating to judges' or juries' assessment of credibility in suppression of confession cases is lacking, it is generally believed that . . . where the confession's admissibility depends on whether the judge believes the police or the suspect's testimony, judges invariably believe the police.").

defendant confessed voluntarily. *Commonwealth v. Nester*, 709 A.2d 879, 882 (Pa. 1998) (citations and footnote omitted); *Commonwealth ex rel. Butler v. Rundle*, 239 A.2d 426 (Pa. 1968); *Commonwealth v. Harrell*, 65 A.3d 420, 434 (Pa. Super. 2013). In other words, as to voluntariness, the state must convince the judge that it is more likely than not that the confession was voluntary. *See Lego v. Twomey*, 404 U.S. 477 (1972).

By contrast, many states require the prosecution to prove beyond a reasonable doubt that a confession was given voluntarily.[71] For example, in Massachusetts, the "Commonwealth must demonstrate voluntariness beyond a reasonable doubt, and evidence of this must affirmatively appear from the record."[72] Still other states provide that the state must meet its burden of showing voluntariness on a motion to suppress by "clear and convincing evidence." *State v. Rodgers*, 447 A.2d 730, 731 (R.I. 1982).

A more robust burden of proof at these hearings will allow the merits of a defendant's suppression claims to be addressed. Scholars have noted that "[a]s a

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71 *See State v. McCarthy*, 819 A.2d 335 (Me. 2003); *Moody v. State*, 841 So. 2d 1067 (Miss. 2003); *Henry v. State*, 738 N.E.2d 663 (Ind. 2000); *State v. Hammond*, 742 A.2d 532 (N.H. 1999); *People v. Williamson*, 667 N.Y.S.2d 114 (N.Y. App. Div. 1997); *Commonwealth v. Mello*, 649 N.E.2d 1106, 1113 (Mass. 1995); *State v. Corder*, 460 N.W.2d 733 (S.D. 1990); *State v. Franklin*, 803 So. 2d 1057 (La. Ct. App. 2001) (noting that at a hearing on a motion to suppress, it is the State's burden to prove confession's voluntariness beyond a reasonable doubt).

72 *Mello*, 649 N.E.2d at 1113.

practical matter, [the preponderance-of-the-evidence] standard of proof often renders the suppression . . . a *fait accompli.*"[73] Use of the preponderance standard in voluntariness hearings necessarily leads to the admission of more false confessions than would a higher standard of proof. The preliminary factual determination made by the court at the suppression stage likely has serious consequences for the criminal defendant, given the unduly strong presumption by most juries of the reliability and ultimate truth of a confession.

Accordingly, the *Amici* request that this court raise the burden of proof for motions to suppress confessions to a reasonable doubt standard.

CONCLUSION

For the above-stated reasons, the *Amici* respectfully request that this Court: 1) establish a conclusive presumption of coercion when a confession is induced by extrinsic misrepresentations or intrinsic misrepresentations relating to the results of scientific tests; or 2) establish a rebuttable presumption of coercion when a confession is induced by extrinsic misrepresentations or intrinsic misrepresentations relating to the results of scientific tests; and 3) establish a heighted burden of proof for the suppression of a confession when it has been

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[73] Michael D. Pepson and John N. Sharifi, *Lego v. Twomey: The Improbable Relationship Between an Obscure Supreme Court Decision and Wrongful Convictions*, 47 Am. Crim. L. Rev. 1185, 1185-86 (2010) (noting that this is often true because of the substantial evidence that police perjury is prevalent at such hearings).

induced by extrinsic misrepresentations or intrinsic misrepresentations relating to the results of scientific tests.

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Dated: February 16, 2016

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Amicus Brief complies with Pa. R. Civ. P. 2135 in that the brief, exclusive of cover page, table of contents, table of cases, Proof of Service and any addenda contains 12,939 words.

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CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2016, I electronically filed the foregoing AMICUS BRIEF with the Deputy Prothonotary for the Pennsylvania Supreme Court using the PACFile system, with electronic service on the following counsel:

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I further certify that on February 17, 2016, two copies of the foregoing AMICUS BRIEF will be served on the counsel by first class mail.

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