Fordham Urban Law Journal

Volume 50
Number 1 *Rethinking Public Places: Relation, Rights, and Recognition*

Article 4

2022

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EXPERT TESTIMONY ON FALSE CONFESSIONS: AN OLD PSYCHOLOGICAL PROBLEM WITH NEW CHALLENGES IN NEW YORK COURTS

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INTRODUCTION

Melissa Lucio was scheduled for execution on April 27, 2022 for the murder of her 2-year-old child Mariah, a crime she has long claimed that she did not commit.[1] In February 2007, Lucio claimed that Mariah accidentally fell down a flight of stairs.[2] Two days later, when Lucio could not wake Mariah from her nap, she rushed Mariah to the hospital where she was later pronounced dead.[3]

The circumstances leading to Lucio's conviction are riddled with disturbing police behavior. Detectives took Lucio in for questioning less than two hours after Mariah's death, while Lucio was still distraught and grieving.[4] In a five-hour-long interrogation that ran late into the night, the detectives used coercive methods on Lucio that are widely known to produce false confessions: "[t]hey shouted at Ms. Lucio; berated her as a neglectful mother; repeatedly showed her photos of her dead child; and implied that if she wasn't at fault, one of her other children or her husband would have to be."[5] At one point, around 3:00 a.m., one detective even directed Lucio to hit a doll to demonstrate the alleged abuse that led to Mariah's death.[6] Throughout the interrogation, Lucio asserted her innocence more than 100

1. *See* J. David Goodman, *Texas Court Halts Execution of Mother Convicted of Killing Child*, N.Y. TIMES (Apr. 26, 2022), https://www.nytimes.com/2022/04/25/us/melissa-lucio-execution-texas.html [https://perma.cc/8S96-S6B7].

2. Innocence Staff, *What's Next for Melissa Lucio, Texas Woman on Death Row*, INNOCENCE PROJECT (May 2, 2022) [hereinafter *What's Next for Melissa Lucio*], https://innocenceproject.org/whats-next-for-melissa-lucio-texas-woman-on-death-row/ [https://perma.cc/U3FW-WPX6]; Innocence Staff, *Melissa Lucio: 10 Facts You Should Know About This Innocent Woman Facing Execution*, INNOCENCE PROJECT (Apr. 18, 2022, 7:30 PM) [hereinafter *Melissa Lucio: 10 Facts*], https://innocenceproject.org/melissa-lucio-9-facts-innocent-woman-facing-execution/ [https://perma.cc/AG2R-2CQM].

3. *See What's Next for Melissa Lucio*, *supra* note 2.

4. *See id.*

5. *See* First Subsequent Application for Writ of Habeas Corpus Filed Pursuant to Article 11.071, § 5 of the Texas Code of Criminal Procedure at 4, Ex Parte Lucio, No. WR-72,702–05 (Tex. Crim. App. Apr. 15, 2022) [hereinafter April 15 Habeas Application].

6. J. David Goodman, *In Polarized Texas, Rare Accord: A Hispanic Mother Shouldn't Be Executed*, N.Y. TIMES (Apr. 22, 2022), https://www.nytimes.com/2022/04/22/us/melissa-lucio-texas-execution.html [https://perma.cc/3NCG-KRLF].

times.[7] Eventually, exhausted and defeated, she told the detectives: "I guess I did it."[8] The prosecution maintained that Mariah's death was due to abuse by Lucio, citing bruises on Mariah's body.[9] In 2008, Lucio was sentenced to death partly based on her statements that she made during the interrogation.[10]

Less than two days before she was set to die, the Texas Court of Criminal Appeals granted Lucio a stay, finding that the trial court should consider new evidence in four claims because of the court's possible reliance on Lucio's false confession.[11] After Lucio's upcoming hearing,[12] the trial court may recommend a new trial.[13] This outcome would have broad-ranging significance: without such interventions, Lucio would have been the first Latina in the U.S. to be executed by lethal injection since the death penalty was reinstated in 1976.[14]

Lucio's case generated widespread national attention from media,[15] increased advocacy from supporters for Lucio's freedom, and even brought bipartisan lawmakers "together in mutual outcry."[16] Lucio's most recent habeas application[17] petitioned for relief from Lucio's conviction and death sentence on the grounds that the State's case was based on Lucio's coerced

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7. *See* April 15 Habeas Application, *supra* note 5, at 4 n.1 ("During the interrogation, Ms. Lucio verbally asserted her innocence 86 times, and non-verbally asserted her innocence (by, e.g., shaking her head) 35 times.").

8. *See What's Next for Melissa Lucio*, *supra* note 2.

9. *See* Sanya Mansoor, *A Texas Court Halted Melissa Lucio's Execution. Here's What to Know About Her Case*, TIME (Apr. 28, 2022, 5:23 PM), https://time.com/6171393/melissa-lucio-execution-texas/ [https://perma.cc/QPJ4-ZKFH].

10. *See What's Next for Melissa Lucio*, *supra* note 2.

11. Order on Application for Post-Conviction Writ of Habeas Corpus and Motion for Stay of Execution from Cause No. 07-CR-00885 at 2–3, Ex Parte Melissa Elizabeth Lucio, No. WR-72,702–05 (Tex. Crim. App. Apr. 25, 2022).

12. The hearing has not yet been scheduled. *See What's Next for Melissa Lucio*, *supra* note 2.

13. *See id.*

14. *See* Mansoor, *supra* note 9.

15. *See, e.g.*, Last Week Tonight, *Wrongful Convictions: Last Week Tonight with John Oliver*, YOUTUBE (Mar. 7, 2022), https://www.youtube.com/watch?v=kpYYdCzTpps&ab_channel=LastWeekTonight [https://perma.cc/U8VR-VSW8]; Sabrina Van Tassel, *The State of Texas vs. Melissa*, HULU (2020), https://www.hulu.com/movie/the-state-of-texas-vs-melissa-48e646e4-be05-4465-815a-a3eb9756c914 [https://perma.cc/3ZEX-34SU].

16. Goodman, *supra* note 6; *see also* Mansoor, *supra* note 9 ("Lucio's case has drawn widespread outrage from a bipartisan group of more than 100 Texas state lawmakers, as well as dozens of anti-domestic violence, religious and Latino groups[,] and celebrities . . . .").

17. *See* April 15 Habeas Application, *supra* note 5 (requesting that the Texas Court of Criminal Appeals stay Lucio's scheduled execution and vacate her conviction and death sentence). For more on the procedural history of Lucio's case, including previous state and federal habeas proceedings, see *id.* at 45–46.

admission by law enforcement, "unscientific and improper analysis of [Lucio]'s affect and demeanor following her daughter's death[,] and testimony . . . claiming — contrary to medical evidence — that Mariah's death . . . resulted from abuse."[18] The application maintained Lucio's innocence and argued that no juror would have convicted her "[b]ut for the State's use of [Lucio's] false testimony."[19] The application also alleged that the State suppressed statements from Lucio's older daughters, which corroborated Lucio's account that Mariah's fall was an accident.[20] Additionally, the application cited to new scientific evidence regarding Lucio's "exceptionally high risk of falsely confessing during the relentlessly coercive, nighttime interrogation, due to her history of significant trauma and domestic abuse,[21] rendering her custodial admissions unreliable."[22] Experts on false confessions, including interrogation expert David Thompson and psychologist Dr. Gisli Gudjonsson, "analyzed [Lucio]'s interrogation and concluded that [Lucio]'s admissions [were] unreliable and simply a regurgitation of words and facts that officers fed her throughout a highly coercive interrogation process."[23]

Lucio's attorneys also submitted a Clemency Application to the Texas Board of Pardons and Paroles on March 22, 2022, which included declarations from false confession and medical experts and jurors.[24] Four

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18. *See id.* at 5–6.

19. *Id.* at 6.

20. *See id.* at 4, 49. These eyewitness statements were suppressed by police and the prosecution: one CPS investigator's report recording Mariah's sister Selina's statements that bruises were from the fall were not disclosed to Lucio's defense counsel, and defense counsel also did not learn of another videotaped interview of Mariah's brother Rene describing the fall and the resulting bruise around Mariah's eye until the third day of trial. *See id.* at 49. In total, seven of Lucio's older children had told police and the CPS investigators that Lucio never abused Mariah or any of her children. *See id.* at 49–50.

21. At trial, the defense called two witnesses — clinical social worker Norma Villanueva, and psychologist Dr. Pinkerman — to testify that Lucio was physically and sexually abused as a child by her stepfather, as an adult in her marriage to Guadalupe Lucio, and in her partnership with Robert Alvarez. *See id.* at 39–40. Dr. Pinkerman further testified that he had conducted psychological testing and concluded that Lucio had major depression and Post-Traumatic Stress Disorder (PTSD). *Id.* at 41.

22. *Id.* at 48.

23. *See What's Next for Melissa Lucio*, *supra* note 2 (internal quotation marks omitted); *see also* Gisli H. Gudjonsson, *I'm an Expert in False Confessions Who Looked at Melissa Lucio's Case. Texas Is Executing an Innocent Woman*, INDEPENDENT (Apr. 6, 2022, 9:15 PM), https://www.independent.co.uk/voices/melissa-lucio-execution-texas-expert-false-confessions-b2052512.html [https://perma.cc/RN6J-LWHS].

24. Mansoor, *supra* note 9; *see also* Innocence Staff, *Melissa Lucio, Scheduled to be Executed on April 27, Appeals to Texas Pardons Board and Governor for Clemency*, INNOCENCE PROJECT (Mar. 22, 2022), https://innocenceproject.org/melissa-lucio-scheduled-execution-april-27-appeals-texas-pardons-board-governor-clemency/ [https://perma.cc/2A8W-FKJ4] (summarizing how seven nationally-recognized experts reviewed the evidence in Lucio's case); Application for Commutation of Death Sentence to a

jurors who voted to sentence Lucio to death indicated their concerns about the evidence withheld and how it could have impacted the opinion of the jurors; an alternate juror submitted a declaration supporting clemency relief for Lucio as well.[25] As a result of the Court of Criminal Appeals's stay of execution decision, the Board of Pardons and Paroles stated that it "will not be making a clemency recommendation at this time."[26] If the trial court decides not to recommend a new trial, or if a new trial is granted but Lucio's conviction does not get overturned, the Clemency Application is one of the last avenues for Lucio to escape death row.[27]

Lucio's case is not the first nor only time that the public has paid attention to the prevalence of false confessions and their contribution to wrongful convictions. In another well-known case, five Black and Latino teenagers — now famously known as the Central Park Five — were convicted of the 1989 rape and assault of Trisha Meili, a jogger in Central Park, despite the lack of DNA or physical evidence.[28] The five teenagers, then aged 14 to 16 years old, had confessed to the rape and assault after being interrogated in

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Lesser Penalty or, in the Alternative, a 120-Day Reprieve from Execution at 30–42, In re Lucio (Mar. 22, 2022) [hereinafter Clemency Application] (arguing that Lucio is at a high risk of false confession because of the officers' guilt-presumptive, highly manipulative, and coercive interrogation, as well as Lucio's personal characteristics, which include a history of sexual abuse, PTSD, and other health conditions).

25. *See* Clemency Application, Exhibit 24 (Declaration of Alejandro Saldivar) (indicating he would have wanted to hear more evidence about "Melissa's past and its effect on her reaction and demeanor during the interrogation," "false confession statistics and battered women," and how he thinks he would have decided differently if he heard this evidence); Exhibit 34 (Declaration of Ernestina Espinoza) (stating that Lucio should be granted a new trial if there is new evidence); Exhibit 35 (Declaration of Johnny Galvan) ("I think it would be better if Melissa was not killed. I wish I could change my vote."); Exhibit 36 (Declaration of Constance Poland) (writing that a new jury should be allowed to hear new evidence that was not presented to the juror during the trial); Exhibit 37 (Declaration of Emma Molina - an alternate juror) ("Had I heard evidence of Melissa's psychological state due to the abuse she suffered in her past, I would have understood why she showed no emotion in the interrogation video.").

26. Press Release, State of Tex. Bd. of Pardons & Paroles, Melissa Elizabeth Lucio-Clemency Vote (Apr. 25, 2022), https://www.tdcj.texas.gov/bpp/Melissa_Elizabeth_Lucio-Clemency_Vote.pdf [https://perma.cc/3C5X-B23H].

27. *See* OFF. OF THE TEX. ATT'Y GEN., CAPITAL PUNISHMENT APPELLATE GUIDEBOOK 12 (2018) ("Once the appeals are exhausted, and the inmate has exercised all rights to appeal with no relief, and any requested clemency is denied, the execution takes place.").

28. *See* Jim Dwyer, *The True Story of How a City in Fear Brutalized the Central Park Five*, N.Y. TIMES (May 30, 2019), https://www.nytimes.com/2019/05/30/arts/television/when-they-see-us-real-story.html [https://perma.cc/7ANL-XS6A] (reflecting on the trial, the investigation by the Manhattan District Attorney's office that led to the exoneration, Ken Burns' 2012 documentary "Central Park Five," and Ava DuVernay's recent Netflix series "When They See Us"). Jim Dwyer had covered parts of the trials in 1990 for New York Newsday, a newspaper. *See id.*

custody for 14 to 30 hours.[29] In 2002, Matias Reyes, a convicted murderer-rapist, came forward and confessed to the crime.[30] New DNA evidence also linked Reyes to the rape, leading to the reopening of the case and the eventual exoneration of the five teenagers, who had grown into men while in prison.[31] It has been 20 years since the Central Park Five — Korey Wise, Yusef Salaam, Raymond Santana, Antron McCray, and Kevin Richardson — were exonerated of their wrongful convictions.[32]

The problem of false confession is not new or unique,[33] and it remains a nation-wide problem.[34] Despite increased awareness of the existence of false confessions, the problem of false confessions is not limited to a few rare, high profile case. As Professor Saul M. Kassin points out, Lucio's case "represents the tip of the iceberg" of false confession cases, and the hostile interrogation tactics used to elicit her confession illustrate the systemic issue of false confessions.[35]

As of the time of this publication, the Innocence Project recorded 375 DNA exonerations between 1989 and 2022, and reported that 29% of those cases involved false confessions.[36] Of these exonerations, 8.26% originated

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29. Saul Kassin, *False Confessions and the Jogger Case*, N.Y. TIMES (Nov. 1, 2002), https://www.nytimes.com/2002/11/01/opinion/false-confessions-and-the-jogger-case.html [https://perma.cc/N6GH-YE4E].

30. *See Man Says He Was Central Park Rapist*, ABC NEWS (Sept. 26, 2002), https://abcnews.go.com/Primetime/story?id=132076&page=1 [https://perma.cc/Y9TT-35FH].

31. Kassin, *supra* note 29; *see also* Susan Saulny, *Convictions and Charges Voided In '89 Central Park Jogger Attack*, N.Y. TIMES (Dec. 20, 2002), https://www.nytimes.com/2002/12/20/nyregion/convictions-and-charges-voided-in-89-central-park-jogger-attack.html [https://perma.cc/M2EL-NCUD].

32. *See* Aisha Harris, *The Central Park Five: 'We Were Just Baby Boys'*, N.Y. TIMES (May 30, 2019), https://www.nytimes.com/2019/05/30/arts/television/when-they-see-us.html [https://perma.cc/D8RT-BT79].

33. Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCH. SCI. PUB. INT. 33, 34 (2004) ("Despite its historic symbolic value and notoriety, the [Central Park Five] jogger case illustrates a phenomenon that is not new or unique.").

34. The National Registry of Exonerations ("NRE") has recorded 19 exonerations involving false confessions in the year 2021 alone. *See* NAT'L REGISTRY OF EXONERATIONS, 2021 ANNUAL REPORT 4 (2022).

35. *See* Mansoor, *supra* note 9.

36. *DNA Exonerations in the United States*, INNOCENCE PROJECT, https://innocenceproject.org/dna-exonerations-in-the-united-states/ [https://perma.cc/GU84-R4NV] (last visited Sept. 14, 2022). The Innocence Project was founded in 1992 by Barry C. Scheck and Peter J. Neufeld. *About*, INNOCENCE PROJECT, https://innocenceproject.org/about/ [https://perma.cc/9CZW-87LR] (last visited Sept. 14, 2022). It is now an independent nonprofit that "works to free the innocent, prevent wrongful convictions, and create fair, compassionate, and equitable systems of justice for everyone." *Id.*

in the State of New York, and 45% of those involved false confessions.[37] New York also has the third-highest exoneration rate behind Illinois and Texas and the second-highest rate for convictions overturned because of a false confession, with 44 convictions overturned since 1992.[38] Undoubtedly, New York "has a long and ignominious history of wrongful convictions related to false confessions" and "[t]he phenomenon of unreliable, coerced confessions is as broad . . . as it is deep and longstanding."[39]

Courts in New York are just beginning to grapple with how to address the prevalence of false confessions in the state. One significant hurdle to doing so is the introduction of expert testimony on the existence of false confessions. In *Frye v. United States*, the United States Court of Appeals for the District of Columbia Circuit held that scientific principles "must be sufficiently established to have gained general acceptance in the particular field" before being used in expert testimony.[40] The *Frye* test is also known as the "general acceptance test," which New York state courts have continued to follow to this day.[41]

The New York Court of Appeals issued two significant decisions within the last ten years that seem to indicate a trend toward addressing the problem of false confessions. In 2012, the New York Court of Appeals stated for the first time in *People v. Bedessie* that "expert testimony on the phenomenon of false confessions should be admitted" if the testimony is relevant to the defendant and the actual interrogation in each case.[42] However, *Bedessie* also held that the trial court did not abuse its discretion in declining to hold a *Frye* hearing[43] to assess whether the principles in the defense expert's proffer were generally accepted in the scientific community, and so the expert testimony was properly excluded.[44]

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37. Saul M. Kassin, *It's Time for Police to Stop Lying to Suspects*, N.Y. TIMES (Jan. 29, 2021), https://www.nytimes.com/2021/01/29/opinion/false-confessions-police-interrogation.html [https://perma.cc/2AKT-RNQK].

38. Jan Ransom, *3 Detectives Obtained a False Murder Confession. Was It One of Dozens?*, N.Y. TIMES (Feb. 15, 2021), https://www.nytimes.com/2021/02/15/nyregion/3-detectives-obtained-a-false-murder-confession-was-it-one-of-dozens.html [https://perma.cc/D8H9-V5UZ].

39. Dorothy Heyl, *The Limits of Deception: An End to the Use of Lies and Trickery in Custodial Interrogations to Elicit the "Truth"?*, 77 ALB. L. REV. 931, 931–32 (2014).

40. 293 F. 1013, 1014 (D.C. Cir. 1923); *see also infra* Section II for more on *Frye*.

41. *See infra* notes 142–43 and accompanying text.

42. 970 N.E.2d 380, 380–81 (N.Y. 2012).

43. "When there is a fact issue as to whether an expert based their opinions on generally accepted principles, [a] court can hold a *Frye* hearing." Practical Law Litigation, *Admissibility of Expert Witness Testimony in New York State Supreme Court* at Novel Science — Frye Hearing, WESTLAW, WL-014-2936, https://us.practicallaw.thomsonreuters.com/w-014-2936 [https://perma.cc/9ZWH-HDKK] (last visited Sept. 14, 2022)

44. *Bedessie*, 970 N.E.2d at 380–81.

Nearly a decade later, in *People v. Powell* (*Powell III*), the New York Court of Appeals reaffirmed that expert testimony may be admitted regarding the factors associated with false confessions, yet, the court held again that proffered expert testimony at the *Frye* hearing was properly excluded.[45] While still using the *Frye* standard for the admissibility of the expert testimony, the *Powell III* court went beyond the general acceptance test, stating that "an expert's opinion may be precluded if it presents too great an analytical gap between the data and the opinion proffered."[46] The court cited to *Bedessie* to rule that the trial court must also determine if the proffered testimony was relevant to the particular defendant and the defendant's interrogation before the court.[47] Further, the court found that defendant's expert did not link her research on the possible causes of false confession to the specific circumstances of the defendant's interrogation.[48]

This Note argues that *Bedessie* and *Powell III* hinder the likelihood of expert testimony on false confessions being admitted in New York state courts by imposing a relevancy and linkage requirement on top of *Frye*'s "general acceptance" test.[49] For example, if an expert testifies generally on potential causes of false confessions, yet does not point to specific evidence or the circumstances of the defendant's interrogation, that testimony could be excluded. This is true even if there is no recorded videotape of the interrogation for the expert to point to, which was the case in *Powell*[50] and *Bedessie*.[51] Thus, *Bedessie-Powell III*'s additional requirements make it harder for expert testimony on false confessions to be admitted. In both cases, the two proffered expert testimonies were excluded completely.

Most scholars have described these recent New York cases as welcome developments for allowing expert testimony on false confessions to be used in trial.[52] After all, *Bedessie* and *Powell III* both acknowledge that that

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45. People v. Powell, 182 N.E.3d 1028, 1039, 1054 (N.Y. 2021) [hereinafter *Powell III*].

46. *Id.* at 1038 (internal quotation marks and citations omitted).

47. *Id.*

48. *Id.* at 1039.

49. *See infra* Section II.C.

50. *See Powell III*, 182 N.E.3d at 1040 ("Dr. Redlich's report stated that the failure of the police to record the interrogation resulted in her uncertainty as to situational factors that may have been present.").

51. *See* People v. Bedessie, 970 N.E.2d 380, 387 (N.Y. 2012) (summarizing how Dr. Ofshe criticized the detective's failure to record the interview with Bedessie).

52. *See* Patricia A. Lynn-Ford, *Evidence*, 63 SYRACUSE L. REV. 745, 746–51 (2013) (discussing *Bedessie* and the admissibility of expert testimony on the issue of reliability of a confession in a Survey of recent New York cases); Karianne M. Polimeni, *New York on Eyewitness Identifications: Progressive or Regressive?*, 68 SYRACUSE L. REV. 635, 656 n.165 (noting that New York State has been more progressive on the issue of false confessions than wrongful confessions based on eyewitness identification); John Eligon, *State Court Allows False-Confession Experts, but Bar is High*, N.Y. TIMES (Mar. 29, 2012),

expert testimony on false confessions could be admissible "to educate a jury about those factors of personality and situation that the relevant scientific community considers to be associated with false confessions."[53] The effects, however, of requiring an expert's testimony to be carefully tailored to the facts of each case before they can be admitted remains unexplored.[54] Without helpful and relevant expert testimony, the likelihood of wrongful convictions based on false confessions increases.

Part I of this Note addresses the problem of false confessions in the context of wrongful convictions and criminal law. This part also discusses the disproportionate impact of false confessions on marginalized and vulnerable populations.

Part II of this Note discusses the general arguments for and against admitting expert testimony on false confessions in courts. Part II then focuses on New York's current case law and requirements for admitting expert testimony on false confessions, starting with *Bedessie*. Finally, this part analyzes how *Bedessie* and *Powell III* narrowed *Frye*'s general acceptance standard for using expert testimony on false confessions by requiring experts to tailor their testimony to the facts of each defendant's interrogation and case.

Part III of this Note discusses how *Bedessie* and *Powell III*'s additional requirements on top of *Frye*'s general acceptance test can result in the exclusion of relevant expert testimony. This Part then proposes potential solutions for overcoming these procedural barriers when attempting to admit relevant expert testimony on false confessions that could aid the jury. First, under the existing standard set forth in *Powell III*, lawyers must prepare their experts on how to present their expert testimony — ensuring that their analyses fit the facts of each case. Second, as admissibility of expert

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https://www.nytimes.com/2012/03/30/nyregion/new-yorks-highest-court-acknowledges-issue-of-false-confessions.html [https://perma.cc/3CUL-48F6] (reporting that the *Bedessie* decision was the first time the New York Court of Appeals allowed expert testimony at trial, and, despite the high bar for determining relevance, the decision "was a welcome sign for defense lawyers and innocence advocates").

53. *Bedessie*, 970 N.E.2d at 389; *Powell III*, 182 N.E.3d at 1056 (quoting *Bedessie*, 970 N.E.2d at 389).

54. Recent scholarship on false confessions touches on a variety of other topics. *See, e.g.*, Danielle Palmieri, *From Interrogation to Truth: The Juvenile Custodial Interrogation, False Confessions, and How We Think about Kids in Trouble*, 54 CONN. L. REV. 1, 1, 5–6 (2022) (proposing a community-centered approach to use neutral specialists, instead of law enforcement, for interrogations of juveniles); Meagan A. Mckenna, False Confessions: Forensic Psychologists as Expert Witness, at iv, 4–5 (2021) (Psy.D. Thesis, Alliant International University) (ProQuest) (exploring the standards of evaluation forensic psychologists use when serving as an expert witness evaluating claims of false confessions); Allan Fong, *Interrogations and False Confessions: How the Innocent are Made Guilty*, 30 S. CAL. REV. L. & SOC. JUST. 363, 382–88 (2021) (recommending solutions to modernize law enforcement interrogation practices).

testimony is within the trial court judge's discretion, and the New York Court of Appeals operates under an abuse of discretion standard, trial court judges should exercise their discretion in admitting expert testimony that is relevant to the case. The jury could then assess the weight and reliability of the evidence, with the aid of the expert testimony. Third, the New York Court of Appeals should broaden what constitutes an abuse of discretion when excluding expert testimony.

I. WRONGFUL CONVICTIONS AND FALSE CONFESSIONS

Wrongful convictions occur when innocent individuals are "wrongfully prosecuted, convicted, and incarcerated" — a gross miscarriage of justice and a failure of the American criminal justice system.[55] This Part gives a brief overview of the study of false confessions in the context of wrongful convictions and criminal law. Section I.A investigates the problem of false confessions, relying on psychological and sociological literature to identify situational and dispositional factors that could lead an innocent person to falsely confess. Section I.B then examines Supreme Court cases that allow for psychological interrogation, including techniques that science has shown could contribute to false confessions. Finally, Section I.C discusses the disproportionate impact false confessions have on marginalized populations.

As early as 1932, Edwin Borchard, in his pioneering book *Convicting the Innocent*, identified false confessions as one of the leading causes wrongful convictions.[56] Borchard detailed sixty-five convictions in his book, identified a number of causes of wrongful conviction, such as "eyewitness misidentification, perjured testimony, and police and prosecutorial misconduct," and suggested "policy solutions to reduce the frequency of wrongful conviction."[57] While Borchard documented each innocent defendant's case and potential causes leading to each wrongful conviction, his book did not systematically analyze the causes of error in each case studied.[58]

The advent of increasingly sophisticated forms of DNA technology and new scholarship that emerged in the 1990s generated a renewed energy and activism around the study of wrongful convictions.[59] In 1987, Hugo Bedau and Michael Radelet published a watershed study identifying 350 cases of wrongful convictions in America between 1900–1987, presenting a

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55. *See* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 901 (2004).

56. *Id.*

57. *Id.*

58. *Id.* at 902.

59. *See id.* at 903–04.

systematic analysis of the causes of these errors.[60] As the "largest and most compelling data set on wrongful convictions " at the time, Bedau and Radelet's article sparked renewed interest among scholars in the field.[61] Further, DNA technology allowed factual innocence to be established with certainty in numerous post-conviction cases, illuminating the errors and fallibility of the legal system.[62] These advances revealed that wrongful convictions are not infrequent cases that slipped through the cracks. Rather, they "occur with regular and troubling frequency in the American criminal justice system, despite our high-minded ideals and the numerous constitutional rights that are meant to procedurally safeguard the innocent against wrongful conviction."[63] Backed by renewed interest and new technology, scholarship on wrongful convictions and false confessions has continued to grow in the last few decades. False confession scholarship illustrates just one corner of an imperfect criminal justice system and the troubling idea that many more innocent, false confessors are still incarcerated today.

A. The Problem of False Confessions

False confessions, one of the leading causes of wrongful convictions in the United States,[64] are "admission[s] to a criminal act — usually accompanied by a narrative of how and why the crime occurred — that the confessor did not commit."[65] False confessions account for 12% of the total 3,233 exonerations recorded by the National Registry of Exonerations.[66] Still, the actual number of false confession cases are greater than the number of exonerations.[67] "[F]alse confessions . . . are generally invisible[,]"[68]

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60. *See id.* at 903; *see also* Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 58 (1987) ("Clear injustices perpetrated by the police compose nearly a quarter of the errors we have identified, and perhaps not surprisingly they were usually coerced confessions. In forty-nine of the cases (14 percent), the defendant's confession played an important role in his or her conviction, even though the confession was later shown to have been coerced.").

61. *See* Drizin & Leo, *supra* note 55, at 903.

62. *See id.* at 905.

63. *Id.*

64. *See supra* notes 36–39 and accompanying text.

65. Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. HUM. BEHAV. 3, 5 (2010).

66. *Percent Exonerations by Contributing Factor*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx [https://perma.cc/58JH-U53H] (last visited Sept. 22, 2022).

67. *See* SAMUEL R. GROSS & MICHAEL SHAFFER, EXONERATIONS IN THE UNITED STATES, 1989–2012 3 (2012).

68. *Id.*

making it a challenge to accurately assess the frequency of wrongful convictions and false confessions.[69]

Furthermore, exoneration statistics do not provide a full picture of the problem of false confessions.[70] Most suspects who falsely confess are never convicted if their charges are dismissed before trial or never filed.[71] Few convictions based on false confessions are cleared by exoneration.[72] False confessions lead to a strong inference of guilt and unleash a "chain of confirmation biases that make the consequences difficult to overcome despite innocence."[73] From the moment a false confession is coerced, the effects of the confession follow the defendant through the interrogation, the trial, the sentencing, and any post-conviction relief and appeals,[74] and also undeniably shape how other people look at the defendant.[75]

The idea of false confessions is a counterintuitive one: "[h]ow could innocent people convincingly confess to crimes they knew nothing about?"[76] Commentators, even influential legal scholars, did not believe that false confessions occurred for decades, until the dramatic shift in understanding

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69. *See* Richard Leo, *Police Interrogations, False Confessions, and Alleged Child Abuse Cases*, 50 U. MICH. J.L. REFORM 693, 699 (2017).

70. *See* Samuel Gross & Maurice Possley, *For 50 Years, You've Had "The Right to Remain Silent": So Why Do So Many Suspects Confess to Crimes They Didn't Commit?*, MARSHALL PROJECT (June 12, 2016), https://www.themarshallproject.org/2016/06/12/for-50-years-you-ve-had-the-right-to-remain-silent [https://perma.cc/P5M5-H5YZ].

71. *See id.*

72. *See id.* (only a third of these cases were exonerations after conviction, while the charges for most of the cases were "dismissed before trial or never filed at all because of indisputable proof of innocence").

73. Saul M. Kassin, *Why Confessions Trump Innocence*, 67 AM. PSYCH. 431, 441 (2012). As defined by the American Psychological Association, confirmation bias is "the tendency to gather evidence that confirms preexisting expectations, typically by emphasizing or pursuing supporting evidence while dismissing or failing to seek contradictory evidence." *Confirmation Bias*, APA DICTIONARY OF PSYCH. (2022), https://dictionary.apa.org/confirmation-bias [https://perma.cc/YQ9B-N7DX].

74. *See* Kyle C. Scherr, Allison D. Redlich & Saul M. Kassin, *Cumulative Disadvantage: A Psychological Framework for Understanding How Innocence Can Lead to Confession, Wrongful Conviction, and Beyond*, 15 PERSPS. ON PSYCH. SCI. 353, 354 (2020) (presenting a framework for how an innocent suspect, once targeted by an interrogator's presumption of guilt, can be cumulatively disadvantaged through multiple stages: "starting during police interviews and custodial interrogations; continuing into the investigation of witnesses, alibis, and forensic evidence and through guilty-plea negotiations with prosecutors and/or a courtroom trial before a judge and jury; and persisting into postconviction appeal efforts at exoneration and reintegration into society").

75. *Id.* at 368 (noting how the persisting stigma of being a guilty criminal can be linked to an exonerated individual, even "precipitat[ing] a series of negative judgments of these individuals as lacking intelligence, suffering from mental health issues, not entirely innocent, and, ultimately, less deserving of government-sponsored reintegration aids such as psychological and career counseling and job training").

76. Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1052 (2010).

in recent years.[77] As a result, confessions have long been considered the "gold standard" of evidence,[78] and shown in mock jury studies as having more impact on verdicts than other potent forms of evidence.[79] Many do not understand why someone would confess to a crime they did not commit, and therefore fail to consider circumstances that could lead to false confessions.[80] People also do not adequately discount confessions, even when jurors are told it was the result of coercion, or that the confessor suffered from psychological illness or interrogation stress.[81]

The development of wrongful conviction scholarship has created a new awareness across all fields — including "scholars, legislators, courts, prosecutors, police departments, and the public" — that innocent people falsely confess.[82] Recent high-profile cases such as the Central Park Five, as well as the increased popularity of true crime documentaries in popular media, have generated public interest in the phenomenon of false confessions.[83] Melissa Lucio's case is yet another example in 2022, as the nation grappled with how a mother was somehow led to death row based on an admission that occurred under a highly coercive and guilt-presumptive interrogation.[84]

Psychological and sociological literature have elaborated on a number of factors that contribute to the likelihood of false confessions. Specifically, studies have "identified both dispositional [factors] (e.g., youth, cognitive impairment, psychological disorders) and situational factors (e.g., length of

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77. *Id.* ("For example, John Henry Wigmore wrote in his 1923 evidence treatise that false confessions were 'scarcely conceivable' and 'of the rarest occurrence' and that '[n]o trustworthy figures of authenticated instances exist.'").

78. Kassin et al., *supra* note 65, at 4; Jennifer Lackey, *False Confessions and Testimonial Injustice*, 110 J. CRIM. L. & CRIMINOLOGY 43, 44 (2020).

79. *See* Kassin, *supra* note 73, at 441; *see also DNA Exonerations in the United States*, *supra* note 36 (recording that "23 (22%) of the 104 people whose cases involved false confessions had exculpatory DNA evidence available at the time of trial but were still wrongfully convicted [as of July 29, 2020]").

80. *See* Drizin & Leo, *supra* note 55, at 910 ("Like many criminal justice officials, most people appear to believe in what one of the authors has labeled 'the myth of psychological interrogation': that an innocent person will not falsely confess to a serious crime unless he is physically tortured or mentally ill.").

81. *See* Kassin, *supra* note 73, at 433–34.

82. Garrett, *supra* note 76, at 1052–53; *see also* Emma Cueto, *Do People Give False Confessions? All Too Often, Experts Say*, LAW360 (Feb. 3, 2019), https://www.law360.com/articles/1124914/do-people-give-false-confessions-all-too-often-experts-say [https://perma.cc/EK5Z-7JBE] (referencing Professor Saul M. Kassin, Professor Brandon Garrett, and forensic expert Brian Leslie and summarizing the false confession phenomenon).

83. *See* Hannah Brudney, *Confessions of a Teenage Defendant: Why a New Legal Rule Is Necessary to Guide the Evaluation of Juvenile Confessions*, 92 S. CAL. L. REV. 1235, 1238 (2019).

84. *See supra* notes 1–30 and accompanying text.

interrogation, false evidence, minimization themes that imply leniency)" that contribute to the risk of false confessions.[85] First, for dispositional factors, certain marginalized and vulnerable populations may have personal risk factors that could lead to a higher likelihood of false confessions.[86] For example, Dr. Gisli H. Gudjonsson pioneered a clinical, individual-differences approach, and devised a compliance scale and the popular Gudjonsson Suggestibility Scale (GSS) to measure an individual's susceptibility to influence.[87] Studies using GSS have shown that an individual's suggestibility under interrogation can correlate with cognitive and personality measures, such as ethnic background,[88] age,[89] and intelligence.[90] Second, common situational risk factors, including lack of sleep, food, drink, physical discomfort, excessive interrogation length and isolation from friends, family, and legal counsel, "deplete the self-control necessary to maintain one's innocence."[91] Innocent suspects may confess due to feeling terrified, helpless, and exhausted in an isolating situation, because they are deceived or tricked by interrogation tactics, or simply because they do not understand what they are doing.[92]

Two significant articles written in the 1990s by social psychologists Richard Ofshe and Richard Leo outlined how police elicit confessions from the innocent through their highly influential rational choice decision

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85. *See* Brent Snook et al., *Urgent Issues and Prospects in Reforming Interrogation Practices in the United States and Canada*, 26 LEGAL & CRIMINOLOGICAL PSYCH. 1, 9 (2021); *see also* Kassin & Gudjonsson, *supra* note 33, at 51–55 (describing personal and situational risk factors).

86. *See* Kassin & Gudjonsson, *supra* note 33, at 52–53; Brudney, *supra* note 83, at 1247.

87. Dr. Gudjonsson served as one of the experts as part of Melissa Lucio's Clemency Application, and also wrote an op-ed on how Lucio's testimony has the hallmarks of a false confession. *See* Gudjonsson, *supra* note 23. *See generally* GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK (Wiley ed. 2003).

88. One study found that "Afro-Caribbean police detainees scored significantly higher than their Caucasian counterparts on all the . . . suggestibility measures." GUDJONSSON, *supra* note 87, at 65.

89. A number of studies indicate that younger children are more susceptible than older children and are more likely to give in to leading questions or interrogative pressure. *See id.* at 381.

90. One study found that subjects with IQs below 100 correlated significantly with suggestibility, while IQs above 100 did not correlate significantly. *Id.* at 382. Other studies found no significant correlations between intelligence and suggestibility. *Id.* at 383. Gudjonsson proposes that suggestibility is mediated by a range of factors, rather than one singular factor — thus, intellectual functioning is only one of several factors. *Id.* at 384.

91. Ilann M. Maazel, *False Confessions, Mistaken Identification and Wrongful Convictions*, N.Y.L.J. (Mar. 10, 2021), https://www.law.com/newyorklawjournal/2021/03/10/false-confessions-mistaken-identification-and-wrongful-convictions/ [https://perma.cc/PVB2-GWVJ].

92. *See* Gross & Possley, *supra* note 70; *Expert Testimony on False Confessions* § 1:24 *in* PSYCH. & SCI. EVIDENCE IN CRIM. TRIALS (2022).

theory.[93] Following the tradition of Edwin Borchard, Ofshe and Leo used a case study approach to analyze cases involving individuals who had confessed and were convicted.[94] In a similar vein, Barry Scheck and Peter Neufeld founded the Innocence Project in 1992 using DNA technology as a way to reinvestigate cases, test biological evidence, and exonerate wrongfully convicted prisoners.[95]

Professor Saul M. Kassin, a leading expert on false confessions, notes that the scientific community agrees that false confessions do occur, and that certain dispositional and situational factors increase the likelihood of someone falsely confessing to a crime they did not commit.[96] For example, the American Psychology-Law Society published a white paper on the risk of presenting false evidence.[97] The American Psychological Association also passed a resolution on the Interrogations of Criminal Suspects warning against coercive interrogations that could lead to false confessions.[98] In a 2018 survey of 87 Ph.D. experts on the psychology of confessions worldwide, 94% endorsed as highly reliable the proposition that "[p]resentations of false incriminating evidence during interrogation increase the risk that an innocent suspect would confess" while 100% agreed "[m]isinformation about an event can alter a person's memory for that event."[99] Besides confirming that false confessions do occur, decades of scientific research have shown the need to consider situational and

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93. *See* Richard J. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 STUD. L., POL. & SOC'Y 189 (1998) [hereinafter Ofshe & Leo, *The Social Psychology of Police Interrogation*]; Richard J. Ofshe & Richard A. Leo, *Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979 (1997) [hereinafter Ofshe & Leo, *The Decision to Confess Falsely*].

94. *See* Ofshe & Leo, *The Decision to Confess Falsely*, *supra* note 93, at 985–86 (finding that psychological interrogation is so effective because "[a]n interrogator's goal is to lead the suspect to conclude that confessing is rational and appropriate," using tactics such as: leading suspects to believe that there is overwhelming evidence against them, that there are advantages if they confess, and that ultimately, the marginal benefits of confessing outweigh the marginal costs); *see also* Ofshe & Leo, *The Social Psychology of Police Interrogation*, *supra* note 93, at 210–38 (illustrating the five proposed classification schemes of voluntary and reliable confessions, stress-compliant unreliable confessions, coerced-compliant reliable confessions, non-coerced-persuaded confessions, and coerced-persuaded confessions, through real cases and excerpts from the interrogation); Saul M. Kassin & Allison D. Redlich, *On the General Acceptance of Confessions Research: Opinions of the Scientific Community*, 72 AM. PSYCH. 65, 74–76 (2018).

95. Kassin & Redlich, *supra* note 94.

96. Kassin, *supra* note 37.

97. *See generally* Kassin et al., *supra* note 65.

98. *See generally Resolution on Interrogations of Criminal Suspects*, AM. PSYCH. ASS'N (Feb. 2022), https://www.apa.org/about/policy/interrogations [https://perma.cc/X5VE-PBN6].

99. *See* Kassin & Redlich, *supra* note 94, at 71–72.

dispositional factors that could lead an innocent individual to falsely confess in the criminal justice context.

B. Supreme Court Cases on Psychological Interrogation

Current Supreme Court jurisprudence allows for psychological interrogations[100] that contribute to false confessions. Though the landmark decision *Miranda v. Arizona*[101] recognized that modern psychological interrogation "exacts a heavy toll on individual liberty and trades on the weakness of individuals," the Court did not forbid these practices.[102] Thus, interrogators can use *Miranda* as justification for the legality of coercive techniques.[103] Instead of regulating the interrogation process, the Court required police to give warnings before they start, and then only continue if the suspect waives his right to silence; only the warnings and waiver are required before admitting any statements made by a defendant.[104] This constitutional framework is concerned with the "procedural fairness of police questioning" but not police inducements and tactics that could lead to false confessions.[105]

In *Frazier v. Cupp*, the Supreme Court made it lawful for police to elicit confessions by outright lying to suspects about evidence.[106] Police continue to use psychological techniques in interrogations today. For example, the Reid technique, an accusatory method of questioning designed to elicit a confession (even through the use of deceptive tactics), is the most prevalent training programs for interrogators in the United States.[107] Although the technique is allowed under current United States Supreme Court precedent, it "has been increasingly criticized for its guilt-presumptive approach, its coercive nature, and its premise of isolating and psychologically manipulating the suspect."[108]

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100. Rather than relying on physical tactics, modern day police interrogations use a guilt-presumptive approach of social influence to elicit confessions, using techniques involving custody and isolation, confrontation, minimization, and even trickery and deception. *See* Kassin & Gudjonsson, *supra* note 33, at 41–43.

101. *See generally* 384 U.S. 436 (1966).

102. *Id.* at 455.

103. *See* Gross & Possley, *supra* note 70.

104. *See Miranda*, 384 U.S. at 476–79.

105. Ofshe & Leo, *The Decision to Confess Falsely*, *supra* note 94, at 1117 (noting the lack of substantive safeguards under constitutional law of criminal procedure for police inducements that could lead to false confessions, because psychological tactics "do not legally qualify as coercive or fundamentally unfair").

106. *See* 394 U.S. 731, 737–39 (1969).

107. *See* Ariel Spierer, *The Right to Remain a Child: The Impermissibility of the Reid Technique in Juvenile Interrogations*, 92 N.Y.U. L. REV. 1719, 1721–22 (2017).

108. *Id.* at 1721–22.

The Supreme Court still allows the police to use psychological techniques such as "isolation, accusation, attacks on the suspect's alibi, cutting off denials, confrontation with true or false incriminating evidence, the use of 'themes' . . . and inducements."[109] These interrogation techniques involve both maximization and minimization.[110] Maximization tactics "intimidate a suspect by making him believe that the magnitude of the charges and the seriousness of the offense will be exaggerated if he does not confess," while minimization tactics "lull a suspect into believing that the magnitude of the charges and the seriousness of the offense will be downplayed or lessened if he confesses."[111] Importantly, psychological methods of interrogation have evolved to become more sophisticated, "relying on more subtle forms of manipulation, deception, and coercion."[112] Under the guise that these tactics are not illegal, police continue to use these psychological interrogations elicit false confessions, even coming up with new tactics that contribute to false confessions.[113]

Finally, one of the main "purpose[s] of American police interrogation is to elicit incriminating statements and admissions — ideally a full confession — in order to assist the State in its prosecution of the defendant."[114] Rather than focusing on the search for truth for each individual case, the police's end goal of eliciting a confession to be used in the courtroom, and using psychological tactics that satisfies the Supreme Court minimal standard, is a misuse of police interrogation power that exacerbates the problem of wrongful convictions in the United States.

C. The Disproportionate Impact of False Confessions on Marginalized Populations

A false confession is even more troubling when assessing its disproportionate impact on marginalized and vulnerable populations, and how it contributes further to mass incarceration and injustice in the American criminal system.

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109. Drizin & Leo, *supra* note 55, at 911–12.

110. *Id.* at 912.

111. *Id.*

112. *Id*. at 910; *see also* Ofshe & Leo, *The Social Psychology of Police Interrogation*, *supra* note 94, at 190 (observing that "accusatory interrogation has become more subtle, sophisticated and differentiated" with the use of psychological methods, and that false confessions are caused by "inappropriate, improper, and inept use" of such methods).

113. *See infra* notes 155–57 and accompanying text.

114. Drizin & Leo, *supra* note 55, at 911.

First, research has shown that juveniles are disproportionately represented in false confession populations.[115] As mentioned *supra*, the Central Park Five case illustrated how juveniles are vulnerable to false confessions.[116] Specifically, juveniles have unique dispositional and situational factors that make them more susceptible to interrogation techniques.[117] For example, juvenile brains have different neurological and cognitive capabilities than adult brains, such as the underdevelopment of the prefrontal cortex, hypersensitivity to short-term rewards, and inability to consider long-term consequences.[118]

The troubling effect of false confessions on juvenile populations is compounded when considered alongside the racial inequality entrenched in the criminal justice system.[119] The Central Park Five case is just one example that "fit[s] into a broader pattern that included the Scottsboro Boys from the 1930s, the Trenton Six from the 1940s and the Harlem Six from the 1960s — all cases of racial injustice involving groups of minority youths charged or convicted of violent crimes against white victims, but eventually overturned."[120] The vicious cycle starts with minorities being more likely to be arrested as juveniles, thereby leading to a higher likelihood of false

115. Brudney, *supra* note 83, at 1242 (collecting statistics on the prevalence of false confession in exonerated juveniles and noting that "juveniles are disproportionately more likely than adults to falsely confess to a crime they did not commit"); *DNA Exonerations in the United States*, *supra* note 36 (reporting that 31% of the false confessors out of the 375 DNA exoneration cases recorded by the Innocence Project were 18 years old or younger at the time of arrest).

116. *See* Brudney, *supra* note 83.

117. *See id.* at 1247; Palmieri, *supra* note 54, at 6–7.

118. *See* Brudney, *supra* note 83, at 1247–49; Palmieri, *supra* note 54, at 11.

119. *See generally* ELIZABETH HINTON ET AL., AN UNJUST BURDEN: THE DISPARATE TREATMENT OF BLACK AMERICANS IN THE CRIMINAL JUSTICE SYSTEM (2018), https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf [https://perma.cc/N2VT-TH32] (presenting an overview of how America's history of racism and oppression continues to manifest itself in the disproportionate representation of Black Americans in the nation's criminal justice system). *See also* ASHLEY NELLIS, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 5 (2021) https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/ [https://perma.cc/L3U8-AGH5] (finding that "Black Americans are incarcerated in state prisons at nearly 5 times of the rate of white Americans" and "Latinx [Americans] are incarcerated in state prisons at . . . 1.3 times the incarceration rate of white[] [Americans]").

120. Carl Suddler, *How the Central Park Five Expose the Fundamental Injustice in Our Legal System*, WASH. POST (June 12, 2019, 6:00 AM), https://www.washingtonpost.com/outlook/2019/06/12/how-central-park-five-expose-fundamental-injustice-our-legal-system/ [https://perma.cc/7EVJ-XR9N] (noting that "racial hysteria and the stigma of criminality attached to [B]lack and Latino youths — especially in cases of violent crimes against white women" is a major driver for cases such as the Central Park Five and the Harlem Six).

confessions.[121] Additionally, Professor Lackey notes that "there is reason to believe that racial prejudice or bias is at work in convictions based on false confessions . . . [g]iven that 85% of juvenile exonerees who falsely confessed are African American, there is further reason to conclude that racism is a significant factor when looking at why confessing selves are given a credibility excess."[122]

Additionally, people with mental impairments and mental illnesses are particularly vulnerable to false confessions.[123] According to the National Registry of Exonerations, as of 2022, 69% of the 174 exonerees with mental illness or intellectual disability falsely confessed.[124] In contrast, out of the 2,886 exonerees with no disability reported, only 8% falsely confessed.[125] It is well-documented that individuals with mental disabilities face heightened risks in the context of police interrogations.[126] For example, this population could have "lower than average comprehension of their *Miranda* rights and ability to invoke them; limitations in cognitive and linguistic abilities; a greater tendency toward social compliance; and a higher likelihood of internalizing false information that is repeatedly fed to a suspect in an interrogation context."[127] These risks, combined with law enforcement's use of coercive and deceptive interrogation techniques, lead to a greater possibility of false confessions.[128]

Lastly, as discussed in its intersection with juvenile groups, race likely also plays a factor when it comes to the likelihood of false confessions, as

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121. *See* Edwin Grimsley, *What Wrongful Convictions Teach Us About Racial Inequality*, INNOCENCE PROJECT (Sept. 26, 2012), https://innocenceproject.org/what-wrongful-convictions-teach-us-about-racial-inequality/ [https://perma.cc/F57E-ZTRA] ("Many African-American and Hispanic exonerated men who were arrested as juveniles in urban communities were coerced into give [sic] incriminating statements that significantly differed from the crime scene evidence.").

122. Lackey, *supra* note 78, at 67.

123. Rebecca Brown et al., *Attacking the False Confession: Advocacy in the State Forum*, NAT'L ASS'N DEF. L., https://www.nacdl.org/Article/FalseConfessionJune2020IssueMembershipMarketing083 [https://perma.cc/64JU-L9PR] (last visited Sept. 16, 2022).

124. *Age and Mental Status of Exonerated Defendants Who Confessed*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Documents/False%20Confession%20Table%20N=3060.pdf [https://perma.cc/W5ZE-MBWM] (last visited Sept. 12, 2022).

125. *Id.*

126. *See, e.g.*, Samson J. Schatz, *Interrogated with Intellectual Disabilities: The Risks of False Confession*, 70 STAN. L. REV. 643, 658–77 (2018) (discussing the heightened risks faced by individuals with intellectual disabilities and providing a methodology for identifying indicia of intellectual disability within the larger NRE database).

127. Brown et al., *supra* note 123.

128. *See* Michelle H. Walton, *Barriers to Justice: Inaccessibility of New York's Criminal Justice System for Individuals with Intellectual and Developmental Disabilities*, 14 ALB. GOV. L. REV. 71, 83–86 (2021).

Black and Latinx populations are more likely to be targeted unfairly by the police.[129] According to the Innocence Project, 60% of the 375 DNA exonerees are African American, 8% are Latinx,[130] and 40% of Latinx exonerees are individuals who falsely confessed to crimes they did not commit because they did not understand English.[131] One 2015 dissertation on the effect of race in police interrogations observed that there has been little research on this topic thus far.[132] This dissertation used interviews from Black and white participants in a mock crime interview to evaluate the role a suspect's race plays in police officer's veracity judgments.[133] The results indicated that "police officers were significantly more likely to misjudge innocent Black suspects as guilty than innocent White suspects, while showing no difference in their accuracy rates for guilty suspects."[134] The dissertation also found that "police officers judged Black suspects to be less cooperative and less forthcoming than White suspects."[135]

Another 2020 study on the disproportionate representation of Black individuals among the wrongfully convicted suggests that "contributors to wrongful conviction that involve perceived criminality, such as racial bias, eyewitness error and official misconduct, are more common in cases of African American exonerees."[136] Further, although this topic is not well-researched, immigrants or Limited English Proficient (LEP) criminal defendants could also be vulnerable to false confessions, even if they are not a group usually associated with false confessions.[137]

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129. *See Criminal Justice Fact Sheet*, NAACP, https://naacp.org/resources/criminal-justice-fact-sheet [https://perma.cc/R9JL-U9YD] (last visited Sept. 12, 2022) ("A Black person is five times more likely to be stopped without just cause than a white person . . . [and 65% of Black adults, and 35% of Latino and Asian adults] . . . have felt targeted because of their race.").

130. *DNA Exonerations in the United States*, *supra* note 36.

131. *See* Daniele Selby, *Why Latinx People Are Uniquely Vulnerable to Wrongful Conviction*, INNOCENCE PROJECT (Oct. 7, 2020), https://www.innocenceproject.org/how-wrongful-conviction-impacts-latinx-latino-hispanic-communities/ [https://perma.cc/8NFR-9NYW].

132. *See* Sara C. Appleby, Guilty Stereotypes: The Social Psychology of Race and Suspicion in Police Interviews and Interrogations (2015) (Ph.D. dissertation, City University of New York) (on file with CUNY Academic Works, City University of New York).

133. *Id.* at iv.

134. *Id.*

135. *Id.*

136. *See* Elizabeth J. Lattner, Perceived Black Criminality and Its Impact on Contributors to Wrongful Convictions in Cases of African American Men (Aug. 2020) (M.A. thesis, Ohio University) (on file with Ohio University) (experimental study that "examines the effects of perceived criminality and cultures of racial hostility on the contributors to wrongful convictions in 2,141 male exonerees").

137. *See* Sarah Moya, *Language Barriers and Cultural Incompetency in the Criminal Legal System: The Prejudicial Impacts on LEP Criminal Defendants*, 49 FORDHAM URB. L.J. 401, 411 (2022) (noting how many immigrants or less-educated LEP criminal defendants

The populations presented in this section are by no means the only populations that could be more prone to false confessions. The research summarized above, however, does indicate that marginalized and vulnerable populations already likely to suffer under the inequities of the criminal justice system are also disproportionately impacted by the problem of false confessions.

II. THE PROBLEM OF EXPERT TESTIMONY

Despite the established literature on the occurrence of false confessions, the admissibility of expert testimony on false confessions in courts remains a contentious issue. In 2013, the Supreme Court declined to grant review on the question of admissibility of expert testimony on false confessions.[138] Both the federal circuits and state courts remain divided on the admissibility of expert testimony on false confessions, even where the testimony satisfied the statutory and jurisprudential standards of admissibility.[139]

Courts usually defer to confession evidence.[140] While federal judges have evidentiary discretion to admit or exclude confession evidence,[141] the

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"lack familiarity with the customs and culture surrounding law enforcement in the United States"); *see also* William Y. Chin, *Multiple Cultures, One Criminal Justice System: The Need for a "Cultural Ombudsman" in the Courtroom*, 53 DRAKE L. REV. 651, 658–59 (2005) ("Cultural incompatibility also creates problems for minority defendants, such as the minority defendant waiving important rights, mistakenly admitting to charges, and suffering unanticipated consequences . . . [such as] if the immigrant defendant fears authority and thus agrees to whatever the authorities demand, including admitting to crimes the defendant did not commit."); Palmieri, *supra* note 54, at 9–11 (observing how linguistic diversity can impact an individual's experience in the interrogation room).

138. *See* Motion for Leave to Proceed in Forma Pauperis Petition for a Writ of Certiorari at i, Boyer v. Louisiana (2012) (No. 11-9953) (presenting the admissibility of "relevant and reliable expert testimony as to the psychology of interrogations and false confessions" as one of the questions) [hereinafter Boyer v. Louisiana Cert Petition]; *see also* Boyer v. Louisiana, 568 U.S. 936 (2012) (denying to review the question on the issue of expert testimony on false confessions), *cert. dismissed as improvidently granted*, 133 S. Ct. 1702 (2013) (per curiam) (denying to review the question on the issue of expert testimony on false confessions).

139. *See* Boyer v. Louisiana Cert Petition, *supra* note 138, at 27–35 (reviewing splits in circuit courts and state courts); *see also* Hugh Kaplan, *New Research Wasn't Enough to Admit Expert Testimony on False Confessions*, BLOOMBERG L. NEWS (Mar. 19, 2014, 12:00 AM), https://news.bloomberglaw.com/product-liability-and-toxics-law/new-research-wasnt-enough-to-admit-expert-testimony-on-false-confessions [https://perma.cc/53BZ-A235].

140. *See* Kassin et al., *supra* note 65, at 9 ("Judicial respect for confessions emanates from the power of confession evidence and the critical role that confessions play in solving crimes.").

141. *See* FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."). New York State follows the Federal Rules of Evidence on this point, allowing trial judges to have discretion in excluding evidence. Guide to New York Evid. rule 4.07, Exclusion of Relevant Evidence, https://www.nycourts.gov/judges/evidence/4-

probative value of a proper confession would not be substantially outweighed by prejudice, as the confession is highly relevant and directly related to whether the defendant is guilty of the crimes charged.[142] Courts are inconsistent when it comes to admitting expert testimony on the psychology of confessions, with some admitting such testimony under certain circumstances, and other courts excluding experts for a variety of reasons: that the testimony is not helpful to jury, not reliable, or not generally accepted.[143]

The "general acceptance" test on the admissibility of expert testimony was first articulated in 1923 in *Frye v. United States*.[144] There, the United States Court of Appeals for the District of Columbia Circuit held that "a well-recognized scientific principle or discovery . . . must be sufficiently established to have gained general acceptance in the particular field in which it belongs."[145] In 1993, the Supreme Court replaced *Frye* in federal courts with *Daubert v. Merrell Dow Pharm., Inc.*, holding that trial judges "must determine at the outset . . . whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine fact in issue."[146] The Court presented a non-exhaustive list of five factors to consider: (1) whether a theory or technique could be tested; (2) whether the theory or technique has been subjected to peer review; (3) the known potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; and finally, (5) the "general acceptance" factor.[147] Soon after, the Federal Rules of Evidence were modified to codify the principles of *Daubert*.[148]

RELEVANCE/4.07_EXCLUSION%20OF%20RELEVANT%20EVIDENCE.pdf [https://perma.cc/M48D-DXHT].

142. *See, e.g.*, People v. Mateo, 811 N.E.2d 1053, 1071, 1083 (N.Y. 2004) (holding that defendant's confession was voluntary and finding that the probative value of defendant's full confession was not substantially outweighed by its potential for prejudice to defendant).

143. *See* Kassin & Redlich, *supra* note 94, at 66; *see also Expert Testimony on False Confessions*, *supra* note 92.

144. Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

145. *Id.* This general acceptance standard "served as the benchmark for admissibility of expert evidence for most of the twentieth century" and is widely known as the *Frye* "general acceptance" test. 6 CLIFFORD S. FISHMAN & ANNE T. MCKENNA, JONES ON EVIDENCE § 45:1 (7th ed. 2022).

146. Daubert v. Merrell Dow Pharm., Inc., 508 U.S. 579, 588 (1993).

147. *Id.* at 594. The *Daubert* and Rule 702 inquiry are meant to be "flexible" with the emphasis "solely on principles and methodology, not on the conclusions that they generate." *Id.* at 594–95.

148. FED. R. EVID. 702 ("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

State courts have adopted either the *Frye* test, the *Daubert* test, a hybrid approach, or their own separate framework.[149] Currently, eight states follow *Frye*, most other states have adopted *Daubert* in whole or in part, and three states uses their own standard.[150] New York remains a *Frye* jurisdiction,[151] and this Note will focus its analysis on expert testimony in New York state courts. Section II.A. makes the case for admitting expert testimony on false confessions, while Section II.B. describes the case for excluding expert testimony on false confessions.

A. The Case for Admitting Expert Testimony

Many scholars and commentators have argued for the increased use of expert testimony in courts to aid jurors in understanding how and why false confessions occur. Their main argument is that, despite the increasing awareness of false confessions, real jurors still have no common understanding of the scientific literature on this highly counter-intuitive idea of false confessions.[152] The American Psychological Association (APA) has submitted various amicus curiae briefs in a range of court cases similarly emphasizing the difficulty of assessing confession evidence, arguing that "psychological experts should be permitted to testify at trial because their testimony would draw from generally accepted research and would assist the trier of fact."[153] Experts on false confessions overwhelmingly agree that their role is to aid the jury in assessing confession evidence.[154]

One article collecting commentaries from 11 authors on reforming police interrogation techniques in the United States highlights the importance of

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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.").

149. FISHMAN & MCKENNA, *supra* note 145, at § 45:5.

150. Kassin & Redlich, *supra* note 94, at 74.

151. Guide to New York Evid. Rule 7.01 Opinion of Expert Witness (revised Dec. 2021), https://nycourts.gov/JUDGES/evidence/7-OPINION/Opinion.shtml [https://perma.cc/DZ92-6SZS] (setting forth "New York's continued adherence to the rule of *Frye v. United States*"); *see* FISHMAN & MCKENNA, *supra* note 145, at § 45:38.

152. *See* Leo, *supra* note 69, at 700.

153. *See* Kassin, *supra* note 73, at 435 (referencing Brief for Amicus Curiae American Psychological Association, Rivera v. Illinois (Ill. App. Ct. July 12, 2010) (No. 2-09-1060), http://www.apa.org/about/offices/ogc/amicus/rivera.aspx [https://perma.cc/7U5D-TLNH]; Brief for Amicus Curiae American Psychological Association in Support of Appellant, Michigan v. Kowalski (Mich. Sept. 1, 2011) (No. 141932), https://www.apa.org/about/offices/ogc/amicus/kowalski.pdf [https://perma.cc/XUE8-EAZD].

154. *See* Kassin & Redlich, *supra* note 94, at 63. In the 2018 survey of 87 confession experts mentioned by Kassin and Redlich, one pertinent opinion notes that "[r]egarding their role as scientific experts, virtually all respondents stated that their primary objective was to educate the jury and that juries are more competent at evaluating confession evidence with assistance from an expert than without." *Id.*

expert testimony in cases involving false confessions.[155] Dr. Allison D. Redlich's commentary discusses the issue of interrogating in the shadow of trial — that the goal of an accusatorial interrogation is to obtain a confession that can be admitted into court and lead to a conviction.[156] Law enforcement thus developed "tricks of the trade."[157] By way of example, the Reid technique[158] has now been modified to train law enforcement officers to "document if and when suspects were given food, water, breaks and so on . . . . They may also ask suspects on the record if they were treated well or that they were not threatened or promised anything."[159] Dr. Redlich argues that "[i]nterrogators interrogate in the shadow of trial by documenting the same indicators of voluntariness and reliability that judges rely on when evaluating confession evidence" — and urgent reform is needed to identify these techniques to "disabuse judges and other triers of facts" on what really is or is not voluntary admissions of guilt.[160]

Professor Kassin's commentary discusses how false evidence ploys used in the Reid technique and other confrontational approaches can lead innocent people to confess.[161] Notably, Professor Kassin states that the overview of research consists of "indications of general acceptance within the scientific community," tracking the language of the *Frye* general acceptance test.[162] That there is general acceptance within the scientific community is a major argument in favor of admitting expert testimony on false confessions in courts that follow the *Frye* jurisdiction.[163]

Finally, Laura H. Nirider's commentary elaborates on why the law fails to prevent false confessions. Nirider observes that "[a] profound disconnect exists between the current state of empirical knowledge regarding the problem of false confessions and the common law governing confessions."[164] For example, current Supreme Court jurisprudence only

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155. *See* Brent Snook et al., *Urgent Issues and Prospects in Reforming Interrogation Practices in the United States and Canada*, 26 LEGAL & CRIMINOLOGICAL PSYCH. 1, 10 (2021) (discussing what each of 11 authors views as the critical research and reform issues in the psychology of interrogation).

156. *Id.* at 7–8.

157. *Id.*

158. *See* Spierer, *supra* notes 107–08 and accompanying text.

159. Snook et al., *supra* note 155, at 8.

160. *Id.*

161. *See id.* at 9. In one interesting comparative analysis, Professor Kassin describes how "[i]n most of the world (e.g., England, France, Germany, Spain, New Zealand, Australia, Japan, Taiwan, and all of Scandinavia), police are not permitted to deceive suspects in this way . . . [y]et in some countries (e.g., United States, China, and Israel), this tactic is routinely used." *Id.*

162. *Id.*

163. *See id.*

164. *Id.* at 16.

bars involuntary confessions, and it separates questions of voluntariness from those of reliability.[165] This separation indicates that "judges must determine whether a confession is voluntary without reference to whether it is false."[166] Nirider also comments on how 35 years have passed since the U.S. Supreme Court last issued any substantive guidance on what it means for a confession to be involuntary.[167] Now it is up to lawyers, "armed with researchers' conclusions," to "urge the reformation of voluntariness law — from the U.S. Supreme Court down."[168]

As identified by these leading scholars on false confessions, there remain urgent issues and reformation needed in the legal justice system to bridge the gap between law and scientific research. A practical consequence of that sentiment includes presenting such expert testimony on false confessions in court to aid judges and triers of facts.

B. The Case for Excluding Expert Testimony

The most common reasons cited for excluding expert testimony on false confessions under the *Frye* test are that the testimony is not helpful to the jury, not reliable, not relevant, nor generally accepted in the scientific community.[169]

Courts also exclude expert testimony based on the idea that expert testimony "invades the province of the jury" and that such testimony won't actually benefit the jurors, when jurors are capable of assessing the validity of a confession themselves.[170] In *People v. Bedessie*,[171] the trial court judge excluded expert testimony on false confessions because the judge did not "see in any way, shape or form how an expert can assist . . . juror[s] in their ability to draw conclusions from the evidence in a case by case basis [as to] whether or not a confession was falsely given."[172] The judge further noted that "jurors are completely and utterly competent to draw from their own life

165. *Id.*
166. *Id.*
167. *Id.*
168. *Id* at 17.
169. *See* David A. Perez, *The (In)Admissibility of False Confession Expert Testimony*, 26 TOURO L. REV. 23, 41–42 (2010).
170. Jonathan P. Vallano & Ryan Winter, *A Look at Expert Testimony on False Confessions*, 44 AM. PSYCH. ASS'N 25, 25 (2013), https://www.apa.org/monitor/2013/03/jn# :~ :text=Courts%20often%20exclude%20expert%20testimony,expert%20testimony%2C%20and%20that%20juries [https ://perma.cc/MQG4-RANF].
171. *See* discussion *infra* Section II.C.i.
172. 970 N.E.2d 380, 383 (N.Y. 2012).

experiences [and], from their everyday experiences whether or not a statement is in fact voluntary and knowingly given."[173]

The judge was not questioning the validity of false confession as a phenomenon; rather, he remarked that "the phenomenon of false confessions . . . has moved from the realm of startling hypothesis into that of common knowledge, if not conventional wisdom."[174] The argument for excluding expert testimony is that problems associated with false confessions are now common knowledge, and there is no longer any need for expert testimony.

Other commentators have questioned the reliability of false confession evidence completely and argued that the jury should be the ultimate trier of fact.[175] David A. Perez acknowledges that there is a growing consensus that police interrogation tactics should be reformed and expert testimony on false confessions should be admitted in criminal trials.[176] Despite this acknowledgement, he argues for the exclusion of expert testimony on false confessions because the evidence is based on anecdotes rather than empirical research, and the methodology used in false confession research has a high rate of error.[177] Perez also asserts that false confessions do not occur as frequently as experts have claimed.[178] Finally, he argues that expert testimony would invade the province of the jury, and that the jury is an adequate protection against both false confessions and police coercion.[179] Additionally, Perez's critique involved looking at the influential studies this Note has mentioned so far: the 1998 Leo and Ofshe study[180] and the 1987 Bedau and Radelet study.[181] Perez questioned their statistically inadequate sample sizes and reliance on secondary sources for case studies.[182]

In response to the 1997 Leo and Ofshe study, Professor Paul G. Cassell wrote that the "empirical linchpin" for Leo and Ofshe's proposed study is missing, that they did not address the frequency claim of false confession properly, and that their proposal did not demonstrate how courts can

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173. *Id.*

174. *Id.* at 385. There were two panels of prospective jurors in *Bedessie*. During voir dire, "only one individual out of 28 questioned the proposition that an innocent person might confess to a crime he did not commit, even in the absence of physical coercion." *Id.*

175. *See* Perez, *supra* note 169, at 25 ("[F]alse confessions are exceedingly rare and . . . the evidence upon which the leading false confession scholars rely on is very unreliable.").

176. *Id.* at 24.

177. *Id.* at 44.

178. *Id.*

179. *See id.*

180. *See generally* Ofshe & Leo, *The Social Psychology of Police Interrogation*, *supra* note 93.

181. *See generally* Bedau & Radelet, *supra* note 60.

182. *See* Perez, *supra* note 169, at 45–46.

accurately exclude false confessions while properly admitting the true ones.[183] Cassell further argues that confessions, if true, have high probative value that is not substantially outweighed by unfair prejudice, and is powerful evidence of guilt.[184] Because confessions are considered the gold standard of evidence, adding expert testimony on false confessions could be an additional step with minimal effects, but it can also be confusing and misleading when the confession is true. Based on these considerations, some commentators are against the inclusion of expert testimony on false confessions in courts.

C. New York Cases on False Confession Expert Testimony

This Note now turns to the admissibility of expert testimony on false confessions in New York state courts. To qualify for admission, an expert's testimony must be based upon principles generally accepted within the relevant scientific community sufficient to satisfy the reliability concerns of *Frye*.[185]

1. People v. Bedessie

In recent years, New York State has allowed expert testimony on false confession to be used in court. In *People v. Bedessie*, the New York Court of Appeals considered for the first time "the admissibility of expert testimony proffered on the issue of the reliability of a confession" and held that "proper case expert testimony on the phenomenon of false confessions should be admitted."[186] Notably, the court stated that "there is no doubt that experts in such disciplines as psychiatry and psychology or the social sciences may offer valuable testimony to educate a jury about those factors of personality and situation that the relevant scientific community considers to be associated with false confessions."[187]

The *Frye* standard, however, still imposes limitations on when such testimony can be admitted, and the *Bedessie* court found that the trial court

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183. *See* Paul G. Cassell, *Balanced Approaches to the False Confession Problem: A Brief Comment on Ofshe, Leo, and Alschuler*, 74 DENV. L. REV. 1123, 1125–29 (1997). In response, Leo and Ofshe explained that their article was about how improper interrogation methods could lead to false confessions, and that Cassell's critique mistakenly focuses on the frequency of false confessions. *See* 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. L. REV. 1135, 1135 (1997).

184. *See* Cassell, *supra* note 183, at 1128.

185. BENCH BOOK FOR TRIAL JUDGES-NEW YORK § 6:6. EXPERT WITNESSES (2022); *see generally* Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

186. 970 N.E.2d 380, 380–81 (N.Y. 2012).

187. *See id.* at 388–89.

did not abuse its discretion when declining to hold a *Frye* hearing to determine whether the expert's opinion is based on principles "generally accepted in the scientific community" and thus, whether to permit the expert's testimony.[188] The *Bedessie* court clarified that the expert's proffered testimony "must be relevant to the defendant and interrogation before the court."[189] Yet, experts still "may not testify as to whether a particular defendant's confession was or was not reliable."[190]

Bedessie made statements to the police admitting to the alleged sexual abuse of a four-year-old boy, but later recanted her statements at trial.[191] She testified that Detective Bourbon accused her of sexual abuse and claimed he had a "recording of her voice on the tape recorder 'sexing' [sic] with the boy."[192] Bedessie challenged the detective to play the recording, but backed down when the Detective "confronted [her] with two options: to tell the truth and go home, or to go to a Rikers Island jail, where she would be beaten."[193] In response, Bedessie agreed to answer the detective's questions, telling the detective "she would 'do anything' for him if he would let her go home to her sickly mother."[194] She also testified that the detective gave his word that he would let her go home, and that he "wrote something on a piece of paper and directed her to sign it, [and] she did so without reading what she was signing."[195]

The defense submitted an application to the judge for permission to introduce the testimony of Dr. Ofshe, an expert on the field of false confessions.[196] Dr. Ofshe's proffer presented "information on the topic of police interrogation and tactics that can result in unreliable statements, information on the phenomenon of false confession and an analysis of Ms. Bedessie's interrogation."[197] The majority found that "Dr. Ofshe's proffer had nothing to say that was relevant to the circumstances of this case" and that his report was speculation; the conclusions were "unsupported even by

188. *Id.* at 381.
189. *Id.* at 389.
190. *Id.*
191. *See Bedessie*, 970 N.E.2d at 382, 384.
192. *Id.* at 384.
193. *Id.*
194. *Id.*
195. *Id.* at 385.
196. *See id.* at 383. If the judge had granted the application, Dr. Ofshe would have been allowed to testify as defendant's expert. This is the same Dr. Ofshe who presented the influential rational choice theory in the context of false confessions. *See* Ofshe & Leo, *The Social Psychology of Police Interrogation*, *supra* note 93; Ofshe & Leo, *The Decision to Confess Falsely*, *supra* note 93.
197. *Bedessie*, 970 N.E.2d at 386.

defendant's version of her interrogation."[198] The majority noted that Dr. Ofshe's discussion about young children in sex abuse cases had "nothing to do with any factors or circumstances correlated by psychologists with false confessions."[199]

Additionally, the majority noted that "certain types of defendants are more likely to be coerced into giving false confession — e.g., individuals who are highly complaint or intellectually impaired or suffer from a diagnosable psychiatric disorder" — but that Dr. Ofshe failed to proffer testimony that this specific defendant exhibited any of these traits.[200] As a result, the trial court declined to hold a *Frye* hearing, and the Court of Appeals upheld the trial court's decision.[201]

Dr. Ofshe also criticized the detective's failure to videotape the interview, because failing to record left the substance vulnerable to contamination, and it allowed the detective to steer the defendant into an inaccurate confession.[202] Despite this testimony by Dr. Ofshe, the court decided that these effects were mere speculation.[203]

Further, even where Dr. Ofshe's application to the court offered to apply the analysis of interrogation to the specifics of defendant's account, the majority still found that the descriptions were vague.[204] In one example, Dr. Ofshe stated that the defendant said the detective "accused her of sexually abusing the child in an aggressive and threatening manner, demeaned her by using vulgar language and was 'punishing' in other unspecified ways."[205] The majority found that Dr. Ofshe did not link defendant's statements to any published analyses of interrogations by the relevant scientific community, and that later in the trial testimony, the defendant did not testify about the alleged improper interrogation.[206] Dr. Ofshe also commented that:

> [i]n an interrogation such as [defendant's] in which the investigator relies on evidence ploys (claims that overwhelming evidence links the suspect to the crime) to base his a[s]sertion that the suspect's position is hopeless and therefore the suspect will be arrested, tried and convicted, introducing the treatment alternative strategy is likely to be very influential.[207]

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198. *Id.*
199. *Id.* at 386–87.
200. *Id.* at 387.
201. *See id.* at 381 (reasoning that the trial court did not abuse its discretion).
202. *See id.* at 387.
203. *See Bedessie*, 970 N.E.2d at 387.
204. *See id.* at 388.
205. *Id.*
206. *See id.*
207. *Id.* (quoting Dr. Ofshe's trial testimony).

The two alternatives were either that the defendant confess or that she be "sent to Rikers Island where she would be brutalized by the other inmates because she was a child abuser."[208] The majority was not convinced that this was sufficient and held that Dr. Ofshe did not demonstrate that this strategy was generally accepted within the relevant scientific community.[209]

In contrast, the dissent criticized the majority's approach, arguing that Dr. Ofshe did apply his research to the defendant's interrogation, and that his proffer was "relevant to this specific case, [and] sufficient to warrant a *Frye* hearing on whether such information is generally accepted."[210] In the dissent's opinion, "without a *Frye* hearing on the issue of whether the proposed testimony contained information generally accepted by the scientific community," it is not possible to make the determination on whether the trial court abused its discretion by excluding the testimony.[211] The dissent stated that in cases such as *Bedessie*, where "there is little to no corroborating evidence connecting defendant to the commission of the crimes charged, a jury will benefit from the testimony of an expert explaining factors relevant to the reliability of a confession."[212]

2. Cases after Bedessie

After *Bedessie*, there have been a handful of cases in New York where the appellate courts reversed defendants's convictions because the trial courts improperly excluded expert testimony on false confessions. As mentioned *supra*, the use of *Bedessie* to reverse convictions in cases that would benefit from expert testimony on false confessions is a welcome development when it comes to potentially preventing wrongful convictions.[213]

In *People v. Evans*, the court found that expert testimony on false confessions may not be rejected based on the argument that there is no general acceptance within the scientific community on the science of false confessions.[214] Here, the defense counsel's original request, along with the supplemental application of Dr. Sandford Drob as an expert, sought to present an evaluation (1) of the defendant's ability to waive his Miranda rights, (2) of his susceptibility to making a false confession, and (3) on the

208. *Id.*
209. *See Bedessie*, 970 N.E.2d at 388.
210. *Id.* at 390–91 (Jones, J., dissenting).
211. *Id.* at 390.
212. *Id.* at 389.
213. *See supra* notes 52–53 and accompanying text.
214. 32 N.Y.S.3d 119, 124–25 (App. Div. 2016).

topic of false confession.[215] The trial court excluded expert testimony about false confessions and the defendant's susceptibility to making a false confession.[216] The appellate court later found that the trial court "improvidently exercised its discretion in denying defendant's motion to present expert testimony", and reversed the defendant's charges.[217]

In *People v. Days*, [218] the defense counsel also moved to introduce expert testimony on the issue of false confessions, including extensive proffers from Dr. Jessica Pearson and Dr. Richard Leo,[219] as well as the videotaped confession; nevertheless, the trial court denied the motion on the ground that the subject is "'within the understanding of an average juror,' and that other New York courts had held such testimony to be inadmissible."[220] Following *Bedessie*'s ruling in 2012, the *Days* court clarified that "psychological studies bearing on the reliability of a false confession" are beyond "the ken of the typical juror."[221] The court found that the trial court's denial of the defendant's motion to introduce expert testimony on the subject of false confession was not a harmless error.[222] When an error is not harmless, a reversal and a new trial is warranted; thus, the court reversed the defendant's conviction.[223]

3. People v. Powell

The New York Court of Appeals recently reaffirmed *Bedessie* in *People v. Powell* (*Powell III*).[224] After being charged with committing two robberies,[225] Powell sought to challenge two statements: (1) a handwritten statement by Powell that, without providing any detail, admitting to having committed robberies, and (2) a written statement, summarizing Powell's oral statement, prepared by a detective after Powell was identified in lineups by

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215. *See id.* at 120 ("[Dr. Drob was supposed to testify on the] causes of false confessions and tests like the Gudjonsson Suggestibility Scales (GSS), which measures a person's vulnerability to suggestion."); *see also supra* notes 23, 87.

216. *See Evans*, 32 N.Y.S.3d at 120.

217. *Id.* at 125.

218. 15 N.Y.S.3d 823 (App. Div. 2015).

219. *See id.* at 831; *see supra* notes 93–94 for more on Dr. Leo — this is the same Dr. Leo behind the influential Leo & Ofshe papers on rational choice theory. It is worth observing that the experts discussed in these New York cases are also the leading scholars on false confessions discussed in the earlier sections of this Note.

220. *Days*, 15 N.Y.S.3d at 829.

221. *Id.* at 830 (internal quotation marks omitted).

222. *See id.* at 832.

223. *See id.* at 832–33.

224. *See generally Powell III*, 182 N.E.3d 1028 (N.Y. 2021).

225. *Id.* at 1031.

both victims.[226] Powell signed the second blank page of this statement, which did not contain any factual allegations.[227]

The detectives and Powell presented two different versions of the interrogation events.[228] Detective Grinder testified that Powell asked the detective to type out his oral statement, and the detective retrieved medications and provided food for defendant.[229] At trial, Powell testified that "he had low intelligence, suffered from seizures, and had a history of schizophrenia, depression and substance abuse."[230] He further testified that he ingested heroin and crack cocaine the day before interrogation and had a seizure and urinated on himself while in the interrogation room.[231] Additionally, he stated that Detective Grinder told him "he would not get the medication or medical treatment unless defendant cooperated."[232] Finally, Powell testified Detective Grinder obtained medicine but put it out of his reach until he gave police the handwritten statement, and that Detective Grinder also "hit him in the head four or five times."[233]

Here, the trial court in *Powell I* ordered a *Frye* hearing to address the admissibility of the Dr. Redlich's proposed testimony.[234] Dr. Redlich[235] identified three dispositional factors: Powell's "mental illness, intellectual disability[,] and substance abuse."[236] She also identified situational factors such as Powell being detained and questioned for over 24 hours.[237] Additionally, she noted that Powell's statement evidenced minimization because he referenced his drug abuse, and his statements did not provide any new information that was known to the police.[238] After the *Frye* hearing, the trial court denied defendant's request to call Dr. Redlich as a witness.[239]

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226. *Id.* at 1032.
227. *Id.*
228. *See id.* at 1033.
229. *See id.* at 1033–34.
230. *Powell III*, 182 N.E.3d at 1034.
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.* at 1035.
235. *See supra* note 74 and accompanying text. Dr. Redlich recently opined on Melissa Lucio's case, expressing concern on the length and timing of the interrogation and the police's egregious questioning techniques. *See* Marisa Iati & Kim Bellware, *Melissa Lucio Gets Stay of Execution so Court Can Consider New Evidence*, WASH. POST (Apr. 25, 2022), https://www.washingtonpost.com/nation/2022/04/25/melissa-lucio-texas-death-penalty/ [https://perma.cc/2W9W-EB3H].
236. *Powell III*, 182 N.E.3d at 1035.
237. *See id.*
238. *See id.*
239. *Id.* at 1036.

The trial court, appellate court, and the New York Court of Appeals each had a different justification for the exclusion of Dr. Redlich's testimony.[240] First, the trial court found that defendant failed to "meet its burden of establishing through the testimony of Dr. Allison Redlich that expert testimony on false confessions is *readily acceptable* in the scientific community."[241] The court also cited *Daubert* and said that Dr. Redlich "failed to establish whether or not there was a known or potential rate of error in her methods of research."[242] Finally, the trial court reasoned that it will "only permit a witness in this area to testify who has personal knowledge of this case, the circumstances under which the defendant made these alleged confessions, and this defendant's mental infirmities."[243]

In a one-page opinion, the intermediate appellate court provided different logic. The court cited *Bedessie* and found that the "proffered expert testimony was *relevant* to the specific circumstances of this case" as justification for excluding the testimony, affirming the trial court's decision.[244] The opinion did not make any reference to a requirement that the testimony be "readily acceptable" or the *Frye* general acceptance test, nor did it mention *Daubert*, the known or potential rate of error, or the personal knowledge requirement.[245]

Finally, the majority in the Court of Appeals reaffirmed that expert testimony may be admitted regarding the factors associated with false confessions, but held that expert testimony was properly excluded in this case because the defendant's expert did not link her research on causes of false confession to the specific circumstances of the defendant's interrogation.[246] The majority held that "the trial court did not abuse its discretion in finding that the proffered testimony would not have aided the jury."[247] The dissent noted, however, that "[t]he court made no such finding; the court's decision after the *Frye* hearing purported to solely address whether the research that Dr. Redlich described had gained general acceptance in the relevant field."[248] Nor is there any discussion in the lower courts's opinions about relevance, analytical fit, Dr. Redlich having to link

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240. *See infra* Appendix (comparing, in table format, the various language from the *Powell* decisions and dissent).

241. People v. Powell, 38 N.Y.S.3d 374, 379 (Sup. Ct. 2014) [hereinafter *Powell I*] (emphasis added).

242. *Id.* at 380.

243. *Id.* at 381.

244. People v. Powell, 87 N.Y.S.3d 31, 32 (App. Div. 2018) [hereinafter *Powell II*] (emphasis added).

245. *See generally Powel I*, *Powell II.*

246. *See Powell III*, 182 N.E.3d at 1041–42.

247. *Id.* at 1039.

248. *Id.* at 1057 n.16 (Rivera, J., dissenting).

her research to the case at hand, or the testimony having to aid the jury.[249] Finally, the majority also stated that the trial court's requirement that the expert needed to have personal knowledge was erroneous.[250]

The three-judge dissent from the Court of Appeals argued that the expert testimony should have been admitted "because defendant established . . . that the science of false confessions was generally accepted in the relevant scientific community."[251] The dissent contended that the question of whether the scientific analysis fit the facts of the case is separate from the question of general acceptance.[252] The dissent noted that when Dr. Redlich attempted to "testify as to the facts of defendants' case," she was "stopped from doing so by the prosecution's persistent objections, most of which were properly sustained by the [trial] court."[253]

Furthermore, the dissent commented on how the trial court "inappropriately relied on the United States Supreme Court's decision in *Daubert* [citation omitted], which announced the federal standard [in such cases]. *Frye*'s general acceptance test is different from the multi-factor validity and reliability standard of *Daubert*[.]"[254] Finally, the dissent explained that the majority "usurps the jury's role by weighing the evidence and assessing whether Dr. Redlich was credible."[255]

Despite New York being more open to expert testimony on false confessions, *Bedessie* and *Powell* indicate that the admissibility of such testimony remains in the discretion of the trial judge. Even when the expert testimony meets the *Frye* standard of being generally accepted in the scientific community, a court can foreclose the admissibility of such testimony if the expert does not link the scientific analysis to the facts of the case.

4. The Impact of Bedessie *and* Powell

Bedessie and *Powell* have introduced unclear standards and additional requirements beyond the *Frye* general acceptance test. *Bedessie* created a procedural obstacle by introducing a relevancy standard. The trial court also did not conduct a *Frye* hearing and based its judgment on a seven page expert proffer.[256] In fact, the relevancy standard more closely tracks the *Daubert*

249. *See generally Powell I, II, & III*; *see also* Appendix.
250. *Powell III*, 182 N.E.3d at 1056, n.14.
251. *Id.* at 1043 (Rivera, J., dissenting).
252. *Id.* (Rivera, J., dissenting).
253. *Id.* at 1057.
254. *Id.* at 1055; *see also supra* Section II (explaining *Frye* and *Daubert*).
255. *Powell III*, 182 N.E.3d at 1056.
256. *See supra* Section II.C.i.

standard instead of the *Frye* test.[257] Dr. Ofshe, despite being one of the most prominent scholars on false confessions, was not afforded the opportunity to testify at the *Frye* hearing.[258]

The *Powell I* trial court did not depend on *Bedessie* when it excluded Dr. Redlich's testimony — it used the readily acceptable language of the *Frye* test, then introduced one of the *Daubert* factors without citing the rest of the *Daubert* factors. The *Powell II* court then completely changed course and cited to the relevancy standard in *Bedessie*. Finally, the *Powell III* court combined the general acceptance standard with the relevancy standard in *Bedessie*, and introduced more new language to ensure there are no "'analytical gap[s] between the data and the opinion proffered,'" and that the expert "link[s] her research on the possible causes of false confessions to the case at hand."[259] Throughout the three *Powell* cases, there were no consistent applications of either *Frye* or the precedent *Bedessie* case. The result in all three cases is the complete exclusion of Dr. Redlich's testimony on false confessions.

The New York Unified Court System updated the Guide to New York Evidence in June 2022 to include a new Rule 7.15 Expert Testimony on Confessions, derived from *Bedessie* and *Powell.*[260] Rule 7.15(2) states that the trial court, when deciding the admissibility of expert testimony on the reliability of confessions, should consider:

> (a) whether the proposed expert testimony is based on principles that are generally accepted within the relevant scientific community; (b) whether the proffered testimony meets the general requirements for the admission of expert testimony (Guide to NY Evid rule 7.01 [1]), in particular, whether the testimony is beyond the ken of the jury and would aid the jury in reaching a verdict; (c) whether the proffered testimony is relevant to the defendant and interrogation before the court; and (d) the extent to which the People's case relies on the confession.[261]

Rule 7.15 and the subsequent note to the Rule do not mention the linkage or analytical gap requirement used in *Powell III*. Additionally, this rule presents as a multi-factor test rather than the *Frye* general acceptance test, which adds further confusion to the standards controlling the exclusion of relevant expert testimony after *Bedessie* and *Powell*.

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257. *See supra* notes 144–47.

258. *See id.*

259. *See Powell III*, 182 N.E.3d at 1039, 1055.

260. *See* Guide to N.Y. Evid. rule 7.15, Expert Testimony on Confessions (revised June 2022), https://nycourts.gov/JUDGES/evidence/7-OPINION/7.15_FALSE_CONFESSION_EXPERT.pdf [https://perma.cc/6V2Q-D2DA].

261. *Id.* at 7.15(2).

III. TOWARDS ADMISSION OF RELEVANT EXPERT TESTIMONY ON FALSE CONFESSIONS

Narrowing the *Frye* standard in New York courts has hindered the courts's abilities to admit helpful and relevant scientific expert testimony and keep up with new scientific developments. This is especially concerning considering legal profession's reluctance to adopt new technology and scientific findings.[262] As such, false confession — the idea that someone would confess to a crime they did not commit — remains a counterintuitive concept.[263] After *Powell*, defendants must ensure they call on a qualified expert who can link their research to the facts of the case and the circumstances of the defendant's interrogation. Defendant's counsel in *Powell* stated to the court that "he could not find a psychologist who could present both the clinical evaluation and the research-based testimony as required by the court."[264] Even if the defense counsel could procure such an expert, the dissent correctly points out that constant objections from opposing counsel when an expert tries to testify to the facts of the case can be disruptive and can undermine the validity of the case, especially when the court sustains these objections.[265]

Significantly, false confessions affect vulnerable populations, such as the defendant in *Powell* who testified that he "had low intelligence, suffered from seizures, and had a history of schizophrenia, depression and substance abuse."[266] When considering the fact that vulnerable populations are disproportionately represented in false confession cases,[267] the helpfulness of expert testimony on false confession only increases. In these cases, expert testimony on the dispositional factors and situational factors that could contribute to the risk of false confessions would only aid the jury in assessing the evidence, not confuse them.

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262. *See Science, Technology, and Law*, ENCYCLOPEDIA.COM, https://www.encyclopedia.com/science/encyclopedias-almanacs-transcripts-and-maps/science-technology-and-law [https://perma.cc/TD9M-R58C] (last visited Sept. 28, 2022) (noting how case law is slow to adapt to scientific advances due to the binding effects of stare decisis, while science and technology are not impeded and progress at increasing rates).

263. *See supra* Part I.

264. *Powell III*, 182 N.E.3d at 1052 (Rivera, J., dissenting).

265. *See id.* at 1057.

266. *Id.* at 1034 (majority op.); *see also supra* Section I.C.

267. *See supra* Section I.C.

A. Preparing the Expert Testimony so it Passes *Powell*'s Linkage Requirement

The major takeaway of *Powell III* for practitioners and defense counsel is preparing expert testimony to satisfy *Powell*'s linkage requirement, such that there is no great analytical gap between the data and the opinion.[268] *Powell III* requires experts to link the research on the possible causes of the false confession to the defendant's case and the circumstances of the defendant's interrogation.[269] While the linkage requirement does ensure that relevant testimony is admitted and can be a beneficial and necessary requirement, it becomes a troublesome burden when experts do not have access to certain evidence that they would need to present their testimony. For example, in *Powell*, the police failed to record the interrogation.[270] New York state law requiring law enforcement to record custodial interrogations was not passed until 2018.[271] This gap between the law and the procedure of the case therefore introduced concerning evidentiary circumstances.

In contrast, when the interrogation is recorded and provided, experts can more easily satisfy this linkage requirement. In Lucio's Clemency Application, Dr. Gudjonsson reviewed all five hours of Lucio's interrogation on 10 CDs and provided detailed references and analysis in his clinical forensic psychology report.[272] For each CD, Dr. Gudjonsson provided a timestamp, the name of the interrogator, his personal observations, direct quotes from the interrogation, and comments on the interrogation techniques.[273] Dr. Gudjonsson's report can serve as an example of expert testimony that would pass the linkage requirement under *Bedessie-Powell*, as it links directly on possible causes of the false confession to the exact words of the defendant's interrogation.

Further, under *Bedessie*, the expert could not testify to the ultimate issue of whether the defendant's confession was reliable or not. As such, if an expert tries to testify to the facts of the case, there is a high likelihood that the prosecution will object, and the court will sustain the objection. *Powell III*'s majority concedes that experts do not need personal knowledge of the case, retains the linkage requirement, and reaffirmed *Bedessie*. Despite

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268. *See Powell III*, 182 N.E.3d at 1038.

269. See *id.*

270. *See id.* at 1040.

271. N.Y. CRIM. PROC. LAW § 60.45 (McKinney 2018); *see also* Innocence Staff, *New York State Law Requiring Video Recording of Interrogations Takes Effect*, INNOCENCE PROJECT (Apr. 5, 2018), https://innocenceproject.org/new-york-state-law-video-recording-interrogations-takes-effect/https://innocenceproject.org/new-york-state-law-video-recording-interrogations-takes-effect/ [https://perma.cc/S9VF-WZZ5].

272. Clemency Application, *supra* note 24, Exhibit 10 at 4–5, Appendix I.

273. *See id.* at Appendix I.

stating that there needs to be no personal knowledge, the linkage requirement still puts the onus on defense counsel and experts to make sure they tailor the expert testimony to the defendant's specific case and defendant's interrogation. Experts must walk the line between not testifying on the ultimate issue while still connecting their testimony to the facts of defendant's case.

In light of this narrow standard, defense counsel should be aware of the difficulties in getting expert testimony on false confessions admitted. Defense counsel should also note that framing expert testimony as helpful and educational to the jury could make it more persuasive for a trial judge. This approach further tracks the language in *Bedessie* and the overall *Daubert* sentiment in the federal jurisdictions.

B. Admitting or Limiting the Expert Testimony Under the Trial Court's Discretion, Rather Than Completely Excluding the Expert Testimony

Rule 7.15(1) of the Guide to New York Evidence provides that "[e]xpert testimony regarding the reliability of a confession may be admitted, limited, or denied in the discretion of the trial court."[274] The trial court's decision on the admissibility of the expert testimony is subject to an abuse of discretion standard on appellate review.[275] It is within the trial court's province to find whether an expert testimony is relevant to the circumstances of the case.[276] Thus, the trial court's discretion is the first crucial step as to whether relevant expert testimony is admitted in each defendant's case, and ultimately presented in front of the jury.

Trial court judges should use their discretion to allow social science evidence when it satisfies the *Frye* general acceptance standard, rather than rule on the foundations of the testimony or the reliability of the testimony before even allowing it in front of the jury. As the dissent in *Powell III* suggests, the jury, not courts, are charged with weighing the evidence with the aid of the expert testimony. By allowing expert testimony to be presented to the jury, the jury can now be the one making the proper judgments as the trier of facts.

If any irrelevant testimony emerges from a *Frye* hearing, "the proper action here was for the court to limit the testimony to the factors present in

274. Guide to N.Y. Evid. rule 7.15, Expert Testimony on Confessions (revised June 2022).

275. *Id.* note at 2–3 (note on Rule 7.15 subdivision (1) and the standard of review).

276. *See* People v. Bedessie, 970 N.E.2d 380, 391 (N.Y. 2012) (Jones, J., dissenting) ("[A] trial court is 'obliged to exercise its discretion with regard to [the] relevance and scope of the expert testimony' . . . ." (citation omitted)).

the case."[277] Rule 7.15 specifically states that expert testimony may be "admitted, *limited*, or denied"[278] — it is fully within the trial judge's discretion to exclude certain parts of the expert testimony and admit other parts. A trial judge does not have to exclude an expert testimony in full just because there was some irrelevant testimony. This solution satisfies the concern that irrelevant or confusing testimony might be introduced, while ensuring that helpful testimony could be presented to aid the jury in assessing the case.

For example, in *Bedessie*, the majority took issue with the fact that Dr. Ofshe discussed the suggestibility of young children in sex abuse cases when it has nothing to do with the factors of false confessions.[279] This line of testimony is a good example of how trial courts can limit proffered expert testimony by excluding irrelevant testimony, rather than rejecting expert testimony altogether. Any other testimony that is relevant to the facts of the case and the potential causes of false confessions could still be preserved and used in trial.

This solution maintains the role jurors play as the ultimate triers of facts.[280] The New York Court of Appeals has already ruled in *Days* that the general topic of false confession is beyond the understanding of an average juror.[281] Research has also shown that jurors do not adequately discount confession evidence despite being told it was coerced.[282] Accordingly, including helpful and relevant expert testimony would only seek to aid the jurors in making the final assessment on the credibility of the witnesses and the weight of the evidence.

C. Broadening What Constitutes as an Abuse of Discretion for the Expert Testimony

Lastly, courts should extend *People v. LeGrand* to the area of false confessions, as argued in Judge Jones's *Bedessie* dissent.[283] In *People v. LeGrand*, the New York Court of Appeals held that it was an abuse of discretion to exclude expert testimony on the reliability of eyewitness

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277. *Powell III*, 182 N.E.3d 1028, 1060 (N.Y. 2021) (Rivera J., dissenting); *see also Bedessie*, 970 N.E.2d at 391 (Jones, J., dissenting) (stating that it would have been proper "to admit [expert] testimony [on false confessions] and limit it to information that is accepted by the scientific community and is relevant to this particular case.").

278. Guide to N.Y. Evid. rule 7.15, Expert Testimony on Confessions (revised June 2022) (emphasis added).

279. *Bedessie*, 970 N.E.2d at 386–87.

280. *See supra* Section II.B for critique on how jurors should be the ultimate triers of facts.

281. *See* People v. Days, 15 N.Y.S.3d 823, 829 (App. Div. 2015).

282. *See supra* note 80 and accompanying text.

283. *Bedessie*, 970 N.E.2d at 390 (Jones, J., dissenting).

identifications[284] after the trial court improperly said the proposed expert testimony was not generally accepted within the relevant scientific community.[285] Specifically, the holding requires courts to find that excluding expert testimony on the reliability of the defendant's disavowed confession is an abuse of a trial court's discretion "'if that testimony is . . . ([1]) based on principles that are generally accepted within the relevant scientific community, ([2]) proffered by a qualified expert and ([3]) on a topic beyond the ken of the average juror.'"[286]

Redefining what constitutes an abuse of discretion can serve as an additional check on trial court judges who improperly exclude expert testimony that could have aided the jury in learning more about false confessions. Since expert testimony on eyewitness testimony — also based on scientific principles, psychological studies, and sociological research — is similar to expert testimony on false confessions, existing case law in New York can serve as a guide for the area of expert testimony on false confessions. Notably, New York State Unified Court System's Guide to New York Evidence specifically compared the two, stating that "[t]he rules applicable to the admissibility of an expert on the reliability of a confession parallel the rules applicable to an expert on the reliability of identification evidence."[287]

New York courts have already held that the issue of false confessions is based on topics generally accepted within the relevant scientific community and is also a topic beyond the ken of the average juror.[288] This satisfies prong one and three of the *LeGrand* rule. Combined with a qualified expert, if the courts do adopt this abuse of discretion standard towards the exclusion of expert testimony on false confessions, defendants would have a higher likelihood of getting their convictions reversed if they could not present expert testimony in the first place. Without invading the trial court's discretion in excluding evidence, broadening the abuse of discretion standard based on pre-existing case law in New York courts can serve to protect vulnerable defendants.

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284. Expert testimony on eyewitness identifications is beyond the scope of this Note, but eyewitness misidentifications are the leading cause of wrongful convictions in the United States. *See DNA Exonerations in the United States*, *supra* note 36 (listing that 69% of the 375 DNA exoneration cases involved eyewitness misidentification).

285. People v. LeGrand, 867 N.E.2d 374, 376 (N.Y. 2007).

286. *Bedessie*, 970 N.E.2d at 390 (Jones, J., dissenting) (citing *LeGrand*, 867 N.E.2d at 376).

287. Guide to N.Y. Evid. rule 7.15, Expert Testimony on Confessions, note at 2 (revised June 2022).

288. *See supra* Section II.C.iii.

CONCLUSION

The evolution of the admission of expert testimony of false confessions remains elusive and limiting, despite the outward promising appearance of progress on the matter. The *Bedessie* and *Powell* cases seem to indicate that New York's standard is more akin to *Daubert* than *Frye* because of the introduction of certain *Daubert* factors such as relevancy, aiding the jury, and known potential error rate. The cases, however, are inconsistent in the standard they apply, resulting in the latest *Powell III* cases using the language of not having an "'analytical gap between the data and the opinion proffered'" and the requirement to "link" expert testimony to possible causes of false confessions.[289]

In light of this confusing standard, experts, lawyers, and judges all have the potential to ensure that relevant expert testimonies on false confessions are admitted. Defense counsel can work with experts on preparing expert testimony that satisfy the *Bedessie-Powell* requirements. Trial judges can exercise their discretion in admitting limited parts of expert testimony that are relevant. Lastly, appellate judges can broaden what constitutes an abuse of discretion when an expert testimony on false confessions is excluded, allowing for the chance of relevant expert testimony to be presented again.

Finally, it is important to note that expert testimony on false confessions is only one problem relating to false confessions, and more broadly, wrongful convictions in criminal law. To take Melissa Lucio's case as an example, expert testimony on false confessions could aid Lucio in her upcoming hearing, and psychological and sociological evidence presented by scientific experts in Lucio's Clemency Application could sway the Texas Board of Pardons and Paroles down the line. But these are last minute attempts to save Lucio from death row and from the uncertainty of her now-delayed execution. The damage was already done when she, and any other innocent defendants, were forced into a false confession in the interrogation room. Lucio's statements have followed her since 2008. Regardless of all the new scientific evidence in support of her case, Lucio faces an uphill battle in getting a new trial, and eventually, hopefully clearing her name. As scholar Richard Leo noted, expert witness testimony is necessary, helpful, and can make a difference, but it may not be the best reform for preventing wrongful convictions based on false confessions.[290] More research in the psychological, sociological, and scientific fields is needed. So too is reform in courts, legislatures, and in the criminal justice system as a whole.

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289. *See Powell III*, 182 N.E.3d at 1041, 1055 (quoting Gen. Elec. Co. v. Joiner, 522 U.S. 136 (1997)); *see also supra* Section II.C.ii.

290. Leo, *supra* note 69, at 720.

APPENDIX

Relevance vs. General Acceptance	
Powell I (N.Y. Sup. Ct. 2014)[291]	"[D]efendant failed to meet its burden of establishing through the testimony of Dr. Allison Redlich that expert testimony on false confessions is *READILY ACCEPTABLE* in the scientific community."[292]
Powell II (N.Y. App. Div. 2018)[293]	"With regard to expert testimony on the phenomenon of false confessions, in order to be admissible, 'the expert's proffer must be *RELEVANT* to the [particular] defendant and interrogation before the court.'"[294]
Powell III (N.Y. 2021) (majority op.)[295]	"[T]he court was required to determine, under *Frye*, whether the proposed expert opinion testimony was based on principles and methodologies *GENERALLY ACCEPTED* within the relevant scientific community."[296] * * * "[T]here is no abuse of discretion when the trial court disallows expert psychological testimony as to false confessions when it is not *RELEVANT* to the circumstances of the custodial interrogation in the case at hand."[297]
Powell III (N.Y. 2021) (dissent)[298]	"The proffered false-confession testimony satisfied the standards for admissibility under both [*Bedessie* and *Frye*] because defendant established, through an extensive record, that the science of false confessions was *GENERALLY ACCEPTED* in the relevant scientific community. The lower courts — and the majority — should have ended the analysis there, rather than focusing on questions of foundation, the fit between the proffered testimony and the facts of the case, and the methodologies used by social sciences researchers — none of which are relevant at a *Frye* hearing."[299]

291. *Powell I*, 38 N.Y.S.3d 374 (Sup. Ct. 2014).
292. *Id.* at 379 (emphasis added).
293. *Powell II*, 87 N.Y.S.3d 31 (App. Div. 2018).
294. *Id.* at 32 (emphasis added) (quoting People v. Bedessie, 970 N.E.2d 380 (N.Y. 2012)).
295. *Powell III*, 182 N.E.3d 1028 (N.Y. 2021).
296. *Id.* at 1038, 1028 (emphasis added).
297. *Id.* at 1042 (emphasis added).
298. *Id.* (Rivera, J., dissenting).
299. *Id.* at 1043 (emphasis added).

References to *Daubert*	
Powell I (N.Y. Sup. Ct. 2014)	"Dr. Redlich's testimony was insufficient in that it not only failed to establish that her expertise is generally accepted in the scientific community, but also her testimony failed to establish whether or not there was a *KNOWN OR POTENTIAL RATE OF ERROR* in her methods of research."[300]
Powell II (N.Y. App. Div. 2018)	N/A
Powell III (N.Y. 2021) (majority op.)	N/A
Powell III (N.Y. 2021) (dissent)	"Here, the Frye court inappropriately relied on the United States Supreme Court's decision in *Daubert* [citation omitted], which announced the federal standard. *Frye*'s general acceptance test is different from the multi-factor validity and reliability standard of *Daubert*."[301]
Analytical Gap, Linkage, and Fit	
Powell I (N.Y. Sup. Ct. 2014)	N/A
Powell II (N.Y. App. Div. 2018)	N/A
Powell III (N.Y. 2021) (majority op.)	"In addition, even where based on reliable principles and methods, an expert's opinion may be precluded if it presents *'TOO GREAT AN ANALYTICAL GAP BETWEEN THE DATA AND THE OPINION PROFFERED*.'"[302] "[T]he trial court found that [Dr. Redlich's] testimony at the *Frye* hearing revealed her difficulty in *LINKING* her

300. *Powell I*, 38 N.Y.S.3d at 380 (emphasis added) (citing Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993)).

301. *Powell III*, 182 N.E.3d at 1055 (Rivera, J., dissenting).

302. *Id.* at 1038 (majority op.) (emphasis added) (citation omitted).

	research on the possible causes of false confessions to the case at hand."[303]
Powell III (N.Y. 2021) (dissent)	"[W]hether 'the scientific analysis must *'FIT'* the facts of the case' is a distinct question from general acceptance."[304] "Instead of determining solely whether Dr. Redlich's testimony and the additional documentary evidence established acceptance within the scientific community of the dispositional and situational factors that lead to false confessions, the majority assesses matters of *FOUNDATION AND FIT*, which would be appropriate under *Daubert*, but not under our *Frye* standard."[305] "Dr. Redlich can hardly be at fault here; indeed, she attempted to testify as to the facts of defendants' case, but was repeatedly stopped from doing so by the prosecution's persistent objections, most of which were properly sustained by the *Frye* court."[306]
Personal Knowledge	
Powell I (N.Y. Sup. Ct. 2014)	"This court will only permit a witness in this area to testify who has *PERSONAL KNOWLEDGE* of this case, the circumstances under which the defendant made these alleged confessions, and this defendant's mental infirmities."[307]
Powell II (N.Y. App. Div. 2018)	N/A
Powell III (N.Y. 2021) (majority op.)	To the extent the trial court opinion can be read as requiring the expert to have personal knowledge of defendant in order to qualify as a witness, that determination was in *ERROR*.[308]

303. *Id.* at 1039 (emphasis added).

304. *Id.* at 1055 (Rivera, J., dissenting) (emphasis added) (quoting KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 203.3 (8th ed. 2020) *and* DAVID H. KAYE ET AL., THE NEW WIGMORE: A TREATISE ON EVIDENCE § 8.3.1(c)(3) (2d ed. 2021)).

305. *Powell III*, 182 N.E.3d at 1056.

306. *Id.* at 1057.

307. *Powell I*, 38 N.Y.S.3d at 381 (Sup. Ct. 2014).

308. *Powell III*, 182 N.E.3d at 1056, n.14 (citations omitted).

Powell III (N.Y. 2021) (dissent)	"To the extent the *Frye* court precluded the testimony because Dr. Redlich did not personally evaluate defendant, that was a *MISAPPLICATION OF THE LEGAL STANDARD*, which the majority concedes . . . ."[309] "As Dr. Redlich explained, she was testifying as a researcher about the factors generally recognized as associated with false confessions; she is not a clinician. Nothing in our case law precludes such testimony, so long as it is relevant and will assist the jury in evaluating the evidence and reaching a verdict."[310]
Aiding the Jury	
Powell I (N.Y. Sup. Ct. 2014)	N/A
Powell II (N.Y. App. Div. 2018)	N/A
Powell III (N.Y. 2021) (majority op.)	"On this record, the trial court did not abuse its discretion in finding that the proffered testimony would not have *AIDED THE JURY*."[311]
Powell III (N.Y. 2021) (dissent)	"The court made no such finding; the court's decision after the *Frye* hearing purported to solely address whether the research that Dr. Redlich described had gained general acceptance in the relevant field."[312] "Dr. Redlich's testimony would have assisted the jury in determining whether to believe defendant's version of the interrogation and whether defendant falsely confessed based on the circumstances as he described them. Dr. Redlich discussed modern psychologically-based interrogation methods based on the Reid Technique, including, as relevant here, the role of theme development, implied promises of leniency, and minimization."[313]

309. *Id.* (Rivera, J., dissenting).
310. *Id.* at 1061, n.20 (citations omitted).
311. *Id*. at 1039 (majority op.) (emphasis added).
312. *Id.* at 1057, n.16 (Rivera, J., dissenting).
313. *Powell III*, 182 N.E.3d at 1059.

	"Dr. Redlich testified to interrogation tactics that defendant claimed he was subjected to, including withholding of food and medicine, lengthy interrogation, and promises that Detective Grinder would 'help' defendant if defendant 'helped' him."[314]
Weighing the Evidence	
Powell I (N.Y. Sup. Ct. 2014)	N/A
Powell II (N.Y. App. Div. 2018)	N/A
Powell III (N.Y. 2021) (majority op.)	N/A
Powell III (N.Y. 2021) (dissent)	"The majority also goes further, and like the Frye court, usurps the jury's role by *WEIGHING THE EVIDENCE* and assessing whether Dr. Redlich was *CREDIBLE*."[315] "In any event, it was not Dr. Redlich's role at the *Frye* hearing to apply the science to the facts of the case; 'matters going to trial *FOUNDATION* or the *WEIGHT OF THE EVIDENCE*' are 'not properly addressed in the pretrial Frye proceeding'."[316]

314. *Id.*
315. *Id.* at 1056.
316. *Id.* at 1055 (citation omitted).