

[CAPTION]

**NOTICE OF INTENT TO OFFER EXPERT TESTIMONY THAT BEARS ON THE
VOLUNTARINESS, RELIABILITY AND CREDIBILITY OF THE CONFESSION and
MEMORANDUM OF LAW**

The Defendant, by counsel, respectfully requests this Court to issue an order approving the Defendant's request to present the testimony of clinical psychologist, [INSERT EXPERT NAME].

In support of his defense, and as grounds therefore, the Defendant states as follows:

1. [INSERT FACTS OF CASE FOR THE BASIS OF EXPERT'S OPINION/TESTIMONY]
2. But for the Defendant's confession, the government has very little evidence to suggest that the Defendant committed this crime. Thus, the reliability of the confession is a material issue.
3. [INSERT QUALIFICATIONS OF EXPERT, INCLUDING NUMBER OF TIMES HE OR SHE WERE QUALIFIED TO TESTIFY, EDUCATION, BOARDS, PUBLICATIONS, ETC.].
4. [INSERT METHOD EXPERT USED TO EVALUATE CLIENT AND RELIABILITY AND ACCEPTANCE IN THE COMMUNITY OF SUCH METHOD].
5. [INSERT EXPERT'S DIAGNOSIS AND/OR OPINION REGARDING THE RELIABILITY OF THE CONFESSION OR AFFECT OF DEFENDANT'S MENTAL CONDITION ON RELIABILITY OF CONFESSION].
6. [IF APPLICABLE: Post traumatic stress disorder was recognized as a valid mental illness by the Indiana Supreme Court in Marley v. State, 747 N.E.2d 1123 (Ind. 2001), which involved a defendant who was pursuing an insanity defense based on post-traumatic stress disorder. (The Marley decision in no way questioned the validity of this mental illness, but

simply held that where it is the basis for an insanity defense, the defendant must comply with the notice provisions governing that defense.))

7. [INSERT EXPLANATION OF DEFENDANT’S NEED FOR THE EXPERT: FOR EXAMPLE -Neither Defendant, nor counsel is sufficiently knowledgeable in the area of post traumatic stress disorder, depression, and other diagnosed mental disorders from which the defendant suffers. Nor is the Defendant or his counsel knowledgeable regarding the combined effect of these mental disorders on the voluntariness, reliability and/or credibility of the Defendant’s confession. Indeed, the Defendant can hardly be expected to testify regarding the effects of a mental health condition from which he suffers, particularly since this is a mental illness for which he has never been treated. Moreover, because of the need for specialized training and expertise in this area, it will be impossible for Defendant to present any evidence on this issue without the services of an expert].
8. Defendant’s expert readily meets the criteria set forth in Ind. Evid. R. 702(b), that is, that “the scientific principles upon which the expert testimony rests are reliable.” [INSERT SPECIFIC EXPLANATION]
9. The Defendant’s expert will not opine on any element of the offense or usurp the role of the jury in evaluating credibility. Nor will the Defendant’s expert testify that the defendant’s confession was false, as such testimony would clearly violate Ind. Evid.R.704(b). [INSERT HOW TESTIMONY WILL AID JURY. FOR EXAMPLE- The Defendant’s expert’s opinion will aid the jury in understanding several well defined mental disorders that are listed in the DSM-IV from which the defendant suffered, and the impact these disorders had on the Defendant’s vulnerability to social influence and pressure from authority figures, both of which are long standing fields of psychological inquiry which embrace concerns

such as an individual's vulnerability to dissociative stress reactions, to suggestiveness, and to compliance with authority figures. Based on the application of these foundational understandings of the psychology of social influence and pressure, and its impact on veterans suffering from post traumatic stress, the Defendant's expert will testify to factors that increase the risk of an inaccurate or unreliable confession, but will not testify to the ultimate legal issue of the voluntariness, reliability and/or credibility of the Defendant's confession in this case].

10. The average layperson is not qualified to discern whether or not some one suffers from many mental illnesses, let alone to assess the impact that mental illness may have on an individual's vulnerability to suggestion or capacity to resist interrogative pressure. Pursuant to Ind. Evid. R. 702(a), where scientific expertise will "assist the trier of fact to understand the evidence or to determine a fact in issue..." expert testimony is permitted.
11. Without the assistance of an expert's specialized understanding, the jury will never hear evidence to counter the superficial and surface judgments of the police to the effect that the defendant didn't seem impaired, or seemed calm – which judgments were part of the government's evidence at the suppression hearing before the Court. It can scarce be gainsaid that there is an "obvious distinction between a mental health professional examining a patient in private and a jury observing a defendant testifying on the witness stand....while the jury members might have been able to visually identify [the defendant's] demeanor, they were not trained to interpret and assess those observations." United States v. Finley, 301 F.3d 1000, 1014 (9th Cir. 2002) (reversing the Defendant's conviction due to the improper exclusion of Defendant's psychological expert who would have testified that the defendant suffered from delusions and an atypical belief system at the time of the offenses).

12. In Crane v. Kentucky, 476 U.S. 683 (1986), a unanimous United States Supreme Court held that it was an unconstitutional deprivation of an accused's Sixth Amendment rights to present a defense, to compulsory process or confrontation and his Fourteenth Amendment right to due process to bar him from presenting evidence regarding the psychological and physical circumstances of his interrogation that he claims resulted in a false confession. The Court found that the circumstances of the confession were relevant to both the voluntariness and credibility of the confession, as well as to guilt or innocence. As the Court observed in Crane:

...the physical and psychological environment that yielded the confession can also be of substantial relevance to the ultimate factual issue of the defendant's guilt or innocence. Confessions...are not conclusive of guilt...as with any other part of the prosecutor's case, a confession may be shown to be "insufficiently corroborated or otherwise...unworthy of belief." Lego v. Twomey [404 U.S. 477] at 485-86 [1972]. Indeed, stripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit guilt? 476 U.S. at 689.

13. The Indiana Supreme Court has likewise held that the Defendant is entitled to present expert testimony on false confessions in Miller v. State, 770 N.E.2d 763, 773 (Ind. 2002).
14. Defendant must be allowed to present the expert's opinion to the jury in order to protect his right to present a defense (U.S. Const. 6th Amend; Ind. Const., Art. I, Sec. 12 & 13), his right to call witnesses on his own behalf (U.S. Const. 6th Amend; Ind. Const., Art. I, Sec. 13), his due process right to a fair trial (U.S. Const. 5th & 14th Amend., Ind. Const., Art. I, Sec. 13), the equal protection of the laws (U.S. Const. 14th Amend; Ind. Const., Art. I, Sec. 23), and the protection against cruel and unusual or disproportionate punishments (U.S. Const. 8th & 14th Amend; Ind. Const., Art. I, Sec. 16. Given the magnitude of the constitutional rights at stake, the defendant urges the Court to be

mindful of the fact that “few rights are more fundamental than that of an accused to present witnesses in his own defense,” Taylor v. Illinois, 484 U.S. 400, 408 (1988), and consequently, “...courts should use particular caution in applying the drastic remedy of excluding a witness altogether.” Finley, 301 F.3d at 1018. Similar considerations drive Daubert’s cautionary note: “Vigorous cross-examination, presentation of contrary evidence and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.” Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 596, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993). In fact, failure to satisfy all the Daubert factors goes to the weight of the evidence and not its admissibility in Indiana. Turner v. State, 953 N.E.2d 1039 (Ind. 2011) (failure to satisfy Daubert factors, such as the lack of formal testing and the inability to pinpoint other research to support an expert’s opinion, were issues for cross-examination).

15. IF APPLICABLE - The State deposed the defense expert on [INESRT DATE]. The prosecution has not filed any motion to bar his testimony. The State may well be willing to concede that his testimony is admissible. However, undersigned counsel needs to know, not only in order to prepare the case for trial, but also to make travel arrangements for the expert.

Wherefore, the Defendant respectfully requests this Court to issue an order approving the Defendant’s request to present the testimony of clinical psychologist, [INSERT EXPERT NAME], and for all other relief just and proper in the premises.

(Signature)