[CAPTION]

MEMORANDUM OF LAW
(FALSE CONFESSION EXPERT)

I. Introduction

For many years, social scientists have claimed that people sometimes confess to crimes that they did not commit. It has now become undeniable that the social scientists are right: False confessions do exist and DNA evidence has proven it. In fact, we now know that it is not uncommon for people to confess falsely to crimes, that those false confessions nonetheless make compelling evidence, and that jurors have relied on scores of false confessions mistakenly to convict innocent people.

According to the Innocence Project, the leading authority on post-conviction DNA exonerations, more than twenty five percent of the first one hundred ninety seven post-conviction DNA exonerations involved innocent persons who had made false confessions or admissions. *See The Innocence Project*, http://www.innocenceproject.org. See also, Causes and Remedies of False Confessions;"[1] Saul M. Kassin, "The Psychology of Confession Evidence," Vol. 52, No. 3, *American Psychologist*.

[1] The infamous "Central Park jogger" case is a particularly vivid example of the catastrophic results of false confessions. All five defendants confessed to the crime; all five served their full sentences. DNA testing subsequently revealed that all five confessions were false. Because the victim was so brutally beaten, she was incapable of identifying who had attacked her, and so the prosecution's case had relied primarily on the five defendants' confessions, four of which were videotaped. Years later, a man named Matias Reyes, who was then serving time for another rape and murder, confessed to having been the Central Park rapist, and the truthfulness of his confession was confirmed by DNA testing. A key factor in generating the false confessions were police lies

Given the fact that DNA evidence can be used to assess the reliability of a conviction in only a small number of cases, it is likely that many, many more wrongful convictions have occurred that cannot be refuted by DNA evidence, and that a similar proportion of these wrongful convictions are themselves based on false confessions.

Even law enforcement training experts, John Reid & Associates, have conceded that false confessions do exist. The 4th Edition of the Reid School's treatise on interrogation includes, for the first time, a full chapter devoted to the topic,[2] entitled "Distinguishing between True and False Confessions."

II. The Frequency of False Confession is Beyond the Ken of Lay Jurors

Why would someone confess to committing a criminal act if they were innocent? The mere notion seems contrary to common sense. In other words, the concept of a false confession is one to which lay jurors are likely to be inherently hostile, and it is even more likely that lay jurors will not understand the factors that can explain *why* innocent people confess to crimes. Put more simply, the subject of how and why false confessions occur is beyond the ken of the average juror.

In cases involving prosecution experts, the Indiana Courts have found the "beyond the ken" standard to be quite low. For example, in Simmons v. State, 504

about the evidence. One defendant was told that his fingerprints were on the jogger's clothes. The police told another defendant that another of the defendants had implicated him. See e.g. Marks, "Why People Confess to Crimes They Didn't Do," The Christian Science Monitor, Dec. 5, 2002; ABC News, DA Wants Central Park convictions Tossed, Dec. 4, 2002, at www.abcnews.go.com/us/story?id=91009&page=1.

[2] Inbau, Reid, Buckley and Jayne, Criminal Interrogation and Confessions, 4th Edition (Jones & Bartlett Publishers, (2004); Chapter 15. "Distinguishing Between True and False Confessions."

N.E.2d 575 (1987), the Indiana Supreme Court upheld the prosecution's use of expert testimony regarding rape trauma syndrome to explain behaviors by the alleged victim that otherwise seemed inconsistent with rape, including her failure to remember having been with her alleged rapist at a store where he cashed a check. And, the Indiana Supreme Court has exhibited a fundamental sense of fairness and parity – holding in Henson v. State, 535 N.E.2d 1189 (1989) that since the state had been allowed to present expert testimony in Simmons on rape trauma syndrome, it was error to not allow the defense to do the same. The expert in Henson was a psychologist who had extensive credentials in evaluating and treating patients with post traumatic stress syndrome, including those who suffered from this mental condition due to traumatic rape.

The Indiana Supreme Court found that the defense was entitled to present expert testimony on false confessions in Miller v. State, 770 N.E.2d 763, 773 (Ind. 2002). As the Court opined:

> Expert testimony is appropriate when it addresses issues not within the common knowledge and experience of ordinary persons and would aid the jury. Ind.Evidence Rule 702(a). "When [jurors] are faced with evidence that falls outside common experience, we allow specialists to supplement the jurors' insight." Carter v. State, 754 N.E.2d 877, 882 (Ind. 2001)(finding experts may not testify, however, "to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions." Evid.R. 704(b)). "We expect jurors to draw upon their own personal knowledge and experience in assessing credibility and deciding guilt or innocence." Carter, 754 N.E.2d at 882. In Carter, we held that a psychologist's testimony that autistic children find it difficult to deceive "came close to, but did not cross the line into impermissible Rule 704(b) vouching. Id. at 883-84.

Given that the phenomenon of false confession is beyond the ken of the average juror – and, according to the testimony of the detective at the suppression hearing, is something he has never seen before, the defendant should be allowed to present expert testimony on this issue. If a seasoned detective who has had a career in law enforcement for 13 years such as the detective has no knowledge of false confession, surely jurors also do not necessarily know that mental illness can increase an innocent person's vulnerability to confessing to a crime that he or she did not commit.

III. Indiana Courts Have Upheld Expert Testimony on False Confessions

The Indiana Supreme Court has previously ruled that expert testimony pertaining to the voluntariness, credibility and reliability of a confession is admissible. Miller v. State, 770 N.E.2d 763 (Ind. 2002). In Miller, a murder prosecution, the Indiana Supreme Court held that where the defendant's statement played a prominent role in the State's case, the trial court committed reversible error in excluding the testimony of the psychologist called by the defense as an expert in the field of police interrogation and false confessions. This case shows that the Indiana Supreme Court understands the defendant's constitutional right to present expert psychological testimony on the issue of the reliability, credibility and voluntariness of a confession to the jury.

In Carew v. State, 817 N.E.2d 281 (Ind.Ct.App. 2004), the Indiana Court of Appeals held that the trial court's exclusion of expert testimony regarding police interrogation techniques used in the interrogation of a mentally retarded individual was an issue that should have been raised on appeal by appellate counsel and appellate counsel was ineffective for failing to do so.

Mental illness may militate against a finding of voluntariness of a confession. "The degree of impairment of mental faculties at the time of the waiver and statement is of critical

importance in determining whether a statement was given voluntarily." Brown v. State, 485 N.E.2d 108, 113 (Ind. 1985).

IV. Expert Testimony on False Confessions is Generally Accepted.

The field of study of coerced confessions is widely accepted by the legal and social-scientific communities. The leading textbook on the subject, The Psychology of Interrogations and Confessions,[3] includes thirty one pages of references focusing on the phenomenon of false confession, as well as other topics of relevance to interrogation practices. An earlier edition of this book included over nine hundred separate articles on the subject of interrogation and false confessions. Gisli Gudjonsson, The Psychology of Interrogations, Confessions and Testimony, John Wiley & Sons (1992). See also, "When the Innocent Speak: False Confessions, Constitutional Safeguards and the Role of Expert Testimony," Nadia Soree, 32 *Amer. J. Crim. L.* 191 (Spring, 2005); Kassin & Kiechel, "The Social Psychology of False Confessions: Compliance, Internalization and Confabulation," Vol. 7, No. 3, *Journal of the American Psychological Association*.

As was recently noted in the *Monitor on Psychology*, (September, 2006 at p. 21), "[a] recent tide of psychological research suggest that false confessions often arise after innocent people waive their legal protections due to the ignorance of the system, or their belief that the evidence will vindicate them…[as well as] the power of social influence…."

The United States Supreme Court noted over 20 years ago in Crane, supra, "…the physical and psychological environment" of the interrogation can be of "substantial relevance" and "a confession may be shown to be 'insufficiently corroborated or otherwise…unworthy of belief." The Supreme Court has recently again acknowledged the problem of false confessions-

[3] By Gisli H. Gudjonsson, Institute of Psychiatry, King's College, London; John Wiley Series in The Psychology of Crime, Policing and Law, 2003.

in the context of discussing one particular mental disorder – that of mental retardation. The problem of false confessions is especially acute with regard to mentally retarded individuals because they are most vulnerable to the police techniques most likely to produce a false confession. See Atkins v. Virginia, 536 U.S. 304, 320-21 n.25 (2002) (discussing wrongful convictions of persons on death row generally and noting the exoneration of one mentally retarded individual wrongfully convicted based on his unwitting false confession).

Several other jurisdictions have upheld the admission of evidence that the defendant suffered from mental illness that was relevant to the issue of the voluntariness, and/or the reliability and credibility of the defendant's confession. This is hardly surprising, for, to hold otherwise is to eviscerate the presumption of innocence for any defendant who confesses. To hold otherwise is tantamount to a return to the "trials" of several hundred years ago, when confession obviated the need for trial altogether.

> [W]hile a finding of involuntariness cannot be predicated solely upon [the defendant's] mental instability, his mental state is relevant 'to the extent it made him more susceptible to mentally coercive police tactics….It takes less in terms of threats or other means of inducing fear to interfere with the deliberative processes of one whose capacity for rational choice is limited than it takes to affect the deliberative processes of one whose capacity is not so limited. [Citations omitted].
> Smith v. Duckworth, 910 F.2d 1492, 1497 (7th Cir. 1990).

[INSERT FACTS. FOR EXAMPLE: In the instant case, the interrogating detective used two techniques that were mentally coercive and designed to foster fear. The fact that they did not know of the Defendant's mental illness is not dispositive. First, the detective repeatedly lied. The detective claimed on three occasions early on in the interrogation, to possess devastating evidence that, in truth, he did not have. Nor did the detective have a good faith basis for this deception. Secondly, the detective repeatedly expressed absolute certitude regarding the Defendant's guilt, and refused to accept the Defendant's repeated protestations of innocence.

Thirdly, the detective confidently accused the Defendant of involvement in other serious crimes, leaving the Defendant to fear that there was a complete break down in the reliability of the criminal investigation process. Fourthly, the detective isolated the Defendant in a windowless interrogation room, late at night].

In United States v. Shay, 57 F.3d 126 (1st Cir. 1995), the First Circuit reversed the district court's decision to exclude the Defendant's proffered psychiatric testimony. At trial, the Defendant had attempted to discredit his confession by presenting expert testimony from a psychiatrist who had diagnosed Shay as suffering from Munchausen's Disease, or "pseudologia fantastica," a factitious disorder that is listed in the American Psychological Association's Diagnostic and Statistical Manual of Mental Disorders, [hereinafter, DSM]. The psychiatrist would have testified that this disorder caused Shay to "spin out webs of lies which are ordinarily self-aggrandizing and serve to place him in the center of attention." Id. at 129-30. On appeal, Shay argued that the district court had erroneously interpreted Rule 702, and further that the exclusion of the testimony infringed his Sixth Amendment right to present a complete defense. Id. at 130, n.3. In reversing the conviction, the First Circuit observed:

> …whether or not the jury had the capacity to generally assess the reliability of these statements…it plainly was unqualified to determine without assistance the particular issue of whether Shay Jr. may have made false statements against his own interests because he suffered from a mental disorder. Common understanding conforms to the notion that a person does not make untruthful inculpatory statements….[The expert] was prepared to offer specialized opinion testimony, grounded in his expertise as a psychiatrist, that could have "explode[d] common myths" about evidence vital to the government's case. Id. at 133-34.

The Court held that while an expert ordinarily cannot testify to whether a witness is lying or telling the truth, the expert's testimony was admissible because the jury was "plainly unqualified to determine without assistance the particular issue of whether [the defendant] may have made false statements against his own interests because he suffered from a mental disorder." Id.

In United States v. Vallejo, 237 F.3d 1008 (9th Cir. 2001), a Hispanic defendant charged with marijuana offenses had been denied the right to present testimony from his high school psychologist that Defendant's severe language disorder explained discrepancies between the defendant's recollection of his interrogation and the recollection of the customs agents. The Court held that the exclusion of this testimony was reversible error. Difficulties understanding and speaking English encountered by special education students in high-pressure situations are not within the common knowledge of average layperson. Such testimony was relevant to the defendant's struggles to express himself during interrogation and at trial and could aid the jury in understanding these issues as well. The testimony was deemed admissible even though the psychologist did not personally examine defendant, because the expert did review ten years' worth of school documentation regarding the Defendant. The Court observed that the failure to examine goes to the weight of the testimony and not to the admissibility.

The intersection of mental disability and techniques of police interrogation has also been found admissible by the Eleventh Circuit. In United States v. Roark, 753 F.2d 991 (11th Cir. 1985), a psychologist was prepared to testify that the Defendant was extremely susceptible to suggestions. Id. at 994. He testified *in camera* that the conditions of the Defendant's interrogation raised the possibility that "she would create stories to please her questioners, a condition known as `compulsive compliance.'" Id. The trial court excluded the testimony on the grounds that the doctor's testimony would not assist the jury in deciding whom to believe. Id.

The Eleventh Circuit reversed, holding this evidence should not have been excluded:

> [The proposed expert] was presumably qualified to assist the jury in reaching a factual conclusion. His testimony was designed to help the trier of fact determine whether it was more or less probable that [the defendant] was somehow psychologically coerced into making the inculpatory statements. His testimony was thus certainly relevant to the issue of what weight the jury should give Roark's incriminating statements. Id.

Numerous state courts have agreed with the federal courts and allowed expert testimony regarding the special circumstances or susceptibilities of particular defendants. See, e.g., State v. Buechler, 572 N.W. 2d 65,73-74 (Neb. 1998) (reversing conviction because trial court's exclusion of false confession expert testimony was harmful error); Beagel v. State, 813 P.2d 699, 707 (Alaska 1991) (reversing homicide conviction because trial court erroneously excluded expert opinion of psychiatrist that defendant's confession to police was product of mental disorder); People v. Hamilton, 415 N.W.2d 653, 655-56 (Mich.Ct.App. 1987) (reversing trial court's preclusion of expert testimony from clinical psychologist who had interviewed defendant and was prepared to explain to jury psychological reasons why defendant made statement alleged by defense to have been false); Reilly v. State, 355 A.2d 324, 336-37 (Conn. Sup. 1976) (granting motion for new trial in first-degree murder case in part on finding that "an injustice was done to [the defendant] at his original trial because of the absence of any expert testimony to raise the issue of the reliability of [his] confessions and admissions. The confessions and admissions went totally unexplained except in the testimony of [the defendant] himself.").

V. Conclusion

It is critical that jurors hear this evidence in evaluating the defendant's defense; in fact, it would be constitutional error to exclude it.[4] The Supreme Court has recognized that a defendant has the absolute constitutional right to introduce "competent, reliable evidence bearing on the credibility of his confession." Crane v. Kentucky, 476 U.S. 683, 690 (1986) (exclusion of evidence as to length and manner of interrogation violated fundamental constitutional right to a fair opportunity to present a defense). Because the Defendant has proffered "competent, reliable evidence bearing on the credibility of his confession," and because this evidence meets all the requirements for the

[4] See, e.g., United States v. Shay, 57 F.3d 126, 133 (1st Cir. 1995, supra) (District Court's exclusion of expert testimony regarding defendant's mental disorder and confession reversible error because "common understanding conforms to the notion that a person ordinarily does not make untruthful inculpatory statements.")

admissibility of expert testimony generally, and because the Indiana courts have recognized the validity of expert testimony regarding confessions in both Miller and Carew, the federal and Indiana Constitutions require that his jury be permitted to hear this evidence.

Given the overwhelming importance jurors attach to such statements, and that a majority of jurors do not believe a defendant would confess falsely, fundamental fairness dictates the same result. Confession does not unerringly equal guilt.

(Signature)