

No. 15-1716

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

ROBEL PHILLIPOS,

Defendant-Appellant,

v.

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

On Appeal from the United States District Court
for the District of Massachusetts, No. 1:13-cr-10238-DPW-3
Before the Honorable Douglas Woodlock

**MOTION OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION
FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE
IN SUPPORT OF REHEARING**

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May 30, 2017

Pursuant to Federal Rules of Appellate Procedure 29(b), the American Psychological Association respectfully moves for permission to file the attached brief amicus curiae. As the leading association of psychologists in the United States, APA has an institutional interest in increasing and disseminating knowledge regarding human behavior and fostering the application of psychological learning to important human concerns, such as the administration of criminal justice.

This case involves an area in which APA can further those goals and contribute to the court's understanding of relevant scientific research, data, and literature. The district court dismissed research into false confessions—an established and well-regarded field of social psychology—as “faux science.” APA is well situated to explain why that holding is flawed and has a strong interest in having the ruling corrected.

May 30, 2017

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

According to the word-processing system used to prepare the foregoing motion (Microsoft Word 2010), the motion complies with Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 129 words, excluding the portions exempted by Rule 32(f).

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CORPORATE DISCLOSURE STATEMENT

The American Psychological Association is a not-for-profit, non-stock corporation incorporated under the laws of the District of Columbia and organized under section 501(c)(3) of the Internal Revenue Code. APA has no parent company and no publicly held corporation has an ownership interest in APA.

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INTEREST OF AMICUS CURIAE

The American Psychological Association is the leading association of psychologists in the United States. A non-profit scientific and professional organization, APA has approximately 115,000 members and affiliates. APA's purposes include increasing and disseminating knowledge regarding human behavior, and fostering the application of psychological learning to important human concerns.

APA's Division 41, the American Psychology-Law Society, focuses on the intersection of law and psychology. Its purposes include informing the legal community of current research in the field of law and psychology.

APA and its members have done considerable work on the subject of false confessions. For example, in 2014 APA's Council of Representatives adopted a "Resolution on Interrogations of Criminal Suspects," addressing the risks of false confessions. See <http://www.apa.org/about/policy/interrogations.aspx>.

APA has also filed more than 170 amicus briefs in courts around the country, briefs that have been cited frequently by courts, including the U.S. Supreme Court. See, e.g., *Moore v. Texas*, 137 S. Ct. 1039, 1051 (2017); *Hall v. Florida*, 134 S. Ct. 1986, 1994-1995, 2000-2001 (2014); *Commonwealth v. Wright*, 14 A.3d 798, 816 n.16 (Pa. 2011).

APA has a rigorous approval process for amicus briefs, the touchstone of which is an assessment of whether there is sufficient scientific research on a question before a court that APA can usefully contribute to the court's resolution of that question. APA regards this as one of those cases. The district court's dismissal of false-confession research as "faux science" is deeply flawed, and APA is both well situated to explain why and strongly interested in having the ruling corrected.¹

ARGUMENT

THE EXCLUSION OF DR. LEO'S TESTIMONY WAS AN ABUSE OF DISCRETION

At trial, the government introduced Robel Phillipos' confession, which he signed after an unrecorded four-hour interrogation. Phillipos sought to counter the confession in part with testimony from an expert, Richard Leo, about the phenomenon of false confessions and various risk factors that are correlated with them.

Without conducting a *Daubert* hearing, the district court excluded this testimony as unreliable. It held that false-confession research is not "the kind of discipline that is appropriate to display to the jury," describing the field as "faux science" and its practitioners as "at best, archivists ... and, at worst, anecdotalists."

¹ Neither party's counsel authored the brief in whole or in part. Neither party or party's counsel—nor any person except APA and its members and counsel—contributed money intended to fund the preparation or submission of this brief.

10/14/2014 Trial Tr. 159-160, 162 (Dist. Ct. ECF No. 519). The court further concluded that false-confession testimony would not “expose[] the jury to learning or experience that they do not have” and would “usurp[] from the jury” their “common-sense judgments about whether or not in this case there was a false confession given.” *Id.* at 159-160.

A panel of this Court affirmed, deeming it “reasonable” for the district court to conclude that there is no “body of reliable material that constitutes understanding in this area,” and that the testimony “would introduce the jury ... to a kind of faux science.” Slip op. 15.

The district court’s assessment of the relevant scientific research is wrong. And this Court’s affirmance of the exclusion of Dr. Leo’s testimony will have far-reaching harmful consequences, allowing courts to prevent jurors from hearing well-grounded expert testimony that appropriately redresses common and pernicious biases and misunderstandings. This Court should grant rehearing and reverse. Alternatively, the pertinent paragraph of the panel’s opinion should be revised to remove the reference to “faux science” and to make clear more generally that the panel’s ruling rests on the specific circumstances of this case and not any general infirmities with the relevant social-science research.

A. False-Confession Research Is Reliable

Contrary to the district court's assertion, false-confession research bears multiple hallmarks of reliability. Using rigorous quantitative and qualitative methods over many decades, researchers in this field have built a body of empirical findings, which run counter to the assumptions of many lay people yet are widely accepted among psychologists and leading organizations in psychological science.

False-confession research has been a mainstream area of psychological inquiry for over a century. See Münsterberg, *On the Witness Stand* 137-171 (1908). It rests on broadly accepted findings in social psychology: that people are responsive to reinforcement and conditioning, that they are influenced by perceptions of immediate consequences more than delayed ones, and that they are vulnerable to influence by trained professionals who use specific strategies to induce acts of compliance. See generally Kassin, *Expert Testimony on the Psychology of Confessions*, in *Beyond Common Sense* 195, 201-203 (Borgida & Fiske eds., 2008). Building on these findings, social-science researchers have focused systematically on the psychological mechanisms by which police interrogators elicit confessions.

This research is based on accepted methods. Researchers test their theories using sophisticated quantitative and qualitative approaches, including rigorous use of the experimental method. Through controlled laboratory and field experiments,

researchers have tested causal hypotheses about the cognitive and psychological effects of particular interrogation tactics. *See, e.g.,* Kassin & Kiechel, *The Social Psychology of False Confessions*, 7 *Psychol. Sci.* 125, 126 (1996); Russano et al., *Investigating True and False Confessions Within a Novel Experimental Paradigm*, 16 *Psychol. Sci.* 481, 484 (2005).²

For example, in one study published in a leading journal, subjects typing on a keyboard were accused of causing the computer to crash by pressing a key they had been instructed to avoid. *See* Kassin & Kiechel, *supra*, at 126-127. Despite their innocence and initial denials, subjects were asked to sign a confession.

When a confederate falsely said she saw the subject hit the forbidden key, the number of innocent subjects who signed more than doubled, increasing from 35% of the participants to 89%. *Id.* at 127. Subsequent studies have replicated that

effect, even where confession bore concrete negative consequences. *See*

Horselenberg et al., *Individual Differences and False Confessions*, 9 *Psychol.*

Crime & L. 1, 6 (2003); Redlich & Goodman, *Taking Responsibility for an Act Not*

Committed, 27 *Law & Hum. Behav.* 141, 151 (2003).

² Other techniques used in this field include individual and aggregated case studies, *see, e.g.,* Gudjonsson, *The Psychology of Interrogations and Confessions* 217-243 (2003), and systematic observation of police interrogation tactics and related contextual factors, *see generally* Leo, *Inside the Interrogation Room* 86 *J. Crim. L. & Criminology* 266 (1996). These diverse research methods are all established in the field and unquestionably valid.

Similarly, in a study published in another top-ranked journal, researchers showed that suggestive memory-retrieval techniques induced 70% of participants in a controlled study to have false memories of committing a crime. *See Shaw & Porter, Constructing Rich False Memories of Committing Crime*, 26 Soc. Psychol. 291, 296 (2015). Experiments have also shown that an interrogator's minimizing the wrongfulness of a crime—a commonly used technique—can triple the rate of false confessions. *See Russano et al., supra*, at 484. These are only a few examples of a robust empirical literature establishing such effects.

Research has likewise revealed additional factors that are correlated with false confessions. For instance, in a paper published in a leading interdisciplinary journal, researchers showed that sleep deprivation increased a person's chances of falsely confessing by four-and-a-half times relative to a control group. *See Frenda et al., Sleep Deprivation and False Confessions*, 113 Proceedings of the Nat'l Academy of Scis. 2047, 2048-2050 (2016). Still other factors have likewise been shown by experiments to be robustly correlated with false confessions. *See Owen-Kostelnik et al., Testimony and Interrogation of Minors*, 61 Am. Psychologist 286 (2006) (youth); Kassin & Gudjonsson, *The Psychology of Confessions*, 5 Psychol. Sci. Pub. Int. 33, 53-54 (2004) (length of detention).

These studies are not mere “anecdotes,” as the district court suggested. The studies examine testable and falsifiable hypotheses, subject them to rigorous

experimental inquiry, produce error rates in the form of statistical probabilities, and provide consistent results across many contexts. As indicated, moreover, the studies in this field have been published in leading, peer-reviewed journals of scientific psychology. Books and literature reviews in the field also synthesize the research for other scientists. *See, e.g.,* Gudjonsson, *The Psychology of Interrogations, Confessions and Testimony* (1992); Kassin & Gudjonsson, *supra*, at 33-67.

Indeed, APA can authoritatively attest that the study of false confessions has achieved general acceptance within the scientific community. In 2010, for example, following a four-year review process, a scientific white paper on false confessions was published in one of APA's major, peer-reviewed journals. *See* Kassin et al., *Police-Induced Confessions*, 34 *Law & Hum. Behav.* 3 (2010). The approval and publication process for this paper included consultation with a scientific advisory board consisting of three world-renowned and independent research psychologists, as well as peer-review by four anonymous experts in the field.

In addition to APA, moreover, the Association for Psychological Science has devoted an entire issue of its flagship publication to a peer-reviewed article reviewing the relevant literature. *See* Kassin & Gudjonsson, *supra*, at 33. And in a recent survey of academics working on interrogation and confession, over 90%

agreed that the effects on false confessions of techniques such as misinformation, minimization and evidence ploys are sufficiently reliable to be presented to a jury. Kassin et al, *On the General Acceptance of Confessions Research*, Am. Psychologist (forthcoming 2017).³ This further indicates the broad acceptance of false-confession findings.

Put simply, false-confession research uses established and robust methods, follows the highest standards of professional review (by experts from disparate branches of social psychology), and has achieved widespread approval within “the relevant community,” *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 151 (1999). This firmly rebuts the district court’s claim that the field is “faux science.” In fact, the relevant body of scientific conclusions easily warrants admission under Federal Rule of Evidence 702.

B. Expert Testimony On False Confessions Helps Jurors Understand Critical Evidence

Contrary to the district court’s view, *see supra* p.3, expert testimony on false confessions also “help[s] the trier of fact to understand the evidence.” Fed. R. Evid. 702(a). That confirms its admissibility.

The notion of a false confession is highly counterintuitive to many jurors. Lay people find it difficult to believe that an innocent suspect would (absent

³ APA can lodge a copy of this forthcoming article if doing so would assist the Court.

mental illness or physical force) confess to a crime he did not commit. *See* Chojnacki et al., *An Empirical Basis for the Admission of Expert Testimony on False Confessions*, 40 Ariz. St. L.J. 1, 3-4 (2008); Kassin & Gudjonsson, *supra*, at 59; Henkel et al., *A Survey of People's Attitudes and Beliefs About False Confessions*, 26 Behav. Sci. & L. 555, 577-580 (2008). Courts and commentators have noted the consequent widespread belief that virtually all confessions are both genuine and particularly probative of guilt. *See United States v. Shay*, 57 F.3d 126, 133 (1st Cir. 1995); Kassin & Gudjonsson, *supra*, at 40, 59. This predisposition may prevent jurors from fairly considering the possibility that a defendant confessed falsely.

Even jurors who are open to that possibility, moreover, often lack the tools to distinguish a false confession from an authentic one. Research shows that neither lay people nor experienced professionals distinguish truths from lies with high levels of accuracy. *See* Kassin et al., *supra*, at 6; Vrij et al., *Pitfalls and Opportunities in Nonverbal and Verbal Lie Detection*, 11 Psychol. Sci. Pub. Int. 89, 101-102 (2010); Kassin et al., *I'd Know a False Confession if I Saw One*, 29 Law & Hum. Behav. 211, 216 (2005). And analysis of actual cases suggests that false confessions can be particularly challenging to identify because they often contain signals of veracity, such as references to the confessors' thoughts, feelings, and motives, or non-public facts about the crime that became known to the

defendant during an interrogation. *See* Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. 1051, 1053 (2010); Appleby et al., 19 *Police-Induced Confessions*, Psychol. Crime & L., 111,126 (2013).

Expert testimony responds to these issues, calibrating jurors' views about the reliability of confessions by providing empirically grounded information about the phenomenon of false confessions and the circumstances under which they may occur. That is a quintessential example of assisting the trier of fact to understand the evidence.⁴

Recognizing this, other appellate courts have deemed expert testimony on false confessions admissible. One court, for example, reversed a conviction based on the exclusion of such testimony, stating that it “would have let the jury know that a phenomenon known as false confessions exists, how to recognize it, and how to decide whether it fit the facts of the case being tried.” *United States v. Hall*, 93 F.3d 1337, 1345 (7th Cir. 1996). Indeed, the court explained, it is “precisely because juries are unlikely to know that social scientists and psychologists have identified [factors] that will cause individuals to make false confessions that the

⁴ As this discussion should make clear, the district court's concern that Dr. Leo's testimony would “usurp[]” the jury's role was misplaced. False-confession expert testimony does not tell the jury whether a particular confession is false. It helps correct misimpressions about confessions generally, and gives jurors tools to make *their own*—well-informed—judgment about a confession's truth or falsity.

testimony would have assisted the jury in making its decision.” *Id.* There is no reason for this Court to take a contrary approach.

Finally, expert testimony about false confessions helps jurors evaluate the evidence by educating them about the risk factors that can yield a false confession, including interrogation tactics that police use to elicit confessions and traits that can render a person particularly prone to confess falsely. Researchers have systematically observed these factors—about which jurors, again, typically have little knowledge—and studied their effects. *See, e.g.,* Gudjonsson, *The Psychology of Interrogations and Confessions*, *supra*, at 141-151; Kassin et al., *Police Interviewing and Interrogation*, 31 *Law & Hum. Behav.* 381, 389-390 (2007); Kassin et al., *Police-Induced Confessions*, *supra*, at 27-30; Gudjonsson & Pearce, *Suspect Interviews and False Confessions*, 20 *Current Directions Psychol. Sci.* 33 (2011).

For example, experts can explain to jurors that police interrogators often follow a psychologically oriented and largely standardized process known as the “Reid Technique.” This technique involves making a suspect feel trapped, uncertain, and despondent, and then offering sympathy and moral justification, thus normalizing and minimizing the crime until the suspect sees confession as an expedient exit strategy. Studies have shown that this technique is extremely effective at generating confessions—both true and false. Kassin et al., *Police-Induced Confessions*, *supra*, at 27-30.

In educating jurors about these psychological processes, experts help jurors give context to the particular confession at issue. Experts can explain, for example, that lawful interrogation techniques, such as confronting suspects with powerful but false evidence of their guilt or minimizing the wrongfulness of the alleged crime, are significantly correlated with producing false confessions. Experts can also explain that length of detention and a suspect's youth and mental capacity have statistically significant effects on the propensity to confess falsely. Informing jurors about the results of this research is another appropriate role for expert testimony because jurors, armed with the information, can better evaluate the validity of a confession, based on not only their appraisal of a defendant's credibility but also an objective assessment of particular risk factors present—or not present—in the case.

CONCLUSION

Rehearing should be granted and the district court's judgment reversed. Alternatively, the pertinent paragraph of the panel's opinion should be revised to remove the language suggesting that false-confession research is "faux science" and to make clear more generally that the panel's ruling on this issue rested on the specific circumstances of this case and not because of any broad infirmities with the relevant social-science research.

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