

# Admissibility of False-Confession Testimony: Know Thy Standard

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The reliability of confessions is subject to a variety of factors, some of which give rise to expert testimony. To the degree that prosecutors construe the determination of reliability as an objective standard, they may attempt to bar testimony. Moreover, when the testimony is theoretical rather than clinical, there are additional challenges. Depending on jurisdiction, the admissibility of expert testimony on whether a confession was knowing, intelligent, and voluntary is subject to a legal threshold such as the *Frye* or *Daubert* standard. The authors review a 2002 New Jersey Superior Court ruling that illustrates the forces that shape the admissibility of confessions.

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There are many reasons that criminal suspects give false or unreliable confessions, covering a broad range of scenarios—coercion by police, mental illness or retardation, and publicity-seeking, for example.<sup>1,2</sup> Because the waiver of rights embedded in giving a confession must be knowing, intelligent, and voluntary, defendants may later challenge the use of the confession as evidence.<sup>3,4</sup> The usual arguments are that the suspect was coerced or deceived or that, due to a mental condition, the defendant lacked an understanding of his or her rights. Defendants often have the option to challenge the use of an incriminating statement when they argue that their rights were infringed on. For example, they could claim that they were not adequately apprised of *Miranda* warnings or could not exercise the rights because of internal or external factors. Internal factors can range from mental retardation to psychosis to intoxication and drug withdrawal.<sup>1</sup> External factors involve claims of maltreatment or threats. Any one or more of these factors can raise doubt as to the overall reliability of the statement.

Criminal defendants may attempt to use expert testimony by psychiatrists, psychologists, and academics, to persuade the court to suppress a statement. In jurisdictions where the adjudication of these matters is not entirely objective, there is an opportunity to proffer testimony that, for example, the suspect's will was overborne or that the suspect

fits the profile of a false confessor.<sup>2</sup> On these occasions, the testimony may come under scrutiny about its own reliability or general acceptance as scientific. Because suppression hearings are before a judge, the issue of prejudice versus probative value is not salient. However, when the nature of the testimony involves nonclinical information, such as social psychology research findings, courts have serious questions about how helpful it may be to the trier-of-fact.

The historical standard that courts have used to determine the admissibility of scientific evidence is the *Frye* test.<sup>5</sup> Under *Frye*, testimony is admissible if it has gained general acceptance by the relevant scientific community. The contemporary standard, the *Daubert* test,<sup>6</sup> makes the judge a gatekeeper for admissibility. Under *Daubert*, testimony is liberally admitted if it is scientifically reliable and helpful to the trier-of-fact. The application of *Daubert* to “softer” applications, such as social science, was stated in 1999 (*Kumho Tire v. Carmichael*).<sup>7</sup> In the wake of a liberalized standard for admissibility of testimony, there have been several areas in which the introduction of psychiatric or psychological testimony has become controversial, including confessions, battered-woman syndrome, and repressed memories.<sup>8</sup> The basis of the controversy is that expert witnesses have presented theories of behavior or empirically based formulations that have relevance to the case but questionable benefit to the trier-of-fact.

## State of New Jersey v. Patrick Free

In terms of standards for expert testimony, New Jersey is a hybrid state—retaining the *Frye* test in

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criminal cases and adopting *Daubert* in civil cases. In the case of *State of New Jersey v. Patrick Free*,<sup>9</sup> we see the interplay between expert witnesses in a false-confession claim, wherein the appellate court reversed a trial court ruling that a social psychologist's testimony would be admissible. Part of the problem in *Free* was confusion over which legal test applied.

In January of 1998, Patrick Free, an individual without any known contributory psychiatric history was taken into police custody and charged with the murder of Adam Suopys. Free had reportedly been subjected to an aversive and protracted police interrogation, resulting in his confession of the crime charged. The defendant later made a motion to suppress his confession as involuntary and in violation of his Fifth Amendment rights. His motion was rejected. Free then served the State with the expert report of social psychologist Saul M. Kassin, PhD, on the credibility of his confession. Dr. Kassin, professor of psychology and Chair of Legal Studies at Williams College, has published articles on police interrogation procedures.<sup>2</sup> The trial judge permitted him to testify on the question of whether Free's confession was knowing and voluntary.

Dr. Kassin reported that Free was questioned, interrogated, and tested for more than 17 hours and for most of that time had persistently maintained his innocence. Free was held in a sparsely furnished room, without contact from family or friends, was not offered food, and was found to be sleep deprived at the time of his statements. Detectives assigned did not record Free's initial statements—even though a recorder was available. Consequently, there was no official record of his story and no recorded evidence of the aversive prodding and threatening that ultimately led to a coerced confession, in the expert's opinion. Free had maintained that he was often interrupted when telling his story and was given details of the crime scene not previously known. Free asserted that the questioning was confrontational enough to break down defenses and render his denial of accusations futile. Finally, Free had been subjected to a prepolygraph interview at 1:30 a.m., the test itself at 2:20 a.m., and a postpolygraph interview culminating in his taped confession at 5:06 a.m. Dr. Kassin concluded his report by stating that the recorded confessions "should be treated with extreme caution." The report, reproduced in the opinion, indicates that Free's confession was similar to those

found in documented "coerced-compliant" and "coerced-internalized" false confessions.<sup>2</sup>

The State moved to preclude Dr. Kassin from testifying, but the judge ruled for the defendant, stating that the witness could testify as an expert witness on questions of whether the statements were voluntarily given, and to the extent that opinions can be given within reasonable psychological certainty. The State's argument was that the defense had failed to meet its burden in demonstrating that the proposed testimony was reliable. The evidentiary hearing proceeded, with Dr. Kassin testifying for three days. Psychiatrist Dr. Michael Welner testified during five days for the State. The thrust of his testimony was that Dr. Kassin's schema was not scientific. The trial judge permitted the defense testimony, reasoning, in part, that Dr. Kassin's testimony was not based on science, but rather on specialized knowledge. Moreover, the trial judge opined that the area under question was not "truly scientific" or "readily subject to investigatory techniques. It is, instead, an area that should be determined by the jury and not by a judge exercising a gate-keeping function" (Ref. 9, p 91). It was apparent to the appellate court that this reasoning presumed a *Daubert* standard in interpreting New Jersey Rule of Evidence 702.<sup>10</sup> The irony of the judge's eschewing the gatekeeper function while invoking *Daubert* principles was not lost on the appellate court, which pointed out that New Jersey case law had already settled the question of whether psychological testimony was within the category of scientific evidence—in the affirmative.

Despite the overall admissibility of psychological testimony in confession cases, the appellate court was quick to draw a distinction between "testimony [about] scientifically recognized mental disorders relevant to each defendant's confession [and] the effects, in general of police interrogation techniques" (Ref. 9, p 91). In accepting Dr. Kassin's testimony, the court said, the trial judge went too far. The trial judge should have applied the *Frye* test and looked at the general acceptance of Dr. Kassin's principles and methodology. In retrospect, the appellate court reasoned, his opinions would have fallen short, given *Frye's* more stringent standard.

The *Free* decision bolstered this view by citing similar cases from around the country, first citing four cases that tended to support the defendant's introduction of testimony about false confessions. In *U.S. v. Hall*,<sup>11</sup> the defendant proffered testimony by

Dr. Richard Ofshe, another well-known false-confession theorist; the *Daubert* test was applied. The court was interested in two things: whether the expert had “specialized knowledge” and whether the testimony would be helpful to the trier-of-fact. The *Hall* court severely limited Dr. Ofshe’s testimony. In *Callis v. State*,<sup>12</sup> an Indiana court ruled on another case with Dr. Ofshe. In that case, the appellate court affirmed the trial court’s ruling that the testimony would not be admissible because it would invade the province of the jury. That is, the expert could testify about false confessions generally, but was barred from stating an opinion about the reliability of this particular defendant’s confession. In *People v. Lopez*,<sup>13</sup> the court ruled that a psychologist could testify on the psychological environment of an interrogation. This court, citing the defendant’s right per *Crane*,<sup>4</sup> used no standard for admissibility on scientific grounds. Finally, the *Free* court cited a California case, *People v. Page*.<sup>14</sup> In that case, a social psychologist was permitted to testify about why a person might make a false statement, but he could not state an opinion about Page’s reliability. The appellate court sustained the ruling.

Next, the *Free* decision cited three cases that tend to support the State’s position. In *State v. Tellier*,<sup>15</sup> the expert witness in Maine simply asserted that false confessions exist, but did not back up the opinion with either scientific evidence or a clinically based view. Giving the jury background information about false confessions would not have aided them. Similarly, in *Kolb v. State*,<sup>16</sup> the Wyoming Supreme Court sustained a ruling that rejected a psychologist’s testimony about a “false-confession syndrome.” When in a hearing the witness conceded that there was no syndrome, the testimony was barred for lack of scientific reliability. Finally, in *State v. Ritt*,<sup>17</sup> the Supreme Court of Minnesota affirmed a ruling that a psychologist could not testify about the effects of an interrogation technique. The defense had requested that the expert review the videotaped confession to point out instances of coercion, but no evidentiary hearing was held, and the trial court ruled that the expert would not enlighten the jury. The judge used an evidentiary rule virtually identical to New Jersey’s.

Having looked at a variety of related cases, the *Free* court rejected the trial court’s ruling that Dr. Kassin could testify, citing, per *Frye* and New Jersey Rule 702,<sup>10</sup> several factors: Dr. Kassin’s premises had not gained general acceptance, his opinions would not be

scientifically reliable, his testimony would not assist the trier-of-fact in understanding the evidence or a fact at issue, and the subject matter would not be beyond the ken of jurors.<sup>9</sup> The court reasoned that, although people do not usually make statements against their interest, jurors would not believe that all confessions are true. “Moreover, the coercive factors mentioned by Dr. Kassin, such as isolation, persistent questioning, confrontation with real or fabricated evidence of guilt, and minimization of the consequences of confession, are all matters that a jury would recognize as having a potential for causing a false confession” (Ref. 9, p 96).

## Discussion

The *Free* case is instructive in several ways. First, courts are reluctant to permit testimony on a general academic subject, such as whether, under some circumstances, suspects make false confessions. It has been pointed out that this phenomenon should not come as news to the general public. For example, there were many false confessions in the Salem witch trials and after the Lindbergh baby kidnapping.<sup>18</sup> Second, the proposed testimony must pass through the filter of a standard test of admissibility—the stringent standard of *Frye* or the liberal threshold of *Daubert* and its progeny. Third, even if the expert’s subject matter is acceptable, there must be a connection between the witness’s methodology and the defendant in question. Thus, as we have noted previously,<sup>1</sup> a connection between a clinically diagnosed mental condition and a suspect’s capacity to waive rights is more likely to succeed. The reason is that the methodology is the psychiatric/psychological examination, rather than an abstract discussion of what people do under certain circumstances. In other words, testifying about a theory of false confessions is not nearly as potent as testifying about the qualities of the suspect at the time in question.

One must be careful to know the admissibility test in the jurisdiction, and to understand how close one’s opinion can come to the ultimate issue. It is unlikely, for example, that under some form of Federal Rule of Evidence 702,<sup>19</sup> an expert will be permitted to opine that a confession was in fact false. On the other hand, it might be educational for a jury to hear testimony about how an individual with mental retardation lacked the reasoning power to understand *Miranda* warnings and to employ their admonition.

The courts have informed us that juries are not in need of scientific opinions about whether a person will confess falsely under duress. However, psychiatrists have a role in educating juries about psychiatric syndromes relevant to the calculus of reliability of confessions. For example, in *United States v. Shay*,<sup>20</sup> the defense at trial proffered the testimony of Dr. Robert Phillips on the matter of how a psychiatric syndrome could have given rise to a false confession to another inmate. The trial court refused to allow it, citing the jury's ability to come to its own conclusion. The case was remanded on appeal for a full evidentiary hearing using a *Daubert* standard.

Summarizing his views on the false-confession theorists, Agar characterizes the nascent body of knowledge as not "voodoo science" but not ready for "prime time" either (Ref. 17, p 42). Our view is that attorneys should continue to use expert testimony in the area of the reliability of confessions and that expert witnesses should be prepared to face *Daubert* or *Frye* challenges.

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