State of New York
Court of Appeals

OPINION

No. 22
The People &c.,
Respondent,
v.
Howard Powell,
Appellant.

Kendra L. Hutchinson, for appellant.
Christopher Blira-Koessler, for respondent.
The Innocence Project, Inc.; Center for Appellate Litigation et al., amici curiae.

DiFIORE, Chief Judge:

False confessions elicited during custodial interrogations do exist. In *People v Bedessie* (19 NY3d 147, 161 [2012]), we recognized that the phenomenon of false confessions during custodial interrogation is common knowledge, and we opined that

expert psychological testimony relevant to the defendant and the custodial interrogation at issue 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." The admissibility and limits of the expert's testimony lie primarily in the sound discretion of the trial judge, and the expert may not render an opinion as to the truthfulness or falsity of the confession. The primary issue presented in this case is whether the trial court, in denying defendant's *Bedessie* application, erred in precluding the testimony of defendant's proffered expert witness on false confessions after holding *Frye* and *Huntley* hearings. On this record, the trial court's determination was not an abuse of discretion as a matter of law.

I

Defendant was charged with having committed two elevator robberies over the course of three days. During the first incident on February 23, 2010, HT was robbed at knifepoint in an elevator of a building in the Queensbridge Housing Complex. Two days later, a second individual, EY, was robbed by a man displaying what appeared to be a box cutter, in an elevator of the same housing complex. EY first encountered the robber, whom she described as a six-foot-tall, light-skinned black male in his 30s, carrying an umbrella, when he asked her to light his cigarette as she exited a local grocery store at about 3:00 p.m. on the afternoon of February 25. As EY walked back to her nearby apartment, the same man followed her into her building. The two entered the elevator and, when the doors closed, the man physically attacked the victim. The robbery, including a face-to-face struggle between the victim and her assailant that lasted more than two minutes, was

captured on the building's video surveillance system. Although the perpetrator's face is not clearly visible to the viewer of the video, the film depicts a tall man wearing a hooded, dark-colored coat and hat, carrying a large black umbrella with a curved handle.

EY's assailant fled with her electronic benefits transfer (EBT) card. Surveillance footage from a nearby deli, recorded at approximately 4:00 p.m., depicts a tall man similar in build and appearance to the man who committed the robbery—wearing the same type of clothing and carrying a large umbrella—attempt to use the stolen EBT card a short time after the robbery. The card was declined and the man then attempted to use it in the ATM. The surveillance footage from the well-lit store shows portions of the man's face from multiple angles. By interviewing witnesses and matching photographs with the surveillance footage, the police identified defendant as a suspect.

On March 1, 2010, defendant was arrested on the fifth floor of a building in the Queensbridge Housing Complex for possession of crack cocaine and was transported to the local precinct. There, he was interviewed about the robberies that took place on February 23 and 25. The following day, defendant made the two statements that are in issue here. The first statement, elicited during the morning hours, was handwritten by defendant. Without providing any detail, defendant admitted to having committed robberies, claimed to have been under the influence of drugs and indicated he wanted to help the police.[1] The second statement was elicited in the afternoon, after defendant had

[1] The terse first statement read: "Was using drugs for two weeks and was doing really bad. I did a few robbery [sic] and I am very sorry please forgive me I want to help NYPD but only you can help me with this, I was really messed up on drugs and I am

been identified in lineups by both victims. The statement prepared and typewritten by the detective assigned to the case summarized defendant's detailed oral statement, in which he admitted following the victim (EY), who was carrying groceries, and robbing her of her EBT card after a struggle in the elevator. Defendant again claimed to have been "messed up on drugs" and that he wanted to help the police.[2] He signed the statement on the second page, which contained no factual allegations.

Defendant was indicted for two counts of robbery in the first degree.[3] Prior to trial, defendant served a CPL 250.10 notice of intent to introduce psychiatric evidence for the purpose of demonstrating that he was suffering from psychiatric conditions that "adversely

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sorry if I've hurt any one."

[2] The second statement read:

> "Sometime toward the end of last week I followed this oriental girl from the 40 side of 10 Street into her building. She was carrying groceries. I went into the building and then into the elevator with her where I robbed her. This one gave me a fight for my money and tried to push me away. I kept pushing her but I didn't try to hurt her. I usually keep a razor knife in my pocket but didn't think I had time to get it out. The only thing I got from her was an EBT card with no numbers on it.
> I was using drugs for two weeks and was doing really bad. I did a few robberies and I am very sorry. Please forgive me. I want to help the NYPD but only you can help me with this. I was really messed up on drugs and I am sorry if I've hurt anyone."

[3] Defendant also confessed to the robbery of HT, but that typewritten statement was suppressed based on the People's failure to provide a separate CPL 710.30 notice. Defendant's motion for severance of the two robbery counts was granted prior to trial.

affected the voluntariness and reliability of the interrogations conducted." In support of his position, defendant submitted medical records of his history of a seizure disorder, depression, and schizophrenia, as well as a forensic psychological report prepared by Sanford L. Drob, Ph.D., who conducted a clinical evaluation of defendant. Dr. Drob characterized defendant's intellectual function to be within the "borderline range," with an IQ of 78. He concluded that defendant had several mental health issues, including possible paranoid ideation and substance abuse issues. Dr. Drob opined that the combination of attendant factors, including defendant's mental illness and cognitive deficits, "could make him vulnerable to suggestion in a custodial setting."

Huntley Hearing

Defendant moved to suppress the two noticed statements. At the *Huntley* hearing, Detective Grinder and defendant testified to contradictory narratives of the circumstances surrounding the custodial interrogation.[4] Each version is summarized here, as is necessary to evaluate the trial court's *Bedessie* determination.

Detective Grinder testified that defendant was arrested at about 2:20 p.m. on March 1. While defendant was held in the precinct's interrogation room, one of his hands was handcuffed to the wall. Grinder, who arrived at the precinct about two hours after the arrest, advised defendant of his *Miranda* rights later that same evening at about 6:30 p.m. Defendant signed and initialed the *Miranda* card, waiving his rights, but did not make any

[4] Defendant's motion to suppress the identification evidence was denied and no issue is raised on appeal as to the validity of the lineup identifications.

admissions on March 1. When told his arrest was made in connection with robberies committed in the Queensbridge Housing Complex, defendant became visibly agitated and denied any involvement. The detective, who intended to conduct lineups the next day, ended the interview. Upon defendant's request, Detective Grinder traveled to defendant's friend's home, where he retrieved four bottles of medication prescribed to defendant. The detective returned to the precinct and vouchered the medications. He could not recall whether defendant took the medication. Shortly thereafter, at about 11:50 p.m., defendant was transported to central booking for lodging that night.

On the morning of March 2, at approximately 9:30 a.m., Detective Grinder and another detective transported defendant from central booking back to the precinct. Defendant was given breakfast—coffee and a bagel. Defendant's demeanor was now calm, and he agreed to speak with detectives. *Miranda* warnings were not reissued, nor was the interview recorded. At about 10:00 a.m., the detectives began discussing the charges and informed defendant that he would be required to participate in lineup identification procedures. Detective Grinder supplied defendant with pen and paper and left him alone in the room where he handwrote the first statement.

Two lineups, each with six participants, were conducted on March 2 at 12:30 p.m. and both victims identified defendant. Shortly after the lineups were conducted, and while in the interrogation room with the two detectives at about 1:00 p.m., defendant asked the detectives if he had been identified by the victims. The detectives informed him that he had been identified by both victims and asked if he wanted to make any further statements.

Defendant then admitted that he had committed four robberies, including the two charged here.[5] He asked Grinder to write out the confessions for him, as he was not a good writer, and proceeded to give the second statement orally. Grinder, who did not take any notes, later typed up the confession, which defendant signed on the blank, second page. Detective Grinder testified that he spoke with defendant on-and-off "the whole day" on March 2 and that he provided defendant a meal from Burger King. He further testified that defendant did not request any medical assistance and did not appear to be experiencing any type of drug withdrawal. At about 8:30 p.m. that night, defendant was returned to central booking.

Testifying on his own behalf, defendant gave a very different version of the interrogation events. As to his background, he testified that he had low intelligence, suffered from seizures, and had a history of schizophrenia, depression and substance abuse. He had been prescribed various medications for those conditions but the last time he took his medications was at about 8:00 p.m. the night before his arrest (February 28). On the morning of March 1, defendant ingested heroin and crack cocaine. After his arrest that afternoon, he was feeling paranoid and scared and, later that day, at some time between 4:00 and 5:00 p.m., while he was handcuffed to the wall in the precinct interrogation room, he had a seizure and urinated on himself. He asked Detective Grinder for his medication

[5] The police investigated but were unable to match his confession to the other two robberies with any known complaints and, in the absence of corroboration of the confession, no typewritten statements were prepared. This evidence of new information does not support the claim in the proffered expert report that defendant's statements evidenced a classic element associated with false confession cases—the absence of any "new information unbeknownst to the police."

and Grinder told him that he would not get the medication or medical treatment unless defendant cooperated. Further, according to defendant's testimony, Grinder threatened that if he asked to go to the hospital again, Grinder would make sure defendant did not go before a judge for four or five days. Grinder then left defendant to go to an outside location to retrieve defendant's medication at approximately 9:00 p.m. When he returned, Grinder placed the medication at the end of the table in the room, out of defendant's reach. Defendant claimed he received the medication the next day (March 2), but only after he gave the police the handwritten statement, which he denied was truthful. Defendant testified that he only wrote the statement to appease the detective because he was deprived of his medication and food and was scared that he would have another seizure.

On cross-examination, defendant alleged that, on the night of March 1, between 7:00 and 8:00 p.m., while in the interrogation room, Detective Grinder hit him in the head four or five times. Later that night, when he was brought back to central booking for lodging, he saw medical personnel but, other than providing basic history, he did not mention anything about his mental health or seizures because he did not feel that he could tell them what was going on. Defendant, when shown the exhibit of the typewritten, signed confession, repeatedly denied that he made those admissions or that he had ever "seen or heard th[o]se statements." He testified that, after the lineups, he simply signed the blank second page. Notwithstanding his concession that it was his signature and initials on the *Miranda* card, he claimed that he did not receive *Miranda* warnings until about 6:00 p.m.

on March 2, after he signed the second page of the typewritten statement, which contained no factual allegations.

The hearing court credited defendant's testimony only to the extent it did not conflict with Grinder's and denied the motion to suppress the statements.

Frye Hearing

Citing to *People v Bedessie*, defendant moved to admit the testimony of Allison Redlich, Ph.D., as an expert witness "to educate the jury" on factors that were generally accepted in the relevant scientific community as associated with false confessions. Defendant attached a 12-page report from the highly credentialed Dr. Redlich based on her review of the *Huntley* hearing testimony, police reports, and Dr. Drob's report. In order to resolve the conflicting witness accounts of the custodial interrogation in her report, Dr. Redlich credited defendant's account, which she found "more telling." To demonstrate general acceptance in the field of false confession research, attached to the motion were several publications, including some that were co-authored by Dr. Redlich.[6]

The trial court ordered a *Frye* hearing to address the admissibility and scope of the proposed testimony.[7] At the hearing, Dr. Redlich was found to be an expert in the field of

[6] One of these publications was a 2009 "white paper" approved by the American Psychology Law Society—one of only two such papers published in the history of that division of the American Psychological Association (*see* Saul M. Kassin, et al., *Police-Induced Confessions: Risk Factors and Recommendations,* 34 Law Hum Behav 3 [2010]).

[7] The motion court initially held that the expert's testimony would be permitted, but left "[a]ny limitations on the scope" of the testimony to the trial court.

false confession studies. As stated in her report, and mirroring the expert testimony proffered in *Bedessie*, Dr. Redlich set forth the three types of false confessions: voluntary (not coerced—could be offered to protect another or attain notoriety), coerced compliant (where the suspect's will is overborne) and internalized (through deceptive interrogation techniques, the suspect comes to believe he or she is guilty). She also set forth the paradigm of a series of dispositional and situational factors that have been recognized as contributing to the risk of false confessions. Relevant to the facts of this case, Dr. Redlich identified three dispositional factors that defendant displayed, based on his medical reports: mental illness, intellectual disability and substance abuse. As to situational factors, Dr. Redlich found that defendant was in custody and questioned intermittently for over 24 hours, that his statements evidenced minimization by the reference to his drug abuse, and that the statements admitting to the crimes charged did not provide any information that was not already known to the police. Related to these situational factors she focused primarily on the Reid technique, a nine-step method of police interrogation based on psychological principles, which she opined was widely used. As part of the Reid technique, the suspect is isolated and confronted with the interrogator's alleged knowledge of his guilt. The interrogator then engages in tactics like presentation of false evidence, minimizing the suspect's responsibility for the crime, or theme development, making the suspect more compliant in offering a confession that mitigates his role. Dr. Redlich opined that these techniques could produce a false confession when employed on innocent individuals—especially where other dispositional or situational risk factors were present.

On cross-examination, Dr. Redlich conceded that she was unaware of the type of training, if any, members of the New York City Police Department received in interrogation techniques, but that, even if they were not specifically trained in the Reid technique, "all interrogations . . . pretty much follow the same model." She also testified that, in her role as a research psychologist, she analyzed videos of actual interrogations, placed reliance on self-reporting from subjects and reviewed legal cases. When queried as to laboratory studies in her field, she identified a study in which her team interviewed defendants in the criminal justice system, including inmates in the Santa Clara County Jail who had confessed to crimes—whether truly or falsely, based on their self-reporting—about their experiences with interrogation. The subjects all had mental illness and 86% of them "had a known serious mental disorder." They were paid for their cooperation and, without the presence of counsel, were asked whether they had ever confessed to or pleaded guilty to a crime they did not commit. No measure was taken to ascertain if their self-reports were true or false. She also testified to two additional studies—the "Alt Key Paradigm" and the "cheating paradigm"—that attempted to use deceptive tactics to induce false confessions in a laboratory-like environment. She conceded that the "Alt Key" study was flawed and no longer used and that the "cheating paradigm" was distinguishable from police interrogation. Dr. Redlich noted that laboratory studies in the field of false confessions are not akin to the analysis done in other scientific fields, such as DNA evidence, where the tests conducted pursuant to an accepted methodology can be replicated to achieve the same results. Laboratory studies in the field of false confessions are likewise distinct from studies done in the field of misidentification, as there are practical difficulties

and ethical considerations in recreating the circumstance of a real-life custodial interrogation in a laboratory setting. She further acknowledged that, as to the laboratory studies in her field, there are issues of external validity and the ability to translate the results to the criminal justice system.

Following the hearing, the court denied defendant's request to call Dr. Redlich as a witness at trial, finding that, based on the evidence presented, defendant failed to meet his burden of establishing that Dr. Redlich's testimony in the area of false confessions was "readily acceptable in the scientific community." The court deemed the showing that the phenomenon of false confessions exists and that interrogation tactics may increase the likelihood of same insufficient to sustain this burden. The court found Dr. Redlich's testimony "in many respects unpersuasive" and noted her failure to establish a known or potential rate of error and her lack of personal knowledge of the circumstances of defendant's confessions. The court also referenced Dr. Redlich's "strong" reliance on the three laboratory studies to form her opinions, noting that the "Alt Key" study had been discredited and that the "cheating study" was inapplicable. Significantly, the court observed that defendant failed to establish that his statement was induced by any of the factors outlined in *Bedessie*. However, recognizing that defendant may possess the dispositional characteristics identified in *Bedessie*, the court left open the possibility that a different expert could testify—one who had personal knowledge of defendant's medical history and the circumstances of the case that may have led to a false confession.

At the next appearance, the court explained that it did not dispute that "the science may be there with respect to false confessions," but that it did not think Dr. Redlich was the proper witness to educate the jury about the phenomenon, given, in part, her testimony that some of the studies on which she relied had since been disavowed. The court clarified that its decision was based on its determination that Dr. Redlich lacked the necessary expertise, rather than the fact that she had not interviewed defendant. Defense counsel then advised the court that he did not intend to call Dr. Drob, the psychiatric examiner whose report on defendant's dispositional factors was relied upon by Dr. Redlich, because defendant was competent to testify at trial as to his own mental conditions.

At trial, defendant's testimony as to the circumstances of his custodial interrogation was consistent with the testimony he gave at the *Huntley* hearing.[8] He testified that his first handwritten statement, which contained no detail linking him to any particular robbery, was coerced—given by him in an attempt to escape the interrogation and get his medication. He testified that he never made the second detailed, typewritten statement and maintained it was wholly manufactured by Detective Grinder. He further claimed all the statements were elicited before he was advised of his *Miranda* rights.[9]

[8] Defendant added at trial that he did not have his prescription glasses at the time of his arrest. In rebuttal, the People introduced a booking photograph into evidence purportedly depicting eyeglasses hanging from defendant's shirt and testimony of defendant's possession of eyeglasses during the interrogation.

[9] We agree with the dissent that ascertaining the timing of when defendant received his *Miranda* warnings required a credibility determination (*see* dissenting op at 8-9 n 3). That quintessential issue of fact was decided against defendant by the *Huntley* court, which denied his motion to suppress the statement, and the jury, who convicted defendant after

The victim, EY, testified at trial and identified defendant as the robber. During cross-examination, defendant elicited inconsistencies between the description she provided to police and his physical appearance—in particular, he was six feet, four inches tall as opposed to six feet, and was significantly older than her description of the perpetrator. Defendant also testified that he was missing 12 teeth in 2010, a circumstance that was not noted by the victim. The surveillance footage from the elevator and the deli were admitted into evidence and played for the jury.

As required by constitutional law in cases where the voluntariness of a statement is placed in issue at the trial (*see Jackson v Denno*, 378 US 368 [1964]; CPL 60.45; CPL 710.70; *People v Graham*, 55 NY2d 144, 147 [1982]), the jury was instructed that, before they could consider defendant's statement as evidence, they had to find the People proved beyond a reasonable doubt that it was voluntarily made. This instruction required the jury to find that defendant received, understood, and waived his *Miranda* rights, or the statement must be disregarded. The jury was further instructed that they must determine whether any statement was obtained by "improper conduct or undue pressure," factoring in such dispositional factors as defendant's intelligence and his physical and mental condition, as well as situational considerations such as the length of time defendant was questioned and the treatment he received from the police during that time. The court also

being properly instructed that statements elicited in violation of *Miranda* must be disregarded as evidence. This credibility determination is not within the province of the proffered expert, as she had no personal knowledge of this factual issue.

gave the jury an expanded eyewitness identification charge, including a charge on cross-race effect (*see People v Boone*, 30 NY3d 521 [2017]).

The jury convicted defendant of robbery in the first degree. Defendant then pleaded guilty to an additional count of first-degree robbery to resolve the count of the indictment involving the robbery of HT, which had previously been severed. The Appellate Division affirmed, holding that it was a provident exercise of discretion for Supreme Court to deny defendant's motion to present expert witness testimony on the phenomenon of false confessions because defendant failed to demonstrate the proposed testimony was relevant to the circumstances of his case (166 AD3d 660, 661 [2d Dept 2018]). A Judge of this Court granted defendant leave to appeal (33 NY3d 980 [2019]).

II

The admissibility and scope of expert testimony are subject to the discretion of the trial court (*see People v Lee*, 96 NY2d 157, 162 [2001]), limiting our scope of review to whether the determination to exclude the proffered expert testimony was an abuse of that discretion as a matter of law. Here, the 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. 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" (*Cornell v 360 W. 51st St. Realty, LLC*, 22 NY3d 762, 781 [2014] [citation and quotation marks omitted]).

It is well-settled that the inquiry under *Frye* "'is separate and distinct from the admissibility question applied to all evidence—whether there is a proper foundation—to determine whether the accepted methods were appropriately employed in a particular case'" (*People v Brooks*, 31 NY3d 939, 941 [2018], quoting *Parker v Mobil Oil Corp.*, 7 NY3d 434, 447 [2006]). Further, particularly "in the social science arena, we have measured the reliability of novel hypotheses and theories—not just methodologies—against the *Frye* standard" (*Cornell*, 22 NY3d at 781). And, under *Bedessie*, in addressing the phenomenon of false confessions, the trial court must also determine whether the same proffered testimony was "relevant to the defendant and interrogation before the court" (*Bedessie*, 19 NY3d at 161). "'It is for the trial court in the first instance to determine when jurors are able to draw conclusions from the evidence based on their day-to-day experience, their common observation and their knowledge, and when they would be benefited by the specialized knowledge of an expert witness'" (*Lee*, 96 NY2d at 162, quoting *People v Cronin*, 60 NY2d 430, 433 [1983]). We have otherwise characterized this determination as an evaluation of whether the testimony "'would aid a lay jury in reaching a verdict'" (96 NY2d at 162, quoting *People v Taylor*, 75 NY2d 277, 288 [1990]).

As we recognized in *Bedessie* in 2012, awareness of the phenomenon of false confessions has evolved to the point of "common knowledge, if not conventional wisdom" (19 NY3d at 156).[10] This, however, does not mean that expert testimony on the theories

[10] As in *Bedessie*, the existence of false confessions was broached by counsel during voir dire and the prospective jurors were generally familiar with the existence of same, with one prospective juror citing as an example the case of the Central Park Five.

behind the reasons for false confessions is rendered unnecessary. Certain aspects of the scientific study of the phenomenon might well be outside the ken of the typical juror (*see* 19 NY3d at 156; *Lee*, 96 NY2d at 162). The proffered psychological expert testimony here is, in certain respects, similar to the expert psychological testimony on rape trauma syndrome addressed in *People v Taylor* (75 NY2d 277). That is, the testimony is not addressed to a particular scientific technology or procedure that, when properly performed, will generate results generally accepted as reliable in the scientific community and admitted into evidence to demonstrate an evidentiary fact (*see e.g. People v Wesley*, 83 NY2d 417, 422 [1994]). Rather, it is meant to be used as an informational tool to educate the jury on the causal connection between relevant factors and false confessions outside their ken, and to do so without opining on the particular facts of the case. In *Taylor*, and the companion case of *Banks*, for example, we held that the expert testimony was admissible to dispel common misperceptions regarding recognized patterns of posttraumatic behavior on the part of rape victims (*Taylor*), but not to prove that the victim's behavior was aligned with a common perception that a rape occurred (*Banks*). Indeed, the latter is akin to an improper bolstering of credibility. Here, the proffered testimony would not have been admissible for the purpose of establishing that a false confession occurred, but to educate the jury about the science of the association between psychological risk factors occurring in a particular custodial interrogation and the making of a false confession, in order to address common misconceptions about a person making a false admission of criminal conduct.

On this record, the trial court did not abuse its discretion in finding that the proffered testimony would not have aided the jury. Although Dr. Redlich is an impressively credentialed researcher, properly qualified by the trial court as an expert in her field, the trial court found that her testimony at the *Frye* hearing revealed her difficulty in linking her research on the possible causes of false confessions to the case at hand. Despite her review of the witnesses' testimony at the *Huntley* hearing, she did not explain how her testimony was at all relevant to the circumstances presented by defendant's interrogation, even by crediting defendant's account of the events over Detective Grinder's.[11] For instance, defendant flatly denied ever making the second, more detailed, confession—so, expert testimony regarding dispositional and situational factors that create a risk of a false confession has no relevance to the oral or written version of that statement. Moreover, defendant maintained that the first handwritten statement was the product of outright coercion—including a physical assault the night before and the deprivation of food and medicine—rather than resulting from psychological coercion of police interrogation that creates the risk of false confession, consistent with a recondite theory of which Dr. Redlich would have testified. There is a difference between the classically, inherently coercive interrogation that produces an involuntary confession—an issue that the jury is well-equipped to understand (*see e.g. Blackburn v Alabama*, 361 US 199, 206 [1960]; *People v Anderson*, 42 NY2d 35, 37-38 [1977])—and the phenomenon of false confessions

[11] She conceded at the hearing that, "[i]f the defendant is not contesting that he made a false confession," her testimony would not be relevant.

involving the interplay of situational and dispositional factors that produce a coercive compliant false confession from an innocent suspect, an occurrence that the jury may find counterintuitive.

Dr. Redlich's written report and her hearing testimony covered a broad spectrum of situational factors, some of which required no explanation to a jury, and others of which had no relevance to defendant or the totality of the circumstances of his interrogation. Dr. Redlich did not anchor her testimony to a possible version of the custodial interrogation as set forth in the *Huntley* hearing testimony. Rather, she broadly stated that the basic tool of psychological tactics inherent in an interrogation is employed in all human interactions to obtain compliance, a statement entirely consistent with the commonsense ability of the jury to discern the effects of the interaction between defendant and the police, absent some extraordinary factor. She then focused heavily on the nine-step Reid technique, which she presumed was used in the case. As the opinion in *Miranda* makes unequivocal with its detailed exploration of the Reid technique, our law has long recognized these specific stratagems may compel the suspect to "merely confirm[] the preconceived story the police seek to have him describe" (384 US 436, 455 [1966]). At bottom, actual evidence that the Reid technique was used in the interrogation is a necessary predicate for any opinion to be probative evidence on that subject. Dr. Redlich also emphasized situational factors that did not exist in this case, such as sleep deprivation, lying to innocent suspects, presenting false evidence to convince the suspect it is no use to deny culpability, and contamination—where the police, and not the defendant, are the source of the information set forth in the

confession.[12] Here, the trial court was well within its province to determine that, since neither witness's account at the *Huntley* hearing presented circumstances supporting the conclusion that the police used these outlined psychological tactics, any expert testimony on that score would be speculative and delivered in a factual vacuum. Notably, no evidence elicited at trial changed this equation to provide any basis for a renewal of the proffer.

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. Video of a past event can certainly enhance the ability of any trier of fact to determine what occurred and video of a custodial interrogation is a boon to the truth. However, as we have recognized, "the neglect to record is not a factor or circumstance that might induce a false confession" (*Bedessie*, 19 NY3d at 158).[13] With respect to defendant's isolation, Dr.

[12] We note that, despite the witness's emphasis on certain situational factors, defendant does not allege that the phenomenon of a coerced internalized false confession occurred here—that he became convinced of his own guilt and confessed after the police confronted him with false information (*see e.g. Warney v State of New York*, 16 NY3d 428 [2011]; *People v Leonard*, 59 AD2d 1 [2d Dept 1977]). Further, the implication that the jury would view an unrecorded confession as the most reliable piece of evidence—or a "gold standard"—seems anachronistic in today's criminal justice world, given the common knowledge of wrongful convictions despite a confession, the import of single source DNA evidence and the ubiquity of surveillance video. Indeed, the 2018 study on which the dissent relies opined that contemporary potential jurors appear more accepting of the possibility of false confession and aware of the coercive nature of certain interrogation methods, and that "researchers should no longer assume that jurors automatically presume guilt in the presence of a confession" (*see* dissenting op at 30-31, n 18, citing Amelia Mindthoff et al., *A Survey of Potential Jurors' Perceptions of Interrogations and Confessions*, 24 Psych Pub Pol'y & L 430, 446 [2018]).

[13] After an extensive study of wrongful convictions, including a review of the white paper co-authored by Dr. Redlich, the New York State Justice Task Force recommended the electronic recording of interrogations—a recommendation that was codified in CPL 60.45

Redlich believed it was "quite hard to discern" the length of the interrogation, asserting that defendant was under custodial arrest for more than 24 hours and that the majority (80%) of proven false confessions had interrogations lasting 6 or more hours. Despite the witness's conflation of the period of arrest and the period of interrogation, under either scenario posited by the police or defendant, defendant was concededly noncompliant the night of his arrest, was then lodged overnight at central booking for eight hours and was not the subject of continuous interrogation while at the precinct on March 2; nor did he experience the associated risk factor of sleep deprivation.

As to certain dispositional risk factors particular to defendant, Dr. Redlich identified cognitive impairment, mental illness and substance abuse.[14] The defense chose to not call the CPL 250.10-noticed psychiatric examiner as a witness. Instead, defendant himself testified at trial to the presence of these dispositional factors and was subject to cross-examination, "display[ing] no sign" that he was particularly compliant, that he lacked understanding of the circumstances of the interrogation or that he was impacted by the above dispositional factors (*see Bedessie*, 19 NY3d at 159). In any event, defendant's substance abuse was not linked to the circumstances of the confession, as there was no

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(3) in 2017 (*see* http://www.nyjusticetaskforce.com/ElectronicRecordingOfCustodialInterrogations.pdf [last accessed Nov. 16, 2021]).

[14] 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 (*see People v Miller*, 91 NY2d 372, 379 [1998]; *People v Aphaylath*, 68 NY2d 945, 947 [1986]).

evidence that he was either intoxicated or in withdrawal at the time he was questioned. Nor did defendant's testimony provide any indication that he was psychologically tricked or induced to believe he had committed the robberies and admitted same. As to the factor of mental illness, Dr. Redlich testified that there was "some evidence" that there was a link between depression or anxiety and susceptibility to false confessions but then conceded that the "evidence is not entirely clear on that." She then went on to suggest that "anybody can be rendered vulnerable in the police interrogation situation" and an individual did not need to have any identified dispositional characteristic in order to render a false confession.

The thrust of Dr. Redlich's testimony was that the presence of dispositional factors may be causally linked to false confessions because they may make a vulnerable individual more susceptible to a wide variety of situational factors in the inherently coercive setting of the interrogation. Relying on the research in her field, the witness noted there is no prevalence rate in the millions of cases where a confession occurred, but approximated that 15 to 20% of the 1,300 documented wrongful conviction cases involved a false confession. In addition, a study in the "white paper," analyzing 125 cases of proven false confession cases in the United States between 1971 and 2002, found that 63% involved defendants who were under the age of 25 (s*ee* 34 Law Hum Behav at 5), a dispositional factor of substantial import. Yet, the witness did not account for defendant's age (51) or his criminal history in relaying these percentages, despite the need at the hearing to demonstrate causative factors in false confession cases she studied. Underscored by nisi prius, her own testimony expressed significant uncertainty as to the applicability of laboratory-like studies

to real-life custodial interrogation and was not particularly probative of what actually occurred in this case. Although Dr. Redlich's testimony may have been informative, the speculative nature of the testimony and the lack of relevance to the particular circumstances of defendant's interrogation presented the risk that the jury might have been confused or misled, rather than aided, by the testimony (*see e.g. People v Cefaro*, 23 NY2d 283, 288 [1968] [the jury should not be "encouraged to make a determination in a factual vacuum, i.e., without evidentiary basis whatsoever"]; *United States v Redlightning*, 624 F3d 1090 [9th Cir 2010], *cert denied* 563 US 1026 [2011] [expert testimony on false confession generally should not be permitted in the absence of evidence that interrogation techniques likely to extract a false confession were employed]). The trial court properly recognized that proving false confessions occur, is not the equivalent of accepting Dr. Redlich's broad, unmoored testimony on the science of false confessions and given her difficulty in explaining the external validity of the studies, her imprecise testimony was insufficient to sustain the burden of establishing general acceptance of the psychological principles she was advocating.[15] Contrary to the dissent's suggestion that the *Frye* hearing curbs the court's discretionary power in allowing an expert to provide educational background to help the jury better understand the risk factors associated with a psychological phenomenon

[15] Although the dissent repeatedly refers to "the science of false confessions," the determination before the trial court was more nuanced. As demonstrated in our holding in *People v LeGrand* (8 NY3d 449 [2007]), even where there is general acceptance for a particular phenomenon—there, factors influencing the reliability of eyewitness identification—that does not mean that all evidence related to that field will be admissible. The court still has a gate-keeping function to perform in determining whether specific research areas relating to that field are generally accepted.

(*see* dissenting op at 25), as we held in *Bedessie*, the trial court may not abdicate its responsibility to determine the relevancy of the proffered educational testimony to the particulars of the individual case, to wit, defendant and the interrogation before the court. Further our precedent is clear that a *Frye* hearing is not the end of the court's determination and the admissibility of social science evidence is a question for the trial court.

We do not equivocate as to the existence of the phenomenon of false confessions or the "evils" that can result from the "interrogation atmosphere" (*Miranda*, 384 US at 456). Nonetheless, the scientific principles involve more complexity than the general conclusion that false confessions do occur, and the expert is supposed to articulate those principles so a jury can apply the information to the actual evidence in the case—not merely speculate in the absence of that evidence. We therefore hold that there 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.

III

The remaining issue for our review is whether it was an abuse of discretion for the trial court to deny defendant's motion to admit expert testimony in the area of eyewitness identification. Prior to trial, defendant sought to admit the testimony of Nancy Franklin, Ph.D., to explain factors affecting the reliability of eyewitness identification, as both robberies involved single-witness identifications, made after a brief encounter with an armed stranger of a different race. The court granted the use of an identification expert in the severed trial relating to the robbery against HT but denied the request in the trial of the

robbery here at issue, because the identification by EY was corroborated by defendant's statements as well as the surveillance footage.[16]

There was no abuse of discretion in the court's determination. The evidence against defendant at trial did not "turn[] solely on the accuracy of the witness['s] identification" but was corroborated by the surveillance video and defendant's statements (*see LeGrand*, 8 NY3d at 457). In light of our determination, it is unnecessary to reach defendant's remaining argument.

Accordingly, the order of the Appellate Division should be affirmed.

[16] The dissent suggests that the trial court may have been susceptible to bias in determining the corroborative value of the confession and surveillance videos depicting the robber because it found defendant's confession admissible after the *Huntley* hearing (*see* dissenting op at 46-47). This proposition is inconsistent with our authority recognizing that a trial court is fully capable of making objective legal determinations, even if it is aware of information that is inadmissible before the finder of fact (*see People v Moreno*, 70 NY2d 403, 406 [1987]). Further, the dissent's point of view that there is "no evidence for the factfinder to weigh until trial" (dissenting op at 46), would entirely vitiate the purpose of pretrial judicial determinations outside the ken of the jury in favor of allowing the jury to hear all evidence, regardless of relevance, reliability, or any prejudice to either party (*see People v Geraci*, 85 NY2d 359 [1995]; *People v Sandoval*, 34 NY2d 371 [1974]; *People v Molineux*, 168 NY 264 [1901]). The law is to the contrary as, "[e]ven where technically relevant evidence is admissible, it may still be excluded by the trial court in the exercise of its discretion if its probative value is substantially outweighed by the danger that it will unfairly prejudice the other side or mislead the jury" (*People v Scarola*, 71 NY2d 769, 777 [1988]).

RIVERA, J. (dissenting):

At issue on appeal is whether the denial of defendant's motion to present expert testimony at trial on false confessions or on cross-racial identifications violated his right to present a defense relating to his innocence. The majority misapprehends our precedent and

the role of the court in determining the admissibility of expert testimony. The proffered false-confession testimony satisfied the standards for admissibility under both *People v Bedessie* (19 NY3d 147 [2012]) and *Frye v United States* (293 F 1013 [DC Cir 1923]) because defendant established, through an extensive record, that the science of false confessions was generally accepted in the relevant scientific community.[1] 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. Given our Court's recognition that false confessions occur and that expert testimony on this phenomenon would aid a jury in assessing the voluntariness of a defendant's incriminating statements, the majority unjustifiedly delays our inevitable determination that there is general acceptance within the scientific community that there are situational and dispositional factors that lead to false confessions.

The trial court also abused its discretion in denying defendant's request to present expert testimony on eyewitness identifications. The testimony satisfied the test for admission under *People v LeGrand* (8 NY3d 449 [2007]) because it would have aided the jury in reaching a verdict, given that there were three factors present in defendant's case

[1] Defendant's burden at the *Frye* hearing was to prove that the science on false confessions was generally accepted at that point in time. My usage of the past tense reflects that temporal burden and not that the science of false confessions is no longer generally accepted. Indeed, more recent research makes clear that particular factors associated with false confessions have general acceptance in the field (*see* Saul M. Kassin et al., *On the General Acceptance of Confessions Research: Opinions of the Scientific Community*, 73 Am Psych 63 [2018]).

which the scientific community considers affect the accuracy of eyewitness identifications. The majority's holding that the confession and the video footage corroborated the victim's identification strays from our holding in *LeGrand* and gives courts license to make findings of fact before evidence has been tested through the adversarial process.

Since defendant asserted his innocence of the crime and presented evidence of how his face and build did not match the victim's description, preclusion of the experts' testimony was not harmless. Defendant is entitled to a new trial where the jury can assess the evidence and his defense with the aid of the false confession and misidentification expert evidence. I dissent.

I.

Defendant Howard Powell was charged with first-degree robbery for separate robberies of complainants HT and EY. The facts underlying the robberies are not disputed, only whether defendant was the perpetrator of the crimes. Defendant's confessions were central to the prosecution's case, and in turn, the circumstances of the interrogation under which those confessions were extracted were central to defendant's claim of innocence. Defendant moved to suppress his statements to the police and the victims' pretrial identifications of defendant. The majority's description of the conflicting accounts of the interrogation provided by the investigating detectives and defendant at the hearing lacks sufficient context and detail. I write to clarify and highlight those parts of the record that shed proper light on defendant's legal challenges.

According to Detective Grinder, defendant was arrested at 2:00 p.m. on March 1, 2010, for unrelated crimes of trespass and drug possession; at the time, he was in possession of crack cocaine and a "crack pipe." Another detective testified that, around 6:30 p.m., defendant was taken to an interrogation room at the precinct, where his arm was handcuffed to the wall. According to the detective, defendant was "aggravated" and "angry," his "eyes were crossed," the "tone of his voice was loud," and he was cursing. Defendant waived his *Miranda* rights, and when asked about a recent spate of neighborhood robberies, defendant denied any involvement.

At around midnight, Detective Grinder transported defendant to Queens Central Booking. Shortly beforehand, the detective retrieved prescription medication that defendant told the officers he needed. The detective could not recall whether defendant informed him why he needed the medication, and he was unable to remember whether he allowed defendant to take any of it. Other testimony established that an officer must fill out a form when a prescription is given to a person in custody. Detective Grinder did not fill out the form and denied knowledge of this policy.

Defendant was returned to the precinct at 9:30 a.m. the following morning and placed in the interrogation room, handcuffed. Defendant was calm and, according to Detective Grinder, he appeared "somewhat jovial." Defendant was given a bagel and coffee. The detective informed defendant of "some of the charges that were being leveled against him" and that he would be put in a lineup. Defendant explained that he had been "very messed up on drugs," but when he was not forthcoming about the robberies, he was

left alone in the interrogation room with pen and paper. Defendant wrote the following statement at around 10:00 a.m.:

> "Howard Powell,
>
> "Was using drugs for two weeks and was doing really bad. I did a few robberiey [sic] and I am very sorry please forgive me I want to help N.Y.P.D. but only you can help me with this, was really MESSED UP on DRUgS [sic] and I am sorry if Ive [sic] hurt any one."

In separate lineups, EY and HT identified defendant. At approximately 1:00 p.m., Detective Grinder told defendant that both complainants had identified him. Defendant then confessed to the robberies of EY and HT as well as another two robberies, neither of which the police could verify. According to the detective, when asked to write a statement, defendant explained that "he didn't . . . have the capacity or he wasn't a good writer," so the detective typed up two separate police reports, one relating to each robbery, describing defendant's accounts.[2] The entirety of the robbery descriptions are contained on the first page of each respective report. The EY report states, in relevant part, that defendant followed an Asian female:

> "from the 40 side of 10 Street into her building. She was carrying groceries. I went into the building and then into the elevator with her where I robbed her. This one gave me a fight for my money and tried to push me away. I kept pushing her but I didn't try to hurt her. I usually keep a razor knife in my

[2] The majority contends that "defendant flatly denied ever making the second, more detailed confession" (majority op at 17). The majority's argument is an attempt at misdirection. Defendant handwrote the first statement, admitted to the robberies, and then signed blank pages of the written statements that Detective Grinder admitted were his summary of defendant's confessions to both crimes.

> pocket but didn't think I had time to get it out. The only thing I got from her was an EBT card with no numbers on it."

The HT report states that defendant also followed a Latina:

> "from 12 or 10 street into a building. I tried not to be too close to her and when I saw what building she was going to I called to her and asked her to hold the door for me. I got into the elevator with her and asked her what floor she was going to, and pressed five when she answered. I robbed her with a steak knife by the time we reached the third floor and at the fifth floor I told her to ride it back down and I ran out the stairs."

The final paragraph of each report is identical and substantially similar to defendant's handwritten statement:

> "I was using drugs for two weeks and was doing really bad. I did a few robberies and I am very sorry. Please forgive me. I want to help the NYPD but only you can help me with this. I was really messed up on drugs and I am sorry if I've hurt anyone."

Defendant's signature is on the second, blank page of these forms.

Defendant was provided some fast food that afternoon. At 8:30 p.m., defendant was transported back to Queens Central Booking. The detective testified that he knew defendant had been in possession of drugs, but at no time after defendant was picked up did defendant say he was experiencing withdrawal symptoms or ask to go to the hospital.

Defendant testified that he did not voluntarily confess to the crimes and described an interrogation that materially differed from the detectives' version. Defendant stated that he had been using crack cocaine and heroin on the day he was arrested. At the precinct, he was scared, depressed, and paranoid, and asked for his medicine, which he had not taken in over a day. While in the interrogation room, handcuffed to a "pole," defendant "went

into convulsions." He had a seizure, urinated on himself, and came to consciousness partially on the floor, partially in a chair. When Detective Grinder discovered defendant, he hit him on the head for urinating on the floor and hit him on the head an additional four or five times later that evening. After the seizure, defendant repeated his request for his medication. Defendant explained to the detective that he takes medication and needed it because he "wasn't feeling well." He also testified that he was afraid he might die if he suffered another seizure. In response, the detective told defendant that "he wouldn't help me unless I helped him . . . . He said if you cooperate I will think about going to get your medication for you." When defendant asked to be taken to the hospital, the detective told him that if he went to the hospital, he would not see a judge for four to five days. Although defendant "couldn't think straight," and he went to the hospital after every previous seizure he had had, he desisted. At around 9:00 p.m., the detective retrieved defendant's medicine and an unsoiled pair of trousers. Upon returning to the precinct, the detective placed the medicine at the end of the table but never gave it to defendant. Defendant testified that he refused to confess because he "really didn't know what kind of statement to give them" and he "was scared to give them a statement to something that I didn't do." Defendant was transferred to Queens Central Booking, where officers accompanied him to his visit with the medical personnel there. The officers told defendant that if he told the medical personnel that he had had a seizure or that anything else was wrong, he would be brought to the hospital by the officers, who would have to work overtime, and that he "was going to pay for it." Defendant did not eat at Central Booking because he missed dinner and slept through breakfast.

By the second day of interrogation, it had been over 24 hours since defendant had taken his medication, and he began to feel "very, very uncomfortable." Defendant described feeling anxious and hungry and that he was experiencing a panic attack. He was worried he would have another seizure and finally capitulated because he "had to do something to get [his] medication." Defendant clarified his physical and mental state, testifying, "I wanted my medication so bad I just did anything," and "just wanted to go home because I know I didn't do anything." The detective told defendant "if you work with us, we [sic] get you up out of here." Then the detective told defendant what to write in a statement. Defendant supplied some of the text because he wanted to give the detective "something that he would be pleased with," without expressly incriminating himself in the two robberies that the detective was investigating. It was only after he confessed that he received his medication and food.

Defendant further testified that the detectives never provided him with *Miranda* warnings on either day of his questioning. He signed the *Miranda* form after 6:00 p.m. on the second day only because he had not eaten, he was stressed, and he was without his medication. Defendant provided a statement shortly before he signed the *Miranda* warnings and testified, "I wrote that [statement] because I was afraid, I wanted to eat, I wanted my medication."[3]

[3] The majority again improperly weighs the evidence here, suggesting that "[n]otwithstanding his concession that it was his signature and initials on the *Miranda* card," defendant "claimed that he did not receive *Miranda* warnings until" after his confession (majority op at 8). Whether or not defendant's account was credible or in conflict with his signature on the *Miranda* card was a question for the factfinder, not this

After hearing these conflicting accounts, the court granted defendant's motion in part to the extent of suppressing the typed statement containing defendant's confession to the HT robbery for lack of proper notice, and otherwise denied the motion, including defendant's request to suppress HT's identifications of defendant.

II.

A. The *Frye* Hearing and the Court's Rejection of Defendant's False Confession Expert Testimony

Defendant's theory of the case was that he was innocent and that the detective coerced a confession by withholding food, medication, and medical care, and used interrogation techniques particularly effective on people with psychiatric and intellectual disabilities. Therefore, he sought to introduce expert testimony at trial on false confessions, specifically on the voluntariness and reliability of confessions provided under certain scenarios present in his case.

First, defendant moved to present psychiatric evidence, including defendant's medical records and the report of a forensic psychologist concerning defendant's psychiatric diagnoses and substance abuse history, and the psychologist's clinical evaluation of defendant. The report recounts defendant's long history of psychiatric

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Court. Contrary to the majority's rejoinder, the lower court's determination of that "quintessential issue of fact" (*id.* at 13 n 9) was only relevant on the ultimate legal question of whether defendant's inculpatory statements should have been suppressed. Moreover, that the trial court instructed the jury to disregard statements obtained in violation of *Miranda* undermines the majority's argument that an expert was not necessary to explain false confessions to the jury (*see id.*).

treatment, both in adulthood and as a child while in custody in various institutional settings. Likewise, defendant had a history of severe substance abuse that began in early adolescence and continued throughout his adult life. The psychologist also administered a battery of tests that revealed defendant's significant deficits in intellectual and cognitive functioning. The causes of these deficits—which may have been a function of a lifelong learning disability, defendant's history of substance abuse, potential brain injuries, mental health issues, or a combination of one or more of these factors—could not be determined. However, the psychologist concluded that defendant's chronic mental health issues, poor processing speed, deficits in reality testing, and impaired thinking were "factors that could make him vulnerable to suggestion in a custodial setting."

Second, defendant moved to introduce the testimony of Allison Redlich, Ph.D. as an expert on false confessions.[4] Based on Dr. Redlich's review of the hearing testimony, the psychologist's report, police reports, and the scientific literature, she was prepared to opine on the dispositional and situational factors that the relevant scientific community had associated with false confessions. In her report, submitted as part of defendant's motion, Dr. Redlich explained that dispositional factors relate to the "disposition" of the purported confessor, including considerations such as mental health conditions, impairments, and substance abuse. Situational factors concern the "situational" circumstances of the interrogation itself, such as physical isolation, the length of the interrogation, the use of deceptive tactics, and promises of leniency. In addition to this report, which discussed the

[4] In the alternative, defendant requested a *Frye* hearing.

science of false confessions generally and in relation to defendant's case specifically, and Dr. Redlich's 22-page *curriculum vitae,* defendant also submitted in support of his motion the psychologist's report; minutes from the detective's hearing testimony about his interrogation of defendant; defendant's hearing testimony; the three inculpatory statements attributed to defendant; two police reports containing the complainants' initial accounts of the robberies; a police voucher listing defendant's medications, dated the day after defendant signed the confessions; the police logbook for the day defendant was arrested; and a selection of nine publications as evidence of the scientific consensus supporting the proffered testimony, including the brief for *amicus curiae* American Psychological Association ("APA") in *Warney v State* (16 NY3d 428 [2011]).[5, 6]

[5] The other eight publications are: Allison D. Redlich et al., *Comparing True and False Confessions Among Persons with Serious Mental Illness*, 17 Psych, Pub Pol'y & L 394 (2011); Allison D. Redlich et al., *Self-Reported False Confessions and False Guilty Pleas Among Offenders with Mental Illnes*s, 34 Law & Hum Behav 3 (2010); Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 Law & Hum Behav 3 (2010) [hereinafter "White Paper"]; Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 Psych Scis Publ Int 33 (2004); Lisa A. Henkel et al., *A Survey of People's Attitudes and Beliefs about False Confessions*, 26 Behav Scis & L 555 (2008); Mark Costanzo et al., *Juror Beliefs About Police Interrogations, False Confessions, and Expert Testimony*, 7 J Empirical Legal Stud 231 (2010); Gisli H. Gudjonsson, The Psychology of Interrogations and Confessions: A Handbook (2003); and brief for *amicus curiae* American Psychological Association in *People v Rivera* (962 NE2d 53, 2011 IL App (2d) 091060 [2011]).

[6] The *Warney* Court reinstated a claim under the Unjust Conviction and Imprisonment Act (Court of Claims Act § 8-b), holding that the claimant—who, at the time of his false confession, had cognitive impairments, a low level of education, and AIDS-related dementia—was not required to provide documentary evidence that his confession was false at the pleading stage of the claim (*see* 16 NY3d at 434-435). The Court held that the lower court "inappropriately made credibility and factual findings, dismissing Warney's claim

Initially, the court granted defendant's request to introduce this expert testimony with the proviso that any limitations on the scope of such testimony would be determined at trial. Thereafter, a different judge assigned to the case ruled that a *Frye* hearing was required to "establish the applicability, parameter, and relevance of this [expert] testimony."

At the *Frye* hearing, Dr. Redlich testified that she was a tenured professor and Executive Director of the Hindelang Center at the University at Albany's School of Criminal Justice. Over the course of 15 years studying police interrogations, she had authored numerous peer-reviewed articles, literature reviews, and book chapters, presented over 100 lectures on the subject, and, to her knowledge, "review[ed] all of the literature" of the field. Dr. Redlich sat on the editorial boards of *Law and Human Behavior*; *Psychology, Public Policy, and Law*; *Behavioral Sciences of Terrorism and Political Aggression: Journal of the Society for Terrorism Research*; and the *Albany Law Review* for its annual issue, Miscarriages of Justice. She was the principal investigator on two surveys and the co-principal researcher on a study sponsored by the Federal Bureau of Investigation's High Value Detainee Interrogation Group, which "studies the effectiveness of interrogation approaches and techniques" and commissions studies to fill research gaps (*High-Value Detainee Interrogation Group*, FBI, https://www.fbi.gov/about/leadership-and-structure/national-security-branch/high-value-detainee-interrogation-group [last

without giving him the opportunity to prove his detailed allegations that he did not cause or bring about his conviction" (*id.* at 437).

accessed Oct. 19, 2021]). One study required that she review, code, and analyze video-recorded police interrogations from police departments across the United States. She also was the recipient of research grants from the MacArthur Foundation, the National Institute of Justice, and the National Science Foundation. She also worked for six years at a private research firm studying the intersection of mental health and the criminal justice system. She had been qualified as an expert in all seven previous cases where she was called as a witness, and she had previously been found competent to testify in a New York local criminal court, before the defendant took a plea deal. She was precluded from testifying in some other cases because those courts had determined that, at that time—approximately ten years prior to the hearing—"the science [was] not sufficiently proven."

According to Dr. Redlich, 15-20% of proven wrongful convictions involve a false confession. She explained that the number was likely higher because most verified false confessions are recorded after DNA exonerations, which comprise only ten percent of cases and are mainly related to murder and rape trials. On cross-examination, she acknowledged that she did not know the number of false confessions in the "entire population of confessions."

Dr. Redlich explained that, as relevant here, a "coerced compliant confession" is the result of a person's will being overborne in the interrogation room either from "a variety of techniques or because of [the person's] dispositional characteristics." In coerced compliant confession cases, people give false confessions "in order to escape the situation" of interrogation. She explained that people with mental health issues or "cognitive

limitations" are more likely to give a false confession because they are more vulnerable and less capable of withstanding "psychologically oriented interrogation techniques." Dr. Redlich testified that people with mental illness and cognitive disabilities "could be more prone to confusion, they have concentration problems," and are less able to weigh short- and long-term benefits. She admitted, however, that the evidence was "not entirely clear" with respect to whether any one mental health issue makes a false confession more likely, but explained that evidence suggests that depression and anxiety are associated with false confessions. Dr. Redlich also discussed the steps of the Reid Technique, a psychologically-based interrogation method, including theme development, implied promises of leniency, and minimization, and outlined factors common to confirmed cases of false confession, including prolonged interrogations, no new evidence resulting from the confession, and the use of false promises. She testified that the Reid Technique is the foundation of modern interrogation techniques and that "people who study interrogation techniques are very familiar with" it. Dr. Redlich explained that the Reid Technique marked a turning point in the 1960s, when the "third degree" and physical means of interrogation were "outlawed" and it became necessary for law enforcement to develop new methods of interrogation.[7]

[7] The Reid Technique itself built on earlier techniques, and was developed in the 1940s by former police officer John E. Reid, an expert in polygraphy (the very technique deemed inadmissible in *Frye*), and then commercialized through paid trainings and publication of an influential manual in 1962, which has been "used by law enforcement agencies themselves as guides" (*Miranda v Arizona*, 384 US 436, 449 & n 9 [1966]; *see also id.* at 448-456 [describing "representative samples of interrogation techniques" and noting that "the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals"]; White Paper at 6 ["By the middle of the 1960s, police interrogation practices had become entirely psychological in nature"]; Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive*

Dr. Redlich explained that other interrogation methods are "all very similar to the [Reid] technique" because "[t]hey rely on psychological techniques. They rely on principles of social influence." On cross-examination, she confirmed that she did not know whether the New York City Police Department trained its officers on the Reid Technique specifically. However, Dr. Redlich reiterated that, based upon her own research and her knowledge of the literature, "[a]ll interrogation methods are like [Reid]" because "[a]ll interrogations are psychologically oriented using principles of . . . psychological influence or social influence."

Dr. Redlich also testified regarding research she had conducted. In one study, she interviewed inmates at the Santa Clara Jail, some of whom had histories of mental health issues, about their experiences with police interrogations. Some inmates self-reported that they had falsely confessed to crimes. Although on cross-examination she acknowledged that she had not attempted to corroborate these self-reported false confessions, she also testified that self-reporting is a generally accepted social research methodology. She additionally testified about two other studies, each representing a paradigm for laboratory research in the field. In the Alt Key Study, researchers instructed test subjects not to touch the alt key on a keyboard, or else the computer would crash. Then, without touching the key, the computer would crash. One hundred percent of test subjects confessed to touching

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Interrogation Techniques, 33 Fordham Urb LJ 101, 117-122 [2006]; Douglas Starr, *The Interview*, New Yorker, Dec. 9, 2013 at 42, available at https://www.newyorker.com/magazine/2013/12/09/the-interview-7 [last accessed Oct. 7, 2021]). Reid's manual, Criminal Interrogations and Confessions, is currently in its fifth edition, published in 2011.

the alt key when accused of doing so—"kind of akin to presenting false evidence or lying to suspects." The Cheating Paradigm, Dr. Redlich testified, entails a group of students engaged in independent study. A student who is in on the study suggests to another student that they cheat together. Forty-one percent of subjects who refused the suggestion nonetheless signed a false confession.

On cross-examination, Dr. Redlich explained that both studies represented the early stages of laboratory research in the field, and that they had faced some criticism regarding their methodologies and their applicability to criminal cases. Although the Alt Key Study was no longer employed, the Cheating Paradigm was still used in the field. Dr. Redlich noted that, in general, "there are limitations to every single scientific method that you employ," including laboratory studies, which sometimes have issues with external validity, "but that's why you employ many different methods."

Apart from her individual research, Dr. Redlich was a co-author of an American Psychology-Law Society ("AP-LS") White Paper on false confessions research.[8] Dr. Redlich explained that "in the 45-year history of the American Psychology-Law Society there have been two white paper scientific consensus papers," and that the one that she had co-authored was the second. Dr. Redlich explained that

[8] The AP-LS is a multidisciplinary organization that was founded in 1968 and "is both a free-standing organization" and a division of the APA (*Membership Details*, AP-LS, https://ap-ls.org/membership [last accessed Oct. 22, 2021]). The APA was founded in 1892 and is "the leading scientific and professional organization representing psychology in the United States" (*About APA*, https://www.apa.org/about [last accessed Nov. 1, 2021]).

> "in order for . . . white papers to come about, there has to be a sufficient body of evidence that has accrued and amassed[.] . . . [I]n my mind[,] to general acceptance, it really decides the issues because these scientific white papers represent the American Psychology-Law Society. They don't represent the author's opinions. They have to be sponsored by the organization. They have to agree in the first place that there is a sufficient body [of evidence]. Then once it's written, they have to approve it. The entire organization has the chance to view it and weigh in on it, and . . . then it goes through a peer review process again, and it will be published."

Dr. Redlich testified that she was a researcher and not a clinician, and that she had never personally examined defendant. She explained that her testimony about dispositional factors was based on defendant's documented mental-health diagnoses and the psychologist's examination. The purpose of her testimony was to inform the jury about the general science of false confessions and to educate the jury about the dispositional and situational risk factors that create an increased risk of false confession. Dr. Redlich noted that there had been "several studies looking at the weight of confession[s] in jurors' minds," which found that "confessions are very weighty." She noted that researchers and practitioners often call confessions "the gold standard of evidence." She also testified that "false confessions are very counterintuitive" because it is "very hard for someone to understand that . . . people would admit to committing a crime that they didn't commit." She pointed to research finding that "very few people will admit that they would ever give a false confession themselves."

The Assistant District Attorney did not call an expert or introduce evidence at the hearing. Nevertheless, in a post-hearing submission, the Assistant District Attorney argued that Dr. Redlich's proposed expert testimony was neither relevant to defendant's case under

Bedessie nor beyond the ken of the average juror. The Assistant District Attorney further argued that Dr. Redlich's proposed testimony was not generally accepted in the relevant scientific community and that it would be within the court's discretion to preclude this testimony in its entirety.

The court denied that branch of the motion which was to permit Dr. Redlich to testify(*see* 53 Misc 3d 171 [Sup Ct, Queens County 2014]). Although the court found that Dr. Redlich was an expert in the field of false confessions, the court concluded that she did not establish "that expert testimony regarding false confessions is readily acceptable in the scientific community" (*id.* at 178). Also, Dr. Redlich "did not convince th[e] court that an expert's testimony on false confessions is scientifically reliable" (*id.*). The court held that "[i]t is insufficient under *Frye* that researchers agree that the phenomenon of false confessions exist and that interrogation tactics will likely increase the risk of law enforcement obtaining a false confession" (*id.*) According to the court, "researchers . . . differ on their opinions as to why and as to which tactics present a danger of obtaining these false confessions" (*id.*). Moreover, citing *Daubert v Merrell Dow Pharmaceuticals, Inc.* (509 US 579 [1993]), the court concluded that Dr. Redlich "failed to establish that her expertise is generally accepted in the scientific community" and whether "there was a known or potential rate of error in her methods of research" (53 Misc 3d at 179). The court also faulted Dr. Redlich for her lack of "personal knowledge of the circumstances under which this particular defendant confessed" and noted that there was no proof that the police

used the Reid Technique (*id.*).[9] Moreover, Dr. Redlich failed to convince the court that the Technique induces or produces false confessions (*see id.*). The court clarified that counsel could call a qualified expert with personal knowledge of the defendant and the circumstances of the interrogation that may have affected whether defendant falsely confessed (*see id.* at 180).

The day before trial for the EY robbery,[10] again on the topic of the false confession expert testimony, the same judge stated that, although Dr. Redlich could not assure him "that science properly does exist that could be an aid to the jury," counsel could call "a psychiatrist or some psychologist properly qualified to testify about [defendant's] medical conditions, and how that could lead to a false confession in this case." Counsel stated he could not find a psychologist who could present both the clinical evaluation and the research-based testimony as required by the court.

[9] The majority finds it "significant[]" that "the court observed that defendant failed to establish that his statement was induced by any of the factors outlined in *Bedessie*" (majority op at 12). I agree that this observation is significant but not for the reason suggested by the majority—as an accurate description of Dr. Redlich's testimony—but because the statement shows how obviously the *Frye* court erred. As the record makes clear, defendant provided ample proof of several situational and dispositional factors which the scientific literature had recognized may lead to a false confession, including psychiatric evidence of defendant's mental illness and intellectual capacity, as well as evidence of coercive custodial interrogation tactics, such as theme development, implied promises of leniency, and minimization (*see infra* at 33-38).

[10] Defendant successfully moved to sever the counts.

B. The Court's Rejection of Defendant's Witness Identification Expert, the Trial, and the Plea

In addition to false-confession expert testimony, defendant also sought to present testimony by an expert on factors affecting witness identification. Defendant argued that the testimony was central to his misidentification defense because the robber and victims were strangers and of a different race, the robber was armed, and the identification was in part based on the highly stressful interactions during the robbery. Defendant proffered the testimony of Nancy Franklin, Ph.D.,[11] to opine on the factors affecting the reliability of eyewitness memory identification, including, among other topics, general principles of how memory works, the effect of high stress on memory of faces, weapon focus, and cross-race effect or own-race bias. In the alternative, defendant sought a *Frye* hearing. The court denied the motion on the ground that the testimony was unnecessary because surveillance videos and defendant's statement to the police corroborated the victim's identification.

At trial, EY described the robbery, testified to her pretrial identification of defendant, and identified him in court as the robber. EY also testified that she did not report the assailant's facial features when she called 911 after the robbery. The Assistant District

[11] Dr. Franklin, now a Professor Emeritus at Stony Brook University is, like Dr. Redlich, an accomplished researcher in the field of cognition, who has testified in over 500 cases on eyewitness identifications across the nation, and has been qualified as an expert several times in New York courts (*see e.g. People v Norstrand*, 35 Misc 3d 367, 372 [Sup Ct, Monroe County 2011] [noting that "(Dr. Franklin) is well credentialed and earlier this year another trial court, following a *Frye* hearing, found her to be qualified to testify as an expert in the field of memory and to offer opinions with respect to 'event stress, exposure time, event violence weapon focus, and cross-racial identification'"], quoting *People v Abney*, 31 Misc 3d 1231[A], 2011 NY Slip Op 50919[U], *1-2 [Sup Ct, NY County 2011]).

Attorney presented surveillance video from the elevator where the robbery occurred, as well as from the deli, where a person had attempted to use EY's stolen EBT card. In the deli video, the alleged robber is wearing a driving cap, which, combined with the camera angled downward from above and the poor image quality, obscures a clear view of the person's face. In the elevator footage, the person has their coat hood pulled over their head, which nearly totally obstructs the view of their face. Over defendant's objection, the court admitted the elevator video into evidence and admitted the deli video even though the court acknowledged that the video images do not clearly depict the robber's face—"That's correct, you can't actually see the face of the person."[12] The deli owner confirmed the events depicted in the video and testified that the person who attempted to use the EBT card was a regular customer, but he did not identify the defendant as that person in court.

The detective's testimony was similar to that presented at the pre-trial hearing. Defendant's handwritten statement and the typed police report containing the confession to the EY robbery were admitted into evidence.

Defendant testified on his own behalf, denying that he had voluntarily and knowingly confessed to the crimes. In further support of his innocence and misidentification defense, he stated that he had 12 missing teeth—including three front teeth—just as he did the day of the crime. The record further reveals that at the time of his arrest, defendant was 51 years-old, six-foot four-inches tall, and weighed 200 pounds.

[12] The majority thus mischaracterizes the video evidence when it describes it as "show[ing] the man's face from multiple angles" (majority op at 3).

Defendant also presented his medical records and evidence from his optometrist that he wore glasses and would have difficulty reading without them. On cross-examination, he admitted that during the interrogation he denied his involvement in two other robberies for which he was not charged.

As requested by defendant, the court instructed the jury that it could consider the confessions if the jury found them to be voluntary beyond a reasonable doubt. The court also gave an expanded eyewitness charge, including a cross-racial identification instruction (*see* CJI2d[NY] Statements [Admissions, Confessions]—Custodial Statements; CJI2d[NY] Statements [Admissions, Confessions]—Traditional Involuntariness; CJI2d[NY] Identification—One Witness]). During deliberations, the jury requested to see the videos. Thereafter, the jury returned a guilty verdict on the sole count of first-degree robbery.

Subsequently, defendant pleaded guilty to the severed count of first-degree robbery of HT, with a promise from the court that the sentences on the robbery counts would run concurrently. The court and the prosecutor also agreed that the plea would be vacated if the trial conviction were reversed. The court sentenced defendant as a persistent felony offender to concurrent prison terms of 25 years to life on the trial conviction and 20 years to life on the plea.

The Appellate Division affirmed both judgments, concluding that "defendant failed to establish that his proffered expert testimony was relevant to the specific circumstances of this case" (166 AD3d 660, 661 [2d Dept 2018]). The court did not reach defendant's

remaining claims. As I discuss, it was reversible error to deny defendant's requests to present expert testimony on false confessions and eyewitness misidentification.

III.

Under the standards set forth in *Bedessie* and *Frye*, defendant should have been allowed to present Dr. Redlich's expert testimony on factors associated with false confessions, which he alleged were present in his case. Contrary to the District Attorney's arguments and the majority's conclusion that Dr. Redlich would not have provided useful testimony for the jury, her proffer established that the phenomenon of false confessions was generally accepted in the relevant scientific community, as were the dispositional and situational factors associated with false confessions. Additionally, the court should have permitted expert testimony on factors impacting the accuracy of eyewitness identification. The victim's identification was not sufficiently corroborated: defendant's confession was contested and could not serve as corroboration, and the video evidence did not clearly show the alleged robber. The court abused its discretion as a matter of law in precluding the testimony of the proffered experts. Because the case turned on eyewitness testimony and defendant's confession, the preclusion was not harmless as it denied his ability to present a defense. Defendant was entitled to have the jury determine the validity of the confessions and the reliability of the eyewitness identification with the assistance of expert testimony. Therefore, I would reverse the Appellate Division's affirmance of the trial conviction. And because, as defendant argues, and the District Attorney concedes, the court informed

defendant that the plea would be vacated if the trial conviction was reversed, I would also reverse the Appellate Division's affirmance of the plea conviction.

A. False Confession Expert Testimony

The admissibility of expert testimony is a matter of discretion entrusted to the court (*see De Long v Erie County*, 60 NY2d 296, 307 [1983], citing *Selkowitz v Nassau County*, 45 NY2d 97, 102 [1978]). Thus, a court's decision to preclude expert testimony after a *Frye* hearing is reviewed for abuse of discretion (*see LeGrand*, 8 NY3d at 452). "Expert testimony is admissible if the analysis involved is beyond the ken of the typical juror and the results would be relevant to an issue in the case" (*People v Allweiss*, 48 NY2d 40, 50 [1979]). "[I]n recognition that expert testimony . . . may involve novel scientific theories and techniques, a trial court may need to determine whether the proffered expert testimony is generally accepted by the relevant scientific community" (*People v Lee*, 96 NY2d 157, 162 [2001]). New York has adopted the test under *Frye v United States* (293 F 1013), which asks "whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally" (*Parker v Mobil Oil Corp.*, 7 NY3d 434, 446 [2006], quoting *People v Wesley*, 83 NY2d 417, 422 [1994]). "While the *Frye* test turns on acceptance by the relevant scientific community, we have never insisted that the particular procedure be 'unanimously indorsed' by scientists rather than 'generally acceptable as reliable'" (*Cornell v 360 W. 51st St. Realty*, 22 NY3d 762, 780 [2014], quoting *Wesley*, 83 NY2d at 423).

This Court's *Frye* jurisprudence is clear that the only matter for consideration at a *Frye* hearing is the general acceptance of the science presented. Critically, "[t]he *Frye* inquiry is separate and distinct from the admissibility question applied to all evidence—whether there is a proper foundation—to determine whether the accepted methods were appropriately employed in a particular case" (*Parker*, 7 NY3d at 447, citing *Wesley*, 83 NY2d at 422, *and People v Wernick*, 89 NY2d 111, 115-116 [1996]). The Court has explained that "matters going to trial foundation or the weight of the evidence" are "not properly addressed in the pretrial *Frye* proceeding" (*Wesley*, 83 NY2d at 426). Rather, questions pertaining to foundation should be addressed by a motion in limine (*see People v Brooks*, 31 NY3d 939, 941 [2018]), and questions of weight and credibility are reserved for the factfinder. Likewise, whether "the scientific analysis must 'fit' the facts of the case" is a distinct question from general acceptance (1 Kenneth S. Broun et al., McCormick on Evidence § 203.3 [2020]; *see also* David H. Kaye et al., The New Wigmore: Expert Evidence § 8.3.1 [c] [3] [2021]).

Here, the *Frye* court inappropriately relied on the United States Supreme Court's decision in *Daubert* (509 US 579), which announced the federal standard. *Frye*'s general acceptance test is different from the multi-factor validity and reliability standard of *Daubert*, adopted in rule 702 of the Federal Rules of Evidence. In *Daubert*, the Supreme Court announced a test of "scientific validity," which focuses on the reliability and relevancy of evidence (*see* Expert Evidence §§ 8.3.1 [b], 8.3.2). *Daubert* explained that the federal approach is intended to be more flexible than the *Frye* standard and places more

responsibility on the judge (*see* 509 US at 588-589). Under the federal test, general acceptance in the scientific community is but one factor for a court to consider. More pointedly, *Daubert*'s "emphasis is different from *Frye*'s and its impact depends on how the concepts of validity and fit are applied" (Expert Evidence § 8.3.2 [footnote omitted]). The Supreme Court clarified *Daubert*'s holding as to the "fit" of testimony in *Gen. Elec. Co. v Joiner* (522 US 136 [1997]). In rejecting respondent's argument that, under *Daubert*, "the 'focus, of course, must be solely on principles and methodology, not on the conclusions that they generate,'" the Court explained that "conclusions and methodology are not entirely distinct from one another" (*id.* at 146, quoting *Daubert*, 509 US at 595). Thus, under the federal standard, in determining whether expert testimony should be admitted, "[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered" (*id.*).[13] In contrast, under *Frye*, a court determines only whether the scientific community has generally accepted the results as reliable, not the appropriateness and soundness of the scientific methodology. "The general acceptance test operate[s] as a surrogate for reliability" (Daniel J. Capra, *The* Daubert *Puzzle*, 32 Ga L Rev 699, 703 [1998]), while questions of "fit" might go to the foundation and scope of

[13] In *Cornell*, we explained that "[w]e have sometimes expressed this precept in terms of the general foundation inquiry applicable to all evidence" (22 NY3d at 781). In that case, however, the "analytical gap" turned on a narrow question of whether the expert adhered to methodologies that have gained general acceptance in the field to prove specific causation between mold and the plaintiff's illnesses (*see id.* at 783-785). We separately concluded that the expert failed to prove general acceptance in the field that there was a general causal link between "molds" and the plaintiff's "adverse health effects" (*id.* at 783).

testimony (*see Brooks*, 31 NY3d at 941; *Wesley*, 83 NY2d at 426) or to the weight of the evidence, questions New York entrusts to the trier of fact.

The majority, like the *Frye* court below, misconstrues the applicable legal standards (*see* majority op at 23, citing *United States v Redlightning*, 624 F3d 1090 [9th Cir 2010] ["The district court identified the correct legal standard for determining the admissibility of expert testimony: Federal Rule of Evidence 702 and the Supreme Court's decision in *Daubert* (509 US 579)"], *cert denied* 563 US 1026 [2011]).[14] 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. 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.

"False confessions that precipitate a wrongful conviction manifestly harm the defendant, the crime victim, society and the criminal justice system" (*Bedessie*, 19 NY3d at 161). In *Bedessie*, this Court noted that the phenomenon of false confessions has "moved from the realm of startling hypothesis into that of common knowledge, if not conventional wisdom" (*id.* at 156), and thus held that, "in a proper case expert testimony on . . . false

[14] *Redlightning* is also distinguishable on the facts. In that case, unlike the circumstances here but similar to those noted by this Court in *Bedessie*, the District Court "excluded the evidence [on false confessions] after [the proffered expert] himself testified that there was nothing in the record to support his theory that the interrogation techniques used in this case raised a risk of a false confession" (*Redlightning*, 624 F3d at 1110).

confessions should be admitted" (*id.* at 149). The Court recognized not only that false confessions occur, but that there was research purporting to show situational and dispositional factors associated with false confessions, and that those situational and dispositional factors are beyond the ken of the average juror (*see id.* at 159). However, the Court concluded that none of the factors proffered by the expert were present in the defendant's case (*see id.* at 161). Thus, no *Frye* hearing was required and it was not an abuse of discretion to preclude the testimony (*see id.*). Nevertheless, the Court emphasized 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" (*id.* at 161). In contrast, as the majority recognizes, "the expert may not testify as to whether a particular defendant's confession was or was not reliable, [and] the expert's proffer must be relevant to the defendant and interrogation before the court" (*id.*; *accord* majority op at 2 ["(T)he expert may not render an opinion as to the truthfulness or falsity of the confession"]). Thus, under *Bedessie*, a court should permit expert testimony on the dispositional and situational factors generally accepted within the scientific community as associated with false confessions where the factors are suggested by the circumstances of the defendant's case (*see Bedessie*, 19 NY3d at 159-161).[15]

[15] Since *Bedessie*, the First and Second Departments of the Appellate Division have reversed convictions based on the denial of a defendant's request to present false confessions expert testimony (*see People v Evans*, 141 AD3d 120 [1st Dept 2016] [rejecting the District Attorney's argument that there is no general acceptance within the scientific community on the science of false confessions]; *People v Days*, 131 AD3d 972,

The majority does not seriously dispute that the field of false confessions research had gained general acceptance in the relevant scientific community at the time of the *Frye* hearing. Instead, the majority concludes that Dr. Redlich's testimony would not have assisted the jury in reaching a verdict based on its evaluation of the voluntariness and reliability of defendant's confession because Dr. Redlich had "difficulty in linking her research on the possible causes of false confessions to the case at hand" (majority op at 18).[16] In doing so, the majority conflates the "beyond the ken" analysis with *Frye*'s focus on general acceptance. The majority faults Dr. Redlich for "not explain[ing] how her testimony was at all relevant to the circumstances presented by defendant's interrogation" (*id.* at 18; *see also id.* at 24 ["(T)he scientific principles involve more complexity than the general conclusion that false confessions do occur, and the expert is supposed to articulate those principles so a jury can apply the information to the actual evidence in the case"]). 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 (*see Bedessie*, 19 NY3d at 161; majority op at 2). 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

979 [2d Dept 2015] [clarifying that "psychological studies bearing on the reliability of false confessions" are beyond "the ken of the typical juror" (internal quotation mark omitted)]).

[16] The majority holds that "the trial court did not abuse its discretion in finding that the proffered testimony would not have aided the jury" (majority op at 18). 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.

the weight of the evidence" are "not properly addressed in the pretrial *Frye* proceeding" (*Wesley*, 83 NY2d at 426).[17]

The majority also implies that the jurors in this case had sufficient knowledge of false confessions such that Dr. Redlich's testimony was unnecessary. The majority points to voir dire in this case, and notes that most jurors "were generally familiar with" the concept of false confessions, including one juror who cited the Central Park Five case (majority op at 16 n 10). As Dr. Redlich testified, confessions are the "gold standard," the strongest pieces of evidence that a prosecutor can present at trial.[18] As she also noted, even

[17] The majority also notes that, on top of not explaining the relevance of her testimony, Dr. Redlich "even credit[ed] defendant's account of the events over Detective Grinder's," and that she "conceded" that her testimony would be irrelevant if defendant had not asserted that his confession was false (majority op at 17 & n 10). It is unclear what bearing this has under *Frye*. Dr. Redlich would not have been allowed to testify as to whether she believed defendant at trial because whether the confession was false or not was an ultimate question of fact for the jury (*see Bedessie*, 19 NY3d at 161). Further, it is a truism that Dr. Redlich's testimony would be irrelevant in a case where the defendant did not dispute the validity of the confession. Indeed, in the context of rape trauma syndrome, the majority correctly points out that expert testimony "is meant to be used as an informational tool to educate the jury on the causal connection between relevant factors and false confessions outside their ken, and to do so without opining on the particular facts of the case" (majority op at 17; *see also People v Taylor*, 75 NY2d 277, 288 [1990]).

[18] The majority again disagrees with Dr. Redlich's expert opinion—which was based on a review of the relevant scientific literature—that juries perceive confessions as the "gold standard" of evidence, and labels her opinion as "anachronistic" (majority op at 20 n 12). But it is the majority view that is anachronistic as it ignores the scientific consensus on false confessions based upon the majority's (incorrect) view of today's "criminal justice world" (*id.*). At the time of the *Frye* hearing in this case, studies had made clear that notwithstanding knowledge of the phenomenon of wrongful convictions, potential jurors nonetheless afforded heavy weight to confessions and had limited knowledge of the situational and dispositional factors affecting false confessions (*see e.g.* Costanzo et al. at 244 ["(P)otential jurors significantly underestimate the power of a false confession"]). And, today, "even though potential jurors are generally more knowledgeable [about false

the average juror who is generally aware of false confessions does not understand the situational or dispositional factors that might lead to one (*see* Henkel et al. at 560-563, 570; *see also* Mindthoff et al. at 442 [noting that notwithstanding increasing awareness of false confessions, jurors still view confessions as strong evidence of guilt and "still generally believe that they themselves are relatively unlikely to falsely confess"]). Indeed, in the Central Park Five case, the supervising prosecutor—who certainly has general knowledge of false confessions—continues to maintain that the prosecution was not improper and that the confessions were not coerced (*see* Linda Fairstein, *Netflix's False Story of the Central*

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confessions] than they once were, their knowledge is still far from perfect" (Amelia Mindthoff et al., *A Survey of Potential Jurors' Perceptions of Interrogations and Confessions*, 24 Psych Pub Pol'y & L 430, 446 [2018]). To be sure, "relative to potential jurors of the past, contemporary potential jurors generally appear to be more accepting of the possibility that false confessions can occur," and "researchers should no longer assume that jurors automatically presume guilt in the presence of a confession" (*id.*; *but cf. id.* ["(C)onsidering that discrepant findings have emerged, further research on the topic is needed so that researchers can better assess what contemporary jurors know and how they apply their knowledge" (citation omitted)]). However, notwithstanding that more potential jurors jurors today have knowledge that false confessions occur and are open to hearing evidence on that question, potential jurors still afford significant weight to confessions at trial (*see id.* at 440 table 10), and a large plurality of potential jurors misunderstand the relevant situational and dispositional factors that contribute to false confessions (*see id.* at 438 table 7, table 8). Indeed, out of 2,883 exonerations tracked by the National Registry of Exonerations, 359 (12%) involved false confessions (*% Exonerations by Contributing Factor*, National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx [last accessed Nov. 1, 2021]).

The majority's assertion that DNA evidence and surveillance videos are now the "gold standard" of evidence (*see* majority op at 20 n 12) is not relevant to how jurors view confessions, and also ironically ignores debates over the reliability of those two forms of evidence (*see e.g. People v Williams*, 35 NY3d 24, 48-49 [2020] [DiFiore, Ch. J. concurring] [concurring in majority holding that it was an abuse of discretion when court denied *Frye* hearing to address "credible dispute among scientists in the relevant scientific community" over DNA evidence]).

Park Five, Wall Street J, June 11, 2019, § A at 19, available at https://www.wsj.com/articles/netflixs-false-story-of-the-central-park-five-11560207823). If even an experienced prosecutor adheres to the reliability of a confession in the face of evidence to the contrary, we cannot expect that the average juror will comprehend the dynamic factors that lead to false confessions.

That expectation is borne out by research, which confirms that even potential jurors who know that false confessions occur believe that having expert testimony would be helpful to their deliberative process (*see e.g.* Mindthoff et al. at 440 ["78.3% of the overall (study) sample agreed (that) . . . having an expert testify about how and why false confessions occur would be useful for making a verdict decision in a disputed confession case"]). Here, Dr. Redlich would have aided the jury by testifying to dispositional and situational factors that the scientific community had found were associated with false confessions. Her expert opinion as to those factors and their general acceptance was not speculative but based on her scholastic and professional bona fides, including her tenured professorship and extensive publishing of book chapters and in peer-reviewed journals, as well as her participation in high-profile studies and professional organizations and her comprehensive knowledge of the scientific literature in the field of false confessions and precipitating factors.

That testimony is precisely the evidence the *Bedessie* Court anticipated would be admissible. First, the *Frye* court concluded that Dr. Redlich was an expert in the field of false confession studies. Second, as established by her testimony and the scientific studies

admitted at the hearing, there was agreement in the scientific community on the phenomenon of false confessions as well as the dispositional and situational factors associated with false confessions (*see e.g.* Redlich et al., *Comparing True and False Confessions*; Redlich et al., *Self-Reported False Confessions*; Costanzo et al.). Indeed, Dr. Redlich referenced the AP-LS White Paper, which she co-authored, and which demonstrated that an overwhelming scientific consensus existed on the topic sufficient to warrant the AP-LS' imprimatur; it was only the second white paper in the 45-year history of the AP-LS.

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. The *Frye* court's conclusion that this testimony was irrelevant because Dr. Redlich could not testify that the interrogators or even the NYPD employed the Reid Technique, and because the court was not convinced that the Reid Technique produced false confessions, is unpersuasive. 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. Whether those tactics were labeled the Reid Technique is irrelevant. This myopic focus on the Reid Technique also ignores Dr. Redlich's testimony

that there was a general consensus that all modern forms of interrogation are based, at least in part, on the Reid Technique and similar methods.

Moreover, the White Paper discloses that there is a "strong consensus" that individuals with cognitive impairments or psychological disorders are particularly susceptible to false confession under pressure (White Paper at 30; *see also* Redlich et al., *Self-Reported False Confessions* [discussing false confessions among people with mental health problems]; Redlich et al., *Comparing True and False Confessions* [comparing true and false confessions among people with serious mental illness]). The White Paper also concludes that a voluminous body of research supports that people make choices to "maximize their well-being given the constraints they face" (White Paper at 15). With respect to responses to interrogation, the cost-benefit analysis tends to favor outcomes that are immediate rather than delayed (*see id.*).

The majority calls Dr. Redlich's testimony "speculative," "broad, unmoored," and "imprecise" (majority op at 23) because she also testified to various other situational factors, including methods consistent with the Reid Technique, such as sleep deprivation and the use of false evidence, that were not present in this case (*see id.* at 19-20). The majority misunderstands Dr. Redlich's testimony and the purpose of the *Frye* hearing. Dr. Redlich's testimony was "broad" because she was providing the court with sufficient information to evaluate whether the science of false confessions is generally accepted in the scientific community. Dr. Redlich was not suggesting that all of the factors she discussed were present in defendant's case, nor was she suggesting that she would testify

as to those factors before a jury. That Dr. Redlich was overinclusive points to her thoroughness and professional acumen, not to her alleged inability to remain "moored" to the topic at hand or "precise" in her analysis. Moreover, that some of the situational factors Dr. Redlich referred to were not present in defendant's case goes to the scope of the testimony, not acceptance within the scientific community of those factors. The proper action here was for the court to limit the testimony to the factors present in the case.[19]

The majority concludes that, because there was an overnight break in questioning and the written confession occurred less than four hours after his return to the precinct on the second day, the interrogation was not lengthy or coercive (*see id.* at 20-21). The majority again misunderstands the distinction between fact and law, jury and judge. It is beyond the ken of the jury to understand that, even under those conditions, the interrogation could be coercive for someone with defendant's mental and physical conditions. That Dr. Redlich described uninterrupted interrogations somewhat longer in length again goes to the weight of the evidence, not whether the situational factor of the duration of the interrogation is recognized by the scientific community. Indeed, after weighing the evidence, the jury might have disagreed with Dr. Redlich's expert opinion that even an interrogation that has been broken up into discrete periods can prove coercive, just as the jury might have disagreed with Dr. Redlich that Detective Grinder used methods similar to the Reid Technique. But, then again, the jury might have found Dr. Redlich's testimony persuasive. At a minimum, the testimony would have been helpful to the jury in assessing

[19] Indeed, the first judge to consider defendant's request took that view.

the evidence. Put another way, it is firmly within the jury's province to evaluate the evidence—in this case, the conflicting accounts of defendant and the police, the written confession, and the typewritten confession—and expert testimony should be admitted when it will aid the jury in that role. As the Court has repeatedly emphasized, the admissibility of expert testimony is determined first at a *Frye* hearing. Questions of relevance and foundation should be resolved separately, generally by pretrial motions in limine or through objections at trial (*see Brooks*, 31 NY3d at 941; *Parker*, 7 NY3d at 447; *Wesley*, 83 NY2d at 426).[20]

The majority unpersuasively reasons that defendant's confessions to another two unconfirmed robberies undermined Dr. Redlich's expert conclusion that defendant's case exhibited a "classic element associated with false confession cases," specifically that defendant did not provide "any 'new information unbeknownst to the police'" (majority op at 7 n 5). Even if that were true, determining that this fact undermines the expert's conclusion requires evaluating and weighing the evidence, which is the province of the jury, not the *Frye* court. However, it can hardly be said that defendant's confession to two

[20] 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 (*see* majority op at 21 n 14). 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 (*see Bedessie*, 19 NY3d at 161; *LeGrand*, 8 NY3d at 452). To the contrary, *Bedessie* prohibits what the lower court here mandated: expert testimony "as to whether [this] particular defendant's confession was or was not reliable" (19 NY3d at 161).

apparently non-existent robberies is "new information." Indeed, such a "confession" points towards *all* of the confessions being false.

The majority also contends that Dr. Redlich's opinions were unreliable because she was "imprecise" in setting out the factors that were relevant to defendant's case (*id.* at 23). The record belies this argument. It is uncontested that defendant has an intellectual impairment and that such cognitive impairments were generally accepted as relevant dispositional factors within the relevant scientific community (*see e.g.* White Paper at 20-21; Kassin & Gudjonsson at 53 ["People who are intellectually impaired are also disproportionately represented in databases of actual false confessions"]).[21]

Further, and contrary to the majority's assertion, Dr. Redlich did not testify that it is "not entirely clear" whether mental illness is a dispositional factor (majority op at 22). She expressly stated that mental illness, in general, is a well-known factor because people with mental illness are "more prone to confusion" and "have concentration problems" (*see*

[21] The majority asserts that this dispositional factor is not relevant because defendant "displayed no sign" (*Bedessie*, 19 NY3d at 159) when testifying "that he was impacted by the . . . dispositional factors" identified by Dr. Redlich, including cognitive impairment (majority op at 21). This claim is incredible for several reasons. First, the majority assumes that people with cognitive impairments present in a particular way (*see* Elizabeth F. Emens, *Framing Disability*, 2012 U Ill L Rev 1383, 1402 [2012] ["Outside perspectives on disability tend to hold disability at arm's length, to try to create distance from it, both physically and psychologically"]). Second, it is impossible to discern from a written record whether a person "displayed" any "signs." That is why this Court should not reach such credibility determinations and leave such findings to the factfinder—the jury. Finally, even if this Court could reach whether defendant displayed any "signs" of his cognitive impairment, such a finding would be irrelevant. The relevant question is whether defendant's cognitive impairment affected him at the time of the interrogation, not while he was testifying, presumably after taking his medication and being prepared by counsel.

e.g. Redlich et al., *Comparing True and False Confessions* at 5 ["Mental impairment is a commonly recognized risk factor for true and false confessions"]). The White Paper referenced by Dr. Redlich and submitted in support of defendant's request to present this expert testimony holds the same view (*see* White Paper at 21-22). Dr. Redlich also candidly acknowledged that the "evidence is not entirely clear" as to the effects of *specific* mental illnesses but that there is "some evidence that people with depression and symptoms of anxiety" are more likely to falsely confess (*see e.g.* Gisli H. Gudjonsson et al., *Custodial Interrogation, False Confession and Individual Differences: A National Study Among Icelandic Youth*, 41 Personality & Individual Differences 49, 55-57 [2006]). Dr. Redlich's alleged equivocation as to mental illness should have been grist for cross-examination at trial. Indeed, such a cross-examination might have effectively undermined the weight of her opinion with the jury. But it could not serve as a basis to conclude that she was not qualified to testify on the matter. Again, the majority substitutes its own weight and credibility determinations for what should have been a determination by the finders of fact.

The majority also points to additional factors that Dr. Redlich did not explicitly address in her testimony and that might have undermined defendant's claim that his confession was coerced, including that the bulk of false confessions discussed in one study cited in the White Paper were by people who were 25 years old or younger and that defendant had a prior criminal history (*see* majority op at 22, citing White Paper at 5). It was not defendant's burden to address each and every dispositional factor that could conceivably affect the likelihood of a false confession. As with the mental illness factor,

the prosecution could have cross-examined Dr. Redlich, or proferred the testimony of a rebuttal expert, to explain why defendant's prior criminal history and age undermined his claim of a false confession.

Dr. Redlich made clear that research methodologies used in the field—such as self-reporting studies—are generally accepted. That there is "no prevalence rate" for false confessions, as the majority notes (*id.*), is irrelevant. Not every field of scientific inquiry can produce prevalence rates with certainty, nor is a "prevalence rate" necessary to determine scientific validity (*see* APA Dictionary of Psychology, validity [https://dictionary.apa.org/validity] ["Validity has multiple forms, depending on the research question and on the particular type of inference being made"]). Likewise, the *Frye* court's conclusion that social sciences methodologies lack an error rate might be relevant under *Daubert* (*see e.g. United States v Begay*, 497 F Supp 3d 1025, 1076-1077 [D NM 2020] [finding, under *Daubert* standard, that false confession research has an "unacceptably high rate of error"]), but not under *Frye*.

If all this were not enough to lay bare the deficiencies in the majority's analysis, the assertion that Dr. Redlich "expressed significant uncertainty as to the applicability of laboratory-like studies to real-life custodial interrogation" (majority op at 22-23) reveals a further misunderstanding of the *Frye* standard. Presumably, the majority is referring to the *Frye* court's conclusion that Dr. Redlich's Alt Key and Cheating Paradigm studies were unpersuasive. The limitations on these earlier studies did not undermine the evidence presented on dispositional and situational factors generally recognized by the scientific

community. The early studies are an example of the evolution of the science, not evidence that the identified factors have been rejected as factors present in false confessions. Indeed, they are paradigms in laboratory research, not the culmination of the current scientific literature. Moreover, as Dr. Redlich testified, while laboratory studies might not be generalizable to the field in all circumstances, researchers engage a variety of methods to ensure that they can produce generalizable results (*see generally* Alan Bryman, Social Research Methods 41 [4th ed 2012] ["(C)hoices of research strategy, design, or method have to be dovetailed with the specific research question being investigated"]). In any case, the Court has emphasized that some disagreement in the relevant scientific community does not itself support preclusion of the expert testimony (*see Cornell*, 22 NY3d at 780; *Wesley*, 83 NY2d at 423; *People v Middleton*, 54 NY2d 42, 49 [1981]).

In sum, the evidence at the *Frye* hearing established Dr. Redlich's undisputed credentials and standing in the field of false confessions research, including on situational and dispositional factors. The evidence also established that, at the time of the hearing, the phenomenon of false confessions was generally accepted in the relevant scientific community; there was scientific consensus in the literature on the situational and dispositional factors that increase the likelihood of false confession; the general public did not fully understand the factors that result in a false confession; and several of those factors were present in defendant's case. The *Frye* court abused its discretion in denying the motion to present such expert testimony to the jury, and the Appellate Division erroneously concluded that the testimony was not relevant to the circumstances of defendant's case.

The majority takes a different approach, decoupling and cabining each of the situational and dispositional factors and explaining why each, on its own, might not be good enough evidence of a false confession. That is the job of the jury, not this Court.

Preclusion of Dr. Redlich's testimony was not harmless beyond a reasonable doubt (*see People v Foster-Bey*, 35 NY3d 959, 961 [2020] [applying harmless error in the *Frye* context]). The evidence was not overwhelming. Indeed, defendant presented strong evidence of his innocence based on the differences in his age and his physical and facial appearance compared to the victim's description of the robber. He also presented medical evidence of his mental and physical condition. The confession was critical to the prosecution, and powerful evidence of defendant's guilt, even if, and perhaps especially if, the jury doubted the accuracy of the eyewitness identification. Defendant disputed the detective's description of the interrogation and defendant's statements. Thus, the expert testimony would have assisted the jury in reaching a verdict by providing specialized knowledge on false confessions and the factors associated with that phenomenon as they applied to defendant's case. Under the circumstances, and by any measure, it cannot be said that the error was harmless (*see generally People v Crimmins*, 36 NY2d 230, 237-238 [1975]; *People v Rouse*, 34 NY3d 269, 281 [2019]).

B. Eyewitness Identification Expert Testimony

The trial court also erred in denying defendant's request to present expert testimony on cross-racial eyewitness identification. In *LeGrand*, this Court held that "it is clear that expert testimony regarding the factors that affect the accuracy of eyewitness

identifications, in the appropriate case, may be admissible in the exercise of a court's discretion. Moreover, there are cases in which it would be an abuse of a court's discretion to exclude expert testimony on the reliability of eyewitness identifications" (8 NY3d at 456).

Recently, in *People v Boone*, we reaffirmed the fact that "[m]istaken eyewitness identifications are the single greatest cause of wrongful convictions in this country, responsible for more wrongful convictions than all other causes combined" (30 NY3d 521, 527 [2017] [cleaned up]). We explained that the "cross-race effect" contributes to misidentifications to a troubling degree:

> "Social scientists have found that the likelihood of misidentification is higher when an identification is cross-racial. Generally, people have significantly greater difficulty accurately identifying members of other races than members of their own race. According to a meta-analysis of 39 psychological studies of the phenomenon, participants were '1.56 times more likely to falsely identify a novel other-race face when compared with performance on own-race faces'" (*id.* at 528, quoting Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 Psych Pub Pol'y & L 3, 15 [2001]).

The Court has announced a broad concern regarding "the potential for misidentification when a person observes an assailant—usually a stranger—for the first time in a highly stressful environment" (*People v Muhammad*, 17 NY3d 532, 546 [2011], citing *People v Santiago*, 17 NY3d 661 [2011] [decided on the same day]; *see also People v Abney*, 13 NY3d 251, 268-269 [2009] [distinguishing *Abney*'s companion case, *Allen*, in which the "defendant was not a stranger" to the robbery victims]). The cross-race effect

and an eyewitness' familiarity with a suspect, as well as the degree of event stress, are all factors that have been identified by this Court as being counterintuitive to a jury's understanding of human behavior and memory (*see e.g. Santiago*, 17 NY3d at 672; *Abney*, 13 NY3d at 268; *Lee*, 95 NY2d at 162; *c.f. e.g. Norstrand*, 35 Misc 3d 367; *People v Williams*, 14 Misc 3d 571 [Sup Ct, Kings County 2006]; *People v Radcliffe*, 196 Misc 2d 381 [Sup Ct 2003], *affd* 23 AD3d 301 [1st Dept 2005]). They are also factors generally recognized within the scientific community as potentially affecting eyewitness identification accuracy, which are not well understood by the general public, and therefore the proper subject of expert testimony (*see e.g.* Jules Epstein, *The Great Engine that Couldn't: Science, Mistaken Identity, and the Limits of Cross-Examination*, 36 Stetson L Rev 727 [2007]; Richard S. Schmechel et al., *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability*, 46 Jurimetrics J 177 [2006]; Charles A. Morgan el al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 Intl J L & Psychiatry 265 [2004]; Peter N. Shapiro & Steven Penrod, *Meta-Analysis of Facial Identification Studies*, 100 Psych Bull 139 [1986]). Defendant's proffer clearly met the standard articulated in *LeGrand*. The identification was by a stranger, EY, who was of a different race than defendant and based, in part, on observations of the robber made under stressful conditions involving a weapon.

The trial court denied defendant's request, not because the expert testimony was unreliable or jury instructions would suffice, but because, in the court's assessment, the surveillance video and defendant's confessions corroborated the identification. In *LeGrand*

the Court held that "the admissibility of such evidence would . . . depend upon the existence of sufficient corroborating evidence to link defendant to the crime. In the event that sufficient corroborating evidence is found to exist, an exercise of discretion excluding eyewitness expert testimony would not be fatal to a jury verdict convicting defendant" (8 NY3d at 459). Assuming that the expert evidence is otherwise admissible, "it is an abuse of discretion to deny a motion for expert testimony on eyewitness identifications in a case that depends solely on the accuracy of eyewitness testimony if there is no corroborating evidence connecting the defendant to the commission of the charged crime" (*Muhammad*, 17 NY3d 545-546).

Here, the trial court manifestly abused its discretion as a matter of law. Contrary to the majority's conclusion, the surveillance video, while "well-lit" (majority op at 3), does not clearly depict the robber's face or other dispositive identification characteristics.

To the extent that the District Attorney contends that the jurors were able to compare the video images to their in-person observations of defendant as part of their fact-finding role, this argument ignores the potential effect of cross-racial identification on the jury's deliberations. In other words, like an eyewitness, jurors are subject to the same difficulties in discerning physical characteristics of a person of a different race (*see* CJI2d[NY] Implicit Bias—Final Instructions ["We all develop and hold unconscious views on many subjects. Some of those unconscious views may come from stereotypes and attitudes about

people or groups of people that may impact on a person's thinking and decision-making without that person even knowing it"]).[22]

Nor can the defendant's confessions corroborate the eyewitness identification where defendant disputes the voluntariness of those confessions. Indeed, the CPL instructs that "a written or oral confession, admission, or other statement made by a defendant with respect to [the defendant's] participation . . . in the offense charged, may not be received in evidence against [the defendant] in a criminal proceeding if such statement was involuntarily made" (CPL 60.45 [1]). And, as I have discussed (*see supra* at 41), the error was not harmless (*see Crimmins*, 36 NY2d at 241-242).

The error here is an example of how the case law has strayed from the justification for the corroboration prong of *LeGrand*. The majority has missed an opportunity to clarify the law and instead leads us further down a wrong path. Arguably, corroboration is an appropriate factor where there has been a trial and the identification evidence has gone through "the traditional truth-testing devices of the adversary process" (*Harris v New York*, 401 US 222, 225 [1971]). As the Court clarified in *People v McCullogh*:

> "The decision to admit or exclude expert testimony concerning factors that affect the reliability of eyewitness identifications

[22] This Criminal Jury Instruction was recently adopted following the recommendation of the Special Adviser on Equal Justice to the Unified Court System (*see* Report from the Special Adviser on Equal Justice in the New York State Courts at 84 ["We recommend that OCA request that a new or standing committee, such as the Committee on Criminal Jury Instructions, develop model jury instructions on implicit bias for both civil and criminal cases"], available at https://nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf). The majority undermines the import of this new instruction (*see* n 24, *infra*).

> rests within the sound discretion of the trial court. When the motion is considered during the People's case-in-chief, the trial court performs this function by weighing the request to introduce such testimony 'against other relevant factors, such as the centrality of the identification issue and the existence of corroborating evidence'" (27 NY3d 1158, 1161 [2016] [citation omitted], quoting *Lee*, 96 NY2d at 163; *see also LeGrand*, 8 NY3d at 459).

"Courts reviewing such a determination simply examine whether the trial court abused its discretion in applying the 'standard balancing test of prejudice versus probative value'" (*id.* at 1161, quoting *People v Powell*, 27 NY3d 523, 531 [2016]). But on a pretrial motion, as here, a court cannot consider whether the identification is corroborated by proffers of hotly-contested evidence that turns on credibility issues and fact determinations because those matters may only be resolved by the jury after the evidence is admitted at trial. Indeed, because there is no evidence for the factfinder to weigh until trial, what appears a proffer of strong evidence of guilt may wither once subjected to cross-examination.[23]

[23] The majority's reliance on *People v Scarola* (71 NY2d 769, 777 [1988]) is misplaced (*see* majority op at 25 n 16). Scarola resolved two appeals in which the respective defendants challenged the denial at trial of evidence proffered in support of their claims of misidentification, not a pretrial determination on whether there was corroboration of the eyewitness' identification. On the question actually at issue in *Scarola*, after "[c]onsidering the inherent lack of trustworthiness of defendants' proposed exemplars and the difficulty of testing the authenticity of any alleged speech impediment they displayed" (*Scarola*, 71 NY2d at 777), the Court concluded that the trial courts did not abuse their discretion in rejecting the proffers. According to the Court "voice exemplar evidence . . . is relatively easy to feign" (*id.* at 778). *Scarola* merely states black-letter law: admissible evidence may be excluded if it is more prejudicial than probative. Contrary to the majority's characterization of my analysis here, I do not maintain that all evidence must be admitted at trial (*see* majority op at 25 n 16). I merely explain what should be obvious from our prior case law, that a court cannot in a pretrial context decide that evidence to be proffered at trial corroborates eyewitness testimony when the jury alone must make that very same determination as part of its factfinding and credibility determinations.

The Innocence Project in its *amicus* brief persuasively argues that research indicates that the notion of corroboration "rests upon an unscientific assumption" that corroborating evidence itself is not subject to what is known as "forensic confirmation bias" (*see e.g.* Karl Ask et al., *The 'Elasticity' of Criminal Evidence: A Moderator of Investigator Bias*, 22 Applied Cognitive Psych 1245 [2008]). Like all people, forensic analysts exhibit cognitive biases, including confirmation bias, whereby they credit evidence that supports their conclusions, and discount evidence that is inconsistent with their preconceived beliefs (*see e.g.* Saul M. Kassin et al., *The Forensic Confirmation Bias: Problems, Perspectives, and Proposed Solutions*, 2 J Applied Rsch Memory & Cognition 42, 45-48 [2013]; Itiel E. Dror et al., *Context Management Toolbox: A Linear Sequential Unmasking [LSU] Approach for Minimizing Cognitive Bias in Forensic Decision Making*, 60 J Forensic Sci 1111 [2015] [outlining taxonomy of cognitive biases that affect forensic examiners]; Daniel C. Murrie et al., *Perceptions and Estimates of Error Rates in Forensic Science: A Survey of Forensic Analysts*, 302 Forensic Sci Intl 109887 [2019] [discussing forensic analysts' wrongful perceptions of low false positive rates]). Amicus notes that these cognitive biases also infect how courts interpret evidence, creating "an 'investigative echo chamber'" or "bias snowball effect" whereby misinterpreted evidence compounds and affects how courts evaluate corroboration (Kassin et al., *The Forensic Confirmation Bias*, at 45, 46). In this appeal, for example, if the trial court had assumed that defendant's confession was not false, it would have been predisposed to view the surveillance footage as corroborative of the eyewitness identification, and likewise for the converse. Thus, even

after the adversarial process, a court might be susceptible to the same biases in evaluating whether evidence is corroborative under *LeGrand* and *McCullough*.[24]

C. Defendant's Convictions Must be Reversed

For the reasons I have discussed, the Appellate Division order affirming defendant's conviction, upon a jury verdict, of first-degree robbery should be reversed and a new trial ordered. The order affirming the conviction upon defendant's plea to first-degree robbery of the second victim should also be reversed and the case remitted for further proceedings on the indictment. Prior to entering his plea, the court informed defendant that the sentences would run concurrently and that the court and the People agreed that the plea judgment would be "reversed and restored to its original state" if the trial judgment were reversed. Given the court's representations, the appeal from the guilty plea count is contingent on resolution of the appeal from the trial judgment. As such, because the trial conviction should be reversed, the plea conviction cannot stand (*see People v Williams*, 17 NY3d 834, 836 [2011], citing *People v Fuggazzatto*, 62 NY2d 862, 863 [1984]).

[24] The majority states that "a trial court is fully capable of making objective legal determinations, even if it is aware of information that is inadmissible before the finder of fact" (majority op at 25 n 16, citing *People v Moreno*, 70 NY2d 403, 406 [1987]). The majority bypasses the discussion here entirely. The trial court here did not make an objective legal determination but rather determined matters of credibility against defendant and in doing so exceeded the court's authority by invading the province of the jury. Put differently, defendant's confession and the video could only corroborate the eyewitness' identification if the confession was found to be truthful and the video had been determined as clearly depicting defendant's image—determinations that were solely within the province of the jury. Even if that were not the case, implicit bias training for lawyers and judges is now commonplace, putting to rest any suggestion that legal professionals are immune to this well-documented and relatively automatic human behavior.

IV.

Defendant sought to establish his innocence with the aid of two highly credentialed and respected researchers, who would have informed the jury how various factors that have gained general acceptance in their respective fields might have contributed to a false confession and a misidentification, thus aiding the jury in its assessment of the evidence. In my view, the court erred in concluding that the science on false confessions was not generally accepted and that the identification was corroborated by the confession and the videos. The error in denying defendant's requests to call both experts was not harmless. We are long past equivocating about the reality of false confessions and eyewitness misidentification, giving a wink and a nod to science all the while affirming convictions where experts are precluded from testifying. It's time to put this research before those who hold a person's liberty in their hands so that they may judge for themselves.

Order affirmed. Opinion by Chief Judge DiFiore. Judges Garcia, Singas and Cannataro concur. Judge Rivera dissents in an opinion, in which Judges Fahey and Wilson concur.

Decided November 18, 2021