SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: CRIMINAL TERM: PART 81
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THE PEOPLE OF THE STATE OF NEW YORK,

Ind. No.
5850/2007,
4346/2008

Decision

-against-

and
Order

NATAVIA LOWERY,

Defendant.

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RICHARD D. CARRUTHERS, J.:

I. Introduction

On November 8, 2007, Natavia Lowery confessed to the police that she had taken the life of Linda Stein. Later that same day, she repeated her confession to an assistant district attorney. On each occasion, she was advised of the *Miranda* rights before questioning commenced. *Miranda* v. *Arizona*, 384 U.S.436 (1966). She told the interrogators that she understood the rights, and that she was willing to answer questions about the Stein homicide without the assistance of an attorney.

After an extensive hearing, this Court denied the defense motion to suppress Lowery's confession in a decision filed on April 27, 2009.[1] Thereafter, the Court ordered a second hearing at the request of the defense concerning Lowery's confession. This second hearing provided the defense an opportunity to explore, pursuant to *Frye* v. *United States,* 293 F. 1013 (1923),

1The reader's familiarity with the decision is assumed for this discussion.

whether expert testimony concerning the phenomenon of false confessions should be admitted at Lowery's forthcoming trial. Although Lowery has not yet formally disavowed her confession, the Court granted the Frye hearing in anticipation that she would do so at her trial either personally or by indirection.

During the *Frye* hearing, the defense presented the testimony of Solomon Fulero, Ph.D, on the subject of false confessions. Fulero has a doctorate in social psychology and is a certified clinical psychologist. He does not regularly treat patients, because, as he says, he does not like to do so. Instead, he conducts research on societal problems having psychological themes. He also provides expert testimony on various topics in courts throughout the United States, and teaches psychology at a college in Ohio. Fulero has not examined or tested Lowery, and says he has no wish to do so. He stated at the *Frye* hearing that he does not intend to provide an opinion during trial about whether her confession is true or false. Instead, he offered to "educate" the jury about what he calls "the science" of interrogation and confession.

Fulero indicated during his hearing testimony that he believes that false confessions frequently are induced by the manner in which interrogations are conducted, a belief that he intends to convey to the jury. Therefore, if permitted, Fulero would discourse at trial upon such topics as the virtually irresistible "power" that he believes social situations have over all individuals, tactics of persuasion purportedly employed by law enforcement officials during questioning, and the impact

that conformity and obedience have upon suspects in the interrogation setting. According to Fulero, these are all factors that could induce a normal, intelligent person to confess to a crime that she did not commit. He proposed to present as a central theme of his trial testimony that an interrogation method called the Reid technique encapsulates all these factors, and increases the likelihood that an innocent suspect will confess. *See, page 23, infra.*

Although Fulero testified that he would eschew any expression of an opinion about the truth or falsity of Lowery's confession, he made clear that he wishes to examine it virtually line by line at the trial to show the jury how the police utilized the purported confession-inducing Reid technique while interrogating her. He would employ this stratagem as part of the process by which that would "help [the jurors] make a determination in a case as to whether or not the confession is true or false." He conceded in his testimony that he does not know whether the Reid technique is employed by the New York City Police Department, but indicated that he would conclude that it was if the interrogation method used here "walked like a duck."

Each side called a single witness during the *Frye* hearing, Fulero by the defense and Michael Welner, M.D., by the prosecution. Welner is a forensic psychiatrist. His view is the anthesis of Fulero's. Welner stated that false confessions are rare events. To Welner individual strengths and weaknesses are all important in analyzing the phenomenon of false confessions. Based upon his study of known and claimed false

confessions, he believes that those most likely to confess to crimes that they did not commit are juveniles, the mentally retarded, and the mentally ill. He testified that it is only through rigorous psychological and psychiatric examinations that one could determine whether a particular individual was susceptible to confessing to a crime that she did not commit. Welner claimed that the authorities upon which Fulero relied in presenting his views at the hearing are either irrelevant or flawed and misleading "soft science."

Having considered the evidence adduced at the hearing, the submissions by the parties, and the arguments of counsel, the Court finds that expert testimony concerning false confessions should not be admitted at trial.

II. The Applicable Cases

Under the *Frye* standard, testimony of an expert witness concerning a novel scientific theory may be admitted as trial evidence where that testimony is (1) applicable to an issue in the case, (2) based upon principles that are generally accepted in the relevant scientific community, (3) proffered by a qualified expert, and (4) beyond the ken of the average juror. *People* v. *LeGrand*, 8 N.Y.3d 449, 452 (2007); *People* v. *Abney,* 13 N.Y.3d 251 (2009); *People* v. *Rosario,* 20 Misc.3d 401, 405 (2008). In the *LeGrand* case, the Court of Appeals reaffirmed the potential value of expert testimony where the reliability of an eyewitness's identification of a defendant is at issue. Noting that expert testimony in such cases is not admissible *per se* but rests within the sound discretion of the trial court, the

Court of Appeals cited its prior opinion in *People* v. *Young,* 7 N.Y.3d 40 (2006), to caution that "'if the case turned entirely on an uncorroborated eyewitness identification it might well [be] an abuse of discretion to deny the jury the benefit of [the expert's] opinions'[*Young*] at 45." 8 N.Y.3d, at 456. It further observed that a trial court in deciding how to exercise its discretion should consider the jurors' "day to day experience, their common observation and their knowledge," and then determine whether they would benefit from what the expert could relate on the basis of his or her specialized knowledge. 8 N.Y.3d, at 455-456.

The general discussion contained in *LeGrand* about the *Frye* standard and its broad comments concerning the discretionary admission of expert testimony are relevant to the trial of any criminal case in which expert testimony is offered. However, the specific holding of *LeGrand* is inapposite in the Lowery case. *LeGrand* has as its focus a matter that is not of concern here, i.e., the prevention of a conviction based upon mistaken eyewitness identification. Issues pertaining to eyewitness identification are different from those pertaining to confessions, whether true or false. *See, People* v. *Rosario*, *supra,* 20 Misc.3d, at 407-408; *People* v. *Crews,* 2008 N.Y. Slip. Op. 50145 (U), 2008 W.L. 199887 (Co. Ct. 2008). Expert testimony in an eyewitness identification case treats those reasons that might lead even a mature, well balanced person to make a mistake. The eyewitness may have had an inadequate opportunity to observe the perpetrator. She may have been

extremely nervous during the incident. Perhaps she focused more attention upon a weapon than the culprit's face. Whatever the reason, the result of an erroneous identification is the unwarranted prosecution of another individual, most often someone with whom the eyewitness is not even acquainted. The non-party eyewitness suffers no direct adverse consequence from her act of identifying the wrong person. On the other hand, when a suspect confesses to a serious crime such as homicide that she did not commit, she engages in a self-destructive act either intentionally or under delusion that is fraught with possible dire consequences to herself and not some mere stranger.

Although the Court of Appeals has found expert testimony relating to human cognition admissible under the *Frye* standard in appropriate eyewitness identification cases, it has not ruled upon whether expert testimony on the topic of false confessions should be admitted in criminal cases. However, in *People* v. *Wernick*, 89 N.Y.2d 111, 118-119 (1996), the Court of Appeals squarely stated that an expert witness should not be permitted to "parade" before the jury evidence touching upon issues relating to mental or emotional conditions that is potentially unreliable and prejudicial. Consistent with this policy, the lower courts in New York have issued several decisions that, with one notable exception, have ruled inadmissible expert evidence concerning false confessions that is akin to that limned by Fulero in his testimony at the *Frye* hearing. For example, in *People* v. *Green,* 250 A.D.2d 143 (3 Dept. 1998), lv.

den'd, 93 N.Y.2d 973 (1999), the Appellate Division held that the trial court properly exercised its discretion in precluding the defense from calling as a witness an expert who would testify that "interrogative suggestibility" made the defendant prone to falsely confessing. The Appellate Division ruled that the expert's testimony lacked probative value, would likely confuse the jury, and, in any event, did not pass muster under the *Frye* standard:

> When we previously considered the issue of the admissibility of expert testimony on the interrelationship between a defendant's psychological profile and the reliability of a confession, we found that such testimony was properly excluded (*People* v. *Lea,* 144 A.D.2d 863, *lv denied* 73 N.Y.2d 857). We reasoned that it was not sufficiently relevant to outweigh the confusion it would inject into the trial, and, moreover, was lacking in the degree of certainty that would give it probative force (*id.,* at 864-865). While some Federal courts have permitted this type of testimony (*see, United States* v. *Shay,* 57 F.3d 126, 130-134; *United States* v. *Hall*, 974 F. Supp. 1198, 1203-1206), they do not offer persuasive precedent since, instead of applying the *Frye* "general acceptance test" that we apply (*see, People* v. *Wernick,* 89 N.Y.2d 111, 115), they followed the more liberal *Daubert* standard [*Daubert* v. *Merrell Dow Pharm., Inc.,* 509 U.S. 579 (1993)] (*see, People* v. *Wesley*, 83 N.Y.3e 417, 423, n 2). Therefore, as there is nothing in the record to persuade us to depart from our holding in *People* v. *Lea* (*supra),* we find that County Court did not abuse its discretion in rejecting defendant's proffered expert testimony (*see, People* v. *Perry,* 251 A.D.2d 859).

250 A.D.2d, at 146-147.

The *Lea* decision mentioned with approval in *Green* affirmed the decision of a trial court to prohibit a psychologist from providing evidence undermining the reliability of the defendant's confession to having committed sodomy against a child. The psychologist did not intend to testify that the

defendant suffered from any mental disease or defect in supposedly making a false confession. Rather, he proposed to suggest to the jury that the defendant's personality was such that it made him deferential to the wishes and attitudes of others. The Appellate Division ruled that such testimony was not sufficiently relevant to outweigh the potential for confusion, and, in any event, "lack[ed] in the degree of certainty which would give it probative force [citation omitted]." *People* v. *Lea*, 144 A.D.2d 863, 865 (3 Dept.), lv. den'd, 73 N.Y.2d 857 (1988). To the same effect is *People* v. *Days*, 31 A.D.3d 574 (2 Dept.), lv. den'd, 7 N.Y.3d 811 (2006), where the Appellate Division again ruled that the trial court had properly exercised its discretion to preclude expert testimony concerning the defendant's susceptibility to police interrogation techniques.

In *People* v. *Shepard,* 259 A.D.2d 775, 777 (3 Dept. 1999), the Appellate Division viewed the topic of expert testimony concerning false confessions from a different prospective, and ruled that such evidence was properly excluded at trial because it related to matters within the ken of the average juror. As the Appellate Division stated, the trial court correctly exercised its discretion in refusing to permit the expert to testify, because "the evidence sought to be introduced does not 'depend upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence.' [citations omitted]." Finally, on the appellate level, there is *People* v. *Rogers,* 247 A.D.2d 765 (3 Dept.), lv. den'd, 91 N.Y.2d

977 (1998). The defense offered the testimony of an expert who was prepared to say that psychological testing indicated that the that the defendant lacked the capability to understand the *Miranda* warnings. The Appellate Division ruled that the evidence adduced at a *Frye* hearing failed to demonstrate that the proposed expert testimony was based upon scientific principles or procedures which had gained general acceptance in a specified field. *Id.,* at 766. Although the case does not deal directly with a false confession claim, it is nonetheless relevant in view of remarks that Fulero made during the hearing about the adequacy of *Miranda* warnings as they are normally administered and as the police and prosecutor provided them to Lowery. *See, page 20, infra.*

The foregoing cases establish that even where the results of psychological testing of the suspect are available in connection with a claim of false confession, a trial court would be well advised to exercise its discretion in favor of excluding the evidence. Here, as noted previously, Fulero has not even tested Lowery, but would speak generally on the subject of false confessions from what he claims is the prospective of social psychology. He would then go on to critique Lowery's confession in detail, clearly indicating, if not outright stating, that he views it with skepticism. Because his testimony would not be anchored in any professional examination of Lowery, what this witness has to say would have even less "probative force" than evidence that the foregoing cases ruled as properly excluded.

The trial courts in New York have almost unanimously

followed the Appellate Division holdings, and exercised their discretion to foreclose expert testimony concerning factors that supposedly contribute to the elicitation of false confessions. In *People* v. *Philips*, 180 Misc.2d 934 (Sup. Ct. 1999), for example, the trial court precluded a purported expert from testifying about the general nature of voluntary custodial statements, abusive police interrogation techniques, and the susceptibility of the defendant to defer to the police during questioning. The court stated that the defense had failed to show that the testimony was based upon any specific tests or procedures that would assist the jury in evaluating the reliability of the defendant's statements. Thus, said the court, the testimony would serve only to distract the jury by having them "speculating on the value of the expert testimony, not utilizing [the proposed testimony] based on accepted scientific principles." 180 Misc., at 940.

Among the reasons that trial courts have cited more recently for rejecting such testimony are the following: social psychologists have not yet developed "a truly scientific body of knowledge about false confessions" (*People* v. *Rosario*, *supra*, 20 Misc.3d, at 410); the proposed testimony of the expert deals with subject matter that is not beyond the ken of the average juror (*People* v. *Crews*, supra, 2008 W.L. 199887); the expert (Fulero) held forth in an affidavit on the supposed prevalence of false confessions and of coercive police interrogation tactics without providing a proper foundation, and, further, the expert made "numerous assertions that plainly have no basis in

his expertise in psychology" (*People* v. *Wiggins*, 2007 W.L. 2598351 (Sup. Ct. 2007); and that nothing in the expert's proposed testimony had any relevance to the case to be tried (*People* v. *Bean*, 2007 W.L. 2584296 (Co. Ct. 2007).

Within the last year, a trial court in Rensselaer County in *People* v. *Adrian Thomas,* precluded a purported expert on false confessions from offering at trial a detailed critique of the defendant's statement in the context of the interrogation method that the police were said to have employed. This, of course, is what the defense intends to present to the jury through Fulero's testimony. The *Thomas* court observed that the witness's testimony about false confessions was based largely upon anecdotal evidence that "has not yet developed into a reliable body of scientific research * * * ." Slip Op., at 3. The court also stated that there was no reliable data concerning the frequency of false confessions. This inhibited an analysis of whether any particular interrogation techniques might more readily induce a person to confess to a crime she did not commit. *Id.* Further, the court stated that the proposed expert testimony failed to establish any causal connection between interrogation techniques described by the expert witness and the occurrence of false confessions. *Id.,* at 3-4. These shortcomings, according to the court, would serve only to confuse the jury, and inhibit it from fulfilling its traditional role of deciding credibility issues.

People v. *Kogut*, 10 Misc.3d 305 (Sup. Ct. 2005), is the only reported case in which a court in New York State ruled

expert testimony on the false confessions admissible. In doing so, the court cited as authority a federal case, and appears to have applied a standard for the admission of expert testimony concerning novel theories that is not as exacting as specified by the Court of Appeals.

III. Difficulties Presented By Fulero's Proposed Testimony

A. Devaluation of Individual Differences

This Court is mindful of the statement of the Court of Appeals in *LeGrand*, *supra,* that the general acceptance standard of *Frye,* "emphasizes 'counting scientists' votes, rather than * * * verifying the soundness of a scientific conclusion'[citations omitted]." 8 N.Y.3d, at 457. However, a trial court has the responsibility when applying the *Frye* standard to assess whether a particular expert purporting to propound a novel theory presents views that are either sound or lacking in requisite "probative force". *People* v. *Green, supra*, 250 A.D.2d, at 146. In *People* v. *Rosario*, *supra,* the court observed that those working in the social sciences have been permitted to testify about theories that are based upon careful scientific analysis such as "rape trauma syndrome, abused child syndrome, and similar conditions to explain the behavior of a victim[.]" 20 Misc.3d, at 407. Nonetheless, the same court then found from evidence adduced at a *Frye* hearing that testimony of the social psychologist witness on the subject of false confessions was to be excluded from trial. Although social psychologists and others in the social sciences have provided meaningful contributions in other areas touching upon legal

issues, the theories concerning false confessions at least as described by Fulero still remain without a sufficient analytical and scientific framework so as to render admissible the testimony that he has to offer. In the Court's view, this problem became particularly apparent when this witness testified about the power of situation versus qualities and characteristics of an individual.

When Fulero was asked at the commencement of the *Frye* hearing to list matters of value to him in his study of false confessions, he made no mention at all of individual psychological or psychiatric testing. *See, pages 2-3, supra.* What is important, he said, is the stress of the interrogation setting. As he put it, "everything that drives our behavior is not about our personal or some personality characteristics or the kind of thing that clinical psychologists or psychiatrists study but the power of the situation that drives all of us, puts [*sic*] somebody in a powerful enough situation and their actions will be driven by the social situation much more than by who they are." Thus, he suggests that psychological and psychiatric testing is of little or no relevance here. This reasoning doubtlessly explains why Fulero has neither examined Lowery nor reviewed the results of any mental tests that may have been administered to her.[2]

Fulero's declaration of the relative valuelessness of individual qualities when exposed to the supposed powerful engine of police interrogation is sweeping, indeed. His words

2The Court notes that Lowery's counsel have not provided notice of an intention to present a psychiatric defense or psychiatric evidence.

are particularly jarring since he was not referring to physical or psychological torture, but, rather, to ordinary police questioning. Even absent inhumane treatment, Fulero believes that because an individual's "personal" and "personality characteristics" recede in significance during interrogation, any innocent person may falsely confess. According to Fulero, no matter the level of a person's intelligence or mental stability, she will confess to a crime, whether or not she committed it, if "put in the right circumstances." To be sure, Fulero acknowledged that the mentally retarded and mentally ill have some enhanced vulnerability to confessing falsely. However, he sounded the stark warning that when interrogated by the police, "[t]here but for the grace of God go all of us."

While Fulero's invocation of the salvific power of God's grace is appreciated, he provided little in the way of worldly authority to support his rather gloomy thoughts about the human condition. His words are virtually identical to a statement found in a law review article by Drizen and Leo, entitled, "The Problem of False Confessions in the Post-DNA World." 82 N.C. L.Rev. 891 (2003). Fulero cited this article frequently as he testified. Drizin and Leo suggest that this supposed dominance of the power of the situation over the value of the individual is "[o]ne of the most well-established findings of all of social psychology[.]" 82 N.C. L.Rev., at 919, fn. 150. However, as Welner pointed out in his testimony, the sole support that these authors offered for this proposition is a book entitled *Social Psychology: Unraveling the Mystery* by Kenrick and Neuberg. Far

from being a scientific treatise, this work is a textbook commonly used in college survey courses in social psychology. It does not have interrogations and confessions as its focus, and is hardly authoritative.

Fulero directly offered the results of two psychological experiments as support for the proposition that anyone can be made to confess falsely irrespective of level of intelligence or soundness of mental state. They were performed independently by Dr. Stanley Milgram and by Dr. Saul Kassin. Milgram's study concerned the phenomenon of social conformity, and was inspired by his interest in the ease with which apparently ordinary individuals living in Nazi Germany committed crimes against humanity at the bidding of their government. Test subjects were ordered to administer electric shocks of increasing intensity to other individuals. The "victims" would cry out ever more loudly in pain as the session continued. In reality, no shocks were administered. Milgram found that an unexpectedly large percentage of the test subjects continued to follow the experimenter's commands to administer shocks irrespective of their perception that they were inflicting pain upon the pretend victims. In Kassin's study college students were given a typing task, and cautioned that important data would be obliterated were they to press the "alt key" on the keyboard. The experimenter caused the computers to crash irrespective of whether or not the forbidden alt key was pressed. The majority of test subjects, when confronted, confessed to having pressed the alt key, with some including imaginary details. This

study has been described as an attempt to examine the false confession phenomenon.

In the Court's view, the Milgram and Kassin experiments are irrelevant. Milgram's methodology did not even include questioning, and was not intended or designed to explore interrogation and confessions at all, true or false. Further, the experiment involved the perceived infliction of pain upon a stranger and not upon the test subject. This scenario has no bearing upon the self-destructive act of making a false admission of guilt, whether knowingly or in a deluded state, to an interrogator who is often perceived as occupying an adversarial role.

As to Kassin's experiment, the college students quite simply faced no ill consequences in admitting to having crashed someone else's computer. Therefore, they would have had little reason to disagree when falsely accused of pressing the alt key. In fact, Kassin himself acknowledged this as a shortcoming in the experiment. Kassin and Kiechel, *The Psychology of False Confessions*, 7 Psych. Sci. 125 (1966). Others have sharply criticized the Kassin study, asserting that the alt key experiment misses the mark entirely on the subject of false confessions. As the prosecutor pointed out during Fulero's cross-examination one social psychologist, Dr. Richard Ofshe, testified in a criminal case in Louisiana that the experiment was "laughable," "incompetent," "so stupid," and "terribly naive." Welner, the prosecution's expert, followed suit in his testimony, and dismissed the use of ths study as authority

concerning false confessions as just "pathetic." This Court sees no reason to adopt these harsh descriptive adjectives. However, the Court does accept the point that Kassin's experiment cannot compare with a genuine police interrogation where a suspect knows that she is facing a criminal charge and is advised of her constitutional rights prior to questioning. The experiment simply says nothing about Fulero's thesis that individual characteristics are of little importance during the interrogation setting.

The Court must also observe here that Fulero displayed a surprising unfamiliarity with the details of the alt key experiment. During direct examination he extolled Kassin's work as "some of the best" in the field. In fact, he called the experiment "incredibly creative work." Having done so, however, he provided a description of Kassin's methodology that was largely erroneous. After a recess during the hearing, he returned for continued direct examination and retracted his mistaken account. He explained that he had not read the study in quite some time. Later, during cross-examination, he protested that it was unfair for the prosecutor to pursue questioning about the details of Kassin's methodology and the reasons for his own mistaken description of it on direct. His effort to fend off the prosecutor's cross-examination was, of course, ineffectual. Given the fact that it was this expert who brought the alt key study to the fore as an aspect of his proposed education of a jury, it was surprising that he did not have a better grasp of its nuances.

Fulero offered the Milgram and Kassin studies as "experimental analogs." Perhaps he did so because he was unaware of the existence of any analytical data that might support his theory that the power of interrogation could induce all of us to confess to crimes that we did not commit. It is interesting that in offering the Milgram and Kassin experiments as authority, the witness stated during direct examination that "any argument to the contrary goes to the weight to be given to those studies, not whether or not they tell us anything." When specifically asked whether there was a difference between pressing the alt key and murdering someone, his response was: "I would agree there is a difference; that goes to the weight, not the admissibility." His shift in roles from purportedly dispassionate psychological expert to advocate and attorney at law seemed effortless for him.

B. Diminution of the Miranda Admonitions

Pursuing the theme of the dominance of the stress of the situation over individual characteristics, Fulero went on to suggest that the safeguard afforded by the *Miranda* warnings is illusory in most instances. He observed that the almost universal police practice is to have a suspect give a simple "yes" or "no" response when asked whether she understands the admonitions. According to the witness, "[t]hat is not a really good way to do it." The harm, Fulero complained, is that it fosters "yea saying" by the suspect. That is, this practice - - which Fulero labeled as "bad" *Miranda* - - supposedly induces the suspect to make thoughtless responses without really

comprehending the rights as she submits to interrogation. He added that he would consider a reading of the rights to be "good *Miranca*" only if the investigator were to ask the suspect to explain in detail what she understands each right to mean. He swiftly added that the *Miranda* rights as twice propounded to Lowery were "pretty much a litany" and an example of the "bad *Miranda"* variety.

Fulero based his disparagement of so-called "bad *Miranda*" practice upon unnamed psychological studies about "yea saying." He asserted that these studies indicate that individuals sometimes feign comprehension to prevent a listener from detecting physical or intellectual deficits. He did not provide any information about authorship or methodology. When the Court inquired whether the studies pertained to interrogations and confessions, Fulero conceded that they did not. The studies thus say nothing about the ability of a person to comprehend the serious circumstances attendant to police interrogation at a station house. Moreover, they cannot contribute anything at all to a discernment of a suspect's ability to understand and reply meaningfully to *Miranda* warnings of either the "bad" or "good" variety. It also must be said here that Fulero provided no support for the proposition that a suspect subjected to the *"good Miranda"* procedure would in fact have a better comprehension of the constitutional rights than one who gives a simple, clear declaratory response that she understands.

Since *Miranda* was handed down by the Supreme Court in 1966, police officers and other law enforcement officials have asked

suspects whether they comprehended the rights by posing the direct question, "Do you understand?" This Court is unaware of any case in any jurisdiction that has condemned this forthright procedure as "bad."[3] Whether the jury should accept or reject the testimony of Walla and Rivera, the investigating detectives, about administration of the *Miranda* rights, the nature of the interrogation, and the content of Lowery's confession are fair questions. The danger in Fulero's proposed testimony about *"*bad*"* and *"good Miranda"* is that it would distract the jury from a legitimate inquiry as to whether Lowery knowingly and voluntarily waived her rights and whether she made a true or false confession. The jury would be invited, instead, to wonder why Walla and Rivera did not employ the *Miranda* procedure that Fulero has ordained as "good." Fulero's animadversions about the administration of *Miranda* admonitions, unsupported as they are by scientific principles or procedures, simply should not be placed before the jury. *See, People* v. *Rogers, supra,* 247 A.D.2d 765.

C. The Irrelevance of Testimony About the Reid Technique

Fulero testified at length about the Reid technique of interrogation. He said that the hallmarks of the technique include rapport building (using affability to gain the suspect's trust and compliance), maximization (indicating that the suspect might as well confess since her guilt is a foregone gone

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3On a personal note, in almost forty years of dealing with criminal justice issues, the writer has not heard of a single instance where a police officer has provided *Miranda* in the "good" form championed by Fulero. While an officer may use this novel device if so disposed, the normal method of administering the *Miranda* rights should not be debunked upon the flimsy basis that Fulero provided.

conclusion), minimization (encouraging the suspect to confess so that the police can "help" her), theme development (leading the suspect to acceptance of responsibility), false evidence ploy (lying to the suspect about the existence of incriminating evidence), and social isolation (keeping the suspect from family and friends}.

During direct examination, Fulero made it plain that he considers these hallmarks of the Reid technique to be pressure tactics used by the police who follow the method. He says that the tactics serve to increase the number of confessions both true and false. As he phrased it, "these techniques are taught to people because they increase the total number of confessions but as the true ones rise so do the false one[s]." Having said this, Fulero offered nothing of scientific or evidentiary value to support his assertion that the Reid technique leads to an increase in false confessions. In fact, on cross-examination he conceded that the Reid technique does not have a causal connection to false confessions. The best he could do was to state that the use of the false evidence ploy had been "linked" to false confessions. He made the further concession that he has no idea of the number of false confessions supposedly elicited when the Reid technique was employed. Instead of providing a figure, he simply stated that the "Reid people," i.e., those who teach the method, know what it is, but are not releasing the information. How he became aware that the "Reid people" are thus withholding information about false confessions, the witness did not explain. More to the point, by

admitting that he does not know the figure, he undermined his own assertion that false confessions increase with use of this technique.

These concessions by Fulero call into question the relevance of much of what he proposes to say about of the Reid technique. There is the difficulty that Fulero did not know whether the the New York City Police Department utilizes the Reid technique as an interrogation method. More significantly, irrespective of whether the Police Department encourages use of the method, the suppression hearing evidence shows that many of the hallmarks of the Reid technique are simply absent from the record of Lowery's interrogation. There was no evidence that Walla and Rivera resorted to maximization, minimization, theme development, and the false evidence ploy. With respect to the last, which the witness designated as "linked" to elicitation of false confessions, Fulero was made aware during the hearing that these detectives brought to Lowery's attention genuine information that they actually had about her whereabouts and activities near the time of the homicide. When asked to comment upon how this conduct comported with use of the false evidence ploy, Fulero seemed to agree that it did not: "I don't recall if the Reid technique advises the presentation of evidence that is true. I don't recall that. I recall what is called the evidence ploy but that is about false evidence." Fulero's testimony about factors that simply played no part in the interrogation of Lowery would only cause further confusion for the jury, and should not be admitted.

During his detailed critique of Lowery's confession, Fulero opined that signs were present that the detectives established good rapport with Lowery. Further, he made note of the fact that Lowery was present at the station house for many hours before she finally confessed. Details of Lowery's many efforts to maintain contact with Walla are fully described in the Court's previous opinion. The opinion also details the evidence pertaining to her overnight stay at the station house, as well as the circumstances of the interrogation which lasted a few hours of the total. Whether the conditions attendant to her confession had an untoward impact upon what Lowery eventually told the police is a matter that is well within the ability of a jury to assess. Fulero's testimony could not conceivably enhance what the jurors will be able to resolve on the basis of their own experience, common observation, and knowledge. *People* v. *LeGrand, supra,* 8 N.Y.3d, at 455-456.

D. Speculation About the Number of False Confessions

Both the defense and prosecution agree that false confessions do occur. They differ significantly in their opinions about the frequency of this phenomenon. Welner testified that a false confession is the result of the "interplay of the vulnerabilities of a particular defendant." For an expert to provide meaningful testimony where the truthfulness of a confession is in issue, he said, the expert must know what factors in the particular defendant's background make her vulnerable to confessing falsely. As noted previously, his examination of the phenomenon of false confessions showed

him that those most likely to confess to crimes that they did not commit are juveniles, the mentally retarded, and the mentally ill. As the prosecutor reports, this is a view with which Professor Drizen, a co-author of the Drizen and Leo article, would agree on the basis of his study. *See, People's Brief, at 18*. Unlike Fulero, Welner does not believe that such individuals have merely an enhanced vulnerability to confess falsely, but, instead, form the predominant group of individuals who do. Because Welner's findings are that false confessions by and large are made by persons in this group, he contended that false confessions are rare events. Welner added that a normal person of average qualities would not confess to a murder that she did not commit.

As discussed already, Fulero posits that false confessions occur with frequency. However, he conceded that it is impossible to know how many persons confess falsely in any given year. He testified that to be able to arrive at this figure, he would need to know the number of police interrogations occurring that year and then apply "some magic gold standard to determine which [confessions] are true and which ones are false in advance." Nevertheless, having conceded the impossibility of calculating an accurate figure, he went on to offer on direct examination a reckoning method that to him "makes pretty good sense." Stating that the annual number of felony convictions in this country was about 1.5 million, the witness offered "for the sake of argument" to grant that the criminal justice system was 99.5% accurate. Applying this percentage to the annual yield of

felony convictions, he figured that this would mean that there are roughly 7,500 unjust and unwarranted felony convictions each year. He estimated that the percentage of unjust convictions that featured false confessions ranged anywhere from 15% to 25% "depending on who you read[.]" He was referring to several studies, including among others the Drizen and Leo article and data provided by the Innocence Project. Applying any percentage within this wide range would lead one to conclude that hundreds of false confessions occur in the United States each year.

There are serious flaws in Fulero's methodology. First, no one knows how accurately the criminal justice system works in endeavoring to ensure that only the guilty are convicted. Although one hopes that no innocent person suffers the injustice and catastrophe of an unwarranted conviction, see e.g., *People* v. *McCaffrey*, NYLJ, December 11, 2009, col. 3, the criminal justice system is not perfect because it is a human institution. The annual rate of proper convictions may be 99.5% as Fulero posits. However, the accuracy rate might be higher or lower. The range of false confessions that the witness culled from studies, from 15% to 25%, is extremely broad, indicating in itself that anything approaching an accurate estimate cannot be achieved. Further, each of the studies to which Fulero referred pertains to a relatively small number of false confessions occurring over long periods of time. That a study may reflect a false confession rate of !5%, 18%, 20%, or 25%, "depending upon who you read," simply does not mean that that percentage is universally applicable to the entire United States for any

particular year or number of years.[4] The actual percentage of false confessions could be radically different.

Fulero fully acknowledged on cross-examination that all one could say with scientific accuracy about the number of false confessions is that it "is greater than zero and that is what counts." However, if that is the best that science can do at this point, it would be inappropriate for Fulero to share his calculation method with the jury. In fact, during cross-examination Fulero conceded, "There is no way independently to know how many confessions in the world are true or how many are false, in the same way there is not way to know how many eye witnesses are correct or incorrect." Why, therefore, he brought up his calculation method on direct as something that would be of use in his proposed education of the jury is a mystery. Simple logic and Fulero's own concessions show that any estimates obtained by using his method would not amount to analytical data, but, instead, would be nothing more than rank speculation.

The defense brief presents a "thought experiment" based upon a statement that Welner, the prosecutor's expert, made during trial. Welner's comment was that he accepted a self-reporting study of police officers that indicated that an officer might expect to see a false confession once in his or her career. Capitalizing upon Welner's acceptance of the study, the defense estimates that 5,000 false confessions might have

4Welner noted in his testimony that his review of actual cases showed that some convictions reflected in two of the studies that Fulero mentioned, the Drizen and Leo article and the Innocence Project data, did not involve false confessions at all. Welner also criticized Drizen and Leo for relying in part upon newspaper accounts as sources from which they gathered information about supposed false confessions.

occurred in New York City alone from 1989 to 2009, given the number of investigating detectives at work during those years. *Defense Brief, at 19.* This estimate is far higher than even Fulero's method would suggest if modified for use in a single city, even a very large one such as New York. The Court does not expect one to employ here the sort of rigorous deductive reasoning that led Einstein to the cosmological constant. However, more is needed than a facile projection of a figure based upon Welner's perhaps unreflective acceptance of a single study. In any event, Welner remained adamant in his testimony that false confessions are extremely rare events.

What can be gleaned from the testimony of Fulero and Welner is that estimates about the frequency of false confessions are speculative. The only point that can be accepted with certainty is Fulero's statement that the number is "more than zero[.]" Otherwise, the testimony of both witness on this subject is vague at best. Expert testimony on this subject is yet another matter that would serve only to confuse the jury were it to be admitted.

IV Conclusion

The field of social psychology has made meaningful contributions concerning legal issues other than false confessions. However, as represented by Fulero, the members of that discipline do not constitute a relevant scientific community with respect to false confessions whose views can meet the standard for admissibility in New York. On the basis of Fulero's testimony, the Court accepts as accurate the finding of

the trial court in *People* v. *Rosario, supra,* 20 Misc.3d, at 410, that social psychologists have not yet developed "a truly scientific body of knowledge about false confessions." Moreover, the above discussion shows that Fulero would have nothing of value to contribute that a jury, properly guided by careful instructions, could not determine for themselves. Perhaps, as Welner asserts, those psychologists and psychiatrists who have the ability to examine an individual for characteristics consistent with a susceptibility to confess falsely might constitute a scientific community with valid information to convey in this area. However, the record of the *Frye* hearing does not suffice to permit the Court to determine whether the tests that such experts might administer would meet the general acceptance standard.

It is this Court's determination that expert testimony on false confessions shall not be admitted at the Lowery trial.

The foregoing constitutes the decision and order of the Court. The clerk is directed to distribute copies of this decision and order to counsel for each party.

Dated: New York, N.Y.
January 11, 2010

Richard D. Carruthers,
Acting Justice