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STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,	Michigan Supreme Court No. 162497
Plaintiff-Appellee,	Court of Appeals No. 343755
v	Wayne County No. 16-005631-01-FC
JOSHUA LAMAR-JAMES STEWART,	
Defendant-Appellant.	

BRIEF OF AMICUS CURIAE THE INNOCENCE PROJECT IN SUPPORT OF DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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INTERESTS OF AMICUS CURIAE[1]

Amicus curiae is the Innocence Project, Inc., a non-profit organization dedicated to providing pro bono legal services to incarcerated people whose innocence may be established through the development of a post-conviction record. The Innocence Project has served as counsel or provided assistance in hundreds of successful post-conviction exonerations of innocent persons nationwide. The Innocence Project also seeks to prevent wrongful convictions by researching the causes of wrongful conviction and pursuing legislative, administrative, and judicial reform initiatives designed to enhance the truth-seeking functions of the criminal justice system, and to prevent the admission of unreliable evidence in courts around the country. Such reforms include those designed to prevent the elicitation and evidentiary admission of false confessions—a primary cause of wrongful convictions.

This case calls upon the Court to determine the admissibility of a confession elicited from an 18-year-old, who was interrogated for three hours in the middle of the night by officers who engaged in a variety of psychologically coercive tactics. Most significantly, the officers used the "false evidence ploy"—a tactic in which police lie about the inculpatory evidence they possess—and falsely suggested their teenaged suspect would receive leniency in exchange for his confession. As documented in many of the known false confession cases, the use of false evidence ploys and promises of leniency during interrogation—including implicit promises of leniency, communicated by "minimizing" the severity of the crime or the accused's role in the commission of the offense—is so powerfully coercive that innocent people subjected to such tactics, particularly young people like Appellant Joshua Lamar-James Stewart, are placed at a significant

[1] No part of this brief was drafted by counsel for either party, nor did either party or their counsel contribute financially to its preparation. No entity contributed, financially or otherwise, to the preparation of this brief other than amicus curiae and counsel for amicus curiae.

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risk of falsely incriminating themselves. Amicus thus has a compelling interest in this Court issuing a ruling that deters officers from using such tactics, thereby protecting innocent people in Michigan from the risk of false confession. To prevent against future wrongful convictions caused by false confessions, amicus urges this Court to hold that Mr. Stewart's confession was psychologically coerced and therefore involuntarily provided and, in so holding, to rule inadmissible custodial statements obtained after police engage in the false evidence ploy and communicate false promises of leniency.

INTRODUCTION

False confessions are a primary cause of wrongful convictions, contributing to approximately one-third of all known convictions that were later overturned through DNA evidence. See Innocence Project, *DNA Exonerations in the United States* <https://www.innocenceproject.org/dna-exonerations-in-the-united-states/> (accessed November 2, 2022). In Michigan alone, in the last two decades, at least 11 innocent people have been exonerated after having been wrongfully convicted based on their own false confessions. See University of Michigan Law School, *The National Registry of Exonerations* <https://www.law.umich.edu/special/exoneration/Pages/ detaillist.aspx> (accessed November 2, 2022). Collectively, these Michigan residents spent approximately *240 years* wrongfully imprisoned, *id.*, while the actual perpetrators remained free to commit additional crimes.

Since the first DNA exoneration in 1989, a robust canon of scientific research has developed, providing empirical data on the factors that can lead innocent people to inculpate themselves. These risk factors—many of which are present in the instant case—are categorized broadly into the "dispositional" characteristics of the confessor (such as youth or cognitive disability) and the "situational" circumstances of the interrogation itself (such as the police interrogation tactics or the environment in which the interrogation occurred). See Kassin et al,

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Police-Induced Confessions: Risk Factors and Recommendations, 34 L & Hum Behav 3, 4 (2010).[2] Although several such risk factors are at issue in this case, amicus focuses primarily on two—the "false evidence ploy" and "minimization" tactics—as each has played an outsized role in inducing false confessions from the innocent and, as exemplified by the decisions below, their coercive impact is often given insufficient weight by courts applying a totality-of-the-circumstances test[3] to assess the voluntariness of confession evidence.

Courts and legislatures, as well as the foremost experts in the study of false confessions, and even a leading law enforcement training organization, have all recognized the dangerously coercive power of the "false evidence ploy"—a tactic in which the police deceive a suspect about the evidence they possess. The tactic functions to engender feelings of helplessness, as the suspect, regardless of guilt or innocence, feels "trapped" based on the perceived "inevitability" of evidence against them and, consequently, views acceding to officers' suggestions of guilt as the only option. *Id*. at 16-17. See also Kassin, *The Social Psychology of False Confessions*, 9 Soc Issues Pol'y Rev 25, 34 (2015) (concluding, based on scientific studies, that the false evidence ploy has a grave psychological impact and leads to false confessions). An innocent suspect, counterintuitively, may feel particularly incentivized to confess under such circumstances *because of* their innocence and corresponding naive belief that the truth will ultimately prevail regardless of the words they utter in the interrogation room. See *Police-Induced Confessions*, 34 L & Hum Behav at 22-23

[2] Saul Kassin, whose work is cited throughout this brief, is a Distinguished Professor of Psychology at the John Jay College of Criminal Justice in New York and Professor Emeritus at Williams College in Massachusetts. Dr. Kassin is one of the pioneers of the scientific study of false confessions and has received a Presidential Citation Award from the American Psychology-Law Society, in addition to other awards in recognition of his work. Williams College, Department of Psychology, *Saul Kassin Biography* <https://web.williams.edu/Psychology/Faculty/Kassin/biography/ index.html> (accessed November 2, 2022).

[3] See, e.g., *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988) ("The ultimate test of admissibility [of a custodial statement] is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made.").

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(explaining that "*innocence* itself may put *innocents* at risk"). Indeed, a vast number of the nation's proven false confessions have been elicited during interrogations in which officers used the false evidence ploy against innocent suspects. *Id.* at 12. Despite interrogating officers' use of this highly coercive, deceptive tactic, nearly all of these false confessions elicited in response to the false evidence ploy were found to be "voluntary" and admitted into evidence. See Kassin, *Duped: Why Innocent People Confess—and Why We Believe Their Confessions* (Lanham: Prometheus, 2022), p 307 ("Almost every innocent confessor . . . who appear[s] in the wrongful-conviction databases, had . . . their confessions . . . deemed voluntary and hence admissible at trial."). Wrongful convictions and decades of social science thus demonstrate that the use of false evidence ploys leads to false confessions, and that those confessions are likely to be admitted into evidence under the current legal standards, thereby placing innocent confessors at grave risk of wrongful conviction. To prevent future miscarriages of justice, this Court should hold that officers' use of a false evidence ploy renders the subsequent confession per se involuntary and inadmissible.

Another coercive interrogation tactic at issue here, which has likewise played a significant role in extracting false confessions from the innocent, is "minimization"—a term referring to a category of techniques "designed to provide the suspect with moral justification and face-saving excuses for having committed the crime in question." See *Police-Induced Confessions*, 34 L & Hum Behav at 12. Scientific research has revealed that officers who engage in minimization tactics that downplay the seriousness of the offense or provide "a choice of alternative explanations—for example, suggesting to the suspect that [a] murder was spontaneous, provoked, peer-pressured, or accidental rather than the work of a cold-blooded premeditated killer" communicate "by implication that leniency in punishment is forthcoming upon confession." *Id.* Consistent with real-world examples from proven false confession cases, scientific studies reveal that such

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minimization tactics "have the pernicious effect of making people expect leniency even in the face of warnings that police cannot influence sentencing." See Luke & Alceste, *The Mechanisms of Minimization: How Interrogation Tactics Suggest Lenient Sentencing Through Pragmatic Implication*, 44 L & Hum Behav 266, 282 (2020). This Court has recognized the coercive power of a promise of leniency, and that a "promise need not be express," as implications "can convey as much as express statements." See *People v Conte*, 421 Mich 704, 729-740; 365 NW2d 648 (1984) (opinion by WILLIAMS, C.J.). Consistent with the principles underlying the *Conte* plurality opinion, and in order to meaningfully deter both explicit false promises of leniency and minimization tactics that implicitly communicate such promises, this Court should hold that when officers use such tactics, the confession that follows will be per se inadmissible.

Here, during an approximately three-hour-long interrogation, the police used both the false evidence ploy and minimization tactics to elicit a confession from Mr. Stewart: they said they had video evidence and witnesses against him that did not exist and implied that he could be sentenced to just two years if he confessed. (102a, 108a-109a, 115a-116a).[4]

Amicus urges this Court to hold that confessions like Mr. Stewart's, which are elicited following false evidence ploys or false promises of leniency—including promises communicated implicitly via "minimization" tactics—render a confession per se involuntary and inadmissible. In the alternative, and at a minimum, the Court should hold that the use of such tactics will militate heavily in favor of a finding of inadmissibility, and encourage trial courts assessing voluntariness to consider the relevant social science demonstrating the coercive impact of such tactics. Had the courts below properly considered the psychological manipulation involved in the interrogating officers' use of these deceptive tactics, particularly in light of the additional false confession "risk

[4] Citations to page numbers are to pages of Appellant's Appendix to Supplemental Brief.

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factors" present in this case, they likely would have correctly found that Mr. Stewart's confession was involuntary and inadmissible.

Amicus further submits that, to protect all of its citizens from the risk of falsely confessing in response to false evidence ploys and false promises of leniency, this Court should apply the proposed admissibility rules to confessions elicited from all subjects of interrogation, regardless of the subjects' ages. At minimum, the Court should apply such rules in cases involving interrogations of children, adolescents, and young adults (as defined below) who, like Mr. Stewart, are categorically more vulnerable to coercive interrogation tactics than adults.

STATEMENT OF RELEVANT FACTS

On May 6, 2016, Joshua Lamar-James Stewart, an 18-year-old high-school student, was taken into police custody outside of a hospital in Detroit. *People v Stewart*, unpublished per curiam opinion of the Court of Appeals, issued November 24, 2020 (Docket No. 343755), p 1. Mr. Stewart was detained after police officers observed him sitting on the hood of a car that they suspected had been stolen and used during the course of two robberies and a homicide earlier that day. *Id.* Mr. Stewart was then interrogated while in police custody. *Id.* Thereafter, for three consecutive hours, between approximately 3:40 a.m. and 6:40 a.m., two officers aggressively interrogated Mr. Stewart in a small interrogation room. (7a); Appellant's Supp Br on Appeal 11, June 30, 2022. The officers yelled, banged on the table, cursed, insisted on Mr. Stewart's guilt, and, most notably, lied to Mr. Stewart about the evidence the police possessed and falsely implied that Mr. Stewart could only avoid a 20-to-life prison sentence if he confessed to his involvement in the homicide, while suggesting his involvement was justifiable.

From the outset of Mr. Stewart's interrogation, the officers engaged in coercion and deception. Prior to administering the *Miranda* warning, the lead interrogator, Officer MacDonald, trivialized the importance of Mr. Stewart's constitutional rights. (3a) (prefacing the *Miranda*

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warning by saying that he needed to "go through some paperwork real quick" because he just had "a couple questions"). Then, as Mr. Stewart signed the *Miranda* waiver form, Officer MacDonald suggested that Mr. Stewart was only in custody to be questioned about a stolen car. (6a). In fact, the officers were investigating a homicide that had occurred during one of the robberies earlier that day.

During the interrogation, the officers insisted Mr. Stewart was lying when he denied knowledge of the robberies and homicide in question, threatened their teenaged suspect that he should not "get smart" with them, and warned him: "you don't want to battle." (30a-33a). Accusing him of "rehearsing" his statement with someone else, the officers repeatedly scolded and cursed at Mr. Stewart as they rejected his assertions of innocence. (40a-46a) ("I'm not going to believe . . . that bullshit."; "You know what else is dumb[?] [S]itting here telling me this bullshit ass story you telling me."); (78a) ("You go ahead and come up off that innocence shit with me."). While insisting the officers knew Mr. Stewart was involved in the homicide and attempted robberies, Officer MacDonald also pounded the table and cursed at Mr. Stewart repeatedly. (96a) (pounding the table, as seen in the interrogation video, while yelling "I ain't putting that gun in your hand. I know [someone else] had the pistol."); (112a) (telling Mr. Stewart expressly for the first time that they were investigating a murder, not a stolen car: "Fuck that stolen car. That stolen car ain't shit.").[5] The officers also repeatedly told Mr. Stewart that he would be "better off" confessing to having participated in the robberies and the homicide, particularly if he "didn't know what was going to happen" and had not intended for anyone to get killed. (43a). The officers assured him that confession to his involvement in the crimes would be "okay," telling him that

[5] In addition to these physically threatened gestures and yelling, the officers used the "n-word" more than 50 times during the interrogation, both to describe Mr. Stewart and the other possible suspects.

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"it's okay to just be there" at the scene and that "it's okay to be there unarmed." (98a). The officers also told Mr. Stewart that the interrogation was his "opportunity" to "correct these dumb ass decisions you made." (74a).

At one point, after Officer MacDonald urged Mr. Stewart to "[f]ucking man the fuck up" and confess, Mr. Stewart directly asked the officers to tell him what they wanted to hear from him: "So, what you want me to say?" (96a). Shortly thereafter, after having been interrogated continuously for over 90 minutes, Mr. Stewart expressed an evident desire to leave the interrogation room and said, "I'm trying to just get out of here." (99a).

In the course of forcefully rejecting Mr. Stewart's repeated insistence that he was innocent, the officers used what is known as the false evidence ploy. Specifically, they falsely claimed that they were in possession of video footage of one of the robberies and that they had eyewitnesses that identified Mr. Stewart as one of the perpetrators. Officer MacDonald repeatedly insisted that there was "a camera point[ed] right at the street," where the robbery and shoot-out allegedly occurred, and that as a result "it's on video." (142a-143a). Officer MacDonald also insisted that he had "witnesses" saying Mr. Stewart was at the crime scenes. (102a, 129a). Based on the record in this matter, amicus understands that no such video was collected or entered into evidence at trial and that no such eyewitnesses had identified Mr. Stewart, nor were any eyewitnesses called to testify at trial to identify Mr. Stewart as a perpetrator in the offense.

The officers also told Mr. Stewart repeatedly that if he did not confess to being the driver of the vehicle involved in the robberies and homicide, then Deontea White, who the officers believed was the shooter, would say that *Mr. Stewart* was actually the shooter. (84a-85a) ("Because at the end of the day [White] [is] smarter than you . . . . He going to run circles around your ass when it comes to the judicial system. He gone to have you looking stupid as fuck and

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you going to do 20 to life . . . . He's smart enough to put you as the shooter. . . . That motherfucker going to put that pistol in your hand, not the one that's got dropped. He's going to put the one that killed somebody in your hand.") The officers suggested that the only way for Mr. Stewart to "take control of [his] own life" was to confess before he was implicated by Mr. White. (100a). The officers repeatedly told Mr. Stewart that, if he confessed, but told them the gunfire was the result of an accident, that it "wasn't supposed to happen" or that he "didn't know it was going to happen," then he would be taking back "control." (82a-91a). Otherwise, they told him, if he continued to "sit here not saying nothing," Mr. Stewart would allow Mr. White to implicate him and, as a result, he would spend "20 to life" in prison. (84a).

Significantly, the officers also told Mr. Stewart a story about a young woman who, like Mr. Stewart, was suspected to be the getaway driver in a murder and, after confessing to police, received two years in prison and would soon have "her record [] clean." (108a-109a). The officers suggested that Mr. Stewart could receive the same favorable deal, as opposed to 20-to-life, if he also confessed. (115a-116a). After the officers implied that Mr. Stewart's only hope of escaping a decades-long prison sentence was to confess, and after Mr. Stewart began to implicate himself as the driver of the car involved in the homicide, Mr. Stewart explained his understanding of the officers' implied promise of leniency when he stated: "[Y]'all talking about 20 or 2 [years' imprisonment]. Who wouldn't take 2." (162a).[6] After beginning to comply with the officers' exhortations to confess, Mr. Stewart asked for clarity about the promise: "So I should come out a winner?" *Id.*

[6] Detective Kelly Lucie, the other interrogating officer in the room, hedged the officers' previous statements by stating, "We're not the judge and we're not the jury. We don't—we don't hand down sentencing. All we do is investigate the crime," before reinforcing that a confession would likely result in leniency: "But over the years we've seen that we've been explaining how someone does the right thing they come out winning." (162a).

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Mr. Stewart's motion to suppress his confession as involuntary was denied, and his confession was admitted into evidence at trial. As noted in the factual recitation in Mr. Stewart's Supplemental Brief on Appeal, which the State does not rebut, his confession and presence in the car at the hospital were the only evidence against him; the police did not have any forensic evidence nor eyewitnesses that implicated Mr. Stewart. Appellant's Supp Br on Appeal 12, June 30, 2022; Pl-Appellee Supp Br 1. Based on the confession evidence and his presence at the hospital, Mr. Stewart was convicted of armed robbery and other related offenses, and sentenced to 23 to 46 years' imprisonment. On appeal, the trial court's ruling admitting Mr. Stewart's confession as voluntary was affirmed. See *Stewart*, unpub per curiam op at 3-5. This Court now has the opportunity to consider whether a teenager's confession, elicited after an hours-long, psychologically coercive and deceptive interrogation, conducted in the middle of the night, was in fact "voluntary," and whether the current totality-of-the-circumstances test—which the courts below applied to admit Mr. Stewart's confession—adequately prevents the admission of psychologically coerced and, potentially, false confessions that follow officers' use of the false evidence ploy and false promises of leniency.

ARGUMENT

I. False Confessions Are a Leading Cause of Wrongful Convictions.

False confessions have been "recognized as one of the leading sources of erroneous convictions of innocent individuals." Klaver et al, *Effects of Personality, Interrogation Techniques and Plausibility in an Experimental False Confession Paradigm*, 13 Legal & Crim Psych 71, 72 (2008) (citations omitted). False confessions have been a contributing factor in the wrongful

convictions underlying nearly one-third of all known DNA exonerations[7] and about one in eight of all exonerations nationwide, as tracked by the National Registry of Exonerations. See University of Michigan Law School, *The National Registry of Exonerations* <https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx> (accessed November 2, 2022). False confessions are particularly prevalent in cases like this one—homicide offenses involving young suspects. *Id.* (nearly 75% of all known false confessions elicited from people aged 18 or younger that resulted in wrongful convictions were for murder). In Michigan, since the year 2000, there have been at least 11 exonerations where the defendant falsely confessed. *Id.*

As experts have explained, these proven false confessions "most surely represent the tip of an iceberg," as known false confessions necessarily account for only a fraction of the actual confessions given by innocent people. *Police-Induced Confessions*, 34 L & Hum Behav at 3. The known dataset of cases necessarily excludes "false confessions that are disproved before trial, many that result in guilty pleas, those in which DNA evidence is not available, those given to minor crimes that receive no post-conviction scrutiny, and those in juvenile proceedings that contain confidentiality provisions." *Id.*

Many of the known false confessions were elicited by police officers using tactics associated with the "Reid Technique" of interrogation. See *id.* at 7. Named after one of its founders, John Reid, the Reid Technique has been the "most widely publicized and probably most widely used" interrogation method in the United States since its inception in the 1960s. Gohara, *Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 Fordham Urb L J 791, 808 (2006). The Reid Technique instructs

[7] Innocence Project, *DNA Exonerations in the United States* <https://www.innocenceproject.org/ dna-exonerations-in-the-united-states/> (accessed November 2, 2022).

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officers to isolate the suspect in a "small private room, which increases his or her anxiety and incentive to escape." *Police-Induced Confessions*, 34 L & Hum Behav at 7. Interrogating officers then engage in a nine-step process that is intended to "lead suspects to see confession as an expedient means of escape." *Id.* Although the Reid Technique is effective in eliciting confessions from custodial subjects, it relies in part on interrogation tactics that pose a risk for "the ultimate failure of the suspect interview process—a false confession from an innocent suspect," and in fact the method's guilt-presumptive, psychologically manipulative tactics have coerced many innocent people to falsely confess. Eastwood & Watkins, *Psychological Persuasion in Suspect Interviews*, 11 Investigative Interviewing Rsch & Prac J 54, 57 (2021) (noting that "[t]he propensity for Reid-style approaches to create false confessions has been demonstrated within both laboratory paradigms and real-world cases") (citation omitted). Due to its role in eliciting false confessions, the Reid Technique is today regarded as so controversial that "a consulting group that . . . has worked with a majority of U.S. police departments, said . . . it will stop training detectives in the method" and will now "use the Reid technique only to educate police on the risk and reality of false confessions." Eli Hager, The Marshall Project, *The Seismic Change in Police Interrogations* <https://tinyurl.com/5zxfybru> (accessed November 2, 2022).

When coercive interrogation methods produce a false confession, the confession typically functions as the catalyst to a chain of events that ends in wrongful conviction. Once elicited, false confessions bias the investigative process, often resulting in the premature termination of the investigation, or the accumulation of additional false evidence of guilt against the innocent confessor. Following a confession, police often "close the investigation, deem the case solved, and overlook exculpatory information—even if the confession is internally inconsistent, contradicted by external evidence, or the product of coercive interrogation." Kassin, *Why*

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Confessions Trump Innocence, 67 Am Psych 431, 433 (2012) (citations omitted). See also Leo, *False Confessions: Causes, Consequences, and Implications*, 37 J Am Acad Psychiatry L 332, 340 (2009) (stating that "no other class of evidence is so profoundly prejudicial" as the false confession, which has a "strong biasing effect on the perceptions and decision-making of criminal justice officials") (citation omitted). Various studies have shown that confessions are "potent enough to corrupt other evidence in a case, such as the judgments of experienced polygraph examiners, eyewitnesses, and individuals judging handwriting samples, often resulting in an array of [inaccurate conclusions] and creating the appearance of corroboration." See Appleby & Kassin, *When Self-Report Trumps Science: Effects of Confessions, DNA, and Prosecutorial Theories on Perceptions of Guilt*, 22 Psych Pub Pol'y & L 127, 137 (2016) (citations omitted). See also *Why Confessions Trump Innocence*, 67 Am Psych at 436-438 (noting the high prevalence of additional evidentiary errors, such as mistaken eyewitness identification, when a false confession is involved, given a false confession's power to "taint[] the perceptions of eyewitnesses, forensic experts, and others"); *Police-Induced Confessions*, 34 L & Hum Behav at 23-24 (describing a study in which fingerprint experts changed 17% of their previously correct matches or exclusions when presented with a false confession).

Moreover, false confessions have an overwhelming impact on factfinders, and, therefore, if a false confession is admitted into evidence, the innocent confessor is highly likely to be wrongfully convicted, even in the face of compelling evidence of innocence. Social scientists studying the influence of false confession evidence on jurors have found "unequivocal" evidence that "confessions have more impact on verdicts" than most other forms of evidence, including eyewitness identification evidence. *When Self-Report Trumps Science*, 22 Psych Pub Pol'y & L at 127-129 (citation omitted). Research has demonstrated that, when someone admits criminal

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activity to the police, in light of the commonly held belief that people would never falsely confess to a crime themselves, see Costanzo et al, *Juror Beliefs about Police Interrogations, False Confessions, and Expert Testimony*, 7 J Empirical Legal Stud 231, 238-239 (2010), and "in light of the adverse consequences that will follow [a false admission of guilt], people trust that confession." Kassin, *False Confessions: How Can Psychology So Basic Be So Counterintuitive?*, 72 Am Psych 951, 956 (2017). Consequently, "people do not adequately discount confessions—even when they are retracted and judged to be the result of coercion." *Why Confessions Trump Innocence*, 67 Am Psych at 433-434 (citations omitted). In fact, 22% of exonerees whose wrongful convictions were based on confession evidence now known to be false were convicted *despite* the availability of exculpatory DNA evidence at the time of trial. See Innocence Project, *DNA Exonerations in the United States* <https://www. innocenceproject.org/dna-exonerations-in-the-united-states/> (accessed November 2, 2022). See also *When Self-Report Trumps Science*, 22 Psych Pub Pol'y & L at 127-128 (discussing a report analyzing 19 cases in which confessors to rape and/or murder were tried and convicted despite having been exculpated by DNA tests).

The significant weight that factfinders give false confession evidence may be amplified when the confession is "contaminated," meaning the innocent suspect adopts detailed crime facts which are suggested to them by interrogating officers. See Garrett, *The Substance of False Confessions*, 62 Stan L Rev 1051, 1079-1083 (2010) (detailing instances in which suggestion by police was apparent in recordings of analyzed false confessions). As a result of contamination—which may occur when, for example, police use leading questions or show photographs of the crime scene or victim to the suspect during the interrogation—many proven false confessions contain detailed factual narratives that the innocent suspect had no knowledge of, but which were suggested, sometimes inadvertently, to the innocent confessor by the interrogating officers.

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See Appleby et al, *Police-Induced Confessions: An Empirical Analysis of Their Content and Impact*, 19 Psych, Crime, & L 111, 124-125 (2013). See also Leo et al, *Promoting Accuracy in the Use of Confession Evidence: An Argument for Pretrial Reliability Assessments to Prevent Wrongful Convictions*, 85 Temp L Rev 759, 775-776 (2013) ("[C]ontaminated/formatted false confessions contain not only nonpublic crime facts, but a coherent and compelling storyline, motives and explanations . . . .").

The tendency of law enforcement to truncate its investigation after a confession is elicited, and the inclination of factfinders to credit confession evidence, not only make wrongful convictions of innocent confessors highly likely but may also allow the actual perpetrators to remain at large without accountability. *Promoting Accuracy in the Use of Confession Evidence*, 86 Temp L Rev at 771-773; see Innocence Project, *DNA Exonerations in the United States* <https://www.innocenceproject.org/dna-exonerations-in-the-united-states/> (accessed November 2, 2022) (noting that, since the first DNA exoneration in 1989, there were 48 additional crimes, including 25 murders, that were committed by the true perpetrators of crimes for which innocent false confessors were wrongfully convicted). The elicitation and admission into evidence of false confessions thus present a high risk of injustice not only for innocent suspects, but also for crime victims and the local community.

II. Hundreds of Wrongful Convictions and Decades of Scientific Research Demonstrate that Police Deception about Incriminating Evidence and the Communication of False Promises of Leniency Can Lead to False Confessions.

The patterns found among hundreds of known false confessions, the results of scientific experiments regarding interrogation coercion—which build on foundational principles of psychology—as well as the consensus among relevant experts, make it abundantly clear that police deception and implicit promises of leniency during interrogation have the coercive power to convince innocent people to confess to crimes they did not commit. The last 30 years of relevant

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scientific research and expert analyses—which make plain the power of such deceptive tactics to coerce a confession from a suspect, regardless of guilt, especially when the suspect is a young person—warrants serious consideration by this Court.

A. Police Lies about Incriminating Evidence—Known as "False Evidence Ploys"—Place Innocent People at Risk of Falsely Confessing.

Coercive interrogation techniques can take many forms, but perhaps none is as controversial or as powerful as the "false evidence ploy." A false evidence ploy involves presenting the suspect with fabricated evidence of guilt, such as "an eyewitness identification that was not actually made, . . . a polygraph test[] that [the suspect] did not actually fail" or—as in this case—video evidence of the crime that did not exist. *Police-Induced Confessions*, 34 L & Hum Behav at 28. False evidence ploys have been implicated in the vast number of proven "police-induced false confessions." *Id.* at 12. The continued use of this tactic in police interrogation, and its potential to elicit false confessions from innocent suspects, has drawn criticism from leading experts on false confessions, courts, and lawmakers, as well as law enforcement organizations. Such widespread criticism is the result of robust evidentiary support for the reality that police deception in interrogation is highly coercive, places innocent people at grave risk of wrongful conviction, and is unnecessary for effective police work.

As a leading expert on false confessions has explained, the evidence demonstrating the dangerously coercive nature of police deception in interrogation and, specifically, the false evidence ploy, can be thought of as existing in a "four-tiered pyramid." *Duped*, p 122. At the foundation of the pyramid are "the long-standing principles of psychology, all of which point to the perils of [presenting a custodial subject with] misinformation." *Id.* On the next "tier" are "experiments specifically demonstrating the false-evidence effect on confessions," and "[y]et another step up are the opinions of scientists reflecting this research literature." *Id.* Lastly, "[a]t

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the very top of the pyramid are the real-life anecdotes from actual cases," in which the false evidence ploy led to a false confession and, consequently, the wrongful conviction of the innocent confessor. *Id.* An examination of each "tier" demonstrates the dangerous coercion of the false evidence ploy and its power to elicit false confessions from innocent suspects.

Foundational psychological principles about social influence explain how police deception manipulates innocent people into confessing. Psychologists agree that "people make choices believed to maximize their well-being given the constraints they face"—a principle known as the "matching law." *False Confessions*, 72 Am Psych at 955 (citation omitted). In the context of an inherently stressful police interrogation, this principle functions to render custodial subjects "myopic in their orientation, preferring outcomes that are immediate rather than delayed, the latter depreciating over time in their subjective value" as the stress of the interrogation continues. *Id.* (citation omitted). When police officers present a suspect with misinformation in this context—when they lie to a suspect about nonexistent evidence of guilt—they exacerbate the suspect's stress of denying the interrogators' accusations, thereby incentivizing even innocent suspects to comply with officers' demands for a confession, as they are led to believe that such compliance will put an end to the immediate stress of interrogation. See *Police-Induced Confessions*, 34 L & Hum Behav at 14, 28 (explaining that the goal of an interrogation is "to increase the anxiety and despair associated with denial and reduce the anxiety associated with a confession" and that "the false evidence ploy . . . is designed to thrust suspects into a state of inevitability and despair"). Such confessions—in which the innocent suspect ultimately views persistence in their claim of innocence as ineffectual, and compliance with officers' insistence on a confession as the better alternative to the stress of continued interrogation—are known as "coerced-compliant" false confessions. *Id.* at 14. See also Perrillo & Kassin, *Inside Interrogation: The Lie, The Bluff, and*

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False Confessions, 35 L & Hum Behav 327 (2011) ("[R]esearch has shown that people in general confess as an act of social compliance when they feel trapped by the apparent strength of the evidence against them and perceive no other means of escape.") (citations omitted).

Foundational psychological research also explains how misinformation "can alter a person's memory for that event." Kassin et al, *On the General Acceptance of Confessions Research: Opinions of the Scientific Community*, 73 Am Psych 63, 70 (2018). Specifically, research experiments in the field have shown that "presentations of false information" are so powerful that they can "substantially alter subjects' visual judgments, beliefs, perceptions of other people, behaviors toward other people, emotional states, . . . self-assessments, memories for observed and experienced events, and even certain medical outcomes, as seen in studies of the placebo effect." *Police-Induced Confessions*, 34 L & Hum Behav at 17 (citing 11 "highly recognized [classic studies] in the field" that "revealed that misinformation renders people vulnerable to manipulation"). The psychological impact of misinformation explains why, for some innocent suspects, the false evidence ploy may produce a "coerced-internalized" false confession—an incriminating admission by an innocent suspect who, persuaded by the interrogators' misrepresentation of the evidence, actually begins to doubt their memory of the event and wrongfully believe in their own guilt. *Id.* at 15.

Building upon the psychological principles regarding human behavior and the impact of misinformation on memory and perception more broadly, there has been significant experimental research that has specifically studied and demonstrated the power of the false evidence ploy to produce both coerced-compliant and coerced-internalized false confessions. In a groundbreaking study that has come to be known as the "computer crash paradigm," college students volunteered to participate in a controlled experiment in which they were falsely accused of crashing a computer

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system by pressing a key they had been instructed to avoid. *Id.* at 17. Despite not having done so, nearly all students who were presented with false evidence—namely, that a research confederate in the room said they witnessed the student hit the forbidden key—falsely admitted to hitting the relevant key and crashing the system. *Id.* See also Kassin & Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 Am Psych Soc 125 (1996). Significantly, this result has since been replicated in a variety of additional studies "using vastly different methods, [all] leading innocent subjects to confess" to various forms of misconduct, including violent acts. Snook et al, *Urgent Issues and Prospects in Reforming Interrogation Practices in the United States and Canada*, 26 Legal & Criminological Psych 1, 10 (2021) (describing a variety of experiments demonstrating that the presentation of false evidence can lead innocent people to confess to "cheating, in violation of a university honour code[,] . . . stealing money from the 'bank' in a computerized gambling experiment . . . and recalling past transgressions, including acts of violence") (citations omitted). Such studies have even demonstrated the capacity for the false evidence ploy to lead innocent people to internalize their own guilt and become convinced that they have committed wrongdoing. See, e.g., *Inside Interrogation*, 35 L & Hum Behav at 328 (describing the results of a laboratory study in which misinformation "increased the number [of participants] who internalized guilt, from 12 to 55%"). Further, experimental research has supported the conclusion that innocent people, *because of their innocence* and corresponding tendency to believe that there will be sufficient evidence to demonstrate their innocence, are, paradoxically, at particular risk. *Why Confessions Trump Innocence*, 67 Am Psych at 433 (providing a real-world example of how "*innocence* can put *innocents* at risk" and discussing laboratory experiments that have shown that "innocence is a state of mind that leads people to trust the criminal justice system during interrogation").

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In addition to the psychological principles and the laboratory research that demonstrate that the false evidence ploy is so coercive that it has the power to make innocent people implicate themselves in crimes they did not commit and, potentially, even to believe in their own guilt, there is also vast consensus among experts to this effect. See, e.g., *Urgent Issues and Prospects*, 26 Legal & Criminological Psych at 10 (noting that "the scientific community is in agreement regarding the risk of false evidence" in interrogation because it is "clear that misinformation renders people vulnerable to manipulation" and "[n]umerous laboratory experiments specifically demonstrate the false evidence effect"). Indeed, in a 2018 survey of leading experts on false confessions and interrogation coercion, *all* agreed that "misinformation about an event can alter a person's memory for that event," and nearly all agreed that "presentations of false incriminating evidence during interrogation increase the risk that an innocent suspect would confess to a crime he or she did not commit." *On the General Acceptance of Confessions Research*, 73 Am Psych at 70-72. In fact, these experts overwhelmingly agreed that the false evidence ploy increases the risk of false confession in a manner "equally perilous" to the use of "explicit promises of leniency, threats of harm or punishment," and even torture. *Id.* at 75. Likewise, the American Psychological Association—"the leading scientific and professional organization representing psychology in the United States, with more than 133,000 researchers, educators, clinicians, consultants, and students as its members," American Psychological Association, *About APA* <https://www.apa.org/about> (accessed November 2, 2022)—recommends "that law enforcement agencies, prosecutors, and the courts recognize the risks of eliciting a false confession by interrogations that involve the presentation of false evidence." American Psychological Association, *Resolution on Interrogations of Criminal Suspects* <https://www.apa.org/about/ policy/interrogations> (accessed November 2, 2022).

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Further, some law enforcement experts who research police interviewing and interrogation tactics have supported efforts to limit or prohibit the use of the false evidence ploy. For example, Susan Brandon, the former research manager of the High-Value Detainee Interrogation Group ("HIG")—a federal law enforcement and security entity that houses a research program that "studies the effectiveness of interrogation approaches and techniques"[8]—wrote in support of a statute seeking to deter police use of the false evidence ploy, noting that "research [] strongly supports the notion that lying about evidence is unnecessary" as a tactic of interrogation. *Duped*, p 123. Indeed, one of the world's leading law enforcement training organizations, Wicklander-Zulawski, has recommended against the use of the false evidence ploy, reasoning that "[f]abricating details about the investigation can not only jeopardize the credibility of the investigator but may also contaminate the confession . . . [and] may lead to pressure on an innocent person" to confess. Thompson, Wicklander-Zulawski & Associates, Inc., *Conviction Review Unit Report: Key Takeaways* <https://www.w-z.com/2020/08/05/conviction-review-unit-report-key-takeaways/> (accessed November 2, 2022).

Finally, the apex "tier" of evidence regarding the significant coercion involved in the false evidence ploy is composed of the real-world examples of innocent people who, when presented with false evidence of guilt, confessed to a crime and were subsequently wrongfully convicted. The tragic experiences of innocent false confessors reveal that the potential for a false evidence ploy to induce a false confession, or convince an innocent person of their own guilt, is "not a mere laboratory phenomenon." *Inside Interrogation*, 35 L & Hum Behav at 328. Rather, the false evidence ploy has been behind multiple high-profile false confession cases in which innocent

[8] Federal Bureau of Investigation, *High-Value Detainee Interrogation Group* <https://www.fbi.gov/investigate/terrorism/high-value-detainee-interrogation-group> (accessed November 2, 2022).

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suspects falsely confessed, such as in the high-profile case of the Central Park Five.[9] See, e.g., *Lie for a Lie*, 33 Fordham Urb L J at 791-793 (describing the use of false evidence ploys to extract confessions in the Central Park Five case); *The Substance of False Confessions*, 62 Stan L Rev at 1097-1099 (describing additional cases of innocent people falsely confessing in response to the false evidence ploy). Another example is the case of New York teenager Martin Tankleff who, after coming home to find his parents had been violently attacked and left unconscious, was interrogated and falsely told by interrogating officers that his hair had been found on his mother's body and that his father had emerged from a coma and named him as the perpetrator. Eidam, Lindemann & Ransiek, eds, *Interrogation, Confession, and Truth: Comparative Studies in Criminal Procedure* (Baden-Baden: Nomos Verlagsgesellschaft, 2020), *Structural Police Deception in American Police Interrogation: A Closer Look at Minimization and Maximization*, pp 183-184. In fact, his father never emerged from a coma, and both Tankleff's mother and father died from the injuries sustained during the attack. *Id.* Without any understanding that the police were permitted to lie, and not understanding why his father would name him as the attacker if he was not, Tankleff "came to believe during the interrogation that he must have committed the brutal attack on his parents despite having no memory of doing so." *Id.*at 184. See also *Police-Induced Confessions*, 34 L & Hum Behav at 17-18; *Inside Interrogation*, 35 L & Hum Behav at 328. Doubting his own recollection and his own innocence, Tankleff confessed, his confession was admitted into evidence, and, consequently, he was convicted and spent nearly two decades in

[9] The Central Park Five, also known as the Exonerated Five, are five men who falsely confessed to the attack and rape of a woman in Central Park when they were young adolescents, the youngest being 14. The detectives who interviewed them repeatedly lied about the existence of evidence against them, as well as falsely told the young suspects that they had implicated each other. They spent 13 years in prison before the actual perpetrator confessed to the crime and they were exonerated. Salaam, Richardson & Santana, *We Are the 'Exonerated 5.' What Happened to Us Isn't Past, It's Present*, <https://www.nytimes.com/2021/01/04/opinion/exonerated-five-false-confessions. html/> (accessed November 8, 2022).

prison before he was ultimately exonerated and released. *Interrogation, Confession, and Truth*, p 184.

Taken together, the psychological principles, laboratory research, expert consensus, and numerous examples of false confessions made in response to the false evidence ploy confirm that the highly coercive power of police deception during interrogation can and does compel people to confess to crimes they did not commit, resulting in wrongful convictions of the innocent.

B. Interrogation Tactics that Communicate a False Promise of Leniency in Exchange for a Confession Place Innocent People at Risk of Falsely Confessing.

As a plurality of this Court recognized decades ago, when police officers communicate—even via "subtle" or "tacit" means—that a suspect will receive leniency in exchange for a confession, the resulting confession may be rendered involuntary and inadmissible. *Conte*, 421 Mich at 741 (opinion by WILLIAMS, C.J.) (holding that because implicit suggestions of leniency "can convey as much as express statements . . . [t]here is no room for a distinction between tacit and express understandings") (original quotation marks and citation omitted). In the decades since *Conte*, social science research and the study of known false confessions have revealed just how psychologically coercive the use of implicit promises can be—namely, that, "[j]ust like explicit promises . . . , techniques that implicitly promise leniency . . . substantially increase the risk of causing a suspect to perceive that he or she has no meaningful choice but to comply with the interrogators' demands and requests—in order to . . . receive the implicitly promised leniency—and confess." *Interrogation, Confession, and Truth*, pp 197-198. Indeed, scientific research has demonstrated that "there is actually little difference in the way that explicit and implicit promises . . . are interpreted in a police interview setting" and "research has directly linked these subtle implied tactics to false confessions in an experimental setting, much like their explicit counterparts . . . ." *Urgent Issues and Prospects*, 26 Legal & Criminological Psych at 13.

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Significantly, a common police interrogation tactic known as "minimization"—an umbrella term referring to interrogation techniques "designed to provide the suspect with moral justification and face-saving excuses for having committed the crime in question"—has been shown to "communicate[] by implication that leniency in punishment is forthcoming upon confession," and may "lead innocent people who feel trapped to confess." *Police-Induced Confessions*, 34 L & Hum Behav at 12, 18. "Moral minimization" refers to the sub-category of minimization tactics that communicate to the suspect that the crime in question is morally justifiable, was an accident, was the victim's fault, or otherwise suggests there is a defensible reason for the perpetrator's criminal conduct. See *Id.* at 12. See also *The Mechanisms of Minimization*, 44 L & Hum Behav at 267. Experts overwhelmingly agree that "[m]inimization tactics that communicate sympathy and moral justification for a crime lead people to infer leniency upon confession." *On the General Acceptance of Confessions Research*, 73 Am Psych at 70, 72.

Moral minimization is common in modern police interrogation and is taught as a critical aspect of the Reid Technique of interrogation, which instructs officers to "develop a 'minimizing theme' that, among other things, downplays the moral seriousness of the offense." *The Mechanisms of Minimization*, 44 L & Hum Behav at 267. Specifically, the Reid Technique instructs officers that they should propose a binary choice to their suspects—either they committed the crime for an inexcusable or repulsive reason, or simply because of a mistake or lapse in judgment that reflects only basic human nature. See Reid, *Selecting the Proper Alternative Question* <https://reid.com/resources/investigator-tips/selecting-the-proper-alternative-question> (accessed November 2, 2022) (explaining that the "choices presented in an alternative question generally contrast an undesirable characteristic of the crime to one that is desirable" but "accepting either choice results in the first admission of guilt"); Inbau et al, *Criminal Interrogations and*

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Confessions (Chicago: Jones & Bartlett Learning 2013), pp 293-303 (instructing officers on how to utilize the "alternative question" technique to "weaken the suspect's resistance" to confession and to "impl[y] a rather sympathetic attitude on the part of the investigator"). The Reid trainers offer various examples, such as: "Did you plan this thing out for months in advance, or did it just happen on the spur of the moment?" or, "Did you steal that money to buy drugs and booze, or was it used to help out your family?" Reid, *Selecting the Proper Alternative Question* <https://reid.com/resources/investigator-tips/selecting-the-proper-alternative-question> (accessed November 2, 2022).

Through empirical research, the use of such moral minimization tactics has been directly linked to an increased rate of false confession. Specifically, one scientific study has found that the use of moral minimization techniques significantly increased "the false confession rate" by as much as 200%. *Interrogation, Confession, and Truth*, p 199. Additionally, when minimization tactics were used in combination with the communication of an "explicit deal," then the false confession rate increased by more than 700%. *Id.*

Further, moral minimization is routinely used in conjunction with the tactic of "maximization"—another umbrella term used to categorize interrogation techniques that "convey the interrogator's rock-solid belief that the suspect is guilty and that all denials will fail." *Police-Induced Confessions*, 34 L & Hum Behav at 12. See also, e.g., *Criminal Interrogation and Confessions*, p 192 (instructing interrogating officers to express "absolute certainty in the suspect's guilt"). Maximization involves implicitly or explicitly threatening harsher consequences if the suspect persists in a claim of innocence, as well as "making an accusation, overriding [the suspect's] objections, and citing evidence, real or manufactured, to shift the suspect's mental state from confident to hopeless." *Police-Induced Confessions*, 34 L & Hum Behav at 12. Significantly,

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scientists have found that when minimization is used in conjunction with maximization, the rate of false confession is even further increased. Specifically, empirical research has revealed that "the combined use of minimization and maximization techniques increased the false confession rate from 3% to 43%." *Interrogation, Confession, and Truth*, p 199 (citations omitted). Accordingly, the "experimental studies show that minimization and maximization techniques—especially those that manipulate suspect's perception of tangible negative and positive consequences depending on whether he confesses or continues to deny—substantially increase the risk of eliciting false confessions and substantially decrease the accuracy of confession evidence." *Id.* (emphasis omitted). In fact, analyses of the known false confession cases "have shown that minimization and maximization interrogation techniques—communicating implicit promises and threats (if not explicit promises and threats) are almost always present in police interrogations leading to proven false confessions." *Id*. (emphasis omitted).

C. Adolescents Subjected to Coercive Police Interrogation Tactics Falsely Confess at a Substantially Higher Rate than Adults, Resulting in an Increased Risk of Wrongful Conviction.

The impact of coercive interrogation tactics—including false evidence ploys and false promises of leniency—is magnified when used against adolescents, late adolescents—like Mr. Stewart—and young adults. See Center for Law, Brain & Behavior at Massachusetts General Hospital, *White Paper on the Science of Late Adolescence: A Guide for Judges, Attorneys, and Policy Makers* (January 27, 2022), p 32, available at <https://clbb.mgh.harvard.edu/white-paper-on-the-science-of-late-adolescence/> (accessed November 2, 2022) [hereinafter "*White Paper on the Science of Late Adolescence*"]. While there is some disagreement in the field as to what precisely constitutes adolescence and adulthood, since brain development does "not rigidly conform to chronological boundaries," leading experts define adolescents as those aged 10 to 17, late adolescents as those aged 18 to 21, and young adults as those aged 22 to 25. *Id.* at 46 n 242.

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Although adults—including adults without any cognitive, developmental, or mental health issues—can and do falsely confess in the face of coercive police tactics, young people under age 25 make up the majority of known false confessors. See University of Michigan Law School, *The National Registry of Exonerations* <https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx> (accessed November 2, 2022) (documenting that nearly 64% of false confessions contained within the database were elicited from individuals under age 25); Drizin & Leo, *The Problem of False Confessions in the Post-DNA World*, 82 NC L Rev 891, 945 (2004) (discussing a study of 125 false confessions that found children under age 18 made up approximately one-third of false confessors in the sample considered, and another 27% of innocent confessors were between 18 and 24 years old).

Modern neuroscience helps to explain the overrepresentation of young people in the population of innocent people who falsely confess. Neuroimaging has revealed that the areas and systems of the brain that are responsible for future planning, judgment, and decision making—the prefrontal cortex and other regions that make up the "cognitive-control networks"—are not fully developed until one's early-to-mid-20s. See Steinberg, *Risk Taking in Adolescence: New Perspectives from Brain and Behavioral Scienc*e, 16 Ass'n for Psych Sci 55, 56 (2007); Johnson, Blum & Giedd, *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 J Adolescent Health 216 (2009) (noting that the "adolescent brain continues to mature well into the 20s").

The neurobiological differences evident in adolescents and young adults result in a diminished capacity to withstand interrogation coercion, for various reasons. Young people generally react to stress differently than adults, which is of critical import in the context of police interrogation—an interaction that is "stress-inducing by design," and, generally, conducted in a

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manner to "increase the anxiety and despair" of the suspect. *Police-Induced Confessions*, 34 L & Hum Behav at 7. Even for adults, "stress impedes judgment because it negatively impacts the abilities to weigh costs and benefits and to override impulses with rational thought," but adolescents under stress are "vulnerable to further distortion" of their "already skewed cost-benefit analyses . . . ." Owen-Kostelnik, Reppucci & Meyer, *Testimony and Interrogation of Minors: Assumptions About Maturity and Morality*, 61 Am Psych 286, 295 (2006).

Young people are also less able to adequately account for the future consequences of their actions during police interrogation. To resist the pressure to confess falsely, an innocent suspect must engage in "future orientation"—a term used to refer to the "constellation of abilities to think and reason about the future or connect current behavior with future events"—because they must prioritize the long-term consequences of uttering an untrue admission of guilt over escaping the interrogation. Cleary, *Applying the Lessons of Developmental Psychology to the Study of Juvenile Interrogations: New Directions for Research, Policy, and Practice*, 23 Psych Pub Pol'y & L 118, 121 (2017). See also Davis & Leo, *Interrogation-Related Regulatory Decline: Ego Depletion, Failures of Self-Regulation, and the Decision to Confess*, 18 Psych Pub Pol'y, & L 673, 677 (2012). Scientific research has established that future orientation increases with age. *Applying the Lessons of Developmental Psychology*, 23 Psych Pub Pol'y & L at 121. Young people who have not fully developed the ability to engage in future orientation are therefore more likely than adults to confess falsely without adequately accounting for the long-term consequences of their actions during the interrogation. See *id.* Moreover, an inability to prioritize long-term consequences distorts the perception of the duration of an interrogation, so that even a relatively short period of interrogation may be perceived by adolescents as endless, adding to the pressure on young suspects to adopt interrogators' narratives, regardless of guilt. *Id.* In fact, many adolescents who have

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falsely confessed have explained that they did so to put an end to the interrogation or, in the context of a police-station interview, so that they would be permitted to "go home." *Id.* at 120; *The Problem of False Confessions*, 82 NC L Rev at 969-970.

III. To Prevent False Confessions and Wrongful Convictions, this Court Should Hold that Custodial Statements Elicited Following Police Deception about Evidence and False Promises of Leniency Are Involuntary and Inadmissible.

Because deceptive interrogation tactics create a significant risk that the suspect will provide a coerced and, potentially, false confession, amicus urges this Court to adopt a rule that two particular tactics—the false evidence ploy and the communication of false promises of leniency, including through use of moral minimization tactics—will render a resulting confession per se involuntary and inadmissible. Alternatively, as discussed further below, this Court should hold that the use of such tactics will militate heavily in favor of a finding of involuntariness and that the social science regarding the impact of such tactics should be considered in courts' voluntariness analyses when proffered. Accord *State v Derri*, 199 Wash 2d 658, 675; 511 P3d 1267 (2022) (holding that, when applying the test for admissibility of eyewitness identification evidence, trial courts "must apply relevant, widely accepted modern science . . . at each step of the test").

Adopting a rule that confessions elicited after the use of a false evidence ploy or the communication of false promises of leniency are categorically involuntary is the most effective way to meaningfully " 'deter[] police from using a tactic that might induce the innocent to confess falsely.' " *State v Hillery*, 956 NW2d 492, 499 (Iowa, 2021) (citation omitted). Indeed, several courts, including the U.S. Supreme Court, have announced or acknowledged per se rules to deter the use of particularly coercive police interrogation tactics. See *Beecher v Alabama*, 389 US 35, 38; 88 S Ct 189; 19 L Ed 2d 35 (1967) (holding that there is an "inescapable conclusion" that a confession is involuntary if the confessor has been threatened "at gunpoint to speak his guilt"); *United States v Jenkins*, 938 F2d 934, 938 (CA 9, 1991) (noting that "confessions accompanied

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by physical violence wrought by the police have been considered per se inadmissible"); *State v Matsumoto*, 145 Hawaii 313, 316; 452 P3d 310 (2019) (creating a per se rule barring a specific form of police deception—namely, lying to a suspect about the results of their polygraph test because such lies " 'are of a type reasonably likely to procure an untrue statement or to influence an accused to make a confession regardless of guilt' " (quoting *State v Kelekolio*, 74 Hawaii 479, 511; 849 P2d 58 (1993)). Indeed, in *Ashcraft v Tennessee*, the U.S. Supreme Court held that continuous custodial interrogation for 36 hours is "so inherently coercive that" a resulting confession cannot be deemed constitutionally admissible, and thus effectively created a rule that such a lengthy, continuous interrogation will render a resulting confession per se involuntary. 322 US 143, 154; 64 S Ct 921; 88 L Ed 1192 (1944). Police deception in interrogation has been demonstrated to have a comparably coercive impact—and place innocent suspects at similar risk of falsely confessing—as the tactics that these courts have found render a confession involuntary per se. See, e.g., *On the General Acceptance of Confessions Research*, 73 Am Psych at 75 (surveyed experts "judged the tactic of presenting suspects with false evidence . . . as equally perilous[]" to "explicit promises of leniency, threats of harm or punishment, and [torture]").

Indeed, in recognition of the dangers of police deception, there is an emerging trend within the United States to limit the use of deceptive tactics in interrogations. Several states have recently passed legislation curtailing the use of the false-evidence ploy and promises of leniency during interrogations of young people,[10] and many other state legislatures are working to pass similar

[10] Specifically, in 2021, Illinois made criminal confessions by children under 18 presumptively inadmissible when "a law enforcement officer or juvenile officer knowingly engages in deception." 2021 Ill Laws 2. The statute defines deception as both "the knowing communication of false facts about evidence" and "unauthorized statements regarding leniency by law enforcement." *Id.* Oregon passed a similar law in 2021, creating a presumption of involuntariness for confessions made by children during custodial interrogation where "the peace officer intentionally used information known by the officer to be false to elicit the statement." 2021 Or Laws 1. Utah also passed a law banning police from "provid[ing] false information about evidence that is reasonably likely to elicit an incriminating response from the child" or "mak[ing] an unauthorized statement about leniency for the offense." 2022 Utah Laws.

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bans.[11]

Additionally, several state and federal courts have recognized the coercive power of deception and limited, or criticized, the use of the false evidence ploy. For example, the Hawaii Supreme Court has "recognized that false claims of physical evidence result in an unsettling number of false or involuntary confessions," and held "that misrepresentations about the existence of incontrovertible physical evidence that directly implicates the accused is an exceptionally coercive interrogation tactic and its use is a strong indicator that the suspect's statement was involuntary." *State v Baker*, 147 Hawaii 413; 465 P3d 860, 878-879 (2020). Likewise, the U.S. Court of Appeals for the Seventh Circuit has found impermissible coercion when police falsely led a suspect to believe that the police were in possession of medical evidence that conclusively established his guilt. *Aleman v Hanover Park*, 662 F3d 897, 906 (CA 7, 2011). The Seventh Circuit reasoned that the false presentation of evidence by an interrogator may "destroy the information required for a rational choice." *Id*. Particularly when interrogators' misrepresentation of evidence "foreclose[s] any other conclusion" but that the suspect committed the offense, the suspect's choice and perception of reality may be " 'seriously distort[ed].' " *Id*. (quoting *United States v Rutledge*, 900 F2d 1127, 1130-1131 (CA 7, 1990)). See also *People v Thomas*, 22 NY3d 629, 643; 8 NE3d 308 (2014) (holding that the interrogating officers' use of deception during the interrogation at issue functioned to "nullify individual judgment in any ordinarily resolute person

See also 2022 Cal Stat 2 ("During a custodial interrogation of a person 17 years of age or younger relating to the commission of a misdemeanor or felony, a law enforcement officer shall not employ . . . deception or psychologically manipulative interrogation tactics."). Most recently, Delaware passed a law prohibiting the use of deceptive tactics in custodial interrogations of suspects under the age of 18, defining "deceptive tactics" as "stating evidence presently exists, knowing that it does not, or communicating promises of leniency in sentencing, charging, or pretrial release in order to induce a confession or other incriminating evidence." Del Code Ann tit 11, §§ 2021, 2022 (2022).

[11] See, e.g., SB S324A, 2021-2022 S, Reg Sess (NY 2021) (prohibiting admission of confession evidence where the confession was "involuntarily made," meaning "by means of any promise or statement of fact, which promise or statement undermines the reliability of the defendant's statement, or creates a substantial risk that the defendant might falsely incriminate himself or herself; or by knowingly communicating false facts about evidence to the defendant").

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and [was] manifestly lethal to self-determination when deployed" against a vulnerable suspect); *Wilson v State*, 311 SW3d 452, 465 (Tex Crim App, 2010) (holding that it is unlawful for Texas officers to fabricate physical evidence and use it during interrogation); *Gray v Commonwealth*, 480 SW3d 253, 259 (Ky, 2016) (recognizing that police "trickery" is likely to produce a coerced confession); *State v Swanigan*, 279 Kan 18, 25, 39; 106 P3d 39 (2005) (holding that a confession was elicited involuntarily after, among other coercive tactics, the interrogating officer lied to the accused about his fingerprints being found at the crime scene).

Recently, in *State v Gonzalez*,[12] one of the justices of the New Jersey Supreme Court expressly called on that court to recognize both the "ethical concern[s]" with sanctioning police deception, and the reality that the "use of lies may overbear the will of a suspect, overcome the suspect's ability to resist the psychologically coercive pressures inherent in the interrogation process, and, in some instances, elicit a false confession." 249 NJ 612, 640; 268 A3d 329 (2022) (Albin, J, concurring). Describing the issue of police deception in interrogation as one of "supreme importance," New Jersey Supreme Court Justice Albin urged the court to decide in the next appropriate case, "whether sanctioning deception and trickery in the interrogation process offends judicial integrity and whether the cost of potentially eliciting false confessions outweighs the benefits of eliciting a number of true confessions." *Id.* Justice Albin queried:

> When deceptive interrogation tactics are sanctioned by our courts, what is the lesson conveyed to the public—that law enforcement officers can lie to a suspect, but when a suspect lies to the police, it is a crime? One day, this Court will have to decide whether the continued use of lies and trickery is a constitutionally permissible practice—whether it is a principled and sufficiently reliable means of inducing a truthful confession from a suspect.

[12] The defendant in the *Gonzalez* case, like Mr. Stewart, had been falsely told that surveillance cameras had captured her alleged criminal conduct, when in fact no such evidence existed. *State v Gonzalez*, 249 NJ 612, 622; 268 A3d 329 (2022).

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Id. at 639-640 (citation omitted). As Justice Albin noted, other courts have expressed similar disdain for the sanctioning of police deception. See, e.g., *State v Phelps*, 215 Mont 217, 225; 696 P2d 447 (1985) ("[W]e cannot condone the tactics of this officer who informed Phelps as to the existence of incriminating evidence when the evidence was inconclusive."); *State v Register*, 323 SC 471, 480; 476 SE2d 153 (1996) (stating that "the misrepresentation of evidence by police is a deplorable practice").

Similarly, courts have also recognized the manipulative power of the use of moral minimization and other tactics that communicate false promises of leniency. For example, the New Jersey Supreme Court found a confession involuntary when it was elicited after the "detectives repeatedly minimized the nature and gravity of the defendant's alleged offenses." *State v LH*, 239 NJ 22, 48; 215 A3d 516 (2019). See also *Commonwealth v DiGiambattista*, 442 Mass 423, 435-440; 813 NE2d 516 (2004) (suppressing a custodial statement because the interrogating officer minimized the crime and repeatedly suggested that counseling, in lieu of jail, would be possible); *Commonwealth v Monroe*, 472 Mass 461, 472; 35 NE3d 677 (2015) (" '[M]inimization' during interrogation of a crime of which a defendant is accused, combined with other factors, can render a confession involuntary because minimization carries with it an implied promise that the requested confession will result in lenient treatment" (quoting *DiGiambattista*, 442 Mass at 439)); *Commonwealth v Baye*, 462 Mass 246, 258-259; 967 NE2d 1120 (2012) (finding a confession involuntary where, among other things, officers used moral minimization tactics, including "repeatedly indicat[ing] that they realized the defendant 'never intended on anybody getting hurt,' and that the deaths were 'an accident,' the result of a 'comedy of errors' "); *Baker*, 147 Hawaii at 427 (noting that the interrogating officers "repeatedly attempted to portray the commission of the alleged offense as understandable . . . [and] . . . [i]n doing so, [the officer]

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implicitly promised [the accused] that he would receive more favorable treatment if he adopted [the officer's] version of events and confessed. This tactic was reasonably likely to influence [the accused] to make an involuntary confession, particularly when combined with other coercive interrogation tactics"); *People v Freeman*, 668 P2d 1371, 1379 (Colo, 1983) (en banc) (reasoning that the interrogating officers' efforts "to minimize the seriousness and the extent of the defendant's criminal liability . . . are weighty factors to be considered within the totality of the circumstances" even though they did not amount to express promises of leniency); *State v Hunt*, 151 A3d 911, 914; 2016 ME 172 (2016) (finding a confession involuntary where, among other tactics, officers engaged in "minimization of the moral blame associated with the alleged conduct").

Moreover, the U.S. Supreme Court has recognized that explicit promises of leniency that induce a confession are, generally, unconstitutionally coercive. See, e.g., *Lynumn v Illinois*, 372 US 528, 534; 83 S Ct 917; 9 L Ed 2d 922 (1963) (holding that a confession was involuntary where it was made after officers promised the suspect that her confession would prevent the state from taking custody of her children); *Conte*, 421 Mich at 712.[13] As noted, social science demonstrates that "there is actually little difference in the way that explicit and implicit promises . . . are interpreted in a police interview setting." *Urgent Issues and Prospects*, 26 Legal & Criminological Psych at 13 (citations omitted). Thus, as one expert has aptly stated, permitting the use of minimization tactics that communicate false promises of leniency, while prohibiting express promises of leniency, is "circumventing the law's intent." *Duped*, p 128.

[13] *See also e.g., State v Polk*, 812 NW2d 670, 674 (Iowa, 2012) ("The defendant's confession is to be suppressed if it follows the officer's improper promise of leniency."); *Sheriff v Bessey*, 112 Nev 322, 326; 914 P2d 618 (1996) (holding that "promises of mental health treatment in exchange for confession, assurances of more favorable treatment rather than incarceration in exchange for confession, misrepresenting the consequences of a particular conviction, representation that welfare benefits would be withdrawn or children taken away unless there is a confession or suggestion of harm or benefit to someone," will render a resulting confession "coercive per se").

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Consistent with the growing number of courts recognizing the inherent coercion of the false evidence ploy and tactics that communicate false promises of leniency, and to meaningfully safeguard against the conviction and imprisonment of innocent people for crimes they did not commit, amicus urges this Court to adopt a rule that any confession elicited after the use of such deceptive tactics is per se involuntary and inadmissible. This Court has the constitutional authority to implement a rule that precludes confession evidence obtained by such powerfully coercive interrogation tactics so as to ensure confessions are given voluntarily, as required by Article 1, § 17, of Michigan's 1963 Constitution, either by virtue of its supervisory powers through state constitutional due process guarantees or by amending state evidentiary rules. See generally *id.* art 6, § 5. To prevent false confessions and wrongful convictions, this Court should seize the opportunity presented by this case and issue a ruling that precludes confession evidence elicited by two of the most pernicious police interrogation tactics. In so doing, this Court would align Michigan law with decades of social science demonstrating the powerfully coercive effect of these tactics and, thereby, guard against the tragic injustice of wrongful conviction.

In the alternative, this Court should hold that such a categorical rule applies to people under age 25 who, like Mr. Stewart at the time of his interrogation, have heightened vulnerability in the interrogation room due to their young age, leaving them at significant risk of false confession when confronted with police deception. As this Court has recently recognized, there is a "clear consensus that late adolescence—which includes the age of 18—is a key stage of development characterized by significant brain, behavioral, and psychological change," and that, because late adolescents "are still developing cognitively[,] . . . late adolescents are hampered in their ability to make decisions, exercise self-control, appreciate risks or consequences, feel fear, and plan ahead." *People v Parks*, unpublished opinion of the Supreme Court of Michigan, issued July 28,

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2022 (No. 162086), p 2. Without such a rule, courts may continue to ignore this precedent in the context of police interrogation, and wrongfully treat adolescents and young adults, who are categorically more vulnerable to interrogation coercion, as "adults"—just as the Court of Appeals did here. *Stewart*, unpub per curiam op at 3 (reasoning that, because he was 18 years old at the time of interrogation, "Stewart was no longer a 'juvenile' and therefore could not benefit from the legal recognition that juveniles have a diminished decision-making capacity").

If the Court is not inclined to issue such categorical rules, it should at minimum issue a ruling that makes clear that the use of such tactics is disfavored, and will militate heavily towards a finding of involuntariness, particularly when used against people under the age of 25. Further, to help prevent against admission of unreliable confession evidence, the Court should encourage trial judges to consider the relevant, generally-accepted social science in assessing the voluntariness and corresponding admissibility of confession evidence. Accord *Derri*, 199 Wash 2d 658 at 675 (holding that, when applying the test for admissibility of eyewitness identification evidence, trial courts "must apply relevant, widely accepted modern science . . . at each step of the test"); *State v Henderson*, 208 NJ 208, 217-220; 27 A3d 872 (2011) (announcing a revised test for the admission of eyewitness identification evidence that takes into account the relevant social science); *State v Lawson*, 352 Or 724, 746; 291 P3d 673 (2012) (holding that "variables identified in the scientific research" warrant consideration in the admissibility test for eyewitness identification evidence).

IV. Mr. Stewart's Interrogation Was Replete with Police Deception, False Promises of Leniency, and Other "Risk Factors" for False Confession, and Should Be Found To Be Involuntary and Inadmissible.

Mr. Stewart's case makes clear why the current standard for assessing voluntariness of custodial statements must be revisited. Despite the officers' lies to their teenaged suspect about the evidence they had against him, and false promises that he would receive leniency if he

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confessed, the trial court and the appellate division found that, in consideration of the totality-of-the-circumstances, Mr. Stewart's confession was voluntary.

For all of the reasons discussed above, amicus urges this Court to hold that the deceptive interrogation tactics in this case—the false evidence ploys and the false promises of leniency—rendered Mr. Stewart's confession per se involuntary and inadmissible. Under amicus's proposed rule for assessing admissibility of confessions elicited after the police use a false evidence ploy or communicate a promise of leniency, this Court should find Mr. Stewart's confession to be per se inadmissible, without the need for an assessment of the totality of the circumstances, because the police undisputedly engaged in such tactics. *First*, as detailed above, the interrogating officers explicitly lied to Mr. Stewart about the evidence against him—namely, the officers told him there was video evidence which did not exist, and that unnamed witnesses had identified him as a perpetrator in a homicide, when no such witnesses had identified him. (143a-144a) (officers telling Mr. Stewart "my man got video on the front of his house[, s]o, it's on video," that "[m]y man got a camera pointing . . . right at the front of his house[, w]here he's parked at[, s]o now that's on video" and that "[w]hen you on video you can't say 'aw that ain't me' "); (141a-142a) (officers telling Mr. Stewart that they knew he was "minimizing" his conduct because "my man['s] house got a camera pointing right at the street"); (102a) (officers telling Mr. Stewart that "[t]hese [witnesses were] telling me you was there . . . . Witnesses. Do you know what witnesses are, Bro?"). *Second*, the officers used both moral minimization tactics that communicated a false promise of leniency *and* made a near explicit promise that a confession would prevent him from serving a 20-to-life prison sentence. See, e.g., (84a) (officers telling Mr. Stewart that "you going to do 20 to life . . . . because you're not saying what happened"); (108a-109a) (officers telling Mr. Stewart a story about a similarly-situated woman who confessed to being present at two homicides

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and was given a two-year sentence, and claiming that, without confessing, she would have gotten a harsher sentence); (82a, 98a) (officers offering Mr. Stewart face-saving excuses like " '[the shooting] wasn't supposed to happen' " and "[i]t's okay for you to just be there"). The officers' promises apparently had their intended effect, as Mr. Stewart told them while confessing: "y'all talking about 20 or 2. Who wouldn't take 2." (162a).

Even were this Court not to apply a per se rule that statements elicited after the use of such deceptive tactics are inadmissible, Mr. Stewart's confession should be deemed involuntary under the totality-of-the-circumstances test, particularly when considered in light of the social science discussed above. In addition to the use of the false evidence ploy and minimization tactics, and a near-explicit promise of sentencing leniency, the officers also employed another "situational" risk factor for false confession, when they engaged in maximization tactics, such as repeatedly denying Mr. Stewart's claims of innocence (40a-46a) and using threatening language. (30a-33a). The officers also interrogated Mr. Stewart in the middle of the night in a small police interrogation room and isolated him from his mother, despite his repeated requests to contact her. (153a, 156a, 172a). Such "prolonged isolation from significant others in this situation constitutes a form of deprivation that can heighten a suspect's distress and incentive to remove himself or herself from the situation." *Police-Induced Confessions*, 34 L & Hum Behav at 16. Further, in light of the interrogation occurring between approximately 3:40 a.m. and 6:40 a.m., it is reasonable to assume that Mr. Stewart was suffering from sleep deprivation—another risk factor for false confession because a sleep deprived person is much more vulnerable to coercion. *Id.* at 7 (noting that sleep deprivation "is historically one of the most potent methods used to soften up [suspects] and extract confessions from them"). Moreover, and significantly, the officers used these psychologically coercive interrogation tactics against an 18-year-old who, due to his young age, was categorically

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more vulnerable to the interrogation coercion. See Section III earlier; see also *White Paper on the Science of Late Adolescence*, p 32.

Thus, the numerous situational and dispositional risk factors in this case compel a finding that Mr. Stewart's confession was involuntary, as the totality-of-the-circumstances informed by the relevant social science reveal that his " 'will ha[d] been overborne and his capacity for self-determination critically impaired . . . .' " *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988) (quoting *Culombe v Connecticut*, 367 US 568, 602; 81 S Ct 1860; 6 L Ed 1037 (1961)).

CONCLUSION

For all the reasons explained above, in order to protect its residents against false confession and wrongful conviction, this Court should (1) reverse Mr. Stewart's conviction because his statement was involuntary and should not have been admitted in evidence against him; and (2) hold that custodial statements made after the police lie to suspects about evidence against them or communicate, even implicitly, promises of leniency, must be deemed involuntary and inadmissible per se.

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Respectfully submitted,

/s/ Benjamin Gruenstein

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