# STATE OF INDIANA ) IN THE CARROLL COUNTY

) SS:

COUNTY OF CARROLL ) CIRCUIT COURT

STATE OF INDIANA, )

)

Plaintiff, )

)

v. ) CAUSE NO. 08C01-1110-FA-000003

# )

)

* 1. )

)

Defendant. )

**MOTION IN LIMINE TO EXCLUDE UNRELIABLE STATEMENTS**

The Defendant, by counsel, respectfully moves this Court in limine to exclude as evidence in this cause any and all oral and written communications, confessions, statements, admissions or tests, alleged to have been made by the Defendant while being interrogated in police custody in this cause. Separate and apart from suppressing the Defendant’s recorded statements on grounds that they are involuntary, this Court has the power to exclude Defendant’s statements as unreliable and unduly prejudicial under Indiana Evidence Rule 403.

In support of this Motion, the Defendant states the following:

* + 1. On April 4, 2007, in response to an interrogation conducted by law enforcement officers, the Defendant gave a series of statements. The Defendant was in custody at the time of the interrogation.
		2. Indiana Evidence Rule 403 is the rule which empowers judges to act as gatekeepers to prevent unreliable or unduly prejudicial evidence from confusing a jury or otherwise tainting its verdict. Pursuant to this Rule, relevant evidence can be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice.” Ind. Evidence Rule 403.
		3. As the United States Supreme Court has long understood, confessions wield an enormous degree of persuasive power over the minds of factfinders. *See Hopt v. Utah*, 110 U.S.

574, 584-85 (1884) (recognizing that a “voluntary confession of guilt is among the most effectual proofs in the law”); *Miranda v. Arizona*, 384 U.S. 436, 466 (1966) (explaining that a confession is “the most compelling possible evidence of guilt”) (citing *Mapp v. Ohio*, 367 U.S. 643, 685 (1961) (Harlan, J., dissenting)); *Colorado v. Connelly*, 479 U.S. 157, 182 (1986) (citing E. Cleary, *McCormick on Evidence* 316 (2d ed. 1972)) (observing that “[t]riers of fact accord confessions such heavy weight in their determinations that the introduction of a confession makes the other aspects of a trial in court superfluous”).

* + 1. With great power, however, comes the potential for great prejudice. Confessions can be so prejudicial, in fact, that they can persuade factfinders to convict despite the existence of significant exculpatory evidence, such as conflicting physical evidence, contradictory accounts of witnesses, and alibis. *See* Lisa E. Hasel & Saul M. Kassin, *On the Presumption of Evidentiary Independence: Can Confessions Corrupt Eyewitness Identifications?*, 20 Psychol. Sci. 122 (Jan. 2009). Confessions exert such a strong persuasive pull over factfinders because most people believe that “one who is innocent will not imperil his safety or prejudice his interests by an untrue statement.” *Hopt*, 110 U.S. at 585; *see also* Hasel & Kassin, 20 Psychol. Sci. at 122 (noting that “people reflexively trust confessions, as they do other statements against self-interest”).
		2. Once considered a near-universal truth, this view has been exposed as a myth in recent years. *See, e.g.*, *Corley v. United States*, 129 S. Ct. 1558 (2009) (citing Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N. C. L. Rev. 891, 907 (2004), for the proposition that “mounting empirical evidence” shows that “a frighteningly high percentage of people” falsely confess). To date, 297 individuals have been exonerated on the basis of DNA testing after having been convicted of crimes that they did not commit; approximately one-quarter of these individuals falsely confessed to the crimes in question. *See* Innocence Project, Understanding the Causes: False Confessions,<http://www.innocenceproject.org/understand/False-Confessions.php>(last visited August 26, 2012).
		3. Given the prejudicial power of confession evidence and the risk that an unreliable confession can lead a jury to wrongful convict an innocent defendant, it is essential that judges be able to assess the reliability of confession evidence and to use their power as gatekeepers of to exclude those confessions whose probative value is outweighed by their prejudicial effect.
		4. Fortunately, there are widely accepted tools for assessing the reliability of confessions. In fact, police officers receive training in how to distinguish between reliable and unreliable confessions. The nation’s leading trainer of interrogation techniques is John E. Reid and Associates. In the 2005 edition of their training manual for police, “Essentials of the Reid Technique, Criminal Interrogations and Confession,” the authors explain how to assess the reliability of confessions:

After a suspect has related a general acknowledgment of guilt, the investigator should return to the beginning of the crime and attempt to develop information that can be corroborated by further investigation, and should seek from the suspect the full details of the crime and information about the suspect’s subsequent activities. What should be sought particularly ***are facts that would only be known by the guilty person*** (e.g. information regarding the location of the murder weapon or the stolen goods, the means of entry into the building, the type of accelerant used to start the fire, or the type of clothing on the victim).

Fred Inbau, et al., Essentials of the Reid Technique, Criminal Interrogations and Confessions

(Jones and Bartlett, 2005), at 217 (emphasis added). If the suspect’s narrative of the crime reveals details known only by the guilty party or the police (dependent corroboration) or which leads to new or previously undisclosed evidence of guilt that is corroborated by investigators (independent corroboration), then the narrative is powerful evidence of the confession’s reliability. See Inbau, Reid, et al., Criminal Interrogations and Confessions (5th ed. 2013), at

354-355*.* See also *State v. Mauchley,* 67 P.3d 477, 482 (Utah 2003).

1. In order to adequately assess the reliability of a confession, however, Reid and Associates trains its officers to withhold key details of the crime from suspects while interrogating them:

When developing corroborative information, the investigator must also be certain that the details were not somehow revealed to the suspect through the questioning process, news

media, or the viewing of crime scene photographs. In this regard, it is suggested that early during an investigation, a decision be made by the lead detective as to what evidence be withheld from the public [and press], as well as from all suspects. This information should be documented in writing in the case file so that all investigators are aware of what information will be withheld.

Inbau, et al, Essentials of the Reid Technique, Criminal Interrogations and Confessions, at 217.

1. When police officers reveal facts to the suspect, usually inadvertently – a process known as “contamination” – they necessarily compromise the reliability of the confession. Without an electronic recording of the entire interrogation, however, judges and juries are unable to spot contamination. As a result they accord confessions too much probative value in deciding to convict and often mistake unreliable confessions for reliable confessions. For this reason, the mere fact that a confession is highly detailed does not necessarily mean that it is reliable. In fact, in a study of the first 200 DNA exonerations, Professor Brandon Garrett found that virtually all of the proven false confessions were filled with precisely the kinds of details that make a confession appear to be reliable, details that must have been leaked by the interrogator to the false confessor. Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. 1051, 1053 (April 2010)(finding contamination in 36 of the 38 false confessions). For this reason, courts must scrutinize recordings of interrogations to see whether the details in the confession came from the suspect in the first instance, or whether they were the product of contamination.
2. A close review of the recordings of Defendant’s interrogation reveals that his confession is the product of extensive police contamination. Defendant did not provide the police with information that could only have been known by the person who shot the victim. . The recordings show the detectives, in their efforts to get Defendant to admit to shooting the victim, repeatedly leaking details to Defendant which Defendant later incorporated in his confession.

Nor did Defendant provide information that led the police to evidence that they did not already know about. The entire interrogation appears to have been an attempt by the officers to get Defendant to “merely confirm[] the preconceived story the police … [sought] to have him describe,” *Miranda v. Arizona*, 384 U.S. 436, 455 (1966), and to agree to “the composition of a

statement that was not even cast in his own words,” *Culombe v, Connecticut*, 367 U.S. 568, 634 (1961). See Expert Report of Professor , attached hereto as Exh. A.

1. Because of extensive contamination, Defendant’s confession has little probative value. Because jurors view confession evidence as such compelling evidence of guilt, however, Defendant’s confession has the potential to lead jurors to convict him. In short, the probative value of his confession is outweighed by its prejudicial effect and this Court should exclude it under Ind. Evid R. 403.
2. The admission of a contaminated confession may also raise due process concerns. Eyewitness identification, like false confessions, is recognized as a leading case of wrongful convictions. Recognizing that law enforcement can contaminate accurate identifications through unduly suggestive lineup procedures, in *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977), the United States Supreme Court held that “reliability is the linchpin in determining the admissibility of identification testimony”. If an identification procedure is unduly suggestive, an in-court identification is only permitted if the prosecution can demonstrate an independent source for the identification, so that their identification is reliable notwithstanding the improper police procedures. In order to prevent wrongful convictions, reliability should be the linchpin in determining the admissibility of confession evidence as well. If a confession is so tainted by suggestive questioning, including the use of leading questions and other forms of contamination, the confession should be excluded.

WHEREFORE, the Defendant, by counsel, respectfully requests this Court:

1. Conduct a pre-trial hearing to determine if the statements alleged to have been given were reliable or were the product of contamination; and
2. Exclude as evidence in this cause any and all communications, confessions, statements, or admissions, written or oral, made by him prior to, at the time of, or subsequent to

his arrest in this cause whose probative value is outweighed by their prejudicial effect or whose reliability is so undermined by contamination as to raise due process concerns under the state and federal constitution.