**DEPARTMENT OF THE AIR FORCE**
**UNITED STATES AIR FORCE TRIAL JUDICIARY**

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| UNITED STATES OF AMERICA | DEFENSE MOTION IN LIMINE TO ADMIT DR. SPOCK'S EXPERT TESTIMONY |
| v. | |
| CAPT JAMES T KIRK<br>Squadron (AFGSC)<br>Davis Monthan AFB, Arizona | 2 October 2021 |

## MOTION

Pursuant to Military Rules of Evidence (M.R.E.) 702, the Defense moves this Honorable Court to permit the defense appointed forensic psychologist to testify about false confession during trial on the merits of *United States v. Kirk*.

## SUMMARY

The Government intends to challenge the anticipated testimony of the defense-appointed forensic psychologist, Dr. S'Chn T'Gai Spock, in a *Daubert* hearing. Trial Counsel has represented that they intend to challenge the subject matter to which Dr. Spock intends to testify as well as the qualifications of Dr. Spock in an expert in the psychology of disputed confessions/admissions. If permitted, Dr. Spock will testify to three areas of specialized knowledge/expertise in the defense's case-in-chief: (1) how and why false confessions occur; (2) identification of features in the recorded interrogation from 22 November 2019 which are associated as risk factors frequently identified in false confession/admission cases; and (3) the social-psychological principles at play in false confessions/admissions which explain and demystify the counterintuitive nature of false confessions as well as why people are highly unlikely to accept that false confessions exist. This motion outlines the reasons why Dr. Spock's testimony should be permitted.

## FACTS

1. On 25 March 2020, the Convening Authority referred one charge and specification under Article 120b, UCMJ, against Capt Kirk. The Charge and its Specification allege Capt Kirk intentionally touched the genitalia of his daughter, DA, with intent to gratify his sexual desire on divers occasions between on or about 1 July 2018 and on or about 31 November 2019.

2. On 22 November 2019, Special Agent Ida Know interrogated Capt Kirk. The Defense incorporates by reference all paragraphs under "Facts" and "Argument" contained in the Defense's Motion to Suppress Statements, AE VIII. SA Know testified at motions hearing on 20 September 2020 that he used a number of techniques designed to get Capt Kirk to talk to him including: rapport building, minimization of the offense, introduction of themes or theories which are otherwise unsupported with evidence, forced choice dilemmas presented to Capt Kirk, confronting Capt Kirk with "the truth" and proclaiming his knowledge of his guilt, interruption of Capt Kirk's attempts to proclaim innocence, over-emphasis of the amount and quality of evidence in the case against Capt Kirk, suggesting relief or leniency if Capt Kirk confessed, and outlining consequences of his failure to confess.

3. On 8 May 2020, pursuant to Defense's request, 20 AF/JA approved the appointment of Dr. S'Chn T'Gai Spock as an expert consultant in the field of forensic psychology to assist the defense in preparing for trial. Attachment 1. Dr. Spock is an expert in the field of false confessions/admissions. Attachment 2. He holds his Ph.D. in Counseling Psychology from the University of the Outer Limits. *Id*. He has been licensed as a psychologist since 1991, and has been offering clinical and forensic psychological services since 2000. *Id.* He has published and lectured in the field of false confessions and interrogations multiple times. *Id.* He has provided professional consultations pertaining to false admissions/confessions and has conducted many examinations/testified on this topic. Attachment 4.

4. On 16 June 2020, Defense Counsel requested supplemental funding for Dr. Spock to allow him to testify at trial to a variety of topics pertaining to false admissions/confessions pursuant to the theory that Capt Kirk made false admissions at trial. Attachment 3. In a sworn affidavit, Dr. Spock outlined exactly what he would testify to at trial, if the request was granted: the counterintuitive nature of false admissions/confessions and the research supporting the phenomenon; how and why false admissions occur in addition to procedures which interrogators can use to protect against incidents of false admissions; eight types of psychological interrogation techniques used by SA Know which increase the likelihood for a false confession; the social-psychological principles which are unknown to the public and which explain why people are unlikely to accept that false admissions occur. Attachment 4.

5. This request was approved by 20 AF/JA on 29 June 2020 as evidenced by a signed MOA by a representative of the GCMCA. Attachment 5.

6. On 28 June 2020, the day before the approval, trial counsel verbally told defense counsel that it intended to lodge a *Daubert* challenge to the proffered testimony of Dr. Spock.

7. False confession testimony is generally accepted in specialized psychological communities. *S*ee Attachment 6 at 67; *see also generally* Attachment 7. There is a voluminous web of scholarly research surrounding psychology and confessions primarily published in books and peer-reviewed journals. *Id* at 65 and 68, T.1.; Attachment 7. The American Psychology Association has asserted through amicus curia briefs that innocent people can be induced to confess to crimes they did not commit; that juries have difficulty assessing confession evidence, which is counterintuitive; and that research is based on generally accepted methods. Attachment 6 at 67. In a 2018 research study, experts overwhelmingly concluded that various interrogator techniques can lead to a false confession and that juries are unable to adequately place the false confession in proper context as a matter of common sense. *See id.* at 72. In fact, the study reports that only 26% of experts believed that false confessions are known to the average person as a matter of common sense, and that only 28% believed that people can accurately distinguish between true and false confessions. *Id.* Ultimately among those participating in the study, 96% found that juries were better off with a competent expert than without one to assist in explaining confession-related issues.

8. There is a wealth of research that suggests that police interrogation tactics have a potent impact on people, causing innocent people to admit to criminal behavior that they did not commit. Attachment 7 at 14-15. This conclusion is drawn from a number of controlled studies focused on manipulating situational risk factors that increase (or decrease) the rate of false confessions. *Id.* at 16-19. Included in these risk factors are: physical control and isolation, presentations of false evidence, and minimization techniques. *Id.* Studies also reveal that innocence itself is a risk factor for increasing the likelihood of a false confession. *Id.* at 22-23.

9. At the heart of false confession phenomenon are core, well-established principles of psychology. *Id.* at 15. This includes: responsiveness of people to enforcement and subject to the laws of conditioning; the influence of behavior by perceptions of short-term gain versus long-term consequences. *Id.* A voluminous body of research also reveals that people make choices that they think will maximize their well-being given the constraints they face, making the best of the situation they are in – what psychologists refer to as "matching law." *Id.* Studies also show that individuals tend to be impulsive in their orientation in an interrogation, preferring outcomes that are immediate rather than delayed, with delayed outcomes depreciating over time in their subjective value. *Id.* Research also shows that people are highly vulnerable to influence from change agents who seek their compliance. *Id.* Finally, cognitive and neuroscience research shows that individuals are at risk of memory transience, misattribution effects, and suggestibility in interrogations. *Id.* Particularly in cases where a suspect is dispositionally or situationally rendered vulnerable to manipulation and the interrogator misrepresents the evidence, suspects confabulated memories about nonevents. *Id.* at 16.

10. If permitted, Dr. Spock will testify to the following issues, all of which are outlined in Attachment 4:

a. How and why false confessions occur.

(1) This will include reference to numerous, well-researched studies by experts in the field and a body of data that spans decades. Included in this body of research includes specific instances where innocent people were coerced into making false confessions.

(2) This will also include testimony about common interrogation tactics used by law enforcement which studies have shown increase the likelihood of false confessions/admissions.

b. Identification of features in the recorded interrogation from 22 November 2019 which are associated as risk factors frequently identified in false confession/admission cases.

(1) This will include the identification and analysis of specific techniques utilized by Agent Know, which Agent Know admitted to using at his own admission at the motions hearing on 17 May 2020: suspect ingratiation, refusal to accept suspect denials, minimization of the alleged offense, appeals to confess in order to assist AW, deceptive embellishment of incriminating evidence, forced-choice dilemmas presented, implications of leniency or assistance, maximization and implied threats, detection of deception, and use of criminal "profiling" in interrogations for the identification of perpetrators.

(2) Dr. Spock will explain why these techniques, also known as situational factors, can increase the risk of false confessions based on fundamental psychological principles. This will also include how law enforcement are trained to conduct interrogations in specific methods that are well known to place suspects at risk for a coerced confessions.

(3) This will also include the psychological phenomenon that takes effect on some individuals when faced with such techniques.

c. The social-psychological principles at play in false confessions/admissions which explain and demystify the counterintuitive nature of false confessions as well as why people are highly unlikely to accept that false confessions exist.

11. There is no direct evidence in support of the charge and specification in this case other than the admission by Capt Kirk.

**BURDEN OF PROOF AND PERSUASION**

12. Pursuant to RCM 905(c)(2)(A), the defense as the proponent of the admission of this evidence has the burden of persuasion. Pursuant to RCM 905(c)(1), the standard of proof on any factual issue necessary to decide this motion is by a preponderance of the evidence

**LAW**

13. MRE 702 states "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(c) the testimony is based on sufficient facts or data;

(e) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case."

14. Under *United States v. Houser*, to have an expert testify, defense must show:

(1) qualifications of the expert, MIL 702

(2) the subject matter of the expert testimony, MIL 702

(3) the basis for the expert testimony, MIL 702

(4) the legal relevance of the evidence, MIL 401 and 402

(5) the reliability of the evidence MIL 401

(6) whether the probative value of the testimony outweighs other considerations, MIL 403. *United States v. Bell,* 72 MJ 543, 551 (Army Ct. Crim App. 2013)(citing *United States v. Houser*, 36 MJ 392, 397 (CMA 1993).

15. In *Houser*, the Court of Military Appeals determined that the military judge did not abuse his discretion in permitting the testimony of counterintuitive victim behavior. *Houser*, 36 MJ at 400. In coming to this conclusion, the court made the following findings:

a. Regarding Subject Matter Expert Testimony:

(1) "The test is not whether the jury could reach the same conclusion in the absence of the expert evidence, but whether the jury is qualified without such testimony to determine intelligently and to the best possible degree the particular issue without enlightened from those having a specialized understanding of the subject." *Id*. at 398. (internal citations omitted).

(2) Expert testimony about counterintuitive behavior of a victim following a sexual assault "assists jurors in disabusing themselves of widely held misconceptions" and that "rape-trauma-syndrome testimony by a properly qualified expert may be admissible to assist the trier of fact to understand the evidence." *Id.* at 399.

b. Regarding Basis of Expert Testimony. "[A]n expert's opinion may be based on personal knowledge, assumed facts, documents supplied by other experts, or even listening to the testimony at trial." *Id.* at 399. Therefore, the CMA concluded, "there was no requirement that [the expert] interview the victim before she could testify to her six-stage model and the symptoms of typical rape survivors." *Id.*

c. Regarding Relevance. The CMA found that the testimony of the expert in the case was relevant because "certain behavioral patterns such as failure to resist or delay in reporting a rape could be confusing to the fact-finders because these may be counter-intuitive." *Id.* The CMA further found that "[i]t is logically relevant for an expert to explain that certain behavior patterns occur in a certain percentage of rape cases or child abuse cases. This is not to say that the offense occurred but, rather, that these events may happen to some victims. Without the testimony the members are left with their own intuition." *Id.*

d. Regarding Reliability. The CMA stated

> The probative value of the evidence under this test depends on its reliability. Since most judges do not have the appropriate scientific background, it is up to the proponent to establish the probative value and the reliability of the evidence by testimony or scientific and legal writings.
> *Id.*

e. Regarding Probative Value. The *Houser* court resolved the 403 balancing test by weighing the expert's testimony in the context of the entire case. *Id.* at 400. The defense in the case raised a number of issues concerning the behavior of the victim, and the expert's testimony helped put the behavior evidence in perspective—it was needed to explain to the members the behavioral patterns of the victim which were highlighted by the defense. *Id.* The expert also gave a framework within which the members could consider the arguments made by the opposing party, and not to issue opinions on the ultimate issue. *Id.* Finally, the opposing party conducted extensive cross examination of the expert to place her testimony in perspective. *Id.* Based on these reasons, the *Houser* court found that the testimony survived MRE 403. *Id.*; *see also United States v. Dougherty*, 2013 CCA LEXIS 1072 (N-M Ct. Crim. App. 2013) (finding that the probative value of a false confession expert's testimony outweighed any danger of unfair prejudice, confusion of issues or danger of misleading the members due to the centrality of the confession to the Government's case).

16. In *Daubert v. Merrell Dow Pharms.*, which came out two months after *Houser*,1 the Supreme Court of the United States outlined six factors to be considered by the judge in determining whether scientific evidence meets the requirements for reliability and relevance:

1 Despite the fact that *Houser* was published prior to *Daubert*, the Court of Appeals for the Armed Forces held that the two decisions are consistent, with *Daubert* providing more detailed guidance on the fourth and fifth *Houser* prongs pertaining to relevance and reliability. *Griffin*, 50 M.J. 278, 284 (CAAF 1999).

> a. Whether the theory or technique can be and has been tested
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> b. Whether the theory or technique has been subjected to peer review and publication
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> c. The known or potential error rate
>
> d. The existence of maintenance of standards controlling the techniques operation
>
> e. The degree of acceptance within the relevant scientific community, and
>
> f. Whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

509 U.S. 579, 593-95 (1993).
17. In *Crane v. Kentucky*, the Supreme Court of the United States weighed in on the issue of the counterintuitive nature of false confessions. 476 U.S. 683, 689 (1986). The *Crane* Court stated:

> Confessions, even those that have been found to be voluntary, are not conclusive of guilt…[S]tripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?

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[1] Despite the fact that *Houser* was published prior to *Daubert*, the Court of Appeals for the Armed Forces held that the two decisions are consistent, with *Daubert* providing more detailed guidance on the fourth and fifth *Houser* prongs pertaining to relevance and reliability. *Griffin*, 50 M.J. 278, 284 (CAAF 1999).

*Id.*; *see also United States v. Shay*, 57 F.3d 126, 133 (1st Cir. 1995)("Common understanding conforms to the notion that a person ordinarily does not make untruthful inculpatory statements."). The Court also acknowledged that "the physical and psychological environment that yielded the confession can also be of substantial relevance to the ultimate factual issue of the defendant's guilt or innocence." *Id.* The Court ultimately concluded that an accused has a constitutional right to challenge the credibility of a confession admitted into evidence against him "when such evidence is central to the defendant's claim of innocence." *See id.* at 690.

18. In *United States v. Bell*, a persuasive sister-service case, the Army Court of Criminal Appeals found that the military judge placed undue influence on error rates in denying the defense an expert to testify to facets of false confessions. 72 MJ 543, 551 (Army Ct. Crim. App. 2013).

> a. Specifically, the defense expert would have testified to, among other issues, the

> situational factors may involve the specific interrogative approach or approaches that were used [in the interrogation]. They also may include the length of the interrogation or the time of day, and how those factors affect decision making. [The expert would have] also discussed maximization and minimization techniques and how those interrogation methods might increase the chance of a false confession. Maximization techniques involve a variety of approaches that seek to increase one's perception of the strength of the evidence. In contrast, a minimization technique is designed to put the subject at ease and gain their trust by downplaying a suspect's perception of the consequences associated with a particular act or by minimizing the suspect's responsibility in the situation. [The expert would have] testified that the use of these techniques in general increases the likelihood of false confessions, and the minimizing techniques in particular doubles the likelihood of a false confession.

*Id. at 553.*

b. The *Bell* court ultimately found that the military judge did not abuse his discretion despite the error of placing undue influence on error rates because there were very few situational factors in the case that lended support to the defense's claims that the interrogation was so coercive as to create a climate where a false confession would be likely. *Id.* at 554. This included an absence of any pressure by the interrogator, a lack of use of techniques by the interrogator, a lack of exaggeration of the government's case, and a lack of minimization of appellant's culpability. *Id.* at 555.

c. Finally, the *Bell* court noted that "military practice does not prohibit the use of a false confession expert in courts-martial. Indeed, we can envision many different scenarios where expert testimony regarding false confessions would be helpful to the fact finder." *Id; see also United States v. McGinnis*, 2010 CCA LEXIS 96, *25 (Army Ct. Crim. App. 2010)("In addition, neither this court, nor our superior court has found this type of testimony to be per se inadmissible.")(internal citations omitted).

19. In *United States v. McGinnis*, another persuasive, unpublished sister-service case, the Army Court of Criminal Appeals found that the military judge abused his discretion in denying the defense request for expert assistance in the area of coercive law enforcement techniques which may lead to a false confession. 2010 CCA LEXIS 96 (Army Ct. Crim. App. 2010).

a. In *McGinnis*, the defense proffered that the testimony of its expert would "describe psychiatric conditions that tend to make a declarant in general more impressionable or susceptible to suggestibility by an interrogator." *Id.* at *21. The expert would have sought to "educate the panel on how interrogation techniques are designed to break down the will of a suspect" and how certain features of an accused can suggest particular suggestibility to coercive interrogation techniques." *Id.* at *21-22. The defense was clear that it would not elicit testimony from the expert to the ultimate opinion as to whether the appellant's confession was, in fact, false. *Id.* at *22.

b. While the *McGinnis* court acknowledges that "some courts have found this type of testimony to be inadmissible," it cited to other courts that have permitted this type of testimony as admissible:

*Callis v. State, 684 N.E.2d 233, 239 (Ind. App. 1997)* (affirming trial court's decision to admit, on limited grounds, expert witness testimony regarding police interrogation tactics); *State v. Baldwin, 125 N.C. App. 530, 482 S.E.2d 1, 5 (N.C. App. 1997)* (holding that the

trial court erred in excluding expert witness testimony that police interrogation tactics made defendant susceptible to giving a false confession).

c. Ultimately, the *McGinnis* court found that "[t]estimony concerning coercive interrogation techniques and how those personality traits that make one particularly susceptible to those techniques could assist the members in understanding the similarly counterintuitive behavior of admitting to criminal acts that one did not commit." *Id.* at *26-27. It further found that "[e]xpert testimony could assist the members in understanding *why* [false confessions] occur without running afoul of the 'human lie detector' testimony." *Id.* at *27.

20. In the persuasive federal circuit court case of *United States v. Hall*, the defense wanted to call an expert to testify about "the fact that experts in his field agree that false confessions exist, that individuals can be coerced into giving false confessions, and that certain indicia can be identified to show when they are likely to occur." 93 F.3d 1337, 1341 (7th Cir. 1996). The trial court ruled, however, that "the jury could appreciate whether police interrogation techniques were suggestive by themselves and that [the expert's] testimony would invade the prerogative of the jury to assess [investigators'] credibility." *Id.* The Seventh Circuit ultimately found that "[i]f the expert testimony would be helpful and relevant with respect to an issue in the case, the trial court is not compelled to exclude the expert just because the testimony may, to a greater or lesser degree, cover matters that are within the average juror's comprehension." *Id.* at 1342. It further found that "[t]he expert, in short, would have given [the jury] a reason to reject the common sense evaluation of the facts that they would otherwise be entitled to use." *Id.* at 1344. Finally, the *Hall* court recognized that:

> Even though the jury may have had beliefs about the subject, the question is whether those beliefs were correct. Properly conducted social science research shows that common held beliefs are in error. [The expert's] testimony, assuming its scientific validity, would have let the jury know that phenomenon known as false confessions exists, how to recognize it, and how to decide whether it fits the facts of the case being tried.

*Id.* at 1342. The court recognized this as valid social science that could have helped the jury make its decision as to whether to believe the confession was true or false. *Id.* at 1345. As a result, by omitting the evidence, the jury "may have been deprived of critical information it should have had in evaluating [the defendant's] case." *Id.*

21. In *United States v. Griffin*, CAAF found that a military judge did not abuse his discretion when he denied the admission of defense expert testimony about false confessions. 50 M.J. 278, 278 (CAAF 1999).

c. In *Griffin*, the accused confessed to sexual misconduct with his daughter to an interrogator. *Id.* At 281. The interrogation was not recorded. *See id.* At 280-81. The special agent who conducted the interrogation testified that the appellant never got upset during the interrogation, that he made no threats or promises, and was otherwise open to hearing the story from the appellant. *Id.* At 280. The appellant testified that the interrogator used a number of tactics to pressure him to make a confession, including threats, minimization techniques, continuing with the interrogation after a request for a lawyer, and dictating the written confession. *Id.*

b. The expert in *Griffin* proffered testimony that focused on components that affect vulnerability in an interrogation. *Id*. At 281. He would have testified to the fact that the appellant made a coerced compliant false confession. *Id.* At 282. Dr. Frank also ran a battery of psychological tests on the accused and was prepared to testify to those results. *Id.* At 281-282. The Government called Dr. Nancy Slicner to testify that the research in the area of false confessions (as of the time of this case in 1999) was limited by an inability to control the variables of false confession studies, and to develop a research protocol to conduct a "controlled study." *Id.*

c. The military judge determined that the interrogator's version of what happened in the interrogation was more credible than what the appellant had offered. *Id.* He also found the accused's version lack credibility. *Id.* Finally, the judge found that the testimony failed the MRE 403 balancing test. *Id.* At 283.

**ARGUMENT**

*Dr. Spock's specialized knowledge in the field of false confessions will help the trier of fact to understand that a counterintuitive phenomenon known as false confessions exists, how to recognize it, factors that can increase the likelihood of a false confession, and whether those factors fit the facts of the case being tried*.

22. The first prong under MRE 702 encapsulates *Houser* factors 1 and 2. All have been met by the defense.

23. Dr. Spock has specialized knowledge in the field of false confessions. He holds a Ph.D. in the broader field of psychology. He's been licensed for over 30 years as a psychologist, has researched, published, taught and lectured on topics involving interrogation techniques and false confessions/admissions for over 30 years of practice. He was the keynote an instructor for the State Bar of Arizona for over 10 years and lectured on false confession psychology. Of the 200+ times Dr. Spock has testified as an expert, 20 times have been about false confession psychology. He has consulted as an expert in false confession psychology for prosecution and defense dozens of times.

24. Similar to the specialized knowledge of the Government expert in *Houser*, Dr. Spock holds specialized knowledge of the counterintuitive behavior of false confessions which are spurred at the hands of situational factors, namely interrogation techniques, which are employed by some interrogators. Based on his study of peer-reviewed research spanning decades, Dr. Spock is both aware of the interrogation techniques that increase the likelihood of a false confession, and identified several at issue in the interrogation of Capt Kirk. He is prepared to testify to the psychological phenomenon and counterintuitive behavior of falsely admitting to crimes not committed, generally, that some people engage in when facing such interrogation techniques. He will not opine on the ultimate issue: whether Capt Kirk gave a false confession.

25. Dr. Spock will share his specialized knowledge with the members of the panel because, as the *Shay* court stated, "common understanding conforms to the notion that a person ordinarily does not make untruthful inculpatory statements." Similar to the rationale acknowledged in *McGinnis*, Dr. Spock's testimony is designed to assist the members in understanding why false confessions occur without actually opinion on whether Capt Kirk actually falsely confessed. Although some of the testimony Dr. Spock proffers may be within the average juror's comprehension, just as the expert's testimony in *Hall*, this should not result in the exclusion of the testimony.

*Dr. Spock's testimony is based on generally accepted, well-researched, and peer-reviewed facts and data as well as the transcribed interrogation of Capt Kirk from 22 November 2019.*

26. The second prong of MRE 702 encapsulates *Houser* factor 3 and *Daubert* factor 5. All have been met by defense.

27. The Basis of Dr. Spock's Testimony, in part, is the Body of Science Studying False Confession Psychology which is Generally Accepted in the Field of Psychology. Attachments 6 and 7 to this motion outline just how thoroughly researched the area of false confessions is. Specifically, Attachment 6 details empirical research which ultimately concludes that the vast majority of experts agree that deception detection, police interrogations, and confessions have been sufficiently researched and analyzed in peer-reviewed publications to lend to reliable testimony in court. Attachment 7 details specific studies led by world-renown psychologists in the field of false confessions which analyze cases of proven false confessions, the rates of false confessions in controlled studies, convictions based on false confessions, and which police interrogation techniques are most likely to cause false confessions. Dr. Spock also plans to rely on the body of research which discusses the counterintuitive nature of making inculpatory statements and why juries need assistance understanding this phenomenon to make sense of the evidence and put it in its proper context.

28. Dr. Spock will also rely on sufficient facts and data of this particular case. The 22 November 2019 interrogation of Capt Kirk by SA Know was reduced to a verbatim transcript. Dr. Spock relied on the transcript to identify the situational factors that are more likely to cause a false confession.

*Dr. Spock's testimony is the product of reliable principles and methods.*

29. The third prong of MRE 702 encapsulates *Houser* factor 5 and *Daubert* factors 1-4. All have been met by defense.

30. Dr. Spock will testify to the principles underlying identification of interrogation techniques, or situational factors, which are more likely to cause a false confession. This includes understanding the specific type of techniques used by interrogators and identifying those techniques that research shows are more likely to cause a false confession. Dr. Spock is well steeped in this body of research and is prepared to testify to it.

31. The evidence is highly reliable. First, the interrogation from 22 November 2019 was recorded, and there is no dispute from either party that the video or the transcript is inaccurate or misleading. Second, the body of research upon which Dr. Spock draws on to complete his scientific method is highly reliable based on an analysis of *Daubert* factors 1-4:

a. *(1) Whether the theory or technique can be tested.* Dr. Spock will testify that experimental research in psychology is structured to be falsifiable and is derived from the scientific method. Experimental research related to false confessions utilizes a "null hypothesis." A null hypothesis proposes that the researcher's hypothesis is, in fact, false. For example, if the researcher believed that using minimization tactics increases the rate of false confessions, the null hypothesis would be that minimization tactics do not increase the rate of false confessions in a sample. No "real world" experiments can be conducted

where an individual is placed in a criminal situation to make a false confession because it would be highly unethical to do so. This does not preclude designing experiments which address the specific factors related to false confessions, such as waiver of *Miranda* rights, interrogation techniques, accuracy of deception by investigators, providing a false confession in a mock crime, etc. In fact, SA Know testified in motions practice on 17 September 2020 that part of his training included study of experiments of this sort. The falsifiability of research on false confessions is akin to the falsifiability of other well accepted psychological principles that have been involved in criminal cases and have been deemed worthy for testimony under the *Daubert* standards, such as eyewitness testimony, the accuracy of memory, counterintuitive victim behavior (like the testimony at issue in *Houser*), etc.

b. *Whether the theory or technique has been subjected to peer review and publication.* There is a plethora of articles and citations on variables related to false confessions from peer reviewed journals, including topics such as, but not limited to: waiver of *Miranda*; police interrogation techniques; the ability of law enforcement to detect deception; inducing false confessions; implanting and inducing false memories; the effects of confession evidence on juries; factors related to juvenile suspects, etc. The reference list at Attachment 7 and Attachment 8 cite to hundreds of titles, including an extensive number of articles in peer-reviewed journals. Reputable peer-reviewed journals that house articles on false confession psychology include: Law and Human Behavior, the journal of the American Psychology-Law Society (Division 41 of the American Psychological Association); The Journal of Experimental Psychology: Applied; Psychological Bulletin; Psychological Science; Journal of Applied Psychology; Behavioral Sciences and the Law; Journal of Forensic Psychiatry & Psychology.

(1) More importantly, comprehensive articles on the subject have been written in American Psychologist, which is the official journal of the American Psychological Association. The articles in this journal typically address the science and practice of psychology and the implications for national and international policy issues. The journal typically publishes articles with meta-analytic reviews or key data points of major psychological science issues, rather than single study empirical research. In other words, it publishes on subjects for which there is ample empirical studies. Approximately 70% of submitted manuscripts are returned without review within 30 days because this journal only publishes articles relevant to the entire field of psychology. Subjects without wide acceptance and grounded in scientifically sound research would not be published in such a journal.

(2) Moreover, articles have been published in Psychological Science in the Public Interest, which is the journal for the Association for Psychological Science, a professional group much smaller than the American Psychological Association and largely composed of experimental researchers.

c. *The known or potential error rate and the standards controlling the techniques operation.* It is important to be clear about which "error rates" are at issue, the research on factors related to false confessions vs. a particular confession being false. Dr. Spock would be testifying on the research regarding factors facilitating false confessions, and if those factors were present in Capt Kirk's case. In the scientific method, a hypothesis is not "proven." This is because there could always be other phenomenon of which one is not aware of that actually causes the effect of the hypothesis. In the scientific method, a researcher sets up a "null hypothesis," which is actually the opposite of what the researcher

believes to be the case. For example, a null hypothesis would be whether a certain interrogation technique will not result in an increased number of confessions among participants. The researcher would then subject the data to a probability test. If the predicted results were unlikely to have occurred by random chance, then the researcher rejects the null hypothesis; and this supports his/her proposition. In summary, there *are* known error rate for the conclusions of the research conducted related to false confessions. Error rates, called the "alpha level," are used for tests of statistical significance in determining whether or not a hypothesis is supported or rejected. Typically the alpha level is set at .05 or .01. This means that if the results occurred by chance, and not the researcher's hypothesized variables, it would rarely occur--5% or l% of the time.

d. Although *Griffin* stands in opposition to the defense's position, Dr. Spock will testify that since the publication of this case (1999), the specific issues that Dr. Slicner testified to in that case, which CAAF relied on in finding no abuse of discretion, are outdated. The science behind false confession psychology has evolved tremendously over the past 21 years. Further, although known error rates are impossible to pinpoint, *Bell* persuasively stands for the proposition that to place too much emphasis on known error rates is error. Further, unlike *Bell*, there are a number of situational factors actually present in this case which were not present in *Bell.*

*Dr. Spock has reliably applied the principles and methods to the facts of the case.*

32. Dr. Spock has reliably applied the principles and methods to the facts of this case. Understanding those interrogation techniques that are likely to cause an innocent person to falsely admit to guilt, Dr. Spock looked for those interrogation techniques in the recorded interrogation of Capt Kirk. He identified that the agent used several techniques that can increase the likelihood of a false confession.

*The probative value of Dr. Spock's testimony outweighs all other considerations.*

33. Under *Houser* factor 6 and *Daubert* factor 6, the probative value of Dr. Spock's testimony is not substantially outweighed by the danger of prejudice, confusion of the issues, or misleading of the jury.

34. Several cases, some binding and some persuasive on this Court, have already reached the conclusion that the probative value of false confession psychology testimony is not substantially outweighed by other concerns.

a. First, *Houser* stands for the proposition that the expert's testimony on counterintuitive behavior in the field of psychology is highly probative because it helps place certain facts in the context of the entire case for the benefit of the members. This was especially important, according to CAAF, after the opposing counsel in the case raised a number of issues concerning the behavior of the victim; the expert testimony was needed to explain to the members the behavioral patterns of the victim which were highlighted by the defense. The same is true here. The Government has made clear that the central focus of its case is the admission of Capt Kirk. It has very little other evidence, as made clear by its witness list and the motion testimony of Ms. Wilson on 17 September 2020. Just as in *Houser*, Dr. Spock is only going to provide a framework within which the members could consider the arguments made by the opposing party, and not to issue opinions on the ultimate issue. Finally, in this case, as in *Houser*, the opposing party may conduct extensive cross

examination with the aid of their own expert, Dr. Nelson, to place his testimony in perspective.

b. Second, *Crane* stands for the proposition that without the ability to challenge the circumstances that prompted his confession, Capt Kirk is effectively disabled from answering the one question every rational member needs answered: If the Capt Kirk is innocent, why did he previously admit his guilt? The Supreme Court also explicitly acknowledged that "the physical and psychological environment that yielded the confession can also be of substantial relevance to the ultimate factual issue of the defendant's guilt or innocence." Here, Dr. Spock plans to testify to the situational factors, physical and psychological, that were identified in this case that are consistent with factors that can lead to a false confession. Finally, the *Crane* Court unequivocally supports the argument that Capt Kirk has a constitutional right to challenge the credibility of his admission because "such evidence is central" to Capt Kirk's claim of innocence.

c. Third, persuasively, *McGinnis* and *Dougherty* are factually similar to this case. Just as the *McGinnis* court found that "[t]estimony concerning coercive interrogation techniques and how those personality traits that make one particularly susceptible to those techniques could assist the members in understanding the similarly counterintuitive behavior of admitting to criminal acts that one did not commit," the same is true in this case with Capt Kirk. Dr. Spock's testimony would "assist the members in understanding why [false confessions] occur without running afoul of the 'human lie detector' testimony." Just as the *Dougherty* court found that the probative value of a false confession expert's testimony outweighed any danger of unfair prejudice, confusion of issues or danger of misleading the members due to the centrality of the confession to the Government's case, the same holds true here.

d. Even putting aside precedent and persuasive authority, on this case's own merit, there is no rational argument that the danger of prejudice substantially outweighs the probative value of Dr. Spock's testimony. The Government is not prejudiced by having Dr. Spock testify. They have retained their own expert to help cross examine Dr. Spock. They are free to question him on areas of the science or application of the science they deem lacking. The prejudice to the Accused, on the other hand, is substantial if this is kept out. Capt Kirk's case comes down to whether he can properly contextualize the admission he made on 22 November 2020. Without being able to do that, he is deprived of his constitutional right to mount a defense as *Crane* explains.

e. Similarly, there can be no rational argument that Dr. Spock's testimony would be more confusing than probative. *Not* allowing the testimony would leave the members being confused as to why a person would make an admission but later deny the contact. The testimony by Dr. Spock is aimed to reconcile this clear counterintuitive behavior. Moreover, there is no danger that Dr. Spock's testimony would mislead the jury. Dr. Spock will simply provide a framework through which the members may analyze the facts of the case. The opposing party expert and cross-examination are additional assurances that any hint of misleading information will be cured. Finally, this testimony is not a waste of time or cumulative, as there is no other information offered in the case that can explain the counterintuitive phenomenon of false confession psychology.

**RELIEF**

THEREFORE, the defense respectfully requests this Honorable Court to admit Dr. Spock's expert testimony. At this time the defense anticipates examining the following witnesses pursuant this motion: Dr. Spock.

Respectfully submitted on 2 October 2020,
IMA PEACH, Maj, USAF
Defense Counsel

Attachments:
1. Memo from 20 AF/JA approving Dr. Spock as an expert consultant, dated 8 Sep 20, 2 pgs
2. Dr. Shawn Spock's Curriculum Vitae, undated, 11 pgs
3. Defense Request for Supplemental Funding for Dr. Spock, dated 16 Sep 20, 4 pgs
4. Affidavit by Dr. Spock, dated 16 Sep 20, 3 pgs
5. Memorandum of Agreement for Dr. Spock's supplemental funding, dated 29 Sep 20, 2 pgs
6. Article: "On the General Acceptance of Confessions Research: Opinions of the Scientific Community" by Kassin and Redlich, dated 2018, 18 pgs
7. Article: "Police-Induced Confessions: Risk Factors and Recommendations" by Kassin, et. al., dated 15 Jul 09, 36 pgs
8. Reference list for publications discussing false confession psychology, undated, 6 pgs

**CERTIFICATE OF SERVICE**

I hereby certify that I served the above motion on the military judge and trial counsel via e-mail and e-filing on 2 October 2020.
IMA PEACH, Maj, USAF
Defense Counsel