



6-1-2016

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### **Recommended Citation**

Katherine Reamy, *Pennsylvania Stacks the Deck Against Defendants in Commonwealth v. Alicia, Leaving False Confession Assessments to the Jury*, 61 Vill. L. Rev. 321 (2016).

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2016]

PENNSYLVANIA STACKS THE DECK AGAINST DEFENDANTS  
IN *COMMONWEALTH v. ALICIA*, LEAVING FALSE  
CONFESSION ASSESSMENTS TO THE JURY

KATHERINE REAMY\*

“One of the hallmarks of the American criminal justice system is the importance it attaches to the protection of the rights of criminal defendants. Just because someone is charged as a defendant does not mean that he committed the crime in question; that simple truth lies behind the presumption of innocence and the many procedural rules that combine to assure that due process is observed.”<sup>1</sup>

I. THE OPENING DEAL: INTRODUCTION TO FALSE CONFESSIONS

On February 4, 1982, a young court reporter was found brutally murdered in her apartment.<sup>2</sup> The autopsy confirmed she had been sexually assaulted and stabbed multiple times in her back and neck.<sup>3</sup> Investigations proceeded for over a month before police mistook George Allen Jr. for one of the suspects in the case.<sup>4</sup> Allen was brought in for questioning, and even after detectives learned of their mistake, they continued to ques-

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\* J.D. Candidate, 2017, Villanova University Charles Widger School of Law; B.S. 2014, Santa Clara University. I would like to thank my family and friends for always supporting me. I am especially thankful to all those who provided feedback and input on my Note. I would also like to thank the *Villanova Law Review* and everyone who helped with the publication of this Note.

1. See *United States v. Hall*, 93 F.3d 1337, 1339 (7th Cir. 1996) (discussing importance of procedural safeguards in criminal justice system relating to false confessions).

2. See *George Allen, Jr.*, INNOCENCE PROJECT, <http://www.innocenceproject.org/cases-false-imprisonment/george-allen-jr> [<https://perma.cc/UD86-FZA5>] (last visited Mar. 21, 2016) [hereinafter *George Allen, Jr.*, INNOCENCE PROJECT] (explaining Innocence Project’s case of George Allen Jr.). The victim in that case, Mary Bell, was found by her boyfriend, whom she lived with. See *id.* (discussing facts of George Allen Jr.’s case).

3. See *id.* (stating cause of death as multiple stab wounds in Mary Bell’s murder).

4. See *id.* (explaining early investigation into Mary Bell’s murder). Police had three original suspects in the case: Kirk Eaton (a “known sex-offender”), the victim’s boyfriend, and the victim’s ex-husband. *Id.* On March 14, 1982, police mistook Allen for Kirk Eaton and brought him in for questioning. *Id.*

tion Allen.<sup>5</sup> Allen ultimately confessed to the rape and murder of the young court reporter—a crime he did not commit.<sup>6</sup>

A jury convicted Allen and sentenced him to fifty years for capital murder followed by fifteen years for rape, sodomy, and first-degree burglary.<sup>7</sup> Allen served over thirty years in prison, prior to his exoneration on January 18, 2013.<sup>8</sup> Blood-type evidence proved Allen should not have

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5. *See id.* (“Detective Herbert Riley later realized the mistake, but initiated interrogating Allen nevertheless.”); *see also* George Allen, Jr., NAT’L REGISTRY EXONERATIONS (Jan. 18, 2013), <https://www.law.umich.edu/special/exoneration/pages/casedetail.aspx?caseid=4091> [<https://perma.cc/X8NW-QW8S>] [hereinafter *George Allen, Jr.*, NAT’L REGISTRY OF EXONERATIONS] (elaborating on circumstances surrounding officers’ continued questioning of Allen when he should not have been suspected). Allen was taken in after he was seen walking near Mary Bell’s apartment. *Id.* An “officer in the [ ] sex offenses division interviewed” Allen about the Mary Bell murder. *Id.* In the interview, Allen stated he “had previously forced women to have sex with him and then denied it.” *Id.* However, “[t]he officer felt Allen was unreliable and she ended the interview.” *Id.* Detective Herbert Riley then questioned Allen and obtained a confession to the Mary Bell murder. *Id.*

6. *See* George Allen, Jr., NAT’L REGISTRY EXONERATIONS, *supra* note 5 (noting Allen provided Detective Herbert Riley with a “tape-recorded statement” that he killed Mary Bell); *see also* George Allen, Jr., INNOCENCE PROJECT, *supra* note 2 (discussing interrogation process of Allen that led him to falsely confess). Allen suffered from an array of mental health issues, and investigators were therefore more easily able to convince Allen that they had evidence against him. *See id.* On the interrogation recording, Allen also stated that he was “under the influence of alcohol” at the time of the interview. *Id.* Further, detectives asked Allen leading questions that “prompt[ed]” him into giving answers that fit the crime’s description. *See id.* When detectives did not ask leading questions, Allen gave answers and facts that did not fit the crime’s description.

7. *See* State v. Allen, 684 S.W.2d 417, 419 (Mo. Ct. App. 1984) (stating appellate court’s recitation of Allen’s jury conviction), *habeas corpus granted sub nom.*, State ex rel Koster v. Green, 388 S.W.3d 603 (Mo. Ct. App. 2012); *see also* George Allen, Jr., INNOCENCE PROJECT, *supra* note 2 (noting Allen’s two trials, in which his first trial was “deadlocked at ten-to-two in favor of an acquittal”). Allen’s second trial led to his conviction and sentence. *See id.* The predominant evidence used at trial was Allen’s confession and a police lab analyst’s testimony. *See id.* The analyst testified that semen found at the crime scene contained “A and H antigens which could not exclude Allen as the source of the semen.” *Id.* The victim’s colleague also testified that she spoke to the victim on the night of the murder and that when she arrived at the victim’s house to pick up some work documents, “the perpetrator was already inside the home.” *See id.* A hypnotist was used to help the colleague recall if she called the victim’s name, which corroborated Allen’s statement that he heard a voice. *See id.* However, the hypnotist session was never revealed to counsel. *See id.*

8. *See* George Allen, Jr., INNOCENCE PROJECT, *supra* note 2 (explaining Allen was serving a 95-year sentence at the time); *see also* Bill Berkowitz, *Wrongfully Convicted: The Problem of False Confessions*, BUZZFLASH (Nov. 19, 2012), <http://truth-out.org/buzzflash/commentary/wrongfully-convicted-the-problem-of-false-confessions/17648-wrongfully-convicted-the-problem-of-false-confessions/> [<https://perma.cc/U2NA-67R9>] (noting “Allen was released on his own recognizance, but he has not yet been fully exonerated”). *But see* Alana Massie, *Missouri Man Exonerated After Serving More Than 30 Years for a Rape and Murder Evidence Shows He Didn’t Commit*, INNOCENCE PROJECT (Jan. 18, 2013), <http://www.innocenceproject.org/news-events-exonerations/press-releases/missouri-man-exonerated-after-serving-more-than-30-years-for-a-rape-and-murder-evidence-shows-he-didnt-commit> [<https://per>

even been a suspect in the case.<sup>9</sup> No experts testified on the phenomenon of false confessions in Allen's trial nor to the fact that Allen suffered "an extensive history of severe mental illness, including hospitalizations for schizophrenia . . . ."<sup>10</sup>

Psychologists have defined false confessions as "an admission . . . plus a postadmission narrative . . . of a crime that the confessor did not commit."<sup>11</sup> Although this phenomenon may seem baffling, it occurs more often than one may think and can be devastating to a defendant's case at trial.<sup>12</sup> As one researcher put it, "lay people have an easier time understanding why someone would kill themselves . . . than they do why someone would confess to a crime [they] did not commit."<sup>13</sup>

Since 1989, DNA evidence has helped exonerate 336 wrongfully convicted individuals in the United States alone.<sup>14</sup> Of these exonerations,

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ma.cc/WM3U-L3F5] (exonerating Allen fully after "Attorney Jennifer Joyce filed a motion [ ] dismissing the indictment against George Allen Jr., finally completing his 30 year struggle to clear his name").

9. See *George Allen, Jr.*, INNOCENCE PROJECT, *supra* note 2 (explaining that evidence used against him included semen containing "A and H antigens which could not exclude Allen as the source of the semen"). The real perpetrator has never been found. *Id.*

10. See *id.* (explaining one reason why Allen may have falsely confessed was because he had extensive history of mental illness).

11. See Richard A. Leo, *False Confessions: Causes, Consequences, and Implications*, 37 J. AM. ACAD. PSYCHIATRY L. 332, 333 (2009) (noting four ways confessions are proved false). A confession can be proven false "when it can be objectively established that the suspect confessed to a crime that did not happen"; "the [suspect] could not have committed the crime because it would have been physically impossible to have done so"; "when the true perpetrator of a crime is identified"; or "when scientific evidence . . . conclusively establishes the confessor's innocence." *Id.*; see also Catherine E. White, Comment, "I Did Not Hurt Him . . . . This Is a Nightmare": The Introduction of False, but Not Fabricated, Forensic Evidence in Police Interrogations, 2015 WIS. L. REV. 941, 953 (noting process of how false confessions can occur includes three types of "errors": "the misclassification error, the coercion error, and the contamination error").

12. See Evan Nesterak, *Coerced to Confess: The Psychology of False Confessions*, PSYCH REP. (Oct. 21, 2014), <http://thepsychreport.com/conversations/coerced-to-confess-the-psychology-of-false-confessions/> [<https://perma.cc/SDR8-Z9JY>] (discussing effects of falsely confessing). For a further discussion of the statistics on false confessions in the United States, see *infra* note 16.

13. See Ali Venosa, *Interrogation Techniques, Mental Illness Are 2 Reasons Why People Falsely Confess to Crimes*, MED. DAILY (Dec. 15, 2015), <http://www.medicaldaily.com/interrogation-techniques-mental-illness-are-2-reasons-why-people-falsely-confess-365306> [<https://perma.cc/C2TE-XWMW>] (internal quotation marks omitted) (noting factors that could lead to false confessions). Saul Kassin, a psychology professor at John Jay College of Criminal Justice, notes, "It's virtually impossible for judges and juries to see past confessions whether they're true or false." Nesterak, *supra* note 12.

14. See *DNA Exonerations Nationwide*, INNOCENCE PROJECT, <http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/dna-exonerations-nationwide> [<https://perma.cc/ER87-PDCY>] (last updated Mar. 17, 2016, 11:42 AM) (providing statistics on exonerations for false convictions, including race, age at time of conviction, and length of time served).

31% involved false confessions.<sup>15</sup> Even more shocking is the recent rise in false confession exonerations between 2009 and 2014 for convictions that occurred when DNA evidence was available.<sup>16</sup> Over these six years, sixty-six individuals were exonerated for crimes they did not commit, including twenty-six who falsely confessed.<sup>17</sup> Close to half of these false confession convictions were unsupported by DNA evidence that exculpated the defendants at the time of conviction.<sup>18</sup> This raises questions as to why the criminal justice system is still failing so many individuals in light of technological advances and how, if at all, the law will remedy the problem.<sup>19</sup>

Among the many proposed safeguards to prevent false confessions, one in particular has been a matter of much dispute: admission of expert testimony.<sup>20</sup> Scholars have argued that expert testimony helps to “sensi-

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15. See *id.* (“[F]alse confessions are the leading contributing factor—contributing to 71 (63%) of the 113 homicide cases among the DNA exonerations.”); see also *Facts and Figures, FALSE CONFESSIONS*, <http://www.falseconfessions.org/fact-figures> [<https://perma.cc/C7PF-TBZB>] (last visited Mar. 22, 2016) (“Since the late 1980s, six studies alone have documented approximately 250 interrogation-induced false confessions.”). Additionally, “92% of false confessors are men.” *Id.*

16. See Brandon L. Garrett, *Contaminated Confessions Revisited*, 101 VA. L. REV. 395, 395–96 (2015) (noting “second wave” of false confessions from 2009 to 2014). Professor Garrett’s article explores the question of why there have been a large number of recent exonerations despite the availability of DNA testing and evidence at the time of the trials. See *id.*; see also George C. Thomas III, *Regulating Police Deception During Interrogation*, 39 TEX. TECH L. REV. 1293, 1293–94 (2007) (discussing role police tactics can play in false confessions).

17. See Garrett, *supra* note 16, at 396, 404 fig. 1 (providing “Characteristics of False Confessions in DNA Exoneration Cases”). This number is baffling in light of DNA evidence’s prominence in the last decade, but may be explained by the notion that “jurors may have a very hard time believing that [someone] could confess falsely.” See *id.* at 396 (hypothesizing reasons for heightened level of false confessions).

18. See *id.* (“Nineteen of the entire group of sixty-six exonerees had DNA tests exclude them at the time they were convicted. Sixteen of the new cases involved groups of false confessions by individuals inculcating each other . . .”). See generally *Can DNA Demand a Verdict?*, LEARN.GENETICS, <http://learn.genetics.utah.edu/content/science/forensics/> [<https://perma.cc/CL9M-XJAU>] (last visited Mar. 22, 2016) (noting importance of DNA evidence in acquittal as well as conviction).

19. See Garrett, *supra* note 16, at 396, 404 (suggesting criminal justice system is convicting wrong individuals too often). Professor Garrett specifically asks, “Why are so many of the recent exonerations cases with false confessions, often despite the availability of DNA testing at the time of trial?” *Id.* at 396.

20. See *id.* at 425–27 (noting three different roles experts can play in false confession cases at trial). First, experts could explain the basics of false confessions, such as “explaining that false confessions can occur at all, under what general circumstances, and based on what types of psychological phenomenon.” *Id.* at 426. Second, experts can testify to the “factors that may contribute to false confessions . . .” *Id.* Finally, experts can discuss case specific details. *Id.* at 427. In addition to expert testimony, there are additional proposed safeguards to the prevention of false confessions that this Note will not address in depth, but will mention briefly here. See *id.* at 416. These include reforms such as recording entire interrogations; using “blind” interrogations; assessing the voluntariness of a confession; allowing a judge to first assess the admissibility of a confession; revising jury instructions. See *id.* at 416–29.

tize[ ]” jurors to the research surrounding false confessions.<sup>21</sup> However, the United States Supreme Court has never ruled on the admissibility of expert testimony on false confessions.<sup>22</sup> Without a decisive ruling on the matter, appellate courts have differed in their treatment of false confession expert testimony.<sup>23</sup>

In *Commonwealth v. Alicia*,<sup>24</sup> the Pennsylvania Supreme Court held expert testimony on false confessions is inadmissible because it intrudes upon the jury’s role as the sole assessor of credibility.<sup>25</sup> This case marked the furtherance of a per se inadmissible approach to expert testimony in Pennsylvania.<sup>26</sup>

This Note disagrees with the Pennsylvania Supreme Court’s holding that expert testimony on false confessions intrudes upon the jury’s role as the sole assessor of credibility.<sup>27</sup> It argues the court failed to acknowledge and adhere to exceptions in the case law and improperly ruled in light of

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21. See *id.* at 425 & n.133 (explaining proposed purpose of expert testimony on false confessions).

22. See David A. Perez, Comment, *The (In)Admissibility of False Confession Expert Testimony*, 26 *TOURO L. REV.* 23, 35 (2010) (“The admissibility of false confession expert testimony has not been addressed by the Supreme Court, despite the contentious debate being played out on all levels of state and federal courts.”); see also *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 588 (1993) (“Nothing in the text of [ ] Rule [702] establishes ‘general acceptance’ as an absolute prerequisite to admissibility.”). In *Daubert*, the Supreme Court dealt with the admission of scientific expert testimony. See *id.*

23. See Garrett, *supra* note 16, at 425 (explaining how different courts have reached different conclusions as to expert testimony on false confessions). For example, some appellate courts have found expert testimony on false confessions admissible. See, e.g., *Boyer v. State*, 825 So.2d 418, 419–20 (Fla. Dist. Ct. App. 2002) (noting expert testimony should not be excluded “just because the testimony may cover matters within the average juror’s comprehension”). Other courts have held it is inadmissible because the potential for false confessions is within the common sense of jurors. See Garrett, *supra* note 16, at 425 & n.136; see also, e.g., *People v. Son*, 93 Cal. Rptr. 2d 871, 883 (Dist. Ct. App. 2000) (explaining testimony regarding police tactics used to induce false confession were not in question). Similarly, some courts have found that the scientific research surrounding false confessions is not sufficiently established. See *id.*; see also, e.g., *Riley v. State*, 604 S.E.2d 488, 495 (Ga. 2004) (stating “false confession theory needs further study and refinement” (quoting James R. Agar II, *The Admission of False Confession Expert Testimony*, *ARMY LAW.*, Aug. 1992, at 26, 42)).

24. 92 A.3d 753 (Pa. 2014).

25. See *id.* at 764 (basing its conclusion on Pennsylvania precedent as well as related case law from other jurisdictions).

26. See, e.g., *Commonwealth v. Spence*, 627 A.2d 1176, 1182 (Pa. 1993) (holding expert testimony used to “attack rather than enhance the credibility” is inadmissible), *abrogated by* *Commonwealth v. Walker*, 92 A.3d 766 (Pa. 2014), *as recognized in* *Commonwealth v. Selenski*, 117 A.3d 1283 (Pa. Super. Ct. 2015); *Commonwealth v. Seese*, 517 A.2d 920, 922 (Pa. 1986) (holding expert testimony about classes of individuals (e.g., children) is inadmissible); *Commonwealth v. O’Searo*, 352 A.2d 30, 32 (Pa. 1976) (holding expert testimony encroaches on jury’s assessment of credibility).

27. See *Alicia*, 92 A.3d at 764 (ruling expert testimony on false confessions is inadmissible).

recent decisions.<sup>28</sup> Part II provides an overview on the admission of expert testimony in Pennsylvania generally, as well as an overview as to how other jurisdictions specifically approach the admission of expert testimony on false confessions.<sup>29</sup> Part III then sets out the facts and procedure of the case and analyzes the Pennsylvania Supreme Court's decision-making process in *Alicia*.<sup>30</sup> Part IV criticizes the Pennsylvania Supreme Court's approach in treating false confessions in *Alicia*.<sup>31</sup> Finally, Part V asserts the per se inadmissible standard regarding expert testimony on false confessions must be eliminated in Pennsylvania, and admissibility decisions should be left to the discretion of the trial court.<sup>32</sup>

## II. THE HOUSE ALWAYS WINS: HISTORICAL BACKDROP OF *ALICIA*

The Pennsylvania Supreme Court faced a matter of first impression in deciding the admission of expert testimony on false confessions.<sup>33</sup> Prior to *Alicia*, Pennsylvania courts laid the groundwork for the restrictive approach ultimately adopted by the court.<sup>34</sup> These courts found expert testimony often invaded the jury's role as the sole arbiter of credibility.<sup>35</sup>

### A. *Pennsylvania Ups the Ante in Expert Testimony Cases*

The Pennsylvania Rules of Evidence govern the admissibility of expert testimony.<sup>36</sup> Rule 702 states that an expert may testify when their "scientific, technical, or other specialized knowledge is beyond that possessed by

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28. See *id.* at 762–63 (failing to address Alicea's argument of exception under *United States v. Benally*, 541 F.3d 990, 993–96 (10th Cir. 2008)); see also *Benally*, 541 F.3d at 993–96 (barring expert testimony on false confessions but leaving open an exception for identifiable mental disorders that raise questions of "cognitive voluntariness," which was present in *Alicia*). For further discussion, see *infra* notes 157–58 and accompanying text.

29. For a further discussion on admissibility of expert testimony, see *infra* notes 39–103 and accompanying text.

30. For a further discussion of the facts, procedural history, holdings, and decision-making process in *Alicia*, see *infra* notes 104–52 and accompanying text.

31. For a further discussion of the holding in *Alicia* and its impact, see *infra* notes 153–90 and accompanying text.

32. For a further discussion of how *Alicia* will affect defendants in the future, see *infra* notes 191–203 and accompanying text.

33. See *Alicia*, 92 A.3d at 762 ("[T]his Court has not previously ruled on the admissibility of expert testimony concerning false confessions . . .").

34. For a further discussion of the Pennsylvania cases that set the groundwork for *Alicia*, see *infra* notes 39–77 and accompanying text.

35. For a further discussion of the cases that held expert testimony invaded juror's role as sole arbiter of credibility, see *infra* notes 39–77 and accompanying text.

36. See generally PA. R. EVID. 702(a)–(c) (determining when experts are qualified to testify under state evidentiary standards; noting Rule 702 does not change Pennsylvania rule for qualifying witnesses as experts); see also *Miller v. Brass Rail Tavern, Inc.*, 664 A.2d 525, 528 (Pa. 1995) (noting Pennsylvania test to determine when witness qualifies as expert "is whether the witness has any reasonable pretension to specialized knowledge on the subject under investigation").

the average layperson . . . .”<sup>37</sup> Experts may also testify when their “scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue . . . .”<sup>38</sup>

In 1976, Pennsylvania adopted a narrow approach to the admission of expert testimony on psychological matters.<sup>39</sup> In *Commonwealth v. O’Searo*,<sup>40</sup> the jury convicted the defendant of first-degree murder after a shooting in a public restaurant.<sup>41</sup> On appeal, the defendant argued the trial court erred in excluding the testimony of a clinical psychologist.<sup>42</sup> The psychologist would have testified, among other things, that the defendant had no intention of killing the victim.<sup>43</sup>

The Pennsylvania Supreme Court held the trial court did not err because the testimony involved a matter of common knowledge.<sup>44</sup> Specifically, the court stated that an assessment of a witness’s credibility is within the sole discretion of the jury.<sup>45</sup> The court explained that to permit psychological testimony that would bolster the credibility of the defendant

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37. See PA. R. EVID. 702(a) (emphasizing an expert must have knowledge “beyond that” of an average person); see also *id.* 701(a)–(c) (allowing witness to testify as layperson when testimony is “(a) rationally based on [their] perception; (b) helpful to clearly understanding the witness’s testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702”).

38. See *id.* 702(b) (noting expert testimony is admitted only if it assists jurors in understanding). Additionally, experts may testify when their “methodology is generally accepted in the relevant field.” See *id.* 702(c).

39. See *Commonwealth v. O’Searo*, 352 A.2d 30, 32 (Pa. 1976) (holding psychological testimony that helped determine witness credibility invaded jury’s role as assessors of credibility).

40. 352 A.2d 30 (Pa. 1976).

41. See *id.* at 31–32 (noting shooting arose after argument between defendant, victim, and third individual). The defendant had undergone open-heart surgery and stated that he had “[become] fearful of a heart attack and drew the gun . . . to get the people away from him.” See *id.* at 32 (internal quotation marks omitted) (noting defendant “had no intention of harming the victim”).

42. See *id.* (summarizing one of defendant’s arguments raised on appeal). The defendant also contended that “the Commonwealth withheld evidence favorable to [him]”; the trial court erred in charging the jury, after a weekend recess, that defendant initially “testified that someone had grabbed his hand”; the trial court failed to grant two point modifications for his charges; the trial court erred in finding his conduct could have been premeditated; and the trial court erred in instructing the jury that using a deadly weapon comes with an intent to kill. See *id.* at 32, 32–36.

43. See *id.* at 32 (summarizing offered expert testimony that was ruled inadmissible by the trial court). Among the expert’s testimony, the psychologist was going to testify that the defendant felt “fearful” he would suffer a heart attack during the scuffle and drew his gun to ward people off. See *id.*

44. See *id.* (holding that expert testimony was inadmissible because it intruded upon jury’s role to assess credibility of witnesses). See, e.g., PA. R. EVID. 701(a)–(c) (defining what constitutes common knowledge or layperson testimony).

45. See *O’Searo*, 352 A.2d at 32 (basing rationale on past Pennsylvania precedent). In reaching its conclusion, the court relied on *Collins v. Zediker*, 218 A.2d 776, 777–78 (Pa. 1966), which held that expert testimony is inadmissible when its subject is considered common knowledge. See *id.*; cf., e.g., *Commonwealth v. Hoss*,

“would be an invitation for the trier of fact to abdicate its responsibility to ascertain the facts [by] relying upon the questionable premise that the expert is in a better position to make such a judgment.”<sup>46</sup> In reaching its holding, the court found past precedent that admitted psychological testimony to be unpersuasive.<sup>47</sup> This case marked the foundation for Pennsylvania’s strict approach to the admission of expert testimony on psychological matters.<sup>48</sup>

Ten years later, the Pennsylvania Supreme Court affirmed and expanded the *O’Searo* holding.<sup>49</sup> In *Commonwealth v. Seese*,<sup>50</sup> a pediatrician testified to the veracity of an eight-year-old’s claim that she had been sexually abused.<sup>51</sup> The trial court admitted the pediatrician’s testimony on her personal knowledge of and experience with the veracity of children’s statements regarding sexual abuse and rape.<sup>52</sup> However, on appeal, the Pennsylvania Supreme Court reversed, citing *O’Searo*’s holding that “[i]t is an encroachment upon the province of the jury to permit admission of expert testimony on the issue of a witness’[s] credibility.”<sup>53</sup> The court in

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283 A.2d 58, 67–68 (Pa. 1971) (admitting expert testimony about bullet and gun consistency because it was outside jurors’ common knowledge).

46. *See O’Searo*, 352 A.2d at 32 (noting “a concept as fundamental to our law as trial by jury of one’s peers can[not] be cavalierly abandoned”).

47. *See id.* (ignoring defendant’s arguments that testimony should have been interpreted in accordance with previous case law). The court distinguished it from *Commonwealth v. McCusker*, 292 A.2d 286 (Pa. 1972), which considered the admissibility of expert testimony as to “the psychological likelihood of [ ] behavior under a [certain] stimulus.” *See id.* The court also rejected the notion that the testimony was admissible because it did not “address the capacity to form [a] specific intent to kill.” *See id.*; *see also* *Commonwealth v. Light*, 326 A.2d 288, 292–93 (Pa. 1974) (noting admissibility of psychological expert testimony on capacity to form specific intent to kill).

48. *See, e.g., Commonwealth v. Alicia*, 92 A.3d 753, 764 (Pa. 2014) (determining expert testimony regarding false confessions is inadmissible); *Commonwealth v. Spence*, 627 A.2d 1176, 1182 (Pa. 1993) (determining expert testimony on eyewitness misidentification is inadmissible), *abrogated by* *Commonwealth v. Walker*, 92 A.3d 766 (Pa. 2014), *as recognized in* *Commonwealth v. Selenski*, 117 A.3d 1283 (Pa. Super. Ct. 2015); *Commonwealth v. Seese*, 517 A.2d 920, 922 (Pa. 1986) (determining expert testimony regarding veracity of children’s testimony inadmissible).

49. *See Seese*, 517 A.2d at 922 (holding expert testimony that determines veracity as to specific group of people is inadmissible). This holding added to Pennsylvania case law, which previously banned only the admission of expert testimony on witness identification. *See Walker*, 92 A.3d at 769 (explaining Pennsylvania’s previous stance).

50. 517 A.2d 920 (Pa. 1986).

51. *See id.* at 920 (summarizing facts of case). The defendant, who was found guilty of statutory rape and corruption of a minor after he conducted sexual activities with an eight-year-old girl, appealed the superior court’s opinion. *See id.*

52. *See id.* at 921 (summarizing admitted testimony as to veracity of eight-year-olds about sexual abuse). Defense counsel objected to the pediatrician’s testimony and the trial court held the pediatrician could not “reference [ ] medical literature” in her answer but could answer based on her own knowledge and experience. *See id.*

53. *See id.* at 922 (reversing admission of expert testimony because it encroaches upon jury’s role as sole assessor of credibility); *see also O’Searo*, 352 A.2d at

*Seese* expanded this holding to include testimony on the “veracity of [an entire] class” of individuals.<sup>54</sup> The court reasoned that if testimony were permitted with respect to a certain class, it would shift jurors’ focus “from determining the credibility of the *particular* witness” to that of “the class of people of which the particular witness is a member.”<sup>55</sup> *Seese* marked an expansion to the exclusion of expert testimony on an array of psychological issues.<sup>56</sup>

In the years following *Seese*, Pennsylvania courts continued to affirm previous holdings and deny admission of expert testimony.<sup>57</sup> In 1993, the Pennsylvania Supreme Court faced a new argument supporting the admission of expert testimony.<sup>58</sup> Specifically, in *Commonwealth v. Spence*,<sup>59</sup> the defendant was “found guilty [of first-degree murder], aggravated assault, possession of an instrument of crime, and criminal conspiracy.”<sup>60</sup> On appeal, the defendant argued the trial court erred by not admitting a psychologist’s opinion testimony “because the expert was going to attack rather than enhance the credibility of the victim . . . .”<sup>61</sup> The testimony the defendant sought to have admitted would have discussed “the effects of stress upon the persons . . . called [ ] to make [eyewitness] identifica-

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32 (holding it is encroachment on jury’s role for experts to testify as to credibility of witnesses).

54. *See Seese*, 517 A.2d at 921–22 (theorizing that if class based testimony was admitted there could be testimony about “veracity of the elderly, of various ethnic groups, of members of different religious faiths, of persons employed in various trades and professions, etc.”).

55. *See id.* at 922 (summarizing why testimony as to class of individuals is impermissible).

56. *See id.* (adding expert testimony about particular class of individuals to list of excluded topics).

57. *See, e.g., Commonwealth v. Dunkle*, 602 A.2d 830, 831, 837 (Pa. 1992) (holding testimony as to typical behavior patterns of sexually abused children was inadmissible because it intrudes upon jury’s right to determine credibility); *Commonwealth v. Gallagher*, 547 A.2d 355, 356–57 (Pa. 1988) (holding expert testimony on rape trauma syndrome inadmissible because it enhanced victim’s credibility, intruding on jury’s role as sole assessor of credibility).

58. *See Commonwealth v. Spence*, 627 A.2d 1176, 1182 (Pa. 1993) (holding even if expert testimony is used to “attack rather than enhance [witness] credibility,” it is still inadmissible), *abrogated by Commonwealth v. Walker*, 92 A.3d 766 (Pa. 2014), *as recognized in Commonwealth v. Selenski*, 117 A.3d 1283 (Pa. Super. Ct. 2015).

59. 627 A.2d 1176 (Pa. 1993).

60. *See id.* at 1180 (sentencing defendant to death after jury found two aggravating circumstances). This case involved a defendant who, along with two other men, entered the home of the victim, stabbed his sleeping wife to death, and, after a struggle, fled. *See id.* at 1178. The victim recognized the defendant fleeing the scene. *See id.*

61. *See id.* at 1182 (summarizing defendant’s argument in favor of admitting expert testimony). The defendant stated that the expert was going to be used to attack the credibility of the witness, which was different from expert testimony used to enhance the credibility of the witness. *See id.*

tions.”<sup>62</sup> Specifically, the psychologist was going to testify that because the victim had been beaten and stabbed, “his perception [could] have been distorted” when he saw the defendant from his house.<sup>63</sup>

The Pennsylvania Supreme Court held that regardless of “whether the expert’s opinion is offered to attack or to enhance [credibility], it assumes the same impact—an ‘unwarranted appearance of authority in the subject of credibility which is within the facility of the ordinary juror to assess.’”<sup>64</sup> This holding reaffirmed Pennsylvania’s restrictive approach to the admission of expert testimony.<sup>65</sup>

On the same day *Alicia* was decided, the Pennsylvania Supreme Court decided *Commonwealth v. Walker*,<sup>66</sup> which also involved the admission of expert testimony on eyewitness identification.<sup>67</sup> Unlike in *Alicia*, the court in *Walker* adopted a much more inclusive approach and concluded that the admission of “expert testimony regarding eyewitness identification [wa]s no longer *per se* impermissible, . . . leav[ing] the admissibility of such expert testimony to the discretion of the trial court,” which effectively overturned *Spence*’s holding.<sup>68</sup>

In *Walker*, the defendant wanted to present expert testimony on the problems with “human memory, the science as to human recall, and . . . the reliability of eyewitness testimony generally.”<sup>69</sup> The defendant suggested that such testimony would inform the jury of “scientific advance-

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62. *See id.* at 1182 (offering expert testimony to impeach Commonwealth’s eyewitness).

63. *See id.* (summarizing proposed expert’s testimony to attack credibility of witness); *see also, e.g.*, Gary L. Wells, Mark Small, Steven Penrod, Roy S. Malpass, Solomon M. Fulero & C.A.E. Brimacombe, *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603 (1998) (summarizing case study results from forty wrongful convictions; noting number of erroneous convictions based on victim identification).

64. *See Spence*, 627 A.2d at 1182 (quoting *Commonwealth v. Gallagher*, 547 A.2d 355, 358 (Pa. 1988)).

65. *See id.* (expanding impermissible expert testimony to include testimony that attacks as well as enhances witness credibility).

66. 92 A.3d 766 (Pa. 2014).

67. *See id.* at 769 (noting “we address the question of whether a trial court may, in its discretion, permit expert testimony in the area of eyewitness identification, and, in doing so, we reconsider our current decisional law which absolutely bans such expert testimony”).

68. *See id.* (limiting holding of *Spence* and adopting a different approach than *Alicia*); *see also* *Commonwealth v. Alicia*, 92 A.3d 753, 755 (Pa. 2014) (holding expert testimony on false confessions inadmissible for it intrudes upon jury’s role as sole assessor of credibility).

69. *See Walker*, 92 A.3d at 771–72 (specifying how expert would have explained “how the mind works”). Additionally, the expert would have testified about “weapons focus,” “cross-racial identification” reliability, “decreased accuracy” of identification in “traumatic” events, “increased risk of mistaken identification” without police warning, effects of viewing a photo array or line up before, and “lack of a strong correlation between witness” confidence and accuracy. *See id.* at 773.

ments in the field of memory and eyewitness identification . . . .”<sup>70</sup> The trial court held that the evidence was inadmissible because it “would have an unwarranted appearance of authority on the eyewitness’s credibility.”<sup>71</sup> Instead, the defendant could attack the witness’s credibility in cross-examination and closing arguments.<sup>72</sup> On appeal, the superior court affirmed the trial court’s ruling, reasoning that past precedent has been “unequivocal” in rejecting expert testimony that would assess the credibility of witness testimony.<sup>73</sup>

The *Walker* court noted a clear trend in other jurisdictions to permit the admission of expert testimony on eyewitness identification.<sup>74</sup> Next, the court addressed the impact admitting the evidence would have on a jury’s credibility assessments.<sup>75</sup> The court concluded expert testimony on the psychological factors present in eyewitness identification does not speak directly to the veracity of a particular witness; instead, such testimony helps teach jurors how to assess witness credibility.<sup>76</sup> Ultimately, the court found an “absolute ban on expert testimony in [the field of eyewitness identification was] no longer the best approach . . . .”<sup>77</sup>

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70. *See id.* (summarizing defendant’s argument for inclusion of expert testimony on eyewitness identification).

71. *See id.* at 771 (reasoning “the probative value of such testimony was nominal, as several witnesses identified [defendant] and their encounters with him were more than brief”).

72. *See id.* (summarizing trial court’s reasoning as to why expert evidence was inadmissible and which safeguard was still available to defendant). The trial court followed the same line of reasoning that Pennsylvania courts have previously relied on. For a further explanation, see *supra* notes 39–71 and accompanying text.

73. *See Walker*, 92 A.3d at 772 (internal quotation marks omitted) (affirming trial court’s ruling that expert testimony on eyewitness identification is inadmissible). The superior court also stated that it “found itself ‘constrained to apply the consistent precedent of our Supreme Court until it rules otherwise with regard to this type of evidence.’” *See id.*

74. *See id.* at 782 (allowing eyewitness expert testimony “at the discretion of the trial court, for the purpose of aiding the trier of fact”). The court also noted that only two other jurisdictions “adhere[d] to a *per se* exclusionary approach to the admission of expert testimony regarding eyewitness identification.” *See id.* at 783; see, e.g., *State v. Young*, 35 So. 3d 1042, 1050 (La. 2010) (noting Louisiana’s *per se* exclusionary rule). Kansas’s *per se* exclusionary rule was recently abrogated in *State v. Carr*, 331 P.3d 544, 690 (Kan. 2014), *rev’d*, 136 S.Ct. 633 (2016).

75. *See Walker*, 92 A.3d at 784 (noting correct use of expert testimony can aid the jury, rendering them better able to assess credibility).

76. *See id.* at 784 (holding admission of expert testimony does not assess witness credibility, instead it helps aid jurors on topics they may be unfamiliar with, thus potentially enhancing their ability to assess witnesses). The court also rejected the argument that cross-examination and closing arguments are a sufficient alternative to admission of expert testimony on eyewitness identification. *See id.* at 786 (dismissing other alternative means to admission of expert testimony).

77. *See id.* at 788 (limiting holding only to area of expert testimony on eyewitness identification).

B. *Don't Forget About the Wild Card: Expert Testimony Laws in Other States*

Alicia presented the Pennsylvania Supreme Court with an opportunity to address an issue of first impression—the admissibility of expert testimony on false confessions.<sup>78</sup> Pennsylvania has predominately ruled against admitting expert testimony on an array of psychological topics, out of fear that such testimony would intrude upon the jury's role as the sole assessor of witness credibility.<sup>79</sup> Nonetheless, it is important to note the disparity among other jurisdictions in their approaches to this issue.<sup>80</sup>

Similar to the Pennsylvania Supreme Court's approach, the Tenth Circuit in *United States v. Benally*<sup>81</sup> affirmed the district court's decision that expert testimony on false confessions is inadmissible because it encroaches upon the jury's credibility assessment function.<sup>82</sup> The defendant in *Benally* "was convicted of abusive sexual contact with a child . . ."<sup>83</sup> The defendant initially denied sexually abusing the children in question, but later confessed to the allegations and provided his confession to officers in a written statement.<sup>84</sup> Prior to trial, the defendant offered expert testimony that would have explained "whether false confessions occur" and "why people confess falsely."<sup>85</sup> He also clarified there would be no opinion testimony as to whether the defendant had falsely confessed.<sup>86</sup>

On appeal, the defendant argued the district court erred in excluding the expert testimony because the testimony was offered for "the limited purpose" of overcoming the notion that "sane people [ ] do not confess falsely . . ."<sup>87</sup> The Tenth Circuit held that the district court did not abuse its discretion in excluding the expert testimony because the "testimony

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78. See generally *Commonwealth v. Alicia*, 92 A.3d 753 (Pa. 2014).

79. For a further discussion on Pennsylvania's rulings on admissibility of expert testimony, see *supra* notes 39–77 and accompanying text.

80. For a further discussion of disparity on admissibility of false confessions in jurisdictions outside of Pennsylvania, see *infra* notes 81–103 and accompanying text.

81. 541 F.3d 990 (10th Cir. 2008).

82. See *United States v. Benally*, 541 F.3d 990, 994–95 (10th Cir. 2008) ("[T]he credibility of witnesses is generally not an appropriate subject for expert testimony." (quoting *United States v. Adams*, 271 F.3d 1236, 1244–45 (10th Cir. 2001) (internal quotation marks omitted))).

83. See *id.* at 992 (noting that defendant was questioned following questionnaire report that victim had been sexually abused by defendant). This case arose after two of defendant's girlfriend's nieces reported incidents of sexual abuse at school. See *id.* The defendant was convicted in a second trial because his first resulted in mistrial for failure to reach a unanimous verdict. See *id.* at 993.

84. See *id.* at 992 (summarizing factors surrounding alleged false confession).

85. See *id.* at 993 (summarizing offered expert testimony).

86. See *id.* (summarizing limits of offered expert testimony and stating district court holding that expert testimony evidence was inadmissible because it was not reliable or relevant); see also *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) (describing standards for relevancy and reliability).

87. See *Benally*, 541 F.3d at 993–94 (summarizing defendant's argument for admission of expert testimony on false confessions raised on appeal). The defendant emphasized that the testimony would be about false confessions generally,

inevitably would ‘encroach [ ] upon the jury’s vital and exclusive function to make credibility determinations.’”<sup>88</sup> The court also stated that “with or without the opinion” as to whether the defendant falsely confessed, the effect “would be the same: disregard the confession and credit the defendant’s testimony that his confession was a lie.”<sup>89</sup> However, the court also noted an exception to its holding for when an “expert will testify to the existence of the defendant’s identifiable medical disorder that raises a question regarding the defendant’s cognitive voluntariness.”<sup>90</sup> This exception did not apply in this case because the defendant was unable to identify a medical condition that caused him to falsely confess.<sup>91</sup>

The Seventh Circuit held expert testimony on false confessions is admissible when it goes “to the heart of [the] defense.”<sup>92</sup> The defendant in *United States v. Hall*<sup>93</sup> was convicted for the kidnapping and murder of a fifteen-year-old girl and sentenced to life in prison.<sup>94</sup> When the defendant confessed, there were no notes or recordings of the interview, and the officer wrote out the statement of events for the defendant to sign.<sup>95</sup>

At trial, the defendant argued that because of his personality disorder, he was “susceptible to suggestion and pathologically eager to please,” which caused him to confess to a crime he did not commit “in order to gain approval from the law enforcement officers who were interrogating him.”<sup>96</sup> On appeal, the defendant noted that he planned to use testimony

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and the expert would give no opinion as to whether or not he falsely confessed. *See id.*

88. *See id.* at 995 (alteration in original) (quoting *United States v. Adams*, 271 F.3d 1236, 1245 (10th Cir. 2001)).

89. *See id.* (reasoning expert testimony gets excluded because “it usurps a critical function of the jury [or] it is not helpful to the jury” (internal quotation marks omitted)).

90. *See id.* at 996 (distinguishing this case from exception because no medical disorder was suggested); *see also* *United States v. Hall*, 93 F.3d 1337, 1345 (7th Cir. 1996) (holding expert testimony on false confession admissible when it “went to the heart” of defense).

91. *See Benally*, 541 F.3d at 996 (holding defendant does not fit any laid out medical condition exception).

92. *See Hall*, 93 F.3d at 1345 (holding expert testimony on false confessions was admissible).

93. 93 F.3d 1337 (7th Cir. 1996).

94. *See id.* at 1339–41 (summarizing victim was riding her bike when kidnapped). The victim’s body in this case was damaged so badly it was impossible for investigators to determine cause of death. *See id.* at 1339.

95. *See id.* at 1340 (stating “[b]etween March 1994, and November 15, a Detective . . . of the Wabash Police Department had several conversations with Hall”). Officers realized the defendant suffered from mental health issues and the defendant began to see a therapist. *See id.* It was “unclear whether every person involved in the [current] case knew about his counseling . . . [but] many did.” *Id.* Later, on November 15th, the defendant was questioned from 10:00 AM until approximately 3:20 AM the next morning. *See id.* The defendant was originally interviewed after multiple reports of him following girls in his van. *See id.* at 1339–40.

96. *See id.* at 1341 (summarizing “in the words of the Wabash police, [he was] a ‘wannabe’”).

from experts to support this claim.<sup>97</sup> Specifically, one expert would testify about the defendant's "susceptibility to various interrogation techniques," the impact of suggesting answers to him, and his capacity to falsely confess.<sup>98</sup> The trial court held that the proffered expert testimony on false confessions was inadmissible because the jury could assess the credibility of defendant's argument on their own.<sup>99</sup>

Ultimately, the Seventh Circuit reversed and remanded because the jury was deprived critical defense information.<sup>100</sup> The court reasoned that because juries are unlikely to know that the existence of a personality disorder can cause individuals to falsely confess, this information would have assisted their decision-making process.<sup>101</sup> This testimony went to the heart of the defense, and the defendant was entitled to present his own account of the case.<sup>102</sup> Together, these cases set the groundwork for *Alicia*'s controversial holding.<sup>103</sup>

### III. PLACE YOUR BETS

The Pennsylvania Supreme Court addressed the admissibility of expert testimony on false confessions in *Alicia*.<sup>104</sup> The court held expert testimony regarding false confessions—both generally and with respect to any particular defendant's case—was inadmissible.<sup>105</sup> The court reasoned the testimony would constitute "an impermissible invasion of the jury's role as the exclusive arbiter of credibility."<sup>106</sup> The dissent argued that a

97. *See id.* (noting one expert would have testified 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").

98. *See id.* (acknowledging this was testimony defendant believed should have been giving at trial). Instead, the testimony that was provided was about the defendant's mental condition; one problem with his attention-seeking behavior was that it caused him to give people the answer he believed they wanted to hear. *See id.*

99. *See id.* (stating "the jury could appreciate whether police interrogation techniques were suggestive by themselves").

100. *See id.* at 1345 (reversing trial court's holding of evidence as inadmissible because jurors had right to information offered by defense and could then make their own assessment regarding credibility).

101. *See id.* (explaining role expert testimony could have played and jury's ability to decide how much weight to attach to testimony).

102. *See id.* (explaining how testimony was key to defense's argument). Additionally, the court noted that because a cause of death could not be determined, there was no corroborating evidence as to whether his confession describing how he killed the victim was accurate. *See id.* The court also took issue with the fact that an officer wrote the statement and the defendant merely signed it. *See id.*

103. *See generally* Commonwealth v. Alicia, 92 A.3d 753 (Pa. 2014).

104. *See id.* at 762 (noting court had not yet decided whether expert testimony on false confessions is admissible in Pennsylvania).

105. *See id.* at 764 (reasoning "we are not persuaded by the rationale of those courts that have admitted expert psychological/psychiatric testimony regarding the phenomenon of false confessions").

106. *Id.* (stating "we conclude, in agreement with the Tenth Circuit Court's decision in *Benally*"); *see also* United States v. Benally, 541 F.3d 990, 995 (10th Cir.

per se prohibition against expert testimony on false confession interrogations was improper in light of the court's recent holding and should be left to the discretion of the trial court.<sup>107</sup>

#### A. *Facts and Procedure*

On November 1, 2005, Jose Alicea<sup>108</sup> (Alicea) was arrested for a shooting in a Philadelphia restaurant.<sup>109</sup> Alicea was "detained by police and questioned over a period of approximately six hours."<sup>110</sup> At the beginning of the interview, Alicea denied any involvement in the shooting; however, he later confessed by the end of the interview.<sup>111</sup> Alicea was subsequently charged with "murder, criminal conspiracy, possession of an instrument of crime, and two violations of the Uniform Firearms Act."<sup>112</sup>

On May 3, 2007, Alicea filed a Motion for Use of a False Confessions Expert, stating he was "of low intelligence and has been [a Supplemental Security Income] disability beneficiary due to mental health issues most of his life."<sup>113</sup> Alicea hoped this evidence would prove that he was told to

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2008) (holding false confession testimony would invade on jurors' ability to assess credibility).

107. *See id.* at 765–66 (Saylor, J., dissenting) (suggesting "an emerging reluctance to adhere reflexively to nineteenth-century conventions and axioms, amidst growing evidence produced by social and behavioral scientists").

108. "Mr. Alicea's name is incorrectly spelled 'Alicia' on the docket." Brief of Amici Curiae the Innocence Network & the Pennsylvania Innocence Project in Support of Appellee at 1 n.1, *Commonwealth v. Alicia*, 92 A.3d 753 (Pa. 2014) (No. 27 EAP 2012), 2012 WL 8681641, at \*IV n.1.

109. *See Alicia*, 92 A.3d at 755 (arising after Alicea "and several of his friends . . . had gone to the café" upon hearing someone that had robbed one of them would be there). A physical altercation "ensued between the two groups, a gun was fired, hitting the victim, an innocent bystander who was not part of either group." *Id.*

110. *See id.* (noting Alicea was questioned after bystander was shot).

111. *See id.* (noting Alicea confessed only after hours of interrogation); *see also id.* at 755 n.1 (quoting end of Alicea's confession, "Everybody just started fighting, tables and chairs started flying. I started to back up and as I did that, I pulled a gun out of my waist. I pointed it at the guys and told them to stop throwing chairs. The guy threw another chair and the gun went off. . . . I didn't mean to kill anyone. I was really feared [sic] of the guys throwing chairs at me so I fired so I can get out of this tradity [sic]." (second and third alterations in original)). It is also important to note that Alicea had a well-below average IQ of 64. *See* Brief for Appellee at 9 n.5, *Commonwealth v. Alicia*, 92 A.3d 753 (Pa. 2014) (No. 27 EAP 2012), 2012 WL 8681639, at \*8 n.5.

112. *Alicia*, 92 A.3d at 756 (announcing sole evidence against Alicea was statement from one individual). However, two other witnesses identified two of Alicea's friends as the shooter. *See id.*

113. *See id.* (noting "[t]he only evidence identifying [Alicea] as the shooter (other than his confession) comes from two corrupt sources"). Instead, Alicea believed the shooter was another individual with whom he went to the Blue Mountain Café. *See id.*

“take the fall for the real perpetrator.”<sup>114</sup> Alicea also suggested that the testimony would “provide a number of clues indicating [his confession] is a false confession.”<sup>115</sup> The Commonwealth replied by filing a motion to exclude Alicea’s expert, reasoning that “whether an individual falsely confessed to a crime is within the jury’s own ability to evaluate.”<sup>116</sup>

On June 17, 2008, the trial court determined Alicea’s proffered expert, Richard Leo, Ph.D., J.D., was qualified in the “field of police interrogations.”<sup>117</sup> Dr. Leo’s proposed testimony would have educated the jury about “police interrogation methods, psychological research on [these] methods, and [the] coercive interrogation methods that” increase the risk of false confessions.<sup>118</sup> Additionally, Dr. Leo would have “discuss[ed] the specific interrogation techniques he discerned from interviewing [Alicea] about what took place during his interrogation, and identif[ied] any possible risks of false confession posed by those techniques.”<sup>119</sup> Finally, Dr. Leo would have explained how Alicea’s low IQ score related to his likelihood of falsely confessing.<sup>120</sup>

The Court of Common Pleas of Philadelphia County issued an order on August 12, 2008, permitting Dr. Leo to testify about general police interrogation methods and the general concept of false confessions.<sup>121</sup>

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114. *See id.* (quoting Motion for Use of a False Confessions Expert, at ¶¶ 4–6 (May 3, 2007)) (internal quotation marks omitted). For a discussion of the evidence the Commonwealth had against Alicea, see *supra* note 113.

115. *See id.* at 756–57 (quoting Motion for Use of a False Confessions Expert, at ¶ 7 (May 3, 2007)) (internal quotation marks omitted). Alicea’s motion alleged the idea that “jurors find it impossible to believe that a person would make a false confession . . .” *Id.* at 757 (internal quotation marks omitted). The motion also stated that there have been over 185 cases of false confessions. *See id.*

116. *See id.* at 757 (summarizing Commonwealth’s argument to not admit expert testimony on false confessions). The Commonwealth also argued that expert testimony about false confessions “in general . . . would undermine the fact-determining process because such testimony would be based on mere speculation.” *See id.*

117. *See id.* (internal quotation marks omitted) (summarizing results of court of common pleas’ hearing on proposed expert testimony). Dr. Leo described police interrogations as a “two-step psychological process” in which the police convince the suspect that they have been caught and then motivate the suspect to confess. *Id.* Additionally, Dr. Leo described the two types of false confessions: a “‘compliant’ false confession” where the suspect is “psychologically coerced” into lying, and a “‘persuaded’ or ‘internalized’ false confession” where the suspect confesses because they believe they committed the crime but have no recollection of it. *See id.*

118. *See id.* at 758 (summarizing first part of Dr. Leo’s expert testimony about general information on false confessions and police interrogation techniques).

119. *See id.* (summarizing second part of Dr. Leo’s expert testimony regarding specific interrogation techniques used).

120. *See id.* (summarizing third part of Dr. Leo’s expert testimony regarding Alicea’s low IQ score’s link to false confessions).

121. *See Alicia*, 92 A.3d at 758 (allowing Dr. Leo to testify generally about false confessions). The testimony Dr. Leo was allowed to give was based on his own research and knowledge, in addition to research and knowledge of others as to “the general concept of false confessions,” “police interrogation techniques,”

However, Dr. Leo was barred from discussing any specific interrogation techniques used in Alicea's case and his opinion on whether or not Alicea falsely confessed.<sup>122</sup>

In response, the Commonwealth filed an interlocutory appeal in the Pennsylvania Superior Court, asserting Dr. Leo's testimony would "invade the credibility-assessing function of the jury."<sup>123</sup> The trial court explained its admission of Dr. Leo's testimony in a 1925(a) opinion, stating because he was not allowed to testify to the case specifics, "the jury would remain the ultimate arbiter of [Alicea's] credibility . . . ."<sup>124</sup>

The superior court affirmed the trial court's order and held Dr. Leo's testimony "would not usurp the jury's credibility-determining function . . . ."<sup>125</sup> The Commonwealth appealed, and the Pennsylvania Supreme Court reversed and remanded, holding expert testimony such as Dr. Leo's proposed testimony constituted "an impermissible invasion of the jury's role as the exclusive arbiter of credibility."<sup>126</sup>

#### B. *Pennsylvania Goes "All In": Narrative Analysis*

The Pennsylvania Supreme Court decided the case on May 28, 2014.<sup>127</sup> On appeal, the Commonwealth argued Dr. Leo's proffered testimony would impermissibly intrude on the jury's role as sole arbiter of credibility.<sup>128</sup> Alicea countered by arguing, "Dr. Leo's testimony is admis-

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"[p]olice interrogation methods," and "[w]hy certain interrogation techniques . . . increase the [likelihood] of false confession[s]." *See id.*

122. *See id.* at 758–59 (detailing that Dr. Leo could not testify to "[s]tatements provided to him by [Alicea]," any documents or reports that discussed Alicea, his beliefs on what factors from the specific interrogation may have led to a false confession, as well as his own opinion as to the veracity of Alicea's confession).

123. *See id.* at 759 (arguing trial court erred in admitting Dr. Leo's testimony). Additionally, the Commonwealth argued, "Dr. Leo's methodology was not generally accepted in the relevant scientific community, and, therefore did not meet the admissibility requirements . . . ." *See id.* at 759 n.10; *see also* Grady v. Frito-Lay, Inc., 839 A.2d 1038, 1044 (Pa. 2003) (noting Pennsylvania adopts "general acceptance" standard for whether or not to admit expert testimony).

124. *See Alicia*, 92 A.3d at 759 (upholding admission of specific expert testimony on false confessions). In reaching its conclusion that the jury would remain the ultimate arbiter of credibility notwithstanding the admitted expert testimony, the trial court noted that Dr. Leo was barred from testifying about any case specific allegations, as well as the veracity of Alicea's confession. *See id.* *See generally* PA. R. APP. P. 1925(a)(1) (explaining 1925(a) opinion requirements).

125. *See Alicia*, 92 A.3d at 759 (attributing their decision to fact that court had barred expert testimony about specific circumstances of Alicea's case). The superior court was divided in its conclusion. *See id.*

126. *See id.* at 764 (summarizing Commonwealth's appeal following 1925(a) opinion as well as the Pennsylvania Supreme Court's holding). The issue before the court was "does expert testimony on the 'the phenomenon of false confessions' impermissibly invade the jury's exclusive role as the arbiter of credibility?" *Id.* at 759–60.

127. *See id.* at 753.

128. *See id.* at 760 (supporting its argument by relying on Pennsylvania precedent that barred expert testimony on psychological issues). Specifically, the Com-

sible for the sole purpose of educating the jury as to a topic about which it would be otherwise uninformed.”<sup>129</sup> The majority held that the proposed expert testimony constituted “an impermissible invasion of the jury’s role as the exclusive arbiter of credibility.”<sup>130</sup> The dissent argued that a *per se* prohibition against expert testimony on false confessions interrogations was improper in light of the court’s holding in *Walker* and that admissibility determinations on expert testimony should be left to the discretion of the trial court.<sup>131</sup>

1. *Know When to Hold ‘Em: Majority’s Approach*

The court began its analysis by stating the standard of review was *de novo*.<sup>132</sup> Next, the court stated expert testimony is admissible under the Pennsylvania Rules of Evidence “when the expert’s scientific, technical, or other specialized knowledge is beyond that of the average layperson and will help the fact-finder to understand the evidence or determine a fact in issue.”<sup>133</sup> The court also noted it is within the role of the jury to determine whether a witness is lying; therefore, expert testimony that assesses

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monwealth relied on Pennsylvania precedent that reasoned psychological expert testimony was inadmissible because it “invest[ed] the opinions of experts with an unwarranted appearance of authority on the subject of credibility, which is within the facility of the ordinary juror to assess.” *See id.* (quoting *Commonwealth v. Gallagher*, 547 A.2d 355, 358 (Pa. 1988)) (internal quotation marks omitted).

129. *See Alicia*, 92 A.3d at 760 (summarizing Alicea’s argument on appeal that Dr. Leo’s expert testimony was admissible). In conjunction with this argument, Alicea presented amici curiae brief from the Innocence Network and the Pennsylvania Innocence Project. *See id.* This brief stated that jurors do not fully understand interrogation techniques and false confessions; therefore Dr. Leo’s testimony would “provide a framework” for determining whether or not Alicea falsely confessed. *See id.* (internal quotation marks omitted).

130. *See id.* at 764 (reversing superior court’s order and remanding to court of common pleas for further proceedings).

131. *See id.* at 765–66 (Saylor, J., dissenting) (summarizing view that expert testimony should have been admissible).

132. *See id.* at 760 (noting *de novo* review applies to questions of law with plenary scope of review); *see also, e.g., J.C.B. v. Pa. State Police*, 35 A.3d 792, 794 (Pa. Super. Ct. 2012) (stating “our standard of review is *de novo* and our scope of review is plenary”). Additionally, the court noted evidentiary rulings were evaluated under an abuse of discretion standard of review. *See id.* “An abuse of discretion will not be found based on a mere error of judgment, but rather exists where the court has reached a conclusion which overrides or misapplies the law, or where the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will.” *Alicia*, 92 A.3d at 760 (citing *Commonwealth v. Eichinger*, 915 A.2d 1122, 1140 (Pa. 2007)).

133. *See Alicia*, 92 A.3d at 760 (citing PA. R. EVID. 702(a)–(b); *Commonwealth v. Lopez*, 854 A.2d 465, 470 (Pa. 2004)).

witness credibility is barred.<sup>134</sup> Instead, jurors can rely on their life experiences and common knowledge to assess witness credibility.<sup>135</sup>

After the court laid the groundwork for assessing whether Dr. Leo's testimony was admissible, it reviewed the relevant Pennsylvania case law.<sup>136</sup> Specifically, the court summarized cases where it held expert testimony presented by the Commonwealth was inadmissible because it related to "whether a witness [wa]s being truthful."<sup>137</sup> Next, the court summarized its previous decisions that held defendant's expert testimony was inadmissible because it intruded upon the jury's role as the sole arbiter of witness credibility.<sup>138</sup>

Following the court's summary of Pennsylvania case law, it noted the admissibility of expert testimony on false confessions was an issue of first impression for Pennsylvania.<sup>139</sup> Therefore, the court expanded its analysis to include how other jurisdictions have addressed the issue and briefly

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134. *See id.* (stating Pennsylvania has consistently held jurors are capable of determining witness veracity).

135. *See id.* at 761 (citing *Commonwealth v. Davis*, 541 A.2d 315, 317 (Pa. 1988)) (stating jurors can assess witness credibility by their common knowledge of human tendencies, "demeanor of [ ] witness," and life experiences).

136. *See id.* (summarizing case law in Pennsylvania that held psychological expert testimony inadmissible on an array of topics). For a list of these cases, see *infra* note 138.

137. *See id.* (acknowledging barred testimony provided "a generalized explication of human behavior under certain particular circumstances"); *see also, e.g.*, *Commonwealth v. Dunkle*, 602 A.2d 830 (Pa. 1992) (holding expert testimony on why child victims of sexual abuse sometimes do not immediately report as inadmissible because the behavior is well within the range of jury's knowledge and experiences); *Commonwealth v. Gallagher*, 547 A.2d 355 (Pa. 1988) (holding expert testimony on rape trauma syndrome inadmissible because its only purpose was to enhance the credibility of the victim); *Commonwealth v. Seese*, 517 A.2d 920 (Pa. 1986) (deciding expert testimony that children rarely lie about sexual abuse was inadmissible because it encroached on jury's role as assessors of credibility).

138. *See Alicia*, 92 A.3d at 761–62 (explaining psychological expert testimony presented by defense was inadmissible because it infringed upon jury's credibility assessing function); *see also, e.g.*, *Commonwealth v. Crawford*, 718 A.2d 768, 773 (Pa. 1998) (deciding trial court properly excluded expert testimony on reliability of repressed revived memory because testimony was intended only to attack the Commonwealth's witness' credibility); *Commonwealth v. Abdul-Salaam*, 678 A.2d 342, 352 (Pa. 1996) (denying defendant's request for funding for expert on eyewitness identification); *Commonwealth v. Simmons*, 662 A.2d 621, 631 (Pa. 1995) (barring expert testimony on reliability of eyewitness identification); *Commonwealth v. Spence*, 627 A.2d 1176, 1178, 1182 (Pa. 1993) (upholding trial court's exclusion on expert testimony about effects of stress on victim's eyewitness identification), *abrogated by* *Commonwealth v. Walker*, 92 A.3d 766 (Pa. 2014), *as recognized in* *Commonwealth v. Selenski*, 117 A.3d 1283 (Pa. Super. Ct. 2015).

139. *See Alicia*, 92 A.3d at 762 (noting however that courts in other jurisdictions have assessed admissibility of expert testimony on false confessions); *see also* Howard J. Bashman, *Ups and Downs of Arguing Cases of Apparent First Impression*, LEGAL INTELLIGENCER (Mar. 3, 2012), *available at* <http://howappealing.abovethelaw.com/HJBColm-UpsAndDownsOfArguingCasesOfApparentFirstImpression-03-1213.pdf> [<https://perma.cc/ALA2-RARL>] (discussing pros and cons of appellate lawyers arguing cases of first impression).

summarized four jurisdictions that held expert testimony on false confessions was inadmissible.<sup>140</sup>

Next, the court noted and briefly addressed the three cases Alicea relied on to support his position that expert testimony on false confessions is admissible.<sup>141</sup> The court reasoned that after a careful review of opinions from Pennsylvania and other jurisdictions, it agreed with the Tenth Circuit's decision in *Benally*.<sup>142</sup> Therefore, the court held the proposed expert testimony was "an impermissible invasion of the jury's role as the exclusive arbiter of credibility."<sup>143</sup>

Subsequently, the court found that even though Dr. Leo would not offer opinion testimony as to whether Alicea falsely confessed, general testimony about interrogation techniques that can lead to false confessions improperly "invites the jury" to conclude that the interrogation techniques used in the particular case were improper, and thus the defendant's confession was unreliable.<sup>144</sup> The court noted potential problems that could arise if it admitted the testimony, such as the Commonwealth presenting a competing expert, which the court felt would not help the jury under-

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140. See *Alicia*, 92 A.3d at 762–63 (acknowledging case law outside Pennsylvania has adopted prohibition on false confession expert testimony); see also *Brown v. Horell*, 644 F.3d 969 (9th Cir. 2011) (holding expert testimony regarding interrogation methods likely to elicit false confessions inadmissible because defendant's explanation for why he falsely confessed was within the jury's experiences to assess); *United States v. Benally*, 541 F.3d 990 (10th Cir. 2008) (refusing to admit expert testimony on whether false confessions occur as well as why they can occur); *United States v. Jacques*, 784 F. Supp. 2d 59 (D. Mass. 2011) (holding expert testimony about existence of false confessions generally as well as testimony about the features in defendant's interrogation that increased chance of false confession was inadmissible); *State v. Free*, 798 A.2d 83 (N.J. Super. Ct. App. Div. 2002) (holding trial court abused its discretion in admitting expert testimony as to false confession and interrogation techniques because it was within jury's knowledge to understand potential for false confessions during interrogation).

141. See *Alicia*, 92 A.3d at 763–64 (summarizing cases Alicea cites in support of his argument that expert testimony on false confessions is admissible); see also *United States v. Hall*, 93 F.3d 1337 (7th Cir. 1996) (admitting expert testimony on false confessions because it went to heart of defendant's argument that he confessed "due to a personality disorder that ma[de] him susceptible to suggestion and [ ] eager to please"); *Boyer v. State*, 825 So. 2d 418 (Fla. Dist. Ct. App. 2002) (holding juries need to be informed that phenomenon of false confessions exists, as well as how to determine if it occurred in case at hand); *Miller v. State*, 770 N.E.2d 763 (Ind. 2002) (holding expert testimony on phenomenon of false confessions would have assisted the jury in understanding an area that is outside their experiences).

142. See *Alicia*, 92 A.3d at 764 (stating it agreed with *Benally* court's reasoning that proposed testimony would encroach upon the jury's role to make credibility determinations). The court noted encroachment occurs even when the expert does not testify as to the expert's opinion about whether or not the defendant in the current case falsely confessed. See *id.* at 763–64.

143. *Id.* at 764 (summarizing "we believe that the matter of whether [Alicea's] confession is false is best left to the jury's common sense and life experience").

144. See *id.* (concluding "Dr. Leo's proposed testimony would [not] merely serve a pedagogical function").

stand the evidence.<sup>145</sup> Instead, the jury would benefit more from its own common sense assessment of the evidence.<sup>146</sup> Alicea could thoroughly attack the veracity of his confession through “cross-examination and argument.”<sup>147</sup> Accordingly, the court reversed the superior court’s order and remanded the case to the court of common pleas for further proceedings consistent with its holding.<sup>148</sup>

## 2. *Know When to Fold ‘Em: Dissent’s Approach*

The dissent believed a per se prohibition against expert testimony on human behavior in police interrogations was improper in light of the court’s holding in *Walker*.<sup>149</sup> In particular, the dissent argued it was not enough to presume jurors’ life experience and common sense could guide them in issues about perception and memory.<sup>150</sup> Instead, in cases “where the science is sound and the evidence is deemed probative and necessary,” jurors should have the option of hearing expert testimony on a topic that they may be otherwise unfamiliar with.<sup>151</sup> In the dissent’s view, decisions regarding the admissibility of expert testimony should be entrusted to trial judges.<sup>152</sup>

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145. *See id.* (hypothesizing that Commonwealth would present competing expert to state identical interrogation techniques elicit true confessions as well). This has the potential to only confuse jurors further. *See id.* *See generally* Neil Vidmar & Shari Seidman Diamond, *Juries and Expert Evidence*, 66 BROOK. L. REV. 1121 (2001) (discussing what social scientists know about impact of expert testimony on jurors).

146. *See Alicia*, 92 F.3d at 764 (suggesting after proper development of issues in case, jurors are well equipped to reach decisions).

147. *See id.* (theorizing that Alicea could present his false confession argument at other points during trial).

148. *See id.* (declaring superior court’s previous admission of expert testimony on false confessions inadmissible).

149. *See id.* at 765 (Saylor, J., dissenting) (noting admissibility of psychological expert testimony should be within discretion of trial judges). *Walker* was decided the same day as the case at hand, however, in *Walker*, the Pennsylvania Supreme Court took a much more inclusive approach and held that an absolute ban by the reviewing court on expert testimony on eyewitness identification was improper and the admissibility should be left to the trial court to determine. *See generally* Commonwealth v. Walker, 92 A.3d 766 (Pa. 2014).

150. *See Alicia*, 92 A.3d at 765 (Saylor, J., dissenting) (“[N]o longer will we intone that jurors’ life experience and common sense will necessarily guide them to the truth when the essential inquiry encompasses understanding the complex subjects of perception and memory.”).

151. *See id.* (summarizing dissent’s suggestion to fix problem of jurors not understanding issues of perception by presenting established scientific evidence).

152. *See id.* at 766 (stating dissent’s approach to admissibility of expert testimony on false confessions as better trusted to trial judges).

IV. CALLING PENNSYLVANIA'S BLUFF: CRITICAL ANALYSIS OF *ALICIA*

By failing to admit expert testimony on false confessions, the Pennsylvania Supreme Court inhibited jurors' decision-making process.<sup>153</sup> Pennsylvania courts have consistently refused to admit psychological expert testimony on the grounds that it intrudes upon jurors' role as the sole arbiters of credibility.<sup>154</sup> In *Alicia*, the Pennsylvania Supreme Court justified the exclusion of expert testimony on the basis of state precedent and the Tenth Circuit's approach in *Benally*.<sup>155</sup> However, the court should have adopted the dissent's approach and admitted the expert testimony for two reasons.<sup>156</sup> First, the court improperly interpreted the case law and failed to adequately address Alicea's arguments.<sup>157</sup> Second, the court

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153. See *id.* at 764 ("We cannot conclude that expert testimony as to such generalities would help the jury understand the evidence . . ."). As a result, jurors had less evidence available to them when making their assessment of witnesses. See *id.* See generally Lynne ForsterLee, Irwin Horowitz, Elizabeth Athaide-Victor & Nicole Brown, *The Bottom Line: The Effect of Written Expert Witness Statements on Juror Verdicts and Information Processing*, 24 LAW & HUM. BEHAV. 259, 259–70 (2000) (noting how presentation of expert testimony to mock jurors in psychological study helped jurors render verdict).

154. See *Commonwealth v. Crawford*, 718 A.2d 768, 772–73 (Pa. 1998) (summarizing previous Pennsylvania case law's approach to admission of expert testimony on psychological matters). For a further discussion on Pennsylvania's approach to the admissibility of psychological issues, see *supra* notes 39–77 and accompanying text.

155. See *Alicia*, 92 A.3d at 764 ("[W]e conclude, in agreement with the Tenth Circuit Court's decision . . . that expert testimony . . . constitutes an impermissible invasion of the jury's role . . ."); see also *United States v. Benally*, 541 F.3d 990, 993–95 (10th Cir. 2008) (establishing approach adopted by Pennsylvania Supreme Court to deny admissibility of expert testimony on false confessions).

156. See *infra* notes 159–61 and accompanying text. Justice Saylor argued that the court should have followed the same approach as they did in *Commonwealth v. Walker*, which lifted the per se prohibition on the admission of expert testimony regarding eyewitness identification. See *Alicia*, 92 A.3d at 765 (Saylor, J., dissenting); *Commonwealth v. Walker*, 92 A.3d 766 (Pa. 2014). On the basis of the *Walker* decision, the dissent emphasized that the courts can no longer rely solely on jurors' common sense and life experiences when it comes to issues of perception and memory. See *id.* Instead, when the science is well established and probative in the case, the trial court should have the discretion to admit it. See *id.* The blanket prohibition is no longer proper for expert testimony on human behavioral issues. See *id.* at 765–66.

157. See *id.* at 762–64 (discussing court's interpretation of case law in favor of its approach as well as Alicea's approach). The court did not consider the medical disorder exception in *Benally*, which should have applied to Alicea if the court followed the Tenth Circuit's reasoning more closely. See *id.* Additionally, the court only briefly mentioned the three cases Alicea cited in support of his argument for admission. See *id.* at 763–64. The court did not discuss the applicability of these cases to Alicea's case or provide any analysis; instead it simply regurgitated the facts and holding of the cases. See *id.*; see also Brief for Appellee, *Commonwealth v. Alicia*, 92 A.3d 753 (Pa. 2014) (No. 27 EAP 2012), 2012 WL 8681639, at \*17–18 (presenting Alicea's three arguments in his brief to supreme court).

reached an improper decision in light of its most recent precedent on admissibility of expert testimony.<sup>158</sup>

A. *Pennsylvania Buys in to Misleading Precedent*

In *Alicia*, the Pennsylvania Supreme Court relied too heavily on previous expert testimony decisions and improperly interpreted the case law from other jurisdictions.<sup>159</sup> The court looked at Pennsylvania's approach to the admission of expert testimony and emphasized that it is well within jurors' abilities to "determin[e] whether a witness is lying, and thus [it is impermissible]" to present expert testimony regarding credibility assessments.<sup>160</sup> However, the court failed to acknowledge that the concept of false confessions might be outside the range of jurors' life experience and common sense.<sup>161</sup>

Alicea presented cases to support this proposition, which the court only briefly addressed.<sup>162</sup> Unlike the precedent that the court ultimately relied upon, the cases Alicea cited in his brief were more on point with the facts and circumstances of the instant case.<sup>163</sup> While the court referenced

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158. See *Alicia*, 92 A.3d at 765 (Saylor, J., dissenting) (discussing Pennsylvania's most recent decision, *Walker*). In *Walker*, the court adopted a more inclusive approach that eliminated the per se prohibition on the admissibility of another psychological topic: eyewitness identification. See *Walker*, 92 A.3d at 766.

159. See *Alicia*, 92 A.3d at 761–63 (analyzing case law to determine if expert testimony on false confessions was admissible).

160. See *id.* at 760–62 (summarizing court's analysis of previous Pennsylvania decisions on admissibility of expert testimony and stating lay jurors are able to assess veracity of witnesses based on their life experiences, therefore expert testimony cannot assess or question witness' credibility); see also *Commonwealth v. Davis*, 541 A.2d 315, 317 (Pa. 1988) (stating witness credibility assessments are reserved for jurors because it is well within their knowledge to determine when witnesses lie). The matters assessed were not issues of admissibility of expert testimony on false confessions; instead they were issues of admissibility on areas of sexual abuse reporting, rape trauma syndrome, and revived repressed memories. See *id.*; see also *Commonwealth v. Crawford*, 718 A.2d 768, 773 (Pa. 1998) (holding expert testimony on revived repressed memories inadmissible); *Commonwealth v. Dunkle*, 602 A.2d 830, 836–38 (Pa. 1992) (holding reasons why children don't report sexual abuse right away is inadmissible); *Commonwealth v. Gallagher*, 547 A.2d 355 (Pa. 1988) (holding expert testimony on rape trauma syndrome inadmissible); *Commonwealth v. Seese*, 517 A.2d 920 (Pa. 1986) (holding testimony that children rarely lie about sexual abuse inadmissible).

161. See Nesterak, *supra* note 12 (summarizing Psychology Professor Saul Kasin's opinion on detrimental effects falsely confessing has on trial and explaining lay people do not intuitively understand concept of false confessions).

162. See *Alicia*, 92 A.3d at 763–64 (stating cases Alicea cites in support of his argument that expert testimony should be admissible). Alicea presented three cases, but the court only stated the cases' facts and holding without analysis. See *id.*; see also, e.g., *United States v. Hall*, 93 F.3d 1337 (7th Cir. 1996); *Boyer v. State*, 825 So. 2d 418 (Fla. Dist. Ct. App. 2002); *Miller v. State*, 770 N.E.2d 763 (Ind. 2002). For a further discussion of the facts and holdings of the cases Alicea cited in his brief, see *supra* note 141.

163. For a discussion of how the cases Alicea cited were more on point than the cases relied upon by the majority, see *supra* note 141.

four cases from other jurisdictions that held expert testimony on false confessions were inadmissible (albeit for different reasons), the court relied most heavily on *Benally*.<sup>164</sup> The court found it persuasive that general testimony on false confessions was inadmissible because it usurped the jury's credibility-assessing role.<sup>165</sup> However, in reaching its conclusion, the court failed to note the exception acknowledged in *Benally* and cited in Alicea's brief.<sup>166</sup> The court in *Benally* stated "expert testimony regarding the voluntariness of a confession is admissible when the expert will testify to the existence of the defendant's identifiable medical disorder that raises a question regarding the defendant's cognitive voluntariness."<sup>167</sup> To support this exception, the court cited *Hall*, which Alicea also relied upon in his brief.<sup>168</sup>

The court in *Hall* determined that expert testimony on false confessions was admissible because the testimony served as the basis of the accused's defense.<sup>169</sup> The defendant argued that his personality disorder

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164. See *Alicia*, 92 A.3d at 764 (stating that "[a]fter careful review of relevant" case law, it agreed with *Benally*'s holding that expert testimony on false confessions impermissibly invaded jurors' role as "exclusive arbiter of credibility"); see also *United States v. Benally*, 541 F.3d 990 (10th Cir. 2008) (holding expert testimony on false confessions encroaches on jurors' credibility assessing function).

165. See *Alicia*, 92 A.3d at 764 (stating agreement with Tenth Circuit); see also *Benally*, 541 F.3d at 994 (holding expert testimony on false confessions was inadmissible). In reaching its conclusion, the *Benally* court first restated the defendant's argument that the expert testimony was going to be about false confessions generally and not about that specific case. See *id.* at 993-94. The court then stated that the testimony would inevitably encroach on the jury's role to make credibility assessments, because the testimony would signal to the jury to disregard the confessions and believe the defendant's argument that it was false. See *id.* at 995. Next, the court noted that the prejudicial effect of the testimony would substantially outweigh its probative value; therefore, it was inadmissible under FED. R. EVID. 403. See *id.* See generally FED. R. EVID. 403. Finally, the court looked at an exception to the bar on expert testimony regarding false confessions for when a medical disorder raises a question of cognitive voluntariness, but determined this was inapplicable because the defendant did not identify a medical disorder he was suffering from. See *Benally*, 541 F.3d at 996.

166. See *Benally*, 541 F.3d at 996 (noting exception to bar on expert testimony regarding false confessions for when defendant has identifiable medical disorder that raises question of cognitive voluntariness). In *Alicia*, the court stated that it was in agreement with the Tenth Circuit, however it failed to note the exception the Tenth Circuit addressed in *Benally* and its applicability to Alicea. See *Alicia*, 92 A.3d at 764.

167. See *Benally*, 541 F.3d at 996 (stating exception to bar on expert testimony regarding false confessions). This was ultimately inapplicable to the defendant in *Benally* because he did not identify a medical condition that contributed to his decision to confess. See *id.*

168. See *id.* (citing *United States v. Hall*, 93 F.3d 1337, 1345 (7th Cir. 1996)); see also *United States v. Shay*, 57 F.3d 126 (1st Cir. 1995) (holding defendant was entitled to present expert testimony that he suffered from mental disorder that caused him to tell self-incriminating lies).

169. See *Hall*, 93 F.3d at 1345 ("The government is entitled to argue its version of these facts to a jury, in support of its theory about the validity of the confession, but Hall was entitled to present his own theory to them as well . . ."). The pro-

made him more susceptible to suggestion and caused him to falsely confess.<sup>170</sup> This argument is extremely similar to the one Alicea advanced.<sup>171</sup> Alicea argued that the expert testimony would have been used to prove that he was told to “take the fall for the real perpetrator.”<sup>172</sup> He also argued that the testimony would “provide a number of clues indicating it [was] a false confession” because he is of “low intelligence and has been an SSI disability beneficiary due to mental health issues most of his life.”<sup>173</sup> This is exactly the exception laid out in *Benally* and *Hall*: Alicea was of low intelligence and suffered from mental health issues that raised a question of cognitive voluntariness, and this susceptibility was the heart of his defense.<sup>174</sup> Because the court failed to acknowledge this exception both in its discussion of *Benally* and in Alicea’s arguments, the court’s reliance on *Benally* and *Hall* was misplaced.<sup>175</sup>

#### B. Alicia at Odds with Recent Pennsylvania Precedent

The dissent’s reasoning for affirming the superior court’s decision was more persuasive than the majority’s basis for reversing and remand-

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posed testimony was about the defendant’s mental condition, subsequent “susceptibility to [ ] interrogation techniques,” and capability of confessing to a crime he did not commit. *See id.* at 1341, 1345. This went to the “heart of [the] defense” because the defendant’s entire argument was that because of his personality disorder, he confessed to a crime he did not commit to gain approval from law enforcement officers. *See id.* at 1345.

170. *See id.* at 1341 (stating that defendant’s mental health condition was that he suffered from “high level[s] of susceptibility,” as well as “attention-seeking behavior[s],” which was why he falsely confessed to gain officers’ approval).

171. *See Alicia*, 92 A.3d at 756–57 (noting Alicea’s below-average IQ score as well as mental health issues as basis for confession). For a further discussion of the medical disorder Alicea cites as why he false confessed, see *infra* note 173.

172. *See id.* (internal quotation marks omitted) (noting two witnesses used against him originally thought someone else was guilty).

173. *See id.* (internal quotation marks omitted) (summarizing Alicea’s defense as to why he falsely confessed). Alicea’s IQ score was 64, which put him in the mentally retarded range; *see also* ROSA EHRENREICH & JAMIE FELLNER, HUMAN RIGHTS WATCH, *Mental Retardation: An Overview*, in BEYOND REASON: THE DEATH PENALTY AND OFFENDERS WITH MENTAL RETARDATION (Malcom Smart & Cynthia Brown eds., 2001), available at [http://www.hrw.org/reports/2001/ustat/ustat0301-01.htm#P206\\_25341](http://www.hrw.org/reports/2001/ustat/ustat0301-01.htm#P206_25341) [<https://perma.cc/9KGD-VE73>] (stating that individuals with IQ below 70 classify as mentally retarded).

174. *See United States v. Benally*, 541 F.3d 990, 996 (10th Cir. 2008) (acknowledging exception to bar on expert testimony regarding false confessions when defendant has identifiable medical disorder that raises question to his cognitive voluntariness); *see also Hall*, 93 F.3d at 1345 (holding expert testimony on false confessions is admissible when it goes to heart of defense); *United States v. Adams*, 271 F.3d 1236, 1246 (10th Cir. 2001) (establishing exception for when there was “no question about the voluntariness of the confessions”).

175. *See Alicia*, 92 A.3d at 763–64 (omitting discussion of *Benally* exception as well as failing to acknowledge expectation of its application when raised by Alicea, establishing basis for reversing and remanding).

ing.<sup>176</sup> Specifically, the dissent argued the court should have adopted an approach similar to that of *Walker*.<sup>177</sup> This approach would leave issues of admissibility within the sole discretion of the trial court and set the standard that psychological expert testimony is not per se inadmissible in Pennsylvania.<sup>178</sup> The dissent emphasized the *Walker* court's finding that the life experiences and common sense of jurors are no longer enough to rely on for complex issues of perception and memory.<sup>179</sup> Instead, if the science is sound, probative, and necessary, a per se prohibition on such testimony is inappropriate.<sup>180</sup> The argument that expert testimony on psychological issues is an impermissible intrusion on jurors' roles as the sole arbiter of credibility is no longer sufficient.<sup>181</sup> Instead, the potential intrusion must be weighed against defendants' interest in offering probative, scientific evidence that could better inform the jurors' analysis.<sup>182</sup> Trial judges are better equipped to weigh the evidence and render fair outcomes related to experts' testimony; therefore, discretion should be left to the lower courts.<sup>183</sup>

The Pennsylvania Supreme Court decided *Walker* and *Alicia* on the same day, yet the two cases adopted contradictory approaches to the admissibility of psychological expert testimony.<sup>184</sup> *Walker* eliminated an absolute prohibition on expert testimony regarding eyewitness identification

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176. See *id.* at 765–66 (Saylor, J., dissenting) (summarizing dissent to majority's holding excluding expert testimony on false confessions).

177. See *id.* (arguing *Walker* decision represented judicial modesty which court should have followed). See generally *Commonwealth v. Walker*, 92 A.3d 766 (Pa. 2014) (eliminating exclusion on bar to expert testimony regarding eyewitness identification).

178. See *Alicia*, 92 A.3d at 765–66 (Saylor, J., dissenting) (stating effects following *Walker* would have on issue of admissibility of expert testimony on false confessions).

179. See *id.* (emphasizing modern changes call for admission of expert testimony on issues of memory as well as perception because they are oftentimes too far outside of jurors' life experiences to understand).

180. See *id.* (suggesting limiting admission of expert testimony on false confessions to situations where science behind expertise is sound and testimony is probative as well as necessary to educate jurors).

181. See *id.* (stating banning expert testimony on basis that it is an impermissible invasion on jurors' role as sole arbiter of credibility is not sufficient justification because issues of human behavior are often outside jurors' common sense knowledge).

182. See *id.* (suggesting need to balance intrusion on jurors' credibility assessing function against defendants' interest in admitting probative scientific testimony to aid jurors in their decision-making process).

183. See *id.* (arguing admissibility decisions should be left within discretion of trial court judges because they should be trusted to make fair decisions, especially when they know any inconsistencies will be addressed by appellate courts in development of precedential law).

184. See *id.* at 753; see also *Commonwealth v. Walker*, 92 A.3d 766 (Pa. 2014). The court in *Alicia* barred expert testimony on false confessions because it would impermissibly intrude upon jurors' role as sole arbiter of credibility. See *Alicia*, 92 A.3d at 764. The court in *Walker* admitted expert testimony on eyewitness identification because it did not improperly intrude upon juror's role as sole arbiter of

in Pennsylvania.<sup>185</sup> The court in *Walker* reasoned that expert testimony on psychological factors that impact eyewitness identification does not directly speak to the veracity of a witness, instead it teaches jurors how to assess witness credibility.<sup>186</sup>

The court should have interpreted the facts and arguments presented by Alicea in light of *Walker* and extended *Walker*'s elimination of a per se inadmissible rule and left decisions in the hands of the trial court.<sup>187</sup> As in *Walker*, *Alicia* involved a well-established psychological concept that many jurors may be unfamiliar with because it is outside their life experience and common sense.<sup>188</sup> Therefore, expert testimony could teach them how to assess a witness.<sup>189</sup> Additionally, the mechanisms of cross-examination and closing argument are similarly insufficient to protect Alicea's rights.<sup>190</sup>

#### V. PENNSYLVANIA'S HOLDING IN *ALICIA* RAISES THE STAKES FOR DEFENDANTS

The court's decision in *Alicia* set the standard in Pennsylvania that expert testimony on false confessions is per se inadmissible.<sup>191</sup> Litigants and practitioners, mostly those who represent criminal defendants, will

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credibility due to empirical research and acceptance of testimony in other jurisdictions. See *Walker*, 92 A.3d at 786.

185. See *Walker*, 92 A.3d at 786 (holding absolute ban on expert testimony regarding eyewitness identification no longer proper because it does not assist or improve jurors' role as sole arbiters of credibility).

186. See *id.* at 780 (stating reasoning of court in support of its holding to admit expert testimony on eyewitness identification). The court found this evidence would help the jury make credibility assessments because it has been shown that jurors have misconceptions regarding the problems with eyewitness identification, and the testimony in certain cases would help aid jurors' assessments by making them fully aware of the problems. See *id.*

187. See *id.* (emphasizing psychological expert testimony does not intrude upon jurors' credibility assessing function); see also *Alicia*, 92 A.3d at 765–66 (Saylor, J., dissenting) (suggesting decisions of admissibility be left within sole discretion of trial court judge and prohibition on general testimony about false confessions is misplaced). Rather, psychological expert testimony aids jurors' credibility assessing function. See *Walker*, 92 A.3d at 780.

188. See *Alicia*, 92 A.3d at 756–57 (proposing expert testimony on false confessions is area in which jurors are unfamiliar).

189. See *id.* (proposing expert testimony on false confessions should be admitted as jurors find it impossible to believe someone would falsely confess); see also Garrett, *supra* note 16, at 396 (explaining concept of false confessions).

190. See *Alicia*, 92 A.3d at 764 (noting traditional methods of cross-examination as well as argument are enough to present defense that individual falsely confessed); see also *Walker*, 92 A.3d at 786 (stating cross-examination as well as closing arguments are insufficient to teach jurors about problems in eyewitness identification).

191. See *Alicia*, 92 A.3d at 764 (holding expert testimony on false confessions is impermissible because it intrudes upon jurors' role as sole arbiter of credibility).

face an uphill battle attempting to admit expert testimony on false confessions in the wake of this decision.<sup>192</sup>

Following *Alicia*, a major defense has been taken away, and the suggested safeguards of cross-examination and argument are not sufficient protections in light of increased exonerations.<sup>193</sup> Between 2009 and 2014, there were twenty-six exonerations for individuals who had falsely confessed.<sup>194</sup> The majority of these exonerees were convicted, despite DNA evidence establishing their innocence.<sup>195</sup> As one researcher put it: “[A] confession is universally treated as damning and compelling evidence of guilt, it is likely to dominate all other case evidence and lead a trier of fact to convict the defendant.”<sup>196</sup> Given this information, why are we preventing defendants from informing jurors about the phenomenon of false confessions?<sup>197</sup> Pennsylvania emphasized that expert testimony on false confessions would intrude upon jurors’ roles as sole arbiter of credibility,

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192. See *id.* (noting how this decision falls in line with previous Pennsylvania decisions that have held expert testimony on various psychological issues is impermissible); see also *Commonwealth v. Spence*, 627 A.2d 1176, 1182 (Pa. 1993) (holding testimony used to attack rather than enhance credibility is inadmissible), *abrogated by* *Commonwealth v. Walker*, 92 A.3d 766 (Pa. 2014), *as recognized in* *Commonwealth v. Selenski*, 117 A.3d 1283 (Pa. Super. Ct. 2015); *Commonwealth v. Seese*, 517 A.2d 920, 922 (Pa. 1986) (holding testimony about class of individuals is inadmissible); *Commonwealth v. O’Searo*, 352 A.2d 30, 32 (Pa. 1976) (holding expert testimony addressing witness credibility is inadmissible). Because the expert testimony issue in *Alicia* was a matter of first impression in Pennsylvania, it set the standard, making it impossible to admit expert testimony on false confessions. See *Alicia*, 92 A.3d at 763, 764. See generally Amelia Hritz, Michal Blau & Sara Tomesko, *False Confessions*, CORNELL U. L. SCH. SOC. SCI. & L., [http://courses2.cit.cornell.edu/sociallaw/student\\_projects/FalseConfessions.html](http://courses2.cit.cornell.edu/sociallaw/student_projects/FalseConfessions.html) [<https://perma.cc/N4JZ-3KF3>] (last visited Mar. 22, 2016) (defining false confessions as “an admission to a *criminal act*” (emphasis added) (internal quotation marks omitted)).

193. Compare *Alicia*, 92 A.3d at 764 (noting safeguards of cross-examination as well as oral argument allow defendants to advance their arguments), with *Walker*, 92 A.3d at 788 (noting cross-examination in conjunction with argument are not sufficient safeguards).

194. See Garrett, *supra* note 16, at 395–96 (discussing rise in false confession exonerations from 2009 to 2014).

195. See *id.* (stating nearly half of false confession exonerees had DNA evidence that exclude them as suspects at time of conviction).

196. See Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 429 (1998) (footnote omitted) (defining dilemma false confessions presents for defendants); see also Nesterak, *supra* note 12 (quoting Saul Kassin, Psychology Professor, John Jay College of Criminal Justice, explaining how difficult it is for people to understand concept of false confessions).

197. See *Alicia*, 92 A.3d at 753 (holding expert testimony on false confessions is inadmissible). This holding prevents jurors from hearing arguments or theories regarding false confessions. See *id.*

but what about the defendants?<sup>198</sup> Should defendants not be allowed to teach jurors about a credibility issue they may not understand?<sup>199</sup>

Going forward, Pennsylvania should eliminate the per se prohibition on expert testimony regarding false confessions.<sup>200</sup> It should instead follow an approach similar to the *Walker* decision and leave admissibility decisions within the hands of the trial court.<sup>201</sup> At the very least, Pennsylvania should establish an exception for expert testimony when the defendant has a medical disorder that raises a question of cognitive voluntariness.<sup>202</sup> Psychological issues, such as that of false confessions, are often outside jurors' common sense and knowledge, and it is time for Pennsylvania to start acknowledging that.<sup>203</sup>

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198. *See id.* (holding made to protect jurors' role as sole arbiter of credibility).

199. *See id.* at 765 (Saylor, J., dissenting) (summarizing argument that jurors' life experiences should not be relied on to guide them with complex psychological issues).

200. *See id.* at 765–66 (stating approach that Pennsylvania should eliminate per se prohibition on expert testimony regarding false confessions, like it did for expert testimony on eyewitness identification).

201. *See id.* (stating argument that decisions of admissibility should be left to trial court); *see also Walker*, 92 A.3d at 788 (eliminating absolute ban on admission of expert testimony regarding eyewitness identification).

202. *See, e.g., United States v. Benally*, 541 F.3d 990, 996 (10th Cir. 2008) (noting exception to bar on expert testimony regarding false confessions for when medical disorder raises issue with cognitive voluntariness); *United States v. Adams*, 271 F.3d 1236, 1246 (10th Cir. 2001) (noting juries are not capable to resolve issues of cognitive voluntariness without expert testimony); *United States v. Hall*, 93 F.3d 1337, 1345 (7th Cir. 1996) (noting expert testimony on false confessions can be used when going to heart of defense).

203. *See Alicia*, 92 A.3d at 765 (stating complex psychological issues of human behavior are often outside of jurors' common knowledge).