

[CAPTION]

**MOTION FOR ORDER AND INSTRUCTION AUTHORIZING JURY
DETERMINATION OF THE VOLUNTARINESS, RELIABILITY AND CREDIBILITY
OF THE CONFESSION**

The Defendant, by counsel, respectfully requests this Court to issue an order granting the Defendant's request that his jury determine the voluntariness, reliability and credibility of the confession beyond a reasonable doubt, and that the Court so instruct the jury both in the preliminary and the final instructions. As grounds therefor, the defendant states as follows:

1. The defense has the right to litigate the voluntariness, reliability and credibility of his confession before the jury, regardless of the Court's determination of voluntariness.

Under the Indiana Constitution, the voluntariness of a confession must be proved beyond a reasonable doubt. Magley v. State, 335 N.E.2d 811, 817 (Ind. 1975); *overruled on other grounds*, 689 N.E.2d 1238 (Ind. 1997). Prohibiting the defendant from introducing evidence disputing the voluntariness, credibility and reliability of a confession is a violation of the defendant's right to present a defense. A confession is a violation of the defendant's right to present a defense under the 6th and 14th Amendments to the United States Constitution and Article I, Sec. 13 of the Indiana Constitution. Crane v. Kentucky, 476 U.S. 683 (1986); see also Holmes v. South Carolina, 126 S. Ct. 1727 (U.S. 2006).

2. Additionally, in Miller v. State, 770 N.E.2d 763 (Ind. 2002), the Indiana Supreme Court made it clear that the jury must also make its own determination as to the voluntariness of a confession:

The trial court must make a preliminary factual determination of voluntariness when assessing the statement's admissibility. The jury, however, remains the final arbiter of all factual issues under Article I, Section 19 of the Indiana Constitution. Even if the court preliminarily determines that the statement is voluntary and admits it for the jury's consideration, then the defendant is still entitled to dispute the voluntariness of the statement once it is presented to the jury. Although the court has previously determined voluntariness in connection with the statement's admissibility, the jury may find that the statement was involuntarily given. If the jury makes such a determination, then it should give it no weight in deciding the defendant's guilt or innocence. Id. at 772-73.

Under Miller, if the trial court finds that the statement is voluntary, the defendant is still entitled to dispute its voluntariness at trial. The Indiana Supreme Court's decision in Miller held that expert opinion regarding the psychology of police interrogation and its effect on those suffering from a mental illness are topics outside the common knowledge and experience of jurors and are therefore admissible. To hold otherwise would be to deny the defendant his constitutional right to present a defense. Miller held that the trial court had erroneously excluded testimony of a psychologist called by the defense as an expert in police interrogation and false confessions, and, given the prominence of the defendant's statement in the prosecution's case, exclusion of this evidence affected Miller's substantial rights and required reversal of his conviction. While the mental illness in issue in Miller was mental retardation, the Court's opinion was not limited to any specific mental disease.

See also Carew v. State, 817 N.E.2d 218, 288 (Ind.App. 2004)("Rule 704(b) does not prohibit general opinion testimony that coercive police techniques could increase the likelihood of a false confession from an individual with diminished intellectual functioning.").

3. Even if both the court and the jury find that the confession was voluntary, the credibility and reliability of a confession remain issues to be determined by the jury, not the trial court. Stanger v. State, 545 N.E.2d 1105 (Ind.Ct.App. 1989), *overruled on other grounds*, 689 N.E.2d 1238 (Ind. 1997).

WHEREFORE, the Defendant respectfully requests that the Court issue an Order authorizing the jury to determine the voluntariness, credibility and reliability of the confession, and further that the Court instruct the jury accordingly both in the preliminary and the final instructions.

(Signature)