**Exhibit “2”**

IN THE UNITED STATES DISTRICT COURT

IN THE WESTERN DISTRICT OF NORTH CAROLINA ASHEVILLE DIVISION

CIVIL ACTION NO. 1:13-cv-224

# MEMORANDUM IN SUPPORT OF DEFENDANTS’ MOTION IN LIMINE TO EXCLUDE PLAINTIFF’S EXPERT, SAUL KASSIN, FROM OFFERING OPINIONS OR EVIDENCE



ROBERT WILCOXSON,

Plaintiff,

vs.

BUNCOMBE COUNTY, BOBBY

MEDFORD, IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES, SAM CONSTANCE, IN HIS INDIVIDUAL CAPACITY, GEORGE SPRINKLE, IN HIS INDIVIDUAL CAPACITY, MICHAEL MURPHY, IN HIS INDIVIDUAL CAPACITY, JOHN ELKINS, IN HIS INDIVIDUAL CAPACITY, AND UNKNOWN JOHN DOE INVESTIGATOR, A/K/A RONEY HILLIARD, IN HIS

INDIVIDUAL CAPACITY,

Defendants.

NOW COMES the named Defendants, collectively, by and though undersigned counsel, and hereby submit this Memorandum in Support of

Defendants' Motion in Limine to Exclude Plaintiff’s Expert, Saul Kassin, Ph. D.,1 from offering any opinions or evidence; or, alternatively, exclude Dr. Kassin’s testimony, to the extent such opinions attempt to provide the jury with opinions, evidence, conclusions or inferences that any criminal defendant’s or witness’s testimony or recorded statement, in any form, is truthful or false.

# INTRODUCTION

Defendants anticipate that Plaintiff intends to call Saul Kassin, Ph. D, for expert trial testimony, regarding factors that experts consider that purportedly cause false confessions or false guilty pleas. In addition, it is anticipated that Dr. Kassin will attempt to offer an expert opinion as to the truth or falsity of the confessions of criminal defendants Teddy Isbell (“Isbell”), Larry Williams (“Williams”), Damian Mills (“Mills”), and Kenneth Kagonyera (“Kagonyera”). It is also expected that Dr. Kassin’s testimony will include opinions as to the truth or falsity of the guilty pleas of the aforementioned criminal defendants, and criminal defendant Robert Wilcoxson—now civil Plaintiff.

Simply stated, Dr. Kassin’s anticipated testimony and opinions will not assist or help a jury to understand the evidence of this case, or to determine any facts at issue; his anticipated testimony is not based on sufficient facts or data to support his opinions; the testimony and opinions are not the product of reliable

1 Defendants’ Index is “Exhibit 1” and Defendants’ Memorandum is “Exhibit 2.”

principles and methods; and Dr. Kassin does not reliably apply the principles and methods, relied upon in his report and his deposition testimony, to the specific facts of this case.

For the reasons stated in this Memorandum, and in the report submitted by Defendants’ Expert, Paul G. Cassell, Esq., (submitted herewith as “Exhibit 3”), this Court should exclude any testimony, opinion or evidence offered by Dr. Kassin.

# FACTS AND PROCEDURAL HISTORY

1. **Robert Wilcoxson’s Guilty Plea**

On August 15, 2002, Robert Wilcoxson (“Wilcoxson”) pled guilty to the charge of second degree murder for the death of Walter Bowman in open court in North Carolina. (Wilcoxson Dep. 152:22-158:1, see also State v. Wilcoxson, 00-

CRS-65008, Plea Transcript, August 15, 2002, Doc. 93-81.) Wilcoxson was represented by Asheville attorney, Jack Stewart. (Wilcoxson Dep. 146:10-15; see

also Doc. 93-75 (Wilcoxson Dep. excerpts).) At the time of the plea, Wilcoxson

represented the court that: the charges had been explained to him by his lawyer; he understood the nature of the charges and every element of each of the charges; he had discussed the possible defenses to the charges with his lawyer; he understood that he had a right to plead “not guilty” and be tried by a jury, and he understood that he was giving up that right; he understood that he was pleading guilty to second-degree murder which was a Class B-2 Felony, and he could receive up to

479 months in prison; he, in fact, plead “guilty”; he had other charges dismissed as a result of a plea arrangement with the State; and he entered the plea of his own free will, with full understanding of the same. (Doc 93-81, 3:18-6:9.) He also denied that anyone had “made any promises or threatened [him] in any way to cause [him] to enter [the] plea against [his] wishes.” Id.

Almost nine years later, on April 12, 2011, Wilcoxson was deposed by members of the North Carolina Innocence Inquiry Commission (“NCIIC”). Wilcoxson was asked, “Why did you plead guilty?” He responded:

Because . . . I was kind of stuck between a rock and a hard place. Meaning that I had some charges uh, some fleeing to elude charges, stolen property charge, a schedule two charge, and the lawyer that I had at the time, told me that they was gonna boxcar those numbers. Which he said would’ve came to 15 to 18 years, and I would’ve still had the murder case to fight. He told me if I take the plea that they would bring it down; they would drop all the other charges and give me 94 to 125 months; which was 7 years 11 months to 10 years 5 months. I had already been in the county for 2 years and some change. So that was telling me I was going home in 5 years. Plus, I had a daughter, you know what I mean, a daughter on the way. Because my daughter was still in the womb when I got incarcerated, you know. I never had a bond so I never got a chance to be home with her. And there was a chance of me losing my whole life to the, to the system . . . probably catching a life sentence or a death sentence . . . and she wouldn’t have a father for the rest of her life. So it was either . . . go with the flow and get as less time as I can, or still remain and claim my innocence but, you have a life sentence . . . and then my daughter would grow up without a father. [ . . . .] That was the reason for me taking the plea. If she wasn’t

born, I probably would be in here right now with a life sentence. Because I wouldn’t have took the plea.

(April 12, 2011 Deposition of Robert Wilcoxson by the NCIIC, herein after “NCIIC Dep.,” submitted herewith as “Exhibit 4,” pp. 14-15.)

Wilcoxson’s rationale was virtually identical when he provided testimony at before a three judge panel on September 20, 2011. (NCIIC Sp. Session Buncombe Cnty. Crim. Sup., Sept. 20, 2011, submitted herewith as “Exhibit 5,” 891:17- 892:2.) Prior to his plea on August 15, 2002, Wilcoxson had the opportunity to consult with his attorney and receive discovery, including his co-defendants’ statements and confessions, witness statements, and the Buncombe County Sheriff’s Office investigative file regarding the second degree murder charge against Wilcoxson arising from the investigation of the Walter Bowman homicide. (Wilcoxson Dep. 148:16-22, 287:22-25; see also Doc. 93-1, Buncombe County

Brief in Support of Summary Judgment, “Facts” (Wilcoxson also had the opportunity to confront co-defendant Larry Williams in April 2002).) On September 22, 2011, pursuant to N.C. Gen. Stat. § 15A-1469(A), a three judge panel determined that Wilcoxson proved by clear and convincing evidence that he was innocent of the murder of Walter Bowman on September 18, 2000. (See Id.

“Procedural History.”) On August 9, 2013, Wilcoxson filed the 42 U.S.C. § 1983 action before this Court. Id.

# Saul Kassin, Ph.D

* 1. **Dr. Kassin’s Assignment and Qualifications**

Dr. Kassin was asked to:

review materials related to the 2002 guilty plea of Robert Wilcoxson to the murder of Walter Bowman, and to provide expert testimony generally regarding the factors that may cause individuals to falsely implicate themselves and others in a crime, and the factors that can cause an innocent person to plead guilty to a crime he did not commit. [He] was also asked to assess the specific factors that affected Robert Wilcoxson’s decision to plead guilty.

(Dr. Kassin’s Report, Feb. 21, 2015 (“Kassin Report”) submitted herewith as “Exhibit 6.”)

Dr. Kassin is presently a “Distinguished Professor of Psychology” at the John Jay College of Criminal Justice of the City University of New York. (Kassin Report, Ex.5, p.1.) He holds himself out as an expert “on the social psychology of interviews, interrogations and guilty pleas.” Id. Dr. Kassin does have an extensive

history of professional qualifications and he has published research regarding false confessions. Id. at 1-3. Dr. Kassin testified that he has studied the psychological

foundations that underlie the opinions he has in this case for 37 years. (Kassin Dep. (“Kassin”) 217:6-19, submitted herewith, in full, as “Exhibit 7.”) He testified that these principles of psychology are accepted in the field of social psychology and that experimental studies are an accepted methodology in the field of social psychological research. (Kassin 217:20-9, 218:20-219:23.) Dr. Kassin has not

been tendered and accepted as an expert in any state or federal court in North Carolina. (Kassin 45:21-24.)

# Dr. Kassin’s Report, Opinions and Deposition Testimony

Dr. Kassin stated in his deposition testimony that he has not been asked to form additional opinions about the case, other than those expressed in his written report. (Kassin 10:3-11.) Plaintiff reserved the right to supplement Dr. Kassin’s report during Dr. Kassin’s deposition, but no supplement has been provided to date. (See Kassin 10:15-18.) Dr. Kassin testified that he has not made any

analysis regarding the law enforcement interrogation practices in this case. (Kassin 80:19-81:7.)

Dr. Kassin specifically stated that he has not formed an opinion regarding whether any of the confessions by Wilcoxson’s co-defendants were false. (Kassin 103:3-9, 205:11-22.) Dr. Kassin has never evaluated Wilcoxson, he has never met Wilcoxson and he has never met any of the witnesses, defendants or claimants related to this case. (Kassin 20:8-17; see also Kassin 158:8-10, 211:15-212:3 (“I

have not evaluated these interrogations and confessions, I don’t know the facts surrounding those statements.”).) With respect to the testimony of pertinent criminal attorneys or criminal defendants, Dr. Kassin has only reviewed the written transcripts of attorney Jack Stewart and Plaintiff Robert Wilcoxson. (Kassin 58:11-19, 158:8-10, 172:4-14.) Dr. Kassin has not listened to or seen any of the

witnesses’, defendants’ or claimants’ testimony. (Kassin 59:3-12.) Notwithstanding, Dr. Kassin stated that, to his knowledge, risk factors for false confessions like age and mental health were not present with Wilcoxson who was in his early 20’s at the time of his guilty plea. (Kassin 86:2-25.) Further, Wilcoxson did not confess in this case. (Kassin 95:20-96:12.)

Dr. Kassin testified stated that “he did not actually do a full analysis” of the conditions under which Wilcoxson pled guilty and his four co-defendants implicated themselves. (Kassin 206:7-13.) Further, he did not read documents pertaining to the guilty plea negotiations. (Kassin 206:13-14.) He “simply looked at the information that Wilcoxson was faced with and drew from the literature that [he] had reviewed.” (Kassin 206:13-17.) Dr. Kassin also testified, “I did not ask for more information. This was sufficient given the nature of the opinions that I gave, which is here are some of the known risk factors in producing false confessions and then in this producing false guilty pleas.” (Kassin 175:21-176:1) He explained that his purpose was limited to “essentially trying to educate the system about why it is if [Wilcoxson] were innocent he would have given a false guilty plea, why would he have done that under the circumstances. For that I don’t need to talk to him, in fact, I never talk to defendants.” (Kassin 176:13-19; see

also Kassin 176:24-177:3 (intending to “to educate the court about what factors

would increase the likelihood that even an innocent person would behave like a

guilty person and plead guilty.”).) Dr. Kassin testified that it is not his role to tell the jurors whether a particular guilty plea was true or false, but that his goal is “to present the jury with the kinds of tools and information that they can make that decision with a greater base.” (Kassin 224:21-225:6.)

Earlier in his deposition, however, Dr. Kassin also testified that the analysis of data of false confessions “may or may not be” applicable to Wilcoxson’s guilty plea. (Kassin 103:10-13.) He also testified that “the same pressures apply to a guilty Mr. Wilcoxson as they do an innocent Mr. Wilcoxson.” (Kassin 205:1-5.) Further, Dr. Kassin is not aware of any study where an individual is accused of a serious crime but also has some other unrelated charges pending as Wilcoxson and his co-defendants did in this case. (See Kassin 137:3-13.) Regarding whether Dr.

Kassin had opinions about the risk factors for false confessions or guilty pleas applying to the facts of this case, Dr. Kassin stated:

“Well, the literature that I described I think stands intact and its relevance to this case is an empirical question. I think that’s for a judge or a jury to determine whether it’s relevant. Again, I haven’t immersed myself in the case facts to tell you point by point whether the literature applies to this case on this point.”

(Kassin193:5-17.)

When testifying about interrogation methods, including physical threats, physical abuse, verbal threats, or promises of leniency or immunity from prosecution, Kassin admitted, “I don’t think it takes a psychologist to figure out

that those are aspects of pressure, those are the kinds of pressure that would be brought to bear that could put an innocent person at risk to give a false confession .

. . .” (Kassin 71:19-72:9.)

Dr. Kassin also referenced a field experiment where he described having prisoners recite true confessions and false confessions to determine later whether individual participants could decipher the difference between the two. (Kassin 34:12-21, 35:19-22.) He indicated that he did not involve trained professionals in the assessment of the confessions because:

“[p]art of the reason we almost didn’t need to is that there has been research showing that whether the trained professional is a robbery investigator, a polygraph examiner, a psychiatrist, a judge, or a customs inspector .

. . Secret Service were tested in one study as well. There is a very low ceiling on people’s ability to detect deception and to do so with accuracy.”

(Kassin 34:12-21, 35:19-22.) (referring to Ekman & O’Sullivan (1991) and Kassin, Meissner & Norwick (2005) in his deposition testimony.) More specifically, Dr. Kassin testified that, on average, people are 54 percent accurate at making a judgment regarding the truth or falsity of a confession, regardless of their background, training or field of expertise. (See Kassin 35:23-36:25.)

# ARGUMENT

The admission of an expert opinion is governed by Federal Rule of Evidence 702, which states:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

As the United States Supreme Court explained in Daubert v. Merrell Dow

Pharmaceuticals, Inc., 509 U.S. 579 (1993), Rule 702 imposes a duty on trial

courts to act as “gatekeepers” to ensure that speculative and unreliable opinions do not reach the jury. Daubert, 509 U.S. at 589 n.7. The overall objective of the

gatekeeping requirement is to make certain that expert witnesses employ in the courtroom the “same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152

(1999). The trial court’s gatekeeping role is especially significant as “expert witnesses have the potential to be both powerful and quite misleading” because of the difficulty in evaluating their opinions. Cooper v. Smith & Nephew, Inc., 259

F.3d 194, 199 (4th Cir. 2001) (citations omitted); see also Daubert, 509 U.S. at

595.

To fulfill its role as gatekeeper, a trial court must determine whether the expert has the requisite qualifications to offer the opinions he provides. Poulis-

Minott v. Smith, 388 F.3d 354, 359 (1st Cir. 2004). The trial court must also

examine the expert’s principles and methods, as well as the application of the facts to such methods to ensure they meet the reliability requirements under Rule 702. United States v. Johnson, 617 F.3d 286, 294 (4th Cir. 2010). Finally, the court

must “ensure the relevancy of expert testimony,” meaning that it must determine whether the testimony will assist the trier of fact. Daubert, 509 U.S. at 591.

In all cases, the proponent of the expert witness bears the burden of establishing that the expert’s testimony satisfies the qualification, reliability, and helpfulness requirements of Rule 702 and Daubert. See Daubert, 509 U.S. at 592

1. 0; see also Maryland Cas. Co. v. Therm-O-Disc, Inc., 137 F.3d 780, 783 (4th

Cir. 1998).

Specifically, with regard to expert testimony for false confessions, courts frequently refuse to admit testimony from experts because jurors are capable of recognizing coercive tactics, inconsistent statements, voluntariness and truthfulness, and such testimony from experts is more likely to confuse the jury than help them with a decision clearly within their province. See e.g., Kogut v.

City of Nassau, 2013 U.S. Dist. LEXIS 102198 (E.D.N.Y. July 22, 2013) aff’d

Kogut v. County of Nassau, 2015 U.S. App. LEXIS 7934, \*1, 30 (2d Cir. May 14,

2015); People v. Rosario, 20 Misc. 3d 401, 405; 862 N.Y.S.2d 719,722 (Sup. Ct.

Queens Co. 2008) (citations omitted); Commonwealth v. Robinson, 449 Mass. 1,

10; 864 N.E.2d 1186, 1190 (2007).

Here, A) Dr. Kassin’s anticipated testimony regarding factors that experts consider that purportedly cause false confessions or false guilty pleas will not assist or help a jury to understand the evidence of this case, or to determine any facts at issue; B) Dr. Kassin’s anticipated testimony is not based on sufficient facts or data to support his opinions; C) his testimony and opinions are not the product of reliable principles and methods; and D) Dr. Kassin does not reliably apply the principles and methods, relied upon in his report and his deposition testimony, to the specific facts of this case.

# Dr. Kassin’s proposed testimony will not assist the trier of fact and/or the trier of fact is equally competent to determine the factors that may or may not cause false confessions or false guilty pleas

Dr. Kassin’s proposed testimony fails the first requirement for admissibility under Rule 702 of the Federal Rules of Evidence because, even if this Court accepts that Dr. Kassin does have scientific, technical, or other specialized knowledge, such knowledge will not help the trier of fact in this case understand evidence or determine a fact at issue. See Fed. R. Evid. 702; see also

United States v. Belyea, 159 Fed. Appx. 525, 529 (4th Cir. 2005) (“Rather than

making broad generalizations about evidentiary value, a court must determine whether expert testimony will help the jury, given the facts in issue in the particular case.”)

Dr. Kassin’s testimony has been excluded for this and similar reasons in other cases, even though false confessions may be counter-intuitive to a juror. See

Kogut v. City of Nassau, 2013 U.S. Dist. LEXIS 102198 (E.D.N.Y. July 22, 2013)

aff’d Kogut v. County of Nassau, 2015 U.S. App. LEXIS 7934, \*1, 30 (2d Cir.

May 14, 2015) (affirming earlier this month, without specific analysis of the trial court’s exclusion of Dr. Kassin, but explaining that the trial court did not abuse its discretion regarding the admissibility of expert testimony). In Kogut, the Eastern

District of New York disagreed with the plaintiff’s assertion that “Dr. Kassin's testimony was necessary to help the jury evaluate the evidence and put the Kogut confession into perspective,” when the trial court denied the plaintiff’s motion for a new trial. Kogut, 2013 U.S. Dist. LEXIS 102198 at \*20. Quoting a conference

held earlier in the case, Kogut held:

‘While Professor Kassin has some special training in psychology and police techniques regarding false confessions, his knowledge, background and proffered testimony do not meet the criteria under Rule 702. His qualifications are impressive but the facts and data that he relied upon are weak. The principles and methods are difficult to relate to the issues we have here. **Essentially, this is an area that the jurors can decide for themselves**. The jury can determine if Kogut was exhausted, high, or submitted to constant clues given to him by Detectives Volpe, Sirianni, and Dempsey, or that Kogut believed he failed the test, was terrified of the detectives and finally that he was worn down by refusals to allow him to call a lawyer or his girlfriend.’

Kogut v. City of Nassau, 2013 U.S. Dist. LEXIS 102198, at \*21 (quoting

Sept. 6, 2012, Tr.6) (emphasis added). Kogut also reasoned, in performing its

gatekeeping function and excluding Dr. Kassin’s testimony, that federal courts “have consistently considered, and excluded, expert testimony on the topic of false confessions.” Id. at \*22 (citing United States v. Deputee, 349 F. App'x 227, 229

(9th Cir. 2009); United States v. Mamah, 332 F.3d 475, 475 (7th Cir. 2003);

United States v. Mazzeo, 205 F.3d 1326, 2000 WL 323032, at \*2 (2d Cir. 2000);

Yang Feng Zhao v. City of N.Y., No. 07-CV-3636, 2008 U.S. Dist. LEXIS 67044,

2008 WL 3928238, at \*2 (S.D.N.Y. Aug. 20, 2008); Bell v. Ercole, No. 05-CV-

4532, 2011 U.S. Dist. LEXIS 122314, 2011 WL 5040436, at \*13 (E.D.N.Y. Oct.

21, 2011) (excluding Dr. Kassin under Daubert); Commonwealth v. Robinson, 449

Mass. 1, 5-6, 864 N.E.2d 1186, 1189-90 (2007) (same)).

In the case at bar, Dr. Kassin admits that he “simply looked at the information that Wilcoxson was faced with and drew from the literature that [he] had reviewed.” (Kassin 206:13-17.) He “did not ask for more information. [He thought] [t]his was sufficient given the nature of the opinions that [he] gave, which is here are some of the known risk factors in producing false confessions and then in this producing false guilty pleas.” (Kassin 175:21-176:1) Despite repeated testimony stating that he believes he will be able to educate the court or the jury about such risk factors, he admitted that that the analysis of data of false confessions “**may or may not be**” applicable to Wilcoxson’s guilty plea. (Kassin

103:10-13) (emphasis added); see also Kassin 205:1-5 (“the same pressures apply

to a guilty Mr. Wilcoxson as they do an innocent Mr. Wilcoxson.”).) Moreover, he

**doesn’t “think it takes a psychologist to figure out**” that interrogation methods,

including physical threats, physical abuse, verbal threats, or promises of leniency or immunity from prosecution are “aspects of pressure.” (Kassin 71:19-72:9.) (emphasis added). When conducting his own field experiment, he even appears to be aware that people, on average, are slightly more accurate than flipping a coin at making a judgment regarding the truth or falsity of a confession, regardless of their background, training or field of expertise. (See Kassin 34:12-21, 35:23-36:25.) In

this case, a jury will likely be presented with the in-person trial testimony of the named Defendants, Wilcoxson and Wilcoxson’s co-criminal defendants from the underlying criminal cases. All trial witnesses will be subject to thorough examination and cross-examination during their testimony. Even if Wilcoxson’s co-criminal defendants do not appear for trial or cannot be located, their video depositions have been taken throughout discovery, where they were subject to cross-examination. In addition, the jury will also likely be presented with exhibits that comprise the entire Buncombe County Sheriff’s Office’s investigative file into the Bowman homicide, including officers’ typed notes and criminal defendants’ and witness’ handwritten statements. Surely, the evaluation of this evidence is within the providence of the jury. And, given the numerous cases around the

country that prohibit expert testimony regarding false confessions and guilty pleas because jurors are capable of deciding for themselves whether a suspect had to endure coercive law enforcement tactics, whether criminal defendants or witnesses present inconsistent statements, and whether an individual has provided a truthful or untruthful statement, any testimony from an expert suggesting the risk factors that experts review for essentially the same analysis is more likely to confuse the jury than help them. Significantly, it also opens the door to highly suggestive testimony regarding the weight or credibility of evidence in the case by a purported expert who has done little more than review the Complaint or the testimony of Plaintiff Wilcoxson and his criminal attorney. (See Kassin 20:8-17, 58:11-19,

158:8-10, 175:21-176:1, 206:7-17, 211:15-212:3.) Accordingly, Dr. Kassin should be prohibited from providing any testimony or opinion to the factfinder in this case.

# Dr. Kassin’s anticipated testimony is not based on sufficient facts or data to support his opinions

“To be relevant, an expert's opinion must be based on ‘sufficient facts or data,’ and the witness must be able to ‘appl[y] the principles and methods reliably to the facts of the case.’” United States v. Redlightning, 624 F.3d 1090, 1111 (9th

Cir. 2010) (quoting Fed. R. Evid. 702.) Again, Dr. Kassin admits that he has “not evaluated these interrogations and confessions, I don’t know the facts surrounding those statements.” (Kassin 211:15-212:3 (referring to all of the relevant

interrogations and confessions in the case except for, perhaps, the deposition testimony of Wilcoxson); see also Kassin 20:8-17, 58:11-19, 158:8-10, 175:21-

176:1, 206:7-17.) Indeed, it is hard to believe that it could be “clear” to Dr. Kassin that “a number of risk factors were present in this case that would lead an innocent young defendant like Robert Wilcoxson to plead guilty to a crime he did not commit” unless he simply accepted the Complaint, and Robert Wilcoxson’s and Jack Stewart’s deposition testimony, as true on its face. (See Kassin Report, Ex.5 ,

p. 14.) Kassin’s deposition testimony also overwhelmingly supports the conclusion that he does not have a sufficient basis to conclude, or even advise, about the factors that may or may not have surrounded Wilcoxson’s guilty plea. Id. at 16. Because it is clear that Dr. Kassin’s testimony is not based on sufficient

facts in the record, he should be excluded from providing any testimony or opinions in this case.

# Dr. Kassin’s anticipated testimony and opinions are not the product of reliable principles and methods

Kogut concluded that a review of Dr. Kassin's report in that case supported

the conclusion that his testimony was not the product of reliable principles and methods because Kassin wrote in his report, “‘While it is not possible to determine with precision the statistical prevalence of the problem, it is clear that false confessions occur . . . .’” Kogut, 2013 U.S. Dist. LEXIS 102198 at \*22-23

(internal citation omitted).

Interestingly, Kassin’s report submitted in this case on February 21, 2015, states, similarly, “While it is not possible to calculate a statistical prevalence rate, it is clear that false confessions have occurred with some degree of regularity ”

(Kassin Report, Ex. 5, p. 4.) As stated above, Dr. Kassin also testified that the analysis of data of false confessions “**may or may not be**” applicable to

Wilcoxson’s guilty plea. (Kassin 103:10-13.) (emphasis added). And, he had not “immersed” himself in the case fact to state “point by point whether the literature applies to this case on [a] point.” (Kassin193:5-17.)

To be clear, Dr. Kassin’s anticipated testimony should be excluded in its entirety for the same reasons set forth in Kogut regarding confessions and, in this

case, guilty pleas in particular. But, assuming, *arguendo*, that Dr. Kassin’s opinions are the product of reliable principles and methods regarding only confessions, Dr. Kassin acknowledges that Wilcoxson pled guilty, but did not confess in this case. (Kassin 95:20-96:12.) If it is Dr. Kassin’s belief that the analysis of data for false confessions may or may not apply to Wilcoxson’s guilty plea, then a jury would certainly be confused by Dr. Kassin’s testimony if he informed them about certain risk factors for confessions, but then the Court had to instruct the jury not to apply those risk factors to a guilty plea because it “may or may not” apply and is not the product of reliable principles and methods. Thus, again, Dr. Kassin’s anticipated testimony should be excluded in its entirety for the

same reasons set forth in Kogut and for the concern that his testimony will serve to

confuse, rather than help, the jury.

# Dr. Kassin does not reliably apply the principles and methods, relied upon in his report and his deposition testimony, to the specific facts of this case.

Assuming, *arguendo*, that the principles and methods that Dr. Kassin applied in his report and testimony are reliable, Dr. Kassin does not reliable apply those principles and methods to the specific facts of this case.

While Rule 702 (d) does not require an expert to know all facts of a case, it does require an expert to reliably apply the principles and methods utilized to the specific facts of the case. Fed. R. Evid 702. Dr. Kassin does not reliable apply his framework to the facts of this case in numerous respects. For the sake of brevity, two examples are explained here—one regarding the alleged confession(s) of Larry Williams and one regarding the alleged confession(s) of Teddy Isbell.

Dr. Kassin testified that he was not even aware that Wilcoxson had the opportunity to confront Larry Williams, with their lawyers present, on April 6, 2002, prior to Wilcoxson’s plea on August 15, 2002. (Compare Kassin 171:2-8

with Wilcoxson 148:16-22, 189:23-190:8, 287:22-25.) But, Dr. Kassin testified

that he reviewed Wilcoxson’s deposition. (Kassin 58:11-19, 158:8-10, 172:4-14.) Wilcoxson explained in his deposition that he asked Williams in April 2002, “How can you even speak in front of a jury, a courtroom, and some judges? You can’t

even tell the fake statement just with us four in a room.’” (Wilcoxson191:6-11.) This testimony by Wilcoxson—which appears to indicate that he believed that Williams was lying and would not be able to hold his story together in front of a jury—may have been a factor for Wilcoxson to consider in either going to trial or pleading guilty. Dr. Kassin, however, did not even consider this fact.

Dr. Kassin also cannot know whether Teddy Isbell—who is actually unnamed in Dr. Kassin’s report or in his deposition—was under the influence at the time of his interrogation, unless he took the Complaint as true, because he has not reviewed the transcript of any individual who has knowledge of that interrogation or the officers’ typed notes of that interrogation. (See Kassin 58:11-

19, 158:8-10, 169:25-4, 172:4-14; Kassin Report, Ex. 5, 14.) Dr. Kassin also does not know which interrogation that was, or how many subsequent interrogations Isbell attended—with counsel present—after the interrogation referenced in the report. The reason why Dr. Kassin does not know any of this is because he “did not ask for more information.” (Kassin 175:21-176.) Dr. Kassin did not think that he needed any more information to before he attempted to provide jurors with the “kinds of tools and information” that they can use to make the decision regarding whether a guilty plea is true or false. (Kassin 175:21-176:1, 224:21-225:6.) Since his deposition, Dr. Kassin has also not provided any supplemental report, and should not be allowed to do so now. (Kassin 10:15-18.)

For these reasons, and many more explained in Defendants’ Expert’s, Paul Cassell’s, report, Exhibit 2, Dr. Kassin has failed to reliably apply his principles and methods utilized in his report and deposition to the specific facts of the case. See Fed. R. Evid. 702; Daubert, 509 U.S. at 579. Thus, Dr. Kassin’s report and

deposition testimony fails to satisfy another essential element for the admission of his testimony or opinions before this Court under Fed. R. Evid. 702.

# CONCLUSION

For the above stated reasons, Defendants, collectively, respectfully request that the Court preclude Plaintiff’s expert, Saul Kassin, from offering any testimony or opinion in this matter. Alternatively, Defendants request that Dr. Kassin’s testimony be limited to only an explanation of the factors that experts have found should be considered in evaluating whether a confession is truthful or false, with a reservation of all of Defendants’ rights to dispute Dr. Kassin’s testimony to the extent that this Court deems just and proper.

This the 29th day of May, 2015.

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# CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing “Offer of Judgment” was served on the following by electronic notice through the Electronic Case Filing system of the U.S. Federal Court for the Western District of North Carolina at the following electronic addresses:

David S. Rudolf Attorney for Plaintiff [dsrudolf@rwf-law.com](mailto:dsrudolf@rwf-law.com)

This 29th day of May 2015.

/s/ John T. Jeffries John T. Jeffries

N.C. Bar. No. 22134