# IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA ASHEVILLE DIVISION

**CASE NO.: 1:13—00224**

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| **ROBERT WILCOXSON,**  **Plaintiff,**  **v.**  **BUNCOMBE COUNTY, et. al.**  **Defendants.** | **Plaintiff’s Memorandum in**  **Opposition to Defendants’ Motion to**  **Exclude Plaintiff’s Expert, Saul Kassin, From Offering Opinions or Evidence** |

NOW COMES Plaintiff Robert Wilcoxson, through undersigned counsel, and opposes Defendants’ Motion to Exclude Plaintiff’s Expert, Saul Kassin, From Offering Opinions or Evidence.

# INTRODUCTION

The heart of Plaintiff’s case is that although he is in fact innocent of the murder of Walter Bowman, the false confessions of his co-defendants and the false identification of him by Shaun Bowman, which were created as a result of Defendants’ misconduct, caused him to enter a guilty plea despite his innocence.

The jurors in this case will necessarily hear that four of Mr. Wilcoxson’s co- defendants allegedly confessed to being involved in the murder of Walter Bowman, and told the police that Robert Wilcoxson was involved. They will also hear that

Robert Wilcoxson subsequently pled guilty to second-degree murder relating to the death of Walter Bowman.1

Thus, at the time of deliberations, at least some (if not all) of the jurors will have to ask themselves the following questions: (1) why, if co-defendants Isbell, Williams, Mills and Kagonyera are truly innocent, did they confess, implicate Wilcoxson, and plead guilty to Bowman’s murder; and (2) why, did Robert Wilcoxson, an innocent man, plead guilty to Bowman’s murder?

The jurors will ask these questions because it is counterintuitive to the average person that an innocent man would confess to a murder he did not commit, let alone plead guilty to a murder he did not commit. To put it in common parlance, jurors will have a hard time “wrapping their minds” around this concept. As Dr. Kassin explained in his deposition, there is:

“much research demonstrating that the facts and figures about false confessions and police interrogations are counterintuitive, that the average person doesn't know it as a matter of common sense.

\* \* \* \*

. . . it's not part of people's common sense. People don't believe that somebody would confess to a crime they did not commit, in the same way that they don't believe that people would take other actions that are not self-serving.”

1 Despite the unanimous judgment of a three-judge panel of North Carolina Superior Court Judges that Robert Wilcoxson is innocent of the murder of Walter Bowman by clear and convincing evidence (Exhibit A, attached), Defendants have made it clear during the depositions that they intend to argue, if permitted to do so, that Robert Wilcoxson is guilty of that murder. They have also made it clear that they intend to argue that Mr. Wilcoxson’s co-defendants are guilty of that murder, and that their confessions, which implicated Mr. Wilcoxson, were true.

Kassin Deposition, attached as Exhibit B, pp. 209:24-210:3; 223:3-8.

Defendants’ proposed expert, Professor Cassell agrees that “it isn't common sense; correct.” Cassell Deposition, *Gonzalez v. County of Los Angeles*, p. 154:18- 20, attached as Exhibit C.

To answer these questions logically and fairly based upon the evidence in the case, the jurors need to have some knowledge and understanding of the basic psychological factors that underlie the known phenomena of false confessions and false guilty pleas.2 Dr. Kassin’s testimony will assist the jury in this regard. That is Dr. Kassin’s recognized area of expertise, and that is what he proposes to testify about in this case. He will not be testifying about the truthfulness of any confession or guilty plea in the Walter Bowman homicide, or that any particular circumstance caused any particular statement or guilty plea to be false.

Nevertheless, in an effort to keep the jury in the dark about the factors that put innocent people at risk of confessing or pleading guilty to crimes they did not commit, Defendants completely mischaracterize Dr. Kassin’s proposed testimony. Defendants first assert that Dr. Kassin will testify “regarding factors that experts consider that purportedly *cause* false confessions or false guilty pleas.”

2 The DNA exonerations of the past two decades establish beyond any doubt that false confessions and false guilty pleas exist. Of the 325 cases in the Innocence Project’s database as of April 15, 2015, which are all cases of proven exonerations through DNA, approximately 25% involved false confessions. A number of these also involved false guilty pleas. Kassin 97:2-25

Defendant’s Memorandum In Support Of Defendants’ Motion To Exclude Plaintiff’s Expert, Saul Kassin, From Offering Opinions Or Evidence (hereinafter “Defendants’ Memorandum”), Doc. 113-2, p.2 (emphasis added). Defendants further assert 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.”

*Id*. (emphasis added).

This is not what Dr. Kassin testified to at his deposition. At no point did he assert that a factor “caused” a false confession. He was specifically asked whether he had any opinions as to the truth or falsity of (a) the co-defendants’ confessions,

1. the co-defendants’ guilty pleas, or (c) Robert Wilcoxson’s guilty plea. Dr.

Kassin responded that he did not. Kassin 103:5-9. “I never evaluated the interrogations or the confessions.” Id. at 159:2-3. Indeed, in explaining that the existence of false confessions is a factor that puts an innocent person at risk for entering a false guilty plea, Dr. Kassin went out of his way to make clear that he was not testifying about causation:

“the cautious researcher in me is quick to point out *that is not a causal statement. It's not a statement about false confession causing or not causing false guilty pleas ”*

Kassin 145:15-18. When specifically asked by Defendants’ counsel whether he would be trying to tell the jurors that a particular guilty plea was true or false, Dr. Kassin responded unambiguously:

*No*. I have never done that, I would not do that, it's not my role to do that, that's the jury's decision. *My goal would be to present the jury with the kinds of tools and information that they can make that decision with a greater base.”*

Kassin 224:25-225:6

The evidence is clear that Dr. Kassin is well qualified to assist the jury by providing information they can use to assess whether a particular confession or guilty plea is true or false. The risk factors identified by Dr. Kassin in his proposed testimony have been widely accepted in the field of psychology and among those scientists who study the psychology of false confessions and guilty pleas. The risk factors identified by Dr. Kassin in his proposed testimony are relevant to the evidence the jury will have to consider and the issues they will have to decide. Dr. Kassin’s testimony is based on solid social science, and will assist the jury in answering the questions that exist in this case. It is therefore admissible under Rule 702.

# Legal Argument

* 1. **Dr. Kassin’s Testimony is Admissible Under Rule 702 of the Federal Rules of Evidence**

In the aftermath of the Supreme Court’s decisions in *Daubert v. Merrell*

*Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993) and *Kumho Tire Co. v. Carmichael,* 526 U.S. 137 (1999), Rule 702 was amended in 2000. The current rule allows a witness “who is qualified as an expert by knowledge, skill, experience, training, or education” to testify in the form of an opinion *or otherwise* if:

1. 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*;

1. the testimony is based on sufficient facts or data;
2. the testimony is the product of reliable principles and methods; and
3. the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702 (emphasis added). “A district court is granted broad latitude in making its determination on the admissibility of proposed expert testimony. *Buser*

1. *Eckerd Corp*., 2015 WL 1438618 at \*2 (EDNC, March 27, 2015). See also *United States v. Gastiaburo,* 16 F.3d 582, 589 (4th Cir.1994) (“The trial judge has broad discretion under Rule 702.”). Moreover, “the rejection of expert testimony is the exception rather than the rule.” Buser, 2015 WL 1438618 at \*2.

In a recent case in the Eastern District of North Carolina, District Judge Flanagan explained the requirements relating to the admissibility of expert testimony:

“Courts have distilled the requirements of Rule 702 into two crucial inquiries: whether the proposed expert’s testimony is relevant and whether it is reliable.

\* \* \* \*

In order to be considered relevant, the proposed expert testimony must appear to be helpful to the trier of fact. *See Daubert,* 509 U.S. at 591–92. ‘Testimony from an expert is presumed to be helpful unless it concerns matters within the everyday knowledge and experience of a lay juror.” *Kopf v. Skyrm,* 993 F.2d 374, 377 (4th Cir.1993).

“ ‘[*T]he test of reliability is flexible’ and ‘the law grants a district court the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination.’*” *United States v. Wilson,* 484 F.3d 267, 274 (4th Cir.2007) (quoting *Kumho Tire,* 526 U.S. at 141–42). One factor pertinent to reliability is the proposed expert’s qualifications.

\* \* \*

Additional factors also bear on the reliability of the expert’s testimony. They may include: “(1) whether a theory or technique can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether a technique has a high known or potential rate of error and whether there are standards controlling its application; and (4) whether the theory or technique enjoys general acceptance within the relevant community.” *Tunnell v. Ford Motor Co.,* 245 F. App’x. 283, 286 (4th Cir.2007) (citing *Kumho Tire,* 526 U.S. at 149–50).”

*Buser*, 2015 WL 1438618 at \*2-3.

* 1. The Appropriate Method of Determining Reliability Under Rule 702 Depends on the Type of Expert Testimony Proffered

The appropriate method of determining whether proposed expert testimony is reliable necessarily varies depending on the subject matter. Expert testimony regarding subjects like DNA profiles, the identification of controlled substances, or

the causes of cancer in a particular population require the application of precise methodologies and standards, utilize statistical analyses, can be tested objectively, and have known or potential error rates. *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 593-94, 113 S.Ct. 2786, 296-97 (1993*).*

Other expert testimony which is commonly admitted in federal court, such as the particular accounting practices required by GAAP, do not involve the application of precise methodologies or statistical analysis, cannot be “tested objectively,” and do not have known or potential error rates. The same is true for expert testimony about psychological issues, such as the competency of a defendant to stand trial, or whether he knows right from wrong.

The courts have recognized this distinction. “[T]he measure of intellectual rigor will vary by the field of expertise and the way of demonstrating expertise will also vary In all cases, however, the district court must ensure that it is dealing

with an expert, not just a hired gun.” *Tyus v. Urban Search Management*, 102 F.3d 256, 263 (7th Cir. 1996).

With regard to expert testimony relating to psychology, the court in *Tyus* noted that such testimony “must be tested to be sure that the person possesses genuine expertise in a field and that her court testimony ‘adheres to the same standards of intellectual rigor that are demanded in [her] professional work.’” See also *Braun v. Lorillard Inc*., 84 F.3d 230, 234 (7th Cir. 1996).

In *United States v. Hall*, 93 F.3d 1337 (7th Cir. 1996), the Seventh Circuit described the methodology that is appropriate in evaluating the admissibility of expert testimony by a social psychologist regarding the risk factors relating to false confessions. The court set forth a three-pronged test. The first two prongs address the reliability of the proposed expert testimony. The third prong addresses the relevance of the proposed testimony; i.e, whether it will assist the jury. The three prongs are:

* + 1. First, the court must consider whether the work that the scientific expert has done meets the appropriate standards of intellectual rigor. Hall, 93 F.3d at 1342-43.
    2. Next, the court must determine whether the proffered testimony is based upon the expert's special skills. *Id*. at 1343-44.
    3. Finally, the court must determine whether the proffered testimony will assist the trier of fact to understand or determine a fact in issue. *Id*. at 13443.

Dr. Kassin’s proposed testimony meets all three criteria.

* 1. Dr. Kassin’s Testimony Meets the First Prong of the *Hall* Test - His Work on the Psychology of False Confessions Meets Any Reasonable Standard of Intellectual Rigor

Dr. Kassin has studied the basic psychological principles that underlie the phenomena of false confession and guilty pleas for more than 37 years. He has published college textbooks on both psychology and social psychology that discuss

3 As to this last factor, the court in *Tyus* concluded, “Social scientists in particular may be able to show that commonly accepted explanations for behavior are, when studied more closely, inaccurate. These results sometimes fly in the face of conventional wisdom.” 102 F.3d at 263.

these basic psychological principles. He has written or co-authored thirteen books, twenty-five book chapters, and over 90 peer-reviewed articles in scientific journals on various aspects of false confessions and guilty pleas. He has designed and conducted more than fifty field experiments, which have been used in hundreds of other field experiments around the world, and which have been published in peer- reviewed scientific journals. Kassin 24:21-34:5.

Defendants’ do not dispute that Dr. Kassin is one of the leading researchers and experts in the United States on the psychological factors that put innocent people at risk of confessing and or pleading guilty to crimes they did not commit.4 Although they attempt to temper their recognition of his substantial qualifications by stating that “*he holds himself out* as an expert ‘on the social psychology of interviews, interrogations and guilty pleas,’” the fact of the matter is that far from just “holding himself out,” Dr. Kassin is recognized by other experts in the field of social psychology as someone whose research and articles on these topics have been seminal in developing an understanding of the psychological underpinnings of false confessions and guilty pleas.

For example, the American Psychology-Law Society (AP-LS) has given Dr. Kassin its Award for Distinguished Contribution in 2014, and the American

4 Defendants admit that “Dr. Kassin does have an extensive history of professional qualifications and he has published research regarding false confessions.” Defendants’ Memorandum, p. 6. Their expert, Professor Cassell, concedes “Professor Kassin has a distinguished background and has published important research in the false confessions area.” Cassell Report, p. 22, fn. 111.

Psychological Association has given him its Presidential Citation in 2007. He is a Fellow of the American Psychological Association, the Association for Psychological Science, the American Psychology-Law Society, and the Society for Personality and Social Psychology. He has served on the Editorial Board of *Law and Human Behavior,* the flagship scientific peer-reviewed journal of the AP-LS for 30 years, and has been invited to lecture on false confessions to various professional groups and in various universities. Kassin Report, attached as Exhibit D, pp. 2-3.

Perhaps most relevant to his proposed testimony in this case, Dr. Kassin was selected by the AP-LS to be one of the co-authors of the seminal Scientific Review Paper, ‘‘*Police-Induced Confessions: Risk Factors and Recommendations*,’’ which was approved by the American Psychological Association (APA) and published in the peer reviewed journal *Law & Human Behavior.*5 This article, sometimes referred to as the “White Paper,” is only the second such paper to be authorized and approved by AP-LS in its 42-year history. The paper reviews all of the scientific literature and published studies on the subject of false confessions, and identifies what the relevant scientific community has now accepted as the risk

5 The rigorous review process that this review paper was subjected to before being approved by the APA is set forth in detail in Thompson, *An American Psychology-Law Society Scientific Review Paper on Police Interrogation and Confession,* a copy of which is attached as Exhibit E.

factors for false confessions. A copy of the Scientific Review Paper is attached as Exhibit E.

In short, Dr. Kassin’s intellectual rigor in studying false confessions is beyond question. Far from being a “hired gun,” Dr. Kassin rarely consults on cases, accepting only 1 or 2 out of every hundred he is asked to consider, and only agrees to consult on cases that raise issues related to his academic research. Kassin 14:6-9; 41:18-24. He is scrupulously honest. He refuses, for example, to offer opinions about the incidence or prevalence of false confessions in the criminal justice system, because “I think it's important to be honest about what we know and what we don't know, and what we don't know is the prevalence rate.” Kassin 70:4-7.

Dr. Kassin’s qualifications in the field of the psychology of false confessions are further summarized in his Curriculum Vitae, which is attached as Exhibit F, in his deposition testimony (Kassin 10:12-39:11), and in his report (Kassin Report, attached D, pp. 1-3).

* 1. Dr. Kassin’s Testimony Meets the Second Prong of the *Hall* Test - His Proposed Testimony Is Based Upon His Special Skills, Training and Experience

The second prong of the *Hall* test is that the expert’s testimony must be based upon his special skills, training and experience. In short, he must be applying his particular expertise to the topic upon which he proposes to testify.

Here, that topic is an explanation of the factors that place innocent people at risk of confessing and/or pleading guilty to a crime they did not commit, and the psychological processes that explain why these factors create that risk.

During his deposition, Dr. Kassin made clear on several occasions that his proposed testimony was based upon his special skills, training and experience in social psychology. For example, in explaining how he has identified the factors that place innocent people at risk of confessing to a crime they did not commit, Dr. Kassin stated:

“the literature as I view it begins with the foundation of basic psychology, and it moves from basic principles of psychology that have nothing to do with police interrogations, but rather the principles of reinforcement, reward and punishment, human decision making, social influence that have a bearing on this situation. Then the literature that I rely on has to do as well with laboratory and field experiments . . . Then it's only at the very top of what I think of as a pyramid of evidence where we look at actual cases involving known false confessions.”

Kassin 193:25-194:15. Dr. Kassin further explained:

“So what I learn about false confessions comes from an array of sources beginning with the foundations of basic psychology, working my way through laboratory and field experiments, and surveys and observational studies, and then working my way up to some of those DNA exoneration cases.”

Kassin 213:7-13. With regard to the factors that place innocent people at risk of pleading guilty, Dr. Kassin stated

“That again is based on a range of *basic psychology principles* that take us through *human decision making* and then those studies that I cited that are laboratory experiments, some involving the cheating

paradigm, and the database involving the DNA exonerations and other exonerations ”

Kassin 216:22-217:3. As to the differences between the factors that place innocent people at risk for false confessions and the factors that place innocent people at risk for false guilty pleas, Dr. Kassin explained:

“In looking at the difference between false confessions and false guilty pleas, and what the precise micro differences might be from one to the other it really is important, and maybe this gets at my perspective as a psychologist, to understand that *there's 100 years of research on the principles of reinforcement and human decision making, and the conditions under which people do what Nobel Laureate Herb Simon said when he referred to “satisficing*,” which is they don't make decisions that are optimal, they make decisions that are satisfying and sufficient given the constraints they face. . . .

Those are principles that, you know, we have found them to be true not only in a laboratory but in work settings and military settings and school settings; *these are laws of human nature*. While I appreciate that there are differences from one situation to another, from my perspective we're looking at broader, more *core principles of human nature* that transcend that.”

Kassin 137:20-138:19.

In sum, Dr. Kassin’s proposed testimony about the factors that place innocent people at risk for confessing or pleading guilty to a crime they did not commit, is based on his special skills -- his training and experience in social psychology, his knowledge of the literature relating to this topic, his involvement with and knowledge of the experiments relating to this topic, and his knowledge of the empirical studies that have been done relating to actual exonerations. It

therefore meets the second prong of the *Hall* test.

Dr. Kassin’s proposed testimony also meets the applicable reliability factors identified by Judge Flanagan in *Buser* -- the proposed expert’s qualifications, whether the theory has been subjected to peer review and publication, and whether the theory is generally accepted within the relevant community. 6 Dr. Kassin’s qualifications are impressive, the factors he identifies as putting innocent people at risk of falsely confessing and pleading guilty have been subjected to extensive publication and peer-review, and these factors have been accepted in the relevant scientific community, as evidenced by the Scientific Review Paper (White Paper) approved and published by the AP-LS (Exhibit E), and by the six Amicus Briefs on the psychology of false confessions approved and filed by the American Psychological Association, which are attached as Exhibits G-1 – G-6.

E. Dr. Kassin’s Testimony Meets the Third Prong of the *Hall*

Test - It Will Assist the Jury in Evaluating The Actions

of Robert Wilcoxson and His Co-Defendants in Confessing and/or Pleading Guilty

1. The Court Must Determine On a Case-by-Case Basis Whether The Expert Will Assist the Jury in Evaluating the Facts at Issue

Defendants’ primary argument is that “Dr. Kassin’s proposed testimony will

6 The other reliability factors identified in *Buser*, whether the theory can be (and has been) tested, whether the theory has a high known or potential rate of error, and whether there are standards controlling the application of the theory, are not applicable to the psychological testimony at issue in this case. But Dr. Kassin’s proposed testimony has been corroborated by empirical studies of false confessions in cases of known DNA exonerations, as he noted in his deposition. Kassin 96:13-103:2.

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.” Defendants’ Memorandum, p. 13. In support of this argument, Defendants rely upon the District Court’s decision in *Kogut v. County of Nassau*, excluding Dr. Kassin’s testimony in that case because “Essentially, this is an area that the jurors can decide for themselves.” Defendants’ Memorandum, p. 14.

The Fourth Circuit, however, has explicitly rejected that reasoning in a case involving the exclusion of expert testimony relating to the risk factors that apply to false confessions*.* In *United States v. Belyea*, 159 Fed. Appx. 525 (4th Cir. 2005), the district court had refused to allow an expert to testify on “the factors correlating with false confessions.” *Id*. at 527. The district court found that “the testimony would not help the jury because ‘jurors [already] know people lie.’” *Id.* The Fourth Circuit held that the district court had abused its discretion under Rule 702, and that *Daubert* “requires a nuanced, case-by-case analysis of whether the proposed expert testimony will assist the trier of fact.” *Id*. at 529. The “court must determine whether expert testimony will help the jury, given the facts in issue in the particular case.” *Id.*

Specifically, the Court held that with regard to false confessions:

Jurors may know that people lie in everyday life or even sometimes under oath, particularly when they believe lying to be advantageous. Jurors may not know, however, that people lie on occasion to their own detriment by falsely confessing to crimes that they did not commit. The phenomenon

of false confessions is counter-intuitive and is not necessarily explained by the general proposition that “jurors know people lie.”

\* \* \* \*

The [appropriate inquiry is] whether jurors commonly know about false confessions as a particular form of lying and about specific factors that may correlate to false confessions.

*Id.* at 529-530.

The court in *Belyea* noted that the expert would have addressed “whether and how” the particular facts in the case, including that the suspect was a drug addict, that he was being held on an unrelated charge, that he was terrified, and that he had suffered from behavioral problems throughout his life, “correlate to false confessions.” *Id*. at 530. The court concluded that “the limited record suggests that the testimony would be helpful by at least clarifying that some people, contrary to common sense, make false inculpatory statements.” *Id*. It further concluded that the improper exclusion of this evidence could not be deemed harmless. *Id*. at 531.

Belyea was not allowed to introduce potentially forceful evidence supporting his contention that his confession was false. The excluded expert testimony would have explored, among other factors, characteristics (such as anxiety problems) and interrogation techniques (such as false accusations) that make suspects more likely to confess falsely [H]e

could not explain that false confessions, while counter-intuitive, do in fact occur and are more likely to occur in certain circumstances, perhaps in the very circumstances of his case. This evidence would likely have altered the complexion of the case.

*Id*.

1. Dr. Kassin’s Proposed Testimony Relates to the Facts That Are In Dispute In This Case

Dr. Kassin, like the false confession expert erroneously barred from testifying in *Belyea,* proposes to testify about “whether and how” the particular facts in Mr. Wilcoxson’s case “correlate” to false confessions and false guilty pleas.

For example, the evidence at trial will be that at the time he was questioned by the police on September 25, 2000, Teddy Isbell was a long-time crack addict who had been using crack for three weeks straight. He had not slept in three days. He was visibly high on crack cocaine. He was confronted with false evidence (that he told his mother he had been present at the murder, although she told the NCIIC he had not told her that, and that she had never told BCSO that Teddy had made such a statement). He was accused of lying. The interrogation did not start until the late evening, and lasted more than three hours. Isbell did not claim to have been with Wilcoxson on the night of the murder until late in the interrogation, which is when he claimed, for the first time, to have personal knowledge about Wilcoxson’s alleged involvement.

Dr. Kassin will testify, based upon his training in and knowledge of psychology, his own research, the research and field studies conducted by other expert, the hundreds of peer-reviewed articles on false confessions published over the past twenty years, the empirical research done utilizing the data base of DNA exonerations compiled and maintained by the Innocence Project in New York, and

the National Registry of Exonerations compiled and maintained by the University of Michigan Law School, that the following are risk factors for false confessions, all of which could apply to the facts in this case:7

* 1. a weak or vulnerable suspect (i.e., a drug addict and/or a person who is high on drugs);
  2. sleep deprivation;
  3. the presentation of false evidence; and
  4. the length of the interrogation.

With regard to Larry Williams, the evidence at trial will be that when he was interrogated on September 26, 2000, he was only 16 years old. He had a history of behavioral problems, had been designated as a Willie M class member, and had been in and out of group homes for years. He had been arrested and held on other charges, and was isolated from his parents and any support system. After denying on multiple occasions that he knew anything about the Bowman murder, he was confronted by Sheriff Medford himself in the jail after midnight, who screamed at him and threatened that if he did not confess to the Bowman murder and implicate Wilcoxson and the others, he would spend the rest of his life in prison without parole, although he had no criminal record at the time. What was implied to Williams was that if he did confess, he would be treated leniently and would be

7 Dr. Kassin testified regarding the applicability of the various risk factors to Teddy Isbell and Larry Williams during his deposition. Kassin 229:15-231:21

released to go home.

Dr. Kassin will testify that the following are risk factors for false confessions, all of which could apply to the facts in this case:

1. the age and maturity of the suspect;
2. a history of behavioral problems;
3. isolation:
4. minimization;
5. explicit threats; and
6. implied promises of leniency.

The reasons these constitute risk factors for false confessions will also be explained, as they were during Dr. Kassin’s deposition. Kassin 70:8-86:1, 89:17- 90:14, 92:5-11, 194:24-195:7.

With regard to plaintiff Robert Wilcoxson, the evidence at trial will be that he pled guilty to second degree murder, even though he was innocent, because four of his co-defendants had confessed and implicated him, that these four had agreed in their plea agreements to testify against him, and would have their stories straight, that he believed that Shaun Bowman had identified him as one of the perpetrators, that his lawyer advised him that he would be convicted at trial, and that he would not get a fair trial because he was black and from out-of-town, that he was facing the death penalty or life in prison without parole if he was convicted, that he was

facing unrelated charges and was told that the District Attorney would vindictively seek maximum sentences on those if he went to trial on the murder charge and was acquitted, that he had been held without bond and without being indicted for almost two years, and that he was only 22 years old and was isolated from his family and support system in Michigan. Kassin 169:8-184:22; 191:13-192:8; 197:3-18.

Dr. Kassin will testify that the following are risk factors for false guilty pleas, all of which could apply to the facts in this case: 8

1. the existence of false confessions;
2. the existence of false identifications;
3. prolonged pre-trial detention;
4. the severity of the potential penalty compared to the leniency of the potential plea bargain;
5. the existence of unrelated charges;
6. the race of the defendant; and

h. the assessment of the defendant’s counsel.

The reasons these constitute risk factors for false guilty pleas will also be explained, as they were during Dr. Kassin’s deposition. Kassin 121:2-163:3; 225:7-229:7

8 Both false confessions and false guilty pleas involve admissions to a crime that the person did not commit. Dr. Kassin noted that the decision making process involved in false confessions and false guilty pleas are the same. “[T]he decision to give a false confession and the decision to give a false guilty plea are governed by the same rules. . . . The time frame is different. The decision-making calculus is very much the same.” Kassin 130:6-25. Thus, the risk factors that apply to false confessions also apply to false guilty pleas.

In short, Dr. Kassin’s testimony in this case will be helpful to the jury. The plaintiff will have to establish to the jury’s satisfaction that Robert Wilcoxson’s co- defendants confessed, implicated him, and pled guilty even though they were innocent. Plaintiff will also be required to prove, by a preponderance of the evidence, that he pled guilty to second-degree murder in exchange for a lesser sentence even though he was innocent. Proving these allegations will require the jury to reach conclusions that are counterintuitive - that innocent people confessed to a murder they did not commit and implicated Robert Wilcoxson in that murder, and that Robert Wilcoxson plead guilty to a murder he did not commit.

Dr. Kassin’s testimony will not only educate the jurors about the fact that false confessions and false guilty pleas exist. Most importantly, it will also provide the jurors with guidance, based upon established psychological principles, intellectually rigorous study, and well-accepted research and conclusions on the psychology of false confessions, about the factors to consider when evaluating whether the confessions and guilty pleas of the co-defendants are truthful or false, and in evaluating why, if Robert Wilcoxson was innocent, he nevertheless plead guilty to second-degree murder. What Dr. Kassin will explain to the jury are

“the *known risk factors in producing false confessions and . . . false guilty pleas. This is what the science and the research knows about this phenomenon*. . . . *I don't opine about whether or not Wilcoxson's guilty plea is true or false*. . . . So my purpose was limited in scope to essentially *trying to educate the system about why it is if he were innocent he would have given a false guilty plea, why would he have*

*done that under these circumstances.* . . . it's not the purpose of my report or opinion or testimony down the road to opine about whether this is a true or a false guilty plea, but rather *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*.”

Kassin 175:21-177:3. He will not in any way invade the province of the jury, nor comment on the credibility of any witness’s trial testimony in this matter.

1. The Fact That Dr. Kassin Is Not Completely Familiar With The Facts Surrounding the Statements and Guilty Pleas is Irrelevant

Defendants make much of the fact that Dr. Kassin did not review the entire discovery in this case relating to the co-defendants statements or to Wilcoxson’s decision to plead guilty. Defendants Memorandum, pp. 7-9. They argue from this that his proposed testimony “is not based on sufficient facts or data to support his opinions”. *Id*. at 17-18. They also argue that his testimony is “not the product of reliable principles and methods” because he declined to speculate about how frequently false confessions occur (Id. at 18-20),9 and that he “does not reliably apply the principles and methods [he relies upon] to the specific facts of this case.” *Id.* at 20-22.

Defendants’ arguments completely miss the mark. Dr. Kassin will not be offering opinions about the truth or falsity of any statement or guilty plea. He will

9 Defendants also seize on five words out of 232 pages of deposition transcript, “may or may not be” to argue that Dr. Kassin’s testimony will be confusing. But he is testifying only to the risk factors that are associated with false confessions and guilty pleas, not that any confession or guilty plea is false. Whether these factors are or are not applicable to any given confession or guilty plea will be for the jury to decide.

simply be testifying about the factors the jury should *consider* in determining this key issue. The Notes of the Advisory Committee on Proposed Rules state that:

“An intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge. The most common source of this knowledge is the expert witness, although there are other techniques for supplying it.

Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded. *The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts.* . . .” (emphasis added).

This is precisely what Dr. Kassin proposes to do.

“the purpose of my report was not to make a determination that Wilcoxson's guilty plea was a true guilty plea or a false guilty plea, whether he's guilty or innocent; *the purpose was to bring to bear on that decision-making process the relevant psychology*.” Kassin 206:18-23 (emphasis added).

1. Defendants’ Examples of Courts That Have Excluded Expert Testimony Regarding False Confessions Is Misleading and Irrelevant

Defendants reference a handful of cases, mostly in the context of criminal prosecutions, that have excluded expert testimony on the topic of false confessions. Defendants’ Memorandum, pp. 12, 15. These cases are irrelevant. None of the cases referenced by Defendants is within the Fourth Circuit, where *Belyea* established the law to be applied by the district courts in deciding this issue.

Moreover, for each one of these cases excluding a false confession expert,

there are literally scores of trial court decisions allowing such testimony.10 But of course, these decisions are not appealed by the criminal defendant because he has won, nor by the State because they can’t.

# CONCLUSION

In this case, Plaintiff’s expert, Defendants’ expert, and the Fourth Circuit all agree that it is counterintuitive for a jury to think that an innocent person would confess to a murder he did not commit, much less plead guilty to a murder he did not commit. The science of psychology can help the jury understand how this can happen under certain circumstances, and describe the factors that can place an innocent person at risk of falsely confessing or pleading guilty.

In doing so, Dr. Kassin will not provide any opinion on the truth or falsity of any statement or guilty plea, comment on the credibility of any witness, or invade the province of the jury in any other way. This court should therefore deny Defendants’ motion to preclude Dr. Kassin from testifying.

In the alternative, Plaintiff respectfully requests that the court schedule a *Daubert* hearing at which the Court may assess the extent to which Plaintiff’s experts will testify consistent with the holding in *Belyea.*

Respectfully submitted this 25th day of June, 2015.

10 For example, Dr. Richard Leo has been allowed to testify as an expert on false confessions more than 200 times. See *Caine v. Burge,* Case 1:11-cv-08996, N.D.Ill., Dec. # 209, attached as Exhibit H, p.3 (allowing Dr. Leo to testify as an expert on false confessions in a 1983 suit against the Chicago Police). Dr. Kassin has been allowed to testify as an expert in false confessions in Massachusetts, New York, South Carolina, California, Illinois, New Jersey and West Virginia.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on June 25, 2015, the foregoing, Plaintiff’s Memorandum in Opposition to Defendants’ Motion to Exclude Plaintiff’s Expert, Saul Kassin, From Offering Opinions or Evidence was served on the below counsel of record by submitting it to the Court for electronic service:

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