

State v. Kenneth Manzi Kagonyera
00 CRS 65086
Buncombe County

State V. Robert Wilcoxson, III
00 CRS 65088
Buncombe County

AFFIDAVIT & REPORT
OF STEVEN A. DRIZIN

STATE OF NORTH CAROLINA
COUNTY OF BUNCOMBE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
00 CRS 065086; 00 CRS 065088

STATE OF NORTH CAROLINA)
)
 v.)
)
 KENNETH M. KAGONYERA;)
 ROBERT WILCOXSON III)
 _____)

**AFFIDAVIT OF
STEVEN A. DRIZIN**

The undersigned, having first been duly sworn, deposes and says the following:

1. I am over the age of eighteen, suffer no legal disabilities, have personal knowledge of the facts set forth below, and am competent to testify.

2. I am a Clinical Professor of Law at Northwestern University School of Law. My primary area of academic interest and research has centered on the circumstances under which police interrogation tactics are likely to produce false confessions. I have written and published numerous articles on the subject of interrogations and confessions, reviewed hundreds of hours of interrogation tapes and transcripts, testified before legislative committees and task forces in Illinois and Wisconsin, and have lectured widely to defenders, judges, prosecutors, and police officers throughout the United States, Canada, and Japan.

3. On November 19, 2010, I was contacted by the North Carolina Innocence Commission's Executive Director, Kendra Montgomery-Blinn, and asked to review statements provided by the defendants in the above-captioned matter. On the same day, Ms. Montgomery-Blinn emailed me copies of the statements.

4. On December 21, 2010, I spoke with Commission Staff Attorney Jamie Lau and Ms. Montgomery-Blinn. I told Mr. Lau and Ms. Montgomery-Blinn that inconsistencies between the statements of the defendants were some evidence of their unreliability but could also mean that the individuals were just trying to minimize their involvement. Additionally, I said that there are some indicia of reliability, such as Kenneth Kagonyera's statement being made in the presence of Mr. Kagonyera's attorney. I told Mr. Lau and Ms. Montgomery-Blinn that I needed more information before I could reach any opinions and would like answers to several additional questions before making any conclusions.

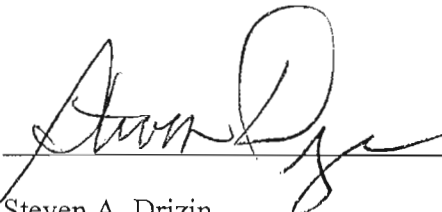
5. During my discussion with Mr. Lau and Ms. Montgomery-Blinn, they answered many of my questions. Additionally, they provided me with several documents that I requested to assist me with my review of this case, including, among other things, DNA test results, transcripts from plea hearings, and additional witness statements and police reports.

6. Additionally, between December 21, 2010, and April 6, 2011, when I submitted my final report, Mr. Lau responded to numerous questions that I posed via email and over the telephone. Mr. Lau has also provided additional materials for my review, including a letter from attorney Carl Horn to the Commission concerning his advice to Jennifer Regan, his client, to assert her privilege against self-incrimination and a copy of the video-deposition of Larry Jerome Williams, Jr.

7. After carefully reviewing all of the materials provided by the Commission, I have concluded that the statements of Kenneth Kagonyera, Robert Wilcoxson, Damian Mills, Larry Jerome Williams, Jr., and Teddy Isbell are highly unreliable. Moreover, these statements are far less reliable than Robert Rutherford's confession to a DEA Agent. The attached report, titled "*Opinions Regarding Reliability of Statements of Kenneth Kagonyera, Robert Wilcoxson, Teddy Isbell, and Larry Jerome Williams, Jr.*" and dated April 6, 2011, outlines, in detail, my qualifications, the academic literature surrounding false confessions, my analysis of the statements in this case, and the basis for my conclusions.


FURTHER THE AFFIANT SAYETH NOT

This the 20th day of April, 2011.

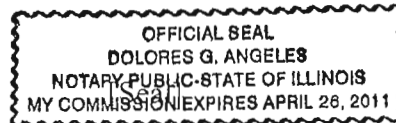


Steven A. Drizin

Sworn to and subscribed before me this 20th day of April, 2011



Notary Public



My Commission Expires: 4/26/2011

CURRICULUM VITAE

STEVEN ANDREW DRIZIN

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EDUCATION

NORTHWESTERN UNIVERSITY SCHOOL OF LAW

Chicago, Illinois

Juris Doctor, May 1986

HONORS: Dean's List, Semesters 1, 2, 6;
Editor-in-Chief, *Journal of Criminal Law & Criminology*, 1985-1986.

HAVERFORD COLLEGE

Haverford, Pennsylvania

Bachelor of Arts in Political Science, 1983

HONORS: Graduated with Honors in Political Science

PROFESSIONAL EXPERIENCE

NORTHWESTERN UNIVERSITY LEGAL CLINIC

NORTHWESTERN UNIVERSITY SCHOOL OF LAW

Clinical Professor, September 2003

Assistant Director, January 2001

Legal Director, Center on Wrongful Convictions, February 2005

Co-Founder, Center on Wrongful Convictions of Youth 2008

Supervising Attorney, Children and Family Justice Center, June 1993 – Feb. 2004

Responsibilities have included teaching criminal law to first year law students, serving as an attorney and professor in clinical program in which second and third year law students provide legal assistance to indigent clients in criminal, juvenile delinquency, appeals, and post-conviction cases involving wrongful convictions. In juvenile justice, I worked with a team of attorneys, social workers and researchers in a project aimed at reforming Juvenile Court of Cook County and advocating for juvenile justice policy based on sound research and principles of adolescent development. Much of my policy and research-related work has been directed at preventing false and coerced confessions by collecting and analyzing false confession cases in Illinois and throughout the country and promoting solutions such as the videotaping of all custodial interrogations.

SACHNOFF & WEAVER LTD.
Chicago, Illinois

**Litigation Associate, September 1986-October 1988;
September 1989-August 1991.**

Practice in commercial litigation, including federal and state civil procedure, securities fraud, fraudulent conveyance, bankruptcy, Section 1983, prisoner's rights, and breach of contract actions.

LAW CLERK TO THE HONORABLE ILANA D. ROVNER, UNITED STATES DISTRICT COURT JUDGE FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, October 1988-August 1989.

AWARDS

American Bar Association's Livingston Hall Award (2005) recognizes an "unsung hero, an attorney working in the juvenile justice field who embodies both exceptional dedication and advocacy skills."

National Juvenile Defender Center's 2000 Juvenile Defender Leadership Award for outstanding dedication and advocacy in the juvenile justice field. October 26, 2000 in Houston, TX.

PUBLICATIONS IN THE AREA OF FALSE AND COERCED CONFESSIONS

BOOKS

David Strauss, Barbarous Souls (Afterword by Steven A. Drizin)(Northwestern University Press, 2010)

Rob Warden & Steven A. Drizin (eds.), True Stories of False Confessions (Northwestern University Press)(August 2009, Northwestern University Press).

Steven A. Drizin & Richard A. Leo, The Problem of False Confessions in the Post-DNA Age (2008)(translated into Japanese and published as a book along with an amicus brief filed by the Center on Wrongful Convictions before the Supreme Court of Japan)(translated by Kazuko Ito)(Japan UNI Agency, Tokyo, 2008).

LAW REVIEW ARTICLES

Drizin, S., *Remarks at the Dinner Celebrating the Centennial of the Journal of Criminal Law and Criminology, January 29, 2009*, 100 *Journal of Criminal Law & Criminology* 101-108 (2010)

Drizin, S. & Luloff, G, *Are Juvenile Courts Wrongful Conviction Factories?*, 34 N.KY. L. REV. 257-322 (2007)

Leo, R., Drizin, S., Neufeld, P., Hall, B., and Shavell, A., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 Wis. L. Rev. 479-539 (2006).

Drizin, S. and Reich, M., *Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations To Accurately Assess the Reliability and Voluntariness of Confessions*, 52 Drake L. Rev. 619 (Summer 2004).

Drizin, S. and Leo, R. *The Problem of Police-Induced False Confessions in the Post DNA Age*, 82 N.C.L.Rev. 891 (March 2004)(qualitative and quantitative analysis of 125 proven false confessions)

Drizin, S. and Tanenhaus, D. "Owing to the extreme youth of the accused": *The Changing Legal Response to Juvenile Homicide*, 92 Journal of Criminal Law & Criminology 641-705 (Spring/Summer 2002).

Drizin, S. and Colgan, B. *Let the Cameras Roll: Mandatory Videotaping of Interrogations is the Solution to Illinois' Problem of False Confessions*, 32 Loyola University Chicago Law Journal 337 (Winter 2001).

JOURNAL ARTICLES AND POLICY BRIEFS

Kassin, S., Drizin, S., Grisso, T., Thomas Grisso, Gudjonsson, G., Leo, R.A., Redlich, A., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 Law and Human Behavior 3-38 (2010) (published as a White Paper by the American Psychological Association).

Drizin, S. , *Defending a False or Coerced Confession Case: What You Need to Know To Represent Your Clients Effectively?*, The Wisconsin Defender, Vol. 12, Issue 1 (Winter 2004), available online at <http://www.wisspd.org/html/publications/docs/wdefwinter04.pdf>

Drizin, S.A. *False Confessions: Some Developmental And Forensic Considerations*, available on website of Cornell Institute on Research for Children at <http://www.human.cornell.edu/units/circ>

BOOK CHAPTERS

Leo, R.A. and Drizin, S.A., "The Three Errors: Pathways to False Confessions and Wrongful Convictions, in *Interrogation and Confessions: Research, Policy and Practice* (edited by G.D. Lassiter and Christian A. Meissner)(American Psychological Association, 2010).

Redlich, A. and Drizin, S. "Police Interrogation of Youth," in *Mental Health Needs of Young Offenders: Forging Paths Toward Reintegration and Rehabilitation* (edited by Carol Kessler and Louis Krause, M.D.)(Cambridge University Press, 2007)

Drizin, S, and Colgan, B. "*Tales From The Juvenile Confession Front: A Guide To How Standard Police Interrogation Tactics Can Produce Coerced and False Confessions From Juvenile Suspects*", a chapter in *Interrogations, Confessions, and Entrapment* (edited by G. Daniel Lassiter), a volume in the *Perspectives in Law and Psychology Series*, edited by Ron Roesch (Kluwer Academic/Plenum Publishers, 2005)

OP-ED PIECES

"*Controls vital when cops question kids,*" The Arizona Republic, November 26, 2008.

"*Videotape All Police Interrogations,*" The Providence Journal, March 6, 2003, Commentary, at B4.

"*Good Reason to Tape Suspect's Interrogation,*" Chicago Sun Times, June 30, 2002, at 36A.

"*Taping Confessions Makes Just Sense,*" Milwaukee Journal Sentinel, May 12, 2002, Commentary, at ___.

"*False Confessions: Evidence of Flaws,*" Chicago Sun Times, December 28, 2001, at 41.

"*Juvenile Interrogation Reform Still Lacking,*" Chicago Sun Times, September 4, 2001, at 31.

"*Let's go to the videotape: Why law-enforcement officials should start taping interrogations.*" Chicago Tribune, Commentary, June 20, 2001, at 17.

"*Coerced Confessions Shine Light on Taping,*", Chicago Sun Times, Commentary, February 1, 2001, at 29.

"*Require Police to Videotape Confessions,*" The Detroit News, Comment, Sunday April 22, 2001, at 15A.

"*It's T.V., Not A True 'Confession',*" by Steven A. Drizin and Richard A. Leo, Los Angeles Times, Commentary, September 4, 2000, at B15.

Reprinted As:

"*It's T.V., Not A True 'Confession',* by Steven A. Drizin and Richard A. Leo, Orlando Sentinel, Editorial, September 12, 2000, at All.

"*Television Doesn't Do Justice to Real-Life 'Confessions'*" by Steven A. Drizin and Richard A. Leo, Opinion, San Francisco Chronicle, September 10, 2000.

"*Quelling an Outcry with Meaningless Reforms,*" Chicago Daily Law Bulletin, Lawyer's Forum, October 8, 1998, at 6.

"*In the Maelstrom: Children as Murder Suspects,*" Chicago Daily Law Bulletin, Lawyers' Forum, August 28, 1998, at 19-20.

"When Little Tykes Give 'Full Confessions'," Chicago Tribune, August 26, 1998, Commentary, at 19.

"Interrogation Law Puts Youths at Risk," Chicago Sun Times, May 7, 1998, Commentary/Letters to the Editor, at 34.

LECTURES AND PRESENTATIONS IN THE AREA OF FALSE CONFESSIONS AND POLICE INTERROGATIONS

National Judicial Institute (Institut National de la Magistrature), *The Problem of False Confessions in the Post-DNA Age* presentation to trial court judges (**St. John, Newfoundland)(October 27, 2010)**.

Cook County Public Defender's Training, Nutshell IV, *The Three Errors: Pathways to False Confessions and Wrongful Convictions* (**September 2, 2010, Oakbrook, IL.**)

Roundtable on Police Interrogations of Youth, *Anatomy of a Juvenile False Confession*, Illinois Juvenile Defender Symposium, (**June 4, 2010, Chicago, IL.**)

Innocence Network Conference, Presentation on Pathways to False Confessions, (**Atlanta, Ga. April 18, 2010**)

Rutgers Law Review Symposium, Presentation on Juvenile False Confessions, (**Newark, NJ, April 11, 2010**)

Arkansas Public Defender Commission, Conference on Juvenile Defense, Defending a False Confession Case (**Little Rock, Arkansas, December 11, 2009**)

Ontario Court of Justice, East Regional Seminar, National Judicial Institute (Institut National de la Magistrature), *The Problem of False and Coerced Confessions*, presentation to trial court judges (**Kingston, Ontario, October 6, 2009**).

Cook County Public Defender's Office, Attacking the Statement Case in the Age of False Confessions (**Oak Brook, IL. September 9, 2009**)

National Judicial Institute (Institut National de la Magistrature), *Frailties in the Criminal Justice Process*, presentation to trial and appellate court judges (**Victoria, British Columbia, Canada, March 3-6, 2009**).

Lectures on False Confessions sponsored by the Japanese Federated Bar Association, Tokyo Bar Association, Osaka Bar Association, and at Ryokuku University (**December 2009, Japan**)

National Juvenile Justice Network, *Juvenile False Confessions, Advocacy Opportunities in an Age of Wrongful Convictions* (**Chicago, IL. June 26, 2008**).

Defending Illinois Death Penalty Cases in 2008, *Presentation on False Confessions* (**Chicago, IL. March 4, 2008**).

National Judicial Institute (Institut National de la Magistrature), *Frailties in the Criminal Justice Process*, presentation to trial and appellate court justices from all provinces of Canada (**St. John's, Newfoundland, Canada, Nov. 1, 2007**).

National Juvenile Defender Summit, *Paint By Numbers: Colorable Constitutional Claims Under the 4th, 5th, 6th, and 8th Amendments* (**Portland, OR. October 20, 2007**)

Wisconsin State Public Defender's 2007 Annual Criminal Defense Conference, Forty Years After *Gault*: Advocating For Children and Young Adults in Juvenile and Adult Courts, *Why Juveniles Are More Vulnerable to Police Interrogation Tactics* (**Milwaukee, WI. October 11, 2007**)

Interrogations and Confessions: A Conference Exploring Current Research, Practice & Policy, *Police Interrogation of Children and Teenagers in the post-DNA and post-Roper v. Simmons* ages (**El Paso, TX. September 26-29, 2007**).

OACDL Juvenile Law Seminar: *Defending Juvenile False and Coerced Confession Cases* (**Columbus, OH. Sept. 20, 2007**)

Presentation of False and Coerced Confessions to New Orleans Parish Public Defenders (**New Orleans, LA. May 4, 2007**)

Juvenile Defender Training in Arkansas, *The Problem of Juvenile False Confessions in the Post-DNA Age*, (**Little Rock, AR, April 20, 2007**)

Defending Illinois Death Penalty Cases in 2007, Illinois Institute for Continuing Legal Education (IICLE), *Presentation on False Confessions*, (**Chicago, IL. March 20, 2007**).

Forensic Seminar at DePaul University School of Law, *The Problem of False Confessions in the Post-DNA Age* (**Chicago, IL. February 16, 2007**).

The California Public Defender's Association Presents: 11th Annual Felony Defense Practice Seminar, *Police Interrogations, False Confessions, Coerced Confessions & Wrongful Convictions* (**Yosemite, Ca. November 2006**)

2006 Juvenile & Forensic Science Conference, *The Science of False Confessions*, Emory Univ. School of Law (**Atlanta, Ga. Nov. 8, 2006**)

Symposium of Salmon P. Chase College of Law and Children's Law Center of Northern Kentucky, Re-envisioning the Role of the Juvenile Court in the 21st Century, *Are Juvenile Courts Breeding Grounds for Wrongful Convictions: Using the Lessons of the Innocence Movement to Improve the Juvenile Court* (**Covington, Ky., Sept. 28-29, 2006**).

MacArthur Foundation Research Network on Adolescent Development & Juvenile Justice Network Conference, *Presentation on Juvenile False Confessions* (**Washington, D.C., Sept. 20-22, 2006**)

Montana Public Defender's Orientation Conference, *Presentation of Defending Confession Cases in the Age of False Confessions* (**Bozeman, Mont., July 14, 2006**)

Rhode Island Public Defender's Training, *Presentation on Defending Confession Cases in the Age of False Confessions* (**Providence, R.I., June 28, 2006**)

Kentucky Bar Association, Annual Convention, Presentation of False Confessions in the Post-DNA Age (**Covington, Ky., June 16, 2006**)

Maine Juvenile Defender's Training, *Defending Juvenile Clients in False and Coerced Confession Cases* (**Portland, Me, April 28, 2006**)

Mississippi Public Defenders Association, Spring Conference, "*Why Would My Client Give A False Confession,*" (**Robinsonville, MS, April 20, 2006**)

National Judicial Institute (Institut National de la Magistrature), Appellate Courts Seminar, *Frailties in the Criminal Justice Process*, presentation to appellate court justices from all provinces of Canada (**Montreal, Canada, April 10, 2006**)

Wisconsin Criminal Justice Study Commission, *False Confessions and Police Interviewing* (**Milwaukee, WI, February 23, 2006**)

Wisconsin Law Review Symposium, "*Preventing Wrongful Convictions: Reexamining Fundamental Principles of Criminal Law to Protect the Innocent,*" presentation on legal changes needed to ensure reliability of confessions and safeguard against wrongful convictions (with Richard Leo)(**Madison, WI., November 19, 2005**)

National Judicial Institute (Institut National de la Magistrature), *Frailties in the Criminal Justice System: The Judge's Role*, presentation to Saskatchewan judges on the psychology of police interrogations and confessions (**Regina, Saskatoon, November 9, 2005**)

Montana Statewide Juvenile Justice Conference, *Kids Are Different, Juvenile Justice Issues in Montana*, presentations on juvenile confessions (**Big Sky, Montana, September 27, 2005**)

National Judicial Institute (Institut National de la Magistrature), *Frailties in the Criminal Justice System: The Judge's Role*, presentation to Canadian judges on the psychology of police interrogations and false confessions (**Prince Edward Island, Canada, September 21, 2005**)

ABA Annual Meeting, *The Challenge of False and Coerced Confessions of Juveniles* (**Chicago, IL. August 7, 2005**)

Eyewitness Identification Best Practices, *Effective Law Enforcement Intervention*, sponsored by the Office of the Wisconsin Attorney General (**Appleton, WI, April 28, 2005**)

2005 National Innocence Network Conference, *Practical Tips on Litigating Eyewitness Identification and Confession Cases* (**Washington, D.C., April 2, 2005**)

8th Annual National Alliance Conference, Juvenile Justice: Youth and Disabilities, *What Parents Need to Know When a Child with a Disability Has Been Arrested* (**Washington, D.C., February 2, 2005**)

National Juvenile Defender Summit, Plenary Speaker: *Challenging False and Coerced Confessions*; Workshop Speaker: *Using Research and Psychology to Litigate a False Confession Case* (**Nashville, TN, October 22-24, 2004**)

Minnesota Criminal Justice Institute, *The Problem Of False Confessions in the Post-DNA Age* (**Minneapolis, MN, August 24, 2004**)

Wyoming Juvenile Justice Conference, *Police Interrogations and False and Coerced Confessions of Juveniles*, (**Sheridan, Wyoming, June 17-18, 2004**)

Office of the Maryland Public Defender, Spring Conference 2004, *Police Interrogations and False and Coerced Confessions* (**Ocean City, Md. May 21, 2004**)

Ohio Juvenile Defender Leadership Summit, *False and Coerced Confessions*, (**Dayton, Ohio, April 30, 2004**)

Los Angeles County Public Defender's Office, 22d Annual Juvenile Delinquency Law Conference, *Defending a False or Coerced Juvenile Confession Case*, (**El Segundo, CA, April 23, 2004**)

Cornell University Department of Human Development, College of Human Ecology, Cornell Law School, American Studies Program, Death Penalty Project, Department of Government, Family Life Development Center and Cornell Institute for Research on Children: "Rethinking the Criminalization of Youth": Presentation on Juvenile Interrogations and Confessions (**November 7, 2003, Ithaca, N.Y.**)

American Bar Association, Juvenile Justice Center, Juvenile Defender Leadership Summit, *Assessing Knowing and Voluntary Waivers of Miranda Rights and Juvenile False Confessions; Strategies to End Life without Parole Sentences for Juveniles; and a United States Supreme Court Wrap-Up*. (**Baltimore, Md. October 25-26, 2003**)

Wisconsin Association of Criminal Defense Attorneys Annual Conference, "Can't Trust The Message," Presentation on False Confessions (**June 19, 2003, Madison, WI**)

Law and Society Association Annual Conference, *Exploding the Myth of False Confessions: Lessons from the Central Park Jogger Case* (**presented with Professor Richard Leo, June 2003, Pittsburgh, Pa.**)

Salmon P. Chase College of Law's Wrongful Convictions Symposium, *The Problem of False Confessions*, (**to be presented in Cincinnati, OH, February 22, 2003**)

American Academy of Forensic Sciences, 55th Annual Meeting, *Police Induced False Confession in the Post-DNA Age* (**Chicago, IL. February 20, 2003**).

Family Resource Center on Disabilities, *What Parents Need to Know About Protecting Children from Police Interrogations* (**Chicago, IL., January 18, 2002**).

The American Society of Criminology Annual Conference, *The Consequences of False Confessions Revisited in the DNA Age*, (with Professor Richard Leo) (**Chicago, IL. November 14, 2002**).

Midwest Regional Defender Center's Conference, 2002 Leadership Summit, *Kids Are Different, Individual and Systemic Methods for Attacking Confessions* (**Chicago, IL. July 25-26, 2002**).

Midwest Regional Defender Center's Conference, Juvenile Justice on Appeal, Training of Illinois State Appellate Defenders, *Coerced and False Confessions, What You Need to Know in Order to Protect Your Client* (**Chicago, IL., July 18, 2002**)

Maine Association of Criminal Defense Attorneys Annual Conference, *False Confessions, Adult and Juvenile Defense*, (**Portland, Maine June 7, 2002**)

American Bar Association, Juvenile Justice Center, Juvenile Defender Leadership Summit, *The Chicago Experience: Using the Principles of Adolescent Development and Research to Impact Policies and Practices Regarding Questioning Children*. (**Miami, Fla, October 26, 2001**)

Twelfth Annual Public Defender Seminar, Iowa Public Defender's Association, *Interrogations and Confessions of Juveniles*. (**Sioux City, Iowa, June 20, 2001**)

The Illinois Public Defender Association Spring Seminar, *False Confessions and Problematic Interrogations (Protecting Children and Preserving the Truth)*. (**Urbana, IL, May 18-19, 2001**)

American Bar Association, Juvenile Justice Center, Juvenile Defender Leadership Summit, *Child Suggestibility: Implications for Confessions, Interrogations and Interviews*. (**Houston, TX, October 27-29, 2000**)

Indigent Defense 2000, *Redefining Leadership for Equal Justice*, Moderator of Plenary Session: *Fulfilling the Promise of Gault – Better Outcomes for Children* and of Workshop: *Police Interrogations, False Confessions, and the Impact on Children and the Court*. (**Washington, D.C. June 29-30, 2000**)

University of Michigan Law School's Criminal Law Society, Juvenile Justice Symposium, Presenter on Police Interviewing Techniques (**Ann Arbor, MI, January 28, 2000**)

Amnesty International's Hearings on Police Brutality, Presenter on False Confessions and Children (**Chicago, IL, October 21, 1999**)

American Academy of Child & Adolescent Psychiatry, AACAP Annual Meeting Symposium, *Juvenile Justice: Who, Where, and What Next?*, Panelist (**Chicago, IL, October 20, 1999**)

American Bar Association, Juvenile Justice Center, Juvenile Defender Leadership Summit, *The Impact of High-Powered Police Interrogations on Children*, Co-Panelist with Richard Ofshe (Washington, D.C., October 16, 1999)

1998 Annual Fall Criminal Defense Conference, Wisconsin Public Defender, Presentations on Competencies and Capacities of Children and Prosecuting Childhood—Some Legal Issues (November 12, 1998).

TESTIMONY AS EXPERT WITNESS ON POLICE INTERROGATIONS AND FALSE CONFESSIONS

In the Matter of Marquis G., 10 Del. 522 (testified as an expert in pre-trial voluntariness hearing on issues relating to juvenile false confessions in September 21, 2010)

In the Matter of Gregory Taylor (testified as expert in assessing the reliability of confession evidence in hearing before North Carolina Innocence Inquiry Commission)(September 2009)

In the Matter of Tyler T., (testified as expert on juvenile false confessions in juvenile court in Grays Harbor, Washington (September 2008)

In the Matter of Christine Susan Cummings (testified as expert on juvenile false and coerced confessions in clemency hearing)(February 2004)

In the Matter of J.R., No. J-1150-04 (qualified as an expert in subject of juvenile false and coerced confessions in juvenile court in Washington, D.C.)(Trial: October 2004)(Judge Fern Saddler)

Best v. Grant County (gave deposition as expert witness in class action litigation concerning the failure of Grant County public defenders to adequately represent defendants in confession cases)(June 2005)

In the Matter of Barry Massey (testified as expert on juvenile false and coerced confessions in clemency hearing)(September 2006)

TELEVISION, RADIO, AND PRINT MEDIA APPEARANCES

Mr. Drizin has frequently appeared on national and local news programs as an expert in the area of juvenile justice and has widely been quoted on the subject of false confessions and police interrogations. He has been a featured guest on ABC's *Nightline* with Ted Koppel, *The News Hour* with Jim Lehrer, CNN's *Burden of Proof*, FOX T.V.'s *In-Depth Program*, CBS's *The Dr. Phil Show*, MSNBC's *The Dan Abrams Show*, National Public Radio's *Weekend All Things Considered* with Jacki Lyden, Pacifica Radio's *Democracy Now* with Amy Goodman, and National Public Radio's *Tavis Smiley Show*. In addition, portions of his interviews have been broadcast nationally on ABC News, ABC's *Good Morning America*, NBC's *Nightly News*, NBC's *Weekend Today Show*, CNN's *The World Today*, MSNBC's *The Brian Williams Show*, CNBC's *The Rivera Show Live*, CNN's *Headline News*, and The Voice of America's *News Now*, the A & E. Network's *The*

Point and *American Justice*, and CBS News' *60 Minutes*. He has been consulted and cited as an expert in false confessions and videotaping police interrogations in numerous newspapers and magazines, including the *New York Times*, *the New York Times Magazine*, *Washington Post*, *Wall Street Journal*, *Newsday*, *Chicago Tribune*, *Chicago Sun Times*, *Miami Herald*, *South Florida Sun-Sentinel*, *Detroit Free Press*, *Detroit News*, *San Francisco Chronicle*, *Chicago Magazine*, *Columbia Journalism Review*, and *Atlantic Magazine*.

April 6, 2011

Re: Opinions Regarding Reliability of Statements of Kenneth Kagonyera, Robert Wilcoxson, Teddy Isbell, and Larry Jerome Williams Jr.

At the request of attorneys for the North Carolina Innocence Commission (NCIC), I have been asked to review the statements of several defendants who were arrested, charged with and convicted of the murder of Walter Rodney Bowman which took place on September 18, 2000 in his Asheville, North Carolina home. Six defendants were ultimately arrested in connection with the attempted robbery and murder of Mr. Bowman, including Teddy Isbell, Larry Williams, Jr., Kenneth Kagonyera, Robert Wilcoxson (a.k.a. "Detroit"), Aaron Brewton (a.k.a. "Man") and Damian Mills. Four of these defendants gave statements implicating themselves in the crime (Isbell, Williams, Mills, and Kagonyera) and five of the six pled guilty (Isbell, Williams, Kagonyera, Mills, and Wilcoxson). Charges were eventually dropped against Aaron Brewton. The five defendants who pled guilty to second degree murder received the following sentences:

Damian Mills; Plea date: 6/26/01; Sentence: 120-153 Mos.
Kenneth Kagonyera; Plea date: 12/13/01; Sentence: 144-182 Mos.
Larry Williams, Jr.; Plea date: 2/25/02; Sentence: 100-129 Mos.
Robert Wilcoxson; Plea date: 8/15/02; Sentence: 150-189 Mos.
Teddy Isbell; Plea date: 12/11/03; Sentence: 66-89 Months

Mr. Isbell pled guilty and was sentenced on one count of conspiracy to commit robbery with a dangerous weapon.

After four of the defendants had confessed, pled guilty and received their sentences, new exculpatory evidence surfaced in the form of a confession by another man who not only admitted his involvement in the robbery and murder of Walter Bowman but named two accomplices.¹ On March 27 and 28, 2003, Robert Rutherford, an inmate in federal prison in Manchester, Ky., confessed to Special Agent Barnabas Whiteis of Drug Enforcement Administration ("DEA") that he was involved in a homicide that occurred in the Fairview Community of Asheville, N.C. in 2000. Rutherford did not mention any of the defendants in his confession, naming instead Brad Summey and Lacy Pickens as his accomplices. Summey, Pickens, and Rutherford were early persons of interest in the case as their names were first mentioned in a Crime Stoppers tip received a few days after the crime.

After reviewing the statements of Isbell, Williams, Wilcoxson, Mills, and Kagonyera, and other documents related to the police investigation and comparing their statements with Rutherford's statement, it is my opinion that the statements of the five convicted defendants are highly unreliable. They are internally inconsistent, are

¹ Of the defendants who pled guilty, only Teddy Isbell's plea was taken after Robert Rutherford came forward and confessed to the crime. It is unknown when Buncombe County District Attorney Ronald L. Moore became aware of Rutherford's confession or whether this information was shared with Isbell's attorney prior to his plea.

inconsistent with each other, are uncorroborated, did not lead police to the discovery of any new evidence related to the murder, and are further undermined by newly discovered evidence, including DNA evidence which corroborates Rutherford's confession.

I. Qualifications

I graduated from Northwestern University School of Law in 1986. Since August 1991, I have been employed as a law professor at Northwestern University School of Law where I now hold the rank of Clinical Professor of Law. I have also taught the law school's introductory course on criminal law to first year law students. In March of 2005, I became the Legal Director of Law School's Center on Wrongful Convictions. The Center is one of the first "innocence projects" in the United States and its attorneys and staff have been involved in 23 exonerations since its founding.

My primary area of academic interest and research has centered on the circumstances under which police interrogation tactics are likely to produce false confessions. In particular, I have studied the effect of police interrogation tactics on juvenile defendants, paying special attention to the question of whether developmental differences between juvenile and adult defendants make juveniles more vulnerable to coercive interrogation tactics and more likely to make false confessions. During this period, I have written and published numerous articles on the subject of police interrogations and confessions, reviewed hundreds of hours of interrogation tapes and transcripts, testified before legislative committees and task forces in Illinois and Wisconsin. I have also lectured widely to defenders, judges, prosecutors, and police officers throughout the United States, Canada and Japan.

In the past ten years, I have both worked on numerous confession cases and consulted with many attorneys in false confession cases and been widely recognized as an expert on false confessions in numerous newspapers, television and radio news programs and documentaries. I have also been retained as an expert in several cases, including several in Washington, D.C., several in the state of Washington, and in Arizona, Pennsylvania, and Wisconsin. In North Carolina, I was retained as an expert and testified before the North Carolina Innocence Commission in the case of Gregory Taylor, the first man to be exonerated by the Commission. In the fall of 2010, I was retained as an expert by the Civil Rights Division of the Justice Department. Together with former D.C. Homicide Detective James Trainum, we were hired to evaluate the interrogation policies and procedures of the New Orleans Police Department.

Over the past twelve years, my law students and I have been collecting and analyzing false confessions, not only from Illinois, but from around the nation. Starting primarily with press accounts of false confession cases (and then building case files with additional documents, where possible), I have amassed the largest database of proven false confession cases in the country, now over 200 proven false confessions. Richard Leo, one of the foremost experts on false confessions in the world, and I have analyzed the first 125 proven false confessions from this database in a law review article which we published in 2004 in the North Carolina Law Review. The article takes both a

quantitative and a qualitative look at the false confession problem in United States in the post-DNA age and addresses questions about the existence and extent of the false confession problem, the kinds of defendants who are particularly vulnerable to making false confessions, the cause of false confessions, and the solutions needed to prevent or minimize interrogation-induced false confessions. The article has been widely cited by courts, academics, and judicial, legislative, and independent task forces and innocence commissions in various states that have studied the problem of wrongful convictions. In 2009, in the case of *Corley v. United States*, 129 S.Ct 1558 (2009), the United States Supreme Court cited the Drizin-Leo article where Justice Souter noted that “custodial police interrogation, by its very nature, isolates and pressures the individual, and there is mounting empirical evidence that these pressures can induce a frighteningly high percentage of people to confess to crimes they never committed.” (Citing Drizin & Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N. C. L. Rev. 891, 906-907 (2004)). In addition to the United States Supreme Court, my work has been cited in numerous state Supreme Court decisions.

II. Materials Reviewed

I reviewed numerous documents provided to me by the staff of the NCIC, including, but not limited to, police reports documenting the various interviews of each of the defendants and their statements, the statements of other witnesses interviewed by the police during the investigation, additional police reports documenting the investigation into Rodney Bowman’s murder; Evidence Control Form relating to receipt of gloves and bandanas; Crime Stoppers Logs; DNA test results; questionnaires to the NCIC from Robert Wilcoxson and Kenneth Kagonyera and correspondence to and from these defendants to the NCIC; Teddy Isbell’s Hearing Transcript; Mr. Isbell’s Motion to Disqualify DA Ronald Moore; Mr. Kagonyera’s Attempt to Withdraw his Guilty Plea; Mr. Kagonyera’s Motion for Appropriate Relief; D.A. Moore’s Response; contents of article from Asheville Citizen Times dated September 20, 2000; an affidavit from Barnabas Whiteis dated March 14, 2010; DEA Form 6, Report of Investigation from Barnabas Whiteis dated March 28, 2003; videotaped interview of Larry Jerome Williams, Jr., and a letter dated March 25, 2011 from attorney Carl Horn III to Jamie Lau regarding the Jennifer Lee Regan Deposition.

III. The Role of False Confessions and False Guilty Pleas in the Study of Wrongful Convictions

The study of wrongful convictions in America dates back to 1932 with Edwin Borchard’s 1932 pioneering book, *Convicting the Innocent*² in which he detailed sixty-five convictions in which innocent individuals were wrongfully prosecuted, convicted and incarcerated. In Borchard’s study and all those that have followed, the problem of false confessions has been featured prominently as one of the leading causes of wrongful

² Edwin M. Borchard, *CONVICTING THE INNOCENT: SIXTY FIVE ACTUAL ERRORS OF CRIMINAL JUSTICE* (1932).

conviction. Although researchers have been unable to discern with precision the statistical prevalence of the problem, their studies have revealed that false confessions are a common source of error in wrongful convictions, ranging from approximately 14% to as much as 25% of the wrongful convictions dataset. For example, Hugo Bedau and Michael Radelet's 1987 watershed study, "Miscarriages of Justice in Potentially Capital Cases," published in the *Stanford Law Review*, identified 350 cases of wrongful conviction in potentially capital cases in America from 1900-1987.³ Of these 350, false confessions played a causal role in 49 of the 350 miscarriages of justice, approximately 14% of the cases in their sample. A more recent study of known wrongful convictions by Samuel Gross and his colleagues at the University of Michigan, found that in 51 out of 340 known exonerations since 1989 (15%), the wrongfully convicted defendants had falsely confessed.⁴

Researchers tend to be conservative in their characterization of false confessions as "proven false confessions." There are only four ways that a confession can be proven false. First, there are cases where suspects confess to crimes that never occurred. For example, there are numerous documented "dead-alive" cases where suspects confess to killing people who have gone missing only to find out that the "victims" are alive and well. Second, confessions are proven false in cases of physical impossibility. For example, it is physically impossible for a person to be in two places at the same time. Some suspects confess to crimes that occurred during a time frame when the evidence shows they were locked up in jail or prison. Third, scientific evidence can prove a confession false. The most common scientific evidence that exonerates a false confessor is DNA evidence, but fingerprint evidence, ballistic evidence, blood evidence and other forensic evidence can also demonstrate that a confession is unreliable. The final category is called "true perpetrator identified," a broad category that can involve DNA evidence which not only excludes the confessor as the source of DNA found at a crime scene but also identifies the true perpetrator or can involve situations where the true perpetrator comes forward and admits to the crime and provides police details of the crime that prove that his confession, and not the original suspect's, is the more reliable confession.

The DNA exonerations involving false confessions necessarily represent only a small fraction of the total number of proven false confessions. DNA evidence is only available in a small percentage of cases, usually murder and murder/rape cases and researchers know very little about the problem of false confessions in other cases. Moreover, the Innocence Project's database only includes DNA exonerations in wrongful conviction cases. Drizin and Leo's database of 125 proven false confessions includes those proven false by DNA and from other sources (e.g., the true perpetrator confessed, no crime occurred, physical impossibility, etc.) and also includes pre-conviction

³ Hugo Adam Bedau and Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 *Stan. L. Rev.* 21 (1987). Bedau and Radelet's catalogue of innocents convicted in potentially capital cases increased to 416 by 1992. Michael Radelet, Hugo Bedau and Constance Putnam, *IN SPITE OF INNOCENCE* (1992).

⁴ Samuel R. Gross, et al., *Exonerations in the United States 1989 Through 2003*, 95 *J. CRIM. L. & CRIMINOLOGY* 523, 544-546 (2005)

exonerations.⁵ Today, largely as a result of DNA testing, most innocents who are wrongfully arrested are exonerated before their wrongful arrests can ripen into wrongful convictions.

One other remarkable statistic is worth noting and is highly relevant to the analysis of the confessions obtained in the Bowman murder. In several studies of wrongful convictions based on false confessions, there have been multiple false confessions in the same case. The most infamous multiple false confession case is the Central Park Jogger case in New York City which involved five proven false confessions of teenagers to the rape and attempted murder of a jogger in New York's Central Park in 1989. More recently, the case of the Beatrice Six involved four proven false confessions to the murder and rape of a woman in Beatrice, Nebraska and five false guilty pleas. Only one of the six defendants maintained his innocence and went to trial. In Drizin & Leo's study of 125 proven false confessions, 38 or 30% involved cases in which two or more defendants falsely confessed in the same case. As Saul Kassin, perhaps the leading researcher on false confessions in the United States has noted, once detectives obtain one false confession from a suspect, they then use that confession to coerce other false confessions from co-defendants: "If the first person to implicate the others is giving a false statement, and then the first leads to the second, and the first two are used to leverage the third, then certainly you're building a house of cards."⁶

The phenomenon of false guilty pleas has received less study than that of false confessions, although it stands to reason that the numbers of false guilty pleas are probably much higher given that 97-99% of all criminal cases are resolved by plea bargaining.⁷ Many of the same pressures which lead a suspect to falsely confess can lead a suspect to plead guilty to crimes they did not commit. In the false guilty plea context, however, the promises of leniency and threats of harm are above board and the suspect has the benefit of counsel to assess the pros and cons of pleading guilty, assuming that counsel is effective. This is a big assumption to make. Confession evidence is perhaps the most powerful evidence in a court of law. Many defense attorneys, faced with a client who confesses, start negotiating for the best deal they can get with prosecutors as soon as possible. They often dismiss or ignore the client's claims that his confession is false.

Of the 125 cases in Drizin & Leo's study, 14 innocent defendants (11%) eventually plead guilty to crimes they did not commit.⁸ Of the first 259 DNA exonerations, 19 defendants plead guilty. There are also several cases involving multiple false guilty pleas by defendants in the same case, including the Beatrice Six case (in which five innocent defendants pleaded guilty to the murder and sexual assault of a

⁵ Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.CAR.L. REV. 891 (March 2004).

⁶ Drizin & Leo, *supra*, at 972-973.

⁷ Allison Redlich, *The Susceptibility of Juveniles to False Confessions and False Guilty Pleas*, 62 RUTGERS L. REV. 943, 944 (2010). See also Allison D. Redlich, *False Confessions, False Guilty Pleas: Similarities and Differences*, in POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE AND POLICY 49, 60 (G. Daniel Lassiter & Christian A. Meissner eds., 2010)

⁸ *Id.* at 957.

woman in Beatrice, Nebraska in 1985) and the more recent case of Bobby Dixon and Philip Bivens who falsely confessed and pleaded guilty to the murder and rape of a woman in Hattiesburg, Mississippi in 1979. Although more research needs to be done on this point, it is quite possible that the same multiplying effect we see with false confessions may also exist with false guilty pleas.

IV. The Social Psychology of Police Interrogations and False Confessions: An Overview

Although the existence of an increasing number of false confessions debunks the common assumption that an innocent person would never confess to a crime she did not commit, the mere existence of false confessions does not explain *why* an innocent person would confess to a crime. The answer to this question lies in well-established psychological and sociological literature on the causes, characteristics, and consequences of police interrogation and false confession. This research has led to an increased understanding of how and why people confess to crimes they did -- and sometimes did not -- commit.⁹

By and large today, confessions (both true and false ones) are not obtained by brute force or other third degree methods. Interrogators are trained to employ a variety of psychologically-oriented tactics such as isolation, invading a suspect's personal space, accusation, interrupting a suspect's denials, asking suggestive questions, alternating displays of sympathy with displays of hostility, and offering to "help" the suspect only if she confesses. In particular, two standard tactics -- maximization (false or exaggerated characterizations of evidence) and minimization (expressions of sympathy and moral justification as when one suspect is encouraged to place primary blame on another suspect) are highly effective in inducing confessions.¹⁰ These inducements either implicitly or explicitly communicate the message that the suspect will receive less punishment, a lower prison sentence, or some form of investigative, prosecutorial, judicial or juror leniency or clemency if he confesses, but that the suspect will receive a higher charge or longer prison sentence if he does not confess.¹¹ Although these tactics are effective in inducing the guilty to confess, they sometimes cause innocent people to confess, especially when repeatedly used over time and in combination with the other tactics.

⁹ See, e.g., Kassin, S.M. (1997), The psychology of confession evidence, *American Psychologist*, 52, 221-233; Kassin, S.M. & Kiechel, K.L. (1996), The social psychology of false confessions: Compliance, internalization, and confabulation, *Psychological Science*, 7, 125-128; Kassin, S.M. & McNall, K. (1991), Police interrogations and confessions: Communicating promises and threats by pragmatic implication, *Law and Human Behavior*, 15, 233-251; Gudjonsson, Gisli (2003), *The Psychology of Interrogations and Confessions, A Handbook*; Ofshe, R.J. & Leo, R.A. (1997), The decision to confess falsely: Rational choice and irrational action, *Denver University Law Review*, 74, 979-1119.

¹⁰ The leading interrogation manual is FRED E. INBAU, JOHN E. REID, JOSEPH P. BUCKLEY, & BRIAN C. JAYNE, *CRIMINAL INTERROGATION AND CONFESSIONS* (4th ed. 2001).

¹¹ The more explicit the promise of leniency or threat of harm, the more likely that a court will later rule that the confession is coerced and exclude it from evidence.

Experienced police officers and detectives typically receive intensive training in the practice and law of interrogation. As they gain more experience and additional training, they learn to apply and fine-tune their interrogation skills. Detectives are taught a variety of psychological techniques to use to overcome a suspect's denials and to elicit incriminating statements, admissions, and/or confessions. These techniques, most of which are perfectly legal, seek to influence, persuade, manipulate, and deceive suspects into believing that: 1) their situation is hopeless and 2) their best interest lies in confessing. Sometimes, however, interrogators use techniques and methods of interrogation that are coercive – they either directly or implicitly promise leniency or threaten harm -- and thus regarded as legally impermissible. Such tactics are present in virtually every proven police-induced false confession.

Typically, most interrogations begin with a short period of rapport building, usually some light banter about non-threatening subjects in which the detective attempts to put the suspect at ease. During this time frame, interrogators will obtain pedigree information from the suspect -- basic background information about the suspect's age, schooling, etc. If *Miranda* warnings are given, they are usually given during the rapport building stage, in a manner designed to minimize the importance of the warnings (“you’ve seen these on television” “these are something I have to give you in order for you to tell my your side of the story”) and to suggest that only the guilty would invoke their rights because they must have something to hide.

The rapport building period is also important because during this phase of the process, interrogators, who are trained to think that they can detect whether a suspect is telling the truth by analyzing the suspect's non-verbal behavior (body language) or the words the suspect uses in answering certain questions, often decide whether to interrogate a suspect based on their behavioral analysis. The leading interrogation trainer, John E. Reid & Associates, in their training materials, tells interrogators that truthful subjects are upright, open, relaxed, lean forward occasionally, frontally aligned with interviewer, and make casual posture changes. Deceptive subjects retreat, slouch, or are frozen in their seats, their heads or bodies slump, shake their hands and feet, and they tend to make guarded and defensive moves such as placing their hands over their mouths or crossing their arms. As far as verbal behaviors go, the truthful are composed, interested, concerned, realistic, cooperative, give direct and spontaneous responses and specific denials, they appear sincere and confident in the outcome of the investigation and voice their belief that the offender should be punished. Deceptive subjects tend to be overly polite, lack confidence in the outcome of the investigation, claim mental blocks or a lack of memory, blame others, minimize the offense, use qualifying phrases like “I swear to God” and voice a belief that the offender should be punished lightly or given a second chance.¹² According to Reid and Associates, investigators trained in their Behavior Analysis Interview (BAI) can distinguish truth and deception at an 85% level of accuracy.¹³

¹² See e.g. Inbau, Reid, Buckley & Jayne, *Criminal Interrogations and Confessions* (4th ed. 2001) at 131-153.

¹³ http://www.reid.com/services/r_behavior.html

Investigators who receive such training often come to believe that they are effective human lie detectors. The problem is that there is no evidence to suggest that those trained in behavior analysis techniques are any more effective at detecting deception than anyone else. Numerous studies have shown that the police accuracy rate ranges from 45 to 60% and that college students and others have similar or higher accuracy rates when detecting deceit. Other studies have determined that training police and college students in the basics of the Reid technique actually decreases their accuracy in detecting deception but increases their confidence that they are interrogating only the guilty.¹⁴

Even more troubling is the fact that behavioral symptom analysis may be particularly inaccurate with youthful suspects. Youthful subjects tend to slouch more in their seats than do adults, make less eye contact with adults, and take longer to respond to questions than adults, especially if legal language is used by adults.¹⁵ There is therefore, even greater danger that investigators will make erroneous judgments about a juvenile suspect's guilt based on behavioral analysis, and will expose innocent and vulnerable juveniles to the next stage of the interrogation – the confrontational part of the process.

The first step in the process of breaking down the suspect's resistance to confessing involves an abrupt change in the nature of the questioning, a change intended to raise the suspect's anxiety level, increase his discomfort, and begin altering a suspect's perception of his situation to one of hopelessness. Typically, this is accomplished by a direct accusation of guilt – the interrogator tells the suspect that he or she is absolutely convinced that the suspect is guilty and that nothing the suspect can say will convince the interrogator otherwise. Interrogators are trained to cut off and override a suspect's denials, to attack and try to undermine a suspect's assertion of an alibi or claims of innocence and most importantly, to confront the suspect with incontrovertible evidence of his guilt, whether real or non-existent. Through the use of these techniques, which are recycled over and over again throughout the interrogation, interrogators communicate the message to the suspect that regardless of the suspect's denials or protestations of innocence, he is going to be arrested, prosecuted, convicted, and eventually incarcerated.

Once the interrogator has caused the suspect to understand that he has been caught and that there is no way out of this predicament, he seeks to convince the suspect that the only way to improve his otherwise hopeless situation is by confessing to the offense(s) of which he is accused. The second step of successful interrogation thus consists of offering the suspect inducements to confess — reasons or scenarios that suggest the suspect will receive some personal, moral, communal, procedural, material, or other benefit if he confesses to some version of the offense. Researchers have classified the types of inducements investigators use during the second step of interrogation into three categories: *low-end* inducements, *systemic* inducements, and *high-end* inducements.

¹⁴ For a list of such studies, see Jessica R. Meyer and N. Dickon Reppucci, *Police Practices and Perceptions Regarding Interrogation and Interrogative Suggestibility*, 25 BEH. SCI. & LAW 1, 6-7. (2007).

¹⁵ *Id.*

Low-end inducements refer to interpersonal or moral appeals the interrogator uses to convince a suspect that he will feel better if he confesses. Such appeals include that only the “truth will set the suspect free,” or that confessing is the moral or Christian thing to do, or that God will forgive the suspect only if he confesses. While such low-end inducements are common, rarely do they lead innocent suspects to confess.

Systemic inducements refer to appeals that the interrogator uses to focus the suspect's attention on the processes and outcomes of the criminal justice system in order to get the suspect to come to the conclusion that his case is likely to be processed more favorably by all actors in the criminal justice system if he confesses. Typical examples of these inducements include that the interrogator will “go to bat for the suspect” with the prosecutor or the judge when the case comes to court, or that he will write up his report in a favorable way if the suspect confesses. Often, the interrogator will ask the suspect directly to think about the ways in which cooperation will be viewed by the judge or jury and conversely, how non-cooperation will be seen: “who would you rather be when you get to court, the stand up person who admits he made a mistake, owns up to it, feels bad about it, and wants to atone for it or the person who continues to lie about their involvement, drags the victim's family through the mud of a trial, and wastes the court's time by forcing a trial whose conclusion is already determined.”

As the interrogation proceeds, interrogators often turn up the heat by placing strict time limits on the offer of help that accompanies a systemic inducement. They tell the suspect that this is the suspect's one and only chance to tell his side of the story and often threaten to leave the room or “walk out the door” if the suspect does not take the bait. The message to the suspect is clear – it is now or never -- if you pass up this opportunity, those in the system with the power to determine his fate (police, prosecutor, judge, and jury) will no longer be open to the possibility of seeing his actions in their most favorable light.

High-end inducements refer to appeals that directly communicate that the suspect will receive less punishment, usually in the form of a lower prison sentence or a lesser charge, and/or some other form of police, prosecutorial, judicial, or juror leniency if he complies with the interrogator's demand that he confess. Noncompliance, however, will lead to a higher charge or greater punishment. *High-end* inducements may either be implicit or explicit: the important question is whether the interrogation technique communicates the message, or is understood to communicate the message, that the suspect will receive a lower criminal charge and/or lesser punishment if he confesses as opposed to a higher criminal charge and/or greater amount of punishment if he does not. These messages are communicated in a variety of ways. For example, interrogators sometimes try to persuade suspects that their behavior was merely an “accident” or was provoked, or was a justified or necessary act of self defense. Portraying the suspect's behavior as an accident or one of self-defense tells the suspect that his act was either not a crime at all or one deserving of far less punishment than a premeditated or cold-blooded crime.

Sometimes interrogators use more explicit *high-end* incentives. In these variations, interrogators describe to the suspect the different degrees of the alleged offense, and propose to the subject a scenario in which the suspect committed the less heinous version of the offense, one which carries less punishment. Even more explicit inducements involve telling the suspect that he or she may receive the death penalty for the alleged offense and that confession may be his best or only chance to save his life. In many of these scenarios, interrogators who rely on *high-end* inducements will present the suspect with only two choices – innocence is not one of them -- if the suspect agrees to the good choice (a minimized version of the offense, such as involuntary manslaughter or self-defense), he will receive a lower amount of punishment or no punishment at all; but if he does not confess, criminal justice offices will impute to him the bad choice (a maximized version of the offense, such as pre-meditated first degree murder), and he will receive a higher level of punishment or perhaps the harshest possible punishment. (This technique is sometimes referred to in the academic literature as the maximization/minimization technique).

The point of *high-end* inducements is to communicate to a suspect that it is in his rational self-interest to confess to the minimized or non-incriminating version of the offense that the interrogator suggests. It is in the suspect's rational self-interest to do so because he will receive a lower charge, a lesser amount of punishment, and/or no time in prison. If he fails to confess, however, he will receive a higher charge, a greater amount of punishment, and more time in prison, perhaps even the death penalty.¹⁶

Social science research has repeatedly demonstrated that some *systemic* inducements (depending on the content of the inducement, how explicitly or vaguely it is stated, and the message that it communicates) and all *high-end* inducements are coercive because they rely on implicit and/or explicit promises of leniency and threats of harm to induce compliance. Such promises of leniency and threats of harm are not only regarded as coercive in the social science literature because of the messages they convey and their demonstrated impact on the decision-making of individuals, but they are also regarded as legally impermissible by courts.

When experts evaluate whether a particular interrogation is coercive, they carefully study the facts of the interrogation and then analyze these facts in light of the extensive social science research literature on the social psychology of interrogation and confession and their experience in studying other interrogations: They try to determine if any of the interrogator's techniques were coercive by applying the generally accepted findings of the social science research literature on the subject of interrogation, coercive influence techniques, and false confessions to the specific facts of the case. In particular, the expert must assess whether the interrogator used any techniques that communicated, either implicitly or explicitly, that the suspect would receive a lower sentence, a lesser amount or type of punishment, or perhaps no punishment at all if he complied with the interrogator's demands and/or receive a higher amount or type of punishment — or

¹⁶ The most thorough discussion of this “rational choice” model of understanding the police interrogation process is in Richard J. Ofshe and Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*. 74 DENV. L. REV. 979 (1997).

perhaps the harshest punishment possible — if he did not comply with the interrogator's demands. The expert may also evaluate whether the interrogation techniques, either individually or cumulatively, had the effect of causing a suspect to perceive he had no choice but to comply with the demands of the interrogator and thus whether the interrogation, in effect, overbore his will.

V. Differentiating Between Reliable and Unreliable Confessions

Once a confession is induced through police interrogation, the best way to determine the confession's trustworthiness is to evaluate the fit between the suspects' post-admission narrative (the account the suspect gives after she admits to the crime) and the objectively knowable facts of the crime (the underlying crime facts and the derivative evidence).¹⁷ This analysis should reveal whether the suspect possesses actual knowledge of the crime or is ignorant of information that should be known to the perpetrator. A guilty confessor will be able to provide information that only the police know, both dramatic and mundane crime scene evidence that the offender should know, and an explanation for unusual and anomalous crime scene facts.

The innocent confessor lacks personal knowledge of the crime facts. She can repeat information that has been told to her by the police officers or which she has learned from other sources (press accounts, visiting the crime scene or seeing crime photos, discussions with family members, neighbors, etc, seeing photos, etc.). However, when asked for information outside of these sources, she will be forced to either guess or to claim a lack of knowledge. When she does guess, she will often make mistakes. Her confession will often be riddled with errors and lacking in specifics. If her narrative fits poorly with the crime facts, fails to corroborate known information and provide unknown information and contains errors about information she should have known if she was involved in the crime, her confession is unreliable and quite possibly false.

In order to properly evaluate the fit between the suspect's post-admission narrative and the known facts, it is of course essential that the interrogator not contaminate the suspect's knowledge by disclosing to her information relating to the investigation. In many false confession cases, police officers inadvertently suggest information to a suspect in the pre-admission phase of the interrogation (sometimes they show a suspect crime scene photos or take a suspect to the crime scene). If the entire interrogation is recorded, then one can see whether the information in the suspect's narrative originated with the suspect or was suggested to the suspect by the authorities. If not, there is an even higher risk of false confession, as factfinders are likely to attribute the information to the suspect rather than find that a police officer inadvertently has suggested it.

¹⁷ See Ofshe, R.J. & Leo, R.A. The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions, *Studies in Law, Politics, and Society*, 16, 189, 199; Ofshe, R.J. & Leo, R.A. (1997), The decision to confess falsely: Rational choice and irrational action, *Denver University Law Review* 74, 979-1119.

There are other factors that are important in assessing reliability. One important factor is whether the confessor can not only corroborate what the police know but will provide information that the police do not know, leading them, for example, to a murder weapon, profits from a robbery, or items of bloody clothing worn during the crime scene. This is what John E. Reid & Associates calls “independent corroboration.”

In multi-defendant confession cases, a second factor in assessing reliability is consistency among the statements of the co-defendants. In moving to vacate the Central Park Jogger defendants’ convictions, the District Attorney’s Office placed great weight on this factor, noting that:

Using their videotaped statements as the point of comparison, analysis shows that the accounts given by the five defendants differed from one another on the specific details of virtually every major aspect of the crime -- who initiated the attack, who knocked the victim down, who undressed her, who struck her, who held her, who raped her, what weapons were used in the course of the assault, and when in the sequence of events the attack took place.¹⁸

Finally, in assessing the reliability of a confession, experts review police reports, transcripts, electronic recordings, interview notes and other documents to see if the statement is internally consistent; i.e., whether the statement wavers from one telling to the next). Typically, law enforcement officers see internal inconsistencies as evidence that a suspect is being deceptive and that the changes in the statements reflect the difficulties the suspect is having with admitting the truth. In this scenario, the final statement by the suspect, in which the suspect admits to the crime, is deemed the most reliable of all the statements. Although this may be the case, it is not always the case. In some false confession cases, innocent suspects resist telling law enforcement officers what they want to hear but give in little by little in response to pressure from their interrogators and a desire to end the interrogation. The final confession represents not a march towards the truth but a march toward what the suspect believes the interrogator wants to hear.

VI. The Three Errors Common to All Police-Induced False Confessions: Misclassification, Coercion, and Contamination

There are three errors that occur in virtually every proven false confession case. First, police officers misclassify an innocent person as a guilty suspect. Second, interrogating officers subject the innocent person to a highly confrontational, accusatory interrogation that invariably involves lies about evidence and direct or implied promises of leniency or threats of harm. The third stage – the contamination error – makes it virtually certain that a false confession will lead to a wrongful conviction. Contamination occurs when interrogators, usually inadvertently, suggest to the suspect crime facts that only the true perpetrator could have known. When the suspect finally breaks down and confesses, he incorporates the details that were fed to him by law enforcement officers

¹⁸ Affirmation of Nancy E. Ryan, Assistant District Attorney, County of New York, in Response to Motion to Vacate Conviction, ¶¶ 86 (No. 4762/89).

into his confession and adopts them as his own. Two other psychological processes also play a role in each of these pathways to wrongful convictions based on false confessions. Tunnel vision is the process by which an individual focuses on one outcome to the exclusion of all others. In the interrogation process, it is the tendency of an interrogator to focus on a suspect to the exclusion of all others and to use the interrogation process to build a case for conviction. Confirmation bias is the psychological process that causes an interrogator to seek out and interpret evidence in ways that support his existing beliefs, perceptions and evidence and to avoid or reject evidence that does not.

The post-admission narrative process is about more than merely eliciting information from the suspect. Investigators are trained to shape the suspect's narrative to make the confession as persuasive as possible and to enhance the chances of conviction. In this way, confessions are scripted or constructed by interrogators. A persuasive crime narrative requires an explanation of why the crime happened – the motives and explanations of the suspect for committing the crime. It also should contain a statement of the suspect's emotions, not only his or her emotions at the time of committing the crime, but also the shame, regret, or remorse the suspect now feels for having committed the crime. Interrogators are also trained to get the suspect to cleanse the interrogation process, usually by providing statements to the effect that the confession was voluntary. Interrogators will ask the suspect, usually after the suspect's resistance has been broken down and he has been made to believe that it is in his best interests to confess, whether the suspect was treated well, given food and drink, bathroom breaks, and other comforts, and whether any promises or threats were made to the suspect. Finally, and perhaps most importantly, the confession must contain both general and specific crime knowledge – the details of the crime that only the true perpetrator should know.

The problem of contamination in false confession cases arises when the interrogator pressures a suspect during the post-admission narrative phase to accept a particular account of the crime story – one that usually squares with the interrogator's theory of how the crime occurred – and then suggests, deliberately or inadvertently, crime facts to the suspect. The presence of these facts in the suspect's confession gives the suspect's narrative credibility and the appearance of corroboration. If the interrogation process is not electronically recorded, the interrogator is free to assert that these crime facts were volunteered by the suspect and the trial devolves into a swearing contest between the suspect and the interrogators over who was the source of the details in the confession. If the entire process is recorded, however, then it may be possible to trace the contamination.

A recent study of all of the proven false confessions in the DNA exoneration database reveals that the problem of police contamination is extreme. Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. 1051 (2010). In all cases but one (95% or 36 of the 38 exonerees for whom trial or pre-trial records could be obtained), police reported that suspects confessed to a series of specific details concerning how the crime occurred. As the prosecutor in one of these cases -- Robert Miller's -- briefly put it, "He supplied detail after detail after detail after detail. And details that only but the killer could have known." The non-public facts contained in

confession statements then became the centerpiece of the State's case. Although defense counsel moved to exclude almost all of these confessions from the trial, courts found each to be voluntary and admissible, often citing to the apparent reliability of the confessions. Appellate courts almost uniformly upheld these decisions, again citing to the "inside information" apparently known by the defendant. DNA later exonerated all of these defendants, and, in many cases, identified the true perpetrators. While it is possible that some of these details could have been learned by the defendant from media accounts, most of the information was non-public. These details must have been fed to the suspect by the detectives, usually through leading questions, showing the suspect crime scene photos, and in some cases, taking the suspect to the crime scene. Of the forty false confessions studied by Professor Garrett, 10 innocent men and women both falsely confessed and plead guilty.

VII. The Reliability of the Defendants' Statements in the Bowman Investigation

There are numerous reasons to question the reliability of the statements of the defendants in the Bowman murder investigation and to be concerned that some or all of these men (Kenneth Kagonyera, Robert Wilcoxson, Larry Williams, Jr., Damian Mills, and Teddy Isbell) have been wrongfully convicted. The two strongest reasons to classify these confessions and guilty pleas as "proven false confessions and guilty pleas" are scientific evidence (DNA not only excludes the defendants but has been matched to another perpetrator) and that one of the true perpetrators has come forward and confessed to his participation and named his accomplices, one of whom is a DNA match to evidence connected to the crime. The other two defendants named in the confession cannot be excluded as the source of DNA found on evidence connected to the crime. These and other reasons are discussed below:

A. Confession of Robert Rutherford to DEA Agent about his involvement in the murders

Walter Rodney Bowman was murdered at approximately 11:30p.m. on Monday September 18, 2000. Very early on in the investigation, the investigators in this case received a Crime Stoppers Tip that named three perpetrators. The call came in on September 20, 2000 at 7:10 a.m. The three perpetrators were named as Rob Rutherford (address unknown), JJ Pickens,¹⁹ and Brad Summey. There is no evidence that this tip was ever followed up (perhaps because the police erroneously determined that Pickens was in custody at the time of the crimes).

On March 27 and 28, 2003, Robert Rutherford, an inmate in federal prison in Manchester, Kentucky, confessed to Special Agent Barnabas Whiteis of the Federal Bureau of Investigation that he was involved in a homicide that occurred in the Fairview Community of Asheville, N.C. in 2000. The confession narrative is as follows:

¹⁹ The State and the Commission are proceeding on the basis that Lacy Pickens III is the same person as "JJ Pickens."

In August 2000, Dawana Bowens, one of Shaun Bowman's girlfriends, learned that Bowman's father had approximately \$108,000 in currency, marijuana, and cocaine in his residence in the Fairview community of Buncombe County. Bowens told Rutherford and her other boyfriend, Bradford Summey. The three decided to burglarize the residence and were shown the residence and the surrounding neighborhood by an accomplice named Jennifer Reagan. Another accomplice, Jay Pickens, was brought into the burglary plot and the three started to watch the house. Bowens said the money was inside the house so the team decided to rob the house even though individuals were at home.

Sometime around August 2000, Rutherford, Summey, and Pickens drove in Pickens's vehicle, a 1970's model blue Olds Cutlass sedan. They parked less than a block away from the house on the same side of the street in a dirt drive. They approached the residence and hid in the bushes on the right side of the house. At approximately 9:30 or 10:00p.m., they entered the house wearing bandanas on their faces. Pickens and Summey wore gloves. Summey had a silver .9mm semi-automatic pistol, Pickens carried a 12 gauge full size pump shotgun with a pistol grip. Rutherford was unarmed. Rutherford opened the front screen door and the main door was open. Pickens and Summey entered first followed by Rutherford. There were several individuals seated on a couch watching the ballgame on TV to the left. One was Shaun Bowman. Pickens ordered all individuals get to the floor with Rutherford standing guard. Walter Bowman ran from either the living room or the kitchen area to the first room on the left. Summey followed him. Bowman shut the door. Summey tried to get it open but shot through the door near the lock. They got scared and left without going to the right rear bedroom where the cash was supposedly stashed.

After departing the residence, they retrieved their car, stopping by a ditch along the road to stash the weapons. They went to the Shell gas station on Hendersonville, Hwy. where Rutherford threw his bandana and the others may have thrown away their gloves. They went to Rutherford's grandmother's house where Rutherford told his mother. They then went to Summey's house where Rutherford picked up his car.

The next day, after hearing in media accounts that Rodney Bowman had died, Rutherford, Pickens, Bowen, Summey, and Regan returned to where they stashed the guns. Pickens kept his weapon and he may have later been stopped for carrying a weapon. Summey's shotgun was bagged up and tossed into a dumpster near the UNCA campus.

B. DNA Evidence Excludes the Defendants from the Crime and Links Brad Summey to the Crime; Rob Rutherford and Lacy Pickens also cannot be excluded as the source of DNA connected to items from the crime scene.

In March of 2001, a first round of DNA testing was conducted on items recovered from the crime scene and compared to the DNA of the six suspects arrested and charged with the murder of Walter Bowman: Kenneth Kagonyera, Aaron Brewton, Teddy Isbell,

Robert Wilcoxson III, Larry Williams, Jr., and Damion Mills. DNA from a cutting from a gray bandana and from a red scarf did not match that of the suspects or the victim. The DNA from the cutting of the red scarf was consistent with a mixture of multiple contributors. No additional DNA testing was conducted.

On June 26, 2007, a routine search of the North Carolina CODIS database revealed a match between the cutting from the gray bandana and a convicted offender with DNA database number 2006-00021. The identity of this offender was shared with Lt. John Elkins of the Buncombe County Sheriff's Office on June 26, 2007.

In July 2010, the NCIC submitted buccal swabs from Bradford Summey for comparison with the profiles previously developed from the red and gray bandanas in March 2001. The DNA profile from the gray bandana matched the profile of Bradford Summey. Summey was excluded as the source of DNA on the red scarf which contained a mixture.

Additional DNA test results were obtained from a private lab – LabCorp of America – in November of 2010. Testing was conducted on cuttings from two red bandanas, two brown gloves, and two black gloves. Although all of the defendants were excluded as possible sources of DNA from these items, a partial DNA profile from a brown glove is a mixture of three or more persons, one of whom is a male. Lacy Pickens, could not be excluded as a contributor to the DNA in this sample. A partial profile obtained from a second brown glove contained a mixture. Lacy Pickens could not be excluded as the source of the DNA.

Finally, another round of DNA tests on Item #13, a red bandana found near the crime scene, found a mixture of the DNA of three persons. Robert Rutherford could not be excluded from a male profile in the mixture. One in 6,060 African American males could be included in this partial profile.

C. Corroboration of Rutherford's Statements

Many of the facts in Rutherford's statement are corroborated. The DNA test results are powerful corroboration of Rutherford's statements. Rutherford told the DEA agent that all three men wore bandanas and that Pickens and Summey wore gloves. This is consistent with the accounts of every witness to the crime and such items were recovered by the police. Summey's DNA is on a bandana; Pickens's DNA cannot be excluded from a pair of brown gloves, and Rutherford's DNA cannot be excluded from a bandana. Rutherford, however, can be excluded as the source of DNA found on the gloves, a fact which is consistent with his account that he did not wear gloves. Other facts that are corroborated include:

- 3 men were involved in the crime (this matches initial accounts from Crime Stoppers, the Asheville Citizen Times account on September 20, 2000; Wanda Holloway, Carol Childres, Valencia Barton, Valerie Bowman);

- The perpetrators hid in the bushes near the house (According to Wanda Holloway, when she let the dogs out to go to the bathroom, the dogs were barking like crazy at the bushes next to the house);
- Dawana Bowens was a girlfriend of Shaun Bowman's and is still a family friend of the Bowmans;)
- The description of the shotgun is consistent with the descriptions of the victims – full size pistol grip shotgun (Tony Gibson described the gun as a black long barrel pistol grip shotgun with a Mossberg pump);
- The victims were seated on the couch in the living room watching the football game
- The victim was shot by a shotgun through the door of the bedroom to the left
- There was a right rear bedroom in the home;
- Summey did live near the UNC-Asheville Campus
- Pickens did own a '71 Olds Cutlass (Security video of the suspects captured at a gas station before the crime was committed shows a car that appears to be a '71 Cutlass)

There are several facts in Rutherford's statement that are inconsistent with the known facts of the crime but these appear to be minor mistakes related to the time of the shooting (Rutherford says the crime occurred at 9:30 or 10:00p.m. instead of 11:30p.m.²⁰ and Rutherford says the crime occurred in August 2000 instead of September.)

There appears to have been little risk of coercion or contamination affecting Rutherford's confession. The DEA agent did not ask or pressure Rutherford for this information; Rutherford volunteered it. Rutherford called the agent on two separate occasions – March 27 and March 28, 2003. The agent knew it was Rutherford because he recognized his voice from prior dealings. Although Rutherford did ask for some consideration in exchange for the information he was providing – either a reduction in his federal sentence or mitigation of any sentence he would receive for his participation in the murder of Bowman – none was promised to him by Special Agent Whiteis. The risk of contamination of Rutherford's confession was also minimal. There is no indication that Special Agent Whiteis even knew about the Bowman case before Rutherford called him, making it highly unlikely that he could have inadvertently or deliberately fed facts about the crime to Rutherford.

On the surface, it is hard to imagine what kind of promises of leniency with respect to his federal charges could persuade Mr. Rutherford to implicate himself in a murder. There is no statute of limitations on murder charges and whatever consideration Agent Whiteis could give Rutherford on his drug charges would not mitigate the murder charges, charges which could have exposed Rutherford to a potentially much longer

²⁰ It is possible that the 911 call was not made immediately after the shooting. Two of the witnesses to the shooting, Shaun Bowman and James Gibson, were not present when the police arrived. There were also no drugs, cash or weapons found in the home when police arrived. Some time may have transpired before the shooting was reported to enable Messrs. Bowman and Gibson to flee and remove these items from the crime scene.

sentence. There is also no information that has been provided to me that suggests that Rutherford had a habit of making false confessions.

Finally, additional corroboration concerning Rutherford's confession comes from Jennifer Lee Regan, a woman named by Rutherford as an accomplice to the planned burglary of the Bowman home. In a telephone conversation with NCIC Staff Attorney Jamie Lau, Ms. Regan confirmed that Robert Rutherford was her boyfriend for a period of time and admitted that she knew Brad Summey. After being read Rutherford's statement, she did not deny anything in the statement. After cancelling a scheduled meeting with NCIC staff, she retained a lawyer, Carl Horn, III, a former Assistant United States Attorney and United States Magistrate Judge. In a letter dated March 25, 2011, Mr. Horn notified Jamie Lau of the NCIC that if called to testify at a deposition, Ms. Regan would assert her Fifth Amendment privilege to any questions related to "her brief relationship with Mr. Rutherford or the others implicated in Mr. Rutherford's statement."

D. Lacy Pickens was Not in Custody on Date of Murder

On February 15, 2008, Kenneth Kagonyera filed a Motion for Appropriate Relief, seeking an evidentiary hearing on *Brady* issues and actual innocence claims relating to the newly discovered affidavit of Robert Rutherford, an affidavit which was not disclosed to the defense. In a pleading filed in response to Kagonyera's affidavit, District Attorney Ronald L. Moore dismissed Rutherford's confession as unreliable but agreed to do DNA testing of the bandanas and work gloves and to compare those test results with the DNA of Pickens, Rutherford and Summey. In dismissing Rutherford's confession as unreliable, the District Attorney claimed that one of the individuals named by Rutherford could not have committed the crime because he was in the Buncombe County Detention Facility for two and one-half months including the date the crime was committed. If true, this would undermine the reliability of Rutherford's confession, at least as far as the involvement of the incarcerated individual was concerned.

In a Crime Stoppers Report dated September 20, 2000, and received at 7:10a.m., the caller named three men as possible perpetrators in the Bowman murder: Robert Rutherford, JJ Pickens, and Brad Summey. It appears that someone in law enforcement did some initial follow-up on these names because next to Summey's name was the notation "out of town working" and next to Pickens' name the words "in custody since 9-14-00" are written.

Before opining on the reliability of Rutherford's confession, I contacted North Carolina Innocence Commission staff member Jamie Lau to see if, in fact, Mr. Pickens was in custody on the date of the crime. Mr. Lau told me that further investigation has revealed that Mr. Pickens was not in custody on the day of the crime. He was only serving his sentence on the weekends and was not at the detention center on Monday September 18, 2000. In other words, he had the opportunity to commit the murder of Bowman.

E. Internal Inconsistencies in Defendants' Statements

One factor that is important in analyzing the reliability of a confession is whether the statements are internally consistent, i.e., consistent from telling to telling. This is only one indicia of reliability. Internally inconsistent statements can be reliable. In the absence of a recording of the interrogation, it is difficult to know whether the statements are internally inconsistent because the suspect was withholding information from the police or attempting to mislead the police in earlier statements or because the suspect is innocent, cannot remember what story he told previously, and conforms his statements over time to what he thinks the police want to hear.

The statements of the defendants in this case are riddled with internal inconsistencies about critical details of the crimes, including who participated in the crime, the roles of the participants, the number of and types of cars driven to the crime scene, what the perpetrators were wearing, who was armed, the types of weapons used, what happened during the crime, what happened after the crime, etc. This is especially so with respect to the statements of the defendants who gave multiple versions of the crime - - Teddy Isbell, Larry Williams and Damian Mills. Their stories changed dramatically each time they spoke to the police. After one defendant's story changed, the police went back and extracted statements from the other defendants that incorporated these changes.

1. Teddy Isbell

The first big break in the investigation came on September 25, 2000. Teddy Isbell, an admitted crack addict, came forward to the police with information about the Bowman murder. Isbell came forward with the assistance of Matt Bacoate, a man who ran a substance abuse program in the community, and met with Lt. Sam Constance at Bacoate's place of business. Also present at the first interview were Bacoate and Isbell's girlfriend. Isbell described how he heard Kagonyera boast about the crime at a dice game and that Kagonyera said that "things got messed up" and Robert Wilcoxson ("Detroit") had shot the man. Isbell named Kenny Kagonyera, Robert Wilcoxson, and Larry Williams as the perpetrators and Wilcoxson's van as the car driven to the crime scene.

Isbell came forward because he was worried that his fingerprints would be found on the gun used to kill Bowman. According to Isbell, Kagonyera, Larry Williams, and Aaron Brewton had broken into his apartment at the Pisgah View Apartments and stolen some items from the owner, a man named Louis. Louis was apparently out to get Kagonyera and was armed. Isbell told police that Kagonyera ordered him to go to his apartment and retrieve a gun for Kagonyera's protection.

Later that same day, Isbell was again interviewed at the Sheriff's Office by Constance. District Attorney Ronald L. Moore was present for this interview as was Isbell's girlfriend Anita Hines and his employer Matt Bacoate. Also present for portions of the interview were Det. Forrest Weaver of the Asheville Police Department. Isbell's story changed during this meeting. Isbell admitted that he helped to plan the robbery.

According to Isbell, he had planned the robbery of Shaun Bowman because Shaun's brother, Leon, told him that Shaun was holding a lot of drugs and money. In exchange for this information, Kagonyera had agreed to give Isbell an "8-ball of crack."

During this interview, Isbell's story changed once again. When detectives confronted Isbell with prior statements to Bacoate and his mother²¹ that he had been present when Bowman was shot, Isbell first stated he was in the van with the others but got out "on State Street." He later changed his story, telling Lt. Constance that Larry, Kenny, Detroit and Detroit's girlfriend Dea Johnson were involved. For the first time, he stated that two cars were driven to the scene. He said that the boys were in the van and that Dea followed in a beige color Monte Carlo. He claimed that Kagonyera had told him that Detroit was the shooter.

On September 28, 2000, Lt. Constance and District Attorney Moore re-interviewed Teddy Isbell at Moore's office in the presence of Isbell's counsel. Isbell's story changed dramatically yet again. First, he said he was not present at the crime scene. He told the authorities that two groups were out to rob Shaun Bowman – a crew composed of Kenny, Larry Williams, Jr., and Jajuan Kinney's cousin. The second group was Wilton, and Aaron Brewton's brother (Robert Wilcoxson had told police that he heard that Wilton, Trey, and Vaughn were the killers). In this version, Isbell claimed that Jajuan told him that the Kagonyera and not Wilcoxson was the shooter. He claimed to be smoking crack with Leon Bowman at the time of the crime. He also changed his story about the break-in at Louis's apartment. He now claimed that it was Kenny, Aaron Brewton, and Damian (Mills) who were involved in the break-in and not Larry.

2. Larry Williams, Jr.

Larry Williams, the youngest defendant at the time of his arrest at only 16 years of age, first became of interest to the police when his name was mentioned along with Kenny Kagonyera and Aaron Brewton in a Crime Stoppers tip on September 23, 2000. Another witness claimed to have heard Aaron Brewton brag about his role in the crime and mention Larry's name along with Kenny.

Larry was first interviewed by Detectives Sprinkle and Murphy at 8:45a.m on September 25, 2000 at the Buncombe County Detention Center where he was being held on other charges. Williams told the police that he has known Kenny Kagonyera for approximately three years and has been hanging out with Robert "Detroit" Wilcoxson for three months. He denied hanging out with Brewton with whom he had a fight and

²¹ In an interview with Jamie Lau, staff attorney at NCIC, Teddy Isbell's mother adamantly denied ever telling Det. Forrest Weaver that Teddy had confessed to her his involvement in the Bowman murder. She told Lau that she would have cut her ties to her son if he had told her this. She also told Lau, however, that she often can't remember what happened yesterday and does not remember what she told Weaver more than ten years ago.

adamantly denied any role in the murder. At 9:30 a.m, he signed a written statement in which he declares: "I'm not involved this murder."

On September 26, 2000, investigators returned to Larry Williams, armed with Isbell's statement that Williams was involved in the crime. This time the interview was conducted by Lt. Sam Constance and Det. Forrest Weaver. District Attorney Ron Moore was present for portions of the interview as was Sheriff Bobby Medford. Williams started with a story that he and Kenny and Aaron "Man" Brewton and Detroit were driving around in the van smoking blunts and watching movies. Sheriff Medford then entered the room and when he left, he claimed to have obtained Williams' confession.

In this story, Williams described how Brewton, Wilcoxson, and Kagonyera picked up two white girls and had sex with one of them, a girl named Hannah. Williams did not participate in the sex. After dropping off the girls, it was Brewton who came up with the idea of robbing the younger Bowman. He knew where Bowman lived. Brewton had a .45, Detroit had a shotgun, and he and Kenny were unarmed. As they approached the house all dressed in black, Williams got scared and turned around. He heard a girl scream, a gunshot, and then joined the others as they sped back toward the van. According to Williams, Brewton, who was the only one wearing a bandana, had blood on his clothes.

Williams asked to speak with Weaver and Constance and Moore left. Williams then recanted his confession and stated he had only confessed because he was scared and that while he was in the van with Kenny, Man and Detroit, he was not with them during the homicide.

Lt. Constance and Sheriff Medford interviewed Larry Williams again at the detention center on September 28, 2000. Williams agreed to talk with them without his attorney. He told them that he was "Detroit's boy" and that he spent the night of the murder in Detroit's van with Corey smoking blunts and watching movies. He became emotional and said that Detroit had nothing to do with this but that Kenny had said he had to get rid of a shotgun after the murder.

On October 10, 2000, Williams asserted his right to counsel and refused to speak with Detective Murphy when he came to the detention center.

On October 11, Williams got word to Detective Murphy that he wanted to talk. Williams then told Murphy that a guy named "Little Roy" knew about the murder and said that Damian Mills was involved. Williams says that Little Roy was giving details just like *the details that Sheriff Medford had given him*. Williams refused to sign a statement.

On October 24, 2000, Williams was charged with first degree murder. Prior to telling him he was charged, at 11:25a.m., Lt. Constance and Detective Murphy questioned Williams and told him that time was running out for him. Williams accused Constance of lying to him and said he wanted to leave. He was then formally charged.

Shortly after noon, Larry consulted with his father and Sgt Clementson and then agrees to speak with the police again. Williams then began to tell a series of statements that implicated him and others deeper and deeper in the crime:

- First, he said it was Damian Mills, and not him, who went to the Bowman house.
- Second, he said that he stayed in Detroit's van with Corey while Teddy Isbell, Kenny, and Damian went to the Bowman house.
- Third, for the first time, he introduced a different car into the story, claiming that he drove Kenny's blue car to the house on Fairview and that he stayed with the car while Teddy Isabel, Damian Mills, Detroit and Kenny went to the house. After first stating that he did not know who wore gloves and a bandana, he told investigators that Kenny and Damian were wearing them. Kenny was the shooter and it was Damian's idea to toss the gloves and bandanas out the window.
- In his next statement, he added Brewton to the story, claiming that "Man" had a gun.
- In a turnabout, he added a second car. In addition to Kenny's blue car, Williams said that Detroit's van was also driven to the Bowman's. Larry, Detroit, and Brewton were in the van; Teddy was driving Kenny's car with Kenny in the front and Damian in the back. After the shooting, Aaron remarked in the car that "he could not believe that Kenny shot the man." The story was later embellished with further details, included that Kenny had a shotgun and Damian had a .45 and that all of them wore bandanas.

On October 27, Williams again summoned Murphy and Clementson to speak to him. He told them that he had lied when he first named Brewton as the shooter because he was scared. He then told them that neither he nor Detroit was at the Bowman house.

3. Damian Mills

Damian Mills' stories, like those of Larry Williams, were all over the map, although his final story coincided in many respects with Larry's. Mills is Kagonyera's cousin. He was first interviewed at the detention center on October 11, 2000 by Det. George Sprinkle, Det. Elkins, and Sgt. Sandra Clementson. He denied any involvement in or knowledge of the crime. He claimed he did not know Rodney Bowman and had never been to Bowman's residence.

On October 26, 2000, Det. Elkins visited Mills at the detention center and re-interrogated him. During the interrogation, Mills changed his story numerous times. First, Mills said he went over to Pisgah View Apts. to hang with Kenny and smoke some weed. He stated that Kenny was talking about needing some "cheese" (money). Mills then left and drove back to his grandfather's apartment. Later that evening, Kenny pulled up in his blue Impala and blew the horn. Damian got in the passenger side of the back seat, asking Williams to slide over closer to Robert Wilcoxson. The group went to a project on Livingston Street, parked the car, and smoked four or five blunts. The group left and went to someone else's house where Bruton got out of the car and went inside.

After Bruton returned, they continued driving around and smoking marijuana. After riding for a while, they stopped again and everyone exited the vehicle, except for himself. The others came running back to the car around twenty-five minutes later in a hurry and Kenny peeled off at a high rate of speed. Mills described what the men were wearing as follows: Bruton was wearing all black and had on a pair of brown gloves and a black and white bandana; the others were dressed in black and that Kenny and had on brown gloves. Williams and Wilcoxson were wearing black gloves. Kenny was wearing a camouflage-colored bandana.

After a break for food, Lt. Constance joined the interrogation and Mills elaborated on the story. According to Mills, Kagonyera had been talking about robbing Shaun Bowman for a month because Bowman owed him money over some “bad shit” (drugs). After Kenny picked him up on the night of the crime, Kenny kept talking about collecting some money from “old boy” and “robbing this dude” to get some cheese. Wilcoxson and Bruton were talking about the robbery on the way there but Larry Williams was quiet, sitting in the back like a “puppy.” The group believed there was a lot of money in the Bowman house. Although Damian was not supposed to share in the split of the money, he asked for a share for being a “lookout.” The agreed upon share was \$2,500 to \$3,000. Kagonyera was armed with a .9mm or a .45 caliber handgun. In addition to wearing dark clothes, Wilcoxson was wearing a scarf and black gloves and had no gun. Larry had on a ski mask but had no gun. Bruton was carrying a black pistol grip shotgun with a “short barrel”, was wearing black clothing and a “black and white or blue and white bandana”. When they ran back to the car, everyone was yelling at Bruton for shooting the man. Mills could not lead the detectives to the pistol grip shotgun. He thought the gloves and a scarf were tossed out of the window during the getaway. Mills told the detectives that he went along with the robbery to get some money and that when Kenny, who likes to rob people, is doing a robbery, he likes to “chill” with his accomplices all day. Damian also admitted to being the lookout during Kenny and Brewton’s break in at Louis’s place in Pisgah View. After the break-in, the three of them went to Kagonyera’s grandmother’s house on White Fawn Drive to try to start Kenny’s Impala. He and Kenny were wearing gloves, the same ones that Brewton and Kagonyera were wearing on the night of the homicide. Mills’ statement – the most detailed statement of all – omits any mention of Teddy Isbell. It also has the five men in one car – Kenny’s Impala. There is no mention of Wilcoxson’s van.

There appears to be one final statement of Mills that is not incorporated into an interview report. All that was produced to me were handwritten notes of an interview with Mills. The notes were undated and the author of the notes is unlisted. These notes appear to clear up the inconsistencies. In these notes, Mills’ story is remarkably similar to Larry Williams’s story. There are additional details that fit with accounts given by Wanda Holloway and Shaun Bowman. Teddy Isbell is mentioned as having planned the robbery with Kenny and Detroit. Mills, Teddy, and Kenny drove to the crime in Kenny’s Impala while Detroit, Brewton, and Williams went in a burgundy and white van. In this version, Damian stayed with the cars and Larry walked halfway and stopped. Kenneth had the .45, Brewton had the Tech Nine, and Wilcoxson had the pistol grip shotgun. In this version, Shaun Bowman was fighting Kagonyera and Wilcoxson got Shaun off by

threatening him with the shotgun. A girl tried to run and was caught and grabbed by the hair. The notes then say “woke Bowman. Scuffle. Shot him through the door.” The major difference in this statement is that Detroit and not Brewton is the shooter.

F. Inconsistencies Among The Statements of the Co-Defendants

The last of the defendants to confess was Kenneth Kagonyera who confessed on November 30, 2001 to District Attorney Ronald L. Moore and Detective L.B. Raymond in the presence of his attorneys. Kagonyera stated that the idea for the robbery was Wilcoxson’s and Brewton’s. Wilcoxson and Brewton were armed. Wilcoxson and Williams came by and picked up Kagonyera and Damian Mills so they could follow them. Mills drove Kenny’s Chevy out to Fairview and Wilcoxson drove a Dodge van. Mills had a Tec-9, he had a .9mm. Brewton had a .45, and Wilcoxson had a shotgun. Isbell drove the van on the way out with Brewton, Williams and Wilcoxson. Kagonyera followed them with Mills. When they got to Fairview, Isbell, who was unarmed, stayed by the car. When they entered the house, there were four people inside: Bowman, and old man, a girl, and another man. Wilcoxson ran after the old man who ran down the hallway into a bedroom. Kagonyera ran down the girl who went to the kitchen. Mills kept a gun on Bowman. Brewton stayed in the living room to make sure everyone was staying down. After the shotgun went off, Wilcoxson ran back down the hall and they all left the residence. Brewton took all the guns at the scene. Mills and Kagonyera left together. Three days after the shooting, a Thursday, Mills, Isbell, Wilcoxson, Williams, Brewton, and Kagonyera met up at Pisgah View apartments where Kagonyera had dropped Mills. They smoked some pot and got a story together. Kagonyera claimed he did not know what happened to the gun.

The defendants’ confessions, like those of the Central Park Jogger defendants, differ with respect to specific details of virtually every major aspect of the crime – who planned the attack, who carried what weapons, what the perpetrators were wearing, the number and type of cars driven to the crime scene, who entered the home, who was the lookout, who fired the fatal shots, where the defendants went after the attack, what was done with the clothing and the guns, etc. On one fact all of the defendants’ confessions are in agreement – none of the defendants ever mentioned the three men who ultimately were implicated in this case by DNA and a confession – Summey, Rutherford and Pickens.

G. Failure to Lead Police to Independent Corroborating Evidence

None of the defendants were able to lead the police to any evidence corroborating their confessions. The defendants did not provide the police with a single verifiable fact that the police did not already know about. The defendants willingly gave blood, hair and tissue samples to be tested for their DNA. DNA evidence excluded the co-defendants from two bandanas at the time the co-defendants pled guilty and has subsequently excluded them as the source of DNA on other items since tested. The chances that not a single one of the six defendants – if they were guilty -- would leave their DNA on items collected from the crime scene is remote.

H. Connections Between the Two Sets of the Defendants

Only one of the defendants, Teddy Isbell, had any connections with Messrs. Rutherford, Pickens, and Summey. According to the staff of the NCIC, Isbell was close to Pickens's family and especially close to Lacy Pickens whom he considered like a brother. He also knew Summey and Rutherford by name. Since Isbell was the first defendant to come forward, this raises questions in my mind as to whether he was involved in the crime or had knowledge of the crime from Pickens. It also raises questions about whether Isbell named the others to deflect attention from the Pickens crew.

I. Some Evidence of Contamination

Without a recording of the interrogations, it is difficult to tell whether the police contaminated the defendant's confessions by feeding them information or whether the suspects came up with the details of the crime on their own. There is, however, some evidence of contamination in the police reports. When Larry Williams was interviewed on October 11, he told Det. Murphy that he wanted to talk. Williams then told Murphy that a guy named "Little Roy" knew about the murder and said that Damian Mills was involved. Williams said that Little Roy was giving details just like *the details that Sheriff Medford had given him*.

In a video-recorded conversation with NCIC staff, Williams again claimed that Medford, in the presence of District Attorney Ron Moore, fed him details of his confession by asking him leading questions in a highly confrontational part of the interrogation that included screaming. Williams also noted a second source of contamination for additional details in his final October 24th confession. Between October 11th and October 24th, Williams was not in police custody. While he was out on the street, he spoke to several people in the community to try to obtain information about the Bowman murder. Based on this neighborhood gossip, Williams filled in some additional blanks in his confession narrative on the 26th. He also cited a common third source of contamination – the rumor mill in the detention center where he was being held.

In Williams' videotaped deposition he provided an account of how Sheriff Medford provided him with the information in his confession. His description is consistent with the way that contamination often occurs in cases of proven false confessions. Police officers do not usually contaminate confessions intentionally. They generally do not tell suspects exactly what to say and then rehearse the story with them until the suspect can credibly repeat it. Instead, in the heat of the moment or out of frustration, they ask leading questions which impart the information to the suspect. Williams resisted the notion that Medford "told him what to say." Williams said that Medford was "throwing hints" or "interrogating me by putting a little extra information out there" with his questions and making me "have knowledge of information that I had no knowledge of". In order to please Medford, who was yelling at him and threatening him by telling him that he would never get out of prison unless he confessed, Williams simply cobbled together a story involving all of the defendants by piecing together

information he received from Medford. The fact that Williams did not overstate his case – by claiming that Medford scripted the confession for him – adds credibility to his account.

The fact that the final stories of the defendants coincide on many points – and that none of these confessions mention the names of Rutherford, Summey, or Pickens – is additional powerful evidence that the police contaminated their confessions and pressured them into adopting a story that fit their theory of the case at the time.

J. Post-Conviction Assertions of Innocence

Three of the defendants independently asserted that they were innocent in letters written to the NCIC and other organizations that investigate claims of actual innocence in North Carolina: Kagonyera, Wilcoxson, and Larry Williams, Jr. Williams claimed in his videotaped deposition that he had dodged the NCIC staff, in part, because he was angry that NCIC had waited until after he had served his time to contact him. Williams testified that he had written to the innocence project in Raleigh and had never received a response: “I tried to reach out to y’all for so many years,” said Williams, “but you never came.” After learning that the NCIC was not even in existence until 2007 and that Williams was holding a grudge against the wrong group, he warmed up and began to be more cooperative during the interview.

VIII. Conclusion

It is my professional opinion that the statements of Kenneth Kagonyera, Robert Wilcoxson, Damian Mills, Larry Williams, Jr. and Teddy Isbell are highly unreliable. The statements are internally inconsistent, inconsistent with one another, and uncorroborated. DNA evidence obtained from items recovered from the crime excludes all of the defendants. This same DNA evidence matches one of the alternate suspects – Brad Summey – and the other two suspects cannot be excluded as the source of the DNA. There is also evidence of contamination in this case – the police reports indicate that Larry Williams claimed that Sheriff Medford had given him details of the crime and Williams testified under oath how the contamination occurred. In short, the confessions of the five defendants who were convicted of and pled guilty in this case were proven to be unreliable in two ways: by scientific evidence (DNA) and by a confession of the true perpetrator.

The statements of the defendants are far less reliable than Rutherford’s confession. Rutherford’s confession is corroborated by the DNA evidence and the details in that confession more closely match the objectively knowable evidence of the crime. The circumstances under which Rutherford confessed also buttress the reliability of his confession. Rutherford sought out the DEA agent to provide him with information about the Bowman murders. Although he was seeking some consideration for the information, the DEA agent never promised him any leniency or sentence reduction for the information (and none was ever given to Rutherford). Rutherford knew details of the

crime that only the true killers could have known, he knew information that had never been released publicly about the crime, he led the police to information they did not know about (the identities of his accomplices) and his confession has been corroborated by DNA evidence. Moreover, the DEA agent could not possibly have contaminated Rutherford's confession with details of the investigation into the Bowman murder because he did not know these details at the time Rutherford called him.

