

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA  
Criminal Division - Felony Branch

UNITED STATES	:	
	:	
v.	:	Docket No. F-18-03
	:	Judge Thomas Motley
ANTOINE SMITH	:	Trial: March 15, 2004
	:	
	:	

MOTION IN LIMINE TO INTRODUCE EXPERT TESTIMONY AND  
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Defendant Antoine Smith, by and through undersigned counsel, respectfully moves this Honorable Court, pursuant to the Fifth and Sixth Amendments to the United States Constitution and District of Columbia law, to allow expert testimony in the above-captioned matter by Richard J. Ofshe, Ph.D. Specifically, Mr. Smith seeks to introduce expert testimony regarding the existence of false confessions, namely, that individuals may be coerced into giving false confessions, and that certain indicia may be identified to show when false confessions are likely to occur. Mr. Smith also seeks to introduce a mental health expert, Dr. Rebecca Yount, on the related issues of mental retardation generally, Mr. Smith's mental disabilities in particular, and how those disabilities might make Mr. Smith uniquely vulnerable to offering a false confession.

In support of this motion, counsel states the following:

1. Mr. Smith is before this Honorable Court charged with one count of Robbery, in violation of District of Columbia Code Section 22-2801. Trial in this matter is set for March 15, 2004.

2. Following his arrest at 8:50 p.m. on January 1, 2003, Mr. Smith was taken to the First District Police Station and questioned by detectives. At 12:52 a.m. on January 2, 2003, he signed a waiver of rights form (PD 47) and soon after made a videotaped statement regarding an incident that allegedly occurred earlier that evening.

3. Defense counsel hereby provides written notice to government counsel, as required by Superior Court Rule of Criminal Procedure 16 (A)(1)(E), of Mr. Smith's intention to call Dr. Richard J. Ofshe and Dr. Rebecca Yount as expert witnesses in this case.

**MEMORANDUM OF POINTS AND AUTHORITIES**  
**IN SUPPORT OF MOTION TO INTRODUCE EXPERT TESTIMONY**

I. INTRODUCTION

For many years, social scientists have claimed that people sometimes confess to crimes that they did not commit. It has now become undeniable that the social scientists are right: False confessions do exist and DNA evidence has proven it. In fact, we now know that it is

not uncommon for people to confess falsely to crimes, that those false confessions nonetheless make compelling evidence, and that jurors have relied on scores of false confessions mistakenly to convict innocent people.

According to the Innocence Project, the leading authority on post-conviction DNA exonerations, thirty-three of the first one hundred twenty three post-conviction DNA exonerations involved false confessions or admissions. See *The Innocence Project*, <http://www.innocenceproject.org>., "Causes and Remedies of False Confessions;"<sup>1</sup> see generally, Steven A. Drizin & Beth A. Colgan, *Let the Cameras Roll: Mandatory Videotaping of Interrogation is the Solution to Illinois' Problem of False Confessions*, 32 *Loyola Univ. Chi. L.Rev.* 337, (2001); Saul M. Kassin, "The Psychology of Confession Evidence," Vol. 52, No. 3, *American Psychologist*,; Kassin & Kiechel, "The Social Psychology of False Confessions: Compliance, Internalization and Confabulation," Vol. 7, No. 3, *Journal of the American Psychological Association*. Given the fact that DNA evidence can be used to assess the reliability of a conviction in only a small number of cases, it is likely

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<sup>1</sup> The infamous "Central Park jogger" case is a particularly vivid example of the catastrophic results of false confessions. All five defendants confessed to the crime; all five served their full sentences. DNA testing subsequently revealed that all five confessions were false.

that many, many more wrongful convictions have occurred that cannot be refuted by DNA evidence, and that a similar proportion of these wrongful convictions are themselves based on false confessions.

Why would someone confess to committing a criminal act if they were innocent? The mere notion seems contrary to common sense. In other words, the concept of a false confession is one to which lay jurors are likely to be inherently hostile, and it is even more likely that lay jurors will not understand the factors that can explain *why* innocent people confess to crimes. Put more simply, the subject of how and why false confessions occur is beyond the ken of the average juror.

A recent survey of potential District of Columbia jurors demonstrate juror ignorance and hostility to the notion of false confessions. A recent survey of one thousand potential District of Columbia Jurors (attached as Appendix 1) demonstrates both that jurors find videotaped or written confessions extraordinarily persuasive evidence, *See id.* at 2, and that many jurors discount entirely the possibility that those confessions might be wrong. Specifically, sixty-eight percent of the survey respondents indicated that they believed a defendant would confess falsely "not very often" (40%) to "almost never" (28%).

As matters currently stand, therefore, it is likely that at the time Mr. Smith's jury is sworn, almost 70% of its members will believe that false confessions almost never or very infrequently occur, and even more will have no basic understanding of the factors that cause false confessions to occur. It is highly likely, therefore, that Mr. Smith's jury will not be able to meaningfully evaluate his false confession defense in the absence of expert testimony. Mr. Smith accordingly proposes to present expert testimony on the subject, which will correct common misperceptions as to the nature of confessions and will educate jurors in this complex scientific field by not only acquainting them with the reality of false confessions but also by giving them the tools to assess whether Mr. Smith's confession itself was false.

Mr. Smith proposes to present two expert witnesses in order to give jurors a meaningful understanding of this complex topic. Dr. Richard Ofshe, who will explain the phenomenon of false confessions to the jury and, by providing jurors with information about the social science research on this subject, will provide jurors with the tools necessary to assess whether or not Mr. Smith's confession bears the traditional hallmarks of unreliability. Dr. Ofshe is the country's leading expert

on false confessions, and has testified as an expert witness in hundreds of criminal cases in more than thirty state and federal jurisdictions on behalf of both the prosecution and the defense.

Dr. Rebecca Yount will then provide more context with respect to one particular factor associated with false confessions: False confessions by the developmentally disabled. As the Supreme Court has recently recognized, the problem of false confessions is especially acute with regard to mentally retarded individuals because they are most vulnerable to the police techniques most likely to produce a false confession. *Atkins v. Virginia*, 536 U.S. 304, 320-21 n.25 (2002) (discussing wrongful convictions of persons on death row generally and noting the exoneration of one mentally retarded individual wrongfully convicted based on his unwitting false confession).

It is critical that jurors hear this evidence in evaluating Mr. Smith's defense; in fact, it would be constitutional error to exclude it.<sup>2</sup> The Supreme Court has recognized that a defendant has the absolute constitutional

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<sup>2</sup>See, e.g., *United States v. Shay*, 57 F.3d 126, 133 (1<sup>st</sup> Cir. 1995)(District Court's exclusion of expert testimony regarding defendant's mental disorder and confession reversible error because "common understanding conforms to the notion that a person ordinarily does not make untruthful inculpatory statements.")

right to introduce "competent, reliable evidence bearing on the credibility of his confession." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)(exclusion of evidence as to length and manner of interrogation violated fundamental constitutional right to a fair opportunity to present a defense). Because Mr. Smith has proffered "competent, reliable evidence bearing on the credibility of his confession," and because this evidence meets all the requirements for the admissibility of expert testimony generally, the constitution and District of Columbia law require that his jury be permitted to hear this evidence. Given the overwhelming importance jurors attach to such statements, and that a majority of jurors do not believe a defendant would confess falsely, fundamental fairness dictates the same result.

I. THE PROFFERED EXPERT TESTIMONY MEETS THE REQUIREMENTS FOR ADMISSION SET FORTH IN DYAS.

A. Dyas v. United States

In *Dyas v. United States*, 376 A.2d 827, 832 (D.C. 1977), the District of Columbia Court of Appeals set the requirements for the admission of expert testimony.

Under *Dyas*,

(1) the subject matter "must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average

layman [emphasis added]"; (2) "the witness must have sufficient skill, knowledge, or experience in that field or calling as to make it appear that his opinion or inference *will probably aid the trier in his search for truth* [emphasis added]"; and (3) expert testimony is inadmissible if "the state of the pertinent art or scientific knowledge does not permit a reasonable opinion to be asserted even by an expert."

*Dyas*, 376 A.2d at 832.

In this case, the testimony of Doctor Ofshe and Doctor Yount meets these requirements. Dr. Ofshe is being offered as an expert in the field of coercive police interrogation techniques and the phenomenon of false or coerced confessions. This complex subject is beyond the ken of the average juror and Dr. Ofshe is qualified to testify that experts in his field agree that false confessions exist, that individuals can be coerced into giving false confessions, and that certain indicia can be identified to show when they are likely to occur.

Dr. Yount is being offered as an expert in the field of developmental and psychiatric disabilities - a subject that is also obviously well beyond the ken of the average juror. Dr. Yount is prepared and fully qualified to testify regarding the skills and limitations of developmentally disabled individuals, including their susceptibility to suggestive questioning. As we will show, this testimony also satisfies the three *Dyas* requirements.

II. THE PROFFERED TESTIMONY IS BEYOND THE KEN OF  
THE AVERAGE JUROR.

The first *Dyas* requirement is that the testimony be "so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman." For subject matter to be "beyond the ken" it must "supply an interpretation of the facts which differs from the ordinary lay person's. . . ." See, e.g., *Ibn-Thomas v. United States*, 407 A.2d 626, 634-45 (D.C. 1979)(testimony of clinical psychologist on "battered women's syndrome" beyond the ken because it helped the jury see the facts differently from "the ordinary lay perception . . . advocated by the government.")

In cases involving prosecution experts, the Court of Appeals has made clear that the "beyond the ken" standard is extremely low. Police narcotics witness - that is, police officers who inform jurors about how drug dealers behave - have repeatedly been found to have information considered beyond the ken. See, e.g., *Blakeney v. United States*, 653 A.2d 365, 369 (D.C. 1995) (drug expert necessary to show that drug dealers use pagers to sell drugs); *Owens v. United States*, 688 A.2d 399, 404 (D.C. 1996) (drug expert necessary to inform jurors about "runners" and "holders").

Similarly, experts on such subjects such as how sexually abused children behave have been deemed a proper basis for expert testimony. The standard that the Court of Appeals promulgated in *Mindombe v. United States*, 795 A.2d 39, 43 (D.C. 2002), is instructive: "such expert testimony is admissible in cases where the government successfully proffers that the facts and evidence to be presented at trial are likely to be inconsistent with a lay juror's expectations as to how a child sexual abuse victim should respond to such a traumatizing event." The court further explained that, "it is only fair that jurors are made aware of the differences in children's cognitive processes . . . because of the reality that child victims of sexual abuse do have a range of responses and the jury's possible misconception of the same. . . ." *Id.* at 52.

In the case before this Court, jurors' expectation and belief that defendants only confess when they are guilty is inconsistent with the fact that mental disabilities together with police coercion may produce a confession that is false. As in *Mindombe*, therefore, the proffered testimony here is well beyond the expertise of a lay juror, and thus it is "only fair" in the case before this Court that expert testimony be admitted to counter lay jurors' expectations and beliefs regarding false confessions;

indeed, the subject matter of the testimony proffered by each of Mr. Smith's experts is far more "distinctively related to some science, profession, business or occupation" than the resident narcotics testimony permitted in *Blakeney* or the "sexual abuse" profiling testimony permitted in *Mindombe*.

A. The subject matter of Dr. Ofshe's proposed testimony is beyond the ken of a lay juror.

If he is admitted as an expert, Dr. Ofshe will inform the jury about the general nature in which police interrogation works. He will describe the use of psychological principles to undermine a suspect's confidence and lead him to believe that his arrest and conviction are virtually certain - even if he is innocent. Dr. Ofshe will help the jury understand the way that police officers are trained to obtain confessions from suspects in their custody. Understanding the factors which can lead to a person giving a false confession will help the jury analyze Mr. Smith's confession and decide whether or not the indicia of a false confession are present.

As the poll attached as Appendix 1 illustrates, education on these subjects is needed because District of Columbia jurors overwhelmingly do not understand the phenomenon of false confessions, indicating that such

information is in fact beyond their ken. This Court can reasonably infer, therefore, that jurors are equally unaware of the police interrogation techniques leading suspects to confess falsely, to which Dr. Ofshe will also testify.

This Court can rely on the poll in deciding whether the subject matter of Mr. Smith's proposed expert testimony is beyond the jury's ken. See *Atkins*, 536 U.S. 304, 320-21 n.25. In *Atkins*, the Supreme Court examined whether executing a mentally retarded individual violated the Eighth Amendment prohibition on cruel and unusual punishment. Noting that a punishment is "excessive," and therefore prohibited by the Eighth Amendment, if it is not proportioned to the offense, the Court looked to "prevailing standards of decency" to determine whether executions of mentally retarded individuals violated the Constitution. *Id.* at 311. Among the sources consulted by the Court in determining the prevailing standard was polling data.<sup>3</sup> *Id.* at 316 (noting the existence of "approximately twenty state and national polls on the issue"). Similarly, this court may take into account the fact that sixty-eight percent of eligible jurors in the

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<sup>3</sup> In affirming grant of summary judgment following negligence and strict liability suit against tobacco company, the First Circuit relied in part on "a breadth of sources – such as newspapers, polls, surveys...contemporaneous with the time period at issue in the case." See *Cruz-Vargas v. R.J. Reynolds Tobacco Company*, 348 F.3d 271, 278 (2003).

District of Columbia believe that defendants "not very often" to "almost never" make false confessions in deciding whether the proposed subject matter is beyond the jury's ken.<sup>4</sup>

B. Dr. Rebecca Yount's subject matter is beyond the ken.

Dr. Yount will likewise testify to matters that a lay juror would not otherwise understand or misinterpret. In her evaluation of Mr. Smith, Dr. Yount relied on assessment tools that require extensive training to implement. Mental disabilities are defined by an established set of clinical factors. As the Supreme Court has noted, "clinical definitions of mental retardation require not only sub-average intellectual functioning, but also significant limitations in adaptive skills." *Atkins*, 536 U.S. 304 at 318. Dr. Yount will help the jury understand whether Mr. Smith meets the clinical definition of mental retardation. She will inform them that although mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial, "they have

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<sup>4</sup> *Gucci v. Gucci Shops, Inc.*, 688 F. Supp. 916 (S.D. New York 1988)(plaintiff Paolo Gucci sued Gucci Shops for right to use his name, claiming that it did not violate trademark. Defendant retained services of polling firm to assess likely confusion between "Gucci" and "Paolo Gucci" products. Finding the survey reliable because "it canvassed a significant segment of the relevant population, was formulated and supervised by qualified experts, contained appropriate questions, and permitted interviewees to frame answers in their own terms," the Court found that there was a likelihood of appreciable customer confusion.) In this case, the poll was conducted by a nationally recognized firm, sampled a significant segment of the relevant population – eligible jurors – was appropriately framed and permitted interviewees a range of responses to questions. This Court may likewise rely on the poll submitted by Mr. Smith.

diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand others' reactions." *Id.* All of this contrasts with the interpretation of the facts consistent with the beliefs of most laypersons and proffered by the government. *Ibn-Thomas*, 407 A.2d 626.

The poll of eligible jurors is further evidence that the effects of mental disability and police coercion are not within the average juror's ken. On a scale of zero to ten, zero meaning not persuasive at all and ten meaning extremely persuasive," jurors were asked how persuasive they found testimony from a mental health expert. See Appendix 1 at 2. As the poll shows, jurors themselves recognize that mental health and disability are subjects that require expert knowledge, and would find such evidence of great assistance in evaluating the evidence before them. It is imperative that jurors receive this information as part of Mr. Smith's defense.

III. BOTH EXPERTS HAVE SUFFICIENT SKILL AND EXPERIENCE TO AID THE TRIER OF FACT.

The Court of Appeals further requires that an expert have sufficient skill or knowledge to aid the trier of

fact. *Dyas*, 376 A.2d at 832. Both Dr. Ofshe and Dr. Yount clearly meet this requirement as well.

A. Dr. Richard J. Ofshe

Dr. Ofshe holds a bachelor's degree in psychology and a master's degree in sociology from Queens College, and a doctorate in sociology from Stanford University that he received in 1968. Over the last thirty-five years of practice, Dr. Ofshe has become a leading expert in the field of coerced and false confessions. He has published six books and hundreds of articles, including "The Anatomy of a Murder Confession," delivered at the American Academy of Forensic Sciences in February 2004. Dr. Ofshe has evaluated thousands of individuals to assess their mental condition and capabilities, and has been admitted and testified as an expert just under two hundred times and in 31 different states. See Appendix 3, "Summary of Dr. Richard Ofshe's Testimony Regarding Interrogation and Confessions." He has conducted training sessions on false confessions and the effects of police interrogation for various universities, professional organizations, law enforcement agencies, and courts of law. He clearly possesses sufficient skill and knowledge to aid the trier of fact. He is undisputedly one of the leading experts in the country in this area, and, therefore, clearly satisfies

the second prong of *Dyas*. He has personally examined Mr. Smith regarding the circumstances of his interrogation by the Metropolitan Police, and will assist the jury in evaluating the reliability of this critical piece of evidence.

B. Dr. Rebecca Yount

Dr. Yount has been a practicing psychologist for thirty years. She specializes in the evaluation and treatment of persons with developmental disabilities and mental illness. She has been qualified as an expert in this jurisdiction, evaluated numerous individuals with mental retardation in relation to both civil and criminal matters, and consulted with both the United States Attorney's Office and the Public Defender Service. See Appendix 4.

Dr. Yount has examined Mr. Smith and found that he is borderline mentally retarded, with an especially limited verbal capacity. These findings should be admitted to help the jury understand the psychological environment that yielded Mr. Smith's confession, a subject beyond the ken of the average juror. That knowledge, in turn, will have substantial bearing on the ultimate factual issue of Mr. Smith's guilt or innocence. See *Dyas*, 376 A.2d, at 832.

III. THE STATE OF THE ART OF THE SCIENCE AT ISSUE IS SUFFICIENT TO ALLOW ADMISSION.

*Dyas* further requires that the state of the art on which the expert testimony is based be such that a reasonable opinion may be asserted by the expert. *Dyas*, 376 A.2d at 832. The state of the art is such, both for Dr. Ofshe and for Dr. Yount.

A. The state of the art of false confessions is fully developed.

The field of study of coerced confessions is widely accepted by the legal and social-scientific communities. The leading textbook on the subject, *The Psychology of Interrogations, Confession and Testimony*, references between nine hundred and one thousand separate articles on the subject of false confessions. Gisli Gudjonsson, *The Psychology of Interrogations, Confessions and Testimony*, John Wiley & Sons (1992). As Dr. Ofshe's curriculum vita shows, his research has been subject to peer review since its inception.

In *United States v. Hall*, 974 F. Supp. 1198, 1202 (C.D. Ill. 1997), Illinois' highest court thoroughly examined the scientific validity of Dr. Ofshe's work. See Appendix 5. In reversing the trial court's exclusion of that evidence, the court explained: "The study of false

confessions generally involves the systemic observation of real-world interrogations. This method is generally accepted as reliable by the community of social psychologists in this field." *Id.* at 1202. As the evidentiary standard requires:

The researcher initially obtains documented cases in which an innocent person has confessed to the crime. For instance, the researcher may look at cases in which another person subsequently confesses and is convicted of the crime or in which it is revealed, through DNA evidence or otherwise, that the defendant could not have committed the crime. Dr. Ofshe hypothesizes, and his peers appear to agree, that the major analytical method for determining the existence of a false confession is the post-admission narrative statement. In this technique, the confessor is asked about the details of the crime about which he has just confessed. If he relates facts that only the murderer would know, he must be guilty. If he relates facts inconsistent with the evidence at the crime scene, he is probably confessing falsely.

Id. at 1203-04. After the researcher determines that a confession is false, he or she goes back over the confession, either by analyzing a video or audio tape or interviewing the parties involved, to determine what led to the false confession. Id. at 1204. By reviewing hundreds of such confessions, Dr. Ofshe and others in his field have isolated variables that lead to false confessions. *Id.* at 1204. (For a detailed discussion about variables that lead to false confessions, see Richard J. Ofshe, *The Decision to*

*Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U.L. REV. 979 (1997)). Thereafter, according to the court in *Hall*:

[T]he studies based upon observational data are subjected to a process of peer review within the social psychologist community. Authors generally respond to the criticisms of their peers before actually publishing the paper. He further testified that there is no dispute in the scientific community that false confessions do exist and that studying things such as coercion and the post-admission narrative statement is the proper method of analyzing whether and why they occur.

*Hall*, 974 F. Supp. at 1204.

In an equally relevant opinion regarding Dr. Ofshe's findings, the Indiana Supreme Court held that the trial court's exclusion of testimony regarding the "psychology of relevant aspects of police interrogation and the interrogation of mentally retarded persons . . ." was erroneous and deprived the defendant of the right to present a defense. *Miller v. State of Indiana*, 770 N.E.2d 763, 774 (2002); Appendix 6. In *Miller*, as in the instant matter, Dr. Ofshe was prepared to testify regarding police interrogation and the indicia of true or false confessions. *Id.* at 771. The Indiana Supreme Court found that Dr. Ofshe's testimony would have assisted the jury in understanding issues outside their common knowledge and experience and would have preserved the defendant's right

to challenge the weight and reliability of the state's primary evidence against him. *Id.*; see also, *Boyer v. Florida*, 825 So.2d 418,419(2002)(exclusion of Dr. Ofshe's testimony reversible error, jury entitled to hear relevant evidence on the issue of voluntariness. (citing *Hall*, 93 F.3d at 1344)); *People v. Guerro*, 2002 WL 1875118 (Cal. App. 2002)(upholding trial court's admission of Dr. Ofshe's testimony); *United States v. Raposo*, 1998 WL 879723 (S.D.N.Y. 1998)("an individual with a certain psychological profile may be more susceptible than other members of the general population to making a false confession"); *United States v. Smith*, 638 F.2d 131 (9<sup>th</sup> Cir. 1981)(testimony regarding defendant's mental condition at time of confession admissible).

Numerous state courts have agreed with the federal courts and allowed expert testimony regarding the special circumstances or susceptibilities of particular defendants. See, e.g., *Beagel v. State*, 813 P.2d 699, 707 (Alaska 1991) (reversing homicide conviction because trial court erroneously excluded expert opinion of psychiatrist that defendant's confession to police was product of mental disorder); *People v. Hamilton*, 415 N.W.2d 653, 655-56 (Mich. App. 1987) (reversing trial court's preclusion of expert testimony from clinical psychologist who had interviewed

defendant and was prepared to explain to jury psychological reasons why defendant made statement alleged by defense to have been false); *State v. Burns*, 691 P.2d 297, 301 (Ariz. 1982) (finding error when expert psychological testimony precluded as to defendant's state of mind at time of confession to police because effects of drug use beyond the ken of average juror); *Reilly v. State*, 355 A.2d 324, 336-37 (Conn. Sup. 1976) (granting motion for new trial in first-degree murder case in part on finding that "an injustice was done to [the defendant] at his original trial because of the absence of any expert testimony to raise the issue of the reliability of [his] confessions and admissions. The confessions and admissions went totally unexplained except in the testimony of [the defendant] himself.")

B. The science of mental disability is fully developed.

Mental health experts have long been aware of the risk that a mentally retarded suspect's eagerness to please authority figures can lead him to confess falsely. See generally, Welsh S. White, *False Confessions and the Constitution: Safeguard Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 123 (1997) ("Even in the absence of a lengthy interrogation and police deception, a suspect with mental retardation may be more susceptible to

trying please those whom he perceives as authority figures.") As the Supreme Court made clear in *Atkins*, mentally retarded persons are often "followers rather than leaders." *Atkins*, 536 U.S. 302 at 318. Testimony regarding Mr. Smith's mental disabilities bears on the reliability of his confession, which the jury is required to evaluate.

It is well-established that a statement is inadmissible if it is found to be involuntary. *United States v. Bennett*, 495 F.2d 943, 949 (D.C. Cir. 1974)("The focal point of any investigation into the voluntariness of an utterance is the mind of the defendant, and the critical inquiry is whether or not in the totality of the circumstances the assertion is the product of a rational intellect and a free will.") Even if a statement is ruled admissible by the trial court, voluntariness remains a question for the trier of fact. Evidence about how a confession was obtained bears upon both its voluntariness and its credibility. See *Crane*, 476 U.S. 683 at 690 (holding that when the defendant unsuccessfully challenges the admissibility of his statement before trial, he may still challenge its voluntariness.) Dr. Yount's testimony is, therefore, also relevant on the issue of whether Mr. Smith's confession was the product of his "free and unconstrained choice," as required by the Supreme Court in

*Colorado v. Connelly*, 479 U.S. 157, 166 (1986) (discussing mental condition as a relevant factor in the voluntariness determination).

The First Circuit's decision in *United States v. Shay*, 57 F.3d 126 (1st Cir. 1995) Appendix 7, sheds additional light on the way that expert testimony regarding a defendant's mental state, together with information regarding coercive police interrogation techniques, can be of critical importance to a jury. In *Shay*, a psychiatrist was prepared to testify that the defendant, who had confessed, suffered from a mental disorder that caused him to tell lies placing himself at the center of attention. *Id.* at 129-30. The trial court excluded the evidence, primarily on the grounds that the jury was capable of determining the reliability of the defendant's statements without such testimony. *Id.*

The First Circuit reversed, holding that the defendant was entitled to present this evidence, and the error in excluding it was not harmless. According to the court:

Common understanding conforms to the notion that a person ordinarily does not make untruthful inculpatory statements.... [The expert] was prepared to offer specialized opinion testimony, grounded in his expertise as a psychiatrist, that could have "explode[d] common myths" about evidence vital to the government's case.

*Id.* at 133. The court held that while an expert ordinarily cannot testify to whether a witness is lying or telling the truth, the expert's testimony was admissible because the jury was "plainly unqualified to determine without assistance the particular issue of whether [the defendant] may have made false statements against his own interests because he suffered from a mental disorder." *Id.*

The intersection of mental disability and techniques of police interrogation has also been found admissible by the Eleventh Circuit. In *United States v. Roark*, 753 F.2d 991 (11<sup>th</sup> Cir. 1985) a psychologist was prepared to testify that the defendant was extremely susceptible to suggestions. *Id.* at 994. He testified *in camera* that the conditions of the defendant's interrogation raised the possibility that "she would create stories to please her questioners, a condition known as 'compulsive compliance.'" *Id.* The trial court excluded the testimony on the grounds that the doctor's testimony would not assist the jury in deciding whom to believe. *Id.*

The Eleventh Circuit reversed, holding this evidence should not have been excluded:

[The proposed expert] was presumably qualified to assist the jury in reaching a factual conclusion. His testimony was designed to help the trier of fact determine whether it was more or less probable that [the defendant] was somehow

psychologically coerced into making the inculpatory statements. His testimony was thus certainly relevant to the issue of what weight the jury should give Roark's incriminating statements.

*Id.*; see also *State v. Buechler*, 572 N.W. 2d 65,73-74 (Neb. 1998) (reversing conviction because trial court's exclusion of false confession expert testimony was harmful error).

The testimony proffered in this case meets all of the criteria required in this jurisdiction. It is critical to the jury's evaluation of the facts of this case, and it is of nothing less than constitutional import.

WHEREFORE, for the foregoing reasons, and any others that may appear to this Honorable Court after a hearing in this matter, Antoine Smith respectfully requests that his Motion to Introduce Expert Testimony be granted.

Respectfully Submitted,

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Matthew Kadushin  
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202-628-1200

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Motion has been served, by hand, upon the Office of the United States Attorney, 555 Fourth Street N.W., Washington, D.C. 20530, to the attention of \_\_\_\_\_, Esq., on this \_\_\_\_ day of February, 2004.

\_\_\_\_\_  
Matthew Kadushin

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA  
Criminal Division - Felony Branch

UNITED STATES	:	
	:	
	:	Docket No. F-18-03
v.	:	Judge Thomas Motley
	:	Trial: March 15, 2004
ANTOINE SMITH	:	
	:	

ORDER GRANTING DEFENDANT'S MOTION TO INTRODUCE EXPERT  
TESTIMONY

Upon consideration of the Defendant's Motion to Allow Expert Testimony, it is this \_\_\_\_\_ day of \_\_\_\_\_, 2004, ORDERED and ADJUDGED that the Defendant's Motion to Allow Expert Testimony is hereby GRANTED.

\_\_\_\_\_  
The Honorable Thomas Motley

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