

No. 06-117

In The Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ROUNN HAR, RESPONDENT

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT*

BRIEF FOR THE RESPONDENT

ISSUES PRESENTED

1. Whether the district court failed to perform its gate-keeping function in arbitrarily excluding testimony regarding false confessions and social sciences in general without making a particularized reliability or relevance determination.
2. Whether a court is required to provide jurors with an instruction alerting them to the occurrence of false confession when defendant challenges the truthfulness of his confession.
3. Whether the district court violated Mr. Har's right to confrontation, as guaranteed by the Sixth Amendment of the United States Constitution, by allowing Dr. Gerber to testify to the substance of her conversations with Mr. Har's mother and sister, without providing Mr. Har an opportunity to cross-examine either.

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STATEMENT OF THE CASE

Mr. Har was indicted for one count of Murder in the First Degree (18 U.S.C. §1111) and one count of Murder in the Second Degree (18 U.S.C. § 1111). On July 7, 2005 the Honorable Susan Bright of the United States District Court of the Eastern District of Boerum held a pre-trial motion hearing at the request of Petitioner to determine the admissibility of two defense experts. The court excluded the testimony of Dr. John Wallace, an expert in the field of false confessions, and admitted the testimony of Dr. Roberta Kalf, a psychiatrist. In response to Dr. Kalf's testimony, Petitioner sought to allow Dr. Jessica Gerber, an expert in mental states and personality orders, to testify as a rebuttal expert. Defense counsel objected to Dr. Gerber's testimony at trial about the substance of her conversations with Mr. Har's mother and sister. Mr. Har was convicted of second degree murder and sentenced to fifteen years in prison. He appealed to the United States Court of Appeals for the Fourteenth Circuit, challenging "the exclusion of Dr. Wallace's expert testimony on the study of false confessions, the refusal of the trial judge to instruct the jury about false confessions, and the admission of Dr. Gerber's rebuttal evidence concerning her interviews with Har's family." (R. at 93.) The Court of Appeals reversed Mr. Har's conviction, finding that the trial court erred as to all three issues. This Court then granted Petitioner's writ of certiorari to review the decision of the Fourteenth Circuit.

STATEMENT OF THE FACTS

Soon after moving to the United States in 1996, Mr. Rounn Har began working for the television show, *Daily Dollars*, hosted by Sack Seafoam, who was murdered in 1997. (R. at 1.) Mr. Har is originally from Mago, where he lived while the country was in the midst of a civil war. (R. at 15, 88.) Mr. Har has been diagnosed as suffering from Post-Traumatic Stress

Disorder (“PTSD”), which Dr. Roberta Kalf, an expert witness testifying for Mr. Har, believes was brought on by the stress of the Magoian civil war, (R. at 15), including the death of his brother (R. at 70). Dr. Kalf also diagnosed Mr. Har as having a compliant personality, making him highly open to suggestion and intimidation from authority figures. (R. at 14-15.)

Nathaniel Walker is a retired FBI investigator, who led the investigation into Sack Seafoam’s murder. (R. at 45.) Walker arranged, through his daughter, to confront Mr. Har regarding the murder of Mr. Seafoam. (R. at 43.) Walker is trained in interrogation techniques and even taught classes on these techniques. (R. at 47.) During the confrontation, he told Mr. Har that he was an ex-FBI agent. (R. at 76.) The Walker father-daughter team used traditional law enforcement techniques to intimidate and coerce Mr. Har, including misleading Mr. Har to believe that his fingerprints were at the scene, villainizing Mr. Har, and swinging a golf club while standing above Mr. Har. (R. at 48, 75.) The Walkers fed Mr. Har alcoholic beverages. (R. at 75.) Twice when Mr. Har attempted to leave, Mr. Walker pushed him back down onto the couch. (R. at 75, 76.) Ms. Walker convinced Mr. Har that he blacked out at the time of the alleged acts. (R. at 78-79.) Finally, they promised Mr. Har leniency, claiming that they were on his side and that their statements could not be used against him. (R. at 79, 80.)

At a pretrial hearing, Dr. Wallace, a witness enlisted by Mr. Har, proffered to the court that the science of false confessions has been tested in controlled studies and that extensive articles have been published regarding this counterintuitive phenomenon. (R. at 8, 9.) Dr. Wallace proffered that false confessions to crimes are common among people with personality disorders, and that excessive stress and authority figures contribute to false confessions. (R. at 11.) Ultimately, Judge Bright held Dr. Wallace’s testimony inadmissible and Dr. Kalf’s testimony, regarding Mr. Har’s PTSD and compliant personality, admissible. (R. at 15-16.)

At trial, Mr. Har objected to testimony of the prosecution's rebuttal witness, Dr. Gerber, on the ground that her testimony pertaining to statements made by Mr. Har's family were inadmissible as a violation of his Sixth Amendment right to confrontation. (R. at 53.) He also argued that the substance of Dr. Gerber's conversations with Mr. Har's mother, Mrs. Har, and sister, Chava, is hearsay and, therefore, inadmissible unless Mr. Har has the opportunity to cross-examine them. (R. at 53.) Judge Bright then excused the jury and allowed Petitioner to examine Dr. Gerber, to determine whether the testimony violated Mr. Har's constitutional right. (R. at 53.)

Outside the presence of the jury, Dr. Gerber revealed that her conclusions regarding Mr. Har's mental condition were based on her conversations with Mrs. Har and Chava. (R. at 52.) Dr. Gerber testified to the circumstances of the conversations, indicating that she informed both Mrs. Har and Chava that she was a psychiatrist working at the Government's request (R. at 54, 57), and that she was involved in a trial and wished to discuss Mr. Har (R. at 56-58). Additionally, Dr. Gerber questioned Mrs. Har, as opposed to allowing her to answer in a narrative fashion, and had trouble understanding Mrs. Har, who did not speak fluent English. (R. at 56.) Finally, Dr. Gerber testified that she could not say with any certainty that Mrs. Har and Chava had an accurate memory of Mr. Har. (R. at 57, 58)

Following this examination, Judge Bright overruled Respondent's objection and allowed Dr. Gerber to testify regarding her conversations with Mrs. Har and Chava. (R. at 59.) Dr. Gerber stated before the jury that these conversations contributed to her conclusion that Mr. Har did not suffer from PTSD. (R. 59-60.). At the close of the trial, Judge Bright instructed the jurors that they could only consider the conversations between Dr. Gerber and Mrs. Har and Chava "for one, and only one purpose – that is, to assist...in evaluating the thoroughness of Dr.

Gerber's opinion." (R. at 65.) She also informed the jury not to consider the statements by Mrs. Har and Chava to be true. (R. at 65.).

Furthermore, Judge Bright refused a jury instruction proposed by Respondent that brought to the jurors' attention the phenomena of false confessions. (R. at 86.) The rejected jury instruction had identified certain characteristics of individuals and circumstances surrounding statements that may indicate that the statements are false. (R. at 86.) Instead of providing the instruction proposed by Respondent, Judge Bright gave a general instruction that the jury shall determine the weight, if any, to give the confession. (R. at 64.)

SUMMARY OF ARGUMENT

The court of appeals correctly held that the district court erred in excluding Dr. Wallace's expert testimony, refusing to instruct the jurors on the occurrence and circumstances of false confessions, and allowing Dr. Gerber to testify to the substance of her conversations with Mrs. Har and Chava. First, the district court did not perform its proper gate-keeping function. Judge Bright did not carefully and meticulously analyze the testimony regarding the science of false confessions; instead, she summarily found that the science was common sense. Judge Bright abdicated her gate-keeping function in arbitrarily ruling on the evidentiary value of social sciences generally. Had Judge Bright fully performed her gate-keeping function and not arbitrarily excluded all social science testimony, she would have found that Dr. Wallace's testimony is scientifically based. Second, had Judge Bright made a valid relevance determination, she would have realized that Dr. Wallace's testimony was essential to helping the jury contextualize Mr. Har's defense, especially because the concept of an innocent person falsely confessing to a crime is counterintuitive. Moreover, this testimony is relevant because

Dr. Kalf diagnosed Mr. Har with PTSD, and Dr. Wallace's testimony would have helped the jury reconcile the nature of this disorder with the specific facts of the interrogation.

Judge Bright also erred in failing to instruct the jury regarding the occurrence of false confessions. In order to properly analyze the evidence regarding Mr. Har's confession, the jury should have been alerted, through an instruction, to the possibility that false confessions occur and the circumstances that may trigger them. This particular case is evidence that this Court should require courts to provide jurors with special instructions regarding false confessions.

Judge Bright erred in allowing Dr. Gerber to testify about the facts of her conversation with Mr. Har's mother and sister. First, because their responses to Dr. Gerber's questioning are testimonial hearsay, the evidence was introduced in violation of Mr. Har's Sixth Amendment Confrontation Clause rights. Dr. Gerber contacted Mrs. Har and Chava to have a structured interview, which was intended to review facts about Mr. Har that supported her hypothesis about his mental state. Second, the limiting instruction provided to the jury was a blatant attempt to circumvent constitutional prohibitions against using testimonial hearsay against a defendant. It is sophistry to suggest that the jury actually limited their use of Mrs. Har's and Chava's to non-substantive purposes. The risk that the jury used this evidence for its truth is so substantial as to amount to a violation of Mr. Har's right to confrontation. Finally, even if this Court agrees with the district court that the conversations between Dr. Gerber and Mr. Har's relatives were non-testimonial, this Court must reject the testimony as a violation of Mr. Har's confrontation rights because it lacks adequate indicia of reliability. Dr. Gerber cannot verify the reliability of the information disclosed by Mrs. Har and Chava, some of which was inaccurate and unclear, and therefore the evidence does not possess particularized guarantees of trustworthiness.

ARGUMENT

I. HAD THE DISTRICT COURT APPLIED THE PROPER *DAUBERT* GATE-KEEPING FRAMEWORK, IT WOULD HAVE FOUND DR. WALLACE'S EXPERT TESTIMONY CONCERNING FALSE CONFESSIONS TO BE BOTH RELEVANT AND RELIABLE

A. In Order For Expert Testimony To Be Admissible At Trial, A District Court Must Find That The Testimony Is Scientifically Based And Will Assist The Jury In Understanding The Evidence

Federal Rule of Evidence 702 (“Rule 702”) governs the admissibility of scientific expert testimony at trial. Fed. R. Evid. 702. This Court has found that Rule 702 requires a district court to act as a gate-keeper in order to “ensure that any and all scientific testimony or evidence is not only relevant, but reliable.” *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 589 (1993). A trial judge may not decide to abdicate her gate-keeping responsibilities by refusing to review the proffered scientific evidence and making “off-the-cuff” determinations of admissibility. *United States v. Velarde*, 214 F.3d 1204, 1209 (10th Cir. 2000). The *Daubert* gate-keeping function obligates a trial judge to make a nuanced, particularized determination as to whether the expert’s testimony both rests on a reliable foundation and is relevant to the case at hand. *Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999). Applying *Daubert*, a district court first should consider whether the reasoning or methodology underlying the expert testimony is scientifically valid. *United States v. Smithers*, 212 F.3d 306, 315 (6th Cir. 2000). Secondly, the district court should determine whether the expert testimony could properly be applied to the facts at issue in order to assist the jury in understanding the evidence. *Id.*

B. The District Court Did Not Perform Its Proper Gate-Keeping Function Under *Daubert* Because It Failed To Create A Sufficiently Developed Record And Because It Arbitrarily Ruled That Expert Testimony On Social Science Research Is Not Scientific, And Therefore Is Never Admissible

As a threshold matter, a district court judge is charged with fully and properly screening expert scientific testimony. This Court should review *de novo* whether the district court applied

the proper legal standard and performed its gate-keeping role under *Daubert*. *Bureau v. State Farm Fire & Gas. Co.*, 129 Fed. Appx. 972, 975 (6th Cir. 2005); *Goebel v. Denver & Rio Grande W. R.R. Co.*, 215 F.3d 1083, 1087 (10th Cir. 2000); *United States v. Hall*, 93 F.3d 1337, 1346 (7th Cir. 1996). A district court's gate-keeping task, by its very nature, necessitates the creation of a "sufficiently developed record in order to allow a determination of whether the... court properly applied the relevant law...." *Dodge v. Cotter Corporation*, 328 F.3d 1212, 1223 (10th Cir. 2003). Additionally, a trial judge's discretion in deciding how to determine whether an expert's testimony is reliable and relevant "does not include the discretion to abdicate completely its responsibility to do so." *Mukhtar v. California State University*, No. 01-15565, 2002 U.S. App. LEXIS 27934, at *25 (9th Cir. Aug. 7, 2002). Here, the record does not reflect that Judge Bright carefully and meticulously examined the proffered scientific evidence; instead, she arbitrarily excluded the science of false confessions and all social sciences as unreliable.

This case is directly analogous to *United States v. Belyea*, where the Fourth Circuit found that a trial court abused its discretion when it failed to make a reliability determination about an expert witness' proposed testimony. 159 Fed. Appx. 525, 530 (4th Cir. 2005). The defendant in *Belyea* sought to introduce expert testimony on false confessions. *Id.* at 528. The district court rejected the expert's testimony, stating blankly that "jurors [already] know people lie." *Id.* at 527. In reviewing the trial judge's reasons for excluding the expert testimony, the Fourth Circuit found that "rather than making broad generalizations about evidentiary value," a court must look at the facts of the specific case when deciding whether the expert's testimony will be helpful to the jury. *Id.* at 529. According to the court, the trial judge's suggestion that expert testimony on false confessions is never admissible was "erroneous as a matter of law because it overlooks *Daubert*'s...requirement for a particularized determination in each case." *Id.* at 530.

Similarly, the Ninth and Tenth Circuits have stressed the importance of making a nuanced, particularized reliability determination. In *United States v. Velarde*, the Tenth Circuit assessed the district court’s decision to admit expert testimony from a pediatrician regarding symptoms and signs of child sexual abuse. 214 F.3d at 1207. The 10th Circuit found that the trial judge’s arbitrary, broad reasoning for admitting the testimony—that he had “heard this testimony before in trials, and it’s not new and novel”—abandoned the gate-keeping function; therefore the Tenth Circuit remanded the case for a more comprehensive *Daubert* finding. *Id.* at 1210-11. Likewise, in *Mukhtar*, the Ninth Circuit held that, despite evidence that the judge exhaustively reviewed five *Daubert* briefs and heard two declarations from the expert witness, the trial judge did not perform his proper gate-keeping function because he “abdicated [his] gate-keeping role by failing to make *any* determination that [the expert’s] testimony was reliable,” 2002 U.S. App. LEXIS at *32, and because he did not substantively address whether the evidence would be helpful to the jury. *Id.* at *20; *see Kumho Tire*, 526 U.S. at 158-59 (Scalia, J., concurring) (“Trial-court discretion in choosing the manner of testing expert reliability is not discretion to abandon the gatekeeping function.”).

Moreover, the Tenth Circuit emphasized that district courts must make specific, detailed records supporting exclusion of proffered expert testimony, in order for an appellate court to properly review the determination. *Dodge v. Cotter Corporation*, 203 F.3d at 1190, 1200 (10th Cir. 2000). The *Dodge* court, in remanding the case, urged the trial judge to “vigilantly make detailed findings to fulfill the gate-keeper role in *Daubert*,” and to ensure that each “particular opinion is based on valid reasoning and reliable methodology.” 203 F.3d at 1200, n.12. Indeed, absent “specific findings on the record, it is impossible to determine whether the district court

carefully and meticulously reviewed the proffered scientific evidence or simply made an off-the-cuff decision to [exclude] the expert testimony.” *Velarde*, 214 F.3d at 1209 (emphasis added).

The District Court’s decision to exclude Dr. Wallace’s testimony was equally as arbitrary and broad as the decisions in *Belyea*, *Velarde*, and *Mukhtar*, and thus the trial judge improperly abdicated his gate-keeping function. As in *Belyea*, at no time did Judge Bright attempt to analyze the various studies and publications describing the deep historical roots and scientific bases for the phenomenon of false confessions. In fact, mirroring the circumstances in *Belyea*, Judge Bright simply stated that “jurors know people lie” and that Dr. Wallace’s testimony is “common sense to most people.” (R. at 15, 16.) Indeed, the determination to exclude Dr. Wallace’s testimony was decidedly bare and did not reflect a careful and meticulous review of the proffered testimony. The record here lacks specific, detailed findings, leaving this Court little to review in determining whether a proper legal framework was applied. It is precisely this type of bare, arbitrary ruling that *Daubert* and Rule 702 are meant to prevent.

Moreover, Judge Bright neglected her proper gate-keeping function when she made the sweeping determination that no social science rises to the level of *Daubert* admissibility. (R. at 16.) Generalized conclusions of this type have been cautioned against by the Fourth, Ninth and Tenth Circuits. As in *Velarde* and *Mukhtar*, Judge Bright mad a gross generalization regarding the evidentiary value of a Dr. Wallace’s field—social science—rather than making a specific determination about false confessions within the narrow facts of Mr. Har’s case. The judge’s abrupt decision to slam the “gate” shut departs from the proper legal framework provided in *Daubert*, and therefore this Court should find that the district court erred in excluding Dr. Wallace’s testimony.

C. Had The Judge Performed Her Proper Gate-Keeping Function, She Would Have Admitted That Dr. Wallace’s Expert Testimony As Reliable And Relevant Under *Daubert*

Had Judge Bright applied the proper *Daubert* test and meticulously evaluated Dr. Wallace’s proffer, she would have found that the science of false confessions is both reliable and relevant. It follows, then, that even if this Court does determine that the district court applied the proper legal framework under *Daubert*, the trial court abused its discretion in finding that Dr. Wallace’s testimony was neither reliable nor relevant. *See Goebel*, 215 F.3d at 1087 (reviewing the district court’s decision to admit expert testimony under an abuse of discretion standard).

1. Dr. Wallace’s expert testimony regarding false confessions is tested and proved, and therefore is reliable social science evidence

To satisfy the first prong of *Daubert*’s test for admissibility, expert scientific testimony must be “derived by scientific method” and “supported by appropriate validation – i.e., ‘good grounds.’” 509 U.S. at 590. This Court has noted that a number of factors bear on the scientific validity of the proffered expert testimony. *Id.* at 593-94. Without creating an exhaustive list, the *Daubert* majority recommended that trial judges assess (1) whether the theory of technique can be and has been tested, (2) whether it has been subjected to some form of peer review or scrutiny within the scientific community, and (3) the reliability of the technique, including, where applicable, the potential rate of error and the general acceptance it enjoyed within the relevant scientific community. *Id.* This reliability test is “flexible,” and *Daubert*’s list of specific factors were “meant to be helpful, not definitive. [These] factors do not apply in every instance in which the reliability of scientific evidence is challenged.” *Kumho Tire*, 526 U.S. at 142. Based on these factors, Dr. Wallace’s testimony satisfied *Daubert*’s reliability requirement.

a. The science of false confessions is a sufficiently tested method

The science of false confessions is fully developed, having been thoroughly tested by experts in the field. Indeed, the First and Seventh Circuits have both found that false confession expertise is grounded in science and that the *Daubert* factors can measure the reliability of the false confession theory. *United States v. Shay*, 57 F.3d 126, 133-34 (1st Cir. 1995); *see Hall*, 93 F.3d at 1346 (finding that the science of false confessions is a sufficiently reliable and developed area). Trial judges have accepted the scientific validity of the study of false confessions. On remand from the Seventh Circuit, the District Court in *United States v. Hall* acknowledged that this field has been tested, stating that “the study of false confessions generally involves the systematic observation of real-world interrogations.” 974 F. Supp. 1198, 1203 (C.D. Ill. 1997).

In the instant case, Dr. Wallace’s testimony is not unlike the testimony of the expert in the *Hall* case on remand. In that case, the court took into account the expert’s proffer that, in reviewing confessions, there is a specific methodology that a researcher follows in order to determine whether a person has falsely confessed. *Id.* at 1204. In relevant part, the expert in *Hall* described the process in the following way:

The researcher initially obtains documented cases in which an innocent person has confessed to the crime... The researcher may [then] 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.

974 F. Supp. at 1204. This testimony is almost identical to the process that Dr. Wallace described in his expert proffer as an “observational” study. After acknowledging that social sciences are difficult to test, the court admitted the expert’s false confessions as reliable. *Id.*

Furthermore, as Dr. Wallace proffered, research on the subject of false confessions began nearly a quarter-century ago. Since then, by reviewing hundreds of such confessions, experts in the field have isolated variables that lead to false confessions. *Hall*, 974 F. Supp. at 1204; *see* Richard J. Ofshe, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74

Den. U.L. Rev. 979, 997 (1997) (providing a detailed discussion of the variables that can lead to false confessions, including stress-compliant false confessions); Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 Harv. C.R.-C.L. L. Rev. 105, 118-31 (1997) (discussing empirical evidence showing interrogation techniques and unique susceptibilities of defendants, which can produce false confessions). At least one commentator noted that it is “now demonstrably clear that false confessions can and do occur, as DNA exonerations have shown.” Janet C. Hoeffel, *Essay: The Gender Gap: Revealing Inequities in Admission of Social Science Evidence in Criminal Cases*, 24 U. Ark. Little Rock L. Rev. 41, n.151 (2001) (citing Barry Scheck, Peter Neufeld, & Jim Dwyer, *Actual Innocence* 92 (2000)). The scientifically-based methodology of false confessions cited by experts in the field is equivalent to the tested and proven science presented here by Dr. Wallace.

b. The science of false confessions has been peer reviewed in numerous publications

The field of false confessions has been repeatedly subject to peer review and scrutiny within the scientific community. In fact, the leading textbook on the subject references nearly one thousand separate articles on the subject of false confessions. Gisli Gudjonsson, *The Psychology of Interrogations, Confession and Testimony* (1992). It is clear that extensive articles have been published on the issue of false confessions. See Major James R. Agar, II, *The Admissibility of False Confession Expert Testimony*, Army Law., Aug. 1999, at 39 (opining that “the science of false confessions appears to meet the publishing and peer review threshold”).

c. The science of false confessions has received substantial general acceptance in the social science community

In evaluating essentially the same expert testimony on false confessions that is presented here, the district court in *Hall* found that the research “is a method generally accepted as reliable

by the community of social psychologists in this field.” 974 F. Supp. at 1203. Furthermore, it has been conclusively said that “no scholar on the subject debates whether false confessions exist.” *Agar, supra*, at 40. The *Daubert* requirement general acceptance provided is similar to the standard promulgated in *Frye v. United States*, which *Daubert* overruled. 293 F. 1013 (D.C. Cir. 1923). The more rigid *Frye* test, still used in some states, excluded expert testimony based on a scientific technique unless the technique was “generally accepted” in the scientific community. *Id.* at 1014. State courts still adhering to the *Frye* test have in some instances admitted expert testimony on false confessions as “generally accepted.” *E.g., State v. Miller*, No. 15279-1-III, 1997 Wash. App. LEXIS 960 (June 17, 1997), *review denied*, 953 P.2d 95 (Wash. 1998); *but see People v. Green*, 250 A.D.2d 143 (N.Y. App. Div. 1998) (ruling that although false confession expert testimony may be admissible under *Daubert*, New York follows the *Frye* test, which calls for exclusion of that testimony).

This Court should find, in accordance with the flexible factors set out in *Daubert* and based on the abundance of literature on the topic and on Dr. Wallace’s testimony, that the phenomenon of false confessions is reliable because it is a tested, proven science that has been subject to peer review and publication and is now generally accepted in the science community; therefore, the district court abused its discretion in excluding the testimony.

2. Dr. Wallace’s Expert Testimony Regarding False Confessions Is Relevant And Will Assist The Jury In Understanding The Evidence

The second question that a court must answer in a *Daubert* analysis is whether the testimony will assist the trier of fact in understanding the evidence; a condition that goes primarily to relevance. 509 U.S. at 592. A trial judge must ask “whether the untrained layman would be qualified to determine intelligently and to the best degree the particular issue without enlightenment from those having a specialized understanding of the subject matter involved.”

Shay, 57 F.3d at 132. This prong of *Daubert* in no way mandates that a district court “exclude all expert testimony that may in some way overlap with matters of the jury’s experience.” *Hall*, 93 F.3d at 1344.

It is critical that jurors hear Dr. Wallace’s testimony regarding false confessions in evaluating Mr. Har’s defense. Indeed, as the First Circuit articulated in *Shay*, exclusion of expert testimony regarding Mr. Har’s confession was reversible error because “common understanding conforms to the notion that a person ordinarily does not make untruthful inculpatory statements.” 57 F.3d 126, 133 (1st Cir. 1995).¹ Because common sense contradicts the notion that innocent people falsely confess to a crime, courts have been compelled to include expert testimony regarding false confessions. In *Hall*, the Seventh Circuit found that, “[i]t was precisely because juries are unlikely to know that social scientists and psychologists have identified a personality disorder that will cause individuals to make false confessions that the testimony would have assisted the jury in making its decision.” 93 F.3d at 1345. In assessing the individualized facts of interrogations, experts can determine “whether and how these particular factors correlate to false confessions.” *Belyea*, 159 Fed. Appx. At 530.

Furthermore, courts have held that expert testimony on false confessions is helpful to the jury in situations where the defendant’s mental disorder made it more likely that he or she confessed falsely. In *Shay*, the First Circuit found the jury plainly unqualified to determine without expert assistance whether the defendant may have falsely confessed because he suffered from a mental disorder. 57 F.3d at 133. Likewise, in *Hall*, the Seventh Circuit noted that “if a possible explanation [for the defendant’s behavior] is that the person is suffering from post-

¹ This Court has recognized that a defendant has the absolute constitutional right to introduce “competent, reliable evidence bearing on the credibility of his confession.” *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (finding exclusion of evidence as to length and manner of interrogation violated fundamental constitutional right to a fair opportunity to present a defense).

traumatic stress disorder, the jury would need expert testimony to allow it to take this possibility into account.” 93 F.3d at 1343. In the instant matter, not only has Mr. Har contended that his confession was false due to the totality of the factors of the particular investigation, but there is also testimony from Dr. Kalf that Mr. Har suffers from PTSD. (R. at 14.) Testimony from Dr. Wallace would help the jury understand the counterintuitive science of false confessions, allowing them to contextualize Mr. Har’s psychiatric diagnosis of PTSD and the grueling nature of the interrogation in this case.

Moreover, the present case differs from those in which expert testimony was excluded because the defendant did not present evidence of his psychiatric disorder. In *State v. Mamah*, the defendant claimed that his upbringing in Ghana made him fear authority, and that he was thus susceptible to falsely confessing to the FBI. 332 F.3d 475, 477 (7th Cir. 2003). Unlike the instant case, however, Mamah presented no evidence suggesting that he had a psychiatric disorder. *Id.* Furthermore, the only witness that could tie the testimony on false confessions to the facts of that case was an anthropologist who was merely prepared to testify about Ghanaian history. *Id.* at 478. Here, Dr. Kalf’s clinical diagnosis provides a link between Dr. Wallace’s testimony regarding the science of false confessions and the atrocities Mr. Har witnessed in Mago. Dr. Wallace’s testimony is essential to provide jurors with a context in which to assess Mr. Har’s claim that he falsely confessed. Therefore, this Court should find that Dr. Wallace’s testimony is relevant, because it will help the jury understand the evidence.

II. TO ENSURE THAT JURIES ARE ABLE TO ADEQUATELY EVALUATE EVIDENCE, THIS COURT SHOULD REQUIRE TRIAL COURTS TO PROVIDE A JURY INSTRUCTION THAT ALERTS JURORS TO THE DOCUMENTED PHENOMENA OF FALSE CONFESSIONS AND LISTS FACTORS THAT MAY CONTRIBUTE TO A DEFENDANT’S FALSE CONFESSION

This Court should require district courts to provide jurors with instructions relating to false confessions because such an instruction will assist jurors to more accurately perform their duties as triers of fact. In the absence of such an instruction, jurors, untrained in the law, are ill equipped to properly address the credibility of confession evidence. Jury instructions are particularly important because they are the only opportunity for the court, as opposed to the advocates of interested parties, to speak to jurors. Because they are provided by the impartial court, jurors give greater credence to the information provided within jury instructions.

A. Jury Instructions Effectively And Properly Frame Legal Questions For The Jury On Issues Where Jurors Have Little Common Knowledge

A primary purpose of jury instructions is to “clarify issues for the jury and to educate the jury about what factors are probative on those issues.” *Humphrey v. Staszek*, 148 F.3d 719, 724 (7th Cir. 1998). Jurors may not simply rely on general knowledge when evaluating evidence; they must perform their function of trier of fact within an established legal framework. *See* 47 Am Jur 2d Jury §2 (stating that “[t]he jury exercises its province upon the evidence introduced at trial, not upon its own knowledge obtained elsewhere”). A court provides this framework to jurors through jury instructions. These instructions “focus [the jury’s] attention on the essential issues in the case and inform it of the permissible ways in which these issues may be resolved.” *U.S. v. Ribaste*, 905 F.2d 1140, 1143 (9th Cir. 1990).

As with any other piece of evidence, a jury must weigh the credibility of a defendant’s confession. For jurors to fairly and completely determine the credibility of a confession, the court must provide an instruction alerting jurors to the occurrence of false confessions and informing them of circumstances which bears on the confession’s veracity. Without this instruction, jurors cannot adequately assess the credibility of confession evidence. They therefore cannot determine the weight of the confession, a critical determination during their

deliberations. *See* 75A Am. Jur. 2d Trial §1193 (stating that “[i]n charging the jury, a trial judge may not interfere with the province of the jury in determining the credibility of witnesses...”).

B. District Courts Should Instruct Juries On False Confessions Because Such Evidence Raises Credibility Concerns That Will Escape The Average Juror

An instruction pertaining to confessions is analogous to the special instruction provided by many courts regarding eyewitness identification. Like identification evidence, confession evidence raises credibility concerns that are not immediately apparent to the average lay juror. Additionally, similar to identification evidence, both this Court and social science research have indicated the significant impact that confessions have on a jury’s deliberation. The Court of Appeals for the District of Columbia Circuit decided in *United States v. Telfaire* that when identification rests solely on the basis of an eyewitness identification, a court must instruct the jury on credibility issues pertaining to eyewitness identification. 469 F.2d 552, 555 n.11 (D.C. Cir. 1972). A court should give this instruction even in the absence of a request from defense counsel. *Id.* at 555 n.11. The District of Columbia Circuit based its decision in large part on the Supreme Court’s rulings in *United States v. Wade*, 388 U.S. 218 (1967), *Gilbert v. California*, 388 U.S. 263 (1967), and *Stovall v. Denno*, 388 U.S. 293 (1967), which defined the rights of criminal defendants during identification proceedings. These decisions signaled the Supreme Court’s recognition of the credibility concerns raised by eyewitness identifications and the need for a specialized jury instruction to alert jurors to these concerns. *See Telfaire* 469 F.2d at 555 (stating that the Supreme Court “sought to take into consideration the traditional recognition that identification testimony presents special problems of reliability by stressing the importance of an identification instruction even in cases meeting the constitutional threshold of admissibility”).

The District of Columbia Circuit provided a model instruction that focused jurors’ attention on the circumstances of the identification and alerted them to factors that impinged on

the reliability of the identification. *Id.* at 558-59. The *Telfaire* court’s instruction reflected both sociological and scientific research, as well as Supreme Court holdings that illuminated the harmful consequences of certain identification procedures. 469 F.2d at 555, n.10, n.11; *see U.S. v. Wade*, 388 U.S. at 228 (“The vagaries of eyewitness identifications are well-known; the annals of criminal law are rife with instances of mistaken identification.”). The level of specialized knowledge necessary to understand credibility issues relating to eyewitness identifications, knowledge that untrained jurors are not likely to possess, necessitates a specific instruction. Because identification techniques and the surrounding evidence of misidentification are not common knowledge among lay jurors, the *Telfaire* court held that a special instruction relating to eyewitness identification was necessary. *See* 469 F.2d at 555 n.11.

This Court should require lower courts to provide juries with special instructions relating to confession evidence for reasons similar to the justifications for identification instructions. The legal development of false confessions parallels that of eyewitness identification. The Supreme Court has long recognized the existence of coerced confessions. *See e.g., Chambers v. Florida* 309 U.S. 227 (1940) (overruling defendant’s conviction because defendant gave a coerced confession as a result of physical abuse). Additionally, in *Arizona v. Fulminante*, the Court acknowledged that a confession greatly influences a jury’s decision of guilt or innocence. 499 U.S. 279, 296 (1991). The Court stated that a defendant’s confession is “probably the most probative and damaging evidence that can be admitted against him....Certainly, confessions have profound impact on the jury...” *Id.*

C. Evidence From Legal And Sociological Studies Compels The Conclusion That A Jury Instruction On False Confessions Is Imperative

Legal and sociological studies similarly document the phenomena of false confessions and the impact of confession evidence on jurors. Professor Welsh White’s analysis of empirical

data led to the conclusion that “standard interrogation methods will lead to untrustworthy confessions when interrogators employ those methods on a particularly vulnerable suspect or employ specific stratagems or tactics on any suspect.” Welsh White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 Harv. C.R.-C.L. L. Rev. 105, 134 (1997). Professor White has identified several factors, relating both to interrogation techniques and the personal characteristics of particular defendants, which contribute to false confessions. *Id.* at 118-134.

Professor Richard Leo’s research echoes that of Professor White’s. In 2004, Professor Leo had proven 125 false confessions of individuals who were ultimately found guilty. Steven A. Drizin & Richard A. Leo, *The Problem of False Confession in the Post-DNA World*, 82 N.C.L. Rev. 891 (2004). Professor Leo concluded that confession evidence is particularly damning in the eyes of jurors. *Id.* at 996 (“This study adds to a growing body of research demonstrating the power of confession evidence to substantially prejudice a trier of fact’s ability to even-handedly evaluate a criminal defendant’s culpability.”). As Professor Leo’s research indicates, “lay jurors...treat confession evidence as more probative than any other piece of case evidence and thus as essentially dispositive of the defendant’s guilt – even when the confession lacks corroboration and is almost certainly the product of psychological coercion and/or police misconduct.” *Id.*

The Seventh Circuit appropriately identified the need for the jurors to be instructed on false confessions and the factors that are likely to contribute to them in *United States v. Hall*, 93 F.3d 1337 (7th Cir. 1996). There, the court of appeals reversed the decision of the district court excluding expert testimony on false confessions. The Seventh Circuit’s reasoning is equally applicable to a rule requiring judges to instruct jurors on false confessions. *Id.* at 1345. The

court of appeal's concern centered around the beliefs held by jurors regarding false confessions, and the fact that these beliefs are often incorrect, as demonstrated by social science research. *Id.* They concluded that the trial court should have permitted the expert to testify in order to "let the jury know that a phenomenon known as false confessions exists, how to recognize it, and how to decide whether it fit the facts of the case being tried." *Id.* The court noted that it was still the responsibility of the jury to assign weight to the testimony but that the jury needed the expert's testimony in order to properly determine the credibility of the confession, a critical part of their deliberations. *Id.* at 1345. While an expert may be able to provide jurors with additional evidence to consider regarding the prevalence of false confessions, a jury instruction also address the concerns of the Seventh Circuit by providing jurors with a legal framework for addressing credibility concerns relating to false confessions.

There is considerable, reliable evidence that individuals falsely confess to crimes. Additionally, social scientists and legal researchers are able to identify certain characteristics of both interrogations and particularly susceptible suspects which lead to false confessions. In light of this research and the Supreme Court's long recognition of the importance of confession testimony, this Court should require trial courts to instruct jurors as to the occurrence of false confessions and provide them with factors that are likely to contribute to false confessions. In order for the jury to adequately perform its function as trier of fact and analyze all of the evidence using proper legal standards, the jury must be informed, through a jury instruction, of the propensity for false confessions under certain circumstances.

III. THE ADMISSION OF THE STATEMENTS OF MR. HAR'S RELATIVES, MADE TO DR. GERBER, VIOLATES MR. HAR'S RIGHT TO CONFRONTATION UNDER THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION

A. Admission Of Dr. Gerber's Testimony Regarding Her Conversations With Mr. Har's Family Is Reversible Error Because It Violates Mr. Har's Sixth Amendment Rights, Which Requires An Opportunity To Cross-Examine All Witnesses

The Confrontation Clause, located within the Sixth Amendment of the United States Constitution, provides that “in criminal prosecutions, the accused shall enjoy the right...to be confronted with witnesses against him.” U.S. Const. amend VI. Recognizing that the Clause’s “ultimate goal is to ensure the reliability of evidence,” the Supreme Court has held that the reliability of testimonial evidence must be “test[ed] in the crucible of cross-examination.” *Crawford v. Washington*, 541U.S. 36, 61 (2004). Therefore, the Sixth Amendment requires that in order for testimonial hearsay to be admitted, the defendant must have an opportunity to cross-examine the hearsay witness. *Crawford*, 541 U.S. at 68. Under *Crawford*, testimonial hearsay evidence is no longer permitted merely because a judge decides that testimony is reliable or because the defendant is “obviously guilty.” *Id.* at 62.

The content of Dr. Gerber’s interviews with Mr. Har’s relatives was both testimonial and hearsay; therefore, introduction of it through Dr. Gerber’s testimony is constitutionally impermissible because Mr. Har did not have an opportunity to cross-examine his mother or sister, due to their unavailability. In addition, even if this Court decides that Mrs. Har and Chava’s conversations with Dr. Gerber were not testimonial, the hearsay testimony violates Mr. Har’s confrontation rights because it lacks “adequate indicia of reliability,” as required by *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), and explained in *Dutton v. Evans*, 400 U.S. 74, 89-90 (1970). Finally, even if this Court finds that the jury instruction, which restricted the jury’s consideration

of Mrs. Har's and Chava's statements to "evaluating the thoroughness of Dr. Gerber's opinion," (R. at 65), cures the hearsay problem, there is a grave likelihood that the jury misused Dr. Gerber's testimony by evaluating it for its truth, thereby violating Mr. Har's confrontation rights.

In order to protect against such Confrontation Clause violations, this Court should find that admission of statements made by Mr. Har's relatives to Dr. Gerber was reversible error. There is only the possibility of reversible error in this case. (R. at 101). Therefore, if this Court determines that there was even the slightest violation of Mr. Har's Confrontation Clause rights, then this Court must uphold the Court of Appeals' reversal and remand for a new trial.

B. The Substance Of Dr. Gerber's Conversations With Mrs. Har And Chava Is Hearsay Because It Is Offered To Prove The Truth Of Dr. Gerber's Diagnosis Of Mr. Har, And Therefore Admission Of The Conversations Through Dr. Gerber's Testimony Violates Mr. Har's Confrontation Clause Rights

"Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c) (internal quotations omitted). Because Dr. Gerber's conclusion that Mr. Har does not have PTSD is, in part, based upon her conversations with Mr. Har's relatives, the substance of those conversations is hearsay, because it is meant to prove the truth of the matter Dr. Gerber asserts. The district court's limiting instruction was a smokescreen, which merely permitted the jury to evaluate those statements for their truth. Moreover, regardless of the limiting instruction's effectiveness, there is a substantial risk that the jury ignored the limiting instruction. Accordingly, this Court should find that the district court committed reversible error in admitting Dr. Gerber's testimony about Mrs. Har's and Chava's interview responses.

1. The district court’s limiting instruction, which allowed the jury to consider Mrs. Har’s and Chava’s statements, is an implausible attempt to circumvent the Confrontation Clause’s prohibition on admitting hearsay

The district court’s reasoning, that allowing Dr. Gerber to testify as to the substance of her conversations with Mrs. Har and Chava, but limiting the jury’s use of the testimony to “evaluating the thoroughness of Dr. Gerber’s opinion” (R. at 65), is a blatant end-around the protections of the Confrontation Clause. It is true that the Confrontation Clause “does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted,” *Crawford*, 541 at 59; however, it is a fallacy to suggest that the jury members could separate their analysis of Dr. Gerber’s general theories without, in part, evaluating their belief about the facts he relayed from Mrs. Har and Chava. *People v. Goldstein*, 843 N.E.2d 727, 732-33 (N.Y. 2005); David H. Kaye, David E. Bernstein, & Jennifer Mnookin, *The New Wigmore, A Treatise on Evidence: Expert Evidence* §§ 3.10.1 at 40 (2007 Supp.).

Such was the court’s approach in *United States v. Stone* in admitting expert testimony from an IRS agent that was partially based on statements from a company’s employees to another investigator. 222 F.R.D. 334, 339 (E.D. Tenn. 2004). Ignoring the fact that the employees were not unavailable and that the interviews were testimonial, the court in *Stone* declared that “the purpose of the out-of-court statements would not be for hearsay purposes, but rather for evaluating the merit of the opinions [the expert] offered.” *Id.* at 39. *Stone* is distinguishable from the present case, because it involved an expert who disclosed the possible hearsay evidence during cross-examination, as opposed to direct examination. *Id.*

More importantly, experts have heavily criticized the *Stone* decision, pointing out that the court’s logic in *Stone* is “weak” because “[t]o use inadmissible information in evaluating an expert’s testimony, the jury must make a preliminary judgment about whether this information is

true.” Kaye, *supra*, §§ 3.10.1 at 40. The *Stone* reasoning produces logically anomalous results, such as that in *State v. Jones*, where a forensic chemist used another agent’s laboratory analysis to testify that a substance was cocaine. 603 S.E.2d 168, 2004 WL 1964890 (N.C. Ct. App. 2004) (unpublished opinion). The error in *Jones* stemmed from the fact that the laboratory analysis, conducted by the non-testifying chemist, was the testifying chemist’s *only* basis for identifying the substance as cocaine, and therefore the testimony amounted to, “the substance is cocaine because the laboratory report informs me that it is cocaine.” Kaye, *supra*, §§ 3.10.1 at 41 (2007 Supp.). Despite this, the state appellate court found *Crawford* not to apply because the analysis was “not admitted for the purpose of proving the truth of the matter asserted.” *Jones*, 603 S.E.2d 168, 2004 WL 1964890. In effect, no one testified as to whether the laboratory analysis was accurate, and the defendant had no opportunity to cross-examine the chemist who conducted the tests.

A more persuasive interpretation of the reality of such limiting instructions is provided in *Goldstein*. In *Goldstein*, much like the instant case, the prosecution presented a forensic psychiatrist who testified about facts obtained in interviews with third parties. 843 N.E.2d at 729-30. The facts from the interviews corroborated the psychiatrist’s conclusion that the defendant suffered from only a “relatively mild mental illness.” *Id.* at 730. As in the present case, the trial court in *Goldstein* permitted the “interviewees’ statements...not as evidence in themselves, but...only to help the jury in evaluating [the psychiatrist’s] opinion,” and thus the interviewees’ statements were not offered to establish the truth of the matter. *Id.* at 732-33. The appellate court, however, concluded that such a distinction was illogical, noting that it did not see “how the jury could use the statements of the interviewees to evaluate [the psychiatrist’s] opinion without accepting as a premise either that the statements were true or that they were false.” *Id.*

Much like the present case, where Dr. Gerber based her opinions about Mr. Har's mental health on conversations with his family, the court in *Goldstein* found that the psychiatrist in that case used her interview to "get to the truth." *Id.* at 732. Thus, the court correctly decided that "[t]he distinction between a statement offered for its truth and a statement offered to shed light on an expert's opinion is not meaningful in this context." *Id.* at 732-33.

Finally, there are some situations where the introduction by one expert of another expert's opinion may be an acceptable non-hearsay use of the opinion; however, this is not one such situation. Previously, courts have allowed one expert to introduce another expert's opinion in the form of an autopsy report or DNA analysis. *See Sauerwin v. Arkansas*, No. Cr 05-27-8, 2005 Ark. LEXIS 565, *7-*8 (Sept. 29, 2005) (noting that it was common and standard practice for a medical examiner to testify concerning an autopsy report to which third-parties had contributed, when the medical examiner had conducted his own review of the evidence); *Goff v. Arkansas*, 953 S.W.2d 38, 42 (Ark. 1997) (allowing an expert witness's testimony when she testified that the DNA report was accurate based on her analysis of the procedures undertaken by third-party DNA technicians). However, in those cases, the non-testifying experts' opinions were merely collateral to the introduction of the testifying experts' opinion. The testifying experts' introduction of the non-testifying experts' opinion was only permissible because the testifying experts had done independent analyses and reached similar conclusions. Such is not the case here, where Dr. Gerber is supporting her hypothesis about Mr. Har's PTSD with non-expert evidence that differs in form from her other evidence. Unlike the experts in *Sauerwin* and *Goff*, who introduced other expert evidence that was identical in form to their own testimony, the interviews with Mr. Har's relatives are patently different from the rest of Dr. Gerber's evidence, which consists solely of her interview with Mr. Har.

This case is more analogous to the decision in *Roberts v. United States*, where a defendant was erroneously denied the right to cross-examination when a DNA expert read non-testifying experts' hearsay conclusions as part of his testimony, without analyzing the evidence for himself. No. 03-CF-853, 2007 D.C. App. LEXIS 77, *42-*46 (Feb. 15, 2007). In the instant case, Dr. Gerber is merely reiterating the opinions of other non-testifying parties, who, unsolicited, would ordinarily not be making such statements. This is not an example of an expert who is attempting to convey information that is a "common and standard practice," such as a routine autopsy report. Therefore, this Court should find that the statements that Mrs. Har and Chava gave to Dr. Gerber were, in fact, hearsay because they were offered for their truth.

2. The district court's decision to admit statements made by Mr. Har's relatives to Dr. Gerber risks jury nullification and violates Mr. Har's Confrontation Clause rights

Even if this Court does not find that the district court's jury instruction impermissibly allowed hearsay evidence, admission of those statements violates Mr. Har's Confrontation Clause rights because the risk is high that the jurors ignored the trial court's limiting instruction and instead used Dr. Gerber's testimony about Mrs. Har's and Chava's statements for their truth. The Supreme Court has held that there are times when the risk that jurors will ignore an instruction is so high that even use of a limiting instruction infringes upon the defendant's Confrontation Clause rights. *See Bruton v. United States*, 391 U.S. 123, 137 (1968) ("Despite the concededly clear instructions to the jury to disregard...inadmissible hearsay evidence inculcating [the defendant]...we cannot accept limiting instructions as an adequate substitute for [the defendant's] constitutional right of cross-examination."). In such cases, which frequently involve non-testifying co-defendants, a limiting instruction is not sufficient to prevent a Confrontation Clause violation because even the clearest instructions to a jury do not diffuse the

“substantial threat” that the jury will misuse the evidence to the detriment of defendants’ Confrontation rights. *Bruton*, 391 U.S. at 137. It is of note that courts have also applied *Bruton* to cases where an expert testifies about inculpatory statements made by non-testifying third-parties. *E.g.*, *Howard v. Walker*, 406 F.3d 114 (2d Cir. 2005).

This Court should extend the reasoning of *Bruton* to the present case, because this case calls into question the “crucial assumption” that jurors will follow the instructions given to them by a trial judge. *Tennessee v. Street*, 471 U.S. 409, 414 (1985). There is a substantial risk that the jury accepted statements by Mrs. Har and Chava for their truth, rather than simply using them to evaluate Dr. Gerber’s testimony. In *Howard*, the Second Circuit found that expert testimony, allowed by the trial court for non-hearsay purposes, was impermissibly admitted against a defendant when an expert-medical examiner relayed incriminatory statements from two apparent co-conspirators. 406 F.3d at 123-128. The present case also involved an expert who relayed inculpatory statements that were asserted for a non-hearsay purpose. The evidence from Mr. Har’s family is uniquely susceptible to misuse because it is likely that the jury assigned special weight to the statements of Mr. Har’s mother and sister—two people who supposedly knew him well. Moreover, in a battle of experts such as the one presented here, where both have based their conclusions on conversations with and observations of Mr. Har, there is a substantial threat that the jury defaulted to Dr. Gerber’s testimony about the comments made by Mrs. Har and Chava as a tiebreaker. Therefore, this Court should find that admitting Dr. Gerber’s testimony regarding her conversations with Mr. Har’s mother and sister violated Mr. Har’s confrontation rights.

C. Mrs. Har’s And Chava’s Statements, Made With The Knowledge That Dr. Gerber Was Working For The Government In Mr. Har’s Trial, Are Objectively Testimonial Under This Court’s Decision In *Crawford*

The statements made by Mr. Har’s relatives to Dr. Gerber were testimonial because they were made during formal interviews between a state-funded expert and potential witnesses, where the interviews served to uncover evidence supporting Dr. Gerber’s and the prosecution’s theory that Mr. Har did not have PTSD. The Supreme Court has recognized that *testimonial* hearsay implicates core Confrontation Clause concerns. *Crawford*, 541 U.S. at 51. In *Crawford*, the Supreme Court found that formal statements taken by police officers are testimonial, *id.* at 52, but stopped short of defining “testimonial.” *See id.* at 68 (“We leave for another day any effort to spell out a comprehensive definition of ‘testimonial’.”). Instead, the Court, in part, recognized that testimonial statements include those “statements that were made under circumstances which would lead an objective witness to believe that the statement would be available for use at a later trial.” *Id.* at 52; *see United States v. Cromer*, 389 F.3d 662, 673 (6th Cir. 2004) (finding a statement testimonial if “made in circumstances in which a reasonable person would realize that it likely would be used in investigation or prosecution of a crime”).

Most importantly, however, the Supreme Court recently clarified the definition of “testimonial” by emphasizing that the “primary purpose of the interrogation” is of critical importance when distinguishing testimonial from non-testimonial statements. *Davis v. Washington*, 126 S. Ct. 2266, 2273-74 (2006). Statements are testimonial when “the circumstances objectively indicate that there is no...ongoing emergency, and that the primary purpose of the interrogation is to...prove past events potentially relevant to later criminal prosecution.” *Id.* at 2273-2274. In contrast, “[s]tatements are non-testimonial when

made...under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.” *Id.* at 2274.

1. Under *Davis v. Washington*, the statements by Mr. Har’s family members are testimonial because Dr. Gerber intended to “prove past events relevant to [Mr. Har’s] later criminal prosecution”

Dr. Gerber contacted Mrs. Har and Chava for the primary purpose of investigating Mr. Har’s personal background in order to support her diagnosis of him in the government’s case against him; therefore, the statements are testimonial under *Davis*. In *Davis*, this Court recognized that when distinguishing testimonial statements from non-testimonial statements courts must evaluate the primary purpose of the interrogation. *Davis*, 126 S. Ct. at 2274. Courts have recognized statements as testimonial when the government questioner’s primary purpose was to preserve a statement for trial, even when the declarant has no such purpose. *See, e.g., United States v. Bordeaux*, 400 F.3d 548, 556 (8th Cir. 2005) (finding that statements made by a rape victim to law enforcements officials during a forensic interview were testimonial because the police intended to discover evidence that could be used to prosecute the defendant).

In the present case, Dr. Gerber’s sole intent was to procure evidence to support her clinical diagnosis—she had no intent to enable police assistance, nor was there an ongoing emergency; therefore, the comments she solicited from Mrs. Har and Chava are testimonial and in violation of Mr. Har’s Confrontation Clause rights. This case is closely analagous to *People v. Goldstein*, where a government psychiatrist interviewed third-parties and testified about their comments. 843 N.E.2d 727, 729-30 (2005). Similar to the present case, because the psychiatrist’s sole purpose was to find support for the prosecution’s case, the responses were declared testimonial and in violation of the Confrontation Clause. *Id.* at 733. This Court should

employ similar reasoning to conclude that admission of the content of Dr. Gerber's conversations with Mr. Har's family members violated Mr. Har's Sixth Amendment rights.

2. Because Dr. Gerber is employed by the prosecution and shared their motivations when interviewing Mr. Har's relatives, the interviews were akin to police interrogations, and therefore are testimonial

Because Dr. Gerber represented the prosecution during her calls to Mrs. Har and Chava, and her questioning of them was akin to an interrogation by police officers. Accordingly, this Court should find their statements were testimonial evidence. In *Crawford*, the Supreme Court was careful to clarify that it used "the term 'interrogation' in its colloquial, rather than...technical legal, sense." 541 U.S. at 53 n.4. Moreover, the Supreme Court has clarified that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id.* at 51. Courts have interpreted these words to mean that conversations between persons not affiliated with the government are not testimonial, *see, e.g., United States v. Townley*, 472 F.3d 1267, 2007 U.S. App. Lexis 454, *18 (10th Cir. Jan. 10, 2007) (finding that a tape-recorded conversation between co-conspirators was non-testimonial because there was no level of police interrogation), while formal investigations involving a rape counselor, *e.g. Maryland v. Snowden*, 385 Md. 64 (Ct. App. 2005), or prosecution's expert psychiatrist, *e.g. Goldstein*, 843 N.E.2d 727 (N.Y. 2005), have been considered testimonial because of the involvement of a government actor. Similar to *Goldstein*, the present case involves an expert witness, Dr. Gerber, employed by the prosecution. While she arguably performed a task common to psychiatry, she performed her interrogation on behalf of the state and therefore is a state agent.

3. Because Dr. Gerber disclosed her identity as a government psychiatrist preparing for Mr. Har’s trial and because of the formal structure of the interview, an objective observer would conclude the solicited statements were part of an investigation or prosecution of a crime, and therefore are testimonial

From the perspective of an objective observer, Mr. Har’s mother and sister talked to a government agent in preparation for Mr. Har’s trial, since Dr. Gerber indicated to both of them that she was interviewing them as a result of Mr. Har’s indictment. This Court recently declared that analysis of whether a statement is testimonial depends, in part, on the declarant’s objective belief. *Davis*, 126 S. Ct. 2274, 2274 n.1; *see United States v. Summers*, 414 F.3d 1287, 1302 (10th Cir. 2005) (“[A] statement is testimonial if a reasonable person in the position of the declarant would objectively foresee that his statement might be used in the investigation or prosecution of a crime.”); *United States v. Cromer*, 389 F.3d 662, 673 (6th Cir. 2004) (declaring that a statement is testimonial if the statement was “made in circumstances in which a reasonable person would realize that it would be used in the investigation...of a crime”). Additionally, the Court noted that as the level of formality in an interaction increases, the chances are greater that statements are testimonial. *See Crawford*, 541 U.S. at 51-52 (describing formulations of the core class of testimonial statements, all of which involve formal government interaction); *see also Goldstein*, 843 N.E.2d at 733 (noting that responses to a government psychiatrist’s questions were formal, similar to depositions and other legal proceedings that the Supreme Court had identified as formal). During a structured interview conducted by a government agent, long after the alleged incident and in preparation for a trial, the declarants are invariably assumed to be objectively aware that they are engaged in testimonial speech. *Id.* at 733.

In the present case, as in *Goldstein*, because Mrs. Har and Chava were contacted by a state psychiatrist, preparing for a trial, their answers were objectively testimonial. In *Goldstein*,

the court noted that although the record did not indicate whether the interviewees subjectively knew that they were being contacted by an expert, it was inferred that they did because the questions were formal and because this situation was far removed from a casual conversation. *Id.* at 733. The facts of the present case, even more than those in *Goldstein*, strongly suggest that the comments by Mr. Har’s mother and sister were testimonial because Dr. Gerber admits acknowledging to both of them that she was a psychiatrist working for the government in preparation for Mr. Har’s trial. (R. at 56, 58). Moreover, the formality of the present situation, where both Mrs. Har and Chava were called by a doctor for the sole purpose of answering structured questions about Mr. Har, objectively indicates that this was diametrically opposed to what the Supreme Court called a “casual remark to an acquaintance.” *Crawford*, 541 U.S. at 51. To rule otherwise creates a dangerous incentive for law enforcement personnel to engage in covert interrogations without revealing their identities as government agents.

D. Even If This Court Determines That Mrs. Har’s And Chava’s Statements Were Non-Testimonial, Admission Of The Statements Through Dr. Gerber Still Violates Mr. Har’s Confrontation Rights Because The Statements Lack “Adequate Indicia of Reliability”

Admission of Mrs. Har’s and Chava’s statements, if found to be non-testimonial, violate Mr. Har’s Confrontation rights because the statements lack “adequate indicia of reliability” as mandated by the Court in *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). The Court’s decision in *Crawford* does not implicate non-testimonial statements made by hearsay witnesses. 541 U.S. at 68. Therefore, non-testimonial statements are still evaluated according to whether the statements bear “particularized guarantees of trustworthiness.” *Roberts*, 448 U.S. at 65-66. Previously, the Court considered various reliability factors in judging the trustworthiness of a hearsay witness’s statements, including whether there was an express assertion about a past fact, whether the witness established personal knowledge of the defendant, whether cross-examination could have

indicated that the witness was not in a position to testify accurately, and whether there was evidence to indicate that the witness's statement misrepresented the defendant's involvement.

Dutton v. Evans, 400 U.S. 74, 89-90 (1970) (plurality opinion).

In the present case, it is clear that Mr. Har's mother and sister have personal knowledge of his upbringing; however, it is not established that they are competent to testify as to his mental state. In particular, Mrs. Har made several factual errors that severely impugn her credibility, including such mundane facts as what age Mr. Har left Mago—she says 18 (R. at 60), in truth it is 22 (R. at 1, 68)—and whether he experienced any difficulty establishing a social life upon leaving his homeland—she says no (R. at 60, 61), while he says it has been emotionally difficult (R. at 68, 70). Moreover, Dr. Gerber, herself, admits difficulty in understanding what Mrs. Har said due to her strong accent (R. at 56), and also concedes that Mrs. Har and Chava could have misremembered facts relating to Mr. Har's childhood (R. at 57, 58). Finally, Dr. Gerber also has no personal relationship with either Mr. Har's mother or sister, and therefore cannot reasonably verify the accuracy of their statements. Thus, because Dr. Gerber seeks to relay *express assertions about past facts* and cannot verify that Mrs. Har or Chava were in a *position to testify accurately*, the Court should reject such evidence, if it is found to be non-testimonial, because it violated Mr. Har's Confrontation Clause protections.

CONCLUSION

Respondent, Mr. Har, respectfully requests that this Court affirm the ruling of the Court of Appeals for the Fourteenth Circuit in holding that the trial court erred by excluding Dr. Wallace's expert testimony on the study of false confessions, refusing to instruct the jury about the nature of false confessions, and admitting Dr. Gerber's rebuttal evidence concerning her interviews with Mr. Har's family, in violation of Mr. Har's confrontation rights.