

No. 06-117

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2006

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 PETITIONER

QUESTIONS PRESENTED

- I. Does it violate the Confrontation Clause to allow an expert to repeat third party statements which formed the basis of the expert's opinion where those statements were not offered for the truth of the matter asserted and the jury was specifically instructed only to use the statements to assess the expert's opinion?
- II. Under *Daubert*, did the court of appeals err by reversing the district court's exclusion of expert testimony where the testimony was not generally accepted, supported by no relevant testing, had no defined error rates, and is common knowledge?
- III. In a district court case where the defendant contests the truthfulness of his confession, must the court instruct jurors that people sometimes falsely confess to crimes?

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OPINIONS BELOW

The opinion of the Eastern District of Boerum District Court is reported as *United States v. Har* at (R. 3). The opinion of the United States Court of Appeals for the Fourteenth Circuit is reported as *United States v. Har* at (R. 88).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part that an accused has a right to be “confronted with the witnesses against him.” U.S. Const. amend. VI.

STANDARD OF REVIEW

The Fourteenth Circuit Court of Appeals erred as a matter of law when it held that the testimony of Dr. Gerber regarding statements made by third parties violated the Confrontation Clause. Questions of Constitutional interpretation, questions of law, are reviewed *de novo*. *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948). The court of appeals also erred in holding that the district court should have admitted expert testimony regarding false confessions. This holding is reviewed under an abuse of discretion standard. *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997). The court of appeals also erred in holding that the district court had to give the jury a detailed instruction on false confessions. This Court reviews errors in jury instructions *de novo*. See *Arthur Anderson, L.L.P. v. United States*, 544 U.S. 696, 702-06 (2005).

STATEMENT OF THE CASE

Like *The Wheel of Fortune*, *Daily Dollars* was an extremely popular television game show. (R. at 1.) Bruce “Sack” Seafoam was the host of *Daily Dollars*. (R. at 1, 25.) On February 28, 1997, Mr. Seafoam’s lifeless body was found “tied to the *Daily Dollars* game wheel.” (R. at 1, 25.) Mr. Seafoam died after being struck on the head and strangled with a microphone cord. (R. at 1.) On June 2, 2005, a grand jury indicted Respondent, Rounn Har, for the murder of Mr. Seafoam. (R. at 1, 2, 90.)

In 2005, Respondent confessed to Nathaniel Walker and Nebraska Walker that he had murdered Mr. Seafoam. (R. at 73-85.) In 1997, Mr. Walker was the head Federal Bureau of Investigation (“FBI”) detective assigned to “the investigation of the death of” Mr. Seafoam. (R. at 39.) He was unable to solve the murder because: 1) investigators found no DNA evidence or fingerprints at the crime scene; and 2) medical personnel cut the knot that secured Mr. Seafoam’s

body to the *Daily Dollars* game wheel before investigators could photograph the knot. (R. at 40-41.) But, Mr. Walker saw the knot before it was destroyed and, eight years later, he could still remember the knot that “kind of resembled a butterfly.” (R. at 40.)

The unique knot appeared before Mr. Walker’s eyes again in March 2005, when he was reading The National World Magazine. (R. at 42.) The magazine showed the knot and described the knot as the national knot for the country of Mago. (R. at 42.) Mr. Walker remembered that Respondent was from Mago and that he was working as a Production Assistant for *Daily Dollars* at the time of Mr. Seafoam’s death. (R. at 32, 41-42.) Although Mr. Walker retired from the FBI in 2002, he continued working as a private investigator. After seeing the “bear hug” knot in The National World Magazine, he resumed his investigation of Mr. Seafoam’s murder. (R. at 42.) To do so, he enlisted the help of his daughter, Nebraska Walker. (R. at 43.)

Ms. Walker, who is also a private investigator, searched the Internet to learn more about Respondent and learned that Respondent had a profile on a dating website called Unite.com. (R. at 30-31.) She created a profile on Unite.com and e-mailed Respondent. (R. at 31.) Ms. Walker told Respondent that she taught elementary school. (R. at 35.) Both individuals exchanged e-mails for a short period of time and then arranged to meet on April 24, 2005. (R. at 31.) The couple spent the day together before going to Mr. and Ms. Walkers’ home to eat pizza, drink beer, and talk. (R. at 31-34.)

While Respondent was in the Walkers’ basement, Mr. Walker entered the room and began conversing with Respondent. (R. at 34-36.) He asked Respondent about working on *Daily Dollars*. (R. at 74.) Mr. Walker stated that he “was the detective assigned to” the Seafoam

murder case. (R. at 76.) During the conversation, which was recorded by Mr. Walker, Respondent stated that he had murdered Mr. Seafoam. (R. at 44, 81-84.)

On July 7, 2005, Respondent was indicted for the murder of Mr. Seafoam. (R. at 1, 2.) His defense counsel requested that the district court hold a pre-trial hearing “to determine the admissibility of expert testimony” from two potential defense witnesses. (R. at 90.) At the pre-trial hearing, the district court heard testimony from John Wallace, Ph.D., who testified about the “occurrence and genesis of false confessions,” and Roberta Kalf, M.D., who testified about Respondent’s “personality traits and psychological disorders.” (R. at 90-91.)

The prosecution sought to exclude Dr. Wallace’s testimony “because it was neither reliable nor helpful to the jury, and therefore did not satisfy the requirements of *Daubert v. Merrell Dow, Inc.*, 509 U.S. 579 (1993).” (R. at 91.) The defense countered that “false-confession evidence was reliable and that, in light of the general belief that innocent people do not confess, it would not only be helpful for the jury, but would indeed be essential to a fair consideration of the evidence.” (R. at 91.) The district court excluded Dr. Wallace’s testimony on false confessions but allowed Dr. Kalf to testify about her psychiatric evaluation of Respondent. (R. at 91.)

During trial, the prosecution presented testimony from Jessica Gerber, M.D., who testified that “in her opinion, based on interviews with [Respondent] Har’s mother and sister, Har was not susceptible to making a false confession.” (R. at 92.) The defense objected to Dr. Gerber’s testimony because the interviews with Respondent’s mother and sister “were testimonial hearsay, having been made to a government agent in preparation for trial” and thus “violative of Har’s Sixth Amendment right to confrontation.” (R. at 92.) The court overruled

the objection and Dr. Gerber testified during trial about how her conversation with Respondent's relatives led her to conclude "that Mr. Har does not have a personality disorder." (R. at 59-61.)

The defense presented testimony from Dr. Kalf. She "testified that Mr. Har suffers from Post-Traumatic Stress Disorder (PTSD) as a result of a traumatic upbringing in Mago while the country was undergoing civil war and therefore has a fear of authority figures." (R. at 51.) The defense cross-examined all prosecution witnesses. (R. at 27-29, 35-38, 45-50, 55-61.)

After all witnesses had testified, the defense objected to the judge's jury instructions and presented the district court judge with a proposed jury charge entitled "Defendant's Proposed Charge on Confessions." (R. at 61-62.) The judge reviewed the charge but did not use the charge. (R. at 62.) The defense renewed its objection to the judge's jury charge because "it fail[ed] to recognize and to instruct the jury that false confessions do occur," and "it fail[ed] to list in detail the various factors which have been shown to increase the likelihood of a false confession." (R. at 62.) The judge noted the objection but did not change the ruling. (R. at 62.)

The jury convicted Respondent "of murder in the second degree." (R. at 93.) He filed an appeal and argued that the district court should have: 1) admitted expert testimony on false confessions; 2) instructed the jury on false confessions; and 3) sustained his Confrontation Clause objection for testimony from Dr. Gerber. (R. at 97-101.) On July 11, 2006, the Court of Appeals for the Fourteenth Circuit held for Respondent on all three issues and reversed and remanded the case. (R. at 101.) One judge dissented from the opinion on all three holdings. (R. at 102-107.)

On October 3, 2006, this Court granted the United States of America's petition for a writ of certiorari. (R. at 108.)

SUMMARY OF THE ARGUMENT

The Fourteenth Circuit Court of Appeals erroneously reversed the district court on three separate issues, holding that: 1) Dr. Gerber was not permitted to testify to the substance of statements made to her by third parties that were the bases of her opinion because such statements violated the Confrontation Clause; 2) the district court abused its discretion by not allowing Dr. Wallace to testify regarding false confessions; and 3) district courts are required to instruct juries regarding false confessions when the issue is raised by the defense. All three of these holdings are in error.

First, Dr. Gerber's testimony did not violate the Confrontation Clause because the testimony was not offered for the truth of the matter asserted. The Confrontation Clause deals exclusively with hearsay evidence. Evidence is not hearsay if it is not offered for the truth of the matter asserted. Here, the evidence was offered merely to allow the jury to assess the thoroughness of Dr. Gerber's testimony, a non-hearsay purpose. The Confrontation Clause was not violated.

Even if the testimony was hearsay, it was not testimonial and needed only to meet the reliability test of *Ohio v. Roberts*. The evidence was not testimonial because the declarants were unaware that their statements would be used later at trial. The *Roberts* reliability test is satisfied if the hearsay either falls into a deeply rooted hearsay exception or has other particularized guarantees of trustworthiness. The statements Dr. Gerber testified to fall under Federal Rule of Evidence 703 and such evidence has been classified as both a deeply rooted hearsay exception and as having other particularized guarantees of trustworthiness. Because this satisfied *Roberts*, the Confrontation Clause was not violated.

Second, the district court did not abuse its discretion by excluding psychologist Dr. Wallace's testimony about false confessions. Dr. Wallace's testimony about false confessions fails to meet the following *Daubert* factors: 1) general acceptance; 2) testing; and 3) error rates. Failure to meet *Daubert* factors renders the testimony inadmissible.

Theories about false confessions are not generally accepted. The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV), which is a manual published by the American Psychiatric Association and used by Mental Health Professionals, does not mention false confessions. False confession theories have not been sufficiently tested, so there is an absence of dependable, empirically-based estimates of the error rate for false confessions. Also, several courts have refused to admit false confession evidence due to reliability problems. Since theories on false confessions fail to meet *Daubert* requirements, the district court properly rejected Dr. Wallace's testimony on false confessions.

Also, reasonable jurors know or should know that people may confess falsely to a crime under certain circumstances. Thus, general testimony about false confessions is a waste of time, especially since a defendant has the right to present specific evidence during trial to show why he did not truthfully confess to committing a crime. The district court did not abuse its discretion by barring Dr. Wallace's testimony.

Third, district courts should not be required to give a jury instruction on false confessions because: 1) procedural fairness gives a defendant the right to present evidence during trial to contest the truthfulness of a confession; and 2) general jury instructions effectively instruct jurors that they must evaluate whether a defendant's confession is truthful based on all the evidence presented during trial. Also, a jury instruction on false confessions is inappropriate if the defense did not present evidence about false confessions during trial.

In this case, the district court clearly instructed the jury that they cannot assume that Respondent truthfully confessed to committing the murder. The jury was told that they must evaluate all the evidence presented during trial before reaching a verdict. Thus, the district court properly rejected the Respondent's proposed jury instructions on false confessions.

ARGUMENT

The Fourteenth Circuit Court of Appeals held that: 1) allowing Dr. Gerber to testify to the substance of statements made by third parties which she based her opinion on violated the Confrontation Clause; 2) the district court abused its discretion by not allowing Dr. Wallace to testify regarding false confessions; and 3) the district court was required to instruct the jury regarding false confessions. All three of these holdings were in error; each should be reversed.

I. Disclosing to the jury the substance of statements that Dr. Gerber based her opinion on did not violate the Confrontation Clause.

The Confrontation Clause of the Sixth Amendment states that an accused in criminal prosecution has a right to be "confronted with the witnesses against him." U.S. Const. amend. VI. This Court has interpreted this phrase to forbid the use of testimonial hearsay unless the person who made the hearsay statement is unavailable at the time of trial and the defendant had a prior opportunity to cross-examine the individual. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). Contained in this statement are two requirements that must be met to activate *Crawford's* test for admissibility: 1) the statement must be hearsay and 2) the statement must be testimonial. *See id.* A statement is not hearsay if it is not offered for the truth of the matter asserted. Fed. R. Evid. 801(c). Even if a statement is hearsay, *Crawford* is not triggered unless it is also testimonial. *Crawford*, 541 U.S. at 68. Hearsay statements that are non-testimonial need only meet the standard set down in *Ohio v. Roberts*, 448 U.S. 56 (1980). *Crawford*, 541 U.S. at 68.

The interviews recited by Dr. Gerber need not meet the standards outlined in *Crawford* because they do not meet the two requirements of *Crawford* eligibility: they are not hearsay because they were not offered for the truth of the matter asserted and, even if they were hearsay statements, they were not testimonial. Thus, if there is a Confrontation Clause issue present, if there is in fact hearsay, the proper test is the *Roberts* test, not *Crawford* analysis. The admission of these statements meets the *Roberts* test because they either fit into a deeply rooted hearsay exception or have “particularized guarantees of trustworthiness.” For both of these reasons, the decision of the court of appeals should be reversed.

A. *Crawford* does not bar the entry of Dr. Gerber’s psychiatric interviews because these interviews were not offered for the truth of the matter asserted and thus are not hearsay.

The substance of Dr. Gerber’s interviews with Respondent’s family is not hearsay because these statements were not offered for their truth, but rather to allow the jury to assess the thoroughness of Dr. Gerber’s evaluation. Hearsay is an out-of-court statement “offered in evidence to prove the truth of the matter asserted.” Fed. R. Evid. 801(c). Statements that are not hearsay do not trigger Confrontation Clause protection. *See Crawford*, 541 U.S. at 59 n.9 (“The [Confrontation] Clause...does not bar...testimonial statements [used] for purposes other than establishing the truth of the matter asserted.”). Experts have long been allowed to offer the substance of information used as the basis of their opinion to the jury as something other than the truth of the matter asserted, such as explaining the basis of their opinion. *See, e.g., Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1261-62 (9th Cir. 1984); *Barrett v. Acevedo*, 169 F.3d 1155, 1163 n.7 (8th Cir. 1998) (“[Evidence used by an expert] is never admitted for the truth of the matter, but simply to show the basis of the expert’s opinion.”).

Several state and federal courts have held, post *Crawford*, that expert testimony does not implicate the Confrontation Clause because the information is offered for purposes other than the truth of the matter asserted. *See, e.g., United States v. Stone*, 222 F.R.D. 334, 339 (E.D. Tenn. 2004) (holding that statements made to experts which they base their opinions on can be used to determine the merit of expert's opinion); *State v. Delaney*, 613 S.E.2d 699, 700-701 (N.C. Ct. App. 2005) (holding that, under North Carolina law, the information relied on by experts to form an opinion that is presented to a jury is not offered for the truth of the matter asserted); *People v. Thomas II*, 130 Cal. App. 4th 1202, 1210 (Cal. Ct. App. 2005) (stating that materials that experts base their opinions on are examined by a jury merely to establish the weight of the expert's opinion). The law presumes jurors will follow limiting instructions, even when the jurors are faced with Confrontation Clause issues. *See Tennessee v. Street*, 471 U.S. 409, 415 n.6 (1985).

The courts in *Stone*, *Delaney*, and *Thomas* all point out that, even in a post *Crawford* world, the basis for expert information can still be offered into evidence for the jury as non-hearsay. In *Stone*, the Eastern District of Tennessee was willing to allow an IRS expert to recite statements that were made out-of-court by others but on which she based her opinion, stating that such statements are used only to "evaluate the merit of the opinions" provided by the expert. *Stone*, 222 F.R.D. at 339.

Likewise, in *Delaney*, a North Carolina court allowed the introduction of a chemical analysis of drugs presented by an expert witness who did not perform the analysis, but who used the results to reach an expert opinion on the substance in question. *Delaney*, 613 S.E.2d at 700-701. Though basing this holding on North Carolina state law, the court explained that the expert's testimony in court, not the out-of-court statements, was the substantive evidence. *Id.*

Similarly, a California appellate court allowed a gang expert to introduce statements made by gang members because the expert used the statements to form an expert opinion. *Thomas*, 130 Cal. App. 4th at 1210. The *Thomas* Court explicitly stated that *Crawford* in no way “undermine[d] the established rule that experts can testify to their opinions on relevant matters, and related information and sources upon which they rely in forming those opinions,” because such information is used only to “assess the weight of the expert’s opinion,” not for the truth. *Id.*

All three of these cases illustrate that information which an expert bases his or her opinion on is not presented to the jury for the jury to evaluate its truth, but rather to evaluate how the expert formed his or her opinion. The issue is whether the expert collected enough information to form a reliable opinion; this task does not ask the jury to evaluate the truthfulness of the statement. The only issue of truthfulness is the truthfulness of the expert’s opinion. *See Delaney*, 613 S.E.2d at 700-701. The truthfulness of the expert’s opinion can be cross-examined by the defense in court and thus does not pose a Confrontation Clause issue. *See, e.g., Crawford*, 541 U.S. 68 (pointing out that the Confrontation Clause only deals with hearsay statements).

When testimony is offered for a purpose other than the truth, for a non-hearsay purpose, it is assumed the jury will use the information as instructed by the judge. *Tennessee*, 471 U.S. at 415 n.6. This assumption is still in place even when the Confrontation Clause is at issue. *Id.* In *Tennessee*, the State offered the confession of co-conspirator to rebut claims by an accused that his confession was coerced. *Id.* at 411-412. The Court held the reading of the confession was not a Confrontation Clause violation and that a limiting instruction insured that the jury would use the information for the proper purposes. *Id.* at 417 (holding that jury instructions are an “appropriate way to limit the jury’s use of evidence in a manner consistent with the Confrontation Clause”).

As in *Stone*, *Delaney*, and *Thomas*, Petitioner here offered the statements of Respondent's family as an explanation for Dr. Gerber's opinion, not for the jury to evaluate the truthfulness of the statements, but rather to weigh and assess the opinion of the expert. Respondent's mother and sister relayed information to Dr. Gerber regarding Respondent's childhood that Dr. Gerber used to reach her ultimate conclusion: Respondent does not suffer from Post Traumatic Stress Disorder (PTSD). (R. at 59.) The jury was not asked, and was specifically instructed, not to evaluate the statements "in any way, manner, shape or form" for the truth. (R. at 65.) The information was a means to help the jurors determine if they believed the expert was giving a reliable opinion. The issue was not whether the jury believed the statements, but whether Dr. Gerber believed the statements, used them in her analysis, and whether the jury felt that the basis for this analysis was substantial enough to make it reliable. These statements gave the jury the needed background to assess the thoroughness of the opinion. Such an analysis cannot adequately occur without a glimpse at the information an expert used in reaching a conclusion.

This case illustrates the importance of the need to assess the basis of expert opinions. Dr. Gerber's testimony directly conflicts with Respondent's expert testimony: Dr. Gerber concluded that Respondent does not suffer from PTSD, while Respondent's expert testified that he does suffer from the disorder. (R. at 59.) The only way for the jury to distinguish which expert has given the most thorough assessment and reached the more trustworthy conclusion is to evaluate how much underlying data the expert used to reach the conclusion. It is not realistic to force juries to decide such a battle of the experts without knowing what kind and what amount of information a diagnosis is based on. Without this information, jurors must blindly choose an expert to believe.

The court of appeals erred in holding that a jury cannot use the statements presented by an expert for any reason other than for the truth. (R. at 100 (holding that such a rationale is a “fiction”).) The court relied on the decision of the New York Court of Appeals in *People v. Goldstein*, 843 N.E.2d 727 (N.Y. 2005). *Goldstein* involved the admission of statements made by third parties to a forensic psychiatrist regarding the mental state of an accused. *Id.* at 730. The court refused to acknowledge the prosecution’s assertion that the third party statements were not offered for the truth, finding that such a distinction was impossible. *Id.* at 732-733. The court, relying heavily on the fact that the expert stated that such statements were used “to get to the truth,” concluded that the statements could have no value to a jury unless they were being offered for the truth. *Id.*

The court in *Goldstein* ignored the fact that, though statements by interviews are used “to get at the truth” of the matter, this is the use made *by the expert*. An expert’s job is to take in all the information, evaluate the truth, and decide what is the proper diagnosis. Any issue defense counsel takes with an expert’s reliance on certain statements may be evaluated during cross examination. The jury’s job is to decide if it accepts what the expert is saying as true by assessing the thoroughness of the expert’s opinion, not to evaluate the truth of the information the expert relies on. *See Delaney*, 613 S.E.2d at 700-701.

Any lasting doubts about how the jury used the family’s statements is remedied by the un rebutted presumption that the jury followed the jury instructions. *See Tennessee*, 471 U.S. at 415 n.6. As in *Tennessee*, the trial court in this case instructed the jury not to “consider [the statements made by Respondent’s family] in any way, manner, shape or form to be true.” (R. at 65.) This instruction places a presumption that the statements were not used by the jury in a way

that would present Confrontation Clause issues; they were used for a non-hearsay purpose. Nothing in the record indicates that this presumption has been rebutted by Respondent.

Because Dr. Gerber's statements were offered to the jury solely for the purpose of assessing the thoroughness of her evaluation and because the jury was properly instructed as such, the statements made by Respondent's family are not hearsay and thus do not pose a Confrontation Clause issue. For this reason, the court of appeals should be reversed. Even if the Court finds that the statements do constitute hearsay, they are non-testimonial hearsay and thus do not have to meet the *Crawford* test.

B. Even if Dr. Gerber's interviews are hearsay, they are not testimonial; therefore, *Ohio v. Roberts*, not *Crawford v. Washington*, applies.

Presuming the statements made by Respondent's family are hearsay, the district court's admission of the statements did not violate the Confrontation Clause because they are non-testimonial and meet the reliability test set out in *Ohio v. Roberts*. Hearsay statements must only meet the *Crawford* test if they are testimonial. *Crawford*, 541 U.S. at 68. Statements that are hearsay, but do not qualify as testimonial, need only meet the standards stated in *Ohio v. Roberts*, 448 U.S. 56 (1980), to pass Constitutional muster. *See Crawford*, 541 U.S. at 68. The statements made to Dr. Gerber were not made with knowledge that they would be used later at trial; thus, they do not qualify as testimonial. Because they are non-testimonial, the statements must only meet the reasonably reliable test of *Roberts*. The statements meet this test because they fall either into a deeply rooted hearsay exception or have "particularized guarantees of trustworthiness." The decision of the court of appeals should be reversed.

i. The statements made by Respondent's family are not testimonial because the declarants did not know or have reason to know that their statements would later be used at trial.

Since Respondent’s mother and sister did not know, nor did they have reason to know, that their statements would be used at a trial, their statements are not testimonial. Testimonial evidence is evidence that, when acquired by law enforcement personal¹ during interrogation, has the primary purpose of establishing or proving “past events potentially relevant to later criminal prosecutions.” *Davis v. Washington*, 126 S.Ct. 2266, 2274 (2006). To determine if statements are testimonial, their use at trial must be known or should have been known by the declarant; the declarant’s state of mind must be evaluated. *See id.* at 2274 n.1.

In *Davis*, this Court elaborated on what testimonial evidence entailed, holding that a 911 emergency call that relayed information as an event was occurring did not constitute testimonial evidence. *Id.* at 2277. Reaching this conclusion, the Court focused on previous cases that, in its opinion, did not constitute testimonial evidence, including *Bourjaily v. United States*, 483 U.S. 171 (1987). *Davis*, 126 S. Ct. at 2275. *Bourjaily* involved statements made by a third party unknowingly to a Government informant. *See Bourjaily*, 483 U.S. at 181-184. The Court in *Davis* emphasized this aspect of the case. *See Davis*, 126 S. Ct. at 2275 (describing *Bourjaily* as a case involving declarations made unknowingly to a government agent).

The Court also noted that, when dealing with interrogations, the state of mind of the declarant, not the questions of the interrogator, are to be evaluated. *Id.* at 2274 n.1. This idea

¹ Petitioner also argues that Dr. Gerber does not qualify as “law enforcement personal,” thus any statements made to her cannot qualify as testimonial. *See Davis v. Washington*, 126 S. Ct. 2266, 2274 (2006). *Davis* notes that testimonial evidence is given to law enforcement personal or their agents. *See id.* at 2274 n.2. Since the Confrontation Clause is meant to protect the accused from issues of prosecutorial misconduct, *see Crawford*, 541 U.S. at 56 n.7, law enforcement personal must be persons conducting interrogations for the purpose of future prosecution. Psychiatrists conduct interviews to determine whether a person has any mental disorders. Though this testimony may be used in court, the objective of the interview is to make a diagnosis, not to prosecute an accused. As pointed out by Judge Snit below, this process is “far removed from the evils addressed by the Confrontation Clause and *Crawford*,” and should not be subject to *Crawford* analysis. This fact was ignored by the *Goldstein* Court, which assumed that not declaring independently contracted psychiatrists as law enforcement officials subject to *Crawford* analysis would render “too little protection” under the Confrontation Clause because the government could merely outsource all its interviewing duties. *Goldstein*, 843 N.E.2d at 733-734. An out-sourced interviewer interviewing just for the sake of prosecution would still be law enforcement personal, or an agent of such, subject to *Crawford*, even if psychiatrists performing diagnostic functions would not be.

was also stated by the Court in *Crawford*: “[Testimonial statements include] statements...made under circumstances which would lead *an objective witness reasonably to believe that the statement would be available for use at a later trial.*” *Crawford*, 541 U.S. at 52 (emphasis added). Aggregating this information shows that, in order for evidence to be testimonial, the declarant must know, or have reason to know, that they are speaking to someone who will later use the statements at trial. *See Davis*, 126 S. Ct. at 2274 n.1, 2275; *see also Crawford*, 541 U.S. at 52, 58. Even the *Goldstein* Court, relied on by the majority below, noted this requirement. *Goldstein*, 843 N.E.2d at 733 (inferring knowledge by the third parties that their statements were being made to a government employed psychiatrist).

Respondent’s family neither knew or had reason to know, that Dr. Gerber was working for the government to prepare for a trial; the court of appeals erred in holding otherwise. Dr. Gerber stated that, though she may have mentioned the trial, she did not inform either Respondent’s mother or sister that she was planning to use their statements at the criminal trial against Respondent. (R. at 56.) Dr. Gerber also did not mention that she was working for the government. *Id.* On the contrary, Dr. Gerber simply asked questions of both the Respondent’s mother and sister, something that, as Judge Snit points out in her dissent, is done everyday in the normal course of being a psychiatrist. *Id.* at 105. Viewing these circumstances objectively, there is no indication that either the sister or the mother knew or should have known they were speaking to a person who would later testify at trial, distinguishing this case from *Goldstein*. The court of appeals erred in finding knowledge on the part of Respondent’s family. Without such knowledge, the statements made by the family cannot be classified as testimonial and are subject only to the *Roberts* reliability test.

ii. The non-testimonial statements of Respondent’s family pass Constitutional muster under either prong of the *Roberts* test.

The testimony of Dr. Gerber meets the *Roberts* test because she reasonably relied on the statements made by Respondent's family, making those statements admissible under Federal Rule of Evidence 703, which can be classified as either a deeply rooted hearsay exception or as evidence that has other "particularized guarantees of trustworthiness." Non-testimonial hearsay statements must only meet the "indicia of reliability" test set out in *Ohio v. Roberts* to comport with the Confrontation Clause. See *Crawford*, 541 U.S. at 68. *Roberts* requires that hearsay fall into a deeply rooted hearsay exception or otherwise be deemed reliable by a court with a finding of "particularized guarantees of trustworthiness."² *Ohio v. Roberts*, 448 U.S. 56, 57 (1980) (syllabus). In *Roberts*, the Court explained that hearsay rules and the Confrontation Clause protect similar values and "stem from the same roots," thus if a statement falls into a hearsay exception, that statement would also not offend the Confrontation Clause. *Id.* at 66 (quoting and analyzing *Califorina v. Green*, 399 U.S. 415 (1970) and *Dutton v. Evans*, 400 U.S. 74 (1970)).

Evidence can also meet the *Roberts* test if it shows "particularized guarantees of trustworthiness." *Id.* at 57. This means evidence must be so trustworthy that the process of cross-examination would "add little to its reliability." *Idaho v. Wright*, 497 U.S. 805, 821 (1990). In other words, "if the declarants' truthfulness is so clear from the surrounding circumstances" that cross-examination would be virtually useless, the hearsay statements do not offend the Confrontation Clause. *Id.* at 820. The Eighth Circuit Court of Appeals has held, citing many other circuits, that evidence that falls under Federal Rules of Evidence 703 meet this test for trustworthiness: "In the context of Rule 703 evidence, such trustworthiness is shown by

² *Roberts*, like *Crawford*, also requires that a witness be unavailable at the time of trial. *Roberts*, 448 U.S. at 65. Respondent has never argued that the witnesses in question are not unavailable, thus Petitioner assume this point is conceded and does not argue it.

the testifying expert's reliance on the material in forming his opinion.” *See Barrett*, 169 F.3d at 1163 n.7 (citing cases from the 1st, 2nd, and 4th circuits).

Federal Rule of Evidence 703 codifies an exception to the hearsay rule for information that is “reasonably relied upon” by experts in a particular field of study. Fed. R. Evid. 703 (allowing experts to disclose otherwise inadmissible information to the jury if the probative value substantially outweighs the prejudicial effect). Many courts have classified this rule as a codification of a hearsay exception. *See, e.g., United States v. Abbas*, 74 F.3d 506, 512-513 (4th Cir. 1996) (“Rule 703 exists so that scientific standards may be admitted as trustworthy and reliable exceptions to the hearsay rule.”). Even courts that have not classified Rule 703 as a hearsay exception have classified it as showing “particularized guarantees of trustworthiness” for purposes of the *Roberts* test. *See, e.g. Barrett*, 169 F.3d at 1163 n.7.

The statements made by Respondent’s family and relied on by Dr. Gerber fall under Rule 703. As noted in Judge Snit’s dissent below, Dr. Gerber is a psychiatrist, and psychiatrists in their daily work rely entirely on the statements of patients, friends, and family in order to diagnosis and treat patients. (R. at 105.) Due to the reality of the work, it was reasonable for Dr. Gerber to rely on these statements. *See generally* Advisory Committee Note to Fed. R. Evid. 703, 56 F.R.D. 183, 283 (describing the need for physicians and other experts to rely on information provided by patients). Statements that fall under Rule 703 qualify as either falling into a “deeply rooted hearsay exception” or presenting “particularized guarantees of trustworthiness”; therefore, presenting these statements to the jury did not violate the Respondent’s Sixth Amendment rights under the *Roberts* test. Because the Confrontation Clause was not violated, the court of appeals should be reversed on this issue.

II. The district court correctly excluded Dr. Wallace’s testimony because it is not based on reliable scientific methods under this Court’s precedent in *Daubert* and *Kumho Tire Co., Ltd.*

Trial judges must act as gatekeepers to ensure that expert opinion evidence is reliable and will assist the trier of fact. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-93 (1993). The defendant offered Dr. Wallace’s scientific opinion on the social psychology of false confessions. (R. at 5.) Opinions based on scientific, technical, or other specialized knowledge all must meet the same standard under Federal Rules of Evidence 702. *Kumho Tire Co., Ltd., v. Carmichael*, 526 U.S. 137, 147 (1999). Under *Daubert*, a district court must first determine if the proposed evidence is reliable. *Daubert*, 509 U.S. at 589-591. If the information is reliable, then the court must determine whether the evidence will assist the trier of fact, often called fit. *Id.* at 591.

The proponent of the expert must show, by a preponderance of the evidence, that the offered testimony satisfies the reliability requirement of *Daubert*. *Daubert*, 509 U.S. at 592 n.10 (citing Fed R. Evid. 104.) The court of appeals held that the trial court abused its discretion in this case because the district judge held that the “testimony about false confessions is, in essence, never helpful because jurors know people lie.” (R. at 95.)

The district court in its oral ruling did not cite to *Daubert*, but correctly explained its role as a gatekeeper. (R. at 15.) The district court held that the methods supporting Dr. Wallace’s testimony were not reliable within the meaning of *Daubert*. *Id.* In so doing, the court relied on the inapplicability of the experiments to a real world situation. (R. at 15-16.) The Supreme Court, in *Daubert*, listed a non exhaustive list of factors which courts should consider when evaluating evidence under Rule 702. *Daubert*, 509 U.S. at 593-94. The factors include: 1)

whether the theory is generally accepted; 2) whether the theory can or has been tested; and 3) what the potential rate of error is of the theory or method. *Id.*

First, the theories that Dr. Wallace relied on are not generally accepted because: 1) the most authoritative treatise of personality disorders lists no disorder related to false confessions; and 2) lower courts have not found the evidence admissible. Second, Dr. Wallace admitted that the theories he relied on have not been subjected to tests that simulate realistic pressures. Third, because no accurate testing has been done, there are no known rates of error; therefore, there is no empirical limitation on theories proposed in this field.

Since the theories that Dr. Wallace offered to testify about are not generally accepted, have not been adequately tested, and have no known rates of error, this Court should reverse the court of appeals and hold that Dr. Wallace's opinions are not reliable under *Daubert* and Fed R. Evid. 702.

A. The opinions that Dr. Wallace would have testified to are not generally accepted because the leading treatise of the field does not recognize them, and because courts which have considered this evidence have rejected it.

The *Daubert* Court held that the federal rules replaced the *Frye* test. *Daubert*, 509 U.S. at 587. Under the *Frye*, the only factor to consider was the "general acceptance" of the method in the relevant scientific community. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). Nonetheless, *Daubert* retained "general acceptance" and the *Frye* test as a relevant factor to consider when deciding the reliability of expert testimony. *Daubert*, 509 U.S. at 594. New Jersey retains the *Frye* test for the admissibility of scientific evidence in criminal trials. *State v. Spann*, 130 N.J. 484, 509 (1993).

New Jersey has rejected, under *Frye*, testimony nearly identical to what defendant offers here because it was not generally accepted. *State v. Free*, 798 A.2d 83, 95-96 (N.J. Super. Ct.

App. Div. 2002). The lower court decided that the testimony was admissible because courts in other jurisdictions had generally accepted the testimony. *Id.* at 92-93. The New Jersey Supreme Court distinguished each cited case from the present one; then it reversed, holding that the conclusions were not generally accepted within the field of psychology. *Id.* at 95-96. The reason the *Free* court held that the theories were not generally accepted was both because of the persuasive authority of other *Frye* courts and because the *Daubert* jurisdictions independently considered the theories unreliable.

The general acceptance prong of the *Daubert* inquiry goes to the acceptance within the relevant scientific community. *Daubert*, 509 U.S. at 594. Other courts rejection of this testimony under *Daubert* requires neutral decision by a court tasked with assessing the evidence's reliability. Under *Frye*, the court must decide whether a technique or theory has gained general acceptance in the relevant scientific community. In either type of jurisdiction the exclusion of the testimony tends to show that the evidence is not generally accepted while the inclusion of the testimony tends to show that the evidence is generally accepted. Courts considering the admission of evidence similar to that Dr. Wallace offered have not tended to admit it. *See Edmonds v. State*, ____ So.2d ____, 2007 WL 14808 (Miss. 2007); *State v. Ritt*, 599 N.W.2d 802, 812 (Minn. 1999); *Kolb v. State*, 930 P.2d 1238, 1242 (Wyo. 1996); *State v. Tellier*, 526 A.2d 941, 944 (Me. 1987).

Some courts have used *United States v. Hall* to justify the admission of social psychologist testimony. *United States v. Hall*, 93 F.3d 1337, 1344-45 (7th Cir. 1996). But in *Hall*, the district court was reversed for a failure to hold a *Daubert* hearing and apply the correct legal standards. *Id.* at 1345. The Seventh Circuit noted that the government did not object to the scientific nature of the evidence so the court presumed the reliability of the evidence. *Id.* at

1334. And the Seventh Circuit concluded “that the [district] court’s failure to conduct a full *Daubert* inquiry” was not harmless. *Id.* at 1345.

In this case, the court held a *Daubert* hearing and specifically rejected the proffered testimony because the defense expert could not satisfy the *Daubert* factors. (R. at 15.) The district court did not mention *Daubert*, but the court correctly noted its gatekeeping function, citing the twin prongs of reliability and helpfulness, and held that Respondent’s expert could not satisfy either. The court did not specifically state the prongs mentioned in the *Daubert* opinion but in context the “mere guesswork” must refer to the statements made by Dr. Wallace on cross, admitting that he could not state a rate of error, provide any estimate of the chance of a false confessions generally, and researchers could not replicate false confessions in controlled experiments. (R. at 13-14.)

This case presents an issue similar to *United States v. Scholl*, 959 F. Supp. 1189 (D. Ariz. 1997). In *Scholl*, the defendant proffered an expert witness to testify about compulsive gambling syndrome. *Id.* at 1194. The trial court permitted the expert to testify about compulsive gambling syndrome but did not permit the expert to testify about factors listed as associated disorders in the DSM-IV. *Id.* The court rejected this testimony because the American Psychiatric Association had not included associated disorders as part of the diagnosis because they were “insufficiently ... specific.” *Id.* In this case, Respondent’s own witness stated that there was no disorder in the DSM-IV related to false confessions. (R. at 12-13.)

The theories that Dr. Wallace would testify about are not generally accepted because courts have excluded them consistently, and because the leading treatise of the profession does not contain the theories about which Dr. Wallace proposed to testify.

B. The theories which Dr. Wallace proposed to testify about have not and cannot be empirically tested in order to establish the scientific validity of the theory.

Dr. Wallace himself admitted that realistic tests of false confessions have not been undertaken and indeed would be unethical. (R. at 13.) Instead, researchers have focused on controlled laboratory experiments involving accusations of crashing a computer program. The court rejected this as a reliable experiment. (R. at 15-16.) Researchers in the field have noted similar dissatisfaction with these experiments. “First, all participants in [these experiments] are factually innocent.... Second, participants ... are accused of accidentally committing a highly plausible ‘crime,’ leaving open the possibility that many participants are unsure whether they are innocent or guilty.” Melissa B. Russano et al., *Investigating True and False Confessions Within a Novel Experimental Paradigm*, 16 Psychol. Sci. 481, 482 (2005). Recent scholarship has expressed doubts on the applicability of the experimental method that Dr. Wallace testified about.

“Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry.” *Daubert*, 509 U.S. at 593. Only if a hypothesis can be empirically tested can a court consider the hypothesis scientific. Without an empirical test the district court was correct to note that the conclusions were “mere guesswork.” (R. at 15.) If a scientist in the field proposed a false hypothesis, absent a controlled test, there is no corrective to discover the error. There is no possibility that Dr. Wallace can isolate variables in a controlled experiment and separate causation from correlation.

C. The theories that Dr. Wallace relied upon as a basis for his opinion have no known associated rate of error because they have not and cannot be subjected to empirical testing.

Dr. Wallace was unable to give an estimate of the rate of error. (R. at 14.) It is widely known and accepted that false confessions actually do occur, but Dr. Wallace cannot give any

estimate of the rate at which false confessions occur. Nor can Dr. Wallace give a reasonable estimate of how much particular practices increase the possibility for a false confession. Dr. Wallace also cannot offer any rate of error in regard to social psychology's prediction of false confessions. The studies and information as noted by the testimony is largely descriptive rather than proscriptive. The information describes individuals who have falsely confessed; it does not, and cannot, predict which of a series of individuals will likely falsely confess. (R. at 14.)

The rate of error is perhaps the most obvious prong of the factors which a court should ordinarily consider when deciding the reliability of a particular technique. In this case it is important to note that Dr. Wallace could offer no estimate of the likelihood of false confessions, let alone the likelihood that his identification of a false confession may be in error. The theories which Dr. Wallace espoused have no rates of error because testing in the manner that other scientific disciplines would is simply not possible.

The theories on which Dr. Wallace sought to testify fail three of the *Daubert* prongs. The district court, therefore, acted within its discretion when it excluded the offered evidence as the evidence is not generally accepted, cannot be tested, and, as a result, has no known rate of error. This Court should reverse the court of appeals' decision that Dr. Wallace's opinion was admissible under the reliability prong of the *Daubert* test.

III. The district court properly excluded Dr. Wallace's testimony because the testimony would not assist the trier of fact.

While assisting the trier of fact, or fit, generally goes to relevance, it also incorporates elements of Fed R. Evid. 403. *Daubert*, 509 U.S. at 591; *see also United States v. Scholl*, 166 F.3d 964, 971 (9th Cir. 1999). The subjects which Dr. Wallace proposed to testify about may roughly be divided into two opinions. First, Dr. Wallace offered his opinion that false

confessions happen and happen more likely than people believe. Second, Dr. Wallace offered his opinion that Respondent, in particular, was more likely to have falsely confessed.

In regard to the first opinion, there is nothing in the record which establishes that the district court abused its discretion by finding that this was within the ordinary knowledge and experience of the jurors. The district court properly excluded the second opinion as needless cumulative evidence.

A. The district court correctly held that testimony that false confessions happen is a waste of time because it adds little or nothing that the jury does not already know.

A district court may properly exercise its discretion by excluding expert testimony on a subject that is within the ordinary knowledge of a juror. *United States v. Schmidt*, 711 F.2d 595, 599 (5th Cir. 1983). Dr. Wallace merely proffered evidence that false confessions happen and that they happen more often than people believe. In order to not waste time, the evidence must show that false confessions happen more often than jurors believe, otherwise the expert is saying nothing that will assist the trier of fact. “[T]he fact that people falsely confess is not self-evident and really needs to be explained to jurors....” (R. at 10.) Nowhere in the hearing does Dr. Wallace articulate why this fact needs to be explained to jurors. He does not note the number of jurors or people in general who do not think anyone would falsely confess. Indeed, when pressed Dr. Wallace noted that cases of false confessions became obvious “just by watching the news.” (R. at 14.) If false confessions are obvious from watching the news the defense has left it unexplained why they require an expert to explain it to the jury.

No testimony was elicited to quantify the increase that certain interrogatory techniques would have on a person. Dr. Wallace could not state how likely a false confession was, as a baseline. (R. at 14.) Dr. Wallace also did not state how much minimization (downplaying a

defendant's role in the alleged crime), justification (explaining how a defendant's conduct could be excused), or the techniques used on Respondent would increase the likelihood of false confessions.

It is undisputed that false confessions occur at times. The second defense expert, Dr. Kalf, testified that Respondent, in particular, could not have withstood the interrogation at the Walker residence. Dr. Wallace noted on the stand several high profile false confessions in the news, including the Lindbergh baby kidnapping, the central park jogger case, and the Jon Benet Ramsey case. (R. at 10.) All Dr. Wallace could testify was that people who confess falsely were likely to be interrogated through some particular methods. Dr. Wallace could not testify to the degree of increased incidence, nor could Dr. Wallace discuss the number of false confessions versus the number of truthful confession obtained thereby.

An illustration of a social science experts ability to apply the science to a specific case can be seen in *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214, 1228 (9th Cir. 2007). In *Dukes*, the plaintiff's expert conducted a regression analysis and found significant disparities between women and men at different Wal-Mart stores and that the disparity could only be explained by discrimination. This expert testimony expressly made it more likely that Wal-Mart had engaged in forbidden discrimination.

Dr. Wallace does not and cannot testify that the assumption of people that false confessions are rare is incorrect. He merely opines that false confessions are more likely than people believe they are. Even if correct, this does not mean that false confessions are highly likely or even likely; therefore, Respondent is incapable of articulating the probative value of this evidence.

Dr. Wallace, when pressed, noted that cases of false confessions were obvious.

Testimony of an expert on obvious fact will not assist the jury in its deliberations, as they were properly instructed to consider the truthfulness of the confession. (R. at 65.)

B. To the extent that Dr. Wallace would testify that Respondent, in particular, was likely to falsely confess the testimony was properly excluded as mere cumulative evidence.

A district court may exclude expert testimony under Rule 702 where an expert would add little to the evidence before the trier of fact but the refrain of “me too.” *Kendra Oil & Gas, Inc. v. Homco, Ltd.*, 879 F.2d 240, 243 (7th Cir. 1989) (affirming exclusion where offered expert would have testified to the same effect as other experts, who had already testified). Respondent’s witness, Dr. Kalf, testified extensively about Respondent’s mental condition and concluded that Respondent likely could not have withstood the interrogation without confessing. (R. at 15.) It would be needless for the jury to hear another witness state that, because of Respondent’s personality disorders, Respondent was likely to have falsely confessed. This admission would constitute “me too” testimony. The second expert would merely testify to the same effect as the first expert. Since much of Dr. Wallace’s proposed testimony does little more than reiterate Dr. Kalf’s, the district court was within its discretion to exclude the opinion as cumulative evidence.

IV. District courts should not be required to give a jury instruction informing jurors that false confessions sometimes occur.

A jury instruction on false confessions is unnecessary because general jury instructions effectively inform jurors that they must evaluate all the evidence presented during trial and determine whether the defendant truthfully confessed to committing a crime. During trial, the defense may present direct testimony, cross-examine the opposing side’s witnesses, and argue during closing arguments that the defendant did not truthfully confess to committing a crime.

The judge then instructs the jury that they must evaluate the evidence presented during trial and

determine whether the defendant's confession is reliable as evidence of guilt. *See Jackson v. Denno*, 378 U.S. 368, 387 (1964) ("Just as questions of admissibility of evidence is traditionally for the court, questions of credibility, whether of a witness or a confession, are for the jury."). Given such procedural protections, a district court does not need to instruct jurors that people sometimes falsely confess to committing crimes. Also, an instruction on false confessions is inappropriate if the district court finds that the false confession evidence is inadmissible.

A. Procedural fairness does not require a district court to inform jurors about false confessions.

Procedural fairness requires that a defendant have the right to contest the reliability and truthfulness of a confession by presenting evidence during trial. The Supreme Court has stated that a defendant is disabled from presenting a complete defense if he is unable to present "evidence about the manner in which a confession was obtained" because such evidence "is often highly relevant to its reliability and credibility." *Crane v. Kentucky*, 476 U.S. 683, 690-691 (1986). Furthermore, "[a]n essential component of procedural fairness is an opportunity to be heard (*citing In re Oliver*, 333 U.S. 257, 273 (1948); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). That opportunity would be an empty one if the state were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence." *Id.* at 690 (*citing United States v. Cronin*, 466 U.S. 648, 656 (1984); *Washington v. Texas*, 388 U.S. 14, 22-23 (1967)).

In this case, the record shows that Respondent was given a procedurally fair opportunity to contest the truthfulness of his confession. At trial, Respondent presented testimony from Dr. Kalf, who informed jurors that she believes the defendant suffers from Post-Traumatic Stress Disorder and that past traumatic experiences affect the defendant's attitude towards authority figures. (R. at 14-15, 51.) Through Dr. Kalf's testimony, the defense argued that Respondent

did not confess truthfully because his personality disorder and past traumatic experiences influenced his confession. The defense also cross-examined Dr. Gerber, who testified on behalf of the prosecution as a rebuttal expert witness.

After both sides presented witness testimony, cross-examined the opposing side's witnesses, and presented closing arguments, the district court judge instructed the jury that they must evaluate whether the defendant truthfully confessed to committing murder. The jury instructions given were not, as the Court of Appeals described in its opinion, "bare-boned at best." (R. at 98.) Rather, the district court judge clearly and succinctly instructed the jury several times and in several different ways that the jury must evaluate whether the Respondent's confession is reliable as evidence of guilt based on all the evidence presented during trial. The district court's jury instructions included the following statements:

- If you conclude that the statements made by the defendant were not truthful, then you should acquit the defendant. (R. at 64.)
- The psychiatric testimony [presented in this case] is here to assist you in reaching a decision on the truthfulness of [sic] defendant's confession. (R. at 64.)
- But you must remember that you are the sole trier of the facts and their [(Dr. Walker and Dr. Kalf's)] testimony relates to a question of fact—that is, the truthfulness of defendant's statements to the Walkers, so it is your job to resolve the disagreement [about their conflicting opinions about the defendant's psychological and personality disorders and such disorders affected the truthfulness of his confession]. (R. at 64.)
- The determination of the facts, including the truthfulness of the defendant's statements in this case, rests solely with you. (R. at 65.)

The district court's instructions clearly communicated to jurors that they cannot assume that the defendant truthfully confessed without evaluating all the evidence presented during trial. The trial in this case was procedurally fair because: 1) the defendant was able to present a

complete defense during trial; and 2) the district court properly instructed jurors that they must evaluate whether the defendant truthfully confessed to committing murder.

Procedural fairness is unaffected if a district court gives general jury instructions without a specific instruction on false confessions. The district court properly rejected Respondent's proposed jury instructions because the instructions were superfluous. General jury instructions, like the instructions given in this case, protect a defendant's right to present a complete defense. Thus, a specific jury instruction about false confessions is unnecessary. The decision of the court of appeals should be reversed.

B. General jury instructions clearly instruct jurors that they must evaluate all the evidence presented during trial, including evidence presented by the defendant to contest the truthfulness of his confession, before reaching a verdict.

The legal system assumes that juries can follow jury instructions. *See Watkins v. Sowders*, 449 U.S. 341, 347 (1981) (“And the very proper evaluation of evidence under the instructions of the trial judge is the very task our system assumes juries can perform.”). General jury instructions, such as the instructions given in this case, effectively informs jurors that, as triers of fact, they must evaluate the reliability of all the evidence before using the evidence to reach a verdict. A jury instruction on false confessions is inappropriate if the defense did not present evidence about false confessions during trial.

The Supreme Court has not required additional jury instructions for cases that involve potentially unreliable evidence. In *Manson v. Braithwaite*, 432 U.S. 98, (1977), the Supreme Court acknowledged that eyewitness identification evidence is associated with reliability problems. *Id.* at 111-112 (“Usually the witness must testify about an encounter with a total stranger under circumstances of emergency or emotional stress. The witness' recollection of the stranger can be distorted easily by the circumstances or by later actions of the police.”). Yet,

instead of requiring a jury instruction on reliability problems associated with identification evidence, the Court stated in *Sowers* that the defense has the opportunity during trial to show that the evidence is unreliable. *Id.* at 348 (citing *Manson*, 432 U.S. at 114 n.14, quoting *Clemons v. United States*, 408 F.2d 1230, 1251 (D.C. Cir. 1968) (concurring opinion)).

In cases involving a confession or eyewitness identification, a jury's primary duty is to evaluate the reliability of the confession or eyewitness identification. The Court in *Sowers* stated that "the *only* duty of a jury in cases in which identification evidence has been admitted will often be to assess the reliability of that evidence." *Sowers*, 449 U.S. at 347. In such cases, the district court instructs the jury that they must evaluate the reliability of the identification evidence. Since a general jury instruction clearly communicates to jurors that they must evaluate the reliability of the identification evidence before using the evidence to reach a verdict, an additional instruction on reliability problems associated with identification evidence is unnecessary.

In this case, the district court communicated to jurors that their primary duty is to evaluate whether the defendant truthfully confessed to committing murder. The district court instructed jurors several times that "[i]f you conclude that the statements made by the defendant were not truthful, then you should acquit the defendant." (R. at 64.) The instructions highlighted the conflicting testimony presented by Dr. Kalf and Dr. Gerber and stated that the jurors "may reject the testimony of either psychiatrist in whole or in part," and that the jury is solely responsible for "[t]he determination of the facts, including the truthfulness of the defendant's statements in this case." (R. at 65.) Since the instructions specifically and clearly informed jurors about the evidentiary issues in the case, the district court properly rejected the Respondent's proposed instruction on false confessions

By requiring a jury instruction on false confessions, the court of appeals departed from the assumption that juries can evaluate evidence according to jury instructions. In cases involving a confession, general jury instructions clearly inform jurors that they must evaluate the reliability of the confession before using the confession as evidence to reach a verdict. If the defense presents evidence during trial to show that the defendant did not truthfully confess to committing a crime, an additional jury instruction informing jurors that people sometimes falsely confess is unnecessary. General jury instructions instruct jurors that they must consider all the evidence presented during trial to determine whether the defendant truthfully confessed.

C. If the district court has found that false confession evidence is inadmissible, a jury instruction on false confessions is inappropriate.

There are two significant legal problems with Respondent's proposed jury instruction. First, the jury instruction blatantly states that the jury should consider Respondent's "personality and nature, including the defendant's desire to please authority figures." (R. at 86.) Second, as the defense attorney noted in his submission this jury instruction was an attempt to put into the jury's mind evidence which the district court had already properly excluded under *Daubert*.

First, Dr. Kalf and Dr. Gerber testified to two different opinions about Respondent's "desire to please authority figures." (R. at 14-15, 52.) It is error for a judge to instruct the jury to find a fact. *Minner v. United States*, 57 F.2d 506, 513 (10th Cir. 1932) ("The trial judge undertook to sum up and comment on the evidence. ... His comments were in the nature of an argument to the jury rather than a fair and dispassionate statement of what the evidence showed.") (citing *Hickory v. United States*, 160 U.S. 408 (1896)). Here, Respondent requested an instruction which would state a fact the parties contested as if that fact was beyond dispute.

Second, the defense attorney argued "you have precluded our expert witness on this issue, which increases the importance of a proper and thorough jury instruction." (R. at 63.)

Having lost in the attempt to get the evidence through the front door of *Daubert*, the defense now seeks to admit it through the back door. The court did instruct the jury that they would have to decide whether to believe the confession or not and that they were to decide which expert's testimony to believe. (R. at 64.) Despite a jury instruction which clearly, and correctly, instructs the jury on the law, the defense seeks to have a jury instruction that replicates the greater part of the expert opinion testimony that the court already excluded. Since the district court properly excluded this unreliable evidence, to allow Respondent this instruction would thwart the purpose of *Daubert*.

The trial court properly denied to give an instruction which both erroneously stated a disputed fact as true and attempted to circumvent this Court's ruling in *Daubert* by submitting inadmissible evidence to the jury. Because the jury instruction on false confessions was not required, the court of appeals should be reversed.

CONCLUSION

For the reasons set forth above, this Court should reverse all three holdings of the Fourteenth Circuit Court of Appeals.

March 2, 2007

CERTIFICATE OF SERVICE

This document certifies delivery via first class mail of one original and five copies of this brief to Althea Bender, Prince Competition Coordinator, Moot Court Honor Society, One Boerum Place, First Floor, Brooklyn, New York 11201 on this, the second day of March, 2007

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