

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
Court of Appeals for the Fourteenth Circuit

RECORD ON APPEAL

QUESTIONS PRESENTED

- I. Whether the District Court abused its discretion in excluding expert testimony concerning false confessions and the factors that contribute to their occurrence when it held that the testimony was neither reliable nor helpful to the jury.
- II. Whether the District Court erred in refusing to instruct the jury that people sometimes falsely confess to crimes, including murder.
- III. Whether expert testimony describing the substance of conversations with Respondent's mother and sister violated the Confrontation Clause in light of the District Court's jury instruction to use the statements only to assess the thoroughness of the expert's opinion.

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OPINIONS BELOW

The unpublished decision of the United States District Court for the Eastern District of Boerum granting Petitioner's motion to exclude the expert testimony of Dr. Wallace and denying Petitioner's motion to exclude the expert testimony of Dr. Kalf is in the record at pp. 3-16. The decision of the United States Court of Appeals for the Fourteenth Circuit is in the record at pp. 88-107.

CONSTITUTIONAL PROVISIONS AND FEDERAL RULES INVOLVED

The Sixth Amendment to the United States Constitution and Federal Rules of Evidence 403, 702, 703, 801, 802 and 804 are pertinent to the issues presented in this case, and are reproduced in full in Appendices A and B.

STATEMENT OF THE CASE

On Sunday, April 24, 2005, Rounn Har met with Nebraska Walker, a woman he had met through an online dating service. (R. 64.) Har had to drive all night to meet with Nebraska because of his work schedule. (R. 73.) At the end of the evening, Nebraska suggested that they go back to her house, and Har agreed. Once there, Har met Nebraska's father, Nathaniel Walker (Walker), a former FBI agent who had worked on the murder of Sack Seafoam, the host of a television show called Daily Dollars, which occurred in February of 1997. (R. 76.) Har had been a production assistant to Daily Dollars² at the time of the murder. While holding and intermittently swinging a golf club, Walker began to question Har in the basement of Walker's house. (R. 48.) While questioning Har, Walker falsely claimed that evidence existed to implicate Har, prevented Har from leaving, and repeatedly suggested that he knew Har had committed the murder and that Har would not get in trouble for telling him. (R. 75-80.) Har suggested that he might have committed the crime but he wasn't sure. (R. 82-84.) Walker had been taping the questioning of Har using a hidden camera and turned in Har's confession to the police the next day. (R. 90.)

At trial, Har attempted to introduce the testimony of Dr. Wallace, an expert in the field of false confessions. (R. 5.) The District Court excluded Dr. Wallace's testimony on the grounds that social science evidence could not be verified and thus was not reliable under Daubert. (R. 15-16.) The District Court further held that Dr. Wallace's testimony would not be helpful to the jury. (R. 16.) Dr. Kalf, a psychiatrist with expertise in Post-Traumatic Stress Disorder (PTSD), had interviewed Har and was permitted to testify that he suffered from PTSD and had a compliant personality, making him highly open to the suggestions of others. (R. 14-15.)

The prosecution's case on rebuttal featured a psychiatrist, Dr. Gerber, who was called to testify about Har's mental condition. (R. 51.) Har objected on the grounds that this testimony violated the Confrontation Clause. The District Court overruled the objection on the grounds that the statements were not being offered to prove the truth of the matter asserted. (R. 59.) Dr. Gerber had questioned Har at length before the trial and had spoken briefly to Har's family over the phone. (R. 60.) On the stand, Dr. Gerber testified that Har did not suffer from Post-Traumatic Stress Disorder, did not have a compliant personality, largely grounding her conclusions in her brief conversations with Har's family and their statements. (R. 60-61.)

Lastly, Har requested a jury instruction noting that false confessions do occur and that the jury should take this fact into account when weighing the evidence against him. The District Court denied the requested instruction on the grounds that, like the expert testimony, it would not be helpful to the jury and instructed the jury, in fifteen words, "It is your responsibility to decide the weight, if any, these statements should be given." (R. 64.)

The Fourteenth Circuit reversed the District Court's holding on the three grounds presented for review here. This Court then granted the State's petition for a writ of certiorari to address the expert testimony, jury instructions and Confrontation Clause issues presented in this case.

SUMMARY OF ARGUMENT

The Federal Rules of Evidence, this Court's precedents, and the Constitution of the United States require that the decision of the 14th Circuit be affirmed. To hold otherwise would sanction the District Court's abuses of discretion and thereby deny Respondent a fair trial.

The District Court abused its discretion when it excluded expert testimony about false confessions without considering its particularized application in this case. In reaching the unjustified, sweeping conclusion that social science testimony is unreliable and unhelpful in the real world, the Court failed to correctly perform its gatekeeping function. The District Court also erred in its substantive judgment that the testimony in this case was neither reliable nor helpful to the jury. Testimony about false confessions is grounded in sound methods and principles and informs jurors about a nuanced and counterintuitive aspect of evidence presented at trial.

When a defendant contests her confession, a jury instruction should be given stating that false confessions do occur so as to minimize the presumption against the defendant and fairly balance the trial. While jurors know that people lie, the idea of confessing falsely is counterintuitive and will often confuse juries. A jury instruction better focuses the jury's attention on specific issues of importance, and there could be no more important issue than a defendant claiming to have falsely confessed. Witness identification and the voluntariness of a confession are analogous situations to false confessions in which the courts have been open to specific jury instructions to resolve the issues of importance. A jury instruction in this case would correct the faulty presumption that presently stands against criminal defendants.

Finally, permitting Dr. Gerber to recount the substance of the statements made by Respondent's mother and sister violated the Confrontation Clause of the Sixth Amendment. Testimonial hearsay may never be introduced against a defendant without a demonstration of

witness unavailability and a prior opportunity for cross-examination. The statements in question were offered to prove the truth of the matter asserted, and should not have been admitted as the basis for an expert opinion under Rule 703 because the expert was not applying her expertise to form a conclusion that lay jurors would have been unable to reach, and because the statements were not substantially more probative than prejudicial. The statements were testimonial because a reasonable witness would objectively expect statements made to a government-hired psychiatrist to be used in later judicial proceedings and because Dr. Gerber herself intended to elicit information that could later be used in lieu of live testimony. Therefore, the District Court abused its discretion and Respondent's conviction should be vacated.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE DISTRICT COURT BOTH ABUSED ITS DISCRETION IN EXCLUDING DR. WALLACE'S TESTIMONY AND SUBSTANTIVELY ERRED IN ASSESSING THE RELIABILITY AND UTILITY OF THAT TESTIMONY.

Federal Rule of Evidence 702 provides that expert witnesses may testify to scientific, technical, or other specialized knowledge that will assist the trier of fact provided that the testimony (1) is based upon sufficient facts or data, (2) is the product of reliable principles and methods, and (3) reliably applies those principles and methods to the facts of the particular case. See Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999); Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); Fed. R. Evid. 702. This rule requires a district court to perform a “gatekeeping” role in which it decides whether expert testimony is both reliable and helpful given the circumstances of a given case. In the instant case, the District Court both asked the wrong questions in determining admissibility and reached the wrong substantive conclusions about the reliability and helpfulness of testimony of Dr. Wallace. Because Respondent was convicted largely on the basis of a confession that this expert testimony would have cast doubt upon, this Court should vacate Respondent’s conviction.

A. The District Court Erred in Failing to Make an Individualized Determination as to Whether the Expert Testimony in this Case was Reliable and Helpful.

A court that excludes expert testimony after considering it only generally and not in the context of a particular case abuses its discretion under Daubert as a matter of law. See United States v. Belyea, 159 Fed. App’x 525 (4th Cir. 2005); United States v. Hall, 93 F.3d 1337 (7th Cir. 1996). Here, Respondent’s first expert witness, Dr. Wallace, would have testified to well-established and documented research and theories about false confessions and tied that testimony to the particulars of the instant case. The District Court abused its discretion when it excluded

this testimony simply because it was based in social science rather than considering Dr. Wallace's particularized application of the theory of false confessions to the facts at hand.

1. The District Court considered the study of false confessions as a whole, and in so doing failed to make a particularized determination as to the value of Dr. Wallace's testimony in this case.

The District Court held that the conclusions of Dr. Wallace and other experts related to false confessions were "mere guesswork." (R. 15.) In order to exclude Dr. Wallace's testimony, the District Court would have had to find that in this particular case, the proposed testimony was based on an unreliable methodology, or would not be helpful to the jury. See Belyea, 159 Fed. App'x 525; Hall, 93 F.3d 1337. In Belyea, expert testimony on false confessions was excluded at trial because "whether a confession is false is something juries decide all the time, and I don't need an expert to help them in that respect." Belyea, 159 Fed. App'x at 529-30. This decision was erroneous as a matter of law because in effectively ruling that expert testimony on false confessions was never admissible, it overlooked Daubert's requirement of an individualized determination in each case and ignored that the defendant was particularly susceptible to making a false confession for reasons that might not have been readily apparent to the jury. See id. at 530. Similarly, the District Court in this case categorically excluded social scientific testimony without regard to the details of this case when it said that "[s]ocial science research is not scientific in its methods, and its conclusions related to false confessions are mere guesswork at this point. No evidence has been presented that suggests that the so-called controlled experiments conducted by social psychologists have any relevance in the real world." (R. 15.)

Polygraph tests are an exception to the general requirement of individualized determinations. See United States v. Scheffer, 523 U.S. 303, 311 n.7 (1998) (containing a footnote noting that Daubert did not ban a per se exclusionary rule for polygraph tests); United

States v. Prince-Oyibo, 320 F.3d 494 (4th Cir. 2003). But see United States v. Crumby, 895 F. Supp. 1354 (D. Ariz. 1995) (holding that polygraph evidence may be admitted in light of Daubert despite a previously held per se exclusionary rule in the 9th Circuit). In Prince-Oyibo, a per se bar on the use of polygraph evidence was upheld. However, the court acknowledged, “Daubert’s alteration of the legal landscape threw into doubt the viability of [a] per se rule against polygraph evidence.” Prince-Oyibo, 320 F.3d at 501. Absent circuit precedent that predated Daubert, the panel “might otherwise [have been] inclined to hold that Daubert requires a more nuanced evaluation of polygraph evidence than that dictated by the per se rule on which the District Court relied... [but] only the en banc Court has the authority to consider whether, after Daubert, a per se rule is not viable.” Id. at 501. Thus, even though the circuits are now divided as to whether a per se ban on polygraph evidence remains viable after Daubert, the answer does not control this case because no long-standing per se exclusionary rule for expert testimony on false confessions exists. Additionally, polygraph examination is a simple, singular application of a particular technology and thus susceptible to a per se rule. Social science, by contrast, includes a range of disciplines and complex research techniques that vary from subfield to subfield and expert to expert. Holding the entire field unreliable with a single stroke is the sort of generalized conclusion that Daubert seeks to avoid. See Daubert, 509 U.S. at 591 (the gatekeeping inquiry must be “tied to the facts” of a particular case).

2. The District Court arbitrarily excluded Dr. Wallace’s testimony based on an incorrect belief that findings from social science have no application in the “real world.”

Expert testimony based in social sciences is often helpful in the real world, to the point of being “an integral part of many cases, ranging from employment discrimination actions, to family law matters, to criminal proceedings.” United States v. Hall, 93 F.3d 1337, 1342-43 (7th

Cir. 1996). In Hall, expert testimony would have explained that defendants sometimes falsely confess and that they are more likely to do so when they have certain mental disorders and traits of character such as being “pathologically eager to please.” Id. at 1341. The district court abused its discretion in barring this testimony because it had “overlooked the utility of valid social science . . . which often shows that commonly held beliefs are in error.” Id. at 1345. In this case, the District Court made an identical error when it summarily dismissed the study of false confessions and social psychology generally as “having no relevance in the ‘real world.’” (R. 15.) The District Court focused on the lack of “real world simulations” of false confessions, stating that Dr. Wallace’s testimony was barred because “social science research is not scientific in its methods.” (R. 15-16.) This is contrary to the plain language of Rule 702 which contemplates the admission of expert testimony based upon “technical” or “other specialized” knowledge. Fed. R. Evid. 702; see also Kumho Tire, 526 U.S. 137 (holding that Daubert’s requirements apply to all expert testimony and not only to that requiring scientific knowledge). If the District Court was correct in its apparent belief that only replicable laboratory experiments can form the basis for expert testimony, this Court would surely have said so in Daubert rather than explaining the nuanced and multi-faceted test that it did. Daubert, 509 U.S. 579; see also United States v. Hall, 974 F. Supp. 1198 (C.D. Ill. 1997) (holding expert testimony about false confessions reliable despite a lack of evidence from laboratory experiments).

Expert testimony on the accuracy of eyewitnesses, which like false confession expert testimony is based in social science and seeks to explain counterintuitive findings about a subject that jurors have some familiarity with, is routinely accepted as reliable and helpful. See Newsome v. McCabe, 319 F.3d 301 (7th Cir. 2003) (holding it was not an abuse of discretion to admit expert testimony concerning the accuracy of eyewitness identification and noting that the

circuit court would have admitted the testimony on first impression); United States v. Smithers, 212 F.3d 306, 315-16 (6th Cir. 2000). In Smithers, an expert witness was barred from testifying as to the accuracy of eyewitness identification based on the belief that juries could fully understand their obligation to be skeptical of eyewitness testimony. Id. This assessment was “simply wrong,” however, because jurors tend to be unduly receptive to, rather than skeptical of, eyewitness testimony. Id. at 315-16. The trial court’s distrust of this social scientific testimony would have led to the “absurd result” that expert testimony on eyewitness identification would always be barred. Id. at 316. The District Court in this case shared the Smithers trial court’s doubts about the utility of social scientific expert testimony, did not recognize that jurors unduly credit confessions that might be false, and would ultimately reach a similar absurd result by barring expert testimony about false confessions in every case. Expert testimony based in social science can often prove both reliable and helpful in the “real world,” and the District Court was in error to hold otherwise.

B. Dr. Wallace’s Testimony About False Confessions Would Have Been Both Reliable And Helpful to a Jury Based on Its Scientific Grounding and Explanation of a Counterintuitive Subject.

Even if the District Court had made the necessary individualized assessment of Dr. Wallace’s testimony, it nonetheless substantively erred in ruling that the proposed testimony was unreliable and unhelpful to the jury. When expert testimony is both based on a reliable methodology and helpful to the jury’s understanding of a fact in issue, it should be presented to a jury, subject to a Rule 403 balancing. Daubert, 509 U.S. 579; Fed. R. Evid. 702; see also FED. R. Evid. 403 (requiring that any evidence be barred if its probative value is substantially outweighed by its tendency to cause unfair prejudice, confusion of the issues, misleading of the jury, undue delay, waste of time, or needless presentation of cumulative evidence).

1. The testimony of Dr. Wallace would have been based upon sufficient facts and data and would have used a tested and reliable methodology.

The study of false confessions goes back over 20 years, involves both real-world observational and controlled studies, and is widely published in peer-reviewed journals. (R. 96.) In determining reliability, district courts must examine expert methodologies holistically, looking to any and all factors that are appropriate in a given case in determining whether expert testimony is reliable. See Kumho Tire, 526 U.S. 137; Daubert, 509 U.S. 579; see also Fed. R. Evid. 702 advisory committee's note. Here, an examination of all relevant factors demonstrates that the study of false confessions uses a reliable methodology.

Possible indicators of a reliable methodology include, but are not limited to, whether the theory can be and has been tested; whether studies using the methodology are published in peer-reviewed journals; the rate of error in the methodology; the existence and maintenance of standards and controls; whether the method is generally accepted in the relevant community of experts; whether experts are proposing to testify about matters growing naturally out of research conducted independent of litigation; whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion; whether the expert has adequately accounted for alternative explanations; whether the expert is being as careful as he would be in his regular professional work outside of litigation; and whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. Kumho Tire, 526 U.S. 137; Daubert, 509 U.S. 579; Tyus v. Urban Search Management, 102 F.3d 256 (7th Cir. 1996).

The list of possible factors that a court might appropriately consider in making a reliability determination has not been, and perhaps cannot be, fully developed because it is the nature of the inquiry that courts be free to examine any relevant factor, even if it has never before

been enumerated or used. See Kumho, 526 U.S. 137. Although district courts have discretion to exclude irrelevant factors in any given inquiry, they are required to consider all of the relevant factors that are reasonable measures of reliability. See Hall, 93 F.3d 1337; see also Kumho, 526 U.S. at 150 (“the [Daubert] factors do *not* constitute a definitive checklist” (emphasis in original)). In Hall, the district court abused its discretion by focusing on the admittedly relevant fact that an expert could not determine to a certainty whether the defendant had confessed falsely to the exclusion of other factors that made the testimony reliable. Hall, 93 F.3d 1337. Here, although the District Court was not required to apply any one particular factor, it erred by addressing only whether the theories of false confessions could be concretely tested in “real world” simulations and excluding all other relevant factors.

The inability of social psychologists to conduct experiments that precisely recreate the stress of being accused of a crime and interrogated by a law enforcement officer is a challenge, but it is not a fatal flaw of the discipline. Observational data from verified cases of real world false confessions confirms the findings of the controlled studies that psychologists can ethically conduct, findings that demonstrate that false confessions occur and that particular mental disorders, traits of personality, and circumstances of interrogation increase the likelihood of false confessions occurring. (R. 13-14.)

Additionally, the false confession studies and conclusions that Dr. Wallace would have testified to are published in peer-reviewed journals, were not prepared for this or any litigation, did not seek to reach an unfounded conclusion, accounted for alternative explanations, and are increasingly generally accepted in the scientific community. (R. 96.) Although determining reliability is not as simple as comparing the total number of factors for and factors against and

choosing the greater number, the District Court ignored all of the factors that weighed in favor of admission.

Just as false confession testimony should not be barred per se, it should not be allowed in every case. When the methodology used is unreliable or is unreliably applied to a given case, district courts have an obligation to prevent the testimony from reaching the jury. Daubert, 509 U.S. 579. In United States v. Hebah, an expert would have testified that the defendant was prone to give false confessions based on an overly compliant nature and a tendency to acquiesce to the wishes of others. This testimony was properly excluded because the “expert” witness’s resume failed to establish that he had expertise or even considerable experience in the area of false confessions; the expert relied on the defendant’s truthfulness to verify a personality assessment established with an unverified measure; the tests used required the defendant’s honesty but could not detect dishonesty; and the expert could not say with certainty whether the defendant was compliant or a false confessor. United States v. Hebah, 164 Fed. App’x 678, 690 (10th Cir. 2006). In contrast, Dr. Wallace’s credentials are impeccable and his studies and conclusions are in the mainstream of his discipline. Therefore, the individualized assessment that Daubert requires properly led to the exclusion of false confession testimony in Hebah, but requires its admission here.

Experts on false confessions are sometimes barred from testifying. See generally United States v. Mamah, 332 F.3d 475 (7th Cir. 2003); United States v. Mazzeo, No. 99-1223, 2000 WL 232032 (2nd Cir. Jan. 21, 2000); Klein v. Vanek, 86 F. Supp. 2d 812 (N.D. Ill. 2000). In Mamah, a Ghanaian immigrant sought to introduce expert testimony that false confessions occur and that the defendant was susceptible to making such a false confession because of an incident during which he was coercively interrogated while in Ghana. Mamah, 332 F.3d 475. The

testimony was excluded because the expert could not establish that an individual who is coercively interrogated on one occasion would be susceptible to giving a false confession on a second occasion that did not involve coercive interrogation. Mamah, 332 F.3d at 478. Thus, although the expert's testimony would have been reliable, he was unable to connect it to the particulars of the defendant's case. In this case, Dr. Wallace would have testified as to the existence of false confessions and that certain circumstances, personality characteristics, and mental disorders make false confessions more likely. Combined with the video recording of the coercive circumstances of the confession and Dr. Kalf's diagnosis of Respondent as compliant, fearful of authority figures, highly suggestible, and suffering from Post-Traumatic Stress Disorder, this testimony would have been closely tied to the particulars of this case. Therefore, Dr. Wallace's testimony should have been admitted as reliably applied to the facts of the case.

2. Respondent's expert's testimony would have assisted the jury in determining whether Respondent's confession was false.

Expert testimony must assist the jury in determining a fact in issue or else it would be either irrelevant or a waste of the Court's time. Daubert, 509 U.S. at 590. Expert testimony assists the jury when it expands their understanding of a matter within their experience or explains something to them that they do not know. See United States v. Belyea, 159 Fed. App'x 525 (4th Cir. 2005). Courts are not compelled to exclude expert testimony that may overlap with matters within the jury's experience provided that the expert offers special knowledge or skills that would be particularly helpful in determining whether a person was telling the truth. Hall, 93 F.3d 1337; Klein, 86 F. Supp. 2d 812.

It is well established that criminal suspects sometimes falsely confess, and those false confessions can often be caused in part by pertinent characteristics of the individual. See Atkins v. Virginia, 536 U.S. 304 (2002) (acknowledging the false confession of a mentally handicapped

man). While admitting that false confessions do occur, opponents of expert testimony on false confession often reply that, “juries know people lie.” See United States v. Griffin, 50 M.J. 278 (C.M.A. 1999). This quip fails to acknowledge that expert testimony on false confessions can help explain why people might lie to their own detriment by falsely confessing. Belyea, 159 Fed. App’x 525. “The phenomenon of false confessions is counter-intuitive and is not necessarily explained by the general proposition that ‘juries know people lie.’” Id. at 529; see generally Fed. R. Evid. 804(b)(3) (admitting hearsay by an unavailable declarant when the statement was against interest because of a presumption that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true).

In fact, in cases in which defenses hinge on counterintuitive explanations for behavior, juries are “plainly unqualified to determine without assistance the particular issue of whether” defendants’ counterintuitive explanations are valid. Hall, 93 F.3d at 1344 (quoting United States v. Shay, 57 F.3d 126, 133 (1st Cir. 1995)). In United States v. Shay, the defendant had confessed to setting a car bomb and was barred from introducing testimony about Munchausen’s Disease, a mental disorder that may lead sufferers to invent grandiose lies. Shay, 57 F.3d at 133. The trial court’s exclusion of this expert testimony was an abuse of discretion because the expert had been “prepared to offer specialized opinion testimony, grounded in his expertise as a psychiatrist, that could have ‘explode[d] common myths’ about evidence vital to the government’s case.” Id. at 133. Thus, the proper inquiry is not whether juries know people lie, but the more particularized inquiry of whether jurors know that suspects confess falsely, and why they do so. Id. at 530. Insofar as the answer to this question is “no,” expert testimony about false confessions is helpful to juries and would have been if admitted in this case.

II. A SPECIFIC JURY INSTRUCTION IS REQUIRED WHEN A CRIMINAL DEFENDANT CONTESTS HER CONFESSION SO AS TO PRESERVE THE PROPER BALANCE OF PRESUMPTIONS AND TO ACCORD WITH THE REASONING OF THE COURTS IN ANALOGOUS SITUATIONS.

Clarifying instructions are required in cases where complex issues are likely to confuse jurors and a jury instruction regarding false confessions is required of the District Court in this case. The system is presumptively against a criminal defendant who confesses, in clear violation of our notion of “innocent until proven guilty.” By confessing, the beliefs of juries will, by and large, be against the defendant and will set a presumption against such a defendant. The precedent laid down by the circuit courts supports requiring a jury instruction in eyewitness identification cases, reasoning that without such an instruction, juries will be unable to accurately perform their duties because of counterintuitive notions about eyewitness identification. Further, it is appropriate for courts to address such complex issues in jury instructions even if they are not specifically addressed at trial.

A. The District Court was Required to Instruct The Jury on the Phenomenon of False Confessions In Order to Refute Commonly-Held Misconceptions and Safeguard the Presumption of Innocence.

In this case, the District Court was obligated to give a jury instruction drawing attention to the phenomenon of false confessions. Clarifying instructions are required in cases where complex issues are likely to confuse jurors. It is appropriate for courts to address such complex issues in jury instructions even if they are not specifically addressed at trial.

Jurors must be explicitly advised of the incidence of false confessions, particularly to crimes as serious as murder, because of the extraordinarily disproportional evidentiary weight jurors accord confessions. A personal confession of guilt is considered “the most probative and damning evidence that can be admitted against [a defendant]” because “a jury may be tempted to rely on it alone when reaching its decision.” Arizona v. Fulminante, 499 U.S. 279, 280, 296

(1991) (Blackmun, J., concurring). Even the Federal Rules of Evidence reflect the assumption that no one would voluntarily make a false statement against their own interest; Rule 804(b)(3) states that declarations against interest are excepted from the bar against hearsay – exculpatory statements are untrustworthy, but inculpatory statements are trustworthy. See Fed. R. Evid. 804. In this case, the Fourteenth Circuit correctly realized that most jurors would find a false confession to murder so contrary to commonly held beliefs about basic human nature as to be highly improbable, if not impossible. (R. 97.) However, it is uncontested that false confessions *do, in fact occur*. Thus, when a defendant challenges the truthfulness of his confession at trial, it is especially important to instruct the jury about this phenomenon in order to counterbalance the possibly unjustified weight jurors place on this single piece of evidence, and ensure that the defendant is still able to receive a fair trial. Without such a precaution, there is an unacceptable risk of the greatest injustice in our entire criminal justice system – wrongful conviction.

Excluding expert testimony because it would be unhelpful to the jury does not preclude giving a jury instruction calling attention to the general topic of that expert’s proposed testimony. In State v. Cromedy, the court gave jury instructions regarding cross-racial, sole witness identification, while at the same time excluding expert testimony on the subject due to a lack of scientific certainty. State v. Cromedy, 727 A.2d 457 (N.J. 1999). Thus, just as in Cromedy, the District Court’s conclusion that Dr. Wallace’s testimony did not meet the requirements of Daubert did not preclude instructing the jury that false confessions occur, and that blind faith in the truthfulness of confessions is problematic. Judges may even be better suited than experts to introduce social science evidence to juries. See United States v. Hall, 165 F.3d 1095, 1120 (7th Cir. 1999) (Easterbrook, J., concurring).

Common sense might suggest that jurors know people lie, and therefore an instruction regarding the occurrence of false confessions is unnecessary. However, experience with domestic violence and rape cases suggest otherwise. For example, numerous studies have shown that the common perception of rape involves active physical resistance by the victim, and that a lack thereof is easily mistaken for consent. See *In re M.T.S.*, 609 A.2d 1266 (N.J. 1992); Jennifer Gentile Long, Explaining Counterintuitive Victim Behavior in Domestic Violence and Sexual Assault Cases, 40 Prosecutor 12 (2006) (“The behaviors of sexual assault victims...frequently conflict with the behavior the public expects.”). Because of these misconceptions, expert testimony has been necessary to explain counterintuitive behavior and have juries weigh evidence in a more accurate manner. See Long, supra (“An experienced expert can explain behaviors that jurors often find baffling. Specifically, an expert can explain that a victim’s failure to scream out or resist during her attack may result from her shock and subsequent inability to focus.”). Just like the rape victim who does not scream or fight, the occurrence of a false confession seems counterintuitive, and defendants must fight an uphill battle against society’s ideas of who confesses and why. See Welsh S. White, *False Confessions and the Constitution*, 32 Harv. C.R.-C.L. L. Rev. 105, 107 (1997). To correct this misperception and ensure that the defendant does not suffer an unfair disadvantage, district courts should be required to give a jury instruction regarding false confessions when the defendant challenges the truthfulness of his confession.

When a defendant challenges the validity of his confession, jury instructions are of critical importance for preserving the presumption of innocence. See *United States v. Telfaire*, 469 F.2d 552, 555 (D.C. Cir. 1972) (“The presumption of innocence that safeguards the common law system must be a premise that is realized in instruction and not merely a promise. In

pursuance of that objective, we have pointed out the importance of and need for a special instruction.”). The District Court’s refusal to give a jury instructions alerting the jury to the phenomenon of false confessions was therefore erroneous and requires vacating Respondent’s conviction.

B. The District Court Erred When It Denied Respondent’s Request for a Jury Instruction on False Confessions, When Instructions are Required in Similar Circumstances in which Jurors Must Evaluate Counterintuitively Unreliable Evidence.

Jury instructions are routinely required in circumstances where mistaken eyewitness testimony or an involuntary confession may disproportionately sway the jury. False confessions present similar challenges for impartial evaluation, and should be required in this circumstance, as well.

1. Confessions and eyewitness testimony are both disproportionately weighted by juries and counterintuitively unreliable; instructions are regularly required in identification cases, and should be required in confession cases, which present the same pair of problematic issues

Like confessions, eyewitness identifications carry enormous weight with juries. And, like confessions, social science has demonstrated that eyewitness identifications are much less reliable than most people believe. In response to the growing body of scholarship demonstrating the counterintuitive unreliability of eyewitness identifications, many courts have begun to require jury instructions to prevent undue prejudice to defendants. Indeed, refusal to give such an instruction has been considered reversible error. See United States v. Mays, 822 F.2d 793, 798 (8th Cir. 1987) (approving specific jury instruction when eyewitness identification presents a serious issue). The possibility of a conviction based on false confession is at least as serious, if not more so, than the risk of conviction based on false identification, so failure to give a jury instruction in Respondent’s case should be considered reversible error, as well.

Courts are willing to grant defendants' requests for instructions on issues that are not well understood by juries because other safeguards alone cannot adequately focus the jury's attention on the critical issues. See United States v. Anderson, 739 F.2d 1254, 1258 (7th Cir. 1984) (holding that "the trial judge must, at defendant's request, instruct the jury about eyewitness identification"). Id. at 1258. Although district courts retain broad discretion in framing jury instructions, it is essential for courts to prepare juries to make factual determinations on issues which may be counterintuitive. See Hall, 165 F.3d 1095; Anderson, 739 F.2d 1254. But see Telfaire, 469 F.2d 552, 555 (rejecting blanket requirement for instruction in cases where not requested by defendant, but recognizing "the importance of and need for a special instruction on the key issue of identification" to preserve the presumption of innocence for defendants). In Hall, the court stated that jury instructions in eyewitness cases were an indispensable compliment to cross-examination in order to ensure that the jury was "adequately focused on the issue of eyewitness identification and fully able to assess the ability of the eyewitness to perceive and remember." Hall, 165 F.3d at 1107. The need for jury instructions in false confession cases is even stronger than in eyewitness cases, because when the damaging evidence is the defendant's own statement, cross-examination provides little relief, and instructions may be the only way to raise the profile of the false confession phenomenon among the jurors.

2. Jury instructions should be required in cases in which the falsity of a confession is at issue, just as they are in cases in which the voluntariness of a confession is at issue, because the two inquiries involve similar concerns and are of similar importance.

Juries give great weight to confessions. In recognition of this and in the interests of ensuring fair trials, jury instructions are required when the voluntariness of a confession is in dispute. McAffee v. United States, 105 F.2d 21 (D.C. Cir. 1939); McCool v. United States, 263 F. 55 (6th Cir. 1920). Where evidence regarding the validity of a confession is conflicting, a jury

instruction about the confession must be given, but there is some flexibility as to exactly what such an instruction must contain. See McCool, 263 F. 55. In McCool, the two defendants contested the voluntariness of their confessions to breaking into a railroad car and stealing automobile tires. The district court instructed the jury to consider all elements, especially the confessions, and “called the attention of the jury to this evidence, and instructed [the jury] to give to these confessions such consideration as in its opinion they might be worth.” Id. at 58. Although the confessions’ voluntariness was disputed, the district court was within its discretion to submit the confession for the jury’s consideration provided that the submission was “*under instruction* to disregard [the confession] if it finds that it was not voluntary.” Id. (citing Wilson v. United States, 162 U.S. 613 (1896)) (emphasis added).

The requirement of jury instructions in cases alleging involuntary confession has persisted and developed over many years. See McNabb v. United States, 123 F.2d 848 (6th Cir. 1941), *rev’d on other grounds*, 318 U.S. 332 (1943). The defendants in McNabb argued that their confessions were not voluntary because of the coercive interrogation methods used by law enforcement officers. The trial court appropriately instructed the jury:

If the confessions or admissions were not of a free and voluntary nature, then you will entirely disregard such confessions or admissions. In passing upon these questions you will consider the age and experience, the station in life and the physical condition of the defendants making such statements, whether they had friends or relatives or counsel present, whether the questioning was carried on in a reasonable manner or not, whether they were threatened, abused or forced to do acts against their will. Id. at 852.

“Where the evidence conflicts as to whether the confession is voluntary, if the court decides that the confession is admissible, the jury *should be instructed* to reject the confession if *upon the whole evidence* they find that it was not voluntary.” Id. (emphasis added). This emphasizes the importance focusing the jury’s attention on the confessions, rather than simply including confessions among the general instructions about weighing the evidence. The District

Court in the present case devoted only fifteen words to the false confessions and lumped the mention of confessions in with the rest of the evidence instead of calling the jury's attention to the confessions when the confessions were contested as it should have done.

In McAffee v. United States, the defendant was convicted of first-degree murder and confessed to the police at the station after an interrogation. 105 F.2d 21 (D.C. Cir. 1939). The court held that when a district judge is first reviewing a confession for admissibility, it must check to see if there is evidence that the confession might be voluntary. Id. If there is such evidence, it must be submitted to the jury "under proper instructions." Id. at 145. Proper instructions must at least direct the jury that it must find that the defendant understood he was making the confession and that it was voluntary. Id.

3. Because Respondent only seeks an instruction that aids the jury in understanding a counterintuitive phenomenon, arguments against requiring jury instructions in voluntariness cases are inapplicable.

Jury instructions are not necessary in cases in which they add nothing to the jury's understanding of the case or ability to come to a conclusion. The defendant in United States v. Lopez-Alvarez requested jury instructions that would have limited the use of his out-of-court statements if the jury found that he was not present at the time of the crime. 970 F.2d 583 (9th Cir. 1992). In that case, a finding that the defendant was not present at the time of the crime would have justified his acquittal. The defendant's proposed jury instructions, therefore, would have "merely duplicated what the jury ha[d] already been told." Id. at 597. Such was not the situation in the present case. Here, jury instruction would not have duplicated the substantive fact inquiry, as it would have in Lopez-Alvarez. Therefore, an instruction regarding false confessions would have given the jury a tool for assessing the facts before them in this case.

The breadth of cases in which a jury instruction can be given has narrowed somewhat in recent years. United States v. Dickerson, 163 F.3d 639 (D.C. Cir. 1999). In Dickerson, the defendant sought jury instructions that covered instances of both out-of-court statements about the facts of a crime and confessions. The requested instructions would have directed the jury to not convict the defendant if the only evidence presented was the defendant's uncorroborated out-of-court statements. Because corroborating evidence is always required, "jury reconsideration is not required." Id. at 643. In the present case, however, the Respondent does not assert that his confession is the sole evidence against him and therefore insufficient for conviction as a matter of law, but that the confession was false. The jury instruction in Dickerson would be required when the confession was the only evidence presented at trial, whereas in the case before the court, the jury instructions would be required only when a defendant challenges their confession. The Dickerson rule does not speak to instructions required instructions in McAfee, but instead narrows the field in which those instructions can be required. This limiting factor does not serve as a bar to the jury instruction requested by Respondent.

Respondent argues for stronger policing of the quality of a confession rather than its character. Policing the character of the confession has been grounds for disallowing mandatory jury instructions. See United States v. Singleterry, 29 F.3d 733 (1st Cir. 1994). In Singleterry, the defendant confessed to the crimes charged at the time of his arrest, though claimed at trial that this confession could not, by itself, be used to convict him. He argued that the district court should have given a jury instruction requiring the jury to determine whether his confession was trustworthy or not. His proposed rule was overbroad and unprecedented in the federal courts, however. Id. Additionally, the district court had a continuing duty to police the jury's consideration of a confession's probative value. Id. Thus, the defendant in Singleterry sought a

jury instruction that would police the character of the confession by requiring a determination of whether the jury could trust this specific confession. In contrast, Respondent seeks a jury instruction noting that false confessions do occur and that the jury should take note of that counterintuitive fact, which is an instruction regarding the quality of the confession itself.

III. ADMISSION OF TESTIMONIAL STATEMENTS ELICITED FROM THIRD PARTIES, WITHOUT OPPORTUNITY FOR CROSS-EXAMINATION, VIOLATED RESPONDENT'S SIXTH AMENDMENT CONFRONTATION CLAUSE RIGHTS

The Confrontation Clause of the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. CONST. amend. VI. Testimonial hearsay statements may never be introduced against the defendant unless the defendant has had a prior opportunity to cross-examine the declarant, regardless of whether that statement falls within a firmly rooted hearsay exception or has particularized guarantees of trustworthiness. Compare Crawford v. Washington, 541 U.S. 36 (2004) with Ohio v. Roberts, 448 U.S. 56 (1980). In this case, the statements of Respondent’s mother and sister were testimonial hearsay because they were admitted for the truth of the matter asserted and should reasonably have been expected to be available for later use in criminal proceedings. Furthermore, the District Court’s instructions to the jury were insufficient to cure the prejudice resulting from the statements’ admission, and this error requires vacating Respondent’s conviction.

A. The Statements of Respondent’s Family are Hearsay because They Were Offered for Their Truth, Not as the Basis for an Expert Opinion.

The Federal Rules of Evidence define hearsay as an out-of-court statement “offered in evidence to prove the truth of the matter asserted.” See Fed. R. Evid. 801(c). Hearsay is not admissible unless otherwise specified in the Rules. See Fed. R. Evid. 802. Although Rule 703

permits admission of otherwise inadmissible evidence as the basis for an expert's opinion,¹ the District Court erred when it admitted Respondent's family's statements because the psychiatrist was not applying any expertise when she repeated the substance of the statements. See Fed. R. Evid. 703. The admission was also an abuse of discretion because the statements' probative value did not substantially outweigh the significant and irreparable prejudice to Respondent.

1. The prosecution's expert did not apply sufficient expertise to the family statements; therefore they were offered to prove truth of the matter asserted, and are hearsay.

Expert witnesses are permitted to rely on hearsay evidence while applying expertise to the out-of-court statements in order to present opinions, conclusions, or explanations that juries would be unable to infer themselves absent the expert's particularized knowledge. See United States v. Dukagjini, 326 F.3d 45, 58 (2d Cir. 2003); State v. Torres, 874 A.2d 1084 (N.J. 2005); Fed. R. Evid. 703. However, repetition of hearsay without application of any expertise whatsoever would "enable the government to circumvent the rules prohibiting hearsay" in violation of Rule 703 and the Confrontation Clause. See Dukagjini, 326 F.3d at 58; Torres, 874 A.2d at 1099 (permitting an expert to rely on hearsay in order to present a "coherent assessment of the structure, operations, and disciplinary rules" of MS-13 gang so long as expert did not "parrot" specific conversations).

In Dukagjini, a DEA agent testified as an expert on the use of "code words" in recorded conversations allegedly related to narcotics trafficking. See 326 F.3d at 50. When the agent

¹ "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." FED. R. EVID. 703. Respondent is not contesting that information collected from relatives is of a type reasonably relied upon by psychiatrists in the course of forming diagnostic opinions.

testified that such terms as “B-lick” and “spider” referred to heroin, the agent was properly applying his expertise to illuminate the meaning of such conversations for the jury. Id. at 59. However, when the agent offered his personal views on less obscure phrases such as “what’s left over there in that can,” or “your thing,” he was actually relying on his conversations with third parties to prove the truth of the matter asserted—i.e. the true meaning of the recorded transactions. Id. at 59. Similarly, when Dr. Gerber repeated the family statements, she was not presently applying any particular expertise, but simply drawing conclusions that any juror could arrive at on his own. Just as the agent in Dukagjini overstepped the bounds of his expert testimony by interpreting simple phrases, Dr. Gerber overstepped her bounds when she interpreted simple facts such as Respondent’s relocation to the United States or his alleged problems controlling his temper as a child. Whereas average jurors could not have known that “B-lick” referred to heroin, jurors in Respondent’s case were perfectly capable of interpreting the facts contained in the family statements without any particularized expert knowledge. Therefore, Dr. Gerber presented the statements only to prove the truth of the matter asserted.

Using hearsay evidence as the basis for an expert opinion is most justified when it would be impossible for the expert to form her opinion without it. In United States v. Stone, an IRS revenue officer testified as an expert witness in a prosecution for tax fraud, partially based on out-of-court conversations with employees of the defendants’ company. See 222 F.R.D. 334, 336 (E.D. Tenn. 2004). Without this information, it would have been impossible for the officer to explain an intricate and complex fraudulent scheme to lay jurors. See id.; see also State v. King, 904 A.2d 808 (N.J. Super. Ct. App. Div. 2006) (excluding information psychiatrist gathered from third parties, but permitting testimony about out-of-court conversations with defendant, because otherwise doctor would be left with “impermissible net opinion”). In this

case, however, Dr. Gerber had interviewed the Respondent for a total of four and a half hours and performed a series of psychological examinations and tests on him. She had more than a sufficient basis to render her opinion of his mental condition without resorting to hearsay statements of Respondent's family, made halfway around the world. Therefore the admission of the statements was in error, and an abuse of the District Court's discretion.

2. The probative value of the family statements did not substantially outweigh their prejudicial value, and the district court's jury instructions could not eliminate this detriment to Respondent.

Even if the Court finds that Dr. Gerber applied sufficient expertise when relating the family statements, the statements still should not have been admitted because their probative value did not substantially outweigh their prejudicial impact. See Fed. R. Evid. 703. Many courts have expressed concern that Rule 703 must be construed narrowly to prevent expert testimony from becoming a "conduit for hearsay." Hutchinson v. Groskin, 927 F.2d 722, 725 (2d Cir. 1991); see, e.g., United States v. Nettles, ___ F.3d ___ (7th Cir. 2007) (stating that though out-of-court statements are admissible to show context of defendant's own statements, court worries that in future cases government may disingenuously seek to admit statements for context that are, in fact, being offered for their truth); State v. Torres, 874 A.2d 1084 (N.J. 2005); People v. Goldstein, 843 N.E.2d 727 (N.Y. 2005). These and other courts recognize that the risk of violating a defendant's Sixth Amendment right to confrontation is a grave one, and hearsay should only be admitted as the basis for an expert opinion when its probative value is substantial. See also Fed. R. Evid. 703, advisory committee note ("The [2000] amendment provides a presumption *against* disclosure to the jury of information used as the basis of an expert's opinion and not admissible for any substantive purpose. . . .") (emphasis added).

In this case, admitting the family statements was extremely prejudicial to Respondent. The uncorroborated, unreliable hearsay of his mother and sister contained broad sweeping generalizations about Respondent's behavior as a juvenile and had a devastating impact upon the central issue in his defense. There is a strong risk that the jurors would not be able to treat the evidence as solely informing the credibility of Dr. Gerber's opinions, and instead accept the statements for their truth.

In People v. Goldstein, the defendant had raised an insanity defense to a murder charge. See 843 N.E.2d 727 (N.Y. 2005). Just as in Respondent's case, the prosecution's psychiatrist presented facts she had obtained in interviews with third parties in order to refute the defendant's characterization of his mental state. See id. at 729. The State argued that the statements were not offered for their truth, but only to help the jury in evaluating the expert's opinion. See id. at 732. The court rejected this claim, stating that "the 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" because it would be impossible for a jury to effectively evaluate the expert's opinion without first accepting that the statements were either true or false. See id. at 732-33. In other words, although the court found that interviews with third parties were a type of information accepted as reliable in the profession, it nevertheless held that admission of the substantive content of the interviews would be too prejudicial to the defendant. See id. at 731 ("[T]he factually implausible, formalist claim that experts' basis testimony is being introduced only to help in evaluation of the expert's conclusions but not for its truth ought not permit an end-run around a Constitutional prohibition." (quoting Kaye, et al., The New Wigmore: Expert Evidence § 3.7)). The facts of Respondent's case are indistinguishable from Goldstein, and its reasoning is

equally applicable here. The court therefore abused its discretion when it admitted the statements despite the unjustified degree of detriment to the Respondent.

Jury instructions cannot necessarily eliminate the prejudice to defendants when particularly inflammatory hearsay is admitted. See Bruton v. United States, 352 U.S. 123 (1968). In Bruton, during a joint trial, the lower court admitted a confession that implicated both defendants, but instructed the jury it should only be considered evidence against the declarant, and that it should not be considered evidence against the defendant who was not party to the statement. Id. However, this Court held that jurors could not reasonably be expected to follow these instructions because “such admonition against misuse is intrinsically ineffective in that the effect of such a non-admissible declaration cannot be wiped from the brains of the jurors.” Id. at 129 (quoting Delli Paoli v. United States, 352 U.S. 232, 247 (Frankfurter, J., dissenting)). Although as a matter of law, jurors should put such evidence out of their minds, this Court recognized that a “jury cannot segregate evidence into separate intellectual boxes” and the assumption that such prejudicial effects can be easily cured with instructions “all practicing lawyers know to be unmitigated fiction.” Id. at 129, 131.

In this case, the family statements were highly prejudicial to Respondent because of their devastating impact on his claim of false confession. Just as in Bruton, it would be unrealistic to expect jurors to use such testimony only as a basis for evaluating Dr. Gerber’s credibility, but then not consider the statements as true when debating the ultimate issue. Although our criminal justice system requires assuming that jurors will follow clear instructions in most cases, there are some contexts in which the risk that juries cannot or will not follow instructions are so great, “and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.” See id. at 135. Respondent’s case is such a

context. The consequence of the juror's failure to follow the court's instructions is the admission of highly damaging hearsay statements without an opportunity for cross-examination, in violation of the Sixth Amendment. Therefore, the District Court's admission of the statements, even coupled with a limiting jury instruction, was an abuse of discretion and must be reversed.

B. The Statements of Respondent's Family Are Testimonial because of the Objectively Reasonable Expectation that They Would be Used in Later Judicial Proceedings.

Crawford stated clearly that where testimonial hearsay is at issue, the Sixth Amendment requires nothing less than unavailability of the declarant and a prior opportunity for cross-examination. See Crawford, 541 U.S. at 68. Since Crawford, several courts of appeals have rejected a narrow definition of testimonial that would encompass only formalized materials such as affidavits and depositions, and instead held that "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" are testimonial. Crawford, 541 U.S. at 52. See, e.g., United States v. Hinton, 423 F.3d 355, 360 (10th Cir. 2005) ("where an objective witness reasonably anticipates that a given statement will be used at a later trial, that statement is likely testimony[ial] in the sense that it is offered to establish or prove a fact"); 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, 675 (6th Cir. 2004) (testimonial statements identified "by querying whether a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the crime"); United States v. Saget, 377 F.3d 223, 229 (2d Cir. 2004) ("statement must be such that the declarant reasonably expects that the statements might

be used in future judicial proceedings”). In this case, the statements were testimonial both because a reasonable witness would have expected his answers to a psychiatrist’s questions to be used at trial, and because Dr. Gerber elicited the information for precisely that reason.

1. Discussing the behavior of a criminal defendant with a government-hired psychiatrist justifies a reasonable expectation that the statements would later be used at trial.

The statements that Respondent’s mother and sister made to Dr. Gerber were testimonial because a reasonable person in their position would have expected their comments to be available for use at a later trial. In People v. Goldstein, a defendant’s Sixth Amendment right to confrontation had been violated when a prosecution psychiatrist was allowed to relate the substance of conversations she had with third parties about the defendant’s past behavior, which undermined the defendant’s insanity claim. See 843 N.E.2d 727, 732 (N.Y. 2005). The statements in Respondent’s case are thus of the same type as those in Goldstein, and were offered for the same purpose, that is, to contradict the defendant’s version of his own mental state. More importantly, however, in Goldstein, the court stated that the evidence did *not* specifically show that the declarants knew that the psychiatrist was working for the prosecution, but stated “it would be strange if [the doctor] didn’t tell them.” See id. at 733. The court found that the declarants were in no sense making “casual remark[s] to an acquaintance,” and they should reasonably have expected their statements to be used “prosecutorially.” See id. In the present case there is even stronger evidence that that Respondent’s family was aware of Dr. Gerber’s role. Gerber testified that she told Mrs. Har she was “working with Mr. Har at the Government’s request.” (R. 54.) Since Respondent’s family most likely knew that the government was prosecuting him for murder, and Gerber testified that she is “sure” she mentioned the word “trial” during the conversation, Respondent’s family almost certainly

anticipated that their statements would be available in some sort of future judicial proceeding. (R. 56.)

The actual subjective expectations of a declarant are not determinative of whether a hearsay statement is testimonial. See, e.g., Hinton, 423 F.3d 355; Cromer, 389 F.3d 662. In United States v. Summers, a suspect’s spontaneous comment to police upon arrest—“How did you guys find us so fast?”—was testimonial because a reasonable person would understand that such a statement insinuated consciousness of guilt, which could be expected to be of use in a future judicial proceeding, although it is highly unlikely that the suspect was subjectively thinking so logically at the time. See 414 F.3d 1302 (10th Cir. 2005). In this case, due to cultural differences or ignorance of the American criminal justice system, Respondent’s family may not have understood that the statements they made to a psychiatrist would be shared with government officers. However, since an objectively reasonable person being questioned by a psychiatrist hired by the government about the behavioral characteristics of a criminal defendant would be so aware, the statements are therefore testimonial regardless of the actual expectations or comprehensions of Respondent’s mother and sister.

2. When an interviewer intends to collect information for use at a later trial in lieu of live testimony, responses to the questions are testimonial.

In some situations, the testimonial nature of a statement may also be indicated by the intent of the party eliciting the statement. See Davis v. Washington, 126 S. Ct. 2266 (2006). In Davis, a woman called 911 for help with an ongoing domestic dispute, but the emergency situation dissipated shortly thereafter when the aggressor left the home. Id. at 2277. The operator then began asking the caller detailed questions about the assailant and about the events leading up to the assault. Id. at 2271, 2277. The caller’s responses to these questions were testimonial because they were not made in the course of an ongoing emergency, the primary

purpose of the investigation was to establish or prove past events potentially relevant to a later prosecution, and the exchange was strongly analogous to the “structured police questioning” that occurred in Crawford. Id. at 2273-77.

In the present case, Dr. Gerber was performing an analogous function to the 911 operator in Davis. Both were collecting information on behalf of prosecuting agencies. Dr. Gerber testified that her calls to Respondent’s family were for the express purpose of preparing her trial testimony. (R. 55.) This Court stated in Davis that statements made during police interrogations are testimonial because they “are an obvious substitute for live testimony . . . they do precisely what a live witness does on direct examination.” Id. at 2278. It is likely that Dr. Gerber knew that Respondent’s family would be unavailable to testify at trial, and therefore she was gathering information about Respondent’s past that could be used at trial in lieu of live testimony. Therefore, just like the background information gathered from the caller in Davis, the background information gathered from Respondent’s family must be considered testimonial because both were intended to be substitutions for in-court direct examination, which is precisely the type of evil the Confrontation Clause was designed to prevent.

CONCLUSION

For the foregoing reason, Respondent respectfully requests that this Court AFFIRM the decision of the Fourteenth Circuit Court of Appeals.

March 2, 2007

Respectfully submitted,

Counsel for the Respondent

APPENDIX A

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

APPENDIX B

FEDERAL RULES OF EVIDENCE

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill,

experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Rule 801. Definitions

The following definitions apply under this article:

(a) Statement.

A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant.

A "declarant" is a person who makes a statement.

(c) Hearsay.

"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.

(d) Statements which are not hearsay.

A statement is not hearsay if--

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) Admission by party-opponent. The statement is offered against a party and is

(A) the party's own statement, in either an individual or a representative capacity or

(B) a statement of which the party has manifested an adoption or belief in its truth, or

(C) a statement by a person authorized by the party to make a statement concerning the subject,

or

(D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or

(E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) Definition of unavailability.

"Unavailability as a witness" includes situations in which the declarant--

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions.

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) [Other exceptions.][Transferred to Rule 807]

(6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.