

No. 06-117

**IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2006**

UNITED STATES OF AMERICA,

Petitioner,

-against-

ROUNN HAR,

Respondent.

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

BRIEF FOR RESPONDENT

Attorneys for Team #18

ISSUES PRESENTED

- I. Whether the trial court erred in performing its Daubert gatekeeping function where it determined that a defense expert's testimony concerning false confessions and the factors that contribute to their falsity was neither reliable nor helpful to the jury.
- II. Whether the trial court erred in failing to provide jury instructions to make the jury aware that, at times, people falsely confess to crimes, including murder, where the defendant challenges the truthfulness of his confession.
- III. Whether the trial court erred in admitting the substantive content of a prosecution psychiatrist's testimony describing statements she elicited from the Respondent's mother and sister in preparing for trial, even though the trial court instructed the jury to consider those statements only to assess the thoroughness of the expert's opinion but not for the truth of any facts contained in them.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fourteenth Circuit is reproduced in the record at pages 88-101 respectfully.

STATEMENT OF THE CASE

Statement of Facts

The Murder

Rounn Har (“Mr. Har”) was born in Jemg, Mago, where he lived until he emigrated to the United States in May of 1996. (R. 1) A short time after arriving, Mr. Har was hired by the *Daily Dollars* television show as a production assistant. (R. 1) Bruce Seafoam (“Seafoam”), the game show’s host, was found dead on the *Daily Dollars* set on February 28, 1998. (R. 1)

The head detective on the investigation of Seafoam’s death was Nathaniel Walker (“Walker”) of the Federal Bureau of Investigation. (R. 39) Upon arriving at the murder scene, Walker found that Seafoam’s body had been tied to the *Daily Dollars* game wheel through use of an unidentifiable knot. (R. 40) Before any pictures could be taken of the scene, medical personnel arrived and cut Seafoam down from the wheel, destroying the knot in the process. (R. 40) Other than a broken picture frame on the floor, there was no forensic evidence, no fingerprints, and no DNA found at the scene. (R. 41)

During the investigation Mr. Har was interviewed by Walker’s colleague, but there was not enough evidence for Mr. Har to be considered a serious suspect. (R. 42) Throughout the remainder of his employment at the FBI, no arrest was made for Seafoam’s murder. (R. 42) Eight years later, while Walker was working as a private investigator, he became re-interested in Seafoam’s murder because he saw a picture of a Magoian knot in *The National World Magazine* that he thought resembled the one used to tie Seafoam to the wheel. (R. 42) Walker then enlisted his daughter Nebraska Walker (“Nebraska”) to help him re-investigate Seafoam’s case. (R. 43)

The Interrogation

Nebraska contacted Mr. Har using an internet dating website, and they established an e-mail relationship over the course of 3 weeks in which Nebraska consistently deceived Mr. Har into thinking that she was romantically interested in him. (R. 36) Nebraska never informed Mr. Har that she was a private investigator, or informed Mr. Har that her father was a retired FBI agent, and instead she lied and told Mr. Har she was an elementary school teacher. (R. 35)

Nebraska and Mr. Har finally met for a date eight years after Seafoam's murder. (R. 31) Throughout the date, Nebraska consistently deceived Mr. Har into thinking she was romantically interested in him by telling him she thought they could have something special, holding his hand, putting her hand on his leg, and kissing him at the beach. (R. 33, 35, 73)

After having been together for an entire day, Nebraska invited Mr. Har back to her house, gave him a beer, and introduced him to her father. (R. 36) Soon after introductions, Walker and Nebraska proceeded to forcefully interrogate Mr. Har using numerous coercive techniques: they falsely accused him of murdering Seafoam; they badgered him to try to remember committing the murder; they falsely promised Mr. Har leniency if he confessed; and Walker physically intimidated Mr. Har by walking around the room holding a golf club. (R. 73-85) Each of the three times that Mr. Har attempted to end the interrogation by leaving the house, the Walkers physically prevented him from doing so by pushing him back down into his chair. (R. 73-85)

Throughout the interrogation, Mr. Har informed Nebraska on numerous occasions that he had not slept in three days, he had driven through the night, he was "really tired," and he was confused. (R. 73-85) Mr. Har also showed physical signs of disorientation by covering his eyes, shaking his head, and staring at the ceiling in exasperation. (R. 73-85) As a result of this

physical intimidation, deception, coercion, and emotional manipulation, Mr. Har falsely confessed to Seafoam's murder. (R. 73-85)

The Trial and Appeal

In preparation for trial, the state hired Dr. Jessica Gerber to evaluate Mr. Har and prepare an opinion for trial. (R. 51) Dr. Gerber is an independent clinical psychologist who is often retained by the state to evaluate defendants and witnesses for a fee. (R. 54) To prepare her opinion regarding Mr. Har's mental state and to help her shape her testimony for trial, Dr. Gerber called Mrs. Har, Mr. Har's mother, and Chava, Mr. Har's sister, in Mago. (R. 54) During the conversations, Dr. Gerber elicited information from both Mrs. Har and Chava regarding Mr. Har's childhood and used this information to support her opinion of Mr. Har's mental condition. (R. 60) During these conversations Dr. Gerber indicated that she was a psychiatrist working for the Government, that she wanted to talk about Mr. Har, and that she was involved in a trial. (R. 54) At sidebar during trial, Dr. Gerber admitted that she was not in a position to know whether Mrs. Har and Chava had personal knowledge about what they told her, or that Mrs. Har and Chava remembered the instances they recounted from Mr. Har's childhood accurately. (R. 57-58) The trial court permitted Dr. Gerber's testimony to include the substantive content of her conversations with Mrs. Har and Chava. (R. 59-61)

During trial, the court conducted a hearing and admitted the testimony of defense expert, Dr. Roberta Kalf. (R. 14) Dr. Kalf testified that Mr. Har suffered from Post-Traumatic Stress Disorder, had a fear of authority figures due to his traumatic upbringing, and had a "compliant personality" which made him "highly open to suggestion from others." (R. 14-15) She concluded that the combination of Mr. Har's personality disorders and the Walker's coercive interrogation tactics would have made him highly likely to have given a false confession. (R. 15)

The trial court also considered the admissibility of testimony by Dr. John Wallace, an expert in social psychology who had extensive experience in research, teaching, speaking, and scholarly writing on the occurrence of false confessions. (R. 6, 17) Dr. Wallace testified to the methods social science psychologists have used to come to the conclusion that false confessions are a common occurrence among certain groups of the population. (R. 5) Dr. Wallace also testified that false confessions need to be explained to people because they are counterintuitive due to common misperceptions that people would not confess to something they did not do. (R. 5, 10)

Dr. Wallace testified that it is “absolutely accepted” in his twenty-five year old social psychology field, that false confessions occur. (R. 6, 9, 14) He also stated that social psychologists research and study false confessions through controlled and observational studies, and subject the findings to peer review before they are widely published in numerous scholarly journals and hundreds of articles. (R. 8-9) Dr. Wallace testified that observational and controlled studies are the only means of testing false confessions because the re-creation of a false murder confession on a person with personality disorders would be “totally unethical.” (R. 13)

In addition, Dr. Wallace testified that his observational studies review and analyze tapes and transcripts of interrogations of exonerated defendants, to search for the presence of the documented factors known to cause false confessions. (R. 8) Dr. Wallace stated that his retrospective studies find that false confessions are very common among those suffering from exhaustion, sleep deprivation, stress, anxiety and personality disorders. (R. 11) Dr. Wallace also testified that common police interrogation tactics such as minimization, extended questioning, false accusations of guilt, and false promises of leniency were likely to lead to a false confession.

(R. 11) Despite Dr. Wallace's qualifications and expertise, the trial court excluded Dr. Wallace's testimony. (R. 16)

The trial court also rejected Mr. Har's proposed jury instructions which cautioned the jury to use great care when determining the truthfulness of his confession. The instructions alerted the jury to the counterintuitive nature of false confessions by listing specific factors that the jury should consider in evaluating Mr. Har's confession. (R. 86-87)

On appeal, the court reversed and found that the trial court improperly performed its Daubert gatekeeping function when it excluded Dr. Wallace's testimony and should have given the jury the instructions proffered by the defense. (R. 88-101)

Procedural History

On June 2, 2005 Rounn Harr was indicted in the United States District Court in the Eastern District of Boerum for murder under 18 U.S.C. § 1111. (R. 2) The District Court held a hearing on the prosecution's pre-trial motion on July 7, 2005. (R. 3) The Honorable Susan Bright, United States District Judge, granted the prosecution's motion to admit the expert testimony of defense witness Dr. Roberta Kalf, but excluded the expert testimony of defense witness Dr. John Wallace. (R. 5-16) During the trial, after an objection by counsel for defense, Judge Bright admitted the testimony of state's expert witness Dr. Jessica Gerber. (R. 59) At trial, Judge Bright also denied the defense's request for proposed jury instructions. (R. 62)

Respondent brought an appeal in the United States Court of Appeals for the Fourteenth Circuit. (R. 88) On July 11, the Fourteenth Circuit reversed the trial court's decision and held that Dr. Wallace's testimony should have been admitted, the substance of Dr. Gerber's testimony should not have been admitted, and the proposed jury charge should have been read to the jury. (R. 88-101) This Court granted certiorari on October 3, 2006 to decide 1) whether the trial court

properly performed its Daubert gate-keeping function, 2) whether the Respondent's proposed jury instructions should have been admitted, and 3) whether admission of the substantive content of Dr. Gerber's testimony violated Respondent's Confrontation Clause rights. (R. 108)

SUMMARY OF THE ARGUMENT

The trial court inadequately performed its gatekeeping function when it excluded Dr. Wallace's expert testimony which satisfied Daubert's flexible test because it was based on reliable social science, peer-reviewed, and is generally accepted in his field. The jury required the assistance of Dr. Wallace's testimony because the occurrence of false confessions is counterintuitive to, and beyond the common knowledge of, a reasonable juror.

Further, the trial court erred when it failed to give the specific jury instructions requested by the defense to indicate to the jury the factors it should evaluate when determining whether Mr. Har's confession was reliable beyond a reasonable doubt. These instructions were necessary to ensure that the jury proceeded with caution and care where the evidence raised serious questions about the credibility of Mr. Har's confession and where the confession was essential to the prosecution's case.

In addition, the trial court violated Mr. Har's Confrontation Clause rights when it admitted testimonial statements without providing Mr. Har an opportunity to cross examine the witnesses against him. Mrs. Har and Chava's statements to Dr. Gerber were testimonial because they were made to a state-hired psychiatrist under circumstances that would suggest to a reasonable declarant that the statements would later be used at trial. Because Mrs. Har and Chava's statements were testimonial, Mr. Har had a constitutional right to confront these witnesses at trial.

The trial court also violated Mr. Har's Confrontation Clause rights because it admitted unreliable hearsay statements that were unnecessary to aid the jury in evaluating the thoroughness of Dr. Gerber's opinion. Furthermore, the trial court's jury instructions were inadequate because it was unreasonable to believe that the jurors could segregate statements offered as the basis of Dr. Gerber's opinion from statements offered for their truth.

ARGUMENT

I. THE TRIAL COURT FAILED TO PROPERLY PERFORM ITS DAUBERT GATEKEEPING FUNCTION WHEN IT EXCLUDED DR. WALLACE'S EXPERT TESTIMONY CONCERNING THE UNDERLYING FACTORS THAT CONTRIBUTE TO FALSE CONFESSIONS WHERE HIS TESTIMONY WAS BASED ON A RELIABLE SOCIAL SCIENCE AND WAS CRITICAL IN HELPING THE JURY EFFECTIVELY EVALUATE THE TRUTH OF MR. HAR'S CONFESSION.

This Court should affirm the Fourteenth Circuit Court of Appeals and hold that the trial court abandoned its Daubert gate-keeping function when it excluded Dr. Wallace's expert testimony concerning false confessions. Expert testimony is admissible under Federal Rule of Evidence 702 when it is comprised of scientific, technical, or other specialized knowledge that will assist the trier of fact to understand the evidence or determine a fact in issue. FED. R. EVID. 702. Rule 702, like all Federal Rules of Evidence, was designed with a "liberal thrust" and a "general approach of relaxing the traditional barriers to 'opinion testimony'." Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589-92 (1993). Without the application of such specialized knowledge, an intelligent evaluation by the trier of fact is often difficult or impossible. see FED. R. EVID. 702 advisory committee's notes.

To ensure this intelligent evaluation by the jury, a trial judge must act as a gatekeeper to admit expert testimony that is both 1) reliable; and 2) relevant or will assist the jury, while excluding "expertise that is *fausse* (emphasis added) and science that is junky." Kumho Tire

Co., Inc. v. Carmichael, 526 U.S. 137, 147, 158 (1999)(Scalia, J., concurring). This gatekeeping function requires a flexible approach in which the trial judge must make a particularized determination of reliability and relevance in light of the specific circumstances of each individual case. Kumho Tire Co., 526 U.S. at 158; United States v. Belyea, 159 Fed.Appx. 525, 529 (4th Cir. 2005)(Daubert requires a “nuanced, case-by-case analysis of whether the proposed expert testimony will assist the trier of fact”). While this flexibility gives a trial judge broad discretion, it does not allow her to abandon the gatekeeping function altogether. Id. at 158-59 (Scalia, J., concurring).

Dr. Wallace’s expert testimony is the exact type of specialized social science knowledge that Rule 702 was designed to admit, and should have been admitted by the trial judge. The methods and principles underlying his research on false confessions are both reliable and accepted in the field of social psychology. Dr. Wallace’s testimony was relevant because it directly bore on the jury’s intelligent evaluation of Mr. Har’s confession; the lynchpin in the prosecution’s case. The trial judge abandoned her gatekeeping function by failing to conduct a nuanced analysis. By prematurely dismissing Dr. Wallace’s reliable and relevant expert testimony, the trial judge abandoned her gatekeeping function by stripping the jury of its ability to intelligently evaluate the truth of Mr. Har’s confession, and thereby subverted the core principles of the Federal Rules of Evidence favoring the admission of valuable expert testimony.

A. The Trial Judge Misapplied Daubert In Excluding Dr. Wallace’s Testimony On False Confessions Where His Social Science Was Peer Reviewed And Generally Accepted.

Dr. Wallace’s expert opinion was admissible expert testimony because it had been peer reviewed and was based on generally accepted social science methods and principles that were widely practiced and long-established in the field. Under Rule 702, expert testimony should be

admitted so long as it is the product of reliable principles and methods. FED. R. EVID. 702. To ensure only reliable expert testimony is admitted, a trial judge must act as a gatekeeper and evaluate expert testimony by focusing “solely” on the principles and methodology underlying the expert testimony. Daubert, 509 U.S. at 595.

This Court, in Daubert and Kumho, promulgated four general principles and factors (“Daubert factors”) that a judge may consider to execute its gatekeeper function.” Kumho Tire Co., 526 U.S. at 143; Daubert, 509 U.S. at 595. These Daubert factors examine whether the methods and principles underlying the expert testimony: 1) can be and have been tested (“Falsifiability”); 2) have been subjected to peer review and publication (“Peer review”); 3) have a high known or potential rate of error with standards controlling the theory’s operation (“Rate of error”), and; 4) have achieved general acceptance in the relevant community (“General acceptance”). Id. at 593-94.

Daubert makes patently clear, however, that these four factors should serve only as a helpful guide to a trial judge and not as a definitive checklist. Daubert, 509 U.S. at 593. In the context of other specialized knowledge, Daubert’s factors may not all be pertinent or applicable in determining whether testimony is reliable. Kumho, 526 U.S. at 150. The trial judge must exercise its discretion to assess reliability using only factors that are a “reasonable measure of reliability.” Id. In United States v. Hall, (“Hall II”), the trial court specified that two of Daubert’s four factors, falsifiability and rate of error, had “little or no application” to the reliability assessment and admission of a social psychology expert on false confessions, whose principles are based on real-world experience rather than scientific experimentation. United States v. Hall II, 974 F.Supp. 1198, 1200-01, 1202 (C.D. Ill. 1997), cert. denied, 527 U.S. 1029 (1999). The court in Hall II came to this conclusion for two reasons. First, it would be unethical

to scientifically experiment on people with personality disorders by subjecting them to coercive interrogation techniques that would lead them to falsely confess to a crime they did not commit.

Id. Second, practicality constraints limit social science research on false confessions to retrospective analysis of the factors that caused a previous false confession and cannot create new experiments that replicate the manipulative circumstances that cause people to falsely confess. Id. Instead, the court specifically found that the social psychology field of false confessions, identical to Dr. Wallace's, constituted a reliable body of specialized knowledge, using the following three factors: 1) systematic Observation and Analysis; 2) peer review through extensive publication, and; 3) general acceptance in the field. Id.

1. Dr. Wallace's social psychology research is based on systematic observation and analysis of real-world false confessions.

Reliable social science based on real-world experience is verified through systematic observation and analysis of real-life events. Hall II, 974 F.Supp. at 1203. In Hall II, the court found the expert's testimony in the field of false confession social psychology to be based on systematic observation and analysis when it retrospectively examined the false confession transcripts of exonerated defendants to look for the presence of personality disorders and coercive techniques that were well known to lead to false confessions. Id.

Dr. Wallace's expertise is based on a valid form of observational and analytical methodology. This case deals with the exact same science in Hall II, and is supported by the exact same systematic analysis and observation. (R. 8) Like in Hall II, Dr. Wallace based his testimony on his examination of the transcripts of false confessions made by DNA exonerated defendants. (R. 8) Since the expert's observational methodology was held to be reliable in Hall II, Dr. Wallace's identical methodology should likewise have been found admissible in the trial court.

2. Dr. Wallace's social psychology research on false confessions has been subjected to extensive peer review and publication.

Dr. Wallace's social psychology research satisfies Daubert's peer review factor because it has been subjected to extensive peer review and publication. Peer review is a reasonable measure of the reliability of social science testimony. Hall II, 974 F.Supp. at 1203. A trial judge should consider whether the expert's methodology has been submitted to scrutiny in the relevant social scientific community through peer review and subsequent publication in scholarly journals. Id. (allowing peers to critically analyze and expose any weaknesses in its methodology or principles); see Daubert, 509 U.S. at 593 ("submission to the scrutiny of the scientific community increases the likelihood that substantive flaws in the methodology will be detected"). In Hall II, the court held there was sufficient peer review where the social science of false confessions was widely published in scholarly journals and nearly one thousand articles. Hall II, 974 F.Supp. at 1203-04; cf. Kumho Tire Co., 526 U.S. at 157 (Expert's methodology unreliable because there was no reference "to any articles or papers that validate [the expert's] approach"). In addition, the court found the expert's testimony specifically reliable because he had personally submitted over thirty articles for publication and scholarly review. Hall II, 974 F.Supp. at 1203.

Dr. Wallace's social science theory on false confession has been subjected to extensive peer review and subsequent publication. Like in Hall II, Dr. Wallace testified that all observational studies on false confessions are submitted to criticism from peers prior to being extensively published in numerous peer reviewed journals and thousands of articles. (R. 9) Furthermore, not only was Dr. Wallace's testimony based on the identical social science accepted as reliable in Hall II, but he has also personally published more than fifty articles on false confessions in more than ten peer reviewed journals. (R. 18)

3. Dr. Wallace’s social psychology research on false confessions has general and long-standing acceptance in the social science community.

General and long-standing acceptance within the relevant scientific community is a reasonable measure of the reliability of expert testimony under Daubert. Hall II, 974 F.Supp. at 1203. A trial judge should find an expert’s opinions have been generally accepted in the relevant field when other practitioners and experts draw similar conclusions using the same methods. Daubert, 509 U.S. at 593. In Hall II, the social scientist’s conclusions on false confessions were widely accepted because all experts in this twenty-five year old field used the same observational methods to establish sociological factors that cause false confessions. Hall II, 974 F.Supp. at 1204; cf. Kumho Tire Co., 526 U.S. at 157 (no general acceptance because no indication in the record that other experts either used the same tests or drew the same distinctions as a result).

Other experts in Dr. Wallace’s field generally accept his findings because they draw his same conclusions using his same observational methods. Like in Hall II, Dr. Wallace’s testimony indicated that other experts in his twenty-five year old field “absolutely accepted” the occurrence of false confessions. (R. 14) Additionally, Dr. Wallace testified that others in the field “generally recognized” the documented sociological factors leading people with personality disorders to falsely confess when subjected to coercive interrogation tactics. (R. 7-8, 14)

B. The Trial Court Abandoned Its Daubert Gatekeeping Function When It Excluded Dr. Wallace’s Expert Testimony And Thereby Deprived The Jury Of Critical Information That It Needed To Properly Evaluate The Reliability Of Mr. Har’s Confession.

The trial judge handicapped the jury in its primary function of evaluating the reliability of Mr. Har’s confession when it excluded Dr. Wallace’s critical testimony on the causes and factors of false confessions. The “ultimate test” of relevance under Daubert is whether the expert’s testimony will assist the jury to understand the evidence or to determine a fact in issue. United

States v. Hall I, 93 F.3d 1337, 1342 (7th Cir. 1996); Daubert, 509 U.S. at 589-92; FED. R. EVID. 702. Expert testimony assists jurors when they are “plainly unqualified” to evaluate the truth of the evidence “without enlightenment from those having a specialized understanding of the subject matter involved.” United States v. Shay, 57 F.3d 126, 132 (1st Cir. 1995). Jurors are plainly unqualified to discern the truth without expert assistance when the expert’s substantive knowledge is: 1) outside their common knowledge, or; 2) a commonly held misperception. see Belyea, 159 Fed.Appx. at 530; See Hall I, 93 F.3d at 1344.

1. It is outside the common knowledge of a reasonable juror that certain coercive interrogation tactics, like those used by the Walkers, can cause people with certain personality disorders to falsely confess.

It is outside the common knowledge of most jurors that coercive interrogation tactics can cause people with certain personality disorders to make statements against their own interest. A trial judge should not exclude expert testimony for lack of relevance under Daubert unless it is “obviously” within the common knowledge of jurors. Belyea, 159 Fed.Appx. at 530.¹ False confessions are counterintuitive to general perceptions and are not obviously within the common knowledge of a reasonable juror. Belyea, 159 Fed.Appx. at 530.

Even if a reasonable juror understands people lie as a general proposition, it is not the same as understanding the intricacies of the phenomenon that causes people to lie “to their own detriment by falsely confessing to crimes they did not commit.” Id. at 529; see FED. R. EVID. 804(b)(3) advisory committee’s note (suggesting that statements against interest are rare). It is counterintuitive to a reasonable juror that defendants on trial for murder may make statements against their own self-interest. Belyea, 159 Fed.Appx. at 530. The 1st, 4th and 7th Circuits have

¹ see United States v. Lester, 254 F.Supp.2d 602, 609 (E.D.Va. 2003) (Expert testimony assistance is required because traditional trial procedures are ineffective in exposing the possible defect in the reliability of the [evidence] when the testimony is beyond the jury’s common knowledge)

all noted this dichotomy and require a trial judge to admit expert testimony to alert the jury to this reality. Belyea, 159 Fed.Appx. at 529-530 (4th Cir.); Shay, 57 F.3d at 133 (1st Cir.); see Hall II, 974 F.Supp. at 1205-1206 (C.D.Ill.). In Belyea, the district court abused its discretion when it excluded an expert's testimony on false confessions on the grounds that "jurors know people lie." Belyea, 159 Fed. Appx. at 530. This broad generalization was erroneous as a matter of law because even though jurors may know people lie, they do not likely understand that people confess falsely or that someone in a defendant's position may be more likely to do so as a result of coercive interrogation tactics. Id. The court found the trial judge erred because he did not inquire into whether the jurors knew that false confessions occurred and the specific sociological factors that may cause them. Id.

In excluding Dr. Wallace's testimony, the trial court deprived the jury of critical information outside of its common knowledge that it needed to critically evaluate the truth of Mr. Har's confession. Similar to the expert in Belyea, Dr. Wallace also testified that the occurrence of false confessions was not self-evident to most jurors. (R. 9-10) While the jurors below may have known that people lie as a general proposition, Dr. Wallace's testimony was necessary to make clear to the jury that someone in Mr. Har's position may give a false confession when subjected to coercive interrogation techniques similar to those used by the Walkers. This court should find reversible error, as the appeals court found in Belyea, because the trial judge below failed to admit Dr. Wallace's testimony and never inquired whether the jurors commonly knew about false confessions.

2. Even if jurors have gained certain beliefs about the occurrence of false confessions through mass media, Dr. Wallace’s expert testimony was still vital to the jurors’ critical understanding and evaluation of whether the Walkers’ coercive techniques might have caused Mr. Har to falsely confess.

Even if a social psychologist’s expertise may “overlap” to some extent with the jurors’ commonly held beliefs about the existence of false confessions, properly conducted expert testimony “often shows that commonly held beliefs are in error.” Hall I, 93 F.3d at 1344; Shay, 57 F.3d at 133 (social science testimony can “explode common myths” inherent to jurors’ commonly held beliefs). In Hall I, the trial court excluded the testimony of an expert on false confessions on the grounds that the testimony would not assist jurors when they already held some common beliefs about false confessions. Id. at 1344. The appeals court found that the trial court’s ruling “overlooked the utility of valid social science,” which could have assisted the jury “to assess the truthfulness and accuracy of the confession” by alerting the jury to the fact that it might hold its common beliefs in error. Id. at 1345.

The trial court should have admitted Dr. Wallace’s testimony, even if it overlapped with commonly held beliefs about false confessions, to show that these commonly held perceptions might in fact be erroneous. Consistent with the jurors’ knowledge in Hall I, recent media coverage could have given the jurors below some preconceived notions about false confessions. (R. 16) Dr. Wallace’s testimony had utility in exploding any common myths inherent to any of the jurors’ misbegotten beliefs. If it was an abuse of discretion to exclude this illuminating testimony in Hall I, it was similarly an abuse of discretion for the trial court to exclude Dr. Wallace’s enlightening testimony here.

II. THE TRIAL COURT SHOULD HAVE SPECIFICALLY INSTRUCTED THE JURY ON THE CRUCIAL ROLE OF MR. HAR'S CONFESSION IN THIS CASE BECAUSE THE EVIDENCE INDICATED HIS CONFESSION WAS UNRELIABLE AND BECAUSE THE CONFESSION WAS ESSENTIAL TO THE PROSECUTION'S CASE.

The trial judge should have given specific cautionary instructions on false confessions because the evidence showed a strong possibility Mr. Har's confession was false and his confession was the sole basis for his conviction. This Court has found a defendant's confession can be so probative and damaging that a jury is often tempted to reach a decision based on the confession alone. Arizona v. Fulminante, 499 U.S. 279, 280 (1991). If a confession is likely to have such a profound impact on a jury, then the jury's sole reliance upon a false confession will likely lead to the wrongful conviction of an innocent person. See Stephen A. Drizin, Richard A. Leo, The Problem of False Confessions in the Post-DNA World, 82 N.C. L. REV. 891, 960 (2004). (Four out of every five innocent individuals whose confessions were later proven to be false, but who chose to take their case to trial, are convicted on nothing more than their confession). The conviction of an innocent person is one of the greatest dangers a trial judge must guard against, and though "an identification instruction alone will not, of course, obviate the danger...it is a step in the right direction." United States. v. Gregory, 369 F.2d 185, 190 (D.C. Cir. 1966).

As the Fourteenth Circuit Court of Appeals noted below, eyewitness identification evidence poses analogous special problems of reliability to confession evidence. (R. 98) Like eyewitness identification evidence, false confession evidence can be "devastatingly persuasive" to a jury, and its validity is often subject to various external and personal factors that existed at the time the identification or confession took place. See United States. v. Greene, 591 F.2d 471, 475 (8th Cir. 1979); see Fulminante, 499 U.S. at 1248 (finding coerced confessions unreliable);

see United States v. Telfaire, 469 F.2d 552, 555 (D.C. Cir. 1972) (eyewitness identification has special problems of reliability).

Because eyewitness identification evidence is so unreliable and because juries often place such great weight on eyewitness identification evidence, there is a very real danger that a jury's reliance on a mistaken identification will lead to the conviction of an innocent person. Id. As a result of this very real threat to justice, the 8th circuit promulgated, and the 4th, 7th, 10th and D.C. Circuits adopted, specific model instructions, ("Telfaire Instructions"), that a trial judge must give to a jury so that it can properly find the circumstances of the potentially unreliable eyewitness evidence "convincing beyond a reasonable doubt". Id. at 555, 558 ("The presumption of innocence that safeguards the common law system must be a premise that is realized in instruction and not merely a promise"). It is reversible error if a judge fails to give specific cautionary instructions: 1) when the evidence raises serious questions about the possibility of unreliability; 2) when the facts indicate that the evidence was essential to the conviction, and; 3) when the instructions given did not expressly indicate to the jury to be wary of the unreliable and essential piece of evidence and its crucial role in the case. Id.; Greene, 591 F.2d at 477.

A. There Was A Strong Likelihood That Mr. Har's Confession Was False Because He Was Unable To Withstand The Stress Of The Walkers' Interrogation Tactics Due To His Traumatic Upbringing, Related Fear Of Authority Figures, And Compliant Personality.

There was a strong likelihood of the falsity of Mr. Har's confession because he was unable to withstand the stress of the Walkers' interrogation tactics due to his traumatic upbringing, related fear of authority figures, and his compliant and suggestive personality. It is prejudicial error when a court fails to give the jury a specific Telfaire instruction that "highlight[s] the problems" associated with a type of evidence that has a high possibility of being

uncertain or unreliable, given the totality of the circumstances. Greene, 591 F.2d at 476; see United States v. Holley, 502 F.2d 273, 276 (4th Cir. 1974) (“We agree that to guard against misidentification and the conviction of the innocent, it is not enough that the trial judge himself be specifically alerted to the detailed factors that enter into the totality of the circumstances, but that the jury should also be so charged”). Without such specific jury instructions, there is a danger that juries will blindly convict a defendant using only evidence whose credibility they have not yet found to be reliable beyond a reasonable doubt. Id. In United States v. Bernard, the trial court committed prejudicial error in failing to instruct the jury to use “special caution and careful consideration” when judging the credibility of “inevitably suspect and unreliable” accomplice testimony. United States v. Bernard, 625 F.2d 854, 857 (9th Cir. 1980). Likewise, in Greene, in which the evidence indicated that an eyewitness identification may be unreliable, the court committed prejudicial error when its instruction to assess the credibility of the evidence generally, failed to highlight the special problems of reliability with the identification. Greene, 591 F.2d at 476. The court held specific instructions were required to ensure the jury found the identification to be reliable beyond a reasonable doubt. Greene, 591 F.2d at 476.

There is a strong likelihood that the Walkers’ interrogation tactics led Mr. Har to falsely confess to the murder due to his traumatic upbringing, fear of authority figures, and compliant personality. Like in Bernard, in which the accomplice’s testimony against the defendant was inevitably suspect and unreliable, Mr. Har’s confession here is similarly suspect and unreliable. Mr. Har was sleep deprived when he was subjected to the Walkers interrogation tactics which included lies, emotional manipulation, and physical coercion. (R. at 35, 36, 37, 48). Additionally, like in Greene, the trial court here only referred generally to the jury’s responsibility of assessing credibility, without highlighting the specific problems and factors that

influence the reliability of confessions, to ensure the jury found the confession to be reliable beyond a reasonable doubt. (R. 86-87) Since the trial courts in both Bernard and Greene committed prejudicial error by failing to specifically instruct the jury to the factors of unreliability surrounding the evidence in question, the trial court here likewise committed prejudicial error by failing to give specific instructions regarding the unreliability of Mr. Har's confession.

B. The Prosecution's Case Against Mr. Har Was Based Substantially On His Confession.

Mr. Har's conviction, as well as the prosecution's case against him, was based substantially on his confession. It is reversible error when a trial court fails to give "specific and detailed" instructions on the factors influencing reliability, where the case against the defendant is "based solely or substantially" on such unreliable evidence. See Greene, 591 F.2d at 475; (citing United States v. Dodge, 538 F.2d 770, 784 (8th Cir. 1976)). In Greene, the trial court erred in failing to give the jury specific Telfaire instructions, where, despite "considerable circumstantial evidence," the prosecution's case rested substantially on one eyewitness identification which the facts showed likely to be unreliable. Id.; cf. United States v. Mays, 822 F.2d 793, 798 (8th Cir. 1987) (No prejudicial error committed in failing to give specific jury instruction where there was other corroborating evidence by the defendant's accomplice).

The prosecution's case against Mr. Har was based substantially on his confession. Like in Greene, despite the fact that the prosecution here had speculative circumstantial evidence, it substantially based its case on Mr. Har's videotaped confession. (R. 73-85) If it was reversible error to fail to give a specific Telfaire instruction in Greene, it was likewise reversible error for the trial court here to fail to instruct the jury when Mr. Har's confession was essential to the prosecution's case.

C. Because Mr. Har's Confession Was Unreliable, And Because The Prosecution's Case Rested Substantially Upon It, The Trial Court Erred When It Failed To Expressly Alert The Jury To The Crucial Role That Mr. Har's Confession Played In His Case.

A trial court commits reversible error when it does not alert the jury to the crucial role of a solitary and clearly unreliable piece of evidence. Greene, 591 F.2d at 476-77. In Greene, the trial court committed prejudicial error when it “never...elaborated as to any of the dangers of misidentification,” and only informed the jury of some of the considerations pertaining to the general credibility of all witnesses. Id. Similarly, in Telfaire, the court promulgated model instructions which specified that the jurors “should scrutinize the identification with great care.” Telfaire, 469 F.2d at 558. Lastly, in Pon Wing Quong v. United States, a case cited by dissenting Judge Snit below, the trial court gave a proper jury instruction when it instructed the jury that “all verbal admissions must be received with caution.” Pon Wing Quong v. United States, 111 F.2d 751, 758-59 (9th Cir. 1940); (R. 102, 104).

The trial court committed prejudicial error against Mr. Har because it failed to instruct the jury of the crucial role Mr. Har's confession played in this case and that the jury should consider it with caution. Similar to Greene, the trial court here only instructed the jury to generally consider the truthfulness of Mr. Har's confession, but never specified the dangers that would result to his case should that confession be false. (R. 64-66) Mr. Har's proposed jury instructions would have made the jury aware of the dangers of a false confession by specifying that it can play a crucial role in the context of a murder trial. (R. 86-87) Additionally, the trial court's instructions neither mention the “great care” as the model instructions in Telfaire suggested, nor direct the jury to proceed with “caution” like the instructions in Pong Wing Quong. It was reversible error to fail to instruct the juries regarding the crucial nature of the eyewitness identifications in Greene and Telfaire; therefore it was reversible error when the trial

court failed to instruct the jury on the crucial nature of Mr. Har's confession, its dangers, or the caution and care required for its evaluation.

III. THE TRIAL COURT VIOLATED MR. HAR'S CONFRONTATION CLAUSE RIGHTS WHEN IT ALLOWED THE PROSECUTION TO USE AN EXPERT AS A CONDUIT FOR INTRODUCING TESTIMONIAL AND HEARSAY STATEMENTS AGAINST MR. HAR, WHERE THE EXPERT, A STATE HIRED PSYCHIATRIST, ELICITED THE STATEMENTS IN ANTICIPATION OF TRIAL AND WHERE MR. HAR HAD NO OPPORTUNITY TO CROSS EXAMINE THESE WITNESSES AGAINST HIM.

The Confrontation Clause of the Sixth Amendment provides that "in all criminal prosecutions the accused shall enjoy the right...to be confronted with the witnesses against him." U.S. CONST. amend. VI; Crawford v. Washington, 541 U.S. 36, 42 (2004). The Confrontation Clause guarantees a criminal defendant his right to confront the witnesses against him through cross examination. Id at 49. In the context of the Confrontation Clause, 'witnesses' are anyone who "bear testimony," and "testimony is [any] solemn declaration or affirmation made for the purpose of establishing a fact." Davis v. Washington, 126 S.Ct. 2266, 2274 (2006).

Under the Sixth Amendment, the principle purpose of the Confrontation Clause is to prohibit the admission of testimonial hearsay of an unavailable witness against the accused, if the accused does not have an opportunity to cross examine the witness. See Id. Mrs. Har and Chava's responses to Dr. Gerber's questions were testimonial statements made to a state-hired psychiatrist who was preparing her opinion for trial. (R. 55) Accordingly, to admit the substantive content of Dr. Gerber's conversations with Mrs. Har and Chava would undermine the Confrontation Clause's purpose of ensuring an accused the right to confront all witnesses against him. In guaranteeing a right of cross examination, the Confrontation Clause protects a criminal defendant from perjured or unreliable testimony. Raymond LaMagna, (Re)constitutionalizing Confrontation; Reexamining Unavailability and the Value of Live Testimony, 79 S. CAL. L. REV.

1499, 1505 (2006). Ensuring that all witnesses against a criminal defendant testify in front of a jury allows the jury to determine the credibility of both the witness and the testimony. Id. (“Courts have promoted the value of cross-examination to be ‘the main and essential purpose of confrontation’ and ‘the greatest legal engine ever invented for the discovery of truth.’”).

A. When The Trial Court Admitted Mrs. Har And Chava’s Statements To A State-Hired Psychiatrist Preparing For Trial, It Admitted Testimonial Statements In Violation Of The Confrontation Clause Because Mr. Har Did Not Have An Opportunity To Cross Examine The Witnesses.

The trial court violated Mr. Har’s Confrontation Clause rights by admitting testimonial evidence from witnesses that Mr. Har did not have an opportunity to cross examine. Admitting testimonial hearsay evidence violates the Sixth Amendment Confrontation Clause unless the witness making the statements is unavailable and the accused has had a prior opportunity to cross examine the witness. Crawford, 541 U.S. 36 (2004). The Confrontation Clause does not solely apply to in-court testimony, but instead applies to all statements made by witnesses that are accusatory in nature and could conceivably be used in a future trial. Crawford, 541 U.S. at 50.

“Testimonial” has come to mean statements made to a government official, under circumstances that would objectively suggest to the declarant that they would later be used at trial. United States v. Summers, 414 F.3d 1287, 1302 (10th Cir. 2005). “An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” Davis v. Washington, 126 S.Ct. 2266, 2274 (2006). Courts have established an objective test that focuses on the intent and expectations of a reasonable declarant under the specific circumstances in which the statement is made. Summers, 414 F.3d at 1302 (citing Crawford, 541 U.S. at 52). Using an objective test focuses on the intent of a reasonable declarant and allows courts to identify certain factual circumstances that would give rise to a reasonable declarant expecting his statements to be used at trial. Id. (stating that

applying an objective test under these circumstances will more “adequately safeguard the accused’s confrontation right and more closely reflects the concerns underpinning the Sixth Amendment”).

Mrs. Har and Chava’s statements were testimonial because they were made to a psychiatrist hired by the state, for the specific purpose of prosecuting the declarant’s relative. A reasonable declarant in this situation would expect his statement to later be used in that prosecution. Admitting these testimonial statements without Mr. Har having had a previous opportunity to cross examine the witnesses violated Mr. Har’s right of confrontation under the Sixth Amendment.

1. Dr. Gerber, a state-hired psychiatrist, is a government official for purposes of the Confrontation Clause.

Any person hired by the state for the purpose of assisting an investigation or a prosecution is considered a government official for purposes of the Confrontation Clause. People v. Goldstein, 843 N.E.2d 727 (N.Y. 2005), cert. denied, 126 S.Ct. 2293 (2006). An out of court declarant who makes a statement to a state-hired psychiatrist bears testimony governed by the Confrontation Clause. Id. at 733. In Goldstein, a psychiatrist hired by the state to interview witnesses and prepare her opinion for trial acted as a government official. Id. The court went on to hold that the statements made to the psychiatrist during the interviews were unlike a “casual remark to an acquaintance” and more akin to a “formal statement made to a government officer,” such as an investigating police officer. Id.; see also Davis v. Washington, 126 S.Ct. 2266, 2274 (2006); Crawford v. Washington, 541 U.S. 36, 51 (2004). The Court stated the fact that the psychiatrist was not directly employed by the Government had no “constitutional significance for the purposes of defining testimonial for the Confrontation Clause.” Goldstein, 843 N.E.2d at 733.

Dr. Gerber is the equivalent of a government officer because she was hired by the state for the purpose of preparing an opinion for Mr. Har's trial. By calling Mrs. Har and Chava to elicit information to form an opinion about Mr. Har's mental state, Dr. Gerber was acting as a government official. Dr. Gerber spoke to Mrs. Har on the phone for approximately an hour about Mr. Har's aggressiveness as a child. (R. 56) Dr. Gerber testified that Mrs. Har did not speak in narrative, but that instead, like in Goldstein, Dr. Gerber "asked questions and [Mrs. Har] gave [her] answers." (R. 56) Consistent with the interrogations in Crawford, Mrs. Har and Chava's statements were testimonial because Dr. Gerber was a state-hired psychiatrist and the phone interviews she conducted were formal in a manner that normal conversations are not.

2. Dr. Gerber elicited statements from Mrs. Har and Chava in preparation for her testimony in the prosecution's case against Mr. Har.

Mrs. Har and Chava's statements to Dr. Gerber were testimonial because Dr. Gerber orchestrated the conversation in preparation for trial, and indicated such during the course of the conversation. For statements to be testimonial an objective declarant must reasonably believe the statements could later be used in an investigation or a prosecution. United States v. Hinton, 423 F.3d 355, 360 (3d Cir. 2005) (The court held that statements of identification made after the commission of a crime were testimonial because a reasonable person in the declarant's shoes would have expected the statements to be used at trial). Where a state official told or through conduct implied to a witness that they were preparing testimony for trial, the witness should have expected his statements would be used at that trial. People v. Goldstein, 843 N.E.2d 727, 733 (N.Y. 2005), cert. denied, 126 S.Ct. 2293 (2006) (relying on Crawford v. Washington, 541 U.S. 36 (2005)). In Goldstein, even though the record did not reflect evidence that the witnesses knew the psychiatrist was engaged in trial preparation, the court held the interviews were part of

the prosecution's trial preparation and involved "formal" questioning. Therefore, a reasonable witness in the declarant's position should have expected their statements would later be used at trial. Id.

A reasonable person in either Mrs. Har or Chava's position would have expected that their statements to Dr. Gerber could have later been used at trial for three main reasons. First, at the beginning of their conversations, Dr. Gerber informed both Mrs. Har and Chava that she was a psychiatrist who had been hired by the state, and that she was involved in a trial. (R. 56-57) Second, Dr. Gerber informed them that she needed to ask some questions about Mr. Har, and proceeded to ask both witnesses specific questions about Mr. Har's aggressiveness as a child. (R. 54-56) Third, the interrogation lasted for over an hour. (R. 56) A reasonable person in Mrs. Har or Chava's position would expect that an hour's worth of statements made in a formalized question and answer setting, to a psychiatrist hired by the state and engaged in trial preparation, could later be used at trial.

B. The Trial Court Violated Mr. Har's Confrontation Clause Rights When It Allowed The Prosecution To Use An Expert As A Conduit For Introducing Otherwise Inadmissible Hearsay, Which Was Both Unreliable And Unnecessary.

The trial court violated Mr. Har's Confrontation Clause rights when it allowed Dr. Gerber to introduce otherwise inadmissible hearsay evidence that was unreliable and unnecessary to help the jury evaluate the thoroughness of her opinion. While Federal Rule of Evidence 703 allows experts to base their opinions on otherwise inadmissible hearsay, there is a particularized danger in allowing the expert's testimony to include actual hearsay statements where they are 1)unreliable and 2)unnecessary in helping the jury evaluate the expert's opinion. Marsee v. U.S. Tobacco, 866 F.2d 319, 323 (10th Cir. 1989). Inadmissible hearsay underlying an expert's opinion is not admissible simply because the expert reasonably relied upon the hearsay. FED. R.

EVID. 703 advisory committee's note. Experts are not meant to be a conduit to smuggle in inadmissible hearsay evidence. Hutchinson v. Groskin, 927 F.2d 722, 725 (2d Cir. 1991).

The trial court erred when it admitted Dr. Gerber's testimony which included inadmissible hearsay statements that were neither reliable nor necessary to help the jury. The prosecution stepped outside the bounds of Rule 703 and used Dr. Gerber as a conduit to smuggle in Mrs. Har and Chava's hearsay statements. (R. 60-61) These statements were inadmissible because they were both unreliable, by the expert's own admission, and unnecessary to aid the jury in evaluating the thoroughness of Dr. Gerber's opinion. (R. 57-58)

1. Mrs. Har and Chava's statements to Dr. Gerber were not reliable.

Federal Rule of Evidence 703 (as amended in 2000) admits facts or data as the basis of an expert's opinion, as long as the facts or data are of a type "reasonably relied on" by experts in the field when forming their opinions. FED. R. EVID. 703. Requiring that the facts or data admitted be the kind "reasonably relied upon by experts in the particular field" ensures that courts have a means by which they can evaluate whether the data underlying the expert's opinion is trustworthy. Head v. Lithonia Corp., 881 F.2d 941 (10th Cir. 1989); see also Barrell of Fun, Inc. v. State Farm Fire & Gas Co., 739 F.2d. 1028 (5th Cir. 1984).

Mrs. Har and Chava's statements should be excluded because the state could not ensure they were trustworthy. Evidence that would otherwise be admissible under a traditional hearsay exception should be excluded if the evidence bears no indicia of reliability. Marsee v. U.S. Tobacco, 866 F.2d 319, 323 (10th Cir. 1989). In Marsee, where a doctor based his opinion testimony on hearsay statements made in telephone conversations, the trial court admitted the doctor's opinion testimony, but excluded the hearsay statements on which his opinion was based. Id. The court reasoned that the statements could not come in under Rule 703 because the

statements were made to the doctor after he was retained to testify in the case and were therefore unreliable. Similarly, in Bryan v. John Beam Division of FMC Corp., the court excluded hearsay statements from non-testifying witnesses that formed the basis of the testifying expert's opinion where there were no "extraneous indicia of reliability." 566 F.2d 541, 546 (5th Cir. 1978). (Where there are no "external circumstance[s] guarantee[ing] the reliability of the evidence...the purposes of the hearsay rule would suffer if the evidence was admitted").

Mrs. Har and Chava's statements should have been excluded because they were inadmissible hearsay statements with no indicia of reliability. Consistent with Marsee, Dr. Gerber compromised the reliability of Mrs. Har and Chava's statements because she had already been retained by the state to testify against Mr. Har when she conducted the interviews. (R. 54) In addition, Dr. Gerber herself questioned the reliability of Mrs. Har and Chava's hearsay statements for three reasons. First, Dr. Gerber testified that she was not in a position to know whether Mrs. Har or Chava had personal knowledge about the information included in their responses to her questions. (R. 57) Second, Dr. Gerber stated that she was not in a position to know that what Mrs. Har perceived, she perceived accurately. (R. 57) Third, Dr. Gerber testified that she had "no idea" whether Mrs. Har or Chava had an accurate memory or whether they had remembered everything. (R. 57-58) Therefore, as in Bryan, there were no "external circumstances" that would give any indication to either the trial judge or Dr. Gerber, that Mrs. Har and Chava's statements were reliable.

- 2. Mrs. Har and Chava's statements should have been excluded under Federal Rule of Evidence 703 because they were unnecessary to assist the jury in determining the thoroughness of Dr. Gerber's opinion.**

Statements forming the basis of an expert's opinion are unnecessary when they have little probative value in assisting the jury to evaluate the thoroughness of an expert's opinion. People

v. Goldstein, 843 N.E.2d 727 (N.Y. 2005), cert. denied, 126 S.Ct. 2293 (2006). In Goldstein, the trial court erred by admitting specific statements a psychiatrist elicited from witnesses, offered as the basis of the psychiatrist's opinion, for the purpose of helping the jury evaluate the thoroughness of the expert's opinion. Id. The Court of Appeals reversed the trial court's decision, and specifically found the expert could have testified the interviews took place without revealing the information contained therein. Id. The Court held that the trial court should have excluded the substantive content of the psychiatrist's interviews which were unnecessary because they had little probative value in helping the jury evaluate the thoroughness of the psychiatrist's opinion. Id.

The trial court should have excluded Mrs. Har and Chava's statements which were unnecessary because they had little probative value in aiding the jury's evaluation of the thoroughness of Dr. Gerber's opinion. Consistent with Goldstein, Mrs. Har and Chava's statements highlighting the specific instances of Mr. Har's conduct as a child were unnecessary because they had little probative value to the jury in assessing whether Dr. Gerber made a thorough evaluation. (R. 57-61) Like in Goldstein, the trial court should have excluded Mrs. Har and Chava's statements, and only permitted Dr. Gerber to testify that the interviews took place.

C. Limiting Instructions Failed To Ameliorate The Damage Caused By Admitting Hearsay Statements Against Mr. Har In Violation Of His Sixth Amendment Right Of Confrontation.

Mr. Har's constitutional rights were violated when the trial court erroneously permitted the state to introduce Mrs. Har and Chava's inadmissible hearsay statements for the stated purpose of helping the jury evaluate Dr. Gerber's opinion. Statements offered to help a jury evaluate an expert's opinion constitute hearsay when the statements are intended and expected to

be accepted as true, and it is implausible to believe a jury could use the statements to evaluate the expert's opinion without making a determination regarding their truth. People v. Goldstein, 843 N.E.2d 727, 732 (N.Y. 2005), cert. denied, 126 S.Ct. 2293 (2006). After erroneously permitting the prosecution to put inadmissible hearsay before the jury, the trial court's use of limiting jury instructions was inadequate to ensure the jury did not consider the hearsay statements for their truth. Bruton v. United States, 391 U.S. 123, 137 (1968) ("there are some contexts in which the risk that the jury will not, or cannot, follow instructions is 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").

1. Mrs. Har and Chava's statements constitute hearsay because the prosecution intended and expected the jury to accept the statements for their truth.

Statements forming the basis of an expert's opinion, admitted to evaluate that expert's opinion, constitute hearsay because a jury cannot evaluate the statements without first making a determination regarding their truth. People v. Goldstein, 843 N.E.2d 727, 732 (N.Y. 2005), cert. denied, 126 S.Ct. 2293 (2006). In Goldstein, the prosecution introduced hearsay statements through an expert's opinion, arguing that the statements were not offered for their truth, and therefore were not hearsay. Id. at 732. The Court of Appeals reversed the trial court's decision to admit the statements, and held that the statements constituted hearsay because a jury could not consider them as the basis of an expert's opinion without first making a determination regarding their truth. Id. ("Since the prosecution's goal was to buttress [the psychiatrist's] opinion, the prosecution obviously wanted and expected the jury to take the statements as true").

Mrs. Har and Chava's statements constituted hearsay because they formed the basis of Dr. Gerber's opinion and the jury could not use the statements to evaluate Dr. Gerber's opinion

without considering the statements for their truth. The trial court admitted Mrs. Har and Chava's hearsay statements for the stated purpose of allowing the jury to evaluate the thoroughness of Dr. Gerber's opinion. (R. 59) Consistent with Goldstein, Mrs. Har and Chava's statements constitute hearsay because the prosecution intended the statements to buttress Dr. Gerber's opinion, and the jury could not consider them without making a determination regarding their truth.

2. The limiting instructions promulgated by the trial court were inadequate to ensure that the jury did not consider the inadmissible hearsay statements for their truth.

Judge Learned Hand once wrote that limiting instructions are "a mental gymnastic which is beyond, not only [the jury's] power, but anybody else's." Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932). It was unreasonable to think that limiting instructions would ensure that the jury did not consider the substantive content of Dr. Gerber's testimony for its truth. The Government should not benefit by influencing a jury with evidence against a defendant which "as a matter of law [the jurors] should not consider but which they cannot put out of their minds." Bruton v. United States, 391 U.S. 123, 129 (1968). The substantial threat to a criminal defendant's constitutional right of confrontation is "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." Id. In Bruton, This Court overturned a defendant's conviction because the jury could not wipe from its memory a co-defendant's confession, even though the trial court instructed the jury that it could not consider the co-defendant's confession in determining the defendant's guilt. Id. ("a jury cannot be expected to segregate evidence into separate intellectual boxes").

Mrs. Har and Chava's statements were inadmissible hearsay and the jury instructions promulgated by the trial court were inadequate to prevent the jury from considering the hearsay

statements for the truth of the matter asserted. The trial court's admission of Mrs. Har and Chava's testimonial hearsay statements for the sole purpose of giving weight to the thoroughness of Dr. Gerber's opinion is in direct conflict with this Court's ruling in Bruton. If a jury cannot perform the mental gymnastics of disregarding hearsay evidence altogether, it is naïve to assume that the limiting jury instructions here ensured that the jury segregated the truth of Mrs. Har and Chava's statements into one box, and simultaneously segregated their value in determining the thoroughness of Dr. Gerber's opinion into another.

CONCLUSION

For the foregoing reasons, Respondent respectfully asks that this court AFFIRM the decision of the Fourteenth Circuit Court of Appeals.

March 2, 2007

Respectfully Submitted,

Counsel for Respondent

CERTIFICATE OF SERVICE

This is to certify that we are counsel for Respondent and that on this day we have served opposing counsel a copy of this brief.

March 2, 2007.

Attorney for Team #18

APPENDIX A

Amendment VI, United States Constitution

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 Rule of Evidence 702

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.

APPENDIX C

Federal Rule of Evidence 703

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.