

No. 06-117

IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Petitioner.

v.

ROUNN HARR,
Respondent.

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

BRIEF FOR PETITIONER

Team 19

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QUESTIONS PRESENTED

- I. Whether the District Court properly performed its gatekeeping function when it determined that expert testimony on false confessions was both unreliable and unhelpful, where the court determined that the testimony was based on undependable testing and was not generally accepted within the relevant scientific community and the jury was aware that their job was to evaluate the veracity of the testimony presented.
- II. Whether, when a defendant challenges the truthfulness but not the voluntariness of his confession, a thorough credibility instruction is sufficient to guide the jury in evaluating a false confession claim.
- III. Whether testimony by a psychologist who testified to out-of-court statements, made by the subject's relatives during a casual interview, to establish the thoroughness of her evaluation was permissible under the Confrontation Clause.

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UNITED STATES OF AMERICA,
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ROUNN HAR
Respondent.

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Boerum is unreported. The opinion of the United States Court of Appeals for the Fourteenth Circuit is reproduced in the Record at pages 88-107.

STATUTORY PROVISIONS INVOLVED

The Amendments to the United States Constitutions and statutes referenced in this brief are set forth, in pertinent part, in the attached Appendices.

STATEMENT OF FACTS

Rounn Har (Respondent), a 22 year old immigrant from Mago, began working on the American game-show *Daily Dollars* as a production assistant in August of 1996. (R. at 1.) Bruce Seafoam, host of *Daily Dollars*, was found hung by a microphone cord to the game-wheel on February 28, 1997, on the temporary set at Bowling Air Force Base. (R. at 1.)

Nathaniel Walker, the head FBI investigator to the murder, was the first legal enforcement officer to arrive at the crime scene at 7 pm on February 28, 1997. (R. at 39.) Seafoam had an elaborate

knot tied around his neck and had visible trauma to his left temple. (R. at 39). Medical personnel cut the knot while removing the body before any photographs could be taken to record the knot's characteristics, but the knot was already permanently sketched in Nathaniel Walker's memory. (R. at 40.)

Respondent was an original suspect placed at the scene of the crime, but lacked sufficient evidence to elevate his original status to a serious suspect. (R. at 41-2.)

In 2005, after Nathaniel retired, he was reading National World Magazine and saw an article on a special kind of knot, native to the small nation of Mago. (R. at 42.) He instantly recognized the knot as the one tied around Seafoam's neck. (R. at 42-3.) He remembered that one of the original suspects, Respondent, was from Mago. (R. at 42.)

After making this connection, Nathaniel employed Nebraska Walker, his private investigator partner and daughter, into further investigation of Respondent. (R. at 43.) Nebraska Walker started an internet relationship with Respondent and convinced Respondent to make the trip to come to her area for further courting. (R. at 31.) Respondent arrived at 9 am on April 24 for his date with Nebraska. (R. at 37.) Nebraska and Respondent had breakfast, went to Gameland, the beach, and ended the date at the Walker house. (R. at 31-34.) Nebraska introduced Respondent to her father shortly after they retired to the basement. (R. at 73.)

Nathaniel Walker introduced himself, starting with casual conversation. (R. at 73.) Shortly thereafter Nathaniel revealed his former FBI position and continuing interest in the Seafoam murder. (R. at 76.)

Nathaniel began questioning Respondent about his *Daily Dollars* work experience. During the interview, although Nathaniel had no duty to respect FBI ethical duties, he followed FBI protocol. (R. at 47.) Nathaniel also videotaped his conversation with Respondent. (R. at 44.)

In the interview, Respondent admitted that on the day of Seafoam's murder, he had gone to Seafoam's dressing room to confront Seafoam about the host's egregious conduct with Respondent's girlfriend. (R. at 81.) Seafoam laughed at Respondent, telling him his girlfriend would not ever be seriously interested in a poor immigrant like Respondent. (R. at 81.) Respondent admitted that he was pissed off, and that he took a picture frame and hit Seafoam on the head. (R. at 82.) Respondent admitted he was afraid of attracting attention, so he dragged Seafoam onto the set and hung him onto the game-show wheel, tying the knot he knew growing up. (R. at 82.)

Nathaniel contacted the FBI the day after Respondent confessed. (R. at 34-5.) Respondent was later arrested and charged with first and second degree murder. (R. at 1.)

For trial, Respondent's sought to use two experts to testify about Respondent's alleged false confession: Dr. Kalf, a psychiatrist, and Dr. Wallace, a social scientist. (R. at 4.) Dr. Kalf's testimony, which dealt with Respondent's alleged mental health problems and issues, was admissible. (R. at 14-5.) Dr. Wallace was to testify to the social science behind false confessions. (R. at 4.) He admitted during the *Daubert* hearing that false confessions were not a recognized psychological disorder nor included in the Diagnostic and Statistical Manual of Psychological Disorders. (R. at 12.) Dr. Wallace was not permitted to testify at trial because the District Court found his testimony to be both unreliable and unhelpful. (R. at 16)

Petitioner presented Dr. Gerber, a private practice psychiatrist who occasionally works as a "consulting independent psychiatrist". (R. at 54.) Her job is to "evaluate defendants or witnesses" and possibly testify to the conclusions made during those evaluations. (R. at 54.) Dr. Gerber concluded Respondent did not suffer from Post Traumatic Stress Disorder and did not have a compliant personality. (R. at 51-2.) This conclusion was based on four and a half hours of personal examinations with Respondent, personality tests employed by Dr. Kalf, herself, and with telephone conversations with

Respondent's mother and sister. (R. at 54.) When speaking with Respondent's family, Dr. Gerber identified herself as a psychiatrist working at the government's request. (R. at 55.) Her conversations with Respondent's family were "casual and pleasant" (R. at 55.) In response to Dr. Gerber's questions over the phone, Respondent's mother admitted that Respondent was strong willed and independent. (R. at 56-7.) Respondent's sister admitted that Respondent was known for "having trouble controlling his temper", attacking others, and was considered the neighborhood bully. (R. at 61). Dr. Gerber's testimony was admitted. (R. at 59.)

PROCEDURAL HISTORY

Petitioner brought suit against Respondent on June 2, 2005 in the Eastern District of Boerum, United States District Court, pursuant to 18 U.S.C. § 1111, alleging First and Second degree murder of Bruce Seafoam. (R. at 2.)

Petitioner filed a pre-trial motion challenging the admissibility of Respondents social science and psychiatry experts in regard to Respondents confession. (R. at 4.) On July 7, 2005, the trial judge admitted the psychiatrists' testimony on Respondent's alleged personality disorders and his mental condition. (R. at 16.) As a result of allowing Respondent to use a psychiatrist, the trial judge simultaneously allowed Petitioner to use its own psychiatrist to testify as to Respondent's mental state and personality disorders. (R. at 16.)

After a *Daubert* hearing, the District Court excluded Dr. Wallace's testimony because they found it was neither reliable nor helpful. (R. at 15.) Respondent objected. (R. at 16.)

Trial commenced September 19, 2005. (R. at 24.) The trial court overruled Respondent's objection to the use of Dr. Gerber's statements with Respondent's family as violating Respondent's 6th Amendment Confrontation Clause rights. (R. at 53.) The trial court explained that Respondent's

confrontation rights were not offended and that the statements were not offered to prove the truth of the matters asserted. (R. at 59.)

Respondent also objected to the proposed jury instruction, claiming that it was not sufficiently specific to address his false confession claim. (R. at 61-2.) The trial judge concluded that because jurors know that people lie, and false confessions are widespread, then a special instruction is unwarranted. (R. at 63.)

Respondent objected to the admission of Dr. Gerber's testimony claiming that, because it was based on out of court statements and Respondent lacked an opportunity to cross-examine, it violated his Confrontation Clause rights. (R. at 52-3.) Respondent's objection was overruled and the testimony was admitted. (R. at 59.)

The jury found Respondent guilty of second degree murder, and Respondent appealed to the United States Court of Appeals, Fourteenth Circuit. (R. at 99.)

On appeal, the Circuit Court for the United States Courts of Appeals Fourteenth Circuit found that the trial court had failed to adequately perform its *Daubert* gatekeeping responsibilities and that the proposed testimony was in fact reliable and helpful. (R. at 93-7.)

The Circuit Court also found that the trial court erred by not giving a more detailed jury instruction on false confessions. (R. at 98.)

In addition, the Circuit Court found that Dr. Gerber's use of Respondent's mother's and sister's statements violated the Confrontation Clause because these statements were testimonial, and irrelevant to the case unless proffered for the truths of the matters asserted, and thus hearsay. (R. at 99.) The Court of Appeals reversed finding each error to constitute reversible error. (R. at 101.)

Petitioner's writ of certiorari was granted on October 3, 2006. (R. at 108.)

SUMMARY OF THE ARGUMENT

Federal Rule of Evidence 702, as interpreted by *Daubert*, requires that a trial court fulfill its gatekeeping duties by making particularized reliability and helpfulness determination about proposed expert testimony which addresses scientific, technical, or specialized knowledge. In this case, the District Court fulfilled that obligation.

The District Court made a particularized reliability determination by conducting a *Daubert* hearing to carefully consider Dr. Wallace's proposed testimony. The District Court's reliability determination was not arbitrary. The District Court judge specifically addressed several of the *Daubert* factors, including whether evidence of false confessions enjoys a general acceptance within the world of social science and whether there was reliable testing and peer review. Additionally, the District Court's reliability determination was not stated as a per se rule. The judge specifically noted that there may come a time when evidence of false confessions becomes reliable and will therefore be admissible in court.

The District Court also made a particularized helpfulness determination. The District Court conducted a thorough *Daubert* hearing and concluded, based on the testimony presented, that Dr. Wallace's testimony would not be helpful to the jury. The judge determined that, based on the facts of this case, the testimony by Dr. Wallace would not be helpful to the jury because jurors know that sometimes people falsely confess to crimes and they understand that it is their job to make judgment calls about the veracity of testimony.

The District Court's conclusions about the reliability and helpfulness of Dr. Wallace's testimony were not clearly erroneous. Dr. Wallace's proposed testimony would have been unreliable because evidence of false confessions has not been reliably tested and therefore there is a lack of predictability in cases. Also, there is a lack of general acceptance of the theories

surrounding false confessions within the relevant scientific community. Additionally, Dr. Wallace's proposed testimony would not be helpful. Because of the extensive media coverage of cases such as these, the existence of false confessions should be well within the average juror's knowledge. Jurors should be aware that their job is to make judgments about the evidence provided.

The Court of Appeals conclusion that the District Court's jury instructions were insufficient is erroneous. The District Court's jury instructions were sufficient to guide the jury in analyzing the respondent's false confession claim. Because it was the truthfulness and not the voluntariness of the respondent's confession that was at issue, a credibility instruction would be sufficient to guide the jury in evaluating the false confession claim raised by the respondent. In this case, the District Court went beyond what was required by law by giving a detailed, thorough credibility instruction which was more than sufficient to guide the jury in making their truthfulness determination.

The Court of Appeals conclusion that the District Court violated the respondent's Confrontation Clause rights by admitting Dr. Gerber's testimony is erroneous. The Confrontation Clause only excludes testimony which is both testimonial and asserted to prove the truth of its contents. Dr. Gerber's testimony was not testimonial because her interview with the respondent's relatives lacked formality. Dr. Gerber was simply fulfilling her obligation as a psychiatrist by conducting a thorough investigation into the respondent's mental health and the respondent's relatives did not know that they were responding to questions by someone engaged in trial preparation. Additionally, the statements were also not offered for their truth but instead to establish the thoroughness of Dr. Gerber's opinion. The jury instructions clearly instructed the jury to use these statements for this purpose only.

ARGUMENT

I. THIS COURT SHOULD REVERSE THE JUDGMENT OF THE COURT OF APPEALS BECAUSE THE DISTRICT COURT PROPERLY FULFILLED ITS *DAUBERT* GATEKEEPING RESPONSIBILITIES AND ITS CONCLUSIONS REGARDING THE RELIABILITY AND HELPFULNESS OF DR. WALLACE'S TESTIMONY WERE NOT CLEARLY ERRONEOUS.

The Supreme Court established in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), that the admission of expert testimony is governed by Federal Rule of Evidence 702. Rule 702 provides that an expert may testify on “scientific, technical, or other specialized knowledge” if it will “assist the trier to understand the evidence or to determine a fact in issue” and if this “testimony is the product of reliable principles and methods.”

When faced with a question concerning the acceptance or rejection of expert testimony on appeal, the reviewing court should make a two step inquiry. First, the reviewing court should undertake a “*de novo* review of whether the district court properly followed the framework set forth in *Daubert*.” *United States v. Hall* (“*Hall I*”), 93 F.3d 1337, 1342 (7th Cir. 1996) (citing *Bradley v. Brown*, 42 F.3d 434, 436 (7th Cir. 1994)). Secondly, if the reviewing court finds that the district court performed its gatekeeping duties, the court may not disturb the district court’s findings unless they find that the trial judge committed an “abuse of discretion.” *G.E. v. Joiner*, 522 U.S. 136, 146 (1997).

In this case, the District Court properly fulfilled its gatekeeping function and its findings regarding the reliability and helpfulness of the Dr. Wallace’s testimony were not clearly erroneous.

A. The District Court Fulfilled Its Gatekeeping Responsibilities by Making a Particularized Reliability and Helpfulness Determination Regarding Dr. Wallace's Proposed Testimony.

A trial court is required to fulfill its “gatekeeping” responsibilities when faced with a Federal Rule of Evidence 702 question of the admission of expert testimony concerning scientific, technical, or other specialized knowledge. *Daubert*, 509 U.S. at 589-90; *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999). To fulfill this gatekeeping responsibility, a trial judge must “conduct a two-part analysis” before rejecting or admitting expert testimony. *Chapman v. Maytag Corp.*, 297 F.3d 682, 687 (7th Cir. 2002). First, the trial judge must make a determination of whether the proffered testimony is reliable. *Daubert*, 509 U.S. 592-93. Secondly, the trial judge must determine whether the testimony will be helpful. *Id.* at 591. Both of these determinations must be “tied to the facts” of the particular “case”. *Id.* In this case, the District Court judge fulfilled both of her gatekeeping responsibilities by making particularized determinations on both the reliability and helpfulness of Dr. Wallace's proposed testimony.

- i. The District Court made a particularized determination about the reliability of Dr. Wallace's proposed testimony.

The District Court judge properly fulfilled her first gatekeeping responsibility by making a particularized reliability determination regarding Dr. Wallace's testimony. To meet the first gatekeeping responsibility, a trial judge is required to make a “preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid.” *Id.* at 592-93. A “trial court is accorded great latitude in determining how to make *Daubert* reliability findings...” *United States v. Velarde*, 214 F.3d 1204, 1209 (10th Cir. 2000). However, to sufficiently fulfill its first gatekeeping responsibility, the court must “make *some* kind of reliability determination.” *Id.*

Trial judges successfully fulfill the first step of their gatekeeping responsibilities when they make particularized reliability inquiries. *See, e.g., United States v. Demjanjuk*, 367 F.3d 623, 635 (6th Cir. 2004) (the trial court properly exercised its gatekeeping role when the trial judge was “aware of the applicable legal standards” and “considered the expert's methodology.”); *United States v. Havvard*, 117 F. Supp. 2d 848, 851 (S.D. Ind. 2000) (the reliability determination was proper when the trial court held an “evidentiary hearing” and considered the proposed testimony “in some detail.”)

On the other hand, a reliability inquiry which fails to make a case-specific determination and which instead creates a per se rule is insufficient under *Daubert*. *C.f. United States v. Posado* 57 F.3d 428, 432 (5th Cir. 2005) (stating, with reference to polygraph tests, that “[a]fter *Daubert*, a per se rule is not viable.”) Reliability inquiries are also insufficient when trial judges make “arbitrary” decisions without making specific reliability determinations. *See, e.g., United States v. Belyea*, 159 Fed. App'x 525, 529 (4th Cir. 2005). For example, in *Velarde*, 214 F.3d 1204, the trial court admitted the testimony of a doctor without ever making any specific inquiries into the reliability of her findings. The Court of Appeals reversed, finding that the trial judge failed to fulfill his gatekeeping function by making an arbitrary decision which failed to make any reliability determination at all. *Id.* at 1211.

In this case, the District Court made a particularized determination about the reliability of Dr. Wallace's proposed testimony on coerced confessions. The District Court held an evidentiary hearing to directly address whether the proposed testimony would meet *Daubert's* reliability requirements. The judge specifically discussed several of the *Daubert* reliability factors, including whether evidence of false confessions enjoys a general acceptance within the world of social science and whether there was reliable testing and peer review. (R. at 7-15.) The

District Court's determination was not stated as a per se rule. She did not determine that testimony on false confessions could never be admitted. Instead, the judge simply determined that, at this time, research on false confessions does not meet *Daubert's* reliability requirements. (R. at 15-16). She even specifically noted the possibility of social science research on false confessions becoming reliable under *Daubert* sometime in the future. (R. at 16)

Additionally, the District Court's reliability determination was in no way arbitrary. Unlike *Velarde*, in which the reliability determination was held to be "arbitrary" because the trial court failed to make any reliability determination at all, the District Court judge in this case made specific findings about the unreliability of Dr. Wallace's proposed testimony. The judge pointed to social science's failure to utilize scientific methods in testing, the lack of predictability in cases, and the irrelevancy of controlled experiments in identifying real occurrences. (R. at 15-16.) It does not matter that the District Court did not go into great detail about its application of the *Daubert* factors; what is important is that the District Court made some specific determinations regarding the reliability of the proposed expert testimony.¹ The District Court met its first gatekeeping responsibility by specifically addressing the *Daubert* reliability requirements and by making a particularized determination that Dr. Wallace's testimony was unreliable.

- ii. The District Court made a particularized helpfulness determination regarding Dr. Wallace's proposed testimony by making a specific finding that false confessions should be within jurors' common knowledge.

The District Court judge properly fulfilled her second gatekeeping responsibility by making a particularized determination about the helpfulness of Dr. Wallace's proposed testimony. To fulfill the second gatekeeping requirement under *Daubert*, the trial judge must

¹As noted in *Bitler v. A.O. Smith Corp.*, 400 F.3d 1227, 1234 (10th Cir. 2004), "Daubert does not require a district court to linger at the "gate," as if caught in Zeno's paradox, unable to proceed to the main trial..." It is not the length of the determination which is important, only the fact that a case-specific determination was made.

determine if the proposed testimony would helpful in assisting “the trier of fact in understanding the evidence or in determining a fact in issue.” *Daubert*, 509 U.S. at 591.

As with reliability determinations, helpfulness determinations must be based on “nuanced, case-by-case analysis.” *Belyea*, 159 Fed. App’x at 529 (citing *Daubert*, 509 U.S. at 591-92). Trial judges successfully fulfill the second step of their gatekeeping responsibilities when they make particularized helpfulness determinations. *See, e.g., Belyea*, 159 Fed. App’x at 529.

Helpfulness determinations are insufficient when a trial judge fails to make a particularized inquiry into the helpfulness of the proposed testimony. For example, in *Belyea*, 159 Fed. App’x 525, the Court of Appeals found that the district court had failed to make a sufficient helpfulness inquiry into proposed testimony on false confessions. The helpfulness determination was held to be insufficient because the District Court failed to make “a particularized determination,” and instead stated only that “jurors know people lie.” *Id.* at 529.

In the present case, the District Court’s helpfulness determination was sufficient because it was based on particularized analysis of the helpfulness of Dr. Wallace’s proposed testimony. It is true that, like the judge in *Belyea*, the District Court judge stated that “jurors know people lie” as an explanation for her helpfulness determination. However, this case is distinguishable from *Belyea*. In *Belyea* the district court not only failed to make a particularized helpfulness determination, it failed to make any helpfulness determination at all. In that case, the “district court refused defense counsel’s request to make a proffer of the testimony.” *Id.* at 530. Therefore, the record was so sparse that the reviewing court found it “impossible to determine whether the expert testimony would aid the jury...” *Id.* In the present case, the District Court conducted a thorough *Daubert* hearing and concluded, based on this testimony, that Dr.

Wallace's testimony would not be helpful to the jury. This particularized determination is sufficient to meet *Daubert's* requirements for helpfulness determinations. Therefore, the District Court sufficiently conducted both of the gatekeeping duties required under *Daubert*.

B. The District Court Judge's Determination that Dr. Wallace's Proposed Testimony Was Both Unreliable and Unhelpful Was Not Clearly Erroneous.

Upon determining that the trial court properly performed its gatekeeping duties, the appellate court may review the trial court's reliability and helpfulness determinations for an "abuse of discretion." *G.E.*, 522 U.S. at 146. A reviewing court should not disturb the trial court's findings "unless they are clearly erroneous." *Hall I*, 93 F.3d at 1342.

- i. The District Court's determination that Dr. Wallace's false confession testimony was scientifically unreliable because it cannot be adequately tested and has failed to gain general acceptance within the relevant scientific community is not a clearly erroneous conclusion.

Generally, courts have found that "the *Daubert* frame is appropriate for all kinds of expert testimony." *Tyus v. Urban Search Mgmt.*, 102 F.3d 256, 263 (7th Cir. 1996). It is true that some courts have determined that the *Daubert* factors "may be applied in differing degrees when it comes to non-Newtonian science or 'other specialized knowledge.'" *United States v. Hall* ("*Hall II*"), 974 F. Supp. 1198, 1202 (C.D. Ill. 1997). However, what "remains constant...is that there must be some degree of reliability of the expert and the methods by which he has arrived at his conclusions." *Id.* It is this reliability which is lacking in Dr. Wallace's proposed testimony.

"Evidentiary reliability, or trustworthiness, is demonstrated by a showing that the knowledge offered is 'more than speculative belief or unsupported speculation.'" *Posado*, 57 F.3d at 433 (quoting *Daubert*, 509 U.S. at 590). *Daubert* established specific factors for courts to consider when making reliability determinations. These factors include: whether a "theory or

technique...can be tested”; whether it “has been subjected to peer review and publication”; whether there is a high “potential rate of error”; and whether the theory or technique enjoys “general acceptance” within a “relevant scientific community.” *Daubert*, 509 U.S. at 592-94. These factors are not exhaustive and are flexible; a court does not have to consider all in every case. *See Kumho*, 526 U.S. at 150. A trial court enjoys the same “broad latitude” in deciding what the “reasonable measures of reliability are in a particular case,” as it does on reaching its ultimate determination of reliability. *Id.* at 142, 153. In this case, the District Court judge applied several of the *Daubert* factors and cannot be faulted for determining that Dr. Wallace’s proposed testimony was unreliable.

First, the District Court’s determination that testimony on false confessions is unreliable because theories on false confessions cannot be satisfactorily tested is not clearly erroneous. The District Court correctly determined that neither “observational” nor “controlled” studies used to analyze false confessions lead to reliable conclusions. (R. at 8.)

Observational studies are conducted by a researcher who reviews a case where an innocent person has confessed to a crime. (R. at 8.) This type of study proves that false confessions do occur, but does not prove how or why. (R. at 13-14.) Observational studies lead to results so speculative that they are no better than mere guesswork. The researchers can only theorize why an innocent person may confess to a crime; no firm or reliable conclusions can be drawn from this type of testing.

The controlled tests which have been conducted on false confessions are equally unreliable. The study discussed by Dr. Wallace during the *Daubert* hearing involved students who, during a controlled study, falsely confessed to touching a particular computer key and crashing the computer. (R. at 8-9.) The District Court correctly concluded that there is no way

“a situation in which a student who confesses to crashing a computer can be likened to a man confessing to a heinous murder.” (R. at 15-16.) An experiment such as this one is too far removed from situations in which someone confessed to falsely murder as to have any relevance at all and therefore cannot establish any reliable evidence for experts to rely upon.

While it is true that Dr. Wallace believes that these testing techniques led to conclusive results about false confessions, “a trial court's focus generally should not be upon the precise conclusions reached by the expert, but on the methodology employed in reaching those conclusions.” *Bitler*, 400 F.3d at 1233 (citing *Daubert*, 509 U.S. at 595). The methodology used in researching false confessions is so weak that testimony on it would be based on unreliable conclusions. Even Dr. Wallace admits that none of the studies has even led to any firm data which would allow an expert to provide a reasonable estimate of how often false confessions occur and that it has never even been empirically proven that they do occur at all. (R. at 13-14.) The District Court in this case correctly determined that Dr. Wallace’s conclusions were based on unreliable testing techniques which would lead to equally unreliable expert testimony.

Secondly, testimony on false confessions is unreliable because there is a lack of general acceptance within the relevant scientific community. Studies on false confessions are based in social science, so the relevant scientific community would be psychologists and psychiatrists. (R. at 12.) However, the Diagnostic and Statistical Manual of Psychological Disorders, which lists all recognized psychological disorders, not only does not list any disorder related to false confessions, it does not make any mention of false confessions at all. (R. at 12-13.)

Although information on false confessions has been available for a long time, it has gained little support within the relevant community. Dr. Wallace claimed that “false confessions are not a new phenomenon by any stretch of the imagination” and that “[p]eople have been

confessing to crimes they didn't commit for hundreds of years.” (R. at 9.) Additionally, research on false confessions has been conducted for almost a quarter of a century. (R. at 6.) Yet despite the fact that the existence of false confessions is not new, it has been less than twenty years since “persons with any degree of expertise have emerged.” Major James R. Agar, *The Admissibility of Expert Testimony*, 1999 Army Law. 26, 26 (1999). A theory, such as false confessions, which has existed for a long time but which has attracted only “minimal support” within the relevant community “may be properly viewed with skepticism.” *Daubert* 509 U.S. at 594. This lack of general acceptance within the relevant scientific community helps demonstrate that, at this time, testimony on false confessions would be unreliable.

While it is true that, according to Dr. Wallace, observational data on false confessions has been subjected to peer review, this does not override the general unreliability of studies on false confessions. (R. at 8.) Peer review alone is not dispositive. *See Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1313 (11th Cir. 1999) (court found that although an animal study was peer reviewed, it did not “mean it constituted an adequate basis” to prove reliability.) The unreliability of the testing conducted on false confessions and the lack of general acceptance within the relevant scientific community greatly outweigh any reliability which may have been established through peer review. Additionally, as noted by the dissent in the Circuit Court opinion, there are a relatively small amount of professionals who specialize in this field, and this “small and insular community,” which provides the peer review for each other, is not the equivalent of the “relevant ‘scientific community.’” (R. at 103.) Therefore, the District Court correctly determined that expert testimony on false confessions failed to meet *Daubert's* reliability requirements.

- ii. The District Court's determination that Dr. Wallace's false confession testimony would not be helpful to the trier of fact because the only reliable information presented should be within the average juror's knowledge and any testimony on false confessions would be redundant was not a clearly erroneous conclusion.

Proposed expert testimony is considered helpful if it will assist "the trier of fact in understanding the evidence or in determining a fact in issue." *Daubert*, 509 U.S. at 591. "Rule 702's 'helpfulness' standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility." *Id.* at 591-92. Dr. Wallace's proposed testimony was unhelpful because the only reliable information provided was well within an average's juror's knowledge.

As discussed above, research on false confessions has failed to provide any reliable information on why, how, or how often false confessions occur. The only reliable information this research does provide is that false confessions do occur, something which any average person could learn from watching or reading news reports. Dr. Wallace himself admits that there are several famous cases where people have falsely confessed to crimes, including the Lindberg baby kidnapping, and more recently, the Central Park Jogger and the JonBenet Ramsey cases. (R. at 10.) The average person is likely familiar with all of these cases because of the prevalent media coverage. Because of the extensive media coverage of cases such as these, the existence of false confessions should be well within the average juror's knowledge. Therefore testimony on false confessions would not assist them in determining any fact in issue. Because jurors should be aware that people sometimes falsely confess to crimes, the District Court correctly determined that expert testimony on false confessions would simply be redundant.

Additionally, jurors should be aware that their job is to make judgments about the evidence provided. As noted by the Dissent in the Court of Appeals, jurors are aware that they are there to "make determinations as to the truthfulness of statements and the credibility and

reliability of evidence.” (R. at 104.) Every jury trial requires jurors to make these judgment calls and this case is no different.

It is true that a few courts have found expert testimony on false confessions to be helpful to a jury presented with a false confession claim; however, these courts limited the experts to testifying only about the circumstances of the interrogation and the characteristics of the defendant, including specific psychological disorders, which may make him more likely than most to falsely confess. *See Hall I*, 93 F.3d at 1341-42; *Hall II*, 974 F. Supp. at 1205. Dr. Wallace’s proposed testimony, which would have not only addressed the respondent’s specific personality traits but which would have also addressed the psychology of false confessions, would not have been so limited. Additionally, the District Court did permit an expert to testify to the characteristics of the respondent, namely his alleged personality disorders, which may have made him susceptible to a false confession. This testimony would have been sufficient to guide the jury in determining if the respondent was the type of person who might falsely confess to crime. Any additional testimony by Dr. Wallace would have simply been superfluous.

Therefore, the District Court’s determination that Dr. Wallace’s testimony was not helpful was not clearly erroneous because false confessions are something within the jurors’ common knowledge and permitting the testimony would have been redundant.

II. THIS COURT SHOULD REVERSE THE JUDGMENT OF THE COURT OF APPEALS BECAUSE THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BECAUSE IT GAVE JURY INSTRUCTIONS WHICH WERE SUFFICIENT TO GUIDE THE JURY IN EVALUATING THE FALSE CONFESSION CLAIM.

Courts have held that that the decision to give a specific jury instruction rests in the discretion of the trial court. *See, e.g., United States v. Brooks*, 928 F.2d 1403, 1407-08 (4th Cir. 1991) (determining that a trial court has flexibility in determining when to give a specific

instruction on witness misidentification). The “trial judge is in the best position” to determine whether a specific jury instruction is needed, so “adopting a rigid requirement cuts back on the trial court's discretion in the conduct of a trial without any assurance that the fair administration of justice is thereby enhanced.” *United States v. Luis*, 835 F.2d 37, 41 (2nd Cir. 1987). Because the jury instruction is left to the trial court’s discretion, “an appellate court is called upon to decide only whether the failure” to give a specific jury charge “under the circumstances of a given case constitutes such an abuse of the trial court's discretion as to be reversible error.” *Id.* (in reference to jury instructions for eyewitness misidentification.) In this case, the District Court did not abuse its discretion because it supplied jury instructions which were sufficient to guide the jury in evaluating the Respondent’s false confession argument.

A. The Credibility Instruction Given by the District Court Was Sufficient to Guide the Jury in Evaluating the False Confession Claim Raised by the Respondent.

When the voluntariness of a confession is not an issue, courts have consistently held that the failure to give a specific jury instruction is not fatal. *See United States v. Iwegbu*, 6 F.3d 272, 275 (5th Cir. 1993). Instead, a credibility instruction which helps guide the jury in evaluating the truthfulness of a confession is sufficient. *See, e.g., Pong Wing Quong v. United States*, 111 F.2d 751, 757 (9th Cir. 1940).

The respondent did not challenge the voluntariness of his confession. Instead, he raised an objection that the jury charge did not properly reflect the law when “a defendant challenges the veracity of his confession.” (R. at 62.) Because it was the truthfulness and not the voluntariness of the respondent’s confession that was at issue, a credibility instruction would be sufficient to guide the jury in evaluating the false confession claim raised by the respondent. In this case, the District Court went beyond what was required by law by giving a detailed,

thorough credibility instruction which was more than sufficient to guide the jury in making their truthfulness determination.

The jury instruction given by the District Court repeatedly reminded the jury that it was their job to determine the truthfulness of the respondent's confession. The instruction guided them in making the determination by pointing out specific steps they were to take before making conclusions about the truthfulness of the respondent's confession. First, they were told that it was their responsibility to "decide the weight, if any" to give to the respondent's confession itself. (R. at 64.) The instruction informed them that they were to use their "own reason, judgment, and common sense" when making this determination. (R. at 65.)

Secondly, the instruction informed the jurors that they were to consider the psychiatric testimony which had been presented during the trial when "reaching a decision on the truthfulness of the defendant's confession." (R. at 64.) The jury instruction then guided the jury in how to evaluate this conflicting psychiatric testimony. The instruction told the jurors that they were to "consider the respective psychiatrists' qualifications, opinions, and the underlying reasons and facts supporting their reasons for testifying" along with other "considerations which normally apply" when deciding what weight to give to this testimony. (R. at 65.) The instruction also reminded the jurors that they were able to "reject the testimony of either psychiatrist in whole or part" after making this determination. (R. at 65.)

Lastly, the jury instruction went as far as to inform the jurors that, should they conclude that the statements made by the respondent were not truthful, they "should acquit" the respondent. (R. at 64.) Because the credibility instruction detailed both the considerations the jurors were to take into account when determining the truthfulness of the respondent's confession and what the jurors were to do should they determine the respondent falsely

confessed, it was sufficient to guide the jury in evaluating the respondent's false confession claim.

B. Jury Instructions on False Confessions Are Not Analogous to Instructions on Eyewitness Identification. Alternatively, Even if False Confessions are Found to be Analogous to Eyewitness Identification, This Does Not Necessitate a Specific Jury Charge.

Some courts require a special jury instruction to be given in cases where eyewitness identification is an issue. *See, e.g., United States v. Mays*, 822 F.2d 793, 798 (8th Cir. 1987); *United States v. Telfaire*, 469 F.2d 552, 558-59 (D.C. Cir. 1972). While the respondent claims, and the Circuit Court of Appeals found, that because eyewitness identification is analogous to false confessions, courts should be required to give a similar, detailed jury instruction when a false confession claim is raised, this is an incorrect determination.

- i. False confessions are not analogous to eyewitness identification because the latter is fallible in systematic ways and these flaws are supported by extensive authority.

The respondent's analogy between eyewitness identification and false confessions is unpersuasive. Research on eyewitness testimony has shown that it is "systematically fallible" in specific ways. Edward Stein, *The Admissibility of Expert Testimony About Cognitive Science Research on Eyewitness Identification*, 2 *Law, Probability & Risk* 295, 297 (2003). The factors which contribute to eyewitness misidentification are backed up by "dramatic scientific evidence" and reliable authority. *Id.* These specific reliability concerns have led to some courts requiring a specific jury charge for cases where witness identification is an issue.

On the other hand, evidence on false confessions does not benefit from the same reliable scientific authority that backs evidence on eyewitness misidentification. Evidence on false confessions is, at this point, unreliable for several reasons. As discussed earlier, evidence on false confessions has not been satisfactorily tested. It also has not been generally accepted

within the relevant scientific community. It is a social science which is gaining recognition but which is, at this time, lacking the necessary scientific support. While a jury could depend on a specialized instruction on eyewitness misidentification because it would be backed by reliable scientific evidence, a specialized jury instruction on false confessions would be supported by evidence which is untrustworthy at best. Because evidence on false confessions is not backed by the same dramatic scientific evidence and reliable authority which supports evidence of eyewitness identification, the respondent's analogy fails.

- ii. Alternatively, even if false confessions are found to be analogous eyewitness identification, a failure to give a specific jury instruction is not necessarily fatal.

While it is true that some Circuit Courts of Appeal require a specialized jury instruction when eyewitness identification is an issue, other Circuit Courts instead prefer a more nuanced, case-specific analysis which allows the decision to give such an instruction to rest in the discretion of the trial court. *See, e.g., Brooks*, 928 F.2d at 1407-08; *United States v. McGuire*, 200 F.3d 668, 676 (10th Cir. 1999). These courts have decided not to adopt an absolute rule. Instead, these courts endorse a "flexible" rule which allows the trial judge to select a jury instruction based on the "facts of the particular case under review." *Brooks*, 928 F.2d at 1406. In the present case, the District Court's instruction guided the jury on how to evaluate the evidence presented during the trial: the respondent's confession itself and the conflicting psychiatric testimony on false confessions. This case specific instruction would be sufficient to meet this more flexible approach.

III. THIS COURT SHOULD REVERSE THE JUDGMENT OF THE COURT OF APPEALS BECAUSE THERE WAS NO VIOLATION OF THE CONFRONTATION CLAUSE BECAUSE THE STATEMENTS MADE BY THE RESPONDENT'S MOTHER AND SISTER WERE NEITHER TESTIMONIAL NOR OFFERED FOR THEIR TRUTH.

An appellate court reviews *de novo* whether admitting an unavailable witness's hearsay statements violate the Confrontation Clause. *See, e.g., United States v. Cervantes-Flores*, 421 F.3d 825, 831 (9th Cir. 2005). The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him." The Confrontation Clause only applies to "testimonial statements" which are presented for the purpose of "establishing the truth of the matter asserted." *Crawford v. Washington*, 541 U.S. 36, 59, n.9 (2004). In this case, the respondent's constitutional Confrontation Clause rights were not violated because Dr. Gerber's testimony, which relied on statements made by the respondent's mother and sister, was neither testimonial nor offered to establish the truth of the matter asserted.

A. The Statements Made by the Respondent's Mother and Sister Were Not Testimonial Because The Interview with Dr. Gerber Lacked Essential Formality and the Interviewees Did Not Know or Have Reason to Know the Statements Would Be Used at Trial.

The Confrontation Clause applies only to "testimonial statements of a witness." *Id.* at 53. "Only statements of this sort cause the declarant to be a witness within the meaning of the Confrontation Clause." *Davis v. Washington*, 547 U.S. ___, 126 S. Ct. 2266, 2273 (2006). It is the "testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." *Id.* If the statement at issue is not testimonial, the Confrontation Clause does not bar the statement's admission. *See, e.g., United States v. Feliz*, 467 F.3d 227, 232 (2d. Cir. 2006).

In *Crawford*, 541 U.S. at 53, the Supreme Court set forth “various formulations” of the “core class of ‘testimonial’ statements.” Among those were “statements taken by police officers in the course of interrogations.” *Id.* at 53. In *Davis*, the Court further defined what qualifies as an “interrogation.” The Court found that a statement is clearly testimonial when “the interrogation was part of an investigation into possibly criminal past conduct...” *Davis*, 126 S. Ct. at 2278. While the inquisitor does not necessarily have to be a police officer conducting a formal interview, the Court acknowledged that because common law roots of the Confrontation Clause were directed at “Marian magistrates,” that “formality is indeed essential to testimonial utterance.” *Id.* at 2278, n.1. Formality is important because “[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” *Crawford*, 541 U.S. at 51.

In this case, Dr. Gerber’s role lacked that essential formality. Dr. Gerber was not acting in a role equivalent to that of a modern day Marian magistrate or that of an investigating police officer. Dr. Gerber was simply fulfilling the requirements of her job as a psychiatrist by making a thorough investigation into the mental health of her patient in order to provide a sound medical diagnosis. Dr. Gerber was neither a full nor part-time employee of any law-enforcement or prosecutorial organization. (R. at 54.) Instead, Dr. Gerber was working as a “consulting independent psychiatrist” whose job it was to “evaluate defendants or witnesses” and to possibly testify to the conclusions made during those evaluations at trial. (R. at 54.) When she interviewed the respondent’s mother and sister, Dr. Gerber was simply fulfilling her job requirement by making a comprehensive investigation into the respondent’s past in order to satisfactorily evaluate his mental health. Psychiatrists make these types of investigations every day in their practice and are permitted to appear at trial in order to testify to their conclusions.

See Advisory Committee Note to Fed. R. Ev. 703, 56 F.R.D. 183, 283 (1); see also MARGARET A. BERGER AND JACK WEINSTEIN, WEINSTEIN'S EVIDENCE ¶ 703 [O1] at 703-8-703-13 (1994). Dr. Gerber's role was that of a psychiatrist and the interview with the respondent's relatives lacked any of the formality of a police interrogation; therefore, the statements made by the respondent's mother and sister were not testimonial.

Additionally, as the Supreme Court has made clear, "it is...the declarant's statements, not the investigator's questions, that the Confrontation Clause requires us to evaluate." *Davis*, 126 S. Ct. at 2274, n.1. In this case, the respondent's relatives did not know or have reason to know that the statements they made to Dr. Gerber would be used against the respondent at trial. Dr. Gerber simply told the respondent's relatives that she was a psychiatrist working with the respondent at the Government's request. (R. at 54.) She in no way indicated that she would be testifying against the respondent at trial. (R. at 54.) There is nothing in the record to suggest that the respondent's relatives knew that anything they told Dr. Gerber could be used at trial; in fact, Dr. Gerber testified that they "gave no indication of a reaction" when she told them she was working with the respondent at the Government's request and that the conversations with each of them were "very casual" and "pleasant." (R. at 55.)

The Fourteenth Circuit Court of Appeals relied on a New York Court of Appeals decision, *People v. Goldstein*, 843 N.E.2d 727 (N.Y. 2005), when it determined that the statements made by the respondent's family members were testimonial. However, that reliance was erroneous because the instant case is clearly distinguishable from *Goldstein*. In *Goldstein*, the court held that statements made during interviews conducted by the government's psychiatric expert in preparation for trial were testimonial. *Id.* at 733. However, in *Goldstein*, the New York Court of Appeals also determined that the declarants "knew that they were responding to

questions from an agent of the State engaged in trial preparation.” *Id.* at 733. This is factually distinguishable from the declarants in the present case, who did not know that the information they related to Dr. Gerber would be used against the respondent at trial. Because Dr. Gerber was simply fulfilling her obligation as a psychiatrist by conducting a thorough investigation into the respondent’s mental health and the respondent’s relatives did not know that they were responding to questions by someone engaged in trial preparation, the statements were not testimonial.

B. The Statements Made by the Respondent’s Mother and Sister Were Not Offered for Their Truth Because They Were Admitted Only to Show the Thoroughness of Dr. Gerber’s Opinion.

The Confrontation Clause “does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.” *Crawford*, 541 U.S. at 59, n.9. Courts have held that statements which are not offered for their truth but are instead offered to establish the thoroughness of an expert opinion do not violate the Confrontation Clause. *See United States v. Stone*, 222 F.R.D. 334 (E.D. Tenn. 2004).

In the instant case, the District Court correctly determined that admitting the statements made by the respondent’s relatives would not violate the Confrontation Clause because the statements were not offered for their truth but instead offered to establish the thoroughness of Dr. Gerber’s opinion. Dr. Gerber testified that the respondent’s mother told her that the respondent was “stubborn and strong-willed” and that the respondent’s sister told her that the respondent “had a problem controlling his temper” growing up. (R. at 61-62.) When Dr. Gerber testified about these statements, she was not offering these statements for their truth. She was not trying to prove that the respondent was stubborn or strong-willed or that he had a short temper. Instead, Dr. Gerber was on the stand to offer her expert opinion that the respondent did not suffer from

either Post-Traumatic Stress Disorder or a compliant personality disorder as the respondent alleged. (R. at 52.) Dr. Gerber offered the statements made by the respondent's mother and sister in an effort to illustrate to the jury just how she had reached her conclusions. She specifically informed the jury that she had used the interviews to reach her conclusions about the mental health of the respondent. (R. at 52.) She in no way offered the statements to establish the veracity of their contents; she merely offered the statements to show that she had made a thorough analysis of the respondent's mental health before she reached her conclusion. Because out-of-court statements which are not used for hearsay purposes but which are instead used "for evaluating the merit of the opinions" are permissible, there is no Confrontation Clause violation *Id.* at 339.

Additionally, the District Court judge in the present case clearly instructed the jury that the statements made by the respondent's mother and sister were to be used for one purpose only: to assist the jury "in evaluating the thoroughness of Dr. Gerber's opinion." (R. at 65.) The jury charge specifically instructed the jury that they were not to consider the statements "in any way, manner, shape or form to be true." (R. at 65.)

It is true that this Court has found limiting jury instructions are not "an adequate substitute" for a defendant's constitutional right of cross-examination" in certain instances. *Bruton v. United States*, 391 U.S. 123 (1968). However, the Confrontation Clause rights implicated in *Bruton* are much stronger than the rights implicated in the instant case. In *Bruton*, the statements at question were made by a nontestifying defendant who was inculcating a codefendant in a joint trial. The Court first noted in *Bruton* that cases exist where there is a great risk "that the jury will not, or cannot, follow instructions." *Id.* at 135. The Court found that such a case was presented there because the "powerfully incriminating extrajudicial statements of a

codefendant” were “deliberately spread before the jury in a joint trial.” *Id.* at 135-36. The Court found that such statements “were devastating to the defendant,” that their “credibility [was] inevitably suspect,” and it was at these types of statements that “Confrontation Clause was directed.” *Id.* at 136.

In contrast, the statements made by the respondent’s mother and sister lacked such a devastating effect. These were statements made by the respondent’s relatives to a psychiatrist during a telephone interview, not by a codefendant. The statements presented were not accusatory; they were informative and used simply to show that Dr. Gerber had sufficiently investigated the respondent’s mental health before drawing any conclusions. Additionally, there is no reason to suspect the credibility of either the respondent’s mother or sister, who were both merely responding to questions about the respondent’s childhood and personality during a “casual conversation.” Because the statements presented by Dr. Gerber lacked the devastating effect of those presented in *Bruton* and the declarants’ credibility in the present case was not suspect, the statements did not go to the heart of the type of statements the Confrontation Clause was traditionally directed at. Therefore, the jury instructions given by the District Court were permissible and there was no danger that the jury would not be able to follow the clear, concise instructions. The instructions successfully limited the jury’s use of the statements made by the respondent’s mother and sister to be used only for evaluating the thoroughness of Dr. Gerber’s opinion and not for the truth of their contents.

CONCLUSION

For the aforementioned reasons, Petitioner respectfully requests that this Court REVERSE the decision of the Fourteenth Circuit Court of Appeals.

March 2nd, 2007

Respectfully Submitted,

Counsel for Petitioner

APPENDIX A: Federal Rules of Evidence

Rule 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 B: Constitutional Amendments

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 witness against him; to have compulsory process for obtaining witnesses in his favor, and to have Assistance of Counsel for his Defense.