

No. 06-117

IN THE
**Supreme Court of the
United States**

UNITED STATES OF AMERICA,
Petitioners,

v.

ROUNN HAR
Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourteenth Circuit**

BRIEF FOR RESPONDENT

Competition Number 22
Counsel for Respondent

QUESTIONS PRESENTED

- I. Did the District Court properly perform its Daubert gate-keeping function when it determined that defense expert testimony concerning false confessions was per se unreliable and unhelpful?

- II. When a defendant challenges the truthfulness of his confession, is the District Court required to inform the jury that, although it is counter-intuitive, people do falsely confess to crimes and it can consider this possibility in its deliberations?

- III. Did the admission of a psychiatrist's expert testimony recounting in detail the out-of-court statements she elicited from defendant's relatives in preparation for trial violate his rights under the Confrontation Clause even though the jury was told not to consider these statements for their truth?

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STATEMENT OF THE CASE

In May 1996, Rounn Har emigrated to the United States from Mago at the age of twenty-two. (R. at 1.) He was fleeing political violence and persecution, which resulted in the death of his brother. (R. at 70.) In the United States, he quickly found a job as production assistant on the popular *Daily Dollars* game show. (R. at 1.)

On February 28, 1997, Bruce “Sack” Seafoam, host of *Daily Dollars*, was murdered on the show’s temporary set at Bowling Air Force Base. (R at 1.) The crime scene contained no forensic evidence, fingerprints, or DNA; the federal investigators found only a shattered, empty picture frame and an elaborate knot used to tie up the body. (R. at 41.) Unfortunately, medical personnel destroyed the knot before any photos could be taken. (R. at 40-41.)

FBI agent Nathaniel Walker led the investigation of the case. (R. at 39.) Mr. Walker devoted five years to solving the Seafoam murder, albeit with no success. (R. at 42.) In 2002, he retired and became a private investigator. Id. However, the unsolved Seafoam case remained a blow to Walker’s pride. (R. at 46.) In 2005, Walker privately resumed the investigation after he thought he saw, in a magazine, the knot used to tie Seafoam. (R. at 49-50.) This picture was Walker’s sole basis for linking Mr. Har to the murder. (R. at 1, 42.) In 2005, Mr. Har was gainfully employed as a production assistant on the television show *The Best Deal*. Id.

Walker enlisted his daughter and co-investigator, 25 year-old Nebraska Walker, to approach Mr. Har. (R. at 30.) Nebraska located Mr. Har on a dating website, created a fictitious profile to match his interests, and had an e-mail exchange with him, which ended in Nebraska proclaiming she had “been waiting forever to feel this way” and urging him to meet her in person. (R. at 31; Def.’s Ex. A-5.) After Mr. Har drove through the night to see her, the two

spent a day together, holding hands, kissing, and talking. (R. at 35, 73.) Nebraska took Mr. Har back to her house where her father was waiting to interrogate him. Id.

During the interrogation, Mr. Walker employed various aggressive interrogation tactics, including lying to Mr. Har about finding his fingerprints at the scene, while Nebraska flirted with him and provided gentle prodding. (R. at 74-78.) Mr. Har repeatedly voiced his innocence and confusion; however, to escape, he tentatively confessed to Seafoam's murder. (R. at 81-84.) The confession was videotaped via a hidden video camera in the Walker's den. (R. at 44.)

Mr. Har was subsequently indicted for Seafoam's murder. (R. at 88.) Nathaniel and Nebraska Walker testified at his trial. (R. at 92.) The government also introduced Mr. Har's taped confession into evidence. Id. Roberta Kalf, M.D., a psychiatrist, testified for the defense. (R. at 51.) She testified that Mr. Har, as a result of his upbringing in war-torn Mago, suffers from Post-Traumatic Stress Disorder (PTSD), making him extremely fearful of authority figures. Id. She also testified that he has a compliant personality, making him highly open to suggestion. Id. In rebuttal, the government introduced Jessica Gerber, M.D., also a psychiatrist, who testified that Mr. Har does not suffer from PTSD and does not have a compliant personality. (R. at 16.)

Dr. Gerber based her conclusions almost exclusively upon conversations she had with Mr. Har's mother and sister Chava. (R. at 59-61.) Dr. Gerber informed the Hars that she was a psychiatrist working with Mr. Har at the government's request. (R. at 54.) She also indicated that she was preparing for trial. Id. In explaining the basis of her testimony at trial, Dr. Gerber only recounted what Mr. Har's relatives told her regarding their impressions of Mr. Har's personality and behavior as a child. Id. The trial court allowed these statements into the record.

(R. at 59.) The Circuit Court, however, reversed, finding that the admission of these statements violated Mr. Har's Constitutional right to confront the witnesses against him. (R. at 99-101.)

Mr. Har's defense sought to introduce the expert testimony of John Wallace, Ph.D., regarding the phenomenon of false confessions. (R. at 4.) At a pre-trial hearing, Dr. Wallace explained that false confession research is reliable and generally accepted in the social science community. (R. at 6-9.) Dr. Wallace also explained the impact of certain psychological and external factors on the incidence of false confessions. (R. at 10.) Despite this abundant evidence, the District Judge excluded the proposed testimony. (R. at 15.) The Circuit Court reversed, finding the exclusion of Dr. Wallace's testimony clearly erroneous as a matter of law. (R. at 93.) The Circuit Court noted that the District Judge ignored the considerable acceptance and durability of the research on false confessions and the distinctly counter-intuitive nature of these confessions. (R. at 97.)

Unable to introduce Dr. Wallace's testimony, the defense requested a jury instruction explaining the occurrence of false confessions. (R. at 61-62, 86-87.) The District Judge declined to use the instruction, reasoning that the jury did not need to be informed that people lie. (R. at 63.) Again, the Circuit Court found for Mr. Har, noting that a jury instruction on the phenomenon of false confessions was necessary in this case. (R. at 97-98.)

SUMMARY OF THE ARGUMENT

The trial court's exclusion of Dr. Wallace's testimony and its admission of hearsay statements by Mr. Har's mother and sister denied Mr. Har his Constitutional rights to present a complete defense and to confront the witnesses against him.

Expert witness testimony is admissible if it both assists the jury and is the product of reliable methods. Fed. R. Evid. (“Rule”) 702. This Court has found this Rule to be flexible and has noted that it favors the admissibility of expert testimony. The trial court is required to determine the admissibility of expert testimony on a case-by-case basis.

Expert testimony regarding false confessions is helpful because juries are not aware that false confessions exist. Courts determine the utility of expert testimony by first evaluating the relevance of the testimony to the facts of the case and then determining whether the expert’s opinion involves specialized skills or knowledge. United States v. Shay, 57 F.3d 126 (1st Cir. 1995). This Court has held that a defendant must be allowed to present evidence challenging the circumstances surrounding his confession. Crane v. Kentucky, 476 U.S. 683, 690 (1986). Juries could not accurately analyze these circumstances without the testimony of an expert. An expert witness, with specialized knowledge concerning the existence of false confessions and the interrogation techniques that commonly cause such confessions, would help the jury understand an otherwise counter-intuitive argument.

The methodology of the study of false confessions is reliable. This Court has suggested four factors that courts can apply to determine the reliability of the basis of an expert’s testimony: (1) whether the conclusions can be tested, (2) whether they are subject to peer review, (3) the known or potential rate of error, and (4) whether the science is generally accepted in the relevant community. Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 593-94 (1993). Expert testimony can be admissible even though all four factors are not present. The methodology of false confessions research is subject to peer review through numerous publications and is generally accepted in the relevant community. Observations and controlled studies of false confessions adequately substitute for the first and third factors of Daubert. The

trial court's exclusion of Dr. Wallace's testimony was therefore clearly erroneous, and Mr. Har's conviction should be reversed.

Additionally, false confessions are a unique phenomenon that must be brought to the jury's attention by an instruction. Unlike other types of evidence, confessions create an improper presumption of guilt in the minds of juries. Moreover, juries do not expect to encounter a false confession because of well-known Constitutional safeguards preventing the admission of coerced confessions. Juries also assume that confessions are true absent evidence of physical coercion. An instruction would remind the jury of the government's burden while informing jurors that they are allowed to question the truthfulness of a confession in their deliberations. Without such an instruction, most cases involving a false confession would result in wrongful convictions. For similar reasons, many circuits already require a jury instruction regarding the fallibility of eyewitness testimony. Given the greater risk of wrongful conviction in cases of false confessions, it is also imperative to have a jury instruction on this issue.

The trial court also erred in admitting the statements that Mr. Har's mother and sister made to Dr. Gerber. In a criminal trial, the Confrontation Clause requires the exclusion of out-of-court testimonial statements unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. Crawford v. Washington, 541 U.S. 36, 53-54 (2004). The statements of Mr. Har's mother and sister are testimonial because they were made during a government interview designed to gather information for his prosecution. Dr. Gerber's indication to Mr. Har's relatives that she was working for the government and preparing for trial would "lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Crawford, 541 U.S. at 51-52. Although Dr. Gerber was not a police officer, her connection to law enforcement is immaterial under Crawford. For these reasons, and

because Mr. Har did not have a prior opportunity to cross-examine his mother and sister, their statements are inadmissible.

The statements of Mr. Har's mother and sister are testimonial hearsay that must be excluded under Crawford. Although they provide the basis of Dr. Gerber's opinions, the jury must consider them for their truth. If the jury thought Mrs. Har and Chava were speaking truthfully, they would give more weight to Dr. Gerber's testimony; if they found the statements untrue, they would be less likely to credit her opinion. Here, the government is misusing Rule 703 as a "backdoor hearsay exception." Under Rule 703, experts are permitted to rely on otherwise inadmissible information. Yet this information is presumptively excluded from evidence unless its probative value substantially outweighs its prejudicial effect. Fed R. Evid. 703. The statements of Mr. Har's mother and sister are inadmissible under this analysis. Their probative value is weak because they carry no indicia of reliability. Their prejudicial value is high, however, because the jury will be forced as a matter of logic to consider these statements for their truth.

Crawford found that statements not offered for their truth, such as statements offered simply to prove that they were made, do not implicate the Confrontation Clause. As discussed above, however, the statements by Mr. Har's relatives are in fact being offered for their truth. Crawford held that the procedural guarantee of the Confrontation Clause cannot depend on the "vagaries of the rules of evidence." 541 U.S. at 61. The government cannot rely on the amorphous distinctions in Rule 703 to deny Mr. Har's Constitutional right to confront the witnesses against him.

ARGUMENT

I. EXPERT TESTIMONY CONCERNING FALSE CONFESSIONS IS BOTH RELIABLE AND HELPFUL

A. The Federal Rules of Evidence and Supreme Court Precedent Favor Admission of Expert Testimony.

The Federal Rules of Evidence permit expert witnesses to testify provided that such testimony will “assist the trier of fact to understand the evidence or to determine a fact at issue” and that it “is the product of reliable principles and methods.” Fed. R. Evid. 702.¹ The party offering the expert testimony must demonstrate these factors by a preponderance of the evidence. Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 592 n.10 (1993). Daubert discarded the more restrictive test of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), by interpreting the reliability requirement in Rule 702 more flexibly. Therefore, Daubert’s rule is “one of admissibility rather than exclusion.” Jenson v. Eveleth Taconite Co., 130 F.3d 1287, 1298 (8th Cir. 1997)(reversing the exclusion of an expert witness after the trial court had found the testimony unhelpful). Expert testimony is properly excluded only “if it is so fundamentally unsupported that it cannot help the factfinder.” Id. An appellate court reviews the trial court’s decision for abuse of discretion. General Electric v. Joiner, 522 U.S. 136 (1997). In this case, the Fourteenth Circuit held that the trial court reached a clearly erroneous decision in excluding Dr. Wallace’s expert testimony without properly conducting a Daubert analysis.

¹ Fed. R. Evid. 702 reads:

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.

Daubert prohibits per se rules excluding particular types of expert testimony. Joiner, 522 U.S. at 142 (“A court . . . may not categorically distinguish between rulings allowing expert testimony and rulings which disallow it.”). Instead, the trial court must make “a particularized determination in each case.” United States v. Belyea, 159 Fed. Appx. 525, 530 (4th Cir. 2005)(rejecting per se exclusion of expert testimony on false confessions).² The utility of expert testimony and the reliability of the expert’s methods are likewise determined on a case-by-case basis.

B. Expert Testimony Regarding the Phenomenon of False Confessions Assists the Jury When the Credibility of a Confession is at Issue.

The Supreme Court in Daubert described the requirement that expert testimony “assist” the jury as merely incorporating the relevancy requirement in Rules 401³ and 402.⁴ 509 U.S at 587. Yet the Advisory Committee’s Note for Rule 702 recommends that the court judge testimony’s utility by considering whether an “untrained layman” would be qualified to determine the issue without specialized skills or knowledge. Circuit courts have generally combined the tests in Daubert and the Advisory Committee’s Note and applied a two-part inquiry to determine the helpfulness of expert testimony. First, the trial court must determine whether the testimony “fits” the particular facts of the case. United States v. Shay, 57 F.3d 126, 132-33 (1st Cir. 1995). For example, an expert on factors that could influence a child’s response

² Although most circuits have held that per se rules barring expert testimony regarding a specific science are impermissible under Daubert, some circuits still categorically exclude expert testimony on polygraphs because of precedent predating Daubert. See, e.g., United States v. Prince-Oyibo, 320 F.3d 494 (4th Cir. 2003).

³ “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Fed. R. Evid. 401.

⁴ “All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.” Fed. R. Evid. 402.

in an interview was found unhelpful when neither the expert nor the jury knew the actual circumstances of the interview. United States v. Leblanc, 45 Fed. Appx. 393, 401 (6th Cir. 2002). The “fit” requirement embodies the relevance requirement articulated in Daubert. Second, the judge considers whether the expert’s opinions involve specialized skills or knowledge. Shay, 57 F.3d at 133.

1. The Court Must Protect a Defendant’s Right to Present Evidence Challenging the Credibility of His Confession Because Such Evidence is Relevant and Critical to His Defense.

In the case at bar, Dr. Wallace proffered only an exposition of the field of false confessions. He would not have commented on the facts surrounding Mr. Har’s confession in particular. See Fed. R. Evid. advisory committee’s note to amended rule 702 (permitting “the venerable practice of using expert testimony to educate the factfinder on general principles.”). When an expert witness testifies this generally, the only “fit” requirement is relevancy.

Evidence challenging the credibility of a confession is not only relevant, but will often be essential to the defendant’s case. A defendant’s Sixth Amendment right to present a complete defense “would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant’s claim of innocence.” Crane v. Kentucky, 476 U.S. 683, 690 (1986)(reversing a trial court’s refusal to allow the defendant to call police to testify to the circumstances of his interrogation). A per se rule excluding expert testimony regarding false confessions would deny Mr. Har his Constitutional right to present a complete defense.

A defendant’s confession is usually the most damaging evidence admitted against him because the statements come from the defendant himself, who is the most knowledgeable about his past actions. Arizona v. Fulminante, 499 U.S. 279, 296 (1991). The effects of the confession

are heightened when the prosecution's case rests on little else, as in the case at bar. See Id. at 298. The exclusion of expert testimony concerning the credibility of a confession "results in actual prejudice because it has a substantial and injurious effect or influence in determining the jury's verdict." Shay, 57 F.3d at 134 (reversing exclusion of such testimony). In this case, the exclusion of Dr. Wallace's testimony challenging the credibility of the confession was critical to Mr. Har's conviction.

The Tenth Circuit is alone in categorically excluding expert testimony concerning false confessions. United States v. Hebah, 164 Fed. Appx. 678 (10th Cir. 2006). In establishing this per se rule, the Hebah court cited Tenth Circuit precedent excluding any expert testimony concerning the credibility of a witness. Id. at 692. Yet, even these cases recognize that such testimony could be admissible. United States v. Adams, 271 F.3d 1236, 1246 (10th Cir. 2001). Based on the reasoning of the other circuits, a categorical exclusion is inappropriate, and a per se rule against expert testimony challenging the credibility of witnesses in particular is unwarranted.

Moreover, none of the sources of law mentioned in Rule 402 requires "the automatic exclusion of expert testimony simply because it concerns a credibility question," and therefore such evidence is admissible under the Federal Rules of Evidence. Shay, 57 F.3d at 131; see also Daubert, 509 U.S at 587. In fact, "the credibility of a party-opponent is always subject to an attack" even by the party-opponent himself. S. Rep. No. 1277, 93d Cong., 2d Sess. (1974); Shay, 57 F.3d at 132. Therefore, the trial court's exclusion of Dr. Wallace's testimony was clearly erroneous.

2. Juries Could not Accurately Analyze the Circumstances Surrounding a Confession Without the Testimony of an Expert.

The majority of circuits that have ruled on the utility of expert testimony regarding false confessions have held that such testimony is helpful for the jury when the credibility of a confession is at issue. United States v. Belyea, 159 Fed. Appx. 525, 530 (4th Cir. 2005) (citing United States v. Hall, 93 F.3d 1337, 1343-45 (7th Cir. 1996), and United States v. Shay, 57 F.3d 126, 133-34 (1st Cir. 1995)). That someone would confess to a crime that he or she did not commit defies common sense. Belyea 159 Fed. Appx. at 530. Even the Federal Rules of Evidence admit statements against interest on the mistaken assumption that no one would make statements that are damaging to themselves unless they were true. Shay, 57 F.3d at 133 (citing Fed. R. Evid. 804(b)(3) advisory committee's note). Expert testimony on the discipline of false confessions would alert the jury to the existence of false confessions, describe how to identify a false confession, and explain how to decide whether the analysis is relevant to the facts of the case being tried. Hall, 93 F.3d at 1345. Even general testimony regarding the phenomenon of false confessions would assist the jury by providing an explanation for an otherwise counter-intuitive argument. See Id. The Constitutional right to a complete defense, established in Crane, would be meaningless if it allowed a defendant to present evidence concerning the circumstances surrounding his confession but did not extend to expert testimony explaining and interpreting those circumstances.

C. The Methodology of the Study of False Confessions is Reliable.

Daubert suggests four factors for courts to apply in determining the reliability of the basis of an expert's testimony: (1) whether the conclusions can be tested, (2) whether they are subject to peer review, (3) the known or potential rate of error, and (4) whether the science is generally

accepted in the relevant community. Daubert, 509 U.S. at 593-94. Daubert requires this analysis even when the testimony is not based on scientific knowledge. Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1998).

Expert testimony can be admissible even though all four factors are not present. “The nature of the issue, the expert’s particular expertise, and the subject of his testimony” determine which factors apply. Id. at 150. The trial judge has discretion to ascertain which factors are “reasonable measures of reliability in a particular case.” Id. at 153. The Advisory Committee’s Note to Amended Rule 702 observes that “some types of expert testimony will not rely on anything like a scientific method, and so will have to be evaluated by reference to other standard principles attendant to the particular area of expertise.” United States v. Leblanc, 45 Fed. Appx. 393, 399 n.1 (6th Cir. 2002)(citing the advisory committee’s note). A trial judge abuses her discretion, therefore, when she excludes social science testimony simply because it does not meet all of the Daubert factors.

1. The Methodology of False Confessions Research is Subject to Peer Review and is Generally Accepted in the Relevant Community.

Psychological studies on false confessions have been published in mainstream scientific journals, and hundreds of articles have commented on these studies. (R. at 9.) The publishing process subjects these studies to extensive peer review. Subsequent articles in various publications have reviewed and commented on these studies. Moreover, the study of false confessions is accepted in the social science community. (R. at 14.) The phenomenon and its categorization is included in psychology textbooks and is taught in college-level sociology and psychology courses. (R. at 7-8.) It is therefore an accepted field of social science research and is not just the discipline of an insular group.

Although the study of false confessions is not as concrete as ballistics or biology, it is certainly far from being the “junk science” that Daubert would reject. For example, a prediction of future “dangerousness” by examining “the contours of the defendant’s skull” is unacceptable testimony. Joiner, 522 U.S. at 154 n.6 (Stevens, J., dissenting). While no connection can reasonably be proven between the shape of one’s head and a propensity for violence, the relationship between false confessions and circumstances of interrogation is extensively documented.

2. Observations and Controlled Studies of False Confessions Adequately Substitute for the First and Third Factors of Daubert.

Often, the nature of a field of research does not lend itself to experimentation. United States v. Simmons, 470 F.3d 1115, 1123 (5th Cir. 2006)(upholding admission of expert testimony even though it could not be tested and a rate of error could not be ascertained). This is certainly true of false confessions, where it would be unethical to recreate the circumstances that produce such confessions. (R. at 13.) The study of false confessions is not without empirical data, however. In this case, Dr. Wallace would have relied on both observational and controlled studies. (R. at 8.) In observational studies, psychologists review the recorded interrogations of subsequently exonerated defendants who falsely confessed to a crime. Id. They then use statistical analysis to determine which circumstances can lead to a false confession. Id. In controlled studies, subjects are accused of having done something (noncriminal) that they did not do, and various influences are introduced to get them to confess. (R. at 8-9.) These experiments allow psychologists to observe which circumstances can lead to false confessions. While recreation of false confessions is untenable, methods of observation and experience are adequate substitutes. Simmons, 470 F.3d at 1123. Kumho Tire does not require that expert testimony

satisfy all Daubert factors, and therefore judges should not expect testimony concerning false confessions to be based on “real world simulations.” 526 U.S. at 150.

II. THE DISTRICT COURT IS REQUIRED TO INSTRUCT THE JURY CONCERNING FALSE CONFESSIONS WHEN A DEFENDANT CHALLENGES THE TRUTHFULNESS OF HIS CONFESSION.

A. False Confessions Are a Unique Phenomenon That Must be Brought to the Jury’s Attention by an Instruction.

1. Confessions Create a Presumption of Guilt.

An instruction is necessary to remind the jury of the government’s burden to prove the truthfulness of a confession. Once a confession is admitted, it creates a presumption of guilt not permitted by the law. Steven A. Drizin & Richard A. Leo, The Problem of Confessions in the Post-DNA World, 82 N.C.L. Rev. 891, 921-922 (2004). One reason for this inappropriate presumption is that juries believe that most confessions are in fact truthful and corroborated by other evidence. Richard A. Leo & Richard J. Ofshe, The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogations, 88 J. Crim. L. & Criminology 429, 434 (1998). When a jury hears a confession, it will assume the defendant is guilty. This presumption places the burden on the defendant to prove that his confession was false, rather than requiring the government to prove its case beyond a reasonable doubt. A jury instruction is necessary in order to remove this unlawful burden from the defendant. Such an instruction must remind the jury of the government’s burden and inform the jury that false confessions do occur. Then the jury would know that it is allowed to question the truthfulness of a confession in its deliberations.

2. Jury Expectations of Encountering a False Confession are Diminished by the Institution of Constitutional Safeguards.

Juries know that American jurisprudence prohibits the use of coerced confessions at trial. The Fifth Amendment and its interpretation in Miranda v. Arizona, 384 U.S. 436 (1966), prevent the jury from hearing confessions coerced by the state. The police have altered their interrogation procedures, opting for psychological pressures rather than physical abuse. Drizin & Leo, The Problem of Confessions, supra at 908-10. Additionally, false confessions are less likely when defense counsel is present at an interrogation, as is required under the Sixth Amendment. Miranda, 384 U.S. 436. The jury will assume that a confession that has passed these hurdles must in fact be true. False confessions were therefore more obvious and understandable prior to these developments in the law. Drizin & Leo, The Problem of Confessions, supra at 908-10. Despite these protections, and despite jury assumptions regarding confessions, more false confessions occur presently than ever before. Id. at 921. An instruction is essential in order to inform the jury that even confessions admitted into evidence might be false.

3. Juries Assume Confessions Are True Absent Evidence of Physical Coercion.

Safeguards are only one explanation for why false confessions are counter-intuitive. Most jury members also believe that no person would confess falsely to a crime unless he or she were tortured or insane. Id. at 910. A series of studies confirmed this jury behavior. In these studies, members of a mock jury thought that confessions elicited by physical pain were coerced, but confessions drawn out by psychological “persuasion” were voluntary and truthful. Lawrence S. Wrightsman and Saul M. Kassin, Confessions in the Courtroom, 126 (1993). An instruction given to this mock jury cured the problem by bringing the issue of psychological intimidation to

the jury's attention. Id. Since juries are unaware that a confession could be false absent evidence of physical force, such an instruction is always necessary.

B. Given the Overwhelming Weight Juries Place on Confessions, Most Cases Involving a False Confession Result in Wrongful Convictions.

Confessions are the most incriminating evidence against a defendant. Saul M. Kassir & Katherine Neumann, On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis, 21 Law & Hum. Behav. 469, 475 (1997). For this reason, trials in which a defendant confesses result in convictions more often than trials with any other evidence, including eyewitness identification. Drizin & Leo, The Problem of Confessions, supra at 923. Juries sometimes base a guilty verdict on defendants' confessions even if these confessions are demonstrably false. Id. at 961. Given the jury's misunderstanding regarding the issue of false confessions and the incriminating power of a confession, false confessions result in more wrongful convictions than any other kind of evidence.

One study uncovered as much as an 80% chance of conviction for defendants who gave false confessions, despite the usual instruction regarding reasonable doubt. Id. The study aggregated data from 125 confessions given between 1971 and 2002. Id. at 932. In every case considered, the credibility of the confession was disputed. Id. at 924. Each confession was proven false.⁵ See Id. at 925-6. Of the cases that went to trial, 80% of them resulted in the conviction of an innocent person. Id. at 961.

C. Confessions Warrant a Jury Instruction For the Same Reasons as Eyewitness Testimony.

The fallibility of eyewitness identification is well-documented and recognized by the Supreme Court. United States v. Wade, 388 U.S. 218, 228 n.6 (1967). Circuits requiring a jury

⁵ Some crimes were proven to never have occurred, other defendants were exonerated by DNA evidence, and in some cases the real perpetrator was later found.

instruction for eyewitness identification do so primarily because of a concern for the prevalence of wrongful convictions. Eg. United States v. Telfaire, 152 U.S. App. D.C. 146, 146 (1972); United States v. Holley, 502 F.2d 273, 275 (4th Cir. 1974). Without the instruction, juries would not be aware that eyewitness testimony could be mistaken. The policy reasons for jury instructions regarding eyewitness testimony are also present in cases where a defendant challenges his confession. Like eyewitness identification, confessions are not always true. In fact, a jury instruction regarding false confessions is even more necessary than instructions on mistaken identity because a jury is less likely to be aware of this phenomenon. Moreover, confessions carry an even higher propensity for conviction of the innocent than eyewitness identification because of the weight juries place on confessions. Therefore an instruction is necessary to protect defendants.

III. ADMITTING THE GOVERNMENT PSYCHIATRIST’S TESTIMONY VIOLATED THE CONFRONTATION CLAUSE.

A. Admitting the Statements of Mr. Har’s Mother and Sister Violates Controlling Supreme Court Precedent on the Confrontation Clause.

In Crawford v. Washington, 541 U.S. 36 (2004), this Court held that in a criminal trial the Confrontation Clause⁶ requires the exclusion of out-of-court testimonial statements unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination. Id. at 53-54. Crawford’s reasoning emphasized that the Confrontation Clause overrides, and is separate from, the law of evidence. Last term in Washington v. Davis, 547 U.S. ____, 126 S. Ct. 2266 (2006), this Court clarified the definition of “testimonial” for purposes of the Confrontation Clause. Admitting the out-of-court statements of Mr. Har’s relatives violates his Confrontation

⁶ “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .” U.S. Const. amend. VI.

rights under the Crawford-Davis standard because these statements were made during a government interview designed to gather information for his prosecution.

1. The Statements of Mr. Har's Mother and Sister Are Testimonial.

While Crawford did not define “testimonial,” the decision did note that, at the very least, this term includes police interrogations and excludes “a casual remark to an acquaintance.” 541 U.S. at 68, 51. Crawford also offered an exemplary, though not exhaustive, list of testimonial statements: “‘ex parte in court testimony or its functional equivalent,’ ‘extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony or confessions’ [and] ‘statements that were made under circumstances which would lead an *objective witness reasonably to believe that the statement would be available for use at a later trial.*’” Id. at 51-52 (emphasis added)(citations omitted). Davis put forward a more precise definition of “testimonial.” Statements are testimonial “when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” 126 S Ct. at 2274.

The statements of Mr. Har's mother and sister were clearly made under circumstances that would lead an objective witness to reasonably believe they would be available for use at a later trial. On direct and cross examination, Dr. Gerber stated that she mentioned the word “trial” in her conversations with Mrs. Har and Chava and told them that she was a “psychiatrist working with Mr. Har at the Government's request.” (R. at 54, 56-57.) Dr. Gerber also noted that she might have told Mrs. Har and Chava that she would be testifying. (R. at 56.) Mrs. Har and Chava reasonably believed their statements would be used prosecutorially because Dr.

Gerber told them she was a government employee and referenced “testimony” and “trial.” Therefore, the admission of their statements violates the Confrontation Clause under Crawford.

Under Davis, the statements of Mr. Har’s relatives are also testimonial because the circumstances of the interview as recounted by Dr. Gerber objectively indicate that the purpose of the interrogation was to determine past events related to criminal liability. In Davis, this Court expressly left open the issue of “whether and when statements made to someone other than law enforcement personnel are testimonial.” 126 S. Ct. at 2274 n.2.

In United States v. Bordeaux, 400 F.3d 548, 555 (8th Cir. 2005), reh’g en banc denied, 2005 U.S. App. LEXIS 9866 (8th Cir., May 27, 2005),⁷ the Court of Appeals for the Eighth Circuit found a sexual abuse victim’s statements to a child-center employee to be testimonial. This case also defined the term “interrogation” for Confrontation Clause purposes: “a police interrogation is formal (*i.e.*, it comprises more than a series of offhand comments - it has the form of an interview), involves the government, and has a law enforcement purpose.” Id. at 556.⁸ The facts of the interrogation in this case are even more compelling than those of Bordeaux: there, the victim was referred to a non-government center and the interview also served a medical purpose. Here, the interviewer was a psychiatrist working for the government, and her interviews served only a government purpose.

Under Davis and Bordeaux, it is immaterial that Dr. Gerber is not a law enforcement officer. Like a 911 operator and a child center employee, she is not a police officer, but is

⁷ Although United States v. Bordeaux was decided before Washington v. Davis, it is a direct interpretation of Crawford v. Washington and is consistent with the reasoning this Court later employed in Davis.

⁸ Various state courts have found similar statements by child abuse victims to social service workers to be testimonial. See, e.g., State v. Justus, 205 S.W.3d 872, 880 (Mo. 2006) (finding a victim’s statements to a social service worker, provided upon government referral, to be testimonial because the circumstances indicated they would be used prosecutorially).

working at the behest of the government.⁹ As Davis made clear, “it is in the final analysis the declarant’s statements, not the interrogator’s questions that the Confrontation Clause requires us to evaluate.” 126 S. Ct. at 2274 n.1. In People v. Goldstein, 843 N.E.2d 732 (N.Y. 2005), New York’s highest court likewise held that statements to a non-police officer could be testimonial. Under circumstances remarkably similar to those of the present case—a government psychiatrist interviewing defendant’s acquaintances for purposes of evaluating a mental illness defense—that court found no constitutionally significant difference between “an expert retained by the State and a ‘government officer.’” Id. at 733. This holding parallels Crawford’s and Davis’ focus on the quality of the statements made rather than the formal title of the interviewer.

2. Mr. Har Did Not Have a Prior Opportunity for Cross-Examination.

Prior opportunity for cross-examination is established when the defendant had an adequate opportunity to confront the declarant at an earlier trial or hearing. Mancusi v. Stubbs, 408 U.S. 204 (1972)(allowing prior trial testimony of a subsequently unavailable witness at defendant’s second trial); Mattox v. United States, 156 U.S. 237 (1895)(upholding the admission of prior trial testimony of deceased government witnesses, whom the defendant fully cross-examined); California v. Green, 399 U.S. 149 (1970)(finding the Confrontation Clause would not be violated by admitting preliminary hearing testimony given “under circumstances closely approximating those that surround the typical trial.”). Clearly, Mr. Har did not have an opportunity to confront Mrs. Har or Chava at any prior trial or hearing. This is sufficient to establish that admission of their testimonial statements violated Mr. Har’s Confrontation rights.

⁹ Even if a psychiatrist is somehow distinguishable from a 911 operator or a child center employee, Davis explicitly reserved this as an issue of first impression before this Court. Policy reasons clearly militate toward allowing interrogations by non-law enforcement personnel to create testimonial statements. Otherwise, police departments could evade the Confrontation Clause by delegating the questioning of suspects and witnesses to independent contractors.

Under Crawford, for testimonial statements to survive the Confrontation Clause, the witness must be unavailable *and* the defendant must have had a prior cross-examination opportunity.

C. Crawford Applies Because the Statements of Mr. Har’s Mother and Sister Are Hearsay.

In a footnote, Crawford clarifies that the Confrontation Clause does not restrict non-hearsay. Crawford, 541 U.S. at 59 n.9 (“The [Confrontation] Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.”) Mrs. Har’s and Chava’s assertions do not fall within this exception to the Crawford test. Their statements are clearly hearsay because they are offered for the truth of the matter asserted and do not meet the requirements of Rule 703. Moreover, carving out an amorphous exception for statements deemed reliable by evidentiary rules is in direct conflict with Crawford’s categorical, constitutional holding.

1. The Statements of Har’s Mother and Sister Are Hearsay Because They Are Offered for Their Truth.

As the Court of Appeals correctly noted, it is a “fiction” to maintain that the jury will not pass judgment on the truth of Mrs. Har’s and Chava’s statements. (R. at 101.) As an important treatise notes, “to use the inadmissible information in evaluating the expert’s testimony [under Rule 703], the jury must make a preliminary judgment about whether this information is true.” David Kaye, David Bernstein, & Jennifer Mnookin, The New Wigmore: A Treatise on Evidence § 3.10.1 at 40 (2007 Supp). Dr. Gerber’s opinion relied almost exclusively on her conversations with Mrs. Har and Chava. (R. at 59-61.) If the jury thought Mrs. Har and Chava were speaking truthfully, they would give more weight to Dr. Gerber’s testimony; if they found the statements

untrue, they would be less likely to credit her opinion. Hence, the statements of Mr. Har's relatives are offered for their truth, and as such are hearsay.¹⁰

New York's highest court has refused to ignore Confrontation Clause concerns when the government tries to sneak hearsay into evidence under Rule 703. In People v. Goldstein, the New York Court of Appeals found that the jury would have to accept statements of defendant's acquaintances, recounted by a government psychiatrist, as either true or false before deciding how much weight to give the psychiatrist's opinion regarding the defendant's mental illness. 843 N.E.2d 727, 732 (N.Y. 2005). For purposes of the Confrontation Clause, the court found no meaningful distinction between "a statement offered for its truth and a statement offered to shed light on the expert's opinion." Id. at 732-33.

This Court should give substantial weight to the New York Court of Appeals' persuasive and well-reasoned position on Rule 703 and the Confrontation Clause. While some lower state and federal district courts have adhered to the fictional expert-basis/truth distinction, see, e.g., People v. Thomas, 30 Cal. Rptr. 3d 582 (Cal. Ct. App. 2004); United States v. Stone, 222 F.R.D. 334 (E.D. Tenn. 2004), these decisions allow Rule 703 to swallow the Constitutional rule and the Federal Rules of Evidence. Under their interpretation, Crawford's Constitutional imperative would vanish every time an expert took the stand. Rule 703 should be narrowly tailored to avoid constitutional issues. This can be achieved by allowing an expert to state her inadmissible bases generally, but prohibiting her from disclosing the content of the inadmissible evidence.¹¹ Only

¹⁰ "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c).

¹¹ Goldstein hints at such an approach, and one leading commentator and other courts have endorsed it. see, e.g., David Kaye, David Bernstein, & Jennifer Mnookin, The New Wigmore: A Treatise on Evidence § 3.10.1 at 42 (2007 Supp); In re Julio D., 2004 Cal. App. LEXIS 10962, at *10 (Cal. Ct. App. Dec. 6, 2004).

this interpretation of Rule 703 is consistent with the Confrontation Clause and the intent of the Rule's drafters.¹²

2. The Government Is Using Rule 703 as a “Backdoor Hearsay Exception.”

The drafters of the Federal Rules of Evidence, recognizing that Rule 703 was being used to sneak in otherwise inadmissible evidence, amended the Rule in 2000. The instant case involves exactly the type of abuse the 2000 Amendment sought to guard against. The statements of Mrs. Har and Chava are, within the words of the Rule's Commentary, “backdoor hearsay” and, as such, should be scrutinized under the Confrontation Clause. 3 Stephen A. Saltzburg, Michael M. Martin & Daniel J. Capra, Federal Rules of Evidence Manual § 703.02[4] (8th ed. 2002)

Under the Federal Rules of Evidence, hearsay is presumptively excluded from evidence because it lacks reliability. Hearsay is unreliable because the risk that the declarant is lying, misperceives or misremembers cannot be mitigated by the courtroom rigors of oath, cross-examination and first-hand examination by the jury. See Williamson v. United States, 512 U.S. 594, 598 (1994). While the Federal Rules make exceptions to admit certain categories of reliable out-of-court statements, the Confrontation Clause admits of no exceptions.

The 2000 Amendment specifies that otherwise inadmissible facts or data “shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.” Fed R. Evid. 703. The probative value is the “degree to which the otherwise inadmissible information will assist the jury in assessing the weight of the expert's opinion” 3 Saltzburg supra. The prejudicial effect is the “risk that the jury will consider the

¹² As discussed below in B.2, Rule 703 was amended in 2000 to correct for misuse of the Rule as an unofficial hearsay exception.

otherwise inadmissible evidence for its truth, even though instructed not to do so.”¹³ Id. This balancing test, which is the reverse of the test under Rule 403, creates a presumption against disclosure of otherwise inadmissible evidence. Fed. R. Evid. 703 amend. advisory committee’s note. And, because the balancing test was instated as a filter for backdoor hearsay evidence, failing this test is good evidence that the information relied upon is truly being admitted for the truth of the matter asserted.

Applying the test to the instant case, which the District Court failed to do, results in the exclusion of the Hars’ statements. The probative value of Mrs. Har’s and Chava’s statements is low because Dr. Gerber did not establish their reliability. On cross-examination, Dr. Gerber readily admitted that she did not know whether Mrs. Har or Chava perceived Mr. Har correctly or had an accurate memory of him. Dr. Gerber’s account of Mrs. Har’s statements is particularly troubling. As Dr. Gerber admitted, Mrs. Har’s English was difficult to understand, and she simply responded to questions, instead of offering her own narrative. (R. at 56.) Because the jury cannot establish the reliability of Mrs. Har or Chava or the accuracy of their perceptions and memory, these statements do not have any probative value.¹⁴

Moreover, the prejudicial effect of these statements is high because the jury was forced, as an introductory matter, to determine their veracity. The jury could not evaluate Dr. Gerber’s testimony without passing judgment on the truth of Mrs. Har’s and Chava’s statements because they were the foundation of her opinion. While Dr. Gerber stated that her conclusion regarding Mr. Har’s lack of a compliant personality was based on a myriad of admissible information, her

¹³ The Advisory Committee’s Note to Amended Rule 703 also details the tests for probative value and prejudicial effect under the amended rule.

¹⁴ Additionally, admitting the statements of Respondent’s relatives seriously undermines the policy reasons behind the hearsay exclusion. Without cross-examination there is no way to determine whether the declarant misperceives or misremembers. See Williamson.

testimony belied this assertion. (R. at 60.) Instead of explaining how personality tests or interviews with Mr. Har led to this conclusion, Dr. Gerber simply recounted her telephone interviews with Mr. Har's family members in detail. (R. at 60-61.)¹⁵ Thus, the prejudicial effect to Mr. Har is substantial because the jury had no choice but to consider the statements of his relatives for their truth.

3. For Purposes of the Confrontation Clause, Statements Offered as a Basis for Expert Testimony are Fundamentally Distinguishable From Other Statements Not Offered for Their Truth.

In cases where courts have held that non-hearsay does not pose Confrontation Clause problems, it is logically possible for the jury to consider the out-of-court statements for a purpose other than their truth. In the context of Rule 703 and this case, however, jurors must make a preliminary judgment regarding the truth of the statements underlying the expert's opinion.

The case cited in Crawford for the proposition that non-hearsay statements cannot violate the Confrontation Clause is Tennessee v. Street, 471 U.S. 409 (1985). In Street, the defendant argued that he copied his co-defendant's confession.¹⁶ The government introduced the co-defendant's confession to compare them. 471 U.S. at 414. Because the jury could compare the two confessions for their similarities and differences, without regard to the veracity of the co-defendant's confession, this Court found no Confrontation Clause concern. Id. Similarly, in United States v. Trala, the Court of Appeals for the Third Circuit found out-of-court statements, "admitted because they were so obviously false," did not violate the Confrontation Clause. 386 F.3d 536, 545 (3rd Cir. 2004). There, highway police stopped and interrogated the defendant

¹⁵ As for Dr. Gerber's conclusion that Mr. Har does not suffer from Post-Traumatic Stress Disorder (PTSD), this appears to be truly based on both inadmissible and admissible evidence. (R at 59.) However, this does not affect the general conclusion that Dr. Gerber's testimony was tainted with testimonial statements offered for their truth in violation of Crawford.

¹⁶ The co-defendant's and defendant's trials were severed.

and his girlfriend. Id. at 539. In response to police questioning, the girlfriend lied about her identity and the origin of the money in defendant's car.¹⁷ Id. These testimonial statements did not violate the Confrontation Clause because they were admitted to establish defendant's consciousness of guilt, not to show that the statements themselves were true or false. Id. at 543.

When courts admit non-hearsay, out-of-court statements against a criminal defendant, they often instruct the jury not to consider the statements for their truth.¹⁸ See, e.g., Tennessee v. Street, 471 U.S. 409 (1985); Furr v. Brady, 440 F.3d 34 (1st Cir. 2006). The District Judge in Har's case gave such a limiting jury instruction. However, the Supreme Court has held that in certain circumstances, limiting instructions are powerless to protect a defendant's Confrontation rights.¹⁹ Bruton v. United States, 391 U.S. 123, 126 (1968). In such circumstances, this Court found it could not "accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination." Id. at 137.

The above cases pose two issues. One is the possibility the jury will misuse non-hearsay statements. The other is the impossibility that the jury can make a distinction between statements admitted for their truth and statements admitted for other purposes. In many cases, jurors will stray from limiting instructions in their consideration of the evidence. However, in the present case and others involving Rule 703, the jury cannot, as a matter of logic, conform their deliberations to the limiting instruction. Here, the jury *cannot* evaluate the statements of Mr. Har's sister and mother unless they make a preliminary determination that the statements are

¹⁷ Specifically, she said her name was Michele, and then clarified it was Vicky. She also initially told the police sergeant that the money was from "working and saving." When she was re-questioned, she changed her story, first to say the money was from the races in Delaware, and then to say it was from playing slot machines. 386 F.3d at 539-540.

¹⁸ The trial judge in Street used such an instruction.

¹⁹ In Bruton, the evidence at issue was Bruton's co-defendant's confession that he and defendant committed the crime. The evidence was offered for its truth regarding the codefendant in a non-severed trial and was inadmissible hearsay regarding the defendant.

true or false. Consequently, statements admitted as expert bases under Rule 703 do not fit within Crawford's exception for not-for-truth statements.

4. Admitting Substantive, Out-of-Court Statements under Rule 703 Undermines Crawford's Reasoning.

Crawford established that the Constitution's ban on testimonial statements always takes precedence over the Federal Rules of Evidence. As the court stated, "[w]here testimonial statements are involved, we do not think the Framers meant to leave the *Sixth Amendment*'s protection to the vagaries of the rules of evidence" ²⁰ 541 U.S. at 61. Crawford overruled the functional Confrontation Clause standard in Ohio v. Roberts, 448 U.S. 56, 66 (1980) (holding that if a declarant is unavailable, his/her statement is admissible under the Confrontation Clause if it bears adequate "indicia of reliability;" reliability is established if the evidence "falls within a firmly rooted hearsay exception" or has "particularized guarantees of trustworthiness."). Under the Roberts standard, statements determined to be reliable by a judge did not violate the Confrontation Clause. Crawford, 541 U.S. at 61. However, after Crawford, the Confrontation Clause demands that testimonial statements be assessed for their reliability in a particular way: "by testing in the crucible of cross-examination." Id.

Rule 703 rests on a critical assumption regarding the reliability of experts. The argument is that if an expert is willing to rely on certain information in real life, he/she should be allowed to rely on this information in court, whether or not it is otherwise admissible judicially. 3 Stephen A. Saltzburg, Michael M. Martin & Daniel J. Capra, Federal Rules of Evidence Manual § 703.02[2] (8th ed. 2002). This is precisely the type of reliability determination that Crawford found constitutionally inadequate. The Confrontation Clause is a "procedural rather than

²⁰ Crawford uses the term "testimonial statement" interchangeably with "testimonial hearsay," thereby suggesting that the Confrontation Clause analysis should focus on the testimonial character of the declarations, not evidentiary definitions of what does or does not constitute hearsay.

substantive guarantee” of reliability, which requires nothing less than the *process* of cross-examination for testimonial statements. Crawford, 541 U.S. at 61. Admitting testimonial hearsay under Rule 703’s notion of reliability violates the core of Crawford’s rationale. A defendant’s fundamental right to cross-examine those who bear witness against him cannot depend on semantic, impractical distinctions made by the Federal Rules of Evidence. Rather, the Constitution guarantees criminal defendants the right to confront those who testify against them.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the decision of the Court of Appeals for the Fourteenth Circuit be affirmed.