

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA
PETITIONER,

v.

ROUNN HARR
RESPONDENT.

BRIEF FOR RESPONDENT

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STATUTES INVOLVED

United States Constitution Amendment 6 provides:

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

U.S. CONST. Amend. 6

Title 18 United States Code Section. 3501(a) provides in pertinent part:

In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

18 U.S.C. § 3501(a) (2006)

QUESTIONS PRESENTED

- I. Whether the trial court improperly applied the Daubert standard in excluding the testimony of an expert witness whose expertise was outside the knowledge of the jury and based upon peer reviewed, generally accepted, testable social science?
- II. Whether the trial court erred in failing to instruct the jury that confessions are often unreliable and should be assessed accordingly?
- III. Whether the trial court's erred in admitting out-of-court statements asserting Mr. Harr to be stubborn and strong-willed and also violated his Sixth Amendment right to confront witnesses when the declarants were not unavailable and Mr. Harr did not have a prior opportunity to cross-examine them?

STATEMENT OF THE CASE

On February 28, 1997, F.B.I. Agent Nathaniel Walker was summoned to the Daily Dollars game show set to investigate the murder of the host, Sack Seafoam. (R. at 39.) Walker observed Seafoam's body tied to the game wheel. (R. at 39.) Within ten minutes, he decided to walk through the set, and, in his absence, a medical team cut the knot tying the body. (R. at 40). The following pieces of evidence do not exist: forensic evidence, fingerprints, DNA, pieces of fabric, or other helpful clues. (R. at 89). Rounn Harr, who served as a production assistant for the show, was not considered a suspect. (R. at 42). Walker is the only person who claims to recall the knot; he neglected to take a photograph of it. (R. at 49).

In early 2005, Nathaniel Walker had retired from the F.B.I. and was working as a private investigator who spent his days investigating martial infidelity. (R. at 42, 46.) After his retirement, he was upset one murder remained unsolved: the murder of game show host Sack Seafoam. (R. at 46.) In his five years as lead investigator, he failed to gather enough evidence to arrest a single suspect. (R. at 45). Upon his departure from the F.B.I., he copied every piece of evidence in the government's file "so that after [he] retired [he] could continue to work on the case." (R. at 76).

In March of 2005, Walker was reading The National World Magazine and saw an image of a knot from Mago, which “rang a bell in [his] mind and [he] remembered that was where Mr. Harr was from.” (R. at 42.) Walker claims the knot from Mago is the same kind of knot he saw at the murder scene. (R. at 42.) He seized the opportunity to renew his investigation—this time without the oversight of the F.B.I. or the constraints of federal regulations. He felt like “[he] had to find out who did it.” (R. at 76.) He immediately focused his efforts on Mr. Harr, using his daughter, Nebraska, to make contact. (R. at 43).

Nebraska located Mr. Harr on Unite.com, a dating website designed for shy people. (R. at 31, 71). To gain his trust, she began corresponding with Mr. Harr through e-mail, admittedly flirting with him, and eventually convincing him to meet her in person. (R. at 31.) Nebraska falsely told Mr. Harr she was a school teacher, interested in Daily Dollars, and felt connected to him. (R. at 67, 69.) Mr. Harr revealed his feelings of isolation and the hopelessness he experienced growing up under the oppressive regime in his home country. (R. at 70.)

To meet Nebraska for their date, Mr. Harr drove all night after working all weekend. (R. at 73.) On their date, Mr. Harr and Nebraska played miniature golf; Nebraska kissed and caressed Mr. Harr, and condoned Seafoam’s murder. (R. at 32.) To conclude their date, she brought Mr. Harr to the home she shared with Walker, which, unbeknownst to Mr. Harr, was wired for a recorded interrogation. (R. at 33.) She served Mr. Harr beer before Walker entered the basement where they were socializing. (R. at 34.) Immediately, Walker engaged Mr. Harr in a conversation about Mr. Harr’s work at Daily Dollars, asking him about the murder of Seafoam. (R. at 34.) After Walker and Nebraska physically prevented Mr. Harr from leaving their home, R. 75, Walker sent Nebraska out of the room to get Mr. Harr more beer. (R. at 34.)

After Nebraska left the room, Walker began swinging a golf club before finally revealing to Mr. Harr that he was the F.B.I. agent who had led the investigation of Seafoam's murder. (R. at 75.) Walker confronted Mr. Harr about the specifics of the murder before telling him, falsely, that Mr. Harr's fingerprints were found at the scene. (R. at 76.) Once more, Mr. Harr attempted to leave, and Walker pushed him into his chair. (R. at 76). He brandished the golf club while telling a story about a brutal attack with a three iron. (R. at 78). The video, entered into evidence at trial, clearly reveals Mr. Harr's discomfort and distress.

Walker insisted that Mr. Harr would remember committing the crime if he tried. (R. at 77.) Nebraska returned with another beer and told Mr. Harr he might have blacked out after committing the murder. (R. at 78.) Again, she implied whoever killed Seafoam was justified. Continuing the façade, she told him they could not be a couple until he confessed; she persuaded him to speak again with Walker. (R. at 78, 79.) Nebraska promised a confession was only for Walker's personal satisfaction and that she was on Mr. Harr's side. (R. at 80.) Mr. Harr insisted he was innocent. (R. at 79.)

During the interrogation, Nebraska prompted Mr. Harr with facts about the crime, including a broken picture frame, a microphone cord, and the knot. (R. at 79.) After Nebraska and Walker learned that Mr. Harr confronted Seafoam about an affair Seafoam was having with Mr. Harr's girlfriend, they pressed harder. (R. at 78.) Ultimately, Nebraska and Walker led an exhausted and intoxicated Mr. Harr into a confession laced with statements like "I could have," "I guess," and other uncertainties. (R. at 82.)

On June 2, 2005, a grand jury indicted Mr. Harr on one count of first degree murder and one count of second degree murder. (R. at 90.) On July 7, 2005, the district court held a pre-trial hearing to determine the admissibility of psychologists' testimony for the defense and the

prosecution on the issue of false confessions. (R. at 90.) The defense witness, John M. Wallace, Ph.D., testified at the pre-trial hearing that false confessions are a counter-intuitive phenomenon “really need[ing] to be explained to people, jurors, so that they can appreciate why someone would confess to something they didn’t do. It is a common misperception among the general public that if a person confesses to a crime, he is absolutely guilty of that crime.” (R. at 10.) Dr. Wallace also testified that specific psychological and external factors, including coercive interrogation techniques like false accusations of guilt and extended questioning by authority figures, motivate false confessions. (R. at 11.) When the interrogators undermine individuals’ confidence in their memory through tactics such as suggesting a blackout or drunkenness, “coerced internalized confessions” often result. (R. at 7.)

Further, Dr. Wallace testified that false confessions have been studied for over twenty-five years, are generally accepted in the psychology profession, and that controlled, peer-reviewed studies regarding false confessions and the motivators thereof have been cited in “hundreds of articles on false confessions and in numerous psychology texts and is even taught in college level sociology and psychology courses.” (R. at 8.) Despite these facts, the court ruled from the bench that “as a matter of law, the proposed expert testimony of Dr. Wallace is not reliable or helpful, and must be excluded in full.” (R. at 15.)

Drs. Gerber and Kalf’s testimony was admitted at trial on the issue of Mr. Harr’s psychological condition. (R. at 59.) Over the objection of defense counsel, Gerber testified that Mr. Harr was psychologically sound based on pre-trial telephone interviews conducted with Mr. Harr’s family, who still resided in Mago. (R. at 52.) Gerber did not inform Mr. Harr’s family that she was the psychologist involved in the prosecution of Mr. Harr. (R. at 56.) According to Gerber, Mr. Harr’s mother stated in broken English that her son was “stubborn,” “independent,”

“strong willed,” “assertive,” and “self-reliant.” (R. at 60.) His mother mistakenly recalled the date on which Mr. Harr left Mago by four years. (R. at 60, 68.) Gerber also spoke with Mr. Harr’s sister; these out-of-court responses led Gerber to conclude that Mr. Harr was psychologically sound. (R. at 52.) Defense counsel did not have an opportunity to confront Mr. Harr’s family at trial. (R. at 53.)

Dr. Kalf intensely examined Mr. Harr prior to trial and concluded he suffered psychological damage, including Post Traumatic Stress Disorder (“PTSD”), due to his traumatic upbringing under an authoritarian regime. (R. at 51.) Dr. Kalf also testified that Mr. Harr was likely to confess falsely to a crime due to his susceptibility to the power of suggestion. (R. at 51.) The jury was left to evaluate Mr. Harr’s psychological condition without the expertise of Dr. Wallace. (R. at 51.)

During the trial, the defense moved to request a jury charge. (R. at 61.) The requested charge would have instructed the jury on the occurrence of false confessions and listed factors making false confessions more likely. (R. at 86-7.) The court denied the motion and instructed the jury to make a credibility determination. (R. at 64.) The jury returned a verdict of guilty of murder in the second degree. (R. at 93.)

Mr. Harr appealed the conviction to the United States Court of Appeals for the Fourteenth Circuit on the grounds that the district court erred in improperly excluding Dr. Wallace’s testimony, refusing to instruct the jury about false confessions, and allowing Gerber to offer hearsay testimony. (R. at 88.) The court of appeals held, first, the district court erred in failing to admit the reliable and helpful testimony of Dr. Wallace. (R. at 97.) Second, the court held that the failure to give the jury instruction was error. (R. at 99.) Third, the court held that the district court erred in admitting Gerber’s hearsay testimony and, in so doing, violated Mr.

Harr's Sixth Amendment right to confront witnesses. (R. at 101.) Finally, the Court held that each of these errors were harmful. (R. at 101). The government appealed to the Supreme Court on all three issues, and the Court granted the petition for certiorari. (R. at 108).

SUMMARY OF THE ARGUMENT

The central aim of the rules of evidence and the Sixth Amendment is to prevent unreliable evidence from improperly influencing juries. Confessions pose a special danger of improper influence because jurors may not realize they are often unreliable. Thus, juries need experts and special instructions to help them understand the possible dangers of a confession. Further, out-of-court statements made by a criminal defendant's family member may be trusted blindly by jurors if there is no opportunity to cross-examine. Cross-examination would encourage jurors to assess the statements and to weigh them appropriately. In this case, by admitting unreliable evidence, the trial judge failed to preserve the quality of the legal discourse. She failed to apply Daubert faithfully. She failed to charge the jury on the issue of false confessions. And she failed to insist Mr. Harr have an opportunity to confront the witnesses against him. Thus, this Court should affirm the decision of the Fourteenth Circuit.

First, the trial judge erred in failing to perform the Daubert gate-keeping function. Under Daubert, the trial judge must determine whether proposed expert testimony is relevant, reliable, and helpful to the jury. Where a subject is not within the common knowledge of jurors, expert testimony is helpful. Daubert suggests a number of potentially relevant factors to help courts determine the reliability of expert testimony, including assessing the testability of the science, whether the science has been peer reviewed and published, and the general acceptance of the science within the relevant scientific community.

Here, Dr. Wallace's testimony would have been helpful to the jury because the idea people falsely confess to serious crimes is outside the common knowledge of jurors. The testimony was reliable because it is testable, peer reviewed, and accepted within the scientific community. In fact, the science has been peer reviewed and published to such an extent that it is taught in colleges throughout the United States.

Second, the trial judge erred in refusing to charge the jury that false confessions are historically unreliable and must be evaluated cautiously. In certain circumstances, a judge's general cautionary jury charge is insufficient. For instance, in cases where eyewitness testimony is presented against a criminal defendant, many jurisdictions require the judge to charge the jury on the unreliability of eyewitness testimony and the dangers of blind reliance thereon. In cases involving confessions, the judge should be required to issue similar instructions.

Here, the central piece of evidence against Mr. Harr was his confession, which was procured under questionable circumstances in the course of an interrogation conducted by a former F.B.I. agent. Without the expertise of Dr. Wallace, the jurors did not understand the frequency of false confessions or their historic unreliability. Further, jurors often blindly trust confessions. Reliance on these confessions creates a high risk of conviction without appropriate evidence. Thus, judges should be required to charge jurors on the dangers of false confessions.

Third, the trial judge erred in admitting testimonial hearsay and violated Mr. Harr's Sixth Amendment right to confront the witnesses against him. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Generally, hearsay is inadmissible. Further, the Supreme Court has held that, in criminal cases, the Sixth Amendment's Confrontation Clause bars the use of testimonial hearsay against the defendant where the declarant is not unavailable and the defendant has not had a prior opportunity to cross-examine the declarant. Hearsay is

testimonial where the statements are not made during an emergency, and they serve to establish a past fact or further a criminal investigation.

Here, Gerber revealed out-of-court statements made to her by Mr. Harr's family. The statements included that Mr. Harr is an independent person who is not easily swayed by the power of suggestion. Gerber's purpose was to demonstrate that Mr. Harr did not have a compliant personality or PTSD. Although the government contends the statements were offered to allow the jury to assess the credibility of the testimony offered by Gerber, the statements were instead offered for their truth. Thus, the statements were testimonial hearsay and are barred by the Confrontation Clause.

Accordingly, the trial judge erred in at least three ways. First, the judge failed to apply Daubert faithfully. Second, she failed to charge the jury on the issue of false confessions. Third, she allowed Mr. Harr's Sixth Amendment rights to be violated through the admission of testimonial hearsay. Thus, the Fourteenth Circuit's decision to reverse the trial judge should be affirmed.

ARGUMENT

- I. THE DISTRICT COURT IMPROPERLY EXCLUDED THE TESTIMONY OF DR. WALLACE WHICH (1) WOULD HAVE HELPED THE JURY UNDERSTAND THE COUNTER-INTUITIVE PHENOMENON OF FALSE CONFESSION AND (2) WAS RELIABLE, PEER REVIEWED, AND GENERALLY ACCEPTED SOCIAL SCIENCE.

When faced with a question of admissibility of expert testimony, a trial judge must act as a gatekeeper for the jury and determine whether the specific, proposed testimony is relevant, reliable, and helpful to the jury. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589-90 (1993). This gate-keeping function requires a factor analysis examining whether the proffered expertise meets the requirements of Federal Rule of Evidence 702. These factors include: (1)

testability, (2) peer review and publication, (3) rate of error and standards and controls, and (4) general acceptance of the methods in the scientific community. Id. at 593-94. However, the Court in Daubert expressly stated these factors constitute a flexible standard, and trial courts should consider other factors as needed. Id. at 594. The Court reasoned that a flexible standard is appropriate because of the presence of other procedural safeguards such as cross-examinations, contrary evidence, and directed verdicts. Id. at 596.

The Court decided Daubert in response to tensions between the standard for admission of expert testimony announced in Frye v. U.S., 293 F. 1013 (D.C. Cir. 1923) and the subsequently published Federal Rules of Evidence. Daubert, 509 U.S. at 587. Frye required trial judges to determine whether the proffered expert testimony was generally accepted in the scientific community. Frye, 293 F. at 1014. The Court in Daubert focused on the rules' intention to articulate a liberal standard for the admission of expert testimony. Daubert, 509 U.S. at 588-89. The Court intended the factor analysis to result in a broader range of admissible expert evidence. Id. at 595. Frye thus formulated a stricter standard for admission of expert testimony than the standard articulated in the rules as interpreted by Daubert.

When a trial judge excludes proffered expert testimony as it relates the case at bar, abuse of discretion is the standard of review. G.E. Co. v. Joiner, 522 U.S. 136, 143 (1997); Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137, 153-54 (1999). However, the question of whether a court applied the Daubert framework is reviewed de novo. U.S. v. Hall, 165 F.3d 1095, 1101 (7th Cir. 1999). If the judge's decision regarding the admissibility of expert testimony is based upon consideration of the science in general, the court should also review that decision de novo and not for abuse of discretion. See New Hampshire v. Hungerford, 697 A.2d 916, 920 (N.H. 1997); California v. Venegas, 954 P.2d 525 (Cal. 1998); Raynor v. Merrell Pharm. Inc., 104 F.3d

1371, 1376 (D.C. Cir. 1997). Reviewing such decisions for abuse of discretion requires appellate courts to give great deference to trial judges on their decisions of admissibility of general science, which leads to inconsistent application. Oregon v. O'Key, 899 P.2d 663, 688 n.45 (Or. 1995). To check inconsistent application, such decisions concerning science in general should be reviewed with less deference. Id.

- A. Dr. Wallace's testimony would have been helpful in educating the jury about the phenomenon of false confessions because it is not common knowledge that, under high pressure interrogation, vulnerable people may falsely confess to serious crimes.

Federal Rule of Evidence Rule 702 allows the admission of expert testimony if the testimony would assist the jury in understanding an issue not within their common knowledge and understanding. Even when the testimony concerns information within the common knowledge and perception of the jurors, it is helpful if it provides a framework through which the jury can better understand the evidence. Carroll v. Otis Elevator Co., 896 F.2d 210, 212 (7th Cir. 1990). A trial judge must pragmatically decide whether particular information offered by an expert would be helpful. See Id. There is not a strict test for arriving at such a determination; the trial judge must make the decision of helpfulness on a case by case basis. Id. Depriving jurors of reliable information is counter to the reasoning underlying the rules. See generally Daubert, 509 U.S. 597.

Here, Mr. Harr does not dispute it is within common knowledge that people sometimes lie. People are incapable of telling the truth one-hundred percent of the time; human nature prevents it. However, common knowledge does not include the idea that a person would lie about something as serious as committing murder. It is completely foreign to common understanding that someone would confess to a crime he or she did not commit knowing that the statement could lead to a life in prison. Therefore, jurors require special help in understanding

false confessions occur. Jurors also require the assistance of experts to evaluate the likelihood that a particular confession is false. The need for this help is reinforced by the fact that there are identifiable triggers leading to false confessions—both internal and external.

Dr. Wallace’s testimony would have helped the jury in at least two concrete ways. First, he would have testified that the common assumption that no one would confess to a crime he or she did not commit is false. (R. at 9.) Second, Dr. Wallace would have helped the jury evaluate the videotaped confession in this case by testifying to certain factors explaining why people falsely confess to crimes. (R. at 11.)

First, Dr. Wallace would have dispelled the myth that false confessions are always true and reliable. At the pre-trial hearing, Dr. Wallace testified that “false confessions are really so counter-intuitive, most people don’t believe that they ever actually occur, even though we are surrounded by examples of them.” (R. at 9.) Dr. Wallace explained that in the Central Park Jogger case, where seven defendants were accused of rape and murder, the defendants “were . . . convicted with no evidence of their participation outside of confessions.” (R. at 10.) The common-sense idea that no one would confess to something he or she did not do “is absolutely untrue.” (R. at 10.) Thus, Dr. Wallace would have cautioned the jury that false confessions are not always reliable.

Second, Dr. Wallace would have helped the jury evaluate the confession at issue in this case. Had they been given Dr. Wallace’s expertise, the jury could have evaluated the credibility of the videotaped confession in light of specific factors leading to false confessions. Dr. Wallace would have testified that “a large number of false confessors are normal people,” but “false confessions to crimes are very common among people with personality disorders, mental retardation, and among younger people.” (R. at 10.) Further, he would have explained that

external factors like coercive interrogation techniques, questioning by authority figures, stress, and anxiety play major roles in leading people to confess falsely. (R. at 11.)

These factors are particularly relevant in this case due to Mr. Harr's precarious mental condition, the presence of alcohol, and the external pressure to which he was subjected during the interrogation. Dr. Kalf testified Mr. Harr has a compliant personality and suffers from PTSD (R. at 51). These internal problems potentially result from Mr. Harr's childhood and experiences under the violent, authoritarian regime of Mago. (R. at 51.) In the days preceding the interrogation, Mr. Harr corresponded with Nebraska. (R. at 31.) The emails, entered into evidence at trial, reveal Mr. Harr to be a lonely man who was seeking acceptance. (R. at 67-71.) They also reveal a woman who lied willfully in an effort to gain his trust. (R. at 35.) They reveal actions taken by Walker and Nebraska in an effort to convince Mr. Harr to do exactly what they wanted him to do. (R. at 35.) And he did it; he drove all night to be with Nebraska. (R. at 73.) Although the jury was aware that Mr. Harr suffered from these internal ailments, they were tragically unaware of the link between his conditions and the tendency to confess falsely. Further, they were unaware that a person suffering from Mr. Harr's condition is uniquely susceptible to external pressures like having a golf club swung in front of his face and being shoved into a seat and physically restrained from leaving.

Had the jury been given Dr. Wallace's expertise, they would have possessed the tools to link Dr. Kalf's conclusions to the scientific phenomenon of false confessions. The jury could have reached a more informed determination of whether the confession was credible and based in fact. The jury was left to make a misguided determination of whether the confession was accurate without an expert to caution them against blindly trusting confessions or understanding that certain medical and social circumstances lead to false confessions. The evidence was before

them; but they did not know what to do with it. The evidence was pivotal to the defense of the case, but meaningless to the jury without Dr. Wallace's expertise.

The trial judge ruled Dr. Wallace's testimony inadmissible because "jurors know people lie" and because "Dr. Wallace's testimony would not have any light-shedding value." (R. at 16.) However, Dr. Wallace's testimony would have shed tremendous light on the idea jurors should not rely on common sense to determine the credibility of a confession. The judge's characterization of the issue in terms of whether jurors know people lie misses the point entirely; it assumes the knowledge that all people lie would lead jurors to conclude that people may confess to crimes of moral turpitude when they are not guilty.

- B. Dr. Wallace's testimony is reliable under the Daubert factors; the science underlying it is based on testable methodology, peer reviewed in thousands of scholarly articles, and generally accepted in the social science community.

The flexible standard established by Daubert allows trial courts to determine whether particular science is reliable. In making this determination, trial judges should consider, inter alia, (1) testability, (2) peer review and publication, (3) rate of error and standards and controls, (4) and general acceptance in the scientific community. Daubert, 509 U.S. at 593-94. These factors are illustrative only. Id. The standard is flexible; determining reliability often requires the use of factors not expressly listed in Daubert. Id. at 594.

Under Daubert, when analyzing the testability factor, trial judges must focus on the principles and methodologies underlying the science—not the scientific conclusions. Id. at 595. The Court has also held that "nothing in Daubert . . . requires a district court to admit opinion evidence which is connected to existing data only by the ipse dixit of the expert." Joiner, 522 U.S. at 146. A court may conclude "there is simply too great an analytical gap between the data and opinion proffered" to allow the admission of the testimony. Id.

Where there is too great a gap between the methodology and the conclusion, a court may exclude the expert opinion. For instance, in Joiner, scientists attempted to draw comparisons between an alleged carcinogenic chemical's harmful effects in infant mice and humans. Id. The chemical was directly injected into the mice in highly concentrated form, and the mice developed a different type of cancer than the respondent, who contracted lung cancer allegedly as a result of exposure to low concentrations of the chemical. Id. at 139. Further, adult mice did not develop cancer subsequent to concentrated exposure, nor were there studies of any other species. Id. Noting the vast differences in experiments performed on the mice and the respondent's actual case, the Court held there was too great a gap between the methodology and the scientific conclusion. Id. at 146.

Here, Dr. Wallace's conclusions were testable and based on sound methodologies. False confessions have been examined through observational studies. (R. at 8.) These studies analyze people who have confessed to crimes, but have subsequently been exonerated by DNA evidence. (R. at 8.) Researchers study the circumstances of the confession, including the interrogation techniques, to compile categories of false confessors, characterized by both internal and external factors. (R. at 8.) In controlled studies, psychologists accused subjects of making mistakes. (R. at 8-9.) The accusers knew the mistakes were not caused by the subjects. However, under intimidating interrogation by the psychologists and other authority figures, the subjects falsely confessed to the offenses much of the time. (R. at 8.) These methodologies are generally recognized in the psychological community and supported by controlled experiments like the ones referenced by Dr. Wallace at the pre-trial hearing. (R. at 9.) They are also taught in colleges throughout the country. (R. at 9.) Further, these experiments have helped scientists to

explain the phenomenon of false confessions and identify characteristics—internal and external—contributing to their occurrence. (R. at 9.)

Unlike the science in Joiner, Dr. Wallace’s methodology has real world applications. Here, the studies underlying Dr. Wallace’s conclusions were performed on humans, not mice. While the mice in Joiner were subjected to levels of carcinogenic chemicals in much greater concentrations than was the plaintiff, Dr. Wallace’s study featured humans exposed to similar levels of external pressure applied by authority figures. Further, Joiner featured studies performed upon infant mice, while the plaintiff was an adult. In this case, all of the experiments were performed upon adults. The problem in Joiner was that the science leapt from distorted experiments to the real world. Here, the science and the real world exist in tandem: the experiments feature real world observations and studies of vulnerable persons subjected to external pressure, which leads people to confess falsely. Studying confessions of people who are unquestionably innocent demonstrates, contrary to public opinion, people do falsely confess to serious crimes.

Daubert aims to encourage scientists to be good scientists—not good expert witnesses. Methodology published in a peer reviewed journal is subject to rigorous criticism and scientific scrutiny. Daubert, U.S. 509 at 593. Though not dispositive, peer review provides judges, who may have limited scientific knowledge, with a dependable method to evaluate the reliability of the proffered science. Id. at 594.

Before Daubert, the admissibility of expert testimony revolved around the general acceptance of the science. See Frye, 293 F. 1013. Under Daubert, a reliability assessment does not require widespread acceptance in the relevant scientific community. Id. at 594 (quoting U.S. v. Downing, 753 F.2d 1224, 1238 (3rd Cir. 1985)). However, general acceptance in the

scientific community remains an important factor, and a well known methodology that has not been able to attract widespread support “may properly be viewed with skepticism.” Id. This factor simply goes to proving the proffered testimony is based on more than speculation. Daubert, 509 U.S. at 597.

Here, the science at issue is taught at colleges throughout the United States, so contending that it has not been peer reviewed or generally accepted is simply not credible. When noted psychological experts see fit to teach their students that false confessions occur and then delve into the causes and circumstances surrounding those confessions, the science is respected. The function of peer review as a Daubert factor is to help judges who are not scientifically trained understand whether the science is accepted and respected. Daubert, 509 U.S. at 94. That function has been fulfilled in this case. The trial judge should have grasped the general acceptance of the science proffered by Dr. Wallace since it not only was reviewed in thousands of psychological publications and texts, but it is also taught by psychologists at the college level. At the pre-trial hearing, Dr. Wallace testified to the extensive review of the science conducted in texts and articles, including articles in Law and Human Behavior; Psychological Science; The Psychology of Interrogations, Confessions, and Testimony (referencing over 1,000 articles on false confessions); and American Psychologist, the flagship journal of the discipline. (R. at 9.) . These articles were written by nationally respected psychologists like Dr. Saul Kassin, Dr. Richard Ofshe, and Dr. Richard Leo. (R. at 9.) A reasonable judge would have concluded the science was reliable.

In analyzing the admissibility of expert testimony under Daubert, courts acknowledge differences between proffered traditional and social science. Traditional scientific evidence is relatively straightforward for trial judges to assess under Daubert; it is easily tested, peer

reviewed, and rates of error are precise. Social science, on the other hand, poses a difficult challenge for the courts: the science is not as easily tested or subject to accurate rate of error analysis. There are “social sciences in which the research, theories and opinions cannot have the exactness of hard science methodologies.” Jenson v. Eveleth Taconite Co., 130 F.3d 1287, 1297 (8th Cir. 1997). Thus, when social science is being assessed for reliability, the underlying methods must “satisfy the standards for scientific methodology that [the specific] profession would require.” Wessmann v. Gittens, 160 F.3d 790, 805 (1st Cir. 1998) (quoting People Who Care v. Rockford Bd. of Educ. Sch. Dist. No. 205, 111 F.3d 528, 537 (7th Cir. 1997)). Courts recognize “inherent methodological limitations in all social science research” while “holding such expert testimony admissible.” U.S. v. Simmons, 470 F.3d 1115, 1122-23 (5th Cir. 2006) (citing Jenson, 130 F.3d at 1297). Daubert does not specify an acceptable rate of error; nor does it state a level where standards controlling it are so low that the proffered science is inadmissible. In fact, the court’s explanation of this factor is limited to a single sentence. See Daubert, 509 U.S. at 594.

Due to the nature of social science, there is no quantifiable rate of error for false confessions. Forcing the exclusion of any expert testimony that is not subject to an empirical rate of error analysis would deprive jurors of expertise in any area of social science. Jenson, 130 F.3d at 1297. In fact, the types of experiments that would produce a rate of error would be unethical in the field of false confessions. (R. at 13.) The aim of Daubert is to ensure that testimony be reliable and helpful to jurors through a flexible application of the proposed factors. Since this science received extensive peer review, enjoys general acceptance in the scientific community, and is based in sound methodology, the science should have been admitted even absent a quantifiable rate of error.

A trial court's failure to apply the Daubert framework may constitute an abuse of discretion and reversible error. For instance, in U.S. v. Hall, 93 F.3d 1337 (7th Cir. 1996), the defendant confessed to kidnapping a young girl for his own sexual gratification and murdering her. Id. at 1339. The trial judge excluded expert testimony on false confessions offered by a social scientist. Id. At the pre-trial hearing, the expert testified false confessions occur frequently when certain interrogation methods are used. Id. at 1341. However, the trial judge excluded the evidence as a matter of law on the grounds that (1) the science would not add anything to the common understanding of the jury and (2) a social scientist offering such testimony would be judging the credibility of the psychologists who examined the defendant. Id. The trial judge failed to analyze the decision to exclude the testimony through an application of the Daubert factors. Id. at 1335. The Seventh Circuit reversed on a de novo review, holding, absent express reasoning from a trial court, excluding testimony violates Daubert. Id. at 1345.

Here, the Court should review the decision of the district court de novo. Like in Hall, the trial judge simply excluded the testimony of Dr. Wallace. She thought the science as a whole was unreliable and unhelpful to jurors because it is not as testable as traditional science. (R. at 15.) The judge did not go through a sufficient factor analysis to apply Daubert to social rather than traditional science. Thus, the decision should be reviewed without deference to the trial court to further the uniform application of science.

On remand, the district court in Hall applied Daubert and admitted the expert testimony. U.S. v. Hall, 974 F. Supp. 1198, 1199-1200 (D. Ill. 1997). The district court reasoned, first, the social science proffered met the scientific standard of Daubert even though evidence from a "scientifically" tested study was unavailable. Id. at 1200. Second, the social scientist was well qualified. Id. Third, research into false confessions was well documented. Id. at 1204. Fourth,

science on false confessions was subjected to peer review. Id. at 1203. At trial, the expert did not testify that Hall had falsely confessed; he testified as to the factors that would help the jury determine whether Hall's confession was credible. Id. at 1204. Although, on remand, Hall was convicted, the government presented other evidence, including four eyewitnesses, Hall's habit of stalking young girls, and physical evidence. U.S. v. Hall, 165 F.3d 1095, 1101 (7th Cir. 1999).

Here, if the judge had applied the Daubert framework properly to social science, she would have reached the same result as the judge in Hall. The district judge would likely have concluded the science of false confessions meets standards within the psychological community. There was ample evidence of peer review and general acceptance. Dr. Wallace would have testified in a way that would have enabled the jury to assess the credibility of the confession in a meaningful way. Thus, if the trial judge had properly applied the Daubert framework, the evidence would have been admitted as being helpful to the jury.

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN FAILING TO INSTRUCT THE JURY THAT VULNERABLE SUSPECTS FALSELY CONFESS TO CRIMES AS SERIOUS AS MURDER WHEN INTERROGATORS USE INTIMIDATING TECHNIQUES.

Title 18 United States Code Section 3501 (2006) states, when a voluntary confession is made, the judge shall instruct the jury to give such weight "to the confession as the jury feels it deserves under all the circumstances." It should be noted Dickerson v. U.S., 530 U.S. 428 (2000) overruled the statute as it relates to standards of voluntariness. As the statute relates to the jury instruction, it sets forth one charge that the judge must give anytime a confession is entered into evidence. The statute does not state the charge set forth therein is always sufficient. See 18 U.S.C. § 3501 (2006).

In certain circumstances, a judge is often required to give more than a general charge. For instance, the testimony of an eyewitness is often compelling to jurors and outcome

determinative. Eyewitness testimony is historically unreliable, but jurors are typically unaware of the problems with such testimony. Thus, when eyewitnesses are presented, many jurisdictions follow U.S. v. Telfaire requiring the judge to instruct the jury to consider express factors. 469 F.2d 552, 558 (D.C. Cir. 1972). These factors often require the jury to (1) find they are satisfied the eyewitness determined the identity of the defendant based upon his or her own knowledge and recollection, (2) consider the length of time between the crime and the next time the witness saw the defendant, (3) take into account any previous misidentifications, (4) assess the credibility of the witness, and (5) affirm that they are persuaded beyond a reasonable doubt of the identity of the defendant. Id. Thus, when eyewitness testimony is admitted, circuit courts often hold that a general instruction is insufficient. See U.S. v. Scott, 578 F.2d 1186, 1191 (6th Cir. 1978); U.S. v. Roundtree, 527 F.2d 16, 19 (8th Cir. 1975); U.S. v. Hodges, 515 F.2d 650, 652-53 (7th Cir. 1975); U.S. v. Holley, 502 F.2d 273, 275 (4th Cir. 1974); U.S. v. Barber, 442 F.2d 517 (1st Cir. 1971); U.S. v. Ingram, 600 F.2d 260 (10th Cir. 1979).

Courts review a judge's choice of jury charge for abuse of discretion. U.S. v. Beaty, 245 F.3d 617, 621-22 (6th Cir. 2001). When a district court refuses to give a requested instruction, such a decision is reversible error if that instruction is "(1) a correct statement of the law, (2) not substantially covered by the charge actually delivered to the jury, and (3) concerns a point so important in the trial that the failure to give it substantially impairs the defendant's defense." U.S. v. Williams, 952 F.2d 1504, 1512 (6th Cir. 1991); U.S. v. Parrish, 736 F.2d 152, 156 (5th Cir. 1984); U.S. v. Stone, 702 F.2d 1333, 1339 (11th Cir. 1983).

Here, more than a general charge was required. Just as eyewitness testimony is historically unreliable, Dr. Wallace and others confirm confessions are often unreliable. However, confessions present to juries a powerful and potentially catastrophic temptation of

blind reliance. A confession could carry great weight in the eyes of a jury. Particularly where the prosecution's entire case revolves around a confession, there is a strong danger of a confession being inappropriately influential on a jury. Since courts require a Telfaire charge cautioning jurors against relying upon eyewitness testimony without independently evaluating it for reliability, confessions should warrant a similar instruction.

The trial judge's refusal to give the requested jury charge was an abuse of discretion. Here, the requested charge was a correct statement of the law. The requested charge did not differ on the substance of the law from the charge actually given by the jury. The requested charge merely cautioned the jury on the historical unreliability of confessions and encouraged the jury to weigh the confession accordingly. The charge given did not substantially cover the material proposed in the requested charge. The requested charge would have instructed the jury that false confessions are historically unreliable and would have provided guidance including these specific factors: the defendant's (1) age, (2) cultural background, (3) personality and nature including the defendant's desire to please authority figures, (4) the situation with which the defendant was confronted, and (5) the circumstances surrounding the statement. (R. at 86.) The requested charge would have given the jury vital tools, encouraging them to evaluate the confession as an out-of-court statement that is historically unreliable. Absent the requested charge, the jury might not even have thought to evaluate the credibility of the confession.

The failure to give the requested charge was also an abuse of discretion because the charge concerned a point vital to the defense of the case. The case against Mr. Harr featured no physical evidence, no eyewitnesses to the murder—nothing except the allegedly reliable confession. The challenge to the validity of the confession was central to the defense. Had the district court not committed an egregious error in failing to admit Dr. Wallace's testimony, the

jury would have had at least expert testimony as a tool. But the jury did not receive the benefit of expert testimony. They did not receive a jury charge. They were left with a confession received by a defendant under extreme pressure and were never given a single instruction or piece of evidence cautioning them as to the historical unreliability of such confessions. The cumulative effect of these two abuses of discretion is alarming in the scope with which it prevented Mr. Harr from mounting an effective defense.

Just as many courts require the Telfaire charge, courts should require a jury charge when a confession is used against a criminal defendant. Such a charge encourages jurors to make independent findings regarding the reliability of the confession and discourages blind reliance thereon. Without the benefit of a Telfaire-like charge or Dr. Wallace's expertise, the jurors here were forced to evaluate the credibility of the confession—if at all—without any guidance from anyone except the government. The failure to give the requested charge thus constituted an abuse of discretion.

III. THE DISTRICT COURT ERRED IN ALLOWING THE PROSECUTION'S PSYCHIATRIST TO OFFER TESTIMONIAL HEARSAY, FAILING TO ENSURE THE RELIABILITY OF THE EVIDENCE AND TO PRESERVE MR. HARR'S SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES.

Federal Rule of Evidence 703 governs the admissibility of expert opinions. The rule provides "the facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing." The underlying facts or data supporting the inference need not be admissible for the opinion to be admitted so long as they are the type "reasonably relied upon by experts in the particular field." Fed. R. Evid. 703. Prior to 2000, attorneys often used Rule 703 to avoid the hearsay rule by finding an expert who would base his or her opinion on the hearsay statement and convince the judge that the statement was reasonably related to the opinion of the expert and, thus, admissible.

See Turner v. Northern Santa Fe R. R. Co., 338 F.3d 1058, 1061 (9th Cir. 2003). In an attempt to curb this tactic, some courts relied upon Rule 403 and presumed the admissibility of evidence, excluding it only if the danger of unfair prejudice substantially outweighs the probative value. Fed. R. Evid. 403; Nachtsheim v. Beech Aircraft Corp., 847 F.2d 1261, 1270 (7th Cir. 1988).

Therefore, the rule was amended in 2000 to provide “facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.” Fed. R. Evid. 703. Thus, judges must now ask two questions when presented with otherwise inadmissible underlying evidence. First, was the underlying fact of the type typically relied upon by experts in the field? Second, if the underlying fact or data is otherwise inadmissible, did the probative value of the underlying fact substantially outweigh its prejudicial effect? Id.; Northern Santa Fe R.R. Co., 338 F.3d at 1061. If the answer to the first question is “no,” the opinion itself is inadmissible. If the answer to the second question is “no,” the basis of the opinion is inadmissible. Id. Here, the underlying facts relied upon by Gerber are the type typically relied upon by experts in the field of psychology. The probative value of the confession is not an issue on appeal. The advisory committee notes to Rule 703 expressly state that the purpose of the 2000 amendment is to emphasize that, although an expert may reasonably rely upon inadmissible information to form his or her opinion, “the underlying information is not admissible simply because the opinion or inference is admitted.”

Pursuant to Federal Rule of Evidence 801, hearsay is any out-of-court statement offered to prove the truth of the matter asserted. A statement may be (1) an oral or written assertion or (2) nonverbal conduct intended by the declarant to act as an assertion. Fed. R. Evid. 801(a); U.S. v. Ryan, 828 F.2d 1010, 1017 (3rd Cir. 1987). Generally, hearsay is inadmissible. Fed. R. Evid.

802. Barring hearsay from admission prevents blind reliance on statements made out-of-court when the declarant's credibility, perception, memory, and communication skills cannot be meaningfully assessed by the finder of fact. Anderson v. U.S., 417 U.S. 211, 220 (1974). A statement is not hearsay unless it is offered to establish the existence of a fact or facts therein asserted. See Anderson, 417 U.S. at 220.

Prior statements by a witness and admissions by a party opponent are not hearsay. Fed. R. Evid. 801. Further, in Federal Rule of Evidence 803, Congress expressly provided a list of twenty-three exceptions to the hearsay rule. If the statement might reasonably fall under an exception to the hearsay rule, but there is a high risk of the jury believing that the statement is offered for the truth of the matter asserted, courts may exclude the evidence. See Shepard v. U.S., 290 U.S. 96, 104 (1933).

In addition to the hearsay rules, the Sixth Amendment's Confrontation Clause applies to out-of-court statements used against a criminal defendant. U.S. CONST. Amend. VI. The Confrontation Clause is a procedural guarantee designed to assess the reliability of evidence. Crawford v. Washington, 541 U.S. 46, 61 (2004).

Evidentiary rulings are generally reviewed for abuse of discretion. However, in determining whether a defendant's Sixth Amendment rights have been violated by the introduction of evidence, courts conduct a de novo review. U.S. v. Summers, 414 F.3d 1287, 1298 (10th Cir. 2005); U.S. v. Gilbertson, 435 F.3d 790, 794 (7th Cir. 2006); U.S. v. Brito, 427 F.3d 53, 59 (1st Cir. 2005) (holding that whether a particular statement is testimonial should be reviewed de novo); U.S. v. Vargas, 933 F.2d 701, 704 (9th Cir. 1991).

- A. The prosecution's psychiatrist offered out-of-court statements made by Mr. Harr's family in an attempt to assert that Mr. Harr has a noncompliant personality and PTSD.

A distinction between a statement offered to prove the truth of the matter asserted and a statement offered to help the jury evaluate a qualified expert's credibility is not meaningful. For instance, in Goldstein, the defendant was charged with murder and raised the defense of insanity; the prosecution called a forensic psychiatrist in rebuttal. New York v. Goldstein, 6 N.Y.3d 119, 122 (N.Y. 2005). The expert's opinion was based on out-of-court interviews with six people. Id. at 124. The underlying interviews included statements implying that the defendant was using slight mental illness as an excuse for committing murder. Id. The defense objected on the grounds of hearsay, but the prosecution contended the statements were not evidence but were instead offered to allow the jury to evaluate the credibility of the expert's opinion. Id. at 127. The trial judge agreed with the prosecution and admitted the evidence, holding that the statements were not offered to prove the truth of the matter asserted. Id. The Court of Appeals of New York reversed, holding the statements were hearsay by reasoning that the prosecution "obviously wanted and expected the jury to take the [third party] statements as true." Id. at 128. Further, the Court of Appeals stated that "a distinction between a statement offered for its truth and a statement offered to shed light on an expert's opinion is not meaningful in this light." Id.

Here, the government contends the prosecution's psychiatrist offered out-of-court statements to allow the jury to assess the credibility of his expertise rather than for the truth of the matter asserted. Just as the prosecution in Goldstein wanted the jury to believe the statements made about Goldstein were true, the prosecution here sought the same goal. The prosecution clearly wanted the jury to believe Mr. Harr was "strong willed" and "independent," and alleging Mr. Harr's mother told the psychiatrist her son had these traits impermissibly

bolstered the prosecution's case. (R. at 57.) Mr. Harr's mother spoke in broken English and mistook the year Mr. Harr left Mago by four years, but defense counsel had no opportunity to cross examine her on this obvious inconsistency, thus highlighting the dangers of hearsay. (R. at 57.) The state's entire trial theory revolved around Mr. Harr having a strong personality. The prosecution's contention that the statements were not offered to prove that Mr. Harr was an independent, strong willed person is a complete fallacy designed to undermine the purpose of the recent amendment of Rule 703 and the hearsay rules.

In California v. Thomas, 130 Cal. Ct. App. 4th 1202, 1210 (2005), the defendant was charged with gang related activities. The prosecution called a sheriff's deputy to testify as an expert on gang related activities. Id. at 1207. The sole basis of the deputy's expertise was his interaction with other gang members, including his conversations with them. Id. Over objection, the trial judge admitted the expert's testimony, including his recollection of statements made to him by gang members regarding the defendant's alleged gang ties. Id. On appeal, the court held the testimony was not offered to prove the truth of the matter asserted, reasoning the evidence was offered to allow the finder of fact to assess the weight of the expert's opinion. Id. at 1210. The court was constrained by their state's evidence rules which, unlike Federal Rule 703, did not provide for the admission of highly probative hearsay statements as the basis of an expert's opinion.

In Thomas, the lack of amended Rule 703 forced the court to create a fictional difference between offering evidence for the truth of the matter asserted and for the basis of an expert's opinion. However, the new version of Rule 703 allows courts to admit evidence that, while inadmissible as hearsay, is highly probative in weighing an expert's opinion and is not substantially outweighed by unfair prejudice. Further, in Thomas, the unfair prejudicial effect is

low because the out-of-court statements were not the only evidence suggesting the defendant was in a gang. Thus, Thomas was rightly decided, but the absence of amended Rule 703 forced the court to decide the case through backdoor reasoning.

Further, the facts of this case are different from Thomas. Thomas featured a police officer whose expertise was based solely upon his dealings with gang members. When the police officer testified that members of the gang had revealed a partial membership list to him, he was demonstrating to the jury that he understood the inner circle of the gang to which the defendant was accused of belonging. The out-of-court statements showed the jury that the police officer was trusted by gang members, and he understood the nature of a subgroup of one of the hundreds of gangs operating in California. Had the jury not been given an opportunity to hear about the officer's conversations with gang members, they would have had no means of assessing the officer's close relationship with gang members. That understanding was not shown through formal training or degrees; it was shown through the proverbial street smarts of the officer portrayed through the out-of-court conversations he had with gang members.

The facts of Thomas are thus distinguishable from Goldstein and the case at bar. First, in Goldstein, the witness was a forensic psychologist who possessed multiple graduate degrees in the field of psychology. In the presence of the jury, the psychologist was qualified as an expert based largely on her academic credentials. Prior to interviewing Mr. Goldstein, the psychologist had conducted hundreds of interviews with other patients. Her knowledge was based on her academic credentials and the results of controlled experiments. Absent the psychologist testifying to the exact nature of the conversations that she had with people who knew Mr. Goldstein, the jury would still have understood that she was a qualified expert. In this case, there is an analogous situation. The jury would have understood that Gerber was an expert absent her

conversations with Mr. Harr's mother and sister. In Thomas, the jury would have had no reason to give proper weight to the officer's testimony if they had not understood the officer was trusted by the gang and understood its inner-workings. Here, it is completely irrelevant whether Mr. Harr's mother trusted and confided in Gerber because Gerber was accepted as an expert in the field of psychology. Thus, this case is distinguishable from Thomas, and Gerber's statements were offered to prove the truth of the matter asserted.

Accordingly, Gerber's statements were offered to prove Mr. Harr does not have a compliant personality or PTSD. Convincing the jury of these facts was central to the prosecution's strategy. Since an expert's opinion cannot be credible unless its basis is credible, there is no meaningful distinction between a statement offered to prove the truth of the matter asserted and a statement offered to assess an expert's opinion. Where such a distinction has been found, courts have created the distinction fictionally to reach the equitable result. Thus, the admission of the out of court statements in this case was violative of the hearsay rule and constituted an abuse of discretion.

- B. The prosecution's psychiatrist testified to statements made by Mr. Harr's family, who were not unavailable and who defense counsel did not have an opportunity to cross-examine before or during the trial.

From 1980 until 2004, a hearsay statement could not be admitted for use against a criminal defendant unless (1) the declarant was unavailable and (2) there were independent indications of reliability surrounding the statement. Ohio v. Roberts, 448 U.S. 56 (1980). However, the Court overruled Roberts in Crawford when it held indicia of reliability could not overpower the requirement of unavailability. Crawford, 541 U.S. at 61. The Court reasoned, "the Framers [sic] understood that testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable." Id. at 60. Crawford requires a two part

analysis to determine whether a violation has occurred. First, the declarant must be unavailable. Id. Second, courts must consider whether the defendant had a prior opportunity to cross-examine the declarant. Id. at 59.

In overruling Roberts, Crawford reinterpreted the Court's Confrontation Clause jurisprudence. Reasoning that the Roberts standard was too broad due to a failure to discern testimonial from non-testimonial hearsay, the Court held that the Sixth Amendment imposes an absolute bar to testimonial hearsay unless the defendant had a prior opportunity to cross-examine the declarant. Id. at 61. The Court also determined the Roberts standard was too narrow in its focus on reliability. Id. at 60. The Court determined the right to confront witnesses is procedural rather than substantive in nature; the clause does not require reliability, "it requires reliability be assessed in a particular manner." Id. Ultimately, Crawford requires an opportunity for testimony to be assessed for reliability through cross-examination. Determining the reliability of particular testimony is the province of the jury—not the judge. See Id.

Here, the declarants were not unavailable. Mr. Harr received no notice that the prosecution's case would revolve around statements made by his family members. Had he received such notice, Mr. Harr could have asked his family members to come to his trial. The only evidence reflecting the alleged unavailability of the declarants is the fact that they lived in Mago. The prosecution failed to show a good faith effort to locate the declarants. If a declarant is classified as unavailable anytime he or she is out of the country, an incentive would be created to encourage declarants to leave the country on the dates of trial. Thus, the declarants were not unavailable.

Further, Mr. Harr did not have a prior opportunity to cross-examine the declarants. Although they reside in another country, they could have been cross-examined. Given an

opportunity to hear such evidence, the jury could have assessed the statements' reliability through the benefits of cross-examination. Absent cross-examination, the jury had no knowledge of the truth of the statements, the circumstances surrounding those statements, or anything but what Gerber and the government wanted them to know. The central requirement of the Sixth Amendment is that testimony against a criminal defendant must be evaluated through cross-examination. Here, no such opportunity to cross-examine occurred.

In Davis v. Washington, the Court reasoned that providing an exhaustive definition of testimonial hearsay would be impractical but attempted to provide more guidance than Crawford. 126 S.Ct 2266, 2274. The Court broadly held that statements are nontestimonial when made during a police interrogation "under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." Id. Conversely, a statement constitutes testimonial hearsay when "the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." Id. at 2274-75. Statements made during interrogation are testimonial because they serve an investigative and prosecutorial function. Crawford, 541 U.S. at 53.

Statements made to people other than police officers may be testimonial. In Davis, the statements in question were made to a 9-1-1 operator responding to an emergency. The Court held that the statements were not testimonial but, in dicta, the court stated that the statements could have evolved into testimonial statements if, after the emergency ended, the operator had posed questions about the incident. Id. at 2277.

Where a reasonable declarant would have expected his or her statements to be used prosecutorially or at trial, the statements are testimonial. Goldstein, 6 N.Y.3d at 129. For

instance, in Goldstein, supra, the expert was retained by the state to testify at trial. Id. The interviewees were not making casual statements to an acquaintance; they were responding to an agent of the state who was interviewing them to arrive at an opinion as to the defendant's mental condition. Id. Although the record did not reveal whether the interviewees were told they were speaking with an agent of the state, the Court reasoned it "would be strange" if they had not known. Id. Further, the Court stated there was no constitutional distinction between an expert retained by the state and an officer of the state. Id. To make such a differentiation would offer "too little protection" if the prosecution could avoid a violation "by assigning the job of interviewing witnesses to an independent contractor rather than an employee." Id. Thus, the Court held the statements made to the psychiatrist were testimonial, reasoning that statements need not be made under oath or to a police officer to be testimonial in nature. Id.

Here, the statements of the declarants meet the requirements of Crawford and Davis. Like in Goldstein, the statements were not made in an emergency; they were made in the eighth year of a criminal investigation. Although Gerber was not a police officer, she was under the direction of the government and paid by the government. After being hired by the government, the psychiatrist's objective purpose was to establish Mr. Harr as being in a state of perfect mental health. Gerber's mission at trial was to reveal Mr. Harr as the kind of person who would not submit to pressure or make a false confession to a serious crime. Thus, these statements were clearly testimonial hearsay. They are therefore barred by the Sixth Amendment.

Further, as in Goldstein, whether the declarants were subjectively aware their statements would be used at trial is not dispositive. The declarants were contacted by a psychologist who conducted a virtual interrogation about their memories of Mr. Harr. They were asked a host of questions about his character and tendencies. A reasonable person, knowing their family

member was in legal trouble, would go a step further and conclude the conversation could be used at trial.

Statements are testimonial where they are not made in an emergency and are procured in an attempt to further a criminal investigation or establish a past fact. Testimonial hearsay is violative of the Confrontation Clause when it is spoken by an unavailable declarant and the defendant does not have an opportunity to cross examine the declarant. The statements introduced by the prosecution, through the testimony of Gerber, were clearly testimonial. Since the prosecution failed to establish that the declarants were unavailable and Mr. Harr did not have an opportunity to cross examine them, the introduction of the statements violated the Confrontation Clause. On a de novo review, this court should affirm the decision of the Fourteenth Circuit and hold that Mr. Harr's right to confront the witnesses against him was violated.

CONCLUSION

The circuit court's decision should be affirmed because the district court erred by improperly applying the Daubert standard, failing to instruct the jury on the unreliability of confessions, and admitting out of court testimonial hearsay in violation of Mr. Harr's right to confront the witnesses against him.

Respectfully submitted,

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