

NO. 06-117

IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Petitioner

V.

ROUNN HAR,
Respondent

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

BRIEF FOR RESPONDENT

TEAM # 29R

QUESTION PRESENTED

- (1) Whether the district court properly performed its *Daubert* gate-keeping function in determining that a defense expert's testimony concerning false confessions and the factors that contribute to their falsity was neither reliable nor helpful to the jury.
- (2) Whether the district court erred in denying respondent's request for a more specific jury instruction on false confessions when respondent challenged the truthfulness of his confession.
- (3) Whether the district court erred in allowing the prosecution's psychiatric expert to violate the Confrontation Clause by testifying to the substance of her conversations with the Defendant's mother and sister, which were testimonial hearsay.

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STATEMENT OF THE FACTS

Rounn Har, a native of Mago, immigrated to the United States in May of 1996 in order to escape a war torn country ruled by a military junta (R. at 70). In August of 1996, he was fortunate enough to gain employment as a production assistant to Bruce "Sack" Seafoam, the host of *Daily Dollars*, a TV game show (R. at 88). On February 28, 1997, Seafoam was found dead on the set of *Daily Dollars* (R. at 48). An investigation headed up by the FBI was pursued by Agent Nathaniel Walker (R. at 45). Walker's investigation was ultimately inconclusive because there was no forensic evidence present at the scene and interviews with Seafoam's friends, family, several ex-wives, and numerous girlfriends produced no leads (R. at 89). After this inconclusive investigation, the Seafoam case remained Walker's only unsolved case at the time of his retirement in 2002 (R. at 45,89). Upon his retirement, Walker became a private investigator in partnership with his daughter Nebraska Walker (R. at 89).

In March, 2005, Walker's obsession with the Seafoam case was reignited, after reading an article (R. at 49, 89). Walker's obsession with the unsolved Seafoam case led to an investigation of Har (R. at 30). Under the pretense of a romantic interest, Nebraska contacted Har through an internet dating site (R. at 31). Her supposed pursuit of a relationship led to the exchange of several e-mails, each one progressively more suggestive (R. at 67-71). Nebraska finally arranged a meeting for the two under the guise of a breakfast date (R. at 71).

On April 24, 2005, Har drove through the night to meet Nebraska for their date (R. at 73). The two spent a romantic day together, during which, Nebraska led Har to believe that she reciprocated his feelings (R. at 37). Nebraska and Har had breakfast, walked on the beach, went to a sports complex, and finally Nebraska invited him back to her house (R. at 31-33). Upon arriving at her house, Nebraska asked Har to stay a while, leading him into the basement and

giving him a beer (R. at 73). Walker soon joined the couple, and both Nebraska and Walker interrogated Har (R. at 73-85). During the course of the interrogation, the subject of the Seafoam case arose, and Har denied any knowledge or involvement, attempted to get up and leave, but was pushed back onto to the couch (R. at 74-75). Nebraska cajoled Har into staying by suggestively touching his arm, and reassuring him that the sole purpose of the questioning was to placate her father (R. at 78). During the interrogation, Walker and Nebraska used traditional law enforcement techniques, including falsely telling Har that his fingerprints had been found at the Seafoam crime scene (R. at 76). Under the pressure of this coercive environment, Har gave a statement acknowledging participation in Seafoam's death (R. at 82-83). Based on Har's statement to the Walkers, the police arrested Har for the Seafoam murder (R. at 34-35).

On July 7, 2005, the Grand Jury indicted Har for murder (R. at 1-2). On that same date, the United States District Court for the Eastern District of Boerum heard a pre-trial motion by the government to exclude the expert testimony of Dr. John Wallace (R. at 4-16). The defense proposed to offer Dr. Wallace as an expert on false confessions and to have him testify as to the principles underlying the theory of false confessions (R. at 4-5). Dr. Wallace informed the court that false confessions have been studied by social scientists for a period of at least twenty five years, and have been the subject of hundreds of scholarly journal articles (R. at 6-9). Further, he stated the study of false confessions is based on principles that have been studied through observational and controlled studies (R. at 8-9). The court upon hearing Dr. Wallace's testimony and the prosecution's cross examination, summarily ruled that it was disallowing Dr. Wallace from testifying because the testimony was unreliable and unhelpful to the jury (R. at 15-16).

The court also heard testimony from Dr. Roberta Kalf, the defendant's expert, about the mental condition of Har (R. at 14). Dr. Kalf specifically testified that Har has post-traumatic

stress disorder (PTSD) and a compliant personality, as a result of his upbringing in Mago (R. at 14-15). The court allowed the testimony of Dr. Kalf, and then allowed the government's proposed rebuttal witness, Dr. Jessica Gerber (R. at 16).

At trial, Nebraska testified to the facts as set out previously (R. at 29-38). Then, her father, Nathaniel Walker testified (R. at 38-50). After the Government rested, the defense's sole witness Dr. Kalf testified to Har's condition and personality as she had at the pretrial motions (R. at 51). At this time, the prosecution called Dr. Jessica Gerber as a rebuttal witness (R. at 51). Dr. Gerber testified that she had met with Har for about four and a half hours, and that she had interviewed his mother and sister in order to aid in her diagnosis (R. at 52). Dr. Gerber then testified that all of this led her to believe that Har did not in fact have PTSD or a compliant personality (R. at 52).

Following Dr. Gerber's testimony, the defense objected that Dr. Gerber's opinions were based in large part on hearsay from speaking with Har's family (R. at 53). The court overruled this objection, saying that experts could rely on information that was not in evidence in order to form their opinions (R. at 53). Defense counsel responded that Dr. Gerber's testimony should then be limited to only her conclusions based on her research, without the substance of the conversations she had with Har's mother and sister being presented before the jury (R. at 53). The Government affirmed at this time that it would not be calling Har's mother and sister to the stand, rendering them unavailable (R. at 53).

Outside the presence of the jury, Dr. Gerber testified that she has served as an assistant to the Joralemon City Police Department, the County District Attorney, and the Federal Bureau of Investigation as a consulting independent psychiatrist, and a possible expert witness at trial, for which she was paid on an hourly basis (R. at 54). When asked about her phone calls to Mrs. Har,

Har's mother, and Chava, Har's sister, Dr. Gerber testified that she told them she wanted to speak with them about Har because she was working as a psychiatrist with the Government on a trial that involved Har. But she did not tell them that she was going to testify against Har at trial (R. at 54-55). Dr. Gerber further testified that she had called Har's mother and sister in order to firm up her opinion of Har, and to help shape her testimony at trial (R. at 55). When asked about her conversation with Chava, Dr. Gerber testified that she told Chava that she was a psychiatrist that wanted to talk about Har, and she mentioned trial (R. at 57-58). Dr. Gerber asked Chava about her brother's temper, history of physical violence, and reputation in the neighborhood (R. at 58).

After Dr. Gerber's testimony, the district court ruled that Dr. Gerber could testify about the substance of her conversations with Mrs. Har and Chava because they did not implicate the defendant's confrontation right, nor were they offered for the truth of what was asserted (R. at 59). The court also said that it would instruct the jury on the limits of this testimony (R. at 59).

Subsequent to this ruling, the jury returned to the courtroom and Dr. Gerber testified again (R. at 59). During this testimony, Dr. Gerber explained her conclusion was based on her conversations with Mrs. Har and Chava, on the Minnesota Multiphasic Personality Test given to Har, and interviews with Har himself (R. at 60). She explained to the jury that she had spoken with Mrs. Har, who told her that Har was "stubborn" and "strong-willed" and had never looked to others for approval (R. at 60). Then, Dr. Gerber told the jury that Chava told her that Har had a temper control issue, and threw tantrums when he did not get his way and was a neighborhood bully (R. at 60-61).

At the conclusion of testimony, the Defense objected to the court's jury charge regarding false confessions, because it fails to recognize and to instruct the jury that false confessions do occur (R. at 62-63). Additionally, the defense argued that it failed to inform the jury about

factors that increase the likelihood that a confession is false and only addressed weight of testimony on a general level (R at 62). Alternatively, the Defense proposed a more specific instruction on false confession; however, the Court decided to keep the instructions as it originally intended (R. at 63). Also, the court instructed the jury that it was the job of the jury to judge the credibility of all experts involved, including the two psychiatrists (R. at 64). The Court further told the jury that that they could only consider the testimony about the conversations with Mrs. Har and Chava to evaluate Dr. Gerber's opinion, and should not consider them to be true for this purpose (R. at 65).

Har was convicted after this trial under 18 U.S.C. § 1111 (2007) (R. at 88). Har then appealed this conviction to the Fourteenth Circuit Court of Appeals (R. at 88). On July 11, 2006, the Appellate Court decided to reverse and remand the case to the district court (R. at 101). The Appellate Court determined that the trial court ignored its gate-keeping function under *Daubert* by arbitrarily excluding all testimony on the study of false confessions (R. at 93-95). The court also found that the district court's substantive conclusions were erroneous (R. at 95). Specifically, the Appellate Court found that the study of false confessions is reliable as demonstrated by the pre-trial testimony of Dr. Wallace (R. at 95). Furthermore, the court found that the district court erroneously concluded that false confession testimony would not be helpful to the jury (R. at 96-97).

The Appellate Court found that the trial court was responsible for providing the jury with clear guidance on how to evaluate the truthfulness of a confession and that because the defendant's expert witness was prohibited from testifying, the jury should have been given a detailed and thorough instruction about false confessions and the fact that they do occur (R. at 97-98). Additionally, the court compared the problem of false confessions to eyewitness

identifications and held that in both situations a jury instruction, though not curing the problem of reliability, is still a modest improvement (R. at 98).

Finally, the Appellate Court ruled that the district court incorrectly decided on the Confrontation Clause issue (R. at 99). The court determined that the admission of the substance of the conversations with Har's mother and sister violated Har's confrontation right (R. at 99-101). The court based its opinion on the fact that the evidence was testimonial since the statements were made during the course of a police interrogation by Dr. Gerber, who interviewed the two women in preparation for her trial testimony (R. at 100). Further, the court determined that the statements were hearsay because they were offered for their truth, and thus their admission was an end run around the constitutional prohibition (R. at 101). As testimonial hearsay, the admission of these statements violated the Confrontation Clause despite the unavailability of Har's mother and sister, because there had been no prior opportunity for the defense to cross-examine these witnesses (R. at 101). Further, the jury instruction, which was intended to limit the use of the statements, was ruled unable to cure the error (R. at 101). Overall, the Appellate Court determined that these three errors were reversible error, and none were harmless (R. at 101).

On October 3, 2006, this Court granted certiorari based on three questions: the proper application of the Daubert gate-keeping function by the district court, the requirement that the district court instruct the jury about false confessions, and the incurable violation of the Confrontation Clause based on the admission of the conversations between Dr. Gerber and Mrs. Har and Chava (R. at 108).

STANDARD OF REVIEW

An appellate court applies an abuse of discretion standard if a trial court makes an arbitrary decision as to the ultimate conclusion on whether or not to admit expert testimony. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997). Whether the district court's jury instructions were adequate to present the defense's theory of the case is reviewed de novo. *United States v. Smith*, 217 F.3d 746, 750 (9th Cir. 2000). Violations of the core Confrontation Clause concerns is reviewed to determine if they constitute harmless error. *Rushen v. Spain*, 464 U.S. 114, 130 (1983). Further, the ability of jury instructions to cure violations of core Confrontation Clause concerns is reviewed de novo. *Smith*, 217 F.3d at 750.

SUMMARY OF THE ARGUMENT

Daubert mandates that district courts be gate-keepers when faced with the proffer of expert testimony, which requires the courts to make a fact-specific inquiry as to whether proposed testimony would be reliable and helpful to the jury. When Har proposed to offer Dr. Wallace's testimony relating to false confessions, the district court did not fulfill its gate-keeping function. Additionally, its conclusion that the theory of false confessions was unreliable was inconsistent with the pre-trial record, which contained numerous factors that the Court has given as guidelines, including being the focus of numerous studies by social scientists that have been published in several peer-reviewed journals. Further, Dr. Wallace's proposed testimony would be helpful to the jury because false confessions are counter-intuitive, and an expert would be able to shed light on why a person would falsely confess to a serious crime such as murder. Since Har's confession was central to his conviction, the district court's abdication of its gate-keeping

duties and its erroneous finding as to the reliability and helpfulness of the testimony was prejudicial.

In addition to the district court's *Daubert* error, the court was also incorrect to refuse Har's requested jury instruction. In this case Har's false confession was central to government's case; however, the court only advised the jury that it was to decide what weight to give evidence. A confession is probably the most damaging evidence that can be admitted. Without a specific jury instruction addressing the fact that false confessions occur and what situations are likely to produce them, the jury is inadequately prepared to make a factual determination as to the confession's truthfulness. Further, a parallel can be drawn between the reliability problems of eyewitness misidentification and false confessions. Courts have remedied eyewitness misidentification through the use of specific jury instructions. Because false confessions contain the same problems they should be fixed by the same remedy. Moreover the unwillingness of the court to give the requested jury instruction only compounded the *Daubert* issue, making false confessions a completely opaque topic for the jury.

Finally, the district court improperly allowed Dr. Gerber to testify to the substance of her conversations with Mrs. Har and Chava in relation to Har. An expert may rely on inadmissible evidence to form their opinions; however, this evidence does not thereby become admissible. The conversations in this case were testimonial in nature because they were the product of an interrogation by a government hired expert. In addition, Mrs. Har and Chava both knew they were giving answers which had some relation to a trial, and the primary purpose of the conversation was to gather information related to a past crime. Because the substance of these conversations was testimonial, the Court requires not only that the witnesses be unavailable, but that Har have had a prior opportunity to cross-examine them, which he did not. Further, the

statements were hearsay, because their truth or falsity had to be gauged in order to determine the veracity of the conclusions which Dr. Gerber reached. Dr. Gerber instead is being used as a conduit to present inadmissible hearsay to the jury. In light of this error, which violates Har's Constitutional right to confrontation, a limiting jury instruction is insufficient to cure any prejudice.

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT DETERMINED THAT A DEFENSE EXPERT'S TESTIMONY CONCERNING FALSE CONFESSIONS AND THE FACTORS THAT CONTRIBUTE TO THAT FALSITY WAS NEITHER RELIABLE NOR HELPFUL TO THE JURY.

This court should affirm the Court of Appeals and find that the district court failed to perform its *Daubert* gate-keeping function when it decided to exclude Dr. Wallace's expert testimony concerning false confessions (R. at 93-95). The district court's exclusion of Dr. Wallace's testimony as unreliable and unhelpful to the jury was not only procedurally incorrect, but also substantively incorrect. Excluding the testimony was an abuse of discretion that resulted in substantial prejudice to the defendant because the challenged confession was central to his conviction. Allowing Dr. Wallace's to testify as an expert would have shed light on the phenomenon of false confessions and would have allowed the defendant to explain why his confession was false. Fed. R. Evid. 702 governs expert testimony:

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. Fed. R. Evid. 702.

In the seminal *Daubert* case, this Court held that when a trial court judge is faced with a proffer of expert testimony under Fed. R. Evid. 702, he or she must act as a gatekeeper and make a case-specific finding of whether that particular expert testimony is reliable and helpful to the jury before admitting or refusing to admit the testimony. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591 (1993). First, the trial court must make a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid. *Id.* at 593. Secondly, the court must determine whether that reasoning or methodology properly can be applied to the facts in issue. *Id.* at 593. This gate-keeping function applies to all kinds of expert testimony not just scientific testimony. *Kumho Tire Co. v. Carmichael*. 526 US 137, 141 (1999).

In this case, the district court did not make a case-specific finding of whether the proffered evidence fulfilled the two *Daubert* prongs, instead summarily finding the testimony to be unreliable and unhelpful to the jury (R. at 15). Second, the district court's finding that the study of false confessions was inherently unreliable was arbitrary in that it was in direct opposition to Dr. Wallace's testimony about the nature of false confessions. Lastly, the finding by the district court that, even were it reliable, Dr. Wallace's testimony on false confessions would not assist the jury did not take account of the fact that jurors may not know the reasons and motivations for a person falsely confessing to a crime (R. at 16).

A. *The district court abused the discretion it was granted in as a gatekeeper when it did not make a case-specific finding of reliability and helpfulness*

When performing its *Daubert* gate keeping function a trial court has broad discretion in deciding whether or not to admit expert testimony. *Gen. Elec. Co.*, 522 U.S. at 141. An appellate court applies an abuse of discretion standard if a trial court makes an arbitrary decision as to the ultimate conclusion on whether or not to admit expert testimony. *Id.* at 141. Rather

than making broad generalizations about evidentiary value, a trial court must, on the record, make some kind of reliability determination about whether expert testimony would have helped the jury, given the facts at issue in the particular case. *United States v. Belyea*, 159 Fed. App'x. 525, 529 (4th Cir. 2005).

Here, the trial court judge abused its discretion when it summarily held that Dr. Wallace's testimony was neither reliable nor relevant to the case. The trial court failed to give sufficient weight at the extensive number of peer-reviewed research on false confessions, instead focusing on the fact that no real world simulations have ever been conducted in the field. In deciding that testimony relating to false confessions was unreliable the judge ignored the actual cases of false confessions cited by Dr. Wallace and the published findings of researchers that actual cases of false confessions have occurred.

B. The proposed testimony by the respondent's expert witness met the requirement of reliability and therefore should have been admitted

Under its first role as a gatekeeper, a trial court is asked to determine whether the proposed testimony, including methodology employed by witness in arriving at proffered opinion, rests on a reliable foundation and is relevant to the facts of the case. *Daubert*, 509 U.S. at 591. Evidentiary reliability or trustworthiness is demonstrated by a showing that the knowledge offered is more than speculative belief or unsupported speculation. *Id.* at 593. In *Daubert*, this court expounded four illustrative factors that a district court can take into account in determining whether proffered testimony is reliable: whether the proffered testimony has been or can be tested; whether the proffered theory or technique has been subjected to peer review and publication; the known or potential rate of error of the particular theory or technique, and whether means exist for controlling its operation; and the extent to which the theory or technique has been tested. *Id.* at 595.

Though a trial court is granted broad discretion in determining whether particular methodology is sufficiently reliable, this court has mandated that lower courts should not exclude all evidence of questionable reliability. *Id.* at 595. This court has held the view that vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. *Id.* at 595.

Here, the trial judge abused her discretion when she held that expert testimony on false confessions is never admissible because it is not scientific in its methods and its conclusions are mere guesswork. As the Court of Appeals noted, Dr. Wallace cited long-lived observational studies dating back twenty five years demonstrating cases where defendants have falsely confessed to crimes, only to be cleared through DNA evidence (R. at 6-8). Furthermore, the research mentioned by Dr. Wallace meets several of the indicia of reliability expounded by *Daubert*. As noted by Dr. Wallace, observational studies of false confessions have been subjected to extensive peer review, appearing in prestigious publications such as the *American Psychologist*, *Law and Human Behavior*, and *Psychological Science* (R. at 11). Research accepted for publication in a reputable scientific journal after being subjected to the usual rigors of peer review is a significant indication that it is taken seriously by other scientists, i.e., that it meets at least the minimal criteria of good science. *Daubert v. Merrell Dow Pharmaceuticals* 43 F. 3d 1311 (9th Cir. 1995). While it is true that false confessions have not been quantified, the district court erred in concluding that this indicated that the theory of false confessions is not widely accepted. To the contrary, Dr. Wallace's testimony clearly indicates that false confessions are widely accepted by the scientific community - the categories of false confessors were identified by over twenty years ago and the categorization of these confessions has been

accepted by being cited in hundreds of articles on false confessions and by being taught in college level sociology and psychology courses.

Furthermore, for expert testimony to be deemed reliable, certainty is not required. *Kumho Tire Co.*, 526 US at 142. All that is required is that the knowledge asserted be based on good grounds. *Id.* at 142. It is clear that Dr. Wallace's testimony on the phenomenon of false confessions is based on good grounds because it cites the existence of actual cases where false confessions have occurred, including infamous cases such as the Lindbergh kidnapping, in which over 200 people falsely confessed as well as the Central Parker Jogger case in which five defendants who were convicted of a kidnapping based on their confessions were later exonerated through DNA evidence (R. at 10).

Other circuits have recognized the value and reliability of expert testimony by social scientists as well. The Seventh Circuit Court of Appeals has held that it was reversible error for a district court to exclude expert testimony on false confessions based on reliability. *United States v. Hall*, 93 F. 3d 1337, 1341 (7th Cir. 1996). Though the *Hall* court acknowledged that social science in general and psychological evidence in particular have posed practical difficulties for courts attempting to apply Fed. R. Evid. 702, social science testimony has increasingly become a part of many cases such as employment discrimination actions and criminal proceedings. *Id.* at 1342-1343.

Given that the theory of false confessions has been subjected to peer-review and publication, been tested through observational studies, and been accepted by social scientists in general, it is clear that the theory of false confessions is a reliable theory. In excluding Dr. Wallace's testimony, the district court made a severe error because it excluded testimony that

would have assisted the jury determine whether the confession that the defendant was challenging was in fact a truthful confession or not.

C. The district court erred when it ruled that the false confession testimony would not be helpful to the jury

After performing its reliability analysis, the trial court must to determine whether the proffered testimony is relevant to the facts of the case and would aid the trier of fact. *Daubert*, 509 U.S. at 593. This is essentially a relevance inquiry. *Id.* at 594. When the district court ruled that expert testimony would not be helpful to the jury, the court failed to make the fact-specific analysis that *Daubert* mandates. Since the defendant was challenging the validity of his confession, Dr. Wallace's testimony would have helped the jury make an assessment of whether his confession was a credible one or whether it was false and would have given the jurors reasons as to why a person would falsely lie. Since the district court judge never conducted this analysis, reliable and relevant evidence was improperly excluded, resulting in prejudice to the defendant.

It is clear that testimony by Dr. Wallace would have been helpful to the jury to decide a very important issue – whether the confession upon which the defendant's conviction was based was in fact truthful. Even if it were within the common knowledge of the jury that people lie and false confessions do occur, jurors may not why a normal person would confess falsely to murder. An average juror would not have been familiar with Post-Traumatic Stress Disorder and compliant personality disorder - the disorders that the defendant was diagnosed with - or the effects of these disorders on confessions to a serious crime or the likelihood that interrogation techniques such as villainizing the victim, befriending the suspect, and lying about evidence would elicit a false confession. *See, e.g. Welsh S. White, Confessions in Capital Cases*, 2003 U. Ill. L. Rev. 979 (2003). Expert testimony by Dr. Wallace would have let the jury know that a

phenomenon known as false confessions exists, how to recognize it, the characteristics of false confessors, what motivates false confessors, as well as the interrogation techniques associated with false confessions. All of these inquires would have assisted the jury decide whether respondent's confession was truthful when it was given.

Moreover, the prejudicial effect of excluding the expert testimony was exacerbated by the trial court in this case when it refused to issue instructions informing the jury that people do sometimes falsely confess to crimes such as murder. A contention may be that expert testimony would not have been needed here because the district court permitted Dr. Kalf to testify and her testimony would have informed the jury of the respondent's personality traits and psychological disorders and their bearing on the likelihood that he was susceptible to confessing falsely. However, just because the jury would have been informed of the respondent's personality traits and his susceptibility to falsely confessing does not mean that jurors would understand why a person would falsely implicate themselves, especially for a murder.

At least two Courts of Appeals have held that it is reversible error for a trial court to exclude expert testimony on false confessions. The Fourth Circuit in *U.S. v. Belyea* was faced, like in this case, with a trial court that excluded expert testimony on factors that correlate with false confessions. *Belyea*, 159 Fed. App'x. at 529. The district court in that case had rejected the motion on a similar ground – that the testimony would not help the jury because jurors already know people lie. *Id.* at 529. The Fourth Circuit reversed, holding that the district court should have inquired into whether jurors commonly know about false confessions as a particular form of lying and about specific factors that may correlate to false confessions. *Id.* at 529. The *Belyea* court said that given that the defendant in that case was lied to during his interrogation, was a drug addict, admittedly terrified during the interrogation, and had suffered from clinical

depression and behavioral problems throughout his life, the expert on false confessions would have been able to address whether and how these factors correlate to false confessions. *Id.* at 530.

Similarly, the Seventh Circuit in *Hall* reversed the trial court's exclusion of expert testimony relating to false confessions, saying that once a judge has decided that a confession to a crime is voluntary, a defendant was entitled to present, and the jury was entitled to hear evidence on the issue of voluntariness. *Hall*, 93 F. 3d at 1344. The trial court judge had similar to the trial court in this case and in the *Belyea* case excluded the evidence because it was held to be within the jury's knowledge. *Id.* at 1345. The Seventh Circuit reversed and held that the excluded expert testimony would have let the jury know that a phenomenon known as false confessions occurs, how to recognize it and to decide whether it fits the facts of the case being tried. *Id.* at 1345.

D. Excluding the expert testimony of Dr. Wallace could entail the respondent being falsely convicted.

Not allowing Dr. Wallace to testify could mean that the jury's finding of guilt was based on a falsity. Allowing expert evidence on the existence of false confessions, the characteristics of false confessors in general, and the interrogation techniques associated with false confessions would help the jury make an accurate assessment of whether the confession was truthful when it was given. A good example of false confessions leading to an extended length of incarceration is given by the Central Park Jogger case. Richard A. Leo, et. al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 Wis. L. Rev. 479 (2006).

In that case, a woman was attacked while jogging in New York City's Central Park and was beaten, raped and left for dead. *Id.* at 479. Five teenage boys were arrested a few days

before the victim's body was discovered for robbing bicyclists and joggers in a separate area of Central Park. *Id.* at 480. Police Officers jumped to the conclusion that the joggers and bicyclists involved in these incidents must have also attacked the Central Park Jogger. *Id.* at 480. Detectives interrogated the boys, aged between fourteen and sixteen, throughout the night, ultimately eliciting confessions from all five. *Id.* at 480. Though the boys claimed that their confessions were the product of coercion, the trial judge found the confessions voluntary and admitted them into evidence. Richard A. Leo, *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 Wis. L. Rev. at 481. Largely on the basis of these confessions, all five defendants were convicted of participating in the rape of the Central Park Jogger. *Id.* at 481. Nearly thirteen years after the attack on the jogger, a convict named Matias Reyes contacted authorities and informed them that, he acting alone, had raped the Central Park Jogger. *Id.* at 482. Reyes provided an accurate description of the assault of the jogger and his story was rich in detail and included facts that none of the boys had mentioned. *Id.* at 482-83. Moreover, Reyes' DNA matched that taken from semen recovered from the Central Park Jogger crime scene. *Id.* at 482. In light of the credibility of Reyes confession, the incriminating DNA evidence and the problems with the boys' confessions, prosecutors conceded that new evidence would have made it likely that the jury would have reached a different verdict. Richard A. Leo, *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 Wis. L. Rev. at 484. The prosecutors supported the defendants' motions to vacate the judgments against them. *Id.* at 484.

The Central Park Jogger case is not an isolated case. Five studies alone have documented almost 300 cases of interrogation-induced false confessions since the 1980s. *Id.* at 515. Moreover, as of March 1st, 2007, there were 195 DNA exonerations of convictions,

approximately 23 percent of which resulted in whole or part from police-induced false confessions. *Innocence Project*, <http://www.innocenceproject.org> (last visited March 1st, 2007).

A Confession is among the most powerful evidence introduced in a court of law. This is because police, prosecutors, judges and jurors, and the media all tend to view confessions as self-authenticating and as evidence of guilt. False confessions are viewed as contrary to common sense which is precisely why jurors need to know that lengthy scientific evidence backs up the fact of false confessions and may explain why someone would falsely confession to a crime.

For the above entitled reasons, this court should affirm the finding of the Court of Appeals, finding the expert testimony by Dr. Wallace fulfill the *Daubert* mandates of reliability and helpfulness.

II. THE COURT OF APPEALS WAS CORRECT WHEN IT DETERMINED THAT WHEN A DEFENDANT CHALLENGES THE TRUTHFULNESS OF HIS CONFESSION, THE COURT SPECIFICALLY ADDRESSES THE ISSUE OF FALSE CONFESSIONS.

This court should uphold the finding of the Court of Appeals that a specific instruction regarding false confessions was required. In the case at hand, Har maintains that the statement that he gave to the retired FBI agent an his daughter was a false confession. As there is ample evidence showing that jurors are likely to believe a confession regardless of the circumstances, and that confessions are often times false, Har is entitled to a specialized jury instruction stating that at times, people falsely confess to crimes, including murder. *White, supra*, at 107.

In addition, false confessions and eyewitness identification testimony both involve questions of reliability and as such it is appropriate that false confessions, like eyewitness identification testimony, be accompanied with specific jury instructions. Lastly, this requirement

of specialized jury instructions is especially compelling where expert witnesses on a complicated issue are precluded from testifying.

A. *It is necessary for the court to provide the jury with instructions that explain false confessions and the factors that may increase the likelihood that a confession is false.*

Special jury instructions regarding false confessions are particularly important because a defendant's confession is unique in that "[i]t is probably the most probative and damaging evidence that can be admitted against him, and, if it is a full confession, a jury may be tempted to rely on it alone in reaching its decision." *Arizona v. Fluminate*, 499 U.S. 279, 280 (1991).

While jurors may realize that people do not always tell the truth and thus may falsely confess to some crimes, "[t]hat a defendant may confess falsely to a serious crime such as murder, however, would strike most jurors as highly improbable, if not impossible." White, *supra*, at 107; *see also* Steven A. Drizin and Richard A. Leo, *Problems of False Confessions in the Post-DNA World*, 82 N.C.L. Rev. 891, 910 (2004) (finding that most people believe "that an innocent person will not falsely confess to a serious crime unless he is physically tortured or mentally ill"). Just as the court is obligated to use procedures that "adequately insure a reliable and clear-cut determination of the voluntariness of the confession," *Jackson v. Denno*, 378 U.S. 368, 391 (1964), the court is equally obligated to insure that a reliable and clear-cut determination is made as to the truth or falsity of the defendant's confession.

Social scientists have demonstrated that even where constitutional methods of questioning are used, false confessions may still be produced. Sharon L. Davies, *The Reality of False Confessions --Lessons of Central Park Jogger Case*. *See* 30 N.Y.U. Rev L. & Soc. Change 209, 248-249 (2006); *see also* Drizin, *supra*, at 902 (holding that more recent studies have identified false confession as the leading or primary cause of wrongful conviction in anywhere from fourteen to twenty-five percent of the sample cases studied"). Because methods of

questioning alone will not remedy this situation, and because the “rules of evidence express a strong preference for leaving questions of fact to a jury,” the court is obligated to attempt to remedy the situation by providing the jury with more explicit instructions on false confessions. Drizin, *supra*, at 902.

The jury instruction in this instance was inadequate because it only instructed the jury to decide what weight statements should be given. Without specific instructions as to the fact that in some instances individuals falsely confess to murder, the jury is ill-equipped to adequately assess the factual issue in front of them. *Id.* at 902; *Contra Mayes v. State*, 925 So.2d 130, 133 (Miss. Ct. App. 2005)(holding that when the requested instruction did no more than reiterate the fact that the jury was to determine the weight to give a confession, that the trial court was not required to “grant a separate instruction on the weight and credibility to be given to a confession”). Given all of the evidence that jurors do not understand false confessions, the court is obligated to provide the jury with an instruction that informs them of the fact that at times, people falsely confess to crimes, including murder.

This case is distinguishable from *United States v. Iwegbu*, because while that court held that it is not a fatal error if courts fail to give specific instructions regarding confessions, providing that voluntariness is not an issue, that case did not address the issue of the truthfulness of confessions. *Iwegbu*, 6 F.3d 272, 275 (5th Cir. 1993). The cases are also distinguishable in that in *Iwegbu* the plain error standard was applied because the issue of voluntariness had not been raised before trial, and no instructions were ever requested. *Id.* at 275-76. As such, in this case the court was required to provide the jury with a jury instruction that specifically addressed false confessions.

- B. *Because eyewitness identification's unreliability has led to the requirement of a specific jury instruction on the issue, a specific jury instruction is also required to remedy the unreliability of false confessions.*

Like false confessions, the problems with eyewitness misidentification have led to the wrongful convictions of individuals. In order to remedy the unreliability of eyewitness identifications, the court has required a jury instruction be given to the jury when the identification is the central issue in a case, and its reliability is questionable. *United States v. Thoma*, 713 F.2d 604, 607 (10th Cir. 1983); *see also* *United States v. Anderson*, 739 F.2d 1254, 1258 (2d Cir. 1984)(holding that when there is an eyewitness identification issue, if the defendant requests an instruction on eyewitness identification testimony, the trial judge must instruct the jury accordingly). Following the court's reasoning on eyewitness identification, the appellate court was correct in holding that special jury instruction was required because the defendant's incriminating statement was both unreliable and the central issue of the case.

Given the parallel concern about reliability, the fact that a jury instruction is required for eyewitness identification testimony indicates that a special jury instruction that people falsely confess to crimes including murder is also required. *See generally* *Watkins v. Sowders*, 449 U.S. 341 (1981). In both eyewitness identifications and false confessions, there is a real risk of wrongful conviction. *See, e.g.*, Edward Stein, *The Admissibility of Expert Testimony About Cognitive Science Research on Eyewitness Identification*, 2 *Law, Probability & Risk* 295 (2003); *See* *United States v. Wade*, 388 U.S. 218, 228-29 (1967) (stating that misidentification due to improper suggestion upon the witness may lead to more miscarriages of justice than all other factors put together). In response to the risks present in eyewitness identification some circuits have mandated jury instructions on the topic. *United States v. Barber*, 442 F.2d 517, 528 (3d Cir.); *United States v. Hodges*, 515 F.2d 650, 652-53 (7th Cir. 1975).

It is illogical to turn a critical question over to the jury without first attempting to educate the jury about the “risks involved or the information now available that could illuminate its inquiry.” *United States v. Telfaire*, 469 F.2d 558, 559 (D.C. Cir. 1972)(citing *United States v. King*, 461 F.2d 152, 58 (1972) (Bazelon, C.J., concurring)). This Court should adopt the reasoning of *Telfaire* and find that because the false confession is a critical question involving risks and it will be difficult for the jury to understand, a jury instruction telling the jurors that people do confess to serious crimes, including murder is required. *Telfaire*, 469 F.2d at 559.

Although some courts have held that jury instructions as to eyewitness identification testimony should be approached in a flexible way, when a false confession is a main issue in a case, and the confession’s truthfulness is uncertain, an instruction giving specific details about false confessions to the jury is required. *Thoma*, 713 F.2d at 607. The reasons that courts use a flexible approach in giving instructions on eyewitness identification are not concerns here. In eyewitness identification testimony, courts consider factors relating to the circumstances under which the witness observed the perpetrator before deciding whether or not to give the special jury instruction. *United States v. Hall*, 165 F.3d 1095, 1107-08 (7th 1999). For false confessions, no such circumstances present a problem regarding the testimony because what was said is not in question; rather the statement’s truthfulness is what is at issue. As shown in numerous sociological studies, the circumstances surrounding the confession are not necessarily determinative of the truthfulness of a confession. *Davies, supra*, at 248-49.

Even if the court were to adopt a flexible approach that allowed the judge more discretion, the judge in this case would have no other choice but to provide a special instruction because the false confession is the main issue of the case and its truthfulness is in question. *Telfaire*, introduced the flexible approach for eyewitness identification and it has been interpreted to

require the instruction when the “identification is the main issue in a case and evidence of identification is uncertain or qualified.” *Thoma*, 713 F.2d at 607. It is reversible error to refuse specific jury instructions on false confessions where, as in this case, the government’s case rests almost entirely on a confession that may be false. *United States v. Mays*, 822 F.2d 793,798 (8th Cir. 1987)(citing *United States v. Green*, 591 F.2d 471, 477 (8th Cir. 1979).

The jury should have been provided with a jury instruction that specifically addressed false confessions and the circumstances that may lead to them. Despite the fact that unlike in the field of eyewitness identifications, in the field of false confessions there is not a widely accepted authority that lists factors, a jury instruction should still be given. *See, e.g. Stein, supra*.

In this case, the interrogators used coercive interrogation techniques including false accusations -the lie about the defendant’s fingerprints being found at the scene-in a situation where the defendant was sleep deprived from driving through the night and likely anxious because he was in a situation of interrogation that he had not expected (R. at 73,76). *Compare Drizin, supra*, at 909-911. Even if the court only allowed this portion of an instruction, it would enhance the understanding of the jury.

Given the parallels between eyewitness identification testimony and false confessions, a jury instruction is required when a confession is the central issue in a case and its reliability is uncertain, because the same concerns about reliability that are present in eyewitness identification testimony, are also present in false confessions. *Watkins*, 449 U.S. at 341.

C. Exclusion of expert testimony makes jury instructions on the matter all that much more important.

The Court of Appeals was correct in holding that the requested jury instruction should have been given (R. at 98). When a court refuses to allow expert testimony on the subject of false confessions, it is even more imperative that it provide the jury with an instruction that

specifically addresses false confessions. *United States v. Carter*, 410 F.2d 942, 950-951 (7th 2005) (finding that where the court twice cautioned jurors about assessing eyewitness testimony and the risks presented with it and specifically addressed the fact that the specific jury instructions remedied the fact that an expert's testimony was denied); see also *Anderson*, 739 F.2d at 1258).

In conclusion, the Court of Appeals was correct in holding that a specific instruction regarding false confessions was required in this case.

III. THE DISTRICT COURT IMPROPERLY ALLOWED THE PROSECUTION'S PSYCHIATRIC EXPERT, DR. GERBER, TO TESTIFY TO THE SUBSTANCE OF HER CONVERSATIONS WITH MRS. HAR AND CHAVA, HAR'S MOTHER AND SISTER RESPECTIVELY, BECAUSE THE CONVERSATIONS WERE TESTIMONIAL HEARSAY; AND IN SO DOING, VIOLATED THE CONFRONTATION CLAUSE, WHERE SUCH VIOLATION WAS NOT CURABLE BY A LIMITING JURY INSTRUCTION.

Generally, an expert may base their opinions on facts "perceived by or made known to the expert at or before the hearing," if they are the "type reasonably relied upon by experts in a particular field in forming opinions." Fed. R. Evid. 703. These facts "need not be admissible in evidence in order for the opinion or inference to be admitted." *Id.* However, any of the facts or data that is relied on which are 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." *Id.* Therefore, courts generally draw a line between what information an expert may rely upon for their opinion and that which is admissible for the jury to consider. *See, e.g., United States v. Stone*, 222 F.R.D. 334 (E.D.Tenn. 2004).

In this case, Har does not assert any objection to Dr. Gerber's reliance on the conversations she had with Mrs. Har and Chava in order to form her opinion. The Respondent

does, however, disagree with the district court's admission of the substance of those conversations before the jury (R. at 53). The district court's admission of these conversations was based on their erroneous ruling that the evidence was not testimonial, nor was it hearsay, and that any error was cured by a limiting jury instruction (R. at 59). Har maintains that the substance of these conversations may only be viewed as testimonial hearsay, and so violated his confrontation rights. Further, Har argues that the error because it was a Constitutional error was incurable by an instruction to the jury.

A. *The substance of the conversations with Defendant's mother and sister are testimonial, and therefore cannot be admitted as evidence through Dr. Gerber because their admission constitutes a violation of the Confrontation Clause.*

The Confrontation Clause requires that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend VI. This Court recently revisited this area of law in *Crawford v. Washington*, 541 U.S. 36 (2004) and *Davis v. Washington*, 126 S. Ct. 2266 (2006). In that case, the Court held that the Confrontation Clause only becomes relevant when the evidence sought to be admitted is testimonial hearsay. *Crawford*, 541 U.S. at 68. The Court, pointed out, however, that not all hearsay was to be considered testimonial, but rather only hearsay which implicates the Sixth Amendment's core concerns. *Id.* at 51. As phrased by *Davis*, "it is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation clause." *Davis*, 126 S. Ct. at 2273.

The specific danger with these testimonial statements was the fear of prosecutorial abuse, where the government was involved with the intent to produce "testimony with an eye toward trial." *Crawford*, 541 U.S. at 57, n. 7. This danger did "not evaporate when testimony

happen[ed] to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances.” *Id.* at 57, n. 7.

The *Crawford* Court, via Justice Scalia, went on to say that it had no need to reach an exact definition of what was testimonial. *Id.* at 68. The Court did give several examples of what it considered functional equivalents of in court testimony, which included affidavits, custodial examinations, prior testimony, and pretrial statements that declarants would reasonably expect to be used prosecutorially.” *Id.* at 51. Scalia then noted that the basic determination would be if they were "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 52. In general, statements that would qualify under this standard would be those taken by police officers in the course of interrogations as well as statements taken by other government officers. *Crawford*, 541 U.S. at 52-53.

In the present case, Dr. Gerber's interviews with Mrs. Har and Chava were equivalent to in court testimony. It is unreasonable to believe that the two women did not believe their statements were going to be used later by the Government, because any reasonable person would assume that a Government affiliated psychiatrist, calling for the purposes of preparing for litigation, would later use their statements in some way. Further, Dr. Gerber herself admits that she mentioned trial to the women during their conversations (R. at 56). These statements gave Mrs. Har and Chava the idea that the statements they were giving were related to an upcoming trial.

Two years later, the *Davis* Court clarified *Crawford* by discussing the term testimonial and its meaning. *Davis*, 126 S. Ct. at 2273. Here, Scalia again writing for the Court, began to use the primary purpose analysis, which asks if the interrogation is meant to enable police to

provide assistance in an ongoing emergency, or “to establish or prove past events potentially relevant to later criminal prosecution.” *Id.* at 2273-74. The Circuit Courts have since applied this test as determinative to what is testimonial. *United States v. Summers*, 414 F.3d 1287, 1302 (10th Cir. 2005); *see also* *United States v. Hinton*, 423 F.3d 355, 360 (3d Cir. 2005) (testimonial statements include those made under circumstances that would leave objective witness to believe they would be available for use at a later trial); *United States v. Cromer*, 389 F.3d 662, 675 (6th Cir. 2004) (looking at intent of declarant, to see if reasonable person would anticipate his statement being used against the accused in investigating and prosecuting the crime). *Davis* also stated that the final analysis rests on the nature of the declarant’s statements. *Davis* at 2274, n.1. Similarly, the Circuit courts in, applying the *Crawford/Davis* analysis, have asked if questions are intended to help assess a situation and meet the needs of a victim, which would reflect a non-testimonial nature to any statements given. *United States v. Clemmons*, 461 F.3d 1057, 1061 (8th Cir. 2006). Overall, the Court determined that testimonial statements come from interrogations, which are solely directed at establishing the facts of a past crime, in order to identify or give evidence against the perpetrator. *Davis.* at 2276.

In Har's case, the statements of his mother and sister were not used to assess an urgent situation, nor were they intended to help a victim. The statements here were intended to gather information to tie Har to a past crime, the death of Seafoam. After all, there was no imminent danger to anyone at the time that Dr. Gerber was questioning the two women. Also, Dr. Gerber herself admits that she called Mrs. Har and Chava in order to firm up her opinion of Har and to shape her trial testimony (R. at 55).

In addition to the primary purpose, Scalia made reference to the level of formality in a statement as well as the seriousness of the crime involved to determine how flexible a court

should be in using testimonial evidence. *Id.* at 2277, 2279. Thus, a prime example of an interrogation which would yield testimonial hearsay is one done by law enforcement. *Id.* at 2274. Further, the Court clarified that an interrogation need not be reduced to an affidavit in order for it to be testimonial. Rather, an officer taking notes during an interrogation is simply no different than the party signing an affidavit containing their statements. *Id.* at 2276.

While not binding, *People v. Goldstein*, 6 N.Y.3d 119 (2005) proves instructive of the actual application of *Crawford*. In that case, the New York Court of Appeals took *Crawford* to mean that testimonial statements were for the purpose of establishing or proving some fact, as opposed to a “casual remark to an acquaintance.” *Goldstein*, 6 N.Y.3d at 128. The *Goldstein* case was in fact factually parallel to the present case. *Id.* at 128. In that case, a therapist testified to the out of court statements made to her. *Id.* at 128. The court noted that this was testimonial hearsay, because all of the declarants should reasonably have expected their statements “to be used prosecutorially or to be available for use at a later trial.” *Id.* at 129. That case is also instructive because it recognized that there is in fact little difference between a government officer and an expert retained by the State, at least for Constitutional purposes. *Id.* at 129.

In Har's case, the statements were not made as casual remarks. Rather, the statements were made after the women were reached by a woman claiming to be a psychiatrist with the Government working to helping Rounn Har, their son and brother respectively (R. at 54-55). Like the therapist in *Goldstein*, Dr. Gerber is not a Government Officer. However, as she testified herself, she has served as an assistant to the Joralemon City Police Department, the County District Attorney, and the Federal Bureau of Investigation as a consulting independent psychiatrist, and a possible expert witness at trial (R. at 54). Therefore, she has been hired as an expert many times before, and generally works in the prosecutorial posture of the cases.

Moreover, Dr. Gerber is paid by the hour for her work, and so has a clear incentive to maintain her loyalty to the agencies that hire her (R. at 54). In light of the above, the only conclusion that can be drawn from this situation is that the statements by the two women were in fact testimonial.

The Court went on to rule that in order for any testimonial hearsay to be admitted at trial, the declarant must be unavailable and the defendant must have had a prior opportunity to cross-examine the witness, this proposition, finding ample evidence in the historical records.

Crawford, 541 U.S. at 53-54. Thus, in the Court's final conclusion, "testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Id.* at 59. These requirements were seen as necessary to effectuate the ultimate goal of the Confrontation Clause, which was "to ensure reliability of evidence," where such guarantee was "not that the evidence be reliable, but that reliability be assessed in a particular manner: by testing it in the crucible of cross-examination." *Id.* at 61. So, the Constitution was seen as giving us a method to test reliability of statements already made, cross-examination. *Id.* at 67.

In the present case, the Government has affirmed that Mrs. Har and Chava will not be called as witnesses, and thus they can be deemed unavailable (R. at 53). For the second prong, nowhere does the record does it reflect that the defendant had an opportunity to previously cross-examine his mother and sister. Therefore, the testimonial statements in this case should not be admitted, and any such admission violates Har's confrontation rights.

B. *The substance of the conversations with Defendant's mother and sister was offered to prove the truth of those statements so that the jury could use this evidence to judge the reliability of the expert's opinion.*

A further contention by the district court and the Petitioner in this case is that regardless of whether these statements are testimonial, they are not offered for their truth, in other words they are not hearsay (R. at 59). Petitioner claims the substance of Dr. Gerber's conversations with Mrs. Har and Chava were offered to aid in determining the reliability of the expert opinion, but not as true statements. In this case, it is impossible for the jury to assess the credibility of Dr. Gerber's opinion without deeming the substance of these conversations to be true or false, and therefore this argument is of no avail to the Government.

Hearsay is defined as "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). As this Court said in *Bruton*, "the theory of the hearsay rule is that the many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested assertion of a witness, may be best brought to light and exposed by the test of Cross-examination." *Bruton v. United States*, 391 U.S. 123, 136, n. 12 (1968). In the present case, it is uncontested that the statements made by Mrs. Har and Chava were not offered while testifying at a trial or hearing; however, the Government asserts that they are not offered for their truth or falsity. As the Court noted in *Goldstein*, this is a "factually implausible, formalist claim that experts' basis testimony is being introduced only to help in the evaluation of the expert's conclusions but not for its truth," and really it only "permit[s] and end-run around a constitutional prohibition." *Goldstein*, 6 N.Y.S. 3d at 128.

As this Court noted in *Lundy*, the final obligation of a trial judge "is to assure that the expert witness is truly testifying as an expert and not merely serving as a conduit through which

hearsay is brought before the jury.” *United States v. Lundy*, 809 F.2d 392, 395 (7th Cir 1987). In the present case, Dr. Gerber is allowed to freely express her opinion; however, she herself has stated that she did not need the statements of Mrs. Har and Chava to form her expert opinion (R. at 55). Why then must she relate the substance of her conversations with the two women? The answer is the same as in *Lundy*; the Government is attempting to admit this inadmissible evidence using Dr. Gerber as a conduit. Just because inadmissible evidence is used as the basis of an opinion, however, does not turn it into admissible evidence. *Stone*, 222 F.R.D. at 339. If we did allow the substance of these conversations to be admitted through Dr. Gerber’s testimony, it would be “an open door to all inadmissible evidence disguised as expert opinion.” *United States v. Scrima*, 819 F.2d 996, 1002 (11th Cir. 1987).

C. *After evidence in violation of the Confrontation Clause is admitted at trial, a jury instruction limiting the use of such evidence cannot cure the error.*

The district court further erred in asserting that despite any possible injury to Har, the admission of the testimonial hearsay was cured by a jury instruction (R. at 59). Given the nature of the right violated in this case is a Constitutional one, this cannot be a sufficient remedy. As this Court recognized decades ago, it is a “naïve assumption that prejudicial effect can be overcome by instructions to the jury... [and] all practicing lawyers know [it] to be unmitigated fiction.” *Bruton*, 391 U.S. at 129 (citing *Krulewitch v. United States*, 336 U.S. 440, 453 (1949)).

In this case, Har’s Sixth Amendment rights were violated, and so no jury instruction could cure such a grave error. The present case falls into one of the “contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.” *Bruton*, 391 U.S. at 135. Here the jurors would be required to determine if Dr. Gerber

was a reliable expert based on uncorroborated statements made to her by Har's mother and sister. The jury cannot possibly be asked to judge that these two close relatives of Har would be telling the truth, and then take the second step of judging whether Dr. Gerber was a reliable source for acquiring and relating the information. The limiting instruction in this case is simply too little, too late.

It is difficult in general for a jury to determine when they can and cannot use evidence they have heard, let alone where intrinsically reliable figures such as the defendant's mother are involved. *Bruton*, 391 U.S. at 131. No matter how clear any limiting instruction, the Court should not "accept limiting instructions as an adequate substitute for [respondent's] Constitutional right of cross-examination." *Id.* at 138. The real "effect is the same as if there had been no instruction at all." *Id.* at 138. There is no reason to sacrifice Constitutional liberties for "greater speed, economy and convenience," "[t]he price is too high." *Id.* at 135 (citing *People v. Fisher*, 249 N.Y. 419, 432 (1928)).

Overall, the substance of Dr. Gerber's conversations with Mrs. Har and Chava are testimonial hearsay; and therefore, the Confrontation Clause requires a prior opportunity for the defendant to cross-examine these declarants in addition to their unavailability. Because Har did not have this opportunity, his confrontation rights have been violated. Further, no jury instruction can cure this Constitutional error, and any attempt to do so is insufficient.

CONCLUSION

Har asks that this Court affirm the findings of the Court of Appeals for the Fourteenth Circuit and grant him a new trial. Har is entitled to a new trial because the district court made several prejudicial errors prior to and during his trial which resulted in a conviction whose validity is reasonably questionable. First, the district court abdicated its gatekeeping function in

excluding the proffered testimony on false confessions and made an arbitrary decision when it found that false confessions testimony is neither reliable nor helpful to the jury. Second, the district court erred in refusing Har's requested jury instruction on false confessions because without it the jury was uninformed about the occurrence of false confessions and the factors that may lead to them. Finally, the district court improperly allowed testimonial hearsay to be admitted, which violated of the Confrontation Clause; and could not be cured through a limiting jury instruction.

Respectfully Submitted,

TEAM # 29 R

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