
In the
United States Supreme Court

UNITED STATES OF AMERICA,

Petitioner

-against-

ROUNN HAR,

Respondent

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

BRIEF FOR PETITIONER

QUESTIONS PRESENTED

- I. Did the District Court properly perform 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?
- II. At trial, when a defendant challenges the truthfulness of his confession, is the District Court required in its instruction to make the jury aware that, at times, people falsely confess to crimes, including murder?
- III. Was the Confrontation Clause violated by a prosecution psychiatric expert's testimony describing the substance of statements she elicited from defendant's mother sister in preparing for trial, even though the District Court instructed the jury to consider those statements only to assess the thoroughness of the expert's opinion but not for the truth of any facts contained in them.

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STATEMENT OF THE CASE

A. Factual History

Respondent, Har, confessed to brutally murdering beloved Sack Seafoam, the host of the popular game show *Daily Dollars*. (R. at 82-84). Har strangled Mr. Seafoam with an electrical cord and tied him to the *Daily Dollars* game wheel with the obscure “Magoian” knot. (R. at 1). Prior to his confession, Mr. Seafoam’s gruesome murder remained unsolved for eight years. (Dynamic Duo Solve The Seafoam Murder Mystery, The Joralemon Herald, June 1, 2005). As a result of the heroic efforts of former FBI agent, Nathaniel Walker, and his daughter, Nebraska, who investigated Respondent, he was apprehended on April 30, 2005. *Id.* Mr. Walker began to suspect that Har was the murderer when he came across a magazine spread featuring a picture of a unique knot identical to the one that Mr. Seafoam was tied with. (R. at 42-43). Furthermore, this knot was the national knot of Mago, *Id.*, the country in which Respondent was born and emigrated from. (R. at 1). After Mr. Walker questioned Har regarding his employment with *Daily Dollars* and relationship with Mr. Seafoam, Respondent confessed to the murder. (R. at 82-84).

B. Procedural History

In a pre-trial hearing, Honorable Susan Bright found that expert testimony for Respondent failed the *Daubert* requirements and was unreliable and unhelpful. The determination was made following direct and cross-examination of the Respondent’s expert witness, Dr. Wallace, who was prohibited from testifying at trial regarding the occurrence of false confessions. (R. at 15).

At trial, the Government produced Respondent’s videotaped confession, witness testimony, and photographic evidence of the Magoian “Bear Hug” knot used to hang the victim on the wheel. (R. at 26, 29-35, 38-44, 51-62, 72, 73-85). Respondent had an opportunity to view

the videotaped confession. (R. at 44). All of the witnesses were cross-examined, however, the defense failed to cross-examine Dr. Gerber. (R. at 59-61). On direct-examination, she was allowed to repeat statements Respondent's mother and sister ("Declarants") made to her concerning his personality to provide the jury with a foundation for her opinion. (R. at 59). Declarants are foreign nationals living in Mago, (R. at 70), and thus the prosecution could not compel their attendance through subpoena. The Respondent had one sole witness, Dr. Kalf. (R. at 51).

Judge Bright issued a jury instruction guiding the jury to acquit the defendant if they doubted the truthfulness of his confession and to accept the Declarants' statements not for the truth of the matter asserted but for assistance in evaluating the thoroughness of Dr. Gerber's opinion. (R. 64-66). The jury convicted Respondent. (R. at 88), who subsequently appealed to the United States Court of Appeals for the Fourteenth Circuit. The Circuit Court reversed and the Government petitioned this Court for certiorari, which was granted on October 3, 2006.

SUMMARY OF THE ARGUMENT

This Court should reverse the United States Court of Appeals for the Fourteenth Circuit's ruling and hold that (1) the District Court properly performed within its broad discretion a *Daubert* analysis in excluding proffered expert testimony, (2) a jury instruction is not required for false confessions, and (3) there was no violation of the Confrontation clause. The District Court committed no errors thus its decision must be upheld.

First, the trial judge properly conducted within her broad discretion a *Daubert* analysis pursuant to Federal Rule of Evidence 702 making the correct conclusions that the respondent's proffered expert testimony on false confessions as both unreliable and not helpful. This Court should provide the trial judge appropriate high deference upholding a recognized principle in

evidentiary rulings and this Court's determination that the judge must act as gatekeeper and ultimate determinant as to the reliability of expert testimony.

Second, when a defendant, at trial, challenges the truthfulness of his confession the decision to award one is within the discretion of the district court. Sometimes, Courts issue cautionary instructions when the voluntariness of a confession is at issue or when there is a significant chance of misidentification by an eyewitness. This is simply because there is empirical proof and broad acceptance that a defendant may involuntarily confess to a crime and that misidentification occurs. However false confessions have no scientific basis and are merely theoretical. Furthermore, the Circuit Courts analogy to misidentification and voluntariness is in vain because neither require a cautionary instruction. Lastly, the respondent's confession is adequately corroborated eliminating the need for a cautionary charge.

Finally, the Confrontation Clause was not violated when Judge Bright allowed Doctor Gerber to repeat in her testimony statements she obtained from Respondent's mother and sister when she interviewed them to develop her medical diagnosis. Firstly, the statements were offered to lay a foundation for her expert testimony and not for the truth of the matter asserted. Secondly, the statements were not provided with the knowledge that they would be used for prosecuting Respondent. Because Respondent's mother and sister could not have reasonably expected their statements to be used at trial, these statements are not testimonial and Crawford is inapplicable. Lastly, Judge Bright properly admitted these statements as statements made for the purposes of a medical diagnosis pursuant to Roberts and Rule 803 (4) of the Federal Rules of Evidence. In the alternative, if the declarants' statements qualify as testimonial and Crawford applies, the statements remain admissible under Crawford since the declarants were unavailable at trial and Respondent had an opportunity to cross-examine Doctor Gerber at trial.

ARGUMENT

I. THIS COURT SHOULD UPHOLD THE DISTRICT COURT'S EXCLUSION OF PROFFERED EXPERT TESTIMONY BY DR. WALLACE BECAUSE THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT PROPERLY APPLIED THE *DAUBERT* FRAMEWORK PURSUANT TO ITS BROAD GATE-KEEPING ROLE.

Exclusion of the proffered expert testimony is appropriate because the district court has high discretion in making reliability determinations pursuant to Federal Rule of Evidence 702 and its *Daubert* gate-keeping function. Federal Rule of Evidence 702 governing expert testimony provides: 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 return of an opinion or otherwise. Fed. R. Evid. 702 (amended 2000). Rule 702 has been amended in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and now bestows trial judges with the responsibility of acting as “gatekeepers” to exclude unreliable testimony. Fed. R. Evid. 702 (amended 2000). Trial judges are provided great leeway in making reliability determinations pursuant Rule 702 and the United States Court of Appeals, Fourteenth District failed to provide the district court with appropriate deference as required.

This Court in *General Electric Company v. Joiner* 522 U.S. 136, 141 (1997), held that abuse of discretion is the proper standard of review of a district court's evidentiary ruling. The district court has broad discretion in making reliability determinations of expert testimony and only when the district court explicitly fails to apply to make such reliability determination does it abuse its power. *United States v. Shay*, 57 F.3d 126 (1st Cir. 1995) (stating that the lower court's decision will only be reversed if it based its decision on an incorrect legal standard) ; *United States v. Velarde*, 214 F. 3d 1204, 1209 (10th Cir. 2000) (holding that reversal of the admission of expert testimony appropriate when the lower court made no reliability determination).

A reversal is warranted when the trial court has completely overlooked the application of the *Daubert* framework or when an analysis is not conducted as to the particular facts of the case both requirements are met here. *Kuhmo Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999) ; *Velarde*, 214 F.3d at 1209 ; (R. at 15-16). Abuse of discretion in admitting and excluding evidence pursuant to Rule 702 requires a clear disregard of any type of *Daubert*-reliability considerations and questioning by the trial judge. See *United States v. Smithers*, 212 F.3d 306, 311 (6th Cir. 2000). The trial judge enjoys a broad discretion in determining reliability in light of the specific circumstances of the case as well as how to assess an expert's reliability, including what procedures to utilize in making that assessment and in making the ultimate determination of reliability. *Velarde*, 214 F.3d at 1208-09 (holding that *Kuhmo* and *Daubert* make it clear that the court must, on the record, make *some* kind of reliability determination) ; *United States v. Belyea*, 159 Fed. Appx. 525, 529 (4th Cir. 2005).

Unless the decision by the trial court is clearly erroneous its decision should not be disturbed if the *Daubert* framework was properly applied. *United States v. Frazier*, 387 F.3d 1244, 1259 (11th Cir. 2004) (stating that under the abuse of discretion review there will be occasions in which the reviewing court will affirm the district court even though the reviewing court would have gone the other way). Without broad discretion the trial judge would lack discretionary authority to avoid "unjustifiable expense and delay" by having to conduct mini-trials into the reliability of each proffered expert testimony. See *Kuhmo*, 526 U.S. at 152-53. The required reliability and helpfulness determination may easily be satisfied by mentioning *Daubert* specifically and focusing on questions as applied in *Daubert* and *Kuhmo*. See *United States v. Hall*, 93 F.3d 1337 (7th Cir. 1996); *Velarde*, 214 F.3d at 1210 citing *United States v. Charley*, 189 F.3d 1251 (10th Cir. 1999) (stating that evidentiary decisions do not warrant

reversal if it determined that in some apparent manner, that the expert testimony admitted was reliable). Only when the trial judge does not consider the evidence at all as demonstrated by the record without any type of reliability considerations set forth in *Daubert* is it a per se and arbitrary finding of unreliability warranting a reversal. See *United States v. Posado*, 57 F.3d 428, 429.

The trial court specifically cited to its gate-keeping function on the record and discussed the proffered expert testimony as it related to the case at hand thus precluding a reversal. Here, there was proper conduction of the required reliability analysis pursuant to *Daubert*. The trial judge, Judge Bright, acknowledged her *Daubert* gate-keeping function stating that she would only be allowing evidence that is “reliable and will be helpful to the jury.” (R. at 5).

Additionally, Judge Bright on the record based stated that her decision was based on her determination the case at hand is a case where “expert is going to testify on something that is unreliable or that is common sense to most people.” (R. at 15). When a trial court makes some type of reliability determination demonstrated by citing *Daubert* and its gate-keeping function there can be no finding of abuse of discretion and the reliability determination must be upheld. See *United States v. Hall*, 93 F.3d 1337, 1342 (7th Cir. 1996). The district court’s determination to exclude Dr. Wallace’ testimony may only be reversed if Judge Bright had clearly failed to make a reliability determination but as demonstrated by the trial transcript, Judge Bright clearly applied the *Daubert* framework to conclude as to the lack of reliability and helpfulness of his testimony properly keeping the testimony out pursuant to Rule 702.

II. THE DISTRICT COURT WITHIN ITS BROAD DISCRETIONARY GATEKEEPING ROLE PURSUANT TO A PROPERLY APPLIED *DAUBERT* FRAMEWORK CORRECTLY FOUND THAT DR. WALLACE’ TESTIMONY TO BE BOTH (1) UNRELIABLE DUE TO ITS METHODOLOGY AND (2) UNHELPFUL BECAUSE HIS TESTIMONY WOULD NOT ASSIST THE JURY IN EVALUATING THE ISSUE AT HAND.

Pursuant to the framework set out in *Daubert* Judge Bright correctly, within her discretion, found that Dr. Wallace's testimony on false confessions would be both unreliable because social science research methods which his conclusions would be based lack scientific merit and not helpful because unreliable testimony cannot be helpful and false confessions are within juries common knowledge. Under *Daubert*, a trial court should consider: (1) whether the methodology by which the experts reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert* and, (2) whether the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue. *Quiet Technology DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1340-41 (11th Cir. 2003) ; *Daubert*, 509 U.S. at 589 ; *United States v. Smithers*, 212 F. 3d 306 (6th Cir. 2000). In addition, *Daubert* notes a number of non-exclusive factors that the trial court may consider that would bear on the reliability of expert testimony. *Daubert*, 509 U.S. at 592-94; *Hall*, 93 F.3d at 1341.

An expert testimony is provided testimonial latitude unavailable to other witnesses based on an assumption that their testimony is based on trustworthy methodologies. *Kuhmo*, 526 U.S. at 148. The overall purpose of conducting a *Daubert* analysis is to uphold a standard of evidentiary reliability and it is the trial judge who is the ultimate decision-maker and gatekeeper in making these determinations. Fed. R. Evid. 702 (amended 2000). While Dr. Wallace qualifies as an expert his testimony is inadmissible since his methodology is unreliable and his testimony would not be helpful to the jury in assessing the truthfulness of Respondent's confession.

This case presents a question of first impression in this Court: whether expert testimony on false confessions based on social science research suffice for admission under Rule 702. Federal and state courts are split on whether to admit expert testimony on false confessions.

State of Kansas v. Cobb, 30 Kan. App. 2d 544, 565 (2002). This split is similar to the controversy surrounding the admission of expert testimony regarding the reliability of eyewitness identification. *See United States v. Langan*, 263 F.3d 613, 620-22 (6th Cir. 2001). When such controversy and split exists it is important to keep in mind the district court's broad discretion in determining the reliability and helpfulness of the particular testimony provided in Rule 702 and amended in 2000 pursuant to this Court's holding in *Daubert*. *Id.* at 621-22. Thus although this Court has yet to resolve the issue of the reliability of expert testimony on false confessions in particular, it has explicitly held that the trial court should receive high deference in making such determinations. *See Id.*

A. Dr. Wallace's Methodology And Theory Regarding False Confessions Is Unreliable And Was Therefore Properly Excluded From Respondent's Trial.

The trial judge must assess whether the expert's opinion is reliable, this inquiry requires a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and properly applied to the facts in issue." *Daubert*, 509 U.S. at 592-93. The legitimacy of an expert's approach is no longer predicated on "general acceptance of the methodology in the particular field in which it belongs." *Id.* at 588-589 (holding that *Frye* requiring "general acceptability" as the exclusive test for admitting expert testimony has been displaced by the Rules of Evidence). Instead, "general acceptance" has been incorporated as one the factors in the framework trial judge's use in assessing reliability. *Id.* at 593-594. The remaining three factors guiding the trial judge in his or her inquiry are (1) whether the expert's theory or technique has been tested; (2) whether it has been subjected to peer review and publication; (3) whether there is a known or potential rate of error. *Id.* These factors, however, are not a "definitive checklist or test." *Id.* These factors demonstrate the overarching goal of the *Daubert* analysis to assure that the subject of an expert's testimony is grounded in methodology

that is “scientific” meaning it can be tested, quantified, and replicated. *Id.* at 590 (stating that the methods and procedures need not be perfect but they must “represent a process for proposing and refining theoretical explanations about the world that are subject to further testing and refinement). The focus is not to the conclusions but on the methodology to achieve them. *Id.* at 595. Strict restrictions as to the reliability in methodology stems from the great leeway provided to expert testimony witnesses not provided to normal witness testimony. *Kuhmo*, 526 U.S. at 148.

United States v. Hall has addressed whether to admit or exclude proffered expert testimony on false confessions and stated that social science, to satisfy as “reliable” for admission pursuant to Rule 702, must base their conclusions on methodologies that satisfy “quantative and qualitative” requirements. *See* 974 F. Supp. at 1202. Reliability is determined by looking to the particular field of social science and the reliability of the methods in that field to come to their conclusion. *Id.* at 1202. The reliability of methods used by many social scientists relying primarily on real-world experience rather than experimentation should be evaluated by the existence of “quantative and qualitative” requirements placed upon those experiences before such a method to base “specialized knowledge.” *Id.* There must be a threshold number of experiences from which the expert is basing his or her conclusions and those experiences should be sufficiently similar in nature to form a valid basis for comparison. *Id.*

Judge Bright made no error finding Dr. Wallace’s false confession testimony as unreliable based on an assessment that his conclusions were derived from unreliable methods since the “social science methods” basis for false confession occurrences are “mere guesswork and non-scientific.” (R. at 15). Dr. Wallace’s testimony would have been based upon methods lacking knowledge as to its rate of error. Dr. Wallace’s testimony demonstrates the lack of

accuracy in terms of quantity and acceptance by the psychiatric and psychological communities as a whole towards the phenomenon of false confessions. False confessions is not supported by particular theories as Dr. Wallace conceded and researches “studying false confessions have problems determine the exact number” of occurrences of false confessions. (R. at 13).

Dr. Wallace points to numerous studies in controlled settings, studies on the rate of students who would falsely confess to pushing a computer button, but as Judge Bright points out they are not comparable to a criminal setting where a person’s freedom is at stake thus unreliable. (R. at 15-16). Notably, Judge Bright as all trial judges are not required to go through each *Daubert* reliability factor but must take them into consideration when appropriate as done here.

B. Dr. Wallace’s Testimony Would Not Be Helpful In Assisting The Jury In Determining The Truthfulness Of Respondent’s Confession Since His Testimony Is Not Reliable And Because Jurors Have Common Knowledge About False Confessions.

Prior to admitting expert testimony, the court must not only determine reliability but also whether the testimony has propensity to assist the jury in understanding or determining a fact in issue, often referred to as the “helpfulness” standard. *Daubert*, 509 U.S. at 591-592; *Fed. Rules. Evid.* 702. Determining the “helpfulness” of proffered evidence requires the court to first determine “whether the proposed testimony is relevant and fits the facts of the case.” *United States v. Shay*, 57 F.3d 126, 132-34 (5th Cir. 1995). Even if the proposed testimony is relevant and fits the facts of the case it must still have a reliable basis. *Id.* at 132 (stating that unless the witness’s opinions are informed by expertise, they are no more helpful than the opinions of a lay witness).

Expert testimony directed “to lay matters which a jury is capable of understanding and deciding without the expert’s help” is not helpful and must be excluded as non-relevant and not fit to the fact. *Andrews v. Metro North Commuter Railroad Co.*, 882 F.2d 705, 708 (2d Cir.

1989) (stating that the jury needed no expertise opinion to assist in evaluating whether the train platform was a “safe place” when plaintiff testified as to its condition being “dirty, filthy, and kind of icy”). Relevant and admissible testimony usually pertains to information that is outside an ordinary juror’s common knowledge. *See General Electric Co., v. Joiner*, 522 U.S. 136 (1997) (stating that expert testimony regarding carcinogenic effects of chemicals admissible on remand if plaintiff was exposed to such chemicals) ; *United States v. Frazier*, 387 F.3d 1244, 1262 (11th Cir. 2004). Expert testimony will not help the jury if it offers “nothing more than what lawyers can argue in closing arguments.” *Frazier*, 387 F.3d at 1262-63 citing 4 *Weinstein’s Federal Evidence* § 702.03[2] [a]. An imprecise opinion will not be helpful because it could easily serve to confuse and mislead the jury furthermore allowing Dr. Wallace’s testimony could have possibly lead to a battle of experts exacerbating confusion not assisting the jury in anyway. *Frazier*, 387 F.3d at 1266 ; *Langan*, 263 F.3d at 624. Repetitive testimony is not helpful to the jury thus when testimony on matters are within common knowledge of jurors it is inadmissible because it would only repeat what the jury is already aware. *See United States v. Lester*, 254 F.Supp.2d 602, 608 (E.D. Va.2003) ; *See Hall* 974 F. Supp. at 1205 (stating that social scientists may be able to show commonly accepted explanations for behavior are, when studied more closely, inaccurate).

Judge Bright’s conclusion that the proffered expert testimony would not be helpful to the jury was based on Dr. Wallace’s own testimony that jurors would be aware of the existence of false confessions based on the news and thus correctly concluded that the jury could adequately judge for themselves the veracity at issue regarding the defendant’s confession. *See Belyea*, 159 Fed. Appx. at 529. First, expert testimony must be reliable in its methods to draw a conclusion regarding the particular matter to which the expert testimony is directly relevant, here

Respondent's alleged phenomenon of false confessions. *Kuhmo*, 526 U.S. at 153. Since Dr. Wallace's is not reliable based on current social science research methods they cannot possibly assist the jury. (R. at 15). Second, since there is readily available information in the news as to the existence of false confessions Dr. Wallace's testimony cannot be of assistance to the jury to determine the veracity of Respondent's confession. (R. at 16).

Judge Bright made no errors in excluding Dr. Wallace's testimony because it was not only unreliable due to methodology but within common knowledge of the jury thus would have been unhelpful. Similar to eyewitness identification jurors may use "common sense and their faculties of observation" to judge the "credibility" of the defendant's confession without the need for an expert, especially considering that deficiencies or inconsistencies in his testimony could have been brought out in the cross examination of witnesses Nathaniel and Nebraska Walker as well as Respondent's ability to take the stand. *See United States v. Angleton*, 269 F.Supp.2d 868, 873 (S.D.Tex. Jun 09, 2003) (quoting *United States v. Harris*, 995 F.2d 532, 535 (4th Cir. 1993)); *Langan*, 263 F.3d at 624. In fact, the Respondent had ample opportunity to cross-examine both Nathaniel and Nebraska Walker. (R. at 45-50, 35-38). During the cross-examination of Nebraska Walker she testified to the occurrences of false confessions and taking interrogation classes. (R. at 35-38). During the cross-examination of Nathaniel Walker he was questioned about interrogation and overly coercive interrogation techniques to obtain voluntary confessions. (R. at 47). And most importantly the jury viewed the videotape of Respondent's confession offered and admitted into evidence as Government Exhibit 2 and a transcript of that conversation as Government Exhibit 3. (R. at 44). The jury provided with all these facts could have easily derived a conclusion as to the veracity of Respondent's confession without Dr. Wallace's testimony that false confessions do in fact exist.

This Court should defer to the district court's broad discretion since the district court properly applied the *Daubert* framework correctly determining exclusion of Dr. Wallace's testimony on false confessions because it is neither reliable due to its unscientific methodologies or helpful because its methods are currently lacking testability and precision but also because juries are quite aware of the existence of false confessions especially through recent media coverage.

III. THE HOLDING OF THE CIRCUIT COURT SHOULD BE REVERSED BECAUSE A JURY INSTRUCTION IS NOT REQUIRED FOR FALSE CONFESSIONS.

Respondents and the Court of Appeals are attempting to create a new rule that would require a cautionary instruction when the truthfulness of a confession is questioned. Realistically however, under existing law a cautionary instruction is applied flexibly, within the discretion of the District Court, only when the voluntariness of a confession is at issue or when there is a significant chance of misidentification by an eyewitness. *See, e.g., United States v. Brooks*, 928 F.2d 1403, 1406 (4th Cir. 1991); *United States v. Brown*, 615 F.2d 1020, 1023 (4th Cir. 1980.) Courts, at times, issue voluntariness and identification instructions because there is wide acceptance that a defendant may involuntarily confess and that misidentification occurs. *See, e.g.,* Edward Stein, *The Admissibility of Expert Testimony About Cognitive Science Research on Eyewitness Identification*, 2 *Law, Probability & Risk* 295, 295-296 (2003); *See, e.g.,* Laura Magid, *Deceptive Police Interrogation Practices: How Far is Too Far?*, 99 *L. Mich. L. Rev.* 1168, 1190-1195 (2001). However, the concept of false confessions remains a controversial phenomenon. *See Id.* at 1172. Additionally, when voluntariness and eyewitness identification is contested a cautionary instruction is not granted when the questioned evidence is corroborated as it is here. *See, e.g., United States v. Dickerson*, 163 F.3d 639, 640 (D.C. Cir. 1998); *See, e.g.,*

Neil v. Biggers, 409 U.S. 188, 199 (1972.) The ruling of the Circuit Court should be reversed and thus The Supreme Court should not adopt a cautionary instruction for false confessions for three reasons. First, unlike eyewitness testimony where misidentification has been scientifically proven, false confessions are theoretical. Second, the analogy to misidentification and voluntariness is futile because neither require a cautionary instruction as the discretionary district court correctly recognized. And third, the confession here is sufficiently corroborated usurping a request for a cautionary charge for any reason.

A. False Confessions Are Not Scientifically Proven Like Misidentification And Thus Do Not Require A Cautionary Instruction.

Unlike the extensive scientific proof and wide social acceptance of the occurrence of misidentification and coerced confessions, false confessions are based merely on social scientific research and appear highly unlikely, creating an insubstantial basis on which to award a cautionary instruction.

The function of a cautionary instruction is to have the jury disregard or consider certain evidence for a specific purpose only. *Black's Law Dictionary* 714 (8th ed. 2004). It becomes necessary when the evidence could be highly prejudicial to the defendant, the justification for the identification cautionary instruction. Specifically, the identification instruction is used to counteract the high degree of prejudice to the defendant that could occur if he is misidentified by an eyewitness. *See, e.g., Watkins v. Sowders*, 449 U.S. 341, 351-352 (1981) (Brennan, J., dissenting) (arguing the dangers to the defendant inherent in eyewitness identification). Courts adopted this special instruction based on extensive scientific proof. *See, e.g., Henry Fradella, Why Judges Should Admit Expert Testimony on the Unreliability of Eyewitness Testimony*. 2000 Fed. Cts. L. Rev. 3, 6-38 (2006) (discussing a multitude of cognitive scientific research factors assisting the unreliability of eyewitness testimony). Furthermore, misidentification is a widely

accepted occurrence in society bolstering the need for a cautionary instruction. *See Id.* at 35; *See, e.g., Stein, Supra*, at 295. On the contrary, the occurrence of false confessions is based in little, if any, empirical evidence explaining the lack of legal authority that recognizes the need for an instruction to caution against them. *See Richard A. Leo, The Problem of False Confessions in The Post-DNA World*, 82 N.C. L. Rev. 891, 906 (2004) (admitting very few studies have quantified and analyzed false confessions); *See Magid, Supra*, at 1190.

Here, the respondent urges the court to adopt a cautionary instruction for false confessions based on the assertion that they are “notorious” and a “regular occurrence”. (R. at 98). However, Magid in her article *Deceptive Police Interrogation Practices: How Far is Too Far?* reveals, “there is no sound empirical proof that such instances are widespread.” 99 Mich. L. Rev at 1190. It is particularly for this reason that the district court refused to admit Dr. Wallace’s testimony. (R. at 15). It would be counter-intuitive to prevent Dr. Wallace from testifying to an uncertain phenomena yet present a jury instruction compelling jurors to weigh this phenomena against the multitude of evidence corroborating the truthfulness of Respondent’s confession. Alternatively, eyewitness identifications are treated as suspect due to extensive proof of their occurrence. Fradella, in *Why Judges Should Admit Expert Testimony on the Unreliability of Eyewitness Testimony*, explains there are “decades of research on the topic” and specifically details 13 empirically based causes of misidentification including stereotypes, timing, and stress. 2006 Fed. Cts. L. Rev. at 4, 17, 21, 23. Again, however, even Leo while advocating that false confessions are widespread and in need of reform in *The Problem of False Confessions in The Post-DNA World*, admits that “only a few studies have systematically aggregated, quantified, and analyzed the causal role of false confession[s].” 82 N.C. L. Rev. at 906. Dr. Wallace also admitted this fact during cross-examination. (R. at 14). Without empirical proof that false

confessions affect a defendant, there is no justification for a cautionary instruction. If The Court approves a mandatory instruction for false confessions on a claim based merely in social psychology, it will open the floodgates of litigation for numerous other speculative theories of guilt. In light of this it becomes clear that Justice Bright's charge, to acquit the defendant if the jury believes his statements not to be true, was attentive in that it took into consideration the possible prejudice to the defendant if in fact his confession was false balanced with the understanding that issuing a cautionary instruction may set unjustified precedent. (R. at 64).

In short, the study of false confessions is still evolving and has in no way reached the level of substantiation that misidentification research has. Identification instructions are only accorded based on the significant proof discovered through such research and until evidence of false confessions is significantly established a cautionary instruction is unfounded.

B. Neither Misidentification Nor Voluntariness Requires A Cautionary Instruction Because The Granting Of One Lies Within The Discretion Of The District Court Judge.

Respondents attempt to analogize the occurrence of misidentification to that of false confessions in order to justify the use of a cautionary instruction for the later. However, this venture is fruitless because a cautionary instruction is simply not required for misidentification or, in the alternative, voluntariness and thus neither is one for false confessions.

Neither voluntariness nor misidentification requires a precise instruction. *See, e.g., United States v. Cowden*, 545 F.2d 257, 267 (1st Cir. 1976); *Brooks*, 928 F.2d at 1406. Only when specific circumstances signify the need for a cautionary instruction is one afforded. *See, United States v. Telfaire*, 469 F.2d 552, 556 (D.C. Cir. 1972); 18 U.S.C. § 3501(a) (2006). Consequently, it is the job of district court to identify such conditions and decide whether they rise to level of warranting a cautionary instruction. *See Brown*, 615 F.2d at 1023.

“The requirement of a cautionary instruction on identification issues is not an absolute rule but is a flexible one to be applied in connection with the facts of the particular case under review.” *Brooks*, 928 F.2d at 1406; *See, e.g., United States v. McGuire*, 200 F.3d 668, 668 (10th Cir. 1999) (adopting a flexible approach in determining whether the district court abused its discretion in refusing to give such an instruction). Only when circumstances suggest a strong possibility of misidentification is a more pointed charge on identification required. *See United States v. Luis*, 835 F.2d 37, 38 (2d Cir. 1987)(granting a cautionary charge on identification only when the witness had a brief glimpse of the suspect under poor circumstances); *See Telfaire*, 469 F.2d at 556 (holding that a cautionary instruction is only warranted when a case exhibits “special difficulties” associated with eyewitness identification). Similarly, when voluntariness is at issue a cautionary instruction at times may be appropriate. § 3501(a). “Such an instruction, however, may be refused where the testimony that the confession was voluntary is not controverted.” 75B Am. Jur. 2d *Trial* § 1357 (2006); *Cowden*, 545 F.2d at 267 (finding 3501(a) does not require a ritual instruction where no identifiable issue of voluntariness exists). For both identification and voluntariness instructions, the circumstances of each case are evaluated by The District Court who, in it’s discretion, decides whether to afford a cautionary instruction. *See Luis*, 835 F.2d at 38; *See Brown*, 615 F.2d at 1023. Other than in these specific instances, when a challenge is made to the truthfulness of a defendant’s confession a credibility instruction is an adequate protection. *See, e.g., Pong Wing Quong v. United States*, 111 F.2d 751, 759 (9th Cir. 1940).

Here, neither voluntariness nor identification is at issue and as a result respondent’s request for a cautionary charge was correctly denied. In terms of voluntariness, the respondent did not object at any time to the admission of the confession on the grounds that it was involuntary. (R. at 44). Moreover, nothing in the record suggests that respondents filed a motion

to suppress the confession. Like here, the defendant in *Cowden* did not object to the admission of the confession and consequently The First Circuit there did not require “a ritual instruction where no identifiable issue of voluntariness existed.” 545 F.2d at 267. As for identification, this is clearly not a case hindering on eyewitness testimony, a threshold inquiry determinable of granting a cautionary instruction. The Fourteenth Circuit relies heavily on the analogy of identification to false confessions to justify the need for a mandatory cautionary instruction. (R. at 97-98). However, *Brooks*, a case determined on the identification of the defendant by two witnesses, specifically did not “impose rigid requirements on trial courts [to issue cautionary instructions] under the threat that failure to give the requested charge will later be grounds for automatic reversal.” 928 F.2d at 1408. Furthermore, *Telfaire* qualifies the giving of a cautionary instruction to instances that “exhibit special difficulties often presented by identification testimony.” 469 F.2d at 556. *Luis* illustrates one of these instances as “where the victim or observer had only a brief glimpse of the suspect under poor conditions.” 835 F.2d at 38. In light of this authority, it can hardly be said that identification testimony requires a cautionary instruction, hence neither do contested confessions. In fact, it is quite the opposite. *Pong Wing Quong* exemplifies that a credibility instruction is a sufficient means of guidance for a jury when The Court denies the defendant’s request for a cautionary instruction in response to a contested confession. 111 F.2d at 759. Yet, the instruction given here went way beyond the traditional credibility instruction when it advised the jury to acquit the defendant upon a finding that his confession was not true. (R. at 64). *Brown* appropriately concludes, “the giving of such an [cautionary] instruction is discretionary with the district court depending on the facts of the case.” 615 F.2d at 1023. As such, Justice Bright’s generous credibility charge was clearly within her purview.

The Fourteenth Circuit asserts that *United States v. Mays* requires a specific jury instruction on eyewitness identification. (R. at 98). A closer reading of the case however, reveals that this requirement hinges on whether the “case rests solely on questionable eyewitness identification,” a considerably different standard than the majority puts forth which instead supports the flexible approach to the granting of a requested cautionary charge. *United States v. Mays*, 822 F.2d 793, 798 (8th Cir. 1987).

Concisely, the Fourteenth Circuits argument, that a cautionary instruction is required when the defendant questions the truthfulness of his confession, is dependent on the assumption that eyewitness testimony requires a protective cautionary instruction. Yet, as clearly demonstrated above, this is simply an assumption and actually a cautionary instruction is never required but can be granted at the discretion of the district court judge.

C. A Credibility Instruction Was Appropriately Given By the Discretionary District Court Judge Because The Surrounding Circumstances Sufficiently Corroborate The Confession’s Truthfulness.

In light of the extensive evidence corroborating the truthfulness of the defendant’s confession a cautionary instruction is unnecessary since proper corroboration of the contested evidence eliminates the need for one.

When pivotal evidence is contested a cautionary instruction is not granted if the questioned evidence is corroborated. *See, e.g., Dickerson*, 163 F.3d at 640. This is particularly the case when either or identification voluntariness is at issue. *See, United States v. Hoac*, 990 F.2d 1099, 1109 (9th Cir. 1993); *See, e.g., Neil v. Biggers*, 409 U.S. 188, 199-200 (1972).

Only when significant issues arise as to the reliability of the evidence, such as an involuntary confession or an uncorroborated identification, might a cautionary instruction be appropriate. *See, e.g., Brooks*, 928 F.2d at 1406; § 3501(a). Accordingly, when evidence

corroborating the reliability of contested evidence exists, as it does here, the need for a cautionary instruction is significantly diminished. *See Dickerson*, 163 F.3d at 640 (holding a cautionary instruction is unnecessary when the confession's truthfulness is corroborated); *Hoac*, 990 F.2d at 1109, (finding sufficient corroboration successfully limits the possible prejudice defendant may face without a cautionary instruction). Specifically, corroborating evidence that can successfully usurp the need for a cautionary charge often comes in the form of supporting testimony, or evidence on which a reasonable jury easily could have convicted the defendant. *See United States v. Iwegbu*, 6 F.3d 272, 276 (5th Cir. 1993). Additionally, the video taping of a confession significantly safeguards against a false confession because the interrogators are held accountable. *See*, Welsh S. White, *False Confessions and the Constitution*, 32 Harv. C.R.-C.L. Law Review. 105, 153-154 (1997).

Here, the evidence corroborating the truthfulness of the respondent's confession is extensive: the confession itself is visually and orally documented, professional investigators testified as to the circumstances surrounding the confession, an expert witness testified to the reliability of the respondent's statements, an identifying witness located the respondent at the scene of the crime immediately after it took place, and the respondent's knowledge of the obscure Magoian "Bear Hug" knot used to hang the victim all support that the respondent's confession was truthful. (R. at 26, 29-35, 38-44, 51-62, 72, 73-85). Evidence in this multitude irrefutably supports a finding that a reasonable jury could have convicted Har, as they did, despite his confession. (R. at 88). For example, in *Dickerson* The Court discussed the possibility of warranting a special instruction if it was foreseeable that a jury would convict the defendant prejudicially by concluding purely on his out of court statement. 163 F.3d at 640. However, the court properly determined that the corroborating evidence sufficiently limited the likelihood of

prejudice to the defendant and denied the requested instruction. *See Id.* at 643. There, only one piece of corroborating evidence, a gun found when the defendant, a convicted felon, was pulled over driving his mother's minivan, satisfied this criterion. *See Id.* at 640. Comparatively, there is far more than one piece of corroborating evidence here substantiating the respondent was not prejudiced by the denial of his requested charge. Similarly, *Iwegbu* held failure to give a voluntariness instruction was not plain error because the confession was corroborated by the testimony of an undercover agent and a testimony directly contradicting the respondent's defense. 6 F.3d at 276. Here, the testimony of both Walkers and Dr. Gerber's testimony, serve identical purposes as the evidence in *Iwegbu* and thus deserves the same outcome. (R. at 29-53, 59-61). Moreover, White suggests that video taping confessions is an appropriate and reliable safeguard against the occurrence of false confessions. *See White, Supra*, at 153-154. Here, The confession and interrogation was videotaped and displayed openly for the jury to decide for themselves whether the confession was honest or not or whether the Walkers used deceptive techniques in acquiring the confession. (R. at 44). According to White, this mere fact successfully corroborates the truthfulness of the defendant's confession extremely limiting the need for a cautionary instruction.

Summarily, if Justice Bright granted respondent's request for a cautionary instruction she would have suggested to the jury that the confession was not sufficiently corroborated, which is clearly not the case, as well as expressed her doubt in the principle that corroborating evidence undermines the necessity of a cautionary charge.

In conclusion, nothing in existing case law or supplemental authority suggests that when a defendant challenges the truthfulness of his confession the District Court is required to issue a cautionary instruction. Instead, the authority determines that false confessions are not empirically

proven and thus do not live up to the level required in proving their existence. It also affirms that neither misidentification nor voluntariness, the respondent's primary analogies, require a cautionary instruction and one may only be granted on the basis that the contested evidence is not amply corroborated. However the confession here is corroborated, at length. In light of all this The Court should reverse the holding of the Circuit Court and find for the petitioner.

IV. THE CONFRONTATION CLAUSE WAS NOT VIOLATED BY THE PSYCHIATRIC EXPERT'S TESTIMONY DESCRIBING STATEMENTS MADE BY RESPONDENT'S MOTHER AND SISTER BECAUSE (a) THE STATEMENTS WERE NOT OFFERED FOR THE TRUTH OF THE MATTER ASSERTED (b) THE STATEMENTS ARE NOT "TESTIMONIAL HEARSAY", AND (c) THEY FALL WITHIN A "FIRMLY ROOTED" HEARSAY EXCEPTION.

This Court should reverse the Fourteenth Circuit's ruling that the Judge Bright erroneously admitted statements made to the Government's psychiatrist because the statements (a) served as a foundation for Dr. Gerber's opinion, (b) were not testimonial, and (c) were provided to help her develop her medical diagnosis.

The Confrontation Clause of the Sixth Amendment provides criminal defendants the opportunity to confront adverse witnesses. *U.S. Const. amend. VI*. Persons whose out-of-court statements are introduced at trial against the defendant are witnesses whose statements qualify as testimonial. *Crawford v. Washington*, 541 U.S. 36, 50-51 (2004). Nonetheless, when such statements are offered for purposes other than establishing the truth of the matter asserted, they are not barred by the Confrontation Clause. *Id.* at 59 n.9. Furthermore, this Court has held out-of-court testimonial statements admissible when the declarant is unavailable at trial and there has been a prior opportunity for cross-examination. *Id.* at 68. Unless a statement qualifies as testimonial, *Crawford* does not apply and the rule articulated in *Ohio v. Roberts*, 448 U.S. 56 (1980), remains controlling. *Id.* Pursuant to *Roberts*, non-testimonial out-of-court statements are

admissible when they “fall [] within a firmly rooted hearsay exception” or bear “particularized guarantees of trustworthiness.” *Roberts*, 448 U.S. at 66.

A. Declarants’ Statements Were Properly Admitted Because They Were Offered As A Foundation For Dr. Gerber’s Opinion, Not For The Truth Of The Matter Asserted.

Declarants’ statements to Dr. Gerber were properly admitted by Judge Bright because they assisted the jury in evaluating the thoroughness of Dr. Gerber’s conclusions.

The Confrontation Clause allows use of testimonial statements for purposes other than establishing the truth of the matter asserted, *Crawford*, 541 U.S. at 59 n. 9, and “the admission of a testimonial statement is not enough to trigger a violation of the Confrontation Clause” if it is not being admitted for the truth of the matter asserted. *United States v. Pugh*, 405 F.3d 390, 399 (6th Cir. 2005).

Statements are not offered for the truth of the matter asserted when they are admitted to provide a foundation for an expert witness’s opinion. *See United States v. Leeson*, 453 F.3d 631, 638 (4th Cir. 2006) (out-of-court statements psychologist relied on to form his opinion were admissible since they were “directly relevant to the jury’s task of evaluating his opinion”); *United States v. Farley*, 992 F.2d 1122, 1125 (10th Cir. 1993) (psychologist’s testimony relaying statements made by patient were held admissible at trial for the purpose of laying a foundation for her opinion). When evidence is not offered for its truth, jurors receive a jury instruction informing them that the evidence is inadmissible for its truth. *Id.* Although the Supreme Court expressed concern that a jury may not follow a court’s limiting jury instruction, the Court also articulated “it is not unreasonable to conclude that in many such cases, the jury **can and will follow** the trial judge’s instructions to disregard [certain] information.” *Bruton v. United States*, 391 U.S. 123, 135 (1968) (emphasis added).

Dr. Gerber reiterated the Declarants' statements to provide the jury with a foundation for her conclusion that Respondent did not suffer from Post-traumatic Stress Disorder and a compliant personality. In *Farley*, the Tenth Circuit affirmed a ruling allowing a psychologist to testify to information she received from the victim since the trial judge issued a limiting jury instruction that testimony including the victim's out-of-court statements was offered not for its truth, but to provide a foundation for the doctor's opinion. 992 F.2d at 1125. As in *Farley*, Judge Bright issued an instruction charging the jurors with considering Declarants' "statements for one, and only one purpose- that is, to assist you in evaluating the thoroughness of Dr. Gerber's opinion" and that they "should not consider them in any way, manner, shape or form to be true." (R. at 65).

Judge Bright properly admitted Declarants' statements because they were offered for the sole purpose of laying a foundation for an expert opinion and the Court issued a proper jury instruction.

B. Declarants' Statements Are Not Testimonial Since Respondent's Mother and Sister Could Not Have Reasonably Believed That They Would Be Used At Trial And *Crawford* Is Therefore Inapplicable.

This Court should uphold Judge Bright's decision to admit Declarants' statements made to Dr. Gerber since the foreign Declarants could not have known or intended that their responses would be used for a prosecutorial purpose.

Out-of-court statements do not qualify as testimonial when the declarant could not have reasonably expected that the statements would be used for prosecutorial purposes. *United States v. Cromer*, 389 F.3d 662, 675 (6th Cir. 2005); *United States v. Summers*, 414 F.3d 1287, 1302 (10th Cir. 2005); *United States v. Maher*, 454 F.3d 13, 20 (1st Cir. 2006).

Testimonial statements indicate a declarant intended to serve as a witness and bear testimony against the defendant, thus requiring a right of confrontation and cross-examination. *Crawford*, 541 U.S. at 51. Declarants produce testimonial statements when they seek to provide evidence against the defendant and intend such statements to be used against the defendant at trial. *See Cromer*, 389 F.3d at 675; *Maher*, 454 F.3d at 20. This principle is clearly illustrated through statements made by confidential informants because they consciously seek to provide law enforcement with information against the defendant, thus triggering the Confrontation Clause. *Cromer*, 389 F.3d at 675; *See Maher*, 454 F.3d at 21 (holding informant's statements regarding defendant's involvement in illegal drug activity testimonial since he agreed to cooperate with the police in investigating the defendant). In cases where intent is not obvious, it can be inferred if the statements were made in response to structured questioning pursuant to a criminal investigation, since the declarant can reasonably expect the statements to be used for prosecutorial purposes. *See Crawford*, 541 U.S. at 51-52 (concluding declarant's statements, which inculpated her husband, made to the police while both were in custody qualified as testimonial and triggered the Confrontation Clause); *Hammon v. Indiana*, 126 S. Ct. 2266 (2006) (holding declarant's statements, made in the absence of her husband, in response to Police officer's questions regarding investigation of her husband's past conduct qualified as testimonial).

The Fourteenth Circuit Court of Appeals erroneously considered Dr. Gerber's intent in interviewing the Respondent's mother and sister and incorrectly determined that the statements were testimonial because the prosecution intended to use them at trial. (R. at 100). The Fourteenth Circuit relied exclusively on *People v. Goldstein*, 6 N.Y.3d 119, 129 (2005), to conclude the statements were testimonial because they were gathered by an expert retained by

the state seeking to introduce them against the Respondent at trial. (R. at 100-101). The proper inquiry on this matter would have been to evaluate Declarants' purpose in responding to Dr. Gerber's questioning. Declarants did not possess the requisite intent to bear witness and provide testimony against the Respondent and could not have reasonably expected their responses to be used against him at trial. Dr. Gerber repeatedly stated she did not indicate to the Declarants she would be testifying for the government at trial. (R. at 54-56). She only provided them with notice that she was "a psychiatrist working with [Respondent] at the Government's request." *Id.* at 54. The Declarants are foreigners residing in a foreign country (R. at 70) and it is highly unlikely that they would know American criminal procedure to be on notice that their statements would be used at a future trial. If this Court decides the proper inquiry in whether a statement is testimonial is by examination of Dr. Gerber's purpose for the interview, the statements remain non-testimonial since she explained the interview was conducted to help shape her diagnosis, not to uncover evidence to be used at trial. (R. at 55).

The Declarants did not seek or intend to provide statements to be used at a future trial and could not have reasonably expected them to be used at trial. Therefore, the statements are not testimonial, *Crawford* is therefore inapplicable, and the statements should be admitted under *Roberts*, as statements made for the purposes of medical diagnosis.

C. Declarants' Statements Are Admissible Under *Roberts* Because They Fall Within A "Firmly Rooted Hearsay Exception" As "Statements Made For The Purpose Of Medical Diagnosis."

Statements made by the Declarants are admissible under the hearsay exception for medical diagnosis and treatment because they were made to assist Dr. Gerber in formulating her expert opinion.

Non-testimonial out-of-court statements are admissible against a criminal defendant if they fall within a “firmly rooted hearsay exception”. *Roberts*, 448 U.S. at 66. Statements made for the purposes of medical diagnosis or treatment are “firmly rooted hearsay exceptions”, which “satisfy the reliability requirement posed by the Confrontation Clause.” *White v. Illinois*, 502 U.S. 346, 356 n. 8 (1992). Furthermore, “statements made for purposes of medical diagnosis or treatment” are admissible as a hearsay exception “insofar as reasonably pertinent to diagnosis or treatment”. *Fed. R. Evid.* 803 (4).

The medical diagnosis hearsay exception is not limited to patient-Declarants and statements made by close family members are included within the exception. *United States v. Yazzie*, 59 F.3d 807, 813 (9th Cir. 1995) (mother’s out-of-court statements, made to a doctor evaluating her son, which described an alleged sexual encounter between defendant and her son were admissible under medical diagnosis exception). Additionally, the exception encompasses psychotherapists in addition to physicians and nurses. *United States v. Kappell*, 418 F.3d 550, 556 (6th Cir. 2005); *United States v. Yellow*, 18 F.3d 1438, 1442 (8th Cir. 1994); *See Farley*, 992 F.2d at 1125. In *Farley*, *Yellow*, and *Kappell*, psychologists were permitted to testify to out-of-court statements they relied on in formulating their opinions on the basis that such statements fit within Rule 803 (4). *Farley*, 992 F.2d at 1125; *Yellow*, 18 F.3d at 1442; *Kappell*, 418 F.3d at 556-557. The main focus under the exception is “whether [Dr. Gerber] undertook her interviews for the primary purpose of medical diagnosis, rather than for some other purpose,” *Kappell*, 418 F.3d at 556, thus qualifying the statements for admission under Rule 803 (4).

Doctor Gerber’s sole purpose for interviewing Declarants was to confirm the accuracy of the diagnosis she developed after analyzing personality tests administered to the Respondent. (R. at 52, 55). Although her interviews elicited information subsequently admitted at trial, nothing in

the record suggests that developing such evidence was the primary or significant goal of the interviews. In *Kappell*, Dr. Waters, the psychotherapist, testified she was hired to assess the mental health of the Declarants, provide a diagnosis, and that she conducted her interviews solely for the diagnostic purpose. 418 F.3d at 557. Dr. Gerber said she conducted interviews with the Declarants for diagnostic purposes and specifically stated on the record that she interviewed them to “make [her] conclusions accurate” and that she “would have changed [her] conclusions if the information they provided [her] required [her] to do so.” (R. at 55). Additionally, like in *Kappell*, Dr. Gerber informed the Declarants she was questioning them in order to develop a medical diagnosis. *Id.*; (R. at 54-56). There is nothing in the record here undermining her contention that the purpose of the interviews was diagnostic. Therefore the statements qualify as statements made for the purpose of medical diagnosis and were properly admitted by Judge Bright.

Declarants’ statements “ [Respondent] has always been very assertive and self-reliant,” “has never looked to others for approval,” “would fly into rages when he didn’t get his own way,” and “was considered the neighborhood bully” are absolutely relevant to his medical diagnosis, which is a key inquiry in this case, (R. at 60- 61), as well as a requirement under Rule 803 (4). *Fed. R. Evid.* 803 (4). The statements are consistent with Rule 803(4) since they are “statements made for purposes of medical diagnosis or treatment and describ[e]” his general character. *Fed. R. Evid.* 803 (4). Additionally, these statements are relevant because they helped form the basis of Dr. Gerber’s opinion, (R. 60), which is being used to contradict Dr. Kalf’s testimony that Respondent suffers from Post-Traumatic Stress disorder as well as from a compliant personality. (R. at 51). The Declarants also knew Dr. Gerber’s purpose in the interview was to obtain information to arrive at a medical conclusion, since she informed them she was “a psychiatrist

working with [Respondent].” (R. at 54-55). This case is distinguishable from *Kappell* only on the basis that the psychotherapist in *Kappell* formulated a medical diagnosis of the victims and not the defendant. 418 F.3d at 552. Such a distinction is inconsequential since Rule 803 (4) applies to non-patient Declarants. *Yazzie*, 59 F. 3d at 813.

The Declarants’ statements contributed to Dr. Gerber’s expert opinion and both women responded to allow her to make conclusions regarding Respondent’s medical diagnosis, thus qualifying the statements as hearsay exceptions admissible under Rule 803 (4) and *Roberts*.

Under the facts of this case, *Crawford* does not apply and Judge Bright properly admitted declarant’s statements since they were not offered for the truth of the matter asserted, are not testimonial, and qualify as a “firmly rooted hearsay exception” under *Roberts*.

V. IF *CRAWFORD* APPLIES TO THESE FACTS, THE FOURTEENTH CIRCUIT’S CONCLUSION THAT DR. GERBER’S TESTIMONY CONTAINED INADMISSABLE TESTIMONIAL HEARSAY SHOULD BE REVERSED SINCE THE DECLARANTS WERE UNAVAILABLE AND THE DEFENDANT HAD AN OPPORTUNITY FOR CROSS-EXAMINATION.

The Fourteenth Circuit Court of Appeals erroneously concluded that Declarants’ statements were inadmissible pursuant to *Crawford* by failing to assess the Declarants’ unavailability and Respondent’s opportunity for cross-examination. (R. at 100-101). A testimonial out-of-court statement is admissible if the declarant is unavailable and there was an opportunity for cross- examination. *Crawford*, 541 U.S. at 68.

A. The Declarants Are Foreign Nationals Residing In Mago And Are Thus Unavailable For Cross-Examination At Trial.

This Court should reverse the Fourteenth Circuit’s conclusion that Judge Bright should have excluded Declarants’ statements since the Court of Appeals applied *Crawford* erroneously when it failed to assess the Declarants’ unavailability.

A declarant is unavailable to testify when absent from the hearing and the proponent of their statements is unable to procure their attendance by process or other reasonable means. *Fed. R. Evid.* 804 (a)(5). The United States of America does not have jurisdiction to subpoena a foreign national residing in a foreign nation in order to compel them to testify in an American courtroom. *Gillars v. United States*, 182 F.2d 962, 978 (D.C. Cir. 1950) (citing *Blackmer v. United States*, 284 U.S. 421 (1932)); *United States v. Gordon*, 634 F.2d 639, 646 (1st Cir. 1980); *United States v. Zabaneh*, 837 F.2d 1249, 1259-1260 (5th Cir. 1988); *United States v. Siddiqui*, 235 F.3d 1318 (11th Cir. 2000).

This Court recognizes the “lengths to which the government must go to produce a witness is a matter of reasonableness,” *California v. Green*, 399 U.S. 149, 189 (1970), n.22, and additionally, “if no possibility of procuring the witness exists, ‘good faith’ demands nothing of the prosecution.” *Roberts*, 448 U.S. at 75. Therefore, a foreign declarant’s unavailability allows for the admission at trial of their out-of-court statements, provided that there was an opportunity for cross-examination. *E.g. Siddiqui*, 235 F.3d at 1323-1325 (depositions of unavailable Japanese and Swiss nationals properly admitted into evidence since defense counsel cross-examined Declarants at their depositions in Japan and Switzerland).

Respondent’s mother and sister are foreign nationals living in Mago and therefore they reside outside the jurisdiction of the United States. (R. at 70). The fact that the record provides no evidence the Petitioner attempted to obtain Declarants’ appearance at court is not fatal to its case. In *Barber*, the Supreme Court found the prosecution lacked “good faith” in obtaining the declarant’s attendance at trial since it made no effort to secure the incarcerated declarant’s attendance despite the existence of procedures whereby the witness could be brought to trial. *Roberts*, 448 U.S. at 76-77 (discussing *Barber v. Page*, 390 U.S. 719 (1968)). Clearly, the facts

of this case demonstrate that since the United States does not have the power to compel a foreign national's attendance at trial, unlike *Barber*, there are no procedures by which the prosecution could have obtained the declarant's presence, had the prosecution requested their attendance.

The Declarants qualify as unavailable since they were absent from Respondent's trial and the United States lacked jurisdiction to compel their attendance. The prosecution met its "good faith" burden since the "law does not require the doing of a futile act." *Roberts*, 448 U.S. at 74.

B. The Declarants' Statements Are Admissible Because Respondent Had An Opportunity To Cross-examine Dr. Gerber And Her Knowledge As To The Accuracy Of The Statements She Relied Upon To Arrive At Her Expert Opinion.

This Court should reverse the Fourteenth Circuit since it erred in its conclusion that *Crawford* was violated when it neglected to inquire whether Respondent had an opportunity to cross-examine Dr. Gerber.

Where testimonial evidence is at issue, the Sixth Amendment requires an opportunity for cross-examination of the declarant. *Crawford*, 541 U.S. at 68. Despite this requirement, "the Confrontation Clause guarantees only 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish'." *Delaware v. Fensterner*, 474 U.S. 15, 20 (1985).

The purpose of the Confrontation Clause is to test, through cross-examination, the reliability of adverse testimony provided against the defendant. *Crawford*, 541 U.S. at 60. When an expert testifies to evidence that is not presented for cross-examination at trial, the defendant's right to confrontation is preserved by the ability to cross-examine the expert's opinion to determine the reliability of the evidence on which it is based. *United States v. Benedict*, 647 F.2d 928, 932 (9th Cir. 1981) (finding no Confrontation Clause violation where the defendant cross-examined all of the expert witnesses who handled and tested confiscated drugs despite the unavailability of the

heroin at trial); *United States v. Kail*, 804 F.2d 441, 447 (8th Cir. 1986) (concluding defendant's confrontation right satisfied when his counsel cross-examined the expert who evaluated the quality of the unavailable collectible coins at issue). Furthermore, when the prosecution cannot obtain a foreign witness "it may use reliable secondary evidence as a substitute for unavailable testimony without thereby offending the Confrontation Clause." *Benedict*, 647 F.2d at 932.

Cross-examination of the expert relying on unavailable data is sufficient because "it is the person who observed, handled or tested the primary evidence who is the subject of cross-examination, not the evidence itself." *Id.* A psychotherapist is permitted to rely on evidence provided by third parties when developing their expert opinion. *See United States v. Lawson*, 653 F.2d 299, 302 (7th Cir. 1981). Furthermore, "expert reliance upon the output of others does not necessarily violate the Confrontation Clause where the expert is available for questioning concerning the nature and reasonableness of his reliance." *Reardon v. Manson*, 806 F.2d 39, 41 (2d Cir. 1986). In *Lawson*, the Court of Appeals recognized that psychotherapists frequently rely on hearsay evidence in forming their opinions and the Confrontation Clause is not violated when the defendant has an opportunity to cross-examine the expert. *Lawson*, 653 F.2d at 301.

The circumstances in this case illustrate that the Respondent had ample opportunity at trial to question Dr. Gerber on the credibility of her opinion as well as the accuracy of the statements on which it was based. Respondent's counsel, Mr. Parker, cross-examined Dr. Gerber regarding the accuracy of her opinion and whether she could ascertain the accuracy of Declarants' statements and memory. (R. at 57-58). Although the cross-examination occurred outside the presence of the jury, (R. at 53, 55-58) the record is clear that Dr. Gerber was available at trial for cross-examination. (R. at 51, 59-61). The record also reflects that only Petitioner's counsel, Ms. Lee, examined Dr. Gerber in the jury's presence. (R. at 59-61). Mr. Parker failed to cross-examine Dr.

Gerber after Ms. Lee questioned her in the jury's presence (R. at 59-61). This does not undermine Petitioner's argument that Respondent had an opportunity for cross-examination. If the record is unclear, there are two possibilities: Mr. Parker did cross-examine Dr. Gerber or he did not. If he did cross-examine her, then pursuant to both *Benedict* and *Kail*, in which the Confrontation Clause was satisfied by cross-examination of the expert witness on the unavailable evidence, Respondent's opportunity for cross-examination has been fulfilled. *Benedict*, 647 F.2d at 932; *Kail*, 804 F.2d at 447. If Mr. Parker did not cross-examine Dr. Gerber, it was his error not to do so since she was available for cross-examination.

Since the goal of the Confrontation Clause is to test the veracity of the evidence offered against the defendant, the Confrontation Clause has been satisfied in this case by the Respondent's opportunity to cross-examine Dr. Gerber. The Confrontation Clause was not violated when the District Court permitted Dr. Gerber to repeat the statements Declarants made in their interview, since they were unavailable and Respondent had an opportunity to cross-examine Dr. Gerber.

This Court should rule that the Confrontation Clause was not violated by the admission of Declarants' statements since they were properly admitted under *Roberts*, or in the alternative, under *Crawford*. Therefore, this Court should reverse the Fourteenth Circuit's erroneous conclusion that Judge Bright erred in permitting Dr. Gerber to repeat their statements.

CONCLUSION

For the foregoing reasons, Petitioner requests that this Court reverse the ruling of the Court of Appeals for the Fourteenth Circuit and hold that the District Court's decision contained no errors in (1) excluding unreliable proffered expert testimony, (2) providing no jury instructions on false confessions as they are not required, and (3) allowing expert testimony to include statements, not for the truth of the matter, made by respondent's mother and sister.

APPENDIX A

Fed. R. Evid. 702 Testimony by Experts

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 on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

APPENDIX B

18 U.S.C. § 3501(a) (2006)

In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, 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.

APPENDIX C

Fed. R. Evid. 803 (4) Statements for purposes of medical diagnosis or treatment

Statements made for the purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

APPENDIX D

Fed. R. Evid. 804 (a)(5) Definition of Unavailability

“Unavailability as a witness” includes situations in which the declarant- is absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant’s attendance or testimony) by process or other reasonable means.

APPENDIX E

U.S. CONST. amend. VI (1791)

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 access for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.