

Docket No. 06-117  
Spring 2007 Term

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IN THE  
*Supreme Court of the United States*

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UNITED STATES OF AMERICA,

*Petitioner,*

- against -

ROUNN HAR,

*Respondent.*

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

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BRIEF FOR THE PETITIONER

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## **QUESTIONS PRESENTED**

1. “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?” (R. at 108.)
  
2. “At trial, when a defendant challenges the truthfulness of his confession, is the District Court required in its instructions to make the jury aware that, at times, people falsely confess to crimes, including murder?” (R. at 108.)
  
3. “Was the Confrontation Clause violated by a prosecution psychiatric expert’s testimony describing the substance of statements she elicited from defendant’s mother and 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[?]” (R. at 108.)

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## **STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION**

Pursuant to 18 U.S.C. § 1111, the United States District Court for the District of Boerum entered a judgment of conviction against Rounn Har (the “Respondent”) for murder in the second degree and sentenced him to a determinate period of fifteen years in federal prison for said offense. (R. at 92-93.) On direct appeal, the United States Court of Appeals for the Fourteenth Circuit reversed the judgment of the court below, finding that the District Court committed reversible error by precluding the Respondent from presenting false confession evidence, refusing to give a jury instruction on false confessions, and admitting out-of-court statements made to a psychiatrist who worked for the United States of America (the “Petitioner”) into evidence. (R. at 94.) This Court granted the Petitioner’s petition for a writ of certiorari on October 3, 2006, and, therefore, exercises appellate jurisdiction over the instant matter under 28 U.S.C. § 1254(1). (R. at 108.)

## **STATEMENT OF THE CASE**

### **a. Factual History**

Shortly after immigrating from Mago to the United States in 1996, the Respondent began working as a production assistant on Daily Dollars, a popular television game show hosted by Bruce “Sack” Seafoam (“Seafoam”). (R. at 1.) On February 28, 1997, at approximately 6:30 p.m., Seafoam was found dead on the set of his show, which was on a national tour and temporarily filming at the Bowling Air Force Base in Joralemon, Boerum. (R. at 88.) The victim of an apparent murder, Seafoam “had been struck on the head with a blunt object . . . , strangled with an electrical cord, [and] tied to the Daily Dollars game wheel.” (R. at 89.) He was tied to the wheel by a distinctive “butterfly”-like knot that was destroyed during an unsuccessful attempt to revive him. Id.

In short order, Agent Nathaniel Walker, together with a team of subordinates from the Federal Bureau of Investigation (“F.B.I.”), rushed to the scene of the suspected crime in order to investigate the circumstances of Seafoam’s death. (R. at 89.) Over the course of their investigation, the Agents obtained information indicating that the Respondent was the last person to leave the Daily Dollars studio on the day of Seafoam’s death. (R. at 88.) However, in the absence of any forensic evidence other than Seafoam’s body and a broken picture frame, the Agents were unable to link the Respondent to Seafoam’s death, and the murder “remained unsolved when Walker retired [from the F.B.I.] in 2002.” Id.

Following his retirement from the F.B.I., Walker returned to the investigative ranks, working as a private detective with his daughter, Nebraska Walker (“Nebraska”). Id. At the time, Nebraska “had an undergraduate degree in criminal justice and forensic psychology.” Id. In March 2005, while perusing through an issue of The National World magazine, Walker noticed that the knot described in the article he was reading, the “Bear Hug” knot, was the same one that was used in Seafoam’s murder. Id. With that in mind, upon reading that the “Bear Hug” knot is the national knot of Mago and remembering that the Respondent emigrated from Mago, Walker and Nebraska decided to commence a private investigation into the Respondent’s involvement in Seafoam’s death. Id.

Acting as a private citizen, Nebraska developed a plan aimed at provoking the Respondent into confiding in her. (R. at 89-90.) Indeed, by communicating with the Respondent via electronic mail and posing as a potential love interest, Nebraska convinced the Respondent to meet her at a local coffee shop on the morning of April 24, 2005. Id. Eager to make Nebraska’s acquaintance, the Respondent drove throughout the night to meet her and decided to spend the entire day with Nebraska. Id. Notwithstanding the fact that the Respondent claims he was

extremely tired at the time of the alleged interrogation, he accepted an invitation to join Nebraska at her home once their sojourn to the coffee shop came to a conclusion. (R. at 73.)

Upon arriving at her home, Nebraska introduced the Respondent to her father and offered him a beer. (R. at 73-75.) Meanwhile, Walker informed the Respondent that he had been the lead detective assigned to the Seafoam murder investigation and wanted to ask the Respondent a few questions relating to the case. Id. Over the course of this discussion, Walker employed the use of various F.B.I.-sanctioned interrogation techniques, even telling the Respondent that his fingerprints had been recovered from the scene of the crime. (R. at 47-48.) Shortly thereafter, the Respondent cracked, confessing, in detail, to murdering Seafoam. (R. at 90.) Remarkably, Walker and Nebraska captured the entire exchange on videotape and turned a copy of that tape over to law enforcement personnel the following day. Id.

#### **b. Procedural History**

Pursuant to 18 U.S.C. § 1111, a grand jury indicted the Respondent for murder in the first degree and murder in the second degree on June 2, 2005. (R. at 90.) Slightly more than a month later, on July 7, 2005, the Petitioner made a pre-trial motion to preclude the Respondent from offering the testimony of two expert witnesses, John Wallace, Ph.D. (“Dr. Wallace”) and Roberta Kalf, M.D. (“Dr. Kalf”), at his trial. (R. at 4.) Given that his confession was captured on videotape, the Respondent sought to establish that his confession was incredible and planned to call Dr. Wallace, a social scientist, for the purpose of eliciting expert testimony concerning the occurrence of false confessions in criminal matters. (R. at 90-91.) As to the second expert, the Respondent asserted that Dr. Kalf’s testimony was necessary to establish “that he was susceptible to confessing falsely,” as a result of “his personality traits and psychological disorders.” Id. In opposition to the Respondent’s plan to call these witnesses, the Petitioner

argued that Dr. Wallace should be barred from testifying at the Respondent's trial, based upon the fact that his testimony did not meet the expert testimony requirements set forth by this Court in Daubert v. Merrell Dow, Inc. (R. at 91.)

The District Court granted the Petitioner's pre-trial motion in part and denied the Petitioner's pre-trial motion in part. Id. In particular, the District Court excluded the testimony of Dr. Wallace on two grounds, first noting that his testimony was unreliable because "social science research is not scientific in its methods, and its conclusions related to false confessions are mere guesswork . . . ." Id. As to the second ground, the District Court opined that "Dr. Wallace's testimony would not be 'helpful' to the jury, because '[j]urors know that people lie, and given recent media coverage related to false confessions, it cannot reasonably be said that this phenomenon is not within . . . common knowledge . . . ." Id. That being the case, the District Court also denied the Petitioner's motion to exclude the expert testimony of Dr. Kalf, finding her testimony regarding the Respondent's personality disorders and susceptibility to outside influences to be admissible. Id. The Petitioner responded to the District Court's ruling by notifying the court of its intention to call Jessica Gerber, M.D. ("Dr. Gerber"), a psychiatrist, to the stand as an expert rebuttal witness; the Respondent did not object. Id.

On September 19, 2005, the Petitioner commenced its trial of the Respondent for murder in the first degree and murder in the second degree in the United States District Court for the District of Boerum. (R. at 92.) The Petitioner called Walker and Giordano to testify against the Respondent, and introduced both a diagram of the "Bear Hug" knot and a copy of the videotaped confession into evidence. Id. Calling only one witness to the stand, the Respondent presented Dr. Kalf's expert testimony in order to establish that that he suffered "from Post-Traumatic Stress Disorder ["PTSD"]. . . and [had] a compliant personality." Id. During her testimony,

Dr. Kalf stated that the Respondent “would have been highly likely to confess falsely to [Walker], given the circumstances in which he was interrogated.” Id. In order to rebut Dr. Kalf’s testimony, the Petitioner called Dr. Gerber to the witness stand, whereupon Dr. Gerber testified that the Respondent did not have PTSD and was not any more susceptible to stress problems than the average person. (R. at 52.) The Respondent objected to the admission of Dr. Gerber’s testimony, arguing that Dr. Gerber formed her opinions on the basis of out-of-court statements made by the Respondent’s mother, Mrs. Har, and sister, Ms. Chava, such that the admission of her testimony violated the Confrontation Clause of the United States Constitution.<sup>1</sup> (R. at 52-53.) However, the District Court was not persuaded by the Respondent’s assertions and overruled his objection, finding that none of the statements made by the Respondent’s family members were being offered for the truth of the matter asserted. (R. at 59.)

Upon the conclusion of trial, the Respondent urged the District Court to include a statement concerning the occurrence of false confessions in its charge to the jury, but the District Court found that such a charge was unnecessary, given the state of the law.<sup>2</sup> (R. at 62.) After the District Court announced its decision, the Respondent renewed his objection to the court’s charge, asserting that it failed to “instruct the jury that false confessions do occur” and should have contained a list of the factors that “have been shown to increase the likelihood of a false confession.” (R. at 62.) Notwithstanding the Respondent’s objections, the District Court issued its standard charge to the jury, and the jury convicted the Respondent of murder in the second

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<sup>1</sup> Mrs. Har spoke with Dr. Gerber over the telephone for approximately one hour, while Ms. Chava did so for approximately fifteen minutes. (R. at 56-57.) Although both Mrs. Har and Ms. Chava spoke with Dr. Gerber from the comfort of their own homes, they did so without knowledge of Dr. Gerber’s involvement in the Respondent’s case. (R. at 54.) In short, Dr. Gerber never informed either Mrs. Har or Ms. Chava that she intended to testify on behalf of the Government at the Respondent’s trial. (R. at 56.) Rather, as the Record clearly indicates, Dr. Gerber merely stated that she “was a psychiatrist working with Mr. Har at the Government’s request.” (R. at 54-56.)

<sup>2</sup> The District Court directed the jury to limit its use of the out-of-court statements disclosed by Dr. Gerber, stating, in pertinent part, that the jury “may consider those statements for one, and only one purpose – that is, to assist . . . in evaluating the thoroughness of Dr. Gerber’s opinion.” (R. at 65.)

degree. (R. at 62-66, 93.) Shortly thereafter, the District Court sentenced the Respondent to fifteen years in federal prison. (R. at 93.)

On direct appeal to the United States Court of Appeals for the Fourteenth Circuit, the Respondent asserted that his conviction should be reversed because the District Court committed reversible error by excluding the testimony of Dr. Wallace, refusing to instruct the jury about the occurrence of false confessions in criminal proceedings, and admitting Gerber's expert testimony in violation of the Confrontation Clause of the federal Constitution. *Id.* On July 11, 2006, the Fourteenth Circuit reversed the Respondent's conviction for the three reasons asserted by the Respondent, notwithstanding the arguments advanced by Judge Snit in her well-reasoned dissent. (R. at 93-107.) In the wake of the Fourteenth Circuit's decision, this Court granted the Petitioner's petition for a writ of certiorari on October 3, 2006, and this appeal followed. (R. at 108.)

### **SUMMARY OF THE ARGUMENT**

The Petitioner respectfully urges this Court to reverse the order of the United States Court of Appeals for the Fourteenth Circuit, vacating both the judgment of conviction and the sentence imposed upon the Respondent following a trial by jury for three primary reasons. First, given that the District Court acted within its discretion by excluding the Respondent's expert testimony from evidence, the Fourteenth Circuit committed reversible error by vacating the judgment of conviction and sentence in dispute. Second, as Judge Snit so eloquently noted in her dissenting opinion below, the District Court properly denied the Respondent's request for a special jury instruction concerning the occurrence of false confessions, such that the order of the Fourteenth Circuit warrants reversal. Third, the Fourteenth Circuit erred in concluding that the Respondent's Confrontation Clause rights were implicated because the disputed out-of-court

statements, which were disclosed to the jury during Dr. Gerber's expert testimony, were neither testimonial in nature, nor presented for the truth of the matter asserted. Accordingly, the order of the United States Court of Appeals for the Fourteenth Circuit should be reversed.

## **ARGUMENT**

### **I. THE DECISION OF THE COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT SHOULD BE DISMISSED BECAUSE THE DISTRICT COURT DID NOT COMMIT AN ABUSE OF DISCRETION IN EXCLUDING DEFENDANT EXPERT'S TESTIMONY BECAUSE IT IS NEITHER RELIABLE SCIENCE OR RELEVANT.**

#### **A. The Court of Appeals failed to apply an abuse of discretion standard of review to the District Court's order excluding Dr. Wallace's testimony.**

In failing to apply the standard required by this Court under Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999), for reviewing exclusions of expert testimony, the Fourteenth Circuit should be reversed and the order of the District Court reinstated.

In Kumho, this Court stated that the law grants a District Court "the same broad latitude" as to both "how to determine reliability" and "to its ultimate reliability determination." Kumho at 142. This "broad latitude" equates to an abuse of discretion standard. Id. at 152; Zaremba v. Gen. Motors Corp., 360 F.3d 355, 357 (2nd Cir. 2004); Amorgianos v. Nat. Railroad Passenger Corp., 303 F.3d 256, 264 (2nd Cir. 2002). An abuse of discretion does not occur, unless a decision to exclude expert testimony is "manifestly erroneous." Zaremba at 357; Amorgianos at 265. Consequently, the trial judge "must have considerable leeway" in deciding how to go about determining whether a particular expert is reliable. Kumho, 526 U.S. at 152 (emphasis added). This way, a District Court has the discretion to ensure that its doors remain firmly shut to "junk science," while admitting reliable expert testimony. Amorgianos at 267.

In Kumho, this Court reversed the Court of Appeals and reinstated the District Court's order because the appellate court incorrectly applied the abuse of discretion standard to the trial

judge's exclusion of expert testimony. Kumho, 526 U.S. at 153. The District Court, despite finding the expert qualified to testify, concluded that the methodology employed by the expert in analyzing the data, and the scientific basis for the expert's results, to be unreliable. Id. In this Court's view, the trial judge's doubts with the expert's testimony were reasonable, and thus could find no abuse of discretion in the exclusion of the evidence. Id. at 153, 158; see also Zaremba, 360 F.3d at 358 (holding that the District Court did not commit manifest error in excluding expert testimony that failed to satisfy any of the factors pertaining to reliability identified in Daubert).

Here, the Fourteenth Circuit, similarly, incorrectly applied its limited scope of review. Conspicuous by its absence is any mention of the abuse of discretion standard required by this Court in Kumho, or any reference to "manifest error" committed by Chief Judge Bright. (R. at 93-95.) Replacing this Court's established standard of review, the Court of Appeals preferred to wield a carte-blanche wrecking-ball through the trial judge's findings. The Fourteenth Circuit certainly failed to give the District Court "considerable leeway" in either how it determined the reliability of Dr. Wallace's testimony or its ultimate reliability determination.

Here, Chief Judge Bright conducted a full Daubert hearing of the proposed evidence, (R. at 5-14), allowing both Dr. Wallace and Dr. Kalf to present the supposed merits of their theories. Cf. United States v. Smithers, 212 F.3d 306, 310, 314-15 (6th Cir. 2000) (reversing the District Court for not conducting a Daubert hearing at all); United States v. Velarde, 214 F.3d 1204, 1208-09 (10th Cir. 2000) (reversing the District Court for not conducting a reliability determination of the proposed testimony). After this hearing, the judge determined that Dr. Wallace's testimony was both unreliable and unhelpful. (R. at 15-16.) Just as in Kumho, the judge did not doubt Dr. Wallace's qualifications, (R. at 5), but found the methodology employed

and the scientific basis of the testimony to be unreliable. (R. at 15-16.) Considering that the false confession theory cannot be tested, (R. at 13), and that there is no widespread acceptance of the theory, (R. at 12-13); New Jersey v. Free, 798 A.2d 83, 95 (N.J. Super. Ct. App. Div. 2002), the trial judge's concerns, as in Kumho, with Dr. Wallace's testimony were certainly not unreasonable, and thus should not have been overturned.

Nor did the trial judge here, as the Court of Appeals incorrectly believed, create a per se rule permanently excluding false confession testimony. Cf. United States v. Posado, 57 F.3d 428, 429 (5th Cir. 1995) (reversing the trial judge for following the circuit's long-standing per se rule excluding polygraph evidence because such a rule "did not survive Daubert"). Most importantly, Chief Judge Bright unequivocally left the door open to false confession testimony in the future when she stated: "[t]his is not to say that social science research on false confessions will not mature to the point that it is reliable under Daubert, but that day has not come." (R. at 16.); See Major James R. Agar II, The Admissibility of False Confession Expert Testimony, 1999 Army Law 26, 42-43 (finding that the false confession proposition needs further study and refinement). In other words, the District Court's concerns were with the application of Dr. Wallace's testimony to the facts of this case. Furthermore, the Court of Appeals completely ignored the fact that Chief Judge Bright did admit the false confession testimony of Dr. Kalf, (R. at 16). It is this misunderstanding of the District Court's thorough analysis of the proposed testimony and the Court of Appeals' failure to abide by the correct standard of review that has opened the doors to Chief Judge Bright's courtroom to "junk science."

Consequently, in order for trial judge's to have the "considerable leeway" this Court has held that they must in admitting and excluding expert evidence, the Fourteenth Circuit should be reversed.

**B. False confession testimony should not be allowed into the courtroom because it is an unreliable scientific theory that cannot be tested, cannot maintain controlling standards, cannot establish a known error rate, is not subject to meaningful peer review, and has no widespread acceptance.**

The false confession theory is unreliable under Daubert and Kumho and thus, at the present time, has no place within a federal courtroom. The theory cannot be tested, and consequently, cannot maintain controlling standards or a known error rate; it is not subject to meaningful peer review and it has no widespread acceptance.

Under Daubert and Rule 702 of the Federal Rules of Evidence, admission of “scientific, technical, or other specialized knowledge” is governed by a two-prong test. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 597 (1993). The first prong asks whether the “reasoning or methodology underlying the testimony is scientifically valid.” Id. at 592-93; See also United States v. Hebah, 164 Fed. Appx. 678, 691 (10th Cir. 2006). In other words, the proposed testimony must be reliable, and as made clear in Kumho, reliable as to the specific facts of the case. Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 156 (1999). In Daubert, this Court enumerated five pertinent factors for District Courts to consider when determining whether expert testimony is reliable. These factors are; (1) whether the theory can be or has been tested, (2) whether the theory has been subjected to peer review, (3) the known or potential error rate of the theory, (4) the existence and maintenance of controlling standards of the theory’s operation, and (5) widespread acceptance. Daubert at 593-94. At the very least, the proposed evidence cannot be based upon subjective belief or unsupported speculation, and it must be supported by appropriate validation. Id. at 590. This Court further stated in Kumho, that the Daubert factors also apply to technical and other specialized knowledge, but should be considered “flexible” and one or all of them may or may not be pertinent in assessing reliability. Kumho at 150.

State and federal courts are currently split on the admission of false confession expert testimony. However, the courts that have considered the scientific reliability of this so-called theory, have found it to have no reliable basis. See Hebah, 164 Fed. Appx. at 692; Edmonds v. Mississippi, No. 2004-KA-02081-COA, 2006 WL 1073460, at \*11-12 (Miss. Ct. App. 2006) (rev'd on other grounds); New Jersey v. Free, 798 A.2d 83, 95 (N.J. Super. Ct. App. Div. 2002); Maine v. Tellier, 526 A.2d 941, 943-44 (Me. 1987). In Hebah, the Tenth Circuit held that the defendant's proposed false confession testimony "failed the Daubert reliability requirement." Hebah at 692. Among many factors supporting exclusion, the court stated that the expert was unable to establish any error rate in the tests used and the process used to evaluate patients was not generally accepted. Id. In Edmonds, the court found that the trial judge had not abused its discretion in excluding false confession testimony because, even though the proposed expert was qualified, the false confession theory itself was the source of the unreliability. Edmonds, 2006 WL 1073460, at \*11-12. At the Daubert hearing, the expert admitted that no empirical test existed with which to conclude a confession was truthful or not, and consequently, there was "no way to discern a possible rate of error in the field." Id.; see also Tellier, 526 A.2d at 943 (highlighting that the proposed expert could point to "no empirical studies with respect to the frequency of false confessions"). In Free, the court, after a thorough analysis of the judicial decisions concerning false confession testimony, see Free, 798 A.2d at 93-95, held that such evidence had not "gained general acceptance," and thus was "inadmissible as not scientifically reliable." Id. at 95.

Of the courts that do admit false confession testimony, none have given it a ringing endorsement, and importantly, none have provided a detailed approval of its scientific reliability. See United States v. Hall, 974 F. Supp. 1198, 1204-05 (C.D. Ill. 1997); United States v. Shay, 57

F.3d 126, 133-34 (1st Cir. 1995); New York v. Kogut, 806 N.Y.S.2d 366, 372 (N.Y. Sup. Ct. 2005). In Hall, the court conceded that false confession evidence does not constitute a body of reliable scientific knowledge, instead pigeonholing the theory as “specialized knowledge.” Id. at 1205. Despite acknowledging that “no laboratory studies could be conducted in real life situations” and a false confession expert admitting that “the current empirical foundation may be too meager to...qualify as a subject of scientific knowledge,” id. at 1204, the court allowed admission of the testimony. Id. at 1205. In Shay, the Court of Appeals overturned the trial judge’s exclusion of false confession evidence, even though the court failed to conduct any analysis, let alone at length, of the reliability of the proposed testimony. Id. at 133. Notably, the court failed to apply a single one of the factors set out by this Court in Daubert to determine if the evidence was reliable. Id. at 133-34; see also Kogut, 806 N.Y.S.2d at 372 (N.Y. Sup. Ct. 2005) (allowing one of two false confession experts to testify under the Frye “general acceptance” standard, despite the court acknowledging that that it is “debate[able]” whether simulated research could be applied “to any specific real life interrogation”); cf. Major James R. Agar II, The Admissibility of False Confession Expert Testimony, 1999 Army Law 26, 42-43 (finding that false confession testimony “is not yet ready for prime time” and that admission of such evidence is “premature and therefore unreliable”).

Here, preliminarily, the false confession proposition is part of the broader social science field, and therefore, as its title suggests, is a science. See Free, 798 A.2d at 93 (holding that the court did not support categorizing false confession testimony as specialized knowledge rather than science); cf. Hall, 974 F. Supp. at 1205. Even if, though, this Court finds the social sciences to in fact not be a science, the false confession proposition is still inadmissible because not one of the Daubert reliability factors validates admission of the theory.

Under Kumho, the law grants a District Court the latitude to decide which, if any, of the Daubert factors to place the greatest emphasis on when determining the ultimate reliability of proposed evidence. See Kumho, 526 U.S. at 142. Here, Chief Judge Bright determined that the absence of the first Daubert factor was of the greatest significance. (R. at 15-16.) As conceded by Dr. Wallace, himself, the false confession theory has not been and cannot be tested, (R. at 13), and no empirical data exists from which an expert could predict the occurrence of a false confession. (R. at 14.) Instead, the hypothesis of false confessions relies completely on waiting for other forms of scientific evidence, such as DNA testing, (R. at 8), or the confession of another person, to exonerate an individual who had previously confessed. Here, there has been no prior exoneration of the defendant by DNA or any other evidence, and thus Dr. Wallace's "speculat[ive]" propositions are unreliable. (R. at 14.)

In fact, Dr. Wallace cannot even provide a reasonable estimate of how often any false confessions actually occur. (R. at 14.) Instead, he points to "the news" as evidence of his theory, id. but this is obviously not empirically proven data. The "guesswork" of the theory is illustrated by the "so-called controlled experiments," (R. at 15), which Dr. Wallace attempts to have justify his conclusions. One of these "experiments" involved a "student who confesses to crashing a computer." Id. However, as pointed out by Chief Judge Bright, the leap of logic required to correlate crashing a computer with confessing to murder is just too great. (R. at 15-16.) See also Hall, 974 F. Supp. at 1204 (noting that various factors may have "skewed" the test results, "such as the use of college students as subjects"); Edmonds, 2006 WL 1073460, at \*11 (stating that the expert "could not say there was a correlation between youth in her test who falsely confessed to hitting the 'Alt' key and youth who falsely confessed to committing various felony crimes"). It is

these inadequacies with Dr. Wallace's testing methods, and thus the empirical basis of his theory, which led Chief Judge Bright to exclude his testimony.

It is not only the failures of testing for the occurrence of false confessions, though, which submerge this theory in the depths of unreliability. The consequence of not being able to create a meaningful test to predict when false confessions occur is that there is neither a known error rate, nor a standard to control the theory's application. Without a known error rate or controlling standards, a so-called theory becomes the proverbial "bull in a china shop"- uncontrollable and misapplied to particular facts. Therefore, as the trial judge here, or the courts in Free and Tellier, stated, the false confession theory essentially becomes mere "guesswork," (R. at 15), or "abstract, vague and speculative." Free, 798 A.2d at 96; Tellier, 526 A.2d at 944. The extent that the false confession proposition has been subjected to meaningful peer review is also open to question. In Edmonds, a 2006 case, the court found that the "field of expert testimony regarding false confessions appears to be a small group." Edmonds, 2006 WL 1073460, at \*12. The court, citing to the trial judge, stated the group "appears to be six people," two of whom "have attacked the field." Id. The trial judge consequently believed the quality and extent of peer review to be questionable. Id. Although Dr. Wallace asserts that "hundreds of articles" have been written on the theory, this level of publication, even if true, is meaningless if it has not been subjected to the full "scrutiny of the scientific community." Daubert, 509 U.S. at 593.

Finally, the false confession proposition has not gained "widespread acceptance" in the social science field. Although it may be "recognized" that there are categories of false confessor, (R. at 7), this is not the matter in dispute. In dispute, here, is the "widespread acceptance" of how a false confession expert is able to reach the point where he or she can say that Rounn Har's confession is truthful or not. On this point, there is no widespread accepted view in the social

science field. In fact, Dr. Wallace admits that in order for a theory to be accepted by the psychological community, there must be data to support it. (R. at 13.) Here, there is no such data. (R. at 13-14.) Furthermore, Dr. Wallace conceded that the Diagnostic and Statistical Manual of Psychology Disorders, which lists all recognized psychological disorders, does not contain any reference to a disorder related to false confessions. (R. at 12-13.)

Thus, without the existence of empirical data, a known error rate, controlling standards, an undisputed peer review, or widespread acceptance to support it, this Court should reverse the Court of Appeals' decision.

**C. False confession testimony is not relevant scientific evidence because it does not assist a jury in determining whether a specific defendant has confessed truthfully.**

The false confession proposition cannot be applied to the specific facts of this case, and thus does not help the jury determine the issue it was proposed to address-whether the defendant confessed truthfully or not.

The second prong to the Daubert test for expert evidence is that it must be “relevant to the task at hand.” Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 597 (1993). To be “relevant,” “the evidence must possess validity when applied to the pertinent factual inquiry.” United States v. Posado, 57 F.3d 428, 433 (5th Cir. 1995). In Kumho, this Court stated that the issue before the trial court “was specific, not general,” Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 156 (1999) (emphasis added), because the trial judge had to decide if the expert “could reliably determine the cause of this tire’s separation.” Id. at 154.

Apart from the unreliability of the false confession theory, the fact that it cannot be applied to specific confessions, (R. at 13-14), has prompted concern from courts. See New Jersey v. Free, 798 A.2d 83, 96 (N.J. Super. Ct. App. Div. 2002); Maine v. Tellier, 526 A.2d 941, 943

(Me. 1987). In Free, the expert was unable to identify when certain factors, such as isolation and persistent questioning, might lead to a false confession, and consequently could not explain to a jury if the particular defendant had confessed truthfully or not. Free at 96. Similarly, in Tellier, the expert could offer “no opinion” as to whether the defendant’s “admissions were in fact false.” Tellier at 943. Therefore, both courts concluded that the proposed testimony would amount to “nothing more than an assertion that false confessions do occur.” Free at 96; Tellier at 944.

Of the courts that have allowed admission of this evidence, it is noticeable that the scope of the expert’s permitted testimony has been strictly limited. See United States v. Hall, 974 F. Supp. 1198, 1205 (C.D. Ill. 1997); New York v. Kogut, 806 N.Y.S.2d 366, 372 (N.Y. Sup. Ct. 2005). In Hall, a pre-Kumho case, the court expressly limited the expert’s evidence by excluding testimony about whether the interrogation in this specific case caused the defendant to confess falsely, because such testimony would be both “speculative and prejudicial.” Hall at 1205. Similarly, in Kogut, the court would not allow any opinion of whether the defendant’s “confession was in fact involuntary” because when applied directly to the defendant’s interrogation, the theory “takes on the form not of psychological research but rather purely legal argument.” Id. at 372-73.; cf. United States v. Raposo, 1998 WL 879723, at \*5-6 (S.D.N.Y. 1998) (permitting an expert to explain to a jury the psychological condition of the defendant, after performing a number of evaluations, and how it may have made him susceptible to making a false confession).

A further factor that erodes at the relevance of false confession testimony is the existence of videotape of the defendant’s interrogation. In Minnesota v. Ritt, 599 N.W.2d 802 (Minn. 1999), the defendant’s entire interview and formal statement with the police was videotaped. Id. at 812. The court held that the jurors could consequently observe the surrounding physical

environment of the interrogation, and thus, the expert testimony was “unlikely to add either precision or depth” to the jury’s evaluation of the defendant’s statements. Id.

Furthermore, false confession testimony invades the responsibility of jurors to weigh the credibility of witnesses placed before them. See United States v. Scheffer, 523 U.S. 303, 313 (holding that “a fundamental premise of our criminal trial system is that the jury is the lie detector”). In Nimely v. City of New York, 414 F.3d 381 (2nd Cir. 2005), an expert testified that he rejected the possibility that two police officers had lied, and explained various reasons why he came to this conclusion. Id. at 398. The Second Circuit held that this testimony should be excluded because “expert opinions that constitute evaluations of witness credibility, even when such evaluations are rooted in scientific or technical expertise, are inadmissible under Rule 702.” Id. False confession experts, similarly, tell a jury that the defendant was lying when he made his confession, a determination that is clearly to be made by the jurors only, not for them. See Scheffer at 313; Nimely at 397-98.

Here, as in Kumho, the question before the trial judge was specific, not general. Could Dr. Wallace assist the jury in deciding whether Rounn Har’s confession to murdering Sack Seafoam was truthful? A brief perusal of Dr. Wallace’s testimony reveals that the answer to this question is an emphatic “no.” Dr. Wallace, himself, said that he could not even provide a reasonable estimate of the number of total cases that involve false confessions, (R. at 14), let alone try to assist a jury in determining if one specific person, Rounn Har, had confessed truthfully. Id.

In totum, Dr. Wallace’s testimony amounts to an assertion that false confessions do occur. As the court in Free held, without being able to provide a causal link, the coercive factors suggested by Dr. Wallace, such as minimization, extended questioning, and false accusations of

guilt, (R. at 11), are all matters that a jury would recognize as having a potential for causing a false confession. See Free, 798 A.2d at 96. Thus, Dr. Wallace is no more capable of informing the jurors of the truthfulness of the defendant's confession, then they are themselves. In stark contrast, Dr. Kalf was able to examine the defendant and suggest a medically recognized disorder that, in arguendo, may have caused the defendant to provide his confession. (R. at 51.) Unlike Dr. Wallace's testimony, therefore, Dr. Kalf was able to point to a specific condition, relate it to the defendant, and attempt to explain the specific question before the jury. Id.

Furthermore, the jury was assisted in their determination of the truthfulness of the defendant's confession when the trial judge admitted the videotape of the confession. (R. at 73.) Courts and scholars have recognized the importance of such evidence in assisting a jury because it provides a window into the physical environment of the interrogation room and the conduct of those involved in the confession. See e.g., Ritt, 599 N.W.2d at 812; Steven A. Drizin and Richard A. Leo, The Problem of False Confessions in the Post-DNA World, 82 N.C. L. Rev. 891, 997 (2004) (stating that "the risk of harm caused by false confessions could be greatly reduced if police were required to...record the entirety of all custodial interrogations"). The jury is also not assisted, here, by Dr. Wallace's assertions without empirical support, that there is a widespread misconception among the public that people do not confess falsely unless they are in fact guilty. (R. at 10.) As with Dr. Wallace's assertion that "false confessions do occur," (R. at 14), "nothing in either Daubert or the Federal Rules of Evidence requires a District Court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert." Kumho, 526 U.S. at 157; Edmonds v. Mississippi, 2006 WL 1073460, at \*11 (Miss. Ct. App. 2006) (rev'd on other grounds) (holding that the trial judge was not required to accept the "mere assertion" of a misconception among the public that people do not confess falsely).

Thus, this Court should reinstate Chief Judge Bright's decision excluding Dr. Wallace's testimony because for it to be relevant, here, the testimony must assist the jury in deciding whether Rounn Har's confession was truthful. By his own admission, though, Dr. Wallace cannot do this. (R. at 14.) In fact Dr. Wallace concedes that all he is doing is speculating. Id.

**II. THIS COURT SHOULD REVERSE THE ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT BECAUSE THAT COURT ERRED BY CONCLUDING THAT THE RESPONDENT WAS ENTITLED TO A JURY INSTRUCTION CONCERNING FALSE CONFESSIONS.**

As a preliminary matter, the Petitioner respectfully urges this Court to review questions of law arising from circuit court's conclusion that the District Court erred by failing to include an instruction relating to false confessions in its charge to the jury de novo. Pierce v. Underwood, 487 U.S. 552, 557-58 (1988). In addition, questions of fact should be reviewed for clear error, while matters of discretion should be subjected to the abuse of discretion standard of appellate review. Cf. Robert Lewis Rosen Assocs. v. Webb, No. 05-3578, 2007 U.S. App. LEXIS 623, at \*14 (2d Cir. Jan. 11, 2007) (setting forth what the appropriate standards of appellate review are).

Time and again, courts have opined that confessions are unlike any other form of incriminating evidence, including, for example, eyewitness identifications. See, e.g., Arizona v. Fulminante, 499 U.S. 270, 296 (1991) (noting that "[a] confession is like no other evidence"); see also Soffar v. Johnson, 237 F.3d 411, 460 (5th Cir. 2000) (citations omitted) (recognizing that confessions are unique in the evidentiary realm). In this regard, as the Court itself has recognized, confessions are "probably the most probative and damaging evidence that can be admitted against" criminal defendants due, in large part, to the fact that the defendants themselves are in the best positions to account for their past actions. Fulminante, 499 U.S. at 296 (quoting Bruton v. United States, 391 U.S. 123, 139-40 (1968) (White, J., dissenting)). As a

result, juries oftentimes give great weight to the defendants' words, finding detailed confessions to be particularly probative. See, e.g., Lufkins v. Leapley, 965 F.2d 1477, 1482 (8th Cir. 1992).

That being the case, however, courts have also acknowledged that there is no need for a special jury instruction concerning confessions in the absence of an objection relating to the voluntary, or involuntary, nature of a confession. United States v. Iwegbu, 6 F.3d 272, 275 (5th Cir. 1993); see also 18 U.S.C. § 3501(a) (1968). As such, an instruction that apprises a jury of its obligation to weigh all of the evidence and make an informed decision as to the truthfulness and voluntariness of the defendant's confession will suffice for the purposes of the issue currently pending before the Court. Pong Wing Quong v. United States, 111 F.2d 751, 757 (9th Cir. 1940); see also United States v. Barry, 518 F.2d 342, 346 n.5 (2d Cir. 1975) (citations omitted). Moreover, in analogous situations, courts have opined that a criminal defendant is not entitled to a special jury instruction concerning confessions, unless the defendant can establish that his statement was obtained during custodial interrogation and left unrecorded. Massachusetts v. DiGiambattista, 813 N.E.2d 516, 533-34 (Mass. 2004); see also Illinois v. Buck, 838 N.E.2d 187, 206 (explaining that certain courts require corrective jury instructions in the absence of recorded interrogations).

Furthermore, with respect to the contention that false confessions should be treated like eyewitness identifications, it is important to note that there are a number of differences between false confessions and eyewitness identifications, not the least of which is the availability of scientific data. Edward Stein, The Admissibility of Expert Testimony About Cognitive Science Research on Eyewitness Identification, 2 Law, Probability & Risk 295, 297-301 (2003) (discussing the scientific and evidentiary reasons for admitting expert testimony concerning eyewitness identifications). For example, in the 1970s, psychological experts uncovered

substantial, widely-accepted scientific evidence indicating that eyewitness identifications were both inaccurate and unreliable. Jennifer L. Overbeck, Note, Beyond Admissibility: A Practical Look at the Use of Eyewitness Expert Testimony in the Federal Courts, 80 N.Y.U. L. REV. 1895, 1896 (2005). However, as the Record indicates, the same cannot be said for false confessions; indeed, the Respondent's own expert testified that there is no consensus in the scientific community with respect to the occurrence of false confessions. (R. at 12-14.) Moreover, even if there were such a consensus, the decision to grant or deny a defendant's request for a special jury instruction is normally reserved for the discretion of the trial court. United States v. Brooks, 928 F.2d 1403, 1407-08 (4th Cir. 1991).

Here, the voluntary nature of the Respondent's confession is not at issue. (R. at 104.) Rather, as Judge Snit noted in her dissenting opinion below, the District Court's decision to issue a general credibility-oriented instruction, instead of a false confession instruction, is in dispute. Id. In this regard, it is worth mentioning that the Respondent's confession did not result from custodial interrogation and was captured on videotape. (R. at 90.) At the same time, it is important to note that the District Court "went far beyond the requirements of the law when it directed the jury" to acquit the defendant if it concluded that the confession was not truthful. Id. That instruction, when taken in conjunction with the fact that the Respondent's own expert conceded that there was insufficient evidence concerning the occurrence of false confessions to permit consensus within the scientific community, clearly establishes that a special instruction relating to false confessions was unwarranted. (R. at 12-14.) Indeed, even if this Court accepts the Respondent's contention that false confessions are analogous to eyewitness misidentifications, it should, nevertheless, reverse the order of the Fourteenth Circuit because the decision to deny the Respondent's motion for a special instruction relating to false confessions

was a matter reserved for the District Court's discretion. (R. at 104.) Thus, given that the Record does not contain any indication that the District Court abused its discretion by denying the Petitioner's motion for a special instruction, the United States Court of Appeals for the Fourteenth Circuit erred in concluding that the Respondent was entitled to a special instruction concerning false confessions, and this Court should reverse the order of the circuit court below.

**III. PURSUANT TO THE CONFRONTATION CLAUSE OF THE FEDERAL CONSTITUTION, THIS COURT SHOULD REVERSE THE ORDER OF THE COURT BELOW BECAUSE THE DISPUTED OUT-OF-COURT STATEMENTS THAT WERE PRESENTED TO THE JURY WERE NEITHER TESTIMONIAL IN NATURE, NOR OFFERED FOR THE TRUTH OF THE MATTER ASSERTED.**

Confrontation Clause analyses, including evidentiary rulings affecting a defendant's right to confront witnesses, are reviewed *de novo*. United States v. Ellis, 460 F.3d 920, 923 (7th Cir. 2006); United States v. Saget, 377 F.3d 223, 230 (2d Cir. 2004). Applying that standard, courts give appropriate deference to factual findings made by the District Court in its Sixth Amendment analyses and determinations. Saget, 377 F.3d at 230. In addition, Confrontation Clause violations are subject to harmless error tests, which courts review *de novo*. Middleton v. Roper, 455 F.3d 838, 857 (8th Cir. 2006).

The Sixth Amendment states, in pertinent part, 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. Recently, this Court issued a landmark decision redefining the scope and effect of the Confrontation Clause. In Crawford v. Washington, the Court instituted a *per se* bar on the admission of out-of-court testimonial statements that were not subject to prior cross-examination. Crawford v. Washington, 541 U.S. 36, 59 (2004); Saget, 377 F.3d at 226. Specifically, Crawford holds that a declarant's testimonial out-of-court statements are not admissible under the Sixth Amendment unless the defendant had a prior opportunity for cross-examination and the declarant

is unavailable, or the evidence is admitted for purposes other than establishing the truth of the matter asserted. Crawford, 541 U.S. at 53-54, 59 n.9; United States v. Maher, 454 F.3d 13, 19-20 (1st Cir. 2006). As a result, “Crawford claims will usually turn on one of two issues. First, was the out-of-court statement testimonial? Second, if so, is it admissible for reasons other than the truth of the matter asserted?” Maher, 454 F.3d at 20.

In the case at bar, the District Court correctly determined that Jessica Gerber, M.D., a psychiatrist, could disclose to the jury certain out-of-court statements made by the respondent’s mother and sister. (R. at 59.) The District Court found the statements admissible under both the exceptions that this Court articulated. Id.

**A. The out-of-court statements disclosed to the jury by the government’s expert were non-testimonial, and, therefore, were not subject to the Confrontation Clause.**

After this Court decided Crawford, the lower courts were unsure if the Confrontation Clause applied to non-testimonial statements. E.g., Saget, 377 F.3d at 227. In order to settle the confusion, this Court addressed the question in Davis v. Washington, 126 S. Ct. 2266 (2006). The Court made clear that the Confrontation Clause extends only to evidence that is considered testimonial. Id. at 2273-76. Stated differently, the clause simply has no application to non-testimonial statements. Id. at 2274 (holding that the limitation with respect to testimonial hearsay is “so clearly reflected in the text” of the Sixth Amendment that it “must... mark out not merely its ‘core,’ but its perimeter”). As a result, a determination that the out-of-court statements made by the respondent’s mother and sister to Dr. Gerber were non-testimonial will negate the respondent’s claim that the government violated his right to confrontation.

Although the Confrontation Clause only applies to testimonial statements, this Court has expressly declined to provide a comprehensive definition of that term. Davis, 126 S. Ct. at 2273;

Crawford, 541 U.S. at 68. Instead, the Court provided three basic formulations of the core class of testimonial statements: “ex parte in-court testimony or its functional equivalent...; extrajudicial statements... contained in formalized testimonial materials, such as affidavits, depositions... or confessions; [and] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” Crawford, 451 U.S. at 51-52 (citations omitted). As lower courts observed, “the types of statements cited by the Court as testimonial share certain characteristics; all involve a declarant’s knowing responses to structured questioning in an investigative environment or a courtroom setting where the declarant would reasonably expect that his or her responses might be used in future proceedings.” Saget, 377 F.3d at 228; see also, Ellis, 460 F.3d at 923-24.

In the case at bar, the statements relied upon by Dr. Gerber do not fall under any of the formulations articulated in Crawford. Dr. Gerber spoke with Mrs. Har, the respondent’s mother, over the telephone for approximately one hour, and with Ms. Chava, the respondent’s sister, over the telephone for approximately fifteen minutes. (R. at 56-57.) Neither phone call constituted *ex-parte* in-court testimony or its functional equivalent. Nor were the extrajudicial statements contained in formalized testimonial materials; there were no affidavits or depositions involved. There was also no investigative environment or courtroom setting. The respondent’s mother and sister spoke comfortably from their own homes in their own country, and both were very casual, forthcoming, and “quite pleasant.” (R. at 55.) However, the formulations articulated in Crawford are not exclusive; “the Court left open the possibility that the definition of testimony encompasses a broader range of statements.” Saget, 377 F.3d at 228.

In order to determine which statements outside of this core class are testimonial, “the courts of appeals have taken to defining testimonial in terms of whether the declarant reasonably

expected the statement to be used prosecutorially.” Ellis, 460 F.3d at 925; e.g., Mahe, 454 F.3d at 21 (holding a statement to be testimonial because “it [was] clear that an objectively reasonable person in [the declarant’s] shoes would understand that the statement would be used in prosecuting [the defendant] at trial”); United States v. Hinton, 423 F.3d 355, 359 (3d Cir. 2005) (explaining that statements are testimonial when “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial”) (citations and quotations omitted); United States v. Cromer, 389 F.3d 662, 673-74 (6th Cir. 2004) (explaining that a statement is testimonial when “a reasonable person in the declarant’s position would anticipate his statement being used against the accused in investigating and prosecuting the crime”); Saget, 377 F.3d at 228 (“Crawford at least suggests that the determinative factor in determining whether a declarant bears testimony is the declarant’s awareness or expectation that his or her statements may later be used at a trial.”). Therefore, as the courts of appeals agree, the determinative factor, or at least most important aspect, of delineating between testimonial and non-testimonial statements is whether the declarant expected her statement to be used later for prosecution. Ellis, 460 F.3d at 924; Saget, 377 F.3d at 228.

Under this test, the statements disclosed by Dr. Gerber cannot be considered testimonial because Mrs. Har and Ms. Chava could not reasonably have believed that their statements would be used prosecutorially against their family member. All they knew about Dr. Gerber’s involvement was that she “was a psychiatrist working with Mr. Har at the Government’s request.” (R. at 54.) Further, Dr. Gerber testified under oath that she in no way told them or otherwise indicated that she would testify for the government at trial. (R. at 54-58). Even when

pressed on cross-examination, Dr. Gerber was quite adamant and testified that she “*never* said [she] would be testifying for the Government.” (R. at 56) (emphasis added).

In this regard, the case at bar is clearly distinguishable from New York v. Goldstein, 843 N.E.2d 727 (N.Y. 2005), a case relied on by the court below. In that case, New York’s highest court held that statements made during interviews conducted by the government’s psychiatric expert in preparation of his or her trial testimony were testimonial. Id. at 733; (R. at 100). However, crucial to the court’s holding in Goldstein was the following finding of fact: “Hegarty was an expert retained to testify for the People. The record does not specifically show that the interviewees knew this, but it would be strange if Hegarty did not tell them; *we infer that they knew* they were responding to questions from an agent of the State engaged in trial preparation.” Goldstein, 843 N.E.2d at 733 (emphasis added). In the case at bar, there is no basis for a court to make a similar finding of fact. Dr. Gerber only told the interviewees that she “was a psychiatrist working *with* Mr. Har at the Government’s request,” and unequivocally omitted any indication that she was preparing to testify against him at trial. (R. at 54, 56) (emphasis added). Therefore, the majority opinion in Goldstein is neither persuasive nor helpful in resolving the case at bar. “As far as the mother and sister are concerned, they are talking to a doctor about their son, a situation that does not implicate the right to confrontation.” (R. at 106.)

Finally, Dr. Gerber’s efforts can be analogized to the collection of medical documentary evidence, such as autopsy reports and DNA analyses. For example, in North Carolina v. Forte, 629 S.E.2d 137 (N.C. 2006), the highest court of North Carolina determined that DNA analyses prepared by an investigative agent who did not testify at trial were non-testimonial. Id. at 143. In so holding, the court relied on the fact that the undertaking of the reports was neutral in the sense that they had the power to exonerate as well as convict, the reports were not prepared

exclusively for trial, and the agent had no interest in the outcome of any trial in which the reports were used. Id. Likewise, in the case at bar, Dr. Gerber's efforts were neutral in much the same way. She had no personal interest in the outcome of the trial; she was neither a full nor part-time employee of any "prosecutorial organization." (R. at 54.) Instead, she was a "consulting independent psychiatrist" simply trying to perform her duties diligently and competently in order to make a sound medical diagnosis. (R. at 54-55.) In fact, her efforts could have potentially led to exculpatory findings. She testified that she would have changed her conclusions if the information Mrs. Har and Ms. Chava provided required her to do so. (R. at 55.) Additionally, Dr. Gerber's conversations with the respondent's mother and sister were "not really" part of her preparation for trial. Id. Rather, Dr. Gerber wanted to make her conclusions as accurate as possible, no matter whose side the conclusions favored. Id. As a result, based on the tests articulated by this Court and the courts of appeals, and factors used by courts such as the North Carolina Supreme Court, Mrs. Har's and Ms. Chava's statements were non-testimonial.

**B. The out-of-court statements disclosed to the jury by the government's expert were not offered for the truth of the matter asserted, and, therefore, were not subject to the Confrontation Clause.**

Even if the statements relied upon by Dr. Gerber were testimonial in nature, their disclosures to the jury does not violate the rule set forth in Crawford because the statements were not offered for their truth. In Crawford, this Court explicitly stated that "[t]he [Confrontation] Clause... does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." Crawford, 541 U.S. at 59 n.9 (citing Tennessee v. Street, 471 U.S. 409, 414 (1985)). Following Crawford and the pronouncement of this exception, several courts have held that the hearsay statements relied upon by experts do not violate the Confrontation

Clause because the statements are offered not for the truth of the matter, but as the basis for the expert's testimony and to allow an assessment of the weight of the expert's opinion.

Various courts have exempted the information underlying an expert's opinion from implicating the Confrontation Clause on the theory that such information is not offered for its truth but merely to apprise the fact finder of the basis of the opinion. E.g., California v. Thomas, 30 Cal. Rptr. 3d 582, 587 (Cal. Ct. App. 2005); North Carolina v. Bethea, 617 S.E.2d 687, 695-96 (N.C. Ct. App. 2005); New Jersey v. Torres, 874 A.2d 1084, 1098-99 (N.J. 2005); United States v. Stone, 222 F.R.D. 334, 339 (E.D. Tenn. 2004). In so holding, these courts are guided by Federal Rule of Evidence 703, or their state equivalent, which authorizes an expert to base his or her opinion on inadmissible evidence and permits the introduction of that evidence as long as the probative value of the underlying information outweighs its prejudicial impact. Fed. R. Evid. 703. The Bethea court held that the state equivalent of Rule 703 "permits an expert witness to rely on an out-of-court communication as a basis for an opinion and to relate the content of that communication to the jury.... [T]estimony... offered as a basis of an expert's opinion... falls within the exception set forth in Crawford." Bethea, 617 S.E.2d at 695 (quotation omitted). Similarly, while relying on its equivalent of Rule 703, the New Jersey Supreme Court held that "hearsay statements upon which an expert relies are admissible, not for [the purpose of] establishing the truth of their contents, but to apprise the jury of the basis of the opinion reached. Stated another way, an expert may offer out-of-court statements of others to support the opinions presented." Torres, 874 A.2d at 1098 (quotations and citations omitted). It is also noteworthy that the New Jersey Supreme Court found itself to be "in accord with the reasoning of the out-of-state cases that reject arguments similar to defendant's." Id. at 1099. In this regard, the apparent

trend amongst the courts since Crawford is the conclusion that out-of-court statements relied on by experts are not offered for their truth, but merely as the basis of those opinions.

A principal reason for admitting the basis of an expert's opinion is to grant the fact finder an ability to properly assess the weight and merit of that opinion, a notion that hardly infringes upon the Sixth Amendment. As the Thomas court explained:

Crawford does not undermine the established rule that experts can testify to their opinions on relevant matters, and relate the information and sources upon which they rely in forming those opinions. This is so because an expert is subject to cross-examination about his or her opinions and additionally, the materials on which the expert bases his or her opinion are not elicited for the truth of their contents; they are examined to assess the weight of the expert's opinion.

Thomas, 30 Cal. Rptr. 3d at 587 (emphasis added). Many courts agree with Thomas, and conclude that admitting the out-of-court statements relied upon by the expert is necessary to evaluate the merit and value of the expert's opinion. See California v. Reynolds, 42 Cal. Rptr. 3d 761, 774-75 (Cal. Ct. App. 2006); Stone, 222 F.R.D. at 339.

Conversely, in Goldstein, the case relied on by the court below, the New York Court of Appeals disagreed and held that out-of-court statements used by an expert constituted inadmissible hearsay because the jury would have to believe the statements to be either true or false before it could weigh the expert's opinion. Goldstein, 843 N.E.2d at 732-33. However, one of the only cases to examine both Thomas and Goldstein side-by-side explicitly rejected the New York Court of Appeals' approach. In re J.B., No. F048390, 2006 WL 1769850, at \*7-9 (Cal. Ct. App. June 29, 2006). In In re J.B., the court found Goldstein unpersuasive and chose to follow Thomas (id.), believing that juries are entitled to consider all of the sources underlying an expert's opinion in order to assess and evaluate it.

Other recent decisions have reinforced the reasoning in Thomas, holding that evidence underlying an expert's opinion simply fails to implicate the Sixth Amendment in ways that other

testimonial hearsay does. On February 15, 2007, the court in California v. Cooper held that out-of-court statements relied on by mental health experts are “not offered for the truth of the facts stated but merely as the basis for the expert’s opinion.” California v. Cooper, No. B190720, 2007 WL 475789, at \*29 (Cal. Ct. App. Feb. 15, 2007). Citing Thomas, the court concluded that:

The reason [why the Confrontation Clause is not violated] is clear; if hearsay is admitted for a non-hearsay purpose, it does not turn upon the credibility of the hearsay declarant, making cross-examination of that person less important. The hearsay relied upon by an expert in forming his or her opinion is “examined to assess the weight of the expert's opinion,” not the validity of their contents.

Id. at \*30 (citations omitted). Other courts have come to similar realizations about the basis of an expert’s opinion and its relation to the Sixth Amendment. For example, the Third Circuit Court of Appeals rejected a defendant’s Confrontation Clause objection while citing a commentator who addressed the specific relationship between the clause and expert testimony offered under Rule 703. United States v. Zavala, 141 Fed. Appx. 69, 76 (3d Cir. 2005). The court stated,

“In a case where an expert forms an opinion from many sources, including his own experience, rather than simply relating testimonial hearsay to the jury, there is less risk of a Confrontation Clause violation.... On the other end of the spectrum exist[s] cases where an expert has relied on a number of sources and types of data and has added significant expertise to interpret and analyze them. In these circumstances, a confrontation violation likely will not exist because the expert’s opinion is truly original and a product of his special knowledge or experience, and the defendant can test its reliability by cross-examination of the expert.”

Id. (quoting Ross Andrew Oliver, Note, Testimonial Hearsay as the Basis for Expert Opinion: The Intersection of the Confrontation Clause and the Federal Rule of Evidence 703 after Crawford v. Washington, 55 Hast. L.J. 1539, 1558, 1560 (2004)). Under this rationale, it is the expert’s opinion itself that is the evidence, not the underlying basis for the opinion. However,

the jury must be allowed to hear the basis for that opinion, not for the truth of the matter, but to properly assess the weight of that evidence.

In the case at bar, the statements made by Mrs. Har and Ms. Chava were simply not offered for their truth. Here, Dr. Gerber did nothing more than what many other courts allow experts testifying before them to do: disclose the basis for her opinion. She testified that she based her conclusions on conversations with the respondent, his mother and sister, and her analysis of the raw data generated by personality tests administered to the respondent. (R. at 52, 60.) Pursuant to Rule 703 and Crawford's progeny, Dr. Gerber was permitted to disclose the statements of the respondent's family because they were probative in supporting the expert's conclusion that the respondent was missing a number of clinical manifestations of the disorder necessary to confirm his claims. (R. at 52.) Such disclosure permitted the jury to properly evaluate and weigh the government's rebuttal expert's opinion, especially in light of Dr. Gerber's contradictory position to the sole expert called by the defense, Dr. Roberta Kalf, M.D. Simply put, Dr. Kalf testified that the respondent suffered from Post-Traumatic Stress Disorder; on rebuttal, Dr. Gerber testified that he did not. (R. at 51-52.) Therefore, the jury needed to consider the basis of Dr. Gerber's opinion in order to fulfill its task of choosing between two wholly contradictory expert opinions.

Finally, the limiting instruction given to the jury tipped any balance of the probative value-prejudicial impact analysis in the government's favor. "Ordinarily, the use of a limiting instruction that matters on which an expert based his opinion are admitted only to show the basis of the opinion and not for the truth of the matter cures any hearsay problem involved...." Reynolds, 42 Cal. Rptr. 3d at 775; see also Daotien v. Siskiyou County Probation, No. CIV S-03-1252 DFL CMK P, 2007 WL 438901, at \*5 (E.D. Cal. Jan. 30, 2007) ("Most often, hearsay

problems will be cured by an instruction that matters admitted through an expert go only to the basis of his opinion and should not be considered for their truth.”); United States v. Morga, No. 94-30358, 1995 WL 520029, at \*2 (9th Cir. 1995) (holding that a limiting instruction informing the jury that the statement was not offered for the truth of the matter would have resolved any Confrontation Clause problem). Here, the District Court gave an express instruction to the jury limiting its use of the out-of-court statements disclosed by Dr. Gerber. (R. at 65.) It stated, in pertinent part, that the jury “may consider those statements for one, and only one purpose – that is, to assist... in evaluating the thoroughness of Dr. Gerber’s opinion” and “not [to] consider them in any way, manner, shape or form to be true.” Id. These instructions more than adequately convey the limited purpose in which the jury could consider the statements. Case law and precedent dictate that such an instruction resolves any potential hearsay problem in these circumstances. Accordingly, the District Court properly permitted Dr. Gerber to disclose the basis of her opinion in order for a thorough evaluation of that opinion.

### **CONCLUSION**

For the foregoing reasons, the Petitioner respectfully urges this Court to reverse the order of the United States Court of Appeals for the Fourteenth Circuit.

APPENDIX A

**THE SIXTH AMENDMENT TO THE CONSTITUTION OF  
THE UNITED STATES OF AMERICA**

**CONSTITUTION OF THE UNITED STATES OF AMERICA  
AMENDMENT VI**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

