

No. 06-117

IN THE
Supreme Court of the
United States

October Term, 2006

THE UNITED STATES OF AMERICA,
Petitioner,

- *against* -

ROUNN HAR,
Respondent.

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

BRIEF FOR RESPONDENT

Team Number 36
Counsel for Respondent

QUESTION PRESENTED

- I. Whether Dr. Wallace's testimony regarding the factors that contribute the occurrence of false confessions satisfies the Daubert standard for reliability and is relevant to the jury's determination of how to weigh Respondent's confession.
- II. Whether particularized jury instructions enumerating the relevant factors that affect the reliability of a confession is necessary where the defendant's case turns on the confessions.
- III. Whether the admission of prosecution psychiatric expert's testimony describing the substance of the statements she had elicited from Respondent's mother and sister in preparing for trial violated Respondent's rights under the VI Amendment's Confrontation Clause.

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STANDARD OF REVIEW

On a motion to review a trial court's decision to exclude expert testimony, the court must apply an abuse-of-discretion standard of review. Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 152 (1999). When reviewing a challenge to a trial court's admission testimony under the Confrontation Clause the court must apply an abuse-of-discretion standard of review. See Davis v. Washington, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).

STATEMENT OF FACTS

Respondent, Rounn Har was born in Jemg, Mango on July 22, 1974 and immigrated to the United States in 1996. (R. at 1.) From August 1, 1996 until the end of February 1997, Mr. Har worked as a production assistant on the television *Daily Dollars* which was filmed at Bowling Air Force Base. (R. at 1.) On February 28, 1997 around 7:00 p.m. Mr. Seafoam, the host of *Daily Dollars*, ("Decedent") was found dead on set of *Daily Dollars*. (R. at 1.)

Nathaniel Walker, an agent at Federal Bureau of Investigations ("FBI"), was the lead detective investigating Decedent's death. (R. at 39.) When Mr. Walk arrived, the security guards, who had been waiting outside, escorted Mr. Walker inside where he found Decedent tied to the game show's wheel with an elaborate knot using the wire from a microphone. (R. at 39.) Mr. Walker viewed the knot ("Knot") for ten minutes at most before it was destroyed. (R. at 40.) In Decedent's dressing room Mr. Walker found an empty picture frame with shattered glass which had been used to hit Decedent in the head. (R. at 41.) No other forensic evidence indicated who committed the crime. (R. at 41.) Although Mr. Har was interviewed during the initial investigation, he did not become a suspect until eight years later. (R. at 41.)

After retiring from the FBI Mr. Walker became a private investigator. (R. at 42.) Three years after retiring, eight years after initially seeing the Knot, Mr. Walker began to suspect Mr.

Har. (R. at 42.) Mr. Walker saw an article on knot tying in Mago, and immediately thought of Mr. Har. (R. at 42.) When he turned the page and saw the national knot of Mago he recognized it as the same knot used to tie Decedent to the wheel. (R. at 42.) At that time Mr. Walker enlisted his daughter to begin investigating Mr. Har for the murder of Decedent. (R. at 43.)

Ms. Walker is the twenty-five year old daughter of Mr. Walker who has an associate's degree in criminal justice and forensic psychology from Joralemon City University. (R. at 30.) At the request of her father Ms. Walker sought out Mr. Har on an internet dating website. (R. at 31.) Ms. Walker then led Mr. Har to believe that she was romantically interested in him. (R. at 31.) On April 24, 2005 Ms. Walker and Mr. Har went on what she led him to believe was their first date. (R. at 31.) Mr. Har drove all-night after working a full day to meet Ms. Walker for their date. (R. at 73.) Ms. Walker spent the day with Mr. Har and led him to believe they were on a date. (R. 31, 32.) At the completion of date Ms. Walker brought Mr. Har to the den where her father kept his trophies and sporting equipment, including a baseball bat, golf clubs and boxing gloves. (R. at 34.)

After Mr. Har drank a beer given to him by Ms. Walker, Mr. Walker walked into the den to begin his interrogation of Mr. Har. (R. at 34.) Mr. Walker began his interrogation using a police tactic referred as minimization where he diminished the heinous nature of the crime by villianizing the victim. (R. at 74.) In response to Mr. Walker's encouraging questions Mr. Har disparaged Decedent as being a demanding boss. (R. at 74.) Mr. Walker then further diminished the crime by stating that some men "just need some killing" while swinging his golf club. (R. at 75.) At this time Mr. Walker suggested that Ms. Walker get Mr. Har another beer and Mr. Har makes his first attempt to flee. (R. at 75.) However, the Walkers persuade him to stay. (R. at 75.)

Mr. Walker began his interrogation by tell Mr. Har he would consider it a favor if anyone gave him information about the death of Decedent. (R. at 76.) Mr. Walker uses an interrogation tactic of lying about evidence and leads Mr. Har to believe his fingerprints have been found at the scene of the crime. (R. at 76.) After telling Mr. Har that his fingerprints were found at the scene of the crime, Mr. Har makes his second attempt to flee. (R. at 76.) Mr. Walker prevents Mr. Har from leaving by pushing him down. (R. at 76.) Mr. Har then makes another threat of violence by taking another swing of the golf club will referring to senseless murder where a husband killed his wife using a golf club. (R. at 77.)

Ms. Walker then requests that her father give her a moment alone with Mr. Har. (R. at 77.) Ms. Walker then uses the police tactic of promising leniency saying if Mr. Har they can get on with their relationship. (R. at 78-80.) Further Ms. Walker minimizes the crime again by stating that the Decedent probably deserved it. (R. at 78.) Ms. Walker then repeats her father's lie stating that Mr. Har's fingerprints were found at the crime scene. (R. at 78.) Then Ms. Walker uses the police interrogation tactic of suggesting that perhaps the suspect blacked out. (R. at 79.) Ms. Walker tells Mr. Har discusses what happened with her father that they can just get on with their lives. (R. at 79.)

After all this Mr. Walker returns, and Mr. Har begins his confession. In his confession Mr. Har does not provide any facts or information that was not first stated during the interrogation by the Walkers. (R. at 73-85.) Mr. Har states that he went to speak with the Decedent because his relationship with Mr. Har's girlfriend, a fact that was previously suggested to him by Ms. Walker. (R. at 78, 82.) Mr. Har states he hit Decedent over the head with a picture frame after Ms. Walker makes reference to the picture frame. (R. at 82.) Mr. Har continues to stumble through a confession, seeming to guess at what other events could have occurred such as the glass of the frame shattering. (R. at 82.) Ms. Walker then leads him into

admitting that he strangled Decedent by reminding him that there must have been something else in the room. (R. at 83.) Mr. Har remembers a wired microphone that the Decedent carried everywhere with him and then states that he must have used that to strangle him. (R. at 83.) Mr. Har then admits to tying Decedent to the wheel using the knot he grew up tying. (R. at 84.) It is noteworthy that earlier in the interrogation Mr. Walker told Mr. Har that the knot is what lead him to suspect Mr. Har. (R. at 76.)

At trial Mr. Har sought to admit the expert testimony of Dr. Wallace who would explain to the jury that false confessions occur particularly in certain subgroups of the population. (R. at 5.) Dr. Wallace's testimony is based upon over twenty-five years of observational and controlled studies on false confessions. (R. at 6.) Dr. Wallace would testify that there it is generally accepted that false confession do occur and that there are there three categories of false confessions. (R. at 7.) The categories of false confessions are voluntary false confessors, coerced-compliant, and coerced internalized. (R. at 7.) This categorization has been accepted since the publication of a book called The Psychology of Evidence and Trial Procedure in 1985 (R. at 7.)

Dr. Wallace would testify that there are two methodologies used to study false confessions: 1) observational studies and 2) controlled studies. (R. at 8.) In observational studies false confessions are studied by analyzing real-world interrogations and confessions. (R. at 8.) A researcher will typically look at cases where a person who confessed to a crime was later proven innocent—for example through DNA evidence. (R. at 8.) Controlled studies occur in a laboratory environment. (R. at 8.) For example in one study performed by Saul Kassin students were warned not to touch the ALT key on their computer or it would crash. (R. at 8.) However, all the computers were set to crash half way through the experiment. (R. at 9.) Kassin

found that sixty-nine percent of participants confessed although they were not responsible. (R. at 9.)

Dr. Wallace would further testify that there are a variety of external and internal factors that cause individuals to confess falsely. (R. at 10.) Factors that lead to false confessions include: coercive interrogation techniques commonly used by the police such as: minimization, extended questioning, false accusations of guilt, and promises of leniency. (R. at 11.) Other factors that are often relevant include: exhaustion, sleep deprivation, anxiety, and authority figures. (R. at 11.) Further the link between false confessions and these techniques has been researched and subjected to peer review. (R. at 11.)

At trial the Government presented very little evidence beyond Mr. Har's confessions to the Walkers that implicated Mr. Har in the crime. (R. at 25-54.) A security guard who was on duty the day that Decedent was murdered stated that he Mr. Har was the last person he saw leave the studio. (R. at 26.) The security guard also acknowledged that no one was guarding the door when he went on break and that it would have been possible for someone to leave the studio through a window undetected. (R. at 28.)

In its case on rebuttal, the prosecution called Dr. Jessica Gerber, a paid, "independent consulting psychiatrist," to discuss the substance of her conclusions concerning Respondent's mental state. (R. at 51, 54.) In past cases Dr. Gerber has been paid an hourly fee by the Joralemon City Police Department, the County District Attorney, and the Federal Bureau of Investigation in exchange for her services in evaluating defendants and witnesses, with an eye towards possibly serving as an expert witness. (R. at 54.) It was in this capacity as an independent government contractor that Dr. Gerber evaluated and formed her conclusions about Respondent. (R. at 54.)

In contradiction to the statements made by the Respondent's expert psychiatric witness, Dr. Roberta Kalf, Dr. Gerber claimed that Respondent did not suffer from either post-traumatic stress disorder ("PTSD") or a compliant personality disorder, and that his reactions to stressors were average. (R. at 52.) Dr. Gerber stated that her conclusions were based on three sources: four interviews conducted with Respondent lasting a total period of approximately four-and-a-half hours, her own analysis of the raw data generated by personality tests administered to the Respondent, and finally, statements made to her in telephone conversations by Respondent's mother, Mrs. Har, and sister, Chava. (R. at 52-53.) Both Mrs. Har and Chava lived outside the United States, and the prosecution stated that it did not plan to call them to the stand. (R. at 53.) Respondent objected that the prosecution's introduction of the substance of these unrecorded statements, without his having the opportunity for cross-examination of Mrs. Har or Chava, would constitute testimonial hearsay, in violation of his VI Amendment right to confrontation. (R. at 53.) Over this objection, the district court allowed Dr. Gerber to testify as to the substance of those statements. (R. at 58-59.)

During *in limine* proceedings, Dr. Gerber acknowledged that she had "interviewed" Respondent's mother and sister to, "help shape...[her] testimony at trial." (R. at 55.) When speaking with Respondent's mother, Mrs. Har, Dr. Gerber had never explicitly stated that she would be testifying *for* the government. (R. at 56.) However, Dr. Gerber admitted that she "may have said something to that effect" of informing Mrs. Har and Chava that she would nevertheless be testifying. (R. at 56.) Dr. Gerber couched her request for information from Mrs. Har in the context of Respondent's "trial," and stated that her work with Respondent was being done at the government's request. (R. at 55-56.)

The telephone question-and-answer session between Dr. Gerber and Mrs. Har lasted for about one hour; Dr. Gerber recounted Mrs. Har's English as being, "very halting," and, "difficult

to understand.” (R. at 56.) Yet Dr. Gerber stated that she was able to get from the “gist” of Mrs. Har’s responses that Respondent was strong willed and independent. (R. at 56-57.) As Dr. Gerber admitted at trial, she had no way of knowing whether Mrs. Har’s perception was accurate, or her memory impaired. (R. at 57.) Neither could Dr. Gerber assess whether Mrs. Har actually had personal knowledge of everything she had related. (R. at 57.)

Dr. Gerber’s telephone conversation with Respondent’s sister, Chava Har, lasted fifteen minutes. (R. at 57.) Dr. Gerber started the interview by telling Chava (whose English was “quite clear”) that she was a psychiatrist, “mentioned” the trial, and said she wanted to talk about Respondent. (R. at 57-58.) The interview, which began with questions by Dr. Gerber and was conducted in a narrative, probed into specific acts involving Respondent, as well as his reputation in Chava’s neighborhood. (R. at 58.) As with Mrs. Har, Dr. Gerber had no way of knowing whether Chava’s perception or memory were accurate or impaired. (R. at 58.)

In the presence of the jury, Dr. Gerber testified at length to the substance of these two phone conversations, and how the facts derived from them led to her conclusions concerning Respondent’s medical condition. (R. at 59-61.) As the government conceded before the Fourteenth Circuit, there is no possibility that error resulting from the admission of these statements could be harmless. (R. at 101.) Dr. Gerber stated that relieving traumatic experiences from childhood is, “absolutely required to confirm a diagnosis of PTSD in this case,” and, “according to Mr. Har’s mother, Mr. Har has never experienced nightmares, flashbacks, or any other negative symptom associated with the disorder.” (R. at 59.) In response to the prosecution’s question of how what Mrs. Har had said helped Dr. Gerber reach a conclusion regarding Respondent’s PTSD, Dr. Gerber stated the following:

Mr. Har’s mother told me that Mr. Har has always been very assertive and self-reliant. She also said that Mr. Har was “stubborn” and “strong-willed” and has never looked to others for approval, as Dr. Kalf suggested he did in this situation. Mrs. Har’s main

example of these personality traits was that Mr. Har moved to the United States on his own, at age 18, and was able to find a home, employment, and set up a social network without any help. This was the case even though his parents both urged him to stay with them until the entire family could move to the United States. (R. at 60)

Dr. Gerber stated that these actions were, “totally antithetical to actions that someone with a compliant personality would take,” and that, “a very anxious person who always needs approval from authority figures would never [have struck out on his own against the advice of his parents].” (R. at 61-62.) Dr. Gerber also testified as to the substance of the narrative provided by Chava:

Mr. Har’s sister told me that since he was a small child, Mr. Har has always had a problem controlling his temper. Chava said that even up until the age of fourteen or fifteen, Mr. Har would fly into rages when he didn’t get his own way and would often throw things and lash out at others physically. As a teenager, Chava said Mr. Har also got into fights with neighborhood boys on a regular basis. In fact, I was told that Mr. Har was considered the neighborhood bully. These actions – bullying and rage issues – are also totally inconsistent with actions that would be taken by someone with an inadequate personality. (R. at .61.)

At trial’s end, the court’s jury instructions made mention of Dr. Gerber’s substantive recitations of what she was told by Mrs. Har and Chava. In pertinent part, the charge read:

With respect to the prosecution expert, Dr. Gerber, who testified about telephone conversations with defendant’s mother and sister, you may consider those statements for one, and only one purpose – that is, to assist you in evaluating the thoroughness of Dr. Gerber’s opinion. Given the limited purpose for which the statements are before you, you should not consider them in any way, manner, shape or form to be true. Again, only consider the statements as an aid in evaluating Dr. Gerber’s opinion, nothing more...It is most important in making that determination [of whether the government met its burden beyond a reasonable doubt] that you should not consider anything that...[Respondent’s] mother or sister told the psychiatrist as evidence of defendant’s guilt of the crime charged. (R. at 65.)

SUMMARY OF THE ARGUMENT

Under the Daubert standard the lower court erred when it excluded Dr. Wallace’s testimony because Dr. Wallace’s testimony was based on a reliable methodology and would have aided the trier of fact determine how to weigh the Respondent’s confession. Daubert requires

that a trial court make particular findings of facts based on the nature of the expert testimony presented to the court and the facts of the case.

In this case the trial court erred as a matter of law because the court failed to make particularized findings on reliability of the testimony and the relevance to this case. Had the court made such particularized findings, the court would have found that Dr. Wallace's testimony was reliable to the extent that he testified that false confessions occur and that certain external and internal factors increase the likelihood that certain individuals will falsely confess. Looking at the facts of this case, expert testimony was particularly relevant because many of the internal and external factors that increase the likelihood of false confessions were present in the Walkers interrogation of Respondent.

Further, when expert testimony on the phenomenon of false confessions is excluded and the case primarily rest on defendant's confession, the trial court must provide particularized instructions on the factors that increase the likelihood of false confessions. Under Telfaire the court concluded that when a case turns on an eye witness's recollection specific jury instructions enumerating factors that affect the reliability of a witness's statements must be provided. False confessions present similar problems where juries often initially deem them more reliable than they actually are. Particularized instructions will aid the trier of fact by providing them with a list of factors to consider when making their determination as to the creditability of the defendant's statements.

Under recent decisions of the Supreme Court, a reviewing court is obligated to find that the admission of prosecution psychiatric expert's testimony describing the substance of the statements she had elicited from Respondent's mother and sister in preparing for trial violated Respondent's rights under the VI Amendment's Confrontation Clause. The introduction of those statements constituted testimonial hearsay, which despite the district court's instructions, could

not have reasonably been used by the jury to assess the thoroughness of the expert's opinion, without the jury necessarily evaluating the truth of the facts contained within those statements. As the petitioner conceded in circuit court, there is no possibility that this error was harmless.

Even assuming, *arguendo*, that the hearsay statements were nontestimonial in nature, and thus not covered by the Confrontation Clause, their introduction remains barred under the Federal Rules of Evidence, specifically Rule 703. Given the Rule's presumption against disclosure of information not admissible for any substantive purpose, the district court could not reasonably have found that based on the facts of the instant case, the statements' probative value in assisting the jury to evaluate the expert's opinion *substantially outweighed* their prejudicial effect. Thus, under both Constitutional and statutory law, the Fourteenth Circuit was correct in its finding that admission of these statements constituted reversible error. Its decision to reverse and remand should be affirmed.

ARGUMENT

I. THE APPELLATE COURT PROPERLY CONCLUDED THAT THE LOWER COURT ERRED WHEN IT EXCLUDED EXPERT TESTIMONY ON FALSE CONFESSIONS BECAUSE THE STUDY OF FALSE CONFESSIONS IS BOTH RELIABLE AND WOULD HAVE AIDED THE JURY IN THEIR DETERMINATION OF WHETHER RESPONDENT'S CONFESSION WAS GENUINE.

The appellate court properly evaluated Dr. Wallace's expert testimony in light of Daubert's flexible standard which is concerned with the overarching scientific reliability and relevance of the expert's testimony. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 599 (1993). In Daubert, 509 U.S. 592, the Supreme Court reevaluated the *Frye* test in light of the new Federal Rule of Evidence 702. The Court concluded that the Rule 702 altered the test for admissibility of expert testimony and created a more flexible standard than the general acceptance standard of *Frye*. Id. To be admissible under Daubert the expert must 1) have some

scientific, technical or specialized knowledge that 2) will help the trier of fact understand the evidence or determine a fact at issue. Id. In Kumho Tire v. Carmichael, 526 U.S. 137 (1999), the Court held that Daubert's “gatekeeping” function for both reliability and relevance applies not only to scientific evidence but to expert testimony based on specialized or technical knowledge as well.

A. The Appellate Court Properly Concluded That The Trial Court Erred As A Matter Of Law When It Failed To Make A Particularized Determination As To The Reliability and Relevance Of Dr. Wallace's Testimony.

After Daubert a trial judge has an obligation to make particularized findings to determine whether the substance of an expert's testimony is reliable. Daubert, 509 U.S. at 592; Kumho Tire 526 U.S. at 152. Daubert lays four factors¹ that offer guidance in the determination of the reliability of the methodology. Daubert, 509 U.S. at 594. At the same time, under Daubert's flexible standard, these factors are not all inclusive but rather the trial court has discretion in selecting appropriate factors to relevant the specific testimony's methodology. Kumho Tire, 526 U.S. at 152. Failure to make particularized findings of the relevant methodologies is an err as a matter of law. United States v. Belyea, 159 Fed. Appx.525 (4th. Cir. 2005); United States v. Velarde, 214 F.3d. 1209 (10th Cir. 2000).

In this case the trial court abused its discretion by failing to make these required factual findings. Although the trial court makes implicitly references the Daubert standard—the court acknowledges its role as a gatekeeper and duty to evaluate for reliability and helpfulness (R. at 15, 16)—the decision does not include particularized findings as required by Daubert. See Belyea 159 Fed. Appx. 525; Velarde, 214 F.3d. at 1212. The closest the trial court comes to

¹ Daubert lists four factors which can be considered—but are neither wholly exclusive or inclusive--in determining the reliability of the expert's testimony. These factors include: 1) the ability to prove the truth or falsity of the hypothesis; 2) whether the substance has been subjected to publication or peer review; 3) the rate of error; and 4) general acceptance within the scientific community.

making a particularized finding is stating that social science testimony is mere guesswork and is not scientific in its methods. (R. at 15.)

This holding—at best—considers only one factor: the ability to prove the truth or falsity of the hypothesis. Focusing on this one factor follows neither the letter nor the spirit of Daubert. Kumho Tire, 526 U.S. at 524. Kumho Tire, 526 U.S. at 154, requires that when a court is considering expert testimony based on specialized knowledge that the court modifies the factor whenever necessary to accommodate nature of the expert testimony. The study of false confessions, like many other areas of social science, face ethical and practical considerations limit the types of testing procedures available to social scientists. (R. at 13, 14.) The trial’s court fails consider the nature of Dr. Wallace’s specialized knowledge when making its reliability determination. The court does not consider the methodology of the observational studies utilized in studying false confessions—rather the court excludes this testimony because traditional tests of truth or falsity have not been used. (R. at 15.) The court had a duty to consider the reliability of testimony based on these particular observational studies to the extent that they showed that the external and internal factors that increase the likelihood of false confessions. See Kumho Tire, 526 U.S. at 154. The court’s failure to accommodate specialized knowledge based on observational studies by modifying the Daubert factors is an error as a matter of law. Id.

Further the court erred as a matter of law when it concluded that the controlled study had no real world application. (R. at 15.) Under Daubert the court must first weigh the methodology and then determine whether the substance of the testimony is relevant to facts of the case at bar—however the court is not permitted to evaluate the conclusions of the studies themselves. Id. In this case the court excluded expert testimony on the basis of the substance of testimony rather than the methodology used in reaching its conclusions. If the court attempted to evaluate the methodology, the court would have had to acknowledge that controlled study satisfies all

four of the Daubert requirements.² Thus by failing to make particularized findings as to the reliability of the study's methodology the court erred as a matter of law.

To the extent the trial court excluded this evidence on the second prong of helpfulness the court erred as matter of law for failing to make a particularized finding regarding the applicability of the study to the facts of this case. See Kuhmo Tire 526 U.S. at 154 (the trial court must make a particularized finding based on the facts of the case at bar). Here the court did not consider the facts of this specific case—rather the trial court concluded that this study could have no real world application. This broad and imprecise decision is an error because the court did not consider the particular facts of Respondent's interrogation and the applicability of the finding of this study to that specific factual scenario.

Therefore the trial court erred as a matter of law by failing to make the particularized findings of fact as required under Daubert. Under Daubert the court was required to consider the overarching reliability of the methodology utilized by a particular area of scientific study and modify the factors used to evaluate the methodology based on the nature of the expert testimony. Id. The failure to make the requisite modifications to properly evaluate social science testimony was an error as a matter of law under Daubert. Id.

B. The Observational Studies and Controlled Studies Of False Confessions That Dr. Wallace Would Testify To Meet Daubert and Kumho Tire's Reliability Requirements.

The study of false confessions satisfies Daubert's overarching concern for reliability. The study of false confessions can be divided into two sub-categories: 1) observational studies of individuals who confessed to crimes and were later shown to be innocent and 2) the controlled study performed by Saul Kassin. (R. at 10). Testimony based on information derived from these

² A controlled study satisfies three of the four requirements because controlled testing of a hypothesis satisfies factor one. Further, both this study and the study of false confessions generally satisfy the peer review factor and the general acceptance factor. (R. at 13.)

studies is reliable under Daubert to the extent that the testimony is limited to explaining the occurrence of the phenomenon of false confessions and the internal and external factors that increase their likelihood.

1. Observational Studies Performed In The Field Of False Confessions Are Reliable To The Extent That The Expert's Testimony Is Limited To Explaining What Internal and External Factors Increase The Likelihood Of False Confessions.

Observational studies of false confessions can easily satisfy factor two and four—peer review and general acceptance, respectively—of the Daubert standard. Observational studies of false confession began in the 1980's and have gained recognition within the scientific community. See United States v. Smithers, 212 F.3d 306 (6th Cir. 1999) (admitting expert testimony on eye witness testimony the study of which began in 1980). Since then, there have been numerous law review articles, books, and other peer reviewed publications discussing case studies that false confessions occur and the circumstances that caused the false confessions. (R. at 8-11.) Dr. Wallace testified it is generally accepted that there are three categories of false confessors: 1) voluntary false confessors, 2) coerced compliant, and 3) internal coerced. (R. at 7.) These categorizations were published 1985 in The Psychology of Evidence and Trial Procedure. (R. at 7.) Since then these theories have subjected to substantial peer review in the numerous articles. (R. at 8.) Further, there has been substantial peer review of the observational studies that discuss the external factors—such as interrogation techniques—that increase the likelihood of false confessions. (R. at 8.) Dr. Wallace testified that the theory that these external and internal elements increase the likelihood that certain individuals will falsely confess has received general acceptance. (R. at 9.) Therefore Dr. Wallace's testimony regarding the factors that increase the likelihood of false confessions satisfy the peer review and general acceptance aspect of the reliability requirement.

Further Daubert's flexible standard does not require that the first and third factors be satisfied, when an expert is testifying to specialized knowledge obtained through observational studies. Daubert, 509 U.S. at 594, states that the courts overriding concern should be with creating a flexible standard that addresses the overarching reliability of a particular methodology. In Kumho Tire, 526 U.S. at 141, the court acknowledged that “Daubert's list of specific factors neither necessarily nor exclusively applies to all experts or in every case.” Rather the trial court must use its discretion in selecting appropriate factors based on the testimony in that case. Id.

In the study of false confessions there is an inherent limitation because social scientists cannot ethically or practically recreate an interrogation situation where volunteers are pressured into confessing to crimes they did not commit. (R. at 10.) However, this limitation does not require that expert testimony based on observational studies must be excluded under Daubert. Rather, by properly limited the scope of the expert’s testimony to explaining what factors increase the likelihood of false confessions, the court ensures that expert testimony maintains “the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” Kumho Tire, 526 U.S. at 152.

Circuit courts were faced with analogous problem of the methodology of observational studies in cases where experts sought to testify regarding the counter intuitive behavior of victims of sexual abuse. See United States v. Simmons 470 F.3d. 1115 (5th Cir. 2006) (concluding that testimony explaining why rapes wait to report their attacks was reliable that was based on a psychologists experience working with victims in a therapeutic but not experimental setting); United States v. Bighead 128 F.3d 1329 (9th Cir. 1997) (testimony explaining characteristics of rape victims based on the experts observations of rape victims); United States v. Alzanki 54 F.3d. 994 (1st Cir. 1995) (concluding that testimony explaining why abused wife would not abandon her husband based on the expert’s experience researching in a clinic setting

and her general interaction with victims of abuse). The study of the behavior of victims of sexual abuse creates the analogous ethical and practical issues that are created in studying false confessions which prohibits empirical studies.

Nevertheless, courts have permitted experts to testify regarding the behavioral characteristics of victims of these kinds of attacks and ensured reliability by limited the scope of the expert testimony. See Simmons 470 F.3d.1124; Bighead 128 F.3d. 133; Alzanki 54 F.3d. 1007. Experts do not testify to whether the specific witness in the case was a victim of abuse rather they explain different characteristics of victims of abuse based on the observations during interviews with victims of similar abuse. See Simmons 470 F.3d.1124; Bighead 128 F.3d. 133; Alzanki 54 F.3d. 1007. This limitation compliments the ethical limitation inherent in studying this type of abuse. Because social scientists cannot ethically perform empirical studies they cannot identify which factors cause an individual to delay reporting a rape or the error rate in identifying rape victims. Thus they cannot reliably state that the specific witness was a victim. They can however identify characteristics seen in women who have alleged they were attacked in the past. See Simmons 470 F.3d.1124; Bighead 128 F.3d. 133; Alzanki 54 F.3d. 1007. This testimony explains the seemingly counterintuitive behavior of delaying a year to report a rape or staying with an abusive husband had been observed in victims of similar abuse. See Simmons 470 F.3d.1124; Bighead 128 F.3d. 133; Alzanki 54 F.3d. 1007. This testimony provides the jury with a context to understand how to weigh the victim's credibility.

Similarly, in this case, Respondent seeks to admit testimony that would explain a counter intuitive phenomenon so the jury could properly weigh his confession. Like the experts in Simmons, Bighead, and Alzanki, Dr. Wallace's testimony would be based on observations in cases where a confession has reliably been proven false. (R. at 7.) The observations Dr. Wallace bases his testimony on are reliable because they are based on observations of interrogations

where a defendant who was ultimately proven innocent confessed to a crime that they did not commit. (R. at 8.) These studies are even more reliable than those deemed abuse regarding sexual abuse. The experts on sexual abuse had to rely on the veracity of the victims statements in drawing their conclusions about the characteristics of victims of abuse. See Simmons 470 F.3d.1124; Bighead 128 F.3d. 133; Alzanki 54 F.3d. 1007. In the case of false confessions, the experts do not rely on the confessors assertion that they falsely confessed, rather, conclusive evidence demonstrates that the individual who confessed did not commit the crime that they confessed to committing. (R. at 8.) The methodology used in identifying false confessions is accurate therefore the expert can accurately testify that false confessions do occur and what circumstances internal and external circumstances increase the likelihood of false confessions.

2. Saul Kassin's Controlled Study, Which Satisfies Three of The Four Daubert Requirements, Has A Strong Methodology And Enhances The Reliability Overall Of The Study Of False Confessions.

Dr. Wallace's specialized knowledge of false confessions is based on a controlled study which was done in a setting that was analogous to the situation Respondent was in when he confessed to the Walkers. This study satisfies three factors set forth in Daubert. This study controls whether or not the individual committing the act to which they confessed. (R. at 8.). Although none of the participants were guilty of causing the computer to crash over sixty-nine percent of participants confessed. (R. at 8.) This study could have implicated the falsity of the phenomenon of false confessions had none of the students confessed but maintained their innocence throughout the interrogation. Further this study satisfies the other factors because it has been subjected to peer review and received general acceptance. (R. at 9.) This study does not identify the rate at which false confessions occur nor the error rate in identifying false confessions. But by appropriate limiting of expert testimony so that the expert was not testifying to the rate at which false confessions occur or identifying whether the witness confessed falsely

the expert will not exceed their specialized knowledge and thus satisfy Daubert. See Kumho Tire, 526 U.S. 154.

Thus observational and controlled studies used to reach the conclusion that false confessions occur and certain internal and external factors increase their likelihood satisfies Daubert's overarching concern with reliability. By limiting the scope of the expert testimony the court ensures that the expert does not testify to knowledge that has not been reliably studied.

C. Dr. Wallace's Testimony Was Relevant Because Many Of The Factors That Increase The Likelihood Of False Confessions Were Present In The Walker's Interrogation Of Respondent And Knowledge Of These Factors Would Have Enabled The Jury To Properly Weigh The Respondent's Confession.

The second part of the Daubert test is a relevance inquiry. The Daubert court states as an example that expert testimony about the phases of the moon would be relevant if there was a question about how dark the night was but that it would not be relevant if the question was whether the individual was behaving rationally. Daubert 509 US 591. The government's case against Respondent was based primarily on his confession. (R. at 25-51.) The government presented little evidence beyond the confession itself that linked the Respondent to the crime. Id. The only evidence outside of the Respondent's confession was the security guard's testimony and the picture of knot which is tenuously linked to Respondent's home country. The security guard testified that he did not see anyone leave after nail technician. (R. at 26.) But, anyone may have exited undetected by the guard either while the guard was on break or through a window. (R. at 28.) The Government links the Respondent to the crime based on the knot used to tie the decedent to the wheel. (R. at 34.) However this evidence is also weak because the only one person can testify to seeing the knot and they saw it briefly for ten minutes over eight years ago. (R. at 40.)

Thus the weight the jury gave the Respondent's statement was the primary issue in the case. Dr. Wallace's testimony would have aided the jury determine how to weigh the credibility of the confession in two ways. First, his testimony would have made the jury aware of the counter intuitive phenomena of false confessions. Second, his testimony would have informed the jury of factors that increased the likelihood of false confessions so they could properly evaluate Respondent's confession.

Two circuit courts have determined that expert testimony on false confession is relevant where the defendant claims that his compliant personality caused him to confess to a crime that he did not commit. See United States v. Hall, 93 F.3d 1337 (7th Cir. 1996) (the court determined that expert testimony explaining the some people have compliant personality and confess falsely to crimes was admissible because it would aid the jury by making them aware that “a phenomenon known as false confessions exists, how to recognize it, and how to decide whether it fit the facts.”); See also United States v. Roark, 753 F.2d 991(11th Cir. 1985) (in a pre-Daubert decision the eleventh circuit determined that expert testimony on false confessions was relevant where the defendant claimed to a compliant personality which made him more likely to falsely confess). These courts determined that expert testimony explaining that internal factors—such as a compliant personality—and external factors—such as police interrogation techniques—that increase the likelihood of false confessions was relevant where the conviction rested primarily on the confession. Hall, 93 F.3d ; Roark, 753 F.2d 1007.

Further, the many of the factors that increase the likelihood of false confessions were present Respondent's interrogation therefore Dr. Wallace's testimony is particularly relevant in this case. Dr. Wallace would have testified that compliant confessors confess falsely because they seek approval from the interrogator. (R. at 8.) Based on Respondent's behavior when he

spoke with his interrogator a jury may infer that Respondent was evincing approval seeking conduct³. (R. at 74.)

Other factors that Dr. Wallace identifies as contributing to false confessions are: minimization, extended questioning, false accusation of guilt, false promises of leniency, and authority figures. (R. at 8). In this case all those factors are present in Mr. H's interrogation. The interrogators minimize the murder by villainizing Decedent. (R. at 74; 75; 79.) The questioning of Respondent was extends after he states numerous times that he is tired and wants to leave. (R. at 73; 76; 78.) Both interrogators make false accusations of guilt by alleging that his fingerprints were found at the scene and say that the Respondent probably blocked out the memory. (R. at 76; 79.) Finally the interrogators make false promises of leniency by telling him numerous times that if he confesses he will be able to continue his relationship with Ms. Walker without threat of criminal prosecution. (R. at 79; 80.)

Further, to extent Mr. H's account of the murder is accurate all of the facts were stated by the interrogators earlier in the interrogation. (R. 76-84.) The only fact provided by Respondent that could not be linked to an earlier comment by one of the interrogators was that the picture in the frame was of victim. (R. at 82.)

Therefore, expert testimony on the occurrence of false confessions and the factors that increase the likelihood is particularly relevant to this case. Many of the factors are present in the Respondent's confession. Without the aid of expert testimony the jury will not be able to identify these factors and be able to properly weigh the Respondent's statements.

³ For example Mr. Walker is the first to imply that Decedent someone whose death would not be mourned. (R. at 74 ¶¶ 11, 12.) Responding to Mr. Walker, Decedent states that "the guy was a really a piece of...well, he wasn't the greatest of guys." (R. at 74 ¶¶13, 14.) Respondent begins to disparage Decedent's as a womanizer after Mr. Walker suggests that Decedent "treated, the, ah, the dollar girls pretty shabbily." (R. at 75 ¶6.)

III. A PARTICULARIZED JURY INSTRUCTION IS NECESSARY WHEN EXPERT TESTIMONY ON FALSE CONFESSIONS HAS BEEN EXCLUDED BECAUSE IT PROVIDES THE JURY WITH THE INFORMATION NECESSARY TO PROPERLY PERFORM THEIR DUTY AS FACT FINDER.

- A. False Confessions Present A Credibility Problem Anaglou To That Of Eye Witness Testimony Therefore A Particularized Jury Instruction Such As The One Created In Telfaire Is Necessary So The Jury Properly Considers Factors Affecting Credibility In Their Deliberations.

When faced with the daunting evidence that eye witness testimony is as reliable as it appears the court in Telfaire concluded that a particularized instruction was necessary to ensure that presumption of innocence was provided to every defendant. United States v. Telfaire, 469 F.2d 552, 558-59 (D.C. Cir. 1972). In Telfaire the court stated that when the conviction rested primarily on one eye witness' testimony particularized jury instructions were necessary to guarantee that the identification was convincing beyond a reasonable doubt. Id. at 556. The court recommends model jury instructions but states that the primary concern should not be whether those specific instructions were used but rather whether in "real sense the minds of the jury were plainly focused on the need for finding the identification of the defendant as the offender proved beyond a reasonable doubt." Id. at 556.

Many circuit courts and states have adopted Telfaire's policy rational and made it a reversible error to fail to provide particularized jury instructions when a conviction rested primarily on eye witness testimony. See e.g. United States v. Hall 165 F.3d 1095 at 1107 (7th Cir. 1999); United States v. Mays, 822 F.2d 793 (8th Cir. 1987); Commonwealth v. Walker, 421 Mass. 90, 653 N.E.2d 1080 (1995); People v. Perez, 77 N.Y.2d 928, 569 N.Y.S.2d 600, 572 N.E.2d 41 (1991); State v. Warren 230 Kan 385, 635 P2d 1236 (1981). Many states who model their jury instructions of Telfaire instruct jurors to consider: the witness opportunity to observe the offender at the time of the crime, the witness' degree of attention, the accuracy of prior descriptions, the level of certainty demonstrated by the witness at the time of confrontation, the

accuracy of prior descriptions, the length of time between the crime and the confrontation. See e.g. Hall 165 F.3d at 1107; Mays, 822 F.2d 793; Walker, 421 Mass. 90, 653 N.E.2d 1080; Perez, 77 N.Y.2d 928, 569 N.Y.S.2d 600, 572 N.E.2d 4; Warren 230 Kan 385, 635 P2d 1236.

While the State will argue that a particularized jury instruction is prejudicial and allows the judge to weigh the evidence for the jury that is not the case. Carefully tailoring of particularized instructions prevents these effects. Perez, 77 N.Y.2d 928, 569 N.Y.S.2d 600, 572 N.E.2d 41. First, a particularized jury instruction has generally only necessary where the government's case rest on eye witness testimony. See Id. Second, many states limit the judge to stating the factors that have impact on eye witness testimony but do not allow judge to explain how these factors increase or decrease the reliability of the testimony. See Id. Thus the jury is left to weigh the evidence in light of the factors without being unduly influenced by the judge.

False confessions present a harm analogous to that of potentially erroneous eye witness testimony. See Arizona v. Fulminante, 499 U.S. 279, 289 (1991) (a confession is potentially the most damaging evidence that can be presented; a jury is likely to convict on that evidence alone). Jurors are likely to give such evidence heavy weight in making their determination without realizing the inherent fallibility of the evidence. Id. By providing particularized jury instruction outlining the factors that affect the credibility of the testimony the court ensures that jurors minds were focused on the creditability of the confession when making their ultimate determination of guilt. See Telfaire 446 F.2d. 556.

In this case the jury instruction requested by the defendant in this case focuses on factors that are analogous to the factors enumerated in particularized instructions in eye witness testimony. The Defendant requests that the jury consider: 1) that false confessions do occur; 2) facts about the defendant including: his age; his cultural background; his personality including his desire to please; and the situation the defendant was placed in; and 3) the circumstances

surround the interrogation including: the persons conducting the interrogation and their motivations; the length and nature of the interrogation. These internal and external factors have been identified through social science observational studies as affecting the reliability of a confession. (R. at 8.) Listing these factors will provide the same guidance that factors in particularized eye witness testimony provide. After being instructed as to the particularized factors jurors will be required to consider factors that diminish the credibility of the evidence thus ensuring that the Respondent's confession is properly considered.

Therefore this court should apply the policy rational accepted by many lower courts when considering particularized jury instructions on eye witness testimony and apply it to false confession jury instructions. Without the admission of expert testimony or particularized jury instruction jurors will be left unaware of false confessions and are likely to improperly weigh the confession. A particularized instruction informs the jury of the proper considerations to take into account when considering the primary evidence against Respondent. When there is evidence that juries frequently weigh such evidence incorrectly, it is incumbent upon the court to instruct them how to properly weigh the evidence. The State will suffer no undue harm from such an instruction, rather such an instruction will ensure justice by requiring the State to satisfy their burden of proof.

III. PROSECUTION PSYCHIATRIC EXPERT'S TESTIMONY DESCRIBING THE SUBSTANCE OF STATEMENTS ELICITED FROM RESPONDENT'S MOTHER AND SISTER WORKED A HARMFUL VIOLATION OF RESPONDENT'S RIGHTS UNDER THE CONFRONTATION CLAUSE.

A. The prosecution psychiatric expert's testimony, describing the substance of the statements she elicited from Respondent's mother and sister in preparing for trial, constituted inadmissible testimonial hearsay.

1. Inadmissibility of Testimonial Hearsay

In Crawford v. Washington, this Court recognized that the testimonial statements of witnesses who did not appear at trial are admissible, “only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.” Crawford v. Washington, 541 U.S. 36, 59 (2004). The Court held that to do otherwise would violate the “bedrock procedural guarantee” provided by the VI Amendment’s Confrontation Clause that the accused shall be afforded the right to confront the witnesses against him. Id. at 42.⁴ The Crawford Court recognized that a prior opportunity to cross-examine witnesses has historically been the “dispositive” requirement for the admissibility of testimonial statements, and that even where such opportunity has been provided, that testimony has been excluded where the government has not met its burden of establishing witness unavailability. Id. at 55-56.

In the instant case, Respondent was not afforded prior opportunity to cross-examine the declarants of statements made to the prosecution’s expert psychiatric witness, Dr. Gerber, nor did the prosecution make the declarants available for cross-examination at trial. (R. at 53.) Dr. Gerber was thus allowed to testify as to the substance of those statements, without having their reliability put to issue. (R. at 58-59.) The admission of this testimony lay in direct opposition to this Court’s holding that, “where testimonial statements are at issue, the only indicum of reliability sufficient to satisfy constitutional demands is the one the Constitution actually requires: confrontation.” Crawford 541 U.S. at 68-69.

2. Prosecution psychiatric expert’s testimony in the instant case constituted Testimonial Hearsay

While the Court has heretofore found it unnecessary to formulate a precise, all-encompassing definition of “testimony” for the purposes of the Confrontation Clause, the

⁴ The only exceptions the Court found for admitting testimonial hearsay in criminal cases are those that were already “established at the time of the founding” (such “dying declarations”), which do not cover the statements at issue in the instant case. Id. at 54, 56 n6.

statements at issue in the instant case do fall within those categories of testimonial evidence that have so far been recognized by the Court. Indeed, the statements made by the unavailable declarants in the instant case, the substance of which Dr. Gerber had testified to, fall within the various formulations of “testimonial” statements explicitly recognized in Crawford, as articulated by the final definition offered by the Court: “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” Id. at 52 (quoting Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 3).⁵

Based on the facts in the record, it would be *unreasonable* for an objective witness to believe the statements made by Mrs. Har or Chava would be unavailable for later use at trial. Dr. Gerber had told both Mrs. Har and Chava that she was a psychiatrist who wanted to talk with them about Respondent. (R. at 56-57.) Dr. Gerber made specific mention to both women of “trial.” (R. at 56-57.) Dr. Gerber told Mrs. Har that her work was being done at the government’s request. (R. at 55.) Additionally, Dr. Gerber informed the district court that she might have explicitly told both women something to the effect that she would be testifying at trial. (R. at 56.)

While the declarants statements were not made under oath, the Court in Crawford held that to not be dispositive as to the central issue of their constituting testimony. Id.; see also People v. Goldstein, 6 N.Y.3d 119, 129, 843 N.E.2d 727, 733 (2005) (“Crawford itself shows that the statements need not be under oath and need not be formal in their language.”) Nor does the structure or setting of the questioning matter for purposes of statements constituting “testimonial” in violation of the Confrontation Clause. As the this Court has stated, “the Framers

⁵ Dr. Gerber informed the district court *in limine* that her purpose in interviewing Respondent’s mother and sister was to, “help shape...[her] testimony at trial.” (R. at 55.) While this purpose was not *explicitly* conveyed to the declarants, declarant *knowledge* that statements might be used at trial is not required under the “various definitions of ‘testimonial’” recognized by the Supreme Court. Crawford 541 U.S.at 52. Rather, the issue is whether the information that Dr. Gerber provided to the declarants, prior to obtaining their statements, would have led an objective witness to reasonably believe those statements would be available for later use at trial. Id.

were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation.” Davis v. Washington, 126 S.Ct. 2266, 2274, 165 L.Ed.2d 224, 237 n.1 (2006).

What does matter for Confrontation Clause purposes is that in light of the information provided by Dr. Gerber, the declarants could reasonably have expected their statements to be available for later use at trial. Declarants were informed that the person seeking information was doing so in the context of the trial in which Respondent stood accused – it would be unreasonable to assume that they were somehow making “a casual remark to an acquaintance.” Crawford, 541 U.S. at 51. This Court has stated that through *in limine* procedure, trial courts “should redact or exclude the portions of any statement that have become testimonial.” Davis, 126 S.Ct. at 2277. In erroneously holding, without clarification and despite the above facts, that declarants’ statements were nontestimonial, the District Court failed in that responsibility. (R. at 59.)

3. Dr. Gerber, the expert psychiatric witness hired by the government who produced the testimonial evidence, was functioning as a government officer.

In Crawford, this Court warned that “involvement of government officers in the production of testimony with an eye towards trial presents unique potential for prosecutorial abuse.” Crawford, 541 U.S. at 56. This danger of abuse is an ever-present presumption of the Confrontation Clause, which requires no individualized finding of official misconduct or bias. In no uncertain terms, this Court has stated that “the Framers would be astounded to learn that *ex parte* testimony could be admitted against a criminal defendant because it was elicited by ‘neutral’ government officers.” Id. at 66.

It is true that this Court has explicitly left open the question of “whether and when statements made to someone other than law enforcement personnel are ‘testimonial.’” Davis, 126

S.Ct. at 2274. However, that issue need not be reached in the instant case, for in her questioning of Mrs. Har and Chava for the purposes of shaping her testimony for the government at trial, Dr. Gerber was functioning as a de facto “agent” of the government. Id. (“If 911 operators are not themselves law enforcement officers, they may at least be agents of law enforcement when they conduct interrogations of 911 callers.”). The New York Court of Appeals ruling in People v. Goldstein, a post-Crawford case decided on federal VI Amendment Confrontation Clause grounds, is highly illuminating on this point. On a trial history remarkably similar to that of the instant case, the Court of Appeals in Goldstein recognized that “the difference between an expert retained by the State and a ‘government officer’ is [not] of constitutional significance” in the context of a Crawford testimonial hearsay determination. People v. Goldstein, 6 N.Y.3d 119, 129, 843 N.E.2d 727, 733 (2005).⁶

Dr. Gerber, the prosecution’s psychiatric expert in the instant case, had a history of paid consultant work for the Joralemon City Police Department, the County District Attorney, and the Federal Bureau of Investigation, in which her services were utilized in evaluating defendants and witnesses, with an eye towards serving as an expert witness at trial. (R. at 54); see Id. (psychiatrist “was an expert retained to testify for the People.”). It was in this capacity as a paid “consulting independent psychiatrist” for the government that she obtained declarants’ statements in the instant case, and testified to their substance at trial. (R. at 54.) Dr. Gerber told declarant Mrs. Chava that her work with Respondent was done at the government’s request. (R. at 55.) To consider the information Dr. Gerber thus obtained be the work product of a non-governmental actor, would eviscerate the purpose of a fundamental protection offered by the Bill of Rights. As the New York Court of Appeals recognized in Goldstein, “the Confrontation

⁶ Goldstein reversed and remitted for new trial a murder case in which the principle defense was insanity, on the grounds that introduction at trial of a prosecution psychiatric expert’s testimony as to information she had obtained in interviews of third parties violated the defendant’s right to confrontation. Goldstein, 6 N.Y.3d at 132.

Clause would offer too little protection if it could be avoided by assigning the job of interviewing witnesses to an independent contractor rather than an employee.” Id.

B. Despite the district court’s instructions, the testimonial statements could not have been used by the jury to evaluate the thoroughness of the prosecution expert psychiatrist’s opinion, without making a determination as to the truth of the matter asserted.

At the close of trial, the District Court informed the jury that Mrs. Har and Cava’s statements were only to be used to “assist...in evaluating the thoroughness of Dr. Gerber’s opinion,” that the statements should not be considered as true, and that they should not be considered as evidence of Respondent’s guilt of the crime charged. (R.65); see Crawford, 541 U.S. at 59 (“The Clause...does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.”). However, as a matter of logic, this instruction overlooked the fact that the jury could not use these statements for their admitted purpose, without first having to decide upon their truthfulness.

Many of this nation’s most esteemed judicial figures have long assailed the departure from reality required of the jury by such limiting instructions. Judge Learned Hand described them as a “recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody else’s.” Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. N.Y. 1932). Chief Justice Robert Traynor recognized that “a jury cannot ‘segregate evidence into separate intellectual boxes.’” People v. Aranda, 63 Cal.2d 518, 529, 407 P.2d 265, 272 (1965). Mr. Justice Jackson summarized this practical knowledge of the failings of limiting instructions when he noted that “the naïve assumption that prejudicial effects can be overcome by instructions to the jury...all practicing lawyers know to be unmitigated fiction.” Krulewitch v. United States, 336 U.S. 440, 453, (1949) (Jackson, J., concurring).

In the instant case, Dr. Gerber recounted to the jury specific instances of conduct recounted by Mrs. Har and Chava, which the doctor then used as the basis for refuting findings of Respondent's own expert psychiatric witness. Despite the limiting instruction, this usage necessitated a predicate finding by the jury that it consider the testimonial statements to be true, before any finding could be made that the expert's opinion was credible, let alone thorough. Introduction of the testimonial statements thus ran afoul of this Court's admonishment that, "the government should not have the windfall of having the jury be influenced by evidence, which as a matter of law, they should not consider but which they cannot put out of their minds." Bruton v. United States, 391 U.S. 123, 129, (1968) (citing Delli Paoli v. United States, 352 U.S. 232, 248, (1957) (Frankfurter, J., dissenting)).⁷

For example, after Dr. Gerber recounted to the jury specific actions of the Respondent as described to her by Mrs. Har, Dr. Gerber declared that they were "totally antithetical to actions that someone with a compliant personality would take," and that "a very anxious person who always needs approval from authority figures would never [engage in them]." (R. at 60-61.) Dr. Gerber also testified that statements made by Mrs. Har that Respondent "has never experienced nightmares, flashbacks, or any other negative symptoms associated with [PTSD]," demonstrated an absence of the factors, "absolutely...required to confirm a diagnosis of PTSD in this case." (R.at 59.) Likewise with specific actions of the Respondent that Dr. Gerber recounted from her questioning of Chava, which the doctor explained to the jury were "totally inconsistent with actions that would be taken by someone with an inadequate personality." (R. at 61.)

⁷ Influential legal commentary supports the logic of Bruton: "the factually implausible, formalist claim that experts' basis testimony is being introduced only to help in the evaluation of the experts' conclusions but not for its truth ought not to permit an end-run around a constitutional prohibition." DAVID H. KAYE, DAVID E. BERNSTEIN & JENNIFER L. MNOOKIN, THE NEW WIGMORE, A TREATISE ON EVIDENCE: EXPERT EVIDENCE §§3.10.1 at 39-42 (2007 Supp.).

The jury was not made aware of Dr. Gerber's *in limine* admission that she had no means to evaluate the accuracy or inaccuracy of Mrs. Har's or Chava's memory, or their personal knowledge of the events they had recounted. (R. at 57.) Instead, the jury was presented with the substance of statements provided by the government's expert psychiatric witness, obtained from unverifiable sources, and used as the basis for that expert's judgments upon Respondent's mental state. Thus, in considering the thoroughness of the psychiatric prognoses made by Dr. Gerber, the jury *necessarily* had to decide whether or not to accept the truthfulness of Mrs. Har and Chava's statements.

This need to evaluate the truthfulness of statements made by unavailable declarants distinguishes the instant case from expert testimony which survived a confrontation clause challenge in United States v. Stone, 222 F.R.D. 334, 2004 U.S. Dist. LEXIS 12873 (E.D. Tenn. 2004), where "the opinions were shown to have been supported *only* by prior in-court witness testimony and admitted documents." 5-802 WEINSTEIN'S FEDERAL EVIDENCE §802.5, at 3b (Matthew Bender & Co. 2006) (emphasis added). In Stone, the prosecution expert was found to not have relied on testimonial hearsay in violation of Confrontation Clause, because her opinions were based on witness testimony and documents properly admitted into evidence, rather than out-of-court interviews with witnesses not called to testify. Id. n.23.2. Therefore, unlike the instant case, the thoroughness of the expert's opinion could be adequately evaluated by the fact finder, since the facts on which that opinion was based were themselves verifiable, as the defendant was afforded the opportunity to contest those facts through "the crucible of cross-examination." Crawford v. Washington, 541 U.S. 36, 61 (2004). Again, the New York Court of Appeals' reasoning in Goldstein is on point:

We do not see how the jury could use the statements of the interviewees to evaluate...[the prosecution psychiatric expert's] opinion without accepting as a premise either that the statements were true or that they were false. Since the prosecution's goal

was to buttress...[the expert's] opinion, the prosecution obviously wanted and expected the jury to take the statements as true. Goldstein, 6 N.Y.3d 119, 127 (2005).

C. Even assuming, arguendo, that the statements made to the government's psychiatrist were nontestimonial, their introduction would still be barred under the Federal Rules of Evidence.

This Court in Crawford emphasized that out-of-court statements introduced at trial be governed by the VI Amendment. As the Court stated, "leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices." Crawford, 541 U.S. at 51. However, even assuming *arguendo* that declarants' statements in the instant case were held to be nontestimonial, the Federal Rules of Evidence, would still bar admission of Dr. Gerber's testimony as to the substance of declarants' statements.

Federal Rule of Evidence 703 states that "facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion *substantially outweighs* their prejudicial effect." FED. R. EVID. 703 (emphasis added). The rule "provides a presumption against disclosure to the jury of information used as the basis of an expert's opinion and not admissible for any substantive purpose, when that information is offered by the proponent of the expert." Id., (Advisory Committee's Note to 2000 Amendment). The burden on the government to demonstrate that the information's probative value substantially outweighs its prejudicial effect holds true even where the trial court has provided a limiting instruction. Id.

In the instant case, the statements the jury heard attributed to Respondent's mother and sister were, in the context of the crime charged, highly prejudicial. Dr. Gerber told the jury that Respondent's mother Mrs. Har described him as "stubborn," and "strong-willed." (R. at 60)

Respondent's sister Chava was said by Dr. Gerber to describe him as always having had "a problem controlling his temper," and that up through his teens, "when he didn't get his own way" Respondent would "often lash out physically." (R. at 61.) Chava was also purported to describe Respondent as "the neighborhood bully." (R. at 61.)

As discussed supra in Part III.B., given the necessity for the jury, when evaluating the thoroughness of the expert's opinion, to first evaluate declarants' statements for their truth, it is logical that evidence of Respondent's character contained in those statements would be weighed by the jury in making its determinations of fact. Federal law has long discouraged this circumstantial use of character evidence against the accused. See Michelson v. United States, 335 U.S. 469, 476 (1948) ("The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.").

While Rule 703 allows an expert in forming her opinion to rely on information that is inadmissible for substantive purposes, its balancing test forbids the introduction of that information to the jury absent a finding that its probative value "substantially outweighs" its prejudicial effect. FED. R. EVID. 703 (Advisory Committee's Note to 2000 Amendment). Given that Respondent stood charged with murder, the prejudicial nature of his being described as a stubborn, violent, short-tempered bully by his mother and sister, in unimpeachable statements presented by an expert physician, in a case lacking in physical evidence, can hardly be overstated. Against this prejudice, whatever probative value these statements might have had in aiding the jury to evaluate the thoroughness of that expert's opinion cannot reasonably be said to here overcome Rule 703's presumption against admission.

CONCLUSION

For all the foregoing reasons, Fourteenth Circuit correctly held that the District Court's ruling on these matters required reversal. The Fourteenth Circuit's opinion should be affirmed by this Court, and the case remanded.