
Case No. 06-117

IN THE SUPREME COURT OF THE UNITED STATES
MARCH TERM, 2007

UNITED STATES OF AMERICA,

Petitioner,

v.

ROUNN HAR,

Respondent.

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

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

- I. Whether excluding expert testimony on false confessions based on an arbitrary decision that such testimony is unreliable and unhelpful was a violation of the district court's "gate keeping" function under *Daubert* and Rule 702 of the Federal Rules of Evidence?
- II. Whether the district court erred when it refused to instruct the jury on false confessions after improperly precluding Respondent from contesting the veracity of his confession through expert testimony?
- III. Whether admitting testimonial hearsay under the guise of explaining an expert opinion violated Respondent's Sixth Amendment right to confront the witnesses against him?

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Journals & Articles:

Henry F. Fradella, *The Impact of Daubert on the Admissibility of Behavioral Science Testimony*, 30 Pepp. L. Rev. 403 (2003).....8, 12, 14

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Richard A. Leo, *Bringing Reliability Back in: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 Wis. L. Rev. 479 (2006).....13, 14

Richard A. Leo & Richard J. Ofshe, *Criminal Law: The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. Crim. L. & Criminology 429 (1998).....15, 16, 17

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Saul Kassin & Karlyn McNall, *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 Law & Hum. Behav. 233 (1991).....21

Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891 (2004).....17, 18, 21

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Edward Conner, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* (1996).....18

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STATEMENT OF THE CASE¹

Respondent, hereinafter “Mr. Har,” originally from Jemg, Mago, migrated to the United States in 1996 (R. 70). After coming to America, Mr. Har began working on the set of *Daily Dollars* as a production assistant to Sack Seafoam. *Id.* The television show was later cancelled after Mr. Seafoam’s body was found murdered on the set (R. 89). The lead detective on the case, F.B.I. agent Nathaniel Walker, observed an unusual knot was used to tie the victim to the game show wheel. *Id.* The knot was destroyed before it was photographed when two EMS technicians attempted to revive Mr. Seafoam. *Id.*

In March 2005, Walker and his daughter, Nebraska, placed Mr. Har under investigation after Walker saw a depiction of the national knot of Mago in a magazine which he believed to be the same knot used in the murder. *Id.* Nebraska feigned a romantic interest in Mr. Har and arranged a meeting with him on April 24, 2005 (R. 67-71). Mr. Har met Nebraska at 9 A.M. that day after working through the weekend and driving overnight (R. 78, 89). At 4:30 P.M., Nebraska brought Mr. Har to her father’s house, where he was interrogated at length by Walker (R. 73, 90). This interrogation was videotaped via a hidden camera and various law enforcement techniques were used to elicit a confession.² Throughout the questioning by the Walkers, many of the facts and details of the crime were suggested by the father-daughter team in response to Mr. Har’s statements that he did not remember committing the murder (R. 71-85). After twenty minutes, Mr. Har confessed and subsequently was indicted for the murder of Mr. Seafoam (R. 90).

¹ Pursuant to Rule 24(2) of the Rules of the Supreme Court of the United States, the opinions below and constitutional and statutory provisions are omitted.

² The interrogation techniques included lying about the evidence (Walker falsely told Mr. Har his fingerprints had been found at the scene of the murder), villainizing the victim, minimizing the crime, undermining the confidence of the suspect in his own memory (telling Mr. Har he blacked out and did not remember committing the crime), false promises of leniency, and coercion (pushing Mr. Har back down in his seat when he attempted to leave and swinging a golf club during the questioning) (R. 11, 75, 90).

Prior to trial an admissibility hearing was held concerning all expert testimony (R. 4). Mr. Har sought to introduce the expert testimony of Dr. John Wallace, a psychologist, concerning the occurrence of false confessions and the factors that contribute to their occurrence (R. 4-18). Defense counsel argued false confession evidence was reliable and the testimony would be helpful to the jury. *Id.* The district court excluded Dr. Wallace's testimony for failure to satisfy the reliability and helpful requirements under *Daubert* and Federal Rule of Evidence 702. *Id.* The trial judge stated "as a matter of law," the testimony was unreliable because "social science research is not scientific in its methods, and its conclusions related to false confessions are mere guesswork" *Id.* Additionally, the district court held the testimony was not helpful because jurors "know 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.*

At trial, the only substantive evidence presented by Petitioner was Mr. Har's confession and Walker's testimony concerning the knot used to bind the victim's body to the wheel (R. 29-44). Because there were no photographs of the knot and all other individuals who observed the knot are deceased, no other evidence corroborating Walker's identification of the knot was offered at trial (R. 49-50). The sole witness for the defense was psychiatrist Roberta Kalf, M.D., who testified Mr. Har suffers from Post-Traumatic Stress Disorder and has a compliant personality. *Id.* Dr. Kalf further testified that given these characteristics and the circumstances under which he was interrogated, Mr. Har would have been highly likely to falsely confess. *Id.* On rebuttal, Petitioner called Dr. Jessica Gerber who testified that in her opinion Mr. Har was not a person susceptible to falsely confessing. *Id.* Dr. Gerber then disclosed out-of-court statements made by Mr. Har's mother and sister as the basis of her opinion. *Id.* Defense counsel's objections to this testimony as a violation of the Confrontation Clause were overruled.

Id. Defense counsel also objected to the district court judge’s proposed jury instructions because the charge failed “to recognize and instruct the jury that false confessions do occur” and failed to list all the factors that could cause a person to falsely confess. *Id.* The court again overruled the defense’s objection and instead gave its proposed jury instruction. *Id.*

Mr. Har was convicted of murder in the second-degree and sentenced to fifteen years in prison (R. 93). Mr. Har appealed his conviction to the Fourteenth Circuit, challenging the exclusion of Dr. Wallace’s expert testimony on false confessions, the refusal of the district court judge to instruct the jury about the occurrence and genesis of false confessions, and the admission of Dr. Gerber’s interviews with members of Mr. Har’s family over Confrontation Clause objections. *Id.* The Fourteenth Circuit reversed and remanded, holding these three grounds constituted reversible error (R. 101). This Court granted certiorari and Petitioner now appeals the Fourteenth Circuit’s decision (R. 108). Mr. Har asserts the Fourteenth Circuit properly reversed and remanded his conviction for murder in the second-degree.

SUMMARY OF THE ARGUMENT

This Court should affirm the decision of the Fourteenth Circuit, reversing and remanding Mr. Har’s conviction, because the district court failed to perform its gate-keeping function by excluding Dr. Wallace’s expert testimony on false confessions, because justice requires the jury be instructed regarding false confessions and their causes in capital cases, and because the admission of testimonial hearsay to explain Dr. Gerber’s opinion violated Mr. Har’s Sixth Amendment right to confrontation.

The district court’s blanket exclusion of Dr. Wallace’s expert testimony was an arbitrary decision and did not satisfy the particularized reliability determination formally mandated by this Court. In order for expert testimony to be admissible it must be reliable and helpful to the jury.

Had the requisite case-specific determination been performed, the court would have found Dr. Wallace's false confession testimony reliable because social science has a recognized place in the courtroom and false confession research is widely accepted in the field of social psychology. Additionally, Dr. Wallace's testimony would have assisted the jury to understand the evidence in the case, as it is counterintuitive that one would falsely confess to a crime he or she did not commit. Therefore, as Dr. Wallace's testimony was both reliable and helpful, it was admissible. In light of social science research proving convictions based on false confessions have and do occur, public policy mandates the gate-keeping function be adequately and carefully performed when a defendant in a capital case challenges the veracity of his or her confession through expert testimony.

Furthermore, requiring a substantive jury instruction regarding false confessions was imperative given that the trial judge improperly excluded Dr. Wallace's expert testimony. This is a long overdue recognition of one of the leading causes of wrongful conviction in the United States. Scientific and legal research has consistently shown juries tend to convict based on a confession even when such statements have been coerced and substantial proof of innocence exists. Petitioner's own evidence indicates that Mr. Har's statements to the Walkers were the product of certain interrogation techniques which social science research has repeatedly shown are more likely to produce false confessions. The extreme prejudice of admitting this unreliable evidence in a capital case, combined with the fact that false confession expert testimony was excluded, required the trial judge to give an appropriate jury instruction. Failure to do so constituted reversible error as Petitioner conceded in its brief to the Fourteenth Circuit.

Finally, the trial court erred by admitting out-of-court statements by Mr. Har's mother and sister to explain the basis of Dr. Gerber's opinion. The Confrontation Clause excludes out-

of-court statements that are testimonial and hearsay unless the defendant had a prior opportunity to confront and cross-examine the sources of those statements. The statements by Mr. Har's mother and sister were testimonial because an objective witness would have understood the statements could be used at trial, Dr. Gerber was a Government agent who gathered the statements in preparation for trial, and because the interview was conducted in the absence of an emergency to establish past facts relevant to the prosecution of Mr. Har. The statements were also hearsay because they would only have assisted the jury in evaluating Dr. Gerber's opinion if they were first accepted as being either true or false. Furthermore, the instructions given by the trial court were ineffective to prevent the use of the statements for a hearsay purpose. As such, the statements should have been excluded from trial.

ARGUMENT

I. The district court failed to properly perform its “gate-keeping” function by arbitrarily concluding expert testimony on false confessions and the factors which cause them was unreliable and unhelpful to the jury.

The United States Court of Appeals for the Fourteenth Circuit correctly held the district court's preclusion of Dr. Wallace's expert testimony concerning false confessions was an abuse of its “gate-keeping” function required under *Daubert* and Rule 702 of the Federal Rules of Evidence (Rule 702). *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993).

All proffered expert testimony, regardless of its nature, requires the same *Daubert* reliability and helpfulness determination. This is especially important when a criminal defendant's guilt hinges on his own confession, the veracity of which is the linchpin upon which the trial centers. Mr. Har proffered Dr. Wallace, a social scientist with a Ph.D. in psychology and fifteen years of experience researching false confessions, to testify on the phenomenon of false confessions and to provide the jury with a list of general factors which could cause one to

falsely confess. However, the district court abused its discretion and failed to perform its gate-keeping function when it precluded the testimony of Dr. Wallace as unhelpful to the trier of fact, failed to perform a particularized determination based on the facts of the case at bar, and found the testimony possessed insufficient indicia of reliability to meet the standards articulated under *Daubert*. Finally, because it is counterintuitive that a person would ever falsely confess, public policy mandates there be a more exacting reliability determination where the thrust of the prosecution's case rests on the defendant's confession, and expert testimony is offered to refute that confession.

A. The district court abused its discretion and failed to perform its gate-keeping function when it excluded Dr. Wallace's expert testimony concerning false confessions and the factors that contribute to their falsity.

Rule 702 states that scientific, technical, or other specialized knowledge is admissible if it will assist the trier of fact to understand the evidence or determine a fact in issue, and if the testimony is based upon sufficient facts or data, is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case. Fed. R. Evid. 702. Federal district judges are to act as gatekeepers and this Court has delineated several factors to aid in the verification of the reliability of expert testimony. *Daubert*, 509 U.S. 579. When faced with a proffer of expert testimony, a trial judge must engage in a nuanced, case-by-case analysis of whether the testimony is relevant and reliable and if it would assist the trier of fact before admitting or excluding the testimony. *Id.* at 591-92. "While a trial court has broad discretion in deciding whether to admit expert testimony, it abuses this discretion if it makes an arbitrary decision or otherwise makes an error of law." *United States v. Belyea*, 159 Fed. Appx. 525, 529 (4th Cir. 2005).

1. The district court's determination that Dr. Wallace's expert testimony concerning false confessions would not assist the jury in assessing the veracity of Respondent's confession was erroneous.

Whether expert testimony will assist the trier of fact to understand the evidence or determine a fact in issue is a relevancy inquiry. *United States v. Hall*, 93 F.3d 1337, 1342 (7th Cir. 1996) (*Hall I*). The expert's opinion must be based on scientific, technical, or other specialized knowledge, and not on matters within the common knowledge of the factfinder. *United States v. Harris*, 995 F.3d 532, 534 (4th Cir. 1993). However, although the opinion must be based on the witness' expertise, the judge is not compelled to automatically exclude all expert testimony that overlaps with the common knowledge of the trier of fact. *Hall I*, 93 F.3d at 1344. Dr. Wallace's expert testimony on false confessions was based on his expertise as a social psychologist, and while it is true people lie, the phenomenon of false confessions cannot be said to fall within the common knowledge of the jurors.

The First Circuit in *Shay* explored the boundaries of jurors' common knowledge when reviewing the district court's exclusion of expert testimony. *United States v. Shay*, 57 F.3d 126 (1st Cir. 1995). The Government's case in chief relied solely on incriminating statements made by the defendant to the police, media and fellow inmates. *Id.* The defendant contested the veracity of his confessions by offering the testimony of a psychiatrist who concluded the defendant suffered from a mental disorder that causes its victims to make false statements without regard to the consequences. *Id.* The district court found the testimony unhelpful "in light of [] other evidence in the record concerning the reliability of [defendant's] statements." *Id.* at 133. On appeal, the First Circuit reversed, stating the jury was unqualified without assistance to determine whether the defendant may have made the incriminating statements because he suffered from a mental disorder. *Id.* The court noted "common understanding conforms to the notion that a person ordinarily does not make untruthful inculpatory statements." *Id.* The

psychiatrist would have offered specialized opinion testimony, grounded in his expertise, which could have debunked common myths about evidence vital to the government's case: the truthfulness of defendant's confession. *Id.*

Other circuits have addressed whether the admission of expert testimony grounded in social science would assist the trier of fact in understanding evidence essential to the determination of the case. The Seventh Circuit stated "social scienc[e] in particular may be able to show that commonly accepted explanations for behavior are, when studied more closely, inaccurate. These results sometimes fly in the face of conventional wisdom" and Rule 702 encompasses more than just evidence completely inaccessible to the jury. *Tyus v. Urban Search Mgmt.*, 102 F.3d 256, 263 (7th Cir. 1996). With respect to expert testimony concerning false confessions, experts are rarely allowed to testify directly on the credibility of a witness, as this would exceed the scope of the expert's specialized knowledge and invade the jury's province. Henry F. Fradella, *The Impact of Daubert on the Admissibility of Behavioral Science Testimony*, 30 Pepp. L. Rev. 403, 416 (2003).³ However, courts are more receptive to admitting expert testimony regarding confessions and incriminating statements to assist the factfinder when the credibility of a confession is at issue. *Id.* at 416.⁴

³ See *United States v. Filler*, 210 F.3d 386 (9th Cir. 2000) (expert psychiatrist's testimony concerning defendant's mental illness properly admitted to assist jury but the credibility of defendant was within the province of the jury and the expert was thus properly prohibited from testifying concerning the credibility of defendant); *United States v. Binder*, 769 F.2d 595 (9th Cir. 1985) (upholding exclusion of psychiatric expert testimony that went directly to the credibility of the witness); *United States v. Bernard*, 490 F.2d 907 (9th Cir. 1973) (affirmed lower court's exclusion of expert's testimony that defendant suffered from a mental disorder that caused him to lie).

⁴ See *Shay*, 57 F.3d 126 (1st Cir. 1995) (held the psychiatrist's testimony concerning defendant's mental disorder should not be excluded in its entirety but rather limited to matters within his expertise because defendant's conviction rested on his confession to the crime); *United States v. Meling*, 139 F.3d 909 (9th Cir. 1998) (court noted district court could have admitted a psychologist's testimony concerning defendant's personality disorder because it embraced an ultimate issue to be decided by the factfinder, but upheld exclusion as it was directed towards the defendant's credibility); *United States v. Raposo*, 205 F.3d 1326 (2d. Cir. 2000) (affirmed district court's decision expert testimony by a clinical psychologist was

At trial, Mr. Har's confession was the chief piece of evidence upon which his conviction rested. He contested the veracity of his confession, arguing his personality and upbringing, combined with the interrogation circumstances and coercive techniques employed, contributed to his false confession. The excluded testimony of Dr. Wallace was not offered as an expert opinion as to whether Mr. Har did in fact falsely confess. Rather, Dr. Wallace, if permitted, would have presented generalized data on false confessions from social psychological research, demonstrating people do falsely confess and the factors that would cause a person to do so. Because common sense dictates that innocent people do not falsely confess to murder, Dr. Wallace's testimony would have provided the jury counterintuitive sociological explanations of human behavior when under coercive interrogation. This would have assisted the jury in assessing Mr. Har's credibility and the veracity of his confession. Therefore, because Dr. Wallace could have provided unique information outside the common knowledge of the jurors, his testimony was admissible to assist the jury in its assessment of the substance and circumstances surrounding Mr. Har's confession.

2. The district court's blanket statement that expert testimony on false confessions is never admissible and that social science has no application in the "real world" was arbitrary and erroneous.

The district court's exclusion of Dr. Wallace's testimony was an arbitrary, blanket exclusion of social science as unreliable and not a gate-keeping inquiry "tied to the facts" of this particular case. *Daubert*, 509 U.S. at 591; *Khumo Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999). "Social science in general, and psychological evidence in particular, have posed both analytical and practical difficulties for courts attempting to apply Rule 702 and *Daubert*" when making a reliability assessment. *Hall I*, 93 F.3d at 1342. However, regardless of these

admissible because it would be helpful to the jury in understanding that an individual with a certain psychological profile could be more susceptible to making a false confession).

difficulties, social science testimony plays a vital role in many cases, and “whether it is hard to do or not, courts must apply the rules of evidence to these experts as faithfully as they can.” *Id.* at 1343.

The Fourth Circuit has faced the issue of whether a district court evaded its gate-keeping function by arbitrarily excluding the defendant’s expert testimony on false confessions. *Belyea*, 159 Fed. Appx. 525 (4th Cir. 2005). In *Belyea*, the testimony would have shown there was a possibility the defendant falsely confessed and this confession was crucial to his conviction. *Id.* The trial court’s essential reason for finding the testimony inadmissible was because “jurors know people lie” and, therefore, it would not assist the jury. *Id.* at 529. The Fourth Circuit unanimously reversed, holding the district court failed to make the requisite particularized reliability determination as required under *Daubert*. *Id.* The court stated that while it may be true that jurors know people lie, it is a broad generalization inapplicable to the case at bar, and does not mean “jurors know people confess falsely or that someone in [defendant’s] position may be more likely to do so.” *Id.* Such reasoning stood for the proposition that false confession expert testimony is never admissible, an approach that flies in the face of *Daubert*’s requirement for a particularized determination in each case. *Id.* at 530.

Similarly, the Sixth Circuit found a district court’s exclusion of social science expert testimony to be arbitrary and, therefore, erroneous. *United States v. Smithers*, 212 F.3d 306 (6th Cir. 2000). In *Smithers*, the defendant sought to introduce expert testimony concerning eyewitness identification. *Id.* The expert was to testify solely to the general factors that may affect eyewitness accuracy in order to educate the jury. *Id.* at 310. The district court judge excluded the evidence, stating the jury understands it is to be skeptical of eyewitness testimony. *Id.* at 314. The Sixth Circuit found the district court abused its discretion by making an arbitrary

decision, holding “when a defendant’s liberty is at stake, it is incumbent upon the trial court to apply the correct law, follow the appropriate decision-making steps and articulate the bases upon which its decision rests.” *Id.* at 315.

In the present case, the trial judge excluded Dr. Wallace’s expert testimony on the grounds that “social science research is not scientific in its methods, and its conclusions related to false confessions are mere guesswork at this point.” (R. 18). Additionally, the judge stated social science research has little relevance in the real world and “jurors know people lie” so it cannot be reasonably said that the phenomenon of false confessions is not within the common knowledge of the jurors. *Id.* The articulated basis behind the judge’s exclusion of the testimony is an inaccurate conclusion that testimony on false confessions would never be useful to the factfinder. This brisk analysis does not meet the particularized determination required under *Daubert* and was mere lip-service by the court to its gate-keeping function. Courts have recognized properly conducted social science research often serves to overturn commonly held beliefs regarding human behavior. *Hall I*, 93 F.3d at 1345. Social scientists frequently testify at trial, and courts acknowledge that their testimony is an integral part of the case. *Id.*; see *United States v. Mamah*, 332 F.3d 475, 477 (7th Cir. 2003). Therefore, the district court’s failure to perform a particularized determination and articulate a valid reason for exclusion, in a case where the defendant’s liberty was at stake, violated its gate-keeper function and was erroneous.

3. The district court erred in holding Dr. Wallace’s expert testimony concerning false confessions possessed insufficient indicia of reliability to meet the standards under Rule 702 and *Daubert*.

Dr. Wallace’s expert testimony on false confessions possessed sufficient indicia of reliability to satisfy the standards articulated under Rule 702 and *Daubert*. To be admissible, expert testimony must be both relevant and reliable. *Daubert*, 509 U.S. at 589-92. To meet this

standard the testimony must be based on sufficient facts or data, the product of reliable principles and methods, and the witness must have applied the principles and methods reliably to the facts of the case. Fed. R. Evid. 702. *Daubert* also provided trial judges with a number of factors that bear on the scientific validity of the testimony. *Daubert*, 509 U.S. at 593-94. However, this Court clearly stated these factors should not be rigidly applied in every case or for every type of expert testimony, and no automatic exclusion would occur for failure to meet one of the factors. *Id.* at 593.

“Both courts and legal commentators have voiced concerns that *Daubert*’s focus on empirical testability” and “validity may pose serious problems for expert testimony in the behavioral sciences” because most social scientists rely primarily on real-world experience rather than experimentation to arrive at their conclusions. *See* Fradella, *supra*, at 405. Such testimony can offer “information obtained through experience in dealing with psychological problems, reading about case studies, and theoretical speculations of others.” *Id.* at 413. Additionally, social scientists face ethical dilemmas from human experimentation and “inherent complications of isolating human behavioral characteristics in a laboratory setting.” *United States v. Hall*, 974 F. Supp. 1198, 1202 n.4 (C.D. Ill. 1997) (*Hall II*). Although the nature of social science makes its reliability determination more difficult, courts have recognized it as a proper subject of expert testimony, and therefore, a trial judge’s *Daubert* inquiry must be tailored by looking to the scientists in the particular field at issue and the methods they employ. *Id.* at 1202.

In *Hall II*, the district court was ordered to conduct a full *Daubert* inquiry and apply the correct legal standards under Rule 702 to determine the reliability of expert testimony regarding false confessions. *Id.* at 1199. Dr. Ofshe, a social psychologist and one of the pioneers of the phenomenon of false confessions, was proffered to testify on behalf of the defendant that false

confessions occur and that certain factors are likely to produce them. *Id.* The district court noted that during Dr. Ofshe's 35 year academic career, he extensively researched the subject of influence and decision-making, with the past 10 dedicated specifically to police coercion during interrogations. *Id.* at 1203. Dr. Ofshe's field of expertise was determined to be an "established topic within the field of social psychology which drew on principles of rational decision making, perception and interpersonal influence," and has been the topic of numerous articles and books. *Id.* The district court ultimately held, and the Seventh Circuit affirmed, Dr. Ofshe's testimony to be admissible because the "science of social psychology, and specifically the field involving the use of coercion in interrogations, was sufficiently developed in its methods to constitute a reliable body of specialized knowledge under Rule 702." *Id.* at 1205; *see United States v. Hall*, 165 F.3d 1095 (7th Cir. 1999).

Here, just as in *Hall II*, the district court was faced with proffered expert testimony concerning the phenomenon of false confessions resulting from police interrogation. In fact, Dr. Wallace's research and studies were based on theories, studies, and hypotheses developed and cultivated by the preeminent experts in the field, one being Dr. Ofshe himself. The study of false confessions has enjoyed considerable longevity, and in the past two decades alone, hundreds of empirical studies on police interrogations, false confessions, and related issues have been published by social scientists. Richard A. Leo et al., *Bringing Reliability Back in: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 Wis. L. Rev. 479, 514 (2006).⁵ In fact, and even more significantly, these studies have recently been corroborated by individual and aggregate case studies on DNA exonerations proving false confessions have occurred as theorized. *Id.* at 515. The first 62 cases of wrongful conviction were established in

⁵ Richard A. Leo is also considered one of the preeminent experts in the field of social psychology concerning false confession and coercive police interrogation.

2000 through DNA exoneration, and by May 2006, the number had grown to 177. *Id.* at 516. Of these 177 wrongful convictions, 23% were caused by, or related to, false confessions. *Id.* In a landmark 2004 study, two social psychology experts “collected and analyzed a cohort of 125 [interrogation-induced] false confession cases . . . and found that 81 percent of those wrongfully convicted had falsely confessed.” *Id.* This is valid scientific evidence that backs up the theories expounded by social psychologists concerning false confessions and the factors that cause one to do so.

Furthermore, the study of false confessions, its methodologies and techniques, has met judicial acceptance as long as the testimony has been limited and does not include the expert’s opinion on whether the interrogation methods, for example, caused the defendant to falsely confess. *Id.*⁶ Only when the expert’s testimony does not “fit” the facts of the case or when it could not be established that the defendant was interrogated under circumstances producing false confessions, have courts excluded false confession testimony as unreliable and unhelpful to the factfinder. *See Soree, supra* note 6, at 237-38. Here, the circumstances under which Mr. Har’s interrogation occurred consisted of a number of factors identified by Dr. Wallace and other social psychologists that could potentially cause one to falsely confess. As Dr. Wallace was not proffered to testify that Mr. Har did indeed falsely confess, but rather to the behavioral studies concerning false confessions, his testimony was properly admissible.

The Fourteenth Circuit correctly held the district court failed to properly perform its gate-keeping function and abused its discretion by excluding Dr. Wallace’s expert testimony. Social science can assist jurors by illustrating counterintuitive explanations for behavior that may discredit commonly held beliefs. Additionally, social psychology, and more particularly the

⁶ *See also Belyea*, 159 Fed. Appx. 525; *Hall II*, 974 F. Supp. 1198; *Fradella, supra*, 30 Pepp. L. Rev. 430; *Nadia, Soree, When the Innocent Speak: False Confessions, Constitutional Safeguards, and the Role of Expert Testimony*, 32 Am. J. Crim. L. 191 (2005).

study of false confessions, has proven to be a reliable field of social science due to its longevity, literature, methods of peer review, quantity of studies conducted in the field, and the general consensus as to the conclusions reached.

B. In light of recent DNA exonerations confirming the existence of false confessions, public policy mandates the gate-keeping function be adequately performed when the veracity of a confession is challenged through expert testimony.

This Court should require the gate-keeping function be carefully performed and the specific reasoning behind a reliability determination of false confession expert testimony be articulated in cases where the truthfulness of a confession is refuted. In *Fulminante*, this Court stated, “a confession is like no other evidence. Indeed, the defendant’s own confession is probably the most probative and damaging evidence that can be admitted against him.” *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991). This is because the confession “comes from the defendant’s own lips, the one most knowledgeable and unimpeachable source of information about his past conduct.” *Id.* Furthermore, while some statements “may concern isolated aspects of the crime or may be incriminating only when linked to other evidence, a full confession in which the defendant discloses the motive for and means of the crime may tempt the jury to rely upon that evidence alone in reaching its decision.” *Id.*

While it is disturbing that police engage in coercive interrogation techniques which have ultimately resulted in numerous false confessions, it is more disconcerting that testimony which could bring this phenomenon to light is arbitrarily being excluded as unreliable, resulting in “months and years defendants languish in prison after wrongful conviction and [that] additional crimes [are being] carried out by the true perpetrators.” Richard A. Leo & Richard J. Ofshe, *Criminal Law: The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. Crim. L. & Criminology

429, 432 (1998). While social scientists, like Leo and Ofshe, have conducted numerous observational case-studies on false confessions and the problems with police-induced confessions, the precise frequency with which they occur and the overall social and personal harm they generate is unknown simply because behavioral science cannot be studied using the same methods employed by the “hard” sciences. *Id.* Ethical and methodological problems face social scientists alone. For example, it would be difficult and highly unethical to implement clinical testing to study the effect coercion and personality traits and disorders may have on one’s inclination to falsely confess.

In the present case, the only direct evidence establishing Mr. Har as Mr. Seafoam’s murderer was his own confession. The circumstances of the interrogation that produced this confession were highly suspect, involving many of the factors social psychologists have pinpointed most likely to result in a false confession. Additionally, Dr. Kalf, a psychiatrist, testified at Mr. Har’s trial that his Post-Traumatic Stress Disorder and compliant personality were highly likely to cause him to falsely confess under the interrogation techniques employed by the Walkers. Despite these known facts and the social science research dedicated to false confession theory, the district court judge substituted her opinion on what the appropriate testing should have been for that of the trained social psychologist. The fact Mr. Har stood on trial for his life, with his contested confession as the sole evidence against him, required a particularized reliability determination of the false confession testimony in order to ensure an innocent man would not be wrongfully convicted.

In light of all of these considerations, public policy demands this Court impose a stricter gate-keeping responsibility on trial court judges ruling on the reliability of false confession testimony in similar fact patterns. Studies in behavioral science provide the needed assistance to

assure the trier of fact possesses all the tools necessary to understand the evidence when determining the truthfulness of a defendant's confession. How many more wrongful convictions based on false confessions will be tolerated, relying on backend remedies, such as DNA exoneration, as the sole means to rectify the problem before judges are forced to protect a person's innocence on the front-end? With 20 to 25 percent of the 170 DNA exonerations resulting in whole or in part from police-induced false confessions in 2006 alone, *see* Leo, *Consequences, supra*, at 484, the Fourteenth Circuit correctly held the district court's exclusion of Dr. Wallace's false confession testimony was arbitrary and constituted reversible error, as it was reliable and would have assisted the jury.

II. The district court erred in refusing to instruct the jury on false confessions and the factors which cause them after improperly precluding Respondent from contesting the veracity of his confession through the use of expert testimony.

This Court should affirm the Fourteenth Circuit's decision reversing Mr. Har's conviction because mandating a jury instruction on false confessions and their contributing factors when expert testimony on the same was improperly excluded, provides at least minimal protection against wrongful conviction. This minimal protection is essential to the fact finding process due to the tendency of juries to rely on confession evidence alone, regardless of the manner in which a confession was obtained. "[A] suspect's confession sets in motion a virtually irrefutable presumption of guilt among criminal justice officials, the media, the public, and lay jurors." Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 922-23 (2004).

A. Interrogation-induced false confessions are a leading cause of wrongful convictions in the United States.

When expert testimony challenging the veracity of a confession is excluded, requiring a substantive jury instruction regarding false confessions is a long overdue recognition that

“[i]nterrogation-induced false confession has always been a leading cause of miscarriages of justice in the United States.” *See* Drizin, *supra*, at 920. Researchers have known for at least 75 years what many in the legal profession are even now reluctant to admit; innocent citizens have been wrongly convicted and incarcerated because of false confessions. Edwin M. Borchard, *Convicting the Innocent: Sixty-Five Actual Errors of Criminal Justice* (1932). More recently, social science and legal research have confirmed that wrongful convictions continue to occur in the United States at an alarming rate.⁷

The advent and widespread use of DNA technology in the 1990’s revolutionized society’s understanding of wrongful prosecution and conviction in the United States. Edward Connor et al., *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* (1996). Extensive research has consistently shown that mistaken eyewitness testimony and perjury are the leading causes of wrongful convictions. However, most studies have demonstrated that approximately 25% of wrongful convictions are obtained as a result of a false confession. *See* Drizin, *supra*, at 907. While false confessions occur slightly less frequently, their ability to prejudice the jury against an innocent accused is without equal. “The introduction of a confession makes [] other aspects of a trial . . . superfluous, and the real trial, for all practical purposes, occurs when the confession is obtained.” Charles T. McCormick & Edward W. Cleary, *McCormick’s Handbook of the Law of Evidence* 316 (2d ed. 1972).

A commonly held, though incorrect, belief amongst the public is that an individual will never falsely confess to a crime because to do so would be against a person’s self interest. The

⁷ *See* Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 *Stan. L. Rev.* 21 (1987); *see also* Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 *Harv. C.R.-C.L. L. Rev.* 105 (2001).

vast majority of the public and most jurors are unaware innocent people falsely confess because most people are wholly uninformed of police tactics and interrogation methods. These methods are specifically designed to convince suspects that confessing is in their best interest. Thus, the district court's refusal to give a jury instruction regarding false confessions, after excluding testimony on the same, constituted reversible error.

B. Respondent's confession was the result of interrogation methods proven to cause false confessions.

The Fourteenth Circuit's requirement of a substantive jury instruction should be upheld because it would have informed the jury that the interrogation tactics used against Mr. Har are likely to cause unreliable confessions. Such an instruction is essential to a fair trial, especially after the improper exclusion of expert testimony on false confessions, because jurors will be required to at least consider the circumstances under which a confession was made. This will prevent the all too common practice of convicting on the basis of a confession alone regardless of the manner in which the confession was obtained. "If the jury believes that a defendant has admitted the crime, it doubtless will be tempted to rest its decision on that evidence alone" *Fulminante*, 499 U.S. at 313 (Kennedy, J., concurring).

Although police interrogation methods are effective in obtaining confessions from the guilty, they are powerful enough to cause innocent suspects to confess. "Every false confession case is unique, but the factors that have the potential to precipitate false confessions—special vulnerabilities of the suspect or psychologically coercive aspects of the interrogation—are likely to be present in a significant number of cases." *See White, supra* note 7, at 131. Since law enforcement officials only interrogate people already determined to be guilty or involved in a crime, the goal of interrogation is to break the suspect's will and obtain incriminating statements. Fred E. Inbau et al., *Criminal Interrogation and Confessions* (3d ed. 1986).

The first step in breaking a suspect's will is often to convince the suspect irrefutable scientific proof or other unassailable evidence is available that will lead to the suspect's incarceration or execution unless a confession is exchanged for leniency or some other perceived benefit. Richard J. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 Stud. L. Pol. & Soc'y 189 (1997). "When an interrogator deceives a suspect as to the nature of the evidence against him, falsely leading him to believe [] the police have overwhelming evidence of his guilt, the suspect is likely to give an untrustworthy confession." See White, *supra* note 7, at 147. The inherent danger of this tactic is that it can lead the innocent suspect to conclude that maintaining his innocence is no longer in his best interest because he will be convicted regardless. Also, when used against particularly susceptible individuals, the innocent suspect may even be convinced he is guilty when confronted with "irrefutable" scientific proof. "When interrogators repeatedly use these tactics or use them in conjunction with other tactics, they can create the impression that the suspect has no viable alternative to confession." *Id.* at 148.

In the present case, Walker deliberately deceived Mr. Har by falsely telling him, "there were prints all over the place . . . I have copies of them . . . those prints are yours." (R. 76). When Mr. Har denied having any involvement in the murder, Nebraska asked to be alone with Mr. Har and told him, "there is so much evidence." (R. 77, 88). On no less than 13 occasions, Mr. Har denied having any involvement in the death of Mr. Seafoam (R. 73-85).

Interrogators will often follow the presentation of fabricated evidence by telling the suspect that he or she committed the crime and simply cannot remember doing so. Investigators sometimes coerce confessions by persuading the innocent suspect the evidence is so

overwhelming, despite the absence of any memory of having done so, that confessing is the proper and optimal course of action. *See Drizin, supra*, at 918.

Here, the Walkers repeatedly silenced Mr. Har's persistent denials and told him on six separate occasions that he blacked out and should try to remember (R. 77-79, 81-83). The Walkers made repeated "suggestions" to Mr. Har as to how he must have killed Mr. Seafoam (R. 79, 82-83). Subsequently, when Mr. Har made incriminating statements they were often stated in the form of conjecture such as "I *guess* I *could* have blacked out . . . I *guess* I could have grabbed it . . . I *guess* the glass probably shattered . . . I *probably* just dragged him." (R. 82-84) (emphasis added).

Another common interrogation method involves minimizing the gravity, consequence or moral culpability of the crime. Saul Kassin & Karlyn McNall, *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 *Law & Hum. Behav.* 233 (1991). Minimization refers to "tactics that are designed to lull a suspect into believing that the magnitude of the charges and the seriousness of the offense will be downplayed or lessened if he confesses." *See Drizin, supra*, at 912.

In the case at bar, the death of Mr. Seafoam was constantly minimized throughout the interrogation, and even praised, while the Walkers simultaneously led Mr. Har to believe there would be no consequences if he confessed (R. 73-85). Nebraska stated, "look, even if my dad wanted to be in a case against you he couldn't do it, there's [sic] rules like hearsay . . . you're protected." (R. 80). The credibility of Mr. Har's statements was further undermined by promises Nebraska made to Mr. Har. During the interrogation she stated, "I feel really, like a strong connection to you . . . I feel like we have something really special." *Id.* Nebraska also

repeatedly caressed and touched Mr. Har, telling him that if he confessed, “we can put this all behind us,” and could, “have the rest of our lives together.” (R. 79-80).

This Court should affirm the Fourteenth Circuit’s decision because the trial judge’s fifteen word instruction failed to indicate, contrary to public opinion, false confessions do occur and often as a result of the exact methods employed against Mr. Har. The trial judge erred when it “turn[ed] over to the jury this critical question without even trying to acquaint it with the risks involved or the information now available that could illuminate its inquiry.” *United States v. Telfaire*, 469 F.2d 552, 559 (1972) (Bazelon, C.J., concurring). The dispositive issue at trial was the veracity of Mr. Har’s confession which the Government’s own evidence shows was produced by coercive tactics. Because Dr. Wallace’s testimony on false confessions was improperly excluded, the trial court should have instructed the jury to consider the manner in which Mr. Har’s statements were obtained. Petitioner conceded in its appellate brief that there is no possibility the failure to give such an instruction was harmless error (R. 101). Therefore, this Court should affirm the decision of the Fourteenth Circuit.

III. Respondent’s Sixth Amendment right to confront and cross-examine the witnesses against him was violated by the improper admission of out-of-court statements made by Respondent’s mother and sister.

The out-of-court statements made by Mr. Har’s mother and sister were improperly admitted by the trial court under Rule 703 of the Federal Rules of Evidence to explain the basis of Dr. Gerber’s opinion. As amended in 2000, Rule 703 allows inadmissible hearsay considered by an expert in reaching his opinion to be disclosed to the jury. Fed. R. Evid. 703. While Congress may amend the Rules of Evidence by statute to allow experts to disclose the basis of their opinions, a statute may not abrogate a constitutional right. One such constitutional right is that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the

witnesses against him.” U.S. Const. amend. VI. This Court has limited the application of the Confrontation Clause to out-of-court statements that are both testimonial and offered to establish the truth of the matter asserted. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). If these elements are met, the Confrontation Clause excludes the out-of-court statements unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination. *Id.* The out-of-court statements made by Mr. Har’s mother and sister were testimonial in nature and were only helpful in evaluating Dr. Gerber’s opinion if first found to be true or false. Therefore, the admission of these statements violated Mr. Har’s Sixth Amendment right to confront and cross-examine the witnesses against him.

A. The out-of-court statements disclosed to the jury by Dr. Gerber were testimonial under *Crawford* and *Davis* and should have been excluded from trial.

The term testimonial was defined in *Crawford* to include prior testimony in a courtroom setting, statements derived from police interrogations, statements an objective witness would believe could be used at trial, and testimony gathered in preparation for trial. *Crawford*, 541 U.S. at 51-53. The term was further defined in *Davis v. Washington* to include statements made in the absence of an emergency to prove past facts relevant to a subsequent prosecution. *Davis v. Washington*, 126 S. Ct. 2266, 2273-74 (2006). The out-of-court statements made to Dr. Gerber met several of these definitions. The statements were acquired by a Government agent in preparation for trial and an objective witness would have understood these statements could be used at trial. Furthermore, the statements were made in the absence of an emergency to prove past facts extremely relevant to the prosecution of Mr. Har. As such, the statements were testimonial in nature and were admitted in violation of Mr. Har’s right of confrontation and cross-examination.

1. The statements in question were inadmissible under *Crawford* because they were gathered in preparation for trial and an objective witness would have understood the statements could be used at trial.

The defendant in *Crawford* was charged with stabbing a man who allegedly raped his wife. *Crawford*, 541 U.S. at 38. The defendant and his wife were later apprehended and separately subjected to police interrogations. *Id.* During the interrogations, the wife contradicted defendant's claim that the victim was armed at the time of the assault. *Id.* Although she was unavailable to testify at trial, the prosecution introduced the wife's statements to contradict the defendant's claim of self defense. *Id.* The defendant was convicted and appealed, claiming his rights under the Confrontation Clause had been violated. *Id.* In its analysis, this Court deviated from the former Confrontation Clause rubric and proceeded under a testimonial analysis. *Id.*

Although a comprehensive definition of testimonial was not spelled out, *Crawford* provided several examples of testimonial statements. This Court began by noting an individual bears testimony if he makes a formal statement to a government official rather than a casual remark to an acquaintance. *Id.* at 51. This Court went on to hold that at a minimum, the term testimonial applied to prior testimony at a preliminary hearing, before a grand jury or at a formal trial, and to police interrogations. *Id.* at 68. Additionally, statements could be testimonial if an objective witness would reasonably believe that the statement would be available for use at a later trial or if the statements were obtained by officers of the government "involved in the production of testimony with an eye towards trial." *Id.* at 52, 56.

The disclosure of out-of-court statements to explain the basis of an expert opinion is subject to the testimonial analysis laid out by this Court in *Crawford*. For example, the New York Court of Appeals held the Confrontation Clause is violated when an expert reveals out-of-court statements to explain his opinion unless the defendant had a prior chance to cross-examine

the source of those statements. *People v. Goldstein*, 843 N.E.2d 727, 734 (N.Y. 2005). In *Goldstein*, the defendant was charged with second-degree murder. *Id.* His principal defense was insanity, and both he and the prosecution presented psychologists as expert witnesses. *Id.* On direct examination, the State's expert witness testified the defendant was sane at the time of the killing, and disclosed statements made by the defendant's friends and roommates to support his opinion. *Id.* at 729-30. The defendant was convicted and appealed, alleging the admission of these statements violated his rights under the Confrontation Clause. *Id.*

The New York Court of Appeals began its analysis by noting the statements in issue met two of the testimonial definitions identified in *Crawford*. *Id.* The court first found the statements were obtained in preparation for trial by a government official. *Id.* at 733-34. Because the psychologist was deemed a government agent rather than an independent contractor, any elicited testimony had to meet the requirements under the Confrontation Clause. *Id.* Second, the court found these statements did not fit the definition of a casual remark to a stranger and the interviewees reasonably should have expected the statements could have been used at trial. *Id.* at 733. Based on these findings, the court held the statements were testimonial and should have been excluded from trial. *Id.*

The statements in the case at bar met several of the testimonial definitions identified in *Crawford* and should have been excluded from trial. They constituted formal statements to a government official rather than a casual remark to an acquaintance. As in *Goldstein*, the out-of-court statements were elicited by a Government agent in preparation for trial. Mr. Har's mother and sister were both directly contacted by Dr. Gerber, a stranger whom neither had ever met. Dr. Gerber testified she informed Mr. Har's mother and sister she was working with Mr. Har at the Government's request, that she may have told them she would testify, and that she was sure she

mentioned the word “trial” to them both (R. 54-56). Also, Dr. Gerber testified the purpose of the interviews was to make her conclusions accurate and to shape her testimony at trial (R. 55). Based on this, Mr. Har’s mother and sister should have known Dr. Gerber was a Government agent engaged in trial preparation and that any statement made would be available for use at trial. As such, these statements should have been excluded from trial pursuant to *Crawford* and *Goldstein*.⁸

2. Respondent’s mother and sister were interviewed for the primary purpose of establishing past facts relevant to Petitioner’s case and their statements should have been excluded pursuant to *Davis*.

In *Davis v. Washington*, this Court identified another source from which testimonial statements may arise. *Davis*, 126 S. Ct. 2266 (2006). *Davis* was consolidated with *Hammon v. Indiana*, another case involving an alleged violation of the Confrontation Clause through the improper admission of out-of-court statements. *Id.* at 2269. In deciding whether the out-of-court statements were testimonial, this Court focused on the primary purpose of the interrogation in each case. *Id.*

The relevant statements at issue in *Davis* were made to a 911 operator over the phone. *Id.* at 2270. During the conversation, the operator asked the caller a series of questions to determine the nature of the emergency. *Id.* The caller responded by alleging Davis was assaulting her. *Id.* This conversation was later admitted at trial, although the caller was not present. *Id.* On certiorari, this Court noted the woman called in the midst of an assault, circumstances that a reasonable listener would recognize as an ongoing emergency. *Id.* at 2276-

⁸ The dissent’s reliance on *United States v. Stone* is misplaced. Although the court in *Stone* allowed out-of-court statements to explain the basis of an expert’s opinion, the case clearly indicates that counsel for the defendant was present at the interviews. *United States v. Stone*, 222 F.R.D. 334, 339 (D. Tenn. 2004). As such, the defendant had a prior opportunity to cross-examine the witness against him and the admission of these statements did not violate the Confrontation Clause. *Id.* The defendant in the case at bar was not present at the interviews and had no opportunity for cross-examination. Therefore, *Stone* is inapplicable.

77. This Court held statements are non-testimonial when made under circumstances that objectively indicate the primary purpose of the police interrogation is to meet an ongoing emergency. *Id.* at 2273. Because the elicited statements were informally made in an unsafe environment and were necessary to resolve the emergency, they satisfied this definition and were held to be non-testimonial. *Id.*

The relevant statements in *Hammon* were made to police officers who reported to a domestic disturbance. *Id.* at 2271. Upon entering the home, the police escorted a woman into a separate room, where she stated Hammon had assaulted her. *Id.* These statements were admitted at trial, although the woman was unavailable and not present for cross-examination. *Id.* On appeal, this Court found there was no ongoing emergency and that the interrogation constituted an investigation of past conduct. *Id.* This interrogation was further distinguished from the one in *Davis* because it was conducted outside the defendant's presence with an officer receiving the statements for use in his investigation. *Id.*

Unlike the statements in *Davis*, the statements in *Hammon* were found to be testimonial. *Id.* at 2278. This Court held statements are testimonial when the circumstances objectively indicate there is no ongoing emergency and the primary purpose of the interrogation is to establish past facts potentially relevant to later prosecution. *Id.* at 2273-74. Unlike the caller in *Davis*, the woman in *Hammon* was acting as a witness because she recounted how events began and progressed long after the described events were over. *Id.* Such statements were found to be inherently testimonial because they were a substitute for what a witness would provide on direct examination. *Id.* at 2278. As such, their admission at trial violated the defendant's rights under the Confrontation Clause. *Id.*

Here, the out-of-court statements presented to the jury by Dr. Gerber were testimonial based on this Court's ruling in *Hammon*. Like in *Hammon*, there was no ongoing emergency at the time Dr. Gerber interviewed Mr. Har's mother and sister. These interviews were formal because they were performed outside Mr. Har's presence with Dr. Gerber receiving the statements for use in her investigation. Furthermore, Dr. Gerber testified during a side bar that she asked Mr. Har's mother and sister questions about his childhood and his move to the United States (R. 56-58). Mr. Har's mother told Dr. Gerber that he *has* always been very assertive, *was* stubborn and strong willed and *moved* to the United States against his parents' wishes (R. 60) (emphasis added). His sister told Dr. Gerber that he *had* a problem controlling his temper, *got* into fights as a child and *was* considered a bully (R. 61) (emphasis added). The primary purpose of these interviews was to establish past facts highly relevant to the prosecution of Mr. Har, and the responses were a substitute for direct testimony. As such, they were testimonial and ultimately should have been excluded from trial.

B. In addition to being testimonial, the statements by Respondent's mother and sister constituted inadmissible hearsay and should have been excluded from trial.

Hearsay is defined as a statement, other than one made by the declarant while testifying at the trial or hearing, offered to prove the truth of the matter asserted. Fed. R. Evid. 801(c). In other words, the statement must be true or false to be relevant. If a statement is found to be both testimonial and hearsay, the Confrontation Clause requires its exclusion from trial unless the defendant had an opportunity to cross-examine the declarant. *Crawford*, 541 U.S. at 59. However, *Crawford* also held the Confrontation Clause does not bar the use of testimonial statements for non-hearsay purposes. *Id.*

Petitioner relied on this exception by offering the statements of Mr. Har's mother and sister to explain the basis of Dr. Gerber's opinion. Such a use ignores the fact that an opinion

cannot be accepted as accurate without also accepting the facts upon which the opinion is based as true. While the non-hearsay use exception to explain expert opinions may be permissible in civil trials, criminal defendants have the constitutional right to confront the witnesses against them.

1. The statements made by Respondent's mother and sister constituted hearsay because they were only useful in assessing Dr. Gerber's opinion if they were first accepted as true or false.

Under a variety of circumstances, state and federal courts have found the admission of testimonial statements for non-hearsay purposes to violate the Confrontation Clause. For example, the New York Court of Appeals found out-of-court statements admitted to explain the basis of an expert opinion were hearsay and inadmissible absent an opportunity for confrontation and cross-examination. *Goldstein*, 843 N.E.2d at 732-34. In *Goldstein* the State's expert relied on out-of-court statements from the defendant's friends and roommates in the formation of her opinion. *Id.* Although the defendant lacked an opportunity for cross-examination, the trial court admitted the statements for the non-hearsay purpose of explaining the basis of the expert's opinion. *Id.*

On appeal, the statements were held to be inadmissible hearsay because they were useless in evaluating the opinion unless they were first accepted as being either true or false. *Id.* The court further found the prosecution obviously wanted the jury to accept the statements as true because the expert testified her purpose in obtaining the statements was to get to the truth. *Id.* at 732. The court noted that offering out-of-court statements to explain expert testimony ought not permit an end-run around a Constitutional prohibition. *Id.* at 733. Pursuant to these findings, the statements were held to constitute inadmissible hearsay and should have been excluded absent an opportunity to confront and cross-examine the source of the statements. *Id.*

Courts around the nation have also held out-of-court statements admitted for the non-hearsay purpose of explaining the basis of an arrest or investigation violates the Confrontation Clause.⁹ For example, the defendant in *United States v. Williams* was convicted of unlawful possession of a firearm and ammunition by a felon. *United States v. Williams*, 358 F.3d 956 (D.C. Cir. 2004). Prior to his arrest, the defendant was seen throwing something in a nearby field. *Id.* A gun was later recovered but could not be linked to the defendant. *Id.* At trial, out-of-court statements implicating the defendant in an armed robbery were admitted for the non-hearsay purpose of explaining the defendant's arrest. *Id.* On appeal, the court found the statements constituted inadmissible hearsay because they were only relevant to prove the defendant had a weapon. *Id.* at 961.

As *Goldstein* and *Williams* illustrate, purporting to offer an out-of-court statement for a non-hearsay purpose does not automatically shield it from the requirements of the Confrontation Clause. Courts must recognize the façade of a non-hearsay purpose and determine the true utility of a statement. Much like in *Goldstein*, the statements made by Mr. Har's mother and sister were only useful in evaluating Dr. Gerber's opinion if the substance of those statements was first found to be true or false. Petitioner obviously wanted the jury to believe the statements were true because, like the expert in *Goldstein*, Dr. Gerber testified she sought the statements in an effort to make her conclusions accurate (R. 55). Under these facts, the statements constituted hearsay and were implicitly offered to prove the truth of the matters asserted. As such, they were

⁹ See *United States v. Solomon*, 399 F.3d 1231 (10th Cir. 2005); *United States v. Silva*, 380 F.3d 1018 (7th Cir. 2004); *United States v. Lopez*, 340 F.3d 169 (3d Cir. 2003); *Ryan v. Miller*, 303 F.3d 231 (2d Cir. 2002); *United States v. Meserve*, 271 F.3d 314 (1st Cir. 2000); *United States v. Blake*, 107 F.3d 651 (8th Cir. 1997); *United States v. Brown*, 767 F.2d 1078 (4th Cir. 1985); *United States v. Hernandez*, 750 F.2d 1256 (5th Cir. 1985).

inadmissible hearsay and should have been excluded from trial because Mr. Har's mother and sister were unavailable for confrontation or cross-examination.

2. The constitutional protections provided by confrontation and cross-examination cannot be replaced by an instruction limiting out-of-court statements to a non-hearsay purpose.

In the case at bar the court charged the jury to resolve the conflict between Dr. Gerber's and Dr. Kalf's opinions by considering, among other things, the facts supporting their opinions (R. 64-66). The court further instructed the jury to only consider the statements made by Mr. Har's mother and sister for the sole purpose of evaluating Dr. Gerber's opinion (R. 66). The latter instruction was the only means by which the out-of-court statements were "limited" to a non-hearsay purpose. While these instructions may be appropriate in civil cases, they are by no means an acceptable substitute for the protections guaranteed to criminal defendants under the Confrontation Clause.

Judge Learned Hand once wrote that limiting instructions are a mental gymnastic which is beyond, not only the jury's power, but that of anyone else. *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932). This is not to imply limiting instructions are always ineffective. There is actually an assumption that jurors are able to follow a court's instructions even when rights under the Confrontation Clause are at issue. *Frazier v. Cupp*, 394 U.S. 731, 735 (1969). However, this Court has also recognized this assumption may be rebutted in certain contexts. *Bruton v. United States*, 391 U.S. 123 (1968). In *Bruton*, a joint trial was held for two defendants, neither of which testified. *Id.* At trial, the confession of one defendant was read and the jury was instructed to disregard the confession as it applied to the other defendant. *Id.* On appeal, this Court held there are some contexts in which the risk that the jury will not follow instructions is so great, and the consequences of failure so vital, that it cannot be ignored. *Id.* at

135. Despite the limiting instruction, this Court found the risk of misusing the confession was too great and held its admission violated the Confrontation Clause. *Id.*

As was the case in *Bruton*, the risk that jurors will misuse hearsay statements offered to explain an expert's testimony is too great to ignore. Jurors cannot be expected to consider a statement to explain an expert's opinion and completely disregard its substantive content. This reality has been observed in empirical studies which found that despite limiting instructions, jurors often use hearsay admitted to explain opinions in reaching their decisions. Regina A. Schuller, *Expert Evidence and Hearsay*, 19 *Law & Hum. Behav.* 345 (1995). As one commentator noted, it is absurd to instruct a jury not to accept out-of-court statements as true even though the expert did. Paul R. Rice, *Inadmissible Evidence as a Basis for Expert Opinion Testimony: A Response to Professor Carlson*, 40 *Vand. L. Rev.* 583, 585 (1987). Other studies have suggested limiting instructions may actually cause jurors to place more weight on the statements by highlighting the inadmissible material. Lisa Eichhorn, *Social Science Findings and the Jury's Ability to Disregard Evidence Under the Federal Rules of Evidence*, 42 *Law & Contemp. Probs.* 341, 344 (1989). Because limiting instructions are ineffective to deter misuse of statements offered to explain expert testimony, they should not be substituted for the protections provided by confrontation and cross-examination.

The statements made by Mr. Har's mother and sister constituted testimonial hearsay and should have been excluded from evidence. They were taken by a Government agent in preparation for trial and an objective witness would have understood the statements would be available for use by the prosecution. There was no ongoing emergency and the primary purpose of the interview was to establish past facts helpful in prosecuting Mr. Har. Furthermore, the statements were only helpful in evaluating Dr. Gerber's opinion if they were first accepted as

being true or false. Therefore, the statements were inadmissible hearsay and no limiting instruction could replace the protection confrontation and cross-examination provide. As such, this Court should affirm the holding of the Fourteenth Circuit.

CONCLUSION

This Court should affirm the decision of the Fourteenth Circuit because the district court committed reversible error when it failed to make a particularized, case-specific inquiry regarding Mr. Har's proffered expert testimony and admitted testimonial hearsay in violation of Mr. Har's Sixth Amendment right to confront adverse witnesses. The prejudicial effect of these errors was compounded by the trial court's arbitrary refusal to properly instruct the jury regarding false confessions, a leading cause of wrongful conviction in the United States. Singularly and in the aggregate, these errors could not have constituted harmless error and Petitioner conceded as much in its brief to the Fourteenth Circuit. For the forgoing reasons, this Court should affirm the decision of the Fourteenth Circuit.

Respectfully Submitted,

Respondent
Team No. 38

CONSTITUTION OF THE UNITED STATES
AMENDMENT VI

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

FEDERAL RULE OF EVIDENCE 702
TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

FEDERAL RULE OF EVIDENCE 703
BASES OF OPINION TESTIMONY BY EXPERTS

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. 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.

FEDERAL RULE OF EVIDENCE 801
HEARSAY

(a) Statement.

A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant.

A "declarant" is a person who makes a statement.

(c) Hearsay.

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay.

A statement is not hearsay if—

(1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is

(A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or

(B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or

(C) one of identification of a person made after perceiving the person; or

(2) *Admission by party-opponent.* The statement is offered against a party and is

(A) the party's own statement, in either an individual or a representative capacity or

(B) a statement of which the party has manifested an adoption or belief in its truth, or

(C) a statement by a person authorized by the party to make a statement concerning the subject, or

(D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or

(E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).