

**Not Offered for the Truth of the Matter:
Defendant’s Hearsay and the Necessity of Limiting
Instructions in Psychological Defenses**

*“The mind is like an iceberg, it floats with one-seventh of its bulk
above water.”*

-Sigmund Freud-

INTRODUCTION

If understanding the human mind is a daunting task, then proving the human mind must be even more so. Proving the human mind, however, is necessary in many criminal cases. In the realm of serious felonies, the law often requires that the prosecution prove beyond a reasonable doubt the existence of some criminal mindset in the defendant. Generally, a specific intent of some criminal purpose must be established before criminal liability can be imposed. A natural defense therefore arises; if the defendant lacked the requisite mental state—specific intent—at the time of the crime, then there was no crime. Similarly, a person may be deemed unfit for criminal sanction if the defense can establish that the defendant was unable to form the requisite criminal mind because they were legally insane at the time of the crime. Both mental state defenses and the insanity defense are likely to rely on psychological assessments of the defendant, and a psychological expert’s expert testimony at trial.

The psychological sciences are heavily relied upon in mental state defenses because the existence of certain psychological disorders can impair the ability of a individual to form specific intent. This issue can be compounded where observable symptoms of mental disorders that would support a mental state defense are fleeting; meaning that the effects of the disorder are present at some times, but not all. The question for the jury then becomes whether the defendant

had actually formed the requisite criminal intent to commit the crime at the time of the charged offense. Proving whether or not the debilitating mental disorder was in existence at the time of the charged offense, and if it had the effect of preventing the formation of specific intent, becomes the task of the adversarial attorneys. Because the operation and function of the human mind are so complex that the average lay-juror may need assistance in processing the relevant facts, psychological experts are often relied upon by both prosecution and defense in a case concerning the mental capabilities of the defendant.

Additionally, our criminal justice system has long recognized the defense of insanity, which is based on the principle that a person who lacks sufficient mental capacity is not a fit subject for criminal punishment. The existence of legal insanity does not absolve the defendant of criminal wrong-doing, as the mental state defense does, but shifts the focus from punishment to the treatment of their illness, and the management or isolation of dangerous individuals. California uses a modified *McNaghten* standard to establish legal insanity: a defendant must prove by a preponderance of the evidence, in a separate phase of the trial after the guilt of the defendant has been decided, that as the result of a qualifying mental infirmity the defendant either did not know the nature or quality of their actions, or could not tell right from wrong at the time of the crime.¹ Like the mental state defense, psychological experts must be relied upon to

¹ See, Cal. Pen. C. § 25 (“In any criminal proceeding ... in which a plea of not guilty by reason of insanity is entered, this defense shall be found by the trier of fact only when the accused person proves by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the offense.”); *McNaghten’s Case* (1843) 10 Clark & Fin. 200, 210; *People v. Lawley* (Cal. 2002) 27 Cal.4th 102, 169-70 (stating “[t]he test of legal insanity in California is the rule in *M’Naghten’s Case* [citation omitted], as adopted by the electorate in June 1982 with passage of Proposition of Proposition 8. That measure added section 25 ...); and *People v. Skinner* (1985) 39 Cal.3d 765, 769 (specifying that despite the use of the conjunctive “and,” the legal standard applied is if the defendant did not know the nature and quality of his acts, or if he did know what he was doing was wrong.) (See also, *People v. Kelly* (1992) 1 Cal.4th 495, 533).

present opinion evidence on whether the defendant suffered from a mental illness, and to testify as to what effects that disease may have had on the defendant's mind at the time of the crime.

Because experts are generally called upon to testify to opinions formed from a keen understanding of complex issues, modern evidence codes have taken a deliberate step of facilitating the presentation of expert testimony so that it may be properly understood by the jury. Both Federal and California evidence codes allow experts to rely upon and describe to the jury otherwise inadmissible hearsay evidence that experts in their field would reasonably rely upon in forming their opinion.² However, because these rules permit otherwise inadmissible hearsay evidence, there is a natural concern that one side or the other may present prejudicial information to the jury in the guise of the basis of an expert's opinion. Thus, the law provides for the judge to perform a further screening function in deciding whether to admit such evidence.

When faced with potentially inadmissible hearsay, the court may admit the hearsay evidence with a limiting instruction making it clear to the jury that the evidence is only to be used for the limited purpose of the basis of the expert's opinion, but not for the truth of the matter asserted. Alternatively, the judge can decide to exclude the hearsay evidence as being overly prejudicial, or unreliable. Under both the Federal Rules and the California Code, the judge retains wide discretion to keep the jury from hearing such inadmissible evidence if he or she decides that the prejudicial effect admitting the evidence substantially outweighs the probative value of the evidence to the jury. Thus, even under the rules permitting otherwise inadmissible hearsay to be

² See, Fed. Rule 703 and 803(4); Calif. Ev. Code § 801.

presented by experts as the basis of their opinion, the courts are left with a typical evidentiary balancing test in considering the admissibility of that hearsay.³

The hearsay statements of a defendant to a psychological expert in the presentation of a psychological defense provide a prime example of when judicial discretion must be relied upon because a psychological expert will rely heavily upon the statements of the defendant in forming their opinion.⁴ These statements often contain the defendant's own recounting of the incident at issue in the case, and are almost always made after the defendant is in custody and charged. Therefore, there is almost always an implied motive for the defendant to fabricate statements, making them unreliable. But there is also always an evidentiary need for experts to rely on the defendant's statements to form their opinion because a critical component of any psychological expert's assessment of the defendant's psychological condition will be listening to and assessing how the defendant describes his experience. In turn, to enable the jury to perform its role of assessing the weight and value of the expert's opinion, it is critical that the court permit the jury to hear those matters upon which the expert has based his opinion. Therein lies the judicial dilemma addressed by this paper: how should the court properly weigh the possible unreliability

³ Federal Rules of Evidence Rule 403 states:

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

California Evidence Code section 352 similarly states:

The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

⁴ Despite significant legal differences between mental state defenses and the insanity defense, the use of a defendant's hearsay statements to a psychological expert as the basis of the expert's opinion at trial is essentially the same for the purposes of this paper. Thus, this paper will make little distinction between the two defenses in the presentation of its argument, and will refer to them collectively as "psychological defenses."

of a defendant's hearsay statements to a psychological expert against the probative value of those statements in assessing the defendant's mental state or sanity?

It is the position of this paper that when a criminal defendant places his mind at issue, the court should rely on the limiting instruction and admit the otherwise inadmissible hearsay statements, unless the opponent of those statements can affirmatively establish that they are unreliable. Because of the unique difficulties in proving or disproving a human mind, the scales of the evidentiary balancing test should be tipped in favor of the probative value of such statements. Although such statements may be prejudicial to one side or the other, the jury must be trusted to follow evidentiary limiting instructions and, in order to fairly judge the mind of a criminal defendant, the jury should be trusted with more information rather than less. Additionally, the expert's own reliance on the defendant's statements should weigh in favor of the reliability of the statements. Therefore, although the reliability of hearsay is always an important evidentiary issue, statements of a defendant to a psychological expert should be admitted for the limited purpose of the basis of an expert's opinion unless it can be established affirmatively that the statements are unreliable.

In section I, this paper begins by presenting the discretion of the courts in permitting or limiting the admissibility of hearsay statements forming the basis of an expert's opinion. Next, section II argues that the courts should not exercise that discretion in a manner that keeps relevant facts from the jury for a lack of faith that the jury will follow the instructions issued by the court. Then, in section III, this paper argues that the jury cannot properly consider the veracity of an expert's opinion without hearing the basis of that opinion. This paper concludes that the requisite evidentiary bases for psychological defenses must not be undercut by an

inability to present a defendant's hearsay statements to a psychological expert as the basis of his opinion because the probative value of such statements is immense, and traditional concerns of reliability can be adequately addressed with proper judicial instructions to the jury.

I. When otherwise inadmissible hearsay forms the basis of an expert's opinion, the courts have wide discretion in limiting the admissibility of those statements.

As the gate-keeper of evidence, the court exercises considerable discretion concerning the admissibility or inadmissibility of hearsay evidence. This section examines the exercise of this discretion in the instance of expert testimony regarding extrajudicial statements made by a defendant in cases involving psychological defenses. Part A presents the rules governing the use of expert testimony in psychological defenses. Then, part B presents several cases where the courts have considered whether an expert could be permitted to testify to extrajudicial statements made by the defendant as the basis of his opinion in cases concerning psychological defenses.

A. The Use of Expert Testimony in the Psychological Defenses

California Evidence Code section 801 permits the use of expert testimony to aid the trier of fact, and facilitates the use of expert testimony in trial by permitting the expert to present otherwise inadmissible evidence as the basis of their opinion.⁵ Section 801 states:

If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such opinions as is:
(a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and

⁵ In federal jurisdictions, Federal Rules of Evidence Rule 703 governs the use of expert testimony. Rule 703 states: An expert may base opinion of facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the fact or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

(b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

Cal. Ev. Code Sect. 801

Thus, the expert is allowed to present any basis for their opinion, hearsay or otherwise, so long as it is a basis that “may ‘be reasonably relied upon’ for that purpose.”⁶ Experts are allowed to present the bases of their opinion, even if otherwise inadmissible because an experts opinion “is no better than the facts upon which it is based.”⁷

Psychological experts are used when the defendant puts at issue his mental state or sanity at the time of the alleged crime. The legal sanity of a defendant is determined under the provisions of section 25, which states:

In any criminal proceeding ... in which a plea of not guilty by reason of insanity is entered, this defense shall be found by the trier of fact only when the accused person proves by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the offense.

Cal. Pen. C. § 25

A defendant can also attempt to negate specific intent by presenting evidence of a mental disease, mental defect, or mental disorder under California by Penal Code section 28. Section 28 states:

(a) ... Evidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific intent,

⁶ *People v. Bordelon* (2008) 162 Cal.App.4th 1311, 1325 (citing *People v. Carpenter* (1997) 15 Cal.4th 312, 403).

⁷ *Id.*, at 1324 (citing *People v. Gardeley* (1996) 14 Cal.4th 605, 618; and *People v. Ainsworth* (1988) 45 Cal.3d 984, 1012).

premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged.

...

(d) Nothing in this section shall limit a court's discretion, pursuant to the Evidence Code, to exclude psychiatric or psychological evidence on whether the accused had a mental disease, mental defect, or mental disorder at the time of the alleged offense.

Cal. Pen. Code sect. 28.

When specific intent is at issue, a psychological expert's testimony is limited by California Penal Code section 29, which prevents an expert from testifying to the existence or non-existence of the requisite mental state.⁸ Section 29 states:

In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact.

Cal. Pen. Code sect. 29.

Thus, the existence of specific intent is left to the jury to decide as a matter of fact. Ideally, the testimony of the expert will assist the jury in determining the mind of the defendant at the time of the alleged offense by his assessment and presentation of the defendant's psychological condition.

Psychological experts, in particular, present a special area of concern because so much of their opinion is inevitably based on a personal assessment of the defendant, wherein the

⁸ By its very terms, this limitation applies only to specific intent as an element of the crime. Therefore, it is arguable that § 29 does not apply to an expert's opinion on sanity, which is tried as a separate issue.

See, People v. Nunn (1996) 50 Cal.App.4th 1357 (defense expert permitted to testify that defendant tended to overreact to stress and apprehension, which could result in his acting impulsively in certain situations, but not permitted to testify that defendant had acted impulsively in committing charged acts); *People v. Young* (1987) 189 Cal.App.3d 891 (Psychiatrist allowed to testify to diagnosis of mental disease at time of homicide, but not to ultimate legal issue of whether defendant acted with malice aforethought).

defendant is interviewed and will inevitably make out of court statements to the psychological expert. Due to the personal nature of psychological disorders, only the defendant can speak to what he was experiencing at the time of the alleged crime, and at other relevant times. If, as is often the case, the expert is interviewing the defendant after arrest, the expert will be aware of and can factor in the defendant's legal motivations to fabricate psychological symptoms.

Generally, the expert will assess what he considers to be the veracity of the defendant's statements as part of his over-all assessment. However, because a psychological expert's assessment of either a defendant's legal sanity or mental capability to form intent at the time of the alleged crime is invariably based upon the defendant's extrajudicial statements, section 801 inevitably opens the door to a defendant's hearsay statements through the psychological expert's testimony as to the basis of their opinion. Thus, the courts are left with the task of weighing the substantial probative value of a defendant's hearsay as the basis of an expert's opinion against the risk of allowing prejudicial or unreliable hearsay before the jury.

The case of *People v. Ainsworth*, is instructive in this regard.⁹ In *Ainsworth*, the defendant was charged with first degree murder enhanced by special circumstances, and a psychological expert was called by the prosecution to testify to the defendant's capability to form the requisite mental state for the crime.¹⁰ On appeal, the defendant challenged the expert's testimony relating extra-judicial statements made to the expert during the expert's clinical interview.¹¹ The appellate

⁹ See, *People v. Ainsworth* (1988) 45 Cal.3d 984. The expert in this case had interviewed the defendant before trial to assess the defendant's competency to stand trial, which is a separate issue from a mental state defense. However, a psychological assessment for competency will include an interview similar to that used for diagnosing potential psychological conditions that would affect a psychological defense. Thus, statements made by a defendant in a competency assessment may prove to have substantial probative value when a psychological defense is raised later. See, *People v. Crow* (1994) 28 Cal.App.4th 440, 452.

¹⁰ *Id.*, at 1010.

¹¹ *Id.*, at 1010.

court upheld the trial court's admission of these extrajudicial statements because "[a]n expert should be allowed to testify to all the facts upon which he bases his opinion, including relevant declarations to him."¹² In making this determination, the court relied upon section 801, stating:

[o]pinion testimony by an expert must be based on matter "perceived or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates..."¹³

Therefore, it is clear that a defendant's out of court statements to experts are admissible at trial as the basis of an expert's opinion.

However, the court in *Ainsworth* also alluded to the need to limit the purpose of such statements with evidentiary instructions. There, the court stressed that "[t]he statements are admissible not as proof of the facts stated but to enable the expert to explain and the jury to appraise the basis of his opinion."¹⁴ Thus, while a defendant's extrajudicial statements can be admissible through a psychological expert as the basis for the expert's opinion, the court should still limit the use of those statements by the jury to the basis of the expert's opinion in keeping with the typical functioning of hearsay evidence.

B. The Admissibility of a Defendant's Hearsay Statements as the Basis of Expert Opinion.

The concerns attendant to the use of a defendant's hearsay statements to a psychological expert are the same concerns of admitting hearsay evidence generally: relevance and unreliability. The relevance of the testimony is weighed through a traditional balancing of

¹² *Id.*, at 1012 (citing *People v. Brown* (1958) 49 Cal.2d 577, 585).

¹³ *Id.*, at 1012 (quoting Cal. Evid. Code, § 801, subd. (b).).

¹⁴ *Id.*, at 1012 (citing *People v. Brown* (1958) 49 Cal.2d 577, 586).

probative value versus potential prejudice. However, the determination of reliability, which is always an underlying concern in the use of hearsay evidence, subjects the defendant's extrajudicial statements to experts to further scrutiny by the trial court.

The traditional rule against hearsay is based upon a concern for the inability to test the veracity of statements made by an out of court declarant, and all exceptions to the hearsay rule are firmly couched in some external assurance of reliability. Because a large portion of a psychological expert's opinion will be based in otherwise inadmissible hearsay, the courts must determine whether or not the hearsay statements relied upon by the psychological expert are reliable enough to permit the jury to hear them. In this determination, the courts have wide discretion, and the case law varies on whether the expert's own assessment of reliability is sufficient or if the party offering the statements must produce some external indicia of reliability, such as consistency. This paper takes the position that the expert's assessment of reliability should be taken as a sufficient showing of reliability, unless the opponent to the hearsay statements can affirmatively demonstrate that the statements are unreliable.

This concern for reliability is expressed in the case of *People v. Bordelon*.¹⁵ In *Bordelon*, the court held that it was reversible error for the trial court to prevent a psychological expert from testifying to hearsay statements as the basis of his opinion.¹⁶ The court reasoned that the statements made in clinical interviews were relevant to the defendant's mental state defense and reliable because the statement was made before his arrest, at a time when there was no motive for

¹⁵ See, *People v. Bordelon*, *supra*, note 6.

¹⁶ *Id.*, at 1325.

fabrication.¹⁷ Even though the court admitted the evidence, it also noted that, “[a]lthough an opinion may be predicated on hearsay, the trial court has the discretion to ‘exclude from the expert’s testimony any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value.’”¹⁸ The court further opined that, “[p]rejudice may arise if, ‘under the guise of reasons,’ the expert’s detailed explanation ‘brings before the jury incompetent hearsay evidence.’”¹⁹ Thus, it is clear that while the court may be inclined to admit otherwise inadmissible hearsay as the basis of an expert’s opinion, there is still concern that the expert may be abused as a vehicle to get improper evidence before the jury.

In another case presenting the concern for reliability, the court in *People v. Pollock* upheld a trial court’s exclusion of an expert’s testimony regarding the how the defendant’s behavior before, during, and after the charged offense was consistent with a mental disorder because that opinion would necessarily be based on the defendant’s hearsay statements to the expert.²⁰ Like the court in *Bordelon*, this court considered the timing of the statements relevant to their reliability, and took particular note that the statements had been made years after the incident in question. In its deference to the lower court’s determination, the court reasoned, “[w]hen an expert opinion is offered, much must be left to the trial court’s discretion.”²¹ The court further asserted that, “[a]lthough an expert may base an opinion on hearsay, the trial court may

¹⁷ *Id.*, at 1325. The defense was arguing a theory that the defendant suffered from institutional dependence, and that the defendant did not commit a bank robbery with the intent to permanently deprive a bank of its property, but because the defendant wanted to go back to jail. The defendant had told the expert in clinical interviews that he felt lost when he was out of prison.

¹⁸ *Id.*, at 1325 (citing *People v. Pollock* (2004) 32 Cal.4th 1153, 1172).

¹⁹ *Id.*, at 1325 (citing *Carpenter, supra*, at 403).

²⁰ *People v. Pollock* (2004) 32 Cal.4th 1153.

²¹ *Id.*, at 365 (quoting *People v. Carpenter* (1997) 15 Cal.4th 312, 403).

exclude from the expert's testimony 'any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value.'"²² Nonetheless, despite excluding the defendant's specific statements, the court still permitted the defense to proceed with their examination by way of hypothetical questions concerning the essence of those out of court statements.²³ The use of hypothetical evidence emphasizes to the jury that it is their decision to accept or reject evidence, even if the court allows it to be heard. Thus, the court's determination to allow hypothetical evidence to be presented to the jury can be understood as the court affirming the need to give the jury some access to a defendant's hearsay statements in a clinical interview despite the court's concern for reliability.

This recognition of the need to admit some form of the essence of a defendant's hearsay statements has been utilized by other courts as well. In *People v. Hughes*, hearsay statements made to an investigator were excluded by the trial court from the expert's testimony as incompetent hearsay because those statements were inconsistent with other statements that the defendant had made to police.²⁴ However, the court did permit the expert to testify that "among the [bases] for your opinion is an interview with the [d]efendant."²⁵ The court later prevented another defense expert from testifying to specific hearsay statements by the defendant and his family, which were consistent, but did allow the expert to testify to the essence of those

²² *Id.*, at 365 (quoting *People v. Montiel* (1993) 5 Cal.4th 877, 919).

²³ *Id.*, at 365.

²⁴ *People v. Hughes* (2002) 27 Cal.4th 287, 339. Notably, like the situation in *Pollock* and unlike the situation in *Bordelon*, the statements made in this instance were made after arrest, as is the norm in psychological defenses.

²⁵ *Id.*, at 339. In this case, the trial court had "suggested that [the expert] should not be allowed to consider defendant's hearsay statements in forming his expert conclusion concerning defendant's mental competence at the time of the killing," but still permitted the expert to testify "among the [bases] for your opinion is an interview with the defendant." The statements at issue in this case concerned the defendant's use of cocaine the morning of the crime.

statements as the basis of her opinion.²⁶ This method of limiting the statements to their “essence” severely curtails the extent to which the statements can be presented,²⁷ but it still shows the court attempting to find some way to admit the probative portion of the hearsay to the jury without including the more prejudicial aspects.

The consideration of the timing of a defendant’s statements, utilized by the courts in *Bordelon* and *Pollock*, is problematic because usually a defendant will not be psychologically assessed until after his arrest. Thus, there is almost always a risk of unreliability that can be inferred from the circumstances of clinical interview of a defendant. Additionally, psychological experts regularly factor a defendant’s motivation to fabricate for legal gain into their assessments of defendants, and will also base their opinion upon that assessment of the veracity of the defendant’s statements. Therefore, a blanket rule of reliability or unreliability due to the timing of the statements should be avoided.

In comparison, the *Hughes* court’s consideration of the consistency of a defendant’s statements throughout time is a better measure of reliability because it allows for an objective analysis of the substance of the statements, as opposed to a subjective analysis of the conditions under which the statements were made. Because evidence concerning the conditions under which

²⁶ *Id.*, at 396-7. On sentencing, the defense expert was to present a mitigating psychological history and background report, which proposed that a “chaotic and unstable family life affected [defendant’s] ability to cope, his sense of individuality, and his sense of self-esteem.” The statements at issue were made to the expert in interviews with the defendant, his siblings, and his parents, and they largely concerned the breakup of the parents’ marriage and attendant infidelity. There were also statements by the defendant and his siblings that the mother “when intoxicated, accused her children of being gay, attempted to seduce one of defendant’s brothers, and told the defendant that he was ‘probably sexually better than his father.’” The trial court ruled “[the expert] will be allowed to testify that following the separation of the parents, as further evidence of the lack of communication between the parents and failure of the parents even to inform the children that the marriage was breaking apart, the father began to date other women without informing the children of the status of his marriage to the mother, and that the mother, on occasion in fits of intoxication, made sexually inappropriate remarks about or to the children. I believe that further detail than that is not appropriate under the circumstances.”

²⁷ The court in *Hughes* might disagree with this characterization, as it state that “the trial court allowed defendant ‘reasonably wide latitude to present his expert evidence’ and that the ‘few restrictions it placed on the extensive expert testimony’ were proper and did not violate defendant’s constitutional right to present a defense.” *Id.*, at 339.

the statements were made is a subjective inquiry that could be used to attack the credibility of the statements, that inquiry could adequately be made through cross examinations and left to the jury to evaluate.

Similarly, the expert's assessment of the veracity of a defendant's statements should be permitted so that the jury may factor that in to their assessment of the expert's opinion as well. In *Ainsworth*, for instance, the expert was permitted to testify to the entire content of the defendant's out of court statement to him, and offer further testimony that he felt the defendant had been forthright in his statements and was not feigning or trying to cover anything up.²⁸ The court went on to reason that "[t]he doctor's statement of his own belief that [the defendant] was not intentionally lying or deceiving him during the psychiatric interview was relevant to the reliability of the doctor's conclusions."²⁹ The trial court in *Ainsworth* also permitted the expert to testify that, "[the defendant]'s statement regarding his involvement in the crimes [...] was 'fully consistent' with what [the expert] had been told by law enforcement personnel."³⁰ Thus, while the court in *Ainsworth* considered the consistency of the defendant's statements in its determination of reliability, the court also expressed a strong deference to the expert's assessment of reliability and permitted the expert to testify to the jury why he felt the statements were reliable.³¹ Thus, the court in *Ainsworth* set forth a measure of reliability that considered both the expert's assessment of the reliability of the defendant's statements and the consistency of those statements through time.

²⁸ *People v. Ainsworth, supra*, note 9, at 1011-12.

²⁹ *Id.*, at 1012.

³⁰ *Id.*, at 1011.

³¹ The court went on to state that "in such cases, where the *sole* purpose of the psychiatric examination and testimony relates to the credibility of a witness, the psychiatrist may not testify to the ultimate question of whether the witness is telling the truth on a particular occasion." *Id.*, at 1012 (emphasis in original).

While reliability is an important factor in determining the admissibility of a defendant's extrajudicial statements as the basis of an expert's opinion, there is no clear method or bright line rule to measure an out of court statement's reliability at present. In some instances, the courts have indicated that a showing of a statement's consistency with other statements is sufficient. In others, the courts allowed the expert to act as a barometer of the reliability of the defendant's statements. In all cases, however, there has been an inclination to let in some measure of the "essence" of the out of court statements, if not permitting the admission of the statements in their entirety. This paper takes the position that when a mental state or insanity defense is raised, out of court statements made by the defendant should be presumed to be reliable if the expert has chosen to rely on them, unless the opponent of the hearsay can affirmatively demonstrate that the statements are unreliable. As the courts in *Hughes* and *Ainsworth* reasoned, unreliability is best demonstrated through inconsistency in the statements, rather than a subjective evaluation of the circumstances surrounding when the statements were made. Regardless of the measure, absent an affirmative showing of unreliability, any concern for the prejudicial effect is sufficiently addressed through the traditional use of the limiting instruction.

II. The Courts should not keep relevant facts from the jury because the jury must be believed capable of following judicial instructions.

The limiting instruction is often relied upon where relevant evidence is admissible for some limited purpose, but inadmissible for other purposes. This is often the case when the issue is the admissibility of hearsay evidence, particularly hearsay used as the basis of an expert's opinion. In the instance of admitted hearsay evidence, the jury is instructed that they may use the hearsay for a specific purpose, but that the evidence is not to be used for other purposes. Specifically, in regard to hearsay, the evidence cannot be used for the truth of the matter asserted.

This instruction requires jurors to engage in a certain degree of mental gymnastics,³² but it is relied upon frequently because: (1) it is assumed that jurors will follow instructions; and (2) the alternative is the loss of critical evidence.³³ When a defendant is raising a psychological defense, the defendant's out of court statements to a psychological expert fall squarely into this second category because the statements are clearly hearsay, but they are also likely to be the most crucial basis for the expert's opinion. This section of the paper presents the use of the limiting instruction when a court permits a psychological expert to testify to a defendant's extrajudicial statements in a psychological defense.

The court in *Ainsworth* outlines the function of the limiting instruction when used with a psychological expert's testimony. In allowing the expert to testify to the defendant's extrajudicial statements, the court reasoned that the expert's testimony was relevant to the defendant's diminished capacity defense and defendant's extrajudicial statement was "clearly admissible as relevant to the development of [the expert]'s diagnosis of [the defendant]'s mental state."³⁴ The court went on to state that, "[a]n expert should be allowed to testify to all the facts upon which he

³² *Nash v. United States* (2d Cir. 1932) 54 F.2d 1006, 1007 (although recognizing the necessity of the limiting instruction, Judge Learned Hand also noted that limiting instruction require jurors to perform "a mental gymnastic which is beyond, not only their powers, but anybody's else.")

³³ See, *United States v. Snype* (2d Cir. 2006) 441 F.3d 119, 129 ("[T]he law recognizes a strong presumption that juries follow limiting instructions."); and *Travison v. Jones* (N.D.N.Y. 1981) 522 F. Supp. 666, 670 (stating that the presumption that juries follow instructions is a "premise upon which our jury system is founded."); and *Opper v. United States* (1954) 348 U.S. 84, 95 ("Our theory of trial relies upon the ability of a jury to follow instructions."); and *Richardson v. Marsh* (1987) 481 U.S. 200, 211 ("The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process."); and David Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. 407, 440 ("The need [for the limiting instruction] is thought very great: the faith that juries follow their instruction is often said to be 'fundamental to our system of justice,' a 'crucial assumption underlying our constitutional system of trial by jury.'") (quoting from *United States v. Cardall* (10th Cir. 1989) 885 F.2d 656, 668; and *Francis v. Franklin* (1985) 471 U.S. 307, 325 n. 9, respectively); and *id.*, at 444 (noting that "[i]f we thought jurors could not or would not follow that instruction, we would have to choose between either excluding the evidence or admitting it for all purposes. Which of these options seemed more attractive would depend on a kind of calculation very familiar to judges and trial lawyers: balancing the value of the evidence against its capacity to cause unfairness of to lead the jury astray.")

³⁴ *Id.*, at 1012.

bases his opinion, including relevant declarations to him.”³⁵ In enunciating the limiting instruction, the court observed, “[t]he statements are admissible not as proof of the facts stated but to enable the expert to explain and the jury to appraise the basis of his opinion.”³⁶ Where the otherwise inadmissible hearsay evidence is admitted with a limiting instruction, the instruction is typically that the evidence is to be used for some specific purpose, and not for the purpose that would violate the rules of evidence; as evidence for the truth of the matter asserted.

When the limiting instruction is given to the jury, the courts have been inclined to believe that it cures hearsay concerns to some extent because the jury is limited to using the evidence for only acceptable purposes. In *Hughes*, the court found that the scope prosecution’s cross of defendant’s psychological expert was proper, even though the defendant’s hearsay statements were testified to by the expert, because the jury was repeatedly instructed that the information the expert relied on was “received only for the purpose of establishing what the basis for his opinion is, and not to prove those specific facts are true.”³⁷ Specifically, the court noted that, “[t]he evidence was used not to establish motive or state of mind, but to impeach [the expert]’s testimony concerning defendant’s work history (and hence impeach [the expert]’s expert opinion concerning impairment).”³⁸ Additionally, re-emphasizing the court’s faith in the jury’s adherence to instructions, the court stated:

In any event, even were we to assume error, no prejudice appears.
The jury repeatedly was instructed that information relied upon by

³⁵ *Id.*, at 1012 (citing *People v. Brown* (1958) 49 Cal.2d 577, 585).

³⁶ *Id.*, at 1012 (citing *People v. Brown* (1958) 49 Cal.2d 577, 586).

³⁷ *People v. Hughes*, *supra*, note 24, at 335.

³⁸ *Id.*, at 335 (citing Evid.Code § 721, subd. (a) [an expert “may be fully cross-examined as to ... (2) the subject to which his or her expert testimony relates, and (3) the matter upon which his or her opinion is based and the reasons for his or her opinion”].).

[the expert] to form his opinion was ‘received only for the purpose of establishing what the basis for his opinion is, and not to prove that those specific facts are true.’³⁹

Although the limiting instruction requires some faith that jurors will be able to segregate their thinking in the manner asked of them, it is frequently utilized—particularly when it is critical for the jury to hear the evidence despite the fact that it could be used improperly. Additionally, while there is historically a significant distrust of the jury’s ability to perform the mental gymnastics required by the limiting instruction, there is substantial evidence that jurors are able to, and do, follow these instructions when the purpose is to “debias” them to particular evidence.⁴⁰

The use of a defendant’s statements as the basis of an expert’s opinion on sanity provide a sanguine illustration of how this dilemma presents itself to courts and how courts should ideally exercise their discretion in such a matter. A defendant’s statements to an assessing psychological expert are hearsay and present all the dangers of unreliability due to a self-serving purpose, particularly when they are made after the defendant has been arrested. However, they are also an essential component of what a psychiatric expert is called upon to base his or her judgement in assessing the psychological condition of the accused in a psychological defense. To allow an expert’s opinion in this area without allowing the jury to hear the foundational words from the accused that support that opinion presents a critical danger of undercutting the jury’s essential

³⁹ *Id.*, at 335.

⁴⁰ See generally, Sklansky, *supra*, note 33. Specifically, Sklansky cites Linda J. Demaine, *In Search of an Anti-Elephant: Confronting the Human Inability to Forget Inadmissible Evidence*, 16 GEO. MASON L. REV. 99, 105 (2008) (summarizing the “growing body of research on debiasing”); and Dan Simon, *A Third View of the Black Cox: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 543-44, 548-49, 569-74 (2004) (providing a discussion on debiasing and jury decisionmaking more generally) in support of the position that evidentiary instructions, like the limiting instruction, are actually probably quite effective in ensuring that jurors do not “overrely on particular kinds of evidence or react emotionally to it.” *Id.*, at 416.

function of deciding the probative worth of the expert's opinion. The ultimate legal judgement of the defendant's mind is a factual one to be made by the jury, and the courts should err on the side of giving the jury more information rather than less in this difficult task. The limiting instruction is far from perfect, but it is also absolutely necessary to the proper presentation of a psychological expert's opinion. Thus, sound discretion should more frequently be exercised in favor of allowing the jury to hear the defendant's hearsay statements to a psychological expert, along with a limiting instruction that cautions the jury about their proper evidentiary use.

III. The jury cannot properly consider the veracity of an expert's opinion without hearing the basis of that opinion.

In order to properly evaluate an expert's opinion, the jury must be permitted to hear the basis of that opinion and consider how reliable those bases are. As stated in *Bordelon*, "[s]ince an expert's opinion 'is no better than the facts on which it is based,' experts should generally be allowed to testify to all facts upon which they base their opinions."⁴¹ Ergo, if the jury is unable to consider the basis of an expert's opinion, the jury will also be unable to meaningfully consider the opinion as a whole. This section of the paper argues that it is crucial to the proper function of the jury, in a case concerning a psychological defense, to hear a defendant's hearsay statements to a psychological expert as the basis of the expert's opinion.

When a defendant raises a psychological defense, the out of court statements that the defendant makes are an important basis for any psychological expert's opinion. The psychological expert must make his own determination of how credible or reliable the defendant's statements are and should be permitted to testify to that determination. It is for the

⁴¹ *People v. Bordelon*, *supra*, note 6, at 1324 (citing *People v. Gardeley* (1996) 14 Cal.4th 605, 618; and *People v. Ainsworth* (1988) 45 Cal.3d 984, 1012).

jury to assess how astute the doctor's opinion is, and such an assessment permits an examination of the doctor's reliance on statements that the jury may or may not deem credible.

The court in *Ainsworth* recognized the need for the jury to hear out of court statements as the basis of a psychological expert's opinion. There the court stated that, "[A]n expert should be allowed to testify to all the facts upon which he bases his opinion, including relevant declarations to him."⁴² The court reasoned that these statements should be heard by the jury because they "enable the expert to explain and the jury to appraise the basis of his opinion."⁴³ Thus, it is clear that hearsay statements which form the basis of a psychological expert's opinion are crucial to the jury's fact-finding mission.

Furthermore, in *Ainsworth*, not only were the defendant's out of court statements deemed relevant to the expert's opinion, but also "[t]he doctor's statement of his own belief that [defendant] was not intentionally lying or deceiving him during the psychiatric interview was relevant to the reliability of the doctor's conclusions."⁴⁴ Illustrating the importance of limiting what purpose an expert's testimony is used for, and reliance on the jury's ability to properly distinguish the proper use from improper use with instruction, the court emphasized, "[w]hile this testimony of [the doctor] may have tended to enhance the credibility of [defendant]'s testimony, that was not the purpose of the psychiatric examination or of the doctor's testimony."⁴⁵ Thus, as the court in *Ainsworth* recognized, the need for a doctor to testify to his

⁴² *People v. Ainsworth*, *supra*, note 9, at 1012.

⁴³ *Id.*, at 1012.

⁴⁴ *Id.*, at 1012.

⁴⁵ *Id.*, at 1012.

confidence in the defendant's statements speaks to the ability of the jury to accept or reject an expert's opinion based on their evaluation of the basis for his opinion.

Ultimately, for an expert's opinion to have any use to the jury, the jury must be able to consider the facts underlying the opinion. As noted in *Kennemur v. State of California*, "[I]ike a house built on sand, the expert's opinion is no better than facts on which it is based."⁴⁶ Without a presentation of the foundational facts underlying an expert's opinion, the opinion would simply be a statement of belief that could not be subjected to any evidentiary testing or consideration.⁴⁷ Therefore, in the arena of an adversarial criminal trial, when a psychological expert is called to testify to their opinion of a defendant's mind, hearsay statements upon which they rely should also be heard by the jury for the limited purpose of assessing the expert's opinion.

CONCLUSION

Expert testimony plays a special role in the criminal courts, especially where psychological defenses are concerned. In the American system of criminal justice, the existence of a criminal mind is a critical element to be proven before criminal sanctions can attach in most serious offenses. Therefore, the ability to challenge the existence of a criminal mind, or the ability to form it, is a critical defense. However, because of the complexities of the human mind and the elusiveness of the psychological sciences to the lay juror, expert psychological testimony is necessary to any psychological defense. As such, the courts should take into consideration the critical nature of a psychological expert's testimony to the psychological defense, and the need

⁴⁶ *Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 923.

⁴⁷ See, McCormick, Evidence (2d ed. 1972) The Opinion Rule, § 11, 22 ("We use the word 'opinion' as denoting a belief, inference, or conclusion without suggesting that it is well or ill founded.")

for that expert's testimony to be supported by the statements that they rely on in their assessments of the defendant.

The evidentiary codes are clear in that expert testimony must be facilitated to some extent by the admissibility of otherwise inadmissible evidence as the basis of their opinion. Without hearing such evidence, the jury has no viable method of assessing the weightiness of the expert's opinion. However, the courts' measure of reliability of hearsay relied upon by an expert can weigh heavily against the admissibility of a defendant's statements to a psychological expert, even as the basis of their opinion, if the timing of the statements is considered. The practical reality is that most defendants are not psychologically assessed until after they face criminal charges, so most criminal defendants raising a psychological defense would be disadvantaged by the normal evidentiary balancing test, regardless of their actual psychological condition.

This situation can be improved if the courts instead determine reliability by a deference to the expert's determination of reliability, and only exclude a defendant's hearsay statements to a psychological expert where the opponent affirmatively establishes the statements are unreliable. As a preliminary matter, psychological experts generally consider the defendant's possible motivation to fabricate in their assessment, and the courts should permit the expert to testify to that consideration as a basis of their opinion. Additionally, the traditional limiting instruction provides assurance that the jury will not misuse the hearsay evidence for the truth of the matter asserted, but only for the basis of the expert's opinion. Where the limiting instruction is not sufficient, the court can also permit the expert to testify to "essence" of the statements, or allow counsel to present the evidence through the use of hypotheticals.

Moreover, the statements of a defendant to a psychological expert have critical probative importance in a case concerning a mental defense. A psychological assessment will be based largely upon a clinical interview of the defendant and a consideration of his stated experiences in relation to the facts of the case. Thus, a consideration of the defendant's statements to the expert in relation to the expert's opinion is crucial to the jury's evaluation of the expert's opinion. Without the critical component of the defendant's statements to a psychological expert, the psychological defense is stunted at its foundation.

The hearsay statements of a defendant raising a psychological defense are a very narrow area where special considerations could apply to the relationship between rules governing the use of hearsay and expert testimony. Given the critical probative value of such statements, and the multiple ways that the court can cure concerns of prejudice, the courts should adopt the position that the hearsay statements made by a defendant to a psychological expert in a case concerning a psychological defense are reliable unless the opponent can affirmatively establish that they are unreliable. Absent that showing, the court should presume that the jury is following evidentiary limiting instructions in good faith, and trust the jury with more evidence rather than less when they are tasked with judging the mind of a criminal defendant.