

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA

v.

**ABU AGILA MOHAMMAD
MAS'UD KHEIR AL-MARIMI,**

Defendant.

:
:
:
:
:
:
:
:

Case No. 22-cr-392 (DLF)

**GOVERNMENT'S REPLY IN SUPPORT OF
MOTION TO LIMIT THE TESTIMONY OF REBECCA MURRAY**

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully submits this reply in support of the its Motion to Limit the Testimony of Rebecca Murray [ECF 244].

ARGUMENT

As an initial matter, given the defense's frequent references Rule 702, it should be reiterated that the Rules of Evidence do not apply at a suppression hearing. *See* ECC 244 at 3; Fed. R. Evid. 104(a) (providing that, when "decid[ing] any preliminary question about whether... evidence is admissible," the Court "is not bound by evidence rules, except those on privilege"). The government submits that the principles underlying Rule 702 are applicable the exercise of the Court's discretion to limit unhelpful expert testimony at a suppression hearing, but the rule itself does not apply. Accordingly, regardless of what testimony the Court permits from Ms. Murray at the suppression hearing, the issue must be considered anew when government later moves to exclude her testimony from trial. That motion will be litigated under the stricter standards of Rule 702, Rule 403, and the other Rules of Evidence.

For the same reason, the government is not objecting wholesale to Ms. Murray as a defense witness at this stage. Our request is instead that Ms. Murray's suppression-hearing testimony be limited to those facts or opinions that have more than *de minimis* relevance to the disputed issues. Based on the original expert notice, ECF 244-1, and on the defense's response brief, ECF 268, it remains unclear whether Ms. Murray has any such testimony to offer.

As argued in the government's opening brief, ECF 244, Ms. Murray's proffered testimony consists of observations about prison conditions at times and places that are different from the time and place of the defendant's interview. If there were some grounds to assume uniformity of conditions across time and place, these facts might have marginal relevance. But the defense has provided no basis to make such an inference, and there is every reason to think the opposite. Libya is a geographically larger than the state of Alaska, and in the relevant 2011-2015 timeframe rival groups were competing for territory and conditions changing rapidly. *See, e.g.*, ECF 244-1 (Murray expert notice, describing conditions in Tripoli changing from "jubilant" and "heady" to "increasingly chaotic and dangerous"). It therefore seems doubtful that any expert, no matter how knowledgeable, could use conditions at Prison *A* during Time *X* to draw reliable conclusions about conditions at Prison *B* during Time *Y*. As far as the expert notice reveals, Ms. Murray has not even attempted to do so, making her testimony worth little.

Further, the defense still declines to state their position as to the timing of the defendant's interview.¹ They instead argue that they "have an obligation to account for the full time between

¹ The defense's opening brief on the motion to suppress represented that, after the defendant was apprehended, he was immediately brought to a "small room" where he was "eventually" coerced to give a false confession. ECF 159 at 5-7. This prior statement badly undercuts any argument by the defense that the confession might have taken place materially later in time than the government alleges. *See United States v. McKeon*, 738 F.2d 26, 32 (2d Cir. 1984) (affirming admission, as statement of party opponent, defense counsel's opening statement at prior trial that "involve[d] an assertion of fact inconsistent with similar assertions in a subsequent trial").

the government's proffered time and the alleged confession's mysterious surfacing more than three years later in late 2015." ECF 268 at 8. But if the Court receives credible testimony from a government witness that the interview took place in September 2012, and the defense presents no countervailing evidence, then only one conclusion can follow. There is no reason for the Court to spend its time hearing testimony about events that took place after the unrefuted date of the interview.

Finally, the defense has offered no theory of relevance for the various facts about Libyan society, politics, and military actions that are intertwined with opinions about prison conditions in the expert notice. For example, the section about Al Habda prison states the following:

Further raising tensions was the emergence of the Islamic State ("ISIS") in Sirte, four hours east of Misrata along the coast. ISIS announced its arrival to Libya in January 2015, with a huge attack on the luxury Corinthian Hotel, in the heart of Tripoli's downtown. That year a half-hearted attempt by Misratan armed groups - who were also battling Khalifa Heftar's forces in the Oil Crescent - to eliminate ISIS in their Sirte stronghold failed. A renewed and ultimately successful effort in 2016 to destroy ISIS came largely from Misrata armed groups, but this time backed by the international community, most notably the US, UK and Italy, and fighters from Tripoli and western Libyan cities like Zawiyah and Zwara.

ECF 244-1 at 13. The hostilities described here lack any discernable bearing on the voluntariness of the defendant's confession. To promote judicial economy and ensure that the hearing focuses on the facts at issue, the Court should decline to hear testimony on irrelevant topics like the above.

CONCLUSION

For the above reasons, the court should limit Ms. Murray's expert testimony to only those facts with articulable relevance to the issue of suppression.

Respectfully submitted,

JEANINE FERRIS PIRRO
UNITED STATES ATTORNEY

By: /s/ **Conor Mulroe**
CONOR MULROE (NY Bar No. 5289640)
ERIK M. KENERSON (OH Bar No. 82960)
BRITTANY KEIL (D.C. Bar No. 500054)
Assistant United States Attorneys
JEROME J. TERESINSKI (PA Bar No. 66235)
Special Assistant United States Attorney
601 D Street NW, Washington, D.C. 20530
(202) 740-4595 // Conor.Mulroe@usdoj.gov

KATHLEEN CAMPBELL (MD Bar No. 9812170031)
JENNIFER BURKE (MD Bar No. 9706250061)
Trial Attorneys, Counter Terrorism Section
National Security Division
950 Pennsylvania Avenue NW, Washington, D.C. 20530