

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,)
)
 v.) Case No. 22CR392 (DLF)
)
 ABU AGILA MOHAMMAD)
 MAS'UD KHEIR AL-MARIMI,)
 Defendant.)

**DEFENDANT'S RESPONSE TO GOVERNMENT'S
MOTION TO EXCLUDE THE TESTIMONY OF ANTHONY MAY**

The government has objected to Mr. Al-Marimi's notice of proposed testimony from Anthony May as an expert in explosives. This Court should permit his testimony, as he is qualified to testify in this area and because it will assist the jury in understanding the evidence and facts at issue in this case.

ARGUMENT

**I. Standard on Admissibility Pursuant to Federal Rule of Evidence
702**

Rule 702 of the Federal Rules of Evidence, which governs the admissibility of expert witness testimony, provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), the Supreme Court emphasized that Rule 702 requires district courts to perform a critical “gatekeeping” function concerning the admissibility of expert scientific [and technical] evidence. *See Daubert*, 509 U.S. at 588; *Kumho*, 526 U.S. at 152.

II. Mr. May can testify as an expert to educate the jury about explosives and explosives investigation and does not have to testify in the form of an opinion.

As discussed above, a witness who has been qualified as an expert can testify in the form of an opinion *or otherwise*. In considering this issue, the District Court in the District of New Mexico relied on both the plain language of the rule and the related committee notes in finding that “a party may use an expert to present background information to the jury, which need not be based on personal knowledge or applied to the facts of the case”:

Rule 702 explicitly allows an expert witness to testify “in the form or an opinion *or otherwise*,” thus indicating that experts may do more than offer opinions. The Advisory Committee Note to Rule 702 specifically endorses use of an expert to offer background information to educate the jury: “Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded. The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts.” *See United States v. Mulder*, 273 F.3d 91, 102 (2d Cir. 2001) (expert may present background information to help jury understand issues); 29 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure* § 6263 & n.32 (1997 & Supp. 2012) (experts may describe recognized principles, provide general background, or simply explain other evidence). The Government's criticism that the

testimony of Defendant's expert witnesses would not be specifically applied to the facts of this case is not a basis for exclusion: “[I]t might also be important in some cases for an expert to educate the factfinder about general principles, without ever attempting to apply these principles to the specific facts of the case. For example, experts might instruct the factfinder on the principles of thermodynamics, or bloodclotting, or on how financial markets respond to corporate reports, without ever knowing about or trying to tie their testimony into the facts of the case. The amendment does not alter the venerable practice of using expert testimony to educate the factfinder on general principles.” Rule 702 advisory committee's note to 2000 amendment.

United States v. McCluskey, No. CR 10-2734 JCH, 2013 WL 12334168, at *13–14 (D.N.M. Apr. 29, 2013).

The Court went on to list common examples of expert witnesses whose testimony served to educate the jury about a particular field, rather than express an opinion about the facts of the case, including testimony from law enforcement officers regarding drug trafficking.¹ *Id.*

This reasoning is sound and supported by other logical interpretations of Rule 702: “Thus, while experts may testify as to an opinion, they may also give test results, describe recognized principles of their specialized knowledge, provide

¹ “A law enforcement officer testifying about the modus operandi of drug dealers is a common example of background information presented to educate the jury. 4 Weinstein & Berger, *supra*, § 702.04[1][c], at 702-58. For instance, an expert may be used to testify that a particular amount of a controlled substance indicates trafficking rather than possession for personal use. *United States v. McDonald*, 933 F.2d 1519, 1521 (10th Cir. 1991); *see also United States v. Orr*, 692 F.3d 1079, 1102 (10th Cir. 2012) (Holloway, J., concurring and dissenting) (scientific discourse about fuel testing was proper matter for expert testimony); *United States v. Rodriguez-Felix*, 450 F.3d 1117, 1123-24 (10th Cir. 2006) (concluding that “[e]xpert evaluation of eyewitness testimony—in the abstract” may be admissible in limited circumstances).” *McCluskey* at *14.

general background, or simply explain other evidence." Wright & Miller, *Fed. Prac. & Proc.* § 6263. An expert, therefore, can educate the jury about the subject matter at issue, but leave its members to apply that information to the facts of the case:

[T]he witness could give the jury a lecture or exposition about an expert methodology (a technique or theory) without attempting to apply the technique or theory to the facts.⁷ Federal Rule of Evidence 702 states that a qualified expert may testify in the form of "an opinion or otherwise." The Advisory Committee's Note explains that the drafters included "or otherwise" in the text of Rule 702 to signal that "an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact" or another expert "to apply them to the facts" of the case.

§ 12. Expert witnesses: Overview of necessity, proper subjects for expert testimony, reliability, and qualifications, 1 McCormick On Evid. § 12 (9th ed.)

Mr. May can properly testify to educate the jury about the practice of explosives investigation, the training and education that is standard in the field, and the proper role of an investigator in an explosives case.² He is not required to give an opinion in order to educate the jury. Indeed, the government proposes to do exactly that in its expert notice for Alison Pargeter, which relates the areas of Libya's history that Ms. Pargeter will testify about.³

²To the extent that the government seeks additional detail regarding the information Mr. May will provide the jury, counsel will endeavor to provide the government with additional information in advance of any hearing on this matter and to resolve any objection to the testimony.

³Admittedly, Mr. Al-Marimi's notice referred to "Mr. May's Opinions." The areas noted, however, clearly indicate testimony to educate the jury in the area of explosives, as opposed to specific conclusions about the facts of this case. Notably, the notice for Ms. Pargeter's testimony does the same: referring to her testimony about the history and background of Libya as a "Statement of the Expert's Opinions."

III. Mr. May’s testimony as an expert in the area of explosives and explosives investigation is relevant in a case where an explosive incident is alleged to have occurred and the government has introduced its own explosives expert.

The government also argues that Mr. May’s testimony is not relevant because “no indication how any of the topics referenced in the letter are relevant to this case” has been provided. ECF No. 359 at 5. *Daubert* establishes that Rule 702 focuses on two threshold inquiries: reliability and relevance. *Daubert*, 509 U.S. at 590-591. The “relevance” component requires the court to find that the proposed testimony will “assist the trier of fact to understand the evidence or to determine a fact in issue.” *Id.*

Evidence is relevant if it has *any tendency* to make a factor more or less probable. Fed. R. Evid. 401 (emphasis added); *Daubert*, 509 U.S. at 587 (quoting Rule 401, and describing Rule 401’s standard for relevance as “a liberal one”). And expert testimony must be demonstrated to be “more likely than not that...[the testimony] will help the trier of fact to understand the evidence or to determine a fact in issue.” Fed. R. Evid. 702.

Here Mr. May’s testimony will clearly help the jury to understand the complicated nature of explosives and explosives investigations. His knowledge, skill, experience, training, and education in this field will allow the jury to understand the technical aspects of explosives and an explosive event. It will assist them in understanding how an investigation into an explosives event should be conducted and who should conduct it. And, armed with that information, they can evaluate the government’s evidence in this case to decide whether witnesses and evidence in this

case are reliable and what weight to give them. Mr. May's expertise, therefore, is highly relevant in case that centers around an explosion.

CONCLUSION

Mr. May is an expert in the field of explosives and explosives investigation. His testimony will assist the jury by educating them in this area. For these reasons, it should be admitted at trial.

Respectfully submitted
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