

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| UNITED STATES OF AMERICA, |) | |
| |) | |
| v. |) | No. 1:22-cr-392 (DLF) |
| |) | |
| ABU AGILA MOHAMMAD |) | |
| MAS'UD KHEIR AL-MARIMI, |) | |
| Defendant. |) | |

**MR. AL-MARIMI'S RESPONSE IN OPPOSITION TO THE GOVERNMENT'S
MOTION TO PRECLUDE THE TESTIMONY OF DEFENSE
EXPERT DR. BRIAN CUTLER**

Mr. Al-Marimi provided notice that he may choose to call Dr. Brian Cutler as an expert on false confessions to assist the jury in understanding the facts and the law as applied to statements of an accused. The government has challenged the sufficiency of Dr. Cutler's notice, the reliability and relevance of the scientific data underlying Dr. Cutler's opinions, and the admissibility of Dr. Cutler's testimony under Federal Rule of Evidence 403. As explained below, the Court should deny the government's motion in limine.

- I. To the extent that Dr. Cutler's expert notice was deficient, the defense has cured that deficiency; the remainder of Dr. Cutler's notice provides ample notice to the government of all opinions Dr. Cutler would give, the bases and reasons for those opinions, and Dr. Cutler's qualifications.**

The government first takes issue with Dr. Cutler's notice. As an initial matter, the government points to counsel's inadvertent omission of Dr. Cutler's prior testimony from the expert notice. The defense has since corrected that oversight and attaches that list of prior testimony here. *See* Ex. A; *see also* Fed. R. Crim. P. 16(b)(1)(C)(iv) (providing for supplementation and correction of defense expert

notices).

Next, the government argues that the defense's expert notice of Dr. Cutler's anticipated testimony is merely a list of topics that Dr. Cutler will testify about rather than a fulsome summary of his anticipated opinions. *See* ECF No. 340 at 3-4. Comparing the cases the government cites on this point makes clear that the defense's notice of Dr. Cutler's possible expert testimony is amply sufficient. *See, e.g., United States v. Rogers*, 2006 WL 5249745, at *3 (citing cases whose parentheticals describe as deficient notices where the entirety of the noticed testimony consisted of a list a few lines long); *United States v. Duvall*, 272 F.3d 825, 828 (7th Cir. 2001) (finding deficient notice where entirety of summary of expert's anticipated testimony was five lines long); *United States v. Beavers*, 756 F.3d 1044, 1054 (7th Cir. 2014) (finding insufficient expert notice that included a short, general list of examination topics and one sentence about the expert's anticipated opinion); *United States v. Ulbricht*, 858 F.3d 71, 115 (2d Cir. 2017) (finding deficient expert notice that indicated generally that the defense expert would challenge the government's expert's conclusion without providing opinions offered or explain the method used to arrive at those conclusions).

Here, the notice of Dr. Cutler's possible testimony provides incredibly detailed and thorough information about the factors that Dr. Cutler would describe may impact the veracity of a confession, including coercion, interrogation techniques, individual risk factors like age and disability, memory, factors that may influence and manipulate cognitive decision-making processes, biological factors, and social

psychological factors. *See* ECF No. 340-1 at 2-3. Dr. Cutler's notice further provides detailed information about three different types of false confessions: voluntary, compliant, and internalized confessions. *Id.* at 8-9. The notice also describes in detail three different types of investigative errors that can lead to false confessions: classification errors, coercion errors, and contamination errors. *Id.* at 9-24. The notice describes how Dr. Cutler further concludes that the aftermath of false confessions can be seen through confession persistence, confessions tainting other evidence, and the risk that false confessions are given undue weight in court. *Id.* at 25-26.

If what the government is really concerned about is that Dr. Cutler's notice does not contain any opinion about whether Mr. Al-Marimi's alleged confession in particular was false, the notice itself makes clear that that is not how expert testimony regarding false confessions is used in court. Federal Rule of Evidence 703 prevents any expert witness from opining about the ultimate issue in a criminal case, including whether a particular defendant's alleged confession is true. *See, e.g., Tekoh v. County of Los Angeles*, 75 F.4th 1264, 1266 (9th Cir. 2023) (citing *Reed v. Lieurance*, 863 F.3d 1196, 1209 (9th Cir. 2017)). But it does not prevent qualified experts from providing reliable evidence to the jury that science has demonstrated are factors that may impact the veracity of a confession. *Id.*

That is precisely what Dr. Cutler's expert notice states:

The purpose of expert psychological testimony on false confessions is to educate the factfinder about false confessions in general and the individual and situational risk factors that give rise to them. The purpose is not to evaluate and opine on the veracity of a defendant's confession, for such evaluations are understood to be the purview of factfinders and not expert witnesses.

ECF No. 340-1 at 5. After eliciting the noticed background information, the defense would anticipate asking Dr. Cutler to opine about how a series of particular factors (which other evidence in the case indicates are present in this case) may impact the veracity of an alleged confession. As the defense obtained the testimony that the government intends to offer at trial regarding the circumstances of the alleged confession months after Dr. Cutler's notice was due, the defense is happy to supplement Dr. Cutler's expert notice with specific opinions about that testimony. But, as a general matter, Dr. Cutler's notice clearly lays out the opinions he will offer on what factors can impact the veracity of a confession, how those factors can impact a confession, and the scientific bases for those conclusions. As such, Dr. Cutler's expert notice meets the demands of Federal Rule of Criminal Procedure 16 and Federal Rule of Evidence 702.

II. Dr. Cutler's potential testimony satisfies *Daubert*.

The government next argues that Dr. Cutler's potential testimony is (1) not based on scientifically reliable and valid data and (2) will not assist the trier of fact in assessing a fact at issue. Neither of those assertions is true.

A. Dr. Cutler's potential testimony is based on scientifically reliable and valid data.

Federal Rule of Evidence 702 allows for expert testimony based on "knowledge, skill, experience, training, or education" where "it is more likely than not that [] 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". Fed. R. Evid. 702(a) (emphasis added). In *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), the

Supreme Court held that the Federal Rules of Evidence allow the trial judge to ensure that any expert opinion testimony is not only relevant, but reliable. 509 U.S. at 589-90. The Advisory Committee notes to Rule 702 add that, to be reliable, expert testimony “must be the product of reliable principles and methods that are reliably applied to the facts of the case.” Fed. R. Evid. 702, advisory committee’s note.

In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the Supreme Court ruled that “the test of reliability is flexible” and “the law grants a district court the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination.” *Kumho Tire*, 526 U.S. at 141–42 (1999) (internal quotation marks omitted); *see also Daubert*, 509 U.S. at 593-94 (observing that reliability of expert testimony can be shown by ability to test the scientific knowledge at issue, has been subject to peer review and publication, submission of data about the known or potential rate for error where applicable, and general acceptance of the evidence within the scientific community).

Dr. Cutler’s expert notice is again replete with peer-reviewed references that demonstrate that the opinions therein have been obtained through rigorous application of the scientific method and are generally accepted within the scientific community. *See* ECF No. 340-1 at 27-34. For example, Dr. Cutler’s notice cites a variety of studies that have explicitly relied on the scientific method to obtain the quoted results. *See, e.g.*, ECF No. 340-1 at 7 (discussing studies of low accuracy rates of laypersons’ abilities to discriminate between true and false confessions); ECF No. 340-1 at 10 (describing study finding that “[e]xperienced police investigators fare no

better at discriminating true from false confessions”); ECF No. 340-1 at 18 (discussing study finding that “74 innocent suspects eventually confessed to the misconduct of which they were falsely accused”); ECF No. 340-1 at 22 (describing study finding that “contamination was present in 95% of the false confession cases in his data set”).

The thrust of the government’s argument on this point is a string citation to cases excluding false confession experts from testifying. But, the government’s string cite omits the advancement of caselaw and acceptance within the scientific community regarding false confessions. *See, e.g., United States v. Trabelsi*, 1:06cr89 (D.D.C. June 15, 2023) (reflecting Dr. Cutler’s testimony about false confessions after trial court denied government’s *Daubert* challenge); *O’Connell v. Alejo*, Civil Action No. 18-cv-01359-RBJ, 2020 WL 5748810, at *6 (D. Colo. Sept. 25, 2020) (relying on authority “that the science of psychology in relation to police coercion in interrogations is sufficiently developed to constitute a reliable body of specialized knowledge” and “a peer-reviewed scholarly journal of the American Psychological Association, indicating a broad consensus in the scientific community that false confessions occur, and that approximately 80% of the scientific community agrees”); *Harris v. City of Chicago*, 2017 WL 2436316, at 6-9 (concluding after exhaustive factual analysis and thorough examination of similar cases that challenger had not proven that false confession expert testimony was unreliable where expert explained “there is a well-established empirical field of research in the academic disciplines of psychology, criminology, and sociology on the subject of police interrogation practices, psychological coercion, and false confessions dating back to 1908”).

The government also cites to *United States v. Rodriguez-Soriano*, a case where the trial court precluded Dr. Cutler from testifying about false confession risk factors. 2017 WL 6375970 (E.D.VA. December 11, 2017). But, the government fails to mention that the Fourth Circuit reversed the conviction in *Rodriguez-Soriano* because there was “no substantial independent evidence that, together with the confession itself, proves Rodriguez-Soriano’s guilty beyond a reasonable doubt.” 931 F.3d 281, 288 (4th Cir. 2019). The conviction was vacated. *Id.* at 288.

The defense expects the government to cross-examine Dr. Cutler about questions it may have about the bases for his opinions, but a foundation for cross-examination is the norm in such situations. *See, e.g., Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 595 (1993) (“Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.”); Fed. R. Evid. 702 advisory committee’s note to 2000 amendment (“A review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule. *Daubert* did not work a ‘sea change over federal evidence law,’ and ‘the trial court’s role as gatekeeper is not intended to serve as a replacement for the adversary system.’” (quoting *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi*, 80 F.3d 1074, 1078 (5th Cir. 1996)); *see also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1318 (1995) (“the test under *Daubert* is not the correctness of the expert’s conclusions but the soundness of his methodology”).

The Court should deny the government’s challenge to the scientific reliability

and validity of Dr. Cutler's scientific knowledge about false confessions.

B. Dr. Cutler's testimony will aid the trier of fact in understanding critical factors that can impact the veracity of alleged confessions.

The government next argues that Dr. Cutler's testimony is not relevant and will not assist the trier of fact. ECF No. 340 at 8-10. As the defense has argued in the context of the suppression motion, the circumstances surrounding the alleged confession in this case are extraordinary. After the fall of the Qaddafi government in 2011, people affiliated with the Qaddafi government, including mid-level government officials—were “being picked up or disappeared”. 2/11/26 PM Tr. at 87-88. The United Nations reported that Mr. Al-Marimi, along with five others, had been captured by armed groups in September 2011 and taken to Misrata. *Id.* at 99; *see also* U.N. Support Mission in Libya and Off. of the U.N. High Comm'r for Hum. Rts., *Rep. on the Trial of 37 Former Members of the Qadhafi Regime* at 2 (Case 630/2012) at 25 & n.25 (Feb. 21, 2017) (“February 2017 U.N. Report”), <https://unsmil.unmissions.org/sites/default/files/regime-trial-report-english.pdf>. The United Nations was unable to even locate let alone visit Mr. Al-Marimi and the five others until they were transferred to Al-Jawiyah—a new prison in Misrata—in May 2014. *Id.*

The government's own witness testified to the same. Specifically, Jamal testified that: 1) Mr. Al-Marimi was held with several other men in an underground room that was not designed to imprison human beings, Second Day 9:20 AM Tr. at 16, 29; 2) the men were kept in this room all of their time in this facility, First Day 9:48 AM Tr. at 58; 3) the only outside light came in through small windows at the top

of the far wall in the room, First Day 9:48 AM Tr. at 59; 4) the men's incarceration in this facility was so extraordinary that they could not be taken to a hospital if needed because of a desire to keep the men's location secret, Second Day 9:20 AM Tr. at 32; and 5) these men were imprisoned by armed militia members consistent with a military artillery unit, Second Day 9:20 AM Tr. at 20-21. Further, Jamal took precautions to ensure that no one saw his alleged interrogation of these men, including allowing the men to have a lawyer present, which Jamal found had a "negative effect" on his interrogations. Second Day 11:17 AM Tr. at 5-6, 30-31.

Having Dr. Cutler testify about how these factors may have impacted the veracity of an alleged confession is not only relevant, but critical to help the jury understand information that is not within a layperson's common experience. *See, e.g., Tekoh*, 75 F.4th at 1266 ("despite the apparent obviousness of the coercion, at the second trial, the defendants repeatedly disputed that Vega used coercive tactics. And the expert's proposed testimony was not simply about false confessions, but the coercive questioning tactics that lead to them. Dr. Blandón-Gitlin's testimony would help the jury better understand coerced confessions, including why just asking questions can be coercive, issues that are beyond a layperson's understanding and not necessarily obvious, even in these circumstances"); *see also* ECF No. 340-1 at 5-8 (describing scientific evidence demonstrating that "juries—when left to their own devices—have difficulty evaluating confessions (as evidenced in the exoneration cases in which false confessions led to guilty verdicts) is consistent with the more general phenomenon that people do not fully understand social and cognitive psychological

processes that affect our everyday thinking and behavior”).

III. The scope of Dr. Cutler’s expert evidence does not violate Federal Rule of Evidence 403.

Lastly, the government argues that Dr. Cutler’s expert evidence would mislead the jury, be time-consuming, and create a danger of unfair prejudice. *See* ECF No. 340 at 10-12. But, here, by presenting evidence of the alleged confession from the sole witness who has conveniently lost not one but two recordings he testified he made of Mr. Al-Marimi’s confession and simultaneously arguing that the extraordinary circumstances in which Mr. Al-Marimi was placed during the alleged interrogation had no effect on the veracity of the alleged confession, the government has created a need for the defense to combat the government’s presentation with Dr. Cutler’s testimony.

For example, Jamal, contrary to his normal interrogation practice, did not let anyone in the room during his alleged interrogation of Mr. Al-Marimi. No one has yet been able to find any of the men allegedly interrogated with Mr. Al-Marimi to challenge the veracity of Jamal’s claims about the circumstances of their interrogations. And the government waited years after learning of Mr. Al-Marimi’s alleged confession in January 2016 before bringing charges against Mr. Al-Marimi, during which time the head of the secret facility in which Mr. Al-Marimi was imprisoned was killed and can no longer be called to testify about how he ran his secret prison where Mr. Al-Marimi and others could not even be found by neutral, international authorities. Such circumstances cry out for a reliable, scientific explanation of how Mr. Al-Marimi’s alleged confession may have been impacted.

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