

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

UNITED STATES OF AMERICA

v.

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

Defendant.

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Case No. 22-cr-392 (DLF)

**GOVERNMENT'S REPLY IN SUPPORT OF MOTION TO PRECLUDE THE
TESTIMONY OF BRIAN CUTLER**

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 its motion to preclude the testimony of Brian Cutler, ECF 340. For the reasons that follow, in addition to those in ECF 340, the Court should preclude Cutler's testimony.

ARGUMENT

A. Cutler's expert notice does not provide notice of the opinions the defendant claims he will offer.

Federal Rule of Criminal Procedure 16(b)(1)(C) mandates that an expert disclosure by the defense include, among other things, "a *complete statement* of *all* opinions that the defendant will elicit from the witness in the defendant's case-in-chief" (emphasis added). This requirement was added as part of the 2022 amendment to the Rule, imposing a higher standard than the previous version that required only "a written summary of any [expert] testimony that the defendant intends to use." Fed. R. Crim. Pro. 16(b)(1)(C) (2021 ver.). The express purpose of the amendment was to "ensure that parties receive adequate information about the content of the witness's testimony and potential impeachment." Fed. R. Crim. Pro. 16, Notes to 2022 Amendments. Although this statement need not be "verbatim," it must be "complete." *Id.*

Cutler's notice is deficient on its face for the reasons stated in the government's motion. Rather than curing those defects, the defendant's response has now added a new area that Cutler will allegedly opine on: the circumstances surrounding the statement, *i.e.*, the political situation in Libya following the fall of the Qaddafi regime in 2011. *See* ECF 389 at 8-10. Nowhere in the notice provided by the defense does Cutler lay out what his opinions are regarding how the conditions in Libya or the defendant's specific conditions of confinement "may have impacted the veracity of an alleged confession." *Id.* at 9. The defense does not proffer what that opinion is in its brief or anywhere else. Neither the notice nor the brief makes even a passing attempt to connect whatever that opinion may be to any scientific research on false confessions, or whether Cutler possesses the requisite expertise to render such an opinion. The Court should preclude any such testimony, as there has been no notice of what that testimony will consist of, let alone a "complete" statement of that testimony as required by Rule 16(b)(1)(C).

The defense attempts to rescue the remainder of the Cutler notice by arguing that it contains "incredibly detailed and thorough information about the factors that Dr. Cutler would describe may impact the veracity of a confession," *See* ECF 389 at 2-3. While the notice is certainly lengthy, coming in at 26 pages before citations, nowhere in those 26 pages does Cutler tie the general topic descriptions he cites, or the purported research he relies on, to any facts of this case.

The notice is essentially a list of topics untethered to the facts of this case. At no point in the notice does the defense state, for example, whether Cutler would opine that there was a "classification error in investigation" under the facts of this case. *See* ECF 340-1 at 9. Cutler professes to provide information that "Youth is a well-established risk factor for false confession," but does not specify how that opinion translates to the defendant, who was at least in his sixties at the time of the statement. *See id.* at 10. Similarly, Cutler notes that "[i]ndividuals with mental

illnesses are greatly overrepresented among false confessors,” but offers no opinion as to whether the defendant was suffering from a mental illness at the time of the statement or how any such illness may have contributed to his susceptibility to giving a false confession. *Id.* The pattern repeats with the alleged susceptibility to false confessions of those with developmental disabilities, fatigue, hunger, intoxication, sleep deprivation, the use of physical coercion or the “Reid Technique.” *Id.* at 11-14. Those are solely examples: The notice is wholly deficient of *any* statement assessing whether any of the professed risk factors for a false confession were present in this case, and if they were, how those factors are treated in the scientific literature. There is no indication of whether Cutler reviewed the defendant’s statement to determine whether any of the risk factors are manifested therein, or whether he has reviewed *anything* specific to this case. Without any such statement of Cutler’s opinions, let alone a “complete” one, Rule 16(b)(1)(C), defendant’s notice is deficient, and Cutler’s testimony should be precluded.¹

B. The case law does not support the admission of Cutler’s proposed testimony under *Daubert* or Rule 702.

The defendant does not point to a single case standing for the proposition that background information on alleged false confessions, untethered from the facts of the specific case at issue, pass the Court’s gatekeeping functions under Fed. R. Evid. 702 and *Daubert*. Indeed, a cursory

¹ The defense claims it “obtained” the testimony that the government intends to offer at trial regarding the circumstances of the statement after notice was due. ECF 389 at 4. But the defendant had been provided extensive discovery regarding the Libyan Police Officer’s description of the circumstances under which he took the defendant’s statement, as well as an opportunity to meet with that police officer themselves (not to mention the statement itself and three English translations thereof), well before the due date for expert notice. The defense also had access to another of its proffered experts, Rebecca Murray, on whose description of Libya circa 2011 the defense partially relies in its response, prior to the due date for expert notice. The defense also could have supplemented, or requested additional time to supplement, Cutler’s notice at any point after the hearing on his motion to suppress statements. The defense had the opportunity to draft a sufficient notice; it simply chose not to.

reading of Rule 702 establishes that the type of untethered opinions the defendant offers here are not admissible. To admit testimony under that rule, the Court must find that the expert's knowledge "will help the trier of fact to *understand the evidence* or to *determine a fact at issue*," and that "the expert's opinion reflects a reliable application of the principles and methods *to the facts of the case*." Rule 702(a) & (d) (emphasis added). Without any link between the alleged science of false confessions and the facts of this case, Cutler's testimony must be excluded before the Court even reaches *Daubert*.² See *United States v. Redlightning*, 624 F.3d 1090, 1111 (9th Cir. 2010) (upholding exclusion of false-confessions expert testimony where "nothing in the record, including the FBI reports of the October 2 interview and the testimony at the pretrial suppression hearing, showed that any coercive tactic that may lead to a false confession was used when the FBI questioned Redlightning").

Cutler's proposed testimony fares no better under a *Daubert* analysis. The defendant cites, without specificity, to the docket in *United States v. Trabelsi*, No. 06-cr-89 (RDM), in support of his argument that case law now permits testimony regarding alleged false confessions. ECF 389 at 6 (claiming that the *Trabelsi* docket reflected that Judge Moss admitted "Cutler's testimony about false confessions after trial court denied government's [sic] *Daubert* challenge"). It is correct that Cutler was permitted to testify in the *Trabelsi* case, but that testimony was significantly limited after the government's *Daubert* challenge. For example, Judge Moss found that much of Cutler's proposed testimony lacked "sufficient scientific basis that has any bearing on this case." See

² To be sure, Rule 702 leaves room for an expert "to 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." Fed. R. Evid. 702, Advisory Committee Note. But the proponent must still demonstrate the relevance of the testimony to the case, and Cutler's notice, drawn from analysis of techniques purportedly associated with U.S. (not Libyan) law enforcement and silent on the circumstances under which this particular statement was taken, does not do so.

Trabelsi, No. 06-cr-89, June 15, 2023, Trial Tr. (hereinafter “*Trabelsi Tr.*”), Doc. 663, at 24. Judge Moss specifically declined to find that Cutler was qualified as an expert on interrogation tactics, an area that his notice in this case devotes significant attention to. *Compare id.* at 25 with, *e.g.*, ECF 340-1 at 19-22. Similarly, Judge Moss found no scientific support for Cutler’s opinion that the length of an interrogation can be a contributing factor to a false confession, as Cutler admitted that he could not show causation. *Trabelsi Tr.* at 26. Length of interrogation, along with the aforementioned “tactics,” are again listed as a topic in the notice provided by the defense in this case. *See* ECF 340-1 at 12. Judge Moss precluded a host of Cutler’s proffered opinions where those opinions could not be connected to the facts of the case. For example, Cutler’s opinions on physical means of interrogation, sensory deprivation and isolation, and any relationship between promises and false confessions, were excluded. *See Trabelsi Tr.* at 27-31. All of these topics are covered in the defendant’s notice. *See, e.g.*, ECF 340-1 at 13 (physical abuse), 12 (isolation), 16 (promises of leniency). Judge Moss also precluded any discussion by Cutler regarding interrogation techniques in Belgium – where the interview at issue in that case took place – because Cutler lacked any knowledge of Belgian procedures or training. *See Trabelsi Tr.* at 25. Cutler’s notice indicates no familiarity with Libyan procedures or training here. Ultimately, Judge Moss stated, “I think it’s going to be a fairly limited examination, quite frankly. I think it might be well appropriate to exclude it entirely, but I do recognize that when in doubt I should decide things in favor of the defense and give you a little bit of leeway, and so that is what I’m going to do.” *Trabelsi Tr.* at 31. Not exactly a ringing endorsement. The resulting examination was indeed quite limited, taking up only 34 double-spaced pages of transcript – including objections – for direct, cross, and redirect.³

³ *Trabelsi*’s substantive direct examination of Cutler – that which occurred after Judge Moss qualified him as an expert – filled only 11 transcript pages. *See Trabelsi Tr.* at 44-55.

The defendant's *notice* in this case, by contrast, is 34 pages, single-spaced (including list of citations).

Judge Moss's rulings took place prior to the 2023 amendments to Rule 702, and they carry even greater weight following those changes. Rule 702(d) was amended in December 2023 specifically to "emphasize that each expert opinion must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology. Judicial gatekeeping is essential because just as jurors may be unable, due to lack of specialized knowledge, to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion, jurors may also lack the specialized knowledge to determine whether the conclusions of an expert go beyond what the expert's basis and methodology may reliably support." Rule 702, Committee Notes on Rules—2023 Amendment. That gatekeeping function is especially important in light of a 26-page notice (excluding the list of citations) that provides no insight, either express or implied, regarding the facts of this case.

The out-of-district cases cited by the defense (ECF 389 at 6), in support of its claim that false-confession science has progressed, involved much more robust analysis by the proffered experts than that offered by the defense here. For example, the expert's report at issue in *O'Connell v. Alejo*, 2020 WL 5748810 (D. Colo. 2020) involved a 12-page analysis by the proffered expert about how the interrogations at issue in that case interacted with the background principles of the purported science of false confession analysis. *See* Dkt. No. 18-cv-01359-RBJ (D. Colo.), Doc. 63-4, at 34-46. Similarly, the report at issue in *Harris v. City of Chicago*, 2017 WL 2436316 (N.D. Ill. 2017) involved an 18-page analysis of how the interrogations at issue in that case interacted with the background principles of the purported science of false confession analysis. *See* Dkt. No. 1:14-cv-04391, Doc. 230-1, at 17-35. The Court has no similar proffer of Cutler's analysis to even

subject to the *Daubert* analysis. Cutler’s notice is much more analogous to the expert opinion that was properly excluded in *Redlightning*—there, like here, the defendant could point to nothing tying the expert’s opinion to the facts of the case. *See* 624 F.3d at 1111 (“It was thereafter not unreasonable for the district court to exclude Dr. Leo’s proposed expert testimony, particularly where the record affirmatively showed no probability that any technique had been used in interrogation that could support Dr. Leo’s theory of a false confession, and where Redlightning’s confession followed soon after the start of the polygraph examination questioning.”).

Additionally, district courts throughout the country have continued to rule that false-confession testimony is inadmissible, including in cases decided contemporaneously to or after those cited by the defendant above. In *United States v. Begay*, 497 F. Supp. 3d 1025, 1072-79 (D.N.M. 2020), the court conducted an exhaustive analysis of the sources cited by the proffered false-confessions expert, in addition to studies calling the science into question, and concluded, “even limited expert testimony about false confessions’ prevalence and contributing factors -- that does not opine as to the veracity of particular defendant’s confession -- may not satisfy *Daubert*, because insubstantial empirical data supports false-confession theory and false-confession theory is prone to an unacceptably high rate of error.” *Id.* at 1077. In 2024, a District Court in Colorado cited *Begay*’s “exhaustive scrutiny of the evidence purporting to support the false-confession theory,” and noted that the proponent in that case pointed to “no new empirical data that would reliably support the false-confession theory” in excluding proposed expert testimony under *Daubert*. *See Austin v. Brown*, 2024 WL 1602968 at *16 (D. Colo. 2024). *See also United States v. Sammons*, 535 F. Supp. 3d 697 (S.D. Oh. 2021) (excluding purported false confession expert under *Daubert* and Rules 702 and 403 after a hearing).

The notice provided by the defendant does not meet the *Daubert* standard and should be excluded.

C. Cutler’s proposed testimony is inadmissible under Rules 702(a) and 403.

To be admissible, expert testimony must rise above the level of bare relevance: it must be “more likely than not” to “help the trier of fact to understand the evidence or to determine a fact in issue.” Fed. R. Evid 702(a). Any help that testimony provides to the factfinder must separately be based on the proffered “expert’s scientific, technical, or other specialized knowledge.” *Id.* As demonstrated above and in the government’s opening brief, Cutler’s proposed testimony is not relevant to this case because neither he nor the defendant has provided any indication of how any of the alleged false confession factors implicated in his expert notice are present in this case.

Even if the Cutler’s proposed testimony had some marginal probative value, the defense response demonstrates that the proposed testimony fails the Fed. R. Evid. 403 balancing test. According to the defendant, Cutler’s testimony about the danger of false confessions is needed because the Libyan Police Officer took the statement on his own, because the government allegedly took too long to charge him, because the person who ran the facility has died, and because the defense cannot locate others who were held at the same facility. These circumstances, he claims, “cry out for a reliable, scientific explanation of how Mr. Al-Marimi’s alleged confession may have been impacted.” ECF 389 at 10. This argument demonstrates precisely why, even if the testimony passes *Daubert* and Rule 702, it should be excluded under Rule 403: *nothing in the Cutler notice speaks to number of interviewers, availability of witnesses, or timing of charging documents.* He has proffered no “scientific, technical, or other specialized knowledge” in these areas, Rule 702(a), and even if he had, the defense has not proffered how any such expertise applies to the facts that it claims “cry out” for an explanation. Ironically, any such explanation offered by Cutler is likely to be unreliable, given his lack of expertise in those areas. But in light of Cutler’s

academic credentials, his testimony has an outsize possibility of unfair prejudice, confusing the issues, and misleading the jury. *See Parsi v. Daioleslam*, 852 F. Supp.2d 82, 86 (D.D.C. 2012) (“[B]ecause ‘[e]xpert evidence can be both powerful and quite misleading,’ a court has greater leeway in excluding expert testimony under Rule 403 than it does lay witness testimony.”) (quoting *Daubert*, 509 U.S. at 595 (second alteration in original)).

Moreover, Cutler’s testimony runs a serious risk of usurping the jury’s function in deciding the credibility of the defendant’s confession. *See United States v. Benally*, 541 F.3d 990, 995 (10th Cir. 2008); *United States v. Rodriguez-Soriano*, 2017 WL 6375970 at *3 (E.D. Va. 2017).⁴ That risk is even greater where, like here, the proposed expert would “only have testified generally about the conditions known to cause false confessions, which would have included a discussion about the effects of conditions not at issue here, such as torture, in order to establish “the counterintuitive notion that false confessions do in fact occur.” *Benally*, 541 F.3d at 995.

The risk of jury usurpation is further compounded by the defense response, which indicates a need to use Cutler’s testimony to attack portions of the Libyan Police Officer’s credibility that go beyond Cutler’s proffered expertise. *See* ECF 389 at 10. As the *Begay* court noted, “[f]alse-confession theory’s methodological problems also increase the manner in which false-confession expert testimony invades the jury’s province, because false-confession theorists may opine, even

⁴ The defendant complains that the government did not note that *Rodriguez-Soriano* was overturned on appeal on other grounds. *See* ECF 389 at 7. The appellate court overturned the verdict on sufficiency grounds, and as a result, the Fourth Circuit specifically declined to reach the question of whether Cutler’s testimony was improperly excluded. *See* 931 F.3d 281, 290-91 (4th Cir. 2019). Regardless, the cases cited in *Rodriguez-Soriano* firmly establish the long line of court decisions holding that an expert, including a false-confession expert, may not usurp the jury’s function in determining the credibility of a defendant’s statement. That risk is compounded here where the defense intends to use Cutler to respond to the Libyan Police Officer’s testimony in a way that is not supported by Cutler’s qualification and analysis, even if one takes those qualifications and that analysis at face value.

indirectly, about something on which they have little more authority than the jury.” 497 F. Supp. 3d at 1077. Here, similar to *Begay*, the pattern jury instructions inform the jurors, “You are the sole judges of the credibility of the witnesses. You alone determine whether to believe and witness and the extent to which a witness should be believed.” Criminal Jury Instructions for the District of Columbia, Instruction 2.200, Credibility of Witnesses. In evaluating the defendant’s statement, jurors will be instructed to consider, among other things, “whether [the defendant] made the statement voluntarily and understood what he was saying. You may consider whether he was forced, threatened, or pressured, either physically or psychologically, and whether he was promised any reward of benefit for making the statement.” *Id.*, Instruction 2.305, Statements of the Defendant – Substantive Evidence. Cutler’s testimony should thus be excluded because “[i]t is the jury’s exclusive role to determine a witness’s credibility and assign weight to a defendant’s confession. *Begay*, 497 F. Supp. At 1077.

As Judge Walton has held, in the context of finding that proposed testimony regarding eyewitness identification was excludable under Rule 403,

The jurors will be the ultimate arbiter of the facts, and in this role, they must weigh the credibility of each witness. Permitting Dr. Bjork to testify on even the general principles of memory and cognition may cause jurors to surrender their own common sense in weighing the testimony, and instead cause them to rely too heavily upon Dr. Bjork’s testimony. This would amount to an invasion of the jury’s province, as the collective wisdom of the jurors, aided by the trial process itself, will more than adequately provide the jury with the means to assess the credibility and veracity of the witnesses, and testimony concerning scientific principles regarding memory and cognition would only serve to confuse those determinations.

United States v. Libby, 461 F. Supp. 2d 3, 18 (D.D.C. 2006) (cleaned up). Those risks are heightened here, where the defense has proffered no relation between the facts of this case and Cutler’s proffered expertise, and where the defense wants to use that expertise to counter holes it perceives in the government’s case that Cutler’s proffered expertise sheds no light on.

CONCLUSION

The defendant will undoubtedly vigorously challenge the government's evidence regarding the statement he provided in 2012, but he must do so in a way that complies with Federal Rules of Evidence 702, 403, and *Daubert* and its progeny. Because Cutler's proposed testimony satisfies none of the foregoing requirements, it must be precluded.

Respectfully submitted,

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