

**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)

RESPONSE TO DEFENDANT'S UPDATED EXPERT NOTICE OF ANTHONY MAY

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully moves this Court to exclude portions of the proposed expert testimony of Anthony May at trial. The Court should preclude portions of May's testimony because his expert notice is not helpful and irrelevant, and/or the notice is inadequate.

ARGUMENT

The defendant filed an updated notice outlining the various opinions May will present. The defense has listed the following ten opinions:

1. It is misleading to suggest that there is no formal training in the field of explosives for a bomb scene investigator. *See* ECF at 4.
2. An explanation of how evidence should be collected and maintained. *Id.* at 4-5.
3. An investigator can reasonably draw conclusions about the location of the seat of the blast, the type of explosives contained in the device, the direction of the shock wave created by the explosions, and a reconstruction of the device if warranted. *Id.* at 6.
4. The core components of an explosive device. *Id.*
5. An explanation of high vs. low explosives. *Id.* at 7.
6. An explanation of how to determine if an event is a mechanical or explosive event. *Id.* at 7-8.

7. In examining the explosion of a large aircraft, where the physical evidence was either not recovered or significantly damaged recovered over the course of many miles, it is unreasonable for an investigator to claim that he/she can identify the seat of the blast within centimeters. *Id.* at 9.
8. RDX and PETN are chemical explosives, and if they are found in the same explosion, it is probable that the explosive chemical used was Semtex. *Id.* at 10.
9. An investigator's testimony should be limited to what the physical evidence demonstrates. *Id.*
10. The testing that took place at Indian Head, Maryland and Atlantic City, New Jersey would not reliably replicate the alleged conditions of the Pan Am 103 incident. *Id.* at 11.¹

As a preliminary matter the government agrees that the notice given for Opinion 8 is sufficient. The government also agrees that the testimony is relevant. Unfortunately, the arguments as to the admissibility of the remaining portions of May's testimony again fall short.

The first opinion, that "it is misleading to suggest that there is no formal training in the field of explosives for a bomb scene investigator," is an improper opinion under Rules 403 and 702. When Feraday was asked about training, it was in the context of what training he had done back in the late 1950s.

Q. Okay. And I'm going to skip ahead a little bit and then we'll come back to that, but you indicated that eventually you got a certificate in applied physics?

A. Sorry? I then...?

¹ This is a new opinion that was not in the original notice. The government has not had enough time to evaluate the opinion as to its reliability or admissibility and requests two additional weeks to respond to this specific opinion.

Q. You eventually got a certificate in applied physics; correct?

A. Yes. Sorry, yes. That was after the RAF.

Q. Okay. And have you had any additional training or certificates since that time?

A. Not formally. Depends what you mean by "additional training." There is no formal training on improvised explosive devices.

Q. Okay. So no sort of yearly educational requirement in your profession?

A. No.

Q. Okay. And is the last formal education that you received then when you received that certificate?

A. Yes.

Feraday Transcript, Day 1, p. 42-43. Feraday does say he received “formal” training when looked at in the context of the entire exchange. The defense states that May will testify that training should “include textbooks or materials, and classroom instruction, as well as practical field experience. This training can be obtained from various sources, including military experience, or law enforcement agencies.” Feraday’s background includes classroom instruction, Royal Air Force experience and practical field experience. It is clear that that he has the type of training and experience May references. May’s opinion about what training an investigator “should” have is therefore only relevant in that it confirms Feraday’s training met that standard. What is *not* relevant, and should be excluded on that ground and under Rule 403, is May’s opinion that an out-of-context line from Feraday’s testimony is “misleading.” May can testify about what training exists, and defense counsel can argue that May’s testimony contradicts Feraday, but for one expert to accuse another expert of “misleading” the jury would have no probative value while being unfairly prejudicial to the government – especially because, as shown above, Feraday was not

saying that no formal training exists whatsoever, but that there are not the type of official continuing-education that exists in some other fields. Therefore, even if May's opinion about "appropriate" training is allowed, May should not be permitted to frame anything as "misleading."

Further, May's first opinion is irrelevant to the case and any probative value it might have is substantially outweighed by the danger of confusing and misleading the jury about the issues in this case by focusing on what "formal" means. Additionally, Rule 702 states:

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 the proponent demonstrates to the court that it is more likely than not that:

- (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's opinion reflects a reliable application of the principles and methods to the facts of the case.

Fed. Rule Evid. 702. Opinion 1 does not address a fact in issue, so it does not meet the requirements under 702. "The 'help the trier of fact' language of Rule 702 is a relevance test for expert testimony." *Etherton v. Owners Ins. Co.*, 829 F.3d 1209, 1217 (10th Cir. 2016). Expert testimony must "fit"—it must relate to a disputed issue in the case, if it does not, it is not relevant. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591-92 (1993). While experts can certainly contradict or comment on another expert's conclusions, this particular opinion is not one that is relevant. An explanation of "formal training" is not a fact at issue. May's first opinion must be excluded.

There is no specific or “complete statement” as to the remaining opinions (Opinion 2-7, and 9-10) of what the expert might say, as required by Rule 16(b)(1)(C). If May intends to limit his testimony to the conclusory statements as written, then his testimony should be excluded because it is not helpful to the jury and irrelevant. If he plans to say more or elaborate on any of these points, then this notice is clearly insufficient.

For example, Opinion 2 includes a lengthy description of how and where evidence is collected. It includes language such as:

For example, any explosives, explosive residue, IED components, or swabs to be subject to laboratory analysis should be stored in an anti-static bag, which should then be placed in a protective metal container. Other items, such as clothing or other items damaged by the explosion (to show explosive effects), can be stored in a paper bag or box.

It is not clear if May is going to say that was or was not done in this case, or how the procedures that were done affected the findings in this case. The government should be given notice if the witness is going to comment on what Feraday and his team did in the Pan Am case.

Opinions 3, 4, 5 and 6 are similarly vague. Discussions of the core components of a timing device, for example, are not relevant without context. Is May going to talk about the items recovered in this case? Or whether the items could or could not have formed an explosive device? His testimony of how to determine whether an event is a mechanical or explosive event is equally vague and confusing. Is May going to say that the explosion on Pan Am 103 could have been a mechanical event? Is he going to say that Feraday did not consider certain factors? If not, that explanation is not relevant.

Opinion 7 states that “it is unreasonable for an investigator to claim that he/she can identify the seat of the blast within centimeters;” it is not clear if May will say that Feraday’s opinions as

to the location of the seat of the blast are unreasonable. Again, these opinions lack the requisite specificity that would make them relevant to the facts in this case. It should be excluded.

In the Government's reply (ECF 396) the government cited to what was then Opinion 12 and is here Opinion 9:

An investigator in an explosives event should maintain an unbiased approach when examining the evidence and the effect it may have on his or her conclusions and should limit his/her post-blast investigation to the physical evidence that is available and the analysis of that physical evidence.

As there has been no additional context provided, the government's arguments against admissibility remain the same. This is an overbroad statement that one would assume would be fleshed out by the expert. What is an unbiased approach? Is the expert going to opine that the forensic investigator was biased? Is the expert going to opine that certain procedures were not done according to industry standards? Will the expert opine that Feraday did not limit his investigation to the physical evidence? The opinion lacks the context that makes it relevant.

Finally, the defense states that May "could respond to any expert the government calls regarding forensic explosives analysis and their methodology to satisfy Daubert." ECF at 3. This provision seems to act as a catch-all, which goes against the spirit and letter of Rule 16, which requires a "complete statement" of the opinions the defendant will elicit from the witness. If May is going to be responsive to other witnesses/evidence, the government should be learning of this now. The disclosure requirement "is intended to minimize surprise that often results from unexpected expert testimony, reduce the need for continuances, and to provide the opponent with a fair opportunity to test the merit of the expert's testimony through focused cross-examination." Fed. R. Crim. Pro. 16, Notes to 1993 Amendment.

Almost every one of these 10 Opinions suffers from the same problem. They are not specific enough to be relevant and helpful, and if there is some relevance, the notice is insufficient as to why.

CONCLUSION

For the foregoing reasons, the Court should GRANT the government's motion to exclude the majority of the testimony of Anthony May.

Respectfully submitted,

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