

**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-MARIAMI,	)	
Defendant.	)	

**DEFENDANT'S MOTION IN LIMINE TO LIMIT OR EXCLUDE THE
TESTIMONY OF DR. YU-LUNG CHIU**

The government has provided notice of its intent to call Dr. Yu-Lung Chiu as an expert witness in the field of metallurgy. For the reasons set forth below, Mr. Al-Marimi, through counsel, moves this Court to limit or exclude Dr. Chiu's testimony. The testimony as anticipated would violate the Confrontation Clause of the Sixth Amendment and exceed the bounds of this witness's personal knowledge. Additionally, because Dr. Chiu has never previously testified as an expert witness in any proceeding, the defense respectfully reserves the right to voir dire him on his qualifications and the basis for his opinions prior to any ruling on his qualification.

BACKGROUND

Following a related trial in this matter in 2000, a question arose regarding the provenance of a key piece of evidence, PT/35(b), a fragment of printed circuit board alleged to have been found in the disaster wreckage and involved in the suspected detonation device. Specifically, the material makeup, which, in part, led to determination of the printed circuit board's origin was questioned. In order to test

that contention, Dr. Wright was commissioned to conduct scientific analysis of the material composition of the fragment in question and to compare those findings against control samples.

Dr. Wright conducted initial examinations using X-ray Fluorescent (XRF) techniques and authored a report reflecting those findings. According to the record, Dr. Wright concluded that different equipment might yield more detailed results and approached Dr. Chiu to assist with further testing using different technology, including, but not limited to, an Environmental Scanning Electron Microscope (ESEM). Subsequent testing was conducted, and Dr. Wright authored a second report and supplement reflecting the processes and findings from that testing as well. Law enforcement was present during the subsequent testing, accompanying the evidence (PT/35(b) and control samples) brought for examination.

Dr. Chiu was present for some, but not all, of the subsequent examinations. For those examinations at which he was not personally present, he was in a room with law enforcement just outside the room containing the ESEM, and the ESEM was operated by another individual at Dr. Chiu's or Dr. Wright's direction. All final reports — including those reflecting findings from both the initial and subsequent testing — were authored and signed by Dr. Wright. The government has not noticed Dr. Wright as a witness, and upon information and belief, Dr. Wright is unavailable to testify. The government has provided an expert disclosure for Dr. Chiu.¹

¹ As of the filing of this motion, the government has stated that it does not intend to call Dr. Chiu in its case-in-chief.

Appended to its disclosure, the government attached Dr. Chiu's curriculum vitae, two statements of Dr. Chiu, and the reports of Dr. Wright.

ARGUMENT

I. THE TESTIMONY OF DR. CHIU IS LIMITED BY THE CONFRONTATION CLAUSE AND MAY NOT SERVE AS A VEHICLE FOR THE CONCLUSIONS OF DR. WRIGHT

A. Dr. Wright's Final Reports Are Testimonial Statements Subject to the Confrontation Clause

The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court held that testimonial out-of-court statements may not be admitted against a criminal defendant unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination. Forensic reports prepared for use in a criminal prosecution are testimonial. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

The reports at issue here, including the initial report, the second report, and the supplement, were each authored and signed by Dr. Wright. They reflect his conclusions drawn from scientific testing conducted in a law enforcement context, with law enforcement present during examinations. These are not routine bench notes or interim calculations; they are the final conclusions of scientific testing, reduced to formal reports and signed by the analyst who formed those conclusions. Under *Davis v. Washington*, 547 U.S. 813, 819, 822 (2006), such formal written statements made in an investigative context are testimonial. Dr. Wright is the witness the Confrontation Clause requires the government to produce. Because he is

unavailable, and Mr. Al-Marimi has had no prior opportunity for cross-examination, his reports cannot be admitted (directly or indirectly) through Dr. Chiu.

B. Surrogate Testimony Regarding Dr. Wright's Reports Violates *Bullcoming*

In *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), the Supreme Court held that the Confrontation Clause is not satisfied by presenting a surrogate analyst, or someone familiar with lab procedures but who did not perform or certify the analysis at issue, as a substitute for the analyst who actually conducted and signed the forensic report. The Court rejected this approach as constitutionally inadequate. *Id.* at 661–62.

Here, all final reports were authored and signed by Dr. Wright, not Dr. Chiu. Based on the information provided, Dr. Chiu's role was assistive: he was brought in to perform supplemental testing at Dr. Wright's request, and the conclusions drawn from that testing were reduced to reports signed by Dr. Wright alone. Dr. Chiu is precisely the kind of surrogate witness *Bullcoming* prohibits. To the extent the government intends to introduce, adopt, or rely upon Dr. Wright's reports or conclusions through Dr. Chiu's testimony, such testimony must be excluded.

C. Rule 703 Does Not Rescue the Government's Approach

The government may argue that even if Dr. Wright's reports are not themselves admissible, Dr. Chiu may rely upon them as the basis for his own expert opinion under Federal Rule of Evidence 703. That argument fails for several reasons.

First, Rule 703 contemplates that an expert may consider otherwise inadmissible information in forming an opinion — but it does not render that underlying information admissible simply because the opinion itself is admitted. Fed. R. Evid. 703 advisory committee notes (2000). The Rule permits disclosure of the basis to the jury only when its probative value in helping the jury evaluate the opinion substantially outweighs its prejudicial effect. This standard disfavors disclosure.

Second, the prejudicial effect here is substantial. Where inadmissible hearsay or testimonial material forms the sole or primary basis for an expert's opinion, and the expert intends to use it as substantive evidence of his ultimate conclusions, the risk that the jury will treat that material as independently established fact is acute. *Turner v. Burlington N. Santa Fe R. Co.*, 338 F.3d 1058, 1061–62 (9th Cir. 2003) (prejudicial effect of lab report used as basis evidence outweighed its probative value when it was the only evidence of a material fact and the expert intended to use it as substantive evidence of his conclusions). This risk is heightened where, as here, the underlying reports carry the apparent seal of approval of Dr. Wright's formal, signed conclusions, increasing the likelihood that jurors will assign them independent evidentiary weight they are not entitled to receive. *See Junk v. Terminix Int'l Co.*, 628 F.3d 439, 450 (8th Cir. 2010) (finding substantial prejudicial effect where jury might be misled to believe a report reflected EPA findings).

Accordingly, Rule 703 provides no basis for admitting or disclosing Dr. Wright's conclusions to the jury through Dr. Chiu's testimony.

II. DR. CHIU'S TESTIMONY MUST BE LIMITED TO MATTERS WITHIN HIS PERSONAL KNOWLEDGE, AND TESTIMONY REGARDING EXAMINATIONS AT WHICH HE WAS NOT PRESENT MUST BE EXCLUDED OR CAREFULLY LIMITED

Federal Rule of Evidence 602 requires that a witness testify only to matters of which he has personal knowledge. While experts enjoy greater latitude under Rule 703 to rely on facts not personally observed, that latitude does not permit a fact witness to describe procedures he did not see, nor does it permit an expert to offer opinions built on an inappropriate foundation.

The record reflects that Dr. Chiu was not physically present (i.e. in the room containing the testing equipment) for all of the examinations conducted in this matter. However, it also reflects that during those examinations, the ESEM was being operated by another individual at Dr. Chiu's or Dr. Wright's direction. This fact cuts in two directions and warrants careful treatment. On one hand, Dr. Chiu may argue that because he directed the process, he retains sufficient supervisory knowledge to speak to what was done. On the other hand, he was not present to observe the actual operation of the equipment, to verify that his directions were followed precisely, or to account for any variables arising during the examination itself — and all formal conclusions from that testing were ultimately captured in reports signed by Dr. Wright, not by him.

The Court should therefore limit Dr. Chiu's testimony regarding those examinations to what he actually directed and intended, without permitting him to characterize, describe, or vouch for results or procedures as though he had observed

them firsthand. To the extent any opinion he offers rests on the results of examinations he did not witness, the Court should require disclosure of precisely how and to what degree those unobserved examinations factor into his conclusions, so that the jury is not misled about the nature and limits of his personal knowledge.

III. DR. CHIU IS NOT THE AUTHOR OF THE CONCLUSIONS IN THIS CASE AND LACKS THE INDEPENDENCE REQUIRED TO OFFER THEM AS HIS OWN

The record is clear that Dr. Chiu did not design the overall examination protocol, did not determine the course of the investigation, and did not author any of the final reports. Every report, from the initial XRF examination through the second report and supplement generated after the ESEM testing, was authored and signed by Dr. Wright. Dr. Chiu was engaged to perform specific technical tasks at Dr. Wright's request, as an assistant to a more senior analyst who retained authorship and control over all conclusions.

An expert witness must offer opinions that are genuinely his own — formed through his own analysis and judgment. To the extent Dr. Chiu's opinions necessarily incorporate, adopt, or are framed by Dr. Wright's conclusions, they are not truly independent and should not be presented to the jury as such. Allowing him to offer opinions that are in substance Dr. Wright's conclusions, proffered as his own, would violate *Bullcoming*, as discussed above, and would deprive Mr. Al-Marimi of any meaningful opportunity to confront the analyst who actually formed and is responsible for those conclusions.

This concern is compounded by the fact that Dr. Chiu has never previously been qualified or testified as an expert witness in any proceeding. While the absence of prior expert testimony does not, standing alone, preclude qualification, it significantly limits the defense's ability to assess the anticipated scope, methodology, and reliability of his opinions through the usual means of reviewing prior testimony. The defense therefore reserves the right to voir dire Dr. Chiu prior to his qualification and to challenge his qualification at the time of trial.

CONCLUSION

For the foregoing reasons, Mr. Al-Marimi respectfully requests that this Court enter an order limiting or excluding the testimony of Dr. Chiu as set forth herein, and permitting defense counsel to voir dire Dr. Chiu regarding his qualifications and the basis for his opinions before any ruling on his qualification as an expert witness.

Respectfully submitted
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