UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MR. AL-MARIMI'S SUPPORTING CASELAW REGARDING THE APPLICATION OF RULE 404(b) TO HIS ALLEGED CONFESSION

Mr. Al-Marimi, through counsel, submits this response to the Court's April 27, 2026 Minute Order requesting "a list of cases" supporting his position "as to the admissibility of [his] full statement" under Rule 404(b).

I. Caselaw

- In *United States v. Wiggins*, 509 F.2d 454, 461–62 (D.C. Cir. 1975), the D.C. Circuit addressed the admissibility of portions of a defendant's voluntary confession that admitted to uncharged killings. The court noted the general impermissibility of propensity inferences, as well as the permissible uses of other-act evidence for non-propensity purposes. It acknowledged "[a]nother exception may exist if a defendant in his confession of one crime refers to the commission of another offense in such a way that the confession is unintelligible if the reference to the other offense is omitted." However, the court concluded the challenged portions of the statement were far more prejudicial than probative because the unchallenged portions directly addressed the issue the government wanted the jury to infer from the challenged portions. Moreover, "excision of the reference to the three prior murders could easily have been made without impairing the confession."

> There is no support in the law for the prosecutor's theory that evidence of other crimes, otherwise inadmissible, will be admitted if it is part of a confession. On the contrary the law is plain that evidence of other offenses committed by a defendant is not automatically made admissible because the defendant referred to those offenses in a confession. *Sang Soon Sur v. United States*, *supra*. If this were not so, the scope of the evidence at trial would depend upon the extent of the defendant's garrulity when confessing; evidence of crimes unrelated to the one charged—for example the evidence held inadmissible in *Boyd v. United States*, 142 U.S. 450, 12 S.Ct. 292, 35 L.Ed. 1077 (1892)—would be received if mentioned by the defendant in his confession. The possibility of such a result demonstrates the fallacy of the prosecutor's theory.

See also United States v. Brooks, 567 F.2d 134, 140 (D.C. Cir. 1977) ("in the trial of a defendant for one offense evidence of other offenses he has committed is not admissible merely because he mentioned them in a voluntary statement").

- *Sang Soon Sur v. United States*, 167 F.2d 431 (9th Cir. 1948) ("The introduction of evidence of the commission of independent crimes through the medium of the statement or confession cannot be justified on the ground that the relevant portions thereof could not be segregated from the irrelevant. Such a segregation could easily have been made without impairing the force and value of the statement relative to the income tax evasion").
- *Sims v. Stinson*, 101 F. Supp. 2d 187, 199 n.7 (S.D.N.Y. 2000), *aff'd,* 8 F.

App'x 14 (2d Cir. 2001) (stating "a criminal defendant's uncounseled post-arrest statement does not commit him to any position at trial on the admissibility of evidence, especially when defendant objects to admitting the statement itself").

- *Hoover v. Beto,* 467 F.2d 516, 529 (5th Cir. 1972) (stating the "whole of a confession should be introduced, unless parts of it, reflecting the commission of other crimes . . . can be excluded without damaging the whole"). The court addressed the issue of a confession that implicated a codefendant, which it regarded as a similar issue to references in a confession to prior misconduct, and held redactions were required to the extent possible: "If the principal's confession contains parts which tend solely to implicate the accomplice, these parts should be excluded. If the principal's confession contains portions which, while they tend to implicate the accomplice are nevertheless so interwoven with the confession of the guilt of the principal as not to permit a deletion without confusing or obscuring the substance of the confession, these portions are admissible." *See also United States v. Stewart*, 576 F.2d 50, 55 (5th Cir. 1978) (ruling "evidence of a defendant's prior crimes is not rendered admissible because it was contained in a voluntary confession"); *United States v. Cox*, 536 F.2d 65, 70 (5th Cir. 1976) ("Since Exhibit 7 evidences another crime, however, it makes no difference whether it is termed an admission by a party or even a confession.").

- State decisions from across the country likewise recognize that the rules of evidence apply to portions of a defendant's statement that refer to prior misconduct such that excision or redaction may be necessary. *See, e.g.*, *Callis v. People,* 692 P.2d 1045, 1050–52 (Colo. 1984) (collecting cases and holding whether to excise evidence of "prior criminality" from a confession "must be resolved within the framework of traditional rules of relevancy"); *State v. Thamert*, 723 P.2d 1204,1208–09 (Wash. App. 1986) (admissibility of confession referring to prior misconduct requires consideration of "its relevance, potential prejudice, and possible other evidentiary considerations" under the evidentiary rules, including Rule 404(b), regardless of whether the confession was voluntary or would be admissible under the hearsay rules); *People v. Smith*, 327 N.W.2d 499, 501 (Mich. App. 1982) ("Michigan courts have consistently ruled that portions of documents may be excised so that irrelevant or prejudicial information is not placed before the jury. We see little difference between requiring the exclusion of a portion of a defendant's oral statement."); *see also State v. Morris*, 429 So.2d 111, 121 (La. 1983) (explaining state-law framework: "when the state seeks to introduce a confession . . . which contains other crimes evidence, but which is otherwise fully admissible, the defendant . . . . may waive his right to have the whole statement used, object to the other crimes evidence, and require the court to excise it before admitting the statement").

II. Treatises

- Wright & Miller, 22B Fed. Prac. & Proc. Evid. § 5256 (2d ed.), *available on* Westlaw

Wright & Miller identify the limited circumstances in which parts of a confession that refer to uncharged crimes may be admitted: first, if "the other crimes fall within one of the traditional uses. In addition, sometimes the trial judge cannot delete the other crimes without leaving the confession incomprehensible and must admit the entire confession under the doctrine of 'inextricably intertwined' statements."

"Some common law decisions allowed prosecutors to introduce a defendant's confession in its entirety even though it included references to otherwise inadmissible other crimes. Judges may have adopted the doctrine under the influence of the common law rule that the other exclusionary rules did not apply to straight admissions. But the Evidence Rules do not permit judges to admit evidence of other crimes simply because the prosecutor wants to prove them by the defendant's statements."

- Imwinkelried & Lave, 1 Uncharged Misconduct Evidence § 6:28 – Reference to uncharged crime in confession to charged crime, *available on* Westlaw

This treatise reports that the "admissibility of the confession to the charged crime leads to the admission of the references to the uncharged crime" in "[s]ome jurisdictions"; however, the "majority view is contrary" and "[m]ost courts hold that the prosecutor must demonstrate either that (1) the uncharged misconduct would be admissible under one of the normal theories for the admission of such misconduct or (2) the references to the uncharged act are an integral part of the confession, the references are inextricably connected, the references cannot be severed realistically, or (3) the whole confession would be unintelligible without the references to the uncharged misconduct."

The authors endorese the majority view as "a matter of policy and statutory construction[.]" "If the references to the uncharged acts are severable, the prosecution does not need to introduce those references. Whenever possible, the judge should 'sanitize' the evidence by deleting the references to otherwise inadmissible uncharged misconduct. The language of Rule 403 and Rule 404(b) dictate the same result."

- Imwinkelried & Lave, 1 Uncharged Misconduct Evidence § 6:33 – View requiring that uncharged crime be independently logically relevant; Exception for inseparable crimes, *available on* Westlaw

This section of the treatise discusses the *res gestae* or "intrinsic" evidence exception to Rule 404(b) that applies when "the prosecutor cannot elicit only the testimony about the charged act." While the focus is on simultaneous criminal acts, the reasoning expressed in this section also counters the government's contention that Mr. Al-Marimi's statement must be admitted as a whole because it is "one contiguous piece of evidence[.]" ECF 246, at 5.

The authors note the general rule that "the judge must excise the reference to the uncharged act whenever feasible." They identify a narrow exception when "the evidence of the acts may be physically inseparable" such as when it is all found in the "same writing," but only when it is practically infeasible to "excise the references to the uncharged act." For example, while it may be impossible isolate parts of a single stream-of-consciousness statement on a recording, when a recording can be separated into discrete sections with limited cross-references, the portions discussing uncharged acts should not be admitted. "In the final analysis, this doctrine poses an editing problem: Can the trial judge excise the references to the uncharged misconduct without seriously impairing the comprehensibility or apparent credibility of the admissible testimony about the charged offense?"

Respectfully submitted,

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