

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA :  
 : Criminal No. 99-0389-01,02 (RWR)  
 v. :  
 :  
 RAFAEL MEJIA, :  
 HOMES VALENCIA-RIOS, :  
 Defendants. :

GOVERNMENT'S MOTION TO BAR TESTIMONY  
OF DR. RICHARD OFSHE

The UNITED STATES OF AMERICA, by and through undersigned counsel, moves to bar the testimony of Dr. Richard Ofshe, offered as an expert in the area of false confessions and police interrogations.

On September 28, 2001, Homes Valencia-Rios faxed the government a list of potential defense experts. One of these proposed expert witnesses on behalf of Homes Valencia-Rios is Dr. Richard Ofshe, PhD. He is a sociologist, prepared to testify on the issue of false confessions and police interrogations, specifically, "that coerced confessions occur, false confessions exist and that certain indicia can be identified to indicate when false confessions occur." Though not provided to the government, presumably, Valencia-Rios seeks admission of Dr. Ofshe's testimony to assist the jury in evaluating a fact in issue in this case; whether Valencia-Rios' verbal and written statements to law enforcement officers were true confessions. Dr. Ofshe's testimony should not be permitted, since it fails to meet the test of Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S.

579 (1993) and its progeny, particularly Kumho Tire Co., Inc. v. Carmichael, 119 S.Ct. 1167, 1175-76 (1999), and since it is likely to confuse the jury. Fed.R.Evid. 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Id.

In Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), the Supreme Court found that trial courts considering expert scientific testimony must consider "whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." Id. at 592.

The trial court must conduct a two-step analysis when a party proffers expert scientific testimony: it must first "consider whether the testimony has been subjected to the scientific method; it must rule out subjective belief or unsupported speculation ... second, the district court must "determine whether the evidence or testimony assists the trier of fact in understanding the evidence or in determining a fact in issue . . . whether the proposed scientific testimony fits the issue to which the expert is testifying." United States v. Hall,

165 F.3d 1095, 1101-2, (7th Cir. 1999) (citations and internal quotations omitted.)

Following the Supreme Court's decision in Daubert, there developed a split among the circuits as to the applicability of Daubert to non-scientific expert testimony. See United States v. Paul, 175 F.3d 906,910 (11th Cir. 1999). In Kumho Tire Co., Ltd. v. Carmichael, 119 S.Ct. 1167 (1999), the Supreme Court resolved the split, specifically considering how Daubert applies to the testimony of engineers and other experts who are not scientists, and found that "Daubert's general principles apply to the expert matters described in Rule 702 [which] in respect to all such matters, establishes a standard of evidentiary reliability.... where such testimony's factual basis, data, principles, methods, or their application are called sufficiently into question, the trial judge must determine whether the testimony has a reliable basis in the knowledge and experience of the relevant discipline." Id. at 1171, 1175 (internal quotations to Daubert omitted.) In Kumho, the trial court excluded the testimony of an engineer, despite his qualifications, "after doubting and finding unreliable the methodology employed by the expert in analyzing the data obtained...and the scientific basis, if any, for such an analysis." Kumho, 119 S.Ct. at 1176-77.

Since the Supreme Court's decision in Kumho, at least one court has refused to allow Dr. Ofshe to testify as an expert on

the issue of false confessions, after finding him not qualified to do so, pursuant to the holdings of Daubert and Kumho. In United States v. Bartchy, No. CR 99-465 (D. Oregon), the government moved to bar Dr. Ofshe's testimony on false confessions, contending that it is "unscientific, unreliable, confusing to the jury, and fails to meet the standards for admissibility under the rules of evidence and Daubert v. Merrill Dow Pharmaceuticals, 509 U.S. 579 (1993)." See Exhibit A, Government's Motion. Using Dr. Ofshe's own statements as set forth in a publication jointly authored by him,<sup>1</sup> the government argued that the "science" of detecting false confessions is unreliable and should be not be admissible; even under his own theory, Dr. Ofshe could not give an opinion on the truth of the confession at issue, and his theory on false confessions would not assist the jury in determining a fact at issue in the case. Exhibit A. The government further pointed out that the testimony would be confusing to the jury, appeared to be an effort to introduce the defendant's exculpatory statements without taking the stand and without subjecting her to cross examination, and would permit the defendant to impermissibly "vouch" for her own credibility by presenting her story through a expert. Id.

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<sup>1</sup> "The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions," Richard J. Ofshe and Richard A. Leo, *Studies in Law, Politics and Society*, Volume 16, pp. 189-251 (1997 by JAI Press Inc.) This article is included in Exhibit A.

The trial court in Bartchy granted the government's motion, finding "there is no way that I am going to allow the testimony of this so-called expert, Dr. Ofshe. He's just not qualified under the Daubert, Joiner, Kumho trilogy." Exhibit B at p. 2. Since the legal issues at hand, as well as many of the factual issues, i.e. the fact that the government has not been provided with a summary of Dr. Ofshe's testimony or the basis for it, are similar to those at hand, the government adopts and incorporates by reference the motion filed in Bartchy.

Further, the government has additional concerns about Dr. Ofshe's testimony beyond those raised in Bartchy. Dr. Ofshe, a sociologist, does not appear to be qualified as a psychologist to address Valencia-Rios' psychological condition or his susceptibility, if any, to any of the allegedly persuasive or coercive techniques of interrogation which will undoubtedly be a subject of Dr. Ofshe's testimony. Further, even if he were qualified as a psychologist to testify on these issues, he apparently has conducted no psychological tests on this issue. Valencia-Rios' susceptibility to suggestion or coercion is a threshold issue in whether he falsely confessed as a result of any suggestive or coercive techniques, an issue that Dr. Ofshe not only is not qualified to testify to, but on which he is not factually prepared. Without this threshold link between Valencia-Rios and the possibility of a false confession, Dr.

Ofshe's testimony, if allowed, given the foundational problems discussed above, would serve only to confuse and mislead the jury and would not assist them in their decision concerning the weight to be given Valencia-Rios' confession.

Even if this court finds the District Court of Oregon's reasoning nonpersuasive, is not concerned with the lack of psychological expertise and testing, and allows Dr. Ofshe's testimony, it should limit the scope of the testimony and condition it on the testimony of the defendant to lay a factual foundation for the expert opinion. In United States v. Hall, 974 F. Supp. 1198, 1202 (C.D. Ill. 1997), aff'd, 165 F.3d 1095 (7<sup>th</sup> Cir.), cert. denied, 119 S. Ct. 2381 (1999), decided prior to Kumho Tire, the court used an alternate to the Daubert analysis and allowed Dr. Ofshe's expert testimony, but significantly limited its scope:

Dr. Ofshe...can testify that false confessions do exist, that they are associated with the use of certain police interrogation techniques, and that certain of those techniques were used in Hall's interrogation in this case. Dr. Ofshe cannot explicitly testify about matters of causation, specifically, whether the interrogations methods used in this case caused Hall to falsely confess. Without experimental verification, such testimony would be speculative and prejudicial. Dr. Ofshe will simply provide the framework which the jury can use to arrive at its own conclusions. Just as important, Dr. Ofshe cannot testify about the specifics of the post-admission narrative statement in this case. Such an endeavor would require Dr. Ofshe to assess the inconsistencies between Hall's statements to the police and the evidence presented at trial. Dr. Ofshe has no more expertise to perform this task than any juror...Dr. Ofshe cannot testify to Hall's

psychological or psychiatric impairments or the effect of these impairments upon his likelihood of confessing falsely. Dr. Ofshe is not a clinical psychologist nor a psychiatrist and has no expertise in this area."

Id. at 1205.

The Hall court further found that Dr. Ofshe's testimony would assist the trier of fact to understand the evidence only if the defendant presented "admissible testimony to show that the police used coercive interrogation techniques in this case... unless defendant can introduce some admissible testimony regarding the manner in which the interrogation occurred, such as testifying on the stand, the jury will not hear any evidence of coercive interrogation techniques and Dr. Ofshe's testimony would be rendered irrelevant." Id. at 1206. The limits set forth by the Hall court should be imposed on Dr. Ofshe's testimony in this case, if it is allowed. Moreover, presuming that Valencia-Rios will take the stand to establish the necessary factual basis for Dr. Ofshe's testimony, i.e. that he gave a confession bearing indicia considered significant by experts in distinguishing between reliable and unreliable confessions, Dr. Ofshe's testimony would only serve to impermissibly bolster his own credibility.<sup>2</sup>

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<sup>2</sup> Although the Court determined in its ruling that the defendant's confession is admissible as substantive evidence, it is well settled that the defendant may nevertheless "challenge the confession's reliability during the course of the trial." Crane v. Kentucky, 476 U.S. 683, 688 (1986); see 18 U.S.C. § 3501(a); Fed. R. Evid. 104(e). To that end, the defendant is "free . . . to

In United States v. Hall, 93 F.3d 1337 (7th Cir. 1996), the Seventh Circuit reversed and remanded a kidnaping and sexual assault case after the trial court limited the testimony of the defense's proffered experts for failure to conduct a full Daubert inquiry, noting:

the test of Rule 702 is whether the testimony will assist the jury . . . conclusory statements without any explanation why the expert can contribute to the jury's understanding of the subject are also subject to exclusion...even though experts are entitled to give their opinion on an ultimate issue in the case, see Rule 704(a), this does not mean that the opinion may be given divorced from the scientific, medical or other expert basis that qualified the witness in the first place . . . . If the testimony meets the Rule 702 test, the district court may still use the normal controls on scope of testimony and relevance that are available to it.

Id. at 1344-45. Hall makes it clear that there are considerable limits in the admission of expert testimony.

WHEREFORE, the government respectfully requests that Valencia-Rios' expert witness Dr. Ofshe not be permitted to testify at trial.

Respectfully Submitted,

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familiarize a jury with circumstances that attend[ed] the taking of the confession, including facts bearing upon its weight and voluntariness." Lego v. Twomey, 404 U.S. 477, 486 (1972) (footnote omitted); see 18 U.S.C. § 3501(a) (the district court "shall instruct the jury to give such weight to the confession as the jury feels it deserves under all of the circumstances"); United States v. Dickerson, 163 F.3d 639, 643 n.6 (D.C. Cir. 1999).