

will be the opinion of Dr. Leo that the circumstances of the custodial interrogation were such that Mr. Cooper's will was overborne resulting in an unreliable and untruthful statement." (Notice, at 1-2). In a subsequent pleading captioned "Carl Cooper's Response [to] This Court's Order of April 5, 2000 Regarding F.R.Cr.P. 12.2 Notice," the defendant refined further the nature of the anticipated expert testimony, making it clear that his mental state will be in issue. In that pleading, defense counsel expressly stated: "It is the tactics of law enforcement officials and their impact upon Mr. Cooper's 'mental condition' which will be a part of Dr. Leo's testimony." (Response, at 2) (emphasis added).

In neither pleading did the defendant specify the nature of the alleged mental condition that existed at the time he made statements to the police. In an earlier motion to suppress his statements to police as involuntary, the defendant stated: "As his treating medical doctor can attest, Carl Cooper has severe Attention Deficit Hyperactivity Disorder (ADHD). ADHD causes the defendant to become exceedingly verbose, agitated, and frightened." (Motion to Suppress Custodial Statements at p. 17). Although no evidence of this medical history was presented at the suppression hearing, defense counsel provided the government with the defendant's medical records in relation to the government's death-penalty evaluation. Those records reflect that the defendant was diagnosed and treated for ADHD and symptoms of depression during

his teenage years. That treatment, and all apparent medical documentation of ADHD, ceased when he decided to quit treatment in 1987 at the age of eighteen. According to the records provided the government, the defendant has received no medical attention for this condition since that time.

In a recent pleading, styled "Carl Cooper's Motion for Clarification and Relief from this Court's March 29, 2000 Order Regarding Mental Health Evidence," the defendant implied that he may seek to use that information at trial. In opposing the government's request for a mental examination of the defendant, defense counsel in the pleading referred to the dated material and argued that "the use of this historical information, as well as the testimony of the family physician who treated Mr. Cooper from that period cannot, and should not, trigger any right of the government to an examination." (Motion for Clarification, at 2). This statement, along with the proffer that Dr. Leo will testify about the impact of interrogation on some unspecified mental condition of the defendant, raises the possibility that the defense will seek to introduce evidence concerning the diagnosis of ADHD in the guilt phase of the trial.

Based on these representations, the government requests: (1) that the testimony of Dr. Leo be excluded, and (2) that the defendant be precluded from seeking to challenge the reliability of his confessions with evidence of, or references to, any previously diagnosed mental condition.

ARGUMENT

I. The testimony of Dr. Leo should be excluded.

Previously, the defendant moved to suppress his oral and written inculpatory statements that were made to law enforcement officials in Prince George's County, Maryland, on the grounds that those statements were involuntary--the product of coercion, duress, and deceit--and secured in violation of his right to remain silent and his right to an attorney. On February 1, 2000, this Court rejected the defendant's claims and denied the motion to suppress his confessions. After describing in detail all the circumstances surrounding the statements that Cooper made to police between March 1 and 5, 1999, this Court concluded: "Both on the facts and the law, there is no evidence to show Cooper's statements were anything but voluntary. Instead, they were clearly voluntary, readily and eagerly initiated, and provided free of coercion and duress." (Order, at 53).

Specifically, the Court found that Cooper was not subjected to threats, promises, or suggestions regarding what to say; Cooper initiated the discussions with the Prince George's County police, and wanted to talk about Starbucks; Cooper was not threatened with a federal indictment or with the possibility of a death sentence; Cooper repeatedly waived his rights, and wrote most of the

statements himself; and Cooper was not only unafraid of the police, but bragged about his ability to manipulate them.^{1/}

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 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).

The defendant's right to present evidence respecting the circumstances surrounding his confession is not absolute and may have to "bow to accommodate other legitimate interests in the criminal trial process." See United States v. Scheffer, 523 U.S.

^{1/} In addition, the Court specifically noted that "absolutely no evidence has been presented to support Cooper's claims (contained in his motion to suppress) that he was told by officers he would never see his son again, that he had no chance of beating the charges against him, that if he cooperated he would be home in a few years, that he had to answer questions or he would never get out of the police station, that his wife would be sleeping around if he went to jail, and that he suffered from attention deficit hyperactivity disorder." (Order, at 50 n.36).

303, 308 (1998) (internal quotation marks and citations omitted); Montana v. Egelhoff, 518 U.S. 37, 41-42 (1996). "The accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under the standard rules of evidence." Taylor v. Illinois, 484 U.S. 400, 410 (1988). Accordingly, the defendant's presentation of evidence in this respect must conform with the general principles of relevancy. Dockery v. United States, 746 A.2d 303, 306 (D.C. 2000) ("the defendant has no right to present irrelevant evidence"); see Capps v. Collins, 900 F.2d 58, 60-61 (5th Cir. 1990), cert. denied, 498 U.S. 1049 (1991); see also Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986) (trial court retains wide latitude under the Confrontation Clause to limit marginally relevant testimony).

1. **The proposed expert testimony would not assist the trier of fact to understand the evidence or determine a fact in issue.**

As a threshold matter, expert testimony on coercive interrogation techniques would have no relevance in Cooper's trial absent any evidence of coercion. Given the Court's ruling on the voluntariness of his statements, there are only two ways in which the issue Cooper now has identified--the impact of the so-called interrogation techniques on the truthfulness of his confession--can be played out before the jury. First, the defendant will try to elicit testimony about coercive techniques through cross-examination of the police officers who took the statements. That will be unavailing since, as the Court found after an extensive

hearing in which those officers testified, there simply is no evidence of coercion. Second, failing that, the defendant will have to testify if the jury is to hear a different version of how his statements were elicited. That was the choice posed to the defendant in United States v. Hall, 974 F. Supp. 1198 (C.D. Ill. 1997), aff'd, 165 F.3d 1095 (7th Cir.), cert. denied, 119 S. Ct. 2381 (1999). Hall sought to call sociologist Richard J. Ofshe, a colleague of and frequent co-author with Dr. Leo, as an expert on false confessions. But, ruled the district judge, “[u]nless 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.

In People v. Son, 93 Cal. Rptr.2d 871 (Cal. Ct. App. 2000), the court also upheld the exclusion of the proffered expert testimony of Dr. Ofshe. The defendant Son, who had confessed to committing a double murder, wanted Ofshe to testify about “police tactics in wearing down suspects into making false admissions.” Id. at 883. However, “[a]s the trial court noted, there was no evidence that police engaged in tactics wearing down Son into making false admissions. Hence, the proffered expert testimony on police tactics was irrelevant.” Id.

In any event, the issue is one of credibility, and “[i]t is for the jury. . . to evaluate witness credibility.” United States

v. Cunningham, 145 F.3d 1385, 1395 (D.C. Cir. 1998), cert. denied, 525 U.S. 1128 (1999). Indeed, "[a] fundamental premise of our criminal trial system is that 'the jury is the lie detector.'" United States v. Scheffer, 523 U.S. 303, 313 (1998)(citation omitted). Moreover, should the defendant testify, "the fact that [his] testimony support[s] his claim of innocence merely create[s] an issue of fact for the jury to resolve." United States v. Hill, 470 F.2d 361, 366 (D.C. Cir. 1972).

If Carl Cooper testifies that his confession was coerced, then expert testimony on the truthfulness or reliability of his statements would serve only to bolster his credibility improperly. See, e.g., Hinkston v. State, 10 S.W.3d 906, 910 (Ark. 2000)(testimony of clinical psychologist was inadmissible to explain defendant's mental deficits that allegedly caused inconsistencies in his statement to police; such attempt to bolster the defendant's credibility "would have invaded the province of the jury"). Accordingly, such testimony should not be admitted.

Otherwise, the government should be allowed in any case to sponsor expert testimony to bolster the testimony of its witnesses, for example, when a witness claims that a prior inconsistent statement was motivated by fear of the defendant. We have no doubt that we could locate an expert who would testify that, under certain circumstances, the mental state of fear of reprisal increases the likelihood that a witness will lie to the police. Such expert testimony, of course, is not allowed to bolster the

testimony of government witnesses. Nor should it be admitted to bolster the credibility of a testifying defendant. Indeed, the exclusion of such testimony serves to "[p]reserv[e] the jury's core function of making credibility determinations in criminal trials." Scheffer, 523 U.S. at 313.

We simply cannot fathom what the testimony of an expert witness would add to the jury's ability to make this classic credibility finding. Once the police officers have been thoroughly cross-examined as to the circumstances surrounding Cooper's statements, and the defendant has testified, if such is his intention, the jury will be able to assess the credibility of the confession. The jury will then know the circumstances of the interrogation, either solely from the testimony of the officers who testified or from the testimony of the defendant and the officers. Once the jurors arrive at a factual determination concerning the circumstances that surrounded the interrogation of the defendant, it is well within their province to evaluate the impact of those circumstances on the defendant. There is nothing about that determination that is beyond the jurors' ability, especially since defense counsel have indicated that they will not elicit from Dr. Leo testimony about the defendant's specific mental state.^{2/} Clearly, then, there is no need for expert testimony to assist the

^{2/} Since Dr. Leo is neither a psychiatrist nor a psychologist, he is not qualified to render such an opinion in any event.

jury in understanding the defendant's psychological make-up. The jury will have all the evidence it needs from which to draw its conclusions concerning the interrogation and its impact, if any, on the reliability of the defendant's confessions. These are the types of credibility determinations that juries routinely are called upon to make.

That was the conclusion reached by the court in State v. Bolden, 680 So.2d 6 (La. Ct. App. 1996), upholding the trial court's exclusion of the testimony of Dennis Wixted, who was proffered to the court as an expert on law enforcement interrogation. On appeal, the court observed: "As to Wixted's testimony, it is not clear what he would have contributed to the jury's understanding." Id. at 19. The admissibility of the defendant's statement had been resolved in a pretrial suppression hearing and the officers were cross-examined about the circumstances surrounding the interrogation. "Wixted's testimony would have had to involve whether the police procedures somehow coerced or pressured the defendant into making an untrue statement. At trial, there was no issue remaining as to whether the statement was free and voluntary; all that was left was the truthfulness of the statement, i.e., a question of weight." Id.; accord, State v. Loza, 641 N.E.2d 1082, 1094 (Ohio 1994) (court properly excluded from guilt phase of capital trial psychological testimony on voluntariness of defendant's confession; trial judge had ruled on

voluntariness, and jury could weigh the credibility of defendant's confession), cert. denied, 514 U.S. 1120 (1995).

Similarly, in People v. Shepard, 687 N.Y.S.2d 196, 198 (N.Y. App. Div. 1999), the court upheld the exclusion of expert testimony on the validity of the defendant's confession, since "the evidence sought to be introduced does not depend upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence." (internal quotation marks and citations omitted); see Bixler v. State, 582 N.W.2d 252, 256 (Minn.) (no abuse of discretion in excluding psychological expert testimony on suggestibility to coercion of mentally retarded defendant, since the jury "was fully capable of observing and understanding Duane Bixler's propensity to please authority figures, and taking those observations and that understanding into account in evaluating his confession"), cert. denied, 525 U.S. 1056 (1998).^{3/}

2. The subject matter of the proffered expert testimony is not sufficiently reliable to warrant its admission.

In Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), the Supreme Court established Federal Rule of Evidence 702

^{3/} Cf. State v. Monroe, 711 A.2d 878, 889 (N.H. 1998) (defendant was not entitled to funds for expert witness to testify regarding false confessions because he failed to establish the necessity for expert testimony), cert. denied, 525 U.S. 1073 (1999).

as the linchpin of admissibility of expert testimony.^{4/} The Court in Daubert emphasized that the district judge is the gatekeeper of scientific evidence in federal courts, obligated to find that proffered expert testimony be both reliable and relevant. In evaluating the admissibility of proffered expert testimony, the district judge is to consider a number of factors, including whether the technique has been tested, that is, subject to peer review and publication; the known or potential rate of error; the existence and maintenance of professional standards related to a particular methodology; and general acceptance.

Last year, in Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999), the Supreme Court made it clear that the Daubert gatekeeping function applies to all expert testimony, not just scientific expert testimony. While the Court concluded "that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable," id. at 152, the Court emphasized "the importance of Daubert's gatekeeping requirement. The objective of that requirement is to ensure the reliability and

^{4/} 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.

relevancy of expert testimony." Id. Viewed in that light, the defendant's proffered expert testimony does not measure up.

The defendant intends to introduce expert testimony from Richard A. Leo, a university professor with expertise in criminology and sociology, on police interrogation techniques and how the techniques employed by the Prince George's County police led the defendant to provide an unreliable and untruthful statement. Leo and a colleague, Richard J. Ofshe, have written several articles on the subject of false confessions.^{5/} An underlying assumption of their writing is that police officers elicit false confessions all too frequently. A review of the literature and the caselaw demonstrates that rather than enjoying the status of an established and reliable field of expertise, the study of false confessions lacks methodology and is highly controversial.

In an article entitled "The Guilty and the 'Innocent': An Examination of Alleged Cases of Wrongful Conviction from False Confessions,"^{6/} Paul G. Cassell, a critic of the Leo-Ofshe approach, explains why their methodology is unreliable and their underlying assumption untenable. Cassell reviewed a study by Leo and Ofshe of

^{5/} A copy of Richard Leo's curriculum vitae and a list of his publications is attached as Appendix 1. These materials were provided to us by defense counsel on April 6, 2000, pursuant to an order from this Court.

^{6/} 22 Harv. J. L. & Pub. Pol'y. 523 (1999).

sixty criminal cases, in which Leo and Ofshe concluded that in twenty-nine of the cases, false confessions led to the wrongful conviction of innocent persons.^{7/} Cassell examined their methodology and learned that, in analyzing the evidence against their subjects and determining their "innocence," Leo and Ofshe relied primarily on secondary sources, including newspaper articles and conversations with relatives of the convicted defendants. As Cassell notes, in one case where the defendant had provided multiple confessions, Leo and Ofshe relied on inaccurate descriptions of the crime apparently generated by avowed death penalty opponents seeking to overturn a capital sentence.^{8/}

^{7/} Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 *J. Crim. L. & Criminology* 429 (1998).

^{8/} Even a cursory review of sources relied upon by Leo and Ofshe in the study reviewed by Cassell reflects a reliance on articles and sources critical of the death penalty. In footnote 1 of "The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation," Leo and Ofshe expressed gratitude to Robert Perske and Michael L. Radelet for providing case materials used in the article. Radelet is the author, along with Hugo Adam Bedau, of an article entitled "Miscarriages of Justice in Potentially Capital Cases," published at 40 *Stan. L. Rev.* 21 (1987) (n.3) (footnote references are to the Leo-Ofshe study), which Leo and Ofshe term a "landmark study of miscarriages of justice." (n.9.) Other sources for the Leo and Ofshe study include: Tom Held, *Justice Gets 2nd Chance in Murder Case: Victims' Son Wants Fair Trial, No Death Penalty Threat for Accused Outlaws*, *Milwaukee J. & Sentinel*, June 12, 1997 (n.4); Michael L. Radelet et al., *In Spite of Innocence: Erroneous Convictions in Capital Cases* (1992) (n.9); Samuel Gross, *The Risks of Death: Why Erroneous Convictions are Common in Capital Cases*, 44 *Buff. L. Rev.* 469 (1996) (n.380); Stephen Hooker, *The Killing of Joe Giarratano; Death Row Inmate May Not Have Committed* (continued...)

Cassell, on the other hand, examined primary sources, including original trial records, as to nine of the twenty-nine "wrongly" convicted defendants and determined that, in all likelihood, those individuals were not innocent after all.^{8/} Cassell concludes that the so-called problem of false confessions is not pandemic in the criminal justice system, but is in fact concentrated among a narrow and vulnerable population, namely, persons with mental disabilities.

Supporting Cassell's conclusion, we found very few cases in which courts have found error in excluding experts on voluntariness. Almost invariably, in those cases, the defendants suffered from serious mental disabilities. See, e.g., United

^{8/}(...continued)
Murders He Confessed To, *The Nation*, Oct. 29, 1990 (n.499); Pamela Overstreet, Rally Scheduled on Behalf of Condemned Killer, *U.P.I. Regional News*, Feb. 7, 1991 (n.501); Jim Clardy, Reasonable Doubt? New Trial Sought for Death Row Prisoner, *Wash. Times*, May 24, 1990 (n.502); John Harris, A Widely Watched Date with Death; Virginia Inmate's Plea for Clemency Draws National Attention, *Wash. Post*, Feb. 17, 1991 (n.507); Phil McCombs, A Long Road Defers the Death Penalty, *Wash. Post*, June 13, 1982 (n.510); Philip Franchine, No Death Penalty for Baby-Sitter's Killer, *Chi. Sun-Times*, Nov. 21, 1993 (n. 525); and Andrew Buchanon, Death Penalty May Be Sought During Retrial; Jury Had Spared Babysitter's Killer, *Chi. Trib.*, Sept. 16, 1997 (n.529).

^{9/} In some cases, Cassell noted that juries had found the defendants guilty beyond a reasonable doubt after hearing all of the evidence in the case, including the evidence causing Leo and Ofshe to question the result. In other cases, Cassell found that trial courts and district judges, in habeas reviews, had produced lengthy and detailed opinions describing the evidence against the convicted defendants and affirming the validity of their convictions, writings which Leo and Ofshe either ignored or disregarded.

States v. Shay, 57 F.3d 126, 133 (1st Cir. 1995)(trial court erred in excluding "specialized opinion testimony" from a psychiatrist that defendant suffered from a recognized mental disorder; the impact of the disorder on the defendant's statements was outside the jury's understanding); United States v. Roark, 753 F.2d 991 (11th Cir. 1985) (exclusion of expert psychological testimony that defendant was extremely susceptible to suggestions on issue of voluntariness of her confession was reversible error); Commonwealth v. Crawford, 706 N.E.2d 289 (Mass. 1999) (defendant was entitled to present expert testimony on battered woman syndrome and the effects of drug and alcohol dependency at the time of her confession, as relevant on the issue of the voluntariness of her statement to police); State v. Buechler, 572 N.W.2d 65 (Neb. 1998) (clinical psychologist's testimony as to defendant's mental state at time of his confession was improperly excluded, since jury might not understand the effects of drug withdrawal in combination with defendant's mental disorders); People v. Hamilton, 415 N.W.2d 653, 663 (Mich. Ct. App. 1987) (trial court erred in excluding proffered expert testimony of clinical psychologist on how defendant's psychological makeup, including "some very gross immaturities, very rich fantasy life[,] " might have affected his statements to police); State v. Burns, 691 P.2d 297 (Ariz. 1984) (In Bank) (exclusion of psychiatric testimony on the effects that ingestion of LSD may have had on defendant's confession was non-prejudicial error, given overwhelming evidence of guilt); cf. State v. Miller,

1997 WL 328740 (Wash. Ct. App. Jun. 17, 1997) (unpublished opinion) (trial court abused its discretion in denying expenditures for Dr. Ofshe, who could have testified generally on the phenomenon of false confessions; in a separate section of the opinion, the court noted that the defendant suffered from severe psychological disorders)(copy attached as Appendix 2). In contrast, there is no evidence that Carl Cooper suffers from any serious mental disability.

In an article entitled "The Admissibility of False Confession Expert Testimony,"^{10/} Major James R. Agar, II examined Leo and Ofshe's study of false confessions and Cassell's criticism of it. Agar found Leo and Ofshe's methods for determining guilt or innocence and the accuracy of confessions to be both unscientific and highly subjective. "At the very least," notes Agar, "the debate between Leo-Ofshe and Cassell pinpoints the real problem of accurately identifying false confessions in an objective manner."^{11/} In considering the admissibility of expert testimony on false confessions, Agar concludes that while the theory of false confessions meets the publishing and peer review threshold of Daubert, and passes the "general acceptance" factor, "the admission

^{10/} 1999-Aug Army Law. 26 (1999). A copy of this article is attached as Appendix 3.

^{11/} Id. at 32.

of expert testimony based on this new theory is premature and therefore unreliable."^{12/}

This conclusion is supported by the caselaw on the subject of expert testimony concerning false confessions. Courts that have considered whether to admit expert testimony on the voluntariness of confessions have generally excluded such testimony, or sharply curtailed it. In People v. Philips, 692 N.Y.S.2d 915 (N.Y. App. Div. 1999), the court ruled inadmissible the testimony of a psychologist, proffered as an expert on the voluntariness of confessions, because the field lacks general scientific acceptance.^{13/} See also Beltran v. State, 700 So.2d 132 (Fla. Dist. Ct. App. 1997) (no error in excluding testimony of neuropsychologist proffered as an expert on false confessions because of expert's lack of methodology);^{14/} Kolb v. State, 930 P.2d 1238 (Wyo. 1996) (expert testimony on false confession syndrome did

^{12/} Id. at 42. As Agar notes, "This is not 'voodoo science' but it is not yet ready for 'prime time' either." Id.

^{13/} In rejecting expert testimony on the voluntariness of confessions, the court in Philips was not persuaded otherwise by an article offered by the defendant in that case, "The Consequences of False Confessions," by Professors Leo and Ofshe.

^{14/} The court in Beltran "question[ed] whether such testimony, which amounts to no more than an expert's assessment that the confession is involuntary, is ever admissible." 700 So.2d at 133.

not have to be admitted because the theory is not sufficiently developed to warrant an opinion).^{15/}

3. **The proffered expert testimony would likely confuse the jury.**

Even if this Court should determine that the study of false confessions is a proper subject of expert testimony, Dr. Leo's testimony still should be excluded from this case because it would most likely confuse the jury and thus be more prejudicial than probative. If the defendant is allowed to introduce an expert on the unreliability of his statement, then the government should be entitled to introduce an expert to testify that, under all the circumstances, when Cooper confessed, he was telling the truth. At that point, there would be a significant danger that the jury's focus would shift to assessing the credibility of the experts, rather than the credibility of the fact witnesses in the case. That is why courts have cautioned, "the possibility that the jury may be unduly influenced by an expert's opinion mitigates against admission. Nor should the credibility of witnesses in criminal trials turn on the outcome of a battle among experts." State v. Ritt, 599 N.W.2d 802, 811 (Minn. 1999)(upholding exclusion of expert testimony on particular interrogation technique as bearing

^{15/} In Kolb, as in this case, the defendant initially denied committing murder, then progressively admitted his involvement over successive interviews by the police. Nevertheless, the district court excluded expert testimony to explain why the defendant confessed in this manner, concluding that the proposed testimony was "scientifically unreliable." 930 P.2d at 1241.

on reliability of the confession), cert. denied, 120 S. Ct. 1184 (2000).

In Ritt, the court also noted, in rejecting the proffered expert testimony, "there's an extreme danger that it could confuse the jury. It appears to this court that this purported expertise does nothing more at this time than offer the gratuitous opinion of an expert with respect to the credibility of certain evidence that may be admitted here." Id. at 810. In United States v. Griffin, 50 M.J. 278 (C.A.A.F. 1999), the court upheld the ruling of the military judge who granted the government's motion in limine to exclude the expert testimony of a psychologist on false confessions and interrogation techniques. At a hearing on the issue, Dr. Rex Frank testified that in his opinion, coercive strategies-- techniques he described as the use of explicit and implicit threats and offers of leniency--were used to interview the defendant, resulting in what he termed "a coerced compliant type of confession." Id. at 284. A government expert testified that while coerced confessions may be an interesting subject area, it "has not reached scientific acceptability at this point." Id. at 282. The court concluded that the military judge did not abuse his discretion in excluding the expert testimony on grounds that the evidence lacked the necessary reliability to assist the trier of fact and that any probative value was substantially outweighed by the danger of confusion and waste of time. Id. at 283-85. See also People v. Green, 683 N.Y.S.2d 597, 600 (N.Y. App. Div. 1998)

(proffered expert testimony concerning defendant's susceptibility to providing a false confession "was not sufficiently relevant to outweigh the confusion it would inject into the trial and, moreover, was lacking in the degree of certainty that would give it probative force"); United States v. Koslowsky, 1995 WL 580889 (A.F.C.M.R. Sept. 20, 1995) (unpublished)^{16/} (in excluding the testimony of expert witness on false confessions, military judge ruled correctly that any probative value of the proffered testimony was outweighed by the danger of confusion).

4. The proffered expert testimony would invade the province of the jury on an ultimate issue in the case.

Furthermore, the admission of expert testimony--as the defendant has stated he plans to elicit--that his confession is unreliable and untruthful would invade impermissibly the province of the jury on an ultimate issue in the case.^{17/} In State v. Bolden, the court noted that the proffered expert could not have offered an opinion concerning the truthfulness of the defendant's statement, as Cooper seeks to do through Dr. Leo, "because an expert witness may not testify as to the ultimate issue of the case." 680 So.2d 6, 22 (La. Ct. App. 1996). Or, as the court in

^{16/} A copy of this opinion is attached as Appendix 4.

^{17/} Cooper acknowledges his intent to pursue this improper purpose, indicating "it will be the opinion of Dr. Leo that the circumstances of the custodial interrogation were such that Mr. Cooper's will was overborne resulting in an unreliable and untruthful statement." Cooper's Notice of Expert Testimony Pertaining to Mental Condition of Defendant, at 1-2.

Griffin stated succinctly, "an expert witness may not act as a 'human lie detector.'" 50 M.J. 279, 284 (citation omitted). On this ground alone, the testimony of Dr. Leo should be excluded.^{18/} Cf. State v. Schofield, 1999 WL 1033547 (Wash. Ct. App. Nov. 12, 1999)(unpublished opinion), a copy of which is attached as Appendix 6.

In Schofield, the court affirmed the denial of the defendant's motion to suppress his confession as involuntary. Richard A. Leo had testified at the hearing on the motion to suppress. While the trial court found Dr. Leo qualified to describe a particular interrogation technique, the court "found that Dr. Leo was not qualified to testify about the presence of coercion in a specific situation." Id. at *3. As the court also noted, "Dr. Leo admitted he was unqualified to render an opinion as to the defendant's psychological state at the time he confessed." Id. at *2. Cooper's efforts to introduce Richard Leo's opinion that his confession was untruthful and the product of law enforcement tactics on his unspecified mental condition should be equally unavailing.

^{18/} See also United States v. Raposo, 1998 WL 879723 (S.D.N.Y. Dec. 16, 1998)(unpublished opinion), a copy of which is attached as Appendix 5. In Raposo, the district judge ruled that a clinical psychologist could offer expert testimony that the defendant had a certain psychological profile--including a low-average IQ combined with depression--that may render him more prone than others to making a false confession, but "[the expert's] testimony will not address whether the Defendant's confession was false or voluntary." Id. at *6.

In contrast, Dr. Leo's collaborator, Richard Ofshe, eschewed stating an ultimate opinion on the voluntariness of the defendant's confession in United States v. Hall, 974 F.Supp. 1198 (C.D. Ill. 1997), aff'd, 165 F.3d 1095 (7th Cir.), cert. denied, 119 S. Ct. 2381 (1999), and the district court held him to it. The issue arose when Larry Hall's conviction of kidnapping a child for purposes of sexual gratification and transporting her across state lines was reversed, United States v. Hall, 93 F.3d 1337 (7th Cir. 1996), because the district court had excluded Ofshe's proposed testimony without applying the Daubert framework or even mentioning Daubert specifically. "The only thing that is clear is [the judge's] conclusion that the testimony would not assist the jury in its task." Id. at 1342.

The Seventh Circuit indicated that, on remand, the district court should address, first, "whether the proffer demonstrated that a sufficiently reliable body of specialized knowledge existed." Id. Then, if the district court concluded that the field in general qualifies for expert testimony, the proffered testimony should be based on the expert's special skills. "Unless the expertise adds something, the expert at best is offering a gratuitous opinion, and at worst is exerting undue influence on the jury that would be subject to control under Rule 403. . . . In the proper circumstances, experts in psychiatry and psychology can meet

both these hurdles: real science, and testimony based thereon.”
Id. at 1343.^{19/}

On remand, United States v. Hall, 974 F. Supp. 1198, 1205-1206 (C.D. Ill. 1997), the district court ruled that it would admit Dr. Ofshe’s expert testimony, but severely restricted its scope. Dr. Ofshe could testify that false confessions do exist and that they are associated with the use of certain police interrogation techniques. As a threshold matter, however, the court said there would have to be evidence that the police used coercive interrogation techniques in Hall’s case, or Dr. Ofshe’s testimony would be irrelevant. Additionally, the court ruled that if there was evidence that coercive techniques were used, Ofshe nevertheless could not testify “about matters of causation, specifically, whether the interrogation methods used in this case caused Hall to falsely confess. Without experimental verification, such testimony would be speculative and prejudicial.” 974 F. Supp. at 1205. As a final limitation, the court ruled that Ofshe could “not 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.

^{19/} Unlike Dr. Leo, who has no degree in psychiatry or psychology, Dr. Ofshe has a doctoral degree in social psychology.

If this Court were to apply this analysis to the proffered expert testimony in this case, the defendant would have to demonstrate that there exists a sufficiently reliable body of specialized knowledge on the voluntariness and truthfulness of confessions and that Dr. Leo's opinion is based on special skills. For all the reasons discussed herein, the defendant cannot possibly make that showing.

II. The defendant should be precluded from presenting evidence of a previously diagnosed mental condition, since any such evidence would have no bearing on his mental state at the time of his confessions.

In asking the jury to consider the circumstances surrounding his confession for purposes of determining reliability or credibility, the defendant should properly be limited to presenting those facts which are directly relevant or attendant to those circumstances. The jury's focus must be directed to the defendant's state of mind only at the time of the confession. See, e.g., Mincey v. Arizona, 437 U.S. 385, 398 (1978) (in determining whether the accused's statements were "'the product of a rational intellect and a free will,'" the Court focused on the accused's "condition at the time of [his] interrogation") (emphasis added and citations omitted); United States v. Roberts, 14 F.3d 502, 516-517 (10th Cir. 1993) (in assessing voluntariness of confession, the court focused on accused's "mental state at the time of his confession") (emphasis added), cert. denied, 514 U.S. 1044 (1995); United States v. Bennett, 495 F.2d 943, 952-954 (D.C. Cir. 1974) (in assessing whether accused's state of inebriation bore on the

voluntariness of his confession, the court focused on the extent of his inebriated state at the time of his confession); United States v. Smith, 638 F.2d 131 (9th Cir. 1981) (same); Burns v. Beto, 371 F.2d 598, 602 (5th Cir. 1967) (same); Doyon v. Robbins, 322 F.2d 486, 489 (1st Cir. 1963), cert. denied, 376 U.S. 923 (1964) (same). The defendant's state of mind--or whether he was laboring under some form of mental impairment--at some other time is simply not relevant to the weight to be given to his confession. Cf. State v. Sanchez, 400 S.E.2d 421, 424 (N.C. 1991) (expert opinion testimony that at time of interrogation the defendant was mentally incapable of understanding Miranda warnings was relevant to jury's determination of weight and credibility of confession).

The logic behind this rule can be seen in an analogous situation, where a party seeks to impeach a witness with evidence of that witness' mental condition. Just as a defendant's mental condition or his state of mind can be used to impeach the reliability of his confession only if that condition was extant at the time of the confession, evidence of a witness' psychological or mental impairment can be used to impeach that witness only if the witness labored under the effects of the impairment "during the time-frame of the events testified to," such that it "may reasonably cast doubt on the ability or willingness of [the] witness to tell the truth" about these events. United States v. Smith, 77 F.3d 511, 516 (D.C. Cir. 1996) (quoting United States v. Butts, 955 F.2d 77, 82-83 (1st Cir. 1992)). See also United States

v. Lopez, 611 F.2d 44, 45-46 (4th Cir. 1979); Lewis v. Velez, 149 F.R.D. 474, 484-85 (S.D.N.Y. 1993) (declining to "hold[] that any and all aspects of a witness' psychiatric history are probative of credibility"); United States v. Jackson, 863 F. Supp. 1462, 1465 (D. Kan. 1994) ("witness's mental condition . . . must be temporally relevant") (citing United States v. Honneus, 508 F.2d 566, 573 (1st Cir. 1974), cert. denied, 421 U.S. 948 (1975)); Robinson v. United States, 642 A.2d 1306, 1308-10 (D.C. 1994) (permitting defendant in domestic assault case to impeach the girlfriend/victim with her consumption of alcohol on the date of the alleged assault and prohibiting impeachment about her general drinking habits at other times).

Following this reasoning, it is clear that the evidence pertaining to defendant Cooper's diagnosis and treatment for ADHD, see supra, pp. 2-3, would have no bearing on the reliability of his confession unless he can first demonstrate (1) that the effects of the ADHD he suffered during his teenage years persisted into adulthood, (2) that he in fact labored under those effects at the time of his statements to the police in March 1999, and (3) that those effects had some meaningful impact on the reliability of that confession. Absent such a showing, evidence of that condition would be totally irrelevant and inadmissible. Cf. United States v. Childress, 58 F.3d 693, 728 (D.C. Cir. 1995) (in context of insanity defense, the district court initially determines whether evidence of mental illness is relevant and sufficiently grounded to

warrant use at trial); Commonwealth v. Goudreau, 666 N.E.2d 112, 115 (Mass. 1996)(trial court properly excluded testimony from two expert witnesses about the contents of specific records from a mental health center concerning the defendant, in the absence of a showing that the specific records were admissible).

Moreover, even if such evidence were relevant in some attenuated fashion, its probative value would be far outweighed by its potential to have a prejudicial and misleading effect on the jury's deliberations. Its admission would serve only to confuse the issues and raise the danger that it might be misused by the jury in certain ways. See Fed. R. Evid. 403. For example, the jury might consider the defendant's mental condition in the 1980's when evaluating his mens rea to commit the charged crimes in the 1990's, thereby enabling the defendant to contest the elements of intent and premeditation with unfounded and outdated medical evidence. See Jackson, 863 F. Supp. at 1465 (in context of witness credibility, "the witness's mental condition must not introduce into the case a collateral issue which would confuse the jury and which would necessitate allowing the Government to introduce testimony explaining the matter") (internal quotation marks and citations omitted). This evidence could also be used to engender sympathy for the defendant that has no place in the guilt phase of the trial. Or more importantly, the jurors may assume from the introduction of this outdated medical evidence that the defendant's condition persisted through March 1999--despite the lack of any

evidence to that effect--and infer that it should be used to impeach the reliability of the statement.

In short, any marginal relevance of this evidence--which is indiscernible at this point--would be more than outweighed by the danger that it would be misused by the jury. Therefore, without a showing of temporal materiality, evidence of the defendant's previously diagnosed mental condition should be excluded.

CONCLUSION

WHEREFORE, the government asks that the defendant be precluded at trial from introducing the testimony of Richard A. Leo, an expert proffered by the defense on the voluntariness of confessions, and from introducing or making any reference to any previously diagnosed mental condition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Government's Motion in Limine to Exclude Testimony of Proffered Defense Expert on the Voluntariness of Confessions and Evidence of Defendant's Prior Mental Condition were delivered by courier on April 12, 2000, to counsel for the defendant as follows:

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