No. _____

In the Supreme Court of the United States

CARLOS VEGA,

Petitioner,

v.

TERENCE B. TEKOH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Vega v. Tekoh*, 597 U.S. 134 (2022), this Court held that the Ninth Circuit erred in ordering a new trial for respondent Terence Tekoh on the theory that using an un-*Mirandized* confession in a criminal trial violates the Fifth Amendment. On remand, however, the Ninth Circuit reinstated its ruling that Tekoh is entitled to a new trial. This time, a divided panel held that the district court was *required* to admit expert testimony on the potential coercive effect of commonly used interrogation techniques. Judge Miller, who had joined the original panel decision concerning *Miranda*, dissented from the evidentiary decision on remand. Ten other judges dissented from the denial of rehearing en banc, arguing that the panel's decision conflicted with the decisions of other circuits, created a categorical rule requiring the admission of expert testimony bolstering a defendant's testimony that his confession was coerced and false, and "will have a substantial disruptive effect on the administration of justice in [the Ninth Circuit]." App. 71a.

The questions presented are:

1. Whether the Ninth Circuit erred by establishing—in conflict with the decisions of other circuits—a categorical rule requiring the admission of expert testimony that opines on the allegedly coercive circumstances of a confession to a crime.

2. Whether the Ninth Circuit otherwise erred when it mandated the admission of expert testimony that certain lawful interrogation techniques generate false, coerced confessions, where the purpose of such testimony was to impermissibly bolster Tekoh's account of the circumstances of his confession.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Carlos Vega, Deputy Sheriff with the Los Angeles County Sheriff's Department, was a defendant-appellee in the United States Court of Appeals for the Ninth Circuit. The County of Los Angeles and Dennis Stangeland, Sergeant with the Los Angeles County Sheriff's Department, were also defendants-appellees in the United States Court of Appeals for the Ninth Circuit, and are not participating in the proceedings in this Court. The Los Angeles County Sheriff's Department and Does 1 to 10 were named as defendants in the United States District Court for the Central District of California.

Respondent Terence B. Tekoh was plaintiff-appellant in the United States Court of Appeals for the Ninth Circuit.

RELATED PROCEEDINGS

Vega v. Tekoh, No. 21-499, United States Supreme Court, judgment entered June 23, 2022.

Tekoh v. County of Los Angeles, No. 18-56414, U.S. Court of Appeals for the Ninth Circuit. Judgment entered August 4, 2023; rehearing denied January 25, 2024.

Tekoh v. County of Los Angeles, No. 2:16-cv-07297-GW-SK, U.S. District Court for the Central District of California, judgments entered November 7, 2017 and October 5, 2018.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit (App. 1a-7a) is reported at 75 F.4th 1264, and the order and opinions concerning the denial of rehearing en banc (App. 58a-93a) are reported at 91 F.4th 997. The district court's oral and written evidentiary orders (App. 8a-9a, 10a-18a, 96a-103a), its order on the motion for a new trial (App. 22a-53a), and its judgments (App. 19a-21a, 54a-57a) are unreported.

JURISDICTION

The Ninth Circuit entered judgment on August 4, 2023 (App. 1a-4a) and denied petitioner's motion for rehearing en banc on January 25, 2024 (App. 58a-59a). On March 20, 2024, Justice Kagan extended the time to file the petition for a writ of certiorari until May 24, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

LEGAL PROVISIONS INVOLVED

The relevant provisions of the Federal Rules of Evidence are set forth in the appendix to this petition. App. 94a-95a.

INTRODUCTION

Two years ago, this Court reversed the Ninth Circuit's determination that respondent Terence Tekoh could pursue a Section 1983 claim against petitioner Deputy Carlos Vega for an alleged Fifth Amendment violation. *See Vega v. Tekoh*, 597 U.S. 134 (2022). As the Court explained, the Ninth Circuit's decision rested on the faulty premise that an un-*Mirandized* confession to a crime is necessarily "compelled," such that its introduction at trial establishes a violation of the Fifth Amendment. *Id.* at 140. The Ninth Circuit was wrong. "[A] violation of *Miranda* is not itself a violation of the Fifth Amendment." *Id.* at 152.

That should have been the end of Tekoh's case. Yet, on remand, a divided panel of the Ninth Circuit devised a new way to resuscitate it. This time, the panel held that Tekoh is entitled to yet another trial because, at his first two trials, the district court refused to admit expert testimony purporting to verify Tekoh's testimony that his confession to sexual assault was coerced and unreliable. App. 2a-3a.

As Judge Miller explained in his panel dissent, the district court properly excluded that expert testimony because its clear purpose was to improperly vouch for Tekoh's credibility as a *fact* witness. App. 6a-7a. Indeed, the expert's bottom-line conclusion that Tekoh's confession was coerced expressly "assum[ed] the veracity of Mr. Tekoh's accounts of events." 1-ER-80–81. [1] The majority's decision requiring admission of the testimony, Judge Miller explained, clearly

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[1] "ER" refers to the Excerpts of Record filed in No. 18-56414 (9th Cir.). "Dkt. No._" refers to documents filed in No. 16-cv-7297 (C.D. Cal.).

"violate[s]" the rule against expert credibility testimony. App. 6a. Worse, as ten en banc dissenters explained, the panel's ruling treats as "potentially coercive" a wide range of "commonly used interrogation techniques," including (1) "'minimization tactics,' (*i.e.*, blame-reducing excuses for the suspected crime that are suggested by the interrogator)"; (2) "'false evidence ploy[s]' (*i.e.*, bluffing by the interrogator as to what evidence of guilt the police have)," and (3) "'just asking questions.'" App. 71a-72a (alteration in original) (quoting App. 2a-4a).

The Ninth Circuit's decision makes a hash of the Federal Rules of Evidence, establishes breathtaking new substantive standards for evaluating whether criminal confessions are coerced, and will undermine routine police work in the western United States. This Court's review is warranted for at least three reasons.

First, the Ninth Circuit's decision sharply diverges from other courts of appeals on multiple, related issues. Most directly, the panel majority creates a clear split with the Tenth Circuit as to whether a district court may ever exclude expert testimony about the allegedly coercive nature of a police interrogation and its effect on a resultant confession. The Ninth Circuit requires admission of such testimony, while the Tenth Circuit holds that it generally should be excluded. More broadly, the Ninth Circuit's ruling conflicts with precedent from the Second Circuit and other courts upholding the exclusion of expert testimony designed to bolster the testimony of fact witnesses.

Second, the decision below is indefensible on the merits. Under Federal Rule of Evidence 702, the type

of expert testimony at issue here is generally inadmissible. Such testimony usurps the jury's exclusive power to make credibility determinations. The Ninth Circuit's ruling flouts that principle. And its ruling is especially egregious here given (1) the expert's acknowledgment that she based her expert opinion about coercion on the "assumption" that Tekoh's fact testimony was truthful, (2) the panel's view that expert testimony is needed to inform the jury that commonly used (and perfectly lawful) interrogation techniques are "potentially coercive," and (3) the fact that Tekoh himself does not even claim that these techniques coerced his confession. The only possible purpose of such expert testimony was an impermissible one: to bolster Tekoh's account. The Ninth Circuit's errors should not stand.

Third, the decision below—if left unchecked—will obstruct routine police work and badly hamper the use of confessions in criminal proceedings in the Ninth Circuit. As Judge Collins explained, the decision below effectively gives every criminal defendant who confesses the right to introduce expert testimony that the confession was coerced—not only at criminal trials, but also in follow-on civil proceedings (like this one) for money damages. Indeed, the decision below goes even further by labeling basic interrogation techniques "classic coercion" in violation of the Fifth Amendment.

This Court has already rebuked the Ninth Circuit's efforts in this case to expand the scope of liability under Section 1983 with respect to Fifth Amendment compulsion claims. Undeterred, the Ninth Circuit's decision on remand reflects a studied determination to nurture Tekoh's meritless coercion claim—already rejected by two different federal

juries—in a manner that will do maximal damage to the law and to law enforcement. This Court's review is warranted.

STATEMENT OF THE CASE

A. Tekoh Confesses To Sexual Assault

In March 2014, Los Angeles County Sheriff's Deputy Carlos Vega was called to investigate the sexual assault of a patient at a Los Angeles hospital. *Vega*, 597 U.S. at 138-39. When Vega met the victim, he found her "very upset and agitated" and "crying uncontrollably." 3-ER-640–41, 642. The victim—who had recently suffered a stroke that impaired her ability to speak and move—told Vega that, following an MRI, the nursing assistant who transported her back to her hospital room had "lifted [her] sheets," "spread [her vagina] to look inside," and then "put his fingers inside." 2-ER-324–25. The victim also provided a physical description of her assailant. 3-ER-667. Vega found the victim's account "very believable." 3-ER-642. A forensic sexual assault examination revealed vaginal lacerations consistent with the victim's account. 4-ER-853–54.

On-duty nurses identified Terence Tekoh as the nursing assistant who transported the victim following her MRI. 3-ER-668. Shortly thereafter, Vega encountered Tekoh—who fit the victim's physical description of the perpetrator—and led him to an MRI reading room for questioning. *Tekoh v. County of Los Angeles*, 985 F.3d 713, 715 (9th Cir. 2021), *cert. granted*, 142 S. Ct. 858 (2022). Vega believed the interview was non-custodial, so he did not give Tekoh a *Miranda* warning. 5-ER-1022–23.

After being questioned in the reading room, Tekoh wrote out the following statement:

> To who [sic] it may concern,
>
> This is an honest and regrettable apology from me about what happened a few hours ago It was I don't know what suddenly came over me, but it was certainly the most weakest moment I've ever been caught up with in my life. I've never ever found myself doing such a despicable act. And I am I don't think this is an excuse but I'm single and currently don't have a girlfriend and became very excited after I first saw her vagina accidentally. So after dropping her off, I decided to go further by woking [sic] and spreading her vagina lip for a quick view and then went back to my duty post with the intention of masturbating, which I never did.

Tekoh, 985 F.3d at 715 (first alteration in original).

Vega's and Tekoh's accounts of the events leading up to Tekoh's confession "differ sharply." App. 72a. According to Vega, after he encountered Tekoh and asked what happened, Tekoh quickly admitted that he "made a mistake" and asked to "'talk to [Vega] away from [his] co-workers'" in a more private setting. *Tekoh*, 985 F.3d at 716. In the MRI reading room, "Vega handed Tekoh a sheet of paper" and asked if Tekoh could "'write what happened'" while Vega called for his supervisor. *Id.* Tekoh responded by writing his confession "without further prompting." *Id.* Vega's account was corroborated by Sergeant Dennis Stangeland, who joined Tekoh and Vega in the reading room shortly after the questioning began. *Id.*

Tekoh provided a starkly different account. According to him, Vega shut the reading room door and blocked Tekoh from exiting, then told him that he

"might as well admit" to the assault because it "had been captured on video." *Id.* at 715. Tekoh also claimed that Vega "'stepped on his toes,'" used racial epithets, and threatened to report him and his family to "'deportation services.'" *Id.* at 716. According to Tekoh, the entire confession was dictated by Vega and Tekoh agreed to write it only after "Vega put his hand on his gun" and told Tekoh "he was not joking." *Id.*

Tekoh was arrested and tried for unlawful sexual penetration in state court, where he was ultimately acquitted. App. 75a.

B. Tekoh Sues Under Section 1983, The District Court Excludes Tekoh's Expert, And Two Juries Reject Tekoh's Claim

In 2016, Tekoh filed a Section 1983 civil action against Vega and several other defendants, claiming that they violated his Fifth and Fourteenth Amendment rights by: (1) causing his un-*Mirandized* statement to be used against him in a criminal trial; (2) extracting an involuntary confession through a coercive interrogation; and (3) fabricating false evidence. Dkt. No. 37 ¶¶ 47-51.

At trial, Tekoh proffered Dr. Iris Blandón-Gitlin as an expert "on the topic of coerced confessions." App. 26a. Blandón-Gitlin was purportedly qualified to offer testimony on that topic because she has "studied interview and interrogation tactics that critically influence the reliability of information obtained from suspects and witnesses" and has "conduct[ed] research examining the validity of methods to discriminate between true and false statements." 1-ER-79 ¶ 2. Although Blandón-Gitlin has testified in a number of California state criminal trials concerning the reliability of particular

confessions, she has never been qualified as an expert in a federal civil trial to testify whether a confession was compelled within the meaning of the Fifth Amendment. Dkt. No. 86-1 at Ex. D.

The bottom line of Blandón-Gitlin's proffered testimony was her opinion that—"assuming the veracity of Mr. Tekoh's accounts of events," i.e., that Vega stepped on Tekoh's toes, used racial epithets, threatened deportation, and held his gun while dictating a confession—"Mr. Tekoh's written confession was coerced and highly unreliable." 1-ER-80–81. In addition, Blandón-Gitlin planned to testify about the use of "minimization tactics"—"excuses the interrogator creates to explain why the person may have committed the act they are accused of"—and how "Mr. Tekoh's written confession," which according to Tekoh was dictated by Vega, indicated the use of such tactics. 1-ER-84, 90. Blandón-Gitlin also planned to testify about the significance of a "false evidence ploy" that Vega had allegedly used when—according to Tekoh—Vega told Tekoh that he had video evidence of the assault. 1-ER-83–84, 91. Furthermore, Blandón-Gitlin would direct the jury to "critically evaluate the reliability of Deputy Vega's account of events." 1-ER-90. Finally, Blandón-Gitlin planned to testify about ways in which "cultural orientations" might have made Tekoh particularly vulnerable to coercion. 1-ER-85–87.

The district court excluded the testimony as "unnecessary and problematic" for three main reasons. App. 28a-29a. First, "if the jury believed Mr. Tekoh's version" of events, then "his confession was clearly coerced," and the expert's "opinion added nothing of substance." App. 29a. Second, because the entire case hinged on whose account the jury believed,

Tekoh "appeared to be trying to use [Blandón-Gitlin] to simply vouch for his version of the events," which would constitute impermissible buttressing of a fact witness. *Id.* And third, the expert report "included studies and contentions which were irrelevant to the case." *Id.* For example, the report devoted over two pages to the theory that "being a foreigner" and not being a "member[] of the dominant culture" increases the risk of a false confession—as though the jury was supposed to draw on Tekoh's race and nationality to resolve the credibility contest between Deputy Vega and Tekoh. 1-ER-85–88. For these reasons, the district court concluded that Blandón-Gitlin's testimony would be unhelpful, as well as "time-consuming and potentially confusing." App. 17a. It also noted that, because the case "came down to a question of credibility," admitting the testimony could "not . . . alter[] appreciably the jury's perception of the confession," unless the testimony was impermissibly used to bolster Tekoh's credibility. App. 30a.

In November 2017, a jury returned a unanimous verdict for Vega and the other defendants, and the district court entered judgment in their favor. App. 19a-21a. But because the district court had not included "a coerced confession jury instruction under the Fifth Amendment separate and apart from the instruction as to the deliberate fabrication of false evidence," it granted Tekoh's motion for a new trial with respect to the Fifth Amendment claim against Vega. App. 46a.

At his second civil trial, Tekoh once again sought admission of Blandón-Gitlin's testimony, and the district court once again excluded it—largely for the reasons it expressed at the first trial. App. 96a-103a. In October 2018, a second jury rejected Tekoh's

account of coercion, and the district court once again entered judgment in Vega's favor. App. 54a-57a.

C. Tekoh Successfully Appeals To The Ninth Circuit, But This Court Reverses

Tekoh appealed to the Ninth Circuit, arguing that the district court should have (1) instructed the jury that the use of an un-*Mirandized* statement in his criminal trial was sufficient in itself to establish his Fifth Amendment claim; and (2) admitted Blandón-Gitlin's testimony. *Tekoh*, 985 F.3d at 714, 726.

The Ninth Circuit agreed with Tekoh's first argument and thus declined to reach the second argument. It concluded that "the use of an un-*Mirandized* statement against a defendant in a criminal proceeding violates the Fifth Amendment and may support a § 1983 claim." *Id.* at 723. It therefore reversed and remanded for a new trial. *Id.* at 726. Seven judges noted their dissent from the denial of rehearing en banc. *Tekoh v. County of Los Angeles*, 997 F.3d 1260, 1264 (9th Cir. 2021) (Bumatay, J., dissenting from denial of rehearing en banc).

This Court granted certiorari and reversed. It concluded that "a violation of *Miranda* is not itself a violation of the Fifth Amendment" and found "no justification for expanding *Miranda* to confer a right to sue under § 1983." *Vega*, 597 U.S. at 152.

D. On Remand, A Divided Ninth Circuit Panel Compels Admission Of Tekoh's Expert

On remand from this Court, the Ninth Circuit took up Tekoh's argument that the district court abused its discretion by excluding the testimony of Dr. Blandón-

Gitlin. A divided panel concluded that it had and ordered a new trial. App. 1a-4a.

In the panel majority's view, the district court was required to admit Blandón-Gitlin's testimony simply because it was "relevant to Tekoh's case," as a "jury could benefit from Dr. Blandón-Gitlin's expert knowledge about the science of coercive interrogation tactics, which Deputy Vega employed here." App. 2a-3a. As the majority noted, Blandón-Gitlin "planned to testify that the apologies and excuses in Tekoh's statement demonstrate that Deputy Vega utilized minimization tactics"—which the panel called "classic coercion"—to "elicit incriminating admissions." *Id.* Blandón-Gitlin would also "explain to the jury the significance of Deputy Vega's use of a false evidence ploy when [allegedly] he told Tekoh there was video evidence [of the assault]."

The majority acknowledged that Blandón-Gitlin's testimony "assum[ed] the veracity" of Tekoh's claims against Vega. *Id.* It asserted that her expertise would not "impermissibly" vouch for Tekoh's credibility, but instead "help the jury better understand coerced confessions, *including why just asking questions can be coercive*." App. 3a-4a. (emphasis added). The majority reasoned that "false confessions are an issue beyond the common knowledge of the average layperson" and that jurors would be "'better equipped to evaluate [Tekoh's] credibility and the confession'" when armed with Blandón-Gitlin's expert testimony. App. 3a (alteration in original).

Judge Miller dissented. He explained that the entire case turned on deciding "who was telling the truth" about the circumstances surrounding the questioning—Tekoh or Deputy Vega—and that Blandón-Gitlin's testimony "would not have been

helpful to the jury in making that decision." App. 5a. Judge Miller explained that if the jury believed Tekoh's version of events—which centered on indisputably coercive police misconduct—"then it would have been obvious that 'the confession was indeed coerced'" without an expert opining on "other, subtler pressures" Tekoh may have experienced. App. 5a-6a (quoting district court). Further, the expert testimony—which "assumed 'the veracity of Mr. Tekoh's accounts of events'" and concluded that Tekoh's confession was a "'textbook example'" of a false confession—"would have violated [the] principle" that an expert may not "'testify in such a manner as to improperly buttress a witness's credibility.'" App. 6a-7a (citations omitted).

E. Ten Judges Dissent From Denial Of Rehearing En Banc

Judge Collins and nine of his colleagues dissented from the denial of rehearing en banc. App. 71a-93a. Judge Collins's dissent amplified Judge Miller's panel dissent and raised several additional points.

First, Judge Collins noted that the panel majority's decision, which held that "the proffered expert testimony in this case *must* be admitted . . .to help jurors understand 'why just asking questions can be coercive'" would "effectively establish[] a *per se* rule requiring admission of such testimony in false confession cases." App. 78a-79a. Indeed, because the alleged "interrogation techniques" at issue here—"'minimization tactics,'" a "'false evidence ploy,'" and "'just asking questions'"—are "widely used," it "will be difficult, if not impossible, to distinguish this opinion in future coerced confession cases." App. 87a.

Second, Judge Collins explained that the panel opinion "creates a split with the Tenth Circuit's decision in *United States v. Benally*, 541 F.3d 990 (10th Cir. 2008)," a sex-abuse case involving a materially indistinguishable decision to exclude expert testimony on purportedly false confessions. App. 89a-90a. More broadly, Judge Collins identified a "substantial body of additional precedent from other federal and state courts around the country that have repeatedly upheld the exclusion of comparable expert testimony under similarly worded rules of evidence." App. 91a-92a (collecting cases). As he noted, "there does not appear to be any prior *civil* case in which an appellate court has held that such expert testimony must be admitted. On that score, the panel majority's decision apparently stands alone." App. 92a.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari and correct the decision below for three reasons. First, the Ninth Circuit's decision creates a circuit split over the admission of expert testimony opining on confessions. Second, the decision below is egregiously wrong. Third, if the decision below stands, it will undermine routine police work and invite expert-based Fifth Amendment challenges to every criminal confession in the nation's largest circuit. This Court should stop that trend before it starts.

I. THE NINTH CIRCUIT'S DECISION CREATES A CIRCUIT SPLIT REGARDING EXPERT TESTIMONY ON CONFESSIONS

As Judge Collins explained, the Ninth Circuit's decision is an "extreme outlier" that sharply diverges from other circuits' application of the Federal Rules of Evidence in similar circumstances. App. 79a.

Specifically, the decision below directly conflicts with Tenth Circuit precedent on the question whether, under Rule 702, district courts may exclude expert testimony opining on the allegedly coercive circumstances of a confession. Today in the Ninth Circuit, such testimony *must be admitted*; in the Tenth Circuit, such testimony *should generally be excluded*. More generally, the Ninth Circuit's decision conflicts with decisions from the Second Circuit and various other courts as to whether, under Rules 702 and 403, a district court may exclude expert testimony designed to bolster the credibility of a fact witness. This Court's intervention is warranted to resolve these disagreements and clarify whether and when expert testimony is appropriate in these circumstances.

1. Under Rule 702 of the Federal Rules of Evidence, a district court may admit expert opinion testimony only if the court determines "that it is more likely than not" that the expert's testimony "will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a). Furthermore, Rule 403 permits a district court to exclude otherwise admissible evidence where the probative value of such evidence is substantially outweighed by the risk of, among other things, "confusing the issues," or "needlessly presenting cumulative evidence." Fed. R. Evid. 403.

Here, the district court concluded that Dr. Blandón-Gitlin's testimony should be excluded under Rule 702 and Rule 403 because, among other things, Tekoh "appeared to be trying to use [the testimony] to simply vouch for his version of the events." App. 29a. But the Ninth Circuit reversed in a sweeping ruling that leaves district courts with no leeway to exclude

similar expert testimony on the allegedly coercive circumstances of a confession. In the panel's view, a defendant has the right to present expert testimony to support his assertion that a false confession was extracted through supposedly "coercive" techniques such as "minimization tactics," bluffing about the existence of other evidence corroborating the suspect's guilt, and "just asking questions." App. 2a-4a.

2. The Ninth Circuit's approach conflicts with settled precedent in other circuits holding that district courts should exclude expert testimony that seeks to vouch for (or undermine) the credibility of a fact witness's testimony. *See, e.g.*, *United States v. Benally*, 541 F.3d 990, 995-96 (10th Cir. 2008); *United States v. Hill*, 749 F.3d 1250, 1259-60 (10th Cir. 2014); *Nunez v. BNSF Ry. Co.*, 730 F.3d 681, 684 (7th Cir. 2013); *United States v. Allen*, 716 F.3d 98, 105-06 (4th Cir. 2013); *Nimely v. City of New York*, 414 F.3d 381, 398 (2d Cir. 2005); *United States v. Whitted*, 11 F.3d 782, 785-87 (8th Cir. 1993). As these courts have explained, opining on a fact witness's credibility is not the proper "function of an expert," *Allen*, 716 F.3d at 106, because such testimony merely "wrap[s] the lay witness in the expert's prestige and authority," *Nunez*, 730 F.3d at 684.

a. As Judge Collins recognized, the panel's decision here "directly conflicts" with the Tenth Circuit's judgment in *Benally*. App. 78a-79a (Collins, J., dissenting from the denial of rehearing en banc). There, the Tenth Circuit upheld the exclusion of expert testimony about interrogation techniques that purportedly produce false confessions. 541 F.3d at 993. In doing so, the Tenth Circuit recognized and reaffirmed its prior conclusion that such testimony is

"generally not an appropriate subject for expert testimony" because it "encroaches upon the jury's vital and exclusive function to make credibility determinations" and "merely informs the jury that it should reach a particular outcome." *Id.* at 994 (quoting *United States v. Adams*, 271 F.3d 1236, 1244-45 (10th Cir. 2001).

Benally's facts closely resemble those here. In *Benally*, a criminal defendant (Benally) "provided [FBI] agents with a written confession" to a sexual assault, but later "disavowed his confession . . . and claimed it was prompted by coercive tactics used by the FBI agents," which the agents denied. *Id.* at 992-93. At trial, Benally proffered an "'expert in the field of social psychology'" whose expertise included "'the subjects of confession, interrogation techniques,'" and "'the ability of those techniques to cause people to confess.'" *Id.* at 993. She planned to testify "regarding the phenomenon of false confessions," "whether false confessions occur," and "why people confess falsely." *Id.* at 993-94. The purpose of her testimony was to place Benally's allegations "regarding the conditions of his interrogation" and "his explanation for why he confessed falsely" into "a broader, more believable context." *Id.* at 994.

The Tenth Circuit affirmed the district court's exclusion of the proffered expert. *Id.* at 996. It identified several reasons why this kind of testimony is "'generally not an appropriate subject for expert testimony.'" *Id.* at 994. Among other things, such testimony "encroaches upon the jury's vital and exclusive function to make credibility determinations, and therefore does not assist the trier of fact as required by Rule 702.' *Id.* at 995 (quoting *Adams*, 271 F.3d at 1245). Furthermore, "'the testimony of

impressively qualified experts on the credibility of other witnesses is prejudicial" and "unduly influences the jury.'" *Id.* As the Tenth Circuit explained, where the "import" of the expert testimony is to "disregard the confession and credit the defendant's testimony that his confession was a lie," that testimony raises significant problems under Rules 702 and 403. *Id.*

Benally accords with the decisions of many other federal and state courts that have reached the same result under other evidentiary codes. In *Commonwealth v. Alicia*, for example, the Pennsylvania Supreme Court expressed "agreement with the Tenth Circuit['s] decision in *Benally*" and upheld the trial court's exclusion of "expert testimony concerning the phenomenon of 'false confessions'" under the Pennsylvania Rules of Evidence, which, in parts relevant here, are identical to the Federal Rules of Evidence. 92 A.3d 753, 755, 763-64 (Pa. 2014). Like the Tenth Circuit in *Benally*, the Pennsylvania Supreme Court explained that such testimony gives "'an unwarranted appearance of authority as to the subject of credibility, a subject which an ordinary juror can assess.'" *Id.* at 762; *see also, e.g.*, *State v. Cobb*, 43 P.3d 855, 869 (Kan. Ct. App. 2002) ("The type of testimony given by [coerced confession experts] invades the province of the jury and should not be admitted [under Kansas evidentiary rules]."); *United States v. Griffin*, 50 M.J. 278, 284 (C.A.A.F. 1999) (likening the admission of expert testimony about coerced confessions to having an expert witness "act as a 'human lie detector.'").[2]

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[2] Many state and federal courts have refused to entertain coerced-confession expert testimony on related grounds, such as

The Ninth Circuit's decision here squarely conflicts with *Benally* and these other cases. As noted, *Benally* holds that expert testimony is properly excluded where its "import" is to "disregard the confession and credit the defendant's testimony that his confession was a lie," 541 F.3d at 995. But the Ninth Circuit held that Dr. Blandón-Gitlin's testimony *must* be admitted precisely because it would help the jury conclude that Tekoh's confession was a lie. "Because false confessions are an issue beyond the common knowledge of the average layperson," the panel majority reasoned, jurors would be "'better equipped to evaluate [Tekoh's] credibility and the confession'" when armed with Blandón-Gitlin's expert testimony. App. 3a (alteration in original).

b. The Ninth Circuit's decision here also conflicts with the Second Circuit's rejection of similar credibility-bolstering expert testimony in *Nimely*. *See* 414 F.3d at 398. There, the plaintiff had been shot in the back during an arrest, and he subsequently brought excessive-force claims against the arresting officers. *Id.* The officers' credibility was critical to their defense, and they called an expert whose testimony sought to "reconcile the medical evidence that [the plaintiff] was shot in the back with [the police officers'] testimony that [the shooting officer] fired his weapon while [plaintiff] faced him." *Id.* at 389. The expert opined that the officers spoke

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that the testimony relies on "faux science." *United States v. Phillipos*, 849 F.3d 464, 471-72 (1st Cir. 2017); *see also, e.g.*, *People v. Kowalski*, 821 N.W.2d 14, 31-32 (Mich. 2012); *State v. Rafay*, 285 P.3d 83, 112 (Wash. Ct. App. 2012); *Vent v. State*, 67 P.3d 661, 667-70 (Alaska Ct. App. 2003).

truthfully when they testified that, at the time plaintiff was shot, he was facing the officers. In the expert's opinion, "because of the limited powers of human perception" and the speed at which the events were occurring, the officers could have perceived that plaintiff was fully turned when the shooting officer pulled the trigger. *Id.*

The Second Circuit held that the expert's testimony was inadmissible under Rules 702 and 403. First, it explained that "this court, echoed by our sister circuits, has consistently held that expert opinions that constitute evaluations of witness credibility, even when such evaluations are rooted in scientific or technical expertise, are inadmissible under Rule 702." *Id.* at 398. As the court noted, the expert's testimony flew in the face of that rule: It presented the expert's opinion "as to the tendencies of police officers to lie or tell the truth in investigations of the sort at issue here," and provided "various reasons why police officers have no incentive to give false statements in excessive force cases." *Id.* Thus, the testimony "essentially instructed the jury as to an ultimate determination that was exclusively within its province, namely the credibility of [the arresting officers]." *Id.* For these reasons, *Nimely* was not a "close case": The expert testimony was clearly inadmissible under Rule 702. *Id.*

Furthermore, the Second Circuit explained that under Rule 403, it had previously "disapproved of the practice of expert witnesses basing their conclusions on the in-court testimony of fact witnesses, out of concern that such expert testimony may improperly bolster the account given by the fact witnesses." *Id.* In *Nimely*, the question "whether [the arresting officers] . . . were the more believable witnesses, lay

at the heart of th[e] trial." *Id.* By allowing an expert to "state his belief that the officers were not lying" and to "give to the jury a series of rationales for that belief," the trial court had admitted evidence that, at the very least, was "prejudicial, confusing, and misleading to the jury within the meaning of Rule 403." *Id.*

The Ninth Circuit's decision below cannot be reconciled with *Nimely*. As in *Nimely*, Dr. Blandón-Gitlin's testimony sought to opine "as to the tendencies of police officers to lie or tell the truth in investigations of the sort at issue here." *Id.* at 398; *compare* 1-ER-90 (Blandón-Gitlin testimony addressing how to "critically evaluate the reliability of Deputy Vega's account of events"). And it likewise "instructed the jury as to an ultimate determination that was exclusively within [the jury's] province, namely, the credibility" of Tekoh's testimony about his confession. *Nimely*, 414 F.3d at 398; 1-ER-80–81 (opining that Tekoh's confession was "coerced and highly unreliable"). For those reasons, the Second Circuit would have excluded Blandón-Gitlin's testimony under Rule 702.

Similarly, Blandón-Gitlin "bas[ed] [her] conclusions on the in-court testimony of [a] fact witness[]"—Tekoh himself. *Nimely*, 414 F.3d at 398. As the Ninth Circuit panel majority acknowledged, her testimony expressly rested on the "assum[ption]" that "Mr. Tekoh's accounts of events" were true. App. 3a, 6a (Miller, J., dissenting). And, as in *Nimely*, it is "beyond question that issues of credibility"—that is, whether Vega or Tekoh was telling the truth—"lay at the heart of this trial." *Nimely*, 414 F.3d at 398. Under those circumstances, *Nimely* makes clear that Blandón-Gitlin's testimony should have been

excluded because it is "prejudicial, confusing, and misleading to the jury within the meaning of Rule 403." *Id.*

3. For the reasons explained, the district court's decision to exclude Dr. Blandón-Gitlin's testimony under Rule 702 and Rule 403 would have been affirmed had the case arisen in the Tenth Circuit, the Second Circuit, or other courts applying the standard rule precluding experts from bolstering the credibility of fact witnesses. As the en banc dissenters made clear, the Ninth Circuit's outlier approach "stands alone" in *mandating* admission of expert testimony on coerced confessions. App. 92a. This Court should grant certiorari to resolve the circuit split and restore the uniform application of federal law with respect to such testimony.

II. THE NINTH CIRCUIT'S DECISION IS INDEFENSIBLE

The Ninth Circuit panel decision in this case is "deeply flawed in multiple respects." App. 78a (Collins, J., dissenting from denial of rehearing en banc). As a general matter, nothing in the Federal Rules of Evidence suggests that expert testimony of the kind at issue here—testimony seeking to vouch for the credibility of a criminal defendant's testimony that his confession was coerced and false—must be admitted into evidence. Just the opposite: Under Rule 702, a district court should generally exclude such testimony. The Ninth Circuit's decision *requiring* the admission of such testimony is "plainly erroneous." App. 71a (Collins, J., dissenting from denial of rehearing en banc).

The Ninth Circuit's error is especially egregious in light of the particular circumstances of this case. The

purportedly coercive interrogation techniques highlighted by the Ninth Circuit—"minimization tactics," "false evidence ploys," and "just asking questions"—are legal, commonly used techniques that are not coercive as a matter of law. And as Judge Miller explained in his dissent, Blandón-Gitlin's testimony is superfluous because jurors who believed Tekoh's account of his confession could have no doubt that it was coerced. App. 5a. Admitting Blandón-Gitlin's testimony at a third trial would serve no purpose other than to "improperly . . . bolster [Tekoh's] credibility." App. 82a (Collins, J., dissenting from denial of rehearing en banc). The Ninth Circuit's decision should be reversed.

1. The Tenth Circuit got it right in *Benally*. As this Court has explained, it is axiomatic that "'questions of credibility, whether of a witness or of a confession, are for the jury.'" *Crane v. Kentucky*, 476 U.S. 683, 688 (1986). Thus, as the Tenth Circuit held in *Benally*, under the Federal Rules of Evidence, courts generally have no business admitting expert testimony addressing the allegedly coercive circumstances of a criminal defendant's confession because such testimony "inevitably would 'encroach[] upon the jury's vital and exclusive function to make credibility determinations'" about the circumstances of a criminal confession. 541 F.3d at 995 (alterations in original). As the Tenth Circuit correctly noted, the "import" of such testimony in the mine run of cases is to "disregard the confession and credit the defendant's [present] testimony that the confession was a lie." *Id.* Permitting an expert's testimony to serve that function is "'not helpful to the jury'"; to the contrary, it "'usurps a critical function of the jury.'" *Id.*

"[O]ne need look no further than Dr. Blandón-Gitlin's own expert report" for a textbook example of why these rules are necessary. App. 83a (Collins, J., dissenting from denial of rehearing en banc). She planned to testify that Tekoh's confession was "highly unreliable" because "Mr. Tekoh's accounts of events" were "corroborated by his co-workers' testimonies," the "interrogation was not recorded," and Tekoh was subjected to "psychologically manipulative tactics as well as physical abuse." 1-ER-80–81. She also planned to testify that *Vega's account* of the circumstances of the confession was unreliable because it was "significantly different from the various witnesses' accounts, including Mr. Tekoh himself." 1-ER-89. And her entire testimony expressly rested on "'assum[ing] the veracity' of Mr. Tekoh's claim[]" of coercion. App. 3a; 1-ER-80–81.

In other words, Blandon-Gitlin's testimony was designed to send a clear message to the jury: Disregard Tekoh's confession (and witness testimony that the confession was freely given), and embrace Tekoh's story that the confession was a coerced lie. That message embodies a straightforward effort to usurp the jury's power to make its own credibility determinations, without the help of experts. *See, e.g.*, *Nimely*, 414 F.3d at 398.

The problems with expert testimony of this kind run even deeper. In a civil case like this one, where the question whether a confession was unlawfully coerced is the ultimate issue, expert testimony that a confession was coerced provides the jury with a legal conclusion as to that issue. *See Crane*, 476 U.S. at 688 (whether a confession is coerced is a "legal question"); *see* 1-ER-11 (instructing jury as to legal standard on coercion).

That is precisely what Blandon-Gitlin planned to provide the jury. As her expert report declared: "In the current case, as evaluated from a scientific perspective and assuming the veracity of Mr. Tekoh's accounts of events, it is my opinion that Mr. Tekoh's written confession was coerced and highly unreliable." 1-ER-80–81. Expert opinions on an "ultimate issue of law" do not "'*aid* the jury in making a decision, but rather attempt[] to substitute the expert's judgment for the jury's.'" *United States v. Diaz*, 876 F.3d 1194, 1197 (9th Cir. 2017) (quoting *United States v. Duncan*, 42 F.3d 97, 101 (2d Cir. 1994)). Under Rule 702, such opinions must be excluded. *See id.*

Yet the decision below compels the admission of such expert testimony wherever the "circumstances surrounding [a criminal defendant's] confession go to the heart of his case." App. 4a. Thus, in the Ninth Circuit's view, a district court must admit expert testimony where such testimony is "relevant," either because the expert would "opine[] on how" a confession might "indicate classic symptoms of coercion" (a legal conclusion) or else indicate how certain "tactics could elicit false confessions" (a credibility conclusion concerning the truth or falsity of the relevant confession). App. 2a. That upside-down construction of Rule 702 should be reversed.

The Ninth Circuit panel majority addressed these points by asserting the district court was "incorrect[]" when it concluded that "Dr. Blandón-Gitlin's testimony would impermissibly vouch for or buttress Tekoh's credibility." App. 3a. In the Ninth Circuit's view, Blandón-Gitlin was simply "corroborat[ing]" Tekoh's testimony, not engaging in "improper buttressing." *Id.*

This "illusory line" is mistaken. App. 84a (Collins, J., dissenting from denial of rehearing en banc). Only a witness who *independently* perceived the circumstances of Tekoh's confession could "corroborate" his account of the confession. *See Corroborated*, *Black's Law Dictionary* (11th ed. 2019) ("corroborated *adj.* (1822) (Of a statement or claim) supported by independent evidence that is both credible and admissible."). Of course, as the district court noted, Blandón-Gitlin was not a "percipient witness" and therefore could not independently verify Tekoh's account. App. 29a. Her testimony merely "[a]ssum[ed] the veracity of Mr. Tekoh's accounts of events." App. 11a. Blandón-Gitlin could not possibly "corroborate" Tekoh's story, only "bolster" it. *See Bolster*, *Black's Law Dictionary*, *supra* ("bolster *vb.* (1915) To enhance . . . with additional evidence. This practice is often considered improper when lawyers seek to enhance the credibility of their own witnesses."). That is why courts "disapprove[] of the practice of expert witnesses basing their conclusions on the in-court testimony of fact witnesses." *Nimely*, 414 F.3d at 398.

2. Other errors plagued the Ninth Circuit's analysis of Blandón-Gitlin's testimony as well. Most glaringly, the panel majority concluded that her testimony should be admitted because it would shed light on how three potentially "coercive" interrogation techniques—"false evidence ploy[s]," "minimization tactics," and "just asking questions"—"could elicit false confessions." App. 2a-4a.

The problem with this rationale is that all of those techniques are perfectly lawful. The entire question in this case is whether Deputy Vega's interrogation of Tekoh resulted in an unlawfully coerced confession.

See 1-ER-12 (instructing jury that a confession is "improperly coerced or compelled under the Fifth Amendment if a police officer uses physical or psychological force or threats *not permitted by law* to undermine a person's ability to exercise his or her free will") (emphasis added). Tekoh cannot establish his claim by pointing to *lawful* interrogation techniques. Nevertheless, Blandon-Gitlin's testimony, and the panel decision compelling introduction of that testimony, dwelled on the effects of lawful interrogation techniques.

For example, the Ninth Circuit lauded the relevance of Blandón-Gitlin's "expla[nation] to the jury [of] the significance of Deputy Vega's [alleged] use of a false evidence ploy when he told Tekoh there was video evidence." App. 3a. In doing so, it simply ignored the district court's conclusion—well supported by relevant case law—that such tactics are "lawful" and therefore not "coercive." App. 15a; *see, e.g.*, *Dassey v. Dittmann*, 877 F.3d 297, 313 (7th Cir. 2017) (en banc) (recognizing the lawfulness of false evidence ploys); 6-ER-1467 (concession from Tekoh's counsel that a false-evidence ploy is not illegal). That conclusion was correct. Not all external pressure renders a confession coerced within the meaning of the Fifth Amendment. Rather, coercion requires that a "'defendant's will was overborne' by the circumstances surrounding the giving of a confession. *Dickerson v. United States*, 530 U.S. 428, 434 (2000) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973); *see* 1-ER-12 (jury instructions). Bluffing about the existence of incriminating evidence does not come close to clearing the high bar required to render a confession involuntary within the meaning of the Constitution.

The same problem attends the Ninth Circuit's assertion that Blandón-Gitlin's testimony would "demonstrate that Deputy Vega used minimization tactics—*classic coercion*—to elicit incriminating admissions." App. 2a-3a (emphasis added). As Judge Collins noted, the panel's "startling holding" that "minimization tactics" constitute "classic coercion" is "based on no authority at all." App. 85a-86a. Indeed, minimization tactics are used in over a third of all interrogations. *See* Richard A. Leo, *Inside the Interrogation Room*, 86 J. Crim. L & Criminology 266, 278 tbl. 5 (1996). A police interrogator who lends a criminal suspect a sympathetic ear or offers up blame-reducing excuses for the suspect's crime does not impermissibly use "physical or psychological force" to "undermine [the] person's ability to exercise his or her free will." 1-ER-12.

And, of course, the standard interrogative tactic of "just asking questions," App. 4a, is the cornerstone of every police investigation. Neither the panel majority nor the en banc concurrence even attempted to justify the assertion that "just asking questions" amounts to unlawful coercion. Nor could they. Expert testimony about how these techniques might exert subtle pressure on a defendant is wholly inappropriate. And as Judge Collins noted, "no precedent . . . endorses the majority's extraordinary view" to the contrary. App. 80a–81a. The district court was right to conclude that Blandón-Gitlin's testimony about these techniques would not be "particularly helpful" in establishing Tekoh's coercion claim, as the testimony does not show that Vega acted unlawfully. App. 17a.

Furthermore, Blandón-Gitlin's testimony about the significance of these tactics was unhelpful and misleading insofar as much of it "did not line up with

Tekoh's own version of events." App. 84a–85a (Collins, J., dissenting from denial of rehearing en banc). For example, Tekoh himself never testified that Vega employed "minimization" tactics, or that such tactics were responsible for his purportedly false confession. To the contrary, Tekoh's testimony was that Vega employed overtly coercive methods that Blandón-Gitlin and Tekoh's counsel called "maximization tactics." *See* Plaintiff-Appellant Suppl. Br. on Remand from Supreme Court at 11, *Tekoh v. County of Los Angeles*, 75 F.4th 1264 (9th Cir. 2023), 2022 WL 4100977. In Tekoh's own words, he was "ready to write whatever [Vega] wanted" because "[Vega] put his hand on his gun," "threatened [him] with deportation," and "stepp[ed] on [his] toes," so he "wasn't sure what [Vega] would do to [him] if [he] kept resisting" and "just wanted to end the situation." 2-ER 284–85. Nothing in Tekoh's account provided the necessary factual predicate for Blandón-Gitlin's testimony about face-saving "minimization tactics." Expert testimony is admissible only if it "will help the trier of fact to understand *the evidence*." Fed. R. Evid. 702 (emphasis added). But with respect to her testimony on Vega's allegedly coercive tactics, Blandón-Gitlin's opinion was "simply divorced from the factual record of this case." App. 85a (Collins, J., dissenting from denial of rehearing en banc).

3. Finally, the Ninth Circuit's analysis of the supposed relevance of Blandón-Gitlin's testimony was mistaken for another fundamental reason that Judge Miller identified and Judge Collins echoed in their respective dissents:: It was completely unnecessary and would not have helped the jury resolve the central issue in the case.

As Judge Miller noted, and as the district court also recognized, this case "came down to a question of credibility." App 5a (quoting App. 30a). The district court rightly concluded that "if the jury believed Mr. Tekoh's version of the events"—a version according to which Vega "browbeat [Tekoh] physically and verbally, threatened to deport" him and his family, "used racial epithets, denied him access to counsel," and "forced him to write a confession which Vega dictated"—then his "confession was clearly coerced and highly unreliable and [Blandon-Gitlin's] opinion added nothing of substance." App.28a-29a.

No expert testimony is appropriate in these circumstances. After all, no reasonable juror would "need the assistance of a person with specialized knowledge to understand that those conditions, if true, would give rise to a false and coerced confession." *Id.* Expert testimony is unnecessary "when common sense will do." App. 6a (Miller, J., dissenting).

Below, the Ninth Circuit majority acknowledged the district court's conclusion that Blandón-Gitlin's testimony was unnecessary because every reasonable juror who credited Tekoh's testimony would understand that Tekoh's confession was coerced. App. 4a. But the majority rejected that conclusion for two reasons, both mistaken.

First, the Ninth Circuit reasoned that "even in the[] circumstances" alleged by Tekoh, it is "not necessarily obvious" to the "layperson[]" that police questioning might be coercive. App. 4a. That is a dodge. As Judge Miller recognized, it "does not take an expert" to understand that when a suspect writes a confession dictated by a police officer menacingly holding his gun and threatening deportation, he is

being coerced. App. 5a-6a. And in order to avoid any doubt, the district court expressly offered to instruct the jury that if jurors accepted Tekoh's account—that is, "if they f[ound] that Officer Vega threatened [Tekoh] both physically and verbally, threatened to turn his family over to authorities for deportation and put a piece of paper in front of him and told him that he had to write down what Vega said to him"—then the jury should find that Tekoh's confession "was coerced." App. 12a. But Tekoh never took the district court up on that offer, and the panel majority failed to address it, let alone explain why Blandón-Gitlin's testimony would have been helpful in light of that instruction.

Second, the Ninth Circuit determined that even if it was "apparent[ly] obvious[]" that Tekoh had presented an account of unlawful coercion, Blandón-Gitlin's testimony still should have been admitted because, "at the second trial, the defendants repeatedly disputed that Vega used coercive tactics." App. 4a. But if it is "apparent[ly] obvious[]" that the tactics Tekoh described in his testimony are coercive, then the only additive value of Blandón-Gitlin's testimony would be to bolster Tekoh's credibility in the central "dispute[]" with Vega over whether those tactics were actually deployed. *Id.* As noted, it is settled that expert testimony proffered for that purpose is inadmissible. *See, e.g.*, *Benally*, 541 F.3d at 995; *Nimely*, 414 F.3d at 398. At the very least, given the high risk that the jury might substitute expert opinion for its own assessment of credibility, the district court was within its discretion to exclude the testimony under Rule 403. *Id.*; App. 29a.

In short, there was no basis for the Ninth Circuit to second-guess the district court's exclusion of Dr.

Blandón-Gitlin's expert testimony. And its reasoning for reversing the district court was "deeply flawed in multiple respects." App. 78a (Collins, J., dissenting from denial of rehearing en banc). The decision below should be reversed.

III. THE DECISION BELOW WILL BROADLY DISRUPT ROUTINE POLICE WORK AND THE ADMINISTRATION OF JUSTICE

The decision below is the rare evidentiary precedent that will have broad and significant effects—not only with respect to the development of the law, but also with respect to on-the-ground police work throughout the western United States. This Court's review is necessary to prevent those effects.

As explained above, the Ninth Circuit's decision announces a categorical rule: If "the circumstances surrounding [a criminal defendant's] confession go to the heart of his case," then the defendant has a right to introduce expert testimony that will "help the jury better understand coerced confessions." App. 4a; *see also* App. 72a (Collins, J., dissenting from denial of rehearing en banc) (describing the panel majority's "*per se* rule requiring the admission of such testimony in all cases alleging a coerced confession."). Even worse, that rule is built on the assumption that common investigative techniques—minimization tactics, false evidence ploys, and even "just asking questions"—"*can be coercive*," and are thus inherently suspect. App. 4a (emphasis added).

The ramifications of the Ninth Circuit's profoundly novel reasoning are astounding. As Judge Collins noted, the panel's "drive-by" description of minimization tactics as "'classic coercion'" is "startling" and "based on no authority at all."

App. 85a-86a. The same may be said for its suggestion that "false evidence ploys" and "just asking questions" are coercive. App. 3a-4a. All these "tactics" are widely used, effective, and legal interrogation techniques. *See Dassey*, 877 F.3d at 313 (describing false-evidence ploys as a "common interview technique"); Leo, *supra*, at 278 tbl.5 (showing that minimization tactics are used in over one third of all interrogations). And the notion that they are responsible for producing involuntary or false confessions is empirically unfounded. *See* Paul G. Cassell, *The Guilty And The "Innocent": An Examination*, 22 Harv. J.L. & Pub. Pol'y 523, 525-26 (1999).

Yet under the guise of articulating standards for the admission of expert evidence, the Ninth Circuit's decision implies a radical view of the substantive legal standards governing whether an interrogation is coercive. Those new standards will be applied not only in criminal cases, but also in civil actions, like this one, for money damages under Section 1983. As a result, local governments and individual police officers throughout the Ninth Circuit may now expect to face off against coerced-confession experts in countless damages actions involving confessions obtained through "false evidence ploy[s]," "minimization tactics," or "just asking questions," despite the fact that these tactics are *lawful*. App. 2a-4a. Every day, at every police station or street corner in the western United States, police questioning will now take place under the long shadow of the Ninth Circuit's new rule. The decision's pernicious on-the-ground consequences for local governments and law enforcement are reason enough to grant certiorari.

Cf. City of Grants Pass v. Johnson, 144 S. Ct. 679 (2024) (granting certiorari).

The decision below also threatens to change how confession evidence is presented and used in criminal trials. Under the Ninth Circuit's decision, a criminal defendant will have the right to present *expert* evidence bearing on "the circumstances surrounding [his] confession." App. 4a. And, by the same token, the government will presumably enjoy the right to call its own expert to analyze those same circumstances. *See United States v. Pinedo*, No. 21-50242, 2024 WL 2011970, at *3 (9th Cir. May 7, 2024) (relying on the Ninth Circuit's decision in *Tekoh* to uphold the *government's* introduction of expert evidence). Every federal criminal case involving confession evidence in the Ninth Circuit might now devolve into a "battle of the experts" over the circumstances of the confession. That regime will not only add cost and complexity to criminal proceedings but will greatly diminish the jury's proper role in evaluating for itself the credibility and probative weight of a defendant's out-of-court confession. *See Crane*, 476 U.S. at 688.

Those who distrust all criminal confessions will cheer this result. *See, e.g.*, Guha Krishnamurthi, *The Case for the Abolition of Criminal Confessions*, 75 SMU L. Rev. 15 (2022). But the "'need for police questioning as a tool for effective enforcement of criminal laws' cannot be doubted." *Moran v. Burbine*, 475 U.S. 412, 1143 (1986). And police interrogation "is an indispensable instrumentality of justice." *Ashcraft v. State of Tennessee*, 322 U.S. 143, 160 (1944) (Jackson, J. dissenting).

If *every* interrogation that involves "just asking questions" is susceptible to expert analysis regarding

coercion, then every police interrogation will operate under a constant pall of suspicion and uncertainty. Left uncorrected, the Ninth Circuit's opinion will "unduly fetter[]" law-enforcement officers with respect to the basic work necessary to "protect[] society" from crime and introduce unnecessary complexity into the administration of justice. *Id.* The decision below should not stand.

* * *

This Court previously granted certiorari in this case to correct the Ninth Circuit's dangerous attempt to expand Section 1983 liability at the expense of law enforcement. *Vega*, 597 U.S. at 138. On remand, the Ninth Circuit doubled down, issuing another erroneous decision threatening law enforcement and criminal prosecutions. If anything, the panel decision on remand represents an even more radical intrusion into the work of law enforcement by putting *every* confession—not just un-*Mirandized* confessions—under the microscope. That decision, with which eleven Ninth Circuit judges have forcefully registered their disagreement, urgently warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 24, 2024

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Terence B. TEKOH, Plaintiff-Appellant,

v.

COUNTY OF LOS ANGELES; Dennis Stangeland, Sergeant; Carlos Vega, Deputy, Defendants-Appellees,

and

Los Angeles County Sheriff's Department; Does, 1 to 10, Defendants.

No. 18-56414

Filed August 4, 2023

75 F.4th 1264

Before: Mary H. Murguia, Chief Judge, and Kim McLane Wardlaw and Eric D. Miller, Circuit Judges.

Opinion by Judge Wardlaw;

Dissent by Judge Miller

OPINION

WARDLAW, Circuit Judge:

Following a federal trial, Terence Tekoh appealed the district court's decisions to (1) instruct the jury that a § 1983 claim could not be grounded in a *Miranda* violation alone, and (2) exclude the testimony of Tekoh's coerced confessions expert, Dr. Iris Blandón-Gitlin. We ruled in favor of Tekoh on the *Miranda* issue, but the Supreme Court reversed that decision. *See Vega v. Tekoh*, —— U.S. ——, 142 S. Ct. 2095, 2101, 213 L.Ed.2d 479 (2022). On remand,

Tekoh concedes that his *Miranda* claim is no longer viable, but maintains that he is entitled to a new trial on his Fifth Amendment coercion claim because the district court improperly excluded Dr. Blandón-Gitlin's testimony.

We review a district court's decision to exclude expert testimony for abuse of discretion. *United States v. Redlightning*, 624 F.3d 1090, 1110 (9th Cir. 2010). Exercising jurisdiction under 28 U.S.C. § 1291, we reverse.

The district court erred in excluding Dr. Blandón-Gitlin's testimony on coerced confessions. Expert testimony is admissible if it will "help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a). "Whether testimony is helpful within the meaning of Rule 702 is in essence a relevance inquiry." *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1184 (9th Cir. 2002). "Our case law recognizes the importance of expert testimony when an issue appears to be within the parameters of a layperson's common sense, but in actuality, is beyond their knowledge." *United States v. Finley*, 301 F.3d 1000, 1013 (9th Cir. 2002).[1]

Dr. Blandón-Gitlin's testimony was relevant to Tekoh's case, as she would have opined on how the text of confessions can indicate classic symptoms of coercion, and would have explained to the jury how Deputy Vega's tactics could elicit false confessions. She planned to testify that the apologies and excuses

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[1] Defendants-Appellees only contest whether Dr. Blandón-Gitlin's testimony would be helpful to the jury—i.e., its relevance—and do not contest that her testimony is based upon sufficient data or that her conclusions are the product of reliable principles and methods. *See Redlightning*, 624 F.3d at 1110.

in Tekoh's statement demonstrate that Deputy Vega utilized minimization tactics—classic coercion—to elicit incriminating admissions. She would also explain to the jury the significance of Deputy Vega's use of a false evidence ploy when he told Tekoh there was video evidence. A jury could benefit from Dr. Blandón-Gitlin's expert knowledge about the science of coercive interrogation tactics, which Deputy Vega employed here, and how they could elicit false confessions. *See United States v. Halamek*, 5 F.4th 1081, 1088–89 (9th Cir. 2021) (affirming admission of psychological phenomenon where it would help explain that phenomenon to the jury). Because false confessions are an issue beyond the common knowledge of the average layperson, "jurors would have been better equipped to evaluate [Tekoh's] credibility and the confession itself had they known of the identified traits of stress-compliant confession and been able to compare them to [his] testimony." *Lunbery v. Hornbeak*, 605 F.3d 754, 765 (9th Cir. 2010) (Hawkins, J., concurring).

The district court incorrectly concluded that Dr. Blandón-Gitlin's testimony would impermissibly vouch for or buttress Tekoh's credibility. Her testimony, however, was not that Tekoh was credible, but "assum[ing] the veracity" of Tekoh's claims, she concluded that Deputy Vega used these coercive tactics. Expert testimony that corroborates a witness's testimony is not a credibility assessment or improper buttressing, even if it implicitly lends support to that person's testimony. *Cf. Reed v. Lieurance*, 863 F.3d 1196, 1209 (9th Cir. 2017) ("While [a]n expert witness is not permitted to testify specifically to a witness'[s] credibility, we know of no rule barring expert testimony because it might

indirectly impeach the credibility of an opposing party's testimony." (internal quotation marks and citations omitted)).

Appellees argue that Dr. Blandón-Gitlin's testimony lacked probative value because the falsity of the confession was not at issue in the case. According to the appellees and the dissent, even if the jury believed the confession was true, it was "well-equipped" to conclude that Deputy Vega's tactics—racial slurs, threats of deportation, approaching Tekoh with his hand on his gun—were unconstitutionally coercive without Dr. Blandón-Gitlin's testimony. But despite the apparent obviousness of the coercion, at the second trial, the defendants repeatedly disputed that Vega used coercive tactics. And the expert's proposed testimony was not simply about false confessions, but the coercive questioning tactics that lead to them. Dr. Blandón-Gitlin's testimony would help the jury better understand coerced confessions, including why just asking questions can be coercive, issues that are beyond a layperson's understanding and not necessarily obvious, even in these circumstances. *See Lunbery*, 605 F.3d at 763 (Hawkins, J., concurring) (stating that it is "hard to imagine anything more difficult to explain to a lay jury" than the fact that the alleged perpetrator could have confessed to a crime he did not commit).

Because the circumstances surrounding Tekoh's confession go to the heart of his case, excluding expert testimony contextualizing his account was crucial to the outcome. Accordingly, we reverse and remand for a new trial on Tekoh's Fifth Amendment claim.

REVERSED AND REMANDED.

MILLER, Circuit Judge, dissenting:

The jury had to decide who was telling the truth about the circumstances of Tekoh's interrogation by Deputy Vega: Tekoh or Vega. The proffered expert testimony of Dr. Blandón-Gitlin would not have been helpful to the jury in making that decision, so the district court did not abuse its discretion in excluding it.

To be admissible, expert testimony must "help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a). Expert testimony is not helpful if the factfinder is "well equipped" to determine the issue " 'without enlightenment from those having a specialized understanding of the subject involved in the dispute.' " *Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgmt., Inc.*, 618 F.3d 1025, 1040–41 (9th Cir. 2010) (quoting Fed. R. Evid. 702 advisory committee's note).

In this case, no specialized understanding was necessary to assess the evidence of the allegedly coercive interrogation. As the district court explained, "this matter came down to a question of credibility"—if the jury believed Tekoh's account of the interrogation, then it would have been obvious that "the confession was indeed coerced." Tekoh said that when he tried to leave the room, Vega rushed at him, stepped on his toes, and threatened, "I'm about to put your black ass where it belongs, about to hand you over to deportation services, and you and your entire family will be rounded up and sent back to the jungle." According to Tekoh, Vega then ordered him to sit down, handed him a pen and paper, and dictated a confession for him to write. When Tekoh hesitated, Vega allegedly put his hand on his gun. It does not

take an expert to see how that would have been coercive.

According to Tekoh, an expert might have explained that he was also subject to other, subtler pressures. But every situation is theoretically susceptible to some sort of expert analysis. It does not follow that such an analysis would be helpful to the jury, especially not when common sense will do. The jury did not need a psychologist to explain that an officer's putting a hand on his gun would be threatening, any more than it needed a podiatrist to explain that an officer's stepping on a suspect's toes would be painful.

Even if a general discussion of coerced confessions had a role to play in this case, that is not what Dr. Blandón-Gitlin would have offered. Rather, she intended to testify about the coercion of Tekoh's confession in particular. Courts "routinely exclude" testimony by psychological experts who seek to apply general concepts to individual witnesses, because such testimony often amounts to a credibility assessment. *Yu v. Idaho State Univ.*, 15 F.4th 1236, 1246 (9th Cir. 2021) (Miller, J., concurring) (citing cases). Credibility is a matter for the jury to decide, so "[a]n expert witness is not permitted to testify specifically to a witness' credibility or to testify in such a manner as to improperly buttress a witness' credibility." *United States v. Candoli*, 870 F.2d 496, 506 (9th Cir. 1989).

Dr. Blandón-Gitlin's testimony would have violated that principle. She expressly assumed "the veracity of Mr. Tekoh's accounts of events," thus assuming that his confession was coerced. She would have invoked her expertise to press that conclusion on the jury. "From a scientific and professional

perspective," she opined, "the content of [Tekoh's] statement, as a key piece of evidence of the alleged crime[,] is of poor quality." She described part of Tekoh's confession as a "textbook example" of "minimization tactics," or "face-saving excuses the interrogator creates" that "exponentially increase false confessions." In so doing, she foreclosed the alternative interpretation that Tekoh's "face-saving excuses" were just that—efforts to minimize the seriousness of an offense he had actually committed. Jurors have little room to draw their own conclusions about who is telling the truth when an expert uses the contested statement as the "textbook example" of falsity.

In any event, even if there were some basis for admitting Dr. Blandón-Gitlin's testimony, that does not mean that the district court abused its discretion in excluding it. *See General Elec. Co. v. Joiner*, 522 U.S. 136, 143, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997). Under the abuse-of-discretion standard, we must uphold the district court's decision "unless the ruling is manifestly erroneous." *Id.* at 142, 118 S.Ct. 512 (quoting *Spring Co. v. Edgar*, 99 U.S. 645, 658, 25 L.Ed. 487 (1879)). Tekoh has not come close to meeting that standard, so I would affirm the judgment of the district court.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 16-7297-GW(SKx) Date September 28, 2017
Title *Terence B. Tekoh v. County of Los Angeles, et al.*

Present: The Honorable	GEORGE H. WU, UNITED STATES DISTRICT JUDGE	
Javier Gonzalez	Katie Thibodeaux	
Deputy Clerk	Court Reporter/ Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
John C. Burton Maria Cavalluzzi	Antonio K. Kizzie

PROCEEDINGS: PRETRIAL CONFERENCE

Court hears oral argument and issues the following rulings:

Defendants' Motions in Limine:

* * *

No. 9 to Exclude Dr. Iris Blandon-Gitlin Improper and Inadmissible Expert Opinions [86] is GRANTED;

* * *

Plaintiff's Motion in Limine to Exclude Opinion Testimony by Witnesses Not Designated, Including

Jane Creighton [92] is GRANTED IN PART and DENIED IN PART.

The Court continues the pretrial conference to October 5, 2017 at 9:00 a.m. Parties may appear telephonically provided notice is given to the clerk two business days prior to the hearing.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION

HONORABLE GEORGE WU

UNITED STATES DISTRICT JUDGE PRESIDING

Terence Tekoh, PLAINTIFF, VS. County of Los Angeles, et al., DEFENDANT,	)	NO. CV 16-7297 GW

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

THURSDAY, SEPTEMBER 28, 2017

* * *

[40]

* * *

THE COURT: * * *

As to number 9, that was to exclude the testimony from Dr. Blandon Gilton [sic].

MR. BURTON: Gitlin. Blandon-Gitlin.

THE COURT: Blandon-Gitlin. Is it G-I-L-T-I-N?

MS. CAVALUZZI: G-I-T.

THE COURT: G-I-T-L-I-N. Gitlin. Okay.

I think what the plaintiff's gist -- or the main gist of what they expect Dr. Blandon to testify about, and

what appears to be the main opinion in her report, is that, quote, "Assuming the veracity of Mr. Tekoh's account of events, his written confession was coerced and highly unreliable."

Again, you don't need an expert for that. If the jury buys Mr. Tekoh's version of events, then obviously the confession was coerced and cannot be used. And so I don't see why we need an expert for that.

It is not a situation where -- I mean, again, **[41]** this is not -- I don't see why I need an expert on this. It doesn't require expert testimony.

MS. CAVALUZZI: Your Honor, if I may.

THE COURT: Sure.

MS. CAVALUZZI: Well, what we need the expert for, your Honor, is to explain what is special a phenomenon. I think the common sense approach of most jurors would be a person does not confess to something they did not do. In fact, it will probably be the defense position that he confessed because in fact he is guilty.

THE COURT: No. The jurors -- most commonplace people would understand that normally a person who is innocent does not confess.

MS. CAVALUZZI: Right.

THE COURT: Unless there is something in the situation that gives rise to a reason for why a person would confess. For example, coercion. It is clearly understood. You don't need an expert to say that sometimes the person will make a false confession if they are coerced. Sometimes a person might make a false confession because of a particular psychological makeup of that person, which Dr. Blandon is not going to testify as to this particular defendant.

So I don't see why in this particular situation you need an expert, because in fact, according **[42]** to the plaintiff's version of events that Dr. Blandon needs to assume to make her conclusion, the jury is going to have to find that Vega threatened Mr. Tekoh both physically and verbally, threatened to turn him and his family over to the authorities for deportations, put a piece of paper in front of him, and after making threatening gestures with the hand on the gun, ordered him to write what Vega told him.

If the jury believes that, you don't think the jury can find coercion without the testimony of an expert witness?

MS. CAVALUZZI: I don't know necessarily if that would be true, your Honor.

THE COURT: I hate to break the news to you, but I think jurors can reach that conclusion based on the establishment of that evidence.

MS. CAVALUZZI: But there are different levels, I think, your Honor of where a juror will go in terms of what they think would coerce somebody, and everybody would have a different level.

What I think we need the expert for is to give context to what causes --

THE COURT: If you want, I will tell the jury that if they find that Officer Vega threatened him both physically and verbally, threatened to turn his family **[43]** over to authorities for deportation and put a piece of paper in front of him and told him that he had to write down what Vega said to him, I will say to the jury if you find that, you can find that the plaintiff was coerced.

Happy with that? I don't see the need for expert testimony when I am perfectly willing to give that instruction.

MS. CAVALUZZI: Well, that is helpful, your Honor. If I could just quickly point out just two more things to the Court.

In terms of the cases that we cited, in Crowe versus County of San Diego, which involved several teenagers that confessed to a crime they did not commit, which was proven by DNA later, the Court did allow one of these experts and explained why, that it was in order for the jury to understand. And the Court could have said there that, well, it is obvious if you keep people in a room for so many hours and you keep --

THE COURT: No. That is not, because again, there is a problem with that. If you keep people in a room for a certain period of time, that does not in and of itself establish that the statements are coerced.

MS. CAVALUZZI: Well, there were other factors in that case as well, your Honor, with the officers using false information. I mean, that is another one of the **[44]** marks which exists here, is that the officers lie, saying they have him on videotape. And those are the kinds of things that will coerce people. It is a phenomenon that I think --

THE COURT: The only problem is that as to that latter aspect the plaintiff testified that that statement did not cause him, because he was defiant on that. He himself said, well, show it to me, or words to that effect. So I don't think that your expert is going to be able to utilize that one as a factor that would give cause to him to write down a false confession.

MS. CAVALUZZI: Well, as I said, in terms of credibility, your Honor, we also cited the Lonberry versus Hornbeck case. And one of the things that that Court pointed out there is that this expert better equips the jury to determine credibility. It helps the jury. It assists them. And I don't mean --

THE COURT: But the problem is it is not a question of credibility, because the problem is that in order for your expert to give the opinion that she gives, she is saying you assume that what he said was correct.

Well, the problem is that the issue is whether or not what he is saying is correct. It is not whether or not if he says -- if his version of the events is correct that you need an expert to draw anything else.

[45] The problem is that you can't use the expert to bolster his credibility.

MS. CAVALUZZI: No. It is not bolstering, your Honor. It is to put in context how these confessions occur. And so, in other words, we would have no problem with Iris Blandon-Gitlin not addressing the issue of credibility at all, but she could explain to the jury how these kinds of earmarks in certain cases like the fabrication, like the being in an enclosed room, like submitting to authority, figuring out what they want and giving it to them, those kinds of things are in a sense the earmarks of what occurs and why people confess falsely.

And so we could limit her testimony to that, to at least explaining whether or not this case has those markings of what occurs in those case where there is a false confession.

If the Court limits us to that, that is fine. She doesn't have to assume what Mr. Tekoh says is true.

She can just in a general sense explain to the jury how that kind of confrontation and where someone is confronted with this false information -- and I understand, your Honor, that initially Mr. Tekoh stood up to that. But what happens is all of these little things that occur and time passing and being held in this room **[46]** and not allowed to leave come together to result in a coercion.

And so I think that Ms. Blandon-Gitlin should at least be allowed to explain to the jury those kinds of factors that will often result in a false confession, because I just don't think that jurors on their own, that laypeople really understand.

Everyone agrees that if you are tortured you may confess falsely. But what is the level that happens at and what are the types of interrogative methods that are used to get people to confess?

These are things that I think the average juror does not know. For example, the average juror I don't think knows that police are allowed to lie and come up with false information to try to get somebody to confess, and those are the among the factors that cause false confessions.

THE COURT: The problem is that that use of lies, et cetera, is lawful. And so therefore, I don't understand what the problem is because if the use of false statements of that sort is not considered to be coercion, it is considered to be an appropriate tactic, then, you know, you can't say that that is coercive, and therefore, the fact that he confesses is not coerced as a result of that.

[47] MS. CAVALUZZI: By itself, it isn't, your Honor. I agree with the Court. What I am trying to

say is it comes together. And those are the factors that Iris Blandon-Gitlin will testify to.

And as I said, I think it is the reason that that courts such as in Crowe versus County of San Diego and in the criminal case that we cited. And I think in other cases these experts are more and more being allowed to testify.

The issues are the same here as they are in a criminal case in terms of what the expert testifies to. I understand the burden of proof and what we are actually proving here is different, but what the expert testifies to in terms of their expertise and what light they are able to shed is the same here as it was in the criminal case.

THE COURT: But the problem is that it is dependent upon certain facts which the -- you know, again, the problem is that the determination of what the facts occurred, she is not going to be able to testify as to that.

And she can testify as to whether or not supposedly that certain things are coercive, potentially coercive, or to explain the execution of a false confession. But, again, it is not going to be required **[48]** here because if, in fact, the jury believes that he was physically and verbally threatened, et cetera, the confession is coerced. And as I have indicated, I will instruct the jury as to that fact.

MS. CAVALUZZI: Okay. And I understand that, your Honor. But we have more here than just whether the confession is coerced. Our burden is also to prove that it is false.

And so there are some people that would think, okay, you know, clever police tactics coerce somebody

to confess. If that confession is true, then what does it matter?

THE COURT: But the problem here is that the coerce consists of -- sorry, Sergeant Stangeland dictating what was said. And so it is -- again, if they find that he did that, I don't understand what point you are trying to make.

MS. CAVALUZZI: Well, because they still would ask the question, why would somebody -- I think we all imagine ourselves to be the type of person that would not do that. You know, I don't care what the police said. I wouldn't write out something that was a confession.

THE COURT: And Mr. Tekoh, who is the only person who can testify as to this, will explain where why he did write it down. Your expert is not going to be able to do **[49]** anything about that.

MS. CAVALUZZI: But she would be able to explain. As I said it is a phenomenon that occurs and that is why I think these experts are being used. I will submit, your Honor.

THE COURT: I will exclude her testimony. It is not particularly helpful. It will be time-consuming and potentially confusing. And as I have indicated, I will instruct the jury if the defense -- sorry, if the plaintiff wants that -- you know, the use of physical and verbal threats to obtain a confession means that the confession is coerced and it cannot be used as a basis for establishing probable cause.

MR. KIZZIE: Thank you, your Honor, regarding the motion. How about we submit our points regarding that jury instruction because the issue regarding that jury instruction is that rather than telling the jury what factors --

THE COURT: Let me stop you. Let me stop you. You guys can present whatever jury instructions you want that are stipulated to. And if you can't agree, then you can give me each side's versions of what you want. And I will take a look and we will talk about it before I give it to the jury. So that is something we can put off till later.

* * *

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TERENCE B. TEKOH, Plaintiff vs. COUNTY OF LOS ANGELES, a municipal entity, DEPUTY CARLOS VEGA, an individual and DOES 1 through 10, inclusive Defendants	Case No.: CV 16-7297-GW(SKx) [Hon. George H. Wu, Courtroom 9D] **JUDGMENT** Complaint Filed: October 25, 2016 FSC Date: August 31, 2017 Trial Date: October 10, 2017 Closing Date: October 17, 2017

1. This case came on regularly for trial on October 10, 2017 to October 17, 2017 in Department 9D of this Court, the Honorable George H. Wu presiding; the

Plaintiff appearing by Attorney John Burton from LAW OFFICE OF JOHN BURTON and Maria Cavalluzzi of CAVALLUZZI & CAVALLUZZI, and Defendants appearing by Attorneys Rickey Ivie and Antonio K. Kizzie from IVIE, MCNEILL & WYATT.

2. A jury of 8 persons was regularly impaneled and placed under oath. Witnesses were placed under oath and testified. After hearing the evidence and arguments of counsel, the jury was duly instructed by the Court and the cause was submitted to the jury with directions to return a verdict on special issues. The jury deliberated and thereafter returned into court with its special verdict consisting of the special issues submitted to the jury and the answers given thereto by the jury, which said verdict was in words and figures as follows, to wit:

"WE, THE JURY in the above-entitled action, unanimously find as follows on the questions submitted to us:

QUESTION # 1

Did Plaintiff prove by a preponderance of the evidence that Defendant Carlos Vega violated Plaintiff's rights by arresting Plaintiff without probable cause?

Answer: Yes_____ No__X__

QUESTION # 3

Did Plaintiff prove by a preponderance of the evidence that Defendant Vega violated Plaintiff's rights by deliberately fabricating evidence or using techniques that were so coercive and abusive that he knew, or was deliberately indifferent, that those techniques would yield false information that was used to criminally charge or prosecute Plaintiff?

Answer: Yes_____ No__X__

QUESTION #5

Did Plaintiff prove by a preponderance of the evidence that Defendant Stangeland violated Plaintiff's rights by deliberately fabricating evidence or using techniques that were so coercive and abusive that he knew, or was deliberately indifferent, that those techniques would yield false information that was used to criminally charge or prosecute Plaintiff?

Answer: Yes_____ No__X__

It appearing by reason of said special verdict that: Defendant **SGT. CARLOS VEGA and SGT. DENNIS STANGELAND** are entitled to judgment against the plaintiff **TERENCE B. TEKOH**.

Now, therefore, it is **ORDERED, ADJUDGED, AND DECREED** that said Plaintiff **TERENCE B. TEKOH** shall recover nothing by reason of the complaint, and that defendants shall recover costs from said plaintiff **TERENCE B. TEKOH** pursuant to Federal Rule of Civil Procedure 54(d)(1). The cost bill will be submitted directly to this Court for its review and determination.

Dated: November 7, 2017 /s/ George H. Wu

GEORGE H. WU,
U.S. District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 16-7297-GW(SKx) Date March 8, 2018
Title *Terence B. Tekoh v. County of Los Angeles, et al.*

Present: The Honorable	GEORGE H. WU, UNITED STATES DISTRICT JUDGE	
Javier Gonzalez	None Present	
Deputy Clerk	Court Reporter/ Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None Present	None Present

PROCEEDINGS: IN CHAMBERS – RULING ON PLAINTIFF'S MOTION FOR A NEW TRIAL [199]

Attached hereto is the Court's Final Ruling on Plaintiff's Motion for a New Trial. The Court would GRANT the Motion for a New Trial but only as to Plaintiff's Fifth Amendment claim and only as to Defendant Vega.

The Court sets a scheduling conference for March 12, 2018 at 9:00 a.m.

Terence Tekoh v. County of Los Angeles, et al.;
Case No. 2:16-cv-07297-GW-(SKx)
Final Ruling on Motion for New Trial

I. Background

Plaintiff Terence Tekoh sued Defendants County of Los Angeles, Los Angeles County Sherriff's Department ("LACSD") Sergeant Carlos Vega, and LACSD Sergeant Dennis Stangeland for violations of his civil rights. *See generally* First Amended Complaint ("FAC"), Docket No. 37. Plaintiff alleged that Sergeant Vega took him into custody, failed to give the required *Miranda* advisal, and then – by use of threats and coercion – caused him to hand-write a false confession to sexually assaulting a patient at the Los Angeles County/USC Medical Center. *See id.* ¶¶ 47(a)-(c). Additionally, Plaintiff alleged that both Sergeants Vega and Stangeland fabricated reports that were later used to form the basis of a criminal prosecution for sexual assault. *See id.* ¶¶ 47(e), 48. Plaintiff was ultimately acquitted of the offense and thereafter filed this action under 42 U.S.C. § 1983 against the Defendants. *See id.* ¶ 43.

The matter was tried to a jury in October of 2017, resulting in a unanimous verdict for Defendants. *See generally* Docket No. 182. Plaintiff now moves for a new trial, arguing that: 1) the Court erred in excluding Plaintiff's proposed expert on false confessions; 2) the Court erroneously failed to give two of Plaintiff's proposed jury instructions; and 3) defense counsel's persistent misconduct permeated the proceedings and deprived Plaintiff of a fair trial. *See generally* Motion for a New Trial ("Motion"), Docket No. 202.[1] In support of the Motion, Plaintiff

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[1] Plaintiff's Motion was first filed at Docket No. 201. Docket No. 202 corrects – what Plaintiff terms – "drafting errors that can be distracting." *See* Notice of Errata, Docket No. 202 at 1 of 33.

provides the Court with two portions of the trial transcript, *i.e.* defense counsel's opening statement and closing argument. *See generally* Declaration of Matt Sahak, Docket No. 200, Ex. A ("Defs.' Opening") and Ex. B ("Defs.' Closing"). Defendants oppose the Motion. *See generally* Opposition to Motion ("Opp'n"), Docket No. 203.

Additionally, Defendants, as prevailing parties, filed an Application to the Clerk to Tax Costs. *See generally* Docket No. 196. Plaintiff objected to a number of the proposed costs. *See generally* Objection to Cost Bill, Docket No. 198. If the Court were to order a new trial the Defendants' application would become moot. Accordingly, the Court will first consider the Motion and then address Defendants' application.

II. Legal Standard

Federal Rule of Civil Procedure ("Rule") 59(a)(1)(A) permits a court, after a jury trial, to grant a new trial on all or some of the issues "for any reason for which a new trial has heretofore been granted in an action at law in federal court." "Rule 59 recognizes the common-law principle that it is the duty of a judge who is not satisfied with the verdict of a jury to set the verdict aside and grant a new trial." 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2801 (3d ed. 2017) ("*Federal Practice and Procedure*"). "[T]he burden of proof on a motion for a new trial is on the moving party, and the court should not lightly disturb a plausible jury verdict." *Anglo-American General Agents v. Jackson Nat'l Life Ins. Co.*, 83 F.R.D. 41, 43 (N.D. Cal. 1979).

Rule 61 provides that "[u]nless justice requires otherwise, no error in admitting or excluding evidence

– or any other error by the court or a party – is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights." Accordingly, a court will only grant a new trial if a party's "substantial rights" have been affected. *See also United States v. 99.66 Acres of Land*, 970 F.2d 651, 658 (9th Cir. 1992) (stating that a new trial will only be warranted on the basis of an incorrect evidentiary ruling if a party was "substantially prejudiced").

Additionally, "erroneous jury instructions, as well as the failure to give adequate instructions, are . . . bases for a new trial." *Murphy v. City of Long Beach*, 914 F.2d 183, 187 (9th Cir. 1990). Nevertheless, only prejudicial error in the formulation of jury instructions will warrant a new trial. *See Dang v. Cross*, 422 F.3d 800, 805 (9th Cir. 2005). "[P]rejudicial error results when, looking to the instructions as a whole, the substance of the applicable law was [not] fairly and correctly covered." *Id.* (citing *Swinton v. Potomac Corp.*, 270 F.3d 794, 802 (9th Cir. 2001) (alteration in original)).

Finally, a new trial is warranted based on counsel's misconduct "where the 'flavor of misconduct . . . sufficiently permeates[s] an entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict.'" *Settlegoode v. Portland Public School*s, 371 F.3d 503, 516-17 (9th Cir. 2004) (quoting *Kehr v. Smith Barney*, 736 F.2d 1283, 1286 (9th Cir. 1984) (alteration in original)).

III. Discussion

A. Exclusion of Plaintiff's Proffered Expert

Plaintiff first argues that the Court erroneously excluded his proposed expert on the topic of coerced confessions, *i.e.* Dr. Iris Blandon-Gitlin. *See* Motion at 1-5. Prior to trial, Defendants moved to exclude Dr. Blandon-Giltin from testifying on the basis that her proposed testimony failed to meet the *Daubert* standard of admissibility. *See generally* Defs.' Motion in Limine No. 9, Docket No. 86. Plaintiff opposed in writing and, after considering the papers and hearing argument, the Court granted Defendants' Motion in Limine No. 9. *See* Order, Docket No. 150, at 2. Plaintiff argues that he was prejudiced by this evidentiary ruling. *See* Motion at 4.

To prevail here in securing a new trial, Plaintiff must demonstrate both that ruling was erroneous *and* that he was substantially prejudiced. *See 99.66 Acres of Land*, 970 F.2d at 658. A trial court's decision as to whether to admit or exclude expert testimony is reviewed under an abuse of discretion standard. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999); *United States v. Curtin*, 489 F.3d 935, 943 (9th Cir. 2007) (en banc).

Plaintiff contends that the Court's ruling prevented Dr. Blandon-Giltin from being able "to explain, based on studies and scientific data, how innocent people can be coerced to confess to crimes they did not commit. Dr. Blandon-Gitlin's testimony on the science of confessions, how it applies to Defendants' interrogation of Plaintiff, and why Plaintiff's statement read the way it did, contributed to the criminal jury's rejection of the confession." Motion at 4. As a preliminary matter, the Court

would observe that the relevant issue here is *not* an abstract one as to why an innocent person would confess to a crime he or she did not commit. Nor it is what did or did not contribute to the criminal jury's conclusions and verdict. Rather, at the trial in this case, Plaintiff expressly explained in his testimony as to why he wrote and signed the confession. And if one were to believe his version of the events, the confession was indeed coerced.

Plaintiff cites a concurring opinion in a Ninth Circuit case for the proposition that expert testimony was required here because the Court should not "naively assume[] that a jury would be easily persuaded - that an innocent person would confess to a crime they [sic] did not commit - by the confessor's testimony alone." *Lunbery v. Hornbeak*, 605 F.3d 754, 765 (9th Cir. 2010) (Hawkins, J., concurring). In that case, the criminal defendant (Kristi Lunbery) confessed in December 2001 to a murder committed in 1992.[2] *Id.* at 758. However, the actual holding in

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[2] The Circuit Court describes the interrogation that gave rise to the purported false confession as follows:

> For the first hour and one half, the detectives' approach was low-key, touching on various aspects of Kristi's life with [the decedent] and the events of April 17, 1992. Kristi was providing care to Jim, a man with severe mental retardation and epilepsy, and at various points in the interview his interruptions and inarticulate noises may be heard. Kristi's children were not home.
>
> The interview became intense when the detectives showed her a FBI profile of the case and told her that a secret witness had inculpated her. Detective Grashoff then said, "Kristi, we think you did it." She denied it. The detectives said they knew she had done it and only

that case was that it was error at the criminal trial to have precluded the defendant from presenting testimony that another individual had admitted to the murder and the circumstances surrounding it. *Id.* at 760-61. As to the issue of allowing expert testimony as to coerced confessions, the majority opinion did not even reach that question. Instead, the majority's focus (as well as Judge Hawkins's concurrence) was on whether the defendant's counsel were ineffective because they failed to call at trial an expert in regards to false confessions or to further investigate the validity of defendant's confession. *Id.* at 760. Even then, the majority opinion merely held that it needed live testimony from the attorneys before it could decide the ineffective assistance of counsel issue. *Id.*

The facts here are entirely inapposite to those in *Lunbery*. Plaintiff's proposed expert's (*i.e.* Dr. Blandon-Gitlin's) basic opinion was that: "In the current case, as evaluated from a scientific perspective *and assuming the veracity of Mr. Tekoh's accounts of events*, it is my opinion that Mr. Tekoh's written confession was coerced and highly unreliable." *See* Exhibit C to Defendants' Motion in Limine No. 9 to Exclude Dr. Iris Blandon-Gitlin [sic] Improper and Inadmissible Expert Opinions (which is in Dr. Blandon-Gitlin's June 14, 2017 report), Docket No. 86-1 at 15-16 of 42. This Court found that her opinion was unnecessary and problematic because: (1)

> wanted to know why. Was it because he was abusive? "For God's sake, tell the truth," Grashoff urged.
>
> Eventually, Grashoff asked, "Did you shoot Charlie?" She answered, "Yes."

Id. at 757-58.

if the jury believed Mr. Tekoh's version of the events, his confession was clearly coerced and highly unreliable and her opinion added nothing of substance, (2) Plaintiff appeared to be trying to use Dr. Blandon-Gitlin to simply vouch for his version of the events, but she was not a percipient witness, and (3) her report included studies and contentions which were irrelevant to the case.

Plaintiff here testified that Defendant Vega browbeat him both physically and verbally, threatened to deport not only him but also his family, used racial epithets, denied him access to counsel, lied to him regarding the evidence against him, and put a piece of paper in front of him and forced him to write a confession which Vega dictated. A reasonable juror would not need the assistance of a person with specialized knowledge to understand that those conditions, if true, would give rise to a false and coerced confession. Accordingly, the proposed testimony would not have sufficiently helped the jury "to understand the evidence or to determine a fact in issue" to warrant its admission. *See* Federal Rule of Evidence 702. As such, the Court's ruling on Defendant's Motion in Limine No. 9 was not erroneous. *See generally United States v. Redlightning*, 624 F.3d 1090, 1111-12 (9th Cir. 2010).

Furthermore, given the evidence presented at trial, assuming arguendo that the Court ought to have permitted Dr. Blandon-Gitlin to testify, its refusal to do so did not amount to substantial prejudice that would warrant relief and retrial. *See 99.66 Acres of Land*, 970 F. 2d at 658. The jury heard hours of conflicting testimony from Plaintiff plus his witnesses and both individual defendants. Plaintiff testified that Sergeant Vega displayed overt racial animus and

threatened and coerced him into writing out a false confession. Sergeant Vega vehemently denied this. Thus, in the end, this matter came down to a question of credibility.[3] Whatever information Plaintiff's proposed expert might have brought to bear, she would not have been permitted to vouch for Plaintiff's credibility. *See United States v. Candoli*, 870 F. 2d 496, 506 (9th Cir. 1989) ("An expert witness is not permitted to testify specifically to a witness' credibility or to testify in such a manner as to improperly buttress a witness' credibility."). In *Mullen v. Barnes*, No. 2:13–cv–0165–MCE–EFB, 2015 WL 2000764, at *17-19 (E.D. Ca. April 30, 2015), it was held that the trial court's decision to exclude the testimony of an expert on false confessions was not erroneous because the circumstances surrounding the confession was explored in depth by both sides. Additionally, the court held that even if it was error to have excluded the testimony, that error was not prejudicial because the proposed expert testimony in this regard would not have altered appreciably the jury's perception of the confession.

In sum, the Court would not find that its refusal to permit Dr. Blandon-Gitlin to testify was incorrect or that it substantially prejudiced Plaintiff.

B. Plaintiff's Proposed Instructions

Plaintiff next contends that the Court erred in failing to give two of his proposed jury instructions. *See* Motion at 5-13. Both sides agreed on giving the

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[3] In arguing for a new trial on the basis of defense counsel's persistent misconduct, Plaintiff concedes this point. *See* Motion at 21 ("Plaintiff's case fundamentally hinged on whether the jury believed [Plaintiff's] account of what happened . . . , or whether they believed Defendants.").

Ninth Circuit Model Jury Instruction 9.33 on "deliberate fabrication of evidence" (*see* proposed Joint Jury Instructions, Docket No. 142 at 25 of 37). Plaintiff only asked for further relevant instructions on: (1) a "Fifth-Amendment *Miranda* Claim" (*see* Plaintiff's Proposed Jury Instruction ("PJI") No. 19A), and (2) a "Fourteenth-Amendment Coercive Interrogation Claim" (PJI No. 19B). *See* Docket No. 143.

As stated in *Clem v. Lomeli*, 566 F.3d 1177, 1181 (9th Cir. 2009):

> "'[J]ury instructions must fairly and adequately cover the issues presented, must correctly state the law, and must not be misleading.'" *Dang*, 422 F.3d at 804 (quoting *White v. Ford Motor Co.*, 312 F.3d 998, 1012 (9th Cir. 2002)). Each party is therefore" 'entitled to an instruction about his or her theory of the case if it is supported by law and has foundation in the evidence.'" *Id*. at 804-05 (quoting *Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002)). A district court therefore commits error when it rejects proposed jury instructions that are properly supported by the law and the evidence. *Id*. "If, however, the error in the jury instruction is harmless, it does not warrant reversal." *Id*. at 805 (citing *Tritchler v. County of Lake*, 358 F.3d 1150, 1154 (9th Cir. 2004)).

1. <u>Miranda Instruction</u>

Plaintiff's PJI No. 19A stated:

> Plaintiff contends that Defendant Carlos Vega deprived him of rights guaranteed by

the Fifth Amendment to the United States Constitution by interrogating him while in custody without advising him of his rights to remain silent and to consult an attorney. These rights were established by *Miranda v. Arizona*, and are referred to by that case name.

Defendant Vega denies that Plaintiff was in custody for *Miranda* purposes. To determine whether Plaintiff was in custody, and was therefore entitled to *Miranda* admonitions, you should focus on the objective circumstances, not the subjective views of the officer or the individual being questioned. The ultimate question is whether the officer created a setting from which a reasonable person would believe that he or she was not free to leave.

The following factors are among those likely to be relevant to deciding that question:

(1) The language used to summon the individual;

(2) The extent to which the individual being questioned is confronted with evidence of guilt;

(3) The physical surroundings;

(4) The duration of the detention; and

(5) The degree of pressure applied to detain the individual.

In order to establish his Fifth-Amendment claim, Plaintiff must prove by a preponderance of the evidence that Defendant Carlos Vega obtained one or

> more statements from him in violation of *Miranda* that were subsequently used in the criminal case against Plaintiff.

See Docket No. 143 at 2. Plaintiff argues that his "main liability theory [was] that Defendants interrogated him in violation of *Miranda*, and fruit of the illegal interrogation was used against him in a criminal case, a violation of the Fifth Amendment actionable under § 1983." Motion at 6. By failing to give the proposed instruction, the Court supposedly "obliterated" Plaintiff's Fifth Amendment claim to the point that it "did not exist" as far as the jurors were concerned. *Id.* at 10.

However, in the operative FAC as to his Fifth Amendment claim (as opposed to those based on the Fourth or Fourteenth Amendment), Plaintiff alleged that:

> Defendant Vega subjected Plaintiff, while in custody for Fifth Amendment purposes, to a coercive and illegal interrogation, in violation of *Miranda*, generating an involuntary and false confession, which caused Plaintiff to be prosecuted for a sexual assault that he did not commit, an independent violation of the Fifth Amendment, and proximately causing all the damages alleged above.

FAC ¶ 47(b). Notwithstanding Plaintiff's arguments here, his theory was not simply that Defendant Vega was liable for failing to give a *Miranda* advisal prior to questioning Plaintiff. To the contrary, Plaintiff's theory of liability, as clearly detailed in the FAC, was that Defendant Vega "generat[ed] an involuntary and false confession." *Id.*

Plaintiff's PJI No. 19A makes no mention of coercion and it would have permitted the jury to find Defendant Vega liable *per se* under § 1983 merely for obtaining Plaintiff's confession in violation of *Miranda* but without any showing of improper force or duress. Plaintiff's Motion (and PJI No. 19A) would allow the mere failure to advise a suspect in accordance with *Miranda* prior to questioning in a custody situation to be actionable under § 1983, provided that his statement is later used in a criminal proceeding.[4] *See* Motion at 9 (Plaintiff "was 'in custody,' and entitled to *Miranda* admonitions. The statement was used against [Plaintiff] in a criminal case. These facts establish Plaintiff's Fifth-Amendment claim.").

Plaintiff cites no authority for this proposition, as the case he relies upon does not address a mere technical *Miranda* violation but instead deals with a coerced confession/fabrication of evidence situation. *See Hall v. City of Los Angeles*, 697 F.3d 1059, 1068 (9th Cir. 2012). A review of relevant authorities strongly suggests that § 1983 liability will not attach to a technical violation of *Miranda*. As stated in the

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[4] It would be noted that, in certain situations, a statement taken in violation of the *Miranda* requirements can lawfully be admitted in a criminal case. *See e.g. Chavez v. Martinez*, 538 U.S. 760, 790 (2003) ("statements secured in violation of *Miranda* are admissible in some instances."); *United States v. Patane*, 542 U.S. 630, 639 (2004) ("statements taken without *Miranda* warnings (though not actually compelled) can be used to impeach a defendant's testimony at trial . . . , though the fruits of actually compelled testimony cannot . . . . [citations omitted]").

plurality opinion in *Chavez v. Martinez*, 538 U.S. 760, 772 (2003)[5]:

> [The officer's] failure to read *Miranda* warnings to [the defendant] did not violate [the defendant's] constitutional rights and cannot be grounds for a § 1983 action. *See Connecticut v. Barrett*, 479 U.S. 523, 528 (1987) (*Miranda's* warning requirement is "not itself required by the Fifth Amendment . . . but is instead justified only by reference to its prophylactic purpose"); [*Michigan v.*] *Tucker*, 417 U.S. [433,] 444 [(1974)] (*Miranda's* safeguards "were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected").

See also Arden v. Kastell, No. 10-cv-00436 NC, 2012 WL 12893958, at *5 n.4 (N.D. Cal. Sept. 28, 2012) ("Violation of *Miranda* warnings, however, cannot be grounds for a § 1983 action as a matter of law."); *see c.f. Park v. Thompson*, 851 F.3d 910, 926 (9th Cir. 2017) (noting that, in *Chavez*, "a plurality of the Supreme Court said that an officer's failure to read

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[5] The quoted portion of Justice Thomas's plurality opinion had the agreement of Justices Rehnquist, O'Connor and Scalia. However, a majority of the other justices were in agreement with the basic proposition. *See* concurrence in part and dissent in part of Justice Kennedy: "I agree with Justice Thomas that failure to give a *Miranda* warning does not, without more, establish a completed violation when the unwarned interrogation ensues." 538 U.S. at 789. The remaining issue (where the justices could not agree) was the extent to which the scenario gave rise to the specter of a violation of the Self-incrimination Clause.

Miranda warnings to a defendant before interrogation violates only 'judicially crafted prophylactic rules' and, for that reason, was not actionable under Section 1983."); *United States v. Patane*, 542 U.S. 630, 641 (2004) ("a mere failure to give *Miranda* warnings does not, by itself, violate a suspect's constitutional rights or even the *Miranda* rule.").

Given the above cited law, it was not error for the Court to have refused to give Plaintiff's PJI No. 19A.

2. Coerced Confession Instruction

Plaintiff's PJI No. 19B stated:

> Plaintiff contends that Defendant Carlos Vega deprived him of rights guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution by coercing an involuntary confession.
>
> Plaintiff must prove by a preponderance of the evidence that his will was overborne by the circumstances surrounding the giving of a confession.
>
> The due process test takes into consideration the totality of all the surrounding circumstances, including both the characteristics of the person being questioned and the details of the interrogation. These include factors such as the length of the questioning, the use of fear to break a suspect, and whether the police advised the person being questioned of his rights to remain silent and to have counsel present during a custodial interrogation.

> The basic question is whether the confession is the product of an essentially free and unconstrained choice by its maker. If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.

See Docket No. 143 at 3. The Court declined to give this instruction and instead gave the jury the mutually agreed upon Ninth Circuit Model Jury Instruction No. 9.33: Particular Rights - Fourteenth Amendment - Due Process - Deliberate Fabrication of Evidence as follows:

> As previously explained, Plaintiff has the burden of proving that the acts of the Defendants Vega and Stangeland deprived him of particular rights under the United States Constitution. The Fourteenth Amendment protects against being subjected to criminal charges on the basis of false evidence that was deliberately fabricated by a defendant. In this case, Plaintiff alleges the Defendants deprived him of rights under the Fourteenth Amendment to the Constitution when they filed false reports stating that the alleged victim identified Plaintiff as the perpetrator and that Plaintiff confessed to the crime.
>
> For Plaintiff to prevail on his claim of deliberate fabrication of evidence, he must prove at least one of the following elements by a preponderance of the evidence:

(1) Defendant Carlos Vega and/or Dennis Stangeland deliberately fabricated evidence that was used to criminally charge and prosecute Plaintiff; or

(2) Defendant Vega used techniques that were so coercive and abusive that he knew, or was deliberately indifferent, that those techniques would yield false information that was used to criminally charge and prosecute Plaintiff.

"Deliberate indifference" is the conscious or reckless disregard of the consequences of one's acts or omissions.

If Plaintiff proves that a defendant deliberately fabricated evidence that was used to criminally charge and prosecute him, then Plaintiff is not required to prove that the Defendants knew Plaintiff was innocent or was deliberately indifferent to the Plaintiff's innocence.

Not all inaccuracies in an investigative report give rise to a constitutional claim. Errors concerning trivial or unimportant matters is insufficient. Further, mere carelessness or negligence is also insufficient.

Officers are not obligated to further investigate or accept a suspect's versions of the facts or claim of innocence if they otherwise have reasonable suspicion to detain or probable cause to arrest based on other credible information known to them. A mere mistake of fact or refusal to believe

> a suspect's innocent explanation will not automatically make an arrest illegal.

See Final Jury Instructions, Docket No. 181, at 7. Plaintiff argues that the Court erred in refusing to give his PJI No. 19B because "[w]hile the Court's final jury instructions informed the jury on how to evaluate Plaintiff's fabricated-reports claim, it failed to inform the jury on Plaintiff's distinct coerced-confession claim." Motion at 11. The Court finds that Plaintiff has raised an interesting issue.

Following oral argument at the hearing on the present motion and upon further reflection and research, the Court concludes that it *was* error not to have given a *separate* jury instruction that the use of improper coercion to elicit information from a suspect (where the information is later used in a criminal case) is a violation of the Fifth Amendment and can give rise to a claim under § 1983. In reaching that conclusion, the Court examined the precise language of the referenced amendments and the Ninth Circuit's decision in *Hall*, 697 F.3d at 1067-69.

The Fifth Amendment has five clauses referring to concepts covering: (1) Grand Jury, (2) Double Jeopardy, (3) Self-incrimination, (4) Due Process, and (5) Takings without Just Compensation. As relates to this case, the two germane clauses are the third and fourth which provide respectively that: "No person . . . shall be compelled in any criminal case to be a witness against himself;" and "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." The relevant portion of the Fourteenth Amendment only covers the application of due process to the States and delineates that "nor shall any State

deprive any person of life, liberty, or property, without due process of law . . . ."

As discussed by the Ninth Circuit in *Hall*, "[u]sing a coerced confession against the accused in a criminal proceeding implicates [the] Fifth Amendment . . . ." 697 F.3d at 1068. While there is a Fourteenth Amendment due process claim that arises when government agents use "investigative techniques that were so coercive and abusive that they knew or should have known that those techniques would yield false information" which is later employed to bring charges against a defendant (*id.*), "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing such a claim." *Id.* (quoting *Albright v. Oliver*, 510 U.S. 266, 273 (1994)). Thus, a deliberate fabrication of evidence claim (even if it is based on the use of coercive techniques to obtain the evidence) is separate and distinct from a claim resting solely on the improper application of coercion to obtain a statement from a suspect. The former is governed by Fourteenth Amendment's due process provision[6] whereas the latter is controlled by the Fifth Amendment's Self-incrimination Clause. *Id.* ("Here,

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[6] In *Hall*, the Circuit explained that the Fourteenth Amendment due process claim is based upon ". . . 'a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government' . . . . We derived this right from the Supreme Court's holding in *Pyle v. Kansas*, 317 U.S. 213, 216 (1942), that 'the knowing use by the prosecution of perjured testimony in order to secure a criminal conviction violates the Constitution. [citations omitted]." 697 F.3d at 1068.

Hall claims that the detectives coerced his confession and then used that confession to secure his conviction. Thus, the Fifth Amendment is the explicit constitutional provision that governs Hall's claim.").[7]

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[7] The facts in *Hall* are illustrative. In *Hall*, the plaintiff raised his § 1983 coerced confession claim solely under the Fourteenth Amendment. The district court held that Fifth Amendment's self-incrimination clause was the appropriate constitutional basis for such a claim rather than the "more generalized substantive due process provision of the Fourteenth Amendment." *See Hall v. City of Los Angeles*, 710 F. Supp. 2d 984, 992-93 (C.D. Cal. 2010). Noting the plaintiff's failure to allege any claim under the Fifth Amendment, it granted summary judgment as to the Fourteenth Amendment-based § 1983 claim stating that: "Plaintiff cannot remedy his inadequate pleading now by repackaging a Fifth Amendment coerced interrogation claim as one for deliberate fabrication of evidence arising under the Fourteenth Amendment." *Id.* at 993. The court went on to observe that, even if plaintiff's claim were cognizable under the Fourteenth Amendment, his case would still be unsuccessful because: (1) under Ninth Circuit law, the standard for showing a Fourteenth Amendment substantive due process violation in this context is quite demanding ("a Fourteenth Amendment claim of this type is cognizable only if the alleged abuse of power 'shocks the conscience' and 'violates the decencies of civilized conduct,'" citing to *Stoot v. City of Everett*, 582 F.3d 910, 928 (9th Cir. 2009)); (2) the standard required more than showing coercion (*i.e.* it requires that the interrogation techniques be so coercive and abusive that the officers knew or should have known that those techniques would yield false information; and (3) plaintiff's allegations as to defendant officers' improper conduct (*i.e.* their threat to remove his protective status as an informant – whereby he would be subjected to possible violence from other inmates, his being interrogated for several hours, and the denial of his request to speak with his attorney) was insufficient. *Id.* at 995-97.

The Ninth Circuit: (1) affirmed district court's conclusion that a Fifth Amendment coerced statement claim is not similar to (nor is it governed by the same standards as) a claim for deliberate fabrication of evidence in violation of the Fourteenth

Additionally, the Circuit in *Hall* briefly surveyed its caselaw in the area of deliberate falsification of evidence claims, and concluded those cases which had held that the government agents – who had used abusive or coercive techniques to obtain such evidence – had done so as to *third party* witnesses and not as to the suspects/defendants themselves. *Id.* at 1069. It then went on to state that "Hall's coerced confession claim falls within the explicit language of the Fifth Amendment and does not arise as a subset of the substantive due process right set forth in *Devereaux* prong (2)."[8]

In finding the aforesaid error on its part, the Court notes that it did not err in rejecting Plaintiff's PJI No. 19B *as worded*. First, PJI No. 19B makes the same mistake the Court made which was to view the coerced statement issue solely as within ambit of the Fourteenth Amendment due process clause, rather

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Amendment's substantive due process protection; but (2) reversed the district court's denial of plaintiff's request to amend his complaint to allege "an explicit coercive interrogation claim pursuant to the Fifth Amendment." *See Hall*, 697 F.3d at 1067-73.

8 The "*Devereaux* prong (2)" is a reference to the Circuit's holding in *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (en banc), which held that defendants enjoy a constitutional right to be free from prosecution based on deliberately fabricated evidence. *See Hall*, 697 F.3d at 1066. In *Devereaux*, the Circuit stated that a plaintiff can establish a deliberate fabrication of evidence claim by providing evidence that either: "(1) [the government employee] Defendants continued their investigation of [the suspect] despite the fact that they knew or should have known that he was innocent; or (2) Defendants used investigative techniques that were so coercive and abusive that they knew or should have known that those techniques would yield false information." 263 F.3d at 1076.

than the Fifth Amendment self-incrimination clause.[9] Second, PJI No. 19B's focus on the eliciting of a confession from him actually is too restrictive in the present context as to the scope of the Fifth Amendment's constitutional protection which covers the use of personal compulsion to extract *any* evidence from the suspect (not merely a false confession).[10] *See generally Couch v. United States*, 409 U.S. 322, 327-28 (1973).[11] Third, the Court would not find that PJI

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[9] PJI No. 19B starts out by stating that: "Plaintiff contends that Defendant Carlos Vega deprived him of rights guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution by coercing an involuntary confession." Additionally, as argued by Plaintiff, "[t]he Court's instructions do not address Plaintiff's Fourteenth-Amendment coerced-confession claim. Plaintiff presented evidence to support finding that his confession was involuntary. There is binding Ninth Circuit precedent to support Plaintiff's theory. The jury was not given law to make that determination." *See* Motion at 12.

[10] Actually, one might have been able to construct a correct jury instruction by taking the correct portions of PJI No. 19A and No. 19B and leaving out the references that the constitutional violation was based upon the Fourteenth Amendment or the Supreme Court's decision in *Miranda.*

[11] In *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964), the Supreme Court articulated the policies and purposes of the Self-incrimination Clause as follows:

> Our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government . . . in its contest with the individual to shoulder the entire load," . . . our respect for the inviolability of the human personality and of the

No. 19B is entirely a correct statement of the law. For example, it states that: "The basic question is whether the confession is the product of an essentially free and unconstrained choice by its maker." That statement is incorrect – or at least inaccurate – in the Fifth Amendment context herein. Finally, as to the issue of coerced confessions for purposes of the Fourteenth Amendment, the Court had already approved (and gave) the Ninth Circuit's Model Jury Instruction No. 9.33, which adequately covered that topic.

Having concluded that the failure to give a separate instruction on Plaintiff's Fifth Amendment's Self-incrimination Clause claim was in error, the Court next considers whether that mistake was prejudicial. It concludes that it was.

As stated in *Dang*, the Ninth Circuit has emphasized that:

> We have stressed that "jury instructions must fairly and adequately cover the issues presented, must correctly state the law, and must not be misleading." . . . . Further, "[a] party is entitled to an instruction about his or her theory of the case if it is supported by law and has foundation in the evidence" . . . . We also have noted that the "use of a model jury instruction does not preclude a finding of error" . . . . If, however, the error in the jury instruction is harmless, it does not

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right of each individual "to a private enclave where he may lead a private life," our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent." [Citations omitted.]

> warrant reversal . . . . "In evaluating jury instructions, prejudicial error results when, looking to the instructions as a whole, the substance of the applicable law was [not] fairly and correctly covered."

422 F.3d at 804-05 (citations omitted). As noted above, in the FAC, Plaintiff does indicate that his first claim for relief against Defendant Vega is pursuant to 42 U.S.C. § 1983 for a violation of his rights under the Fourth, Fifth and Fourteenth Amendments. *See* Docket No. 37 at 14 of 17. In particular, it is charged that: "Defendant Vega subjected Plaintiff, while in custody for Fifth-Amendment purposes, to a coercive and illegal interrogation, in violation of *Miranda*, generating an involuntary and false confession, which caused Plaintiff to be prosecuted for a sexual assault that he did not commit, an independent violation of the Fifth Amendment . . . ." *Id.*

Looking at the instructions as a whole, Plaintiff's Fifth Amendment Self-incrimination claim was not fairly and correctly covered by the instructions which the Court gave to the jury. Although his Fourteenth Amendment claim was adequately dealt with in the Ninth Circuit's Model Instruction No. 9.33, the criteria for a finding of a Fourteenth Amendment due process violation are not the same as for a Fifth Amendment Self-incrimination claim. Indeed, it has been held that "due process violations under the Fourteenth Amendment occur only when official conduct 'shocks the conscience'. . . ." *See, e.g., Gantt v. City of Los Angeles*, 717 F.3d 702, 707 (9th Cir. 2013). As held by the district court in the *Hall* case, mere coercion is not a sufficient basis for a finding of a substantive due process violation under the Fourteenth Amendment. *See* 710 F. Supp. 2d at 995-

96. The tactics used must "shock the conscience" such that the interrogation itself constitutes a due process violation.[12] *Id.* Further, as held by the Ninth Circuit in *Hall*, "Hall's coerced confession claim falls within the explicit language of the Fifth Amendment and does not arise as a subset of the substantive due process right set forth in *Devereaux* prong (2)." 697 F.3d at 1069.

In sum, the Court's failure to include a coerced confession jury instruction under the Fifth Amendment separate and apart from the instruction as to the deliberate fabrication of false evidence was erroneous *and* prejudicial. Hence, it would grant a new trial on that basis which would only cover the Fifth Amendment claim against Defendant Vega.

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[12] As stated in *Stoot v. City of Everett*, 582 F.3d 910, 928 (9th Cir. 2009):

> The standard for showing a Fourteenth Amendment substantive due process violation, however, is quite demanding. *Chavez* refers to "police torture or other abuse" as actionable under the Fourteenth Amendment, 538 U.S. at 773, and Justice Kennedy's opinion states that "a constitutional right is traduced the moment torture or its close equivalents are brought to bear." *Id.* at 789. Such language is consistent with the general rule that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense'" and therefore a violation of substantive due process. *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 129 (1992)). More specifically, a Fourteenth Amendment claim of this type is cognizable only if the alleged abuse of power "shocks the conscience" and "violates the decencies of civilized conduct." *Id.* at 846 (internal quotations omitted).

C. Defense Counsel's Misconduct

Finally, Plaintiff argues that "[d]efense counsel made myriad statements during trial that were improper, prejudicial, and fundamentally unfair. These statements permeated the trial, prejudiced the Plaintiff and affected the fairness and integrity of the proceedings." *See* Motion at 13. The specific statements cited by Plaintiff are contained in defense counsel's opening statement and closing argument. The Court finds that defense counsel's opening statement (until it was cut-off by the Court) was rife with improper comments, such as:

> Defense Counsel: The evidence will show that in all of [Sergeant Vega's] years with the department, this is his first lawsuit ever.
>
> Plaintiff's Counsel: Objection, Your Honor.
>
> The Court: I will sustain the objection.
>
> Plaintiff's Counsel: Move to strike.
>
> The Court: I don't have to strike because I have already instructed the jury that opening statement is not evidence.
>
> Defense Counsel: Thank you. You can have a seat, Sergeant Vega. Now, Sergeant Stangeland has been with the department 20 years. He is a devout Christian, and has never had case like this claimed against him.
>
> The Court: Counsel, let me have you on sidebar.
>
> (Sidebar begins.)

> Defense Counsel: I'm done with the introduction
>
> The Court: You know that that is improper. And if you don't, you are crazy. And now I have to decide whether or not the Plaintiff is going to ask to go through all of the prior complaints against him, things of that sort.
>
> Plaintiff's Counsel: There was an instruction not to answer when I asked about it.
>
> The Court: No, no. The problem is that he can't get away with that type of stuff. I mean, if you want to, I will give the jury an instruction because he can't – you know, I would not have allowed past conduct to be offered in this case anyway. So, this is not proper. You should know that.
>
> Defense Counsel: All right.
>
> The Court: So if the plaintiff thinks of something, a pound of flesh you want to extract, let me know, and I will consider it.
>
> (Sidebar ends.)

Defs.' Opening at 88:21-90:5. Moments later, defense counsel stated that "the evidence will show that this case isn't about justice or race. It's about capitalizing off an acquittal and about credibility." *Id.* at 90:19-21. At that point, the Court had enough and provided defense counsel one minute to finish up opening statement because, as the Court described it in the presence of the jury, defense counsel had "squandered the opportunity." *Id.* at 90:23-24. Later, outside the presence of the jury, defense counsel asked the Court to be permitted to complete his opening statement.

The Court denied the request stating: "The answer is no. You are not going to be allowed to have an opportunity to complete your opening statement, because again, if you do it . . . if you are given an opportunity and you interject things that are clearly in this Court's opinion improper, this is the consequence." *Id.* at 160:23-161:2.

In addition to the defense counsel's opening statement, Plaintiff points to many statements made during defense counsel's closing argument. As a preliminary matter, the Court notes that Plaintiff failed to object to most of these statements. *See, e.g.*, Defs.' Closing at 6:6-11 (plaintiff's counsel did not object when defense counsel asked the jury "[i]f there was a shred of evidence that Sergeant Vega called Mr. Tekoh a jungle N-word, do you think we would be here? I didn't become the first attorney in my family to defend alleged crooked cops."[13]); *but see, e.g.*, Motion at 16 (arguing that this statement amounted to improper vouching).

"A party will not be allowed to speculate with the court by letting error go without any comment and then seek a new trial on the basis of the error if the outcome of the case is unfavorable." *Federal Practice and Procedure* § 2472. "This principle has been employed in many cases and applies to . . . the content of various arguments of counsel for either side . . . ." *Id.* Plaintiff contends that his counsel did not object because he "was cognizant of the rule that 'constant objections are certainly not required, as they could antagonize the jury.'" *See* Motion at 23 (citing *Kehr*, 736 F.2d at 1286). Plaintiff gives unfairly short shrift to *Kehr*. There, the Ninth Circuit held that the

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[13] It is noted that defense counsel is Black.

district court did not abuse its discretion in denying a motion for a new trial, stating that "while constant objections are certainly not required, as they could antagonize the jury, we note that opposing counsel here never objected during the closing argument or moved for a mistrial." *Id.* (internal citation omitted). Thus, rather than standing for the proposition that counsel may purposefully fail to object during argument and then seek a new trial after an unfavorable verdict, *Kehr* lends supports the general principle that a party must timely object to improper argument or live with the consequences. Accordingly, the Court will not consider statements made by defense counsel that elicited no objection in evaluating Plaintiff's arguments here. The Court is thus left with two statements made by defense counsel in the closing argument that elicited an objection at trial and are now addressed in the Motion.

During his closing argument, defense counsel sought to have the jurors consider the case from the perspective of the alleged victim of Plaintiff's sexual assault: "[i]f you were to tell one of these marshals that a barista downstairs around lunch time sexually assaulted you, male, black, mid 20's, thin build. And they go find a male, black, mid 20's, thin build barista around 12 [sic] fitting the description and they arrest him and they get sued just because he beat the case . . . ." Defs.' Closing at 21:13-18. Plaintiff objected and the Court sustained the objection and admonished defense counsel that the argument was improper. *See id.* at 21:19-22. Notwithstanding the admonishment, defense counsel returned to the theme at the end of his closing, pleading with the jury not to disappoint Plaintiff's alleged victim: when she

"calls me and asks me what happened, don't make me . . . ." *Id.* at 44:17-18. Plaintiff objected and the Court sustained the objection and once again admonished defense counsel that the argument was improper. *See id.* at 44:19-21.

The Court would not find that defense counsel's short opening statement, alone or coupled with the two specified improper arguments during closing, prejudiced Plaintiff to the point that a new trial is warranted. First, the Court sustained Plaintiff's objections and admonished defense counsel repeatedly in the presence of the jury. To the extent that either side was prejudiced by defense counsel's conduct, the Court would find it more likely that the Defendants were harmed as the Court was not coy about its view of the improper portions of defense counsel's opening statement or closing argument in front of the jury. Beyond that, however, the Court notes that Plaintiff's Motion uses four pages to describe the prejudicial effect of defense counsel's conduct. *See* Motion at 21-24. In those four pages, Plaintiff makes no mention of the two arguments defense counsel made during closing that the Court considers here. As for defense counsel's short opening statement, Plaintiff argues only that by suggesting that neither Sergeant Vega nor Stangeland had ever been alleged to commit similar misconduct, Plaintiff was left in an untenable position of being unable to rebut the inference. *See id.* at 22-23. However, at side bar, the Court unambiguously offered Plaintiff relief: "if the plaintiff thinks of something, a pound of flesh you want to extract, let me know, and I will consider it." Defs.' Opening at 90:2-4. Plaintiff did not seek a mistrial, an instruction, or any other remedy, draconian or otherwise, at trial. The Court provided

an opportunity but the time for that is now gone – the Court will not permit Plaintiff to seek a remedy after an unfavorable verdict has been rendered. Additionally, the jury was specifically instructed at the start of trial and again at the close of the evidentiary portion of the trial (before closing arguments) that:

> Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they will say in their opening statements, their closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence.

See Docket No. 180 at 3 of 6 and No. 181 at 3 of 12. A jury is presumed to follow the instructions which are given. *Blueford v. Arkansas*, 566 U.S. 599, 606 (2012).

Finally, the Court is mindful that a new trial is warranted based on counsel's misconduct only "where the flavor of misconduct . . . sufficiently permeates[s] an entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict." *Settlegoode*, 371 F.3d at 516-17. Considering the evidence presented in this case, the Court is not convinced that the jury was influenced by passion and prejudice. To the contrary, the Court would find that the jury found in Defendants' favor despite defense counsel's misconduct, not because of it.[14]

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[14] The Court notes that, after the jury verdict was returned and the jury had been excused – and in response to an inquiry by defense counsel as to his trial performance, the Court did inform him that "he had made a couple of statements in his closing argument that, if they had been said by a prosecutor to a

IV. Defendants' Application to Tax Costs

Having determined that a new trial is warranted, the Court will not consider Defendants' application to tax costs against Plaintiff at this point. *See* Docket No. 196.

V. Conclusion

Based on the foregoing discussion, this Court would GRANT the Motion for a New Trial but only as to Plaintiff's Fifth Amendment claim and only as to Defendant Vega.

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jury in a closing in a criminal case, would have been grounds for a defendant's seeking to overturn a jury's return of a guilty verdict on appeal." *See* Docket No. 192 at 3 of 4. The reason for that viewpoint is that a prosecutor's statement to the jury "carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *See United States v. Young*, 470 U.S. 1, 18-19 (1985). Thus, a prosecutor may not make a statement that imports the power of the government behind a witness (even if it was an inference based on the evidence) – *see United Sates v. Weatherspoon*, 410 F.3d 1142, 1147 (9th Cir. 2005). However, here, defense counsel was not a prosecutor.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TERENCE B. TEKOH, Plaintiff vs. SGT. CARLOS VEGA, Defendants	Case No.: CV 16-7297-GW(SKx) [Hon. George H. Wu, Courtroom 9D] **JUDGMENT** Complaint Filed: October 25, 2016 FSC Date: September 24, 2018 Trial Date: September 25, 2018 Closing Date: October 2, 2018

1. This case came on regularly for trial on September 25, 2018 to October 2, 2018 in Department 9D of this Court, the Honorable George H. Wu presiding; the Plaintiff appearing by Attorneys John Burton and Matthew Sahak from LAW OFFICE OF JOHN

BURTON and Maria Cavalluzzi of CAVALLUZZI & CAVALLUZZI, and Defendants appearing by Attorneys Rickey Ivie and Antonio K. Kizzie from IVIE, MCNEILL & WYATT, APLC.

2. A jury of 8 persons was regularly impaneled and placed under oath. Witnesses were placed under oath and testified. After hearing the evidence and arguments of counsel, the jury was duly instructed by the Court and the cause was submitted to the jury with directions to return a verdict on special issues. The jury deliberated and thereafter returned into Court with its special verdict consisting of the special issues submitted to the jury, each member was polled as to their vote, and the answers given thereto by the jury, which said verdict was in words and figures as follows, to wit:

"WE, THE JURY in the above-entitled action, unanimously find as follows on the questions submitted to us:

QUESTION # 1

Did Plaintiff prove by a preponderance of the evidence that Defendant Carlos Vega violated Plaintiff's constitutional rights by unlawfully coercing an involuntary confession from him that was later used against him in a criminal case?

Answer: Yes_____ No__X__

If you answered "YES" to Question # 1, please answer Question # 2. If you answered "NO," STOP here, answer no further questions, have your presiding juror date and sign the verdict and inform the bailiff that you have reached a decision.

QUESTION # 2

Did Plaintiff prove by a preponderance of the evidence that Defendant Carlos Vega's violation of Plaintiff's constitutional rights by unlawfully coercing an involuntary confession from him that was later used against him in a criminal trial was the moving force (a substantial factor) in causing the injuries now claimed by Plaintiff?

Answer: Yes_____ No_____

If you answered "YES" to Question # 2, please answer Question # 3. If you answered "NO," STOP here, answer no further questions, have your presiding juror date and sign the verdict and inform the bailiff that you have reached a decision.

QUESTION #3

What Plaintiff's damages, if any?

1) Past economic losses such as lost earning, not including legal and bail expenses:
   $_____
2) Legal and Bail Expenses:
   $_____
3) Future economic losses such as lost earnings and lost earning capacity:
   $_____
4) Past and future non-economic losses such as pain and mental suffering, loss of reputation:
   $_____

Please answer Question # 4.

QUESTION NO. 4

Has Plaintiff proven by a preponderance of the evidence that Defendant Vega acted with malice, oppression or reckless disregard of Plaintiff's rights?

Answer: YES_____ NO_____

If your answer to Question # 4 is "Yes," please go to Question # 5. If your answer is "No," please STOP here, answer no further questions, have your presiding juror date and sign the verdict and inform the bailiff that you have reached a decision.

QUESTION # 5:

What is the total amount of punitive damages, if any, that you award to Plaintiff against Defendant Vega? $_____

It appearing by reason of said special verdict that: Defendant **SGT. CARLOS VEGA** is entitled to judgment against the plaintiff **TERENCE B. TEKOH**.

Now, therefore, it is **ORDERED, ADJUDGED, AND DECREED** that said Plaintiff **TERENCE B. TEKOH** shall recover nothing by reason of the complaint, and that defendants shall recover costs from said plaintiff **TERENCE B. TEKOH** pursuant to Federal Rule of Civil Procedure 54(d)(1). The cost bill will be submitted directly to this Court for its review and determination.

Dated: October 5, 2018

/s/ George H. Wu
GEORGE H. WU,
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Terence B. TEKOH, Plaintiff-Appellant,

v.

COUNTY OF LOS ANGELES; Dennis Stangeland, Sergeant; Carlos Vega, Deputy, Defendants-Appellees,

and

Los Angeles County Sheriff's Department; Does, 1 to 10, Defendants.

No. 18-56414

Filed January 25, 2024

91 F.4th 997

Before: Mary H. Murguia, Chief Judge, and Kim McLane Wardlaw and Eric D. Miller, Circuit Judges.

Order;

Concurrence by Judge Wardlaw;

Dissent by Judge Collins

ORDER

Chief Judge Murguia and Judge Wardlaw voted to deny the petition for panel rehearing and the petition for rehearing en banc. Judge Miller voted to grant the petition for panel rehearing and the petition for rehearing en banc. The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35(a).

The petition for panel rehearing and the petition for rehearing en banc (Dkt. 82) are **DENIED**.

IT IS SO ORDERED.

WARDLAW, Circuit Judge, with whom MURGUIA, Chief Judge, and GOULD, Circuit Judge, join, concurring in the denial of rehearing en banc:

The court today declines to rehear en banc an evidentiary ruling a three-judge panel issued on remand from the Supreme Court in *Vega v. Tekoh*, 597 U.S. 134, 142 S.Ct. 2095, 213 L.Ed.2d 479 (2022). The panel had not reached this evidentiary issue in its prior decision that the Supreme Court elected to take up. In that decision, the panel unanimously held based on its understanding of then-existing Supreme Court precedent that an officer's use of an un-*Mirandized* statement could serve as a basis for a 42 U.S.C. § 1983 claim. *See Tekoh v. County of Los Angeles*, 985 F.3d 713 (9th Cir. 2021) ("*Tekoh I*"), *rev'd sub nom. Vega v. Tekoh*, 597 U.S. 134, 142 S.Ct. 2095, 213 L.Ed.2d 479 (2022). Deputy Vega appealed and the Supreme Court clarified its prior caselaw to hold that a *Miranda* violation alone does not provide a basis for a § 1983 claim. *See Vega*, 597 U.S. at 152, 142 S.Ct. 2095.

On remand the panel reached for the first time Tekoh's argument that the district court abused its discretion in excluding Tekoh's expert testimony at trial. The panel majority held, in an originally unpublished disposition, that the district court did so by misapplying Rule 702. *See Tekoh v. County of Los Angeles*, 75 F.4th 1264 (9th Cir. 2023) ("*Tekoh II*"). That decision was correct, and I join our court's

decision to not rehear the case en banc. I write to explain why this is the correct result.

I.

A.

Los Angeles County criminally prosecuted Terence Tekoh twice, both times relying on a written confession that Tekoh has claimed was coerced and false throughout his now decade-long journey through our state and federal judicial systems. After the discovery of new evidence during his first criminal trial, the court granted the parties' joint motion to declare a mistrial. During the second criminal trial some months later, the state trial court admitted the testimony of Tekoh's expert on false and coerced confessions, Dr. Blandón-Gitlin. The jury acquitted Tekoh.

After he was acquitted, Tekoh filed a civil suit against Deputy Vega under 42 U.S.C. § 1983 for, among other claims, coercing an incriminating statement from Tekoh and using it in a police report in violation of Tekoh's Fifth Amendment right against self-incrimination. *See Stoot v. City of Everett*, 582 F.3d 910, 922–26 (9th Cir. 2009). Over the strenuous and repeated objections of Tekoh's counsel, the district court excluded the proffered testimony of Tekoh's expert, Dr. Blandón-Gitlin, who would have testified that the interrogation practices Tekoh alleges Deputy Vega used are associated with coerced confessions, and that Tekoh's written confession contained hallmark signs of coercion. While the parties did not dispute that Dr. Blandón-Gitlin's testimony was based upon sufficient data or that her conclusions were the product of reliable principles and methods, the district court determined that Dr.

Blandón-Gitlin's testimony would not be helpful under Federal Rule of Evidence 702 because if the jury credited Tekoh's account of his interrogation, it would "obviously" find Deputy Vega liable for coercion. The district court further found that Dr. Blandón-Gitlin's testimony, which would have applied her expert knowledge to the facts as Tekoh claimed they occurred, would have amounted to improper buttressing of Tekoh's testimony. Without the aid of expert testimony on coerced confessions, the jury returned a verdict for Deputy Vega.

Tekoh moved for a new trial, which the district court granted in part, based on its failure to properly instruct the jury on the Fifth Amendment deprivation claim. At the second civil trial, the district court again excluded Dr. Blandón-Gitlin's testimony on Rule 702 grounds, reasoning that "[i]f one believes Mr. Tekoh, there pretty much is sufficient evidence that the interrogation was coercive" and again expressing the court's concern that the testimony would amount to improper buttressing. Again without the aid of any expert testimony on coerced confessions, the jury found Deputy Vega not liable.

On appeal, the three-judge panel unanimously remanded for a new trial, reaching only the question—no longer at issue—of whether § 1983 provides a cause of action against an officer who uses an un-*Mirandized* statement against a defendant in a criminal proceeding, as it was then unnecessary to reach the evidentiary issue. *See Tekoh I*, 985 F.3d at 726. Deputy Vega appealed the panel's decision and the Supreme Court reversed and remanded, holding that a *Miranda* violation, standing alone, does not provide a basis for a § 1983 claim. *See Vega*, 597 U.S.

at 152, 142 S.Ct. 2095. The Court did not reach any other issue in the case.

B.

On remand from the Supreme Court, the panel reached for the first time Tekoh's separate and only remaining claim on appeal: whether the district court abused its discretion in excluding Dr. Blandón-Gitlin's testimony under Rule 702. Because the district court ignored Tekoh's arguments that the expert would help the jury understand issues beyond the ken of common knowledge and mischaracterized the proffered testimony as improper witness bolstering, a majority of the panel held that the district court misapplied Rule 702 and abused its discretion in so doing. *See Tekoh II*, 75 F.4th at 1266.

Importantly, both the majority and the dissent agreed that the disposition appropriately should be filed as an unpublished memorandum disposition because the decision did not establish, alter, modify, or clarify a rule of federal law; did not call attention to a rule of law that appears to have been generally overlooked; did not criticize existing law; and did not involve a legal or factual issue of unique interest or substantial public interest. *See* Cir. R. 36-2 ("Criteria for Publication"); Cir. R. 36-3(a) ("Unpublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.").

The panel later designated the already-filed memorandum disposition for publication pursuant to Circuit Rule 36-2(f). That rule, which states that a disposition "shall be" published "following a reversal or remand by the United States Supreme Court," has

long been honored in the breach. For decades, our court has tended not to publish dispositions following remand from the Supreme Court where the only issues remaining after remand are entirely separate from the issues addressed in the Supreme Court's decision (as here),[1] or where the Supreme Court remands with instructions to apply a Supreme Court decision affecting the case.[2]

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[1] *See, e.g., Empire Health Found. for Valley Hosp. Med. Ctr. v. Azar*, No. 18-35845, 2022 WL 17411382, at *1–2 (9th Cir. Dec. 5, 2022) (addressing the litigant's "remaining challenge" in a memorandum disposition following reversal and remand by the Supreme Court); *Lambert v. Nutraceutical Corp.*, 783 F. App'x 720, 721–22 (9th Cir. 2019) (same); *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 584 F. App'x 653, 654–56 (9th Cir. 2014) (same); *United States v. Arvizu*, 32 F. App'x 873, 873–74 (9th Cir. Mar. 21, 2002) (same); *Bartholomew v. Wood*, 96 F.3d 1451 (Table) (9th Cir. Aug. 29, 1996) (same); *United States v. Ramirez*, 163 F.3d 608, 608 (Table) (9th Cir. Sept. 3, 1998) (disposing of the issue the Supreme Court addressed in a published disposition, but "tak[ing] up [the defendant's] alternate ground for affirming the district court[ ]" in a memorandum disposition); *see also Ulleseit v. Bayer Healthcare Pharms., Inc.*, Nos. 19-15778, 19-15782, 2021 WL 6139816, at *1 (9th Cir. Dec. 29, 2021) (addressing the "remaining ground" for relief following vacatur and remand by the Supreme Court); *Kayer v. Shinn*, 841 F. App'x 34, 35 (9th Cir. 2021) (same); *Mena v. City of Simi Valley*, 156 F. App'x 24, 26 (9th Cir. Nov. 23, 2005) (same); *United States v. Verdugo-Urquidez*, 29 F.3d 637 (Table) (9th Cir. June 22, 1994) (same).

[2] *See, e.g., FTC v. Publishers Bus. Servs., Inc.*, 849 F. App'x 700, 700–02 (9th Cir. 2021); *United States v. Johnson*, 833 F. App'x 665, 666–68 (9th Cir. 2020); *United States v. Poff*, 781 F. App'x 593, 593–95 (9th Cir. 2019); *E.F. ex rel. Fulsang v. Newport Mesa Unified Sch. Dist.*, 726 F. App'x 535, 536–38 (9th Cir. 2018); *Castillo v. Sessions*, 743 F. App'x 818, 819–20 (9th Cir. 2018); *Slater v. Sullivan*, 447 F. App'x 759, 759–60 (9th Cir. July 19, 2011); *United States v. Quinones*, 135 F. App'x 64, 65–66 (9th Cir. June 14, 2005); *United States v. Tolentino*, 135 F.

Nevertheless, the panel designated the previously-filed memorandum disposition for publication exactly as written—without elaborating upon the facts or law that would fully constitute a true opinion.

After the disposition was published, the en banc call failed. *See* Fed. R. App. P. 35(a) (en banc rehearing will not be ordered unless it is "necessary to secure or maintain the uniformity of the court's decisions" or involves a question of "exceptional importance"); Cir. R. 35-1. The panel majority's ruling on a single evidentiary question narrowly based on the circumstances of Tekoh's case does not meet this criteria.

App'x 36, 37–39 (9th Cir. June 8, 2005); *United States v. Tate*, 133 F. App'x 447, 448–49 (9th Cir. June 7, 2005); *see also Petersen on behalf of L.P. v. Lewis County*, 697 F. App'x 490, 491–92 (9th Cir. 2017); *Herson v. City of Richmond*, 631 F. App'x 472, 473–74 (9th Cir. 2016); *Johnson v. Finn*, 468 F. App'x 680, 682–85 (9th Cir. Feb. 10, 2012); *Parra Camacho v. Holder*, 478 F. App'x 431, 432 (9th Cir. July 11, 2012); *Valdovinos v. McGrath*, 423 F. App'x 720, 721–24 (9th Cir. Mar. 22, 2011); *United States v. Gonzalez*, 450 F. App'x 662, 663 (9th Cir. Sept. 27, 2011); *Lehman v. Robinson*, 346 F. App'x 188, 188 (9th Cir. Sept. 16, 2009); *United States v. Labra-Valladares*, 220 F. App'x 606, 607 (9th Cir. Feb. 9, 2007); *Earl X v. Morrow*, 156 F. App'x 1, 1–2 (9th Cir. Nov. 15, 2005); *United States v. Moreno*, 125 F. App'x 801, 801–02 (9th Cir. Mar. 3, 2005); *United States v. Magana*, 60 F. App'x 3, 3 (9th Cir. Jan. 13, 2003); *Brown v. Mayle*, 66 F. App'x 136, 137 (9th Cir. June 6, 2003); *United States v. Castro*, 35 F. App'x 553, 553–54 (9th Cir. May 20, 2002); *United States v. X-Citement Video, Inc.*, 77 F.3d 491, 491 (Table) (9th Cir. Jan. 5, 1996); *Lastimosa v. Hughes Aircraft Co.*, 878 F.2d 386, 386 (Table) (9th Cir. June 22, 1989).

II.

A.

Yet the dissent maintains that our court should have reheard this case en banc. The dissent both misstates the panel majority's holding and attacks the disposition based on language the dissent concedes it does not contain.

Most notably, the dissent erroneously claims that the panel majority's decision "hold[s] that the district court was *required* to admit the sort of testimony at issue here." Of course, the decision does nothing of the sort. The dissent appears to walk back this mischaracterization when it asserts that the disposition "*could* be read as *effectively* requiring the admission of such coerced-confession expert testimony . . . ." (emphases added and omitted). But on either count, the dissent is wrong. As we explain below, the panel majority reversed the district court not because it was "*required*" to admit expert testimony on coerced confessions—an absurd proposition—but because the district court fundamentally misapplied Rule 702.

Had the district court engaged in a proper analysis under Rule 702, it might have excluded some or even all of Tekoh's proffered expert testimony without abusing its discretion. Certainly, the panel majority did not hold that expert testimony that satisfies Rule 702 will always satisfy Rule 403. Nor did the panel majority hold that expert testimony could be admitted under Rule 702 if it were not based upon sufficient data or if the expert's conclusions were not the product of reliable principles and methods—neither of which was at issue in this case. *Cf., e.g., United States v. Hayat*, 710 F.3d 875, 903 (9th Cir. 2013) (holding

that the district court did not abuse its discretion in excluding the testimony of an expert who did not demonstrate "particular expertise in the field of false confessions"). Rather, the panel majority's decision, which was limited to the unique facts of Tekoh's case, preserved the discretion of the district courts to determine whether to admit or exclude expert testimony on coerced confessions in whole or in part. Any assertion to the contrary is flatly wrong.

B.

Turning to the narrow question in Tekoh's case, in the civil trial against Deputy Vega, the jury was essentially asked to evaluate two separate but related questions. First, whether Tekoh was credible—that is, which of Tekoh's or Vega's conflicting version of events was true. Second, if Tekoh was deemed credible, whether Vega's actions were unconstitutionally coercive. In its ruling excluding Dr. Blandón-Gitlin's testimony, the district court collapsed these two questions, improperly making its own finding of fact that if anyone believed Tekoh's version of events, they would necessarily find that Tekoh's confession amounted to coercion in violation of the Fifth Amendment. The district court's erroneous finding of fact ignored a host of circumstances in which Tekoh's testimony would not be sufficient alone to satisfy his burden of proof on coercion. It ignored the possibility that the jury could find Tekoh credible but not find that Deputy Vega's conduct amounted to coercion. And it ignored the possibility that the jury could find Tekoh only *partially* credible—that Deputy Vega used racial epithets but never put his hand on his gun or

threatened Tekoh with deportation, for example, such that the isolated conduct did not amount to coercion.[3]

In each of these scenarios, Dr. Blandón-Gitlin's testimony would have been critical for the jury to "understand the evidence" and determine whether Tekoh met his burden to prove by a preponderance of the evidence that his confession was coerced in violation of the Fifth Amendment. Fed. R. Evid. 702(a). By excluding the expert testimony, the district court failed to understand the relationship between the percipient witnesses' testimony as to the circumstances of the interrogation and the expert testimony, which is relevant to how those facts may or may not satisfy the elements of the claim of coercion. In effect, it held that the *only* evidence it would permit Tekoh to offer regarding both the alleged circumstances of the interrogation and its allegedly coercive nature was Tekoh's subjective experience against the word of a law enforcement deputy.

In objecting to the district court's ruling, Tekoh's counsel repeatedly argued that the expert testimony would help the jury understand what is otherwise a counterintuitive fact: that certain interrogation techniques, in particular circumstances, can

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[3] Evidently failing to recognize these possibilities, the district court at one point offered to instruct the jury that if the jury agreed with Tekoh's version of events, coercion was established as a matter of law. Of course the district court never so instructed the jury. But the fact that it offered to do so reflects the mistaken premise on which it based its evidentiary ruling: the erroneous belief that the jury would credit either all or none of Tekoh's account and the assumption, made without the analysis that Rule 702 requires, that the jury would necessarily find coercion established if it credited Tekoh's account

coercively elicit false confessions. Indeed, Tekoh had a valid argument to make that Dr. Blandón-Gitlin's testimony, which had already been accepted in Tekoh's criminal trial as well as dozens of other cases, was both specialized and relevant under Rule 702. As "many courts" in "hundreds" of cases have long acknowledged, false confessions are contrary to the prolific lay understanding that people do not confess to crimes unless they are guilty. *United States v. Hayat*, 2017 WL 6728639, at *10, *12 (E.D. Cal. Dec. 27, 2017). Our society has long abided by this deeply rooted notion, evidenced by the Supreme Court's statement more than 130 years ago that "one who is innocent will not imperil his safety or prejudice his interests by an untrue statement." *Hopt v. People*, 110 U.S. 574, 585, 4 S.Ct. 202, 28 L.Ed. 262 (1884). It continues to permeate our culture at such a fundamental level that we have codified it in our rules of evidence. *See* Fed. R. Evid. 804(b)(3) (declarations against interest are excepted from the rule against hearsay); *Crane v. Kentucky*, 476 U.S. 683, 689, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (recognizing that rational jurors attach credibility to a defendant's confession because an innocent defendant would not admit guilt).

Given the longstanding lay beliefs related to confessions against interest, it would be "naïve[to] assume[ ] that a jury would be easily persuaded that an innocent person would confess to a crime they did not commit by the confessor's testimony [recanting the confession] alone." *Lunbery v. Hornbeak*, 605 F.3d 754, 765 (9th Cir. 2010) (Hawkins, J., concurring). Here, the district court made this very assumption based on its no doubt extensive experience with confessions, coerced or not. In so doing, the district

court substituted its background and specialized knowledge for those of the jurors, ducking the analysis Rule 702 requires.

The district court further erred in concluding that Dr. Blandón-Gitlin's expert testimony would amount to improper witness buttressing. In the criminal trial predating Tekoh's civil suit, the state trial court admitted Dr. Blandón-Gitlin's testimony without any concerns of improper buttressing. For good reason: her testimony provided expert analysis on certain features of Tekoh's written statement and information on the coercive effects of the types of conduct in which Deputy Vega allegedly engaged during the interrogation. That Dr. Blandón-Gitlin would limit her testimony on coercive interrogation techniques to only those techniques Tekoh claimed Deputy Vega used supports our conclusion that the expert was not bolstering Tekoh's credibility. *Cf. United States v. Benally*, 541 F.3d 990, 995 (10th Cir. 2008) (holding it was proper to exclude expert testimony on "the effects of [interrogation] conditions not at issue here, such as torture").

If the jury had found Tekoh not credible, it would have easily discounted Dr. Blandón-Gitlin's testimony as irrelevant. But—and this is the crucial point—if the jury did find Tekoh credible, it could *still* have found that Tekoh did not satisfy the burden of proving the elements of his coercion claim. Dr. Blandón-Gitlin's testimony was helpful because it went to the facts at the heart of Tekoh's legal claim, not to his credibility.

Moreover, even assuming the district court's concerns were valid, those concerns could have been properly addressed through Rule 403 limitations on Dr. Blandón-Gitlin's testimony and further mitigated

through proper direct- and cross-examination. *See United States v. Hall*, 93 F.3d 1337, 1344 (7th Cir. 1996) (noting that, even if expert testimony on false confessions satisfies Rule 702, "the district court may still use the normal controls on scope of testimony and relevance that are available to it"). The district court was free to consider limitations on the scope of Dr. Blandón-Gitlin's testimony outside of Rule 702 but it simply refused to do so, even after Tekoh's counsel repeatedly offered to redact and exclude portions of the report with which the district court had expressed concerns.[4]

III.

As noted above, had the district court engaged in a proper analysis under Rule 702 or Rule 403, it might have excluded some or even all of Tekoh's proffered expert testimony. Its failure to do so amounted to an

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[4] The dissent also argues that we should have reheard *Tekoh II* en banc because the panel majority's decision "creates a split with the Tenth Circuit's decision in *United States v. Benally*, 541 F.3d 990 (10th Cir. 2008)." That case, which arose in the criminal context, did not involve a § 1983 coercion claim. *See* 541 F.3d at 992. The Tenth Circuit held that the proffered expert testimony, which concerned false confessions generally and not coercion specifically, was not relevant because the expert in *Benally*, unlike Dr. Blandón-Gitlin, "was not going to specifically discuss [Benally] or the circumstances surrounding his confession in her testimony." *Id.* at 996. Instead, she was going to testify "about the effects of conditions not at issue [in Benally's case], such as torture." *Id.* Based on the minimal probative value of *that* expert's testimony, the Tenth Circuit held that even if the testimony were admissible under Rule 702 it was inadmissible under Rule 403. In short, *Benally* involved distinct factual and legal circumstances and distinguishable expert testimony. It therefore does not conflict, much less "directly conflict," with *Tekoh II*. Cir. R. 35-1.

abuse of discretion. Given the limited nature of our decision—addressing for the first time in Tekoh's appeal the propriety of a ruling on a single evidentiary issue applying only to the facts of this case—our court was correct to avoid a wasteful use of our en banc resources.

Respectfully, I concur in the denial of rehearing en banc.

COLLINS, Circuit Judge, with whom CALLAHAN, IKUTA, BENNETT, R. NELSON, BADE, LEE, BRESS, BUMATAY, and VANDYKE, Circuit Judges, join, dissenting from the denial of rehearing en banc:

Having just been reversed by the Supreme Court on other grounds, the panel majority on remand has issued yet another plainly erroneous published decision—one that defies settled precedent, creates a circuit split, and will have a substantial disruptive effect on the administration of justice in this circuit. We should have reheard this case en banc.

According to the panel majority's opinion, in conducting a civil trial concerning a § 1983 claim alleging that a police officer coerced the plaintiff's confession, the district court was *required* to admit expert testimony concerning the potential coercive effect of commonly used interrogation techniques. Expert testimony is needed, the majority concluded, so that the jury can understand the coercive effect of "minimization tactics" (*i.e.*, blame-reducing excuses for the suspected crime that are suggested by the interrogator) and "false evidence ploy[s]" (*i.e.*, bluffing by the interrogator as to what evidence of guilt the police have), as well as "why just asking questions can

be coercive." *Tekoh v. County of Los Angeles*, 75 F.4th 1264, 1266 (9th Cir. 2023). In holding that the mere use of such common techniques triggers a need to admit such expert testimony, the panel majority's decision (1) contravenes our caselaw concerning the deference afforded to district judges on evidentiary questions as well as our caselaw supporting the exclusion of expert testimony offered to bolster credibility; (2) could be read as effectively creating a *per se* rule requiring the admission of such testimony in all cases alleging a coerced confession; and (3) creates a split of authority. Although the concurrence in the denial of rehearing attempts to downplay the significance of the panel majority's published opinion—which the panel majority notably declines to amend—that concurrence only serves to underscore how problematic that opinion is in the first place. I dissent from our failure to rehear this case en banc.

I

A

In 2014, Tekoh, a citizen of Cameroon, was working as a nursing assistant at a Los Angeles hospital "[w]hen a female patient accused him of sexually assaulting her." *Vega v. Tekoh*, 597 U.S. 134, 138, 142 S.Ct. 2095, 213 L.Ed.2d 479 (2022). Hospital staff contacted the Los Angeles County Sheriff's Department, which dispatched Deputy Carlos Vega to the hospital. *Id.* Vega questioned Tekoh at the hospital and obtained a signed written statement from Tekoh confessing that he had touched the patient's vagina. However, Tekoh's and Vega's accounts of that interview differ sharply.

Tekoh testified that he never asked to speak privately with Vega, and that Vega instead took him

to a soundproof MRI room after dismissing the two nurses who were with Tekoh. According to Tekoh, once inside the room, Vega blocked him from exiting and began accusing him of sexually assaulting the complainant. This went on, Tekoh said, for about 35 minutes, at which point Vega falsely claimed that they had a video of the sexual assault. Tekoh said that he felt relieved when he heard that, because he thought that a video would prove his innocence. Tekoh said that, as a result, he let out a chuckle, which got Vega angry. When Vega ignored Tekoh's requests to speak to a supervisor or a lawyer, Tekoh claimed that he tried to leave but was physically blocked from exiting by Vega. According to Tekoh:

> I made one or two steps, and he rushed at me and stepped on my toes, put his hand on his gun and said, "Mr. Jungle N-----trying to be smart with me. You make any funny move, you're going to regret it. I'm about to put your black ass where it belongs, about to hand you over to deportation services, and you and your entire family will be rounded up and sent back to the jungle." He said, "Trust me, I have the power to do it."

Tekoh testified that Vega gave him a piece of paper and pen and told him to write down what he had done to the patient and that he should "start by showing the remorse to the judge." Tekoh said that, after he hesitated, Vega told him that "he wasn't joking and he put his hand on his gun." At that point, Tekoh testified, he "was ready to write whatever [Vega] wanted." According to Tekoh, Vega "kept dictating," and Tekoh "was writing" what he was told. It was only after Tekoh signed the written statement that a

second officer, Sergeant Dennis Stangeland, entered the room.

In his trial testimony, Deputy Vega denied every material allegation Tekoh made about Vega's allegedly coercive behavior. According to Vega, when he began questioning Tekoh at the hospital in the presence of others, it was Tekoh who asked if they could move to a room where they could speak privately, and they then moved to the MRI room. Once in the room, Vega said, he did not yell at Tekoh because Tekoh's general demeanor was "humble." Vega specifically denied that he had used "any sort of racial slur." Vega also stated that, for safety reasons, he left the door to the MRI room ajar. Vega said that he decided that he wanted another officer there, and so he called his sergeant to come. After doing so, Vega said that he gave Tekoh a "piece of paper" and asked him to "write what happened while I get my sergeant and we can ask you a couple of questions." He denied that he threatened Tekoh and he also denied dictating Tekoh's statement. Vega said that Tekoh was "cooperative" and seemed to be "feeling guilty." Vega stated that Tekoh did not try to leave; that Vega never stepped on Tekoh's toes; and that Tekoh "just continued to write the letter" while they waited for Sergeant Stangeland. Vega further stated that Tekoh never requested to talk to a lawyer. Vega also specifically denied threatening to have Tekoh deported. He also denied ever placing his hand on his gun. After Sergeant Stangeland arrived, Vega said, they began questioning him by using an "open-ended question" to "give[ ] him a chance to explain himself."

Sergeant Stangeland testified that, when he arrived, Tekoh "didn't seem agitated or distraught" but "appeared to be calm and appeared to be prepared

to talk to both of us." When asked to tell what happened, Stangeland said, Tekoh admitted "that he had touched [the patient], the outer portion of her vagina," but "he was adamant on insisting that his fingers never actually penetrated her vaginal opening." Stangeland said that the interview only "lasted five to ten minutes." At the conclusion, Stangeland stated, they asked Tekoh to "return to writing his statement."

B

Tekoh was arrested and charged in California state court, where, after his first trial resulted in a mistrial, he was retried and acquitted. *Vega*, 597 U.S. at 139, 142 S.Ct. 2095. Tekoh then sued Vega, Stangeland, and the County of Los Angeles under 42 U.S.C. § 1983, alleging that Vega coerced him into writing a false confession in violation of *Miranda* and his Fifth Amendment right against self-incrimination. Vega and Stangeland prevailed at the first trial, but the district court granted a new trial against Vega after concluding that it had given an improper jury instruction. 597 U.S. at 139, 142 S.Ct. 2095. At the retrial against Vega only, the jury again "found in Vega's favor, and Tekoh appealed." *Id.* at 140, 142 S.Ct. 2095. The panel "reversed, holding that the 'use of an un-*Mirandized* statement against a defendant in a criminal proceeding violates the Fifth Amendment and may support a § 1983 claim' against the officer who obtained the statement." *Id.* (quoting *Tekoh v. County of Los Angeles*, 985 F.3d 713, 722 (9th Cir. 2021)). The Supreme Court granted certiorari and reversed. Specifically, the Court held that "a violation of the *Miranda* rules" does not "provide[ ] a basis for a claim under § 1983." *Id.* at

141, 142 S.Ct. 2095. The Court remanded for further proceedings. *Id.* at 152, 142 S.Ct. 2095.

On remand, the panel, by a divided vote, again reversed the defense verdict, but this time based on an evidentiary issue that the panel had previously found unnecessary to decide. *See Tekoh v. County of Los Angeles*, 75 F.4th 1264 (9th Cir. 2023).

Before the first trial, Defendants filed a motion in limine to exclude Plaintiff's expert on coerced confessions, Dr. Iris Blandón-Gitlin. Dr. Blandón-Gitlin was to testify that Plaintiff's written confession was coerced, "assuming the veracity of Mr. Tekoh's account of events." The district court concluded that, in light of that latter feature of Dr. Blandón-Gitlin's proffered testimony, that testimony would "not [be] particularly helpful," and would be "time-consuming and potentially confusing." As the court explained:

> [T]he main opinion in her report, is that, quote, "Assuming the veracity of Mr. Tekoh's account of events, his written confession was coerced and highly unreliable." Again, you don't need an expert for that. If the jury buys Mr. Tekoh's version of events, then obviously the confession was coerced and cannot be used. And so I don't see why we need an expert for that.
>
> . . .
>
> So I don't see why in this particular situation you need an expert, because in fact, according to the plaintiff's version of events that Dr. Blandon needs to assume to make her conclusion, the jury is going to have to find that Vega threatened Mr. Tekoh both physically and verbally, threatened to turn him and his family

> over to the authorities for deportations, put a piece of paper in front of him, and after making threatening gestures with the hand on the gun, ordered him to write what Vega told him. If the jury believes that, you don't think the jury can find coercion without the testimony of an expert witness?

Finally, the court also expressed its concern that allowing Dr. Blandón-Gitlin's testimony would be an improper attempt to "use the expert to bolster [Tekoh's] credibility."

After the first jury rendered a defense verdict, Tekoh moved for a new trial on the ground that, *inter alia*, Dr. Blandón-Gitlin's testimony had been improperly excluded. The district court rejected this particular ground in a written order. Summarizing its ruling, the court stated:

> This Court found that her opinion was unnecessary and problematic because: (1) if the jury believed Mr. Tekoh's version of the events, his confession was clearly coerced and highly unreliable and her opinion added nothing of substance, (2) Plaintiff appeared to be trying to use Dr. Blandon-Gitlin to simply vouch for his version of the events, but she was not a percipient witness, and (3) her report included studies and contentions which were irrelevant to the case. Plaintiff here testified that Defendant Vega browbeat him both physically and verbally, threatened to deport not only him but also his family, used racial epithets, denied him access to counsel, lied to him regarding the evidence against him, and put a piece of paper in front of him and forced him to write a

> confession which Vega dictated. A reasonable juror would not need the assistance of a person with specialized knowledge to understand that those conditions, if true, would give rise to a false and coerced confession.

Over a dissent from Judge Miller, the panel majority reversed, holding that the district court abused its discretion in excluding Dr. Blandón-Gitlin's testimony. In its brief opinion, the panel majority began by quoting this court's prior observation that "[w]hether testimony is helpful within the meaning of Rule 702 is in essence a relevance inquiry." 75 F.4th at 1265 (quoting *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1184 (9th Cir. 2002)). The majority then held that "Dr. Blandón-Gitlin's testimony was relevant to Tekoh's case, as she would have opined on how the text of confessions can indicate classic symptoms of coercion, and would have explained to the jury how Deputy Vega's tactics could elicit false confessions." *Id.* at 1265–66. "Because false confessions are an issue beyond the common knowledge of the average layperson, 'jurors would have been better equipped to evaluate [Tekoh's] credibility and the confession itself had they known of the identified traits of stress-compliant confession and been able to compare them to [his] testimony.' " *Id.* at 1266 (quoting *Lunbery v. Hornbeak*, 605 F.3d 754, 765 (9th Cir. 2010) (Hawkins, J., concurring)).

II

The panel majority's decision is deeply flawed in multiple respects. First, the majority blatantly disregards the abuse-of-discretion standard of review and provides a plainly erroneous explanation for

rejecting the district court's concern that the proposed expert testimony would have effectively vouched for Tekoh's credibility. Second, the panel majority's holding that the proffered expert testimony in this case *must* be admitted under Rule 702 to help jurors understand "why just asking questions can be coercive" could be read as effectively establishing a *per se* rule requiring admission of such testimony in false confession cases. 75 F.4th at 1266. And third, the panel majority's published decision directly conflicts with *United States v. Benally*, 541 F.3d 990 (10th Cir. 2008), and stands as an extreme outlier against the overwhelming body of appellate precedent from the federal and state courts that has repeatedly upheld exclusion of such testimony.

A

As discussed above, the district court summarized as follows its reasons for excluding Dr. Blandón-Gitlin's testimony:

> (1) if the jury believed Mr. Tekoh's version of the events, his confession was clearly coerced and highly unreliable and her opinion added nothing of substance, (2) Plaintiff appeared to be trying to use Dr. Blandon-Gitlin to simply vouch for his version of the events, but she was not a percipient witness, and (3) her report included studies and contentions which were irrelevant to the case.

Under well-settled law, the district court did not err in excluding the proffered testimony on these three grounds.

1

The district court's first rationale is unassailable under the applicable deferential standard of review. The two participants in the key portion of the interrogation—Tekoh and Deputy Vega—provided radically different versions of what occurred. Tekoh said that Vega physically blocked him from trying to leave, stepped on Tekoh's toes, ignored his request to speak to a lawyer, called him racial epithets, threatened him and his family with deportation, threateningly put his hand on his gun, and then dictated the false confession that Tekoh wrote down. Vega denied every single one of those allegations. Given that Dr. Blandón-Gitlin's expert testimony was expressly based on "assuming the veracity of Mr. Tekoh's accounts of events," it was eminently reasonable for the district court to conclude that her testimony would not be "helpful" and would instead be "time-consuming and potentially confusing." As Judge Miller explained in dissent, the district court *permissibly* concluded that—if Tekoh's version of the interrogation was true, as Dr. Blandón-Gitlin assumed—then the coercion would be so obvious that it would "not take an expert to see how that would have been coercive." *See Tekoh*, 75 F.4th at 1267 (Miller, J., dissenting).

The panel majority's opinion nonetheless held that expert testimony was necessary to "help the jury better understand coerced confessions, *including why just asking questions can be coercive*, issues that are beyond a layperson's understanding and not necessarily obvious, even in these circumstances." *Tekoh*, 75 F.4th at 1266 (emphasis added). I am aware of no precedent that endorses the majority's extraordinary view that a district court abuses its

discretion by excluding, in a coerced confession case, expert testimony about "why just asking questions can be coercive."

The concurrence in the denial of rehearing—which is joined by both members of the panel majority as well as by Judge Gould—offers two new grounds for concluding that the district court erred here, but neither of them withstands scrutiny. First, the concurrence says that the district court "*ignored* the possibility that the jury could find Tekoh credible but not find that Deputy Vega's conduct amounted to coercion." *See* Concur. at 1001 (emphasis added). But the district court did not "ignore" that possibility; it expressly *rejected* it as implausible, and that judgment was eminently reasonable. The panel majority would apparently have weighed things differently, but under the abuse of discretion standard, "we may not simply substitute our view for that of the district court." *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc). Second, the concurrence states that the district court "ignored the possibility that the jury could find Tekoh only *partially* credible—that Deputy Vega used racial epithets but never put his hand on his gun or threatened Tekoh with deportation, for example, such that the isolated conduct did not amount to coercion." *See* Concur. at 1001. To the extent that the district court "ignored" the possibility of such a mix-and-match approach to resolving the sharp credibility dispute between Tekoh and Vega, that is unsurprising, because Tekoh did not raise such an argument in the district court. The district court did not abuse its discretion by failing to address speculative hypotheticals conjured by the panel majority that were not argued by Tekoh. And even if

such an argument had been squarely raised, it would still not have been an abuse of discretion for the district court to conclude that Dr. Blandón-Gitlin's testimony would not be sufficiently helpful to the jury to outweigh the potential for unfair prejudice and undue consumption of time.

2

The panel majority further erred in rejecting the district court's additional reasonable conclusion that Dr. Blandón-Gitlin's testimony improperly sought to bolster Tekoh's credibility. Our caselaw has long held that "[e]xpert testimony may not appropriately be used to buttress credibility." *See United States v. Rivera*, 43 F.3d 1291, 1295 (9th Cir. 1995) (citation omitted); *see also id.* (stating that an "expert witness is not permitted to testify specifically to a witness' credibility or to testify in such a manner as to improperly buttress a witness' credibility" (citation omitted)); *United States v. Candoli*, 870 F.2d 496, 506 (9th Cir. 1989) ("An expert witness is not permitted to testify specifically to a witness' credibility or to testify in such a manner as to improperly buttress a witness' credibility."); *United States v. Binder*, 769 F.2d 595, 602 (9th Cir. 1985) (stating that expert testimony on witness credibility improperly invades the province of the jury), *overruled on other grounds, United States v. Morales*, 108 F.3d 1031, 1035 n.1 (9th Cir. 1997) (en banc). The district court's reliance on this further ground for excluding Dr. Blandón-Gitlin's testimony is likewise unassailable under the applicable deferential standard of review. *See Tekoh*, 75 F.4th at 1267 (Miller, J., dissenting) (explaining that the district court permissibly concluded that "Dr.

Blandón-Gitlin's testimony would have violated that principle").

On this score, one need look no further than Dr. Blandón-Gitlin's own expert report to see that the district court had solid grounds to rule as it did. Although simultaneously asserting that she would assume the truth of Tekoh's version of events, Dr. Blandón-Gitlin's report began her case-specific analysis of coercion by opining explicitly on how she would resolve the credibility contest between Tekoh and Vega: "First, Deputy Vega's account of the circumstances in which he met and initially interacted with Mr. Tekoh is significantly different from the various witnesses' accounts, including Mr. Tekoh himself." She then devoted three paragraphs of her report to discussing the testimony of the various witnesses and explaining why she would conclude that the "overwhelming evidence from the multiple witnesses' core accounts suggests that Deputy Vega's account of events about his initial encounter and movement to the [MRI] reading room may have been incorrect"; that "Deputy Vega's accounts of *other* critical events were misreported"; that Vega gave inconsistent testimony at the preliminary hearing in state court; and that "it is important to critically evaluate the reliability of Deputy Vega's account of events."

In holding that the district court abused its discretion in excluding this testimony, the panel majority's opinion asserts that it would not have "impermissibly vouch[ed] for or buttress[ed] Tekoh's credibility," but would merely have "corroborate[d]" it. 75 F.4th at 1266; *see also* Concur. at 1002 (arguing that Dr. Blandón-Gitlin's testimony would not have bolstered Teko's "credibility," but would instead only

have supported "the facts at the heart of Tekoh's legal claim"). I am at a loss to understand this illusory line between corroborating Tekoh's claims about the facts of his interrogation and bolstering the credibility of his claims about those facts. This majority opinion's elusive distinction will be a source of substantial confusion in future cases in this court and in the district courts. And even if there were such a line between vouching and corroborating, the district court acted well within its discretion in concluding that Dr. Blandón-Gitlin's testimony was on the impermissible vouching side.

The concurrence further confirms the opinion's error on this score. The concurrence complains that the district court's exclusion of Dr. Blandón-Gitlin's testimony left Tekoh in a situation in which it "was Tekoh's subjective experience against the word of a law enforcement deputy." *See* Concur. at 1001. This candid comment simply highlights that the primary function of Dr. Blandón-Gitlin's testimony would have been to bolster Tekoh's testimony in the crucial credibility contest between Tekoh and Vega. That, in turn, underscores the panel majority's error in rejecting the district court's reasonable conclusion that Dr. Blandón-Gitlin's testimony violated the settled principle that "[e]xpert testimony may not appropriately be used to buttress credibility." *Rivera*, 43 F.3d at 1295 (citation omitted).

3

The record also amply supports the district court's third conclusion—namely, that Dr. Blandón-Gitlin's "report included studies and contentions which were irrelevant to the case." In particular, Dr. Blandón-Gitlin's testimony about minimization tactics did not

line up with Tekoh's own version of events. Dr. Blandón-Gitlin opined that, because Tekoh's statement included "apologies and excuses," this was evidence that he had been influenced by "minimizing tactics" that are "typically used by interrogators to downplay the offense and influence suspects to confess." As Dr. Blandón-Gitlin explained, "minimization tactics" occur when an interrogator suggests "moral justifications or face-saving excuses" that would "explain why the person may have committed the act," thereby "imply[ing] to the suspect that providing a confession or admission (perhaps with a moral justification) is the best way to get out of the situation." But here, of course, Tekoh never claimed that Vega tried to coax him by offering him minimizing excuses for what had happened; his claim was that Vega dictated the confession verbatim while holding his hand on his gun.

Although there was thus no factual basis in either Tekoh's or Vega's testimony for concluding that Vega used "minimization tactics" in the interrogation of Tekoh, the panel majority's opinion nonetheless inexplicably reverses the district court on this score. According to the panel majority, Dr. Blandón-Gitlin's testimony was "relevant" because it would have assisted the jury in understanding how "Deputy Vega utilized minimization tactics—classic coercion—to elicit incriminating admissions." *Tekoh*, 75 F.4th at 1266. This reasoning is simply divorced from the factual record of this case and flagrantly disregards the applicable deferential standard of review.

Finally, it must be noted that, in discussing this issue, the panel majority's opinion makes the drive-by statement that "minimization tactics" constitute "classic coercion." *Id.* This startling holding is based

on no authority at all, but it now arguably prohibits their use in this circuit. That broad and unsupported statement provides yet another reason why we should have reviewed this case en banc.

In short, the panel majority's remarkable holding that the district court was *required* to admit the sort of testimony at issue here is clearly wrong and squarely contrary to settled precedent.

B

As Judge Miller's dissent persuasively notes, the panel majority's terse explanation for its finding of an abuse of discretion means that the majority's opinion could be read as effectively *requiring* the admission of such coerced-confession expert testimony in all such cases. *See Tekoh*, 75 F.4th at 1267 (Miller, J., dissenting) (noting that the panel majority's opinion will have broad applicability because "*every* situation is theoretically susceptible to some sort of expert analysis" about such "other, subtler pressures" (emphasis added)).

The concurrence nonetheless insists that the panel majority's opinion merely reflects a carefully circumscribed analysis that is "narrowly based on the circumstances of Tekoh's case." *See* Concur. at 1000. This contention is hard to square with the opinion that the panel majority wrote. The potential breadth of that decision is apparent from the starkly simplistic nature of its holding. In reversing the district court's decision "excluding Dr. Blandón-Gitlin's testimony on coerced confessions," the panel majority's opinion holds that the "jury could benefit from Dr. Blandón-Gitlin's expert knowledge about the science of coercive interrogation tactics, which Deputy Vega employed here, and how they could elicit false

confessions," and that her testimony "would help the jury better understand coerced confessions, including why just asking questions can be coercive." 75 F.4th at 1265–66. But the only "tactics" that the majority's opinion says justify admitting this expert testimony are "minimization tactics," a "false evidence ploy," and "just asking questions." *Id.* Because this holding relies on very generally described and widely used interrogation techniques,[1] it will be difficult, if not impossible, to distinguish this opinion in future coerced confession cases.

The concurrence also remarkably suggests that the panel majority's opinion may even leave open the possibility that the district court on remand in this case could *completely* exclude Dr. Blandón-Gitlin's testimony. *See* Concur. at 1000-01. This revisionism is even harder to square with the panel majority's unamended opinion, which rejects all of the many grounds that the district court gave for excluding that testimony. Under the panel majority's opinion, the only issue under Rule 702 was whether Dr. Blandón-Gitlin's testimony "would help the trier of fact to understand the evidence or to determine a fact in issue," *see* Fed. R. Evid. 702(a); *see also Tekoh*, 75 F.4th at 1265 n.1, and the majority proceeds to hold that Dr. Blandón-Gitlin's testimony *does* satisfy Rule 702(a). The opinion also concludes that much of that testimony is relevant; that Dr. Blandón-Gitlin's opinions had an adequate foundation in the testimony

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[1] *See, e.g.*, Richard A. Leo, *Inside the Interrogation Room*, 86 J. Crim. L. & Criminology 266, 278 table 5 (1996) (finding, in a study of interrogation techniques in three cities, that the tactic of "[o]ffer[ing] moral justifications/psychological excuses" was used in 34% of cases and that "[c]onfront[ing] suspect with false evidence of guilt" was used in 30% of cases).

about the facts of Tekoh's interrogation; and that the testimony does not violate the rule against using expert testimony to bolster credibility. *See Tekoh*, 75 F.4th at 1265–66. Given these holdings, it is hard to see what ground the opinion leaves open for remand in this case that could even arguably result in full exclusion of that testimony. The concurrence suggests that the district court will still retain the authority, on remand, to evaluate Dr. Blandón-Gitlin's testimony under Rule 403, but at best that would only give the district court authority, on remand, to trim that testimony around the edges. In the ruling the panel majority reverses, the district court specifically excluded Dr. Blandón-Gitlin's testimony on the grounds that, *inter alia*, it was "not particularly helpful" and would be "time-consuming and potentially confusing." That is a classic Rule 403 analysis, but the panel majority's opinion reverses anyway.

Accordingly, the opinion, as written, clearly does *not* allow the district court in *this* case to re-exclude the entirety of Dr. Blandón-Gitlin's testimony on remand. The concurrence's insistence that its opinion "does nothing of the sort," *see* Concur. at 1000, would have more force if the panel majority had amended its opinion rather than insist that that opinion somehow says something that it plainly does not. And given the difficulty in reconciling the concurrence's statements with the broad language of the opinion, the concurrence is poorly positioned to fault this dissent for expressing an (understandable) measure of uncertainty as to exactly how much coerced-confession expert testimony will be required to be admitted in future cases as a result of the opinion in this case. But what is certain is that the opinion

wrongly rejects meritorious reasons for excluding such testimony, and it does so on broadly phrased grounds that will make it substantially—and unjustifiably—harder to exclude such testimony in future cases. That alone warranted rehearing en banc.

C

The panel majority's flawed decision also creates a split with the Tenth Circuit's decision in *United States v. Benally*, 541 F.3d 990 (10th Cir. 2008).

In *Benally*, the defendant appealed his child sex abuse conviction, arguing that the district court improperly excluded his proffered expert witness on false confessions. *Id.* at 993. The expert would have testified concerning the frequency of false confessions and the interrogation techniques that cause them, testimony that would have borne *less* directly on the interrogee's credibility than Dr. Blandón-Gitlin's would have here. *Id.* at 993–94. The Tenth Circuit found no abuse of discretion, largely due to what it considered to be the district court's permissible concern that the "import of her expert testimony" would be to bolster the interrogee's credibility. *Id.* at 995. Notably, the Tenth Circuit reached that conclusion even though the expert's testimony there would have been confined to these general points and would *not* have "specifically discuss[ed] [Benally] or the circumstances surrounding his confession in her testimony." *Id.* at 995. As *Benally* noted, that limitation on the proffered testimony was an effort to "respond[ ] to the concern expressed" in a prior Tenth Circuit decision "that 'a proposed expert's opinion that a witness is lying or telling the truth might be inadmissible . . . because the opinion exceeds the scope of the expert's specialized knowledge.' " *Id.*

(quoting *United States v. Adams*, 271 F.3d 1236, 1245 (10th Cir. 2001)).

Benally thus recognized that, under *Adams*, the inclusion of a case-specific opinion about whether *this* defendant falsely confessed would be problematic—which is the exact opposite of what the panel majority held here. The concurrence is therefore wrong in contending that *Benally* is distinguishable on the ground that the expert there would not have offered such case-specific opinion testimony. *See* Concur. at 1002-03 n.4. Nothing in *Benally* supports the concurrence's insinuation that, had the expert in *Benally* just taken that extra step of applying her opinions about the effect of specific techniques to Benally's case, the result would be different. *Benally*'s reliance on *Adams* confirms that the opposite is true. Moreover, the Tenth Circuit noted that, even without this sort of case-specific testimony that was criticized in *Adams*, the remaining proffered testimony about the coercive effect of particular interrogation techniques in *Benally* did *not* "address the other problems associated with this type of testimony that were identified in *Adams*," namely, that such expert testimony encroaches on the jury's role by "vouch[ing] for the credibility of another witness" and that the "testimony of impressively qualified experts on the credibility of other witnesses is prejudicial, unduly influences the jury, and should be excluded under Rule 403." *Id.* (quoting *Adams*, 271 F.3d at 1245). That reasoning and result dovetail well with the district court's reasoning here, thereby underscoring the circuit split created by the panel majority's decision. The concurrence has no answer to *Benally*'s analysis on this score.

The extent to which the panel majority's decision here is an extreme outlier is further confirmed by the substantial body of additional precedent from other federal and state courts across the country that have repeatedly upheld the exclusion of comparable expert testimony under similarly worded rules of evidence. *See, e.g., United States v. Phillipos*, 849 F.3d 464, 471–72 (1st Cir. 2017) (holding that the district court did not abuse its discretion in excluding, under Rule 702, testimony of a proposed expert on false confessions) (collecting cases); *Commonwealth v. Alicia*, 625 Pa. 429, 92 A.3d 753, 763–64 (2014) (surveying the caselaw on "the admissibility of expert testimony concerning false confessions" and "conclud[ing], in agreement with the Tenth Circuit Court's decision in *Benally*" that such expert testimony "constitutes an impermissible invasion of the jury's role as the exclusive arbiter of credibility"); *State v. Rafay*, 168 Wash.App. 734, 285 P.3d 83, 112–13 (2012) ("Under the circumstances, the trial court's determination that [the confessions expert's] proposed testimony would not be helpful and would invade the province of the jury was at least debatable. The trial court's exclusion of the proposed testimony was therefore not an abuse of discretion."); *People v. Kowalski*, 492 Mich. 106, 821 N.W.2d 14, 32 (2012) (holding that the lower courts had not abused their discretion in excluding expert "testimony pertaining to the literature of false confessions," as well as additional expert "testimony indicating that defendant's confession was consistent with this literature"); *State v. Cobb*, 30 Kan.App.2d 544, 43 P.3d 855, 861, 869 (2002) (holding, in State's cross-appeal, that the trial court erred in admitting proffered expert testimony "regarding the tendency of

certain police interrogation techniques to produce false confessions," and concluding that the "type of testimony given by [the proposed expert] in this case invades the province of the jury"); *State v. Davis*, 32 S.W.3d 603, 608–09 (Mo. Ct. App. 2000) (finding no abuse of discretion in the exclusion of such false-confession expert testimony, holding that "the offer of proof invaded the jury's province to make credibility determinations"); *cf. also Brown v. Horell*, 644 F.3d 969, 982–83 (9th Cir. 2011) (holding, under AEDPA, that the state court reasonably concluded that the exclusion of testimony from a false-confessions expert did not violate the constitutional right to present a complete defense).

In addition, there does not appear to be any prior *civil* case in which an appellate court has held that such expert testimony must be admitted. On that score, the panel majority's decision apparently stands alone.

III

Lastly, I wish briefly to address the panel majority's peculiar apologia, in the concurrence, for its published opinion in this case. The concurrence notes that the panel originally issued its decision in this case as an unpublished memorandum disposition. That, however, was a clear violation of Ninth Circuit Rule 36-2(f), which requires publication of any "written, reasoned disposition" that is "a disposition of a case following a reversal or remand by the United States Supreme Court."[2] As the

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[2] The panel majority's culling of cases in which that rule has previously been violated may supply grounds for perhaps amending that rule in the future, but they provide no basis for declining to follow that rule here. In any event, given the extent

concurrence notes, the panel majority subsequently "designated the previously-filed memorandum disposition for publication exactly as written—without elaborating upon the facts or law that would fully constitute a true opinion." *See* Concur. at 1000. But nothing in Rule 36-2(f) forbids a panel from *amending* an opinion, as appropriate, so that (in the panel majority's words) it "would fully constitute a true opinion" when it is published in compliance with that rule. The choice to leave the published disposition in this case "exactly as written"—with all its flaws—was the panel majority's to make. If anything, that consideration provides a further reason why we should have reconsidered this matter en banc.

* * *

For all of these reasons, I respectfully dissent from the denial of rehearing en banc in this case.

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to which the panel majority's decision in this case departs from settled law, that decision amply meets the ordinary criteria for publication. *See* Ninth Cir. R. 36-2(a) (publication is warranted if the decision "alters" or "modifies" a "rule of federal law").

Federal Rule of Evidence 403

Rule 403 – Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Federal Rule of Evidence 702

Rule 702 – Testimony by Expert Witnesses

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.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION

HONORABLE GEORGE WU

UNITED STATES DISTRICT JUDGE PRESIDING

Terence Tekoh, PLAINTIFF, VS. County of Los Angeles, et al., DEFENDANT,	)	NO. CV 16-7297 GW

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

MONDAY, SEPTEMBER 24, 2018

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THE COURT: I kind of indicated my ruling on the plaintiff's request for the testimony from Blandon-Gitlin. Is there anything else you want to argue?

MR. BURTON: Well, is this all or nothing?

THE COURT: Well, I don't know exactly what would be the something that you would want her to testify about, because again, your position, as you

stated, is that the important thing is what transpired in the room between Mr. Tekoh and Officer Vega.

MR. BURTON: Well, I think what is important, this is a science. There are cases that admit -- including the Ninth Circuit that we have cited -- that admit this type of expert to give this type of testimony.

THE COURT: It depends. But again, the problem is -- let's put it this way. I could understand that in the context of certain types of criminal cases, especially in a situation where, for example, the defendant does not testify, and so therefore if there is supposedly a statement that is made and the question is **[56]** about the statement and whether or not the statement was voluntary, et cetera.

I can understand maybe some expert in that situation, but the problem is that here again, this is not a situation where the distinctions are so subtle. You know, again, these are things that you don't need an expert to talk about. They are, you know -- I mean, the difference is night and day insofar as what supposedly transpired in the room.

MR. BURTON: Well, I think, your Honor, that we presented it in this way. This is all directly from her report, you know, that was disclosed initially, and we have taken out what we understood to be the Court's concerns from earlier hearings and then we laid it out this way so you could redact things.

We think in particular, using, you know -- two things in particular. The jury, we believe, is going to be concerned, well, why did this guy say he did something involuntarily when the repercussions were this bad. How is it that that could happen.

THE COURT: Well, because the threats were made.

MR. BURTON: But she can explain. Those threats are called maximization tactics. So she can explain the maximization tactics, which is the deportation to Africa. But I think more subtle, and just as important for her to **[57]** address and something that is beyond the day-to-day experience of jurors is the minimization tactic. The fact that I don't know what came over me. It was weak. I don't have a girlfriend. I just thought accidentally -- these are classic techniques that are used by interrogators using this Reid method to overcome somebody's will by thinking, well, if they admit to this it is really not that bad.

Those are minimization tactics that appear right on the face of the written confession.

And then I think another thing -- because she has studied thousands of confessions. She has studied cases that confessions have turned out to lead to wrongful convictions and transcripts.

And another thing is there is what is the post-admission phase of an interrogation. So if somebody, okay, you are right, I did it. Now tell me where the body is buried. Now we get to the real business, which is to tell the officer something that they didn't already know. That is completely missing in this case.

You know, what room was it at? When did you do it, where? None of those details are here. And that is a sign of a coerced confession. Somebody writing with -- saying what he is being told to say as opposed to **[58]** an exercise of free will. And there is a lot of science to back this up.

I think this will be a very brief witness. We can limit her direct to half an hour. We have got her lined up for Wednesday morning. And if there is specific information that you want us to redact, of course we will do that.

But we really feel very strongly, your Honor, and we have said this many times, that the concept of a confession is counter-intuitive it to an average juror. And they need to understand how it is that somebody will make a decision that is so against their interests.

THE COURT: Well, okay. Let's look at the first paragraph of your offer of proof. You said Dr. Blandon-Gitlin will describe various factors that are known in psychological science to coerce people to confess. Mr. Tekoh is a foreigner and a member of a minority group who was interrogated without advisement of Miranda rights. It goes on and on. It is getting more and more problematic.

For example, the fact that he was interrogated without advisement of his Miranda rights is irrelevant unless there was an obligation to advise him of his Miranda rights. So that is a problem.

The fact that he is a foreigner and a member **[59]** of a minority group, that is of itself irrelevant, because even in those cases where you have a person who is a member of some minority group or comes from a foreign country and claims that they come from a background where they always give in to the persons who look like they have a sense of authority, that in and of itself is not sufficient to make the confession involuntary in their cases, such as United States versus Huynh, H-U-Y-N-H, 60 F.3d, starting -- the first page is 1386, but it goes on from page I guess 1387 and 88.

So, you know, her opinions are just problematic. And she says, well, if you rely on what Mr. Tekoh says, well, then, the interrogation was coerced, yes. If one believes Mr. Tekoh, there pretty much is sufficient evidence that the interrogation was coercive. But if you don't believe him and if you believe Officer Vega, then it is not coercive.

We don't need an expert witness to draw that remarkable conclusion.

MR. BURTON: Well, as your Honor has noted several times before, I tend to agree with you. I agree with me. But the defense counsel says even if Mr. Tekoh's version of events is correct, it is still a voluntary, free confession that didn't violate the Fifth Amendment.

That was just said at this lectern about two **[60]** minutes ago with in connection with qualified immunity. That has been their position, that even if everything happened as he said, why he still shouldn't have done this.

THE COURT: Tell you what. Keep Dr. Blandon on a rein, on a leash, and if the argument is made by defense counsel of that sort, then make your request again, but I will allow her to be called in rebuttal as to the position that is being taken by defense counsel.

MR. KIZZIE: Your Honor, I am not exactly clear on what Mr. Burton is even claiming I may argue.

THE COURT: Well, he said that because you argued that for purposes of the qualified immunity that even if one were to accept Mr. Tekoh's version of the events that there was still a basis for qualified immunity.

Although actually maybe defense counsel is right. That actually would be a question of law rather than

a question of fact. So maybe your argument was not well taken in that regard.

MR. BURTON: Well, I disagree. The point he was making is that --

THE COURT: No. He was making the argument that even if you accept Mr. Tekoh's version of the facts that the law wasn't exactly clear that that would constitute a situation of a coerced confession. So therefore Officer **[61]** Vega should be still entitled to qualified immunity.

My response was no, because again, if the version that Mr. Tekoh gave, if accepted by the jury, it seems to me it is a coerced confession, because again, you are not supposed to do things such as put your hand on the gun, things like force a person to write down a confession verbatim the way you are dictating it to him, not to threaten the person to be deported or his family to be deported from the country and things of that sort.

All of those factors taken in totality indicate that there was a coercion to force him to confess, and that his free will was, I don't know if the proper word is subsumed. That is not the right word. Submerged, sub-something. Suppressed. And so therefore I would say that, yes, that is a basis for concluding the confession was coerced.

Anything else you want to argue?

MR. BURTON: Your Honor, may I have one moment?

THE COURT: Sure.

(Counsel confer.)

MR. BURTON: I just would urge that the Court consider the two what I think are the least problematic, as I understand the Court's view here,

on page 5, paragraphs 11 and 12, where she explains how the use of the coercive tactics such as the derogatory language, the **[62]** threats to deportation, are beyond maximization scenarios that are used in interrogations, because she studied them and the typical maximization interrogation, you know, you are in a lot of trouble --

THE COURT: Your problem, however, is the jury is supposed to make the decision based on what a reasonable person would view. And so therefore we don't need an expert to indicate what a reasonable person would view these types of scenarios under, because again, experts don't establish the line for where a reasonable person is.

MR. BURTON: Well, and then No. 12, the use of minimization. We have kind of covered this, but this is what the defense specifically argued during its closing argument, that, oh, well, look, he is apologizing to the judge.

THE COURT: The problem is that, again, you know, that situation, he has already claimed that the entire confession was dictated. So in other words, he is not doing anything. He is not minimizing anything. He is claiming that the officer told him to write that stuff down.

So either he is not telling the truth, in which case he wrote that stuff, or the officer told him. And the officer told him that nobody is doing any **[63]** minimization. And if he is saying now, well, yeah, I wrote that portion of it, I was minimizing it, he is contradicting himself as to from whence the confession comes.

MR. BURTON: What she can say, which I think is appropriate -- there is science to this -- is that it was

easier for him -- for Sergeant Vega to get him to write this down because of the minimization.

In other words, if Sergeant Vega said you are going to write down that you had sex with her or something in the room, he wouldn't have done it. But with the minimization, it is a way of getting somebody to say, okay, I am going to do what you say and then leave the room and then live to fight another day and show that this is false, which is also the same as the next paragraph, which is the use of the evidence ploy.

Now, use of an evidence ploy is not in itself illegal, but it is a dangerous tactic, for the exact reason that was shown in this case.

THE COURT: The problem is the question is not whether or not it is a dangerous tactic. The question is whether or not it is lawful. And if it is lawful and misrepresentations of available evidence have been held not to be coercive, and so therefore not to be unlawful, again, what can I say. Her approach to this is **[64]** contrary -- apparently contrary to most of the cases which have discussed the area.

MR. BURTON: Well, I disagree. I think she tracks the law in this area, and I would urge the Court to allow her to testify. We have her lined up for 8:30 Wednesday.

THE COURT: The answer is no. You have made a record.

MR. BURTON: Okay. Thank you, your Honor.

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