

to homicides in the workplace is relevant to and fits the issues in this case. Although the government is concerned that Dr. Dietz's testimony may open the door to a government rebuttal expert,<sup>42</sup> that is a risk for the defense to choose to take. However, because Dr. Meloy will not be testifying, Dr. Dietz shall not testify about or make reference to his critiques of Dr. Meloy's prior report and testimony.

The Court has weighed the probative value of Dr. Dietz's proposed testimony and finds that it is not substantially outweighed by a danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or the presentation of cumulative evidence.

In summary, the motion regarding Dr. Dietz at Docket 975 is DENIED with the following limitations: Dr. Dietz may testify about workplace violence and his critiques of Mr. Morton's methodology and conclusions. If Mr. Morton's testimony at trial does not address all of what will be permitted by the Court's order on the Morton motion in limine, the Court may narrow Dr. Dietz's testimony correspondingly.<sup>43</sup> Regardless of Mr. Morton's testimony, Dr. Dietz shall not refer to Dr. Meloy or his critiques of Dr. Meloy's prior report or testimony.

**B. Jim Hoerricks (Docket 976; opposition at Docket 992)**

The defense seeks to elicit the expert testimony of Jim Hoerricks, a forensic image and video analyst who uses photogrammetry<sup>44</sup> to analyze digital evidence. The defense

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<sup>42</sup> Docket 975 at 2.

<sup>43</sup> See the Court's forthcoming Order Re: Motions *in Limine* to Exclude Government Expert Witnesses for limitations on Mr. Morton's testimony.

<sup>44</sup> In an unpublished opinion, the Ninth Circuit has described photogrammetry as "the art, science and technology of obtaining reliable information about objects and their environment from a process of recording, measuring and interpreting photographic images." *Hutchinson v.*

proposes to have Mr. Hoerricks testify in three areas: (1) his conclusions based on his review of the surveillance video from the Coast Guard station, which shows a vehicle of interest entering and leaving the base close to the time of the homicides (the T-1 video); (2) his opinion as to whether government expert witnesses who analyzed the T-1 video adhered to recognized best practices guidelines; and (3) whether the investigative techniques used by those government witnesses were tainted by confirmation bias.<sup>45</sup>

**i. Qualifications**

The government does not contest Mr. Hoerricks' qualifications "in the fields of computer forensics, video/photographic analysis, surveillance set up[,] etc."<sup>46</sup> The Court agrees that Mr. Hoerricks' knowledge, skill, experience, and training qualify him to provide expert testimony with respect to his methodology, analysis, and conclusions based on the T-1 video.<sup>47</sup> His testimony may include explaining the distinction between forensic image analysis and other fields, such as traffic accident reconstruction.

However, the government asserts that Mr. Hoerricks is not qualified to render an expert opinion as to vehicle identifications because his *curriculum vitae* does not demonstrate any background in vehicle identification.<sup>48</sup> In the Court's view, expertise in

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*Hamlet*, 243 Fed. Appx. 238, 239 (9th Cir. 2007). Here, the Court uses the term "photogrammetry" to include video or still image conversion, restoration, clarification, enhancement, authentication, measurement, and comparison.

<sup>45</sup> Docket 992 at 5–6. The defense's response in opposition combines Mr. Hoerricks' critique of the methodology used by government witnesses and the risk of confirmation bias into one category. However, they are two distinct areas of proposed testimony and the Court treats them as such.

<sup>46</sup> Docket 976 at 4.

<sup>47</sup> Docket 992-1 (*curriculum vitae* of Jim Hoerricks).

<sup>48</sup> Docket 976 at 4–5 ("He simply has no education, training, knowledge or experience working

Vehicle identification is not required to forensically analyze an image of a vehicle and compare it to the dimensions and features of a specific known vehicle. Otherwise, a forensic imaging expert would also need to be an expert in the subject of the images he reviewed be it facial recognition, animals, weapons, vehicles, or aircraft.<sup>49</sup> It *does* take a photogrammetry expert to utilize the methods and computer programs to properly enhance and measure an image to make the comparison. Because Mr. Hoerricks qualifies as a photogrammetry expert, he may testify as to his methodology and conclusions from comparing the images from the T-1 video to the characteristics of Hondas.<sup>50</sup>

Mr. Hoerricks is also qualified by training and experience to testify as to the accepted methodology and best practices used by other image analysts and to opine as to whether those analysts used sound methods in reaching their conclusions.<sup>51</sup> Mr. Hoerricks' *curriculum vitae* demonstrates that he has received extensive training on the collection of digital evidence and has formulated the standardized procedures for

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with cars—particularly Sport Utility Vehicles.”).

<sup>49</sup> If the government's theory was correct, all of its own witnesses testifying about whether the video shows the Wells' Honda would also have to be vehicle identification experts, which they do not appear to be.

<sup>50</sup> Docket 992-3 (Hoerricks' report dated May 6, 2019, explaining his analysis of the video and comparison to the vehicle in question).

<sup>51</sup> Docket 992-1 (*curriculum vitae* of Jim Hoerricks). Docket 972-3 (Hoerricks' report dated April 1, 2019, describing his review of “previously engaged analysts” methodology and conclusions, the validation—or lack thereof—of certain methods, and what he views as incorrect use of terminology).

collecting video evidence for the Los Angeles Police Department.<sup>52</sup> Review of his report demonstrates his familiarity with published best practices in forensic photogrammetry.<sup>53</sup>

The government maintains that Mr. Hoerricks' opinions as to the qualifications of government experts cannot usurp the Court's role in determining who qualifies to give expert testimony.<sup>54</sup> A district court may not delegate its gatekeeping role.<sup>55</sup> Accordingly, the defense may not elicit testimony from Mr. Hoerricks as to whether other witnesses have the qualifications *to testify* as experts. However, once this Court fulfills its gatekeeping duties by making the necessary findings to allow other witnesses to testify as experts, Mr. Hoerricks may testify as to his opinion of the acceptability, accuracy, and reliability of the methods and techniques used by other experts and the adequacy of their qualifications.<sup>56</sup> This testimony goes to the *weight* the jury should accord the testimony of other experts.

Mr. Hoerricks is not qualified to testify as to whether government witnesses' opinions were tainted by confirmation bias. His *curriculum vitae* shows no formal education or experience in assessing confirmation bias, no detailing of relevant

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<sup>52</sup> Docket 992-1 at 3, 13 (*curriculum vitae* of Jim Hoerricks).

<sup>53</sup> Docket 976-1 at 4.

<sup>54</sup> Docket 976 at 3-4.

<sup>55</sup> *United States v. Ruvalcaba-Garcia*, 923 F.3d 1183, 1190 (9th Cir. 2019) ("We have thus held that a district court abuses its discretion when it either abdicates its role as gatekeeper by failing to assess the scientific validity or methodology of an expert's proposed testimony, or delegates that role to the jury by admitting the expert testimony without first finding it to be relevant and reliable." (internal quotations and alterations omitted).

<sup>56</sup> "Expert testimony relating to the accuracy or reliability of the methodology used by an expert witness may assist the trier of fact without encroaching on the fact finder's role to make credibility determinations." Docket 354 at 8 (Magistrate Judge's 2014 order regarding the admissibility of the expert testimony of Dr. Daniel Reisberg).

knowledge or skills related to assessing confirmation bias, and only one ten-hour training related to confirmation bias.<sup>57</sup> The Court will be allowing the testimony of a defense expert psychologist on the concept of confirmation bias<sup>58</sup>; as compared to that expert, Mr. Hoerricks does not have the same knowledge, skill, experience, training, or education in the field of confirmation bias. Thus, while Mr. Hoerricks has extensive qualifications in the field of forensic video analysis, he does not have sufficient qualifications in the field of psychology or confirmation bias to testify as to whether other experts' opinions have been affected by confirmation bias. Pursuant to Evidence Rule 702, he is not qualified to give expert testimony regarding confirmation bias.

## ii. Reliability

The government asserts that Mr. Hoerricks' opinions as to the methodology and qualifications of government experts are unreliable.<sup>59</sup> The government breaks this assertion down into three parts: First, that Mr. Hoerricks "failed to reference the methods and principles" on which he relied; second, that he "fails to identify any rational foundation for his assertions"; and third, that he does not conduct his own testing using the methods

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<sup>57</sup> Docket 992-1 (*curriculum vitae* of Jim Hoerricks). The ten-hour training occurred in May of 2017 through CONCEPT Professional Training. Docket 992-1 at 6. CONCEPT describes itself as providing "premium online professional training in areas relevant to forensic mental health." [www.concept-ce.com](http://www.concept-ce.com) (last accessed July 9, 2019). The company explains that the course Mr. Hoerricks completed, "Minimizing Bias in Forensic Decision Making," focuses on "application to mental health evaluation" and is intended for "forensic evaluators, including psychologists, psychiatrists, social workers, counselors, and other mental help professionals . . . ." [www.concept-ce.com/product/self-paced-minimizing-bias-in-forensic-decision-making-fmha](http://www.concept-ce.com/product/self-paced-minimizing-bias-in-forensic-decision-making-fmha) (last accessed July 9, 2019).

<sup>58</sup> See § C, *infra*, regarding Dr. Daniel Reisberg.

<sup>59</sup> Docket 976 at 5–7.

to which he subscribes or analyze the video himself.<sup>60</sup> As of the date that the government filed its motion to exclude Mr. Hoerricks' testimony, Mr. Hoerricks had only submitted one report. However, four days after the government filed its motion, Mr. Hoerricks provided a second report, dated May 6, 2019, which indicates that he did complete his own forensic analysis of the T-1 video.<sup>61</sup> The government's motion, filed on May 2, 2019, understandably does not address this second report, but the second report details the methods and technologies Mr. Hoerricks used to reach his conclusions and the foundation for his opinions.<sup>62</sup> These are the same methods, technologies, and technical terminology that he contrasts with the methods, technologies, and terminology used by other experts in this case that are discussed in the April 1, 2019 report.<sup>63</sup> In both of his reports, Mr. Hoerricks adequately referenced best practices standards and used a reliable foundation to reach his conclusions.

### iii. Relevance

The government contends that Mr. Hoerricks' testimony "is irrelevant because it will not assist the trier of fact in deciding a fact or consequence at issue."<sup>64</sup> The government appears to be relying heavily on the T-1 video to support its theory that Mr. Wells is guilty of the homicides: The government has had the video reviewed, analyzed,

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<sup>60</sup> Docket 976 at 6-7.

<sup>61</sup> Docket 992-3 (Hoerricks' May 6, 2019 report).

<sup>62</sup> *E.g.*, Amped Five, Video Commander, pixel dimensions, the Scientific Working Group Digital Evidence (SWGDE) Vehicle Make/Model Comparison Form, and the SWGDE Best Practices for Photographic Comparison for All Disciplines.

<sup>63</sup> *E.g.*, Steven Becker's use of Video Commander.

<sup>64</sup> Docket 976 at 3, 7-10.

or enhanced by at least eight people and will undoubtedly be calling some of them as witnesses at trial<sup>65</sup>; has recreated the T-1 video using the Wells' Honda<sup>66</sup>; and has retained a Honda engineer to compare the vehicle in the T-1 video to Honda vehicles.<sup>67</sup> The jury will be asked to determine whether the vehicle seen in the T-1 video is the Wells' Honda. This question is entwined with the government's theory that Mr. Wells drove his wife's vehicle to the rigger shop (the T-2 building) on the morning of the homicides and is entwined with Mr. Wells' defense that it was not his wife's vehicle seen in the T-1 video. Further, the government has provided notice of its intent to introduce its own experts to testify about identification of the vehicle seen in the T-1 video,<sup>68</sup> which makes Mr. Wells' rebuttal expert on the same topic relevant. Mr. Hoerricks' proposed testimony as to the T-1 video thus fits the issues in this case.

The government's motion also asserts that Mr. Hoerricks' testimony "will result in confusion to the jury, and undue delay" but does not further explain this argument other than to posit that Mr. Hoerricks' analysis is "confusing" and that it would "obstruct the orderly adjudication of justice in this case."<sup>69</sup> Although the analysis is highly technical, its

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<sup>65</sup> Chris Iber, George Skaluba, Gerald Richards, Richard Vorder Bruegge, Angelo Toggia, Neil Schmidt, Steven Becker, and Lalit Mestha.

<sup>66</sup> See Docket 1012, Attachment B (attachment under seal) (Motion to Exclude the April 19, 2012 Government Driving Experiment Video). The government made two recreations of this video, but it is unclear whether it intends to introduce both or just one of them at trial. Docket 1012 at 2 n. 1.

<sup>67</sup> See Docket 1022 (government's opposition to a defense motion to preclude the testimony of Neil Schmidt, a technical specialist at Honda).

<sup>68</sup> See, e.g., Docket 1022 (government's opposition to a defense motion to preclude the testimony of Neil Schmidt, a technical specialist at Honda).

<sup>69</sup> Docket 976 at 3, 9.

exclusion is not warranted based on the risk of confusion or undue delay. The Court finds that the probative value of Mr. Hoerrick's proposed testimony is not substantially outweighed by a danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or the presentation of cumulative evidence.

In summary, the motion regarding Mr. Hoerricks at Docket 976 is GRANTED IN PART and DENIED IN PART as follows: Mr. Hoerricks may testify about the distinction between forensic image analysis and other fields, such as traffic accident reconstruction; his methodology and conclusions based on his review of the T-1 video; and his opinion as to whether government expert witnesses who analyzed the T-1 video adhered to recognized best practices guidelines and their professional qualifications (or lack thereof) that the jury should consider in weighing their testimony. Mr. Hoerricks shall not comment on the veracity of other witnesses. He shall not comment on whether other expert witnesses are *qualified to testify* as experts. He shall not testify as to whether the investigative techniques used by other witnesses were tainted by confirmation bias.

**C. Dr. Daniel Reisberg (Docket 977; opposition at Docket 993)**

The defense seeks to elicit the expert testimony of Dr. Daniel Reisberg, a psychologist who chairs the psychology department at Reed College. The defense proposes to have Dr. Reisberg testify in four areas: (1) the concept of confirmation bias,<sup>70</sup> (2) the role of confirmation bias in forensic analysis and the concomitant increased risk in error when confirmation bias is present, (3) ways to avoid or minimize confirmation bias

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<sup>70</sup> "Confirmation bias is 'the well-documented tendency, once one has made up one's mind, to search harder for evidence that confirms rather than contradicts one's initial judgment.'" *Goswami v. DePaul Univ.*, 8 F. Supp. 3d 1004, 1018 n. 11 (N. D. Ill. 2014), quoting Richard Posner, *How Judges Think*, 111 (2008).