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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. BRIAN PICKARD, Defendant.	Case No. 2:11-cr-00449-KJM DEFENDANT'S DAUBERT MOTION TO EXCLUDE CERTAIN OPINION TESTIMONY OF BERTHA MADRAS Date: August 18, 2014 Time: 9:00 a.m. *Honorable Judge Kimberly Mueller*

I. INTRODUCTION

COMES NOW Defendant Brian Pickard, by and through counsel, and hereby files this Motion to Exclude Certain Opinion Testimony of Bertha Madras, grounded upon *U.S. Const. Amend. V, Federal Rules of Evidence 702, 703* and Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993).

At the outset, it must be noted that by identifying specific statements for exclusion, the defense in no way concedes the accuracy of the balance of the testimony. In fact, it is anticipated that the opinions of Bertha Madras, Ph.D. will be discredited through cross-examination and rebuttal evidence sufficient to render them unreasonable. As the basis of a motion exclude evidence is limited to issues of admissibility, rather than weight, only those aspects of the testimony which fail to meet this threshold standard are the subject of this motion. *Rule of Evidence 702;* Alaska Rent-A-Car, Inc. v. Avis Budget Group, Inc., 738 F.3d 960, 969

(9th Cir. 2013); *see also*, Allen v. Hyland's Inc., 2014 U.S. Dist. LEXIS 107187, 15-17 (C.D. Cal. Aug. 1, 2014), citing Alaska Rent-A-Car, Inc., *supra,* with approval.[1]

II. SUMMARY OF RELEVANT FACTS

Mr. Pickard is charged by Indictment for a violation of *21 U.S.C. Section 841, 846* (Doc. No. 30.) On November 20, 2013, he brought a Motion to Dismiss his Indictment for Violations of *U.S. Const., Amend. V, Art. VI/Amend. X* and Request for Evidentiary Hearing. This Honorable Court granted the Motion for Evidentiary Hearing on March 19, 2014. (Doc. No. 256.) The parties agreed to file any direct examination in written format and to present live testimony for the purposes of cross-examination and re-direct examination. (*Id.*; Doc. No. 295.) A pre-evidentiary hearing confirmation proceeding is set for August 18, 2014, at 9:00 a.m.

Direct examination has been completed by both parties (Docs. No. 309-315, 324.) The Government called one witness, Bertha Madras, Ph.D. (Doc. No. 324.) The defense now moves to exclude certain opinion testimony under *Rule of Evidence 702.*

III. SPECIFIC OBJECTIONS

Defendant seeks an Order from this Court precluding the testimony of Bertha Madras on matters irrelevant or unreliable under *Rule of Evidence 702* and Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993).

Specifically, the defense objects to the following:

A. Opinion testimony reliant on studies the witness herself has discredited. (Dkt. 324, Madras Decl pages 24-35); and

B. Opinion testimony regarding whether there exists adequate assurances that marijuana can be safely used under medical supervision, and has no currently accepted medical use. (*Ibid.*)

IV. THIS COURT HAS AUTHORITY TO EXCLUDE EXPERT TESTIMONY THAT IS IRRELEVANT OR UNRELIABLE.

Rules of Evidence require any proffered expert testimony be: (1) based on the special

[1] Also, in light of the stipulation reached by the parties and articulated in the Joint Statement Regarding Evidentiary Hearing filed on August 9, 2014, the statements which are presented as factual, are to be treated as opinion testimony, and subjected to all appropriate evidentiary objections at the time of the hearing.

knowledge of the expert, and (2) helpful to the finder of fact. *Fed. Rules of Evid. 104(a), 702*; *see also*, Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 585 (1993), J. Blackmun, overruling the former "general acceptance" test Frye v. United States, 293 F. 1013, 1014 (1923); *see also*, Kumho Tire Co. v. Carmichael, 526 U.S. 137, 148 (1999), extending Daubert to all expert testimony. Specifically, the Rule provides:

> 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:
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> (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;
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> (b) the testimony is based on sufficient facts or data;
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> (c) the testimony is the product of reliable principles and methods; and
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> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. Rule of Evid. 702; *see also*, Pyramid Techs., Inc. v. Hartford Cas. Ins. Co., 752 F.3d 807, 813 (9th Cir. 2014).

The trial court, thus, is the gatekeeper to the introduction or consideration of scientific evidence, tasked with ensuring such testimony "rests on a reliable foundation and is relevant to the task at hand." Daubert, 509 U.S. at 589; United States v. Decoud, 456 F.3d 996, 1013 (9th Cir. Cal. 2006). The court should employ a factor-based approach based on the specifics of the case.[2] Decoud, *supra,* 456 F.3d at 1011; *see also,* FTC v. BurnLounge, Inc., 2014 U.S. App. LEXIS 10152 (9th Cir. June 2, 2014); United States v. Sepulveda-Barraza, 645 F.3d 1066 (9th Cir. 2011).

The Court's duty is of particular importance where a witness is retained, as "concern for

[2] The non-exclusive factors explicated by the Daubert Court are: (1) whether the expert's technique or theory can be or has been tested--that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community. *Rule 702*, Notes of Advisory Committee (2000); Decoud, *supra,* 456 F.3d 996 (9th Cir. 2006).

the quality and even integrity of hired testimony is not new" and "the hazards to the judicial process have increased as more technical evidence is presented." *See*, Notes of Advisory Committee on Rules to *Rule 702,* citing to Winans v. New York & Erie R.R., 62 U.S. 88, 101 (1858) and, Judge Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 Harv. L. Rev. 40 (1901).

For the reasons discussed below, the defense asks this Court to sustain his objection and strike the unreliable testimony presented in pages 24 through 35 of Dr. Madras' declaration.

A. Dr. Madras' Testimony Contradicts Her Conclusory Opinion to Such an Extent to Render these Opinions Unreliable.

Rule of Evidence 702 requires an expert to reliably apply sound scientific principles and methods to the facts of the case. Evidentiary reliability is established where application of the principle produces consistent results. Daubert, *supra,* 509 U.S. at 590, *fn. 9*; *see also*, United States v. Hermanek, 289 F.3d 1076, 1097 (9th Cir. 2002), "[i]nconsistent results may be an indicator of unreliability." Indeed, "[r]eliability can be measured in multiple ways, including internal consistency." United States v. Weber, 451 F.3d 552, 564 (9th Cir. 2006).

The party offering the evidence has the burden to establish its admissibility, which includes the foundational requirement of establishing the expert has employed a reliable scientific method and has followed it "faithfully." Daubert v. Merrell Dow Pharm., Inc., 43 F.3d 1311, 1319, *fn. 11* (9th Cir. 1995).

Dr. Madras' testimony is anything but faithful to the standards for medical science to which she purports to adhere. Indeed, she testifies at length about the process employed by the federal government for reviewing and approving medicines, and concludes that unless this process is followed the science is unreliable in predicting the effects of the drug. Having taken this position, she thereafter, asserts "there is strong scientific support for concluding that": (1) marijuana has a high potential for abuse, (Madras Decl., p. 14-17), (2) there is no currently accepted medical use for marijuana (*Id*., p. 17-24), and (3) adequate assurances that marijuana can be safely used under medical supervision are lacking. (*Id*., p. 24 - 27). Further, she utilizes her self described faulty premises to rebut the testimony of three defense witnesses, (*Id*., p. 27 -

35) a role for which she in not qualified to assume. Such testimony is internally inconsistent, and thus unreliable.

As it is the burden of the party offering such evidence to show their expert followed a reliable scientific method "faithfully," where, as here, the Government's witness asserts that in her expert opinion the only way to determine the effects of a proposed medication is by following the "rigorous scientific process" set up for FDA approval (*Id*., p. 13, ¶ 34), and where this same witness asserts that marijuana has not been put through this process, (*Ibid*.), and then immediately thereafter renders an opinion regarding the medical use of cannabis, the Government has failed to satisfy their burden. Accordingly, all testimony presented under Heading V and VI, pp. 14-35, should be stricken as inconsistent and therefore, unreliable.

B. Dr. Madras' Testimony Must Be Confined to the Scope of Her Expertise.

The inquiry under Daubert is not whether a witness is qualified in *some* field, but rather whether he or she is qualified *in the area about which their testimony is proffered*. Daubert v. Merrell Dow Pharmaceuticals, 43 F.3d 1311, 1315 (9th Cir.1995), "[t]he question of admissibility only arises if it is first established that the individuals whose testimony is being proffered are experts in a particular scientific field;" Stagl v. Delta Air Lines, Inc., 117 F.3d 76, 81 (2nd Cir. 1997), "a district court may properly conclude that witnesses are insufficiently qualified… because their expertise is too general or too deficient."

> The fact that a witness may be qualified as an expert with respect to one given area of inquiry does not imply that the same witness is qualified as an expert with respect to any other discrete area of inquiry, and qualification as an expert does not authorize the courts to permit a witness to offer expert testimony within any area of inquiry with respect to which the witness is not so qualified.

Cramblett v. McHugh, 2012 U.S. Dist. LEXIS 187214 (D.C. Or. 2012), citing to Berry v. City of Detroit, 25 F.3d 1342, 1352 (6th Cir. 1994).

"The Daubert test must be applied with due regard for the specialization of modern science. A scientist, however well credentialed he [or she] may be, is not permitted to be the mouthpiece of a scientist in a different specialty. *That would not be responsible science*." Dura Auto. Sys. of Ind., Inc. v. CTS Corp., 285 F.3d 609, 614 (7th Cir. 2002), emphasis added; *see*

also, Redfoot v. B.F. Ascher & Co., 2007 U.S. Dist. LEXIS 40002, *15-34 (N.D. Cal. 2007); Rogers v. Ford Motor Co., 952 F.Supp. 606, 613 *fn.6* (N.D. Ind. 1997), a "scientific expert's credentials may be impeccable but if the proffered testimony deals with matters outside the expert's expertise, the district court is justified" in excluding the testimony under Daubert.

In Redfoot v. B.F. Ascher & Co., 2007 U.S. Dist. LEXIS 40002, *15-34 (N.D. Cal. 2007), a products liability case, a plaintiff consumer sued the defendant manufacturer of a nasal spray which contained ethylmercury, a chemical the plaintiff alleged was the proximate cause of her son's autism. *Id.* at 2-3. The defendant moved to exclude one of the plaintiff's witness, Dr. Geier, a medical doctor, with a Ph.D. in genetics, who specialized in obstetrical genetics. and was board-certified in medical genetics and forensic medicine, from rendering any opinion "in the areas of epidemiology, neurology, or toxicology." *Id.* at 15. The defendant contended, *inter alia*, that Dr. Geier lacked the requisite qualifications to opine on these subjects, as he was not board-certified in pediatrics or pediatric neurology, nor certified as an epidemiologist, a biostatistician, or a toxicologist.. *Id.* at 17-18. The plaintiff argued, however, that the doctor was indeed qualified in these areas because he had: (1) studied vaccines for more than thirty years, and (2) published more than 50 peer-reviewed scientific/medical papers on vaccine safety, efficacy, contamination, and policy, including more than twelve articles dedicated to the issue of thimerosal, mercury, and neurological disorders, including autism. *Id*.

The trial court agreed with the defendant, and limited the expert's testimony to those areas in which he was qualified, stating:

> As an initial matter, the court notes that Dr. Geier is not qualified as a pediatrician, a neurologist, a toxicologist, or an epidemiologist, either by background or training. He is a medical doctor and a geneticist, but has no specialization in any of the relevant medical areas. In particular, there is no evidence that Dr. Geier has either the training or the background to diagnose autism or to treat autism in any child. Simply having an "interest" in vaccines and the possible connection between thimerosal-containing vaccines and the development of neurodevelopmental disorders in children is not sufficient to qualify an individual as an expert in either pediatrics or neurology, or regarding the various forms of mercury and their neurotoxicity.

Id. at 33.

Dr. Madras is a professor of Psychobiology, and based on the proffered testimony and attached Curriculum Vitae [CV] (Madras Decl., Exhibit A), she has training and experience in disciplines relating to drug abuse and addiction, and the biomedical sciences, including biochemistry, psychobiology, and neurochemistry. There is, however, no evidence that Dr. Madras has either the training or the background to diagnose or treat patients suffering from the medical conditions for which she opines marijuana provides *no* relief. While not clear from her proffered testimony and CV, she may have sufficient training and experience treating drug abuse and addiction; however, even in this context her expertise appears to be confined to laboratory research in non-human subjects. Like Dr. Geier in Redfoot, *supra*, having an "interest" in refuting the medical benefits of marijuana (as is apparent from her commentaries and editorials), is not sufficient to qualify her to testify regarding currently accepted medical use of cannabis. Nor is she qualified to render and opinion regarding whether cannabis may be safely used under medical supervision.

1. Dr. Madras is Not Qualified to Testify Regarding The Currently Accepted Medical Use of Marijuana.

The defense asserts here that Dr. Madras is not qualified to testify regarding the currently accepted medical uses of marijuana (Madras Decl., Section V (B), ¶ 46-62), as her expertise relates "to the areas of abuse and addition," rather than to anything related to the medical applications of the cannabis plant or any derivative or synthetic thereof, including any that is readily available for medical use, THC synthetic dronabinol (brand name: Marinol).

Further, her research and research papers have nothing to do with cannabis as medicine, and in fact little to do with marijuana in the first instance. Of the 149 original articles listed in the Bibliography section of her CV, only two even touch on studies involving cannabis. First, "Cannabinoid and D2-like dopamine receptor agonists interact to produce profound sedation in nonhuman primates" (Madras Decl., p. 52, ¶ 78), and second, "Cannabinoid receptor agonists and antagonist effects on motor function in normal and MPTP treated non-human primates. (Madras, p. 53, ¶ 89.) Also, one article entitled "Dopamine Challenge Reveals Neuroadaptive Changes in Marijuana Abusers" is described as an "Invited *Commentary*;" thus, it is of minimal

scientific import. Finally, Dr. Madras notes one marijuana-related topic under "Reviews, Chapters, Editorials, Commentary" (Madras Decl., p. 60), and only two other publications, which are not scientific studies, but rather are described as "Letters to the Editor, other commentaries." *Id*. at 60-61.

Further, a careful examination of her CV demonstrates that Dr. Madras has been involved in just one pre-clinical study of the effects of marijuana, and this study was conducted on non-human subjects: i.e., rats. (*Id*., at 12, "Pilot date shows that rodent adolescent and adult expression profiles of guidance/cell adhesion molecules genes differ in specific brain regions following exposure to THC.")

In effect, Dr. Madras is no more qualified to testify on the subject of marijuana as a medicine than was Dr. Geier (an M.D. and Ph.D. who wrote more than 50 peer review articles on the subject of his proffered testimony) was qualified to testify about the causal link between Ayr Saline Mist and autism. Her testimony on this area must be stricken.

2. Dr. Madras is Not Qualified to Testify Regarding the Supervision of Patients.

The defense also contends that Dr. Madras is not qualified to testify regarding the adequate assurances that marijuana can be safely used under medical supervision, as she is not a physician and has no experience or training monitoring patients, and certainly not those using cannabis as medicine. (Madras Decl., Section V (C), ¶ 63-72.) It is apparent that she eschews the use of plant based medications, which is her prerogative as a biochemist, but does not provide a basis for expertise in the area of patient medical supervision. (*See*, p. 24, ¶ 63.)

What is absent from her declaration and her 66-page CV is any training or experience in the practice of medicine, including patient treatment. Also absent is any training or experience supervising patient care, and although she has been involved in methods of better understanding disorders such as Parkinson's Disease, Schizophrenia, and ADHD,[3] these diagnoses are not based on patient interaction, but rather methods of identification of bio-markers which are

[3] *See*, Madras CV, p. 10, Part II.1.a. Research in cannabinoid receptor agonist and antagonist effects on motor function in nonhuman's with Parkinson's Disease; p. 12, Part II.4.b. Brain imaging techniques applied to adolescent rodents for studying correlation between dopamine transporter levels in the human brain, and ADHD.

identified through laboratory procedures.

In fact, it appears Dr. Madras has had no interaction with human patients, as for the most part her laboratory studies are conducted on non-human subjects. Dr. Madras' experience in studying the effects of marijuana, however, is scant at best, and involves absolutely nothing which would qualify her to testify about the use of cannabis as a medicine under a physician's supervision.

The assertions made in Section V.C., of Dr. Madras' declaration (pages 24-27) are a reiteration of the claims proposed in support of her opinions on the potential for abuse and no currently accepted medical use, and are irrelevant to the issue for which they are proffered (i.e., can physicians adequately supervise patients using medical cannabis). As such, they should be excluded.

Finally, as her rebuttal to three of the defense witnesses is premised on her unqualified opinion articulated in section V, it too must be excluded as unreliable and lacking foundation.

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CONCLUSION

The exclusion of this improper opinion evidence is necessary in this criminal prosecution in order that defendant be allowed his right to Due Process, to confront and cross examine the witness against him, and to exclude evidence lacking in foundation in violation of the Rules of Evidence and Daubert, *supra*, 509 U.S. 579. Specifically, the defense moves to exclude those foundationless opinions expressed in *Sections V(B)* and *V(C)* of the Madras Declaration, as well as any opinion rebutting any defense witnesses who are Medical Doctors, as expressed in her Declaration in *Sections VI(A)* and *VI(B)*.

Dr. Madras' training and experience is focused on studying the effects of abuse and addiction in non-human subjects, and this lack of interaction with human subjects likely informs the internal inconsistencies of her proffered testimony. As such, she cannot be considered qualified to opine regarding whether cannabis has an accepted medical utility or may be safely used under medical supervision, and any such testimony must be excluded in order to comport with statutory and Constitutional principles.

Dated: August 8, 2014

Respectfully submitted,

/s/ Zenia K. Gilg
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