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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. BRYAN SCHWEDER, et al., Defendants.	Case No. 2:11-CR-449-KJM MOTION IN LIMINE TO EXCLUDE TESTIMONY OF STORMES AND BEGIN Date: September 4, 2014 Time: 10:00 am Judge: Hon. Kimberly J. Mueller

NOTICE OF MOTION AND MOTION

TO DEFENDANTS AND THEIR COUNSEL OF RECORD:

Please take notice that, on September 4, 2014, or at such other time as the Court shall designate, in Courtroom 3 of the United States District Court, the United States will, and hereby does, move this Court for an order excluding the testimony of Defendants' witnesses Jennie Stormes and Ryan Begin on the grounds that such testimony is irrelevant and that they may not offer scientific, technical, or otherwise specialized testimony when they are not being offered as experts. This motion is made pursuant to Federal Rules of Criminal Procedure 12 and 47, Local Rule 430.1, and this Court's May 23, 2014, Order (Dkt. No. 294).

DATED: August 12, 2013

BENJAMIN B. WAGNER
United States Attorney

By: */s/ Gregory T. Broderick*
GREGORY T. BRODERICK
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MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

The Court should strike the Defendants' proffered testimony of Jennie Storms and Ryan Begin. Neither is offered as an expert. Stormes is the mother of a seizure-stricken child who is alleged to benefit from edible marijuana products, while Begin is an injured veteran who states that he feels better when he smokes marijuana than when he uses opiates. To the extent they purport to offer scientific or technical opinions, neither is permitted to do so because they are neither offered, nor qualified to testify, as experts. To the extent they are offered for some other purpose, their testimony is irrelevant. Thus, the Court should grant this motion, exclude their testimony, and strike their declarations from the record in this case.

II. Analysis

A. Percipient Witnesses May Not Offer Scientific or Technical Opinions.

The Federal Rules of Evidence draw a clear line: lay witnesses may not present expert testimony. Rule 701(c) specifically provides that non-expert witnesses are not permitted to testify to opinions that are "based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Courts in this district have explained that the "purpose of this rule is to prevent a party from offering an expert opinion 'in lay witness clothing,' and thereby evading Federal Rules of Evidence 702's requirements …." *Coalition for a Sustainable Delta, v. McCamman*, 725 F.Supp.2d 1162, 1183 (E.D. Cal. 2010) (*quoting United States v. Conn*., 297 F.3d 548, 553 (7th Cir. 2002)). As several courts have held, Rule 701 bars a non-expert from testifying to any opinions that "exceed the scope of common experience." *Id*.; *see also Certain Underwriters at Lloyd's, London v. Sinkovich*, 232 F.3d 200, 204–06 (4th Cir. 2000) (error to allow lay witness to answer questions on matters exceeding scope of common experience); *Randolph v. Collectramatic, Inc.*, 590 F.2d 844, 846 (10th Cir. 1979) (Rule 701 "does not permit a lay witness to express an opinion as to matters which are beyond the realm of common experience and which require the special skill and knowledge of an expert witness.")

1. Neither Stormes nor Begin are Offered As Experts, Nor Qualified As Experts.

At the August 6, 2014, meet and confer between counsel for the United States and lead

counsel for Defendants, defense counsel specifically stated that Stormes and Begin were offered only as percipient witnesses, not experts. This was confirmed in the August 8, 2014, joint statement, in which Defendants explained that Stormes and Begin "are not offered as expert witnesses." (Dkt. No. 328 at 2:20). Moreover, their declarations do not offer any basis on which to conclude that they are experts regarding the medical value of marijuana or its abuse potential. Rule 702 specifically requires that an expert be qualified to render the opinions offered. *See* Fed. R. Civ. P. 702. *See Diviero v. Uniroyal Goodrich Tire Co.*, 919 F.Supp. 1353, 1357 (D. Ariz. 1996) ("If scientific knowledge is necessary the expertise must be coextensive with the particular scientific discipline.") (*citing Thomas v. Newton Int'l. Enterprises*, 42 F.3d 1266, 1269-70 & n.3 (9th Cir. 1994) & *Claar v. Burlington Northern Railroad Co.*, 29 F.3d 499, 502 (9th Cir. 1994)).

Because neither Stormes nor Begin are offered as expert witnesses, and because their declarations do not supply any basis on which to conclude that they are qualified to speak to the alleged medical value of marijuana, they may not offer opinions about marijuana.

2. Stormes and Begin Impermissibly Attempt to Offer Expert Opinions.

Although not offering Stormes or Begin as experts, Defendants submitted declarations from them containing expert opinions. This is impermissible, and these portions of their declarations must be struck. For example, Begin asserts that he has "worked with other veterans who have also had positive experiences with medical cannabis" as opposed to narcotic medicines. (Dkt. No. 309 at 4:6-7). To the extent that Mr. Begin is offering a medical opinion with this statement, it must be struck. In addition, Begin states that "it is my opinion that marijuana has a medical benefit…." (*Id*. at ¶ 14). This is clearly a scientific or technical opinion, which he may not offer as a percipient witness (and which he is also unqualified to offer). *See Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996) ("medical diagnoses are beyond the competence of lay witnesses and therefore do not constitute competent evidence.") Nor may Begin state that the other medicines taken by veterans "cause more damage than good," or that "prescribed narcotics" cause "psychological and physical damage." (Dkt. No. 309 at ¶ 14). In sum, all medical opinions in Begin's declaration must be struck and excluded, particularly Paragraph 14 and the first sentence of Paragraph 12.

Ms. Stormes' declaration is similarly flawed. Although she is neither qualified nor offered as

an expert, her declaration purports to offer the opinions that

- "I learned of how high CBD cannabis was being successfully used to treat children with severe seizure disorders…" (Dkt. No. 315 at ¶ 10);
- "I have discovered that the properties which make cannabis an effective medicine can be scientifically explained by the endocannabinoid system which was not discovered in the human body until 1992." (*Id*. at ¶ 16);
- "various strains of marijuana are particularly effective in treating many disorders by working with the endocannabinoid receptors naturally existing within our body in all systems known to scientist. (*Id*.)
- "I have further determined that the cannabis plant is non-toxic and its ingestion results in addiction far less than the pharmaceuticals which my son has been prescribed since he was five months old." (*Id*.)
- "It is physically impossible to overdose on cannabis or to die from cannabis, unlike opioids, benzodiazapines, barbitutates, and other street drugs often used." (*Id*.)
- "there are no CB1/CB2 endocannabinoid receptors in the brain stem where the breathing and other autonomic body functions are regulated, unlike the other drugs listed." (*Id*.)
- "cannabis is the least harmful of all the medications my son has ever been prescribed." (*Id*.)
- "I can state as both a mother and a medical practitioner that cannabis is a safe and effective medicine." (*Id*.)

These are obviously scientific and medical opinions, which Rule 701(c) precludes this lay witness from offering. *See Nguyen*, 100 F.3d at 1467; *see also Reeves v. Shinseki*, 682 F.3d 988, 1001 (Fed. Cir. 2012) ("lay persons are not competent to offer medical opinions") (internal quotations omitted); *Crinkley v. Holiday Inns, Inc.*, 844 F.2d 156, 164 n. 2 (4th Cir.1988) (experts' medical opinions "cannot be said to be manifestly incredible as physical fact within common lay knowledge").

Although not even offered as an expert, Ms. Stormes' status as a nurse does not qualify her to offer the opinions set forth above, either. Cases holding that nurses cannot testify to such issues are legion. *See, e.g.*, *Gayton v. McCoy*, 593 F.3d 610, 616 (7th Cir. 2010); *Vaughn v. Mississippi Baptist Medical Center*, 20 So.3d 645, 652 (Miss. 2009) ("nurses cannot testify as to medical causation."); *see also Elswick v. Nichols*, 144 F.Supp.2d 758, 767 (E.D. Ky. 2001) (nursing expert cannot testify as to how plaintiff received infection because it was "outside [her] area of expertise"); *see also Long v. Methodist Hosp. of Indiana, Inc.*, 699 N.E.2d 1164, 1169 (Ind.Ct.App.1998) ("[W]e now hold that nurses are not qualified to offer expert testimony as to the medical cause of injuries.").

For these reasons, all medical opinions from Stormes and Begin must be struck and excluded.

B. Without the Medical Opinions, the Testimony of Stormes and Begin is Irrelevant.

The purpose of the evidentiary hearing is to "to probe the scientific and medical information" regarding "whether the continued inclusion of marijuana as a Schedule I controlled substance in Title 21 of the federal statutes passes constitutional muster." (Order, Dkt. No. 271 at 3:11-14). Neither Stormes' nor Begin's testimony offers scientific or medical information; rather, their testimony is a fairly transparent plea for sympathy. Everyone empathizes with an injured veteran in pain, or the mother of a sick child. But medical policy is not made based on the individual and difficult circumstances of mothers and wounded warriors. Rather, it is based on scientific analysis and data from the population at large.

Absent her medical opinions, Ms. Stormes' declaration is nothing more than a collection of anecdotes about her son and the hardships they suffer due to his condition. At most, her testimony establishes the hardships suffered by those afflicted with diseases for which there are no known cures, and the hope that a new miracle drug will do the trick. These points are not material to this dispute. The same is true of Begin's declaration. Stripped of its improper medical opinions, it is nothing more than a reminder of the difficulty faced by those who suffer injury in the armed services. While emotionally-charged and undoubtedly sincerely believed, his testimony is not scientific but anecdotal.

Such information is irrelevant to the broader scientific and medical inquiry that is the object of this proceeding. As the DEA Administrator explained more than two decades ago, "[s]ick people are not objective scientific observers, especially when it comes to their own health." 57 Fed.Reg. at 10502-03. The question of whether marijuana has "currently accepted medical use" is simply not informed by whether the mother of a sick child believes that it makes her child feel better. If a "currently accepted medical use" can be established by such anecdotal evidence, then there is no need for DEA, FDA, or most offices of government—each person will become a standard unto himself. As the D.C. Circuit has explained, whether to credit such anecdotes and what weight to give them "is very much a policy judgment which we have no authority to challenge." *Alliance for Cannabis Therapeutics v. Drug Enforcement Admin.*, 930 F.2d 936, 939 (D.C. Cir. 1991). DEA, FDA, and the federal courts accord no weight to such testimony for present purposes. Instead, "only

rigorous scientific proof can satisfy the CSA's 'currently accepted medical use' requirement." *Alliance for Cannabis Therapeutics v. Drug Enforcement Admin.*, 15 F.3d 1131, 1137 (D.C. Cir. 1994). In analogous contexts, the D.C. Circuit has recognized that mere "anecdotal evidence" of a drug's effectiveness "cannot constitute 'substantial evidence' under either the statutory standard or the FDA's regulations." *E.R. Squibb and Sons, Inc. v. Bowen*, 870 F.2d 678, 685 (D.C. Cir. 1989).

In addition, permitting such testimony would create a host of other problems. Stormes and Begin have not been subject to deposition, have not had to produce medical records, and have not been subjected to independent medical examinations. Their testimony is, at most, a recount of what *they believe* marijuana has done for them—not what it has done for them. Even assuming that this evidence has some minor probative value, such value is significantly outweighed by the prejudicial effect. Its admission would lead to a side trial into the true medical condition of Begin and Stormes' son, confusing the issues, delaying proceedings yet further, and wasting time. *See* Fed. R. Evid. 403. As reflected in the advisory committee notes to Rule 403, the term "'[u]nfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Thus, the Court should strike Stormes' and Begin's declaration, and exclude their testimony from this proceeding.

C. Objections to Specific Portions of Testimony.

If the Court does not strike the entirety of Stormes' and/or Begin's testimony, the United States objects to the following specific portions:

1. Ms. Stormes

Testimony	Objection
Stormes at ¶ 1	Relevance. Ms. Stormes is not offered as an expert, and her education and resume are irrelevant.
Stormes at 1:17-2:3	FRE 701(c). Diagnosis and interpretation of diagnosis are outside the scope of lay witness competence.
Stormes at ¶ 4	FRE 701(c). Diagnosis and symptoms of disease are outside the scope of lay witness competence.
Stormes at ¶ 5	FRE 701(c). Prognosis and cure are outside the scope of lay witness competence.
Stormes at ¶¶ 6-9 & 11-12	Relevance. Ms. Stormes' son's previous treatment, attitude, and her hopes are irrelevant to whether marijuana has medical value.

Stormes at ¶ 10	Hearsay; Rule 701(c). Ms. Stormes cannot testify to things she "learned" at a "professional conference" for their truth. Nor can she testify to marijuana's medical applications, or to medical causation.
Stormes at ¶¶ 13-14	Hearsay; Relevance; 701(c). Ms. Stormes cannot testify to what hospital staff in New Jersey told her. Further, testimony about her hardships in securing adequate supplies of marijuana is irrelevant to whether marijuana has medical value. In addition, Ms. Stormes attaches a roster of studies (Exhibit D) which purport to establish increase in seizures among patients admitted to hospitals. Ms. Stormes is not offered as an expert, and cannot offer these studies for their truth.
Stormes at ¶ 15	Rule 701(c); Relevance. As a percipient, Ms. Stormes may not testify that her son needs safe access to state approved medical marijuana to control his seizures…." Her feelings about potentially having to move to Colorado are also irrelevant to whether marijuana has medical value.
Stormes at ¶ 16	Rule 701(c). This entire paragraph consists of expert opinions, which Ms. Stormes is not permitted to offer as a non-expert witness. Further, she is not qualified to offer such opinions under Rule 702.

2. Mr. Begin

Begin at ¶¶ 1-6	Relevance. Mr. Begin's testimony about the nature of his injury and prior medical treatment is irrelevant to whether marijuana has medical value. The only potentially relevant statement is that Mr. Begin has a painful and chronic elbow injury.
Begin at 2:27	Rule 701(c). Mr. Begin is not offered as an expert and therefore cannot testify that marijuana allowed him to "appropriately manage the pain" in his elbow.
Begin at ¶ 8	Hearsay. Mr. Begin cannot testify as to what VA doctors told him.
Begin at ¶ 9	Speculation; Lacks Personal Knowledge. Mr. Begin cannot testify to what VA doctors would do in the future.
Begin at ¶ 10	701(c); Relevance. Mr. Begin cannot testify to his diagnosis of PTSD. This paragraph is also irrelevant as it speaks only to Mr. Begin's perceptions of his personal feelings, which are not at issue in this proceeding.
Begin at ¶ 11	Relevance. Mr. Begin's political and advocacy activities are not relevant to this proceeding.
Begin at ¶ 12	701(c); Hearsay; Lacks personal knowledge. Mr. Begin is not qualified to testify that "other veterans [] have had positive experience with medical cannabis." To the extent it is based on what they told him, it is hearsay. Mr. Begin cannot testify that other veterans are "afraid" or have "fear of being placed in a psych ward." He either lacks personal knowledge, basis this testimony on hearsay, or both.

Begin at ¶ 13	Hearsay; Irrelevant; Relevance. Mr. Begin cannot testify as to what some unidentified spokesperson said. His "wondering" about it is irrelevant. His feelings about potentially moving across the country are irrelevant.
Begin at ¶ 14	701(c); 702. Mr. Begin is not offered as an expert and thus cannot testify to the opinions in this Paragraph. Nor is he qualified to do so.

III. Conclusion

The declarations of Stormes and Begin are a fairly transparent appeal for sympathy, rather than to reason. For the foregoing reasons, the Court should grant this motion, exclude their testimony, and strike their declarations from the record.

DATED: August 12, 2013

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