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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. BRIAN JUSTIN PICKARD, *et al.* Defendants.	Case No. 2:11-cr-00449-KJM SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S DAUBERT MOTION TO EXCLUDE CERTAIN OPINION TESTIMONY OF BERTHA MADRAS Date: September 4, 2014 Time: 10:00 a.m. *Honorable Judge Kimberly Mueller*

COMES NOW Defendant Brian Pickard and hereby submits the instant Supplemental Points and Authorities in Support of his previously filed Daubert Motion to Exclude Certain Opinion Testimony of Bertha Madras, Ph.D., and Exhibit A which identifies the statements to which the defense specifically objects. (Doc. 329.)[1]

I. Dr. Madras' Inconsistent Statements Must be Excluded as Unreliable.

As a preliminary matter, a district court "must" determine: (1) whether an expert's proffered methodology or principle is scientifically valid, *and* also (2) that the expert actually

[1] As the filing deadline for Motions *In Limine* was set on August 8, 2014, the defense prepared in accordance with that date, and did so despite the pending stipulation and proposed order filed by the parties requesting an extension of time. (Doc. 327.) Prior to the order being signed by this Court, the defense filed Motions *In Limine* consistent with the then existing directive. (Doc. 329.) As an extension of time was thereafter granted (Doc. 330), the defense determined it would be helpful to this Court to identify the specific testimony to which the defense objects, and provide additional authority supporting these objections. Accordingly, this Memorandum and attached Exhibit are now submitted as supplemental to the previously filed Motion, and does not assert additional bases for exclusion.

applied the methodology or principle in the particular case. *Rule of Evidence 702*; Claar v. Burlington N. R.R., 29 F.3d 499, 501 (9th Cir. 1994). This includes an inquiry into whether the scientific methodologies were applied reliably in the instant case:

> We believe that the reliability inquiry set forth in Daubert mandates that there be a preliminary showing that the expert properly performed a reliable methodology in arriving at his [or her] opinion. The Daubert Court stated that "under the Rules, the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." This suggests that the inquiry extends beyond simply the reliability of the principles or methodologies in the abstract. In order to determine whether scientific testimony is reliable, the court must conclude that the testimony was derived from the application of a reliable methodology or principle in the particular case.

United States v. Martinez, 3 F.3d 1191, 1198 (8th Cir. 1993), cert. denied, 510 U.S. 1062 (1994), an error in the application of a reliable methodology should provide the basis for exclusion of the opinion where the error negates the basis for the reliability of the principle itself, cited approvingly in United States v. Chischilly, 30 F.3d 1144 (9th Cir. 1994).[2]

In order to sufficiently qualify as scientifically valid under *Rule 702*, the expert's opinion must be derived from the application of a scientific method, not the other way around.

> Coming to a firm conclusion first and then doing research to support it is the antithesis of this method. Certainly, scientists may form initial tentative hypotheses. However, scientists whose conviction about the ultimate conclusion of their research is so firm that they are willing to aver under oath that it is correct prior to performing the necessary validating tests could properly be viewed by the district court as lacking the objectivity that is the hallmark of the scientific method.

Claar v. Burlington N. R.R., 29 F.3d 499, 502-503 (9th Cir. 1994), citing to Viterbo v. Dow Chemical Co., 646 F. Supp. 1420, 1425 (E.D. Tex. 1986), affirmed in 826 F.2d 420 (5th Cir. 1987).

The Government witness here proffers opinions on the effects of cannabis use based on methodologies which she goes to great lengths to discredit throughout her declaration. Indeed, it

[2] United States v. Martinez, *supra*, was initially published by the Eighth Circuit Court of Appeal, but subsequently withdrawn. Citation to this opinion is not, however, subject to the Ninth Circuit Local Rule Local Rule 36-3, as it is not "of this Court." In addition, the Eighth Circuit authorizes citation of unpublished cases prior to 2007 where "the opinion has persuasive value on a material issue and no published opinion of this court or another court would serve as well." 8th Cir. LR 32.1A. In any event, Martinez, *supra*, was cited approvingly by the Ninth Circuit in United States v. Chischilly, 30 F.3d 1144 (9th Cir. 1994).

appears this witness came first to a firm conclusion and then selectively presented only that version of information supporting this conclusion and, as feared by other Courts, the result is not "responsible science." *See*, Dura Auto. Sys. of Ind., Inc. v. CTS Corp., 285 F.3d 609, 614 (7th Cir. 2002). The clear lack of an objective application of a scientific method apparent throughout Dr. Madras' declaration negates the validity of her opinions and, as such, defendant objects to the introduction or consideration of all testimony designated by the red strike-through font in Exhibit A, *and* all testimony presented under the headings "Specific Opinions" (Part V, pp. 15-27, and "Rebuttal to Opinions of the Defense Experts" (Part VI, pp. 27-35), as well as her "Conclusion" (Part VII, p. 36).)

II. The Witness is Not Qualified to Render Expert Opinion in Areas Outside Her Training and Experience.

Whether an expert's opinion is within his or her area of expertise is a preliminary questions to be determined by the trial court. *Fed. Rule of Evidence 104(a)*. (See, Daubert v. Merrell Dow Pharmaceuticals, 43 F.3d 1311 (9th Cir. 1995), trial court is tasked with resolving disputes regarding matters "squarely within" the expertise of an expert; also, Bourland v. City of Redding, 2013 U.S. Dist. LEXIS 4728 (E.D. Cal. 2013) (J. Mueller), expert opinion is "reliable if the knowledge underlying it has a reliable basis in the knowledge and experience of the relevant discipline," citing to Primiano v. Cook, 598 F.3d 558 (9th Cir. 2010), remarking "medicine is not a science but a learned profession, deeply rooted *in a number* of sciences." *Id*., at p. 565, emphasis added; and In re Canvas Specialty, Inc., 261 B.R. 12 (9th Cir. 2001), "[t]he evidence must show that the expert witness possesses the appropriate expertise.")

A District Court is indeed required to assess the proposed expert's qualifications in determining what areas in which they may appropriately be considered to have any "specialized knowledge," above and beyond that of a lay witness. Hopkins v. Dow Corning Corp., 33 F.3d 1116, 1124 (9th Cir. 1994); *accord*, United States v. Alatorre, 222 F.3d 1098, 1103 (9th Cir. 2000); Jinro Am., Inc. v. Secure Invs., Inc., 266 F.3d 993, 1004 (9th Cir. 2001), "care must be taken to assure that a proffered witness truly qualifies as an expert."

When engaging in this inquiry a trial judge must first "determine whether the witness is

proposing to testify to (1) an area of expertise, (2) that will assist the trier of fact to understand or determine a fact in issue." In re Canvas Specialty, Inc., *supra,* 261 B.R. at 18, citing Daubert, 509 U.S. at 592-93; *see also, generally*, Garcia v. Los Banos Unified Sch. Dist., 2007 U.S. Dist. LEXIS 20469 (E.D. Cal. 2007). It is foundational that a "layman, which is what an expert witness is when testifying outside his area of expertise, ought not to be anointed with ersatz authority as a court-approved expert witness for what is essentially a lay opinion." White v. Ford Motor Co., 312 F.3d 998, 1008-09 (9th Cir. 2002).

In White, *supra*, the Ninth Circuit noted the proffered expert witness was not qualified to offer expert opinion regarding whether a vehicle's faulty parking brake caused the Plaintiff's injury, despite the expert's significant training and experience as a metallurgist (the study of the performance of metals) and as a professor of material science and engineering who was trained to read the underlying data. *Id*. at 1001-1006. In determining that the expert's opinion as to causation was of no more value than a lay opinion, the court focused on the methodology by which the expert "got from" the underlying facts to his ultimate opinion. *Id*. As the analytical process the expert employed did not rely on his expertise in how metals perform, the appellate court found the expert had "established no more foundation than anyone trained in any kind of engineering, or even a lay person not trained in engineering, would have to venture the opinion." *Id.*[3]

Indeed, courts have long held the Rules of Evidence require a trial court to "determine whether the expert has minimal educational experiential qualifications in a field that is relevant to a subject which will assist the trier of fact." Diviero v. Uniroyal Goodrich Tire Co., 919 F. Supp. 1353 (D.C. AZ 1996); *see also*, *inter alia,* Jinro Am., Inc. v. Secure Invs., Inc., 266 F.3d 993 (9th Cir. 2001); Olympia Oyster Co. v. Rayonier, Inc., 229 F. Supp. 855 (D.C. Wa 1964), "witnesses have not shown minimal qualifications for their opinion testimony in various scientific fields;" In re Canvas Specialty, Inc., *supra,* 261 B.R. at 18, "[i]t is not enough that the

[3] The Circuit Court noted the witness' lay opinion may have rendered his opinion admissible under *Rule of Evidence 701* (Opinion Testimony by Lay Witnesses) and, because of this alternative theory of admissibility, the court reversed on other grounds, but firmly suggested the trial court's admission of the opinion testimony under *Rule of Evidence 702* (Expert Testimony) may otherwise have been reversible error.

proposed expert have expertise in an area of knowledge. The expertise must be relevant to the determination of the facts in issue."

Much like the expert proffered in White, *supra*, Dr. Madras' lacks sufficient qualifications to opine as to areas outside of her expertise. For any opinion regarding the medical use of cannabis, and the safe use of cannabis under medical supervision does not rely on her expertise in psychobiology, biochemistry, or even drug abuse and addiction. As the court noted in Primiano v. Cook, *supra*, "medicine is not a science but a learned profession, deeply rooted *in a number* of sciences." *Id*., at 565. Particularly, where like in the present case, the expert has *no* medical training, and little *if any* patient interaction her opinion on the challenged issues is informed by nothing more than that of "anyone trained in any kind of [natural science], or even a lay person," and therefore, as was found in White, Dr. Madras may not opine on the issues herein specified.[4]

The objections posed by the defense are to those statements which opine on: (1) the efficacy and benefits of cannabis as medicine, and (2) the safe supervision of patients using medical cannabis under a physician's supervision. Although Dr. Madras presents her testimony in segments relating to each of these topics, as well as others not subject to this motion, the discussions in each section overlap. It is, therefore, insufficient to merely move to exclude by section. Accordingly, in order to streamline this Court's identification and assessment of the specific statements it is here asserted are outside the witness' qualifications the defense identifies the general areas of opinion for which the witness is not qualified and sets forth those specific statements by a strike-through in red font as denoted in Exhibit A.

CONCLUSION

Dr. Madras' qualifications render her a layman where testifying outside of her expertise in psychobiology and biochemistry, and should not be here "anointed with ersatz authority" as an

[4] Generally an expert witness' qualifications would be challenged through *voir dire*; however, as the declarations have been submitted in lieu of live testimony in the present case, the defense relies on the information provided by Dr. Madras in her declaration and attached Curriculum Vitae. Should this Court find it necessary to more fully explore the credentials of this proffered expert witness, the defense is prepared to *voir dire* when live testimony is presented.

expert opinion, nor should her inconsistent application of the scientific methodology be allowed unbridled under the Rules of Evidence and Daubert, *supra*, 509 U.S. 579.

Thus, based on the foregoing, exclusion of those objectionable statements demarcated in the attached Exhibit A, and presented in pages 15-36 of her declaration is required in order to comport with those Constitutional and statutory principles at issue in this criminal prosecution, and to ensure the presentation of responsible evidence-based science.

Dated: August 12, 2014

Respectfully submitted,

/s/ Zenia K. Gilg
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