UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 6:16-cr-187-Orl-41TBS

JOHN MATTHEW GAYDEN, JR.,

Defendant.
_____/

**MOTION TO DISQUALIFY GARY M. REISFIELD, M.D., THE GOVERNMENT'S MEDICAL EXPERT AND REQUEST FOR A *DAUBERT* HEARING**

This expert should be disqualified because he has been biased by the provision of a substantial amount of highly inflammatory task-irrelevant context information. Such bias "cannot be willed away."[1] And since the standard scientific practice of "blinding"[2] this reviewer from biasing context information was not followed, he cannot now deliver an opinion that can be considered reliable. Pursuant to this Court's gatekeeping function under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), it should disqualify the government's medical records review expert.

The defense will present the testimony of Daniel Murrie, Ph.D.,[3] Director of Psychology, Institute of Psychiatry and Neurobehavioral Sciences, University of Virginia. Dr. Murrie will

[1] Nation Research Council, Strengthening Forensic Science In The United States: A Path Forward 122 and fn 9 (The National Academies Press (2009)) (hereinafter "NRC"). Available at https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf

[2] Blinding As A Solution To Bias: Strengthening Biomedical Science, Forensic Science, and Law, (Christopher T. Robertson and Aaron S. Kesselheim, eds, Academic Press (2016)) (hereinafter "Blinding"). Excerpt available at https://books.google.com/books?id=fnjICgAAQBAJ&pg=PR3&source=kp_read_button#v=onepage&q&f=false

[3] Dr. Murrie's CV is attached here as Exhibit 1

provide education testimony[4] explaining what cognitive/confirmation bias is, how it threatens the validity of scientific opinion, measures commonly used to counter the bias, e.g., the various forms of blinding to solve the bias problem, how to identify the appropriate domain and task-relevant materials that should and should not be provided to the particular expert. In this vein, the testimony would likely include hypotheticals to illustrate the issues arising in this case.

"Vigorous cross-examination" does not provide an "appropriate means" of challenging this expert because it would require biasing the jury with the same information that biases the witness, much of which would be otherwise inadmissible. *Daubert,* 509 U.S. at 596. Forcing the defense to forgo or conduct a tepid or sanitized cross-examination prevents Dr. Gayden from presenting his defense thereby denying due process and confrontation rights. *Chambers v. Mississippi,* 410 U.S. 284, 295 (1973) ("diminution [of confrontation rights] calls into question the ultimate integrity of the fact-finding process") (internal quotation and citation omitted); *United States v. Yates,* 438 F.3d 1307 (11th Cr. 2006) (*en banc*) (convictions reversed where testimony was presented over live 2-way video conference).

This witness should be disqualified.

## Background

The government charged Dr. Gayden with seven counts of knowingly and intentionally dispensing and distributing oxycodone outside the usual course of professional practice and for other than legitimate medical purposes in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. Doc. 1 (hereinafter referred to as illegal or illicit prescribing as shorthand). The government did not charge a pattern or course of conduct or a conspiracy or even conduct spanning over a

[4] Rule 702, Fed.R.Evid. encourages "the venerable practice of using expert testimony to educate the factfinder on general principles. Advisory Committee Notes, 2000 Amendments

timeframe. The counts discretely address four individuals' visits to Dr. Gayden on four specific dates in October of 2011.

## The Government's Burden

The burden of proof is on the government to establish the reliability of the expert's opinion:

> *Daubert* requires the trial court to act as a gatekeeper to insure that speculative and unreliable opinions do not reach the jury. [*Daubert v. Merrell Dow Pharmaceuticals* 509 U.S. 579,] 589 n.7, 597, 113 S.Ct. 2786. As a gatekeeper the court must do "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 593–94, 113 S.Ct. 2786. The proposed testimony must derive from the scientific method; good grounds and appropriate validation must support it. *Id.* at 590, 113 S.Ct. 2786. "In short, the requirement that an expert's testimony pertain to 'scientific knowledge' establishes a standard of evidentiary reliability." *Id.* The court must consider the testimony with the understanding that "[t]he burden of establishing qualification, reliability, and helpfulness rests on the proponent of the expert opinion...." *United States v. Frazier,* 387 F.3d 1244, 1260 (11th Cir.2004).

The challenge is not to the witness as an expert *per se*, but to his use and his opinion in this case. As we shall see, even experts, like all persons, are unaware of influences that bias them and their work. Here, the government provided the witness with voluminous and extreme biasing content. The witness himself cannot now be expected to deliver an opinion in this case reasonably free of the risk that the opinion simply confirms the content bias.

## Irrelevant Biasing Information Provided To The Expert

In his December 20, 2017 report, Reisfield states that his opinion that Dr. Gayden illegally prescribed was based on the "client medical records and other documents" he was given. Exhibit 2 (Witness' Opinion Letters). The defense recommends that the Court not review the biasing material as it could have a biasing effect on it. Suffice it to say that the biasing material is voluminous, highly inflammatory, mostly or all inadmissible in the government's case-in-chief,

and presented under only the government's hypothesis that Dr. Gayden is guilty. Its seems very unlikely that the government would challenge this characterization of the material especially considering that later it recognized the biasing nature of the material as will be noted below.

On the other hand, it seems odd not to set forth the material, if only for record-making purposes. So, the defense details this material in Exhibit 3 under a cover page. The Court is urged not to look at it, thereby reducing the risk of becoming biased by exposure to the material. It is requested that the government similarly mask reference to the material should it decide to file a written response.

On about April 3, 2018, counsel apprised the government of the defense's intent to move to disqualify its witness based on the provision of this biasing context information, again much (or all) of which is not admissible in the government's case-in-chief. On April 18, 2018, the defense provided the government notice of Dr. Murrie and his proposed testimony. Now recognizing the biasing nature of this content, the government sent a letter on April 20, 2018, explaining that the witness will now provide his opinion based only on the patients records named in the indictment, "a sampling" of other patient records noted in Exhibit 3, the surveillance video, and Florida Prescription Drug Monitoring (PDMP) data pertaining to prescriptions issued by Dr. Gayden from June 2011 through October 2011. Exh. 2 at 7-9.

## The Risk Of Confirmation Bias

Providing this witness with biasing context information containing only the single hypothesis that Dr. Gayden was guilty substantially risked eliciting an opinion confirming this

bias.[5] Confirmation bias is "well documented"[6] and ubiquitous.[7] Just the simple act of the prosecutor handing over material to an expert risks bias.[8] The risk here was far greater because the information provided by the prosecutor contained lurid inadmissible hearsay of unsubstantiated and uninvestigated rumors about how Dr. Gayden allegedly prescribed drugs illegally.

Experts across a number of domains[9] have been found to return opinion reflecting biasing content information, even including in DNA analysis.[10] In this DNA case for example, the DNA experts in a Georgia rape case were told that the suspect whose DNA they were comparing to that found on the victim was identified by a co-rapist as participating in the rape. These experts found that the suspect could "not be excluded," by the DNA.

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[5] Raymond S. Nickerson, Confirmation Bias, A Ubiquitous Phenomenon in Many Guises 177 (Review of General Psychology 1998, Vo. 2. No. 2, 175-220) ("Ubiquitous"). Available at http://pages.ucsd.edu/~mckenzie/nickersonConfirmationBias.pdf

[6] *Engler v. Herrling,* 490 B.R. 622 at fns 37 and 38 (MDFL 2013) and *Goswani v. DePaul University,* 8F.Supp3d 1004 at fn 11 (N.D. Ill. 2014) both quoting Richard Posner's book, How Judges Think (Harvard University Press 2008); NRC at 122-124.

[7] Nickerson, "Ubiquitous."

[8] NRC at 185.

[9] Latent Fingerprint Examiners: Itiel E. Dror, David Charlton, Ailsa E. Peron, Contextual Information Renders Experts Vulnerable To Making Erroneous Identifications (Forensic Science International 156 (2006)), available at http://www.aridgetoofar.com/documents/FSI%20contextual%20influences.pdf; Itiel E. Dror, David Charlton, Why Expert Make Errors (Journal of Forensic Identification 600/56 (4) (2006)), Available at https://www.researchgate.net/profile/Itiel_Dror/publication/248440075_Why_Experts_Make_Errors/links/53f356fe0cf2da87974469e5/Why-Experts-Make-Errors.pdf

Anthropology: Sherry Nakhaeizadeh, Itiel E. Dror, Ruth M. Morgan, Cognitive Bias In Forensic Anthropology: Visual Assessment Of Skeletal Remains Is Susceptible To Confirmation Bias (Science and Justice 54 (2014)), available at https://www.researchgate.net/profile/Itiel_Dror/publication/248440075_Why_Experts_Make_Errors/links/53f356fe0cf2da87974469e5/Why-Experts-Make-Errors.pdf

[10] Itiel E. Dror, Greg Hampikian, Subjectivity And Bias In Forensic DNA Mixture Interpretation (Science and Justice 51 (2011)), available at http://www.scienceandjusticejournal.com/article/S1355-0306(11)00096-7/fulltext

When 17 other DNA experts were later provided the same DNA evidence without the biasing context information, that the suspected DNA was from an individual identified as a participant in the crime, only one found he could "not be excluded." Twelve found that in fact the person was "excluded" as a possible contributor of DNA and four found the evidence "inconclusive." This is powerful evidence that experts even in the most rigorous of domains return opinion confirming the bias of extraneous content information.

Taking counter-measures to reduce the risk of confirmation bias at the outset is critical to the scientific method because "people can and do engage in case-building unwittingly, without intending to treat evidence in a biased way or even being aware of doing so . . ."[11] And "once one has taken a position on an issue, one's primary purpose becomes that of defending or justifying that position . . . it can become highly biased afterword."[12] "[O]nce exposed people are affected and biased without their control or despite their will power . . . [h]ence an effective frontline strategy to mitigate bias in in the first place to blind decision makers to irrelevant information that can bias their objective interpretations of the facts."[13]

Some very simple blinding countermeasures could have been employed here to decrease the bias potentially contaminating the opinion. The examiner should have been blinded about the doctor he was evaluating by simple redaction. Only task-irrelevant information should have been provided. That would seem to include mainly or only the count-patient medical records. To blind the examiner to these suspect files, other of Dr. Gayden's patient records that are not suspicious should have been included.

[11] Nickerson, Ubiquitous at 175-76.
[12] Id at 177.
[13] Blinding at 20.

The instructions to the examiner should have been neutral like "what do you see in the prescribing conduct," thereby at least partially blinding the examiner to the prosecutor's theory that Dr. Gayden was guilty of issuing prescriptions or distributing drugs outside the course of professional practice and not for a legitimate medical reason. The very provision of Florida Statutes addressing standards of care also biases the examiner by suggesting that Dr. Gayden was not following them. An expert reviewer of medical files should be able to spot these issues without this direction.

A variety of other simple blinding measures could have been employed that need not be catalogued here because no attempt at all was made to reduce the risk of bias. Indeed, the examiner was actively biased by the provision of much task extraneous material that was of an extreme character much of which, if not all of it, is inadmissible in the government's case-in-chief. Neither the witness nor this Court can conclude that the opinion is reliably free of bias.

## The Unavailability of Cross-Examination

The *Daubert* Court made the point that so long as the proposed testimony was reliable and admissible, though "shaky", the "appropriate means" for the opponent was to attack the evidence through "vigorous cross-examination." *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 598-99 (1993). The government has deprived the defense of this technique, however. The primary weakness of this witness's opinion is that he and his opinion were biased by extraneous inadmissible evidence. "Vigorous cross-examination" would entail illustrating to the jury just how the witness was biased by confronting the witness with that same information. This risks biasing the jury also and again with material that the prosecutor would not be able to introduce in his case-in-chief.

Then, in order to attempt to counter the bias, the defense would be burdened with attacking the credibility of this material. Now the focus of the trial becomes centered on this biasing, otherwise inadmissible, material.

This problem was created by the government by providing the witness with this type of biasing content information, among so much more. If the government's witness is allowed to testify, Dr. Gayden now must choose between defending himself though an unsavory cross-examination, requiring the elicitation of otherwise inadmissible hearsay or forgoing this inquiry. A defendant should not be forced to make such a choice because of the government's conduct. It implicates basic due process rights to defend oneself and the meaningful exercise of confrontation.

## CONCLUSION

Under *Daubert*, this Court should disqualify the witness because he has been biased by extreme and voluminous content bias. The risk that he and his opinion simply confirms this bias is high. The opinion is not a reliable because it was not elicited under scientifically standard blinding methods. And because this expert was exposed to voluminous inflammatory biasing content, he cannot now be expected to deliver an opinion reasonably free of bias in this case. Nor can Dr. Gayden attack the witness and his opinion by cross-examination without also biasing the jury.

The witness should be disqualified.

Respectfully submitted,

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FEDERAL DEFENDER

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## CERTIFICATE OF CONFERRING WITH OPPOSING COUNSEL

Pursuant to the Criminal Scheduling Order (CSO), undersigned counsel certifies he has conferred with the attorney for the Government who objects to this motion, and that this motion concerns matters not covered by the CSO.

*/s/ Michael S. Ryan*
Michael S. Ryan
Assistant Federal Defender

## CERTIFICATE OF SERVICE

I hereby certify that the undersigned electronically filed the foregoing *Motion to Suppress Evidence and Request for an Evidentiary Hearing* with the Clerk of Court by using the CM/ECF system, which will send a notice of electronic filing to Vincent Chiu, Assistant United States Attorney, this 20th day of April 2018.

*/s/ Michael S. Ryan*
Michael S. Ryan
Assistant Federal Defender