

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION

- - - - -	-X	
UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	Case No.:
	:	6:16-cr-187-Orl-41TBS
vs.	:	
	:	
JOHN MATTHEW GAYDEN, JR.,	:	Orlando, Florida
	:	May 10, 2018
	:	9:06 a.m.
Defendant.	:	
	:	
	:	
- - - - -	-X	

TRANSCRIPT OF MOTIONS HEARING  
BEFORE THE HONORABLE CARLOS E. MENDOZA  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

Counsel for Plaintiff:	Vincent Chiu
Counsel for Defendant:	Michael Ryan Ali Kamalzadeh

Proceedings recorded by mechanical stenography.  
Transcript produced by computer-aided transcription.

Court Reporter: Suzanne L. Trimble, CCR, CRR, RPR  
Federal Official Court Reporter  
401 West Central Boulevard, Suite 4600  
Orlando, Florida 32801  
e-mail: trimblecourtreporter@gmail.com

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

T A B L E O F C O N T E N T S

<u>PROCEEDINGS</u>		<u>PAGE</u>
	May 10, 2018	
<u>TESTIMONY</u>		
DANIEL MURRIE, PH.D.		
Direct Examination By Mr. Ryan.....		8
Cross-Examination By Mr. Chin.....		29
Redirect Examination By Mr. Ryan.....		36
GARY REISFIELD M.D.		
Direct Examination By Mr. Chin.....		42
Cross-Examination By Mr. Ryan.....		47
EVA SALA		
Direct Examination By Mr. Chin.....		121
Cross-Examination By Mr. Ryan.....		122
Redirect Examination By Mr. Chin.....		125
Recross-Examination By Mr. Ryan.....		152
Further Redirect Examination By Mr. Chin.....		192
Further Recross-Examination By Mr. Ryan.....		193
CLYDE CASKEY		
Direct Examination By Mr. Chin.....		194
Cross-Examination By Mr. Ryan.....		195
JOHN GAYDEN JR.		
Direct Examination By Mr. Ryan.....		197
Cross-Examination By Mr. Chin.....		202

OTHER

Colloquy.....		3
Colloquy Re: <i>Daubert</i> Motion, Document 77.....		4
Further Colloquy Re: <i>Daubert</i> Motion, Document 77.....		57
Colloquy Re: <i>Daubert</i> Motion, Document 79.....		70
Colloquy Re: <i>Daubert</i> Motion, Document 78.....		71
Colloquy Re: Motion to Dismiss, Document 80.....		76
Colloquy Re: Motion to Dismiss, Document 81.....		91
Colloquy Re: Motion in Limine, Document 82.....		95
Colloquy Re: Brady Motion, Document 83.....		98
Colloquy Re: Motion in Limine, Document 84.....		99
Colloquy Re: Motion to Suppress, Document 76.....		117
Further Colloquy Re: Motion to Suppress, Document 76 ...		205
Further Colloquy Re: <i>Daubert</i> Motion, Document 77 .....		221

E X H I B I T S

<u>NO.</u>	<u>MARKED/ADMITTED</u>	<u>PAGE</u>
	Defendant's Exhibit Nos. 1 through 22	admitted..... 5
	Government's Exhibit Nos. 1 through 26	admitted..... 5

1 P R O C E E D I N G S

2 THE COURTROOM DEPUTY: This is the case of United  
3 States of America v. John Matthew Gayden Jr., Case  
4 No. 6:16-cr-187.

5 Will counsel please state their appearances for the  
6 record?

7 MR. CHIN: Good morning, Your Honor. Vince Chiu on  
8 behalf of the United States. I'm joined by DEA Special Agent  
9 Eva Sala.

10 MR. RYAN: Good morning, Your Honor. Michael Ryan  
11 on behalf of Dr. Gayden. There's a few of us here today. Ali  
12 Kamalzadeh is co-counsel.

13 MR. KAMALZADEH: Good morning, Your Honor.

14 MR. RYAN: Jan Reed and David Espiritu are  
15 paralegals and technology.

16 THE COURT: All right. Good morning, everyone.  
17 Feel free to be seated.

18 There are a number of motions pending before the  
19 Court. I have an idea of how we're going to proceed, but I  
20 would like to hear from each of you, starting with the  
21 Government, on any suggestions you have on moving through some  
22 of these motions. Some of them tend to cross paths a little  
23 bit.

24 Mr. Chiu?

25 MR. CHIN: Yes, Your Honor. I think the defense is

1 in agreement. I think the evidentiary development for the  
2 motions is primarily in the *Daubert* and the motion to  
3 suppress. I know that in speaking to Mr. Ryan, both his  
4 expert and my expert are here at some significant expense. So  
5 we would request to deal with the *Daubert* piece of it first so  
6 that we can get those folks on their way and then proceed to  
7 probably the motion to suppress and then go from there, Your  
8 Honor.

9 THE COURT: All right. So that means we're gonna  
10 start with doc 77, the Government's response doc 89, which is  
11 the motion to disqualify Gary M. Reisfield.

12 Are you ready to proceed?

13 MR. CHIN: Yes, Your Honor.

14 THE COURT: We're gonna absorb the evidence in  
15 whatever you present. So let's go on ahead and go.

16 MR. CHIN: Yes, Your Honor. And in speaking with  
17 defense counsel, I think we've agreed on the best way to  
18 present this to the Court. We've agreed on a number of  
19 exhibits. Actually, the defense exhibits -- no, we don't have  
20 any objections to exhibits. So if we can go ahead and move  
21 for the admission both of -- at least for the defense  
22 exhibits I don't have objection to. I can't speak for the  
23 defense --

24 THE COURT: All right. The defense has presented 22  
25 exhibits. I have the exhibit list, along with the actual

1 exhibits. Mr. Ryan, are you moving these into evidence at  
2 this time?

3 MR. RYAN: Yes, Your Honor. I don't think we  
4 object -- I don't object to his exhibits either.

5 THE COURT: We'll just handle this step by step.  
6 Any objection from the Government as to Defense 1 through 22?

7 MR. CHIN: No, Your Honor.

8 THE COURT: All right. They'll be admitted and  
9 marked as such. I'll consider them in my deliberations.

10 (Defendant's Exhibit Nos. 1 through 22 were  
11 admitted into evidence.)

12 THE COURT: The Government's Exhibits 1 through 26,  
13 Mr. Ryan, any objection?

14 MR. RYAN: No, Your Honor.

15 THE COURT: They will all be considered, and they  
16 are admitted for the purposes of this hearing.

17 (Government's Exhibit Nos. 1 through 26 were  
18 admitted into evidence.)

19 THE COURT: All right. Mr. Chiu, are you ready to  
20 proceed?

21 MR. CHIN: Yes, Your Honor. For the initial burden  
22 going forward on *Daubert*, we would rely upon the reports of  
23 Gary Reisfield that are at Defense Exhibit 17. It's actually  
24 a composite exhibit of some of the reports of the expert, and  
25 Dr. Reisfield is here, but I think for the purposes of

1 presenting this issue, it makes -- I think it makes sense for  
2 us to present that initial report of Dr. Reisfield, allow the  
3 defense to present the testimony of Dr. Murrie, and then call  
4 Dr. Reisfield to address those issues.

5 THE COURT: All right. Government's proposing you  
6 call Dr. Murrie first.

7 MR. RYAN: That's fine. I think that makes sense as  
8 well.

9 THE COURT: All right. Feel free to call him.

10 MR. RYAN: All right.

11 THE COURTROOM DEPUTY: Please come forward and be  
12 sworn.

13 **DANIEL MURRIE, PH.D.,**

14 called by the Defense, having been first duly sworn, was  
15 examined and testified as follows:

16 THE COURTROOM DEPUTY: Have a seat there, please.

17 THE COURT: All right. Good morning. Once seated,  
18 please arrange the chair so that you are comfortable with the  
19 chair's proximity to the microphone. State your full name  
20 into that microphone and please spell your last name.

21 THE WITNESS: Good morning. My name is Daniel  
22 Murrie, M-u-r-r-i-e.

23 THE COURT: Does the Government have any concerns or  
24 objections as to this witness being treated as an expert for  
25 the purposes of this hearing?

1 MR. CHIN: Not for the purposes of this hearing,  
2 Your Honor.

3 THE COURT: All right. Go on ahead, Mr. Ryan.

4 MR. RYAN: I'm sorry, Your Honor. May I stop for a  
5 minute? Dr. Gayden is having trouble hearing, I guess,  
6 Mr. Chiu. Could we try the earphones?

7 THE COURT: Yes.

8 MR. RYAN: I'm sorry we didn't clear that up before  
9 we started.

10 THE COURT: That's fine. Let's do it.

11 MR. KAMALZADEH: Your Honor, may I approach  
12 Dr. Murrie with the mouse?

13 THE COURT: Is it working? We're off the record  
14 until we get this thing started.

15 (Discussion off the record.)

16 THE COURT: Yes.

17 MR. KAMALZADEH: Thank you.

18 THE COURT: Again, go on ahead and state your full  
19 name for the record, spelling your last name.

20 THE WITNESS: Yes. Daniel Murrie, M-u-r-r-i-e.

21 THE COURT: All right. Mr. Ryan, your witness.

22 MR. RYAN: Where do you want me, at the table or at  
23 the --

24 THE COURT: The podium is fine.

25 MR. RYAN: Okay.

1 THE COURT: You can arrange the podium -- if you  
2 want to pull it back in between counsel table, you're welcome  
3 to do that.

4 MR. RYAN: Thank you. Is it okay if I just do this?

5 THE COURT: That's fine.

6 MR. RYAN: We have agreed, Your Honor, to the  
7 credentials of the expert.

8 THE COURT: Yes.

9 DIRECT EXAMINATION

10 BY MR. RYAN:

11 Q But just to have a slight intro, go ahead and state your  
12 name, where you work.

13 A Sure. My name is Daniel Murrie. I work as a professor  
14 at the University of Virginia and director of psychology at a  
15 place called The Institute of Law, Psychiatry, and Public  
16 Policy, also teach in the UVA School of Law.

17 THE COURT: Are you hoping not to get knocked out at  
18 the first round here?

19 THE WITNESS: Yes.

20 THE COURT: Sorry. I couldn't resist.

21 THE WITNESS: Yes.

22 THE COURT: Terrible NCAA basketball joke. Go on  
23 ahead.

24 THE WITNESS: No, no. That's apt. Yes.

25 MR. RYAN: I notice that the Court is wearing a bow



1 tie today. I couldn't help but notice that.

2 THE COURT: I appreciate that. Go on ahead.

3 BY MR. RYAN:

4 Q So we all know that you're here to discuss confirmation  
5 bias. So why don't we just start with something simple?

6 Explain confirmation bias. How does it come about, how the  
7 brain works?

8 A Sure. Sure. And I have some slides on this. I don't  
9 know they're projecting now. You can make those come up  
10 though. There we go. Okay.

11 And, Your Honor, you can see anything there? Okay.

12 Just to quickly orient. Cognitive bias exists  
13 because the human brain is very efficient. Without even  
14 knowing it, we use shortcuts and strategies to make decisions  
15 very quickly. So we're not starting from scratch with every  
16 new decision. It's very efficient.

17 So for example, here, we can quickly read this as  
18 ABC. We can quickly read this as 12, 13, 14, even though  
19 that's the same figure in the middle. That B is 13. But we  
20 use contextual clues to make sense of it very quickly.

21 Same here, right? We can read this as "the" and  
22 that as "cat," even though the middle figure is the same  
23 thing. Our brains are quick and efficient.

24 Q Okay. I want everyone to really pay attention to this  
25 particular slide.

1 A Sure. Sure.

2 Q What are you showing us here, Dr. Murrie?

3 A Well, this is an ambiguous figure, right? We look at  
4 this, and it's hard to know what it is. We try to take in  
5 this information and make sense of it. On its own, we  
6 probably can't make it out. But here we can. Right here  
7 we're given the big picture. We can make sense of that kind  
8 of ambiguous piece of it. And what's interesting is when  
9 we -- when we go back, we can still see the big picture,  
10 right? Even though we're back to that ambiguous piece, we now  
11 can't help but see the big picture there. Our brains are so  
12 efficient, it kind of fills in the missing details.

13 And I say all this to describe what are sometimes  
14 called contextual effects. Decades and decades of research  
15 tells us that expectations and emotions, our motivation, our  
16 prior knowledge always influences what we see. It influences  
17 how we make sense of what we see and shapes our decisions.

18 One form of this is confirmation bias. This is a  
19 ubiquitous phenomena. It influences everything, right? Once  
20 we form a hypothesis or receive a theory, we seek and notice  
21 and prioritize evidence that supports our hypothesis.

22 And conversely, we neglect or miss or maybe  
23 undervalue anything that's not going to support our  
24 hypothesis. It's almost like a form of tunnel vision.

25 And this is true for everyone. It's true for

1 scientists. That's why science has developed all sorts of  
2 procedures to guard against these biases.

3           And it's true for forensic experts. Forensic  
4 experts have genuine expertise, genuine incredible skills  
5 sometimes, but they're always responding to questions that  
6 require some objective judgments, some interpretations, and  
7 some opinions. And that might be something as, you know,  
8 simple as looking at two fingerprints to see if they match, if  
9 they're so similar that they came from the same person; or  
10 maybe looking at a fire scene to determine if there was an  
11 accelerant that suggested arson; maybe a polygrapher would  
12 look at ambiguous results and try to determine whether those  
13 reflected truth or dishonesty; a radiologists might look at a  
14 chest x-ray and see some of these ambiguous figures there and  
15 try to determine whether there was perhaps exposures to a  
16 toxin or some kind of disease; psychologists and psychiatrists  
17 might look at results of personality tests and try to infer  
18 whether someone is at greater risk or violence. All of these  
19 are examples of subjective interpretations that experts make.  
20 It's great they do. They bring genuine knowledge and skills  
21 beyond the lay person.

22           But experts are also humans, and every brain is  
23 vulnerable to contextual bias, confirmation bias, and similar  
24 errors. Even scientists serving as experts are influenced by  
25 the background stories, the context, the expectations.

1 Q What is the problem with confirmation bias?

2 A Well, the problem with, with confirmation bias and other  
3 forms of contextual bias is that they really can change the  
4 conclusions from the conclusions that would be based on the  
5 data alone. Those, those are very much jeopardized by  
6 contextual bias or confirmation bias, right? It means that we  
7 risk missing the true state of affairs for a particular theory  
8 that we're introduced to or wedded to.

9 Q So when an expert is exposed to contextual biasing  
10 information, that information may be reflected in the opinion  
11 but not in the data that they're analyzing?

12 A Exactly. So this is -- this is what research tells us  
13 over and over, and particularly the past few decades the field  
14 has really started to explore this and sees this over and over  
15 again. So some really simple, really clever studies, you  
16 know, here's some examples from fingerprint examiners that  
17 shows if you give them contextual information, for example,  
18 that a suspect confessed or a suspect had an alibi, it  
19 actually changes how they read those fingerprints, even if  
20 that has nothing to do with the physical appearance of those  
21 fingerprints. So here's some -- here's some really clever  
22 studies on that that showed that even fingerprint experts when  
23 they had made conclusions about just the fingerprints earlier  
24 in their career were given those fingerprints later with  
25 contextual information, like a theory of the case, maybe a

1 suspect's confession or alibi, and they made totally different  
2 decisions based on that extra information.

3 Q Let me see if I understand that. You're saying experts  
4 who had examined a pair of prints were given the same prints  
5 years later but with different information, different  
6 contextual information?

7 A Correct.

8 Q And they arrived at different conclusions about prints  
9 they had already examined?

10 A Correct. Correct. And the researchers did that just to  
11 make sure it was the contextual information changing the  
12 opinions, right? They knew what the experts believed based on  
13 the fingerprints alone because they had conveyed that opinion  
14 in the past, but later gave them contextual information and  
15 said, Hey, these are from a case where the suspect, you know,  
16 either confessed or had an alibi, and they made different  
17 decisions because of that extraneous information.

18 Q Let me just point something out. You didn't help me  
19 draft my motion in this case, did you?

20 A No, no.

21 Q You didn't trade drafts. You didn't read it for me.

22 A No.

23 Q Or anything like that.

24 A No.

25 Q Just because some of the material is similar, so --

1 A Yeah. Well, these are -- you know, these are well-known  
2 studies now at this point in time, and they apply to a number  
3 of disciplines.

4 So here's, you know, a similar study of handwriting  
5 analysis. They form different conclusions depending on what  
6 they're told about the case, not just looking at the  
7 handwriting. Same for fire investigators. Same for  
8 polygraphers, if they're told a theory of the case or what to  
9 expect, they read the polygraph results differently.

10 Q And you yourself conducted a study in which irrelevant,  
11 task irrelevant information was provided to experts reviewing  
12 psychology reports?

13 A I did. So, you know, this was a study within my field of  
14 psychologists and psychiatrists, people like me, where we  
15 actually gave them all the same information. The only  
16 contextual information that was different was the side they  
17 believed they were working for. We basically tricked them  
18 into all doing the same task, but some believed they were  
19 working for the defense, and some believed they were working  
20 for the prosecution. Sure enough, the side they believed they  
21 were working for shaped the opinions they found, based on  
22 this, this same data. So it's a very subtle context effect,  
23 right, just knowing they're working for one side, but it still  
24 had an influence.

25 Maybe a stronger example even would be this example

1 of forensic physicians who were asked to read chest x-rays in  
2 a lawsuit about asbestos exposure. And in that situation  
3 these experts were given that contextual information, right,  
4 who were told, Hey, this is a legal proceeding. We think you  
5 might find asbestos exposure here. They found it in  
6 96 percent of these chest x-rays.

7 Now, when these same x-rays were given to neutral  
8 experts, who didn't have that same contextual information,  
9 they found asbestos exposure in only 4 percent of the x-rays,  
10 right, they found abnormalities there in only 4 percent. So  
11 that suggestion, the idea that --

12 Q Is that like a 90 percent or plus shift?

13 A It's a -- yeah, it's a shift going from, you know,  
14 there's abnormalities in only 4 percent when there's no  
15 contextual information, but when you provided that suggestion  
16 or that theory of the case, experts are then seeing problems  
17 in 96 percent of the x-rays they're viewing.

18 Q Okay. That makes me want to ask you about this. So  
19 these studies that we've been talking about, fingerprint  
20 studies, your study, the radiology study, it sounds to me like  
21 the only differing information given to the experts in  
22 conducting the study was one piece of information. Is that  
23 correct?

24 A Generally, yeah. You know, it may be as little as the  
25 side that retained them or, you know, in this example of

1 physicians the side that retained them and the suggestion that  
2 they could -- that there might be asbestos exposure there.

3 Q So just knowing the fact the National Research Council --

4 MR. RYAN: I cited to this in the motion, Your  
5 Honor.

6 BY MR. RYAN:

7 Q -- pointed out that just being told you're getting the  
8 information from the prosecutors is enough to influence the  
9 returning opinion from the expert?

10 A Yeah. Even small pieces of information can shape the  
11 opinion, can bias the opinion.

12 Q And that goes a little bit to your study, which was you  
13 handed psychologists, all psychologists -- it was a fairly  
14 large study, correct?

15 A Yeah, hundreds of forensic psychologists and  
16 psychiatrists.

17 Q And 50 were given a set saying, This is from the defense.  
18 50 were given a set saying, This is from the prosecutor. And,  
19 sure enough, the results came back fairly overwhelmingly that  
20 you would give a pro defense or a pro prosecution opinion,  
21 just being told who is paying for your work?

22 A Yeah. That's a quick simple summary, yep, mm-hm.

23 Q So do we have that problem?

24 A You and I?

25 Q Yeah. In other words, are you giving me an opinion



1 because you hired me?

2 A Yeah, you should absolutely ask that. That's absolutely  
3 a fair question. And I would encourage you to ask why do we  
4 know that's not the case, right, you know, what here -- what  
5 do I do to guard against this bias? That's a great question.

6 So, you know, a number of the things we did -- as  
7 you recall, I didn't want to know the details of your case. I  
8 didn't want to know the theory of your case. I'm  
9 presenting -- I'm not rendering an opinion about what exactly  
10 an expert should or shouldn't have seen there. My sort of  
11 stipulation or request here was only to talk about these  
12 problems so that the judge can then make decisions about that,  
13 right? My piece is just to teach about these problems.

14 And as you'll see later in these slides --

15 Q Wait. I want to -- I want to stop for a second.

16 A Yeah.

17 Q So if there's a risk of the expert's opinion being  
18 biassed by one piece of contextual biasing information, does  
19 the risk increase if there's more and richer detail in that  
20 way?

21 A That's, that's almost certainly the case. Now to be  
22 clear, most studies have just used a piece or two. You know,  
23 most studies haven't done voluminous contextual information.  
24 But given that studies that use a bit of information still  
25 finds strong effects, the field assumes probably that there's

1 an additive affect, right, that more is more, and that more  
2 contextually biasing information has a stronger effect on  
3 opinions.

4 Q Just, I want to clarify something. So I didn't provide  
5 you any of the documents in this case?

6 A No. No. I'm not privy to exactly what you're arguing  
7 over today.

8 Q I interrupted you. What were you gonna say?

9 A Oh, um -- I may have lost my train of thought. But just  
10 in short, the consensus in the field is that when contextual  
11 information is not necessary to the narrow scientific task,  
12 whether that's looking at a fingerprint or looking at an  
13 x-ray, the information then is very likely to bias the expert.

14 And this is -- you know, this isn't my pet theory or  
15 anything. This is a widely recognized problem. Government  
16 agencies, national authorities are increasingly putting out  
17 strong cautions about this as they try to reform the forensic  
18 sciences.

19 So that maybe the first and loudest push on this or  
20 the loudest push on this issue, it comes, you know, almost a  
21 decade ago from the National Research Council. Congress  
22 mandated a report on the state of forensic sciences, and they  
23 came back, as you know this was widely publicized, with a  
24 report that was really quite critical, and one of their main  
25 concerns was just plain cognitive bias. Human judgment is

1 subject to so many types of bias. And these aren't the result  
2 of character flaws or bad ethics. They're just part of how  
3 the brain works.

4 And so as the National Research Council says, they  
5 can't be willed away. You know, you can't wish them away or  
6 use great self-control.

7 Q Well, speaking of that, so we'll try to keep it a little  
8 closer to the case, can an expert reevaluate a body of data  
9 that -- okay. Let me try this way.

10 Would an expert be able to ignore biasing contextual  
11 information -- or is it contextual biasing information -- by  
12 re-reviewing a data set where much of that biasing contextual  
13 information was removed?

14 A So you're saying -- you're saying this is a scenario  
15 re-reviewing. Are you saying this is a scenario where they've  
16 reviewed a variety of biasing information, a broad variety of  
17 information and then they're asked to re-review looking only  
18 at the data at hand, right?

19 Q A limited amount of data --

20 (Speakers speaking over one another.)

21 A -- yeah, piece that is specific to their discipline. The  
22 answer would be no. I mean, psychologically there is just --  
23 there is just no way to extract information once you've put it  
24 into your decision making.

25 It's sort of like a math problem. You know, we

1 could -- we could alter a math problem and take out a  
2 particular number from an equation and recalculate it, and  
3 that's possible.

4           But human decision making is just so complicated and  
5 efficient that once it's in there, you can't take information  
6 back out and rerun it.

7 Q    How do we identify task irrelevant information?

8 A    So the field has just a number of recommendations on  
9 this. The National Commission of -- excuse me, the National  
10 Commission of Forensic Science put out a guidance document on  
11 this. There's some strong recommendations.

12           But I think to try to quickly simplify them, the  
13 answer is these are only the materials that an expert needs to  
14 render an expert opinion in his or her discipline on this  
15 particular narrow issue.

16           So, you know, the obvious example would be for  
17 fingerprint experts. They need -- they need the actual  
18 fingerprint, and they may need a tiny bit more information,  
19 like the surface the fingerprint was pulled from because that  
20 could -- that could affect its shape and resolution a little  
21 bit.

22           But it's almost always just the physical evidence.  
23 You know, for a radiologist, that's a chest x-ray, for  
24 example. So it's a discipline-by-discipline decision, and  
25 there's been strong recommendations for every discipline to

1 create their own list of what's task relevant and what's task  
2 irrelevant.

3 But the field is also very clear that certain things  
4 are always task irrelevant. There's never really a time an  
5 expert needs to know a suspect's criminal history or an alibi,  
6 something that might be incriminating or exculpatory. The  
7 expert just doesn't need to know that.

8 A judge or a jury certainly does, right, because  
9 they're taking all the data in to decide a case. But the  
10 expert is really just rendering an opinion on something very  
11 small and narrow, right, a piece of scientific evidence or a  
12 piece of medical evidence, and so they're never really  
13 recommended to know the theory of the case, past criminal  
14 history, mitigating information. Things like that, that are  
15 so important in the courtroom, those things are almost always  
16 inappropriate in a lab because that risks making the expert --

17 Q That would probably include material like rumors about  
18 the suspect?

19 A Yeah. That would just almost always never be relevant to  
20 a particular scientific or medical task, yeah.

21 Q And like I said, I just want to get -- emphasize the  
22 single hypothesis issue. So just even knowing the hypothesis  
23 of the person asking for the opinion can -- risks  
24 contaminating the opinion with that biasing information?

25 A Sure. Sure. That would be a way to set up confirmation

1 bias is to say, We think this may have happened. Do you see  
2 it in the data? That would -- that would be a great way to  
3 elicit confirmation bias.

4 Q So if an expert has been given a great deal of material  
5 outside the task relevant information and renders an opinion,  
6 can we say that it is reasonably free of the risk of that --  
7 of confirming that bias?

8 A There would -- I mean, I follow the question perfectly.  
9 There would be a risk of confirming that bias, right? Any  
10 time there's contextually irrelevant information, what the  
11 field calls task irrelevant information, that risks  
12 compromising an objective opinion.

13 Q And the more and richer the task irrelevant information,  
14 the greater the risk of returning a biased opinion?

15 A That's likely, yeah.

16 Q And could we say such an opinion is reliable?

17 A We -- you would not expect an opinion to be reliable  
18 under those circumstances.

19 Q But what if the expert arguably tells you that he ignored  
20 the task irrelevant information and he just looked at the task  
21 relevant information; he ignored all that stuff that he got  
22 last time; and he just sat down and looked at that?

23 A Yeah. So this is -- this is absolutely a discussion in  
24 the field because this happens a lot, and all sorts of  
25 psychological sciences is very clear in saying that's just not

1 possible.

2           And I want to be clear. That's not a -- that's not  
3 a critique or an indictment of an expert. I'm not -- very  
4 good, very ethical, very conscientious experts can very much  
5 believe that they have not been influenced by certain things.  
6 I'm not saying anyone is lying or manipulating or anything  
7 like that.

8           But the nature of our minds is that we're blind to  
9 our own bias. This is a phenomena called bias blind spot.  
10 It's been, you know, widely researched and documented. So  
11 we're quick to spot bias in others and quick to miss it in  
12 ourselves. That's the definition of the bias blind spot.

13 And --

14 Q    Can we go back to the baseball picture?

15 A    Yeah.

16 Q    Is that an example of how it's very difficult to or if  
17 not impossible to ignore the other information you've been  
18 given in interpreting a certain data set?

19 A    Yeah. It's a very -- you know, it's kind of a silly  
20 simple pictorial example, but it does make that point, right?

21 Q    Can we go back to those slides?

22 A    Yeah. Sure. Essentially, once we've seen something a  
23 certain way, we can't really unsee it, right? We can look  
24 only at a piece of the picture and we still see the big  
25 picture. And, again, normally that's very good. That's an

1 asset in most parts of life. It's just for experts trying to  
2 render an opinion about a small piece of the puzzle, the field  
3 has been very clear in agreeing that we don't want to  
4 contaminate them with the larger problem.

5 Q This is a problem recognized across science fields?

6 A Across science fields, yeah, and it has been in a way for  
7 ages. I mean, this is why we have double blind placebo  
8 controlled studies. That's why that's a gold standard in  
9 medicine because we know that people participating -- people  
10 working on a study, if they know what to expect, they tend to  
11 see it in the data.

12 You know, a hundred years ago that was a real  
13 problem, and you got some strange results, and science was  
14 really quick to recognize that we need a double blind placebo  
15 controlled study, right? We need even the people engaged in  
16 the study collecting the data not to know what to expect  
17 because expectations shape what they would see.

18 Q So am I correct in stating or assuming that scientists  
19 delivering opinions as a standard part of the methodology of  
20 reaching the opinion seek to mitigate the bias, biases?

21 A Yeah. Science has, and I won't bore everyone with all of  
22 those, but, yes, science has a number of procedures meant to  
23 either eliminate or at least mitigate bias.

24 Q Now, is this something unusual that science -- scientists  
25 are just now thinking about doing?



1 A No, this is --

2 Q Are we talking about some new fangled theory?

3 A No. This is old news in science, right. This is very  
4 old news. You know, hundreds of years people have talked  
5 about this. Scientific research has been pushing this for  
6 many, many decades.

7 The only thing that may be new or newer, I guess, is  
8 the real emphasis on this in forensic sciences. I mean,  
9 that's in the past couple of decades, I guess.

10 Q Even ten years ago, the National Research Council was  
11 talking about it?

12 A Absolutely, yeah.

13 Q The point I was gonna make, and I think I missed it is,  
14 they pointed out how the studies, even then, were showing just  
15 being told the prosecutor wants this information risks  
16 returning -- risks eliciting an opinion contaminated by that  
17 bias?

18 A Yeah, what are called --

19 Q In your study -- hold on. Your study was actually after  
20 that. It was about four years after that where you did the  
21 study, and this time the biasing information or theory of the  
22 case is, this is material from the prosecutor, this is  
23 material from the defense, and you got the same result?

24 A Yeah, yeah, the expectancy effect.

25 Q And there are countermeasures being taken in science.

1 Why don't we use an example like that, since it's our  
2 bailiwick here?

3 A Yeah. So just a strong push for blinding in the forensic  
4 sciences. This has been recommended by all sorts of  
5 government authorities. And in short -- the short version of  
6 those is, you know, asking scientists to set up lab procedures  
7 that only expose examiners or experts to the data at hand, not  
8 other information about the suspect, not theory of the case,  
9 but to blind them to all that and have them render opinions  
10 only on the data from their discipline that they're supposed  
11 to analyze.

12 Q So in the type of review that we have in this case where  
13 a doctor is reviewing another doctor's records, would it be  
14 appropriate to blind the expert doctor -- let me try to ask  
15 this better.

16 Would an appropriate countermeasure where an expert  
17 doctor is reviewing the files of another doctor be to mask the  
18 suspect files with innocuous files?

19 A Yes. I think what you're asking about there is sometimes  
20 called -- almost a lineup procedure. So there are a number of  
21 recommendations that suggest experts maybe shouldn't just be  
22 given a piece of evidence and say -- you know, and ask is  
23 there a problem here or what do you think is the problem here,  
24 but even to give it sort of a line up of evidence. It sounds  
25 like maybe in this case that would be a number of files and

1 ask what -- what if any problems are apparent in any of these  
2 files?

3 Q Let's talk about that question right there. Why is it  
4 important when presenting an expert who is doing something  
5 like a record review to say, We would like you -- a question  
6 styled in this way: We would like you to review these files  
7 because they may or may not indicate that a doctor did X?

8 A Yeah. So given various files and asking, you know, what  
9 may or may not be problems in these various files, is a lot  
10 less suggestive than sort of the older tradition of saying,  
11 Here are some files. What problems do you see in those?

12 The latter creates what's called an expectancy  
13 effect. So somebody reviewing the files or the evidence would  
14 expect there to be a problem, and they would try to find, you  
15 know, what's the problem here. Particularly if they're  
16 suggested what the problem may be, they would seek evidence to  
17 confirm that.

18 So, again, there's these recommendations for kind of  
19 a line up of evidence, in which there would be maybe a number  
20 of files or fingerprints, and they say, you know, Which might  
21 be of concern here?

22 Q And even a simple redaction of the file, say the doctor's  
23 name --

24 A Yeah. I don't know if the name is -- oh, you're saying  
25 if there was a line up of various files.

1 Q I'm asking if it would also help mitigate the biasing  
2 contextual information if, for example, the doctor's identity  
3 was redacted because that might convey information to the  
4 expert?

5 A It may. I think it just depends on the case. I don't --  
6 again, I don't know particulars of the case at hand. So it  
7 may not be -- speak into that. I imagine at times it may or  
8 may not be task irrelevant.

9 Q So this is standard scientific procedure is to seek to  
10 mitigate bias in some way?

11 A Correct.

12 Q Not doing that risks returning or eliciting an opinion  
13 contaminated by bias?

14 A Correct.

15 Q And the greater the material, the richer the material  
16 that is of a biasing nature, the greater the risk that the  
17 opinion -- there's a risk of the opinion being contaminated by  
18 this confirmation bias?

19 A Yeah. That's almost certainly true.

20 Q So that would not be a reliable opinion?

21 A You couldn't expect a reliable opinion under those  
22 circumstances.

23 Q I mean, again, no matter how earnest, ethical, and  
24 wonderful the expert is?

25 A Yeah. Again, this isn't an ethics -- there are problems

1 out there. No doubt about that. But I'm not talking about an  
2 ethics problem today. I'm just talking about human cognition.  
3 The way the brain works is that it can't shake bias.

4 MR. RYAN: I think I've covered it, Your Honor.

5 THE COURT: All right. Thank you.

6 Cross-examination?

7 MR. CHIN: Thank you, Your Honor.

8 CROSS-EXAMINATION

9 BY MR. CHIN:

10 Q Good morning, sir.

11 A Good morning.

12 Q Now, a lot of the studies on confirmation bias in the  
13 scientific field involve individuals that are studying very --  
14 making calls on very specific things like fingerprints, DNA,  
15 things like that, right?

16 A That's true, mm-hm.

17 Q Those are things where the universe of information that  
18 they need is relatively small?

19 A True, mm-hm.

20 Q Now, in a case -- and without getting into the details of  
21 this one -- if someone were, say, looking at whether a doctor  
22 was, you know, acting in the course -- in the regular course  
23 of professional conduct, that universe of information would --  
24 might be broader, correct?

25 A It could be. Yeah, it could be. Now, again, most expert

1 opinions are gonna be narrow, relatively narrow; although,  
2 among experts there may be some differences for sure. I'm  
3 gonna --

4 Q Sure.

5 A If I may pour some water here. My throat is getting dry.

6 Q You know, you mentioned psychologically there's no way to  
7 extract information, and, therefore, any conclusion someone  
8 comes to after receiving information is going to be, as you  
9 said, unreliable.

10 But isn't that what, you know, I mean, lawyers do,  
11 you know, on a consistent basis? I mean, you're a professor  
12 of law so you probably have some familiarity.

13 A In what -- you mean when you ask the jury --

14 Q Let me put it this way.

15 A -- to strike something from the record?

16 Q Let me put it a different way. Forgive me if I'm getting  
17 too much into my own frame of reference, but an agent comes to  
18 a prosecutor and says, Hey, I've got this case. This guy has  
19 done all these bad things. This has nothing to do with our  
20 case. This guy has done all this bad stuff, and, you know,  
21 there's this universe of stuff that we know that we can't  
22 prove against him, but, but I've got -- I've got this evidence  
23 that we can, and, you know, I look at this evidence, and I  
24 look at this universe of bad stuff that we can't prove, and I  
25 go, You don't have anything.

1           You know, isn't that essentially what I've done is  
2 taken this information that is extraneous and extracted it and  
3 come to this conclusion based on the other information that is  
4 pertinent to my determination?

5 A     Yeah. I think -- I think that's a great example in the  
6 sense that that's, that's why the court has developed these  
7 rules, you know, restricting excess information, right, only  
8 to focus at the -- on the case at hand.

9           Now, whether that affects a prosecutor's opinion or  
10 not, I don't know. I don't think that's been well studied.  
11 We do, of course, have studies that show that jurors can't  
12 strike what they've heard. So when they're told to disregard  
13 a statement, that they of course really -- they really can't.  
14 That still sticks.

15 Q     I guess what I mean is, it's not necessarily that you  
16 can't -- that someone can't ever set aside facts to render an  
17 opinion that's reliable or correct. What you're saying is  
18 there's a risk that that confirmation bias will creep in from  
19 the extraneous information?

20 A     Yeah. I think -- I think I may -- there is a risk  
21 absolutely. I am saying that. I think I may respectfully  
22 disagree with your -- with your analogy. I don't think that's  
23 quite the right analogy because in that example you as a  
24 prosecutor are deciding whether there's enough to proceed with  
25 a case. You're not really deciding whether -- what you think

1 happened, you know, and certainly in those situations you may  
2 well believe that something happened here but there's not  
3 enough to prove to a jury, right, who wouldn't have access to  
4 all of this other information. So I'm not -- I'm not sure  
5 that's the best comparison.

6 Q Frankly, under this idea, though, of confirmation bias,  
7 isn't almost any witness going to suffer from confirmation  
8 bias? They know that they've been -- they're being called by  
9 the prosecution or the defense? I mean, isn't that going to  
10 be present in any expert witness who knows who they're  
11 testifying for?

12 A Yeah. It's very -- yeah, it's a very common problem.  
13 That's why the field is really trying to mitigate as much of  
14 that as possible.

15 Q And, frankly, I mean, you're a national expert on the  
16 issue of confirmation bias?

17 A Correct.

18 Q No offense to you, but wouldn't it -- you know, wouldn't  
19 it be very, very difficult for you to set that aside and come  
20 in and testify in a case that, Oh, in this scenario there is  
21 no confirmation bias?

22 A Correct. Yeah. And to be clear, I don't -- I don't have  
23 the facts to say that in a case, right? I don't know your  
24 particular case here enough to say there is or there isn't.

25 Q I'm not saying in this case. In this hypothetical case,



1 whatever it may be?

2 A Yeah. No. To say that confirmation bias is somehow not  
3 a risk would be -- would indeed be very hard for me to say,  
4 right? It would be going against all sorts of literature and  
5 authority.

6 Q But it's also what you're looking for.

7 A I'm not looking for anything here, frankly. I'm -- I'm  
8 kind of asked to tell the state of the science here. In fact,  
9 that's why -- that's why I've chocked this full of quotes.  
10 You'll notice the presentation is a lot of quotes from  
11 reports. It's not me spinning words or, you know, reframing  
12 it in my way. I mean, I really am trying to give you what the  
13 field says on this.

14 Q I mean, I guess wouldn't every DEA expert then who works  
15 for the DEA, you know, be suffering from confirmation bias  
16 because they work for the DEA and they're being asked to  
17 decide whether or not these drugs are cocaine or heroin?

18 A Well, so the way the -- and I'm not attempting to shed --  
19 you know, claim expertise on DEA work. In some ways  
20 toxicology reports are some of the most reliable unbiased  
21 reports out there, right. Some of those -- putting a  
22 substance into a machine and getting a reading about what that  
23 substance is is really one of the most reliable procedures we  
24 have.

25 The field doesn't have a lot of critique of

1 toxicologists or those who examine substances that way with  
2 machinery. So I don't want to say there's a problem there.  
3 That's actually one of the most reliable sources of expertise  
4 there is, right when it's coming right out of the machine.

5 Now, as to other more subjective judgments they may  
6 make, you know, I would assume those are subject to all of the  
7 same biases that all humans are subject to.

8 Q Let me ask you this: If an expert were to say in the  
9 situation where someone's reviewing medical files, if someone  
10 were to review a specific doctor's medical file previously and  
11 say, Everything looks great, everything looks fine, wouldn't  
12 that expert then also necessarily be subject to confirmation  
13 bias if he was reviewing that same doctor's files at a later  
14 time or different files at a later time?

15 A Yeah. I mean, let me just make sure I'm following the  
16 question.

17 Q If someone comes to me with a doctor's file for whatever  
18 reason. I look at them and I go, These look fine. And, you  
19 know, and then someone comes back to me five years later with  
20 other files from that same doctor, wouldn't I then run the  
21 risk of confirmation bias from the fact that I had previously  
22 made a finding before?

23 A If that's all the information you had, if all you knew  
24 was that these looked great last time, you absolutely would be  
25 primed to assume they're gonna look good again. I think

1 you're exactly right about that.

2 Now, if you had other contextual information that  
3 says, Hey, maybe there's a problem here, or you should expect  
4 this or that, that, of course, would probably trump the prior  
5 expectation.

6 But, yeah, if all you have is that prior experience  
7 and you have no reason to expect anything different, then that  
8 would be a powerful influence, yeah.

9 MR. CHIN: May I have one moment Your Honor?

10 THE COURT: You may.

11 BY MR. CHIN:

12 Q So in this case you haven't -- you're not familiar with  
13 the facts, correct?

14 A I do know it's a medical case involving medical review,  
15 but --

16 Q You're not familiar with the experts involved?

17 A No, no, no, no.

18 Q And you've never interviewed them or had any exposure to  
19 any of the individuals that would potentially be testifying as  
20 experts?

21 A No. Certainly none that I know of.

22 Q And you've never spoken to or evaluated Dr. Gary  
23 Reisfield?

24 A No, no, not at all.

25 MR. CHIN: I have no further questions, Your Honor.

1 THE COURT: All right. Mr. Ryan, may this witness  
2 be excused?

3 MR. RYAN: May I have a little brief redirect?

4 THE COURT: Yes. But you should stand when  
5 addressing the Court.

6 MR. RYAN: I'm sorry. I was. I just --

7 THE COURT: All right. Go on ahead.

8 MR. RYAN: Sorry.

9 REDIRECT EXAMINATION

10 BY MR. RYAN:

11 Q Is there any literature, studies out there stating that  
12 confirmation bias is not for real?

13 A No, you know -- yeah. Anything that would contradict or  
14 kind of a strong second opinion of --

15 Q Right. Is there --

16 A No. There is a universally accepted phenomena.

17 Q There's no split opinion?

18 A There's no split opinion even in a small way.

19 Q Not even in the small way like there is in climate  
20 change?

21 A Correct. Correct. This is more universally accepted.

22 Q There's at least a small minority in the climate change  
23 debate that says, Yeah, humans are not affecting climate.

24 A Yeah. That would not be that way.

25 Q He gave you a hypothetical regarding a positive review

1 and the expert doing a second review and also coming back with  
2 a positive review. Do you remember that scenario?

3 A Yes, mm-hm.

4 Q If that expert was originally given a body of data, a  
5 rather large body of data without any biasing context  
6 information, and then a couple of years later was given a  
7 smaller body of data on the same doctor, again, without  
8 biasing context information, is the risk that that opinion is  
9 contaminated by bias similar to the risk of an expert who was  
10 given voluminous extraneous contextually biasing information?

11 A No. And I want to ensure that I'm following the question  
12 correctly. So I'm gonna restate a bit. But are you asking if  
13 there's a scenario where somebody does an initial review and  
14 they later do a review and in no -- in neither cases there are  
15 other case theory or what we call task irrelevant information,  
16 that would be a cleaner scenario than a scenario in which  
17 somebody is given a request to re-review with additional new  
18 task irrelevant information.

19 Q Correct.

20 A Did I follow that question?

21 Q He was given a second review that also contained far less  
22 or almost none -- no task irrelevant information? Maybe I  
23 misunderstood your restatement of my question. Let me try  
24 again.

25 Okay. So Mr. Chiu is asking you about a

1 hypothetical where an expert reviews a body of data and comes  
2 up with a particular opinion. That body of data came to him  
3 without it being saturated with contextual biasing  
4 information. And then a couple of years later he re-reviews  
5 sort of a subset of that data, a smaller one, and comes to a  
6 similar opinion. In both instances there's little  
7 contaminating information provided.

8 A Okay. Okay.

9 Q Contrasting -- so the opinion there, I want to compare  
10 the risk of that opinion being contaminated by bias with the  
11 risk of an opinion of an expert who was given a huge volume of  
12 task irrelevant contextual biasing information.

13 A Sure. Sure. Yeah, the task irrelevant information, the  
14 added context beyond the scope of the expert's duties always  
15 risks biasing the conclusion.

16 Q So the expert who once -- who initially reviews material  
17 without biasing contextual clues, then reviews a second set of  
18 files or a subset, the prosecutor was talking about how he may  
19 be influenced by his previous opinion and that he would come  
20 to a similar opinion?

21 A Yeah, and certainly -- I think certainly plausible if  
22 there's no other information added to the mix.

23 Q Well, what I'm asking is the risk of the two opinions,  
24 are they equally -- are there equal risks of contamination  
25 there?

1 A I mean, there's always a greater risk of contamination  
2 the more contextually irrelevant information is there, right?  
3 The more added context, whether that's theory of the case, or  
4 a suggestion that something might be there, the more that's  
5 present, the greater the risk of contamination.

6 Q And Mr. Chiu asked you about the particular expert's  
7 review sort of having a broader reach than would, say, a  
8 fingerprint technician, that fingerprint examiner, that that  
9 makes it different or a broader -- a broader array of data  
10 would be relevant to such an expert. Do you remember?

11 A Yeah.

12 Q But would that still -- would that array of information  
13 include information about the theory of the case?

14 A No. I mean, those are -- there are certain pieces that  
15 are almost always considered task irrelevant, theory of the  
16 case, incriminating information, exculpatory information,  
17 things like that are almost always considered task irrelevant,  
18 because the expert, whether scientist or physician or lab  
19 tech, doesn't really need those to render the opinion about  
20 the medical or scientific issue, and then it, of course, risks  
21 them, you know, making an opinion based on all of this broader  
22 information and giving the illusion there were multiple  
23 sources of independent data, when, in fact, it was all sort of  
24 mixed together.

25 Q You're touching on a concept we didn't really talk about,

1 which I find kind of interesting.

2 So one of the issues with an expert providing an  
3 opinion after having reviewed an array of task irrelevant  
4 information is that that makes that opinion appear as if it's  
5 a separate stream of evidence, free of the other information  
6 in the case. Can you explain that a little bit to Judge  
7 Mendoza?

8 A Yeah. This is one of the big concerns in the field  
9 about, you know, what's called kind of a contamination of  
10 evidence, is that it can look like a fingerprint, say, found a  
11 match and a DNA expert found a match, but if those were  
12 actually informing each other, or maybe they all heard the  
13 suspect was incriminated for some other reason, then it can  
14 look to the Court like, well, look, all of these independent  
15 lines of evidence incriminate this person, when, in fact, it  
16 was originally just one piece, and then that shaped all of the  
17 other experts. So that's -- again, that's sort of  
18 commonsensical, but it's one of the reasons the field has been  
19 so emphatic about, about keeping experts free of this  
20 contextual irrelevant information.

21 MR. RYAN: Thank you. Thank you, Your Honor.

22 THE COURT: May this witness be excused?

23 MR. RYAN: Yes, Your Honor.

24 THE COURT: Will he be subject to recall today?

25 MR. RYAN: I wouldn't anticipate recalling him.



1 THE COURT: Mr. Chiu, are you going to be recalling  
2 him?

3 MR. CHIN: No, Your Honor.

4 THE COURT: All right. Thank you, Doctor. You have  
5 a good day.

6 Are you ready to call your next witness?

7 MR. CHIN: Your Honor, I'll go ahead and call  
8 Dr. Reisfield to the stand.

9 THE COURT: All right.

10 THE COURTROOM DEPUTY: Please come forward to be  
11 sworn.

12 **GARY REISFIELD M.D.,**

13 called by Government, having been first duly sworn, was  
14 examined and testified as follows:

15 THE COURTROOM DEPUTY: Have a seat there, please.

16 THE COURT: Good morning, Doctor. Once seated,  
17 please make yourself comfortable with to the chair's proximity  
18 to the microphone. State your full name into the microphone  
19 and please spell your last name.

20 THE WITNESS: Good morning, Your Honor. Gary  
21 Reisfield, R-e-i-s-f-i-e-l-d.

22 THE COURT: All right. Mr. Chiu, your witness.

23 MR. CHIN: Thank you, Your Honor.

24

25 ////

1 DIRECT EXAMINATION

2 BY MR. CHIN:

3 Q Good morning, Dr. Reisfield.

4 A Good morning, Mr. Chiu.

5 Q Just in the way of background, can you tell us a little  
6 bit about what you do?

7 A I'm an associate professor in the Department of  
8 Psychiatry at the University of Florida College of Medicine in  
9 Gainesville. I am board certified in the specialty of  
10 anesthesia, in the subspecialties of addiction medicine and  
11 pain medicine. I have both a clinical and an academic  
12 practice. My time is spent seeing patients, teaching, doing  
13 research and performing service.

14 Q When you see patients, what context do you see patients  
15 in?

16 A Medical clinic.

17 Q Are you involved in any sort of pain clinic, pain  
18 management clinics, as well?

19 A I've been managing pain clinics for more than 15 years,  
20 but I no longer do. I see patients with complex pain and  
21 addiction problems primarily now.

22 Q Now, you were initially approached by the Drug  
23 Enforcement Administration to consult on a case involving  
24 Dr. Gayden. Do you recall that?

25 A Yes.

1 Q Do you remember initially, you know, the -- well, let me  
2 back up a little bit.

3 And have you done sort of similar consultations for  
4 legal purposes on other occasions?

5 A A few.

6 Q And do you recall what you were asked to basically -- you  
7 know basically determine initially? Like, what was the --  
8 when Drug Enforcement Administration came to you, what was  
9 the -- what were they asking you to do?

10 A I don't recall specifically what the request was, but  
11 obviously the DEA wanted to know whether this behavior  
12 represented legitimate medical practice.

13 Q Okay. And what did they -- what were you provided  
14 initially? I mean, you don't have to detail every piece of  
15 it, but generally speaking.

16 A Well, I obviously got some DEA statements. I also  
17 received medical records. Frankly, I don't remember what the  
18 chronology was, whether I received the DEA statements before  
19 the medical records or vice versa.

20 Q And do you recall at some point me asking you to sort of  
21 take a fresh look at everything and exclude certain, certain  
22 portions of it in determining -- in making a determination?

23 A Yes. That was a recent request.

24 Q Do you recall, generally speaking, what you were asked to  
25 kind of put aside?

1 A I was asked to put aside non-sworn statements that were  
2 provided to me by the DEA.

3 Q And are those the sort of statements that you would --  
4 that in your field you would generally look at in terms of  
5 determining whether something is in the regular course of  
6 professional conduct?

7 A If it were helpful to my determination, yes, but in  
8 general I would look at all materials that were provided to  
9 me.

10 Q Is there sort of like a textbook for what you look at in  
11 determining whether a physician is acting in the regular  
12 course of professional conduct?

13 A Textbook, not that I'm aware of.

14 Q Is there, like, a guideline, so to speak, that --

15 A I look the best I can at what the physician's practice  
16 actually is. And so that information is gleaned from medical  
17 records. Sometimes it's gleaned from audiovisual  
18 documentation of office visits, and occasionally from other  
19 sources of information, such as the DEA statements.

20 Q Now, and initially in those sort of unsworn statements  
21 that you ultimately kind of set aside, how important were  
22 those in formulating your initial opinion?

23 A In reviewing my opinion, there were, I believe, three  
24 items that I included in my opinion that I derived from the  
25 sworn statements. So they were a component of my opinion, but

1 they were certainly not determinative with regard to my final  
2 opinions.

3 Q Like, three conclusions?

4 A Three items. I would be happy to delineate those for  
5 you.

6 Q Sure. Sure.

7 A One of the items that I had noted was that Dr. Gayden had  
8 signed prescriptions, other than on the date they were issued.  
9 Another item was that patients paid cash for their office  
10 visits. What was the third item? Oh, the third item was that  
11 sometimes instead of testing the specimens for drugs, the  
12 specimens were simply discarded.

13 Q So you basically took those things out of your report?

14 A That's correct.

15 Q Did that, though, sort of linger to influence your final  
16 conclusion, even though they were not things you relied upon?

17 A My final conclusion stood largely on the strength of the  
18 medical records and particularly on the audiovisual  
19 documentation of three office visits of a particular patient  
20 in the summer -- I believe it was 2011.

21 Q And how much time did you spend going through and  
22 analyzing and reanalyzing the facts of this case, generally, I  
23 mean?

24 A Time spent in total or time spent subsequent to --

25 Q Both --

1 A -- our conversation.

2 Q -- if you know.

3 A I have no way of answering that question.

4 Q But would it be safe to say it would have been more than,  
5 you know, more than a matter of a few hours?

6 A Certainly so.

7 Q Significant time would you say?

8 A I would say that I probably spent -- if I had to  
9 estimate, I probably spent a couple of hours on each  
10 individual patient's medical record. So I would -- so I could  
11 certainly go back to my calendar and pull my hours, but I  
12 would probably say dozens of hours.

13 Q Now, you've heard of this concept of confirmation bias,  
14 and I think you saw the defense's pleadings on it, correct?

15 A I briefly looked at the document.

16 Q You know, tell me how, if at all, these, these documents  
17 that you ultimately set aside -- well, let me ask -- let me  
18 back up. Do you believe that you were able to come to a  
19 conclusion, setting aside these other documents that we asked  
20 you to set aside?

21 A Yeah. Well, obviously, the issue of confirmation bias  
22 means that this phenomena happened at an unconscious level,  
23 that it would be something that I wouldn't be aware of. But  
24 as I said a moment ago, based on the strength of the medical  
25 records and the audiovisual documentation of those three

1 office visits, that provided a sufficient foundation for my  
2 conclusions without any -- depending at all on the unsworn  
3 statements from the DEA.

4 Q Do you believe you would have come to those same  
5 conclusions looking at the medical records, even if you had  
6 not received that other information?

7 A The information contained in the medical records and the  
8 A/V was enough for me to reach the conclusions that I did.

9 MR. CHIN: I have no further questions, Your Honor.

10 THE COURT: Cross-examination.

11 MR. RYAN: Thank you, Your Honor.

12 CROSS-EXAMINATION

13 BY MR. RYAN:

14 Q Good morning.

15 A Good morning.

16 Q I think it's still morning. I got a little lost there.  
17 So what is the material that Mr. Chiu asked you to set aside  
18 on your second or third review of -- I think it's your third  
19 review of this material.

20 A The unsworn statements obtained by the DEA that they  
21 provided to me.

22 Q Okay. So you're talking about essentially DEA reports of  
23 what patients said?

24 A I believe that's correct. There may have also been some  
25 reports from what staff had said, but I'm not positive about

1 that.

2 Q Okay. You have a book in front of you. I would like you  
3 to look at Exhibit 17.

4 A I'm there.

5 Q This is a letter you wrote to Mr. Chiu on December 20,  
6 2017, cataloging the material you received?

7 A Correct.

8 Q And do you dispute that you received this material?

9 A This is all the material that I believe I received.

10 Q And you reviewed it all?

11 A That's correct.

12 Q Okay. Well, there's a little bit more -- okay.

13 MR. RYAN: Your Honor, on Exhibit 17 -- I described  
14 in my Exhibit 3 to the Document 77 motion, the one I put under  
15 a cover referring to it as the biasing context information,  
16 just so you know, and that would be Exhibit 18 for the hearing  
17 today. So it's the same exhibit.

18 BY MR. RYAN:

19 Q So and today you're saying your opinion rests on what  
20 body of documents?

21 A The medical records, items No. 1 and No. 2, item No. 3, I  
22 believe item No. 8, um, Florida statutes, so essentially the  
23 medical ten records, the subsequent ten random records, the  
24 medical record of MJ, and the three audio visuals that  
25 correspond to office visits of MJ from August, September, and



1 October of 2011.

2 Q Okay. And who gave you all of this other material?

3 A What other material are you referring to?

4 Q The material like the DEA reports, the video of the --  
5 that's mentioned in item 10, things of that nature?

6 A The DEA reports, I believe, were given to me by law  
7 enforcement. I don't recall whether it was DEA or local or  
8 regional law enforcement. I have no recollection of that.

9 Q How do they know to give you this material? Why are they  
10 giving you the material?

11 A Um, why are they giving me the material?

12 Q Yeah. I guess, in other words, did someone just knock on  
13 your door and say, Hey, Dr. Reisfield, you know, here's  
14 some -- here's some DEA reports?

15 A So, obviously, there was a discussion about an  
16 investigation of a physician whose prescribing practices were  
17 under scrutiny. Would you be interested in looking at some  
18 materials and giving us an opinion? That's, you know,  
19 generally how that plays out.

20 Q So the first contact you had with this case was with law  
21 enforcement?

22 A I'm not positive. I would have to go back and look at  
23 my -- probably look at my -- I don't remember whether it was  
24 law enforcement.

25 Q So you don't remember if your first contact with the case

1 was law enforcement or a lawyer?

2 A I'm not positive, no.

3 Q And when the law enforcement -- and you don't know if it  
4 was this law enforcement agent here who brought you the  
5 material?

6 A No, I don't.

7 Q You don't recognize her?

8 A I do not.

9 Q And when you were given this material, did law  
10 enforcement have a discussion with you about it?

11 A Um, I'm sure they did. I don't recall the details of the  
12 discussion.

13 Q Do you remember about when it happened?

14 A I do not.

15 Q So when you wrote this letter to Mr. Chiu, were you  
16 letting Mr. Chiu know that you had -- okay. Let me start  
17 over.

18 Did Mr. Chiu provide you with any data, any  
19 material?

20 A Um, well Mr. Chiu -- someone provided me with these  
21 medical records. I believe they were Mr. Chiu. Mr. Chiu  
22 certainly provided me at least the medical records listed  
23 under item No. 2. I think he provided me the records on item  
24 No. 1. He also provided me prescription drug monitoring  
25 database data.

1 Q That just recently though?

2 A Yes.

3 Q Okay. Let's go back to law enforcement for a second. Is  
4 there, like, e-mail exchanges with you guys? Did they write  
5 you a letter, anything like that, when they provided you with  
6 said material?

7 A With all due respect, I wasn't prepared to answer these  
8 sorts of questions, so I have to say I don't know. We may be  
9 able to go back in time at my calendar, and we can look at,  
10 perhaps, dates on documents, but I really have to plead  
11 ignorance here. I don't know.

12 Q I understand, Doctor. I'm not trying to pinpoint that  
13 precisely. Maybe it sounds like I am. Let me ask again.

14 But you do recall law enforcement presenting you  
15 with some, like, video material, like item No. 10, like the --  
16 you know item No. 11, stuff you said you didn't look at, stuff  
17 you said you set aside recently?

18 A I certainly looked at it, but set aside recently.  
19 Counselor, yes, I do remember the DEA speaking to me. I do  
20 remember them giving me documents of sworn statements, and I  
21 do remember them giving me audiovisual documentation on discs.

22 Q Okay. Do you have any particular dispute with the  
23 concepts of confirmation bias?

24 A I believe it's a real phenomenon.

25 Q So you agree it's something we're blind to ourselves?

1 A Certainly.

2 Q You're on a number of peer-reviewed journals. You're on  
3 the board of peer-reviewed journals, correct?

4 A Correct.

5 Q And part of the scientific method is an attempt to  
6 mitigate biasing information that could bias an expert,  
7 correct?

8 A Once again?

9 Q One thing scientists want to do is try to reduce the risk  
10 of bias in their work?

11 A That's correct.

12 Q And they take certain countermeasures to do that?

13 A In scientific studies they do.

14 Q Is your work here different than a scientific study?

15 A This is forensic review. It is not a scientific study.  
16 It doesn't have, you know, a study design.

17 Q But a forensic reviewer also wants to mitigate bias,  
18 true?

19 A He would -- I think a competent forensic reviewer would  
20 try to mitigate and minimize bias.

21 Q And I think you would agree with me that once an expert  
22 arrives at an opinion it's hard for that expert to disavow  
23 that opinion once given?

24 A I would say that that would not be a credible expert. I  
25 think a credible expert is someone willing to change his or

1 her opinion when faced with different facts or different  
2 circumstances.

3 Q But you are aware of the phenomenon that it's difficult  
4 for opinion makers to change their minds once they reach a  
5 certain opinion on a certain data set?

6 A I don't necessarily agree that that's true for  
7 individuals.

8 Q Okay. Okay. When you're reviewing a doctor's  
9 prescribing habits, would that be a fair characterization of  
10 the work you did in this case?

11 A Um, no.

12 Q Let me just ask you, how would you characterize the  
13 nature of the opinion you were asked to give in this case?

14 A Where the prescribing was in the usual course of  
15 professional practice. So we were focused on the pain  
16 management practice with particular emphasis on the issuance  
17 of controlled substances.

18 Q And when you were asked to review the material, how was  
19 the question or problem posed to you?

20 A Um, I have no specific recollection of the conversation,  
21 but the gist was, Does this prescribing fall within the usual  
22 course of this physician's professional practice?

23 Q And you are -- did you do anything in your review of the  
24 material to essentially double check yourself?

25 A Could you be more specific?

1 Q I'm just asking if you, after rendering an opinion, did  
2 you have a colleague review your work to see if there was any  
3 flaws in your work or if he saw it in a different way?

4 A That's not the customary way these cases are done. I  
5 will tell you that I went back and checked my own work.

6 Q Okay. And document -- rather, I'm sorry. Exhibit 17,  
7 you agree that at the time you provided this opinion that you  
8 had utilized the extraneous material, that you read it, and  
9 that was part of what your opinion was about?

10 A There were aspects of my opinion that did contain  
11 discrete items that were in the DEA non-sworn statements,  
12 correct.

13 Q Okay. Well, it was more than DEA non-sworn statements  
14 you were given.

15 A Well, please --

16 Q Okay. All right. I'm trying to be not biasing in the  
17 hearing. You were also given a DOH complaint. Do you recall  
18 that?

19 A If it's listed here, then I was given it, and I would  
20 have reviewed it. Item No. 5?

21 Q It's items 4 and 5.

22 A Yes.

23 Q Yes. And within that material there was some very --  
24 some very extreme information regarding Dr. Gayden. Do you  
25 recall that?

1 A I recall nothing specifically from those documents  
2 because, again, I was not asked to review those in preparation  
3 for today's hearing, and I have not looked at these materials  
4 in probably the better part of a year.

5 Q I understand. Well, at the time you reviewed all of the  
6 materials you were given?

7 A Correct.

8 Q And so and at the time, in Document 17, you tell us very  
9 clearly that in forming your opinion you reviewed the  
10 following documents?

11 A Correct.

12 Q Okay. So is it fair for us to say that your opinion  
13 contains your -- that the materials that you reviewed are  
14 reflected in the opinion?

15 A I'm not sure I understand the question as you've  
16 precisely asked it. I would ask you, if you don't mind, to  
17 ask it one more time.

18 Q Is it fair to say that the documents that you reviewed  
19 are part and parcel of your opinion, influenced the opinion?

20 A Not necessarily. Because I -- because I reviewed a  
21 document does not necessarily mean that contents of those  
22 documents appear in my opinion or even necessarily influence  
23 my opinion.

24 Q Okay. I'm not talking about content. Okay. Okay. But  
25 you also agree that bias is blind, that we are blind to our

1 own bias?

2 A We can be blind to our own bias, but bias can also be  
3 recognized and managed.

4 Q All right. We can also be blind to what's influencing us  
5 when we've read -- basically this was thousands of pages. You  
6 were provided with thousands of pages. Do you recall that?

7 A I recall a lot of pages.

8 Q Okay. So and not only were you given Department of  
9 Health complaints, which in and of themselves contain a raft  
10 of information that had nothing to do with Dr. Gayden's  
11 medical practice, you were given a video of a woman -- in  
12 fact, it's entitled on item No. 10. I'm, again, still at  
13 Exhibit 17. It appears, if one were to read that line  
14 there -- how do you read that label?

15 A Would you like me to read item No. 10?

16 Q I'm asking you when you look at it, how would you read  
17 it?

18 A "Disc contains interview under oath with former patient  
19 Korrienne Lundstrom."

20 Q How is the disc labeled?

21 A Gayden 2011-11227 interview with GF.

22 Q What's that shorthand for most of the time?

23 A Probably girlfriend.

24 Q And, again, you don't remember that tape now, do you?

25 A I remember nothing about that tape, no.



1 Q It was about 35 minutes.

2 MR. RYAN: I think I'm good, Your Honor. Thank you.

3 THE COURT: Thank you. Mr. Chiu, may this witness  
4 be excused?

5 MR. CHIN: Yes, Your Honor.

6 THE COURT: Will he be subject to recall?

7 MR. CHIN: Not from the United States.

8 THE COURT: From the defense?

9 MR. RYAN: No, Your Honor.

10 THE COURT: All right. Thank you, Doctor. You have  
11 a good day.

12 THE WITNESS: Thank you, Your Honor.

13 THE COURT: I would invite the Government or the  
14 defense, if they have any further witnesses on this matter, go  
15 on ahead and call them.

16 MR. RYAN: I do not, Your Honor.

17 MR. CHIN: The United States has no further  
18 witnesses.

19 THE COURT: All right. I've had a chance to review  
20 the materials you've submitted. So, Mr. Ryan, you're the  
21 moving party. I'll hear brief argument. And we need to  
22 manage our time. I understand this is one of the bigger  
23 chunks of the day. But we don't have an unlimited amount of  
24 time. So if you want to make an argument tying things  
25 together briefly, before we move on to the next motion, you're

1 welcome to do so.

2 MR. RYAN: Certainly, Your Honor. Quite frankly,  
3 Mr. Chiu has not responded to the motion, has not joined issue  
4 with the motion. He does not deny that there was the  
5 provision of a great deal of biasing contextual information.  
6 I think he admits that the material was biasing by  
7 subsequently asking the expert to re-review materials without  
8 a big chunk of the biasing contextual information, even though  
9 some remained.

10 And, Judge, I don't know if you looked at Exhibit 3,  
11 but we're not talking about statement --

12 THE COURT: I was reluctant to since you titled it,  
13 "Please consider reading the motion before reviewing  
14 Exhibit 3," and you put "caution" twice on there, but, yes,  
15 I've had a chance to look at it.

16 MR. RYAN: Okay. If you've looked at it, then I'll  
17 talk about that a little more. That was just my way of giving  
18 the Court the option of remaining blind to the biasing  
19 material.

20 THE COURT: Let me ask you a hypothetical. This is  
21 sort of a quasi *Daubert* issue because what you're essentially  
22 trying to do is create a hole in these expert roles that  
23 essentially is going to exclude just about every expert that  
24 appears.

25 MR. RYAN: No, Your Honor.

1           THE COURT: Let me ask you a hypothetical. I'm  
2 conducting an exclusionary -- there's a constitutional  
3 objection where the defense is seeking to exclude information,  
4 and I grant in part some of that. So something was done  
5 illegally at the beginning of an investigation and during a  
6 motions hearing prior to trial some of those matters are  
7 excluded. The jury is never going to see that.

8           Using that sort of theory, wouldn't it be  
9 inappropriate for me to sentence that person later on if those  
10 matters are not to be considered because of the confirmation  
11 bias I would have against your client at that point?

12           In other words, there are these cases out there, the  
13 appellate cases that indicate, and I've heard this analogy  
14 before, judges are like bathtubs. You pull the plug; all the  
15 water runs out; and we start anew. The idea being that we  
16 erase from -- we erase all of the potential bias we have in  
17 reviewing a potential co-defendant case or another case  
18 similar to that or information about the defendant that's  
19 inappropriately -- would be inappropriately considered for  
20 sentencing. That has to be out.

21           I think, according to this theory, there are no such  
22 things as limiting instructions anymore for jurors. As soon  
23 as I see something I shouldn't see, which implicitly in your  
24 Exhibit 3 you're concerned with, I can't erase it, and I don't  
25 even know that I'm being biased in considering it. And so, if

1 I move forward in this case, then the person who is being  
2 tried is not going to get a fair decision or result from me  
3 once I've been tainted by this biased information. That's  
4 kind of my concern.

5 I think this seems like really all encompassing, and  
6 on top of that there doesn't seem to be a lot of legal  
7 authority. And I don't question the scientific application of  
8 this information, but we're looking and looking and looking,  
9 and if you can help me find where this has been used in this  
10 type of setting to exclude an expert witness, I would love to  
11 know what case that is.

12 Because it seems to me that what the doctor said  
13 was, We're quick to spot bias in others and quick to miss it  
14 in ourselves. He indicated that confirmation bias contains  
15 conclusions, and I don't think there's any dispute on that.  
16 Experts err in reaching conclusions not supported by the data.  
17 So that's kind of sort of where he began his analysis.

18 Well, doesn't cross-examination handle that issue?

19 MR. RYAN: Do you want me to address the  
20 hypothetical or the cross-examination question?

21 THE COURT: Just let's focus on the  
22 cross-examination, or we're just going to go a little too far  
23 down the rabbit hole.

24 MR. RYAN: Your hypothetical is important to  
25 address. First of all, this is the Government's fault. The

1 Government handed the expert material that indicated that the  
2 client raped children. Okay. It really had nothing to do  
3 with examining whether or not was he was a bad pain manager.  
4 So the Government has -- so, first of all, it's the  
5 Government's fault, okay, and they admit it when they then  
6 withdraw it. I'm not saying it's Mr. Chiu's fault. I'm not  
7 blaming this particular prosecutor, but it's the fault of the  
8 Government.

9 Your hypothetical, though, let me address that.

10 THE COURT: Sure.

11 MR. RYAN: There's a difference between the all  
12 source expert or the decision maker. You're the decision  
13 maker, and the way our system works is we want the Court to  
14 have as much information as it can, and we do allow Courts to  
15 make decisions, probably in this day and age, that we now  
16 understand might influence the Court at later times at  
17 sentencing, and we see that happen where the Judge does  
18 exclude the information from the jury because the Judge  
19 recognizes legally the jury shouldn't look at it, but will  
20 even bring it up at sentencing, but I can consider it at  
21 sentencing, this is why I am, and I will alter the sentence  
22 accordingly.

23 That's not what he was asked to do. He was not  
24 asked to make a decision in the case. And that's what the  
25 prosecution did. They handed him their case. They said, He's

1 guilty, and look at all of this information and go ahead and  
2 tell us he's guilty. They didn't ask him -- and you heard the  
3 expert himself say. So he was asked to render an opinion on a  
4 discrete portion of the case on whether or not Dr. Gayden was  
5 prescribing outside the course of medical practice.

6 And in that, they give a video of a woman telling  
7 the interviewer, the DEA interviewer, my boyfriend taught me  
8 how to be a doctor shopper. That's what I did with  
9 Dr. Gayden. I shopped him.

10 And he terminated the patient when he had suspicion  
11 to believe she was doing that. Was that information given to  
12 the expert? No.

13 All of their patient files that they give him -- he  
14 had 5,000 patients. Agent Sala, here, combed through 5,000  
15 records to whittle it down to 191 based on the false criteria,  
16 her notion that the person had to be under 25 and being  
17 prescribed within a certain time period. He had patients that  
18 were over 25, many of them.

19 So the whole body of material given to this expert  
20 is biasing because he's being asked to do one thing, Tell us,  
21 you're the expert. We're not doctors. The jury is not  
22 doctors. We want to hear from you, and Dr. Murrie talked  
23 about why expert testimony is so powerful, Your Honor, is  
24 because it appears to be some independent source. And the  
25 juries rely on it and judges rely on it.

1           We want to know your independent opinion about one  
2 part of the case. In your opinion was he prescribing outside  
3 the course of professional conduct? And that's not what he  
4 was given. He was given standards of conduct, not outside the  
5 professional conduct. He was given Florida standards.

6           Now he's measuring him against a malpractice  
7 negligence standard with a raft of biasing context  
8 information. That's what's different about your hypothetical.

9           And the cross-examination. Mr. Chiu sets up -- or  
10 the Government has set up wittingly or unwittingly a unique  
11 trap for the defense. You know, Dr. Reisfield seems like a  
12 nice guy. He's going to come across very well in front of a  
13 jury. I get that.

14           He's highly accomplished. So I didn't even get into  
15 that. I think there's a whole argument about asking the guy  
16 who has literally written the book on some of this material to  
17 judge, you know -- no offense -- you know, your average  
18 frontline doctor who is just doing a daily grind and isn't  
19 writing articles, isn't writing books, is in fact reading them  
20 to take guidance. So there's even that kind of an argument as  
21 well. So it's a neat little trap that's been set for the  
22 defense, again wittingly or unwittingly. How am I to  
23 cross-examine him?

24           You're right. I couldn't find a case either that  
25 directly said where the confirmation bias problem was used to

1 exclude a witness.

2           There is a Northern District of Alaska case I didn't  
3 cite to because it's kind of far afield, but the Government  
4 was trying to preclude -- or the plaintiff, maybe it wasn't  
5 the Government, that was trying to preclude a confirmation  
6 bias witness. I can give you that case. It's somewhat  
7 instructive. It has to do with the review of film and  
8 pictures and the graininess of it. And the expert was being  
9 called to show how confirmation bias could influence an  
10 expert's opinion on the review of, you know, difficult to read  
11 video or film or photographs. I forget exactly what it was.  
12 I can get you that case, if that's helpful to the Court.

13           THE COURT: Sure. File it. I'll take a look at it.

14           MR. RYAN: Yeah. It's a case where --

15           THE COURT: I mean, you don't need to go over the  
16 case. I'll read it.

17           MR. RYAN: Yeah. Okay. So the plaintiff tried to  
18 knock out the expert, and the Court said, no, the expert is  
19 coming in. They're having confirmation bias experts in the  
20 cases. And Mr. Chiu said I didn't cite to legal authority. I  
21 did in footnote six. I cited to the Middle District of  
22 Florida Bankruptcy Court. They talked about confirmation bias  
23 and it being a well-known phenomenon.

24           I guess what he meant is, did I cite to a case where  
25 an expert has been precluded because of it? You're right. I



1 can't find one either. But it goes to methods, and it goes to  
2 the reliability of the method. The method here is the expert  
3 is given so much overwhelming information of guilt. He was  
4 not asked to review the material to determine whether or not  
5 Dr. Gayden practiced -- or prescribed outside the course of  
6 professional practice, but rather using the statutes for  
7 standards of care in Florida. There are different standards,  
8 Your Honor. How am I to cross him now?

9 *Daubert* itself said, yeah, we want to -- we want  
10 mostly for this information to get in front of the jury. Let  
11 cross-examination to it. Isn't it true, Dr. Reisfield, you  
12 read a statement by a witness who claimed that she knew that  
13 Dr. Gayden had sex with 13- and 14-year-olds? I mean, I  
14 can't -- and it goes on and on and on, including the material  
15 in the Department of Health stuff.

16 So I don't think it's fair that this witness be  
17 allowed to present an opinion in which I'm either stymied in  
18 my cross-examination or give it up all together. And that's  
19 just one piece of the material.

20 In my Exhibit 3 that I cleverly put under my caution  
21 cover, that's a summary of the material. I mean, the material  
22 is voluminous. It's thousands of pages. It's hours of video.

23 It's all kinds of statements that he supposedly paid  
24 off debts to stripper bars with prescriptions. Where is the  
25 evidence for that? And did Agent Sala or anyone in the

1 Government take one step in the direction of confirming that  
2 information? No. There aren't that many stripper bars in  
3 Melbourne.

4 THE COURT: So they should have -- I'm not going to  
5 get into this. I understand. And I appreciate your argument.

6 MR. RYAN: I'm saying it's so much information. And  
7 that's information that he's in fact doing the crime. But  
8 there's no -- it's the lured hearsay of a doctor shopper  
9 patient who was threatened by Agent Sala prior to the  
10 interview. We know you're a doctor shopper. We're going to  
11 charge you with doctor shopping. That's what she says before  
12 all of these interviews, she candidly put it in her ROIs, and  
13 then elicits information from them.

14 I can tell you're tired of me, so I'll stop.

15 THE COURT: I'm not tired of you. But you've made  
16 your point effectively. I appreciate it.

17 Mr. Chiu, anything?

18 MR. CHIN: Just briefly, Your Honor. I won't rehash  
19 the entirety of the pleadings.

20 THE COURT: We're going to run out of time, if we do  
21 that.

22 MR. CHIN: Yes, Your Honor. Real quick. One of the  
23 things that I do want to factually take issue with, the idea  
24 that, you know, the stuff that was -- that would have been, I  
25 guess, put the defendant in a good light was withheld from

1 Dr. Reisfield. I don't know that that's the case. If you  
2 look -- the interview that Mr. Ryan was crossing Dr. Reisfield  
3 on where he had him read the face of the disc is exactly the  
4 same interview that in another pleading, you know, Mr. Ryan  
5 says that that's the valuable testimony that's been lost  
6 because the witness has died. So I mean I don't think it's --  
7 the record supports that only bad stuff was given to  
8 Dr. Reisfield.

9 Just real quick, as far as in terms of why we are  
10 limiting Dr. Riesfield's reliance on material is not  
11 necessarily because we think that -- you know, because of the  
12 bias thing. It's because looking at this case and looking at  
13 the scope of this case, as I'm trying it narrow for trial, I  
14 didn't want Dr. Reisfield to rely on a bunch of stuff, you  
15 know, hearsay evidence that might not come in, even though he  
16 could.

17 THE COURT: I take you at your word, but his  
18 position is a little -- you can't unring the bell is their  
19 possession. He's been exposed to it. You've showed him bad  
20 stuff, and then you come back and tell him, Don't consider bad  
21 stuff. Just make your conclusion based on this limited stuff,  
22 not all the bad stuff we initially gave you, and their  
23 position is he can't forget the bad stuff. But I guess my  
24 problem here is there's a greater potential application here  
25 because in a civil context -- and this would apply across the

1 board -- it's generally understood that Government witnesses,  
2 the people who testify for your side seem to consistently  
3 testify for your side. And in plaintiff and defendant cases,  
4 in civil cases, it's the same deal.

5           When you hire them, you give them all of the  
6 material you want them to have that they rely on, and they  
7 testify to that, and in this particular case, I understand  
8 what his argument is. You painted a picture of a monster  
9 potentially. I haven't seen all of the material in the detail  
10 that you two have. But you paint the guy as a monster, hand  
11 the information to the expert. The expert says, Oh, yeah, he  
12 did it.

13           And then you come back and say, Well, all that stuff  
14 that made him look like a monster, throw that out, erase that  
15 from your memory, and just rely on this little amount of  
16 information, and then he comes back and says, Oh, yeah, he did  
17 it.

18           And their position is, simply put, that even though  
19 consciously he's not considering those items, that  
20 subconsciously he is, even if he doesn't know he is. And now  
21 I have a situation where I have Dr. Murrie, an accomplished,  
22 accredited professional coming in here saying, He's using it,  
23 even though he doesn't know he's using it. And then another  
24 accomplished professional saying, No, no, no. I understand  
25 confirmation bias. I understand it's a real concept. I'm not

1 using it. It's sort of fingers pointing back and forth.

2 It's a difficult decision for me to make. But I  
3 understand where we're at.

4 MR. CHIN: Your Honor, my ultimate point is that if  
5 at the end of the day if Dr. Riesfield's opinion doesn't stand  
6 on the data that he's relying on and the data that the jury is  
7 going to see, I mean, that's something that can be dealt  
8 with --

9 THE COURT: On cross.

10 MR. CHIN: -- on cross.

11 THE COURT: I guess the only solution -- and I'm not  
12 saying this is going to be the solution. But if I were to  
13 accept the premise offered to me by defense, which has never  
14 been used effectively anywhere -- I have to say, I mean, it's  
15 never been used that we can find to exclude any expert  
16 testimony -- then you would have to find a brand-new expert.  
17 You would have to give the expert only the limited data that  
18 you've shown this expert on the final determination, and we  
19 would have to start from scratch.

20 MR. CHIN: That's correct, Your Honor.

21 THE COURT: All right. And the expert that you  
22 obtained on your first try is apparently one of a high-level  
23 expert who is well-respected in the field, and that's why you  
24 wanted to get him. Is that correct?

25 MR. CHIN: That's correct, Your Honor.

1 THE COURT: All right. I understand. Tough  
2 decision. Thank you both for your very capable arguments. I  
3 will take that under advisement.

4 So let's handle the low hanging fruit here. There's  
5 one motion that I think is going to be denied as moot at this  
6 point. There was a motion in limine on one particular issue  
7 where the Government has indicated that it is no longer an  
8 issue. Is that correct?

9 MR. CHIN: Is that Dr. Doering?

10 THE COURT: Let me find it. What number document?

11 MR. RYAN: 79, Your Honor.

12 THE COURT: 79 is a nonissue. Is that a fair  
13 statement from the Government. You don't intend on calling  
14 Dr. Doering. Is that correct?

15 MR. CHIN: That's correct, Your Honor.

16 THE COURT: All right. Mr. Ryan, would you agree  
17 with me that that motion is now moot? They're not calling  
18 him.

19 MR. RYAN: I believe in that motion I also sought to  
20 preclude pattern prescribing testimony. Are we agreed to  
21 that?

22 THE COURT: That's a different motion I thought.

23 MR. RYAN: Oh, maybe it is. I think you're right.  
24 I think it's in my -- I think that's right.

25 THE COURT: All right. So I understand, on 88 -- or