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IN THE SUPERIOR COURT

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,	**CR2015-144211-001**
Plaintiff,	**DEFENDANT'S MOTION TO PRECLUDE TESTIMONY AND REQUEST FOR *DAUBERT* HEARING RE: STATE'S WITNESS TRACY FOSTER**
vs.	
LESLIE MERRITT, JR,	
Defendant	(Assigned to Honorable Warren Granville)
	EVIDENTIARY HEARING REQUESTED

Defendant, through undersigned counsel, hereby requests a hearing pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), to determine whether the government's proposed expert testimony is both relevant and

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reliable. At trial, the State seeks to admit opinions from Tracy Foster, an intelligence analyst, as to (1) what she believes are "logical conclusions" as to who was "most likely using" a particular phone on specific dates, and (2) her interpretations of various Facebook posts made on the Defendant's account. It is Defendant's position that the State's proposed evidence appears to have no relevance to any issue at trial, and the disclosure to date does not meet even the minimum threshold of scientific reliability of the proffered testimony. As such, Defendant respectfully requests an evidentiary hearing.

This motion is supported by the attached Memorandum of Points and Authorities.

MEMORANDUM OF POINT AND AUTHORITIES

I. Introduction

Rule 702 of the Arizona Rules of Evidence and the corresponding Supreme Court case law govern the admissibility of expert testimony. Arizona courts have also recognized federal court decisions interpreting the federal rule as persuasive authority. *Ariz. State Hosp. v. Klein*, 231 Ariz. 467, 473, 296 P.3d 1003, 1009 (App. 2013).

To introduce expert testimony, the proponent must first demonstrate that the proffered expert is "qualified as an expert by knowledge, skill, experience, training, or education..." Ariz. R. Evid. 702[1]. Next, the proponent must satisfy the court that the proffered testimony is both relevant and reliable. *Id.*; *Daubert*, 509 U.S. at 589. The Supreme Court has interpreted

[1] Ariz. R. Evid. 702 provides: If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Rule 702 as requiring that the district court act as a "gatekeeper," ensuring that "any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Id.*, see *also Kumho* Tire Co., 526 U.S. at 141; and *General Electric Co. v. Joiner,* 522 U.S. 136, 142 (1997). The defense requests an evidentiary hearing so as to allow this Court to fulfill its gatekeeper function, as allowing evidentiary objections to be made in front of the jury when the Court hears the proffered testimony for the first time would substantially increase the risk for a potential mistrial and thereby threaten the notion of judicial economy, let alone due process.

The burden of laying the proper foundation for the admission of expert testimony is on the party offering the expert. *Allison v. McGhan Medical Corp.*, 184 F.3d 1300, 1306 (11th Cir. 1999). To satisfy the reliability requirement, the proponent of the expert testimony must show by a preponderance of the evidence both that the expert is qualified to render the opinion and that the methodology underlying her conclusions is scientifically valid. *Daubert*, 509 U.S. at 589-90, 113 S.Ct. 2786. A court should not admit opinion evidence that "is connected to existing data only by the *ipse dixit* of the expert." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997). When the analytical gap between the data and proffered opinion is too great, the opinion must be excluded. *Id.* Similarly, an expert's unexplained assurance that his opinion rests upon accepted scientific methodology is insufficient to establish reliability. *McClain v. Metabolife, Int'l, Inc.*, 401 F.3d 1233, 1244 (11th Cir. 2005); *see also Furmanite America, Inc. v. T.D. Williamson, Inc.*, 506 F. Supp.2d 1126, 1130 (M.D. Fla. 2007).

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II. Reliability

In evaluating whether expert testimony is reliable, the court must consider the following non-exhaustive list of factors: (1) whether the theory is scientific knowledge that will assist the trier of fact and can be tested; (2) whether the theory has been subjected to peer review or publication; (3) the known or potential rate of error and the existence of standards controlling the technique's operation; and (4) the extent to which the methodology or technique employed by the expert is generally accepted in the scientific community. *Ariz. State Hosp. v. Klein*, 231 Ariz. at 473, 296 P.3d at 1009 (App. 2013) citing *Daubert*, 509 U.S. at 593-94. While *Daubert* refers to scientific testimony, *Kumho Tire* held that "[t]he *Daubert* standard applies to all expert testimony, whether it relates to areas of traditional scientific competence or whether it is founded on engineering principles or other technical or specialized expertise." *Smith v. Ford Motor Co.,* 215 F.3d 715, 719 (7th Cir. 2000); *see Kumho Tire*, 526 U.S. at 146.

III. Relevance

Even if the court finds that a proffered expert is qualified and her testimony is reliable, the testimony may not be admitted unless it is also relevant. "When analyzing the relevance of proposed testimony, the district court must consider whether the testimony will assist the trier of fact with its analysis of any of the issues involved in the case." *Ford Motor Co.,* 215 F.3d at 718.

IV. Analysis

Tracy Foster has no training in psychiatry or psychology. She has no experience as a social worker, counselor, or mental health professional. Prior to become an intelligence analyst for the Department of Public Safety, she

was an administrative assistant in the crime lab and was awarded her current position as a promotion. Simply stated, she lacks the requisite background to testify as an expert.

A. Phone Analysis

Foster's report analyzed call usage records and subjectively interpreted them in such a manner to support the State's theory of the case. Her reports are separately submitted under seal as Exhibit 1 (Bates 11798-11825 and 12065-12109).

Indeed, Foster's report is not a report at all. Rather, it is a self-professed rebuttal and self-serving attack on the defense's assertions that the Defendant had an alibi for each and every one of the shootings with which he is charged. Sprinkled through the report are numerous occasions where Foster assumes facts that are not substantiated by the investigation, and where she assumes human behavior factors to opine scenarios that are the "most likely," all in the name of attempting to rebut positions taken by the defense. Yet there are no concrete facts upon which Foster can state an opinion to a reasonable degree of certainty, let alone a scientific certainty, as her opinions are solely the product of conjecture, as opposed to science.

Indeed, a substantial portion of Foster's report is entitled "Motion Alibi Research" and was generated in response to the defense's Motion to Modify Release Conditions filed on October 13, 2015. As the Court will readily recall, the defense provided detailed phone and GPS records, some of which were compiled by the FBI, to demonstrate that the Defendant was nowhere in proximity to several of the shootings.

Foster's report lays out the defense claims, and follows each of them with a section labeled "Rebuttal." Foster's "rebuttals" are nothing but

argumentative speculations, rather than any objective or scientific theories, and are offered for the sole purpose of attempting to undermine the alibi defense.

As a representative example, Foster attempts to rebut the defense's contention that the Defendant's grandmother, Marvene Halterman, will corroborate phone records and testify to her five minute conversation with the Defendant at 10:51 a.m. on Saturday, August 29, 2015. Shootings one and two occurred at 11:03 and 11:05 a.m. that morning. On this point, Foster's report reads as follows:

> Claim 2: ***HALTERMAN*** *indicates that she was talking to* ***MERRITT JR*** *during the phone call at 10:51 on 08/29/15 and that she could hear [the defendant's fiancé]* ***Eddina*** *and their children in the background.* ***HALTERMAN*** *claims that* ***MERRITT JR*** *requested money to pay bills.*
>
> Rebuttal: Call details records for [the Verizon phone] and [the Obama phone] between 08/01/2015 and 08/31/2015 indicate 447 contacts with **HALTERMAN'S** phone [number] indicating it may be difficult to remember the exact details of one particular phone contact.

While Foster's "rebuttal" may serve as fodder for cross examination of Halterman or the State's closing argument, it is by no means proper to elicit such testimony either in the State's case-in-chief or in its rebuttal case. Without question, the Court would sustain the defense's objections to her opinion on grounds including, but limited to, speculation, foundation, and as being argumentative.

In her defense interview, Foster conceded that she employed no scientific methodology whatsoever to arrive at her opinions. She

acknowledged that there is no scientific theory which governed her interpretative processes. She further acknowledged that there is no objective error rate which could be applied to evaluate the objective scientific reliability of her work. In short, she conceded that everything she did was "speculation" on her part and, as her report plainly states, her work was aimed solely at presenting subjective "logical" conclusions that were not made with any scientific certainty.

When the gap between what is required for a scientifically-valid opinion and how an expert arrived at it fails to meet the minimum requirements of scientific reliability, preclusion is warranted as a matter of law. See *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997) (When the analytical gap between the data and proffered opinion is too great, the opinion must be excluded).

Even if, *arguendo,* this Court determines that Foster's testimony passes muster under Rule 702, because it is based entirely in conjecture, it does not pass the test of relevance as it will not assist the trier of fact in determining any of the factual issues presented it.

B. Facebook Posts

A significant portion of Foster's report (Bates 12081-12095) depicts a handful of screen shots of images which Foster selected from the hundreds, if not thousands of posts on the Defendant's Facebook page – all in an effort to make a circumstantial showing that the Defendant is more likely to have engaged in the crimes alleged in the Indictment.

The majority of the posts at issue are "shares" or "re-posting" of news articles about the freeway shootings posted by local media outlets. Although conveniently redacted from Foster's report, the defense has confirmed that

several of these posts were shared by tens of thousands of other Facebook users.

Foster categorized the screen shots as follows: anti-government, anti-law enforcement, and pro-drug. Yet, she conceded that none of the posts upon which she focused were illegal in any way, nor did they represent views that are not shared by millions of Americans. For example, Merritt shared a post concerning his feelings against having to register guns. She opined that this "anti-government" view made it more likely that he was engaged in criminal behavior, but acknowledged that under her logic, the entire NRA was more likely to also be involved with criminal activity. Likewise, Foster opined that Merritt was more inclined to be involved in criminal activity because he shared a post supporting the legalization of medical marijuana, even though there is no allegation whatsoever that the crimes alleged by the State are in any way drug related and the fact that medical marijuana has been legal in Arizona for several years.

As is the case with her interpretation of the Defendant's call usage patterns, Foster's opinions about the Defendant's Facebook posts are grounded entirely upon subjective conjecture and are not the product of any scientific process or methodology. Foster is no more qualified to testify as to behavioral tendency based upon generic social media posts than is an ordinary person on the street, and the means by which she arrived at her conclusions are no more scientifically valid than a Ouija board.

III. The Unreliabilty of Foster's Opinions

"[I]f the foundational data underlying opinion testimony are unreliable, an expert will not be permitted to base an opinion on that data because any opinion drawn from that data is likewise unreliable." *Merrell Dow Pharms., Inc.*

v. Havner, 953 S.W.2d 706, 714 (Tex. 1997). Also,"[i]f an expert's opinion is based on facts that are materially different from the facts in evidence, then the opinion is not evidence." *General Motors Corp. v. Sanchez,* 997 S.W.2d 584, 596 (Tex. 1999); *see also Rayon v. Energy Specialties, Inc.*, 121 S.W.3d 7, 20 (Tex. App.—Fort Worth 2002, no pet.) (professional engineer properly excluded as an expert because he based assumption on an unproven fact).

Additionally, if a test result results from incomplete data or is not scientifically reliable, then it must be barred from the jury's consideration pursuant to Rule 403, Arizona Rules of Evidence. *Buscaglia v. United States*, 25 F.3d 530, 533 (7th Cir. 1994) citing *United States v. Brown*, 7 F.3d 648, 654 (7th Cir. 1993) ("...expert testimony that is otherwise admissible under Rule 702 may nonetheless be excluded under Rule 403 if its probative value is outweighed by the danger of unfair prejudice.")

At the risk of regurgitation, and as noted above, Foster conducted no scientific testing whatsoever to arrive at her opinions. She has conceded repeatedly that her opinions are based on speculation and assumption, and that she arrived at them without any type of defined methodology or analytical process. Moreover, Foster's labeling someone as "anti-government" is substantially prejudicial and bears no probative value as to the ultimate issues before the jury at trial. As such, based on *Daubert, Kumho,* and their progeny, they are wholly unreliable and inadmissible as a matter of law.

CONCLUSION

Based upon the above, the Defendant respectfully requests a *Daubert* evidentiary hearing to determine, prior to trial, as to whether the jury can consider Tracy Foster's opinions, as more fully stated, *supra.*

Respectfully submitted this 15th day of March, 2016.

/s/ Jason D. Lamm
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/s/ Ulises Ferragut
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