

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
SOUTHERN DIVISION at LONDON  
No. 6:14-CR-37-SS-GFVT-HAI

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff	)	<b>Memorandum of Law</b>
	)	<b>Supporting Joint Motion to</b>
vs.	)	<b>Exclude Testimony of</b>
	)	<b>Government’s Pharmacist</b>
	)	<b>Expert Witness</b>
JAMES ALVIN CHANEY, M.D.;	)	
LESA L. CHANEY;	)	
ACE CLINIQUE OF MEDICINE, LLC	)	
	)	
Defendants	)	
	)	

An expert witness the government has identified, Anne Youlio, a doctor of pharmacology, to give testimony regarding whether prescriptions issued by defendant Dr. James Alvin Chaney had a legitimate medical purpose and were issued outside the normal course of medical practice. Apparently, Youlio has no experience or expertise in pain treatment or management. Similarly, Youlio is neither trained nor licensed to treat patients or prescribe medications. Accordingly, the Court should enter an Order excluding at trial any expert testimony from Youlio.

**Statement of the Case**

The government has identified a pharmacist, Anne Marie Youlio, who has a Doctorate of Pharmacology but no medical degree, to opine whether defendant James Alvin Chaney issued prescriptions without a legitimate medical purpose and outside the usual course of professional practice. A copy of the government’s disclosure regarding Youlio is tendered here with as Ex. 1 to this memorandum.

It appears that Youlio’s proposed expert testimony is supposed to support the government’s charges in counts 1-62 of the second superseding indictment.

Counts 2-62 charge that specific patients were issued prescriptions on specific dates that had no legitimate medical purpose and were outside the scope of usual medical practice. All of these, of course, are rolled into the conspiracy charged in count 1 of the superseding indictment, which is premised upon issuance of “prescriptions not for legitimate medical purpose and outside the usual course of professional medical practice[.]” (Second Superseding Indictment ¶ 49 at p. 11, DE 190, Page ID# 1887). There is no indication that Ms. Youlio has either examined any of these patients or even reviewed their files.

Ms. Youlio’s CV indicates substantial work experience as a pharmacist in a number of roles. The CV is attached as Ex. 2 to this memorandum.

It does not appear from Ms. Youlio’s CV that she has much if any experience regarding pain management and its treatment, certainly she is not a medical doctor. It is impossible to infer from Ms. Youlio’s CV that her expertise extends to determining what treatment (including appropriate medication) would be appropriate for a particular condition or patient. It does not appear from Ms. Youlio’s CV that she is qualified to testify regarding “protocols” for the treatment, diagnosis, and prescription of drugs to treat pain. Moreover, there is no indication that Ms. Youlio is trained or licensed to treat patients or to prescribe drugs.

### **Argument**

#### **1. The Government’s Expert Pharmacist Is Not Qualified to Give Expert Testimony Regarding the Propriety of a Pain Medication or Medical Practice**

To be admissible expert testimony must pass the test established by *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). A district court serves a critical role as the “gatekeeper” to the admission of expert testimony. *Daubert*, 509 U.S. at 589. The gatekeeping obligation set forth in *Daubert* applies

with equal force in all types of proposed expert testimony. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999).

To determine whether expert testimony is admissible trial courts must consider the following:

(1) whether the expert is qualified by knowledge, skill, experience, training or education to testify competently regarding the matter she intends to address;

(2) whether the methodology by which the expert reaches her conclusions is sufficiently reliable as determined by the inquiry directed in *Daubert*;

(3) whether the testimony assist the trier of fact, through the application of scientific, technical, or specialized expertise to understand the evidence or to determine a fact in issue.

*In re Scrap Metal Antitrust Litigation*, 527 F.3d 517, 529 (6<sup>th</sup> Cir. 2008).

The proponent of expert testimony not the party challenging it has the burden of establishing each of these requirements. *Smelser v. Norfolk Southern Ry. Co.*, 105 F.3d 299, 303 (6<sup>th</sup> Cir.), *cert. denied*, 522 U.S. 817 (1997).

The first prong of the analysis – whether the expert is qualified – ensures that the proposed expert skills and education are not merely adequate generally, but actually relate to specific opinions he or she proposes to offer. “An expert’s opinion is helpful only to the extent the expert draws on some special skill, knowledge, or experience to formulate that opinion; the opinion must be an expert opinion (that is, an opinion informed by the witness’s expertise) rather than simply an opinion broached by a purported expert.” *United States v. Benson*, 941 F.2d 598, 604 (7<sup>th</sup> Cir. 1991). Thus, an expert may be highly qualified to respond to certain questions and to offer certain opinions, but insufficiently qualified to respond to other, related questions, or to opine about other areas of knowledge. *See, e.g., Smelser, supra* (“When making a preliminary finding regarding an expert’s qualifications under Fed.R.Evid. 104(a), the court is to

examine not the qualifications of a witness in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question.”)(citations and internal quotation marks omitted).

A pharmacist or a doctor of pharmacology, even one with a background and substantial experience in pain treatment, a qualification that Ms. Youlio apparently lacks, is not qualified to give expert testimony regarding the treatment of patients, which goes to whether a particular prescription had a legitimate medical purpose or to the practice of medicine and treatment of patients in general. The Sixth Circuit affirmed the exclusion of similar proffered testimony in *United States v. Mukherjee*, 289 Fed.Appx. 107 (6<sup>th</sup> Cir. 2008).

In *Mukherjee*, the defendant, a doctor, was charged with one count of conspiracy to distribute prescription medication and forty-four counts of unlawfully distributing Oxycontin by issuing prescriptions. 289 Fed.Appx. at 109. These charges mirror those in this case.

The defendant sought to present expert testimony from a doctor of pharmacy, a Dr. Baumann, who, unlike Ms. Youlio, was an expert in pain management and was to testify that the defendant’s actions were medically appropriate. *Id.* at 110. The district court excluded Baumann’s proposed expert testimony, observing that “[h]e’s not a medical doctor, he’s not a—he’s not a D.O., he’s not an M.D.” *Id.*

The Sixth Circuit affirmed as to the exclusion of the pharmacist’s expert testimony, explaining as follows: “Dr. Baumann was a pharmacist who could not issue prescriptions. He was not a physician. His professional skills and qualifications were in analyzing and filling prescriptions. He may have been an expert in pain management, but that expertise did not extend to determining what treatment (including appropriate medication) would be appropriate for a particular condition or patient.” *Id.*

A similar ruling was made by the court in *United States v. Binder*, 26 F.Supp.3d 656 (E.D. Mich. 2014), where the defendant's motion for judgment of acquittal was granted. In *Binder*, the government offered testimony from pharmacists in support of its charge that the defendant doctor had violated 21 U.S.C. § 841 by issuance of some prescriptions. This expert testimony was not sufficient, since the pharmacists were not qualified to either treat patients or prescribe medication. The absence of qualified expert testimony to support its case was fatal to the government's prosecution and, accordingly, the defendant's motion for judgment of acquittal was granted.

There is one case that appears to go against the defendants' motion here, *United States v. Tran*, 609 Fed.Appx. 295 (6<sup>th</sup> Cir. 2015), where the Sixth Circuit did not discuss or acknowledge its earlier decision in *Mukherjee* and asserted that the defendant-appellant's poor briefing had not cited any "relevant legal authority" in support of the argument that the pharmacist's testimony should have been excluded. *Id.* at 299. *Tran* tells us all too little about the pharmacist's qualifications, although the court notes that the pharmacist's testimony was offered to "testify about a pharmacist's ethical and legal obligation to question or refuse prescriptions that appear to be outside the regular course of a physician's practice." *Id.* There is no issue in this case regarding a pharmacist's ethical and/or legal obligation(s), so *Tran* would appear to be irrelevant.

### **Conclusion**

The government's disclosure regarding Ms. Youlio does not indicate that she is qualified to give expert testimony regarding whether a prescription was consistent with a legitimate medical purpose or in the usual course of medical practice, since she is neither trained nor qualified to treat patients or issue prescriptions and appears to have no experience whatsoever in pain treatment.

Accordingly, the Court should enter an Order excluding Youlio's proposed testimony.

Respectfully submitted,

BY: /s/Robert L. Abell  
ROBERT L. ABELL  
120 N. Upper St.  
Lexington, KY 40507  
859-254-7076 (phone)  
859-281-6541 (fax)  
E-mail: Robert@RobertAbellLaw.com  
COUNSEL FOR DEFENDANT  
LESA L. CHANEY

and

BY: /s/ Elizabeth S. Hughes  
(with permission)  
Elizabeth S. Hughes  
GREEN CHESNUT & HUGHES PLLC  
201 East Main Street, Suite 1250  
Lexington, KY 40507  
(859) 475-1471 (phone)  
(859) 455-3332 (fax)  
Email: ehughes@gchandh.com  
COUNSEL FOR DEFENDANTS  
JAMES ALVIN CHANEY, MD, AND  
ACE CLINIQUE OF MEDICINE, LLC

### **Certificate of Service**

I certify that on February 4, 2016, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send notice of electronic filing to the following: All Counsel of Record.

BY: s/Robert L. Abell  
Robert L. Abell  
COUNSEL FOR DEFENDANT