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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiff, -VS- DANIEL BOONE, Defendant	CR. No. 10-XXXXX -01 MOTION IN LIMINE REGARDING EXPERT TESTIMONY CONCERNING DRUG QUANTITY AND FIREARMS

The Defendant, DANIEL BOONE, through counsel Terri Wood, moves this Court to conduct a hearing pursuant to FRE 702, and thereafter enter its Order instructing the Government, its representatives, and witnesses to refrain absolutely from making any reference whatsoever in person, by counsel or

through witnesses or exhibits, to testimony or any other evidence concerning the following:

(1) Opinions that the 89 marijuana plants seized from property in XX, Oregon, where Mr. Boone was found and arrested, and/or the quantity of dried marijuana found on that property, alone or along with cash, firearms and equipment used to distribute marijuana, was consistent with marijuana distribution and inconsistent with personal use.

(2) Opinions that persons who are growing marijuana plants in the number and size on the property where Mr. Boone was arrested, and who are processing and possessing the quantity of dried marijuana found on that property, commonly possess firearms to prevent the theft of their marijuana plants, dried marijuana, equipment, and money derived from marijuana distribution, and to protect themselves from being threatened, assaulted, injured or killed by thieves or robbers.

Defendant so moves upon the grounds and for the reasons that this evidence is inadmissible (1) because it is unreliable and speculative and not relevant, FRE 401 & 402; (2) because it is inadmissible character evidence under FRE 404; (3) because it violates FRE 602; (4) because it is not proper opinion evidence under FRE 702; (5) because it violates FRE 704(b)(4); (6) because it violates the Confrontation Clause of the Sixth Amendment to the United States Constitution; or alternatively, (7) that the prejudicial effect of such evidence outweighs any probative value, and said evidence would tend to confuse the

issues and mislead the jury, and that ordinary objection in the course of trial, even if sustained with corrective instructions to the jury, would not remove the unduly prejudicial impact of this evidence. FRE 403 and the Fifth Amendment to the United States Constitution.

The defense further moves, pursuant to FRE Rules 102, 103, 104, 702 and the Fifth and Sixth Amendments to the United States Constitution, for the Court to conduct this hearing pretrial and outside the presence of the jury.

This Motion is well-founded in law and not made for the purpose of delay. It is supported by the Points and Authorities that follow, and by such other grounds and authorities as may be offered through supplemental memoranda or at hearing on this Motion.

DATED this 30th day of January, 2012.

/s/Terri Wood
TERRI WOOD, OSB #88332
ATTORNEY FOR DEFENDANT

POINTS AND AUTHORITIES

1. *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 147, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) held that the district court's duty to act as gatekeeper and to assure the reliability of proffered expert testimony before admitting it applies to all (not just scientific) expert testimony. The Government agrees that

the testimony to which Mr. Boone objects is expert testimony subject to FRE 702-705. See Government's Rule 16 Notice of Expert Witnesses.

In *United States . v. Hermanek*, 289 F.3d 1076 (9th Cir. 2002), the Court applied *Kumho Tire* to a law enforcement expert witness whose testimony interpreted "drug trade jargon." The gatekeeper role "entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is . . . valid and of whether that reasoning or methodology properly can be applied to the facts in issue." Id., at 1093 (citing *Daubert*, 509 U.S. 579, 597 (1993)). The Ninth Circuit found that the officer's extensive experience and knowledge of drug terminology based on years of investigating drug dealing and interpreting hundred of intercepted communications were relevant "but, standing alone, they neither explain nor establish the reliability of [his opinions]. It is well settled that bare qualifications alone cannot establish the admissibility of scientific expert testimony." Id., at 1093-94.

As a prerequisite to making the Rule 702 determination that an expert's methods are reliable, the court must assure that the methods are adequately explained. The expert must "explain the methodology . . . followed to reach [his or her] conclusions" so that the district court can make the findings required by Rule 702. Presenting only with the expert's qualifications, his conclusions, and assurances of reliability is not enough. Id., at 1094. When expert testimony is essentially a recitation of what the witness has read or been told, there is no

reliable methodology involved. *See, United States v. Mejia*, 545 F.3d 179, 197-198 (2nd Cir. 2008).

FRE 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

2. In the case at bar, the Government is not offering expert opinion to interpret code or jargon used in drug trafficking. That topic of expert testimony fits squarely within Rule 702, because it requires specialized knowledge not possessed by the average juror. Drug jargon "is a specialized body of knowledge, familiar only to those wise in the ways of the drug trade, and therefore a fit subject for expert testimony." *United States v. Freeman*, 498 F.3d 893, 901 (9th Cir. 2007)(citation omitted). Rather, the "expert opinion" evidence the Government seeks to introduce against Mr. Boone is criminal profile evidence—that persons who do exactly what the Government claims Mr. Boone did are involved in marijuana distribution and possess firearms in furtherance of drug trafficking.

Pre-dating and independent of the reliability inquiry mandated by *Kumho Tire*, the Ninth Circuit repeatedly held that criminal profile evidence in drug cases "is inherently prejudicial to the defendant," and could only be admitted in rebuttal of defense efforts to show the defendant's conduct was inconsistent with drug trafficking activities. *United States v. Baron*, 94 F.3d 1312, 1320-21 (9th Cir. 1996)(overruled on other grounds, *United States v. Heredia*, 483 F.3d 913 (9th Cir. 2007). The condemnation of criminal profiles as evidence of guilt is not limited to drug courier profiles. *United States v. Beltran-Rios*, 878 F.2d 1208, 1210-11 (9th Cir. 1989)(noting expert testimony describing the common characteristics of sex offenders is profile evidence that may cause reversible error).

3. Government experts may "testify as to the general practices of criminals to establish the defendants' modus operandi" which "helps the jury to understand complex criminal activities, and alerts it to the possibility that combinations of seemingly innocuous events may indicate criminal behavior." *United States v. Freeman*, 498 F.3d 893, 906 (9th Cir. 2007)(citations omitted). That is not the case here. Indeed, the Government has repeatedly represented to the Court that there is nothing complex about this case, asserting it is simple, straightforward, and can be tried in three days or less. Expert opinion evidence, to be admissible, must be specialized knowledge needed to assist jurors in understanding the evidence. FRE 702, *supra.*

There is nothing complex or innocuous about growing or processing marijuana for distribution, and jurors are readily capable of deciding whether the large quantity of green and processed marijuana located on the property where Mr. Boone was arrested was destined for distribution rather than personal use. *See,* "Note: The Admissibility of Ultimate Issue Expert Testimony By Law Enforcement Officers In Criminal Trials," 93 Colum.L.Rev. 231 (Jan. 1993)(concluding such evidence has generally low probative value and poses a substantial danger of prejudice).

Likewise, there is nothing complex about the reasons why a drug dealer might possess a firearm: to protect himself, his drugs or drug proceeds. The average juror is perfectly capable of drawing those conclusions without expert testimony. *See, United States v. Barrera-Medina*, 139 Fed.Appx.786, 794 (9th Cir. 2005)(unpublished)(noting that even without the expert's testimony regarding counter-surveillance and use of weapons by drug traffickers, "the jurors likely understood that large drug transactions would involve counter-surveillance and armed protectors and that such counter-surveillants likely would be in the area of the drug transaction, perhaps in a car, perhaps communicating with one another and those more centrally involved in the drug transaction, and perhaps armed. As the defendants themselves argued in their motion *in limine:* 'An untrained layman would be qualified to intelligently determine whether the evidence points to the defendants' involvement in the conspiracy and firearm offense.')

4. Rule 704(b) provides:

> No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

"Although enacted to limit psychiatric testimony when a criminal defendant relies upon the defense of insanity, Rule 704(b) applies in fact to all instances in which expert testimony is offered as to a mental state or condition constituting an element of the crime charged or defense thereto." *United States v. Boyd*, 55 F.3d 667, 670-71 (D.C. Cir. 1995).

When the hypothetical facts mirror the alleged facts concerning Mr. Boone' arrest, and the expert opines those facts establish an intent to distribute marijuana, or possession of firearms for the requisite purpose of furthering drug distribution, such expert testimony constitutes an opinion or inference regarding Mr. Boone's intent, in violation of FRE 704(b). *See, Boyd*, *supra.*

In the case at bar, the defense expects the evidence will show that other persons frequented the premises, and that numerous individuals were licensed to grow marijuana on the property where Mr. Boone was found and arrested. He made no statements concerning his involvement in the marijuana grow operation, or in any distribution of marijuana. Thus, the danger of prejudice from the expert testimony proffered by the government is great:

> In a case such as this one, where the facts offered at trial are at best ambiguous as to the defendant's role in alleged criminal

> activity, *expert* testimony on the ultimate issue of fact is likely to have a powerful effect on the result. If a jury has reason to be unsure of a defendant's guilt, but is made to listen to an "expert" who claims to know the defendant's state of mind, the jurors may rely on the purported expertise of the Government witness to cure the ambiguity that they face. This is precisely what the Rule prohibits, for it is the jurors (not the expert) who must decide the ultimate issue of fact. There would be little need for a trial before a jury if an expert is allowed simply to declare the defendant's guilt.

Boyd, at 672.

5. Furthermore, expert testimony on the topic of firearm possession by marijuana growers has no relevance as to why Mr. Boone may have possessed the firearms located at the property where he was arrested, unless offered as an inference of his purpose, to establish an essential element of the 18 U.S.C. 924(c) charge. The Ninth Circuit has interpreted the phrase "possession in furtherance" found in 18 U.S.C. §924(c) to require an "intent to use" the firearm to promote the drug trafficking crime. See, e.g., *United States v Mann*, 389 F.3d 869, 879-80 (9th Cir. 2004); *United States v. Krouse*, 370 F.3d 965, 967 (9th Cir. 2004). Simply stated, "this element of §924(c) turns on the intent of the defendant." Krouse, at 967.

Intent, like any mental state, must usually be proven by circumstantial evidence. When an expert testifies that a person or persons who are growing marijuana plants in the number and size on the property where Mr. Boone was arrested, and who are processing and possessing the quantity of dried marijuana found on that property, commonly possess firearms to prevent the theft of their

marijuana plants, dried marijuana, equipment, and money derived from marijuana distribution, and to protect themselves from being threatened, assaulted, injured or killed by thieves or robbers, that constitutes an "inference as to whether the defendant did or did not have the mental state . . . constituting an element of the crime charged." FRE 704(b). That rule prohibits not only an opinion by the expert that Mr. Boone possessed the firearms to protect his marijuana and cash, but an inference as well.

The defense acknowledges contrary authority by the Ninth Circuit in *United States v. Anchrum*, 590 F.3d 795, 805 (9th Cir. 2009). However, the testimony there was far more generalized, with the expert simply describing "the various reasons a hypothetical drug dealer would possess a firearm." In addition, there was no challenge to the reliability of the expert's testimony on this point, no challenge to the evidence being unnecessary to assist the jury, and no Confrontation Clause challenge.

The Ninth Circuit has noted that the legislative history of 924(c) made clear that Congress did not intend this new prong of the statute to apply to drug dealers who possessed firearms—without a specific factual showing beyond expert testimony that drug dealers often carry firearms to protect their drugs, money and themselves. *United States v. Rios,* 449 F.3d 1009, 1013-14 (9th Cir. 2006). However, the danger is great that the jury will not require a specific factual showing beyond expert testimony, particularly when offered by the investigating agents.

6. In *United States v. Freeman*, 498 F.3d 893 (9th Cir. 2007), the Court embraced the concerns of the Second Circuit in *United States v. Dukagnjini*, 326 F.3d 45 (2d Cir. 2003), regarding the dangers of allowing a law enforcement officer who participated in the investigation to testify about facts as a lay witness, as well as provide expert opinion testimony. 498 F.3d at 902-905. Both *Freeman* and *Dukagjini* involved drug jargon interpretation where the agent testified as an expert in the area of decoding drug jargon and as a lay witness giving general explanations of the conversations between the targets of the investigation. However, the following dangers exist in any dual-purpose law enforcement witness case:

First, "by qualifying as an 'expert,' the witness attains unmerited credibility when testifying about factual matters from first-hand knowledge."

Second, it is possible that "expert testimony by a fact witness or case agent can inhibit cross-examination ... [because a] failed effort to impeach the witness as expert may effectively enhance his credibility as a fact witness." *Id.* at 53-54.

Third, "when the prosecution uses a case agent as an expert, there is an increased danger that the expert testimony will stray from applying reliable methodology and convey to the jury the witness's 'sweeping conclusions' about appellants' activities, deviating from the strictures of Rules 403 and 702." *Id.* at 54.

Fourth, a case agent testifying as an expert may lead to juror confusion because "[s]ome jurors will find it difficult to discern whether the witness is relying properly on his general experience and reliable methodology, or improperly on what he has learned of the case." *Id.*

Finally, "when a case agent/expert strays from the scope of his expertise, he may impermissibly rely upon and convey hearsay evidence." *Id.* at 55. In doing so, the witness may also run afoul of the Sixth Amendment Confrontation Clause. *See id.* at 58-59. See *United States v. Freeman*, 498 F.3d at 903-904 (also noting that if agent based lay testimony on matters not within his personal knowledge, that testimony would be inadmissible).

All of those dangers are magnified when the testimony is of marginal helpfulness to jurors in evaluating or understanding the evidence, as with the Government's proffered expert testimony in this case.

7. Expert testimony is not a vehicle to place a conglomeration of hearsay before the jury, and may also run afoul of the Confrontation Clause of the Sixth Amendment. *United States v. Mejia*, 545 F.3d at 198-199. See also, *Freeman,* 498 F3d at 903 n.2 (noting the defendant did not raise a Confrontation Clause challenge at trial or on appeal, but citing with approval a Second Circuit case where this issue was addressed); J. Seaman, "Triangular Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony," 96 Geo.L.J. 827 (March 2008)(noting "through the vehicle of the expert's opinion, stealth hearsay sneaks into the jury box under the constitutional radar. This practice

raises fundamental questions about out most basic constitutional Due Process rights, about the proper role of expertise at trial, and indeed about the very nature of our system of jury decision-making.")

RESPECTFULLY SUBMITTED this 30th day of January, 2012.

/s/Terri Wood
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