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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

STEVEN RUPP, et al.,

Plaintiffs,

vs.

XAVIER BECERRA, in his official
capacity as Attorney General of the State
of California,

Defendant.

Case No.: 8:17-cv-00746-JLS-JDE

**PLAINTIFFS' MEMORANDUM
OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION TO
EXCLUDE THE TESTIMONY OF
DEFENDANT'S EXPERT
WITNESS CHRISTOPHER B.
COLWELL, M.D. UNDER
FEDERAL RULE OF EVIDENCE
702**

Hearing Date: July 5, 2019
Hearing Time: 10:30 a.m.
Judge: Josephine L. Staton
Courtroom: 10A

STATEMENT OF FACTS

The State has submitted the report of Dr. Christopher B. Colwell, M.D., as expert witness testimony in support of its Motion for Summary Judgment. Expert Report of Christopher B. Colwell, M.D., Declaration of Sean A. Brady (“Brady Decl.”) Ex. 1. In his report, Dr. Colwell claims to “have extensive experience with the different wounds caused by assault and non-assault weapons . . .” *Id.*, Ex. 1 at 3. Based on this experience, he asserts that “[g]unshot wounds from assault rifles, such as AR-15s and AK.-47s, tend to be higher in complexity with higher complication rates than such injuries from non-assault weapons, increasing the likelihood of morbidity in patients that present injuries from assault rifles” and that “assault rifles tend to cause far greater damage to the muscles, bones, soft tissue, and vital organs.” *Id.*, Ex. 1 at 3. Dr. Colwell asserts that these supposed “greater complications are likely due to the higher muzzle velocity and higher caliber of rounds involved in assault rifle shootings.” *Id.*, Ex. 1. at 3-4. Dr. Colwell further asserts that “assault rifles, especially when equipped with large capacity magazines, can fire more shots faster, causing more injuries per victim (and thus more complications)” asserts Dr. Colwell in his report. *Id.*, Ex. 1 at 3. Dr. Colwell depends entirely on other people to tell him whether an “assault rifle” was used in a shooting—usually law enforcement, the victim, or the perpetrator. *See Id.*, Ex. 1 at 5; Ex. 2 at 37.

LEGAL STANDARD

For expert testimony to be admissible, the expert must be “qualified as an expert by knowledge, skill, experience, training, or education.” Fed. R. Evid. 702. Under *Daubert v. Merrell Dow Pharmas., Inc.*, 509 U.S. 579, 589-91 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). Courts must act as “gatekeepers” to exclude unreliable expert testimony. This requires the court to consider the following standards for assessing the admissibility of proffered expert testimony:

1 (a) The expert's scientific, technical, or other specialized knowledge
2 will help the trier of fact to understand the evidence or to determine a
3 fact in issue; (b) [t]he testimony is based on sufficient facts or data; (c)
4 [t]he testimony is the product of reliable principles and methods; and
5 (d) [t]he expert has reliably applied the principles and methods to the
6 facts of the case.

7 Fed. R. Evid. 702. This list, of course, is not exhaustive. *Daubert*, 509 U.S. at 594-
8 95; *Kumho*, 526 U.S. at 150-51. And no single factor is necessarily determinative.
9 *Kumho*, 526 U.S. at 150-51; *see also* Fed. R. Evid. 702, advisory committee's note
10 to 2000 amendment.

11 Consequently, not all opinions that happen to be held by an expert are "expert
12 opinions." *See United States v. Benson*, 941 F.2d 598, 604 (7th Cir. 1991). Opinions
13 falling outside the expert's area of expertise are inadmissible. *See Watkins v.*
14 *Schrivver*, 52 F.3d 769, 711 (8th Cir. 1995) (affirming exclusion of a neurologist's
15 testimony "that the [plaintiff's neck] injury was more consistent with being thrown
16 into a wall than with a stumble into the corner"). And impressive professional
17 qualifications alone are not enough; the expert must have sufficient specialized
18 knowledge to assist the trier of fact in deciding the issues in the case. *See Belk, Inc.*
19 *v. Meyer Corp.*, U.S., 679 F.3d 146, 162-163 (4th Cir. 2012). Moreover, an expert's
20 suitability for testimony depends on the facts of the case; just because an expert may
21 be qualified to opine on one subject does not have any bearing on their suitability to
22 opine on another unrelated subject. *See Jones v. Lincoln Elec. Co.*, 188 F.3d 709,
23 723 (7th Cir. 1999).

24 Under the standards for the admissibility of expert witness testimony set forth
25 in Rule 702 and elucidated in *Daubert* and its progeny, Dr. Colwell's testimony is
26 not admissible. The Court should exercise its broad discretion to exclude it.

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ARGUMENT

I. Dr. Colwell’s Claim that “Assault Weapons” Cause Worse Wounds than Non-“Assault Weapons” Is Unscientific, Beyond His Personal Knowledge, and Thus Unhelpful to this Court in Deciding this Case and Should Be Disregarded under Rule 702

A. Dr. Colwell’s claim that “assault weapons” cause worse wounds than non-“assault weapons” is objectively erroneous

“Assault weapon” is a technical, legal definition. For a rifle to qualify as an “assault weapon” as relevant to this matter, it must be semiautomatic, centerfire with a non-fixed magazine and have either a pistol grip, adjustable stock, or flash suppressor. Cal. Pen. Code §30515. “It cannot be disputed that the characteristics used in this matter to define an ‘assault weapon’ have nothing to do with the velocity at which the weapon launches a projectile.” Updated Expert Witness Rebuttal Report of J. Buford Boone III, Brady Decl., Ex. 3 at 6. Except for barrel design, “the firearm does not alter muzzle velocity or what effect a projectile has on an object upon impact.” *Id.*

Because barrel length and ammunition type are irrelevant for whether a rifle falls under the “assault weapon” definition, as a matter of law, Dr. Colwell’s claim that “assault weapons” cause more damage than non-“assault weapons” is, therefore, objectively erroneous. For, a non-“assault weapon” rifle (e.g., an AR-platform rifle *without* a pistol grip, adjustable stock, or flash suppressor) having an identical barrel to and firing the identical cartridge as an “assault weapon” will have virtually the same effect on a target upon impact. *Id.*

B. Dr. Colwell lacks personal knowledge to claim that “assault weapons” cause worse wounds than non-“assault weapons”

Dr. Colwell does not and cannot dispute that “assault weapon” features have nothing to do whatsoever with what a bullet does on impact. In his deposition, Dr. Colwell conceded that he has no reason to believe that a wound caused by a non-“assault weapon” rifle with the same barrel length and firing the same cartridge as an

1 “assault weapon” rifle would be any different:

2 Q: So do you have any reason to believe that a wound resulting from Rifle A
3 would be any different than a wound resulting from Rifle B?¹

4 A: I don’t have any reason [to] believe that a single wound from either of
5 these weapons would necessarily be different, no.

6 Deposition Transcript of Christopher B. Colwell, M.D., Brady Decl., Ex. 2 at
7 37. He also testified that he could not say how a pistol grip, adjustable stock, or flash
8 suppressor on a rifle might affect a wound. *Id.*, Ex. 2 at 50-54. In fact, he could not
9 identify any aspect of an “assault rifle” that makes it able to cause a worse wound, as
10 he contends such rifles do in his report. *Id.* at 55-56. And he noted seeing individual
11 wounds from a non-“assault weapon” rifle that were “as bad” as wounds from an
12 “assault rifle.” *Id.*, Ex. 2 at 19; 54.

13 These statements alone—setting aside the indisputable fact that “assault
14 weapon” features do not alter a bullet’s speed—are enough to justify entirely
15 excluding Dr. Colwell’s opinion that “assault weapons” cause worse wounds than
16 non-“assault weapons.” They show he has no personal knowledge on which to base
17 that opinion—he cannot connect the severity of the wound to an “assault weapon”
18 feature. And he did not rely on nor is he aware of any peer reviewed studies
19 regarding wounds caused from “assault weapons” that could have helped him *Id.*,
20 Ex. 2 at 69.

21 Likewise, Dr. Colwell is unqualified to opine, as he does, that what he
22 perceives as “[t]he greater complications are likely due to the higher muzzle velocity
23 and higher caliber of rounds involved in assault rifle shootings.” Brady Decl., Ex. 1
24 at 3-4. He does not provide any basis for the implicit assumption in that statement
25

26 ¹ Rifle A is an image of a semiautomatic, centerfire rifle with a detachable
27 magazine but no “assault weapon” features (pistol grip, adjustable stock, or flash
28 suppressor) and Rifle B is that same rifle but with “assault weapon” features (pistol
grip, adjustable stock, or flash suppressor). *See* p. 9 of the report of the State’s expert
Blake Graham for the images.

1 that rounds fired from an “assault rifle” have a higher muzzle velocity and larger
2 caliber than ones fired from a non-“assault rifle.” To the contrary, he admits that it
3 is his understanding that a non-“assault rifle” can have the same or higher muzzle
4 velocity as an “assault rifle.” *Id.*, Ex. 2 at 17. He also concedes that he cannot say
5 what caliber bullets are used in AR-15 or AK-47 platform rifles. *Id.*, Ex. 2 at 24. If
6 he does not know what forces affect muzzle velocity or what caliber rounds “assault
7 rifles” use, then he has no basis to opine on whether muzzle velocity or caliber size
8 is higher let alone whether they are the or cause of anything. Because that is
9 precisely what he does, Dr. Colwell’s opinion should be disregarded for lack of
10 personal knowledge.

11 **II. Dr. Colwell’s Claim that “Assault Rifles” Cause More Injuries Per**
12 **Victim than Do Non-“Assault Rifles” Is Based on Assumptions about**
13 **the Technical Nature of Firearms that Dr. Colwell Is Not Qualified to**
14 **Make and Should Be Disregarded by this Court**

15 “Assault rifles, especially when equipped with large capacity magazines, can
16 fire more shots faster, causing more injuries per victim (and thus more
17 complications)” asserts Dr. Colwell in his report. *Id.*, Ex. 1 at 5. Yet, in his
18 deposition, Dr. Colwell admitted that he cannot say whether an “assault rifle” fires
19 more shots faster than a non-“assault rifle.” *Id.*, Ex. 2 at 45. He further clarified that
20 he is assuming “assault rifles” allow more shots fired quickly based on what he has
21 been told by law enforcement officers. *Id.*, Ex. 2 at 50-51. He then admits to having
22 no specialized, independent knowledge to corroborate that assumption—stating that
23 “if you were to tell me that’s not true, I couldn’t argue with you.” *Id.*, Ex. 2 at 33.

24 Dr. Colwell also agreed that he has no expert opinion on whether an “assault
25 rifle” is more capable than a non-“assault rifle” of putting rounds on target quickly.
26 *Id.*, Ex. 2 at 35-36. And that he cannot tell how quickly shots are fired merely by
27 looking at the wounds. *Id.*, Ex. 2 at 44. Without knowing whether “assault rifles”
28 fire faster than non-“assault rifles” or whether they are able to place rounds on target
faster, Dr. Colwell simply cannot support his claim that “assault rifles” fire more

1 shots faster, let alone that their ability to do so results in more injuries per victim.
2 What's more, his entire premise assumes that rapid fire was necessary or even
3 occurred when there are multiple injuries, despite admitting that he cannot tell how
4 quickly shots were made just by looking at wounds. In other words, he cannot say
5 whether rapid fire was even relevant in any case he recalls.

6 In sum, Dr. Colwell's opinion that "assault rifles cause more injuries per
7 victim depends on the assumption that "assault rifles" fire more shots faster—which
8 he admits he is unqualified to independently verify—should be disregarded as an
9 expert on that topic.

10 **III. Dr. Colwell's Entire Analysis Contrasting "Assault Weapons" with**
11 **Non-"Assault Weapons" Is Not Based on Any Reliable Scientific**
12 **Process or Standard and Is Thus Unhelpful to this Court in Deciding**
13 **this Case and Should Be Disregarded**

14 **A. Dr. Colwell's claim that "assault rifles" cause more harm than non-**
15 **"assault rifles" is based on the unscientific process of recalling**
16 **memories of accounts from other people over the years**

17 Dr. Colwell depends entirely on other people informing him of what firearm
18 was used in determining whether an "assault rifle" was used in a shooting—law
19 enforcement, (*Id.*, Ex. 1 at 5), the victim, or the shooter. *Id.*, Ex. 2 at 22. So, he
20 depends on being informed of whether an "assault rifle" was used by a third party
21 who may have a different definition of the term "assault rifle" or could be wrong or
22 confused. Or, he could be confused on their description, based on his admitted
23 ignorance on the subject of firearm technicalities. *Id.*, Ex. 2 at 37-38; 41.

24 And, he is only informed of the type of firearm in this unreliable way in about
25 30-40% of the wounds he has treated. *Id.*, Ex. 2 at 46. What's more, he is recalling
26 all of this from memory over many years. He has not documented any of these
27 observations. This is just simply not the stuff of scientific evaluation.

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B. Dr. Colwell fails to rely on any measurable scientific-standards in distinguishing “assault rifles” from non-“assault rifles”

Compounding this problem is that Dr. Colwell’s opinions do not contemplate any formal standard for what is an “assault rifle.” He uses his own definition of “assault rifle” (“designed for more rapid fire or combat” like AR-15s, AK-47s, and TEC-DC9s), not California’s. *Id.*, Ex. 2 at 11-14. But even assuming his definition is compatible with California’s, his analysis is unhelpful because it compares apples and oranges: rifles and handguns.

As an illustrative example—the only one he gives in his report—Dr. Colwell recounts two shooting victims who were both shot in the elbow. One was shot with a “Glock handgun” and the other with an “AK-47” rifle. The victim shot with the handgun was treated and released (no specifics are provided on the extent of the wound). The victim shot with the “AK-47” rifle had to have the arm amputated. This anecdote provides virtually no helpful information to this Court except to show why Dr. Colwell’s testimony should be disregarded. As an initial matter, Dr. Colwell does not say whether the number of bullet wounds was the same in each case. Assuming both incidents involved a single bullet wound, Dr. Colwell’s observation is nothing more than the unremarkable fact that bullets fired from rifles generally cause more damage than those fired from handguns. *Id.*, Ex. 2 at 23. It is, therefore, unhelpful to this Court.

The real comparison would be between a rifle with the features that make a rifle an “assault weapon” and a rifle without those features. While Dr. Colwell also testified that wounds caused by what he described as “hunting rifles” were usually not as bad as wounds caused by “assault weapons,” he noted that sometimes they were. *Id.*, Ex. 2 at 18-19.

Tellingly, Dr. Colwell admits he could not tell the difference between wounds caused from 9mm handgun and a 9mm rifle (possibly an “assault rifle”) when treating the victims of the Columbine shooting. *Id.*, Ex. 2 at 62-63. Nor could he tell

1 whether victims of the Aurora shooting that he treated had been shot by the “assault
2 rifle” or the handgun. *Id.*, Ex. 2 at 64-65. What’s more, he admits individuals he lists
3 as “assault rifle” victims could include individuals shot by a machine gun. *Id.*, Ex. 2
4 at 28. This lack of any scientific standard dooms Dr. Colwell’s analysis. His
5 testimony should be excluded.

6 CONCLUSION

7 Plaintiffs do not question Dr. Colwell’s expertise in emergency medicine,
8 including in the treatment of gun-shot wounds. To the contrary, Plaintiffs recognize
9 Dr. Colwell for his distinguished accomplishments in that field and commend him
10 for his heroic, life-saving work over his career. Plaintiffs do, however, challenge Dr.
11 Colwell’s expertise in the specific topics the State offers him to opine about in this
12 matter: the wounding ballistics and technical capabilities of rifles meeting the
13 AWCA’s “assault weapon” definition.

14
15 Dated: May 28, 2019

MICHEL & ASSOCIATES, P.C.

16
17 /s/ Sean A. Brady

18 Sean A. Brady
19 Attorneys for Plaintiffs
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CERTIFICATE OF SERVICE
IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Case Name: *Rupp, et al. v. Becerra*
Case No.: 8:17-cv-00746-JLS-JDE

IT IS HEREBY CERTIFIED THAT:

I, the undersigned, am a citizen of the United States and am at least eighteen years of age. My business address is 180 East Ocean Boulevard, Suite 200, Long Beach, California 90802.

I am not a party to the above-entitled action. I have caused service of:

**PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT OF MOTION TO EXCLUDE THE TESTIMONY OF
DEFENDANT'S EXPERT WITNESS CHRISTOPHER B. COLWELL, M.D.
UNDER FEDERAL RULE OF EVIDENCE 702**

on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed May 28, 2019.

/s/ Laura Palmerin
Laura Palmerin