C. D. Michel – SBN 144258
cmichel@michellawyers.com
Sean A. Brady – SBN 262007
sbrady@michellawyers.com
Matthew D. Cubeiro – SBN 291519
mcubeiro@michellawyers.com
MICHEL & ASSOCIATES, P.C.
180 East Ocean Boulevard, Suite 200
Long Beach, CA 90802
Telephone: 562-216-4444
Facsimile: 562-216-4445

Attorneys for Plaintiffs

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 PARTIALLY EXCLUDE THE TESTIMONY OF DEFENDANT'S EXPERT WITNESS DETECTIVE MICHAEL MERSEREAU UNDER FEDERAL RULE OF EVIDENCE 702

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

INTRODUCTION

The State has designated as an expert witness, Detective Michael Mersereau. Several of the opinions he offers, however, are not those of an expert witness, but rather are baseless speculation. His experience as a law enforcement officer may entitle him to offer expert opinion on some of the issues relating to "assault weapon" identification and use in crimes, but he goes beyond his range on several occasions. As such, Plaintiffs respectfully request that the Court exclude Mersereau's opinions on the issues discussed below, under rule 702, for they are not true expert witness testimony.

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:

> (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) [t]he testimony is based on sufficient facts or data; (c) [t]he testimony is the product of reliable principles and methods; and (d) [t]he expert has reliably applied the principles and methods to the facts of the case.

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

Consequently, not all opinions that happen to be held by an expert are "expert opinions." *See United States v. Benson*, 941 F.2d 598, 604 (7th Cir. 1991). Opinions

falling outside the expert's area of expertise are inadmissible. *See Watkins v. Schriver*, 52 F.3d 769, 711 (8th Cir. 1995) (affirming exclusion of a neurologist's testimony "that the [plaintiff's neck] injury was more consistent with being thrown into a wall than with a stumble into the corner"). And impressive professional qualifications alone are not enough; the expert must have sufficient specialized knowledge to assist the trier of fact in deciding the issues in the case. *See Belk, Inc. v. Meyer Corp., U.S.*, 679 F.3d 146, 162-163 (4th Cir. 2012). Moreover, an expert's suitability for testimony depends on the facts of the case; just because an expert may be qualified to opine on one subject does not have any bearing on their suitability to opine on another unrelated subject. *See Jones v. Lincoln Elec. Co.*, 188 F.3d 709, 723 (7th Cir. 1999).

Under the standards for the admissibility of expert witness testimony set forth in Rule 702 and elucidated in *Daubert* and its progeny, Mersereau's testimony identified below is not admissible. The Court should exercise its broad discretion to reject it.

ARGUMENT

I. Mersereau's opinion that use of "assault rifles" increases casualties in criminal shootings is nothing more than baseless speculation and thus unhelpful to this Court

Mersereau asserts that there is a causal link between use of an "assault rifle" in a shooting and the resulting casualties. Expert Witness Report and Declaration of Michael Mersereau, Declaration of Sean Brady ("Brady Decl.") Ex. 1 at 7, ¶13. In support, Mersereau states that "[t]his has been illustrated in various mass-shootings in and around the City of Los Angeles over the past twenty years." *Id*. Mersereau summarily states that it is his "opinion, based on [his] training and experience, that [those]-described attacks would have been less deadly had the shooters not been armed with assault rifles or assault rifles converted to machine guns." *Id.* at 8, ¶19. For one of the shootings, Mersereau goes so far as to say that it "is highly unlikely that this shooter could have inflicted as many casualties as he was able had his rifles

not been equipped with features that were designed to help the shooter control his firearms with improved accuracy during rapid fire." *Id*. at 9, ¶¶11-13. But, this is the epitome of speculation.

Indeed, Mersereau does not point to any research conducted on the subject, whether by him or anyone else—he didn't even review reports of some of the shootings he lists. Brady Decl., Ex. 2 at 124. He does not claim to have been present at the scene of any of the shootings he mentions. Nor has he performed any analysis of them to determine what role the "assault weapon" features played in them, if any. Instead, he is merely applying his premise that because "assault weapon" features make a rifle easier to use and more accurate during firing, that means a fortiori that those features resulted in more casualties. When pressed at deposition to be specific as to how the features made a difference in each of the shootings he mentioned, he could not. *Id*. at 120-131. Nor was he able to identify critical details about the shootings that could have negated any potential impact of the features, like weather, proximity of the shooter, number of rounds fired, whether the victims were caught by surprise. *Id*. Mersereau refused to accept that those details—of which he was ignorant—could make more of a difference than the features on the rifle. *Id*. Although, he did admit that a non-"assault rifle" (a Mini-14) could have caused the same casualties as an "assault rifle," he just did not *think* it would. *Id*. at 125.

Mersereau is basically saying that the incidents speak for themselves. If that is the case, then an expert is not required to make any information here more understandable. However, he offers no showing of how this opinion is informed and why it is credible. As such, it is pure speculation and simply cannot be of any value to the trier of fact here. In short, he has not "shown his work."

II. Mersereau lacks the expertise to opine on assault rifle use for self-defense

Mersereau opines that "[t]here is no evidence that assault rifles are 'commonly' used for self-defense. While any firearm including an assault rifle could

be used effectively in a self-defense scenario, handguns and shotguns are the more common and preferred choice." Brady Decl., Ex. 1 at 9, ¶23. As with many of his assertions, Mersereau makes this statement without basis in evidence or statistical data, but on his own lay opinion. Mersereau does not claim to be a self-defense researcher or expert on the use of "assault weapons" in self-defense. He simply has no basis to offer this opinion as an expert.

Similarly, he provides no support for his opinion that "the threat needs to be imminent and to some degree up close and personal" to justify using a rifle in a self-defense scenario. *Id*. at 9, ¶23. In fact, this is not only his unsupported, personal opinion, but potentially an inadmissible *legal* opinion about what constitutes legitimate grounds for use of lethal force in the self-defense context. Either way, it should be excluded by this Court.

III. Mersereau's claims that a handgun, shotgun or non-lethal option would be sufficient to deal with a vast majority of self-defense scenarios is pure speculation

Mersereau thinks, without any methodological data in support, that merely presenting a handgun, shotgun, or other weapon is sufficient to persuade a would-be attacker to abandon course. *Id*. at 10, ¶23. This statement is pure speculation. He cites no support for his claim that a handgun is as good as a rifle in the context described. And that is not surprising, because this is not the type of hypothesis that could plausibly lend itself to testing.

He further asserts that the only justification for deploying a rifle and not a handgun "should be based on the fact that the target is beyond the reasonable effective range of a handgun." *Id*. Again, the basis for this opinion is nowhere to be found. He does not base this statement upon data or facts derived from expertise in or knowledge of the defensive use of firearms.

CONCLUSION

Mersereau's experience as a law enforcement officer is not tantamount to being an expert on all assault weapon uses. His opinions described above are

unsupported speculation. As such, his testimony fails to meet the *Daubert* standard and should be excluded.

Dated: May 28, 2019

MICHEL & ASSOCIATES, P.C.

/s/ Sean A. Brady
Sean A. Brady
Attorneys for Plaintiffs

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 PARTIALLY EXCLUDE THE TESTIMONY OF DEFENDANT'S EXPERT WITNESS DETECTIVE MICHAEL MERSEREAU 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.

Xavier Becerra
Attorney General of California
Peter H. Chang
Deputy Attorney General
E-mail: peter.chang@doj.ca.gov
John D. Echeverria
Deputy Attorney General
E-mail: john.echeverria@doj.ca.gov
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102

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

Executed May 28, 2019.

/s/ Laura Palmerin
Laura Palmerin