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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

UNITED STATES OF AMERICA

CR 07-178-RE

v.

DAVID AARON CHATMAN,

Defendant.

**GOVERNMENT'S MEMORANDUM IN
SUPPORT OF ADMISSION OF
EXPERT TESTIMONY UNDER
*DAUBERT***

The United States of America, by Karin J. Immergut, United States Attorney for the District of Oregon, and Billy J. Williams, Assistant United States Attorney, files this memorandum in support of admission of the expert testimony of Dr. Jennifer J. Freyd.

CASE STATUS

Defendant Chatman is currently charged, by indictment, with two counts of Abusive Sexual Contact. This court has scheduled jury trial for this matter on May 19, 2008. The court has also set aside a hearing date for defendant's challenges under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), for May 15, 2008, at 9:00 a.m.

INTRODUCTION

Fed. R. Evid. 702 provides the operative standard for the admissibility of expert testimony, and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), governs the court's application of Rule 702.

Rule 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.

Under *Daubert*, a district court must “ensure than any and all [expert] testimony or evidence admitted is not only relevant, but reliable.” 509 U.S. at 589. To determine reliability, this court must analyze whether “good grounds” establish a sufficient amount of “evidentiary reliability” or “trustworthiness.” *Id.* at 590-91 & n.9. “Good grounds” exist when “the reasoning or methodology underlying the testimony is scientifically valid and . . . can be applied to the facts in issue.” *Id.* at 592-93.

In *Daubert*, the Court suggested several factors that often play a role in a Rule 702 inquiry, but cautioned that “[m]any factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test.” *Daubert*, 509 U.S. at 593. Those *Daubert* factors are (1) “whether [a theory or technique] can be (and has been) tested”; (2) “whether the theory or technique has been subjected to peer review and publication”; (3) “the known or potential rate of error”; (4) “the existence and maintenance of standards controlling the techniques operation”;

and, (5) “general acceptance...of a relevant scientific community.” *Id.* at 593-94 (citations omitted).

Furthermore, the Supreme Court has clarified that a trial court’s gatekeeping function, with regard to testimony offered under Rule 702, applies not only to “scientific” testimony, but to all expert testimony. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 148 (1999).

The key purpose of the *Daubert* analysis is to prevent “junk science” posing as expert testimony from reaching the jury. *Domingo ex rel. Domingo v. T.K.* 289 F.3d 600, 605 (9th Cir. 2002). By way of example, the Supreme Court has explained that “the testimony of a phrenologist who would purport to prove a defendant’s future dangerousness based on the contours of the defendant’s skull” would qualify as “junk science” and should be excluded. *General Elec. Co. v. Joiner*, 522 U.S. 136, 522 n.6 (1997). So long as the testimony satisfies Rule 702 and *Daubert*, the expert may offer opinion evidence, even regarding an ultimate issue of fact (so long as the ultimate issue does not involve the defendant’s *mens rea*). Fed. R. Evid. 704(b).

Also, the Ninth Circuit precedent suggests that a case-by-case review, rather than a categorical approach is necessary. In a case involving a handwriting expert, the court said:

[T]he broad discretion and flexibility given to trial judges to determine how and to what degree [the *Daubert*] factors should be used to evaluate the reliability of expert testimony dictate a case-by-case review rather than a general pronouncement that in this Circuit handwriting analysis is reliable. As the Supreme Court concluded,

we can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends upon the particular circumstances of the particular case at issue.

United States v. Prime, 431 F.3d 1147, 1152 (9th Cir. 2005) (citing to *Kumho Tire*, 526 U.S. at 150.

ARGUMENT

THE PSYCHOLOGICAL TESTIMONY OF DR. FREYD IS RELEVANT, MATERIAL AND ADMISSIBLE UNDER DAUBERT.

1. Brief overview of Dr. Freyd's findings.

Dr. Jennifer Freyd is a Professor of Psychology with the University of Oregon, Department of Psychology and Institute of Cognitive and Decision Sciences. Her professional vita is attached as Exhibit 1. She was asked by the government to review the case materials which include the investigative reports, medical records, and materials pertaining to the "West Coast Extreme All Star Cheerleading" (WCE) organization. She also interviewed the victim in this case. Dr. Freyd was asked to examine the facts surrounding the sexual assault by defendant on the victim during the flight to Portland,¹ and to examine the victim's response in the context of the issues surrounding consent. As part of this analysis, she examined the coach-athlete relationship as it impacts the issue of consent in the context of a sexual assault by a coach. Included in her review and analysis of the questions posed, she relied upon her scholarly knowledge of victim psychology, and research materials. That scholarly knowledge includes Dr. Freyd's research and findings as noted and discussed in various publications describing "betrayal

¹ The facts are fully outlined in the *Government's Trial Memorandum*, pp.2-16, filed on May 7, 2008, and are incorporated by reference to this memorandum.

trauma.” She provided a report of her findings, and it was provided to defense counsel (Exhibit 2).²

The complete context of Dr. Freyd’s analysis and opinion will be adduced at the *Daubert* hearing on May 15, 2008. In her summary, Dr. Freyd’s opines that, based upon review of the facts and materials presented, the victim’s passive response to being sexual assaulted was not an indication of consent, neither was it unusual in a statistical sense, nor surprising given the context and what is known about victim psychology. Indeed, the victim’s responses were consistent with scientific research about female victim passivity in sexual assaults.

Important to this analysis is the context in which the sexual assault occurred. The coach-athlete relationship in this case played an important part in this sexual assault and the victim’s response. Briefly, defendant was an adult male coach, twice the age of the victim. As a coach, the defendant was an authority figure in a position of power. Additionally, the WCE cheerleading club help to create a culture and context where the necessity for obedience to the club and coaches was particularly reinforced. Dr. Freyd’s discussion of betrayal trauma will include the observation that such trauma occurs when a person in power over another abuses that person, and/or when the perpetrator of abuse is someone the victim depends upon or trusts. This dynamic will be offered to explain the victim’s passive response to the defendant’s sexual assault in psychological terms.

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² The minor victim’s name is mentioned throughout Dr. Freyd’s report, therefore, the government is separately filing its motion and proposed order to seal Exhibit 2.

2. Dr. Freyd's testimony is admissible under *Daubert*.

As noted above, Federal Rule of Evidence 702 governs the admissibility of expert opinion testimony. Also as noted, the *Daubert* factors are (1) "whether [a theory or technique] can be (and has been) tested"; (2) "whether the theory or technique has been subjected to peer review and publication"; (3) "the known or potential rate of error"; (4) "the existence and maintenance of standards controlling the techniques operation"; and (5) "general acceptance . . . of a relevant scientific community. *Daubert*, 509 U.S. at 593-94 (citations omitted). Testimony regarding these factors will be adduced at the *Daubert* hearing.

3. Psychological expert testimony is relevant, routine, and admissible.

Pursuant to Federal Rule of Evidence 703, the basis for Dr. Freyd's opinion will be fully explored at the *Daubert* hearing. The Ninth Circuit has consistently found that testimony from psychologists is relevant and admissible evidence. *United States v. Finley*, 301 F.3d 1000, 1004-1017 (9th Cir. 2002) (error to exclude expert testimony of psychologist where reliable and relevant even where diagnosis was "an extremely gray diagnosis"); *United States v. Vallejo*, 237 F.3d 1008, 1019-1022 (9th Cir. 2001) (error to exclude testimony of defendant's high school psychologist regarding special problems of special education students in English communications in high pressure situations). *United States v. Bighead*, 128 F.3d 1329, 1330-1331 (9th Cir. 1997) (government expert's testimony in sex abuse case properly admitted despite claims of infringing on jury's province to determine credibility of the victim); *United States v. Rahm*, 993 F.2d 1405, 1409-1415 (9th Cir. 1993) (error to exclude proffered expert psychological testimony of defendant's mental disorder due to expert's lack of certainty in expert's conclusions). *See also, United States v. Shay*, 57 F.3d 126, 130-134 (1st Cir. 1995)

(clear error to exclude expert psychological testimony on defendant's mental disorder diagnosis of "pseudologia fantastica" as a defense).

In this case, even if defense counsel provides evidence of a contrary view to Dr. Freyd's research or analysis, that does not make her testimony inadmissible. On the contrary, finding opposing views within the psychological community is common place and of no moment in this court's analysis. As discussed in *Finley*, the Ninth Circuit has recognized the fact that "concepts of mental disorders are 'constantly-evolving conception[s]' about which 'the psychological and psychiatric community is far from unanimous' and a 'district court may not exclude proffered expert psychological testimony simply because the defendant's condition does not fit within the expert's-or the district court's own concept of mental 'disorder.'" *Finley*, 301 F.3d at 1012, (quoting *Rahm*, 993 F.2d at 1411).

4. Dr. Freyd's research and opinion exceeds the common knowledge of the average lay person.

The Ninth Circuit has warned against making assumptions about overstating the scope of the average juror's common understanding and knowledge in regards to psychological testimony. *Finley*, 301 F.3d at 1013. In quoting the Seventh Circuit, it noted that "it is precisely because juries are unlikely to know that social scientists and psychologist have identified [such a personality disorder] . . . that the testimony would have assisted the jury in making its decision." *Id.*, quoting *United States v. Hall*, 93 F.3d 1337, 1345 (7th Cir. 1996). The court in *Finley* went on to note that "[o]ur case law recognizes the importance of expert testimony when an issue appears to be within the parameters of a layperson's common sense, but in actuality, is beyond their knowledge." *Id.*, citing *United States v. Vallejo*, 237 F.3d 1008, 1019-1020 (9th Cir. 2001).

There can be little debate that the testimony of Dr. Freyd's opinions and areas of expertise is beyond the knowledge of the average lay person. The defendant has put the victim's character and her response to his sexual assault squarely at issue. He is going to be arguing that a 16-year-old cheerleader under his authority, supervision, and control consented to his sexual acts. He is arguing that she did not respond in a way to suggest that the sexual assault was being done without her permission. The government is entitled to present expert testimony that her passive response to his sexual assault was not unusual or surprising given the coach-athlete relationship that is central to the facts in this case.

5. Rule 403 balancing weighs in favor of admission of the expert testimony of Dr. Freyd.

Federal Rule of Evidence 403 states that:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The government assumes that the defendant will argue that the proffered expert testimony of Dr. Freyd would be prejudicial to his defense that the victim consented. The fact that the evidence may dissuade the jury from believing the defendant's claim of consent on the part of the victim does not make it inadmissible, nor prejudicial. Expert opinion on the psychological research and evaluation of the victim's passive response to her coach's sexual abuse is highly probative to the evidence in this case. Contrary to the notion that such evidence would be confusing, unfair, or misleading, there can be little debate that it would provide the jury with the knowledge to understand what was occurring on the flight during defendant's

sexual assault of the victim. The evidence directly addresses the issue of consent. Its probative value is not substantially outweighed by the danger of unfair prejudice.

CONCLUSION

For the reasons stated in this memorandum and the evidence and arguments to be adduced at the *Daubert* hearing, the expert testimony of Dr. Freyd should be admitted at trial.

DATED this 13th day of May 2008.

Respectfully submitted,

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s/ Billy J. Williams
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