IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	)	
	)	
	)	**Criminal No. 09-05**
v.	)	
	)	**Sealed Order**
CHRISTINA MARIE KORBE,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Pending before the Court are the following motions which Defendant filed under seal: DEFENDANT'S MOTION TO EXCLUDE THE GOVERNMENT'S NON-SCIENTIFIC EXPERT TESTIMONY REGARDING THE SAFETY OF EARLY MORNING "TAKEDOWNS" (Document No. 242); DEFENDANT'S MOTION TO EXCLUDE THE GOVERNMENT'S TRAJECTORY ANALYSIS (Document No. 243); DEFENDANT'S MOTION TO CHALLENGE GOVERNMENT'S EXPERT OPINIONS (Document No. 244); and DEFENDANT'S MOTION TO EXCLUDE THE GOVERNMENT'S HAIR ANALYSIS EVIDENCE (Document No. 245). Defendant has submitted memoranda of law in support of her motions. The government filed an omnibus response in opposition to the motions (Document No. 250), and they are ripe for disposition.

Factual and Procedural Background

This criminal case arose out of the tragic shooting of FBI special agent Samuel Hicks on November 19, 2008. Early in the morning on that date, Hicks and other law enforcement officers were attempting to execute an arrest warrant for Robert Ralph Korbe at the family home, which he shared with his wife, Christina Korbe ("Defendant" or "Korbe") and their two young children.

The arrest of Robert Korbe was part of a larger, coordinated "takedown" plan, which was designed to simultaneously arrest numerous targets of a wiretap investigation. Defendant admits that she shot agent Hicks, but asserts self defense and defense of her small children regarding his death. In addition to charges arising out of the shooting, Defendant is charged with drug and firearm offenses in a nine-count Superseding Indictment.

The jury trial in this case is currently scheduled to commence on October 4, 2010. Pursuant to the Court's pretrial Order, the government filed Written Summaries of Expert Testimony pursuant to Fed. R. Crim. P. 16(a)(1)(G) on August 2, 2010. The government's filing contained summaries of the basis for each expert's opinions and the experts' qualifications. Defendant's challenges to the government's expert opinions and/or qualifications were due on August 12, 2010. Memorandum Opinion and Order of June 16, 2010 (Document No. 209). The pending motions are untimely, as they were not filed until August 17, 2010. Given the gravity of the charges in this case, the Court will address the substance of Defendant's motions. Defense counsel are reminded, however, that strict compliance with the Court's scheduling deadlines is required.

Legal Analysis

Defendant asks the Court to exclude the following testimony: (1) testimony by FBI Supervising Special Agent Michael Christman regarding "take down" operations; (2) testimony by ATF Firearms and Toolmarks Examiner Gregory Klees regarding trajectory analysis; and (3) testimony by FBI Toxicologist Cynthia L. Morris-Kukoski regarding hair sample analysis to determine drug use. In addition, Defendant seeks additional information regarding the basis for

gunshot residue analysis of Allison Murtha, the firearms and ballistics findings of Thomas Morgan, and the medical records of Defendant's visit to the emergency room on September 8, 2008. Defendant also seeks a pretrial hearing on all these issues. The government opposes Defendant's motions and contends that no hearing is necessary.

The admission of expert testimony is governed by Fed. R. Evid. 702, which states:

> 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.

In *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579, 587 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the Supreme Court explained that judges act as gatekeepers to exclude unreliable expert testimony. The Court must consider "qualifications, reliability and fit." *Calhoun v. Yamaha Motor Corp., U.S.A.*, 350 F.3d 316, 321 (3d Cir. 2003). The "qualification" factor is interpreted liberally and may be satisfied by the possession of any specialized knowledge, skills and/or training. *Id.* The "reliability" inquiry evaluates: (1) whether a method consists of a testable hypothesis; (2) whether the method has been subject to peer review; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; (5) whether the method is generally accepted; (6) the relationship of the technique to methods which have been established to be reliable; (7) the qualifications of the expert witness testifying based on the methodology; and (8) the non-judicial uses to which the method has been put. *Id.* Of course, all of these factors may not be applicable in a particular inquiry. The "fit" factor considers whether the proffered expert testimony is relevant to the

issues in dispute in the case and whether it will assist the jury. *Id.* A court need not hold a separate pretrial *Daubert* hearing; voir dire in the presence of the jury is permissible. *United States v. Diaz*, 300 F.3d 66, 74 (1st Cir. 2002). With this background, the Court will address the specific issues seriatim.

A. Take Down Operations

The government intends to present "non-scientific expert testimony" from FBI Supervisory Special Agent Michael Christman regarding operational plans for the coordinated and simultaneous "takedown" (i.e., arrest of multiple targets) of a wiretap investigation. *See* Government's Written Summaries of Expert Testimony at 10. Defendant argues that this testimony is "self-serving" because Christman is the person who approved the operational plan for the arrest of Robert Korbe on November 13, 2008. Defendant also seeks the disclosure of the "arrest plan" for Korbe's arrest. Defendant further contends that Agent Christman's testimony does not satisfy the requirements for either lay or expert opinion testimony. In particular, Defendant argues that "the jury is not assisted by this opinion," and that "[t]here is no reliable basis for the opinion that the "take down" method used in this case reduces 'incidents' and 'minimizes the risk of injury to the public.'"

The government responds that Christman has specialized expertise that will assist the jury, as it is unlikely that jurors will have experience in the specialized area of "takedown" arrests of wiretap investigation targets. The government represents that Christman will not testify as a fact witness about Robert Korbe and/or the particulars of the planned arrest of Robert Korbe. Finally, the government explains that there was no specific "arrest plan" for Robert

Korbe, and identifies the contents of the packets prepared as part of the operational plan for the wiretap takedown.

The Court concludes that the proffered testimony of Supervising Special Agent Christman regarding wiretap takedowns is admissible under Fed. R. Evid. 702.[1] Although there may be no scientific testing to support the assertion that the "takedown" methods employed minimize the risks of injury, Christman's knowledge, training and experience is sufficiently specialized to qualify as expert testimony, in that jurors are unlikely to be familiar with wiretap investigations and "takedown" operations. The testimony is relevant and will assist the jury in this case to understand why agents decided to approach the Korbe home in the early morning hours of November 19, 2008. Defendant has not directly challenged Christman's qualifications in this motion, and will have ample opportunity to do so during cross-examination at trial. As Defendant recognizes, the Court has already ordered the government to turn over the Operations Plan, which would include the "arrest packets" that were given to each team leader. The government's representation that Agent Christman will not testify as a fact witness regarding the specifics of the plan to arrest Robert Korbe will eliminate Defendant's concern regarding the potential prejudice when a government agent testifies in a dual role as both a fact and expert witness. A pretrial hearing is not warranted.

In accordance with the foregoing, DEFENDANT'S MOTION TO EXCLUDE THE GOVERNMENT'S NON-SCIENTIFIC EXPERT TESTIMONY REGARDING THE SAFETY OF EARLY MORNING "TAKEDOWNS" (Document No. 242) will be **DENIED**.

---

[1]The Court need not consider whether the evidence would be admissible as lay opinion testimony under Fed. R. Evid. 701.

B. Trajectory Analysis

The government intends to present a Shooting Trajectory Analysis from Gregory S. Klees, a Firearms and Toolmarks Examiner employed by ATF. Defendant's motion challenges the qualifications of Mr. Klees, but does not take issue with the specifics of his methodology. Defendant points out that Klees' curriculum vitae lists thousands of cases involving firearms, toolmarks and number restoration but does not list any training or experience in "shooting trajectory analysis." Defendant also seeks disclosure of all of the materials Klees used as a part of his analysis, including a booklet of 41 reports and assorted forms, and an interview of Taylor Korbe, Defendant's daughter.

The government responds that trajectory analysis is subsumed within Klees' thirty years of firearms expertise, and notes that he has listed numerous instances in which he served as a speaker or instructor in trajectory analysis and cites a case in which Klees was qualified and testified as a trajectory expert. The government represents that all witness interviews upon which Klees relied[2] for his trajectory analysis were provided in Exhibit L of the appendix. The government has subsequently provided the booklet of 41 reports and the ten supplemental witness interview reports requested by Defendant. *See* Document No. 270.

The Court concludes that Defendant's challenge to Klees' qualifications may be adequately explored by defense counsel by voir dire in the presence of the jury such that a separate pretrial *Daubert* hearing is not warranted. *See Diaz*, 300 F.3d at 74. Defendant will

[2]The Court notes that in civil cases, parties have the obligation to disclose all documents "considered by" the expert, regardless of whether the expert ultimately "relied upon" them. Fed. R. Civ. P. 26, Advisory Committee Notes to1993 Amendments. Fed. R. Crim. P. 16(a)(1)(G), by contrast, requires a summary that describes the expert's opinions, the bases and reasons for those opinions and the expert's qualifications.

have ample opportunity for such an inquiry, and will also have an opportunity to raise challenges to Klees' methodology, if any. If the methodology is to be challenged pretrial, a more specific motion must be filed. In accordance with the foregoing, DEFENDANT'S MOTION TO EXCLUDE THE GOVERNMENT'S TRAJECTORY ANALYSIS (Document No. 243) will be **DENIED WITHOUT PREJUDICE**.

C. Hair Sampling Analysis

The government intends to introduce the expert testimony of Cynthia L. Morris-Kukoski, a toxicology examiner for the FBI, who performed tests to determine whether hair samples obtained from Defendant indicated the presence of cocaine and/or Vicodin. Defendant correctly points out that the FBI laboratory has suspended hair testing for the presence of cocaine, and that a specific request was made to test Defendant's hair for cocaine despite the general suspension of such testing. Defendant has not challenged Ms. Morris-Kukoski's qualifications.

The government, in response, accurately observes that the circumstances regarding the suspension of hair testing for cocaine, the decision to test Korbe's hair, and the limitations on the reliability of hair testing for cocaine use are explicitly stated in Ms. Morris-Kukoski's report. The government further explains that only qualitative testing of Defendant's hair was performed for the presence of cocaine, and that Ms. Morris-Kukoski will <u>not</u> testify that the test results indicate "use" of cocaine by Defendant. Rather, she will opine only that the test results indicate that Defendant was "exposed" to cocaine. The government argues that the presence of cocaine in Defendant's hair is relevant and probative, regardless of whether the exposure occurred via ingestion or externally. The government also contends that the recent technical developments regarding the absorption of cocaine do not impact the results of the Vicodin tests in any way.

The Court agrees with the government. Defense counsel will certainly be given an opportunity to vigorously cross-examine Ms. Morris-Kukoski regarding the tests she performed, the FBI's decision to suspend hair testing for cocaine use, and the decision to test Defendant's hair despite the general suspension, as well as the limitations on the test results. However, those factors do not warrant the exclusion of her testimony. Indeed, from the Court's review of the government's submission, it appears that the government has acknowledged these issues and has reasonably attempted to limit the scope of the opinions it intends to offer regarding the testing of Defendant's hair and the test results. No pretrial hearing is required on this issue.

In accordance with the foregoing, DEFENDANT'S MOTION TO EXCLUDE THE GOVERNMENT'S HAIR ANALYSIS EVIDENCE (Document No. 245) will be **DENIED**.

D. Miscellaneous Discovery Requests

After its review of the summaries provided by the government, Defendant has requested several specific pieces of additional information. Namely, Defendant requests: (1) as to Allison Murtha's report, the location where the wall stub sample was taken; (2) as to Thomas Morgan's report, legible copies of test pattern plates or other media that contained gunshot residue at various distances; and (3) as to Dr. Kranc, legible copies of the medical records.

The government has responded to each of these requests. The government specified the location of the wall stub sample and directed Defendant to the particular lab report. The government directed Mr. Morgan to prepare a CD containing all the digital photographs, which has been provided to defense counsel. The government has provided another copy of the relevant medical records, but agrees that they are difficult to decipher. The government has also requested more legible copies of the records from the hospital. Thus, it appears that the

government has provided all the materials requested by Defendant.

In light of the government's response, DEFENDANT'S MOTION TO CHALLENGE GOVERNMENT'S EXPERT OPINIONS (Document No. 244) will be **DENIED AS MOOT**.

An appropriate Order follows.

McVerry, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	)	
	)	
	)	**Criminal No. 09-05**
v.	)	
	)	
CHRISTINA MARIE KORBE,	)	
	)	
Defendant.	)	

ORDER OF COURT

AND NOW, this 3rd day of September, 2010, in accordance with the foregoing Memorandum Opinion, it is hereby **ORDERED, ADJUDGED** and **DECREED** that DEFENDANT'S MOTION TO EXCLUDE THE GOVERNMENT'S NON-SCIENTIFIC EXPERT TESTIMONY REGARDING THE SAFETY OF EARLY MORNING "TAKEDOWNS" (Document No. 242) is **DENIED**; DEFENDANT'S MOTION TO EXCLUDE THE GOVERNMENT'S TRAJECTORY ANALYSIS (Document No. 243) is **DENIED WITHOUT PREJUDICE;** DEFENDANT'S MOTION TO EXCLUDE THE GOVERNMENT'S HAIR ANALYSIS EVIDENCE (Document No. 245) is **DENIED**; and DEFENDANT'S MOTION TO CHALLENGE GOVERNMENT'S EXPERT OPINIONS (Document No. 244) is **DENIED AS MOOT**.

BY THE COURT:

s/ Terrence F. McVerry
United States District Court Judge

cc: Caroline M. Roberto, Esquire
Email: croberto@choiceonemail.com
Jay T. McCamic, Esquire
Email: jtmccamic@mspmlaw.com

Troy Rivetti, AUSA
Email: Troy.Rivetti@usdoj.gov
Bruce J. Teitelbaum, AUSA
Email: bruce.teitelbaum@usdoj.gov
Donovan Cocas, AUSA
Email: Donovan.Cocas@usdoj.gov