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FILED
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2016 SEP -8 AM 8:46
DAVID W. PETERSON

IN THE KITSAP COUNTY SUPERIOR COURT

STATE OF WASHINGTON,)	
)	No. 15-1-00972-7
Plaintiff,)	
)	MOTION TO PRECLUDE DEFENSE EXPERT
v.)	FROM TESTIFYING TO AN UNPUBLISHED
)	REPORT
GERALDO CASTRO DEJESUS,)	
Age: 31; DOB: 09/26/1984,)	
)	
Defendant.)	

COMES NOW the Plaintiff, STATE OF WASHINGTON, by and through its attorney BARBARA O. DENNIS, Deputy Prosecuting Attorney, with the following Motion to Preclude Defense Expert from Testifying to an Unpublished Report-

A. ISSUE(S) PRESENTED

Issue

Whether William Tobin should be permitted to testify to an unpublished report when experts in Tobin's scientific field would not normally rely upon reports that had not been sufficiently peer reviewed. Answer: No.



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B. ARGUMENT

William Tobin should not be permitted to testify about unpublished reports that experts in the field of ballistics would not ordinarily rely upon.

ER 703 allows an expert to testify as to the basis of his opinion even though that might include hearsay statements “If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.”

“The word “reasonably” in ER 703 gives trial courts discretion in determining whether the underlying information is sufficiently reliable to form the basis of an expert's opinion.” *In re Detention of McGary*, 175 Wash. App. 328, 306 P.3d 1005 (2013). In *McGary*, the Court recognized that the witness qualified as an expert and allowed the expert to testify but did not allow the expert to rely upon a testing procedure that was not relied upon by others in the field.

The same holds true in the present case, William Tobin has been allowed to testify as an expert in this case by this Court. However, that does not in turn mean that Tobin is now permitted to testify about whatever information forms his opinion. He has to rely upon information that other experts in his field would rely upon. In this case, he is attempting to rely upon an unpublished draft report that has not finished the stages of peer review and been finalized. Likewise the PCAST report is not an authoritative scientific article, nor are the committee members scientists in the relevant scientific community. Just as there is a reason for not allowing counsel to cite to unpublished cases, there is also a reason, even more significant, for scientist not to rely upon incomplete work. Scientists go through a peer review process before professional work is published to ensure it's reliability and to ensure that conclusions are properly drawn. It would be unprofessional for a scientist to rely upon work that was not vetted through this process.

Here, the PCAST report is merely an advisory opinion, not a scientific authority. More importantly, the draft version presently available to the parties is exactly that: a draft. By all accounts the final approved version **is different** than the draft versions were. To allow it to be referenced in court as authoritative, without knowing which areas of it have been changed, is the type of impermissible evidence this court must preclude. For a “scientist” to seek to rely on that is irresponsible scientifically, and will be misleading to the jury.



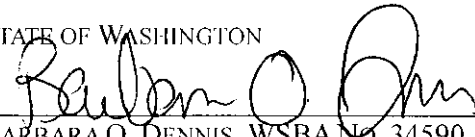
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C. CONCLUSION

Accordingly, this Court should preclude the defense from referencing, introducing, or allowing its witness to testify about an unpublished report.

RESPECTFULLY SUBMITTED this 7th day of September, 2016.

STATE OF WASHINGTON



BARBARA O. DENNIS, WSBA No. 34590

Deputy Prosecuting Attorney

Prosecutor's File Number-15-143920-5

