UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

CASE NO. 99-8131-CR-FERGUSON

UNITED STATES OF AMERICA,
Plaintiff,
V.

HILERDIEU ALTEME, et al.,
Defendants.

REPORT AND RECOMMENDATION

THIS CAUSE is before the Court on defendant Hilerdieu Alteme's Motion to Exclude the Government's Fingerprint Identification Evidence (DE 84), adopted by defendants Jean Lubin, Schenet Joseph and Kesner Joseph, which was referred to United States Magistrate Judge, Lurana S. Snow, for report and recommendation. And evidentiary hearing was held an this motion commencing on April 31 2000.

I. FACTS PRESENTED

The defendant called as a his Sole Witness David Allen Storey, Esq., who has a Ph.D. in forensic science and heads a private research institute, Dr. Storey expressed the opinion that the identification of latent fingerprints is not a scientific determination, He stated that the scientific method requires observation, the formation of a hypothesis and testing. The process of latent fingerprint identification does not utilize

either an objective standard that has been tested, or a well_ defined subjective process that has been tested. Instead, it is a subjective determination based upon the judgment. of an individual, and includes that individuals training, experience and ability,

Dr. Storey explained that the basic premises of fingerprint identification are: (1) fingerprints are permanent and do not change; (2) fingerprints are unique (no two fingerprints are alike), and (3) it is possible to make an identification based on a partial print, if there is sufficient quality and quantity of detail. Dr. Storey does hot dispute the veracity of the first two promises. With regard to the third, he points out that the critical question is how much (quantity and quality of detail) is enough to make the identification. This, he contends, is a subjective determination, and there is no test to determine whether the identification of a partial print is wrong.

Dr. Storey noted that for several years, there a existed a "rule of thumb" that twelve points of identity were sufficient to make an identification. However, there is no scientific basis for the conclusion that any minimum number of points is necessary for a positive identification. Dr. Storey explained that there is an accepted procedure employed by fingerprint examiners known as "ACEV," which entails analysis, comparison, evaluation (is there enough?) and verification by another expert. According to Dr. Storey, this is, at best, an articulated procedure rather than a standardized process.

Dr. Storey stated that simply because the process of latent fingerprint comparison and identification has been utilized for eighty years, and has been accepted in court during that time, it does not follow that this process is a scientific one. He distinguished fingerprint identification from medical diagnosis and treatment on two grounds (1) doctors have scientific training and (2) once a doctor makes a diagnosis and provides treatment, he or she receives feedback which enable the doctor to determine whether the diagnosis was correct. Dr. Story also pointed out that fingerprint identification differs from other areas of forensic science because the only opinion advanced by the examiner is one of absolute identification.

On cross examination, Dr. Storey reiterated that fingerprints are permanent and unique, and acknowledged that there are experts in the field of fingerprint Identification. In fact, Dr. Storey has testified as an expert in this field, and has made identifications from partial latent prints.

The Government called three witnesses in Support of the introduction of latent fingerprint evidence in the instant case. Dr. William J. Babler, an expert in the field of prenatal development of human variation, particularly friction ridges (on fingers, palms, toes and soles of feet) and their configurations, explained why friction ridges are unique and permanent. Stephen B. Meagher, Latent Print Unit Chief of the Forensic Analysis Section of the FBI's Laboratory Division, described in detail the means by

which latent prints are compared and identified, utilizing three levels of comparison. Finally, FBI Senior Scientist Dr. Bruce Budowle, an expert in the fields of genetics, statistics, quality assurance and standards and the validation of forensic science applications, attested to the validity of statistical data pertaining to fingerprint methodology. The testimony of these witnesses is detailed in the Government's Exhibits (attached hereto) and its Response to Motion In Limine Concerning Fingerprint Evidence, which are incorporated by reference in this report.

II. RECOMMENDATIONS OF LAW

Prior to the enactment of the Federal Rules of Evidence, the admission of expert opinion based on a scienLific technique depended upon whether the technique was "generally accepted" as reliable in the relevant scientific community. Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923) . Under the Federal Rules of Evidence, the admission of expert opinion testimony is Rule 702, which 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.

In Daubert v. Merrell_Dow Pharmaceuticals, 509 U.S 579, 588 (1993), the Supreme Court held that Rule 702 supersedes the test articulated in Frye, supra, since "[n}othing in the test of this Rule establishes 'general acceptance' as an absolute

prerequisite to admissibility." Moreover, the rule requires the trial judge to ensure that any scientific testimony or evid6nce admitted is not only relevant, but reliable. However, the subject of scientific testimony need not be known to a certainty, but must be supported by appropriate validation (good grounds) , based an what is known. Id. at 589-90.

The rule requires, first, that the expert must possess knowledge, skill, experience, training or education in the area of his or her testimony greater than the average layperson. The second requirement of Rule 702 is that the experts testimony be reliable, based on valid reasoning and reliable methodology, rather than subjective belief and speculation. When presented with a proffer of expert scientific testimony, the trial court must make a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue-" Id. at 591-2.

In so doing, the court ordinarily would consider the following factors: (1) whether the technique can be, and has been, tested; (2) whether it has been subject to peer review and publication; (3) the known or potential rate of error, and (4) whether the technique has been generally accepted. Id. at 593-94,1

The court characterized these factors as "general observations" and declined to set out a definitive checklist or test. Id. at 593.

> The consideration of the last factor permits, but does not require, explicit identification of a relevant scientific community and an express determination Of a Particular degree of acceptance within that community. Id, at 595.

The Daubert court noted the respondent's concerns that abandoning "general acceptance as the exclusive prerequisite to admissibility of scientific evidence would result in "a 'free for all' in which befuddled juries are confounded by absurd and irrational pseudoscientific assertions." Id. at 595. The court rejected such apprehensions as overly pessimistic, recognizing that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." Id. at 596. Thus, the inquiry envisaged by Rule 702 is a flexible one focusing solely on principles and methodology, not an the conclusions they generate.

In Kumho Tire Co., Ltd. V. Carmichael, ___U.S.___, 119 S.Ct. 1167 (1999) the Supreme Court considered how Daubert applies to the testimony of experts who are not scientists. The court concluded that Daubert's general holding, setting forth the trial judge's "gatekeeping" obligation to screen expert testimony, applies to experts with technical and other specialized knowledge.

Additionally, the court held:

> a trial court may consider one or more of the more specific factors that *Daubert* mentioned when doing so will help determine that testimony's realiability, But, as the Court

> stated in *Daubert*, the test of reliability is 'flexible," and *Daubert's* list of specific factors neither necessarily nor exclusively applies to all experts or in every case, Rather, the law grants a district court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination.

Id. at 1171.

It is clear from the language employed in and Daubert that the change effected by the enactment of Rule 702 was not intended to substitute one rigid, mechanical test for another. Instead, the rule vests with the trial judge broad discretion in evaluating both the reliability and relevance of scientific and technical evidence. Always implicit in such an analysis is the incorporation of the principles of reason and common sense, without which our legal system would be rendered impotent.

In the instant case, the defense expert, Dr. David Storey, offered valuable comments on the limitations and subjective aspects of fingerprint identification. Clearly the qualifications of the fingerprint examiner are a factor in the reliability of his or her identification. Unlike Dr. Storey, however, the undersigned finds that such are limitations apply equally, if not more, to other areas such as medicine.

The difficulty with the argument advanced by the defenses is that it proves too much. If Dr. Story's criticism of the process of fingerprint examination were sufficient to preclude the testimony of other experts, large categories of scientific and

technical testimony would be inadmissible. At a minimum, it would .be necessary to eliminate the defense of insanity, since virtually all psychiatric opinions are subjective, in whole or in part.

Additionally, it is not necessary that the field of latent print examination be, deemed a "science, in order to be admissible, since Rule 702 applied to all types of expert testimony. Virtually the same evidence presented in this 'hearing was heard by the, district judge in United States v. Byron Mitchell Case Number 96-407, United States District Court for the Eastern District of Pennsylvania. In holding that the testimony of the fingerprint expert was admissible, the court first stated that it was not necessary to determine whether the field of latent fingerprint identification was scientific knowledge or technical or specialized knowledge. The court concluded that the Government's expert could testify, and the defense could call experts to testify "as to the ability not identify or make an examination from the fingerprints and . . . any latent fingerprint expert who indicates that fingerprints are not reliable sources of identification." (Government's response, Exhibit A., p. 4) However, the defense was not permitted to present to the Jury any evidence as to whether fingerprint identification was scientific, technical or other. Id.

The undersigned concludes that the latent fingerprint identification process is reliable, is relevant to the issues of the instant case, and should be admitted under Federal. Rule of

Evidence Rule 702. Of course, the defense is free to call its own expert witness to dispute the conclusion of the Government's expert, or to testify as to the inability to make an identification from the subject latent print.

III. CONCLUSION

This court having considered carefully the pleadings, arguments of counsel, and the applicable case law, it is hereby RECOMMENDED that the Motion to Exclude the Government's Fingerprint Identification Evidence he DENIED.

The parties will have ten days from the date of being served with a copy of this Report and Recommendation within which to file written objections, if any, with The Honorable Wilkie D. Ferguson, United States District Judge. Failure to file objections timely shall bar the parties from attacking on appeal factual. findings contained herein. LoConte v. Dugger, 847 F.2d 745 (11th Cir. 1998) cert. denied, 488 U.S. 958 (1988); RTC v. Hallmark Builders, Inc., 996 F.2d 1144, 1149 (lith Cir, 1993).

DONE AND SUBMITTED at Fort Lauderdale, Florida, this *7th* day of April, 2000.

(ORIGINAL DOCUMENT SIGNED)

LURANA S. SNOW
CHIEF UNITED STATES MAGISTRATE JUDGE

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