

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.) No. 4:01CR296 ERW (TIA)
)
 KENNETH COLEMAN, et. al.,)
)
 Defendants.)
)

**GOVERNMENT’S RESPONSE TO DEFENDANT’S MOTION FOR
DAUBERT HEARING ON PROPOSED GOVERNMENT EXPERT TESTIMONY**

COMES NOW the United States of America, by and through its attorneys, Raymond W. Gruender, United States Attorney for the Eastern District of Missouri, Stephen R. Welby, Steven E. Holtshouser, and Julia M. Wright, Assistant United States Attorneys for said District, and for its response, as follows:

Defendant has requested this Court conduct a motion hearing pursuant to Daubert v. Merrill Dow Pharmaceuticals, 509 U.S. 579 (1993) and Kumho Tire v. Carmichael, 119 S.Ct. 1167 (1999) to establish the reliability of expert testimony that the government intends to offer at trial in the area of fingerprinting, trace evidence (hair/fiber/duct tape), and footprint impressions.

Rule 702 of the Federal Rules of Evidence permits the admission of expert testimony where

scientific, technical, or other specialized knowledge will assist the trier of fact. As "gatekeeper" the District Court has discretion to decide whether an expert's testimony rests upon a reliable foundation and is relevant. Daubert at 592. The Court must determine the reliability of expert testimony in light of the facts and circumstances of each particular case. Kumho Tire at 1179. The Daubert Court never held, however, that the required preliminary assessment had to be conducted in relation to *routine* scientific procedure. (emphasis added) Daubert at 592, note 11 (some scientific theories are so firmly established as to have attained the status of scientific law).

Such is the instant case. The government will call experts to testify regarding the analysis and comparison of fingerprints, hair, fiber, duct tape, and footprint impressions. These areas of expertise do not involve a new or novel scientific theory that would require a Daubert hearing. Considering the reliability and relevance of the proposed expert testimony as well as current case law in the Eighth Circuit and other Circuits, the government's proposed expert testimony is admissible without the need for a Daubert hearing..

The Second Circuit recently upheld expert opinion testimony on fingerprint identification in a Daubert challenge in United States v. Havvart, 260 F.3d 597 (7th Cir. 2001). In Havvart, the defendant argued that latent fingerprint comparisons are not reliable because the government's basic premise that all fingerprints are unique remains unproven, and because there are no objective standards to determine how much of a latent fingerprint is necessary to conduct a comparison or for evaluating an individual examiner's comparison. Applying Daubert, the Court noted that fingerprint

evidence has been successfully used and tested by the adversary process for 100 years in criminal trials. Id. at 4. Further, the Havvart Court upheld the District Court's finding that the results of individual fingerprint analysis have been routinely subjected to peer review for verification and that the probability of error is exceptionally low. Id. Based on the same reasoning, the Court in United States v. Reaux, 2000 WL 883221 (EDLa July 31, 2001) found that the expert fingerprint testimony at issue satisfies the Daubert reliability test. The Court in Reaux further found that a pretrial evidentiary hearing is not necessary to determine the reliability of the fingerprint expert's testimony citing United States v. Joseph, 2000 WL 515213 (EDLa May 14, 2001)(holding that an evidentiary hearing was not necessary because fingerprint analysis has been tested and proven to be a reliable science over decades of use for judicial purposes. Reaux at 4.

In addition, the Ninth Circuit has also held that "expert testimony regarding fingerprint comparison is a generally accepted technique that has been subjected to peer review and publication ... that would aid the jury in determining identity." United States v. Sherwood, 98 F.3d 402, 408 (9th Cir. 1996).

The issue of footprint expert testimony was addressed in United States v. Ross, 263 F.3d 844 (8th Cir. 2001). In Ross, the District Court's decision was upheld allowing the admission of expert testimony from a Federal Bureau of Investigations forensic examiner linking footprints and tire imprints found in snow at the crime scene of one of the bank robberies to the defendant's boots and defendant's car tires. The Court held that, after a hearing *in limine*, the evidence met the

requirements of Federal Rule 702 and Daubert and thus was admissible in trial. (*See also United States v. Rose*, 731 F.2d 1337, 1345-46 (8th Cir. 1984), cert. denied, 469 U.S. 931, 105 S.Ct. 326, 83 L.Ed. 2nd 263 (1984) where trial Court did not abuse its discretion in allowing a police department employee to testify as an expert on the subject of shoe-and-print comparison where he had studied firearm and tool mark identification, including shoe-print analysis, attended seminars and workshops relating to same).

In addition to the testimony set forth above, the government intends to call experts to testify to trace evidence regarding hair, fiber, and duct tape analysis and comparison. Hair and fiber evidence was addressed in United States v. Santiago, 156 F.2d 145 (D. Puerto Rico 2001). In Santiago, the Courts found that the principles and procedures underlying hair and fiber evidence are overwhelming accepted and reliable. Id. at 151. The Court stated "as one treatise notes, 'the cases in which courts have excluded hair evidence are so rare that they have literally amounted to only a handful of precedents ... in contrast to the few cases excluding hair evidence, a large body of case law reflects the court's receptivity to hair analysis'". Giannelli, E. Imwinkelried, *Scientific Evidence*, Section 24-3 at 360-61. The Court further stated that the overwhelming majority of courts that have dealt with the issue have found hair comparison evidence to be reliable. Santiago at 151. Further, the issue that the danger of prejudice resulting from the admission of the hair evidence outweighed its probative value was addressed. Citing from United States v. Hickey, 596 F.2d 1082 (1st Cir. 1979), the Santiago Court stated that "the introduction of hair evidence, while not affirmatively implicating the

defendant, will help the jury in determining whether defendant committed the crimes...hair comparison evidence is probative. Santiago at 152. The jury is free to make the determination as to the weight it will give to the testimony, but admissibility is not a question. Guam v. Bruneman, 1998 WL 892666 (Guam Terr. 1998)(*See also* United States v. Busch, 47 MJ 305 (U.S. Court of Appeals for the Armed Forces 1998) where Court held it was not an abuse of discretion to allow qualitative and quantitative analysis of hair samples to go to the Court members and that mass spectrometry hair analysis is admissible).

The issue of duct tape comparison during an armed bank robbery was addressed by the Eighth Circuit in United States v. Agofsky, 20 F.3d 866 (8th Cir. 1994). In Agofsky, the defendant robbed the State Bank of Noel, Missouri, kidnapped the bank president, Dan Short, duct taped Short to a chair, duct taped a concrete block to Short's left ankle and threw Short into the Grand Lake of the Cherokees. Short's body was found a few days later floating in the lake. At trial, the Government introduced expert testimony identifying defendant's fingerprints on both the duct tape used to bind Short to the chair and a on a piece of duct tape that washed ashore nearby which, the evidence showed, had been torn from the tape found on the chair. Agofsky at 868. The government's expert witness testified that, in his opinion, the prints were placed on the tape as the tape was removed from its spool. Similarly, in the instant case, duct tape was used by the defendants during the commission of the crimes to restrain victims. At trial, the government intends to present expert witnesses who will testify that in their opinion, Kenneth Coleman's fingerprint is on a piece of duct tape found in

a storage locker linked to the robberies, and the torn end of duct tape found in another storage locker linked to the robberies matches the torn end of a piece of duct tape that came from one of the bank robbery victim's face.

Wherefore, for the foregoing reasons, the government respectfully requests the defendant's motion for a Daubert hearing on government's proposed expert testimony regarding the examination and comparison of fingerprints, trace evidence, and footwear impressions be denied.

Respectfully submitted,

RAYMOND W. GRUENDER
United States Attorney

-
JULIA M. WRIGHT, #4450
111 S. 10th Street, 20th Floor
St. Louis, MO 63102
(314) 539-2200

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was mailed postage prepaid

United States mail to:

Ronald E. Jenkins, Esq.
10 S. Brentwood, Suite 200
St. Louis, MO 63105
Attorney for defendant Coleman

Robert Herman, Esq.
621 N. Skinker
St. Louis, MO 63130
Attorney for defendant Worthy

Peter Huber, Esq.
222 S. Central, Suite 502
St. Louis, MO 63105
Attorney for defendant Willis

This ___ day of January, 2002.

Assistant United States Attorney