UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA,	)	
	)	
	)	
v.	)	Criminal No. 01-03-B-S
	)	
DENNIS MOONEY,	)	
	)	
Defendant.	)	

GOVERNMENT'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION IN LIMINE REGARDING EXPERT TESTIMONY ON FINGERPRINT AND HANDWRITING IDENTIFICATION

The United States of America, by and through its undersigned counsel, hereby files its response in opposition to defendant's motion to exclude the testimony of the Government's proposed experts in document and fingerprint examination, and states as follows:

INTRODUCTION

On November 28, 2001, the defendant filed the present motion, based upon Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993) and Rule 702, to prevent Lawrence Herb from testifying about a handwriting analysis which led him to believe that Defendant wrote Government Exhibits A-D and also to prevent Charles Coleman from testifying that the Defendant's fingerprints were present on Government Exhibits A-D.

I. Expert Testimony Under Rule 702

In Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993), the Supreme Court provided non-mandatory and non-exclusive factors for the trial court to consider in making its determination of whether to admit expert "scientific" testimony: 1) whether the method consists of a testable hypothesis; 2) whether the method has been subject to peer review and publication; 3) the known or potential rate of error of the technique or theory when applied; 4) the existence and maintenance of standards and controls;

and 5) whether the method is generally acceptable within the relevant scientific community. Daubert, 509 U.S. at 592-96 (envisioning flexible analysis when applying above "Daubert factors"). In the wake of Daubert, confusion arose over whether Daubert's analysis was restricted to expertise in purely scientific disciplines, or should be applied to "technical or other specialized knowledge" under Rule 702. United States v. Starzecpyzel, 880 F. Supp.2d 1027, 1028-29 (S.D.N.Y. 1995) (Daubert inapplicable to handwriting analysis as expertise is practical and not scientific).

In Kumho Tire Company v. Carmichael, 526 U.S. 137, 141, 149-51 (1999), the Court held that Daubert applied not only to strictly scientific disciplines, but to expertise based upon skill, experience, or observation as well. The Court in Kumho emphasized that the Daubert factors do not comprise a mandatory checklist of requirements.

On December 1, 2000, Rule 702 was amended in response to Daubert.[1] The trial court must now

[1] Rule 702, as amended, 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.

examine "not only the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the facts of the case." See Fed. R. Evid. 702 advisory committee's note.

In addition to the three stated requirements under former Rule 702 – type of knowledge, witness qualification and helpfulness to the jury – amended Rule 702 now requires that three additional tests be met before opinion testimony can be admitted. First, the court must find that the expert testimony will be based upon sufficient "facts or data."[2] Subpart (1) of Rule 702 also requires that the facts and data be "sufficient." Determining sufficiency is a quantitative, not a qualitative analysis. See Fed. R. Evid. 702 advisory committee's notes.

The last two requirements set forth in amended Rule 702 encompass Daubert's concerns that an expert's opinion be based upon reliable theory and methodology, and that the theory and method have been reliably applied in the instant case. Although the amended Rule does not attempt to codify the specific factors set forth in Daubert, the standards in subpart (2) and (3)of the Rule are broad enough to require the court to consider any or all of the Daubert factors as appropriate, as well as other factors relevant in determining the reliability of expert testimony. See Fed. R. Evid. 702 advisory committee's note (noting five other factors courts have found relevant in determining whether expert testimony is

[2] There are three possible sources of facts or data upon which expert opinions are based: (1) firsthand observation; (2) facts presented at trial; and (3) presentation of data to the expert outside of court and other than by his own perception. See Fed. R. Evid. 703 advisory committee's notes for the 1972 proposed rule. The term "data" as used in Rule 702 encompasses the type of data envisioned by Rule 703's third category, i.e., reliable opinions of other experts. See Fed. R. Evid. 702 advisory committee's notes to the amended Rule.

sufficiently reliable to be considered).

II. Admissibility of Fingerprint Evidence under Rule 702

In a section of his Motion in Limine devoid of supporting authority, the Defendant asserts that fingerprint analysis is not sufficiently reliable to be admitted under Daubert/Kumho standards. (Motion in Limine at 3-4). In both of the cases cited by the Defendant, the courts admitted the fingerprint evidence. In one of the cases cited by the Defendant, United States v. Havvard, the Seventh Circuit wrote:

> The issue of the reliability of fingerprint evidence after *Daubert* appears to be one of first impression in this circuit, and few other courts have addressed this question. Those discussing the issue have not excluded fingerprint evidence; instead, they have declined to conduct a pretrial *Daubert* hearing on the admissibility of fingerprint evidence, *see United States v. Martinez-Cintron*, 136 F. Supp. 2d 17, (D.P.R. 2001)(relying on the district court's order in this case); *United States v. Cooper*, 91 F. Supp. 2d 79, 82-83 (D.D.C. 2000), or have issued brief opinions asserting that the reliability of fingerprint comparisons cannot be questioned, *see United States v. Sherwood*, 98 F.3d 402, 408 (9th Cir. 1996); *United States v. Joseph*, 2001 WL 515213 (E.D. La. May 14, 2001).

Havvard, 260 F.3d 597, 600 (7th Cir. 2001)(emphasis added). There is simply no support for the claim that fingerprint analysis – which has been successfully used and tested by the adversarial process for the last 100 years – is unreliable. See, United States v. Reaux, 2001 WL 883221 at *3 (E.D. La July 31, 2001).

There are myriad cases in which expert fingerprint analysis has been admitted. See, e.g., United States v. Scantleberry-Frank, 158 F.3d 612 (1st Cir. 1998)(expert testimony admitted at trial that thumbprints on two print cards match); Hall v. DiPaolo, 72 F.3d 243 (1st Cir. 1996) (print expert testified to comparison at trial; print found sufficient to sustain conviction); United States v. Jackman, 48 F.3d 1 (1st Cir. 1995) (print expert permitted to testify that no prints matched and also permitted to opine why no prints would have been found); United States v. Richardson, 14 F.3d 666 (1st Cir. 1994)(print evidence admitted by stipulation).

The Defendant does not contest the qualifications of the Government's fingerprint expert, and, accordingly, the Defendant's Motion for a hearing on the admissibility of expert fingerprint testimony

should be summarily denied.

III. Admissibility of Forensic Document Examination of Disputed Handwriting Under Rule 702

While not completely scientific, handwriting analysis is clearly an area of technical expertise governed by Rule 702. See, United States v. Jones, 107 F.3d 1147, 1159 (6th Cir. 1997)(finding no court that has held handwriting analysis to be inadmissible under the Federal Rules of Evidence); United States v. Velasquez, 64 F.3d 844, 851 (3d Cir. 1995)(handwriting analysis "concerned 'scientific , technical or other specialized knowledge' and was sufficiently reliable to be admissible); United States v. Starzecpyzel, 880 F. Supp. 1027, 1029 (S.D.N.Y. 1995) (finding "sufficient indicia of reliability to sustain admissibility of [forensic document examiner] expertise as nonscientific expert testimony."); Greenberg Gallery Inc. v. Bauman, 817 F. Supp. 167, 172, n. 5 (D.D.C. 1993)(taking judicial notice that "handwriting, like fingerprints, are subject to established objective tests, expert opinions about which are admissible.")

The Federal Rules of Evidence, themselves, support the contention that handwriting analysis is a recognized and reliable field of expertise. Rule 901(b)(3) specifically allows handwriting experts to authenticate questioned documents by comparing them to previously authenticated specimens. Fed. R. Evid. 901(b)(3). Similarly, the federal judicial procedure statute provides that known handwriting samples are admissible in evidence "for purposes of comparison, to determine the genuineness of other handwriting attributed to such person." 28 U.S.C. § 1731. See United States v. Swan, 396 F.2d 883, 885 (2d Cir. 1968) (testimony of handwriting expert admitted in conjunction with exemplars admitted pursuant to 28 U.S.C. § 1731). The acquired skill of comparing handwriting samples has earned broad and lasting acceptance in American courts as a reliable forensic technique. Using a qualified forensic document examiner to assist the trier of fact to understand evidence of the identification of writers stretches back over a hundred years and extends into the post-Daubert/Kumho era. See United States v.

Ortiz, 176 U.S. 422, 429 (1900); United States v. Fleishman, 684 F.2d 1329, 1337 (9th Cir. 1982) (undisputed that handwriting analysis testimony assists juries); United States v. Paul, 175 F.3d 906, 910-11 (11th Cir.), cert. denied, 528 U.S. 1023 (1999).

In his motion, the Defendant does not contest that inquiry into the authorship of Government's Exhibits A-D is relevant to the ultimate issue of his guilt or innocence. Thus, if any aspect of Mr. Herb's proposed testimony carries the tendency to make authorship of Government's Exhibits A-D more or less probable, it qualifies as relevant under Rule 401, and is admissible under Rule 702 to "assist" the jury.

The defendant also does not challenge that Mr. Herb is eminently qualified within the field of forensic document examination. Mr. Herb has over thirty years of experience as a forensic document examiner; he has been certified with the American Board of Forensic Document Examiners for the last twenty-one years, he frequently teaches forensic document examination, and he has qualified as an expert in forensic document examination cases in over 250 federal and state court proceedings.

Daubert set forth a non-exclusive checklist of factors for trial courts to use in assessing the reliability of scientific expert testimony. These specific factors include testing, peer review, rates of error, the existence of standards and controls and general acceptance in the relevant field, to assist in the determination of whether evidence is reliable. Daubert, 509 U.S. at 593-94; see also Fed. R. Evid. 702 advisory committee's note. The Kumho Court held that these factors might also be applicable in assessing the reliability of non-scientific expert testimony, depending upon "the particular circumstances of the particular case at issue." Kumho, 526 U.S. 150.

Federal appellate courts that have addressed the issue have held that testimony by qualified handwriting experts withstands the Daubert standards. See United States v. Jolivet, 224 F.3d 902, 905-06 (8th Cir. 2000); United States v. Paul, 175 F.3d 906, 909-10 (11th Cir. 1999); United States v. Velasquez, 64 F.3d 844, 848-49 (3d Cir. 1995); see also United States v. Jones, 107 F.3d 1147, 1156-60

(6th Cir. 1997) (concluding that handwriting analysis is sufficiently reliable to be a proper field of expertise under Rule 702 without relying on Daubert).

The relevant case law within the First Circuit fully supports the proposition that handwriting analysis is a reliable discipline, and that expertise in it may serve as the basis for testimony under Rule 702. In United States v. Campbell, 732 F.2d 1017, 1021 (1st Cir. 1984), the First Circuit stated: "Indeed, it is the stock in trade of handwriting experts that some characteristics are so personally entrenched that disguise is almost impossible." See, also, Ryan v. United States, 384 F.2d 379, 380 (1st Cir. 1967)(only expert trained in handwriting analysis may express an opinion on authorship of writing where witness does not possess prior familiarity with defendant's handwriting).

In more recent First Circuit cases, handwriting analysis evidence has been admitted without challenge. See, United States v. Salimonu, 182 F.3d 63, 71 n.5 (1st Cir. 1999) (Goverment's handwriting expert testified that letter contained defendant's handwriting); United States v. Finklestein, 39 F.3d 1166 (1st Cir. 1994). United States v. Chambers, 964 F.2d 1250, 1251 (1st Cir. 1992)(testimony allowed about fingerprints on demand notes and about handwriting comparison concluding all four notes were in defendant's handwriting);

Defendant's contention (Defendant's Motion in Limine at p.2), that there is no data upon which handwriting analysis can determine one "author" of a particular writing is beside the point. Rules 401 and 702 only require that expert testimony assist juries in making disputed facts either more or less likely than not. If a forensic document examiner can offer any insight that makes authorship of a disputed document more or less certain, that testimony should be presented to the jury. The conceptual prospect that any random percentage of the public possess identical handwriting does not defeat the purpose or utility of handwriting analysis. The testimony of a forensic document examiner, like all testimony, must be evaluated in light of other evidence of the case. The possibility that, for example, a particular defendant

has handwriting that is indistinguishable from one out of every 100 persons may not be significant in the case of a mere anonymous letter. It may be especially damning, however, where, as here, the other evidence in the case has narrowed the number of potential authors. See United States v. Rosario, 118 F.3d 160, 163-64 (3d Cir. 1997) (testimony of handwriting expert that defendant "probably" wrote forged check, while not alone sufficient for conviction, may be considered by jury along with other indications of guilt).

. Furthermore, contrary to Defendant's bald assertions (Defendant's Motion in Limine at p. 2), the methods of handwriting analysis can be and have been tested. A series of studies intended to measure the ability of professional, certified forensic document examiners to identify the authors of questioned writings from known samples was conducted during the 1990's. The studies found that professional document examiners had an error rate of 6.5 per cent, whereas control groups of graduate engineering and business students who were given the same test posted an error rate of 38.6 per cent. Kam, Fielding, & Conn, Writer Identification by Professional Document Examiners, 42 J. Forensic Sci. 778 (1997); Kam, Wetstein & Conn, Proficiency of Professional Document Examiners in Writer Identification, 39 J. Forensic Sci. 5 (1994). The disparity in error rates between the professional examiners and laypersons demonstrates that an actual, technical expertise in document identification does exist, and that laypersons would benefit from the assistance and insight those experts could provide.

Also contrary to Defendant's contentions, (Defendant's Motion in Limine at p. 2) there is an academic field of forensic document analysis. Academic journals such as the *Journal of Forensic Sciences*, contain a plethora of articles on forensic document examination. The professional publication of the American Society of Questioned Document Examiners provides important articles available for review by critics of forensic document examination.

Standards and controls also exist for applying the methods of analyses in handwriting

examinations. The Scientific Working Group on Questioned Document Examination has published proposed standards for document examinations. The American Board of Questioned Document Examiners certifies examiners to a generally excepted standard of competence. Laboratories accredited by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board come under periodic review to ensure that strict programs of quality control and quality assurance are in place and being practiced. Moreover, it is the nature of questioned document examination that the subject matter of the examination is not destroyed or dissipated, so that a second qualified examiner can compare the objective information upon which an opinion is based and render his or her own opinion as to authorship.

In addition, Mr. Herb, as with all document examiners employed by ATF, undergoes peer review on every document examination he performs before the results are released by the lab. Furthermore, Mr. Herb and all other ATF document examiners periodically undergo external proficiency testing by Collaborative Testing Services which administers tests based on controlled samples.

The defendant, therefore, errs in viewing the Daubert decision as a vehicle to withhold the product of a well-established forensic discipline from a jury's consideration. It does not follow that a decision intended to ease restrictions on admissibility should operate to exclude expert testimony from a discipline that was unquestionably admissible under the prior "general acceptance" test. Handwriting analysis is neither a heretofore unknown technique nor contrary to received scientific knowledge that Daubert sought to address.

Where the basic requirements of Rule 702 are met, challenges to the reliability of expert testimony should come through cross examination and the presentation of contrary evidence; the expert testimony itself should not be excluded. See Daubert, 509 U.S. at 596; see also United States v. Velasquez, 64 F.3d 844, 848 (3d Cir. 1995) ("The axiom is well recognized: the reliability of evidence goes 'more to the weight than to the admissibility of the evidence.'") (citing United States v. Jakobetz,

955 F.2d 786, 800 (2d Cir. 1992)).

The cases cited by the Defendant are distinguishable. First, the district courts cited by defendant admitted the testimony of the proffered handwriting experts, though the testimony was limited in three of the cases. See United States v. Santillan, 1999 WL 1201765, at *5 (N.D. Cal. Dec. 3, 1999) (admitting but limiting handwriting expert testimony); United States v. Hines, 55 F. Supp.2d 62, 70-71 (D. Mass. 1999) (same); United States v. McVeigh, 1997 WL 47724, at *23 (D. Colo. Trans. Fed. 5, 1997) (stating intention to admit testimony on expert's handwriting comparisons, but requiring hearing before admitting evidence on opinion of conclusion on authorship); United States v. Starzecpyzel, 880 F. Supp. 1027, 1041, 1046 (S.D.N.Y. 1995) (finding that handwriting analysis would not withstand Daubert criteria as scientific expert testimony, but admitting expert testimony regarding handwriting in its entirety as technical or other specialized knowledge). Second, in three of the four cases, the courts found that substantial portions of the proffered expert testimony satisfied the Daubert principles. See Santillan, 1999 WL 1201765, at *5 (admitting comparison testimony under Daubert); Hines, 55 F. Supp.2d at 70 (same); McVeigh, 1997 WL 47724, at *1, 23 (admitting comparison testimony under Daubert and leaving open issue of whether to admit conclusions on authorship).

The Defendant points out that some courts have denied the expert the opportunity to express an opinion on the ultimate issue while allowing the expert to highlight similarities between the analyzed writings. (Defendant's Motion in Limine at p.3) Nothing within the federal rules or their interpretation counsels a trial judge to bifurcate expert testimony in the fashion urged by the defendant. Rule 702 provides that once an individual has been qualified as an expert witness, he may testify "in the form of an opinion or otherwise." Accordingly, the intended result of qualification under Rule 702 is the witness's latitude to offer his or her opinion for the jury's consideration -- the foremost distinction between expert and lay witnesses. See United States v. Smith, 519 F.2d 516, 521 (9th Cir. 1975) ("Any qualified expert,

and usually, only such a qualified expert, may express an opinion, and not be restricted in his testimony to facts of which he knows of his own knowledge."); Fed. R. Evid. 901(b)(2) (expressly permits laypersons to render their opinions on the genuineness of disputed handwriting).

In the decisions cited by the defendant, the trial judge did little more than reiterate the defendant's unsuccessful admissibility claims as a pretext for contravening Rule 702. While professing judicious caution, the courts in those cases simply short-circuited the adversarial process and encroached upon the jury's natural province. Expert opinions that may be poorly supported or overly ambitious are easily exposed as such without judicial intervention. See Daubert, 509 U.S. at 596 (explicitly rejecting role for trial judges that were "overly pessimistic about the capabilities of the jury and of the adversary system generally").

For the foregoing reasons, the United States respectfully urges that the Defendant's Motion in Limine Regarding Expert Testimony on Fingerprint and Handwriting Identification be DENIED.

Respectfully submitted,

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DATED: _____