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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF BUTTE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. DAVID AKE Defendant.	NO. CM013606 PEOPLE'S RESPONSE TO DEFENDANT'S MOTION TO EXCLUDE FINGERPRINT EVIDENCE DEPT: B08 DATE: 5/7/01 TIME: 9:30

FACTS

The defendant, David Ake, is charged with two(2) counts of manufacturing methamphetamine in violation of Health and Safety Code section 11379.6. At trial the People intend to present evidence that a latent fingerprint was found by California Department of Justice Latent Print Analyst Jeannie Sindt on one of the items associated with the manufacture of methamphetamine. The People also intend to present evidence that Analyst Sindt compared

the latent print to the known fingerprints of the defendant and determined that the fingerprint matched the defendant's left thumb print. A copy of Analyst Sindt's curriculum vitae is attached to this response.[1]

CASELAW

I. *DAUBERT* AND *KUMHO* ARE NOT APPLICABLE IN CALIFORNIA

The defendant's entire argument in support of exclusion of the fingerprint evidence is based upon the United States Supreme Court opinions in *Daubert v Merrill Dow Pharmaceuticals* (1993) 509 U.S. 579 and *Kumho Tire v Carmichael* (1999) 526 U.S. 137. Neither of these cases, as to the issues relevant in this proceeding, involved issues of constitutional significance. Both cases involved, again as to the issues involved in these proceeding, questions of straight statutory interpretation. The statute involved in both cases is Federal Rule of Evidence 702. Federal Rule of Evidence 702 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."[2] Nowhere in either opinion does the Supreme Court state that the test established in *Daubert* is constitutionally mandated or implicitly required by either Due Process or the Right

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[1] Since the analysis was performed Analyst Sindt has married and changed her name to Jeanne Clark

[2] According to Westlaw Federal Rule of Evidence 702 was amended as of December 1, 2000 to reflect the Supreme Court decisions in *Daubert* and *Kumho.* A copy of the Westlaw annotations and comment is attached to this response.

to a Fair Trial.

The California Evidence Code does not include any provision similar to Federal Rule of Evidence 702. The California Supreme Court has addressed this issue several times. In *People v Leahy* (1994) 8 Cal.4th 587, the Court specifically found that the *Kelly* Test[3] survived *Daubert* and is still the law in California. In *People v Venegas* (1998) 18 Cal.4th 47, the California Supreme Court applied the *Kelly* Test instead of the *Daubert* Test to determine the admissibility of RFLP DNA analysis. In Footnote 30 of the opinion the court specifically addresses *Daubert* and reiterates its position that the *Kelly* Test still applies in California. In *People v Ayala* (2000) 24 Cal.4th 243, a post *Kumho* case, the California Supreme Court again used the *Kelly* Test as the basis of its analysis of the admissibility of "scientific" evidence.

II. THE KELLY TEST DOES NOT APPLY TO FINGERPRINT EVIDENCE

There does not appear to be any published California case that specifically finds the *Kelly* Test does not apply to fingerprint evidence. There is, however, substantial evidence that the California Supreme Court believes that fingerprint evidence does not come within the category of scientific evidence that must be subjected to the *Kelly* Test. In *People v Webb* (1993) 6 Cal.4th 494, the Supreme Court found that the *Kelly* Test does not apply to a new method for developing latent prints. In *Webb* a latent print analyst used an optical laser to illuminate an otherwise invisible latent print on a piece of duct tape. The analyst than photographed the latent print, again with the

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[3] People v Kelly (1976) 17 Cal.3rd 24

assistance of the optical laser, and determined that the latent fingerprint belonged to the defendant. At trial the defense objected to the fingerprint evidence and requested a *Kelly-Frye* Hearing[4]. The trial court overruled the objection[5]. With regard to the application of the *Kelly* Test to latent fingerprint evidence the court stated: "Where, as here, a procedure isolates physical evidence whose existence, appearance, nature, and meaning are obvious to the senses of a layperson, the reliability of the process in producing that result is equally apparent and need not be debated under the standards of *Kelly*, *supra*, 17 Cal.3d 24. We therefore conclude that the laser-derived fingerprint image could not properly have been excluded on grounds it was derived by scientifically unproven means."

In *Venegas*, *supra*, at p 80, the court stated: "The *Kelly* test is intended to forestall the jury's uncritical acceptance of scientific evidence or technology that is so foreign to everyday experience as to be unusually difficult for laypersons to evaluate. In most other instances, the jurors are permitted to rely on their own common sense and good judgment in evaluating the weight of the evidence presented to them." (Citations omitted) The court went on to distinguish RFLP testing in DNA cases from other, more pedestrian, forensic analysis that do not fall under *Kelly*. The court pointed out that it has, in the past, determined that blood spatter analysis (*People v Stoll* (1989) 49 Cal.3rd 1136), shoe print comparisons (*People v Farmer* (1989) 47 Cal.3rd

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[4] Daubert had not yet been decided

[5] The opinion is not clear as to whether a *Kelly-Frye* Hearing actually occurred

888) and using a laser to raise latent fingerprints on duct tape (Webb, *supra*) were not subject to the *Kelly* Test. The court than states "Unlike fingerprint, shoe track, bite mark, or ballistic comparisons, which jurors essentially can see for themselves…" DNA evidence does fall within the category of scientific evidence that must be subjected to the *Kelly* Test." *Venegas*, *supra*, at 81. From this statement it appears clear the California Supreme Court does not believe that fingerprint evidence is subject to the *Kelly* Test.

In *Ayala*, *supra*, the California Supreme Court found that comparative analysis of a bullet lodged within the body of a victim did not require a Kelly Hearing. In *Ayala* the prosecution used X-rays of a slug lodged within the body of the victim to prove that the slug had come from Ayala's gun and not the gun of the co-defendant. The prosecution did this by taping two slugs (a .22 caliber and a .38 caliber) to the victim's body at a point near where the slug was lodged and taking an X-ray. By doing so a ballistics expert was able to determine that the slug lodged within the victim's body was .22 caliber. The defendant raised a *Kelly* objection that was subsequently overruled. In analyzing the *Kelly* issues the California Supreme Court, relying on *Webb* and *Venegas*, stated that this type of comparative analysis is not subject to the *Kelly* Test. It is interesting to note that in the citation to *Webb* the court states "[holding that Kelly does not apply to a chemical, laser, and photographic process used to expose and *identify* defendant's fingerprint on duct tape found at the crime scene]" (emphasis added). Ayala, *supra*, at 281. Although the summary of findings in *Webb* is obviously not binding

on subsequent courts it does give insight into the Supreme Court's opinion on the matter.

People v Pride (1992) 3 Cal.4th 195, and *People v Marx* (1975) 54 Cal.App.3rd 100, although not directly on point, also merit discussion. Both of these cases involved comparative analysis. In *Pride* the court found that analysis and identification of hair samples is not subject to the *Kelly* Test. In *Marx* the court determined comparison and identification of bite mark evidence is not subject to the *Kelly* Test.

Based upon the opinions in *Webb*, *Venegas*, *Ayala*, *Pride* and *Marx* it is obvious that California courts do not consider "comparative analysis" evidence as the type of scientific evidence that is subject to the *Kelly* Test.

III. FINGERPRINT IDENTIFICATION IS NOT A NEW OR NOVEL PROCEDURE

Not all scientific evidence is subject to the *Kelly-Frye* rule. As a practice becomes widespread, it is no longer new or novel, and consequently a *Kelly-Frye* hearing is unnecessary even though no appellate opinion specifically establishes its general acceptance. See; *People* v. *Municipal Court (Sansone)* (1986) 184 Cal.App.3d 199, 201; and, *People v. Palmer* (1978) 80 Cal.App.3d 239, 251-254. In *Pride*, *supra*, at 239, the court found that *Kelly-Frye* was not applicable to hair sample comparisons because "Hair comparison evidence that identifies a suspect or victim as a possible donor has been routinely admitted in California for many years without any suggestion that it is unreliable under *Kelly/Frye*"[6]

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[6] Pre-Daubert case.

The analysis and identification of latent fingerprints is neither new nor novel. Fingerprint analysis and identification evidence has been used in United States courts for almost 100 years. The earliest published opinion involving fingerprint evidence appears to be *People v Jennings* (1911) 252 Ill. 534. In *Piquette v United States* (1936) 81 F.2nd 75, 81, the court took judicial notice of the "well recognized" fact that fingerprint identification is reliable. In *People v Adamson* (1946) 27 Cal.2nd 478, 495, the court stated "Fingerprints are the strongest evidence of identity of a person and under the circumstances of the present case they were alone sufficient to identify the defendant as the criminal."

IV. KELLY AND ITS PROGENY HAVE ESTABLISHED A THREE-PRONG TEST FOR DETERMINING ADMISSIBILITY OF SCIENTIFIC EVIDENCE

Assuming, arguendo, this court finds that fingerprint identification is a new or novel scientific technique the court would need to hold an Evidence Code section 402 hearing to determine the admissibility of said evidence. The admissibility of expert testimony based on a new or novel scientific technique is governed by rules adopted in *Kelly*. Under the *Kelly* Test, the proponent of the evidence must establish (1) the reliability of the method – that it is " 'sufficiently established to have gained general acceptance in the particular field in which it belongs,' " (2) that the witness is an expert qualified to give an opinion on the subject, and (3) that correct scientific procedures were used. *Kelly*, *supra*, at 30.

VI. PUBLISHED OPINIONS HAVE FOUND THAT FINGERPRINT IDENTIFICATION EVIDENCE MEETS THE FIRST PRONG OF THE KELLY TEST

According to *Venegas* "admissibility of expert testimony based on "a new scientific technique" requires proof of its reliability-i.e., that the technique is " 'sufficiently established to have gained general acceptance in the particular field to which it belongs' " *Venegas*, *supra*, at 76; citing *Kelly*, *supra*, at 30. One of the recognized ways to establish that a new scientific technique is sufficiently established is by showing that it has been approved for use in other courts. Once a published appellate opinion has affirmed the admission of evidence based upon a new scientific technique, that precedent is controlling until the opponent can produce new evidence to establish a change in the attitude of the scientific community. *People v Kelly* (1976) 17 Cal.3rd 24; People v. Morganti (1996) 43 Cal.App.4th 643, 658; *People v Smith* (1989) 215 Cal.App.3rd 19; People v. Yorba (1989) 209 Cal.App.3d 1017, 1023-1024. Thus, precedent can eliminate the need to show general acceptance of the technique and to qualify the expert witness to testify about general acceptance. Of course, an expert witness must still be qualified. And the proponent of the evidence still must make a case-specific foundational showing that correct scientific procedures were used. *Morganti*, *supra*, at 660-662.

Although there does not appear to be any published California case in which fingerprint analysis and identification has been subjected to the *Kelly* Test there are two published federal cases in which fingerprint analysis and identification has been found to meet the more restrictive *Daubert* Test. *United States v Havvard* (2000) 117 F.Supp.2nd 848 appears to be the first published opinion applying the *Daubert* Test to fingerprint identification. After a

lengthy discussion of the same issues raised in this case the *Havvard* court states:

> "In sum, despite the absence of a single quantifiable standard for measuring the sufficiency of any latent print for purposes of identification, the court is satisfied that latent print identification easily satisfies the standards of reliability in *Daubert* and *Kumho Tire.* In fact, after going through this analysis, the court believes that latent print identification is the very archetype of reliable expert testimony under those standards. At the request of the government, the court has prepared this written opinion so that other courts might avoid unnecessarily replicating the process of establishing these points as they try to ensure they comply with the Supreme Court's directive to ensure that *all* types of expert testimony are subject to screening for reliability." *Havvard*, *supra*, at 855.

Havvard was decided after a lengthy pretrial evidentiary hearing at which the court heard testimony from experts in fingerprint evidence. It appears from the discussion of the evidence that the defense raised most of the same issues and arguments relating to the reliability of fingerprint identification raised in this case. In addressing Havvard's arguments regarding the individuality of fingerprints the court stated:

> "The evidence establishes that the patterns of friction ridges on fingertips, palms, toes, and the soles of the feet are unique and permanent to each individual. The prints are unique as to each finger and toe of each person. In addition, there is a biological, embryological basis for the claim of uniqueness. Friction ridge patterns are affected by genetics, but even twins with identical genes have different fingerprints." *Havvard*, *supra*, at 852.

In addressing the defendant's argument that the absence of

any uniform standard based upon a particular number of points necessary for identification the court found that the fact that any one point of dissimilarity between the latent print and the known print meets the requirements for a standard.

In addressing the defendant's argument regarding the potential error rate in fingerprint identification the court stated:

> "Another *Daubert* factor is whether there is a high known or potential error rate. There is not. The defense has presented no evidence of error rates, or even of any errors. The government claims the error rate for the method is zero. The claim is breathtaking, but it is qualified by the reasonable concession that an individual examiner can of course make an error in a particular case. See Moenssens, *et al.*, Scientific Evidence in Civil and Criminal Cases at 516 ("in a great number of criminal cases" defense experts have undermined prosecution by showing faulty procedures or human errors in use of fingerprint evidence). Most important, an individual examiner's opinion can be tested and challenged for error by having another qualified examiner compare exactly the same images the first one compared. See also *Daubert*, 509 U.S. at 596, 113 S.Ct. 2786 ("Vigorous 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.").
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> Even allowing for the possibility of individual error, the error rate with latent print identification is vanishingly small when it is subject to fair adversarial testing and challenge. It is certainly far lower than the error rate for other types of opinions that courts routinely allow, such as opinions about the diagnosis of a disease, the cause of an accident or disease, whether a fire was accidental or deliberate in origin, or whether a particular industrial facility was the likely source of a contaminant in groundwater. As these examples indicate, the fact that some professional judgment and experience is required also does not mean that expert testimony is inadmissible. It is instead the hallmark of expert testimony, so long as it can

otherwise meet the standards of reliability set forth in *Daubert* and *Kumho Tire.*" *Havvard*, *supra*, at 854-55

With regard to this defendant's argument that 100 years of use of fingerprint evidence with few documented errors is insufficient to justify admission the *Havvard* court had this to say:

> "Next, the methods of identification are subject to peer review. As just stated, any other qualified examiner can compare the objective information upon which the opinion is based and may render a different opinion if warranted. In fact, peer review is the standard operating procedure among latent print examiners.
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> *Daubert* refers to publication after peer review, which is important in evaluating scientific evidence because it shows that others qualified in a field have evaluated the method or theory outside the context of litigation and have found it worthy of publication. The factor does not fit well with fingerprint identification because it is a field that has developed primarily for forensic purposes. The purpose of the publication factor is easily satisfied here, however, because latent fingerprint identification has been subject to adversarial testing for roughly 100 years, again in cases with the highest stakes possible. That track record provides far greater assurance of reliability than, for example, publication of one peer-reviewed article describing a novel theory about the cause of a particular disease at issue in a civil lawsuit." *Havvard*, *supra*, at 854.

The only other published case applying the *Daubert* Test to fingerprint evidence is *U.S. v Martinez-Cintron* (Federal District Court of Puerto Rico, March 21, 2001) __ F.Supp.2nd __, 2001 WL 327111. *Martinez-Cintron* involved identical to both the present case and *Havvard*. The court in *Martinez-Cintron* applied the

Daubert Test[7] and, like the court in *Havvard,* found that fingerprint identification evidence meets the Daubert requirements for admissibility.

It is interesting to note that both *Havvard* and *Martinez-Cintron*, state that there are no known reported cases in which a court has excluded fingerprint evidence. In the motion to exclude the defense cites *United States v Parks* as a case in which fingerprint evidence was found to be unreliable and excluded. A Westlaw search for a published opinion in this case was fruitless. It appears from the language of the defendant's motion that the defendant is referring to a transcript of an evidentiary hearing on the admissibility of fingerprint evidence yet no transcript was attached to the defendant's motion. It is well-established that unpublished opinions can not be cited as authority. That said, if the defendant wishes to use unpublished opinions and the court is willing to rely on said opinions the People would respectfully direct the court's attention to *United States v. Mitchell*, 96-407-CR (E.D.Pa. Sept. 13, 1999) and *United States v. Alteme*, No. 99-8131-CR (S.D. Fla. April 7, 2000). Both of these cases are mentioned in *Havvard*. *Mitchell* was the first case in which the *Daubert* Test was used to attack the admissibility of fingerprint evidence. After a lengthy evidentiary hearing in which both sides presented fingerprint experts to support their respective positions the trial court found that fingerprint evidence meets the requirements for scientific evidence established in *Daubert*. *Alteme* was the second case in which the *Daubert* Test was used to

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[7] Now codified in Federal Rule of Evidence 702

attack the admissibility of fingerprint evidence. After an evidentiary hearing involving many of the same fingerprint experts who testified in *Mitchell* the court found that fingerprint evidence meets the requirements of *Daubert*. A copy of the written decision in *Alteme* is attached to this response.

Based upon these cases and the cases cited in sections II and III above there is no question that the first prong of the *Kelly* Test has been satisfied with respect to fingerprint evidence.

VI. LATENT PRINT ANALYST CLARK IS QUALIFIED TO TESTIFY AS AN EXPERT ON FINGERPRINT ANALYSIS AND IDENTIFICATION

Attached to this response is a copy of the "Curriculum Vitae" of Jeanne Clark. It is obvious that Latent Print Analyst Clark is, based upon her training and experience, qualified to render an opinion on the detection, development, analysis and identification of latent fingerprints. If necessary the People would have Mrs. Clark available, pretrial, to allow the defense to voir dire Mrs. Clark on her training and experience.

VII. LATENT PRINT ANALYST CLARK FOLLOWED ACCEPTED PROCEDURES AND BASED FORMED HER OPINION BASED UPON INDUSTRY STANDARDS

The final prong of the Kelly Test requires that the proponent of the questioned evidence show that correct scientific procedures were used in reaching the final conclusion. If necessary, the People would have Mrs. Clark available, pretrial, to allow the defense to voir dire Mrs. Clark on her training and experience.

CONCLUSION

Based upon the foregoing caselaw and argument the People respectfully request that this court make the following findings:

1. The *Kelly* Test, and not the *Daubert* Test is the correct method of determining the admissibility of new or novel scientific techniques in the State of California;
2. Fingerprint comparison and identification is not a type of scientific technique that needs to be subjected to the Kelly Test;
3. Fingerprint comparison and identification is not a new or novel scientific technique;
4. Prior decisions from California and other jurisdictions have established that fingerprint comparison and identification techniques are reliable;
5. Latent Print Analyst Jeanne Clark is qualified to testify to latent print development, anaysis, comparison and identification.

May 4, 2001

Respectfully Submitted
Michael L. Ramsey
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By: D. Marc Noel, DDA

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