

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	No. 08-00026-04-CR-W-FJG
)	
CHRISTOPHER L. ELDER,)	
)	
Defendant.)	

**GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANT ELDER'S
MOTION *IN LIMINE* ON PROPOSED HANDWRITING EXPERT
UNDER RULE 702 OF THE FEDERAL RULES OF EVIDENCE**

The United States of America provides the following response in opposition to defendant Christopher L. Elder's motion to exclude the testimony of the Government's proposed expert in questioned document examination:

INTRODUCTION

On February 6, 2008, a Grand Jury returned a Twenty-Four Count Indictment against defendants Mary Lynn Rostie, Cynthia Martin, Troy Solomon, Christopher Elder, and Delmon Johnson. The Indictment charged them with crimes arising out of their participation in a conspiracy to distribute controlled substances (hydrocodone, alprazolam, and Promethazine with Codeine). Defendant Christopher Elder ("Elder") is charged in nine counts. The Indictment alleges that Elder wrote unlawful and invalid prescriptions for thousands of dosage units of Schedule III, IV and V controlled substances. Count One charges all five defendants with conspiracy to distribute controlled substances in violation of 21 U.S.C. § 846. Counts Three through Six charge defendants Elder, Rostie, and Solomon with the illegitimate distribution of Schedule III and IV controlled substances and aiding and abetting, in violation of 21 U.S.C. §

841(a)(1) and 18 U.S.C. § 2. Counts Seven through Ten charge defendants Elder, Rostie, Solomon, and Johnson with the illegitimate distribution of Schedule III, IV and V controlled substances and aiding and abetting, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2.

Included in the discovery provided to Elder was a report prepared by Dan McCarty, Forensic Document Examiner, who opined that a select number of prescriptions contained Elder's handwriting. On May 15, 2008, the Government filed a motion to require Elder to furnish exemplars of his handwriting. On May 18, 2008, Elder filed both an answer to the Government's motion seeking handwriting exemplars and a motion *in limine* to exclude expert witness testimony of the Government's forensic document examiner, based upon *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) and Rule 702. (Doc. Nos. 50 and 51.) On May 22, 2008, the Magistrate Court directed Elder to provide exemplars of his handwriting to the Government.

The United States has engaged a new document examiner named Donald Lock to conduct the handwriting analysis. His report was provided to Elder, who subsequently indicated that he intended to rely on the arguments made in his initial motion *in limine*. This response addresses the arguments made in Elder's motion with specific reference to Mr. Lock's report.

STATEMENT OF FACTS

Donald Lock has been employed in the area of forensic document examination for over 30 years. He conducts examinations of questioned documents, including comparisons of identified handwriting samples with samples of handwriting of unknown or questionable origin.

Mr. Lock received accreditation by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB).

Mr. Lock is a member of the Midwestern Association of Forensic Scientists and the International Association for Identification. Mr. Lock has provided expert testimony in over 100 trials in federal, state, local, and military courts, has made numerous presentations, and has written manuals. *See Attached Curriculum Vitae.*

APPLICABLE PRINCIPLES

A. Expertise Testimony Under Rule 702

American jurisprudence on evidence rests upon a foundation of liberal admissibility and the conviction that the jury should be presented with any and all reliable evidence that will assist it in its deliberation. *See Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 587 (1993) (“*Daubert*”). Rule 702 of the Federal Rules of Evidence (“Rule 702”), which governs the introduction of expert testimony, was drafted in accordance with the “‘liberal thrust’ of the Federal Rules and their ‘general approach of relaxing the traditional barriers to opinion testimony.’” *Id.* (citing *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988)). Thus, until December 2000, Rule 702 directed that “[if] scientific, technical, or other specialized knowledge will assist the trier of fact,” a qualified expert may testify “in the form of an opinion or otherwise.” Fed. R. Evid. 702.

In 1993, the Supreme Court decided *Daubert*, which addressed those instances where a party seeks to introduce expert testimony based upon a novel or unorthodox scientific theory or technique. Under the traditional test enunciated in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), a new discipline or technique had to reach general acceptance within the relevant scientific community before it could be admitted as expert scientific testimony. In *Daubert*, the Court held that the *Frye* test had been superseded by adoption of the Federal Rules of Evidence,

and that the rigid, restrictive “general acceptance” standard was incompatible with the liberal precepts of Rule 702. *Daubert*, 509 U.S. at 585-88. The *Daubert* decision has accordingly led to a re-evaluation of longstanding bars to some types of scientific evidence previously adjudged inadmissible as not within general acceptance. *See, e.g., United States v. Posado*, 57 F.3d 428, 430-32 (5th Cir. 1995) (polygraph testing).

The *Daubert* Court cautioned, however, that Rule 702 does not extend *carte blanche* to litigants to present unorthodox or unproven theories to juries as established “science.” As the Court noted, the text of Rule 702 itself calls upon the trial judge to act as gatekeeper and screen purported scientific evidence for reliability. *Daubert*, 509 U.S. at 589-90. Accordingly, the party offering purported scientific testimony must demonstrate that it represents “scientific knowledge” or the product of scientific reasoning or methods. *Daubert*, 509 U.S. at 592-93.

In undertaking the latter inquiry, the Court provided nonmandatory and nonexclusive factors for the trial court to consider: 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. *See, e.g., United States v. Plunk*, 153 F.3d 1011, 1016 (9th Cir. 1998) (expertise in drug trade jargon not subject to *Daubert* analysis); *United States v.*

Starzecpyzel, 880 F. Supp. 1027, 1028-29 (S.D.N.Y. 1995) (*Daubert* inapplicable to handwriting analysis as expertise is practical and not scientific).

The Supreme Court's decision in *Kumho Tire Company v. Carmichael*, 526 U.S. 137, 141, 149-51 (1999) (“*Kumho Tire*”) erased that distinction and 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 Tire* instructed that the trial judge may consider one or more of the *Daubert* factors in performing the gatekeeping function under Rule 702. The Court emphasized, however, that the *Daubert* factors do not comprise a mandatory checklist of requirements. Since the range of nonscientific expertise admissible under Rule 702 is so varied, none of the *Daubert* factors should necessarily be included or excluded in any assessment of reliability. *Kumho Tire*, 526 U.S. at 150-52 (factors intended to be helpful, not definitive). See *United States v. Paul*, 175 F.3d 906, 910-11 (11th Cir.) (trial court possesses same latitude in selecting factors to assess reliability as accorded its ultimate conclusion on admissibility), *cert. denied*, 528 U.S. 1023 (1999).

On December 1, 2000, Rule 702 was amended in response to *Daubert*.¹ The amendment affirms *Daubert*'s general holding setting forth the trial court's role as gatekeeper, and *Kumho*'s holding that all types of expert testimony present questions of admissibility for the gatekeeper.

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.

The trial court must now 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,” terms taken from Rule 703.² In forensic document examination, the expert normally relies upon facts derived from his or her firsthand observations made during the examination process.³ 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 quantitative sufficiency of the expert's basis for his testimony is part and parcel of the primary requirement of reliability established by Rule 702. *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

² Rule 703 reads in pertinent part:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing.

³ 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.*

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 sufficiently reliable to be considered).

B. *Admissibility of Forensic Document Examination of Disputed Handwriting Under Rule 702*

The methodical analysis of handwriting for distinctive characteristics grows out of a few simple principles: (1) not all people write in the same way and not all handwriting appears the same; (2) while a person's handwriting varies from time to time, the handwriting also carries some combination of recurring characteristics; and (3) the variance of characteristics within a particular person's handwriting is less than the variance of characteristics between the handwriting of all persons. If those foundations were not sound, a person would not be able to recognize even his own handwriting as different from any other writer. The examination of handwriting for distinguishing features is thus regarded as amenable to systematic inquiry and capable of providing insight on authorship.

The acquired skill of comparing handwriting samples has earned broad and lasting acceptance in American courts as a reliable forensic technique. An unbroken history of employing a qualified forensic document examiner to assist in identification of writers stretches from a time prior to the adoption of the Federal Rules, through the period before the *Daubert* decision, and thereafter under the *Daubert-Kumho Tire* formula. *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).

The established standing of handwriting analysis is reflected in the Federal Rules of Evidence itself. 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). *See United States v. McGlory*, 968 F.2d 309, 328-29 (3d Cir. 1992) (handwriting expert qualified to authenticate notes seized from defendant's trash). 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).

Despite the long recognition of handwriting comparison, direct attacks have occasionally been launched in recent years against questioned document analysis as a recognized expertise under Rule 702. Using the occasion of the *Daubert* decision, some defendants have attempted to exclude testimony by forensic document examiners as inherently unreliable.

Courts that have examined the issue of admissibility of handwriting analysis under Rule 702 have concluded that it rests on reasonably reliable bases, that it yields relevant evidence, and that it does assist juries in identifying the writers of questioned documents. *See, e.g., United States v. Starzeczyzel*, 880 F. Supp. at 1028-29. Thus, despite repeated efforts to suppress expert testimony concerning the distinct characteristics of handwriting, courts have repeatedly held that such testimony was admissible under Rule 702.

ARGUMENT

In his motion, Elder does not contest that inquiry into the authorship of the questioned documents – i.e., six prescriptions, three machine-copied refill authorization documents, and a machine-copied signature record – is relevant to the ultimate issue of whether he is guilty or not. (See Deft. Elder’s Mot. to Preclude Govt’s Proposed Handwriting Expert Testimony [Doc. No. 50] at 4-5.) Thus, if any aspect of Mr. Lock’s proposed testimony carries the tendency to make authorship of the questioned documents more or less probable, it qualifies as relevant under Rule 401, and is admissible under Rule 702 to “assist” the jury.

Elder also does not challenge (Deft. Elder’s Mot. to Preclude Govt’s Proposed Handwriting Expert Testimony at 4-5) that Mr. Lock is eminently qualified within the field of forensic document examination. *See Paul*, 175 F.3d at 911. In fact, the Eighth Circuit affirmed then-Chief District Judge Dean Whipple’s finding that Mr. Lock’s expert testimony was reliable “[b]ecause Lock was particularly well-qualified in analyzing questioned documents – having studied and taught internationally, written manuals, and practiced in the field for over two decades, performing several thousand comparisons.” *United States v. Jolivet*, 224 F.3d 902, 906 (8th Cir. 2000). Accordingly, should this Court determine handwriting analysis an appropriate subject of testimony under Rule 702, Mr. Lock’s testimony should be admitted without limitation.

A. *Handwriting Analysis Is “Technical, or Other Specialized Knowledge” within the Meaning of Rule 702.*

Elder’s argument is that “the handwriting evidence in this case will be highly speculative, unreliable, prejudicial and unworthy of placing it before a jury.” (See Deft. Elder’s Mot. to

Preclude Govt's Proposed Handwriting Expert Testimony at 4-5.) This argument is without merit.

Daubert and *Kumho Tire* require this court to act as the "gatekeeper" of expert testimony to ensure that proffered expert testimony is sufficiently relevant and reliable. *See, e.g., United States v. Havvard*, 117 F. Supp.2d 848, 850 (S.D. Ind. 2000) (citing *Kumho Tire*, 526 U.S. at 147; *Daubert*, 509 U.S. at 589). This Court has wide latitude in making its reliability and relevance determinations. *See Jolivet*, 224 F.3d at 905 (citing *Kumho Tire*, 526 U.S. at 152). The court's gatekeeper role, however, is not intended to serve as a replacement for the adversary system: the rejection of expert testimony should be the exception rather than the rule. *See Fed. R. Evid. 702* advisory committee's note. In this case, Mr. Lock's testimony is both reliable and relevant. *See Jolivet*, 224 F.3d at 906.

1. *Donald Lock's Testimony Is Reliable*

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.

The Supreme Court has emphasized, however, that the inquiry under Rule 702 is flexible, and that the factors listed are neither exclusive or dispositive. *Kumho Tire*, 526 U.S. at 151 ("list of factors was meant to be helpful, not definitive"); *Daubert*, 509 U.S. at 592-94 (describing

inquiry as "a flexible one"). Indeed, as the advisory committee stated in its note to amended Rule 702, the "standards set forth in the amendment are broad enough to require consideration of any or all of the specific *Daubert* factors where appropriate." Fed. R. Evid. 702 advisory committee's note (citing *Tyus v. Urban Search Management*, 102 F.3d 256 (7th Cir. 1996) (noting that the factors mentioned by the Court in *Daubert* do not neatly apply to expert testimony from a sociologist); *Kannankeril v. Terminix Int'l, Inc.*, 128 F.3d 802, 809 (3d Cir. 1997) (holding that lack of peer review or publication was not dispositive where the expert's opinion was supported by "widely accepted scientific knowledge"))).

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 Eighth 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. See *Jolivet*, 224 F.3d at 905-06.

The *Daubert* reliability factors strongly support the reliability of handwriting analysis. First, the methods of handwriting analysis can be and have been tested.

Next, the methods of analysis are subject to peer review. Scientific peer reviewed journals such as the *Journal of Forensic Sciences*, contain a plethora of articles on 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. 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.

Another *Daubert* factor is whether there is a high known or potential error rate. There is not. Handwriting analysis easily satisfies the standards of reliability in *Daubert* and *Kumho Tire* and is the very archetype of reliable expert testimony under those standards.

In addition, as noted above, federal evidentiary rules support the view that the expert testimony of forensic document examiners should be admissible under Rule 702. The enlistment of handwriting comparison within Rule 901(b)(3) and 28 U.S.C. § 1731 as a reliable vehicle of authentication of documents provides a strong basis for its admissibility as the subject of expert testimony. *See United States v. Jones*, 107 F.3d 1147, 1159 (6th Cir. 1997) (rejecting contention that handwriting analysis not admissible under Rule 702 by noting that federal rules, through Rule 901(b)(3), affirmatively reflect its reliability).⁴

⁴ The Evidentiary Rules Committee of the Judicial Conference of the United States likewise agrees that handwriting analysis provides a reliable basis for expert testimony. The Committee Note to amended Rule 702 provides handwriting analysis as an example of a field in which experience alone may qualify a witness under Rule 702. *See* Fed. R. Evid. 702 advisory committee's note. The Committee is unlikely to have chosen handwriting analysis from among the scores of forensic disciplines to illustrate a critical point if it considered it subject to serious challenge under Rule 702.

The *Daubert* decision weighs in favor of admitting expert testimony based on handwriting analysis. The *Daubert* Court rejected the traditional *Frye* test as too rigid, contrary to the orientation towards admissibility in the federal rules, and as posing too great an obstacle for litigants attempting to submit novel or unorthodox information to a jury. *Daubert*, 509 U.S. at 587.

Elder, therefore, errs, as others have, 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.

In this case, the testimony of Mr. Lock should be admitted because it is reliable and will assist the jury's understanding of the evidence. Mr. Lock has undergone extensive training in handwriting analysis and has over thirty years of experience in the field. *See* Fed. R. Evid. 702 advisory committee's note ("[T]he test of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience."); *see also Tuf Racing Products, Inc. v. American Suzuki Motor Corp.*, 223 F.3d 585, 591 (7th Cir. 2000) ("Anyone with relevant expertise enabling him to offer responsible opinion testimony helpful to the judge and jury may qualify as an expert witness.").

2. *Donald Lock's Testimony Is Relevant*

Donald Lock's testimony is clearly relevant in this case. Elder, a physician who practices in Houston, Texas, has been indicted for several counts of unlawful distribution and dispensing of pharmaceutical controlled substances. The indictment charges that Elder wrote unlawful and

invalid prescriptions for thousands of dosage units of pharmaceutical controlled substances that were filled by co-defendant Mary Lynn Rostie, a pharmacist in Belton, Missouri. Mr. Lock analyzed several of the prescriptions to determine whether Elder was the author. Mr. Lock also analyzed three machine copied "The Medicine Shoppe" refill authorization documents and a machine copied "Signature Record."

All but the most quixotic critics concede that a person trained in detection of persistent handwriting traits will assist a jury in deliberation over identity of the writer. This is true, as many have observed, not because juries are incapable of perceiving the significance of handwriting traits, but because they are capable. *See Jones*, 107 F.3d at 1160-61.

Jurors may readily understand the objectives of handwriting analysis, but may not be able to detect and synthesize why writing samples appear different. Questioned documents may contain dozens of telltale indicia that require magnification to see or are too subtle for laypersons to detect. *See Tuf Racing Products, Inc. v. American Suzuki Motor Corp.*, 223 F.3d 585, 591 (7th Cir. 2000) ("Anyone with relevant expertise enabling him to offer responsible opinion testimony helpful to the judge and jury may qualify as an expert witness.").

Among the numerous indicia that laypersons are likely to miss, but which may yield identifying characteristics, are letter design, direction of strokes, space ratios between characters and letters, pen pressure, pen lifts, beginning, connecting, and ending strokes, line quality, hesitation, variation, writing skill, angularity and roundness, slant and rhythm, and evidence of distortion or disguise. Furthermore, within the confines of a trial, no juror possesses the time, experience, or equipment available to qualified forensic document examiners when conducting a handwriting comparison.

Finally, the dispute over admissibility of the proposed expert testimony on handwriting characteristics invokes the first rule of relevance that “a brick is not a wall.” McCormick on Evidence, § 185 (1999). The Government does not contend that Mr. Lock’s testimony will foreclose the issue of whether Elder wrote the prescriptions or signed particular documents. It is not required, moreover, to make such a showing under Rules 401 or 702. All that is required to admit Mr. Lock’s testimony is a showing that it makes the authorship of the document in question either more or less certain at the margin. *See* Fed. R. Evid. 401 advisory committee’s note (“Any more stringent requirement is unworkable and unrealistic.”); *United States v. McGlory*, 968 F.2d 309, 346 (3rd Cir. 1992) (“Under Federal Rule of Evidence 702, the expert testimony need only be helpful to the jury. Expert testimony as to the similarities in handwriting [without a complete identification] is generally admissible.”).⁵

Viewed in that light, the sum of Elder’s arguments concerning admissibility are properly regarded as preemptive attacks on the weight of Mr. Lock’s testimony, rather than cognizable grounds to exclude it as inadmissible. Where Elder concedes that Mr. Lock would assist the jury in identifying handwriting characteristics, which may be significant, he cannot maintain that his testimony is not admissible.

B. *Elder’s Concerns Over Reliability and Prejudice Are Best Remedied Through the Customary Safeguards*

1. *Weight of Evidence*

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

⁵ *See, e.g., United States v. Glover*, 846 F.2d 339, 343 (6th Cir. 1988) (no error to admit testimony of handwriting expert even though he could not say conclusively whether defendant wrote threatening letter).

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)).

In the *Daubert* litigation, the Supreme Court directly answered the chorus of amici who argued that liberalization of standards under Rule 702 "will result in a 'free-for-all' in which befuddled juries are confounded by absurd and irrational pseudoscientific assertions." *Daubert*, 509 U.S. at 596. In response, the Court noted that such alarmists were "overly pessimistic about the capabilities of the jury and of the adversary system generally. 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." *Id.* (citing *Rock v. Arkansas*, 483 U.S. 44, 61 (1987)).

The *Daubert* Court added that a trial judge always maintains the authority to direct a judgment at the close of trial, in the event that the received body of evidence supporting a position is insufficient as a matter of law. As the Court observed, "[t]hese conventional devices, rather than wholesale exclusion . . . are the appropriate safeguards where the basis of scientific testimony meets the standards of Rule 702." *Id.* at 596-97 (citations omitted). *See United States v. 14.38 Acres of Land*, 80 F.3d 1074, 1078 (5th Cir. 1996) ("The [*Daubert*] case did not otherwise work a sea change over federal evidence law. . . . As the Court in *Daubert* makes clear, . . . the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system.")

Elder's motion alleges a deficiency with handwriting analysis that strikes at the integrity of its methods and conclusions. That argument, addressed below, reiterates the overblown

concerns dispatched by the Supreme Court in *Daubert*. If Mr. Lock's testimony or handwriting analysis in general is unsound, spirited cross-examination and closing argument is likely to damage the Government's case more than outright exclusion. See *McGlory*, 968 F.2d at 346 ("Any issue regarding certainty of [expert's] testimony goes to weight . . . and could be tested by cross-examination."). Indeed, the potential that expert testimony consists of personal impressions, based on faulty assumptions, and uncertain methods leaves it more, not less, susceptible to effective cross-examination. See *Jones*, 107 F.3d at 1161 (noting that crossing threshold of Rule 702 does not deprive defendant of opportunity and tools to challenge handwriting expert).

Elder fails to assert why his opposition to Mr. Lock's testimony, whether it be frivolous or devastating, cannot be adequately presented through the traditional means of advocacy. See *McGlory*, 968 F.2d at 346 ("Any issue regarding certainty of [expert's] testimony goes to weight . . . and could be tested by cross-examination."). At the very least, Elder should be called to answer at the motion hearing why voir dire, cross-examination, the opportunity to present countervailing evidence, opening statements and closing arguments, and a cautionary instruction, if appropriate, are not up to the adversarial task of confronting any shortcomings in Mr. Lock's methods or conclusions.

Elder contends that Mr. Lock's proposed testimony regarding the questioned machine documents is unreliable, and thus inadmissible, because there is a difference between opinion testimony that a questioned document is "probably written" and "opinion testimony of a more positive nature." (Deft. Elder's Mot. to Preclude Govt's Proposed Handwriting Expert Testimony, at 1 - 2.) This contention is without merit.

This argument has been repeatedly rejected by the Eighth Circuit. In *United States v. Hardrich*, 707 F.2d 992, 994 (8th Cir. 1983), the Government's handwriting expert testified that some of the endorsements and signatures on deposit and withdrawal slips were made by the defendant, some of them "may have been written" by the defendant, and that the defendant "probably wrote" endorsements on certain checks. The Eighth Circuit found the district court did not err in finding such testimony was sufficiently probative so as to be admissible under Rule 702, Federal Rules of Evidence. *Id.*

In *United States v. Tovar*, 687 F.2d 1210, (8th Cir. 1982), the Government's handwriting expert testified that the signatures on the money orders were "probably" the same as those on the exemplars provided by the defendant. *Id.* at 1215. The Eighth Circuit found no error for district court to allow the Government's handwriting expert to testify as he did because the "use of 'probably' indicates some degree of certainty based neither on mathematical odds nor mere speculation." *Id.*

In *United States v. Jolivet*, 224 F.3d 902 (8th Cir. 2000), the Government's handwriting expert opined that the signatory on the questioned documents was "likely" the defendant. The Eighth Circuit found the district court did not abuse its discretion in finding the Government's handwriting expert testimony to be reliable.

In the present case, Mr. Lock found that it is highly probable that Elder wrote the questioned material of four questioned documents. The use of "highly probable" indicates a high degree of certainty based neither on mathematical odds nor mere speculation. *See Tovar*, 687 F.2d at 1215. As noted above, 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.

II. CONCLUSION

WHEREFORE, the United States respectfully urges that Elder's motion to exclude the testimony of Donald Lock under Rule 702 be denied.

Respectfully submitted,

John F. Wood
United States Attorney

By */s/ Rudolph R. Rhodes, IV*

Rudolph R. Rhodes IV #39310
Assistant United States Attorney

Charles Evans Whittaker Courthouse
400 East 9th Street, 5th Floor
Kansas City, Missouri 64106
Telephone: (816) 426-3122

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered on September 3, 2008, to the CM-ECF system of the United States District Court for the Western District of Missouri for electronic delivery to all counsel of record.

John R. Osgood
Commercial Federal Bank
Suite 305
740 NW Blue Parkway
Lee's Summit, Missouri 64086

/s/ Rudolph R. Rhodes, IV
Rudolph R. Rhodes IV
Assistant United States Attorney

Donald L. Lock
1900 Pilgrim Court
Jefferson City, Missouri 65109
573-636-3052
DonLockinc@mchsi.com
CURRICULUM VITAE

BACKGROUND: 1966 - Graduate of Fatima High School,
Westphalia, Missouri.

**CONTINUING
EDUCATION:** Mineral Area College, Flat River, Missouri
University of Missouri, Columbia, Missouri
University of Virginia, Charlottesville, Virginia

MILITARY SERVICE: 1967-1970 - United States Army, Honorable Discharge.

**PROFESSIONAL
RESPONSIBILITIES:** 1987 to 1999 - Supervisor of the Questioned Document and Latent
Print Sections of the Missouri State Highway Patrol Crime
Laboratory.

1975 to 1999 - Investigator of forensic evidence in
Laboratory examinations
Participant in crime scene and criminal
Investigations.

1999 - Criminal Investigator, Missouri Attorney General

2000 – Self Employed as a Forensic Consultant - Questioned
Documents/Latent Prints – D.L. LOCK, INC

**SPECIALIZED
TRAINING** 1970 - Employed by the Missouri State Highway Patrol (Criminal
Records Division). Training experience in classifying, searching
and identification of inked finger prints (Henry System).

1974 - Assigned to Missouri State Highway Patrol Crime
Laboratory, Jefferson City, Missouri.

1974 - Two years apprentice program in Questioned Documents.

1975 - Fingerprint and Latent Print Courses - Law Enforcement
Academy, Jefferson City, Missouri.

1975 – F.B.I. Specialized School in Advanced Latent Print Techniques - Kansas Bureau of Investigation, Topeka, Kansas.

1975 - Forgeries Seminar - Missouri Western University, St. Joseph, Missouri.

1975 - Developed internationally accepted technique and procedures for lifting prints/latent prints from human skin.

1976 - Developed internationally accepted technique and procedure for fingerprinting deceased and/or crippled.

1977 - Professional Photographic Seminar - Kansas City Police Department, Kansas City, Missouri.

1977 – F.B.I. Fingerprint and Latent Print Courses - Lincoln University, Jefferson City, Missouri.

1977 - Crime Laboratory Forensic Photography School – Federal Bureau of Investigation Academy, Quantico, Virginia.

1977 - Missouri Division of the I.A.I. Educational Conference - Jefferson City, Missouri – Multiple Forensic discipline topics.

1978 - United States Secret Service Questioned Document School Washington, D.C.

1978 - Missouri Division of the I.A.I. Educational Conference - Osage Beach, Missouri – Multiple Forensic discipline topics.

1978 - Certified Latent Print Examiner - International Association for Identification.

1978 - Computer Inquiry School - Missouri State Highway Patrol Communications Division - Jefferson City, Missouri.

1979 - Missouri Division of the I.A.I. Educational Conference - Kansas City, Missouri – Multiple Forensic discipline topics.

1979 - Certified Specialist Instructor - Missouri Department of Public Safety.

1981 - Missouri Division of the I.A.I. Educational Conference - St. Joseph, Missouri – Multiple Forensic discipline topics.

1982 - International Association for Identification Educational Conference - Rochester, New York - Latent Prints/Questioned Documents and multiple disciplines.

1982 - Missouri Division of the I.A.I. Educational Conference - Lake Ozark, Missouri – Multiple Forensic discipline topics.

1983 - International Association for Identification Educational Conference - Orlando, Florida - Latent Prints/Questioned Documents and multiple disciplines.

1983 - Latent Fingerprint Collection Seminar - University of Missouri-Columbia, Columbia, Missouri.

1983 - Missouri Division of the I.A.I. Educational Conference - Lake Ozark, Missouri – Multiple Forensic discipline topics.

1984 - Missouri Public Defender Training Conference (Courtroom Demeanor Training) - Columbia, Missouri.

1984 - Death Investigation Seminar - Missouri Southern State College, Joplin, Missouri.

1984 - Missouri Division of the I.A.I. Educational Conference - Lake Ozark, Missouri – Multiple Forensic discipline topics.

1985 - International Association for Identification Educational Conference - Savannah, Georgia - Latent Prints/Questioned Documents and multiple disciplines.

1985 - Missouri Division of the I.A.I. Educational Conference - Osage Beach, Missouri – Multiple Forensic discipline topics.

1986 - Copper Vapor Laser Training - Highway Patrol Crime Laboratory, Jefferson City, Missouri.

1986 - Missouri Division of the I.A.I. Educational Conference - St. Joseph, Missouri – Multiple Forensic discipline topics.

1986 - Crime Scene Investigation School - Law Enforcement Academy, Jefferson City, Missouri.

1987 - International Association for Identification Educational Conference - Alexandria, Virginia - Latent Prints/Questioned Documents and multiple disciplines.

1987 - Automated Fingerprint Identification Systems Training - IBM Morpho Systems, Tacoma, Washington.

1987 - International Forensic Symposium on Latent Prints – Federal Bureau of Investigation Academy, Quantico, Virginia.

1987 - Missouri Division of the I.A.I. Educational Conference - Osage Beach, Missouri – Multiple Forensic discipline topics.

1988 - Automated Fingerprint Identification System (Benchmark) Printrak/Orion, Anaheim, California.

1988 - Automated Fingerprint Identification System (Benchmark) IBM Morpho, Tacoma, Washington.

1988 - Missouri Division of the I.A.I. Educational Conference - Osage Beach, Missouri – Multiple Forensic discipline topics.

1988 - Police Instructors' School - Law Enforcement Academy, Jefferson City, Missouri.

1989 - International Association for Identification Educational Conference - Pensacola, Florida - Latent Prints/Questioned Documents and multiple disciplines.

1989 - Missouri Division of the I.A.I Educational Conference - Osage Beach, Missouri – Multiple Forensic discipline topics.

1989 - Drug Enforcement Training Seminar, United States Department of Justice - Osage Beach, Missouri.

1989 - Automated Fingerprint Identification System Training (IBM Morpho).

1990 - Calligraphy School - Nichols Career Center, Jefferson City, Missouri.

1990 - Missouri Division of the I.A.I. Educational Conference - Osage Beach, Missouri – Multiple Forensic discipline topics.

1990 - Alternate Light Source Training Workshop - Missouri Southern State College, Joplin, Missouri.

1991 - Alternate Light Source Training Workshop - St. Louis County Police Department, Clayton, Missouri.

1991 - Fundamentals of Document Examination for Laboratory Personnel – F.B.I. Academy, Quantico, Virginia.

1991 - International Association for Identification Educational Conference - St. Louis, Missouri - Latent Prints/Questioned Documents and multiple disciplines.

1991 - Missouri Division of the I.A.I. Educational Conference - Lake Ozark, Missouri – Multiple Forensic discipline topics.

1992 - Security Printing Training Workshop - (Lottery/Gaming) Dittler Brothers Inc., Oakwood, Georgia.

1992 - Supervision School - Law Enforcement Academy - Jefferson City, Missouri.

1992 - Missouri Division of the I.A.I. Educational Conference - Osage Beach, Missouri – Multiple Forensic discipline topics.

1993 - Infection Control for First Responders - Law Enforcement Academy - Jefferson City, Missouri.

1993 - Security Printing Training Workshop - (Lottery/Gaming) Scientific Game, Inc., Alpharetta, Georgia.

1993 - Muzzle Print Identification/Special assignment, Missouri State Fair - Sedalia, Missouri.

1993 - Missouri Division of the I.A.I. Educational Conference - Lake Ozark, Missouri – Multiple Forensic discipline topics.

1994 – F.B.I. Advanced Latent Fingerprint School, Law Enforcement Academy, Jefferson City, Missouri.

1994 - Missouri Division of the I.A.I. Educational Conference - Lake Ozark, Missouri – Multiple Forensic discipline topics.

1994 - Muzzle Print Identification/Special assignment, Missouri State Fair - Sedalia, Missouri.

1994 - International Association for Identification Educational Conference - Phoenix, Arizona - Latent Prints/Questioned Documents and multiple disciplines.

1994 - AS400 Word Processing Training - Law Enforcement Academy - Jefferson City, Missouri.

1994 - Dale Carnegie Course, Effective Speaking and Human Relations - Jefferson City, Missouri.

1994 – Courtroom Demeanor Course – Law Enforcement Academy, Jefferson City, Missouri.

1995 - Ami Pro Word Processing Training - Law Enforcement Academy, Jefferson City, Missouri.

1995 - National Academy of Forensic Examiners Training Conference, Springfield, Missouri – Multiple discipline topics.

1995 - Muzzle Print Identification/Special assignment, Missouri State Fair - Sedalia, Missouri.

1995 - Advanced Palm Print Identification Symposium - Law Enforcement Academy, Jefferson City, Missouri.

1995 - Missouri Division of the I.A.I. Educational Conference, Lake Ozark, Missouri – Multiple Forensic discipline topics.

1995 - Security Printing Training Workshop - (Lottery/Gaming) Scientific Game, Inc., Alpharetta, Georgia.

1995 - Missouri Public Defender Training Conference (Courtroom Demeanor Training) - Lake Ozark, Missouri.

1996 - International Association for Identification Educational Conference - Greensboro, North Carolina - Latent Prints/Questioned Documents and multiple disciplines.

1996 - Muzzle Print Identification/Special assignment, Missouri State Fair - Sedalia, Missouri.

1996 - Missouri Division of the I.A.I. Educational Conference - Lake Ozark, Missouri – Multiple Forensic discipline topics.

1996 - Aspects of Stress Management - Law Enforcement Training Institute, University of Missouri-Columbia, Columbia, Missouri.

1997 - OS/2PC (Operating System) Computer Training- Law Enforcement Academy, Jefferson City, Missouri.

1997 – Federal Bureau of Investigation Digital Imaging Seminar for Law Enforcement - Las Vegas, Nevada.

1997 - International Association for Identification Educational Conference - Danvers, Massachusetts - Latent Prints/Questioned Documents and multiple disciplines.

1997 - Muzzle Print Identification/Special assignment at the Missouri State Fair - Sedalia, Missouri.

1997 - Missouri Division of the I.A.I. Educational Conference - Lake Ozark, Missouri – Multiple Forensic discipline topics.

1998 – Digital Imaging Training Seminar - The Career Center, Columbia, Missouri – Digital Imaging/Digital Photography theories and techniques - exercises in capturing, storing, enhancing and usage of digital imaging.

1998 – Computer/Windows 95 Operating System Training – Law Enforcement Academy, Jefferson City, Missouri.

1998 – International Association for Identification Educational Conference – Little Rock Arkansas – Latent Prints/Questioned Documents and multiple forensic disciplines.

1998 – Muzzle Print Identification/Special assignment - Missouri State Fair – Sedalia, Missouri.

1998 - Kansas Division of the I.A.I. Educational Conference – Topeka, Kansas – Multiple Forensic discipline topics.

1998 - Missouri Division of the I.A.I. Educational Conference - Lake Ozark, Missouri – Multiple Forensic discipline topics.

1998 – Research assessment exercises with the first transgenic animals produced by “Cloning/Nuclear Transfer” – Muzzle Print Identification – Roslin Institute, Edinburgh, Scotland.

1998 – Metropolitan Police Department/New Scotland Yard visit and training session – London England – Latent Prints and multiple forensic disciplines.

1999 - Digital Imaging/Photography Work Shop - Missouri State Highway Patrol State Crime Laboratory, Jefferson City, Missouri.

1999 - Southwestern Association of Forensic Document Examiners (SWAFDE) Typewriter Examination and Classification Workshop, Las Vegas, Nevada.

1999 - Missouri State Highway Patrol "MULES"
Certification/Communication Training. Criminal Record
Procedures, MULES, NCIC, NLETS, Springfield, Missouri.

1999 - Missouri Division of the I.A.I. Educational Conference -
Lake Ozark, Missouri – Multiple Forensic discipline topics.

2000 - Missouri Division of the I.A.I. Educational Conference -
Lake Ozark, Missouri – Multiple Forensic discipline topics.

2001 – Research exercises with the United States' first clone
using a somatic cell from an adult Jersey cow – Muzzle Print
Identification – University of Tennessee Agricultural Experiment
Station, Knoxville, Tennessee.

2001 – Muzzle Print Identification/Special assignment -
Missouri State Fair – Sedalia, Missouri.

2001 – Midwestern Association of Forensic Scientists
Educational Conference – St. Paul, Minnesota – Questioned
Documents and Multiple Forensic discipline topics.

2001 – Midwestern Association of Forensic Scientists
Educational Conference – St. Paul, Minnesota – Examination of
Seals and Rubber Stamps Workshop.

2001 – Midwestern Association of Forensic Scientists
Educational Conference – St. Paul, Minnesota – Color Printing
Processes and Counterfeiting Workshop.

2001 - Missouri Division of the I.A.I. Educational Conference -
Lake Ozark, Missouri – Multiple Forensic discipline topics.

2002 – Midwestern Association of Forensic Scientists – Note
Taking Techniques & Considerations for Questioned Document
Examiners Workshop – Lansing, Michigan

2002 – Missouri Department of Natural Resources – Forensic
Video Technology and the Law Training Session

2002 – Muzzle Print Identification/Special assignment -
Missouri State Fair – Sedalia, Missouri.

2002 - Missouri Division of the I.A.I. Educational Conference -
Lake Ozark, Missouri – Multiple Forensic discipline topics.

2003– Muzzle Print Identification/Special assignment -
Missouri State Fair – Sedalia, Missouri.

2003- Missouri Division of the I.A.I. Educational Conference -
Lake Ozark, Missouri – Multiple Forensic discipline topics.

2004– Muzzle Print Identification/Special assignment -
Missouri State Fair – Sedalia, Missouri.

2004 – International Association for Identification Educational
Conference – St. Louis, Missouri – Latent Prints/Questioned
Documents and multiple Forensic disciplines.

2004- Missouri Division of the I.A.I. Educational Conference -
Lake Ozark, Missouri – Multiple Forensic discipline topics.

2005 – Missouri Concealed Weapons Carry Permit Certification
Training - Tebbetts, Missouri

2005 – Muzzle Print Identification/Special assignment -
Missouri State Fair – Sedalia, Missouri.

2005 – Midwestern Association of Forensic Scientists Annual
Training Conference – Expert Witness Testimony Workshop,
Survival Course in the Post-Daubert Climate, Questioned
Documents and multiple forensic discipline topics - St. Louis,
Missouri.

2005 - Missouri Division of the I.A.I. Educational Conference -
Lake Ozark, Missouri – Multiple Forensic discipline topics.

2006 – Midwestern Association of Forensic Scientists Spring
Workshop – Iowa DCI Crime Laboratory (Des Moines Area
Community College) Ankeny, Iowa – Preservation, Examination
and Identification of Deteriorating Documents.

2006 – Muzzle Print Identification/Special assignment -
Missouri State Fair – Sedalia, Missouri.

2006 – Kansas Division of the International Association for
Identification Educational Conference – Junction City, KS
Multiple Forensic discipline topics.

2006 – Missouri Division of the International Association for
Identification Educational Conference – Lake Ozark, MO –

Multiple Forensic discipline topics

2007 – Muzzle Print Identification/Special assignment -
Missouri State Fair – Sedalia, Missouri.

2007 – Midwestern Association of Forensic Scientists Annual
Meeting – Traverse City, MI – Examining Documents Requiring
a Multi-Faceted Approach.

2007 – Midwestern Association of Forensic Scientists Annual
Meeting – Traverse City, MI – Forensic Examination of
Computer Generated Documents.

2007 – Midwestern Association of Forensic Scientists Annual
Meeting – Traverse City, MI – Methods Used for Authenticating
Questioned Documents.

2007 – Midwestern Association of Forensic Scientists Annual
Meeting – Traverse City, MI – Courtroom Testimony for Forensic
Document Examiners.

2007 – Missouri Division of the International Association for
Identification Educational Conference – Lake Ozark, MO –
Multiple Forensic discipline topics

2008 – Muzzle Print Identification/Special assignment -
Missouri State Fair – Sedalia, Missouri.

PRESENTATIONS:

Presenter of numerous short courses and seminars.

Instructor of many specialized training programs at colleges, universities, associations, and law enforcement agencies throughout the state of Missouri.

Instructor of specialized training program at international level -
Questioned Documents – Little Rock, Arkansas.

Conductor of security procedures on Missouri State Lottery tickets
- 1992 to 1999.

Presenter of expert testimony as a Forensic Document Examiner
and Latent Print Examiner in Missouri Municipal Courts, Federal
Courts and Military Courts.

Instructor at Missouri State Highway Patrol Law Enforcement
Academy - Latent Prints and Questioned Documents - 1975 to
1999

**ASSOCIATIONS/
ORGANIZATIONS:**

Missouri Latent Print Certification Committee 1978 - 1990

Chairman of the Missouri Latent Print Certification Committee -
1990 to 2008

Life Active Member - Missouri Division of the International
Association for Identification

Kansas Division of the International Association for Identification

Life Active Member - International Association for Identification

The British Fingerprint Society (Recognized Fellow)

Midwestern Association of Forensic Scientists

The Forensic Science Society (United Kingdom)

Second Vice President, Missouri Division of I.A.I. - 1987

First Vice President, Missouri Division of I.A.I. - 1988

President, Missouri Division of I.A.I. - 1989

Chairman of the Board of Directors, Missouri Division of I.A.I. -
1990

Second Vice President, Missouri Division of I.A.I. - 1996

First Vice President, Missouri Division of I.A.I. – 1997

Co-Chairman of the I.A.I. Questioned Document Sub Committee
– 1996-1997

President, Missouri Division of I.A.I. – 1998

Chairman of the I.A.I. Questioned Document Sub Committee –
1998

Chairman of the Board of Directors, Missouri Division of I.A.I. –
2002, 2003, & 2004

**PUBLICATIONS/
ACCREDITATIONS**

Missouri State Highway Patrol Questioned Documents Training
and Procedures Manuals

Missouri State Highway Patrol Latent Print Training and
Procedures Manuals

Missouri State Highway Patrol Guidelines for obtaining known
handwriting exemplars

Missouri Lottery Inspection Training and Procedure Manuals

Miscellaneous Latent Print and Questioned Document Lesson
Plans

“The Cloned Sheep of Roslin (Muzzle Prints)”, Journal of
Forensic Identification Volume 50, NO 3, May/June 2000

1984 - Missouri State Highway Patrol State Crime Laboratory
received Accreditation in multiple forensic disciplines to include
Questioned Documents and Latent Print Examinations by the
American Society of Crime Laboratory Directors (ASCLD)