

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

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

**DEFENDANT ELDER’S REPLY TO THE
GOVERNMENT’S RESPONSE TO ELDER’S MOTION TO
EXCLUDE HANDWRITING EXPERT TESTIMONY WITH
SUGGESTIONS IN SUPPORT**

The government in its response correctly states that a second report prepared by Mr. Lock was provided to defendant after defendant had filed his motion under consideration here (see doc. 50, defense motion). In conversation with the prosecutor, undersigned counsel advised that he would not be filing a follow up motion and would instead rely on the law and argument in his original motion. Government counsel now seems to take this as a concession of some kind as to the expertise of Mr. Lock and suggests that defendant Elder finds him qualified in all respects.

Defendant does not concede that Mr. Lock is qualified in the first instance and certainly does not concede or agree that his particular methodology employed in this somewhat unique case (comparing non-original faxed questioned documents to similar original documents) is sound within the meaning of *Daubert*, a 1993 case, and *Kumho Tire*, a 1999 case, and the cases that have followed these in this Circuit and others.

The government suggests that Mr. Lock's expertise is unassailable because of findings by the court in *United States v. Jolivet*, 224 F.3d. 902 (8th Cir. 2000). The government fails to point out that Lock's testimony was not objected to at the district court level and the matter was reviewed on appeal on a plain error standard. Furthermore, Lock apparently had a large number of original questioned documents submitted to insurance companies that were allegedly signed by the defendant to make a comparison with. The facts are totally distinguishable from this case and again the 8th Circuit merely ruled that it was not an abuse of discretion to admit Lock's testimony in the absence of proper objections below.

It should also be noted that most of the cases cited by the government in its response pre-date *Daubert* and *Kumho*.¹ The government does cite a post *Daubert* district court case in its response, *United States v. Starzeczyzel*, 880 F.Supp. 1027 (S.D.N.Y. 1995), ostensibly in support of its arguments, which defendant urges the

¹ See *Daubert* at 509 U.S. 579 and *Kumho* at 526 U.S. 137

Court to read closely. Contrary to the government's claims that the issues raised by defendant are settled and weigh against him, *Starzecpyzel*, a lengthy and well researched opinion suggests just the contrary. Indeed, the latter case points to the troubling issue of prejudicial effect versus the probative value of "junk science" and notes the dangers of this type of evidence if it is not properly evaluated for prejudice at the "gate" by the "gatekeeper" before it is put before the jury. See *In Re Air Crash At Little Rock Arkansas*, 291 F.3d 503 (8th Cir. 202).

Mr. Lock may prove to have many accolades to his credit, may be well educated, may have authored many learned works, and may be well respected in many circles. This alone however does not address the issue of whether he has approached his examinations in this case based on fundamentally unsound principles and is offering an opinion that is not generally acceptable within his profession and is simply unreliable in the extreme. From all indications, the questioned documents that Lock looked at were photo copies of faxed documents. Unlike *Jolivet*, there are no original "questioned documents" for him to compare to Doctor Elder's original prescriptions obtained in Texas with a subpoena.

With all due respect to Mr. Lock, his testimony in this case, based on what he has had to work with, would simply amount to the "junk science" discussed in *Starzecpyzel*. His testimony should be excluded because it is unreliable, unsound, unacceptable within the framework of Rules 701 and 702, FREv, and, most

importantly, the prejudicial effect far outweighs its probative value and the prejudice is beyond the reach of a cautionary instruction, even as crafted in *Starzeczyel*, *supra*.

WHEREFORE, defendant moves the Court for an Order excluding his testimony.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I certify that a copy of this pleading has been caused to be served on the Assistant United States Attorney for Western District of Missouri and other ECF listed counsel through use of the Electronic Court Document Filing System on September 6, 2008.

/s/

JOHN R. OSGOOD