UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

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

DEFENDANT ELDER'S MOTION IN LIMINE TO PRECLUDE TESTIMONY OF A GOVERNMENT HANDWRITING EXPERT AND REQUEST FOR A PRETRIAL HEARING TO RESOLVE ADMISSIBILITY ISSUES WITH SUGGESTIONS IN SUPPORT

Defendant anticipates that the government will attempt to introduce evidence that photo copies of faxes and the faxes themselves were "probably" written by the defendant. "Probably written" is to be distinguished from opinion testimony of a more positive nature that would opine that a document was in fact "written" by a particular individual.

In Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). the Supreme Court held that "under Federal Rule of Evidence 702 the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable. 509 U.S. at 589. To assist trial courts with this task, the Court suggested a flexible, factor-based approach to analyzing the reliability of expert testimony. These factors include but are not limited to: 1) whether a method can or has been tested; 2)the known or potential rate of error; 3) whether the methods have been subjected to peer review; 4) whether there are standards controlling the technique's

operation; and 5) the general acceptance of the method within the relevant community. Id. at 593-94.

After handing down Daubert, in Kumho Tire Co. v. Carmichael 526 U.S. 137 (1999), the Court resolved any post-Daubert uncertainty that the trial judge's responsibility to keep unreliable expert testimony from the jury applies not only to "scientific" testimony, but to all expert testimony. Id. at 148.

As a result, a "basic gatekeeping obligation" applies with equal force in cases where "non-scientific" experts wish to relate specialized observations derived from knowledge and experience that is foreign to most jurors. Kumho Tire also makes it clear that "the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable," as well as the ultimate determination of whether the proposed expert testimony is reliable. Id. at 152.

In In Re Air Crash At Little Rock Arkansas, 291 F.3d 503, 514 (8th Cir. 2002) the Court held that "Daubert demands an assessment of whether the expert's methodology has been tested, and an inquiry into whether the technique has been subjected to peer review and publication, has a known or knowable rate of error, and has been generally accepted in the proper scientific community."

> We recognize that the district court has considerable latitude in determining whether expert testimony will assist the trier of fact and be reliable, and it may consider one or all of the Daubert factors in making this determination.

* * *

> We agree with the district court that when reasonably possible, Daubert issues should be raised prior to trial and that ideally the Daubert "hearing" should not be conducted following a fifteen-minute morning recess shortly before the expert is scheduled to testify.

Id. But see U.S. v. Robertson, 387 F.3d 702 (8th Cir. 2004)(holding that the district court is not always required to hold such a hearing prior to qualifying an expert under Rule 702 of the Federal Rules of Evidence). Also see Lauzon v. Senco Products, Inc., 270 F.3d 681, 696 (8th Cir. 2001)(detailed summary of Daubert rulings in the 8th Circuit).

In U.S. v. Prime, 431 F.3d 1147 (9th Cir. 2005)the Court conducted a Daubert hearing that was quite thorough. In affirming the case the Court noted that the expert was given 112 pages of writing known to be the defendant's, 114 pages of a second individual, and 14 pages of a third. The expert was then asked whether the handwriting on 76 documents associated with the alleged conspiracy, such as envelopes, postal forms, money orders, Post-it notes, express mail labels and postal box applications, belonged to any of the co-conspirators. The expert "identified" Prime's handwriting on 45 of the documents. This is of course in sharp contrast to the quality of the questionable documents that the expert in our case has as evidence before him and the fact that he is focusing on primarily scribblings in a small signature block on a faxed prescription.

In contrast to Prime, supra, in the case of In Re Townsend, 309 B.R. 179 (WD Pa, April 29, 2004), a U.S. Bankruptcy Court opinion, the Chief Judge found that an expert who had testified in prior cases (but never in federal court) and who purported to have training and experience in the field and who purported to use accepted methods was not qualified to render an opinion in the case and the testimony was stricken. The expert was being asked to render an opinion as to the validity of a signature on a mortgage document. In Townsend the Judge carefully applied the various criteria of Daubert and did an analysis of the factors and where the evidence fell short. Townsend illustrates the problems and pitfalls of allowing an expert to give an opinion where the questioned document is not a full and complete writing and instead is merely a single signature or, as in our case, what amounts to scribblings on faxed documents of admittedly limited reliability.

In United States v. Lewis, 220 F.Supp.2d 548(SD WV 2002) the district court held that all of the Daubert factors reasonably apply to handwriting analysis and thus are helpful to the court in assessing the reliability of a particular expert's testimony. In ruling that the expert's opinion was not reliable in Lewis, the court observed about the expert that "his bald assertion that the 'basic principle of handwriting identification has been proven time and time again through research in [his] field,' without more specific substance, is inadequate to demonstrate testability and error rate."

Defendant firmly believes that he will be able to establish at a Daubert hearing that

the handwriting evidence in this case will be highly speculative, unreliable, prejudicial and unworthy of placing it before a jury.

WHEREFORE, defendant Elder moves the court to grant his motion and schedule this matter for a Daubert hearing.

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 Rudy Rhodes for Western District of Missouri and other ECF listed counsel through use of the Electronic Court Document Filing System on Sunday, May 18, 2008.

/s/
JOHN R. OSGOOD