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the motion had been timely filed.

According to the defendant, Mr. Klees's testimony should be excluded for several reasons. The government will address, in turn, each of the defendant's proffered reasons for excluding Mr. Klees's testimony, and will demonstrate both that the defendant's claims are meritless, and that Mr. Klees's expert testimony and opinion should be admissible under Rules 702, 703 and 403 of the Federal Rules of Evidence.

## II. ARGUMENT

### A. The Legal Standards Governing The Admissibility of Expert Testimony

In support of his request for the exclusion of Mr. Klees's expert testimony, the defendant cites to the case of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). The defendant correctly states that, under the rulings of the Supreme Court in the Daubert case, trial judges must act as the "gatekeepers" with regard to the admissibility of expert testimony.<sup>2</sup> Rule 702 of the Federal Rules of Evidence was revised in 2000 as a result of the Daubert decision. Rule 702 provides as follows:

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.

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<sup>2</sup>In Daubert, the Court set forth standards to be applied in considering whether to admit "scientific" expert testimony. The Court later expanded the reach of these standards to cover "technical" and "specialized" expert testimony. See Kumho Tire, Ltd., v. Carmichael, 526 U.S. 137 (1999).

The Court in Daubert set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. The specific factors listed by the Court in Daubert include: (1) whether the expert's technique or theory can be or has been tested - that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory 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 technique or theory has been generally accepted in the scientific community. See Advisory Committee Notes to 2000 Amendments to Rule 702. The government's burden with respect to these elements is proof by a preponderance of the evidence. Daubert at 593, n.10.

At the hearing on the defendant's Motion to Exclude, Mr. Klees will testify that ATF's technique in the analysis and identification of toolmarks has been tested and determined to be reliable. In addition, Mr. Klees will testify that the ATF's technique in the analysis and identification of toolmarks has been, and continues to be, subject to peer review. Mr. Klees will also testify regarding the existence and maintenance of the standards and controls relevant to expert toolmark identification testimony, and that the technique utilized by the ATF has been generally accepted in the scientific and technical community. In sum, the government will demonstrate that the expert testimony which will be offered at trial in this case will be reliable and relevant.

Based on the foregoing, the government's position is and will be that the expert testimony of Mr. Klees should be admissible under Rules 702, 703 and 403, and under the standards set forth in the Daubert decision.

B. The Defendant's Claims Are Meritless

1. The Technique Employed by Mr. Klees Can And Has been Tested

The defendant argues that the "premises" underlying toolmark identifications "have not been tested to determine if they can be falsified." (Def.Mot. at p.10.) More specifically, the defendant alleges that the government will not be able to demonstrate that it is impossible for two or more threading machines to leave microscopic marks that are identical, and that it is impossible for toolmark examiners to reliably make identifications from small, distorted pieces of metal fragments. According to the defendant, Mr. Klees's testimony would rely only on "intuitions and assumptions" that have not been tested rigorously. (Def.Mot. at p.11.)

The defendant further argues that, due to the lack of testing, a comparative micrographic examiner like Mr. Klees can, at best, merely determine that certain characteristics are uncommon in the two items under comparison, but that the examiner has no basis to opine what the probability is that the marks were actually made by the same machine. Because such statistical probabilities cannot be demonstrated, the defendant argues, the fundamental hypotheses upon which the toolmark identifications are based cannot be demonstrated.

2. The Defendant's Claim Regarding An Established Error Rate For Toolmark Identifications Is Misleading

In this section of the motion, the defendant claims that, in light of the fact that toolmark validation studies have not yet been performed, there are no established error rates for toolmark identifications. The defendant then claims, without any explanation, that there is "substantial reason to suspect that, when the validation studies are ultimately conducted, the error rates that are established will be significant." (Def.Mot. at p.13.)

3. The Defendant's Arguments Concerning The Field Of Fingerprint Analysis

In this section of the motion, the defendant spends a substantial amount of time discussing numerous viewpoints and academic opinions concerning the utility and reliability of

fingerprint analyses. The defendant also cites to several cases which, according to the defendant, demonstrate the lack of reliability of fingerprint identifications, and the related risks of injustice that can typically follow from misidentification of fingerprints in criminal cases. Because of the minimal amount of relevance that such arguments have with respect to the toolmark identification testimony at issue in this case, the government does not intend to respond to these particular arguments.

4. Contrary To The Defendant's Arguments, There Are Objective Standards Governing Toolmark Comparison And Analysis

The defendant begins this portion of his argument by stating that toolmark examiners in the United States are currently operating in the absence of any uniform objective standards. Consequently, the defendant maintains, all toolmark comparison identifications are completely subjective. Moreover, the defendant claims, "the system of subjective comparative micrographics routinely employed by toolmark [examiners] over the past forty or so years, is scientifically invalid." (Def.Mot. at p.19.)

Next, the defendant claims that the lack of standards in the toolmark community extends to the training and experience requirements for toolmark examiners. According to the defendant,

no such requirements currently exist and that the direct result of this poor training is "deficient examiners."

5. The Defendant's Claims Regarding A "Relevant Scientific Community" Relating To Toolmark Examiners Are Misleading

The defendant claims in this section of the motion that there has never been a relevant scientific community, beyond toolmark examiners themselves, that has shown any sort of general acceptance for the proposition that toolmark comparisons and identifications are reliable. In defining a relevant scientific community, the defendant argues, it is necessary to look beyond the practitioners of the technique that is under assessment.

Moreover, the defendant maintains, "mainstream scientists, by and large, have ignored the question of whether machines can be reliably identified through toolmark impressions." (Def.Mot. at p.24.) The defendant further claims that the

scientific experts who have examined the issue have found that the field of toolmark identifications is "scientifically deficient." (Def.Mot. at p.24, citing David L. Faigman, Modern Scientific Evidence: The Law and Science of Expert Testimony, Section 21-1.0 at p.55 (West 1997)).

6. The Defendant Incorrectly Claims That There Is A "Lack Of Literature" In The Field of Toolmark Identifications

The defendant alleges that the fundamental premises underlying toolmark identifications have not been critically examined in any type of technical literature of the toolmark community. The defendant argues, that "almost no such literature exists." Moreover, the defendant claims that, in the few occasions when the basis of toolmark identifications have been considered in the technical literature, those bases have not been critically examined.

7. The Defendant's Analogies To Handwriting And Hair Analyses Are Misleading

The next basis of the defendant's attack on the toolmark identification field are based on certain selected cases involving handwriting and hair comparison analyses. The defendant avers that, like latent toolmark identifications, the field of handwriting analysis is unreliable in that it has no error rate for the examiners and has no numerical standards governing the analysis. The defendant then goes on to discuss two cases involving forensic document examinations, and the different approaches taken by those courts for resolving the expert testimony issues.

With respect to hair analysis, the defendant claims that the forensic examiners in that field, like toolmark examiners, look for a number of matching characteristics in doing hair comparisons. Then, the defendant argues, analysts in both fields make their determination as to whether the items found at the crime scene are microscopically consistent with the known items relating to the suspect. The defendant claims that, in the field of toolmark identifications, like in the field of hair comparison analysis, there is a scarcity of scientific studies regarding its reliability. In support of these claims, the defendant cites to the case of Williamson v. Reynolds. 904 F.Supp. 1529, 1553 (E.D. Okla. 1995).

Accordingly, the defendant argues, because both handwriting and hair comparison analysis have been found by courts to be unreliable, the toolmark identification testimony, which shares similar degrees of unreliability as stated above, should also be excluded.

8. Toolmark Identifications Have Been Used In Other, Non-Judicial Applications

In this section of the motion, the defendant states that there have been few, if any, "non-judicial applications" of toolmark identifications. Because the use of toolmark identification has been "under the control of the police community rather than the scientific community", the defendant argues, such evidence cannot be viewed as being scientifically reliable.

9. The Government Will Be Able To Establish Non Daubert Factors To Demonstrate The Reliability Of Toolmark Identification Testimony

The defendant correctly anticipates that the government will assert that toolmark identification testimony is based upon "technical" and "specialized" knowledge, rather than "scientific" knowledge. However, the defendant incorrectly argues that the government will be unable to establish that toolmark identification

testimony can satisfy the criteria set forth in the Daubert and Kumho Tire cases.

10. The Government's Toolmark Identification Evidence Is Admissible Under Rule 403 Of The Federal Rules Of Evidence

Rule 403, of course, directs that, in determining whether any item of evidence is admissible, the Court should determine whether its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. The defendant claims, with respect to toolmark identification testimony, that because such testimony will be given by an expert, and because such testimony is inherently unreliable, the jury is likely to give undue and unfair weight to such testimony, thereby unfairly prejudicing the defendant at trial. In support of these claims, the defendant cites to several cases and articles wherein the persuasiveness of expert testimony carried an "aura of infallibility" or was "both powerful and quite misleading." In conclusion, the defendant claims, while the probative value of the government's toolmark evidence is low, the danger of unfair prejudice is extremely high in light of the fact that the jury will give the evidence considerably more weight than it deserves because the evidence comes from an expert.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within Motion was served by first-class mail this  
day of March, 2002, to and upon the following:

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