

1 THE STATE OF OHIO, )  
 ) SS: MICHAEL J. RUSSO, J.  
2 COUNTY OF CUYAHOGA.)

3 IN THE COURT OF COMMON PLEAS  
4 CRIMINAL DIVISION

5 THE STATE OF OHIO, )  
 )  
6 Plaintiff, )  
 )  
7 -v- ) CR 509503  
 )  
8 )  
9 EASHAWN ANDERSON, )  
 )  
10 Defendant. )

11 - - - -  
12 DEFENDANT'S EXCERPT TRANSCRIPT OF PROCEEDINGS  
13 MONDAY AFTERNOON SESSION, MARCH 23, 2009  
14 WEDNESDAY AFTERNOON SESSION, MARCH 25, 2009

15 - - - -  
16 APPEARANCES:  
17 WILLIAM D. MASON, ESQ., Prosecuting Attorney,  
18 by: Pinkey Carr, Assistant County Prosecutor,  
19 on behalf of the Plaintiff;  
20 Mark Marein, Esq.,  
21 Steven Bradley, Esq.,  
22 on behalf of the Defendant.

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24 Cindy M. Eiben, RMR  
25 Official Court Reporter  
Cuyahoga County, Ohio

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BE IT REMEMBERED, that at the A.D.,  
2009 term of said Court, to-wit, commencing on  
MONDAY, MARCH 24, 2009, this cause came on to  
be heard before the Honorable Judge Michael J.  
Russo, in Courtroom No. 17-C, Courts Tower,  
Justice Center, Cleveland, Ohio, upon the  
indictment filed heretofore.

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1                   TUESDAY AFTERNOON SESSION, MARCH 24, 2009

2                   - - - -

3                   \*\*\*\*\* (Excerpt) \*\*\*\*\*

4                   - - - -

5                   THE COURT:                   Before we do the  
6                   video deposition, does anybody have a  
7                   one-minute statement they want to make about  
8                   this hearing, which is a motion in limine?

9                   MR. BRADLEY:                 Judge, I would  
10                  just point out that it's the prosecution's  
11                  burden of proof here. And according to my  
12                  understanding of Daubert, it is incumbent upon  
13                  the prosecution to affirmatively establish  
14                  that the field of toolmark identification  
15                  rests on adequate scientific foundations.

16                  And I didn't hear any testimony from  
17                  the prosecution to establish such a  
18                  foundation, and therefore, we're asking you to  
19                  grant our motion to exclude.

20                  THE COURT:                   Good thing I was  
21                  taking notes.

22                  Miss Carr, if you want, the  
23                  one-minute version.

24                  MS. CARR:                   No problem, your  
25                  Honor.

1           Your Honor, the State has met its  
2           burden as it relates to the testimony,  
3           testimony on firearm or examination  
4           identification from a veteran officer who is  
5           not someone who merely conducts research, but  
6           actually engages in the science. The same  
7           officer who has been declared an expert in the  
8           area, on more than 100 occasions, not only in  
9           this court, but also declared an expert in the  
10          area in Federal Court.

11          Your Honor, as it relates to Daubert,  
12          this is a science, and it's a technique or  
13          theory that can be tested, and has been  
14          tested. It's subject to peer review, as  
15          reflected on State's Exhibits 1 through 4,  
16          that being the detective, in the unit,  
17          Scientific Investigation, with Sergeant  
18          Willson.

19          They know the potential error rate.  
20          And as Sergeant Willson testified, there are  
21          instances in which he and the peer review --  
22          whether it's Detective Ealey or another  
23          detective, there have been instances in which  
24          they didn't agree, and as such, that was  
25          noted.

1                   THE COURT:                   Error rate would  
2                   be a percentage. They don't have that. They  
3                   don't have that type of information.

4                   MS. CARR:                   I'm not  
5                   suggesting a percentage. I didn't use the  
6                   word percentage, your Honor.

7                   But notwithstanding --

8                   THE COURT:                   But that's what  
9                   an error rate is.

10                  MS. CARR:                   Okay. Thanks.

11                  THE COURT:                   Let me address  
12                  all the parties, and you can --

13                  MS. CARR:                   Thank you. All  
14                  right.

15                  THE COURT:                   -- make  
16                  additional comments if you wish.

17                  As I read the Glynn decision,  
18                  Monteiro, Williams, and Diaz, it seems clear  
19                  to me that based upon those decisions, as well  
20                  as the testimony of Professor Schwartz, that  
21                  they're trying, with firearm and toolmark  
22                  identification, to reach a more objective, a  
23                  more, I guess, reliable or testable -- I know  
24                  that's not a word -- but they want to be able  
25                  to reproduce certain results so that there

1 will be no opportunity for someone to be -- to  
2 give testimony that is inaccurate or would  
3 result in a wrongful conviction.

4 And as Professor Schwartz discussed,  
5 there were criticism about DNA that prompted  
6 changes. And I suspect that that's where all  
7 this is going to, not just toolmark  
8 identification, but in many fields based on  
9 the NRC report.

10 Here's what, you know, I find lacking  
11 here. Here's what I find is present. We have  
12 here an expert in ballistics and firearms,  
13 Sergeant Nate Willson, who has been in this  
14 field for a number of years. He apprenticed,  
15 and has testified many times, and has not ever  
16 been excluded from testifying in this  
17 particular field, because he does have  
18 knowledge that's beyond that of a layperson.

19 Most people don't know how a gun  
20 works. They can't take it apart, can't put it  
21 back together, can't say how the discharge  
22 occurs, what the effect is on the various  
23 parts of the gun, the stresses, what happens  
24 with the projectile, what happens with the  
25 casing, how those can be examined, what are

1           their class characteristics,  
2           sub-characteristics, individual  
3           characteristics. He has all that knowledge.

4                        So it's not a criticism or limitation  
5           on Sergeant Willson's knowledge and expertise  
6           in the field. It's just there is an issue  
7           about the field itself, as to whether this  
8           has what was determined in the Glynn case  
9           as -- whether ballistics identification  
10          testimony has sufficient rigor to be received  
11          as science.

12                       And as they talked about in the  
13          Monteiro case, when someone such as Sergeant  
14          Willson does their examination, reaches a  
15          conclusion, it's not based on a quantitative  
16          standard, for how many striations or marks  
17          need to match up or line up; instead, it's  
18          based on a holistic assessment of what the  
19          examiner sees.

20                       And this is the point, in the cases  
21          and literature, Professor Schwartz and  
22          advocates who hold her position want something  
23          more subjective where things can add up  
24          empirically. And other courts have recognized  
25          that this is, well, more or less, an art.

1           It's based on training, skill, experience.

2           There is peer review.

3                       So I'm inclined to agree with Judge  
4           Rakoff in the Glynn case, that in this  
5           particular instance, the ballistics  
6           examination lacks a rigor of science, yet it  
7           has a methodology that has garnered sufficient  
8           empirical support to warrant its  
9           admissibility.

10                      Then the problem is how to admit it  
11           into evidence. And as Judge Rakoff said, the  
12           problem is how to admit it into evidence  
13           without giving the jury the impression of a  
14           risk where forensic evidence is concerned that  
15           it has greater reliability than its empirical  
16           methodology permits.

17                      He discusses the fact, effective  
18           cross-examination may mitigate some of these  
19           dangers. But in case, the Court must play a  
20           greater role not only excluding unreliable  
21           testimony, but also in alerting the jury to  
22           limitations of what is presented.

23                      In the Glynn case, Judge Rakoff did  
24           not allow the expert to testify as to a  
25           reasonable degree of ballistic certainty. But



1           that didn't mean that the testimony was not  
2           admissible and relevant.

3                     He said, it's simply sufficient that  
4           the proffered evidence can make the existence  
5           of any fact that is of consequence to the  
6           determination of the facts more probable or  
7           less probable than it would have been without  
8           the evidence.

9                     He permitted then the ballistics  
10          examiner to testify only that a firearm match  
11          was more likely than not. And I -- that is  
12          what I'm going to allow here.

13                    And not just based on the literature.  
14          One of the things they talked about is the  
15          fact that there should be documentation. And  
16          it's clear that there was not documentation  
17          here showing photomicrographs, description,  
18          other information, that would permit the Court  
19          or even the jury to say, all right, here's why  
20          things line up, here's the description, here's  
21          this.

22                    Now that's -- in this particular  
23          instance, that information is not present.  
24          There is only a bare conclusion.

25                    And I find that based upon the

1 evidence, that Sergeant Willson has expertise  
2 in this area, it can assist the trier of fact  
3 in making their decision; but that the  
4 standard in this particular instance, based  
5 upon the reports and the other evidence that  
6 has been presented for this hearing, he will  
7 only be able to testify that the firearm's  
8 match was more likely than not between the  
9 subject gun and the -- either the pellet or  
10 the firearm casing.

11 So, that's my preliminary ruling on  
12 this motion in limine.

13 Miss Carr, anything you wish to  
14 address on these points that I've discussed?

15 MS. CARR: Your Honor, just  
16 that I respectfully disagree.

17 Thank you.

18 THE COURT: Something else  
19 I -- I do also note, there was peer review  
20 here by a second examiner. Professor Schwartz  
21 wasn't familiar with the name, so she didn't  
22 understand that point.

23 And I also refer to the Diaz case,  
24 which states that the Government is only  
25 required to use a method that passes under

1 Daubert. Which I find that this methodology  
2 of Sergeant Willson and his firearms and  
3 ballistics group, it does pass under Daubert.

4 They are not required to use a method  
5 that bypasses Daubert. But I feel that there  
6 should have been documentation to accompany  
7 that. So I'm not going to allow him to  
8 testify as to the higher standard.

9 So, Mr. Bradley, Mr. Marein, anything  
10 further?

11 MR. BRADLEY: No, Judge.

12 MR. MAREIN: No.

13 THE COURT: All right, thank  
14 you.

15 - - - -

16 (Thereupon, Court was adjourned.)

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18 (End of Excerpt)

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1                   WEDNESDAY AFTERNOON SESSION, MARCH 25, 2009

2                   - - - -

3                   \*\*\*\*\* (Excerpt) \*\*\*\*\*

4                   - - - -

5                   THE COURT:                   One other issue  
6                   I wanted to address. Yesterday we completed  
7                   the hearing with respect to the motion in  
8                   limine that was filed about ballistics  
9                   testimony. I gave a brief decision from the  
10                  bench that the parties would then have the  
11                  opportunity to proceed with the video  
12                  deposition of Sergeant Nate Willson who is  
13                  having eye surgery today. But I just want to  
14                  more formally state the Court's basis so that  
15                  it's clear to the parties.

16                  With respect to ballistics testimony,  
17                  and the admissibility of such testimony in  
18                  Ohio -- I'm citing to State v. Mack, 73 Ohio  
19                  St.3d, 502. And the Supreme Court decided in  
20                  a case from Cuyahoga County, in 1995, that in  
21                  that case Detective Lucy's testimony as to a  
22                  ballistics expert satisfied the requirements  
23                  of both Evidence Rule 702 and 703. The  
24                  Supreme Court, an opinion written by Justice  
25                  Pfeiffer, found that it did.

1           In particular, page 512, they talk  
2           about the fact, Detective Lucy compared the  
3           test shot with the morgue bullet recovered  
4           from the victim, Peterson Ely, and the spent  
5           shell casings recovered from the crime scene,  
6           concluding that all had been discharged from  
7           appellant's gun. Doubtlessly based on his own  
8           observations, the findings of the ballistics  
9           examination were well within Detective Lucy's  
10          knowledge. That was the decision of the  
11          Supreme Court.

12           And further in that section, the  
13          opinion Justice Pfeifer wrote, in this case  
14          Detective Lucy conducted extensive analysis  
15          upon appellant's gun, the morgue bullet  
16          recovered from the victim, and the shell  
17          casings removed from the crime scene. The  
18          fact that his colleagues in the laboratory may  
19          have confirmed or even debated his findings  
20          does not remove his opinion beyond the  
21          boundaries of admissible expert testimony  
22          prescribed by Evidence Rule 703. It does not  
23          state, though, what level of certainty that  
24          Detective Lucy had testified to or what might  
25          be permissible.

1                   There is a foundation, obviously,  
2                   then in Ohio jurisprudence -- and that's  
3                   fairly recent -- for ballistics evidence to be  
4                   admitted in a murder case. I also referred to  
5                   and have considered State v. Clark from our  
6                   Court of Appeals, found at 101 Ohio App.3d  
7                   389. It's a 1995 case.

8                   The significance here for my purposes  
9                   in this hearing is page 414, the discussion  
10                  about expert testimony. In this particular  
11                  instance, Judge Nugent wrote on the panel and  
12                  said, before expert testimony can be admitted,  
13                  the trial Court must also determine if such  
14                  testimony will aid the trier of the fact in a  
15                  search for the truth.

16                  As previously stated, the standard  
17                  for the admissibility of expert testimony in  
18                  Ohio is whether the question evidence is  
19                  relevant, and will assist the trier of fact in  
20                  understanding the evidence presented, or in  
21                  determining a fact in issue.

22                  He indicates further, however, the  
23                  reliability of the expert testimony in a given  
24                  case goes to the weight of the evidence rather  
25                  than its admissibility. And in that instance,

1 he stated, no pretrial evidentiary hearing is  
2 necessary to determine reliability of the  
3 evidence. Rather, it is the reliability of  
4 the methodology employed to obtain the  
5 evidence which must be considered.

6 That was really what we're  
7 considering here, was the reliability of the  
8 methodology. And Clark didn't deal with  
9 ballistics expert, but it dealt with accident  
10 reconstruction. But it's the same principle  
11 we were dealing in that hearing involving  
12 Sergeant Willson's testimony, and that of  
13 Professor Schwartz, the reliability of the  
14 methodology as to whether it should be  
15 introduced in the line of Daubert, and other  
16 cases.

17 MR. MAREIN: Judge, what was  
18 the name of that opinion authorized by Judge  
19 Nugent?

20 THE COURT: State v. Clark,  
21 101 Ohio App.3d.

22 As far as others, it's significant in  
23 State v. Mack, the Supreme Court also held  
24 that a detective with five years of experience  
25 in firearm and toolmark examination who is

1           trained by a 25 year veteran was qualified as  
2           a ballistics expert. In fact, in Clark it was  
3           Kovacic who trained Detective Lucy. He  
4           also -- in fact, Kovacic also trained Sergeant  
5           Willson.

6                         In Franklin County in 2006, in State  
7           v. Deshawn Johnson, 2006 Ohio 209, in that  
8           instance, the defense did not contest the  
9           ballistics expert's qualifications as an  
10          expert witness. They contested the  
11          reliability of his expert opinion in that  
12          case -- paragraph 14 and 15 -- talking about  
13          toolmarks, examination, what relevance they  
14          have in firearm cases, the unique marks that  
15          are imparted.

16                        Comparison was done by the witness in  
17          that case, who testified that these tests are  
18          scientifically valid and commonly accepted  
19          within the scientific community.

20                        The Court said that, in paragraph 15,  
21          given Hardy's explanation of his methodology,  
22          the trial Court did not abuse its discretion  
23          by admitting his testimony, as his opinion was  
24          based on reliable, commonly accepted  
25          scientific principles. That was 2006.



1                   But what we're dealing with is the  
2                   emergence of some professional skepticism  
3                   about this area of expertise. That's what I  
4                   was faced with and I turned to in making my  
5                   decision about the level of certainty that  
6                   could be testified to by the witness.

7                   That Sergeant Willson has knowledge  
8                   beyond that of a layperson. He has  
9                   considerable training and experience. He was  
10                  trained and apprenticed by Superintendent Nick  
11                  Kovacic. He was a member of the Association  
12                  of Firearm and Toolmark Examiners. He's done  
13                  thousands of peer-reviewed comparisons. And  
14                  he attended some seminars, although  
15                  infrequently.

16                  Opposed to that was the fact that  
17                  there was no defined protocol for firearm or  
18                  ballistic comparison. And the Cleveland SIU  
19                  lab, present lab, is not licensed as they are,  
20                  or accredited as they are, for DNA, or drug  
21                  work, I believe. Sergeant Willson is not  
22                  accredited by A.F.T.E. He didn't take  
23                  photographs, did not have notes, did not do a  
24                  narrative report or draft or any sketches.  
25                  And I believe from his testimony, he admitted

1           that his analysis or opinion was subjective.

2                       And that is discussed in United  
3 States v. Edgar Diaz, at page 15, where the  
4 Court stated, it is recognized that there is a  
5 problem with absolute testability in firearms  
6 identification, because the accepted practice  
7 in the field is based on a subjective  
8 assessment and the actual casework. It is  
9 impossible to conclusively state that an  
10 examiner's conclusion is correct or incorrect.  
11 Court finds, though, that that alone, however,  
12 is not enough to render the theory not  
13 testable.

14                       They said, the fact that practically  
15 all laboratories, including the San Francisco  
16 Police Department Crime Lab, required  
17 examiners to thoroughly document their results  
18 and findings, any identifications made must be  
19 photo documented, examiners must indicate the  
20 primary areas on which they base  
21 identifications. The industry standard also  
22 requires confirmation by at least one separate  
23 examiner when an identification is reached by  
24 the first examiner.

25                       In United States v. Chaz, C-h-a-z,

1           again, the Court found that ballistics  
2           examination has sufficient empirical support  
3           to be admissible. But it permitted them in  
4           that instance to testify only to a standard of  
5           more likely than not. They were not permitted  
6           to testify to a reasonable degree of  
7           scientific certainty. As in Diaz -- well,  
8           there was no photo documentation done here. I  
9           would say that is a minimum.

10                       There also is a case, State of  
11           Louisiana v. Jerry Williams, 974 So.2d 157.  
12           They discussed ballistics testimony. It said,  
13           use of expert testimony to identify spent  
14           cartridge cases or bullets to a particular  
15           firearm has a long history in Louisiana and  
16           elsewhere and has been the subject of Daubert  
17           challenges in other jurisdictions.

18                       Then citing to Diaz, that no reported  
19           decision -- I'm sorry, yeah, to Diaz, no  
20           reported decision has ever excluded firearms  
21           identification expert testimony under Daubert.

22                       In the Williams case, the Appellate  
23           Court stated that -- page 12 and 13 -- in the  
24           instant case, reliability of Mr. Beighley --  
25           B-e-i-g-h-l-e-y -- Mr. Beighley's testimony is

1 established by the expert's documentation of  
2 the process he used to reach his conclusion.  
3 In particular, the comparison microscope  
4 photograph of the two projectiles provides a  
5 particularized record of the expert's  
6 methodology. The photo shows dozens of  
7 striations on both projectiles, and those  
8 striations are identical across the groove in  
9 the projectiles cut by the rifling in the  
10 barrel.

11 Nothing in our review of the  
12 testimony of the expert witness and our visual  
13 comparison of the photographs of the two  
14 projectiles suggests in any respect that the  
15 trial Court should have pursued further  
16 inquiry into the potential for error.  
17 Nothing in the record suggests that the trial  
18 Court abused its discretion in allowing this  
19 testimony.

20 So, my holding is limited, in my  
21 view, to this particular case. If there had  
22 been additional evidence, documentation of the  
23 examination done, by way of photographs,  
24 sketches, diagrams, notes, something beyond  
25 what we had here, it may have been -- the

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Court may have been warranted in permitting Sergeant Willson to testify to a reasonable degree of scientific certainty. But since that was lacking, that's why I held that he could only testify to a standard of more likely than not that the projectile was fired by the firearm that was tested.

Anything else, counsel for either party?

MR. MAREIN: No.

MS. CARR: No.

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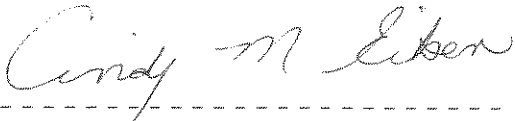
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C E R T I F I C A T E

I, Cindy M. Eiben, Official Court Reporter for the Court of Common Pleas, Cuyahoga County, Ohio, do hereby certify that as such reporter I took down in stenotype all of the proceedings had in said Court of Common Pleas in the above-entitled cause; that I have transcribed my said stenotype notes into typewritten form, as appears in the foregoing Excerpt Transcript of Proceedings; that said transcript is a complete record of the proceedings had in the trial of said cause and constitutes a true and correct Transcript of Proceedings had therein.



-----  
Cindy M. Eiben, RMR  
Official Court Reporter  
Cuyahoga County, Ohio