

**OFFICE OF THE CHIEF CIRCUIT JUDGE
FOURTH JUDICIAL CIRCUIT
FORT LEWIS, WA**

UNITED STATES

v.

SPC JAMAAL A. LEWIS
US Army, 217-08-8512
HSC, 1st Special Forces Group (Abn)
Fort Lewis, WA 98433

RULING OF THE COURT

**DEFENSE CHALLENGE TO
BALLISTICS EVIDENCE**

1. The defense in the above-captioned case by motion asked the military judge to order the convening authority to provide a courtroom where SPC Lewis and members of the panel can see each other during the trial (Appellate Exhibit XV). The government's reply brief is at Appellate Exhibit XVI. Both parties were given an opportunity to present evidence and make argument at UCMJ Art. 39(a) sessions held on 28 and 29 September 2006.

2. Findings of Fact: I find the following by a preponderance of the evidence:

a. The word "science" is a noun defined as "1. a branch of knowledge or study dealing with a body of facts or truths systematically arranged and showing the operation of general laws. 2. systematic knowledge of the physical or material world. 3. systematized knowledge of any kind. 4. any skill that reflects a precise application of facts or principles." This definition is taken from The Random House College Dictionary (Rev. Ed. 1980), purchased by the US Government for official use.

b. The phrase "scientific method" is defined in the same dictionary as "a method of research in which a problem is identified, relevant data gathered, a hypothesis formulated, and the hypothesis empirically tested."

c. The word "empirical" is an adjective defined by the same dictionary as "1. derived from or guided by experience or experiment. 2. depending upon experience or observation alone, without using science or theory, as formerly in medicine. 3. verifiable by experience or experiment."

d. Introduction of opinion testimony by experts regarding the results of a comparison of marks left on cartridges during the process of a projectile such as a round being fired from a pistol is not novel evidence.

e. Introduction of opinion testimony by experts comparing marks on two or more different cartridges based on being expelled from a pistol during the firing or other process is not novel evidence.

f. Testimony regarding Firearm and Toolmark Examination as an area of expert testimony is not novel and is widely accepted in military, federal, and state criminal cases.

g. Mr. Michael Kelley, employed by the US Army Criminal Investigation Laboratory, or USACIL, is an expert in the area of Firearm and Tool Examination by virtue of his education, training, knowledge, skill, and experience. Mr. Kelly has been recognized as such an expert about 240 times in federal and state criminal trials, and in courts-martial.

h. Ms. Brenda Lawrence, employed by the Washington State Patrol Crime Lab, is a forensic scientist and an expert in the area of Firearm and Tool Examination by virtue of her education, training, knowledge, skill, and experience. She has testified in this area in 39 state criminal trials and has always been recognized as an expert.

i. It is beyond the ability of court members to compare bullet cartridges and arrive at a conclusion regarding the effect of a pattern of markings on the cartridges without expert testimony.

j. It is also beyond the ability of court members to compare the markings on spent cartridges found at a crime scene with bullet cartridges fired from a pistol using a slide gathered as evidence in the case and arrive at a conclusion regarding the significance of the markings without expert testimony.

k. Additionally, it is beyond the ability of court members to compare spent cartridges found at two different crime scenes and draw any conclusions from the markings on the cartridges without expert testimony.

l. In performing his comparison of test-fired cartridges or a cartridge with cartridges found at a crime scene, Mr. Kelley applied commonly accepted principles and methods in the field of Firearm and Tool Examination to arrive at a conclusion. Inserting a slide gathered as evidence into a pistol to conduct a test-firing and then using the resultant comparison of cartridges found at the crime scene with a cartridge or cartridges fired from the weapon containing the inserted slide is an application of the principles and methods commonly employed by Firearm and Tool Examiners.

m. Likewise, Ms. Lawrence applied accepted principles and methodology in comparing cartridges found at two crime scenes and arriving at a conclusion.

3. Discussion:

a. When scientific evidence being offered is not novel, the proponent needs to show only that the proffered expert relied upon sufficient facts or data, used reliable principles and methodology, and possessed sufficient knowledge, skill, experience, training, or education (*see United States v. Allison*, 63 M.J. 365 (2006)). A witness may testify as an expert on a particular subject matter only if the military judge determines that the witness is qualified based upon his or her “knowledge, skill, experience, training, or education” regarding that subject (MRE 702). Defense counsel is correct that the military judge serves as a “gatekeeper” to determine whether the party offering expert testimony has established an adequate foundation with respect to reliability and relevance (*United States v. Green*, 55 M.J. 76, 80 (2001)). That was the purpose of holding the hearing pursuant to *Daughbert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) in determining the admissibility of testimony by Mr. Kelley and Ms. Lawrence.

b. The government has the burden to establish the admissibility of the testimony. The evidence presented by the government proved that Mr. Kelly and Ms. Lawrence are qualified by

virtue of their knowledge, skill, experience, training, or education to testify as Firearm and Toolmark Examiners; that they will rely upon sufficient facts or data; that they used reliable principles and methodology; and that their expert testimony will be helpful to the finders of fact and not misleading. There is nothing novel about the field of Firearm and Toolmark Examination. The defense made much about science, or the lack thereof, regarding this field. If one carried through defense counsel's argument to its logical conclusion, psychiatrists and psychologists would never be allowed to testify because they could not prove their conclusions under the defense view of "science." In application of the scientific method, conclusions based upon personal observation are not automatically "unscientific." The human eye and application of experience can be much more discerning than a two dimensional measuring device. Every time a Firearm and Toolmark Examiner conducts an analysis, he or she is applying a scientific method using principles common to the field and accepted methodology, and retesting the fundamental principles of the field. This was obvious in the testimony of both Mr. Kelley and Ms. Lawrence. Some element of subjectivity during observation under a high-powered microscope does not make it unscientific. The observation is an application of an accepted principle that tools leave marks and that skill, training, education, knowledge and experience allow a human to arrive at a conclusion about the meaning of the marks left by the tool. If it were otherwise, physicians would never have conflicting opinions about medical diagnoses, forensic psychiatrists would never be allowed to disagree about a person's DSM IV diagnosis, and anthropologists could never render an opinion about what role a crudely fashioned tool might have played 10,000 years ago because all subjective elements would have to be excluded in arriving at an opinion. This is not what Daughbert or MRE 702 are about.

c. The government has proven that Mr. Kelley and Ms. Lawrence qualify as expert witnesses, that they will testify about matters properly within the scope of MRE 702 and their field of expertise, and that their testimony will assist the members in understanding the evidence and will not be misleading. The testimony is admissible.

4. Ruling of the Court: The defense motion is denied.

Done this 3rd day of October 2006 at Fort Lewis, WA.

-original signed-

DEBRA L. BOUDREAU
COL, JA
CHIEF CIRCUIT JUDGE