UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

UNITED STATE OF AMERICA,

Plaintiff,

vs.

Case No. 15-20152
HON: Terrence Berg

LAWRENCE CHRISTOPHER DAVIS,

Defendant.

CHRISTOPHER RAWSTHORNE
U.S. Attorney's Office
206 Federal Building
600 Church Street
Flint, MI 48502
313-226-9100

DOUGLAS R. MULLKOFF (P33252)
Attorney for Defendant
402 West Liberty
Ann Arbor, Michigan 48103
(734) 761-8585

MOTION IN LIMINE TO PLACE LIMITATIONS ON ADMISSIBILITY OF OPINION TESTIMONY REGARDING BALLISTICS EVIDENCE AND BRIEF IN SUPPORT

NOW COMES Lawrence Davis by counsel Douglas R. Mullkoff who states for his motion as follows:

1. The government provided a laboratory report from the Department of State Police Forensic Science Division dated March 11, 2015, and signed by Ronald Crichton, a state police specialist in the Firearms and Toolmarks Unit.

2. In the report, Mr. Crichton concludes that eight 9 mm luger caliber cartridge cases were fired from a 9mm Luger Bersa, model Thunder 9, semiautomatic pistol, which was previously examined.

3. The government will likely use that conclusion, in the form of expert testimony by Crichton, to connect Defendant to the shooting involved in this case.

4. However, as discussed in the attached memorandum, testimony regarding ballistic testimony does not meet the rigorous standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

WHEREFORE, and for the reasons stated in the attached memorandum, Defendant respectfully asks this Court for an evidentiary hearing at which the government will have to meet the foundational requirements for admission of Mr. Crichton's testimony and to bar Crichton from testifying to a reasonable certainty that the casings match the firearm.

MEMORANDUM IN SUPPORT OF DEFENDANT"S MOTION IN LIMINE AND REQUEST FOR EVIDENTIARY HEARING

A. Issue Presented:

Whether the Court should find that testimony regarding ballistic evidence is inadmissible as expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)?

Defendant answers, "Yes."

The government answers, "No."

B. Factual Background:

It is charged in the first superseding indictment that on July 27, 2014 Lawrence Davis and Christopher Blackwell carried and discharged firearms during and in relation to a crime of violence pursuant to 18 USC §924(c). It is also alleged that they along with co-defendant Lezlye Taylor aided and abetted one another in using physical force

against J.J. by shooting him with a firearm with intent to prevent him from testifying (tampering with a witness by using physical force 18 USC § 1512(a)(2)(A) and 2).

A little over two weeks after the shooting of J.J. (August 12, 2014) Defendant Davis was pursued by Michigan State Police Officers for driving erratically. Overhead lights were activated by the police and Mr. Davis abandoned the vehicle and took off on foot. After a short chase he was arrested. A 9mm Bersa model Thunder 9 semiautomatic pistol and a cell phone were located in the backyard of a residence where he had fallen down. Mr. Davis pled guilty in state court to carrying the concealed weapon which was found with the cell phone.

State Police Firearm Toolmark Specialist Ronald Crichton was asked to compare evidence (bullets, fragments, and casings) found in the parking lot near where J.J. was shot on July 27, 2014 with test shots of the Bersa 9mm model Thunder 9 semiautomatic pistol found near Defendant Davis at the time of his arrest on August 12, 2014. According to his report, 8 cartridge cases found near the July 27, 2014 shooting scene are identified as having been fired from the Bersa 9mm.

C. Argument:

The conventional wisdom on the admission of ballistics evidence has changed dramatically over the last decade:

> By way of general background, for many decades ballistics testimony was accepted almost without question in most federal courts in the United States. *See, e.g., United States v. Hicks,* 389 F.3d 514, 526 (5th Cir.2004) (stating that "the matching of spent shell casings to the weapon that fired them has been a recognized method of ballistics testing in this circuit for decades" and citing examples); *United States v. Monteiro,* 407 F.Supp.2d 351 (D.Mass.2006) (describing admission of firearm identification testimony in prior years as "semi-automatic"); *United States v. Foster,* 300 F.Supp.2d 375, 377 n. 1 (D.Md.2004) ("Ballistics evidence has been accepted in criminal cases for many years.").

But, like many other forms of expert testimony, this practice was subjected to new scrutiny in light of *Daubert* and *Kumho Tire* and the subsequent amendment to Federal Rule of Evidence 702, which gave to the courts a more significant gatekeeper role with respect to the admissibility of scientific and technical evidence than courts previously had played. *See, e.g.,* Advisory Committee Note to 2000 Amendments to Fed.R.Evid. 702 (explaining that the amendment "affirms the trial court's role as gatekeeper" that developed in response to *Daubert* and *Kumho Tire,* which "charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony").

United States v. Glynn. 578 F. Supp. 2d 567, 569-70 (S.D.N.Y. 2008)

The scholarly opinion in *Glynn* proceeds to review several cases in which expert testimony on ballistics evidence failed to meet the *Daubert* test:

(R)ecently, three federal judges have addressed the scientific status *vel non* of ballistics identification testimony, and all three have concluded that, in one respect or another, it does not have sufficient rigor to be received as science. *See United States v. Monteiro,* 407 F.Supp.2d 351, 355 (D.Mass.2006) (Saris, J.) (finding that while the underlying principles behind firearm identification may be scientifically valid, "there is no reliable ... scientific methodology which will currently permit the expert to testify that [a casing and a particular firearm are] a 'match' to an absolute certainty, or to an arbitrary degree of statistical certainty."); *United States v. Green,* 405 F.Supp.2d 104, 120-22 (D.Mass.2005) (Gertner, J.) (discussing ways in which ballistics evidence fails to meet *Daubert* criteria regarding, *inter alia,* testability, reliability, and error rates); *United States v. Diaz,* No. 05-167, 2007 WL 485967, at *11-12, 2007 U.S. Dist. LEXIS 13152, at *35-36 (N.D.Cal. Feb. 12, 2007) (Alsup, J.) (citing *Monteiro's* conclusion that no scientific methodology exists to support a finding of a match to an absolute certainty, but permitting testimony "to a reasonable degree of ballistic certainty"). All three, however, ruled that the expert testimony was sufficiently reliable to warrant admission in some qualified form. *See Monteiro,* 407 F.Supp.2d at 372; *Green,* 405 F.Supp.2d at 124; *Diaz,* 2007 WL 485967, at *13-14, 2007 U.S. Dist. LEXIS 13152, at *41-42. Based on the *Daubert* hearings this Court conducted in *Brown* and *Glynn,* the Court very quickly concluded that whatever else ballistics identification analysis could be called, it could not fairly be called "science."
Glynn, supra, at 570-571.

Accordingly, the evidence is inadmissible as science, which prevents Mr. Crichton from testifying that he has concluded the fired shell casings are a match to the firearm in question. However, the evidence is not without value in trial:

(I)ts methodology has garnered sufficient empirical support as to warrant its admissibility. ... The problem is how to admit it into evidence without giving the jury the impression-always a risk where forensic evidence is concerned-that it has greater

reliability than its imperfect methodology permits. The problem is compounded by the tendency of ballistics experts-such as those in *Brown* and *Glynn-to* make assertions that their matches are certain beyond all doubt, that the error rate of their methodology is "zero," and other such pretensions. Although effective cross-examination may mitigate some of these dangers, the explicit premise of *Daubert* and *Kumho Tire* is that, when it comes to expert testimony, cross-examination is inherently handicapped by the jury's own lack of background knowledge, so that the Court must play a greater role, not only in excluding unreliable testimony, but also in alerting the jury to the limitations of what is presented. The Court therefore concluded that to allow Detective Valenti, or any other ballistics examiner, to testify that he had matched a bullet or casing to a particular gun "to a reasonable degree of ballistic certainty" would seriously mislead the jury as to the nature of the expertise involved.

To be admissible as relevant evidence under the Federal Rules of Evidence, however, evidence (expert or otherwise) need not meet any such exalted level of certainty. It is simply sufficient that the proffered evidence can "make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed.R.Evid.R. 401.

Glynn, at 574.

Having reached the decision to admit the evidence, the *Glynn* Court made it clear that the ballistics specialist could only testify that that the shell casing "more likely than not" matched the weapon at issue in that case.

Here, the factual issue is nearly the same--the matching of fired shell casings to a weapon connected to the Defendant. As in *Glynn,* and the cases cited within, Defendant asks for a similar limitation on the testimony of Mr. Crichton. However, prior to that, it is also necessary for the government to lay a foundation for the testimony, which should be done at an evidentiary hearing.

D. Relief Requested:

Defendant asks this Court to hold an evidentiary hearing regarding the foundation for admission of testimony from ballistics specialist Crichton, and following that hearing either hold that the testimony is inadmissible or limit Crichton's testimony to

a statement that it is "more likely than not" that the casings match the firearm connected to the Defendant.

Dated: 1/14/16

/S/ Douglas R. Mullkoff
Douglas R. Mullkoff
Attorney for Defendant
402 West Liberty
Ann Arbor, Michigan 48103
(734)761-8585
Doug@kmhlaw.com
(P33252)

CERTIFICATE OF SERVICE

STATE OF MICHIGAN)
) ss:
COUNTY OF WASHTENAW)

I hereby certify that on the 14th day of January, 2016, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following: Christopher Rawsthorne at the U.S. Attorneys Office.

/S/ Douglas R. Mullkoff
Attorney for Defendant
402 West Liberty
Ann Arbor, Michigan 48103
(734)761-8585
doug@kmhlaw.com
(P33252)