UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA,

Plaintiff,

v.

CASE NO. 15-cr-20152-2

Hon. Terrence G. Berg
United States District Judge

D2-LAWRENCE CHRISTOPHER DAVIS,

Defendant.

THE UNITED STATES OF AMERICA'S RESPONSE TO DEFENDANT'S MOTION IN LIMINE TO PLACE LIMITATIONS ON ADMISSIBILITY OF OPINION TESTIMONY REGARDING BALLISTICS

The United States of America submits this brief in response to Davis's motion to place limitations on admissibility of opinion testimony regarding ballistics. Davis seeks to set unspecified limits on the testimony of a Michigan State Police specialist in the Firearms and Toolmarks Unit that eight 9mm Luger casings recovered related to this case were fired from a firearm that Davis later pleaded guilty to possessing.

The government does not oppose the evidentiary hearing requested by Davis and set by the Court, and will present evidence at the hearing in support of admission of the results.

However, with the proper foundation and testimony, the Court should admit the ballistics evidence with little to no restriction by the testimony of the witness. The case Davis relies on to limit the admission of testimony by the witness, *United States v. Glynn*, 578 F.Supp.2d 567 (S.D.N.Y. 2008) represents an aberration rather than a dramatic change in the admission of ballistics evidence. Case law—prior to and after *Glynn*--demonstrates that courts have uniformly admitted ballistics evidence with little to no restriction on the testimony.

I. Courts Have Uniformly Admitted Ballistic Evidence and Continue to Do So

A. Admissibility of this evidence is governed by FRE 702, *Daubert,* and *Kumho Tire*.

Federal Rule of Evidence 702 sets the standard for the admissibility of expert testimony, providing that if scientific, technical or other knowledge will assist a trier of fact, that a witness qualified as an expert can testify to an opinion or otherwise if the testimony is based

upon sufficient facts and data, is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case. The United States Supreme Court has clarified that the court has a gatekeeper role related to expert testimony to ensure that the testimony is reliable and relevant. *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999); *Daubert v. Merrell Dow Pharms., Inc.* 509 U.S. 579 (1993).

Daubert set forth a non-exhaustive list of factors that a district court may use to determine the reliability of expert testimony, which are: 1) whether the particular theory can be and has been tested; 2) whether the theory has been subjected to peer review and publication; 3) the known or potential rate of error; 4) the existence and maintenance of standards controlling the techniques operation; and 5) if the technique achieved general acceptance in the relevant community. *United States v. Otero*, 849 F. Supp.2d 425, 429-30 (D. N.J. 2012) *citing Daubert,* 509 U.S. at 593-94. *Kumho Tire* thereafter expanded the *Daubert* analysis as applicable in some form not only to scientific testimony but as to all expert testimony. *Kumho Tire* at 151-152.

The government will submit evidence at the hearing date to satisfy these factors, and a review of the recent case law demonstrates that it is highly likely that the Court should find the evidence admissible.

B. Courts have uniformly admitted ballistics evidence, and nearly uniformly done so with few conditions.

Even the decisions with the most negative conclusions regarding ballistics testimony have noted that "*every single court* post-*Daubert* has admitted" ballistics testimony. *United States v. Green*, 405 F.Supp.2d 104, 108 (D. Mass 2004) (emphasis original). The most restrictive federal decision related to ballistics testimony the government could locate is the case cited by Davis, *Glynn*. In *Glynn*, the Court limited the government's ballistics expert to testimony that it was "more likely than not" that the casings came from the compared firearm. *Glynn* at 575.

Glynn appears to stand alone in this decision, both by cases that precede it and by cases that follow it. Even some of the reasoning applied in *Glynn* has been partially rebutted in later cases.

The first comprehensive textbook in ballistics was published in 1935. *United States v. Foster*, 300 F.Supp.2d 375, fn1 (D. Md. 2004). Since that time, numerous courts have upheld the use of expert

witnesses to testify regarding ballistics identification. *United States v. Davis*, 103 F.3d 660, 672 (8th Cir. 1996); *United States v. Hicks,* 389 F.3d 514, 525-536 (4th Cir. 2004). As recently as 1998, the United States Supreme Court has commented favorably about ballistic evidence. *United States v. Scheffer*, 523 U.S.303, 313-314 (1998) (comparing ballistics evidence and other areas of expert testimony with polygraph evidence, and implicitly recognizing ballistics evidence as reliable.)

Since *Glynn,* courts have not followed in masse to exclude or limit ballistics testimony as drastically as in *Glynn*. Rather, courts have instead continued to allow such testimony, most often without major limitations. *See United States v. Wrensford*, 2014 WL 3715036 (D. V.I. 2014) (rejecting defendant's motion to exclude testimony of firearm and toolmark examiner); *United States v. Taylor*, 663 F.Supp.2d 1170, 1180 (D. N.M. 2009) (denying defendant's motion to exclude firearm identification evidence and allowing expert to testify within "a reasonable degree of certainty in the firearms identification field."); *United States v. Casey*, 928 F.Supp.2d 397, 400 (D. P.R. 2013) (denying defendant's motion to limit testimony of government's firearms

identification expert); *United States v. Willock*, 682 F. Supp.2d 512 (D. Md. 2010) (allowing testimony of firearms identification testimony but not allowing any testimony as to degree of certainty); *United States v. Cerna*, 2010 WL 3448528, *5 (N.D. Cal.) (denying motion to exclude firearm identification testimony, allowing testimony to within a degree of certainty in the ballistics field and explicitly rejecting *Glynn* language).

Most notably, in *United States v. Otero*, 849 F. Supp.2d 425 (D. N.J. 2012), aff'd. 557 Fed.Appx. 146 (3rd Cir. 2014), the district court conducted a thorough analysis of the *Daubert* factors and determined that the testimony was based on reliable methodology. The court relied in part on citation to numerous articles and testing verifying firearm identification. *Id.* at 432-33. The court also severely discredited the testimony of Abina Schwartz, a longtime critic of firearm identification with no training or experience in toolmark identification. *Id.*at 435. The court found her testimony unconvincing and unreliable once subjected to cross examination, and that is especially noteworthy given that the *Glynn* court relied in some part on affidavits and articles submitted by

Schwartz in its decision regarding firearms identification. *Glynn* at fn2. Therefore, the most recent and thorough analysis of firearms identification is not *Glynn* but *Otero*, and is one that this Court should find more instructive.

Conclusion

While courts may provide greater scrutiny to firearms identification evidence then courts once applied, there is no great shift to drastically limit or exclude testimony regarding such evidence. If anything, the most recent decisions have demonstrated that firearms identification evidence has withstood this scrutiny. Following the evidentiary hearing, this Court should admit the proffered testimony without restriction.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2016, the foregoing document was electronically filed by an employee of the United States Attorney's Office with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

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