

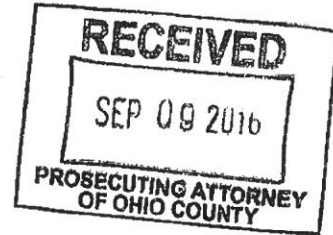
IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

State of West Virginia,

Plaintiff,

vs.

Case No. 16-F-43
16-F-44



Dallas Michael Acoff
and Rocco Pasquale Pandoli,

Defendants.

**MOTION IN LIMINE FOR A DAUBERT HEARING AND EXCLUSION
BALLISTICS EVIDENCE**

Comes Now, the Defendant, Dallas Michael Acoff, by and through undersigned counsel, and respectfully moves this Honorable Court, pursuant to Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993); Kumho Tire Co., Ltd. V. Carmichael, 526 U.S. 137 (1999) and United States v. Mouzone, 687 F.3d 207 (4th Cir. 2012) as well as Rules 702 and 703 of the West Virginia Rules of Evidence, to hold a Daubert Hearing regarding the State's expected presentment of testimony relating to the findings of Phillip Kent Cochran, Detective Safreed, and/or Detective Harris and after said hearing to issue an Order excluding the admission of any testimony, reports or other evidence relating to the use of toolmark investigation. In support of the motion herein, the Defendant argues as follows:

Daubert creates an obligation upon the Court to act as a gatekeeper and ensure that expert scientific testimony is both relevant and reliable. The U.S. Supreme Court, in Kumho Tire Co. v. Carmichael, extended Daubert's principles to all of the expert matters described in Rule 702. See United States v. Mitchell, 365 F.3d 215, 234 (3rd Cir. 2004). The State intends to provide evidence relating to several spent bullets and shells and respective firearms that were identified through

toolmark identification. The Fourth Circuit has noted that there is a dispute in the firearms community regarding contentions that there is a lack of scientific rigor underpinning ballistics identification testimony. United States v. Mouzone, 687 F. 3d at 215. In Mouzone, the Court noted that the District Court had held a Daubert hearing, and after this hearing, a ruling was issued that the ballistics expert in the case was prohibited from opining that it was a “practical impossibility” for different firearms to fire the identified casings and that the expert could not say that he held his opinions to the level of a scientific certainty. Mouzone, 687 F. 3d at 216.

The National Research Council (N.R.C.) did a study that called into question the validity of the assumptions about toolmarks that underlie firearms identification. In its report, titled “Strengthening Forensic Science in the United States: A Path Forward,” the N.R.C. focused on the challenges and limitations faced by a number of forensic science disciplines, including autopsies and medical examinations, DNA analysis, controlled substances analysis, toolmark and firearms identification and many others. It concluded that these fields generally lack sufficient grounding in scientific research to verify the accuracy and validity of their methodologies. National Resource Council, “Strengthening Forensic Science in the United States: A Path Forward” at 13-13, 87 (2009).

Courts have noted that the process and procedure for toolmark investigation is “admittedly subjective.” United States v. Monteiro, 407 F.Supp.2d 351, at 366 (D. Mass. 2006). While it is true, that firearm identification testimony has been admitted for decades, the District Court of Massachusetts noted “that storm clouds, however, are gathering. One commentator from within the firearm identification profession has cited Daubert objections as ‘perhaps the biggest challenge facing the firearms discipline since it was firmly established in the 1920’s.’” Monteiro, 407 F.Supp.2d at 364 [internal citations omitted]. See also, Sexton v. State, 93 S.W.3d 96

(Texas Cr.App. 2002) (rejecting the matching of cartridge cases based on magazine marks alone without recovery of underlying magazine); Ramirez v. State, 810 So.2d 836 (Fla. 2001) (rejecting toolmark analysis matching knife to fatal stab wounds). The Court was concerned with the subjectivity of the test results and believed that it was proper to review the methodology followed by the expert. Monteiro, 407 F.Supp. at 371.

WHEREFORE, the Defendant is moving the Court for a Daubert hearing on the ballistics evidence concerning the reliability of the theory and methodology toolmark identification as well as whether Mr. Cochran correctly followed accepted practices in reaching his results, and after said hearing, the Defendant prays the Court enter an Order excluding all evidence or opinions that do not meet Daubert standards.

RESPECTFULLY SUBMITTED,

DALLAS MICHAEL ACOFF,
Defendant

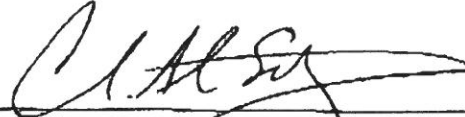
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that service of the foregoing motion was had upon the State this 9th day of September 2016 by facsimile transmission of a true and correct copy thereof to Shawn R. Turak, Esq., Assistant Ohio County Prosecuting Attorney at 304-234-3870 and to Mark D. Panepinto, Esquire, at 304-232-8500.



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