FILED

2011 JAN -7 AM 9: 19

GARY FITZSIMMONS
DALLAS CO., TEXAS
DEPUTY

NO. F-0629926

THE STATE OF TEXAS	§	IN 283RD JUDICIAL DISTRICT
VS.	§	~~COURT OF~~
THAI NGUYEN	§	DALLAS COUNTY, TEXAS

DEFENDANT'S MOTION *IN LIMINE* TO EXCLUDE BALLISTICS EVIDENCE, OR ALTERNATIVELY, FOR A *DAUBERT HEARING*

I. INTRODUCTION

The prosecution intends to offer in its case-in-chief at trial, testimony of a Police Department Firearms Examiner, Susan B. Allen that particular ammunition found at various crime scenes was fired from a Bryco pistol allegedly seized from Nguyen. Because Allen does not divulge the facts or observations on which she based her conclusions, or the standards she applied to reach her conclusions, it is entirely possible that her testimony does not meet even the generally accepted standards of forensic firearms identification. Moreover, even if it did, the evidence is inadmissible under Rule 702 because Allen's conclusions were not in fact the product of reliable principals and methodology.

The purported expert testimony is based on faulty assumptions - such as that all guns leave unique marks on bullets and casings fired through them - which is no longer valid, given modern manufacturing methods and materials. The purported expert testimony is also utterly subjective and standardless with no requirement as to how many similarities it takes to declare "match" or how many differences it takes to rule one out.that the proper expert testimony is based on a valid and reliable methodology, or even "good grounds based on what is known," and, therefore, is inadmissible.

Allen did not test-fire any other gun of the same make and model to see whether the marks

which she observed would have been left on the casing by all such models, instead of just the particular gun in this case. She did not describe or quantify the marks that led her to determine that there was a match. She did not refer to any external validation studies which would establish that each and every high-power clone or Bryco leaves unique marks on a given casing after it is fired through the gun. Because Allen did not even describe the location or type of marks which she observed in determining that there was a match, Allen's report does not explain whether those marks are of the type and placement which are traditionally relied upon by firearms experts in identifying a particular weapon, as opposed to simply identifying the make of gun, from which a cartridge or casing was fired.

II. STANDARD OF REVIEW

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) and *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992) require trial courts to function as gatekeepers, shielding the jury from expert opinion testimony that has not been shown, *by clear and convincing evidence*, to be scientifically reliable. The question in this case is whether ballistics comparison expert opinion testimony meets this high standard when the defendant presents a significant amount of reliable scientific evidence invalidating the theory and the State fails to fully explain its flaws and inconsistencies.

The Development of a Reliability Standard

For many years, the standard for the admissibility of expert opinion testimony required only that the testimony be generally accepted in the relevant scientific community.[1] The *Frye* standard, as it was known, was applied in federal courts as well as in most states. However, after Congress put its imprimatur on the Federal Rules of Evidence, Rule 702 governed the admissibility of expert

[1] *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

testimony. Texas also adopted Rules of Evidence modeled largely on the Federal Rules. Texas Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Although Federal Rule 702, as well as the Texas Rule, set out a seemingly different standard for admissibility than *Frye*, the courts continued to rely on the *Frye* standard when assessing challenges to expert opinion testimony.[2]

The Supreme Court responded to the lower courts' application of Rule 702 in *Daubert v. Merrell Dow Pharmaceuticals.*[3] The Court replaced the *Frye* standard with a reliability standard. No longer did the trial court function merely as a referee, weighing the amount of acceptance a theory had gained in the relevant community, the trial court became the gatekeeper, making an independent assessment of the theory's reliability and the reliability of the methods used in applying the theory.[4] The Court emphasized that trial courts should assess reliability based on the scientific method.[5] And the Court provided four factors to guide lower courts in weighing the scientific reliability of expert testimony:

(1) the extent of empirical testing;

(2) the level of scrutiny and public testing in the scientific community;

(3) consideration of the known or potential rates of error; and

---

[2] *Daubert v. Merrell Dow Pharmceuticals, Inc.*, 509 U.S. 579, 585 (1993)

[3] *Id.* at 587-89.

[4] *See id.* at 592-93.

[5] *Id.* at 590.

(4) a determination of the degree of acceptance within the relevant scientific community.[6]

Daubert cleared the way for novel science in the courtroom. Where a novel theory has not yet gained general acceptance in the relevant community, the proponent of novel scientific evidence can present testimony to the jury if the court finds the scientific theory sufficiently reliable. On the other hand, scientific expert theory that has gained wide acceptance in the community does not automatically make it to the jury, not even when the scientific theory is overwhelmingly accepted. Each theory offered by an expert requires an independent reliability assessment.

Since the Supreme Court's watershed opinion in *Daubert*, trial courts have acted as stringent gatekeepers, keeping unreliable scientific expert testimony away from the jury – primarily in civil trials.[7] Most states, including Texas, apply a variation of the *Daubert* standard in criminal trials as well. And, when assessing whether to allow scientific expert opinion before a jury in a criminal trial, criminal trial courts must grapple not only with the reliability of the scientific principles, but must do so in the context of a system which gives criminal defendants more protections than civil litigants.

The Greater Importance of Reliability in the Criminal Context

---

[6] *Id.* at 593-594.

[7] Paul Gianelli, *The Supreme Court's "Criminal"* Daubert *Cases*, 33 Seton Hall L. Rev. 1071, 1072 (2003); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311 (9th Cir. 1995) (on remand) (emphasizing importance of scientific evidence being based on research); *Claar v. Burlington Northern Railroad*, 29 F.3d 499 (9th Cir. 1994) (upholding exclusion of expert testimony regarding exposure to chemicals in work place); *O'Conner v. Commonwealth Edison*, 13 F.3d 1090 (7th Cir. 1994) (upholding exclusion of physician's expert opinion that he could tell whether particular cataract was caused by radiation); *Casey v. Ohio Medical Products*, 877 F.Supp. 1380 (N.D. Calif. 1995) (opinion of witness based on case studies was not based on reliable scientific evidence and was not admissible under *Daubert*); *Smoltz v. Norfolk and Western Ry. Co.*, 878 F.Supp. 1119 (N.D. Ill. 1998) (plainiff's expert did not come forward with sufficient empirical support for causation opinion that condition was caused by exposure to herbicides); *Porter v. Whitehall Laboratories, Inc.*, 9 F.3d 607 (7th Cir. 1993) (finding experts testimony inadmissible because it was not well grounded in the scientific method); *Rosen v. Ciba-Gelgy Grp.*, 78 F.3d 316 (7th Cir. 1996) (testimony of physician serving as expert witness for smoker that patch had caused heart attack was not valid scientific evidence and was not admissible under *Daubert*); *Moore v. Ashland Chemical, Inc.*, 151 F.3d 269 (5th Cir. 1998) (upholding exclusion of expert testimony not scientifically based).

Our legal system reflects our societal values. Those values afford criminal defendants more protections because at stake in a criminal trial is someone's life or liberty. In a civil action, usually only one's money is at risk. Also our constitution mandates that we assume a person's innocence until proven guilty.[8] Therefore, we require plaintiffs in a civil action to prove their case merely by a preponderance of the evidence. Whereas, in a criminal trial the State must prove the defendant guilty beyond a reasonable doubt. Criminal defendants are afforded court appointed counsel; civil litigants are not.[9] Criminal defendants also enjoy, among other rights, a constitutional right to confront their accusers.[10] Nowhere, then, is the gatekeeping function more important than in the context of the criminal trial.

The trial court should remain cognizant of the additional duty placed upon it in criminal trials – that of protecting a defendant's constitutional rights – because all the rights afforded criminal defendants can be eviscerated by a failure in the gatekeeping function. For example, Justice Blackmun, the author of the *Daubert* opinion, argued in a pre-*Daubert* case that the introduction of unreliable expert testimony violated the defendant's due process rights. Justice Blackmun, dissenting in *Barefoot v. Estelle*, argued:

> The Court holds that psychiatric testimony about a defendant's future dangerousness is admissible, despite the fact that such testimony is wrong two times out of three. The Court reaches this result – even in a capital case – because, it is said, the testimony is subject to cross-examination and impeachment. In the present state of psychiatric knowledge, this is too much for me. One may accept this in a routine lawsuit for money damages, but when a person's life is at stake – no matter how heinous his offense – a requirement of greater reliability should prevail. In a capital case, the specious testimony of a psychiatrist, colored in the eyes of an impressionable jury by the inevitable untouchability of a medical specialist's

---

[8]*See* U. S. Const. amend. V.

[9]U.S. Const. amend VI.

[10]*Id.*

words, equates with death itself.[11]

As Justice Blackmun pointed out, when experts are allowed to express their opinions before a jury without stringent gatekeeping, defendants are bound to lose. Nowhere is this truer than in ballistics comparisons cases. Courts may be tempted to take the position that the parties' experts can battle it out in front of the jury. But this kind of battle, without proper reliability vetting, is destined to doom the defendant's case. First, juries are generally not equipped to serve as the arbiters of scientific reliability.

This is particularly true under the facts of this case when experienced officers are substituting "street experience" for the scientific method. Second, often the least scientific and hence least reliable of expert testimony is the most persuasive testimony. For example, an expert who testifies about DNA profiling must give potential error rates. The DNA expert may tell the jury that there is a one in one million chance that another human could match the same DNA profile. On the other hand, an expert who testifies that the science is exact, that there is no error rate, tends to make a much stronger impression on the jury. Finally, the State's "experts" are simply police officers with minimal training. The jury may see them as having greater reliability because of their position. When the defense calls an expert with excellent credentials, those credentials can be overshadowed by the fact that the expert was "hired" by the defendant. The jury, therefore, may likely conclude that the defendant's experts have a specific agenda – that of ensuring that the defendant goes free. Because juries will tend to overvalue the State's experts and undervalue the defendant's experts, a failure in stringent gatekeeping will tend to unduly prejudice criminal defendants.

Failure to stringently exercise the gatekeeping function in a criminal trial not only threatens

---

[11] 463 U.S. 880, 916 (1983).

a defendant's right to due process, it may also deny a defendant of the right of confrontation.[12] When experts give opinions in a criminal trial that inculpate the defendant, the defendant maintains the right to cross-examine not just the expert's opinions, but the basis of the opinions. Expert opinions are hearsay evidence, specifically allowed in a trial under Rule 702. But when an expert testifies against a criminal defendant and cannot provide the studies and methodologies that give rise to the expressed opinions, the defense is unable to confront the hearsay evidence against the defendant – that is, the particular hypotheses that form the scientific theory espoused by the expert. Therefore, when experts offer their opinions without providing the basis for the opinions, they shield the basis of that opinion from cross-examination and violate a defendant's constitutional right of confrontation.[13]

Reliability Requirements in Texas Courts

Texas courts have adopted the *Daubert* approach in near identical fashion to that utilized in federal courts.[14] The Texas Court of Criminal Appeals and Texas Supreme Court have developed factors, commonly know as the *Daubert/Robinson/Kelly* factors, that trial courts should use to assess an expert opinion's reliability. Among them are:

(1) the extent to which the underlying scientific theory has been or can be tested;

(2) the extent to which the technique or theory relies on the subjective interpretation of the expert;

(3) the existence of literature supporting or rejecting the underlying scientific theory and

---

[12]*See* Gianelli, *supra* note 7, at 1083-86.

[13]*See Crawford v. Washington,* 541 U.S. 36 (2004) (prohibiting the admission of testimonial hearsay in criminal trials).

[14]*Russeau v. State*, 171 S.W.3d 871, 881 (Tex. Crim. App. 2005); *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995).

technique;

(4) the technique's potential error rate;

(5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and

(6) the non-judicial uses which have been made of the theory or technique.[15]

Further, and most importantly, in Texas criminal trials "[t]he proponent of scientific evidence must demonstrate to the trial court, *by clear and convincing evidence*, that the scientific evidence is reliable"[16] and that the expert witness truly has expertise in the precise area in which he is testifying.

Therefore, the issue now before this Court is whether the State can demonstrate through a qualified witness, *by clear and convincing evidence*, that the theory of ballistics comparison is scientifically reliable. This the state cannot do. There is simply no consensus that officer's can accurately state that a "match" exists.

III. The Proffered "Expert" Ballistics Testimony Should Be Excluded Because It Fails To Meet The Admissibility Requirements Of *Daubert* And Rule 702.

1. The State Has Failed To Make A *Prima Facie* Showing That The Proffered Evidence Meets Rule 702.

A review of the expert "report" provided by Allen shows that she has failed to make even a *prima facie* showing that the proffered evidence meets the requirement of Rule 702. Here, the state has provided nothing more than Allen's bald assertions that the cartridge casings delivered to the police

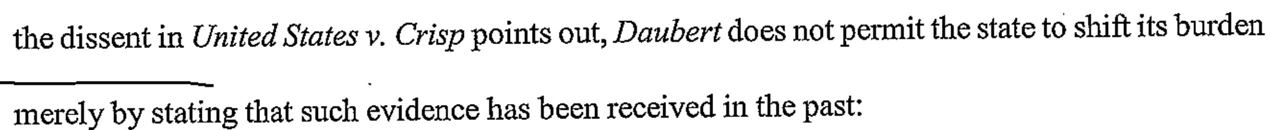
---

[15]*See Russeau*, 171 S.W.3d at 881; *Robinson*, 923 S.W.2d at 557; *Kelly v. State*, 824 S.W.2d 568, 572 (Tex. Crim. App. 1992); *Hartman v. State*, 946 S.W.2d 60, 62, 63 (Tex. Crim. App. 1997).

[16]*Russeau*, 171 S.W.3d at 881(emphasis added); *see also Kelly*, 824 S.W.2d at 573.

"match" the Bryco The opinion fails to state the grounds and basis of the expert opinion, specifically the type and number of marks the expert relied upon in declaring a "match." Because the state has failed to meet its *prima facie* burden, the defendant has no obligation to present evidence that Allen employed unsound methodology or failed assiduously to follow an otherwise sound protocol, and the evidence must be excluded.

The state cannot meet its burden under Rule 702, merely by relying on longtime general acceptance of this kind of forensic testimony. As Judge Gertner acknowledged in *Hines*, a Court's reluctance to exclude the proffered evidence because it would be akin to throwing out decades of generally accepted testimony could be "equated with 'grandfathering old irrationality'" *Hines* at 68, n. 13 (*quoting* D. Michael Risinger, et al., *Exorcism of Ignorance As A Proxy For Rational Knowledge: The Lessons of Handwriting Expertise*, 137 U. Pa. L. Rev. 731, 771 n.182 (1989). As the dissent in *United States v. Crisp* points out, *Daubert* does not permit the state to shift its burden merely by stating that such evidence has been received in the past:



"I am not suggesting that fingerprint and handwriting evidence cannot be shown to satisfy *Daubert*. I am only making the point that the government did not establish in Crisp's case that this evidence is reliable. The government has had ten years to comply with *Daubert*. It should not be given a pass in this case." *United States v. Crisp*, 324 F. 3d 261, 272 (Michael, J., dissenting).

Similarly, Judge Grimm in the *Horn* case, recognized that field sobriety tests, under the general acceptance standard and with the impact of *stare decisis,* had achieved general acceptance without a detailed examination of the underpinnings of the methodology. Judge Grimm placed the burden of validating the methodology squarely on the state observing that, if the state lacked resources to satisfy its burden, "it can be expected, *a fortiori*, that individual defendants charged with DWI and DUI will have even fewer resources to challenge the science and technology underlying

these tests." *Id.* at 551. See also *Ramirez v. Florida,* 810 So. 2d 836 (2001), (excluded all testimony regarding knife mark identification)

2. The Proffered Testimony Does Not Meet Even The Traditional Standards For Toolmark Analysis.

The testimony offered here by Allen does not even meet the standard generally accepted among firearms examiners, a standard that has been set forth and recognized since Colonel Hatcher's seminal treatise on toolmark examination published in 1935 and revised in 1957. *Firearms Investigation, Identification and Evidence.* The state has provided no information as to which type of markings on the casing/bullet the officer used to determine that there was a "match." There is no indication as to whether or to what extent the officer was looking at marks which would be considered class characteristics, marks which all guns of a given type will leave, as opposed to individual characteristics which could possibly be used to identify the specific weapon which fired the shot. Marks left by the ejector/extractor on the casing may be used to identify the type of gun from which the bullet was fired, but not the particular gun of a given make. There is no indication that the officer based her conclusion on the imprint of the firing pin and breach block on the primer cap and cartridge base which, historically at least, have been used by firearms experts to attempt to match the casing to a particular gun as opposed to just a particular make of gun. The state's expert provides no specific description of the marks on which she bases her conclusion, much less photographs of those marks which are generally provided to support the expert's testimony. Thus, the evidence proffered in this case does not even meet the standard of general acceptability in the field, wholly apart from whether the field itself meets the reliability standard of *Daubert* and *Kuhmo Tire.*

The Texas Court of Criminal Appeals has overturned a conviction where a firearms examiner

purported to identify cartridge cases on the basis of magazine marks alone. *See Sexton v. Texas*, 93 S.W. 3d 96, 101,(Tex.Crim. App 2002).

4. The Proffered "Expert" Testimony Is Not Reliable Because It Is Based Upon Faulty Assumptions That Tool Marks Are Unique And Permanent.

Even if the expert's testimony did comport with traditional principles of toolmark analysis, which it does not, the general theory and techniques do not meet Rule 702's standard of reliability, beginning with the underlying assumptions of uniqueness and permanence.. Even under traditional principles of firearms identification, certain markings such as ejector/extractor marks or magazine lip marks were considered merely "class characteristics." They were used to identify the make or the model of the firearm used or, more likely, to exclude makes of firearms which could not have been used. These marks were not typically considered "unique" to a particular firearm. Similarly, traditional firearms examiners acknowledge that firearms are subject to wear, which causes the marks they may imprint on a bullet or cartridge casing to change over time. As a practical matter, however, examiners presume that toolmarks are "permanent" for the purposes of the identification. More importantly, particularly given modern manufacturing methods, there is simply no basis for the assumption, fundamental to classic toolmark identification theory and technique, that those markings previously classed as individual characteristics, specifically barrel rifling and breach face marks, are in all cases "unique" to a particular gun. There have been no independent studies conducted to determine whether in fact each gun creates a unique "fingerprint" on any bullet fired. On the contrary, with modern manufacturing methods, there are minimal, if any, toolmarks to be imparted by the finished firearm on the bullet or cartridge casing that are unique to the particular gun.

See Validation Studies

Thus, a court faced with a *Daubert* motion concerning toolmark identification evidence cannot, simply take judicial notice of the uniqueness and permanence of toolmarks on firearms which might be used to identify a cartridge or casing cycled through them.

5. Testimony Of A "Match" Is Not Reliable.

The evidence is inadmissible under Rule 702 because Allen's conclusions were not in fact the product of reliable principles and methodology. The proffered toolmark analysis meets none of the *Daubert* standards of reliability. There are no meaningfully accepted validity studies in the field. The "field" has little efficacy outside of the courtroom. There are no peer reviews of it. There has been no showing of the officer's error rate. No one can compare the opinion reached by an examiner with a standard protocol subject to validity testing since there are no recognized standards. There is no agreement as to how many similarities it takes to declare a "match" or how many differences it takes to rule it out. *Cf. United States v. Hines*, 55 F. Supp.2d at 69. In all of these cases, the experts make their identification based solely on a "one on one show-up." There is absolutely no evidence that any of these experts could pick a "match" if they were given a line-up of similar exemplars and asked to determine which matched the item sought to be identified.

Since the publication of Hatcher's definitive text in 1935, there have been no scientifically-conducted studies which to a statistically significant probability quantify the likelihood that particular marks will identify a particular make of firearm, much less an individual firearm from a particular make. By way of comparison, DNA evidence of a "match" is only admitted along with statistical evidence of the likelihood of a DNA profile matching by coincidence. Without such statistical evidence of the probability of a coincidental match, the testimony is considered meaningless. General acceptance of the methodology among toolmark examiners fails to satisfy the *Daubert/Kumho Tire* tests where there is no evidence that these professionals have the expertise

needed to evaluate the methods and procedures underlying the techniques. Moreover, in contrast to other forensic sciences, there is good reason why general acceptance of toolmark identification methodology in the past does not necessarily support general acceptance of that methodology now. Modern manufacturing methods have in fact minimized the toolmarks upon which toolmark analysis is based, and logic dictates that whatever efficacy these methods had in the past has been eliminated by these modern manufacturing methods.

Moreover, the actual method used by examiners to declare a "match" is so lacking in scientific method that even a layperson can see its flaws. Firearms examiners are typically law enforcement officers who have learned identification "techniques" from observing other officers. They generally are not required to have any formal scientific or technical education that would enable them to conduct an experiment using scientific method or to state a conclusion to any mathematical probability. Most examiners, many of whom are state and local law enforcement agents, go through no formal training program, certification or annual testing, as do FBI certified fingerprint examiners. The firearms examiner typically, as in the *Prochilo* case, test fires the weapon and compares the test cartridge or casing to that discovered in the course of investigation. The examiner does not fire even one other gun of the same make and model to see if the marks observed might be characteristic of the class or type of gun but not necessarily the individual gun. Nor have any systematic studies been carried out in which repeated firings are analyzed to determine what, if any, marks observed are unique to the particular gun. Where there can be no presumption of the uniqueness and there are uncontroverted examples of failure of the technique, excluding this evidence pending such studies does not, as Judge Pollak found in the case of fingerprint analysis, make "the best the enemy of the good." On the contrary, the method of comparison and of declaring a "match" in the case of toolmarks is both devoid of scientific method and as a factual matter wholly

unreliable.

6. All Expert Testimony Should Be Excluded, Not Just Testimony Of A "Match."

Even where it has been determined that a forensic science lacks sufficient reliability to permit expert testimony of a positive "match," courts have next considered whether to permit experts to testify to the underlying facts of comparison from which jurors could then draw their own conclusions. As the court reasoned in *Horn,* the answer is provided by Rules 701 and 702 of the Federal Rules of Evidence. *Id.* Where such testimony concerns matters, such as handwriting or signs of intoxication, that are within the common experience of jurors and as to which lay witnesses would be permitted to give an opinion under Rule 701, comparison testimony may be appropriate. In areas outside of the common experience of laypersons, however, such as DNA comparison, enlarged fingerprints or toolmarks, any testimony whatsoever is by definition based on scientific, technical or other specialized knowledge and, if it does not meet the requirements of Rule 702/*Daubert*, must be excluded.

Rule 702 applies to all expert testimony, however, not just an ultimate opinion or conclusion. Moreover, the court's own summary of this "purely descriptive" testimony belies its conclusion. Since magnified fingerprints are outside the common experience of laypersons, any descriptions of them must necessarily be based on scientific, technical or other specialized knowledge. Such descriptions do not merely add to the juror's general knowledge about a matter as to which they would otherwise be permitted to reach their own conclusions based on their own observations. That testimony, like the ultimate opinion, is subject to the provisions of Rule 702/*Daubert* and if those standards are not met, is inadmissible.

Moreover, the testimony is unduly prejudicial. Because lay jurors have no experience in their daily lives in comparing ballistics impressions, they have no context within which to place the

expert's testimony pointing out particular degrees of similarity.. With no basis, either from their own experience in daily life or from admissible expert testimony, for determining how many points of comparison might justify the conclusion of a "match," the expert's testimony as to points of comparison is not only meaningless, but unduly prejudicial. The jury will simply assume that, if the court is taking up its valuable time to allow an "expert" to point out matching marks, they must be significant and, conversely, that a coincidental match is unlikely.

In rejecting any attempt to distinguish between scientific and technical evidence and its effect on the jury, the court in *Kuhmo* recognized that, whether the testimony to be offered was "scientific" or "technical," the expert's testimony would rest upon an experience confessedly foreign in kind to the jury's own. Under those circumstances, the trial judge is required to assure that the specialized testimony is reliable and relevant and can help the jury evaluate that foreign experience. *Kuhmo*, 526 U.S. at 149. A fact witness may testify that the suspect was blond because the jury knows from its own experience that the defendant is not the only blond in the population and, therefore, cannot be identified on the basis of that characteristic alone. Jurors have no experience, however, with microscopic toolmarks on bullets,. Without scientifically conducted tests to inform a jury of the likelihood that any particular mark or any set of marks can uniquely identify a bullet shot from a particular gun the testimony is both meaningless and misleading and would be unduly prejudicial were it admitted. This is not a case where the ability of jurors to perform the crucial visual comparisons on their own, as in the case of handwriting, cuts against the danger of undue prejudice from the mystique attached to an expert. *Cf. United States v. Hines*, 55 F. Supp.2d at 70 n.21. On the contrary, where testimony wholly outside the experience of the ordinary juror fails to meet *Daubert's* standards of reliability, it must be excluded in its entirety.

IV. CONCLUSION

For the foregoing reasons, the defendant requests that the Court issue an order *in limine* prohibiting evidence of, or reference in the arguments of counsel to, the proffered ballistics evidence.

Respectfully submitted,

BRUCE ANTON
SB #01274700
2311 Cedar Spring #250
Dallas, Texas 75201
214/468-8100
214/468-8104 (fax)

ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that on the 7 day of January, 2011, a true and correct copy of the above and foregoing Request for Hearing Outside the Presence of the Jury, was delivered to the Assistant District Attorney of Dallas County, Texas.

BRUCE ANTON