

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

vs.

MICHAEL J. O'DRISCOLL

:
:
: No. 4:CR-01-277
:
: (Judge Muir)

FILED
MIDDLE DISTRICT PA

FEB 10 2003

MARY E. HENDERSON, CLERK
Per *[Signature]*
Deputy Clerk

SEALED
ORDER

February 10, 2003

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On February 4, 2003, Defendant Michael J. O'Driscoll was found guilty of the first-degree murder of Robert M. Frankhouser. The penalty phase of this death penalty case commences on February 11, 2003.

On November 18, 2002, O'Driscoll filed a motion entitled "In Limine Motion to Preclude the Government, at the Penalty Phase, From Introducing Evidence of Ballistics Testing Regarding a 9 MM Pistol Alleged to Have Been Used in the Murder of Kent Martin." The motion has been fully briefed and a hearing was held today. The purpose of this order is to give a ruling with respect to that motion.

In *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 592 (1993) the United States Supreme Court stated that the proponent of expert testimony must prove its admissibility by a preponderance of the evidence. In Daubert, the Supreme Court emphasized the district court's gatekeeper role when screening expert testimony for relevance and reliability. Daubert provides a number of nonexclusive factors a court can apply in performing this role such as whether the theory or technique can be, and has

been, tested; whether the theory or technique has been subjected to peer review and publication; and whether the theory or technique has been generally accepted.

In April, 2000, Rule 702 of the Federal Rules of Evidence was amended to incorporate the requirements of Daubert and its progeny. The amended rule became effective on December 1, 2000.

Federal Rule of Evidence 702 governs the admissibility of expert testimony. The proposed expert testimony must meet three requirements in order to be admitted under Rule 702. First, evidence based on scientific, technical, or other specialized knowledge must be useful to the finder of fact in deciding the ultimate issue of fact. This is the basic rule of relevancy. Second, the proposed witness must be qualified to assist the finder of fact. Third, the proposed evidence must be reliable or trustworthy in an evidentiary sense, so that, if the finder of fact accepts it as true, it provides the assistance the finder of fact requires.

The basis for the third requirement is the recent amendment to Rule 702 which adds the following language to the former rule: "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." The language of the amendment codifies Daubert and its progeny. The amended rule states in toto as follows:

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, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

One district court recently stated regarding the field of ballistics as follows:

The Court has not conducted a survey, but it can only imagine the number of convictions that have been based, in part, on expert testimony regarding the match of a particular bullet to a gun seized from a defendant or his apartment. It is the Court's view that the Supreme Court's decisions in Daubert and Kumho Tire, did not call this entire field of expert analysis into question. It is extremely unlikely that a juror would have the same experience and ability to match two or more microscopic images of bullets. In fact, in one recent opinion, the Supreme Court used the example of expert testimony on ballistics to provide a contrast to the marginal utility of polygraph evidence. The Court stated "unlike expert witnesses who testify about factual matters outside the juror's knowledge, such as the analysis of fingerprints, ballistics, or DNA found at a crime scene, a polygraph expert can supply the jury only with another opinion, in addition to its own, about whether the witness was telling the truth." See *United States v. Scheffer*, 523 U.S. 303, 312, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998).

United States v. Santiago, 199 F.Supp.2d 101, 111-12 (S.D.N.Y. 2002) (Marrerro, J.).

At the hearing held today, Stephen G. Bunch, who has worked for the FBI in the area of ballistics for seven years testified regarding the reliability of ballistics testing. Based on his testimony we are satisfied that the field of ballistics is a proper subject for expert testimony and meets the requirements of Rule 702. Upon review of the briefs submitted by the parties


in this case and the evidence presented at today's hearing, we see no reason to exclude the ballistics evidence that was presented at O'Driscoll's 1984 trial for kidnapping.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. O'Driscoll's motion entitled "In Limine Motion to Preclude the Government, at the Penalty Phase, From Introducing Evidence of Ballistics Testing Regarding a 9 MM Pistol Alleged to Have Been Used in the Murder of Kent Martin" (Doc. 403) is denied.

2. Within ten (10) days the government may file proposed findings of fact to supplement this order if it deems it advisable.

3. The Clerk shall forthwith transmit a copy of this order by FAX to the offices of those counsel who may be so reached, shall read the dispositive provisions to other counsel over the telephone, and shall mail a copy to each counsel.



MUIR, U.S. District Judge

MM:gs