

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA

v.

MICHAEL ANTHONY MAHONE
Defendant

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* Criminal Number 03-93-B-W
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DEFENDANT'S MOTION IN LIMINE
REGARDING EXPERT TESTIMONY ON FOOTWEAR COMPARISONS

NOW COMES the Defendant, by and through Billings & Silverstein and pursuant to Fed. R. Evid. 104 respectfully moves this Honorable Court in limine for the exclusion of purported expert testimony at trial. In support of this motion the Defendant offers the following:

The Government, in its Trial Brief, reveals an intention to elicit expert testimony in several areas, including the area of footwear impression comparisons. The defense has received by way of discovery a report from Cynthia D. Homer of the Maine State Police Crime Laboratory in which she claims that three crime scene footwear impressions are "positively identified" as having been made by a pair of shoes which were recovered and which purportedly contain Mahone's DNA. Ms. Homer kindly met with your undersigned counsel to review her methods. Your undersigned believes that the Government intends to call Ms. Homer as an expert to introduce these supposed findings. Conspicuously absent from the Government's Brief is case law supporting the reliability, credibility, & admissibility of footwear comparisons.

Under Fed. R. Evid. 702 Daubert v. Merrill Dow Pharmaceuticals, Inc., 113 S.Ct.

2786 (1993) and Kumho Tire Co. v. Carmichael, 119 S.Ct. 1167 (1999) the trial court acts as gatekeeper in determining the reliability of testimony based on scientific, technical or other specialized knowledge. There are four general factors that the Court as gatekeeper of such evidence should consider:

1. Whether the evidence can be or has been empirically tested;
2. Whether the method, theory or technique has been the subject of peer review or publication;
3. If the evidence at issue involves a scientific technique rather than a scientific theory, is there a known or potential rate of error; and
4. Whether there is "general acceptance" within the relevant scientific community;

After consideration of these factors, the Court should further proceed to a Rule 403 balance.

That footwear impression evidence has been admitted at other criminal trials far from the end of this Court's inquiry.¹ Here, the Government's burden is to satisfy this Court under the Daubert/Kumho standards that *this evidence*, as it relates to *this proceeding*, constitutes the type of expert testimony which is admissible under Rule 702.

In so doing, this Court might consider United States v. Hines, 55 F.Supp. 2d 62 (D. Mass. 1999) where the Court considered a proffered expert handwriting analysis.

¹See e.g. United States v. Allen, (where the Court admitted expert footwear testimony only after hearing extensive testimony from an FBI forensic examiner and from the manager of the Indiana State Police Crime Laboratory).

There, the Court allowed the expert to testify as to the similarities between the writings analyzed refused to allow the expert to render an opinion as to the identity of the author of the writing at issue. The Hines Court's reasoning included that: (1) there is no data upon which handwriting analysis can determine one "author" of a particular writing; (2) there is a lack of empirical testing; (3) there is a lack of any academic field in the area; (4) there is no broad-based peer review of handwriting analysis methods; (5) there is a lack of recognized standards for analysis and comparison; (6) there is no way to compare the expert's opinion with any standardized protocol subject to validity testing; and (7) there is no accepted standard on when a "match" is declared or when one is ruled out. The field of footwear analysis - especially under the circumstances of this case - will yield similar results under these criteria.

Here, a jury - as factfinder - is fully able to judge, compare, and contrast this footwear with the footwear impressions. The Defendant seeks not to limit the Government's expert from thoroughly demonstrating her process of comparison and from, as in Hines, highlighting similarities. This would properly leave the jury, however, to engage in its own fact-finding process regarding the ultimate issue of identification.

WHEREFORE, the Defendant respectfully requests that this Honorable Court issue an Order excluding from this trial expert testimony on the ultimate issue of

footwear identification.

April 1, 2004

**/s/ Richard L. Hartley
Richard L. Hartley
Counsel for Defendant**

**Billings & Silverstein
6 State Street, Ste. 605
Bangor, Maine 04401**

CERTIFICATE OF SERVICE

I, Richard L. Hartley, Esq., hereby certify that foregoing Motion in Limine has been electronically sent to Asst. U. S. Atty. James McCarthy for the Office of the United States Attorney on this 1st day of April, 2004.

/s/ Richard L. Hartley

Richard L. Hartley, Esq.