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UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA)
)
) Criminal No. 03-93-B-W
)
v.)
)
Michael Anthony MAHONE)

**GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION IN LIMINE
REGARDING EXPERT TESTIMONY ON FOOTWEAR COMPARISONS**

Defendant has moved in limine, pursuant to Federal Rule of Evidence 104, for the exclusion of expert witness testimony regarding footwear comparisons based on Federal Rule of Evidence 702, Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). The Government's response is that an evidentiary hearing in this case will provide the Court with a legal and factual basis for admitting such expert witness testimony. Rule 702 permits expert testimony if the testimony relates to "technical or other specialized knowledge" that would assist the trier of fact to understand the evidence to determine a fact in issue. Footprint and tire imprint evidence has been found admissible through expert witness testimony. United States v. Ross, 263 F.3d 844, 846-47 (8th Cir. 2001); United States v. Allen, 207 F. Supp 2d 856, 857-68 (N.D. IN. 2002); United States v. Allen, 208 F. Supp. 984,985-86 (N.D. IN. 2002). Defendant has provided no authority to the contrary.

The Government contends that at such a hearing it will establish that the methodology used by Forensic Scientist Cynthia D. Homer is reliable in that the conclusions reached by those in the field are the product of reliable technical or specialized principles and methods. The

Government also contends that testimony will establish the specialized nature of obtaining footwear impression evidence, a process which entails making test impressions and having qualified, trained and experienced examiners critically comparing the test impressions with lifts taken from the crime scene. This process requires a critically trained eye to ensure accurate results and is not a simple matching process not requiring any specialized skill.

The government contends that it will establish at the hearing that examiners of footwear impression evidence are routinely tested to ensure proficiency in the field; that the techniques used have been generally accepted in the forensic community and that the methodologies described are subject to peer review. Forensic Scientist Homer undergoes outside proficiency testing on an annual basis.

Defendant has not alleged that the opinions of the proposed expert are not reliable or that the underlying methodology which forms the basis of her conclusions is not scientific in nature. Nor has Defendant offered an expert whose testimony would contradict that offered by the Government. Defendant has claimed that the jury itself is capable to judge, compare and contrast the footwear with the footwear impressions and should engage in its own fact-finding process regarding the ultimate issue of identification. The Government disagrees. As the testimony and evidence at the evidentiary hearing will establish, the critical comparison phase of the analysis, which Defendant seems to contend is a simple matching process not requiring any special skill which jurors could do themselves, actually requires a critically trained eye to ensure accurate, and thus more helpful results.

For the reasons and based on the authority set forth above, the Government contends that Defendant's motion to exclude the footwear impression comparison evidence should be denied

and that an evidentiary hearing should be scheduled to provide the Court with a basis on which to make its Fed. R. Evid. 104 determination of admissibility.

Respectfully submitted,

PAULA D. SILSBY
United States Attorney

By: /s/ James L. McCarthy

James L. McCarthy
Assistant U.S. Attorney

Dated: April 23, 2004

CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2004 I electronically filed the Government's Response to Defendant's Motion in Limine Regarding Expert Testimony on Footwear Comparisons with the Clerk of Court using the CM/ECF system which will send notification of such filing(s) to the following:

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