STATE OF NORTH CAROLINA	)	IN THE GENERAL COURT OF JUSTICE
	)	SUPERIOR COURT DIVISION
COUNTY OF FORSYTH	)	08 CRS 60908
STATE OF NORTH CAOLINA,	)	
	)	
Plaintiff,	)	
vs.	)	MOTION IN LIMINE
	)	
DEMETRIUS DALLAS HAIRSTON,	)	
	)	
Defendant.	)	

NOW COMES the Defendant, by and through his undersigned counsel, and moves the Court to exclude any and all testimony regarding firearms identification or ballistics identification by SBI Agent Adam Tanner or any other purported expert testimony regarding ballistics matches or like testimony and shows the Court as follows:

1. It is anticipated that the State will attempt to offer evidence from Agent Tanner or otherwise that shell casings allegedly recovered near the body of [redacted] on or about October 4, 2008, match or otherwise have similar characteristics with a 40 caliber shell casing found at an apartment complex in Winston-Salem and allegedly fired by the Defendant.

2. It is further anticipated that the State will attempt to offer evidence that the casings were fired from the same weapon—which was never recovered—and that weapons generally leave unique markings or "toolmarks" on bullets fired from them which would positively identify the weapon from which the bullet was fired.

3. Although firearms identification or "ballistics" evidence has heretofore been accepted on a case-by-case basis in North Carolina Courts, the Defendant contends and maintains that a confluence of factors present in the instant case militate a conclusion that such evidence should not be accepted in the instant case.

4. The Defendant contends and will offer evidence thereon that there exist systemic scientific problems within the field of firearms identification evidence due to lack of adequate statistical empirical foundations and uniform proficiency testing for alleged experts in this evidentiary arena.

5. Exclusion is mandated in this particular case due to the absence of the gun which allegedly fired the questioned shots, which makes meaningful comparison an exercise in futility.

Additionally, recent revelations of incompetence and mishandling of evidence in the now much-beleaguered SBI laboratory create a substantial likelihood of tainted or incorrect evidence.

6. The entire process by which evidence is handled by the SBI lab lends itself to potential inaccuracies in firearms and took-mark identification, one of the most controversial disciplines of forensic science, if indeed it can be legitimately termed a "science." The evidence to be tested usually comes to the lab whose agents are sworn law enforcement officers with a specific description by other law enforcement officers as to how those officers contend events unfolded. This pattern easily leads to cognitive or subjective bias on the part of the SBI analysts.

7. Without going into excessive detail the Defendant notes that the Attorney General of North Carolina terminated the services of Robin Pengergraft, former director of the SBI in August of 2010 and placed Greg McLeod as SBI director. Mr. McLeod moved quickly to terminate Jerry Richardson as lab director. A number of supervisory agents in the blood and DNA analysis division were likewise removed. Similar actions were taken in the firearms and toolmark identification unit and Attorney General Roy Cooper and McLeod have called upon ASCLD—LAB, a national lab certification agency to audit the work of the firearms division of the lab. A lack of confidence exists in the SBI lab in general and, specifically, in the firearms identification unit itself.

8. Investigation by the Raleigh News and Observer has led to findings that agents have bent rules and pushed bounds of science to deliver what the agents believed that various prosecutors wanted to hear. The lab has never, to this point, functioned as an independent entity.

9. Equally troubling has been SBI Lab's failure to utilize cameras to forever capture the images under microscopic viewing, thus providing at least some basis to support testifying analysts' conclusions. For a relatively insignificant sum of money, cameras could be utilized in an attempt to corroborate the conclusions made by sometimes biased analysts. The lack of such a safeguard is incomprehensible and leads to a conclusion that the lab is avoiding any possible legitimate scrutiny.

10. The Defendant also cites the writings of Adina Schwartz, Ph.D., J.D., in The Columbia Science and Technology Law Review in her article entitled "A Systemic Challenge to the Reliability and Admissibility of Firearms and Tookmark Identification," in which the writer concluded that "adequate statistical empirical foundations and proficiency testing do not exist for firearms and toolmark identification." (The Columbia Science and Technology Law Review, Vol. VI, 2005, pp. 41-42) In the conclusion of her article, Ms. Schwartz quoted the Florida Supreme Court, which states: "any doubt as to the admissibility of expert testimony should be resolved in a manner that minimizes the chance of a wrongful conviction, especially in a capital case." Ramirez III, 810 So. 2d at 853.

11. The Defendant offers the attached Memorandum of Authorities in support of his Motion in Limine.

Respectively submitted this the _____day of January, 2011.

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STATE OF NORTH CAROLINA	)	IN THE GENERAL COURT OF JUSTICE
	)	SUPERIOR COURT DIVISION
COUNTY OF FORSYTH	)	08 CRS 60908
STATE OF NORTH CAOLINA,	)	
	)	MEMORANDUM OF AUTHORITIES
Plaintiff,	)	IN SUPPORT OF MOTION IN LIMINE TO
vs.	)	PRECLUDE FIREARMS IDENTIFICATION
	)	TESTIMONY
DEMETRIUS DALLAS HAIRSTON,	)	
	)	
Defendant.	)	

In the Motion in Limine which is filed simultaneously herewith, the Defendant cites the article written by Adina Schwartz in The Columbia Science and Technology Law Review. The same article was cited in State v. Anderson, 175 N.C. App. 444; 624 S.E. 2d 393 (2006), but the appellate court did not address the merits of the article because counsel failed to raise the scientific literature before the trial court. Accordingly, the issues presented herein are ripe for resolution on the merits for the first time. In Anderson, the Court of Appeals reiterated that the North Carolina Supreme Court has held that the principles of Daubert do not apply in this State. See Howerton v. Arai Helmet, Ltd, 358 N.C. 440, 597 S.E. 2J 674 (2004).

North Carolina's rules regarding establishing that expert testimony at issue is unreliable are a three-pronged test. North Carolina courts employ a three-step inquiry for evaluating the admissibility of expert testimony: (1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? (3) Is the expert's testimony relevant? Howerton (Id.)

An expert's scientific technique on which he bases his/her opinion must be such that its accuracy and reliability has become established and recognized State v. Huang, 99 N.C. App. 658, 663, 394 S.E. 2J 279, 282 (1990). The emphasis of this consideration is on the reliability of the scientific method and not its popularity within a scientific community. "State v. Bullard, 312 N.C. 129, 149, 322 S.E. 2J 370, 381-82 (1984).

The Defendant herein does not mount a Daubert challenge to the projected firearms identification testimony of Agent Tanner; he makes a constitutional, due process argument, based on all factors cited in his Motion and requesting that the Court take judicial notice of the frankly shocking revelations regarding the SBI lab.

The potential testimony of Agent Tanner could be the sole source of evidence from which a jury could conclude the Defendant may have been the person who shot [redacted] That fact is why the preclusion of the testimony is mandated in this case.

The comparison microscope could easily have had camera-capability. There exists no legitimate excuse for the omission of cameras.

The Defendant strenuously argues that the admission of the expert testimony of Agent Tanner amounts to a denial of constitutional due process under the totality of the circumstances presented herein. In Anderson, supra at p.448, the Court ruled for the State because the Defendant did not offer any expert testimony or scientific literature. Such is not the case herein. Further, the Court in Anderson alluded to the fact that the analyst improperly failed to use photographs to document her work and that her methodology failed to comply with accepted scientific methods. The Anderson Court emphasized that these arguments were not properly before it because the Defendant in Anderson did not raise these issues at trial.

The Court continued:

> A Defendant cannot establish an abuse of discretion by the trial judge based on scientific literature never provided to that judge. Defendant's literature review thus does not demonstrate that the trial judge abused his discretion in making his preliminary determination that Agent Powell's testimony was sufficiently reliable to meet with the requirements of Rule 702 of the Rules of Evidence.

The Defendant herein does indeed challenge the testimony of Agent Tanner based on the science (or lack thereof) and alleges that his proposed testimony fails the three-step inquiry in Howerton. The issues may have been procedurally barred in Anderson, but the wording of the opinion is both instructive and prescient. The Court refers to "shaky but admissible evidence" (Id. at 444) in regard to the analogous evidence at issue in this matter. Defendant contends that Agent Tanner's testimony should be precluded as both "shaky and inadmissible". Blind acceptance of the SBI lab's work should be a thing of the past in North Carolina's jurisprudence, at least pending the development of a truly independent laboratory that has as its goal appropriate analyses, not convictions. It is noted that some Federal courts have excluded similar evidence unless a camera was used in conjunction with a microscopic examination.

The Defendant contends that the trial court should conduct a voir dire hearing regarding Agent Tanner's purported scientific expert testimony if the Court does not preclude the same *sua sponte*. Among other matters, the Defendant will examine Agent Tanner regarding the omission of a camera, the protocol followed in the SBI lab at the times pertinent hereto, and whether Agent Tanner received information from other law enforcement officers as to how they contend the underlying events unfolded.

The Defendant notes that the State did not submit any weapons to the lab at any time. He contends that this fact places Tanner's analysis in the "less usual" category of firearms identification. While absent new evidence (which is *not* the case herein) a trial court need not redetermine in every case the reliability of a particular field of knowledge, trial courts must make this decision "in the less usual or more complex cases *where case for questioning the expert's reliability arises.*" *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). Such cause is manifest in this case. Under the totality of circumstances present, it is riddled with such cause.

Clearly the facts of this case take it out of the heartland of firearms identification and mandate an analysis of whether the expert's method of proof was sufficiently reliable in this case. The expert's opinion in this tenuous case was not bolstered by any photographs that the trial court (and/or jury) could analyze. The fact that SBI policy precluded or omitted photographs or the use of a 3-D image is not sufficient explanation or reason. Photographs and digital images are used by firearms examiners all over the United States to document their work for their own use and for publication. *See* Moron, "The Application of Numerical Criteria for Identification in Casework Involving Magazine Marks and Land Impressions," 33:1 AFTE J. 41, 42 (2001); Kriigel & Brooks, "Photography of Bullets Using the Comparison Microscope," 26.1 AFTE J. (1994); see also photographs in the Association of Firearms & Toolmark Examiner's Journal (AFTE).

Defendant anticipates that the State or Agent Tanner may contend that photographs are too confusing for the lay juror. While such a view would not excuse the omission of photographs for the court to examine during voir dire, it also fails to comprehend that a video recording of the whole circumference of the comparison could easily be presented to both the trial court and the jury. The alternative to not introducing photos is legally, facially, insufficient: "I believe that photographs should be introduced in court. I believe they should be required...otherwise, it's just one man's word." Howe, Firearms Identification, 31:1 AFTE J. (1999). It should be noted that there is a trend developing nationwide regarding conjunction with microscopic comparison and that Federal courts will not allow such evidence in the absence of such photographs (Adina Schwartz article, supra). See also, "Report Blasts FBI," Chicago Tribune, November 14, 2004.

Further undermining Agent Tanner's proposed testimony is the apparent fact that he based his "examination" entirely on his observations and did not conduct actual measurements or other objective criteria. Such an analysis does not qualify as an accepted scientific method.

The subjective nature of the analysis herein is rendered even more suspect because it was not a double blind test. In other words, the examiner was given only the "guilty" casings and no foils were included. Accordingly, Agent Tanner was effectively "told" what his test should conclude by the information provided to him by other law enforcement officers. This amounts to cognitive bias or subjective bias. *See*, generally, "The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion," 90 Calif. L. Rev. 1, 15 (2002). Instead of complying with normally accepted scientific methodology, Agent Tanner was told that the casing from the shooting in the apartment breezeway three hours prior should match the casings located near the decedent. He, as a fellow law enforcement officer, was—at least subconsciously, if not consciously—told what the findings "should be" prior to his subjective examination.

As previously stated, North Carolina emphasizes the "reliability of the scientific method and not its popularity within a scientific community." 1 *Brandis & Brown on North Carolina Evidence,* 113 (1998). In this case, while firearms identification may be generally admissible, the testing by Agent Tanner was unreliable. It was subjective, predisposed and awash with cognitive bias—and came from a severely discredited unit at a non-independent lab. His tests were not documented by photograph, no measurements or statistical analysis was employed, and

no gun was submitted with the matters analyzed. The decision to admit an expert's testimony is reviewed for an abuse of discretion. *State v. Bullard*, 312 N.C. 129, 140, 322 S.E. 2d 370, 376 (1984). In this case, defendant contends it would be an abuse of the trial court's discretion to admit the highly questionable test results of Agent Tanner. The admission of the questionable results would imbue the results with the imprimatur of scientific validity insofar as a jury is concerned. Admitting this evidence would result in a fundamentally unfair trial and would violate the defendant's 5th Amendment to due process as well as his 6th Amendment right to a trial by an impartial jury. Such evidence would also violate Mr. Hairston's rights under the North Carolina Constitution, Article I, sections 19, 23 and 27. The admission of the subjective, biased, and unreliable testing results is akin to retrograde extrapolation testimony disallowed by the Court of Appeals in *State v. Davis*, 2010 N.C. App. LEXIS 2076 (Nov. 16, 2010) wherein that Court held "alcohol odor" testimony to be too subjective and speculative to be of any assistance to the jury. The Court emphasized that rigorous standards should be applied to any alleged expert testimony before the same can be deemed reliable enough to convict. Admission of Agent Tanner's testimony would be equivalent to asking the jury to "sacrifice its independence by accepting (the) scientific hypotheses on faith and independent research conducted by the expert" *Howerton* (supra), 358 N.C. at 460, 597 S.E. 2d at 687.

CONCLUSION

The Defendant respectfully requests the Court to enter an Order precluding the admission of any evidence relating to the testing and the results thereof.

This the _____day of January, 2011.

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National Research Council Ballistic Imaging (2008)

STATE OF NORTH CAROLINA FORSYTH COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 08 CRS 60908
STATE OF NORTH CAROLINA)) V.) DEMETRIUS DALLAS HAIRSTON,)) Defendant)	BRIEF IN RESPONSE TO DEFENDANT'S MOTION IN LIMINE

COMES NOW the State of North Carolina, by and through its undersigned Assistant District Attorney, and provides the Court with the following brief in Response to the Defendan't Motion in Limine concerning the admissibility of the expert testimony of SBI Special Agent Adam Tanner.

I. EVIDENCE RELATED TO EXPERT TESTIMONY

Around 2:41 a.m., on October 4, 2008, [redacted] was killed by two bullet wounds. The Defendant was found at the scene, having suffered bullet wounds as well. The State will present evidence that it will argue shows tha[redacted] (from here on referred to as "the Victim") was killed by bullets from a different firearm than the one that wounded the Defendant. Testimony will show that the Victim owned and possessed a .38 caliber revolver, which was located at the scene with 5 spent shell casings and one empty chamber. Other testimony will show that the Defendant possessed a different firearm that was somehow removed from the scene by a third party and was never recovered by law enforcement officials.

Crime scene technicians found and seized four (4) spent .40 caliber shell casings from nearby the location where the Victim died, and in the vicinity of where the Defendant was found when Police arrived on the scene. They also found two fired bullets next to and under the body of the Victim, and another fired bullet near where the Defendant was first located by the Police. All of these items were seized and stored in a secure facility by the Winston-Salem Police Department ("WSPD"), until they were later delivered to the North Carolina State Bureau of Investigation ("SBI") Crime Laboratory in Cary, North Carolina.

Several guns were found and seized in the vicinity of the crime scene, including the Victim's revolver. These firearms were all stored in a secure facility and then later delivered to the SBI lab for analysis, determine if any of them could have been the murder weapon.

A few hours before the above described incident, on October 3, 2008, the Defendant was at the apartment of [redacted], in the Salem Gardens Apartments

complex. While there, he bragged to [redacted] that he had gotten a gun from a police officer by beating the officer up. When [redacted] did not act impressed, the Defendant became angry. [redacted] demanded that the Defendant leave her apartment. The Defendant held his hand in his pocket and said that he had a gun. [redacted] was able to get the Defendant out of her apartment. Almost immediately after that [redacted] heard gun shots right outside her door, and she felt some material or debris falling on her inside her apartment. [redacted] called 911 and Officer Elsasser with the WSPD arrived to investigate. The officer found one spent .40 caliber shell casing that appeared to be in good condition and did not appear to have been exposed to the elements for a long period of time. Possible bullet fragments were also found in the door frame of [redacted] residence. The shell casing and possible bullet fragments were seized and placed into storage at a secure storage facility. They were later delivered to the SBI laboratory in Cary, North Carolina for analysis.

The Defendant was treated for his gunshot wounds at Wake Forest Baptist Medical Center. Officer Munnell with the WSPD seized the Defendant's clothing that was removed by hospital personnel. Officer Munnell transferred custody of the Defendant's clothing to Detective Collins a short time later. Detective Collins stored the clothing in a secure storage facility. A small metal fragment that had traces of a red substance on it was later found amongst the Defendant's clothing. This item was then delivered to the SBI lab for analysis.

II. SBI SPECIAL AGENT TANNER

Once the above described evidence was delivered to the NC SBI lab in Cary, Special Agent Adam Tanner was assigned to analyze each piece of evidence. Agent Tanner does casework related to firearms and tool marks. As part of his duties at the lab, Agent Tanner analyzes fired and unfired bullets, firearms, shell casings, and other evidence related to firearms and tool marks. He has an extensive *curriculum vitae* with several years of experience in this field. Agent Tanner has been qualified as an expert in forensic firearms identification, and he has testified over thirty (30) times as an expert in Courts of Law in North Carolina. Agent Tanner has been called as an expert by both the prosecution and by the defense in criminal trials.

That State will refer to, and seeks to incorporate in this brief by reference, Agent Tanner's *curriculum vitae* and his laboratory reports which have been filed with the Forsyth County Clerk of Court and are included in the Court file. Copies have previously been provided to the counsel for the Defendant.

III. **THE LAW OF NORTH CAROLINA**

The North Carolina Rules of Evidence

N.C.G.S. Section 8C-1, Rule 702(a) reads 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."

N.C.G.S. Section 8C-1, Rule 401 reads as follows:

"Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Howerton v. Arai Helmet LTD.

The law determining the admissibility of expert testimony under Rule 702 is defined in the North Carolina Supreme Court decision in Howerton v. Arai Helmet LTD., 358 N.C. 440 (2004), citing State v. Goode, 341 N.C. 513 (1995). The Howerton Court rejected the standard used by Federal courts, established by the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). In its opinion rejecting Daubert, the Court also rejected the United States Supreme Court's analysis in Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). In rejecting the Daubert and Kumho Tire standard, the North Carolina Supreme Court adopted the standard from Goode:

> ***The most recent North Carolina case from this Court to comprehensively address the admissibility of expert testimony under Rule 702 is State v. Goode, 341 N.C. 513, 461 S.E.2d 631 (1995), which set forth a three-step inquiry for evaluating the admissibility of expert testimony: (1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? Id. At 527-29, 461 S.E.2d at 639-40. (2) Is the witness testifying at trial qualified as an expert in that area of testimony? Id. at 529, 461 S.E.2d at 640. (3) Is the expert's testimony relevant? Id. at 529, 461 S.E.2d at 641.*** **Howerton v. Arai Helmet LTD., 358 N.C. 440 at 458 (2004).**

This is the established test for the admissibility of expert testimony in the State of North Carolina. Daubert and Kumho Tire do no apply in the State of North Carolina. Therefore, any case law, scientific article, law review or journal article, or any other

proffered opinion that bases its entire argument on the Daubert standard is inapplicable to this or any other case in the State of North Carolina.

In Howerton, the Court went on to establish standards for determining the first part of the three-step analysis cited from Goode. The Court stated that, "Initially, the trial court should look to precedent for guidance in determining whether the theoretical or technical methodology underlying an expert's opinion is reliable," and "when specific precedent justifies recognition of an established scientific theory or technique advanced by an expert, the trial court should favor its admissibility." Id. at 459. Such precedent does exist in this particular case.

The Howerton Court established standards for determining the second part of the three-step analysis, "whether the witness is qualified as an expert in the subject area about which that individual intends to testify." Id. at 461. Howerton cites Goode to summarize how to determine this issue:

> ***"It is not necessary that an expert be experienced with the identical subject matter at issue or be a specialist, licensed or even engaged in a specific profession." "It is enough that the expert witness 'because of his expertise is in a better position to have an opinion on the subject than is the trier of fact.'"*** **Id. at 461, citing State v. Goode, 341 N.C. 513 at 529.**

The basic question is whether or not the expert knows more about the area of expertise at issue than does the jury. This is certainly the case when it comes to the area of firearms and tool mark analysis, which will be Agent Tanner's area of expertise for this case.

Howerton next defined the standards for determining the third part of the three-step analysis. The Court stated that, "The trial court must always be satisfied that the expert's testimony is relevant." Id. at 462. The Court deferred to the definition of relevancy set forth in the North Carolina Rules of Evidence, specifically citing N.C.G.S. Section 8C-1, Rule 401.

Finally, the Court in Howerton soundly rejected the Daubert standard by stating:

> ***We have great confidence in the skillfulness of the trial courts of this State. However, we are unwilling to impose upon them an obligation to expend the human resources required to delve into complex scientific and technical issues at the level of understanding necessary to generate with any meaningfulness the conclusions required under Daubert.*** **Id. at 464-465.**

The Howerton Court specifically stated trial courts are not to "delve" into the precise sort of analysis that the Defendant is asking this Court to do in his Motion.

State v. Anderson

The North Carolina Court of Appeals has established precedent on which this Court can rely, as required by the Howerton analysis, when determining the admissibility of Agent Tanner's expert opinions related to forensic firearms and tool mark analysis. In State v. Anderson, 175 N.C.App. 444 (2006), the Court of Appeals assessed the reliability of firearms and ballistics testimony, which is the first of the three-prong analysis defined by Howerton. The Court in Anderson stated:

> ***Our Supreme Court has previously upheld the admission of similar firearms or ballistics testimony…Defendant does not address this precedent, but rather argues that the State did not meet its burden because "[t]he State presented no evidence substantiating the scientific validity" of Agent Powell's comparisons of the bullets and the gun. As Howerton and Morgan establish, however, the State was not necessarily required to do so.***

In Anderson, the Defendant only challenged the first prong of the Howerton test. The Defendant challenged the reliability and methodological adequacy of the expert's testimony in the field of forensic firearms and ballistics. State v. Anderson, 175 N.C.App. 444 at 448 (2006). The Anderson Court went on to cite Howerton:

> ***This assessment does not, however go so far as to require the expert's testimony to be proven conclusively reliable or indisputably valid before it can be admitted into evidence.*** **Id. at 448, citing Howerton v. Arai Helmet LTD., 358 N.C. 440 at 460 (2004).**

The Court specifically found that precedent exists that upholds the admission of similar firearms or ballistics testimony.

State v. McCord

The North Carolina Court of Appeals has established precedent on the specific issue of whether an expert can be qualified and allowed to testify as an expert comparing multiple fired shell casings to determine whether or not they were fired from the same gun, even though the gun that fired them was never found. State v. McCord, 140 N.C.App. 634 (2000). In McCord, the Defendant argued that the expert witness's testimony "regarding shell casings were inadmissible because no proper foundation was laid to show 'the reliability of the scientific methods' used by these witnesses." Id. at 659. The McCord Court disagreed with this argument. The expert in McCord compared shell casings alleged to have been related to a shooting. Though the gun that fired these shell casings was not found, the expert was able to testify that he compared the shell casings and found that, "four of [the shell casings] were worked through the action of the same gun." Id. at 659. This is almost exactly the same type of analysis and expert opinion that the State wishes to offer through the expert testimony of Agent Tanner in the present case.

The Court of Appeals went on to say:

Additionally, because the comparison of bullets and weapons has been accepted as reliable scientific methodology in this State, the trial court properly allowed [the expert] to testify regarding the results of his testing. State v. McCord, 140 N.C.App. 634 at 659, citing State v. Alston, 294 N.C. 577 (1978).

State v. Crandell and State v. Jones

The North Carolina Court of Appeals has specifically found that Agent Tanner is qualified as an expert in the area of bullet identification, and that his testimony was "based on sufficiently reliable methods of proof...and that the testimony was relevant." State v. Crandell, 2010 N.C.App. LEXIS 2390 (2010) (unpublished opinion). The Court of Appeals found Agent Tanner to be "an expert in the field of firearms identification," in State v. Jones, 2008 N.C.App. LEXIS 2003 (2008) (unpublished opinion). In Jones, the Court found unconvincing the Defendant's argument that that Agent Tanner's testimony regarding firearms and ballistics "did not meet the standards of the scientific community." Id. at 16.

Both Crandell and Jones are unpublished opinions and normally would not be controlling authority. However, the State has made a thorough search of all North Carolina Appellate Court cases and has found these two cases to be the only ones that specifically mention Agent Tanner. There are no published opinions that address the same specific points regarding Agent Tanner, as do Crandell and Jones. Therefore, the State argues that according the North Carolina Rules of Appellate Procedure, these cases can be used by this Court as precedent in support of its ruling on the Defendant's Motion.

IV. CONCLUSION

In response to the Defendant's Motion, the State argues that Agent Tanner should be recognized and qualified by this Court as an expert witness in the field of forensic analysis of firearms and tool marks. The State also argues that Agent Tanner's proposed expert testimony should be admitted and that such proposed testimony is highly relevant to assist the jury in its deliberations regarding the facts of this case.

Agent Tanner's proffered testimony meets the standard of admissibility as delineated by Howerton v. Arai Helmet LTD., 358 N.C. 440 (2004). The first prong of the Howerton test is satisfied by the legal precedents stated in State v. Anderson and State v. McCord, cited above. The second prong of Howerton is satisfied by Agent Tanner's own testimony regarding his expertise, training, and knowledge in the field of forensic firearms and tool marks analysis, as well as the legal precedent cited above in State v. Crandell and State v. Jones. The third prong of Howerton, regarding the relevance of the proffered evidence and expert testimony is easily satisfied. The evidence can assist the trier of fact in determining whether the Defendant in fact possessed a firearm at the incident, and it tends to connect the Defendant to both the alleged Armed Robbery and

the alleged Murder of the victim in this case. The probative value of this relevant evidence far outweighs any potential prejudice to the Defendant.

The Defendant's brief offers no case law that has found any North Carolina SBI Agent unqualified to testify as an expert in the field of forensic analysis of firearms and tool marks. The Defendant is unable to cite any North Carolina case law that finds that the field of forensic firearms and tool marks analysis is unreliable as an area for expert testimony. All known precedent finds that it is *reliable* under the Howerton test. The Defendant offers only unsupported and unsubstantiated allegations related to the North Carolina SBI crime lab. The Defendant cites no legal or factual authority for his allegations regarding the firearms and tool marks unit of the SBI crime lab, except for vague and unspecific references to articles written by journalists with no training or specified technical knowledge in the field of forensics. In fact, such allegations are full of factual inaccuracies regarding the SBI crime lab.

Finally, the main source cited by the Defendant is a law review article written by Dr. Adina Schwartz. Adina Schwartz is not an expert. She has never been qualified as an expert in the field of forensic firearms and tool marks, in fact she has been specifically rejected and denied qualification as an expert by multiple State and Federal courts throughout the country. Adina Schwartz has no training regarding firearms, has no education background in firearms or forensics, and has never even fired a gun of any kind. She has a law degree, a PhD in Philosophy, and is a law professor at John Jay College. Even if the Court were to find Adina Schwartz to be an expert, the article that the Defendant cites is based entirely on an analysis of the Daubert standard, which is a standard soundly rejected by the North Carolina Supreme Court.

Respectfully Submitted,

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NORTH CAROLINA

FILED

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

FORSYTH COUNTY

2011 JAN 28 PM 3:39

08 CRS 60908

FORSYTH COUNTY, C.S.C.

STATE OF NORTH CAROLINA

vs.

DEMETRIUS DALLAS HAIRSTON,

Defendant.

ORDER DENYING DEFENDANT'S MOTION IN LIMINE RE: FIREARMS AND BALLISTICS IDENTIFICATION TESTIMONY

THIS MATTER CAME ON TO BE HEARD AND WAS HEARD by the undersigned on January 24, 2011 on Defendant's Motion in limine to preclude Firearms Identification Testimony that the State had indicated that it would be offering during the trial of this case which has been joined for trial with two other charges that are the subject of two other file numbers.

To understand Defendant's Motion, the Court conducted a *voir dire* hearing during which SBI Agent Adam Tanner testified. In addition, all parties recognize at the outset of these proceedings that expert testimony in the field of Firearm and Ballistics Identification has been allowed previously in criminal trials in North Carolina. The Court does not attempt to collect here and cite the cases that have discussed this particular type of expert testimony.

However, Defendant contends that this type of proffered expert evidence is ripe for re-examination due to (a) recent criticism of the validity of the underlying research and (b) ongoing national re-evaluations of the science associated with the field. Defendant also contends that the matter should be revisited in a manner that gives the trial court an opportunity to hear and review the scientific literature that puts into question the soundness of the underpinnings of the North Carolina precedent on this type of testimony.

Moreover, Defendant contends that Tanner's proffered expert testimony, if allowed and admitted, violates Defendant's constitutional right to a fundamentally fair trial, violates his due process rights as guaranteed by the 5th Amendment and violates his 6th Amendment right to a trial by an impartial jury.

In reaching its decision on Defendant's motion, the Court first looks to Rule 702(a) of the North Carolina Rules of Evidence which 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.

In applying this rule, the trial court has a substantial degree of discretion in determining whether to permit expert testimony in a particular case. Guiding the trial court in making this discretionary decision are the teachings of *Howerton v. Arai Helmet, Inc.*, 358 N.C. 440, 597 S.E.2d 674 (2004). In *Howerton*, the North Carolina Supreme Court, referring to *State v. Goode*, 341 N.C.513 (1995), set forth a three step inquiry for evaluating the admissibility of expert testimony: (1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? (3) Is the expert's testimony relevant? *Howerton*, 358 N.C. at 458.

After hearing Agent Tanner's testimony concerning his training, qualifications and experience, the manner in which the evidence was examined and evaluated and considering the applicable precedent, the Court finds that ballistic and firearm's identification expert testimony and the proffered method of proof is sufficiently reliable as an area of expert testimony and is therefore admissible under North Carolina evidentiary law. The Court also finds that Agent Tanner has qualified before in the state courts of North Carolina as an expert in this field and that he is qualified to testify as an expert in this field in this case. Based on a forecast of the evidence, and the stated theories of the case, the evidence proffered through Agent Tanner is relevant.

Consequently, the Court, in its discretion, finds that the evidence, under the three step inquiry for evaluating the admissibility of expert testimony is satisfied in this case such that Defendant's Motion in limine should be denied. However, the Court reserves ruling on what part or parts of Agent's testimony shall be admitted during the trial until it is offered in court during the trial to insure that the all tests of admissibility are met and any Rule 403 analysis is timely undertaken.

In addition, the Court finds and concludes that the admissibility of expert testimony as proffered by the State through Agent Tanner does not violate Defendant's constitutional rights as contended.

Consequently, and based upon the evidence proffered, arguments presented, and authorities submitted, it is ordered that Defendant's Motion in Limine to exclude expert testimony concerning Ballistics and Firearm Identification is denied.

Entered: This the 27th day of January, 2011 *nunc pro tunc* January 25, 2011.

Anderson D. Cromer
Presiding Superior Court Judge