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## Motion in Limine to Exclude Expert Testimony Pertaining to Handwriting Analysis

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IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO

GERALD E. FURST  
CLERK OF COURTS  
CUYAHOGA COUNTY

ALAN J. DAVIS, Special Administrator )  
of the Estate of )  
SAMUEL H. SHEPPARD )  
Plaintiff )  
vs. )  
STATE OF OHIO )  
Defendant )

Judge Ronald Suster

Case No. 312322

**MOTION IN LIMINE**  
**TO EXCLUDE EXPERT**  
**TESTIMONY PERTAINING**  
**TO HANDWRITING ANALYSIS**

Plaintiff hereby moves this Court for an Order striking Phillip Bouffard as a potential witness and to preclude the Defendant, State of Ohio, from offering any testimony from him. The reasons and authorities for granting this motion are set forth fully in the attached brief in support, which is hereby incorporated by reference.

Respectfully submitted,



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## **Brief In Support**

### **I. Background**

Following his acquittal, Doctor Sheppard authored *Endure and Conquer*, a biographical account of his life that focused on his experiences since being accused and convicted of the murder of his wife, Marilyn Sheppard. The State has alleged that, during a book signing party in Columbus, Ohio, Sheppard autographed a paperback copy of *Endure and Conquer*. The State further alleges that Sheppard penned "Yes" under a flyleaf caption asking the question: "Did Sam do it?" The State now intends to introduce this book into evidence, as well as introducing the testimony of a handwriting expert, as a confession by Dr. Sam Sheppard to the murder of Marilyn Sheppard.

### **II. Law and Argument**

Lawyers and legal commentators have recognized for years that handwriting analysis, or forensic document examination ("FDE"), is an unreliable mechanism for determining a document's author. Despite its long-standing use, there is a lack of evidence to support the accuracy of handwriting analysis. D. Michael Risinger et. al., *Exorcism of Ignorance as a Proxy for Rational Knowledge: The Lessons of Handwriting Identification 'Expertise,'* 137 U.Pa. L.Rev. 731, 738-9 (1989) [hereinafter *Exorcism*]. The few empirical studies that have been conducted about FDE show a complete lack of support for FDE's accuracy. *Id.* at 743-51. Of five tests conducted between 1975 and 1987, the accuracy rating of handwriting analysis ranges anywhere from thirteen to fifty-seven percent, depending on which answers are excluded from the analysis. *Id.* Of all of the tests conducted, there have been no comparisons between the accuracy of so-called FDE "experts" and a control group of laymen, raising questions about whether there is any actual science involved in FTE. *Id.* at 743-4; *United States v. Hines*, 55 F.Supp. 2d 62, 68 (D. Mass. 1999) (accepting testimony of Mark Denbeaux that lay people could analyze handwriting as well as "experts"). This

lack of accuracy has drawn parallels to the witchcraft, which was considered to be a "science" for over two centuries despite a complete lack of accuracy. *Exorcism, supra*, at 731-2 (citations omitted).

Courts have also noted the lack of support for handwriting analysis. In *Hines*, the court recognized that even in 1999, there is a lack of evidentiary support for handwriting analysis. The court further recognized that, unlike other sciences, there is no academic field for handwriting analysis, *Hines*, 55 F. Supp.2d at 69; there is also no peer review of handwriting analysis or standard protocol to review an individual examiner's methods. *Id.* Other courts have agreed, holding that "forensic document examination, which clothes itself with the trappings of science, does not rest on carefully articulated postulates, does not employ rigorous methodology and has not convincingly documented the accuracy of its determinations." *United States v. Starzecpyzel*, 880 F. Supp. 1027, 1028 (S.D.N.Y. 1995) (the court concluded that FDE could not be considered scientific knowledge, based on the testimony of Mary Wenderoth Kelly of the Cleveland Police Forensic Laboratory). Because of this lack of accuracy, courts consistently refuse to allow handwriting analysts to state definitively who they believe to be the author of an individual writing.

There is also nothing to link a specific person to an individual writing. Unlike DNA or fingerprint analysis, where each person has a distinctive genetic pattern or shape, handwriting is not unique in that every person has a distinctive pattern. *Hines*, 55 F. Supp. 2d at 69. Similarly, a person's handwriting changes over time, *id.*, further distorting analysis of a person's writings. Handwriting may change within a time as short as a few seconds; however, without evidence as to the accuracy of handwriting analysis, it is impossible to know if this is a realistic possibility.



Because of the lack of reliability of handwriting analysis, such evidence should be excluded from the courtroom. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Supreme Court devised a new system for determining the admissibility of expert testimony. The original mechanism for expert testimony was outlined in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923); this mechanism called for evidence to be generally accepted in the scientific community in order to be admitted. In *Daubert*, the Court instead focused on the reliability of the evidence admitted, *see Daubert* at 589. The Court presented several factors that lower courts could consider when deciding whether to admit expert testimony, including whether the information has been tested; scientific scrutiny and peer review of the technique; the potential rate of error; and general acceptance in the scientific community. *Id.* at 593-5. Although the Court's original holding applied solely to scientific evidence, it recently expanded its ruling in *Daubert* to include all expert testimony. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

Ohio courts have also adopted *Daubert*'s requirements. While *Daubert* applied to Rule 702 of the Federal Rules of Evidence, the Ohio Supreme Court has followed a similar approach to accepting *Daubert*. In *Miller v. Bike Athletic Co.*, 80 Ohio St. 3d 607, 687 N.E.2d 735 (1998), the Ohio Supreme Court held that the key for determining if expert testimony is admissible is whether the expert's opinion is based on scientifically valid principles, not whether the expert's conclusions are correct. *Id.* at syllabus. As Justice Cook noted in her dissent, because Ohio Rule of Evidence 702(C) also requires that an expert's opinion be based on reliable information, the United States Supreme Court's decision in *Daubert* "may be particularly instructive to this court's future development of the reliability standard." *Id.* at 618 (Cook, J., dissenting). While the Ohio Supreme Court has yet to rule on the effect of *Kumho* to the Ohio Rules of Evidence, the court's reliance on

*Daubert* shows that there is strong support that Ohio will follow the United States Supreme Court's expansion of *Daubert* to include all expert testimony.

One of the key understandings of *Daubert* is to make sure that expert testimony is reliable and accurate, instead of "junk science." *Starzecpyzel*, 880 F. Supp. at 1028. Handwriting analysis has only a thirteen to fifty-seven percent rate of accuracy, *Exorcism, supra*, at 747-9; these percentages can hardly be considered reliable. BLACK'S LAW DICTIONARY 1291 (6<sup>th</sup> ed. 1990) (defines reliable as "[t]rustworthy, worthy of confidence"). Even if the handwriting analysis of the alleged confession is correct, under the *Daubert* reliability and *Miller* scientifically valid principles requirements, expert testimony about handwriting analysis should not be admitted because of the complete lack of reliability associated with handwriting analysis.

Furthermore, with accuracy rates as low as thirteen percent, the admission of handwriting analysis should not be allowed to unduly prejudice the jury. Courts are well aware that juries give testifying experts a greater level of credibility than lay witnesses. *Starzecpyzel*, 880 F. Supp. at 1029 ("the problem arises from the likely perception by jurors that FDEs are scientists, which would suggest a far greater precision and reliability than was established by the *Daubert* hearing"); *Hines*, 55 F. Supp. 2d at 64 ("a certain patina attaches to an expert's testimony unlike any other witness; this is 'science,' a professional's judgement, the jury may think, and give more credence to the testimony than [the testimony] may deserve"). By allowing the jury to attach a heightened level of credibility to an "expert" using a mechanism that is by no means accurate, there is too great of a risk that the jury be prejudiced into the belief that handwriting analysis is an exact science.

Unlike the cases on handwriting analysis, the facts of the case at bar present a unique prejudice to the Plaintiff. In many of cases where handwriting analysis is allowed, the judge has



presented a limiting instruction. These instructions inform the jury that they should accept the testimony of handwriting experts only to show similarities between the defendant's writing and the writing in dispute. *See, e.g., Hines*, 55 F. Supp. 2d at 70-71 (jury can hear about similarities between defendant's writing and robbery note, but not the expert's conclusion as to the note's author). In these cases, the alleged author is able to testify as to his or her authorship of the document, and the jury can decide who it chooses to believe. The case at bar does not present this opportunity. Doctor Sheppard died in 1970; as such, the jury would have no testimony to weigh against the testimony of the Defendant's handwriting expert. This creates an undue prejudice against the Plaintiff, who cannot call the alleged author of the writing. Even if the information contained in the handwriting expert's testimony is relevant, its probative value is "substantially outweighed by the danger of unfair prejudice" against the Plaintiff. Evid. R. 403(A).

Additionally, in the Sheppard case, there is a complication over the location of the alleged confession. Unlike other documents, where there are proscribed procedures for recording observations and events, there is no procedure for autographing a book. For example, police and medical reports may be written on forms designed for a specific purpose, such as patients' medical charts or police accident reports. These documents are recorded and stored in accordance with rules governed by trade associations, such as the American Medical Association ("AMA"); or they may be regulated under various local, state or federal laws. As such, it would be easy to link a certain document with an institution, such as the Bay Village Police Department or Bay View Hospital; and from there, it would be possible to link the document to its author.

In the case of the alleged Sheppard confession, there is no mechanism for checking the source of the book. There is no procedure for a book signing, nor is there any procedure for storing such

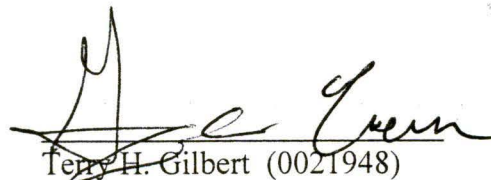
information. Unlike police or medical records, where documents can be authenticated through their compliance with applicable procedures and laws, there is no way to know when the book was purchased, where and how this book was stored and who had access to the book. Because of the unreliability of handwriting analysis, there is no reliable scientific mechanism for determining who authored the alleged confession. As such, without either first-hand accounts or scientifically reliable evidence as to the author of the alleged confessions, the book's authenticity is further questionable, necessitating the book's exclusion.



### III. Conclusion

Because of the unreliable nature of handwriting analysis, this Court should not allow the introduction the allegedly autographed copy of *Endure and Conquer*. The Court should also preclude any testimony as to handwriting analysis conducted on the book and the alleged confessions. Even allowing an expert to testify as to similarities between Dr. Sheppard's writing and the alleged confession would be inherently prejudicial because the alleged author of the writing is unable to contradict the expert's testimony. Furthermore, because of the inability to verify the document's authenticity, it would be unduly prejudicial to the Plaintiff to introduce the book into evidence. For these reasons, the Plaintiff requests that this Court preclude the Defendant from introducing into evidence the alleged confession and any expert testimony as to its authorship of the writing.

Respectfully submitted,



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**Certificate of Service**

The undersigned certifies that the foregoing Motion *in limine* to Exclude Expert Testimony of Handwriting Analysis has been served on William Mason, Prosecuting Attorney, Justice Center, 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 on this 9<sup>th</sup> day of December, 1999.

  
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