

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA  
CRIMINAL DIVISION

FEB 12 - 9 P 5: 30

UNITED STATES OF AMERICA,

DYLAN M. WARD,

JOSEPH R. PRICE,

and

VICTOR J. ZABORSKY,

Defendants.

Criminal Nos. 2008-CF1-26996

2008-CF1-27068

2008-CF1-26997

Judge Lynn Leibovitz

**DEFENDANTS' JOINT MOTION IN LIMINE TO EXCLUDE  
EXPERIMENT EVIDENCE AND TESTIMONY**

Defendants Dylan M. Ward, Joseph R. Price and Victor J. Zaborsky, by and through undersigned counsel, respectfully submit this Joint Motion In Limine To Exclude Experiment Evidence and Testimony.<sup>1</sup>

**I. MR. DEEDRICK'S EXPERIMENT EVIDENCE**

Pursuant to the Court's January 15, 2010 scheduling order, the government's Rule 16(a)(1)(c) expert disclosures were to be provided to the defense on February 5, 2010. Instead, on February 8, 2010 the government provided a supplemental disclosure regarding Mr. Douglas Deedrick, a hair and fiber expert who conducted certain hair and fiber analysis in this case.<sup>2</sup> On March 10, 2010, Mr. Deedrick received a variety of items, including a five inch Wusthof "boning knife," a four-and-a-half inch Wusthof "utility knife," "portions of a white towel," and

<sup>1</sup> In light of the fact that the experiment evidence was not produced to the defense until March 24, 2010, the government consented to Defendants' Motion for an Extension until April 9, 2010, to respond to the experiment evidence and the Defendants filed a timely motion with the Court seeking such an extension.

<sup>2</sup> See Letter from Kirschner to defense counsel, 4 (Feb. 5, 2010).



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“two tubes of equine blood” from another government expert.<sup>3</sup> Using these items Mr. Deedrick proceeded to conduct three new experiments.

Two weeks later, on *March 24, 2010*, the government produced a two-and-a-half page “Report of Examination” authored by Mr. Deedrick (“Report”), stating the results of the three different experiments conducted between March 10 and March 24, 2010, a copy of which is attached as Exhibit A.<sup>4</sup> The Report itself is confusing and vague and does not set forth any specific opinions or the bases for those opinions. Specifically, the Report provides the following limited information about each experiment:

#### Stab Cut Test

*Stab cut tests* were conducted on the two (2) gray T-shirts using the Wusthof boning knife and the Wusthof utility knife. The lengths of the stab cuts are reflected in the following tables. [Tables] It will be necessary to resubmit the victim’s t-shirt (Item 17) in order to compare the stab cut test results.<sup>5</sup>

#### Fabric Imprint Test

*Test Fabric imprints* were made from the “Comcast” and “William & Mary” T-shirts. No imprints like the test imprints were observed in photographs previously taken of the boning knife recovered at the crime scene.

Test fabric imprints were also made with a portion of a white towel. A “dotted” pattern was detected on the test paper. Test imprints on the boning knife using the white towel stained with equine blood revealed patterns similar to those previously observed on the crime scene knife (Item 13).<sup>6</sup>

#### Fiber Transfer Test

*Stab cut tests* were conducted with the boning knife and the black “TULTEX” T-shirt. Three (3) stab cuts were made through the t-shirt into the pork loin and the blade of the knife was examined for fiber transfers. After the fibers were removed, the blade of the knife was thoroughly cleaned. This process was

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<sup>3</sup> Letter from Deedrick to Martin, 1, (Mar. 24, 2010).

<sup>4</sup> Letter from Deedrick to Martin, 1-3 (Mar. 24, 2010) (the “Report”).

<sup>5</sup> Report at 2 (emphasis added).

<sup>6</sup> *Id.* (emphasis added).

repeated two (2) additional times. The fiber transfer test results are included in the following table: [Table]<sup>7</sup>

Other than these four paragraphs and the two referenced tables, no additional information is provided regarding Mr. Deedrick's experiments. Nor does the Report provide any information concerning what controls and protocols—if any—were followed in conducting these experiments.

## II. ARGUMENT

### A. LEGAL STANDARD FOR ADMISSION OF EXPERIMENT EVIDENCE

In this jurisdiction, for “experiment evidence” to be admissible, “the conditions surrounding the experiment” must be “substantially similar to those of the alleged occurrence.” *Taylor v. United States*, 759 A.2d 604, 608 (D.C. 2000). As our Court of Appeals explained in *Taylor*, because of the potential for experiment evidence to “mislead, confuse, divert or otherwise prejudice the purposes of the trial”:

[T]he foundation for admissibility should be scrutinized closely to determine whether the conditions surrounding the experiment were substantially similar to those of the alleged occurrence. In applying the test of substantial similarity, the trial court should be guided by the following principles: Are the dissimilarities likely to distort the results of the experiment to the degree that the evidence is not relevant? Can the dissimilarities be adjusted for or explained so that their effect on the results of the experiment can be understood by the jury? In this connection the court must consider the purpose of the experiment and the degree to which the matter under experiment is a subject of precise science. Absolute certainty is not required if the experiment would be considered valid by persons skilled or knowledgeable in the field which the experiment concerns.

*Id.* (alteration in original) (citations omitted).

In *Taylor*, the defendant was accused of having participated in the armed robbery of a police officer engaged in an undercover drug operation. The robbery was tape recorded and the officer testified at trial that it was the defendant's voice on the police recording. A defense

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<sup>7</sup> *Id.* (emphasis added).

expert made a recording of the defendant's voice and the defendant sought to admit it so that the jury could compare the police recording with the defendant's recording. The matter was appealed and remanded on related issues twice. The Court of Appeals affirmed the trial court's "finding that the proposed tape-to-tape comparison was not minimally reliable for submission to the jury" because "the circumstances surrounding the recording of the two tapes were totally different and as a result of those differences, two very distinctive sounding tapes have been produced [and] . . . the dissimilarities between the two tapes cannot be adjusted or explained so that a comparison of the tapes will render a reliable result." *Taylor*, 759 A.2d at 608.

**B. THE EXPERIMENT EVIDENCE IS NOT SUBSTANTIALLY SIMILAR AND IS INADMISSIBLE.**

**1. The Experiments Lack Sufficient Information Regarding Their Conditions.**

In order for the Court and the Defendants' experts to fully analyze the similarities or discrepancies between "the conditions surrounding the experiment[s]" and "those of the alleged occurrence," *id.*, it is first necessary to have sufficient information regarding the conditions of the experiments. Little if any of this information is provided in Mr. Deedrick's Report.

Specifically, regarding the "Stab Cut Test" the Report states only that "[s]tab cut tests were conducted on the two (2) gray T-shirts . . . ."<sup>8</sup> No information is provided regarding how the "Stab Cut Test" was conducted. For example:

1. How were the t-shirts positioned for the experiment?
2. Were they on stationary objects?
3. Were they moving?
4. If they were moving, how quickly and in what direction?
5. How were the "stabs" conducted?

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<sup>8</sup> Report at 2.

6. What amount of force was used?

7. How was each knife held and what was the angle of the stabbing?

Regarding the “Fabric Imprint Test,” the Report states only that “[t]est fabric imprints were made from the “Comcast” and “William & Mary” T-shirts.” The Report does not define what a “test fabric imprint” is or how the test fabric imprints in this experiment were made. There is simply no information about it whatsoever.

Concerning the “Fiber Transfer Test,” the Report states that the “stab cuts were made through the T-shirt into the pork loin . . .”<sup>9</sup> but leaves any number of significant questions unanswered. For example:

- Was the pork loin being moved at the time the stabbings were made?
- If so, how quickly and in what direction(s)?
- How were the “stabs” conducted?
- What amount of force was used for each stabbing?
- How sharp was each knife?

In addition, given the particular focus of the test, *i.e.*, assessing fiber transfer, how does the viscosity of any residue left by the pork loin on the blade of each knife compare to the viscosity of human blood?

## **2. The Experiments are not Substantially Similar.**

While the foregoing information would be essential to allow defense experts to draw meaningful and complete comparisons between the experiments and the actual stabbing of Mr. Wone, the Court need not consider such information in order to find these particular experiments inadmissible under *Taylor*. The information provided in the Report makes it readily apparent

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<sup>9</sup> *Id.* at 3.

that the conditions of Mr. Deedrick's experiments are not substantially similar to those of the alleged stabbing of Mr. Wone; that "the dissimilarities [are] likely to distort the results of the experiment to the degree that the evidence is not relevant;" and that "the dissimilarities [cannot] be adjusted for or explained so that their effect on the results of the experiment can be understood by the jury." *Taylor*, 759 A.2d at 608. Indeed, unanswered questions about the actual stabbing would, by definition, prevent Mr. Deedrick from successfully conceptualizing experimental circumstances substantially similar to those surrounding the stabbing. Specifically, the following conditions of the actual stabbings are unknown:

- Was Mr. Wone moving when stabbed, and if so, in what direction and at what speed?
- How much force was used to inflict each of the stab wounds?
- How quickly did each stabbing occur?
- How fitted or loose was Mr. Wone's t-shirt, and did the t-shirt itself move during the course of the three stabbings?
- How was the assailant holding the knife and in which hand?
- What was the particular trajectory and angle of the knife as it entered the t-shirt during each stabbing?
- Did the assailant apply pressure in an upward or downward fashion during each stabbing?
- How far along the length of the knife blade was the shirt penetrated?
- How sharp was the knife used in the actual stabbings?

Without such foundational information, none of the government's experiments can be said to approximate, let alone achieve substantial similarity, to the circumstances of Mr. Wone's stabbing, as required by *Taylor*. Consequently, all three are inadmissible.

Specifically, with regard to the "Stab Cut Test," any one or a combination of the unknown conditions would impact the length of each of the cuts created in Mr. Wone's t-shirt.

For example, an application of downward force by the assailant during one of the stabbings could impact the length of the cut in the t-shirt caused by that stabbing. In addition, the manner in which the knife wound impacted the body, including striking tissue, cartilage or bone, would affect the length of the cut to the Mr. Wone's shirt. Similarly, any movement by Mr. Wone could have resulted in changes in size to the cuts in the shirt. Having no factual basis on which to accurately recreate the circumstances under which the cuts in Mr. Wone's t-shirt were made, the experiment is hopelessly and inevitably dissimilar. *Accord, People v. Henderson*, No. C048446, 2006 WL 589383, at \*5 (Cal. App. 3 Dist. Mar. 13, 2006) (holding that "substantial similarity" requirement precluded admitting recreation of a stabbing where "the enactors would also be selecting body movements without any factual basis that would fit their preconceived idea of the manner in which the defendant might have inflicted the wounds."). Moreover, how the cuts in Mr. Wone's t-shirt compare to those made on a t-shirt placed on some unknown object made in some unknown manner by someone who does not know and therefore could not meaningfully replicate the operative conditions of the actual stabbings (angle of blade, pressure applied, movement of assailants arm, etc.), is of absolutely no relevance.<sup>10</sup>

Substantial dissimilarities between experiment and reality likewise render inadmissible Mr. Deedrick's "Fabric Imprint" and "Fiber Transfer" tests. Whatever method Mr. Deedrick employed to create "fabric imprints" using the t-shirts and bags of equine blood, it could hardly reproduce the pattern made by stabbing a living human being through a t-shirt, skin, and internal organs.<sup>11</sup> Furthermore, the Report states that in addition to making imprints (in some unspecified

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<sup>10</sup> Not incidentally, the results of Mr. Deedrick's experiment demonstrated that different sized (longer and shorter) openings were created by the same knife used to stab the same shirt. The experiment also showed that the boning knife and the utility knife created very similar sized cuts (differing as little as 1/16" of an inch according to Mr. Deedrick's means and tool of measurement, neither of which is known). Such results have no determinative value and would plainly only serve to confuse the jury.

<sup>11</sup> According to the defense's blood pattern expert, the wound path of the blade contributes to the pattern

way) using the t-shirts, Mr. Deedrick used a “white towel” which created “[a] dotted pattern . . . on the *test paper*.”<sup>12</sup> As the actual patterns at issue here are alleged to have been created on the steel blade of a knife, any patterns created on paper with a towel, a t-shirt or anything else, are entirely dissimilar and thus irrelevant.

Significant other concerns are raised by the results of Mr. Deedrick test by stabbing a pork loin wearing a t-shirt. Putting aside all the unknown variables of the actual stabbings, it is axiomatic that the number of fibers transferred while stabbing a t-shirt-draped pork loin has no meaningful relevance to the fiber transfer that occurs when a living human being is stabbed through a t-shirt. First of all, the fact that human blood would be deposited and removed from the surface of the blade in the course of a real stabbing makes any results from Mr. Deedrick’s experimental stabbing of a pork loin utterly irrelevant. Moreover, it is not difficult to imagine how the results of such an experiment could easily be influenced by the person conducting it. For example, according to the defense’s fiber experts, the degree of fiber transfer would change according to the speed and the angle with which the knife was inserted and removed from the pork loin through the t-shirt. The ability of the experimenter to influence the outcome of a given experiment was a significant factor in the *Taylor* court’s determination that “courts are obligated to make a thorough foundational inquiry into [the experiment evidence’s] reliability before admitting it.” *Id.* (noting trial court’s finding that “a defendant can alter the sound of his or her voice with relative ease” was among factors warranting exclusion of the experiment evidence).

Finally, both the “Stab Cut Test” and “Fiber Transfer Test,” and any testimony concerning them, are properly excluded because “the matter under experiment is [not] a subject of precise science.” *Taylor*, 759 A.2d at 608. The blood pattern experiment, though dealing

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left on the blade.

<sup>12</sup> *Id.* at 2.



with a recognized forensic science discipline, is nevertheless inadmissible because of its dissimilarity to the actual stabbings, and, as set forth below, because it was conducted by someone unqualified in that forensic science discipline.

**C. MR. DEEDRICK IS NOT QUALIFIED TO CONDUCT THE “STAB CUT TEST” AND “FABRIC IMPRINT TEST” EXPERIMENTS OR TESTIFY TO THEIR RESULTS.**

All three experiments were carried out by Mr. Deedrick, a hair and fiber analyst whose *curriculum vitae* indicates that he was formerly employed by both the Federal Bureau of Investigation Laboratory and, more recently, the Metropolitan Police Department Forensic Science Services Division, where he specialized in “Human/Animal Hair Identification,” “Fiber/Fabric Examinations,” and “Feather Identification.”<sup>13</sup>

As more fully set forth in various other of the Defendants’ motions in limine,<sup>14</sup> for expert testimony to be admissible the trial court must conclude, among other things, that the expert witness whose testimony is offered has “sufficient skill, knowledge, or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth.” *Dyas v. United States*, 376 A.2d 827, 832 (D.C.), *cert. denied*, 434 U.S. 973 (1977). Here, Mr. Deedrick has no qualification in blood stain/pattern analysis, no training as a forensic pathologist, and no expertise or training in crime scene reconstruction. As such it appears that he is qualified neither to conduct the “Stab Cut Test” and “Fabric Imprint Test,” nor to testify as to their results.

Regarding the “Fiber Transfer Test,” we understand that the Government will submit Mr. Deedrick as an expert qualified to conduct fiber analysis. What qualifications or experience he

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<sup>13</sup> See Letter from Kirschner to defense counsel (Feb. 25, 2010); Douglas Deedrick “Statement of Qualifications” at 1, produced at P2433-2435.

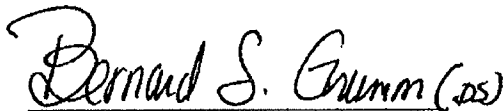
<sup>14</sup> See, e.g., Defendants’ Joint Motion In Limine To Exclude Argument And Testimony That The Crime Scene Was Cleaned And To Limit Argument And Testimony Regarding Lack Of Blood Evidence, 9-11 (Mar. 29, 2010).

has in conducting experiments concerning fiber transfer is an open question, though moot in light of the fact that these particular experiments relating to fiber transfer occurring during the violent stabbing of a human being are inadmissible for the reasons we have stated above.

**CONCLUSION**

For these reasons, the Defendants respectfully move to exclude all expert testimony and evidence concerning or based on the experiments conducted by Mr. Deedrick and reported in his Report of Examination, dated March 24, 2010.

Respectfully Submitted,



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*Counsel for Defendant Victor J. Zaborisky*

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA  
CRIMINAL DIVISION**

**UNITED STATES OF AMERICA,**

**v.**

**DYLAN M. WARD,**

**JOSEPH R. PRICE,**

**and**

**VICTOR J. ZABORSKY,**

**Defendants.**

**Criminal Nos. 2008-CF1-26996  
2008-CF1-27068  
2008-CF1-26997**

**Judge Lynn Leibovitz**

**ORDER**

Upon consideration of Defendants' Joint Motion In Limine To Exclude Experiment Evidence and Testimony, and in consideration of the entire record herein, it is hereby

ORDERED this \_\_\_\_ day of \_\_\_\_\_, 2010 that Defendants' Motion is GRANTED.

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JUDGE LYNN LEIBOVITZ

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Defendants' Joint Motion In Limine To Exclude Experiment Evidence and Testimony, was served, via electronic delivery and first class mail, this 9<sup>th</sup> day of April, 2010 upon:

Glenn Kirschner, Esq.  
T. Patrick Martin, Esq.  
Rachel Carson-Lieber, Esq.  
Assistant United States Attorney  
Office of the United States Attorney  
for the District of Columbia  
555 Fourth Street, N.W.  
Washington, D.C. 20001

  
\_\_\_\_\_  
Veronica Jennings

# EXHIBIT A

**REPORT OF EXAMINATION**

To: AUSA Thomas Martin  
Office of the United States Attorney  
for the District of Columbia  
555 Fourth Street, NW  
Washington, D.C. 20530

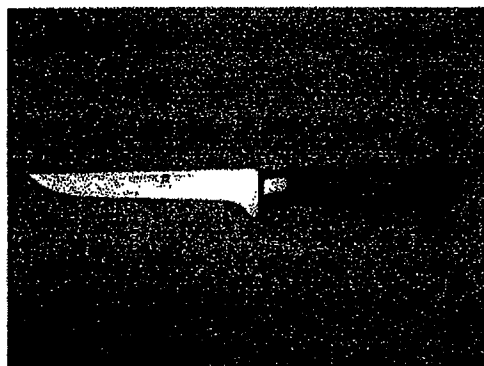
Date: March 24, 2010

FBI Case ID: 95A-HQ-1534475  
MPD Case ID: MCL #06-08779/CCN 2006-105-033

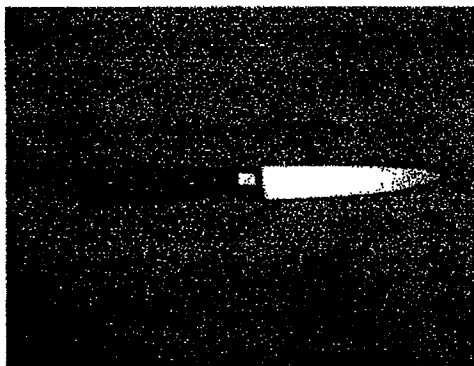
Title: ROBERT ERIC WONE – VICTIM;  
HOMICIDE

The following items were received from Robert Spalding on March 10, 2010:

Wusthof / 5" boning knife (photograph #1)  
Wusthof / 4 ½" utility knife (photograph #2)  
Portions of white towel  
Two (2) tubes of equine blood



*Photo #1 – Wusthof boning knife*



*Photo #2 – Wusthof utility knife*

The following items were acquired for testing purposes:

Gray T-shirt, GILDAN ULTRA COTTON, 99% cotton/1% polyester  
(COMCAST) logo  
Gray T-shirt, DELTA PRO WEIGHT, 90% cotton/10% polyester  
(William & Mary) logo  
Black T-shirt, TULTEX, 100% cotton, (Ryoga Hibiki/Anime World Tour) logo  
Foam blocks  
Pork loin



*Deedrick Forensics, LLC*

**Results of Examination:**

Stab Cut Test

Stab cut tests were conducted on the two (2) gray T-shirts using the Wusthof boning knife and the Wusthof utility knife. The lengths of the stab cuts are reflected in the following tables:

KNIFE	T-SHIRT	CUT #	LENGTH OF CUT
BONING	"COMCAST"	1	11/16"
BONING	"COMCAST"	2	12/16"
BONING	"COMCAST"	3	1" (complete length of blade)

KNIFE	T-SHIRT	CUT #	LENGTH OF CUT
UTILITY	"COMCAST"	1	13/16"
UTILITY	"COMCAST"	2	14/16"
UTILITY	"COMCAST"	3	13/16"

KNIFE	T-SHIRT	CUT #	LENGTH OF CUT
BONING	"WILLIAM & MARY"	1	12/16"
BONING	"WILLIAM & MARY"	2	10/16"
BONING	"WILLIAM & MARY"	3	12/16"

KNIFE	T-SHIRT	CUT #	LENGTH OF CUT
UTILITY	"WILLIAM & MARY"	1	11/16"
UTILITY	"WILLIAM & MARY"	2	11/16"
UTILITY	"WILLIAM & MARY"	3	11/16"

It will be necessary to resubmit the victim's T-shirt (Item 17) in order to compare the stab cut test results.

Fabric Imprint Test

Test fabric imprints were made from the "COMCAST" and "WILLIAM & MARY" T-shirts. No imprints like the test imprints were observed in photographs previously taken of the boning knife recovered at the crime scene (Item 13).

Test fabric imprints were also made with a portion of a white towel. A "dotted" pattern was detected on the test paper. Test imprints on the boning knife using the white towel stained with equine blood revealed patterns similar to those previously observed on the crime scene knife (Item 13).

*Deedrick Forensics, LLC*

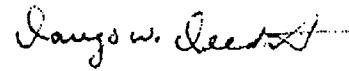
Fiber Transfer Test

Stab cut tests were conducted with the boning knife and the black "TULTEX" T-shirt. Three (3) stab cuts were made through the T-shirt into the pork loin and the blade of the knife was examined for fiber transfers. After the fibers were removed, the blade of the knife was thoroughly cleaned. This process was repeated two (2) additional times. The fiber transfer test results are included in the following table:

TEST #	STAB CUTS #	LENGTHS OF CUTS	# OF BLACK COTTON FIBERS
1	1-3	10/16", 12/16", 13/16"	>20
2	1-3	14/16", 10/16", 12/16"	>40
3	1-3	11/16", 11/16", 10/16"	Approx. 15

**Remarks:**

The test materials and the glass microscope slides are being temporarily retained.



Douglas W. Deedrick  
Deedrick Forensics, LLC