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SUPERIOR COURT OF
THE DISTRICT OF COLUMBIA
CLERK

IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

2010 APR 19 P 1:35

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

Status Hearing – April 23, 2010

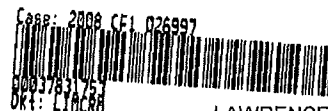
REPLY IN SUPPORT OF DEFENDANTS' MOTIONS IN LIMINE
TO EXCLUDE ARGUMENT, TESTIMONY AND EVIDENCE
REGARDING SEXUAL ASSAULT

On February 26, 2010, Defendants Dylan M. Ward, Joseph R. Price and Victor J. Zaborsky, moved to exclude evidence of uncharged conduct, including the alleged sexual assault of Mr. Wone.¹ On April 2, 2010, the Defendants moved *in limine* to exclude argument, testimony and evidence regarding the alleged sexual assault and chemical incapacitation of Mr. Wone.² In both motions, the Defendants requested a *Frye* hearing to challenge the admissibility of the Government's purported "scientific evidence" of sexual assault.

The Government has now taken the position that it: "do[es] not intend to introduce evidence of, or espouse theories about, paralytic agents or sexual assault in our case-in-chief. However we reserve the right to do so, should the defense open the door,

¹ See Defendants' Joint Response to the Government's Notice of Uncharged Conduct I and Motion *in Limine* to Exclude Evidence of Uncharged Conduct (Feb. 26, 2010).

² See Defendants' Joint Motion *In Limine* to Exclude Argument, Testimony and Evidence Regarding Sexual Assault and Chemical Incapacitation (Apr. 2, 2010).



either during cross-examination of government witnesses or in its case in chief.”³ In the government’s “Omnibus Opposition to Defendants’ Motion in Limine” (“Omnibus Opposition”), it states that “the government still believes that there is admissible evidence tending to show that Mr. Wone *may* have been sexually assaulted before his death. . . . That said, for strategic reasons, the government will not seek to introduce such evidence at trial unless it feels that the introduction of such evidence is necessary to address (and correct) misleading inferences advanced by the defendants either through their examination of trial witnesses or in counsels’ openings or closings.”⁴ *In light of the Government’s position that it could and may seek to introduce so-called “evidence” of sexual assault, the Defendants’ pending motions in limine to exclude the Government from attempting to suggest or argue that Mr. Wone was sexually assaulted remain at issue.*

As set forth below, the simple fact is that there is no “door to be opened.” All three of the Defendants’ forensic pathologists⁵ and the Defendants’ sexual assault expert, Suzanne Rotolo, PhD, MSN, RN, SANE-A, SANE-P, CFN, share the opinion that *there is no evidence that Mr. Wone was sexually assaulted*. Indeed, Dr. Rotolo, a registered nurse who has specialized in sexual assault nurse examinations (“SANE”) for more than nineteen years and who has conducted literally thousands of sexual assault exams, is of

³ Email from Leiber to defense counsel, 1 (Mar. 23, 2010). *See also* Hr’g Tr. 41:24 - 46:10 (Mar. 12, 2010).

⁴ Government’s Omnibus Opposition to Defendants’ Motion in Limine, 23 (Apr. 16, 2010) (emphasis added).

⁵ *See* Expert Disclosure of Dr. Michael Baden, ¶11 (Feb. 26, 2010) (“Dr. Baden will further testify that there is no medical or forensic evidence that Mr. Wone was sexually assaulted.”); Expert Disclosure of Dr. Vincent Di Maio, ¶15 (Feb. 26, 2010) (Dr. Di Maio will testify that there is no medical evidence that Mr. Wone was sexually assaulted.”); Expert Disclosure of Dr. Jonathan Arden, ¶14 (Feb. 26, 2010) (The evidence “does not support the conclusion that Mr. Wone was sexually assaulted.”).

the opinion “based on her review of the medical and forensic evidence in this case, and her nearly two decades of experience in the criminal forensic examination of sexual assault victims, *there was and is no good faith evidentiary basis upon which to allege that Mr. Wone was sexually assaulted.*”⁶

Given the absence of any evidence of sexual assault, and in light of the consensus of the relevant scientific community that the serological testing results of the type relied upon by the Government in this case do not support a finding of sexual assault, there is simply no “door” to be opened. Consequently the Defendants’ motions *in limine* to exclude all argument, testimony and evidence that Mr. Wone was sexually assaulted, which are now fully briefed, should be granted.

I. ARGUMENT

A. THE GOVERNMENT’S CLAIM OF “SEXUAL ASSAULT”

From the night of Mr. Wone’s stabbing, the Government made sexual assault a foundation of its investigation and, later, its case against the Defendants. The fact that there is no evidence to support this allegation has in no way impeded the Government from making it. Indeed, at 7:05 a.m., on August 3, 2006, while the Defendants were still being interrogated and before Mr. Wone had even been autopsied, a lead MPD detective on the investigation told the Medical Examiner’s Office that Mr. Wone’s death was suspected of being “some sort of homosexual related crime.”⁷ The transcripts of the Defendants’ interrogations likewise reveal that within hours of Mr. Wone’s death, the investigating officers *leapt* to the conclusion that because Mr. Wone was a straight man in a house with three gay men, his murder simply *must* be related to a sexual assault.

⁶ Expert Disclosure of Dr. Susan Rotolo, ¶11 (Feb. 26, 2010), attached at Exhibit A.

⁷ OCME Investigative Report, 1 (Aug. 3, 2006).

In contradiction to the investigating officers' theories of sexual assault, Mr. Wone's August 3, 2006 autopsy revealed no evidence of a sexual assault.⁸ Nevertheless, pursuant to a request from MPD, biological specimens were collected from Mr. Wone using a standard "sexual assault kit."⁹ For whatever reason—perhaps because there was no evidence of Mr. Wone having been sexually assaulted—the specimens were not sent to the FBI Laboratory for testing until September 4, 2008, over two years after Mr. Wone's death.¹⁰ The FBI Laboratory processed the specimens and reported to the government that extremely minute amounts of what the FBI Laboratory deemed Mr. Wone's own "semen"¹¹ was found in and around Mr. Wone's genitals and anus. The FBI Laboratory also conducted DNA testing and determined that all of the *so-called* "semen" was that of Mr. Wone and that no sperm cells were present.¹²

Apparently without further discussion with a knowledgeable expert on sexual assault, the Government deemed the FBI's Laboratory findings "proof" that Mr. Wone was sexually assaulted. On October 27, 2008, just weeks after receiving these results from the FBI Laboratory, the Government indicted and arrested the Defendants for obstruction of justice. Though not officially charged with sexually assaulting Mr. Wone, the affidavits submitted in support of the arrests made it clear that the Government's case against all three Defendants was based in large part on its "evidence" that the Defendants

⁸ Autopsy, 2 (Aug. 18, 2006). *See also* Defendants' Joint Response to the Government's Notice of Uncharged Conduct I, 24-25 (Feb. 26, 2010).

⁹ Government's Notice of Uncharged Conduct I, 4 (Feb. 5, 2010) ("Notice I").

¹⁰ *See* FBI Laboratory Report of Examination, 2 (Nov. 24, 2008).

¹¹ As fully set forth herein and in the Defendants' Joint Response to the Government's Notice of Uncharged Conduct I, 28-31 (Feb. 26, 2010), the PSA (also known as "p30") test used by the FBI Laboratory does not detect the presence of semen, rather, according to the manufacturer of the test, it detects the presence of "PSA in seminal fluid." Seratec PSA Semiquant Instructions for Use, 1 (June 2009).

¹² Affidavits in Support of Arrest Warrants, 6 (Oct. 27, 2008).

had drugged and sexually assaulted Mr. Wone. The affidavits emphasized the Defendants' sexual orientations and histories, repeated the FBI Laboratory's findings concerning the presence of Mr. Wone's own "semen," and stated that "*Dr. Goslinoski opined that, taking all the evidence and circumstances into consideration, this finding is suggestive of Mr. Wone having been sexually assaulted.*"¹³

Following the Defendants' indictment, the Government continued to publicly and graphically articulate its theory that one or more of the Defendants drugged, sexually assaulted, tortured and then murdered Mr. Wone. The following statement made by Assistant United States Attorney ("AUSA") Glenn L. Kirschner in open Court on December 19, 2008, makes this unequivocally clear:

And Mr. Schertler also said, there's no evidence that any of these men [the Defendants] are dangerous. You know, Your Honor, the Government has to disagree with that. I appreciate that we're not in here arguing that we can show by clear and convincing evidence future danger to the community as a basis for retention, but we have an innocent victim who was over prolonged period time [sic] -- and when I say prolonged, an hour perhaps, *was tortured, was incapacitated, was sexually suffocated, was sexually abused, had eight needle puncture marks on his body, was -- there was an ejaculation that occurred He [Mr. Wone] was then allowed to lie there, dying, and digesting his own blood for a considerable period of time . . .*¹⁴

The same claims of drugging and sexual assault comprised the overwhelming majority of the Government's February 5, 2010 "Notice of Uncharged Conduct I,"¹⁵ in which the Government paints the Defendants as sexual deviants who presumably had the propensity to drug, sexually assault, dominate and murder Mr. Wone.¹⁶ In support of

¹³ *Id.* at 4-6 (emphasis added).

¹⁴ Hr'g Tr. 30:19 - 31:17 (Dec. 19, 2008) (emphasis added).

¹⁵ Notice I, at 2-7 (the Notice I is 13 pages in length).

¹⁶ Notice I, at 6 ("One could argue that the ultimate in dominating another human being is the

these extraordinary allegations, the Government did not simply repeat the FBI Laboratory's misleading conclusion that it had detected minute amounts of Mr. Wone's own "semen," but instead incorrectly claimed that Mr. Wone's own "sperm" had been found:

The evidence has revealed that all six swabs [collected during Wone's autopsy] taken from victim's [sic] thighs, genitals, rectum and anal cavity, disclosed the presence of **sperm**. The quantities were very small and had to be combined by the FBI analysts to develop a DNA profile. Once combined and tested, there was no DNA found other than that of the victim. *The medical examiner opined that such evidence is suggestive of sexual assault.* Accordingly, the government may seek to introduce other items recovered from 1509 Swann Street that provide the means to commit a sexual assault. . . . [A laundry list of sex-toys follows.] As these items provide the means by which to perpetrate a sexual assault, they are plainly relevant in this case.¹⁷

On March 12, 2010, after a year and a half of publicly alleging that the Defendants drugged and sexually assaulted Mr. Wone (and at the first court hearing following the filing of the Defendants' Response), the Government announced that it was "moving away from" arguing that Mr. Wone was sexually assaulted¹⁸ and would no longer be arguing that Mr. Wone was injected with a paralytic agent. As AUSA Kirschner stated in response to the Court's inquiries: "I don't know that we're actually going to get to the paralytic phase to be honest."¹⁹ In response to requests from defense counsel that the Government clarify its position, on March 23, 2010, the Government emailed defense counsel stating that "[c]onsistent with what [AUSA Kirschner] said at the March 12 status hearing and our discussions in the discovery conference last Friday,

taking of that person's life.").

¹⁷ Notice I, at 4-5 (emphasis added).

¹⁸ Hr'g Tr. 42:3 - 4 (Mar. 12, 2010).

¹⁹ Hr'g Tr. 43:233 - 24 (Mar. 12, 2010).

we do not intend to introduce evidence of, or espouse theories about, paralytic agents or sexual assault in our case-in-chief. However we reserve the right to do so, should the defense open the door, either during cross-examination of government witnesses or in its case in chief."²⁰

On March 25, 2010, defense counsel wrote to the Government stating in pertinent part that:

I believe we all agree that no sexual assault ever occurred and that Mr. Wone was not injected with a paralytic agent, as there is no reliable forensic evidence available to support either of these theories. . . . Because there is no credible evidence that either a sexual assault or use of a paralytic drug occurred here, such testimony would be neither admissible nor relevant; we consequently are unclear as to what circumstances the government contends would "open the door." We would appreciate your clarification of the government's position and believe, respectfully, that because there is no evidentiary basis on which to base the claim that Mr. Wone was sexually assaulted or drugged, such claims would be inappropriate and impermissible during any phase of the trial of this matter.²¹

The Government did not respond to defense counsel's letter, but at the April 5, 2010 status conference in this matter, the Government made clear that if the "door was opened," it would seek to argue and introduce "evidence" to the jury that Mr. Wone had been drugged and sexually assaulted.

While the Government's efforts to avoid publicly conceding that Mr. Wone was never sexually assaulted are not surprising, they are legally untenable. The Government cannot simply avoid a ruling on the admissibility of its fictitious "evidence" of sexual assault and drugging by stating that it *may* not seek to introduce such evidence at trial. This is obviously the Government's strategy and it concedes as much in its Omnibus

²⁰ Email from Leiber to defense counsel, 1 (Mar. 23, 2010). See also Hr'g Tr. 41:24 - 46:10 (Mar. 12, 2010).

²¹ Letter from Grimm to Kirschner, 2-3 (Mar. 25, 2010), attached at Exhibit B.

Opposition, stating that “[i]t is the government’s understanding that the Court has effectively denied the defendants’ motion in limine to exclude evidence of sexual assault as moot, in recognition of the government’s express representation that it would not seek to introduce such evidence in its case-in-chief.”²² As the the Government plainly “reserves the right” to seek to introduce such inflammatory allegations if the “door is opened,” it is, perforce, necessary to resolve what argument or “evidence”—if any—could come through that door. This is particularly true in light of the significant and central role that the Defendants’ sexual orientations and sex lives have played in the Government’s investigation and prosecution of this case.²³ The Government cannot forestall such a determination by threatening to make unfounded and inflammatory claims for which there is no evidentiary basis.

**B. THERE IS NO EVIDENCE—AND NEVER HAS BEEN—OF
MR. WONE HAVING BEEN SEXUALLY ASSAULTED.**

In their February 26, 2010 Response to the Government’s Notice of Uncharged Conduct I (“Response”), the Defendants methodically and systematically examined the Government’s purported evidence of sexual assault,²⁴ demonstrating that the scientific evidence does not—in any fashion—support any suggestion of a sexual assault.²⁵

²² Omnibus Opposition at 23.

²³ The Government’s recently filed “Notice of Uncharged Conduct II” demonstrates the Government’s continuing aim to distract and inflame the jury with baseless allegations regarding the Defendants’ supposed sexual proclivities and relationships. See Government’s Notice of Uncharged Conduct II, 6-8 (Apr. 2, 2010). The defense addresses the legal impropriety of such an effort in its Joint Response to the Government’s Notice of Uncharged Conduct II, to be filed April 19, 2010.

²⁴ The Defendants also addressed the lack of evidence of Mr. Wone having been drugged. See Defendants’ Joint Response to the Government’s Notice of Uncharged Conduct I, 11-32 (Feb. 26, 2010) (“Response”).

²⁵ See Response at 23-32.

Specifically, the defense explained that the distinction between “sperm” and “seminal fluid” has critical forensic significance. Sperm, also referred to as spermatozoa, are released from the male penis at the time of ejaculation. Approximately 70 to 150 million sperm are released in a given ejaculation.²⁶ Seminal fluid, by comparison, is a biological fluid comprised of several different biological components “that originate from several sources including seminal vesicles and the prostate gland. The prostate is the source of the protein Prostate Specific Antigen, [commonly referred to as “PSA”] or p30 protein.”²⁷ Significantly, seminal fluid, unlike sperm cells, is released not only in an ejaculation, but also at the time of death: “muscle relaxation immediately after death explains the finding of leaking out of urine or seminal fluid from the orificium of the urethra [opening of the penis] owing to flaccidity of the urinary bladder and the pelvic diaphragm.”²⁸ Seminal fluid is also discharged at the time of death as “the result of contraction due to the postmortem rigidity of the layer of muscle in the wall of the seminal vesicles.”²⁹

Contrary to the Government’s claims in its Notice I, the FBI Laboratory found *no* “sperm” on or in Mr. Wone.³⁰ What the FBI Laboratory did find on the swabs used to collect samples on and around Mr. Wone’s genitals and on and in his anus, was the presence of PSA (also known as “p30”).³¹ As explained in our Response, the test used by

²⁶ FBI Lab Serology Procedure Manual, “Procedure for the Microscopic Identification of Spermatozoa,” 1 (Dec. 3, 2007).

²⁷ *Id.*

²⁸ Michael Tsokos, 3 Forensic Pathology Reviews, 205 (2005). *See also* Michael S. Shkrum et al., *The Forensic Pathology of Trauma: Common Problems for the Pathologist* 24 (2007).

²⁹ *See also* Werner M. Spitz et al., *Medicolegal Investigation of Death*, 28 (3rd ed. 1993).

³⁰ *See* Serological Examination, 1-2 (Sept. 23, 2008), produced at P1954-P1955.

³¹ “p30” refers to the molecular weight of PSA. “p30” and PSA are the terms used by the FBI Laboratory. *See* Serological Examination, 1-2, (Sept. 23, 2008); FBI Laboratory Serology Procedure Manual § 7.4.13.1 (Dec. 3, 2007) (italics in original).

the FBI Laboratory on the swabs was the "Seratec PSA test kit," which is specifically designed to detect "PSA in seminal fluid." PSA is present and detectable in not only seminal fluid, but also blood and urine³² and the tissue and cells of the prostate, urethra, urinary bladder and anal gland.³³

As our Response explained, given when and where the specimens were collected, it is hardly surprising that they tested positive for PSA. PSA in the seminal fluid alone (or collectively from the seminal fluid, blood and urine) would invariably produce positive PSA results for the swabs collected in and around the genitals. The swabs from inside the anus would also be expected to be positive for PSA given the presence of PSA in the tissue of the prostate cells and anal gland. Indeed, in a study reported last year in the *Journal of Forensic and Legal Medicine*, 64% of the samples taken from the rectum of male corpses known not to have been sexually assaulted produced a **positive** PSA result using the Seratec PSA test.³⁴

Independently, contamination could well account for positive PSA results on the swabs used to take anal specimens from Mr. Wone. Indeed, the Government stated in a recent letter to defense counsel, the Government's own forensic pathology expert, "Dr. Fowler is also of the opinion that, in his experience, semen recovered from inside a

³² Seratec PSA Semiquant Instructions for Use, 1 (June 2009).

³³ S. Kamoshida, et al., "Extraprostatic localization of prostatic acid phosphatase and prostate-specific antigen; distribution in cloacogenic glandular epithelium and sex-dependent expression in human anal gland," 21 *Human Pathology*, 1108-01 (1990); Gaves HCB, "Nonprostatic sources of protein-specific antigen: a steroid hormone-dependent phenomenon?," 41 *Clinical Chemistry*, 7-9 (1995).

³⁴ Phillippe Lunetta, Helmuth Sippel et al., "Positive prostate-specific antigen (PSA) reaction in post-mortem rectal swabs: A cautionary note," 16 *Journal of Forensic and Legal Medicine*, 397-399 (2009).

decedent's anal cavity is generally and most likely the product of cross-contamination at the time the samples are being taken during the autopsy."³⁵

As previously noted, Defendants' three forensic pathologists³⁶ and the Defendants' sexual assault expert, Suzanne Rotolo, PhD, MSN, RN, SANE-A, SANE-P, CFN share the view that there is simply no evidence of sexual assault. Dr. Rotolo, specialized in sexual assault nurse examinations ("SANE") for more nearly two decades, has conducted thousands of sexual assault exams and has testified in dozens of cases, most frequently on behalf of the prosecution. She is a charter member of the International Association of Forensic Nurses, is past president of the Virginia State Council of Sexual Assault Examiners, and served on the Department of Justice's National Standards, Practice, and Training for Sexual Assault Forensic Examinations Focus Group from 2002-2007. As indicated in Dr. Rotolo's February 26, 2010 expert disclosure, it is her expert opinion, "based on her review of the medical and forensic evidence in this case, and her nearly two decades of experience in the criminal forensic examination of sexual assault victims, there was and is no good faith evidentiary basis upon which to allege that Mr. Wone was sexually assaulted."³⁷

³⁵ See Letter from Kirschner to defense counsel, 2 (Mar. 12, 2010).

³⁶ See Expert Disclosure of Dr. Michael Baden, ¶11 (Feb. 26, 2010) ("Dr. Baden will further testify that there is no medical or forensic evidence that Mr. Wone was sexually assaulted."); Expert Disclosure of Dr. Vincent Di Maio, ¶15 (Feb. 26, 2010) (Dr. Di Maio will testify that there is no medical evidence that Mr. Wone was sexually assaulted."); Expert Disclosure of Dr. Jonathan Arden, ¶14 (Feb. 26, 2010) (The evidence "does not support the conclusion that Mr. Wone was sexually assaulted.").

³⁷ Expert Disclosure of Dr. Susan Rotolo, ¶11 (Feb. 26, 2010), attached at Exhibit A.

**C. DR. GOSLINOSKI'S OPINION THAT MR. WONE MAY
HAVE BEEN SEXUALLY ASSAULTED IS INADMISSIBLE.**

As more fully set forth in various other of the Defendants' motions in limine,³⁸ 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). In addition, "[a]n expert's 'opinion must be based on fact or adequate data . . . [N]ot a mere guess or conjecture.'" *Haidak v. Corso*, 841 A.2d 316, 327 (D.C. 2004).

Here, the sole person identified by the Government as espousing the view that Mr. Wone may have been sexually assaulted is medical examiner Lois Goslinoski, DO.³⁹ Based on the qualifications delineated by the government and her *curriculum vitae*,⁴⁰ it does not appear that Dr. Goslinoski has any particular training or expertise of any kind in determining, in the absence of actual physical evidence of assault, whether a sexual assault *might* have occurred. Her speculation that Mr. Wone might have been sexually assaulted appears to be based on her inexperience with or lack of knowledge concerning the forensic limitations of a positive PSA test on samples collected from a male corpse.

In any event, whatever her expertise, Dr. Goslinoski's reported opinion that she believes Mr. Wone might have been sexually assaulted is nothing more than conjecture.⁴¹

³⁸ 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).

³⁹ See Affidavit at 6, (Oct. 27, 2008); Notice I at 4-5 (emphasis added).

⁴⁰ *Curriculum Vitae* of Lois Goslinoski, DO, produced at P2429 - P2432.

⁴¹ Whether this truly is Dr. Goslinoski's opinion remains an open question, since the opinion is not included in either of her expert disclosures provided by the government. See Letter from

As set forth above, there is no physical or forensic evidence of sexual assault. For this reason the Defendants' three forensic pathologists, all of whom are board certified, and Dr. Rotolo, a preeminent member of the SANE community, all agree and conclude that there is no evidence to support an allegation that Mr. Wone was sexually assaulted. Because it is purely speculative and not based upon asserted facts, Dr. Goslinoski's "opinion" is inadmissible.

**D. TESTIMONY THAT "SEMEN" WAS FOUND
ON OR IN MR. WONE IS INADMISSIBLE.**

As previously noted, the FBI Laboratory reported the presence of "semen" on six of the eight swabs used to collect biological samples from Mr. Wone.⁴² "Semen," also known as male ejaculate, is a combination of sperm cells, seminal fluid and other biological components manufactured by the male reproductive organs.⁴³ According to the FBI Laboratory's "Serology Procedure Manual," "human semen is conclusively identified on evidentiary items through the visual observation of human spermatozoa [sperm cells]."⁴⁴ For reasons known only to the FBI Laboratory, its Serology Procedure Manual also specifies that "[t]he following general statement should be included in the report when a positive PSA test result is obtained for a questioned stain: '*Semen was identified on specimen Q1.*'"⁴⁵

In compliance with the latter protocol, the serological analyst in this case, after obtaining positive PSA results on six of the swabs, stated "[s]emen was identified on

Kirschner to defense counsel, 3-4 (Feb. 5, 2010); Letter from Kirschner to defense counsel, 2-3 (Feb. 25, 2010) (delivered Mar. 8, 2010).

⁴² FBI Lab Report of Examination, 5 (Nov. 24, 2008), produced at P231.

⁴³ Department of Justice, "President's DNA Initiative - DNA Analyst Training," available at http://www.nfstc.org/pdi/Subject02/pdi_s02_m02_04.htm

⁴⁴ FBI Laboratory Serology Procedure Manual, "Procedure for the Microscopic Identification of Spermatozoa," 1 (Dec. 3, 2007).

⁴⁵ FBI Laboratory Serology Procedure Manual § 7.4.13.1 (Dec. 3, 2007) (*italics in original*).

specimens [list of specimen numbers].”⁴⁶ This statement is both misleading and contrary to the consensus of the scientific community—and the manufacturer of the Seratec PSA test kit used by the FBI Laboratory—that the test detects the presence of “PSA in *seminal fluid*,” *not the presence of semen*.⁴⁷ Indeed, the “Instructions for Use” accompanying the Seratec PSA test state that “PSA is one of the major proteins in *seminal fluid*” which makes “PSA an interesting marker in forensic science for the detection of even small amounts of *seminal fluid*.”⁴⁸ The Instructions for Use also acknowledge, as previously noted, that PSA is contained in other bodily fluids including “blood” and “urine.”⁴⁹

Consequently, any expert testimony relying on the FBI Laboratory’s erroneous reporting of the presence of “semen” would be impermissible on the basis that it would not be based on “fact or adequate data.” *Dyas*, 376 A.2d at 832. Similarly, any argument or lay testimony regarding the finding of semen is inadmissible on the basis that it has no probative value and would serve only to confuse and mislead the jury. *See Johnson v. United States*, 683 A.2d 1087, 1099-1100 (D.C.1996) (en banc) (evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.”).

III. CONCLUSION

For the foregoing reasons, Defendants respectfully submit that the Court should grant the Defendants’ motions in limine to exclude argument, testimony and evidence regarding the alleged sexual assault of Mr. Wone, including but not limited to any argument or testimony concerning the erroneous report of the presence of “semen.”

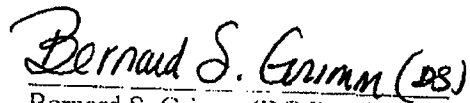
⁴⁶ FBI Lab Report of Examination, 5 (Nov. 24, 2008), produced at P231.

⁴⁷ Seratec PSA Semiquant Instructions for Use, 1 (June 2009) (emphasis added).

⁴⁸ *Id.*

⁴⁹ *Id.*

Respectfully submitted,

 (DS)

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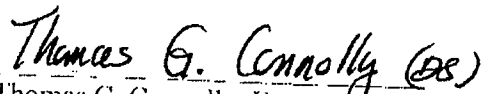
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendants' Reply in Support of Defendants' Joint Motions In Limine To Exclude Argument, Testimony and Evidence Regarding Sexual Assault, was served by hand, this 19th day of April, 2010, upon:

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T. Patrick Martin, Esq.
Rachel Carlson-Lieber, Esq.
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David Schertler