UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	CRIMINAL ACTION 08 CR 10268 WGY
FRANK R. RAGO, and LOUIS G. DESISTO,	)	
Defendants.	)	

LEAVE TO FILE GRANTED BY ORDER DATED OCT. 30, 2009

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION IN LIMINE TO EXCLUDE GERALD LAPORTE'S OPINION TESTIMONY ON *DAUBERT* AND OTHER GROUNDS OR, ALTERNATIVELY, FOR AN EVIDENTIARY HEARING

Defendants, Frank R. Rago and Louis G. DeSisto, submit this reply in support of their motion in limine to exclude Gerald LaPorte's opinion testimony on *Daubert* and other grounds, or alternatively, for an evidentiary hearing (Docket No. 44).

I. THE GOVERNMENT'S ATTEMPT TO EXECUTE A CONDITIONAL AND STRATEGIC RETREAT CONCERNING LAPORTE'S TESTMONY SHOULD BE REJECTED.

The government states that it will no longer offer LaPorte's testimony regarding "ink analysis" in its case-in-chief. Manifestly, the government has had a full and fair opportunity to respond to the defense's overwhelming evidence that LaPorte's "ink analysis" is inadmissible because it is not scientifically reliable and, worse, dangerously misleading. Without presenting one iota of information, evidence, or law demonstrating that LaPorte's "ink analysis" complies with Rules 401, 403, 702 or 703 or *Daubert* standards, the government states:

> The Government makes no representation that Mr. LaPorte's testimony was not admissible pursuant FRE Rules 702 and 703, or that it is excludable under Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 ("Daubert') or FRE 403. The government reserves the right to call Mr. LaPorte as a rebuttal expert witness in this case with respect to the ink analysis with respect to the ink analysis he performed in this case.

Gov. Opp. (Doc.57) at 16.

The Rules of Evidence and *Daubert* standards apply to all evidence, including rebuttal evidence. This Court should reject the government's preposterous and frivolous stance that it can evade its burden to demonstrate that the "ink analysis" complies with the Rules of Evidence and *Daubert* by postponing its presentation of this evidence until rebuttal.

The grand jury record establishes beyond doubt that LaPorte's "ink analysis" was the primary factual basis for the government's charge that Mr. DeSisto obstructed justice by back-dating and authenticating in response to a grand jury subpoena: (1) the September 16, 3003 tally sheet that indicates a 12 to 1 vote in favor local union dues on that date and (2) the 13 ballots that are consistent with that tally sheet. In view of the government's new stance omitting LaPorte's "ink analysis" from its principal case, the government and this Court should expect that there will be non-expert evidence that the secret ballot occurred on September 16, 2003, as indicated by the tally sheet and ballots. Because the government has withdrawn the "ink analysis" from its case-in-chief, there will be no occasion for the defense to call its expert, Larry F. Stewart, to rebut and impeach Mr. LaPorte's "ink analysis." The government cannot be permitted to sandbag the defense by presenting its "ink analysis" in rebuttal. Moreover, in view of the government's failure to litigate the admissibility of the "ink analysis" when it has had a

full and fair opportunity to do so prior to trial, it would be inefficient, inappropriate, and unfair to litigate admissibility during the trial. These grounds are more than sufficient to exclude LaPorte's "ink analysis" from being admitted at trial, whether in the government's principal or rebuttal case. But there is an additional, compelling reason to exclude Mr. LaPorte's evidence.

II. LAPORTE'S EVIDENCE IS A FRAUD ON THIS COURT AND UNCONSITUTIONALLY ENDANGERS THE DEFENDANTS' LIBERTY.

LaPorte first reported the results of his "ink analysis" on June 7, 2006. The report was presented to the grand jury that returned this indictment as if the ink analysis was scientifically reliable evidence that the September 16, 2003 date on tally sheet entitled "Results of Secret Ballot" was back-dated and inauthentic. *See* Secret Service Laboratory Report marked as Grand Jury Exhibit 42, attached hereto as Exhibit A, at p.3.

On July 12, 2007, LaPorte testified concerning his "ink analysis" in United States v. Adham Amin Hassoun et. al, Docket No.04-60001 CR Cooke (S.D. FL) as follows:

> Q. Now, can you tell from your results exactly when ink was put to paper on this document?
> A. No, we can't.
> Q. Are you aware of any scientifically reliable way to make such a determination looking only at the ink for a document like this?
> A. There is no scientifically reliable methodology that could be used to determine the age of the ink or to determine when exactly they were placed on that piece of paper.
> Q. Can you tell from your results when the ballpoint portion was written relative to the non-ballpoint portion?
> A. No, it would be impossible to tell which was done first.
> Q. Are you aware of any scientifically reliable way to make that determination?
> A. No.
> …

Transcript at 55. (Emphasis supplied)

Even more significantly for this case, LaPorte testified:

…

Q. Now, if I understand this correctly, there is a test that can be done to determine the time in which ink was placed on a document, right?
A. No, there is no scientifically reliable test to determine exactly when an ink was put down on a piece of paper.
Q. Have you ever run a phenoxyethanol test?
A. Yes, it's called phenoxyethanol.
Q. Easy for you to say.
A. We can use the terminology PE if you would like, to keep it simple.
Q. Let's do PE. Now, PE is a test which you're able to sort of measure the rate at which an ink dries, right?
A. It's a lot more complex than that, but, essentially, yes. Certain inks have a component known as phenoxyethanol that is present in them, and there have been studies to show that phenoxyethanol basically evaporates at a predictable rate somewhat. It really depends on the type of document that it's on, the storage conditions of that document, the type of ink that has been used and so forth.
Q. In fact, in other case, haven't you performed that test and testified about that test?

Transcript at 67. (Emphasis supplied)

A. I have never testified about using that particular -- like, then I found a positive result. I have testified about the procedure itself, yes.
Q. You have testified about the procedure, right?
A. Yes.
In fact, you explained it to a jury where you said it's like paint drying, right?
A. Correct, yes.
Q. You put it on, you touch it, and it's wet. Two days later, you touch it and it may not come off on your hand, but you can still smell it because it hasn't dried quite enough?
A. Yes.
Q. In fact, that's what you did when you explained to another jury about this test, which is one way of determining how much the ink could have dried?
A. The only time that we would use that test, there would have to be certain circumstances around that document. First of all, we would use it to compare. Let me just provide an example for simplicity. Let's suppose that someone has a diary

of entries and they are purported to have been done in 2001, 2002, 2003, 2004. So we have written entries. It may be purported that they were done at different times, but if it is suspected that they did it all at once, then we can go back and analyze all four of those inks and then try and determine if those inks have significant differences to indicate that they were put down at a different time, or if they are all basically the same.

So, if you would like to go back to the paint example, it would be like putting down four -- paint at four different times and then sort of measuring the tackiness or how much it has dried for each of them. That requires the entries to be produced on the same document so that we would know that it was under the same storage conditions, that it was exposed to the same environmental factors and so forth. Even paper can have an effect. There are a lot of factors that have to –

Q. There are a lot of factors that you can consider. But, in fact, you even wrote an article about this, didn't you?

A. Yes, I published an article.

…

Transcript at 68-69. (Emphasis supplied)

Q. Okay. Well, you are saying because the light blue ink is a non-ballpoint ink --

A. Correct.

Q. -- you cant' compare the ballpoint ink to the non-ballpoint ink?

A. They are two completely different formulations.

Q. Perfect. But you could compare the ballpoint ink, which is the dark blue ink, right to the known samples which you have in your library which you've already testified about, right?

A. No, I can't do that because, as I had explained, the inks have to be stored in the same condition. The inks that we have in our reference collection are stored on different types of paper, they are stored in a humidity and temperature control environment. They are stored in binders. So, you can't do the test and compare it to a standard. It's called relative comparison. You have to do it relative to the other inks on that particular document.

Q. So, then, you could have done it from the ballpoint ink that appeared on the front page to the ballpoint ink which is on the signature page, right?

A. No, because, once again, as I explained, we like to have them on the same document. Now we have got inks that are on page one and inks that are on page four. If I had done that type of examination, I would be getting cross-examined about

> the validity of that testing because page four could have been stored in a different environment versus page one.
> Q. Or they could have been written at different times by different people, right?
> MR. SHIPLEY: Objection, speculation
> THE COURT: Overruled.
> THE WITNESS: Well, of course. I can't tell you when these entries could have been created. I am a scientist, so I can't speculate on when the entries were put down.
> BY MR. NATALE:
> Q. And it would be wrong for anyone to speculate, or to want people to speculate that the date which purports to be on this document was, in fact, the actual date that all of the writing occurred?
> MR. SHIPLEY: Objection to form. Is he asking about based on his ink analysis or in general, because the question is broader than that.
> MR. NATALE: On his ink analysis.
> THE COURT: Based on your ink analysis, sir.
> THE WITNESS: Based on my ink analysis, I can't render a conclusion at all. There is nothing to indicate that this document was not created on the purported day, and there is nothing I can say that it wasn't created on the purported date. There is certainly nothing consistent on this document to indicate to me that it was not created on its date.
> …

Transcript 71-72 (emphasis supplied).

At all material times, Mr. Laporte was well aware that that the "ink analysis" he purported to perform in this case was not scientifically reliable for the reasons he described during his Miami testimony in 2007.

Even though he testified that it is not scientifically reliable to do so, in this case LaPorte compared ballpoint ink writing on two different kinds of paper: (1) document Q2-5, the second page of the June 28, 2001 minutes of a Local 1604 meeting which was written on lined paper; and (2) document Q-3, the tally sheet dated September 16, 2003, written on unlined paper. Even though he testified that it is not scientifically reliable to do so, Mr. LaPorte claimed he could provide a scientifically reliable comparison of the

ink on the two documents even though he has no information concerning the storage and environmental conditions to which these writings were subjected prior being submitted in response to a grand jury subpoena. Moreover, LaPorte's report states that "the inks used to produce the ink entries found on Exhibit Q2-5 and Q-3 were determined to match each other (e.g. Ink designated "F") and the documents are purportedly dated approximately 26 months apart, further testing was conducted on the inks to estimate their relative age." See Exhibit A at 3. However, documents generated during the Secret Service Laboratory's work show that the questioned ink on the two documents as having "similarities to liquid black A inks." And, LaPorte does not identify or match the ink to a single formula. Instead he matches it to two formulas, one being BIC I-7536 and the other, Papermate I-6888.

In the Miami case, LaPorte testified that the phenoxyethanol technique was not scientifically reliable unless the questioned ink was written on the same paper, stored under the same, known environmental conditions, using the specifically identified ballpoint ink. Here, according to LaPorte's own records, the paper is different, the questioned ink is not identified, and the storage and environmental condition are unknown.[1] To make matters even worse, it is undisputed that LaPorte's own efforts to validate the reliability of his "ink analysis" during the examination showed huge and unexplained error rates and disparate results when the results should have been similar or identical. See Summary of Testimony of Larry F. Stewart, attached to the Declaration of Tracy Miner as Exhibit 3 (Doc.46-4) at 13-14. LaPorte's Miami testimony is not merely impeaching. It indicates starkly, that when the government submitted the summary of

[1] The defense's motion featured, *inter alia,* the differences in paper, differences in ink and unknown storage condition as reasons to exclude LaPorte's testimony. Unsurprisingly, the government has not, and cannot, rebut any of this.

LaPorte's testimony dated July 10, 2009, LaPorte and the government knew, and had reason to know, that the "ink analysis" was anything but the scientifically reliable evidence it purported to be. Even now, the government claims to reserve the right to present the "ink analysis," albeit in rebuttal and without presenting a scintilla of evidence that it is scientifically reliable so as to qualify as admissible evidence at all.

This Court is also obliged to consider the damage LaPorte's bogus "ink analysis" has already done in this case. The defense has expended tens of thousands of dollars of precious resources on scientific investigation, expert fees and expenses and legal services to contest the admissibility of LaPorte's falsified "ink analysis." These irreplaceable resources cannot be devoted to the defense of other aspects of this case. Having caused the defense to spend these irreplaceable resources, the government fails to present any substantive response, and instead proposes to present the "ink analysis" in rebuttal and to present LaPorte's indentation analysis as if none of this misconduct has happened. The Court should not countenance the government's misconduct by allowing it to proceed as it proposes.

In sum, it is not Mr. DeSisto or Local 1604 that presented falsified evidence to the grand jury in this case. To the contrary, LaPorte and the government have done so. Depending on the Court's ruling on this motion, the defense reserves its right to present evidence of the government's "forensic" falsification, because it has a Fifth Amendment right to present evidence of the government's misconduct during the investigation that resulted in the charges in this case.

III. LaPORTE'S "COULD NOT BE ELIMINATED AS A POSSIBLE SOURCE" OPINIONS SHOULD BE EXCLUDED.

The last paragraph of LaPorte's summary his proposed testimony states that he detected indentations on three of the thirteen ballots that he examined, numbered 2, 8, and 13 indicating, he opines, that the handwritten check marks on some ballots were created on overlying ballots at some time. He opines that handwritten check marks on ballots numbered 4 and 11 "could not be eliminated as a possible source" of an indentation found on ballot number 2, and that handwritten check marks on ballots numbered 7 and 12 "could not be eliminated as a possible source" of indentations found on ballots numbered 8 and 13. Finally, LaPorte opines that the check mark on ballot number 1 was overwritten (i.e. at least two different check marks) and "could not be eliminated as a possible source" of the indentations. Miner Dec., Exhibit 1, page 3 (emphasis supplied).

The government claims that LaPorte's testimony is admissible to prove that the ballots were not marked by 13 voters and that they are inauthentic. But it cannot and does not rebut the fact that a check mark on one ballot "could not be eliminated as a possible source" of an indentation on another ballot is not Rule 401 relevant evidence that either ballot or both ballots was not marked in a secret ballot by an individual voter. As matter of commonsense and logic, evidence that some event "cannot be excluded as possible" has absolutely value in proving that the event actually occurred. The defense pointed out in its motion that the proffered opinion is entirely consistent with one or more voters marking their ballot when it was on top of stack of as-yet unmarked ballots. The government does not indicate that the proffered indentation analysis is relevant proof to the contrary. In short, LaPorte's opinion a check mark "could not be eliminated as a possible source" of an indentation on another ballot is irrelevant, wastes jury time, and

would create jury confusion by inviting an unsupported and dangerous reasoning: jurors might reason that if a check mark "cannot be excluded as a possible source" of an indentation on another ballot, it can be inferred that the check mark was, in fact, the source of the indentation or, even more unfounded and dangerous because it involves several unsupported inferences, that less than thirteen voters wrote the check marks on the ballots. After evidentiary hearings, Judge Gertner excluded unreliable and unfounded comparison testimony in comparing exemplars of ink handwriting to each other. *United States v. Hines*, 55 F.Supp. 2d 62 (D.Mass. 1999); *United States v. Green,* 405 F. Supp. 2d 104 (D. Mass. 2006).[2] Here, without an evidentiary hearing, the Court should not admit a comparison of ink check marks to indentations in paper.

For all the foregoing reasons, this Court should exclude LaPorte's testimony or, in the alternative, convene an evidentiary hearing, to determine the admissibility of the results of Mr. LaPorte's indentation analysis.

Respectfully submitted,

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[2] None of the cases cited in the government's opposition, including those at 13 n.2, involve a *Daubert* challenge to comparison based on comparison of ink writing to indentations. Certainly, none of them involved a similarly meaningless opinion that ink markings "cannot be excluded as the possible source" of indentations.

Certificate of Service

I, Tracy Miner, hereby certify that I have this day served an electronic copy of the foregoing on Assistant United States Attorney Suzanne Sullivan, Trial Attorney Vincent Falvo, and Attorney Andrew Good.

_/s/_ Tracy Miner_____

Date: November 4, 2009