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An Overview of Firearms Identification Evidence for Attorneys. II: Applicable Law of Recent Origin

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ABSTRACT: This article attempts to broaden the perspective of attorneys, but it should be of value to all forensic scientists. Although the subject matter is directed to attorneys, it nevertheless is applicable to the professional understanding of members of all professional disciplines. It covers the applicable law of recent origin, and the cited court decisions and rules of evidence should enable the reader to find a base from which to begin additional research.

KEYWORDS: jurisprudence, ballistics

An attorney in a criminal or civil case should know the sources of firearms evidence. A failure to be familiar with these sources results in a lack of preparation for a trial involving firearms evidence and an inability to challenge the conclusions and opinions of a firearms examiner. These sources of information can be police records and memoranda, autopsy reports, results of laboratory tests, and other physical evidence such as the clothing of a victim or suspect involved in violent crime. The purpose of this paper is to explore some of the sources of firearms evidence, applicable law of recent date defining the limits for obtaining such information, and the law of recent origin generally related to firearms evidence.

The U.S. Supreme Court in the case of *United States v. Edwards* [*1*] determined that a warrantless search and seizure of clothing of a suspect subsequent to his arrest is permissible and does not violate the Fourth Amendment to the Constitution of the United States. Under this decision police may obtain the clothing of someone suspected of being involved in the commission of a violent crime and may conduct tests on such clothing in a police or state crime laboratory. It is essential that both the prosecutor and defense determine that the clothing of a suspect was seized and that studies, in fact, were made to properly determine the results of any scientific tests conducted. Early preservation of a victim's or suspect's clothing in a case involving firearms creates innumerable possibilities for scientific testing.

It is important to use the weapon and ammunition from the same manufactured batch as that used by or on a victim of a violent act to conduct competent and reliable scientific tests. This requirement has been addressed in Part I of this series of papers. Usually the bullet can be obtained from the body of a murder victim because an autopsy normally is performed promptly and the bullet retrieved is preserved. However, in a shoot-out be-

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tween two or more people, courts have blocked the removal of a bullet from the murder suspect by means of compulsory surgery because such police practices were tantamount to self-incrimination, were used to "shock the conscience," and otherwise violated due process. However, in *United States v. Crowder* [2], the court, sitting *en banc*, rendered an opinion that approved the lower court order for the surgical removal of a bullet from the forearm of a murder suspect where surgery was performed under local anesthetic without any complications anticipated. This judicial ruling opens up avenues for obtaining firearms evidence that heretofore were nonexistent. A prosecutor in a crime involving firearms, where the suspect was also shot, should insist, whenever the surgery would not threaten the life of the suspect, that the bullet be removed and preserved as evidence for any future trial. Defense counsel, under these circumstances, should insist that the bullet removed from the suspect be turned over to his selected criminalist for laboratory scientific determinations.

Fruitful sources of evidence relating to firearms are found in police reports, memoranda, crime laboratory reports, and autopsy reports. A defendant has an absolute right to examine these investigative and scientific reports upon which a government witness will rely to refresh his recollection at trial. The United States Supreme Court carved out this essential right in *Jencks v. United States* [3]. This fundamental law has been qualified by Congress within the law known as the Jencks Act [4]. The Jencks Act has been expanded in some states to permit the defendant to have access to all investigative reports, memoranda, and the results of scientific tests constituting part of the government's preparation for trial or to which a witness may testify upon direct examination at trial. Defense counsel should make a demand motion to the trial court for an order requiring the prosecutor to disclose all investigative reports, memoranda, and the results of tests before the trial, or at least before the witness for the state testifies on direct examination. These documents often contain inconsistencies, improper and incorrect conclusions, and exculpatory evidence. Access to such reports is essential to the cross-examination of a firearms expert.

Sometimes a mere perusal of police records, before or at trial, will disclose falsification of records and a cover-up. In *Fosbee v. Bullach* [5], an award of 1.4 million dollars was rendered by a jury. This verdict included 1.25 million dollars as punitive damages. The suit was a state lawful death action and a federal civil rights action under Title 42 U.S.C. § 1983, on behalf of a 57-year-old male killed by police hunting three alleged criminals. Twenty-eight police officers raided a home without legal probable cause and without a search warrant. They fired 183 bullets into the home, killing the decedent while he was lying in bed. The evidence showed that the police falsified official reports claiming that the decedent had shot first.

Access to firearms evidence at trial contained in memoranda, police reports, and autopsy protocols may assist the defense firearms expert in evaluating the strengths and weaknesses of the methods, procedures, and conclusions related to the firearms identification made by the government's witnesses.

One source of evidence that is seldom explored by defense firearms experts involves conducting specific tests with the alleged assailant's weapon and like ammunition to see if individual identification characteristics are present. In *United States v. Kiliyan* [6], the court allowed a firearms witness to test-fire a grenade and to testify as to the matters he observed during the experiment. Defense counsel in all cases should demand the right to have the weapon test-fired whenever such weapon is in the custody or under the control of the state or federal government. Information derived from these tests and experiments with firearms frequently is invaluable to the defense. A refusal of the court to permit such testing might well be reversible error and grounds for a new trial.

One serious problem that has confronted the defense bar is the extent to which the government must preserve firearms evidence for discovery and inspection. The 6th and

14th Amendments to the U.S. Constitution require that a defendant must have the right to confront or cross-examine his accusers. When firearms evidence is lost or destroyed, inadvertently or intentionally, cross-examination is thwarted and frequently rendered futile or impossible. In cases where firearms evidence is not made available the defense is unable to obtain from his own chosen firearms examiner an analysis of the physical evidence and, consequently, is unable to expose the inconsistencies and frequently fallacious opinions of government witnesses. The defense, therefore, is placed in the situation of accepting at face value the opinions of the government firearms witness.

Courts have not always viewed the inadvertent destruction of firearms evidence as a denial of the right to confrontation. In *People v. Triplett* [*7*], a murder conviction was upheld even though the alleged murder weapon was inadvertently destroyed. The defense argued that this destruction constituted a deprival of the right to confrontation guaranteed by the federal and state constitutions. The defense asserted that this act destroyed defendant's fundamental right by reason of the impossibility of having defense experts analyze the physical evidence or challenge the state's firearms witnesses. In *Patterson v. State* [*8*], the court went a step further and ruled that the destruction of (marijuana) samples submitted to a laboratory for testing was not a denial of the constitutional right of confrontation in a criminal case.

Some federal courts have recommended that physical evidence not be destroyed by the government without notice to the defense and court approval, as stated in the cases of *United States v. Heiden* [*9*] and *United States v. Young* [*10*]. Defense counsel should make a motion to dismiss a criminal case when important firearms evidence is destroyed based upon the denial of the constitutional right to confrontation. If "foul play or intentional destruction" of physical evidence is proven, courts are very apt to dismiss the case or grant a mistrial. Defense counsel should assert that the government has an obligation to obtain a court approval for the destruction of physical evidence and that defense counsel be notified of such intent. This affords fair play and an opportunity to object to destruction of evidence.

Depending on the importance of the physical evidence to the government's case, courts frequently are receptive to dismissing criminal complaints when important physical evidence is intentionally destroyed before the trial. Destruction or spoilage of physical evidence may not constitute a violation of the confrontation clause of the constitution under certain circumstances. However, defense counsel can comment and demand a judicial instruction based on the logical inference that the evidence was spoiled or destroyed because it contained evidence favorable to the accused. Such an argument is effective and persuasive. For example, in *State v. Stanislawski* [*11*], key physical evidence was destroyed and not available to the accused at trial. The Wisconsin Supreme Court stated:

> Failure to produce (physical evidence) indicates as a most natural inference that the party fears to do so and this fear is some evidence that the circumstances, documents, or witness if brought would have exposed facts unfavorable to the party.

When the government spoils, destroys, or fails to disclose photomicrographs, micrographic comparison studies, or other firearms evidence, defense counsel should demand the additional instruction based on *Stanislawski* [*11*] and rightfully exploit this weakness in the government's case during the opening statement and again during final argument.

When the government's witness is unavailable, his written report stating his opinion should not be admitted into evidence. Such documentary evidence would be inadmissible hearsay evidence and courts should exclude such evidence. In *Ward v. Commonwealth* [*12*], a murder case, the court excluded from evidence an autopsy report that contained an opinion of a medical examiner that the victim died as a result of a "gunshot wound to the head."

The refusal of a court to order the disclosure of photomicrographs in the possession of the prosecutor or any agent of the government, or to refuse to allow cross-examination of the photographer called as a witness, would be reversible error in a case where firearms identification is important to the government's case in chief.

Theoretically, the government should be required to prove beyond a reasonable doubt that the weapon in its possession, or under its control, is the weapon used during the commission of the alleged crime. However, courts have been lax in making this a requirement for obtaining a conviction in criminal cases involving weapons. For example, in *Smith v. State* [*13*], the defendant's 20-gauge shotgun was admitted into evidence even though it could not be positively identified as the murder weapon. The state's witness testified that from the inspection of the wadding in the deceased's body, the murder weapon was either a 16- or a 20-gauge shotgun. However, the failure of a government witness to identify the weapon as *the* murder weapon within the custody or under the control of the government is an important point of cross-examination and can be used effectively to demonstrate a reasonable doubt in a criminal case.

Both the defense and prosecution should explore all avenues to obtain information in all cases involving firearms. An important issue in the criminal law is the effect of the government's failure to disclose exculpatory evidence in its possession or under its control. In cases involving firearms evidence this issue is highly relevant. The courts have held that exculpatory evidence is evidence that may negate the defendant's guilt, minimize his participation in a criminal offense, or make any prosecution witness less credible [*14–18*]. Exculpatory evidence may also constitute a prior inconsistent statement of a witness [*19,20*]. In accord with the *Brady* [*14*], *Giglo* [*15*], and *Nelson* [*19*] cases, exculpatory evidence must be disclosed to the defendant upon demand and at trial.

Exculpatory evidence does not have to be disclosed by the prosecution unless proper demand has been made [*19,21,22*]. However, if evidence is so exculpatory on its face that it would exonerate a defendant, a formal demand for such evidence may not be necessary [*23*]. As a matter of routine practice, defense counsel should make formal demand for the disclosure of exculpatory evidence prior to trial. The demand should be as specific as possible, listing the items that the defendant wishes to have disclosed. If the demand is specific and the exculpatory evidence is not disclosed, the prosecution cannot, thereafter, legitimately argue that it was not provided fair and proper notice concerning the items the defendant sought to have disclosed.

Once the demand for exculpatory evidence is made, a failure to disclose such evidence requires reversal of a criminal conviction and a new trial [*14,15,23*]. The defendant is not required to show that the prosecutor's failure to disclose exculpatory evidence was based on bad faith or that the prosecutor knowingly concealed or destroyed exculpatory evidence.

Once a demand is made for the disclosure of exculpatory evidence to one of the government attorneys, such demand extends to other members of the district attorney's staff, state and municipal police agencies, and to state crime laboratories [*15,24–26*]. The demand for exculpatory evidence is binding on all evidence in the possession or under the exclusive control of the state or federal government agency. The practical effect of this holding is that once the demand is made a government attorney has an affirmative duty to peruse the files, records, and all material in the possession or under the control of the government agency to determine whether exculpatory evidence is contained therein. If the prosecution fails to assume this affirmative duty, and if exculpatory evidence is contained within the government's files, reversal of the defendant's conviction is inevitable.

Courts view the failure to disclose exculpatory evidence as a serious matter. They have permitted modification of the standard rules of evidence to promote the full disclosure of exculpatory evidence. In *United States v. Smith* [*27*], the Circuit Court of the District of Columbia reversed the U.S. District Court's refusal to admit police records into evidence

because the records contained exculpatory evidence. The court held that a police record constitutes a business record within the Business Records Act [*28*]. Although a police record was not considered to constitute a business-record exception to the hearsay rule to be used as substitutive or impeachment evidence, the record is admissible when offered by a criminal defendant to support his defense. Thus, the rules of evidence are shaped and changed when they collide with the judicial policy requiring the disclosure of exculpatory evidence.

Courts have determined that the results of scientific tests are within the rules applicable to exculpatory evidence [*11,25*].

In the area of firearms evidence the results of comparison microscope studies, photomicrographs, test-firings of bullets, and other firearms tests may contain inconsistent statements, inconclusive findings, findings favorable to the accused, and information suggestive that another weapon may have been used to perpetrate the alleged crime. In firearms cases it is helpful for the defendant to specify in the demand for exculpatory evidence the following information:

(a) the precise definition of exculpatory evidence;
(b) a statement that the demand extends to other state agencies, including police and crime laboratories; and
(c) the type of tests, memoranda, and documents requested to be disclosed.

These suggestions should provide prosecutors fair notice of whatever evidence is sought by the accused and should preserve the record for an appeal in the event the government fails to disclose the exculpatory evidence demanded.

Firearms evidence under the control or within the possession of the prosecution may be sought through statutory discovery procedures in effect in most states. It is usually sought through motion and not by demand. In Wisconsin [*29*], the defense may request inspection of physical evidence the government intends to use at trial. The defense may gain access to the physical evidence for the purpose of having it analyzed or tested by its own experts [*30*]. Also, the Wisconsin statutes provide that the state crime laboratories may analyze evidence on behalf of the defense.

These procedures assure that the defense may gain pretrial awareness of firearms evidence, the results of specifically requested tests, and other scientifically determined physical evidence to prepare for trial and competently challenge the opinions and conclusions of the government's firearms witnesses. The pretrial discovery procedures are mandatory, and the government must disclose physical evidence or face a penalty of contempt. Defense counsel has an absolute statutory right to take advantage of these pretrial discovery mechanisms particularly as they relate to firearms evidence and other physical evidence. Analyzing the physical evidence and studying the results of scientific tests performed by government firearms witnesses on the day of trial is too little and too late for effective preparation on behalf of a defendant.

A pretrial discovery motion seeking the results of scientific tests should also seek disclosure of the witnesses' notes, any scientific standard used in formulating conclusions, any charts used during the course of the testing, photographs, photomicrographs, and any other documents used by the witnesses in formulating their opinions. This type of specific motion assures full preparation of the defense before the trial and avoids eleventh-hour formulation of questions to be propounded to the government firearms witnesses.

Many prosecutors have an "open file" policy whereby the defense has access to the prosecutor's entire file in a criminal case, including physical evidence and the results of scientific tests completed by firearms witnesses. However, the open file policy can be a trap for the inexperienced and unwary defense counsel if the prosecutor at the time of inspection does not have within his possession the results of crime laboratory tests, police memoranda,

and other pertinent information relating to the firearms evidence. The police and crime laboratory personnel may have actual possession of essential physical evidence obtained during the results of scientific tests. It is important for the defense to make the demand for exculpatory evidence within the possession *or under the control* of the prosecutor. The formal motion requires that the demand be in writing. The motion for the disclosure of specific items of physical evidence should be made even though the prosecutor has an open file policy. This procedure will protect the defendant in the event the prosecutor does not fully disclose the existence of the requested evidence and will preserve the record for a motion to exclude nondisclosed evidence, for dismissal of the criminal charge, or motions for mistrial. If discovery is informal, the items disclosed should be listed in a letter to the prosecutor to preserve the record.

A failure to disclose evidence requested by the defense prior to trial may result in the exclusion of evidence, or the granting of a recess, or continuance. The Wisconsin Supreme Court [*21,25*] deemed a recess was sufficient sanction to permit the defendant to have full access to the evidence requested in a pretrial discovery motion. However, in an appropriate case, the evidence may well be excluded because its introduction creates surprise, substantially interferes with a fair trial, and diminishes the constitutionally safeguarded right to effective representation by counsel. A prosecutor has a continuing duty to disclose evidence requested that comes under his control at any time before or during the trial [*31*]. A prosecutor cannot placidly sit on his hands before the trial and fail to disclose to the defense the physical evidence generated by firearms tests nor use the ineffective excuse that at the time of the initial request the evidence was under the control of a police department or state crime laboratory. The whole discovery procedure requires defense counsel to know what items he wants disclosed before the trial and that he thoroughly document the discovery process.

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