

1 MICHAEL N. BURT, SBN 83377
600 Townsend Street, Suite 329E
2 San Francisco, California 94103
Telephone: (415)522-1508
3 FAX: (415)522-1506

4 TONY TAMBURELLO, SBN 46037
214 Duboce Street
5 San Francisco, California 94104
Telephone: (415) 431-4500
6 Attorneys for Defendant
7 EDGAR DIAZ

8
9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION

12 UNITED STATES OF AMERICA,	)	Case No. CR-05-00167 WHA
13 Plaintiff,	)	EDGAR DIAZ’S REPLY TO THE
14 vs.	)	GOVERNMENT’S FINAL
15 REDACTED DEFENDANT NO. 1, et	)	MEMORANDUM REGARDING
16 al.,	)	DAUBERT HEARING ON
17 Defendants.	)	NARCOTICS IDENTIFICATION AND
	)	MOTION TO STRIKE
	)	DECLARATION OF DEBBIE
	)	MADDEN
	)	Date: December 6, 2006
	)	Time: 8:00 a.m.
	)	Dept: Hon. William H. Alsup

18
19
20 Defendant Edgar Diaz, on behalf of himself and all other defendants, hereby files
21 this Reply to the Government’s Final Memorandum Regarding Daubert Hearing On
22 Narcotics Identification (hereinafter “ Final Memorandum”). Defendants also move to
23 strike the Declaration of Debbie Madden filed in support of the final memorandum on the
24 ground that the evidentiary portion of the hearing was closed on November 21, 2006 and it
25 would be grossly unfair and a violation of defendants’ right to cross examine and confront
26 adverse witnesses and their right to present rebuttal evidence to allow this declaration to be
27 considered at this late date in the proceedings.

28 Much of what the government has to say has already been anticipated and

1 responded to in Mr. Diaz’s Post Hearing Brief. Because of page limitations, not all issues
2 raised by the government can be addressed. However, this *Reply* will address several of
3 the more important legally or factually flawed arguments in the Final Memorandum.

4 First, the government stresses that in nine of fourteen narcotics acts charged in the
5 Second Superseding Indictment, the drugs are still available and can be retested. (Final
6 Memorandum, p.2) However, as the Court more than once pointed out during the course of
7 argument on this motion, the government’s burden to show that its evidence meets the
8 reliability requirement of *Daubert* is not satisfied by showing that the defendant has the
9 independent right to retest the evidence. See, *United States v. Robinson*, 44 F. Supp.2d
10 1345, 1347 (N. D. Ga. 1997)(“If a defendant has [access to the evidence], he may obtain
11 his own expert to offer an opinion on the ultimate fact....A defendant, however, is never
12 required to introduce any evidence and, therefore, the defendant has a right to predicate a
13 trial strategy solely on an attack of the opinion evidence offered by the government.”).
14 Were the rule otherwise, astrology and polygraph testing would both be admissible
15 because in both instances the opponent of the evidence always has the right to retest the
16 evidence using its own psychic or polygraph examiner.

17 The government also implies that in the five cases where the drugs have been
18 destroyed, there is no real problem as to three of them because a particular defendant
19 allegedly¹ admitted guilt in the state case. Even if true, and somehow admissible against
20 non-admitting defendants, such admissions would not satisfy the government’s burden
21 under *Daubert*. As stated in *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, even an
22 innocent defendant may enter a guilty plea simply because “in his view he had absolutely
23 nothing to gain by a trial and much to gain by pleading.” This is especially true in state
24 drug cases prosecuted in San Francisco, where the tradition has always been to “give away
25 the store” for possession of minor quantities of alleged drugs. Moreover, according to the

26
27 ¹ The government says that it is working on getting the plea transcripts. (Memo, p. 2 n.
28 3). Again, as in the case with the Madden declaration, the evidence at the *Daubert* hearing is
now closed and it would be unfair to allow the government an open-ended right to produce
evidence at its liesure.

1 1995 SOP introduced by the government as Exhibit 9, the crime laboratory admits that
2 “since [cocaine base] is the most common drug, the laboratory also encounters many non-
3 controlled imitations of cocaine designed to look like cocaine base.” (p. 61). If the
4 laboratory produces a report that says that such a substance is cocaine base when in fact it
5 is not, how does a defendant’s admission of a “drug” offense on the basis of such a report
6 show that the testing procedures are in fact reliable. It does not.

7 The government also predictably emphasizes the supposed expertise of its two
8 witnesses, stating that Mr. Mudge has “analyzed 1000s of substances” for suspected
9 marijuana and cocaine, and that Ms. Madden “has performed over 20, 000 analyses of
10 suspected controlled substances during her career.” (Memo, p. 2-4). As Mr. Diaz pointed
11 out in his motion (doc. 637, p. 19 n. 13), this argument is not responsive to a *Daubert*
12 challenge. See, *Fuesting v. Zimmer, Inc.*, 421 F.3d 528, 535 (7th Cir. 2005)(“[P]ossessing
13 requisite credentials alone is not enough to render expert testimony admissible”); *United*
14 *States v. Frazier*, 387 F.3d 1244 (11th Cir. 2004)(“Quite simply, under Rule 702, the
15 reliability criterion remains a discrete, independent, and important requirement for
16 admissibility....If admissibility could be established merely by the ipse dixit of an
17 admittedly qualified expert, the reliability prong would be, for all practical purposes,
18 subsumed by the qualification prong.”); *Clark v. Takata Corp.*, 192 F.3d 750, 759 n. 5 (7th
19 Cir.1999) (“A supremely qualified expert cannot waltz into the courtroom and render
20 opinions unless those opinions are reliable and relevant under the test set forth by the
21 Supreme Court in *Daubert*.”); *Richman v. Sheahan*, 415 F.Supp.2d 929, 934
22 (N.D.Ill.2006)(“Just as proof of negligence in the air will not do, neither will proof of
23 expertise in the abstract. A snappy resume does not ensure admissibility.”).

24 Regarding the reliability of SFPD’s marijuana protocol, the Government quotes
25 Government Exhibit 28 for the proposition that “if the criteria...for a positive Duquenois
26 test are rigorously adhered to, and botanical evidence is also available, the Duquenois
27 color test is a reliable screen for cannabinoids.” (Meno p. 6)(emphasis added). Defendants
28 agree that the Duquenois test described in this article, not the Duquenois-Levine test used

1 by the SFPD, has been used as a “screen” for marijuana. However, the word “screen’ is
2 generally used, even in the SFPD drug SOPs, to refer to preliminary screening tests, not
3 definitive identification tests. Futhermore, there is no showing here that SFPD “rigorously
4 adhered” to any marijuana testing protocol, as demonstrated at length in defendant’ post-
5 hearing brief.

6 Regarding cocaine testing, the government astonishingly claims that Government
7 Exhibit 23 shows that “each microcrystalline test results in unique, identifiable crystals if
8 the presence of cocaine is detected, and that no other known substance, when combined
9 with either the gold chloride or platinic chloride reagent, results in these unique crystal
10 formations.” (Memo p. 7). As defendants point out in their post-hearing brief, the
11 conclusion of this study is in fact that because of the limited number of substances actually
12 tested, combined with the multitude of variables that can effect the test, the identification
13 of cocaine should be made with chromatographic or spectrometric methods. This same
14 study Iso refutes the notion that “each microcrystalline test results in unique, identifiable
15 crystals if the presence of cocaine is detected” since the gold chloride crystal depicted in
16 the study looks nothing like the gold chloride standard used by the SFPD or the gold
17 chloride standard produced in Exhibit 200. Contrary to the untested and therefore
18 inadmissible assertions in Ms. Madden’s latest declaration such gross differences in
19 appearance cannot be explained away as magnification variance. It is also not true that “no
20 other known substance, when combined with either the gold chloride or platinic chloride
21 reagent, results in these unique crystal formations”, since the defendants produced at the
22 hearing a photograph of a methamphetamine/platinic chloride crystal that Mr. Mudge
23 mistakenly identified as a cocaine crystal.

24 Finally, the government says that “[n]owhere in the seminal cases of *Daubert* and
25 *Kumho Tire* or the controlling Ninth Circuit case of *Prime* is “reliability” equated with
26 “reviewability.” The government is mistaken. *Daubert* says that “in order to qualify as
27 ‘scientific knowledge,’ an inference or assertion must be derived by the scientific
28 method.” *Daubert*, 509 U.S. 579, 590. *Daubert* also says that “submission to the scrutiny

1 of the scientific community is a component of ‘good science,’ in part because it increases
2 the likelihood that substantive flaws in methodology will be detected.” (Id. at 593)

3 The “scientific method”, as set forth in the SWGGUN and ASTM standards put
4 into evidence by the government itself, stress proper documentation and reviewability as a
5 necessary part of the scientific method. Just as a lack of publication in a peer reviewed
6 journal is usually determinative in *Daubert* litigation, so too is a lack of documentation of
7 the original testing results because the fact that “experts have been unable or unwilling to
8 publish [document] their work undermines [the] claim that the findings these experts
9 proffer are ‘ground[ed] in the methods and procedures of science’ and ‘derived by the
10 scientific method.’” *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311 1318 n .
11 9; See also, *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 155 (“The court could
12 reasonably have wondered about the reliability of a method of visual and tactile inspection
13 sufficiently precise to ascertain with some certainty the abuse-related significance of
14 minute shoulder/center relative tread wear differences, but insufficiently precise to tell
15 “with any certainty” from the tread wear whether a tire had traveled less than 10,000 or
16 more than 50,000 miles. And these concerns might have been augmented by Carlson's
17 repeated reliance on the “subjective[ness]” of his mode of analysis in response to questions
18 seeking specific information regarding how he could differentiate between a tire that
19 actually had been overdeflected and a tire that merely looked as though it had been.”);
20 *United States v. Rincon*, 28 F.3d 921, 924 (9th Cir.1994) (research must be described “in
21 sufficient detail that the district court [can] determine if the research was scientifically
22 valid”).

23 Lack of documentation precludes reviewability and renders testimony inadmissible
24 under *Daubert* and Rule 702. See, *United States v. Monterio*, 407 F.Supp.2d 351, 374 (D.
25 Mass. 2006)(failure to follow documentation and peer review standards renders testimony
26 inadmissible under *Daubert* and Rule 702)(“Until the basis for the identification is
27 described in such a way that the procedure performed by Sgt. Weddleton is reproducible
28 and verifiable, it is inadmissible under Rule 702.”)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CONCLUSION

For the above-stated reasons, and for all of the reasons stated in docs. 634 and 637, defendant Edgar Diaz and all other defendants respectfully request that this motion to exclude the government’s drug identification evidence be granted.

Dated: November 31, 2006

Respectfully submitted,
MICHAEL N. BURT
TONY TAMBURELLO

By /s/ Michael N. Burt
Attorneys for Defendant
EDGAR DIAZ