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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

UNITED STATES OF AMERICA)
)
 vs.)
)
 ADRIAN MENDIOLA) CR No. 10-37
 DAVID SANTOS and) Garapan, Saipan
 ALBERT TAITANO)

- - - - -
 DAUBERT HEARING
 DAY FIVE
 Pretrial (Motions)

- - - - -
 BEFORE THE HONORABLE JOHN HOUSTON, Visiting Judge,
 on May 9, 2011
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FOR THE GOVERNMENT:
 Kirk Schuler, Esq.
 FOR DEFENDANT MENDIOLA:
 Ramon K. Quichocho, Esq.
 FOR DEFENDANT SANTOS:
 Michael W. Dotts, Esq.
 FOR DEFENDANT TAITANO:
 Bruce Berline, Esq.

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Monday, May 9, 2011

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(In open court:)

THE CLERK: If Your Honor please, this is Criminal Case Number 10-00037, United States of America versus Adrian Mendiola, et al, for the continuation of the Daubert hearing.

Counsel, please state your appearance.

MR. SCHULER: Kirk Schuler representing the United States. Behind me is Special Agent George Phocus and Michael Scanlan.

THE COURT: Good morning, sir.

MR. BERLINE: Bruce Berline on behalf of Albert Taitano, who appears this morning.

MR. DOTTS: Michael Dotts on behalf of David Santos, who is present with me in the courtroom.

MR. QUICHOCHO: Ray Quichocho on behalf of Mr. Mendiola, who is present in the courtroom.

THE COURT: Good morning, sir.

We're here for a continuation of our hearing from Friday.

I'd like to make two housekeeping notes clear for the record. Number one, regarding the length

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Afternoon Session

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THE COURT: The record shall reflect that the parties are present.

Mr. Mendiola, Mr. Santos and Mr. Taitano, I'd like to share with you the Court's ruling on motions before the Court.

There are three. First, there's a motion to exclude testimony or evidence with respect to the science of firearms identification; second, there's a motion to preclude Mr. Scanlan from testifying; and third, there's a Government motion that in the event that the testimony is admissible, that the Court exclude the testimony of Professor Schwartz.

I'll take them in order. I'd like to share here my rulings. This is an oral ruling. It will not be in writing. Otherwise, it will be a matter of record.

The defendants move to exclude the testimony demonstrating that certain shotgun shell casings match certain firearms in this matter based upon firearms evidence on the grounds that the research and methodology of such evidence is unreliable and

1 not scientifically based.

2 Rule 702 of the Federal Rules of Evidence
3 governs the admissibility of expert testimony in
4 Federal Court.

5 U.S. versus Finley, a Ninth Circuit case,
6 2002, Rule 702 provides that if scientific,
7 technical or other specialized knowledge would
8 assist the trier of fact to understand the
9 evidence or to determine a fact in issue, a
10 witness qualified as an expert by knowledge,
11 skill, experience, training or education may
12 testify thereto in the form of an opinion or
13 otherwise if, number one, the testimony is based
14 upon sufficient facts or data; two, the testimony
15 is the product of reliable principles and methods;
16 and three, the witness has applied the principles
17 and methods reliably to the facts of the case.

18 In Daubert, the Supreme Court held that the
19 expert witness testimony is admissible under 702
20 only if it is relevant and reliable. The
21 proponent of the expert has the burden of proving
22 admissibility under Daubert.

23 The trial Court is assigned the task of
24 gatekeeper and ensuring that an expert's testimony
25 both rests on a reliable foundation and is

1 relevant to the task at hand by weighing the
2 following factors:

3 One, whether a method can or has been tested;
4 two, the known or potential rate of error; three,
5 whether the methods have been subjected to peer
6 review; four, whether there are standards
7 controlling the technique's operation; and five,
8 the general acceptance of the method within the
9 relevant scientific community.

10 These factors have been held not to be
11 exclusive or exhaustive under *United States versus*
12 *Prime*, 43 Fed. 3d, 1147, 2005 Ninth Circuit case.
13 Instead, the District Court has considerable
14 leeway in determining in a particular case how to
15 go about determining whether a particular expert
16 testimony is reliable.

17 Under *Kumho Tire*, the 1999 Supreme Court
18 case, in *Kumho Tire*, the Supreme Court made clear
19 that the gatekeeping function of the trial Court
20 described in *Daubert* applies to all expert
21 testimony.

22 The primary consideration in every case is
23 whether the testimony is based upon reliable
24 principles. The test of reliability is flexible
25 in the *Daubert*'s list of specific factors neither

1 necessarily nor exclusively applies to all aspects
2 or to every case.

3 The Supreme Court also instructed that the
4 District Court has considerable leeway in deciding
5 these particular factors. With the dictates of
6 these two Supreme Court cases and the Prime case
7 in mind, the Court considers the challenges in
8 this case.

9 With respect to the underlying scientific
10 principles behind firearm, toolmark evidence, the
11 Court finds that the Supreme Court standard has
12 been met. The Court finds that there are
13 standards controlling the technique's operation.
14 The Association of Firearm and Toolmark Examiners,
15 the AFTE theory establishes such standards and
16 guidance.

17 AFTE, the largest organization that supports
18 the interchange of information concerning firearms
19 examination, standardizes terms and conclusions
20 that are employed in the examination, provides
21 training manuals and operational guidelines for
22 examiners and laboratories for uniform methodology
23 and process for firearm examinations and a Code of
24 Ethics for examiners to ensure the enhancement of
25 the integrity of the examinations.

1 Other organizations weigh in to ensure the
2 integrity of the description of the discipline,
3 such as the International Forensic Science
4 Laboratory and Testing Center and the American
5 Society of Crime Laboratory Directors. All
6 organizations accept the terms and conclusions
7 that have become the vertebrae of the discipline;
8 specifically, including the identification, no
9 identification and the inconclusive conclusions
10 reached by examiners.

11 Laboratories are accredited through these
12 organizations, and in some cases, specifically the
13 American Society of Crime Laboratory Directors to
14 oversee and review competencies and proficiencies
15 of individual examiners in member laboratories.

16 The methodology is peer reviewed and in broad
17 context in at least two ways. Peer review ensures
18 that information being disseminated is accurate
19 and reliable. A number of pieces of literature
20 has been presented to reflect that peer review
21 occurs within this forensic discipline. The AFTE
22 Journal, the Journal of Forensic Science, Forensic
23 Bulletin and the ASTM International. The
24 publications reflect the general acceptance of the
25 methods and operations utilized by the firearms

1 identification activity.

2 Importantly, peer review is engrained into
3 the discipline in another very unique way. The
4 evidence reveals that the American Society of
5 Crime Laboratory Directors has undertaken the
6 responsibility of reviewing results of firearm
7 proficiency tests conducted by the Fish and
8 Wildlife Forensic Laboratory.

9 A lab's accreditation is based in part on the
10 competency of its examiners. As has been the
11 subject of the evidence we've heard this morning,
12 the Fish and Wildlife examiners competency test
13 are reviewed by an outside agency. The agency's
14 proficiency review committee monitors and reviews
15 corrective action plans imposed on examiners who
16 fail to successfully complete the competency test.

17 The Court finds that the relevant scientific
18 community is the firearms and toolmark
19 identification examiners community. Some entities
20 and individuals have criticized the reliability of
21 methods utilized in this relevant community.

22 The National Academy of Science, NAS, is
23 empowered to review various scientific disciplines
24 and appears to be charged with informing state
25 coders how to constructively enhance and advance

1 the validity and certainty of various scientific
2 disciplines.

3 For example, there's an article in the
4 materials entitled Strengthening Forensic Science
5 in the United States hyphen A Path Forward. While
6 NAS's critique is helpful and instructive towards
7 improving the validity of all forensic science
8 disciplines, among its shortcomings are, number
9 one, the conclusions that only DNA analysis sets a
10 gold standard that is faithful to all the
11 identified factors listed in Daubert.

12 Number two, all other disciplines are in need
13 of improvement to achieve its gold standard
14 rating; and three, the committee was devoid of any
15 or sufficient number of members skilled in the
16 science or art of firearms and toolmark
17 examinations to inform its analysis and
18 conclusions with respect to methodology and
19 reliability of procedures and operations utilized
20 by skilled practitioners.

21 A read of NAS's reports reflects a genuine
22 interest in an altruistic goal in improving the
23 validity index of all forensic sciences towards a
24 threshold of the previously discussed gold
25 standard, and it does spend considerable time in

1 the firearms area to elevate the discipline.

2 While defendants present evidence that NAS
3 state some concerns regarding the proficiencies
4 involving potential rates of error and other
5 suggestions to improve the validity and
6 conclusions reached by firearms examiners, other
7 evidence also shows that proficiency matters are
8 embraced by the relevant scientific community with
9 regular testing and oversight by examiners and
10 laboratories, as demonstrated in this case.

11 However, even in light of the critique and
12 suggestions to improve the validity of conclusions
13 reached by the firearms and toolmark examiners,
14 NAS does not suggest or find that firearm and
15 toolmark examiner identification is not a science.

16 Professor Schwartz has also criticized the,
17 quote, science, end quote, of firearm
18 identification, relying upon her research and the
19 findings of NAS and other critical writings
20 relating to scientific analysis.

21 While Professor Schwartz's informed
22 viewpoints are relevant in the discussion, the
23 criticism must be considered along with the facts
24 that she is not an examiner; has never examined a
25 firearm and has never taken a proficiency exam,

1 and thus, cannot inform as to the nature and
2 particularities of the observations made in the
3 examining process to the extent individual
4 subjectivity comes into play upon observed data
5 viewed under the lens of examining equipment or
6 what equipment is best utilized under given
7 circumstances.

8 As such, the weight of the evidence suggests
9 that the peer review through publications and
10 organizations that review and monitor examiner
11 competencies in the relevant scientific community,
12 along with the standards employed by umbrella
13 technical and advisory organizations, support the
14 reliability of the methodology.

15 Moreover, cases cited by the defendants do
16 not find firearms identification evidence to be or
17 firearms identification examinations to be a junk
18 science. Based upon this Court's review of the
19 testimony, the exhibits considered and arguments
20 of counsel, the Court finds firearms
21 identification sufficiently satisfies a
22 Daubert/Kumho factors to be a reliable science.

23 Even if the firearms identification
24 discipline does not meet sufficient identified
25 factors in Daubert, this Court finds that it is an

1 area of technical and specialized knowledge,
2 evidence of which would be admissible to assist
3 the trier of fact under Rule 702.

4 As such, defendant's motion to exclude
5 firearms identification evidence as a science is
6 denied.

7 The Court now moves to the defendant's
8 challenges with respect to Mr. Scanlan's
9 qualifications as an expert.

10 Mr. Scanlan has 11 years of experience in
11 examining shotgun shells for the Fish and Wildlife
12 Service. He has been a forensic examiner for many
13 years, beginning in 1985, and is well-seasoned and
14 disciplined in the forensic examinations generally
15 as a result of his varied assignments and
16 positions over the years.

17 He has more than 22 years of firearms
18 identification experience. He applied the AFTE
19 theory of identification in his examination in
20 this case and has followed those guidelines for 25
21 years. He has subscribed to the Code of Ethics
22 established by AFTE over the years.

23 He's engaged in continuing education on
24 firearms identification over the last 11 years.
25 He stays abreast of the development of peer review

1 publications and has contributed to such
2 publications and stays abreast of critical
3 publications in the field, and he has engaged in
4 consistent competency testing since at least 2002.

5 Mr. Scanlan has performed thousands of
6 comparisons in this field and is familiar with and
7 utilizes the equipment generally accepted in the
8 field to perform his examinations to form his
9 conclusions.

10 In addition, his lab adheres sufficiently to
11 the protocols established by AFTE, and his work is
12 peer reviewed in his lab by way of an independent
13 examination performed by another skilled examiner.

14 In this case, the peer reviewer was a
15 supervisor with over 20years of peer review
16 experience.

17 He undergoes established proficiency testing.
18 The evidence shows that Mr. Scanlan received
19 non-consensus results or a nonsuccessful
20 completion of a portion of a competency test
21 administered in 2010. The failure on this test
22 impacts his lab's stature in the relevant
23 scientific community that National organizations
24 use his proficiency rating to assist in
25 determining the lab's accreditation.

1 Evidence shows that the Fish and Wildlife has
2 an internal proficiency review process through a
3 quality controlled director. When Scanlan failed
4 to pass all components of the competency test, the
5 internal quality control administrator and other
6 administrators implemented a corrective action
7 plan, a CAP, and provided notice of test results
8 and CAP to the American Society of Criminal
9 Laboratory Directors and its proficiency review
10 committee.

11 Mr. Scanlan later complied with all
12 conditions of the CAP. The evidence demonstrates
13 that this is the only partially failed competency
14 test in Scanlan's professional examiner history.

15 The Court finds that the evidence concerning
16 his failed test, any failure to timely discuss the
17 case results with the prosecutor or to include any
18 mention of the failure in his report goes to the
19 weight of his testimony, not to the admissibility
20 and his qualifications as an expert firearms
21 examiner.

22 This Court, therefore, finds that Mr. Scanlan
23 qualifies as an expert in firearms identification
24 in this case.

25 However, in light of the evidence reflecting

1 that firearms identification is not an exact
2 science, as with DNA, comparable to the validity
3 standards developed in the gold standard DNA
4 testing procedures, and the extent to which and
5 manner in which the relevant community includes
6 and accepts the, quote, inconclusive category,
7 unquote, as a conclusion, the witness will not be
8 permitted to testify that any conclusion is made
9 to an absolute certainty.

10 Accordingly, defendant's motion to preclude
11 the testimony of Mr. Scanlan is denied.

12 The last motion is the Government's motion to
13 exclude Professor Schwartz's testimony at trial.
14 Professor Schwartz's extensive writing, research
15 and scholarship on the reliability and validity of
16 scientific methods within various forensic science
17 disciplines, including firearms identification,
18 and whether such disciplines qualify as a science
19 was appropriately presented and received in the
20 Daubert hearing.

21 However, the Court finds that Professor
22 Schwartz should be precluded from testifying as an
23 expert at trial. Her testimony regarding the
24 discipline's reliability was for purposes of the
25 Daubert hearing.

1 Daubert and Kumho make clear that the Court
2 is a gatekeeper on whether this evidence is
3 considered. It is not the petit juror's role to
4 do so. So there will be no two full-blown Daubert
5 hearings in this case.

6 The case of Versace versus United States is a
7 case which refused to allow the expert to critique
8 the entire field of the discipline before the
9 petit jury.

10 The Court is of the mind that that is the
11 appropriate analysis, and the Court will not do so
12 in this case.

13 Having said that, the defense is correct that
14 it should be able to introduce evidence that
15 checks the strength of the science and the methods
16 utilized by the expert.

17 Professor Schwartz is not such a witness that
18 can present defendant's proffered evidence. She,
19 again, is not a firearms examiner. She has no
20 experience in firearms identification or
21 examination and has not undertaken a single exam
22 or single proficiency test.

23 She does not qualify as an expert in the
24 field of firearms identification.

25 This Court has approved the procurement of

1 expert resources to test evidence and challenge
2 the Government's expert in this case. So
3 defendants have expertise available to challenge
4 objectively, based upon the evidence and
5 independent firearms examination, the Government's
6 evidence.

7 While a witness' bias and interest in the
8 outcome of a case generally goes to the weight
9 given the evidence and not its admissibility, and
10 while the Court is generally better equipped to
11 decipher objective aspects of a witness' testimony
12 from its advocacy, the Court finds that Professor
13 Schwartz's passion and interest in respect to the
14 demise of the discipline of firearms examination
15 on any permitted stage, whether her scholarship
16 has the ability -- which her scholarship has the
17 ability to influence adversely affects the
18 foundations and premises upon which she espouses
19 and attacks Scanlan's credibility and testing
20 reliability and, thus, adversely affects her
21 reliability as an expert trial witness. Any
22 relevance and probative value intertwined in the
23 rhetoric of her testimony is outweighed by the
24 strong likelihood of misleading and confusing the
25 jury under Rule 403 analysis.

1 While trial testifying experts may be accused
2 during closing argument to have a bias in their
3 discipline, firearm identification is not
4 Professor Schwartz's discipline, and a criminal
5 jury trial in a Federal Court cannot and should
6 not be a public soap box or platform for a
7 self-proclaimed advocate, whether as a
8 noncharacter witness, lay witness or an expert for
9 the Government or defense to influence the
10 traditional fact-finding process.

11 For these reasons, the Government's motion to
12 preclude Professor Schwartz from testifying as a
13 witness at trial is granted.

14 That's the Court's order.

15 Do you want to take a break before we begin
16 from here? Or do you want to move on?

17 MR. BERLINE: Move on.

18 THE COURT: The Court intends to call the
19 jury at eight o'clock in the morning on all
20 three defendants.

21 Mr. Schuler, do I understand you may have a
22 motion?

23 MR. SCHULER: Yes, Your Honor. I have
24 five copies here that I'd like to provide
25 defense counsel with and one for Your Honor.

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CERTIFICATE OF REPORTER

I, PATRICIA A. GARSHAK, Official Court Reporter, in the United States District Court for the Northern Mariana Islands, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct transcript of the proceedings held in the within entitled and numbered cause on the date hereinbefore set forth, and I further certify that the foregoing transcript has been prepared under my direction.

PATRICIA A. GARSHAK, RDR-CRR
Official Court Reporter