

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. DEBORAH BERNINI  
JUDGE

CASE NO. CR-20103531-001

DATE: June 1, 2012

STATE OF ARIZONA  
Plaintiff,

vs.

JOSEPH JAVIER ROMERO (-001)  
Defendant.

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**R U L I N G**

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**RE: DEFENDANT'S MOTION TO PRECLUDE EXPERT TESTIMONY REGARDING FIREARM IDENTIFICATION; STATE'S MOTION TO PRECLUDE TESTIMONY OF DR. RALPH HABER:**

The Court has read the Defendant's Motion, the State's Response, the Reply, the Defendant's supporting documents, exhibits admitted at the May 29 evidentiary hearing, and all cited authorities. The Court has also read the transcript of testimony of Frank Powell from day two and day four of the trial held in August of 2010. Having reviewed the relevant documents and having further considered the testimony presented of Dr. Ralph Haber, the Court finds that the expert opinion testimony of Frank Powell regarding firearms meets the criteria of Rule 702, Ariz. R. Evid., as amended and adopted on January 1, 2012 and is therefore admissible.

Before addressing the issues raised in the motion, the Court wishes to address the testimony of Ralph Haber, Ph.D. Over the objection of the State, the Court permitted Dr. Haber to testify at the hearing challenging the firearms testimony of Frank Powell. Dr. Haber's degrees and background are in experimental psychology and human factors. This was the first time he had ever offered testimony in a courtroom about firearms analysis and it was clear that he had no training in firearms analysis. The sum of his critique was that firearms analysis lacked clearly defined protocols, that the proficiency testing seemed "too easy", and that bias is possible, but not necessarily present. He was dismissive of the methodology used, but could not state what the problem was that rendered the methodology unreliable. Other than quoting from *Strengthening Forensic Sciences in the United States* by the National Research Council, 150- 155, at 154 (2009), there was little helpful information provided

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**R U L I N G**

by his testimony. However, the Court considered the testimony before rendering this decision, so the Motion to Preclude filed by the State was rendered moot.

Amended Rule 702 governs the admissibility of expert testimony and permits the court to determine in advance of trial whether the proposed testimony is sufficiently reliable to justify its admission as evidence. Ariz. R. Evid. 104, 702; *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993). The Rule provides that:

“[A] witness who is qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion if:

- (a) The expert’s scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) The testimony is based on sufficient facts or data;
- (c) The testimony is the product of reliable principles and methods; and
- (d) The expert has reliably applied the principles and methods to the facts of the case. “

No federal court since the United States Supreme Court’s decisions in *Daubert*, *supra.*, and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) has yet found that expert testimony on the subject of firearms and ballistics examinations is inadmissible. See, *United States v. Diaz*, 2007 WL 485967 (N.D. Cal. Feb. 12, 2007); *United States v. Monteiro*, 407 F.Supp.2d 351, 364 (D.Mass. 2006); *United States v. Hicks*, 389 F.3d 514, 526 (5th Cir. 2004); *United States v. Santiago*, 199 F.Supp.2d 101,111 (S.D.N.Y. 2002). Nothing submitted by the defense for the Court’s consideration, either in the form of articles, papers or the testimony of their academic expert, suggests that the subject of firearm analysis is “junk science” or is so unreliable that a qualified expert should be barred from offering opinions regarding firearm or ballistic testing in an Arizona court. The particular witness in this case, Frank Powell, is qualified as an expert in the field through his education, training and experience. His testimony will assist the jury in making an informed decision. The facts and data that form the foundation for his opinions and the tests he personally performed when doing the comparisons are sufficient and the result of reliable principles and methods. And finally, the comparisons performed appear to be reliable and relevant to the facts of the case.

The Court finds that ballistic evidence is reliable and admissible under Arizona’s newly adopted *Daubert* standard and that Frank Powell’s education, training and experience properly qualify him as an expert witness in this field. For these reasons,

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**R U L I N G**

1. The State's Motion to Preclude (the testimony of Dr. Ralph Haber for purposes of the hearing) is DENIED.
2. The Defendant's Motion to Preclude Expert Testimony Re Firearm Identification is DENIED.

cc: Casey F. McGinley, Esq.  
Dawn L. Priestman, Esq.  
Sean H. Bruner, Esq.  
Clerk of Court - Under Advisement Clerk

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