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IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

<p>THE STATE OF UTAH, Plaintiff, -vs- JASON KYLE CLARK, Defendant.</p>	<p>MOTION IN LIMINE TO EXCLUDE DEFENSE EXPERT DAVID LAMAGNA</p> <p>Case No. 071903450FS</p> <p>Judge William W. Barrett</p>
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Plaintiff, the State of Utah, through its counsel, LOHRA L. MILLER, Salt Lake County District Attorney, and BYRON F. BURMESTER, ROBERT L. STOTT, and BERNADETTE M. GOMEZ, Deputy District Attorneys hereby submits this Motion In Limine To Exclude Defense Expert David Lamagna for consideration and respectfully requests that this Court exclude Defendant's witness from testifying.

STATEMENT OF PERTINENT FACTS

Defendant has filed a motion to exclude or limit firearm identification testimony. To support his case, Defendant has given notice that he intends to call David J. Lamagna as an expert witness in the field of toolmarks and firearms identification. Pursuant to the statutory requirement the defense submitted a notice with curriculum vitae (CV) and later a "preliminary affidavit" (note that the affidavit received March 29, 2010 does not have

any of the numerous supporting documents which the report purports to cite). The CV lists the classes that Mr. Lamagna claims to have attended and the experience he claims to have.

ARGUMENT

I. DAVID J. LAMANGA IS NOT QUALIFIED TO TESTIFY REGARDING FIREARMS TOOLMARKS ANALYSIS.

Rule 702 of the Utah Rules of Evidence states in part: “(a) Subject to the limitations in subsection (b), if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.” However, to be admissible the testimony must meet a threshold showing that the testimony is “reliable,...based upon sufficient facts or data, and [has] been reliably applied to the facts of the case.” UTAH R. EVID. 701(b).

An expert can meet the threshold showing “if the principles or methods on which such knowledge is based, including the sufficiency of facts or data and the manner of their application to the facts of the case, are generally accepted by the relevant expert community.” UTAH R. EVID. 701(c).

A. David J. Lamagna Is Not Qualified In The Area Of Firearms Examination Because He Lacks the Pertinent Scientific, Technical or Other Specialized Knowledge

From the Curriculum Vitae provided the State, it does not appear that Mr. Lamagna has ever received any training regarding toolmarks comparison or firearms examination except that he has completed the “Footwear, Toolmarks and Firearm

Impressions” course with the American Institute of Applied Science in 1999. Further, on his “preliminary” affidavit, Mr. Lamagna asserts that he is a member of the International Association for Identification (IAI) as a trained firearm examiner. There is no mention of any training or certification by the IAI. Finally, again in his preliminary affidavit, Mr. Lamagna asserts that he has “received training, and experience throughout the last 32 years of my professional life as an engineer in the specification, and measurement of machined surface finishes (i.e., toolmark analysis).” This assertion is extremely vague. It alludes to a connection to his engineer work but there is no specific mention that the training had anything to do with the forensic comparison of toolmarks of any kind much less, firearms.

In contradistinction, Mr. Lamagna goes on *ad infinitum* recounting all of the other courses of training he has attended in the forensic world such as: Palm print, fingerprint, advanced fingerprint identification, blood stain analysis, blood stain pattern workshop, DNA profiling techniques, arson investigations, homicide investigations, fraud investigations, medical investigator and forensic photography to name a few. He does not, however, indicate anywhere in the materials provided to the State that he has ever engaged in firearm or toolmark comparisons, despite his many years allegedly peripherally associated with the law enforcement community. Merely attending basic courses and reading materials about the history of this particular, specialized field, is insufficient to make a person an expert whose opinions would be admissible in court.

Thus the only training specifically designed for the forensic examination of toolmarks for the purpose of comparing bullets and cartridge casings to specific firearms

is the “Footwear, Toolmarks and Firearm Impressions” course Mr. Lamagna apparently took in 1999. American Institute of Applied Science states on their web home page:

The American Institute of Applied Science developed the home-study correspondence course expressly for students who work full-time or are active in other full-time educational programs. Students have the opportunity to learn at their own pace, without strict deadlines.

The courses offered are designed to teach, in an accessible format, criminology and basic forensics to students who are new to the subject, or to experienced investigators who are interested in using the information to complement their on-the-job experiences.

Taking a single correspondence course that is only partially applicable, which does not appear to have any practical application or internship program, is not sufficient “knowledge, skill, experience, training, or education” to qualify as an expert under Utah Rules of Evidence 702.

B. David J. Lamagna’s Testimony Is Not Generally Accepted By The Relevant Expert Community

Mr. Lamagna is not a member of the Association of Firearms and Toolmark Examiners (AFTE), the preeminent professional association for those who practice in the field of toolmarks and firearms comparison. He has apparently never made a comparison between two bullets or cartridge casings, although he may have looked at photographs. It also appears that Mr. Lamagna has never been subjected to third party certification examination, much less passed one. Mr. Lamagna has never written a peer-reviewed article on the subject of toolmarks/firearms identification.

Mr. Lamagna’s preliminary affidavit is filled with a vivid description of the historical development of the field of forensic identification of firearms as well as his subjective opinions which amount to critiques of the field in general. Nevertheless, it is

difficult to glean what his opinion is from the document. It appears to the State that Mr. Lamagna means to indict the field generally, though he concedes with sufficient technological advancement the identifications could be made. (“I am, however, a proponent of making 3D measurements of all toolmark transfers found on ammunition components.” Preliminary Affidavit of David J. Lamagna, p.32).

In contrast, Mr. Wakefield is the State Firearms Examiner. He is a member of AFTE. He has published articles in peer reviewed journals and has examined thousands of cartridge casings, bullets and firearms. Mr. Lamagna’s apparent ultimate conclusion that 3D measurements must be taken before an accurate identification can be made is not supported by the peer reviewed studies and AFTE (*See e.g.*, Hamby, et. al., “The Identification of Bullets from 10 Consecutively Rifled 9mm Ruger Pistol Barrels: A Research Project Involving 507 Participants from 20 Countries,” AFTE Journal, vol. 41, no. 2, Spring 2009). Accordingly, the proposed testimony of David J. Lamagna is not generally accepted by the relevant expert community. Though Mr. Lamagna has apparently read a number of materials about the field and its history, and has taken several general courses in many different types of forensic science he is nevertheless not qualified to express an opinion regarding toolmarks and firearm identification. Although he never expresses his opinions as to this particular case in his lengthy “Preliminary Affidavit”, Mr. Lamagna should also not be allowed to express expert opinions critical of the testimony of Mr. Wakefield based on the utter absence of information showing that he has an adequate scientific or other basis for expressing such opinions. Therefore, Mr. Lamagna’s testimony is not admissible pursuant to Rule 702.

II. THE TESTIMONY OF DAVID J. LAMAGNA IS NOT RELEVANT

In the course of his 34-page “preliminary” affidavit, Mr. Lamagna introduces himself and discusses his credentials (p.p. 1-5), presents a history of firearm identification (p.p. 6-7), discusses firearms and ammunition manufacture (never once mentioning Beretta, the firearm at issue) (p.p. 8-13), discusses general principles of firearm identification (citing to problems with identification of firearms very different from the Beretta) (p.p. 14-22). Finally, on page 23 Mr. Lamagna presents what he asserts is the proper method of examination. There are only two short paragraphs on page 25 and 26 where Lamagna criticizes the practice of Mr. Wakefield, stating that he did not photograph the steps he was making according to Mr. Lamagna’s proper course of examination. The rest of the document is simply more lecture by Lamagna about the state of firearms identification generally. Interestingly, he criticizes the value of ballistic imagery, indicting the value of the very photographs he is seeking.

Never does Mr. Lamagna express an opinion that the State’s scientist, Mr. Wakefield, has made an incorrect identification.

Rule 401 of the Utah Rules of Evidence states, “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probably or less probably than it would be without the evidence.” The proposed testimony of Mr. Lamagna according to his preliminary affidavit is not relevant. He has not looked at the bullets, the casings, or the firearm in question. Further, he does not express an opinion regarding the comparison that Mr. Wakefield made. Quite simply, he says nothing at all that has any tendency to make the

existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without his testimony.

Further, even if some of his testimony were considered remotely relevant, the long lectures on history, manufacture, examples of dissimilar firearms, and ballistic imaging have no probative value. Such long lectures about things and events unrelated to the issue at hand (was this Beretta the firearm that fired the shots that killed Kevin Kone and wounded Audra Snider and Debra Lindner?) will only serve to confuse the issue and mislead the jury. Utah Rule of Evidence 403 states that relevant “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” It is the State’s position that the testimony of Mr. Lamagna would not be relevant and in any event the miniscule probative value of such a lecture would be substantially outweighed by the *danger* of unfair prejudice, confusion of the issues, or misleading the jury. Accordingly, the State urges the Court to grant the State’s Motion and exclude the testimony at trial of David J. Lamagna.

In several cases in Massachusetts the defense has used Mr. Lamagna as they are in the instant case in their argument to exclude the governments’ ballistics evidence. *Commonwealth v. Meeks*, 2006 WL 2819423 (Mass.Super.); *United States v. Monteiro*, 407 F.Supp.2d 351 (D. Mass. 2006); *United States v. Green*, 405 F.Supp.2d 104 (D. Mass. 2005). In all three cases the government was allowed to introduce its evidence. It does not appear that the government sought to exclude Mr. Lamagna’s testimony. However, in each case the court was critical of Mr. Lamagna’s qualification to express an opinion. “David Lamagna’s background in firearms examination is limited; he does not

conduct firearms examinations on a day-to-day basis, and his training in the field occurred during the years 1994 and 1999 and included attending armorer's schools and instruction courses." *Meeks*, at 29. "Special Agent Curtis has substantially more specific experience in the field than Mr. Lamagna, who while trained in engineering, had no training in ballistics other than a correspondence course." *Monteiro*, at 376. "Defense expert David Lamagna provided limited insight into the problems with O'Shea's methodology. To say the least, Lamagna's credentials left something to be desired. He proclaimed expertise in dozens of fields, but his toolmark experience derived largely from short courses offered by gun manufacturers. He is not professionally affiliated with any forensic organization and has only published one article, and even that did not appear in a peer-reviewed journal." *Green*, at 117.

CONCLUSION

The proffered defense witness, David J. Lamagna is not qualified to testify as an expert in toolmarks and firearms identification. He has nowhere near the requisite training and experience. Further, his report, entitled a "preliminary affidavit" is full of assertions that are unsupported and which are not relevant and tend to confuse the real issues and will mislead the jury. That report is not a typical expert witness report and does not identify the two major things the State would need to know in order to counter the testimony: (1) what is allegedly wrong with the testing and expert conclusions reached by Mr. Wakefield; and, (2) what is Mr. Lamagna's contrary opinion and what is the scientific basis underlying that opinion? Accordingly, the State respectfully urges the Court to grant its Motion in Limine excluding the testimony of Mr. Lamagna at trial.

RESPECTFULLY SUBMITTED this _____ day of April, 2010

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