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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	2:09 CR-243 TS
vs.	:	MEMORANDUM IN SUPPORT MOTION TO EXCLUDE TESTIMONY OF DACE HYATT AND REQUEST FOR *DAUBERT* HEARING
JOSEPH SMITH, et. al.,		
Defendants.		Hon. Ted Stewart
:		
	:	

The United States, by and through the undersigned Assistant United States Attorney, has moved the Court to exclude the testimony of defendant Joseph Smith's proposed expert witness Dace Hyatt. Pursuant to the government's motion a *Daubert* hearing was held on February 4, 2011, during which Mr. Hyatt testified. The Court ordered simultaneous briefings to be filed no later than February 28, 2011.

1. TESTIMONY OF DACE HYATT

At the February 4 hearing, defendant Smith called Dace Hyatt and proffered him

as an expert in the field of Native American artifact appraisal. Hyatt testified that he had been in the business of buying, selling and authenticating Native American artifacts for 21 years, although he had no formal education in the area. (Transcript of Feb. 4, 2011 hearing, p. 7-8, 21-22; hereinafter T. 7-8, 21-22). In his direct examination, Hyatt offered no basis for his methodology, objective analysis, or his application to those concepts to the instant case. His testimony was vague and conclusory, and at best established that he had not followed the protocol that he had established even for himself.

As an example, Hyatt testified that he would not make valuation determinations based on the review of photographs, rather than an in-person inspection of the item. Notwithstanding that, Hyatt testified that the expert reports he submitted to the Court through counsel for defendant were all prepared before he had been afforded an opportunity to examine the items in person. His testimony on direct examination was as follows:

Q. Are there times where you have to authenticate something without access to the item or a microscope?

A There are times I have done just a conjecture authentication, you know, from a photograph, but I always tell people that it's important for me to see the item in person. (T. 10).

Notwithstanding that testimony, Hyatt acknowledged on cross-examination that he had not made any attempt, in the written submissions to the Court, to qualify his

valuations by indicating an in-person inspection was needed:

Q. Now as part of this investigation, what you were requested to do, you were asked to make an evaluation about a number of objects that were allegedly bought and sold during the course of the investigation, correct?

A Yes.

Q In what format were those objects presented to you?

A Well, they were offered to me yesterday in person. I spent the whole day studying them in person.

Q But prior to that, you prepared a report for the defendant in this case that had been presented to the Court as your expert report, correct?

A Yes.

Q And you didn't base that report on any of the observations that you made yesterday?

A It was contingent upon viewing the artifacts in person.

Q At the time you submitted that report, had you seen any of the artifacts in person?

A No.

Q Nowhere in that report does it indicate that it is contingent upon seeing the artifacts in person, does it?

A No.

Q There is nowhere in that report where the language says something to the effect of this is my best guess based on looking at a picture, but I need to see the stuff in person in order to really make an evaluation?

A I did have a disclosure that these evaluations were to the best of my knowledge and experience to date based on the information given to me I believe is how it was worded.

Q But notwithstanding your statement on direct examination that -- and I wrote this down and I think it's an exact quote, but correct me if I am wrong, there are times when I do a conjecture identification by photograph, but when I do so, I make sure that -- I make clear that seeing the actual object -- that seeing the actual object would need to take place?

A Sure, absolutely.

Q Yet nowhere in those documentations that you submitted to this Court as an expert witness report did you make that distinction?

A Not within the report, I did not, verbally.

(T. 22-23)

Of greater concern, perhaps, is that Mr. Hyatt indicated in his report to the Court that he had conducted a microscopic examination of at least one artifact, when in fact he had never seen that artifact in person at the time he prepared the report, and no arrangements or efforts had been made for him to see them at the time he prepared the

report.

Q So at the time you presented those to Mr. Hamilton, no firm arrangements had been made for you to see those items?

A No firm arrangements.

Q There was nothing in your documentation to indicate that these reports were preliminary or speculative and that a final determination could not be made until you saw the objects in person?

A Those were a verbal discussion.

(T. 24-25)

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Q In that determination of authenticity you made the following statement: After a detailed microscopic evaluation, it is my determination that item number 40 has evident characteristics consistent with prehistoric stone artifacts. Does that sound accurate?

A I would have to refer to the report.

Q Let me show it to you. Other than the underlining on there and the notations underneath, does that look like the work that you provided?

A This actually looks like a proof, one of the proof of my documents. This doesn't look like a completed document.

Q You are indicating that you drafted this document?

A It is a proof.

Q And if I proffer to you that this had been submitted to the Court as one of the documents to support your testimony today, you wouldn't have any reason to dispute that, would you?

A No.

Q You don't dispute that you wrote those words?

A Contingent upon microscopic evaluation.

Q You don't dispute that you wrote those words?

A That's correct.

Q At the time you wrote those words, you had never seen that object in person?

A I would have to refer to the quote. Are you sure that that's one from the defender's office?

Q I'm proffering to you that this is a document that has come from the court's docket. The docket number is indicated on the top. So with that representation, you wrote those words?

A Okay. Yes.

Q And at the time you wrote those words, after a detailed microscopic evaluation, it is my determination that this item has evident characteristics consistent with prehistoric stone artifacts, at the time you wrote that you had done a microscopic evaluation, you had never seen that object?

A This is a typo. A typo I'm embarrassed to say, yes.

(T. 33-34)

Hyatt also acknowledged in his testimony that he had personally conducted numerous transactions with the government's Confidential Informant during the period of the investigation (T. 37-39) and that he had been openly critical of the government's investigation (T. 15-18)

2. DISCUSSION

Under Rule 702, Federal Rules of Evidence, a district court must satisfy itself that the proposed testimony of an expert is both reliable and relevant, in that it will assist the trier of fact, before permitting a jury to assess the testimony. *United States v. Rodriguez-Felix*, 450 F.3d 1117, 1122-23 (10th Cir. 2006). In determining whether expert testimony is "both reliable and relevant," case law requires the district court undertake two-step analysis. First the court must determine whether the expert is qualified to render an opinion. Second, if the expert is sufficiently qualified, the court must determine whether the expert's opinion is reliable under the principles set forth in *Daubert [v. Merrell Dow Phaprmaceuticals, Inc.,* 509 U.S. 579 (1993)]. *103 Investors 1, L.P. v. Square D Co.,* 470 F.3d 985, 990 (10th Cir. 2006).

The United States conceded at the evidentiary hearing (T. 5) that the proposed testimony of Mr. Hyatt, if otherwise reliable, is relevant. Defendant is charged under a statute in which a penal differentiation is made based upon value. Therefore, evidence of value is relevant to establish the proof or absence of proof of one of the essential elements

of the offense.

However, Mr. Hyatt's testimony shows that he falls woefully short of the standard the Court is to employ in exercising the "gatekeeper" function established by *Daubert.* Further, his apparent bias, and tangential involvement in the investigation which resulted in defendant's indictment, should bar him as an expert witness.

Under *Daubert,* the methodology used to assess reliability includes: 1) whether the proffered theory can and has been tested; 2) whether the expert's opinion has been subject to peer review; 3) the known or potential rate of error; and 4) the general acceptance of a methodology in the relevant scientific community. *Daubert*, 509 U.S. at 593-94. Reliability questions may concern the expert's data, method, or application of the method to the data. *Id.* Under *Daubert*, any step that renders the expert's analysis unreliable renders the testimony inadmissible. *Id.* This is true whether the step completely changes a reliable methodology or merely misapplies the methodology. *Mitchell v. Gencorp, Inc.,* 165 F.3d 778, 782 (10th Cir. 1999) Finally, it should be noted that the proponent of the expert testimony bears the burden of showing that its proffered expert's testimony is admissible. *Ralston v. Smith & Nephew Richards*, *Inc.,* 275 F.3d 96, 970 (10th Cir. 2001).

Setting aside for a moment Mr. Hyatt's lack of objectivity, his testimony cannot survive scrutiny under that standard. His theory cannot be tested, because he has not established one. He merely testified that, as a result of being involved in a very unique market for 21 years, he is capable of determining market value of Southwest Native

American artifacts. His opinion is not subject to peer review, and he has intentionally avoided membership in any of the professional organizations which may provide such review. (T. 25-27, 40). There is no expressed known rate of error.

Most compellingly, perhaps, is that not only did the defendant fail to establish whether Hyatt's methodology was generally accepted in the scientific community, his testimony firmly established that he did not follow that methodology himself. Hyatt submitted lengthy documents, purporting to establish the value of unique, one-of-a-kind objects, without bothering to (a) view and inspect the items in person, or (b) notify the court that his analysis was not based on such an inspection, despite his own protocol which required such a disclosure.

Furthermore, Hyatt's lack of objectivity should call into question his credibility as a witness. Although the Court curtailed cross-examination of Hyatt's bias, the record makes clear that Hyatt was personally involved as a potential target of the investigation, that he was openly critical of the investigation, and that his valuations are influenced by the monetary requirements of the statute charged:

Q. (By Mr. McKelvie) And in some of those instances the amount that Mr. Gardiner had paid for those objects was wildly in excess of that which you valued them at, correct?

A That is correct.

Q In fact, there were circumstances in which you indicated a value of an item

was $488 and he paid $5500 for it?

A That's possible.

Q You would agree with me that that is a wildly inflated amount, more than a thousand percent?

A Yes.

Q And when you did this evaluation, you did so mindful of the provisions of the Federal Archeological Resources Protection Act, correct?

A I don't quite understand that question.

Q You are very familiar with the statute?

A Yes.

Q You've read it?

A Yes.

Q You've talked about it with colleagues?

A Yes.

Q You understand the penalties that are involved in it?

A In ARPA?

Q Yes.

A Yes.

Q You know that ARPA can be either a misdemeanor or a felony?

A Correct.

Q And whether it becomes a misdemeanor or a felony depends, in some circumstances, on the value of the item?

A That is correct.

Q You know that that value demarcation is $500?

A Yes.

Q So if an item is under $500, it's a misdemeanor, and if it's over $500, it's a felony?

A Yes.

Q And of the items that you evaluated, there is not a single item that you evaluated in excess of $500, is there?

A Well --

Q That's a yes or no --

A The reports are not completed.

Q The reports that you submitted to the Court --

MR. DOUGLAS: Objection, Your Honor. Again, we're going to cross-examination. The question assumes that he's an expert in the area.

MR. McKELVIE: It does not assume that, Your Honor.

THE COURT: I understand what you're doing. I will overrule the objection.

BY MR. McKELVIE:

Q There is not a single item that you valued at over $500, is there?

A In the proofs. They are not completed.

Q If I proffer to you that those proofs were submitted to the Court as your evaluations, none of them is over $500?

A For them to study the format of the proofs.

Q Did you see anything yesterday that changed your mind about whether or not any of those items are worth more than $500?

A Yes.

Q How many items did you see yesterday that were worth more than $500?

A Oh, worth more than 500?

Q Yes.

A I didn't understand the question. Actually I am not aware of anything over $500, no.

Q Notwithstanding the fact that you know that Mr. Gardiner paid up to $6500 for some of those items?

A I am aware of that.

Q During this same period of time you were trading with Mr. Gardiner?

A Yes.

Q You sold a number of objects to him?

A Comparable objects actually, yes.

Q In fact, over a period of about nine months in late 2007 through early 2008,

you sold to him a total of about 17 or 18 objects; is that correct?

A It should be more than that.

Q At least that many?

A Yes.

Q For example, on November 7th of 2007, you sold him a rattle mug for -- yeah, you sold him a rattle mug for $3,000?

A That sounds correct.

Q What was the fair market value of that rattle mug?

A I would say the fair market value would be right around $3,000.

Q Not $300?

A No.

Q Mr. Gardiner knew the value of these things?

A Do you really want me to answer that?

Q He was a pretty shrewd negotiator, correct?

A He was deceptive.

Q But he certainly paid you $3,000 when you thought something was worth $3,000?

A Well, in some cases, yes.

Q You didn't inflate the price by a thousand percent?

A I did not.

Q You dealt with Mr. Gardiner fairly in all the transactions that you had with him?

A Yes.

Q Over a period of that investigation you bought at least17 items from him -- or, excuse me, sold at least 17 items to him for at least $22,825. Does that sound about right?

A During the investigation?

Q Between November of 2007 and September of 2008.

A How many thousand?

Q $22,825.

A 22,000. I haven't done the math actually.

Q Does it sound about right?

A It seems a little high.

Q There were a number of transactions?

A Yes.

Q A number of items?

A That's correct.

Q And your testimony today is that every one of those items that you sold to him you sold at a fair market value?

A Yes.

Q That the value representative of the sale you made with him was what you would have appraised that item in an appraisal to this Court?

A That is correct.

(T. 34-39).

3. CONCLUSION

The government acknowledges that some of the issues raised above may be dealt with at trial through cross-examination of the type employed at the *Daubert* hearing. Mindful of the essential gatekeeping function of the Court, however, there comes a point where the credibility and objectivity of a proposed expert witness is so lacking that the Court should not allow that witness, and create the inference that the witness is, in fact, a witness whose testimony should be given weight or consideration. Furthermore, to the extent that any process or procedure was applicable to Hyatt's attempts to place a value on the Native American Artifacts, he admittedly made no legitimate effort to follow that process or procedure. Therefore, the testimony of Mr. Hyatt should be excluded from trial.

Respectfully Submitted this 28th day of February, 2011.

CARLIE CHRISTENSEN
United States Attorney

__/s/ Richard D. McKelvie____
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