NNH-CR21-0346010-T	:	SUPERIOR COURT
STATE OF CONNECTICUT	:	JUDICIAL DISTRICT OF NEW HAVEN
v.	:	AT NEW HAVEN, CONNECTICUT
TREVOR OUTLAW	:	FEBRUARY 9, 2022

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE ELPEDIO N. VITALE, JUDGE

A P P E A R A N C E S :

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1 THE COURT: All right. Good morning, counsel.
2 ATTY. GARBARSKY: Good morning, your Honor.
3 THE COURT: All right. Before the Court now is
4 again the defendant's Motion for Porter Hearing and
5 Motion in Limine dated February 1st, 2022. The Court
6 heard some testimony yesterday from witness Jennifer
7 Robisheaux, and then argument from counsel in
8 connection with the motion, which is really in two
9 parts, which I think was clarified yesterday, meaning
10 although captioned as a Motion for a Porter Hearing
11 the motion itself also speaks to a Motion in Limine
12 which seeks to limit certain aspects of the witness's
13 testimony in connection with her opinion.
14 So, in connection with the defendant's Motion
15 for Porter Hearing and the Motion in Limine, the
16 Court has reviewed relevant case law and the
17 testimony of the witness, Ms. Robisheaux. The motion
18 itself-- The written motion itself references
19 specifically NAS reports, meaning National Academy of
20 Science Reports from 2008 and 2009, and then during
21 argument I believe, and it may have come up in
22 connection with a citation to a case an NAS Report
23 from a later date in 2016. The defendant, however,
24 has indicated insofar as Porter is concerned that
25 there is no new evidence or developments he is
26 claiming warrants, as discussed in State versus
27 Raynor, 337 Connecticut 527, 2021, and State versus

1 Terrell, 68 Connecticut Law Reporter, 323, 2019,
2 which is cited in Raynor, a renewed challenge to the
3 reliability of the methodology of firearm and
4 toolmark examination. So the Court, in other words,
5 was not asked to perform a so-called gatekeeping
6 function in connection with that testimony.
7 Research reveals that courts across the country
8 have admitted expert testimony concerning toolmark
9 identification, to spite arguments that such evidence
10 does not feature the full rigor of science, and that
11 there is degree of subjective analysis and reliance
12 on the experience of the examiner, as well as certain
13 concerns about statical error rates, which I am not
14 now going to belabor. Many of these cases discuss
15 the so-called NAS Reports and PCAST Reports.
16 In footnote seven and 16 in State versus Raynor,
17 State versus Terrell is referenced, and footnote
18 seven indicates various courts have considered NAS
19 and PCAST Reports and have concluded firearm and
20 toolmark evidence continues to be both reliable and
21 admissible.
22 Since the defendant is not making a claim under
23 Porter that the Court exercise its so-called
24 gatekeeping function based on any new developments or
25 new evidence he has identified since state versus
26 Terrell, so the Court is not as a result required to
27 exercise its gatekeeping function and reassess the

1 methodology at issue as per Raynor, then this Court
2 takes Judicial Notice of the conclusions reached with
3 respect to the admissibility of toolmark and firearm
4 evidence in State versus Terrell. The only issue
5 then for the Court's determination is the limitation
6 the Court should place on the degree of certainty the
7 expert may express concerning her opinion.
8 I pause here parenthetically to note that this
9 case, unlike Raynor, Terrell, and many others I've
10 read, involves merely a comparison of two fired--
11 fired cartridge cases, not a comparison involving
12 ballistic evidence being compared with a gun. There
13 was no gun recovered in this case. The Court is
14 unclear if that is a distinction that matters or not.
15 The Court has not been directed to any authority
16 either way.
17 In the Motion in Limine portion of his Porter
18 request therefore the defendant seeks to limit the
19 expert's opinion to a statement that, quote, she can-
20 - cannot exclude that the two spent cartridge cases
21 at issue were fired from the same firearm. This
22 language is derived from a single Superior Court
23 decision in 2016 from Washington D.C. captioned
24 United States versus Marquette Tibbs, case number
25 2016 CF1 1943, authored by Judge Edelman. That Court
26 enunciated the defendant's request standard on page
27 51 of a 53 page decision without apparent citation to

1 any appellate or statutory authority. Judge Edelman
2 also went on to equate that standard in the Court's
3 words as follows, quote, in other words, that firearm
4 may have fired the recovered casing, end quote.
5 I will note that State versus Raynor was decided
6 after United States versus Marquette Tibbs, and U.S.
7 Shipp was-- U.S. versus Shipp was cited in State
8 versus Raynor. Raynor did not adopt that standard
9 or, in fact, discuss it at all.
10 This court respect-- respectfully disagree that
11 standard articulated in Tibbs is appropriate. As the
12 Court concludes, it is so ambiguous or nebulous,
13 particularly based on the evidence and information
14 before me presented at the hearing, as to be of
15 little to no assistance to the jury when considering
16 the state's expert's testimony along with the other
17 evidence in this case. As I said, no firearm was
18 recovered in this case.
19 The Court was not, in its estimation, presented
20 with a cogent basis to adopt such a standard in this
21 case considering the nature of the information and
22 testimony before me and lack of persuasive case law
23 presented. Why this Court should adopt the standard
24 requested by the defendant was not-- was not
25 sufficiently articulated, nor was how failing to
26 limit the expert's testimony in that fashion would
27 specifically prejudice the defendant in a case where,

1 as far as the Court has been made-- has been made
2 aware in various arguments and in reviewing the
3 warrant in the Franks Hearing, first, there-- there
4 were only two cartridge cases recovered and no
5 firearm and, secondly, no evidence or information of
6 a claim that there were two shooters, or more spec--
7 specifically more than one shooter, or any evidence
8 that there were two guns used.
9 Insofar as the Motion in Limine therefore seeks
10 to compel the adoption of the standard enunciated in
11 Tibbs, that request is denied. The Court is not
12 persuaded that it is appropriate in this case after
13 review of that decision. The other case law that the
14 Court has reviewed which uses a different standard.
15 Turning to what the appropriate scope of the
16 expert's testimony should be, however, the Court has
17 reviewed Raynor and the cases cited therein with
18 respect to this issue, and has reviewed other cases
19 as well. Raynor discussed with approval the state's
20 concession that the methodology employed by firearm
21 and toolmark identification experts would not
22 currently support any representation that their
23 conclusions are one hundred percent infallible. The
24 Court went on to indicate that the state in Raynor
25 suggested that if the Court were to adopt a rule
26 proscribing the language an expert must use in
27 stating his or her opinion that a particular casing

1 was fired from a specific firearm, that the state
2 would support either a requirement that the expert
3 phase the opinion in terms of a reasonable degree of
4 certainty or a practical certainty. By its language
5 immediately following that discussion, to wit, quote,
6 we agree with state, end quote, this Court interprets
7 the Raynor Court as agreeing with both the
8 recognition that there is no support for conclusions
9 rendered in terms of one hundred percent
10 infallibility or a match, if you will, and agreeing
11 with the suggested proscription that the expert
12 utilized either practical certainty or a reasonable
13 degree of certainty.
14 This Court has reviewed cases cited in-- excuse
15 me, cited by Raynor in an effort to appropriately
16 limit the-- the expert's source attribution
17 statement, in other words, level of certainty. This
18 Court is mindful that the Ray-- Raynor Court's
19 general concern is that a level of certainty
20 suggesting a match, practical impossibility, or
21 percentages approaching one hundred percent is not
22 appropriate. Raynor begins this discussion on page
23 555, and it continues to page 557. I will not
24 belabor it.
25 I did, however, read the cases cited therein
26 with the following observations: First, the cases
27 cited in Raynor do not all agree on what language is

1 appropriate. I this vein I will note a couple of
2 things; with respect to the phrase, quote, practical
3 certainty, cited in Raynor which was utilized in
4 United States versus McCluskey, 2013 Westlaw
5 12335325, it is unclear to this Court how exactly
6 that term-- terminology originated. In other cases
7 in that district court of New Mexico, courts in the
8 past had utilized reasonable degree of certainty in
9 the firearms examination field. The, quote,
10 practical certainty, end quote, phrase was adopted by
11 the McCluskey Court only after the expert in that
12 specific case said that he, quote, had no idea what
13 the phrase reasonable degree of scientific certainty
14 meant. Likewise, though, McCluskey doesn't define
15 what practically certain means, however. There is a
16 danger, however, in this Court's view that the phrase
17 could be interpreted as meaning practically certain,
18 which may approach a level of certainty that Raynor
19 suggested should not be countenance or was
20 appropriate.
21 In U.S. versus Johnson, 2019 Westlaw 1130 258,
22 the Court merely in a footnote, footnote 10,
23 references the terminology consistent with, but
24 appeared in that same footnote to conclude that such
25 testimony without further explanation provides the
26 jury with no basis for determining whether such
27 consistencies suggest that the ballistic evidence was

1 fired from the same gun. The difficulty is that
2 explanations of such testimony may then approach the
3 area of suggesting a match or remote unlikelihood, or
4 any other suggestion of a degree of certitude or
5 explanation which Raynor seeks to avoid. Raynor
6 urges trial courts to exercise discretion and impose
7 appropriate limits on such testimony when deemed
8 necessary.
9 At this point I am going to pause and indicate
10 the following: The Court reviewed and listened to
11 again the statements made by the state's expert at
12 the hearing yesterday. When the question was asked
13 whether any conclusions had been reached after her
14 examination of the two fired cartridge cases, her
15 answer was as follows: Based on similar class
16 characteristics and sufficient agreement on
17 individual characteristics the two fired cartridge
18 cases were identified as having been fired from the
19 same firearm. Follow up question, which was with
20 what degree of certainty do you make that statement?
21 Answer: Practical certainty. Question: What is
22 practical certainty? Answer: The likelihood that a
23 different tool could have crated the marks I observed
24 is so remote as to be considered a practical
25 impossibility. Question: Do you quantify it at one
26 hundred percent certainty? The answer was error rate
27 would be close to zero.

1 The Court believes that based on Raynor and
2 State versus Terrell cited with apparent approval in
3 Raynor, that such testimony educed at the hearing is
4 impermissible. The Court has attempted to strike an
5 appropriate balance with the scope of the expert's
6 opinion so that it is intelligible and of assistance
7 to the jury without running afoul of the language in
8 Raynor and Terrell which indicates that those kinds
9 of statements should be avoided, that is the-- That
10 is what Raynor is driving at. There can be no
11 assertion of any potential degrees of certainty or
12 any percentage. Obviously, the expert can explain
13 how various marks are left, what marks consist of,
14 how the marks enable certain conclusions to be drawn,
15 and the use of a microscope and so forth.
16 Court observes that the phrase reasonable
17 probability or reasonable certainty is a term well
18 recognized in Connecticut law in terms of the
19 conclusiveness of an expert's opinion. This Court
20 agrees with the Court in United States versus
21 Monteiro, M-O-N-T-E-I-R-O, 407 F. Supp. 2d 351, and
22 other courts that have adopted this level of
23 certainty standard, such as United States versus
24 Diaz, 20-- 2007 Westlaw 485967; U.S. versus Taylor,
25 663 F. Supp. 2d 1170; United States versus Hunt, 464
26 F. Supp. 3d 1252; U.S. versus Ashburn, 88 F. Supp. 3d
27 239, that an opinion rendered to reasonable degree of

1 certainty in the ballistics field is consistent with
2 our case law and it's criticism of past certainty
3 language used in this field. It is certainly less
4 than the standard criticized in Terrell and,
5 obviously and most importantly, it is a phrase
6 apparently and seemingly noted with approval by our
7 Supreme Court in State versus Raynor as I earlier
8 noted. The Court will therefore limit the scope of
9 the expert's testimony to that standard.
10 Therefore, the state must instruct the witness,
11 and it is the Court's order, that the direct
12 examination and testimony must be conducted so as to
13 avoid the language that I have just described that
14 was provided in the hearing; to wit, there should be
15 no suggestion, either directly or indirectly, of a
16 match. In other words, when the witness said that
17 the fired cases were identified as having been fired
18 from the same firearm, the phrase practical
19 certainty, and in particularly obviously her
20 testimony in explaining that phrase as I indicated,
21 and quantifying the percentage of certainty,
22 including the error rate which she indicated was less
23 than zero.
24 Now I obviously want to stress to everybody the
25 fact that counsel should be alert to the dangers
26 either-- well, the dangers of inadvertently opening
27 the door to some kind of testimony through a question

1 or a follow up question, or a request to explain that
2 is then going to have her launch into something that
3 she said yesterday. So everybody just should be
4 mindful that-- to avoid that kind of circumstances
5 happening, which would obviously then create problems
6 we like to avoid.
7 Okay. Anything anybody needs to add to what
8 I've just indicated?
9 ATTY. FARVER: Only one question I have, your
10 Honor, is that commonly I think the state likes to
11 offer the report, and the report of July 30th, 2020
12 would seem to go against the Court's ruling --
13 THE COURT: Right. So, therefore, --
14 ATTY. FARVER: -- so --
15 THE COURT: -- therefore, it won't be admitted.
16 ATTY. FARVER: All right.
17 THE COURT: I mean I know that happens, I'm not
18 going to get into what I think about --
19 ATTY. FARVER: Okay. I didn't --
20 THE COURT: -- that practice, that's not before
21 me.
22 ATTY. FARVER: That's fine.
23 THE COURT: But I'm just-- Okay. The other
24 thing I need to, I guess, put on the record more
25 fully, I mentioned it yesterday in passing, was the
26 request about-- there was a Motion in Limine
27 regarding gang affiliation. And, in particular, Mr.

1 Farver, you had requested obviously the Court limit
2 to reference to Bloods versus Crips based on a case
3 that you provided me, which I did read. And if--
4 Well, generally speaking, you were objecting to an
5 evidence of gang affiliation all, and if failing that
6 it was going to be admitted you requested that the
7 reference to Bloods and Crips in specific be omitted,
8 if I understand your position correctly.
9 ATTY FARVER: Yes, sir.
10 THE COURT: Okay. All right. Court will rule
11 as follows: Evidence of gang affiliation, if
12 credited by the jury, is not prior misconduct as such
13 evidence in and of itself does not show any bad act
14 or criminal conduct on the defendant's part, the
15 question is one of relevance and whether the
16 probative value of such evidence outweighs any
17 prejudicial effect.
18 The state argues that the evidence of the
19 defendant's alleged gang affiliation is relevant on
20 the issues of motive, intent, and the existence of a
21 conspiracy. The defendant is charged in the second
22 count of the information with conspiracy to commit
23 murder. His alleged co-conspirator, Cheenisa Rivera,
24 is expected to testify as a state's witness pursuant
25 to a cooperation agreement, she has apparently
26 entered a plea of guilty to a conspiracy to commit
27 murder charge.

1 A number of Connecticut cases have addressed the
2 issue of a defendant's membership in a gang and the
3 probative value of such membership and its relevant--
4 relevance on the issues being-- it's being offered
5 for in this case. State versus Johnson 82 Conn. App.
6 777, which involved testimony of gangs identified as
7 the Island Brothers versus the Ghetto Boys and their
8 gang rivalry. State versus Torres 47 Conn App 149,
9 cert was denied, Latin Kings versus the Los Solidos.
10 State versus Watts, 20 Love versus the Latin Kings,
11 strife between those two gangs. In that opinion the
12 Court noted defendant's words to the effect, quote,
13 back then it was like a war on the streets. the Latin
14 Kings Shot at us and we shot back, end quote. State
15 versus Small, 180 Conn. App. 674, cert was denied,
16 testimony about a third party's membership in the
17 bloods gang relevant to the defendant's efforts to
18 sell what was claimed to be the murder weapon to that
19 third party. State versus Wilson, 308 Connecticut
20 412, evidence of defendant's gang affiliation if
21 credited by the jury highly probative of a motive to
22 kill the victim. State versus Marrero-Alejandro 159
23 Conn. App. 376, affirmed at 324 Connecticut 780,
24 defendant's membership in drug organization relevant
25 to motive.
26 It appears to the Court that the evidence the
27 Court has been made aware of suggests what perhaps

1 was a chance encounter between defendant and the
2 decedent at a hotel parking lot in the early morning
3 hours. The hotel was apparently open for business.
4 Certainly evidence of what would allegedly motivate
5 the defendant to allegedly shoot the decedent at that
6 particular location at that time is relevant, and
7 additionally such evidence is relevant to his
8 intention to do so and whether or not he was engaged
9 in a conspiracy with his alleged co-conspirator.
10 Court did review U.S. versus Price, which is the
11 trial court decision cited in U.S. versus Reyes,
12 which I think is what Mr. Farver provided to the
13 Court, which is at 212 U.S. District Lexis 61347, in
14 support of excluding the name bloods from the
15 testimony. The defendant cited Reyes; Reyes cites
16 Price. Price doesn't exactly say what Reyes
17 ultimately concluded. But the Court-- In the
18 exercise of its discretion in this case the Court
19 will, however, limit the introduction of the evidence
20 in this case regarding gang affiliation without
21 reference to the name of the gang, either gang,
22 Bloods or Crips, and simply permit evidence of the--
23 the existence of rival gangs, and one or the other
24 was a member of a rival gang. Again the admonition
25 being to everybody not to open any doors by
26 questioning.
27 Court will provide a limiting instructions at

1 the time of the introduction of the evidence and
2 later in its final instructions.
3 Okay. Anybody need- wish to be heard with
4 respect to that?
5 ATTY. GERMAIN: Just briefly, your Honor.
6 THE COURT: Sure.
7 ATTY. GERMAIN: When we come to that the issue
8 with regards to the-- the witnesses that are
9 testifying, would it be permissible to-- to keep it
10 so narrow to-- to ask leading questions?
11 THE COURT: Mr. --
12 ATTY. FARVER: Well, I-- I would agree with that
13 pro-- procedure, your Honor. I have never objected
14 to when we get to a sensitive area the Court, you
15 know, allowing, and I don't object to leading so that
16 it keeps it from --
17 THE COURT: I think that's a --
18 ATTY. FARVER: -- blowing up.
19 THE COURT: -- good idea on both parts.
20 ATTY. FARVER: Yes.
21 ATTY. GERMAIN: Thank you, your Honor.
22 THE COURT: Okay. Thank you, everybody. Unless
23 there's something else, we're adjourned until Monday
24 at 10:00. Just let me see counsel in chambers for
25 the record.
26 ATTY. GERMAIN: Madam Reporter, --
27 MARSHAL: All rise.

1 ATTY. GERMAIN: -- can I have a copy of the
2 decision.
3 MARSHAL: Court stands adjourned until Monday
4 morning at 10 a.m.
5 **(Court stands adjourned.)**
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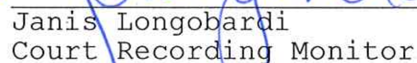
C E R T I F I C A T I O N

I hereby certify the foregoing pages are a true and correct transcription of the audio recording of the above-referenced case, heard in Superior Court, Judicial District of New Haven at New Haven, Connecticut, before the Honorable Elpedio Vitale, Judge, on the 9th day of February, 2022.

Dated this 9th day of February, 2022 in New Haven, Connecticut.



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