STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS	)	
	)	
vs.	)	15 CR 1406601
	)	
RICKY WINFIELD,	)	
	)	
Defendants.	)	

PEOPLE'S RESPONSE TO DEFENDANT'S "MOTION TO EXCLUDE FIREARMS EXAMINATION OPINION TESTIMONY"

Now come the People of the State of Illinois, by their Attorney, KIMBERLY M. FOXX, State's Attorney of Cook County, through her Assistants, Michael Pattarozzi and Patrick Waller who respectfully respond to defendant's "Motion to Exclude Firearms Examination Opinion Testimony." In support of their response, the People state the following:

INTRODUCTION

1. Defendant is charged *inter alia* with first degree murder.

2. During the investigation, firearms evidence was recovered and submitted to the Illinois State Police Forensic Laboratory in Joliet ("ISP Lab") for testing and analysis. The People intend to elicit testimony at trial related to the examination and comparison of this firearms evidence.

3. Defendant has filed a motion entitled "Motion to Exclude Firearms Examination Opinion Testimony." In his motion, defendant asks this Court to 1) "exclude the testimony of the State's firearms examiners under Frye as not generally accepted by the relevant scientific community[;]" 2) "exclude the testimony of the State's firearms examiners under Rule 403 as substantially more prejudicial than probative[;]" 3) "conduct a pretrial hearing to assess both the general acceptance and reliability of firearms examination pursuant to Frye and Rule 403[;]" or 4) "limit the testimony of the State's firearms examiner by precluding conclusions phrased in terms of 'practical certainty,' instead permitting only testimony that the firearms examiner could not exclude any particular gun as the source of any particular bullet or cartridge casing." (Mot. p. 65)

4. For the reasons outlined below, the People respectfully request that this Court deny defendant's motion in its entirety. Under binding Illinois Supreme Court and Appellate Court case law, the firearms identification testimony at issue in this case is admissible and no *Frye* hearing is warranted. Defendant has not and cannot demonstrate that the microscopic examination and comparison of firearms evidence is new or novel. Additionally, nothing cited or discussed in defendant's motion has caused Illinois courts or courts across the nation save a few outliers to alter the conclusion that they have consistently held for decades—that firearms identification testimony is generally accepted and admissible under either a *Frye* or *Daubert* analysis. Finally, defendant has not demonstrated that testimony from qualified forensic scientists regarding the examination of firearms evidence in this case is unduly prejudicial such that exclusion or limitation is warranted under Illinois Rule of Evidence 403.

THIS COURT SHOULD DENY DEFENDANT'S MOTION BECAUSE THE ILLINOIS SUPREME COURT AND ILLINOIS APPELLATE COURT HAVE HELD THAT EXPERT TESTIMONY RELATED TO FIREARMS EVIDENCE IS GENERALLY ACCEPTED AND ADMISSIBLE UNDER *FRYE*.

5. Initially, it must be noted that defendant does not raise an "as applied" challenge to the firearms identification testimony in this case. In his motion, defendant does not call into question the methodology utilized by a forensic scientist during the examination of the firearms evidence related to this case, nor does he challenge an examiner's expert qualifications to conduct the examinations and render expert opinions in his original motion. Rather, defendant's motion is rooted solely in a broader claim that firearms examinations/comparisons "enjoy[ ] no wide-spread scientific acceptance" and, thus, should be deemed inadmissible in this case or subjected to a *Frye* hearing. (Mot. p. 3)

6. In Illinois, the admission of expert scientific testimony is governed by the *Frye* "general acceptance test." See *Donaldson v. Central Illinois Public Service Co*., 199 Ill. 2d 63, 76-77 (2002). Under the *Frye* standard, "scientific evidence is admissible at trial only if the methodology or scientific principle upon which the opinion is based is 'sufficiently established to have gained general acceptance in the particular field in which it belongs.'" *In re Simons*, 213 Ill. 2d 523, 529-530 (2004) (citation omitted). "'[G]eneral acceptance' does not mean universal acceptance, and it does not require that the methodology in question be accepted by unanimity, consensus, or even a majority of experts." *Id*. at 530. Rather, such evidence will be deemed admissible if

"the underlying method used to generate an expert's opinion is reasonably relied upon by experts in the relevant field." *Id*.

7. Illinois law has long recognized the admissibility of firearms identification evidence. Over 85 years ago, in *People v. Fisher*, 340 Ill.216 (1930), the Illinois Supreme Court addressed and rejected a defendant's claim that firearms identification testimony should not have been admitted because it was novel and not a proper subject for expert testimony. The Court concluded that: "We are of the opinion that in this case, where the witness has been able to testify that by the use of magnifying instruments and by reason of his experience and study he has been able to determine the condition of a certain exhibit, which condition he details to the jury, such evidence, while the jury are not bound to accept his conclusions as true, is competent expert testimony on a subject properly one for expert knowledge." *Fisher*, 340 Ill. at 240-41. Since the *Fisher* case was decided in 1930, firearms experts have testified thousands of times in trial courts throughout Illinois. Such experts regularly testify for the State and for defendants.

8. More recently, in *People v. Robinson*, the First District Appellate Court held that the trial court properly denied the defendant's request for a *Frye* hearing on the general acceptance of microscopic firearms comparison and properly allowed expert testimony on the subject at trial. 2013 IL App (1st) 102476 at ¶¶60-91. In so holding, the *Robinson* Court notably rejected the same arguments defendant raises here about the admissibility of firearms identification evidence and the general acceptance of microscopic firearms comparisons.[1]

9. The *Robinson* Court conducted an extensive survey of Illinois case law and judicial decisions from other state and federal jurisdictions and found that courts have "uniformly" concluded that tool mark and firearms identification methodology is generally accepted and admissible at trial. *Id.* at ¶¶79-91. The *Robinson* Court also considered criticisms of the methodology found in "scholarly reports and articles,"

[1] Before addressing general acceptance, the *Robinson* Court first concluded that firearms identification evidence is "scientific" for purposes of *Frye*. *Robinson*, 2013 IL App (1st) 102476 at ¶¶64-67. The *Robinson* Court, however, did not determine whether firearms identification evidence qualified as "new" or "novel" under *Frye*. Rather, the Court assumed, for the sake of argument, that firearms comparisons were "new" so the Court could address the issue of general acceptance. See *Id.* at ¶71. As discussed *infra*, the People maintain that microscopic comparison of firearms evidence is neither new nor novel and that defendant's request for a *Frye* hearing can and should be rejected on that basis alone.

including the 2009 National Research Council Report ("NRC Report"), which defendant relies on extensively in his motion in this case. *Id.* at ¶90. With respect to the NRC Report and similar publications, the *Robinson* Court observed, "[a]lthough the scholarly materials cited by defendant and the defendants in other cases may raise substantial criticisms of the methodology at issue in this case, no court has found these critiques sufficient to conclude the methodology is no longer generally accepted." *Id.* at ¶90. Thereafter, the *Robinson* Court concluded as follows:

> In short, in recent years, federal and state courts have had occasion to revisit the admission of expert testimony based on toolmark and firearms identification methodology. Such testimony has been the subject of lengthy and detailed hearings, and measured against the standards of both *Frye* and *Daubert*. Courts have considered scholarly criticism of the methodology, and occasionally placed limitations on the opinions experts may offer based on the methodology. Yet the judicial decisions uniformly conclude toolmark and firearms identification is generally accepted and admissible at trial. *Id.* at ¶91.

10. Recently, the First District Appellate Court issued its opinion in *People v. Sebastian Rodriguez*, 2018 IL App (1st) 141379-B (June 4, 2018). In *Rodriguez*, the defendant argued that the trial court erred by excluding firearms identification testimony or failing to hold a *Frye* hearing to determine the continued general acceptance of firearms identification testimony. See *Rodriguez*, 2018 IL App (1st) 141379-B at ¶¶54-62. The Appellate Court rejected the defendant's arguments, which mirror the arguments raised by defendant in this case. Specifically, the *Rodriguez* Court: 1) rejected the defense argument that firearms identification testimony is novel because it appears that a *Frye* hearing has never been held in Illinois, 2) rejected the defense comparison of firearms identification evidence to the HGN testing at issue in *McKown*, 3) rejected the defense comparison of firearms identification testimony to other scientific methodologies such as polygraph tests and hypnotically refreshed testimony, 4) rejected the defense argument that the criticisms contained in the NRC report called into question the general acceptance of firearms identification testimony and thus necessitated a *Frye* hearing. *Id*. In conclusion, the *Rodriguez* Court stated:

> Although we understand the concerns raised by other courts and by the NCR [sic] in its report regarding the subjectivity of firearm identification testimony and the inability to test its accuracy, we cannot say that he circuit court erred in denying Sebastian's motion for a *Frye* hearing. Toolmark and firearm identification evidence is not new or

> novel, either pursuant to the plain meaning of those words or in accordance with the analysis employed by our supreme court in *McKown*. Far from being unsettled, the law in Illinois is consistent in its admission of such evidence. See *People v. Robinson*, 2013 IL App (1st) 102476, ¶80 * * * (citation in original).
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> Nor do we find that the NCR's [sic] report so undermines the reliability of ballistics evidence that it has ceased to be "generally accepted" in the scientific community. We agree with the circuit court that the report's concerns go to the weight and not the admissibility of such evidence. Indeed, our review of the record in this case indicates that – in connection with the his [sic] objection that some of Mr. Maryland's testimony lacked foundation, the denial of which Sebastian chose not to contest on appeal—during cross-examination defense counsel explored at length the limitations of Mr. Maryland's conclusions. *Id.* at ¶¶61-62.

11. *Robinson* and *Rodriguez* are dispositive of defendant's motion. Where the Illinois Supreme Court and the Illinois Appellate Court have already ruled that the type of firearms evidence at issue in this case is the proper subject of expert testimony, this Court should deny defendant's motions under the principle of *stare decisis*. See *O'Casek v. Children's Home & Aid Society of Illinois*, 229 Ill. 2d 421, 440 (2008) (*stare decisis* requires courts to follow the decisions of higher courts).

12. Defendant largely dismisses the binding Illinois precedent regarding the admissibility of firearms examination evidence claiming a recent "seismic shift" in the legal and scientific record. (Mot. p. 46). With regard to the claimed shift in the legal record, Defendant cites to recent cases from other jurisdictions in support of this contention. See *New York v. Mansell & Ross*, Ind. No. 267/2018 (N.Y. Sup. Ct. Jan 23, 2020); *United States v. Adams*, Case No. 3:19-cr-00009-MO-1 (D. Or. Mar. 16, 2020); *United States v. Shipp*, 422 F. Supp. 3d 762, 782-83 (E.D.N.Y. 2019); *United States v. Tibbs*, No. 2016 CF1 019431, at 56 (D.C. Sup. Ct. Aug. 8, 2019). While *Ross* and *Adams* more strictly limited firearms evidence at trial, generally speaking, these non-binding opinions fall into the same category of cases that the *Rodriguez* court acknowledged in concluding that firearms examination evidence is admissible in Illinois – those which have "placed limitations on the opinions experts may offer based on the methodology." *Robinson* at ¶91. Indeed, the *Adams* court expressly limited the scope of its ruling, the judge stating "I want to be clear that my ruling, as expressed in the foregoing opinion, is limited by the testimony before me during the hearings held in this **case**. It is not an indictment of forensic evidence **or** toolmark comparison analysis writ large." *Adams* at

*42. Moreover, even in the wake of this so-called seismic change, courts have continued to allow the admissibility of expert firearm examination testimony. *See e.g. United States v Harris*, 2020 U.S. Dist LEXIS 205810 (D.D.C. Nov. 4, 2020) *and United States v. Hunt*, 464 F. Supp. 3d 1252 (W.D. Okla. Jun. 1, 2020). Accordingly defendant's proffered authority does not upend well settled, binding Illinois precedent.

THE "PCAST REPORT" DOES NOT JUSTIFY A DEPARTURE FROM ESTABLISHED PRECEDENT. MICROSCOPIC EXAMINATION AND COMPARISON OF FIREARMS EVIDENCE IS NEITHER NEW NOR NOVEL AND REMAINS GENERALLY ACCEPTED IN THE SCIENTIFIC COMMUNITY. AS SUCH, NO *FRYE* HEARING IS WARRANTED AND THE FIREARMS EVIDENCE AT ISSUE IS ADMISSIBLE.

13. In his motion, defendant implicitly acknowledges that firearms identification evidence uniformly has been deemed generally accepted by Illinois courts and that his arguments are foreclosed by *Fisher*, *Robinson,* and *Rodriguez*. Indeed, defendant readily admits that the type of firearms evidence at issue in this case has never been excluded under *Frye* in Illinois. (Mot. p. 57) Defendant nonetheless maintains that firearms identification evidence lost general acceptance in the scientific community on September 20, 2016, when the President's Council of Advisers on Science and Technology ("PCAST") issued a report entitled "Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature Comparison Methods" ("PCAST report").

14. On the basis of the PCAST report alone, defendant submits that this Court may and should simply exclude the testimony of the State's expert, or, alternatively, defendant asks this Court to hold a *Frye* hearing on general acceptance because "the addition of the PCAST report to the substantial chorus of doubts about firearms examination previously raised in scientific papers" leads to the conclusion that firearms identification "no longer enjoys the 'unequivocal and undisputed' accord necessary to admit such evidence via judicial notice[.]" (Mot. p. 47) As discussed below, defendant's claims regarding the PCAST report are factually and legally bankrupt.

15. Since the PCAST report was issued, several courts have had occasion to consider what, if any, impact the PCAST report has on the general acceptance of firearms comparison evidence. In the overwhelming majority of those cases, the courts rejected arguments identical to those raised by the instant defendant regarding the admissibility of firearms evidence and the need for a *Frye* or *Daubert*-type hearing on admissibility.

16. Here in the Circuit Court of Cook County, Judge Thaddeus Wilson denied a defendant's nearly identical motion for a *Frye* hearing/to exclude firearms evidence in defendant's prior prosecution for the murder of Tyshawn Lee in case number 16CR0871502. Even more recently, Judge Timothy Joyce, in case number 17CR1123101, similarly denied a defendant's motion identical to that in the instant case which raised the same extra-jurisdictional cases defendant cites in this motion to support his claims of a seismic shift in the legal landscape of firearm examination evidence.

17. Notably, Judge Wilson's ruling in the Tyshawn Lee case and Judge Joyce's recent ruling is in accord with the decisions of the Illinois Supreme Court and Illinois Appellate Court which have addressed firearms evidence, discussed above. These rulings likewise tracks the logic and legal analysis of *People v. Juan Luna*, wherein the Appellate Court found that the trial court did not err by denying a request for a *Frye* hearing into the general acceptance of latent print analysis following the issuance of the 2009 NRC Report, which was critical of fingerprint analysis. 2013 IL App (1st) 072253, ¶¶49-84. Like comparative firearms analysis, latent print analysis has been generally accepted and admitted in Illinois courts for decades, the analysis is neither "new" nor "novel," and defense objections to the methodology have been rejected by courts across the country. See *id.* Thus, the conclusion of the *Luna* Court that publication of a document critical of a scientific methodology does not trigger the need for a *Frye* hearing and the Court's observation that the proper forum for addressing such criticisms is trial provide further support for denying defendant's motion.

18. Judicial decisions from other jurisdictions addressing the impact of the PCAST Report on the admissibility of comparative firearms evidence also refute defendant's arguments. In *United States v. Gregory Chester, et al.*, 13 CR 00774 (N.D. Ill. Eastern Division), Judge Tharp denied the defendants' motion to exclude expert testimony regarding firearm toolmark analysis based on the release of the PCAST report, finding that "the PCAST report does not undermine the general reliability of firearm toolmark analysis[.]" In so holding, Judge Tharp noted that the PCAST report "does not dispute the accuracy or acceptance of firearm toolmark analysis within the courts." See *Chester*, p. 2. Rather, the PCAST report "provides foundational scientific background and recommendations for further study." See *Chester*, p. 1. Though the PCAST report

was critical of the types of studies conducted thus far in the field of toolmark and firearms analysis, Judge Tharp noted that PCAST identified one study that met its self-defined criteria and that the study reflected a low error rate for toolmark analysis. See *Chester*, p. 2. Judge Tharp opined that the PCAST report raised an issue of the weight of the evidence, which might be addressed during cross-examination of the government's expert. See *Chester*, p. 2.

19. In *Commonwealth v. Jamare Legore*, SUCR 2015-10363 (Mass. Sup. Ct.), the court denied a defendant's motion for a *Daubert* hearing on the admissibility of firearm analysis evidence, which was based on the issuance of the PCAST report. Like Illinois, Massachusetts courts had previously determined that firearm comparison evidence was generally accepted and admissible, even following the 2009 NRC report. See *Legore*, pp. 1-2. In *Legore*, the court was specifically tasked with determining whether, based on the PCAST report, that precedent should be revisited. See *Legore*, p. 2. The *Legore* court determined that the PCAST report merely "echos the concerns articulated by the National Research Council in 2009, regarding the scientific (foundational) validity of comparative ballistics analysis[.]" See *Legore*, p. 3. The *Legore* court noted that PCAST identified studies conducted since the 2009 NRC report and that "[a]lthough the PCAST report is critical of the methodology employed in some of the studies conducted since 2009 and notes that the Ames Laboratory study, while following appropriate scientific protocols, has not been subject to a peer review, nonetheless [the PCAST report] acknowledges that no study has undermined the claimed reliability of comparative ballistics evidence." See *Legore*, p. 3. The *Legore* court concluded that PCAST's review of comparative firearms analysis "does not significantly alter the findings and conclusions of the NRC report" and saw "no reason to conduct a formal Daubert/Lanigan hearing based upon the report issued by the President's Council." See *Legore*, pp. 3-4.

20. On December 21, 2016, another court held that the PCAST report did not change the established acceptance and admissibility of firearms evidence in criminal proceedings. See *Commonwealth v. Aaron Hernandez*, SUCR 2014-10417 & SUCR 2015-10384 (Mass. Sup. Ct.). In *Hernandez*, the court noted at the outset that the PCAST report specifically stated that the admissibility of firearms evidence is a "decision that belongs to the courts." *Hernandez* at 3. The *Hernandez* Court then concluded that the "PCAST

Report does not significantly alter the findings and conclusions of the NRC reports[,]" and thus held that the PCAST Report did not affect the reliability or admissibility of firearms evidence. *Hernandez* at 5-6. See also *Missouri v. Goodwin-Bey*, No. 1531-CR00555-01 (Miss. Dec. 16, 2016) (ruling firearms evidence is admissible).

21. Thus, numerous cases that thus far have addressed the PCAST Report in the context of firearms evidence are on all fours with the issue before this Court and provide persuasive authority for denying defendant's request for a *Frye* hearing and/or exclusion of evidence. The analysis conducted by these courts is consistent with *Robinson* and *Rodriguez*, in addition to well-established Illinois case law regarding issues of weight versus admissibility, and demonstrates that the PCAST report does not require re-examination of the admissibility of firearms evidence in Illinois.

22. Additionally, these cases highlight an important fact that, while apparent in defendant's motion and the PCAST report, is understandably downplayed in defendant's arguments—namely, that the PCAST report is ***not*** a groundbreaking document. Indeed, the PCAST report relied heavily on and essentially echoed the findings and recommendations contained in the 2009 NRC report. The *Robinson* and *Rodriguez* Courts already considered the 2009 NRC report when they concluded that firearms evidence is generally accepted under *Frye* and the PCAST report does not differ markedly from the 2009 NRC report.[2] This fact is fatal to defendant's claim that the PCAST report demonstrates an evolution in the field of firearms evidence such that it should now be considered "new" or "novel" for *Frye* purposes. (Mot. pp. 57)

23. The Illinois Supreme Court has made clear that "the *Frye* test is necessary only if the scientific principle, technique or test offered by the expert to support his or her conclusion is 'new' or 'novel.'" *People v. McKown*, 236 Ill. 2d 278, 282-83 (2010). The Illinois Supreme Court "has instructed that generally a 'scientific technique is "new" or "novel" if it is "original or striking" or does "not resemble[e] something formerly known or used."'" *Luna*, 2013 IL App (1st) 072253 at ¶63, quoting *People v.*

[2] As discussed in *Robinson*, both Federal and Illinois Courts have considered the 2008 and 2009 NRC reports, and no court has concluded that the findings of those reports warrant the exclusion of expert firearm/toolmark opinion testimony outright. See, i.e., *United States v. Otero*, 849 F. Supp. 2d 425, 438 (D. N.J. 2012); *United States v. Ashburn*, 88 F. Supp. 3d 239, 244-246 (E.D.N.Y. 2015); *cf. People v. Luna*, 2013 IL App (1st) 072253, ¶¶70 (noting that under the *Frye* framework in Illinois, critiques of latent print evidence such as those in the 2009 NRC report go to weight of evidence, not admissibility).

Donaldson, 199 Ill.2d 63, 78 (2002) (internal citation omitted). As already noted, firearms evidence is neither new nor novel in Illinois, but rather has been consistently admitted at trials for over 85 years. Defendant's motion should be denied on this basis alone.

24. Defendant's suggestion that the PCAST report constitutes a type of "new authority" that justifies by-passing the threshold "new or novel" prong of the *Frye* inquiry has no basis in fact or law. (Mot. p. 47). The PCAST report itself does not constitute a scientific advance in methodology such that firearms evidence can be considered "new" again for *Frye* purposes. Additionally, defendant has provided no valid legal support for his suggestion that publication of a "new authority" in a scientific field satisfies the first prong of the *Frye* analysis. By defendant's logic, the release of any publication critical of a scientific methodology would satisfy the "new or novel" prong of *Frye* and trigger the need for an updated hearing on general acceptance. This is clearly not the case. Defendant's argument in this regard also is inconsistent with established Illinois case law holding that the *Frye* standard tolerates criticism of a methodology from experts within the scientific community. See, i.e., *Luna*, 2013 IL App (1st) 072253 at ¶80.

25. Even assuming for the sake of argument, as the *Robinson* Court did, that firearms identification evidence could be considered "new or novel" under *Frye*, defendant's motion is still without merit. Throughout his 65-page motion, defendant vastly overstates the scope, content, and conclusions of the PCAST report as well as the weight of other legal and scientific "authority" on which his arguments are based. As previously discussed, courts across the country have considered the criticisms of both the 2009 NRC report and, more recently, the PCAST report, including all of those voiced by defendant in his motion, and found no basis for excluding firearms evidence or conducting new *Frye/Daubert*-type hearings on admissibility. See, i.e., *United States v. Sebbern*, 2012 U.S. Dist. Lexis 170576 (E.D.N.Y.2012) (where the court traced the history of expert testimony in federal courts, collected relevant cases and scientific criticisms of ballistic evidence, including the NRC report, and ultimately concluded that duplication of the numerous hearings held by other courts was unnecessary and the firearms evidence at issue was admissible). And, as observed by the *Legore* court, the

PCAST report itself acknowledges that no study has undermined the reliability of comparative firearms analysis. See *Legore*, p. 3.

26. Additionally, it should be noted that PCAST is not an accrediting body or authoritative organization within either the forensic science community or the federal judicial system. Rather, PCAST is an advisory group of 19 individuals, including scientists and engineers from varying disciplines. PCAST may make recommendations, but its recommendations are not self-enacting, nor are they binding on the federal government. The PCAST report does not reflect the position of the Department of Justice. At the time of the release of the PCAST Report, the United States Attorney General (Loretta Lynch) affirmatively rejected the recommendations in the PCAST report, stating, "We remain confident that, when used properly, forensic science evidence helps juries identify the guilty and clear the innocent, and the department believes that the current legal standards regarding the admissibility of forensic evidence are based on sound science and sound legal reasoning. *** While we appreciate their contribution to the field of scientific inquiry, the department will not be adopting the recommendations related to the admissibility of forensic evidence."[3]

27. The FBI likewise released a statement voicing its disagreement with "many of the scientific conclusions and assertions of the report." The FBI statement noted that the PCAST report "creates its own criteria for scientific validity and then proceeds to apply these tests to seven forensic science disciplines, failing to provide scientific support that these criteria are well accepted within the scientific community." The FBI statement further criticized PCAST for failing to mention "numerous published research studies" providing support for "foundational validity," an omission that "discredits the PCAST report as a thorough evaluation of scientific validity."

28. The national subcommittee tasked with informing the development of standards and guidelines for the forensic discipline of firearm and toolmark identification, which operates under the U.S. Department of Commerce, also responded to PCAST's post-publication request for references.[4] The National Institute of Standards and

[3] See http://lawprofessors.typepad.com/evidenceprof/2016/09/recently-the-executive-office-of-the-president-presidents-council-of-advisors-on-science-and-technology-pcast-issued-a.html (Last visited 2/11/19).

[4] Following release of the PCAST Report and its rejection by the DOJ and numerous other organizations and entities, co-chair Eric Lander solicited additional information from various

Technology (NIST) administers the Organization of Scientific Area Committees (OSAC), which currently is facilitating the development of science-based standards in several forensic disciplines, including firearms and toolmark identification.[5] OSAC's Firearms and Toolmarks Subcommittee responded to PCAST's request on December 14, 2016 with a 13-page document outlining "why [they] find PCAST's analysis to be inaccurate" with respect to firearms and toolmark identification and providing citations and references for the numerous errors and flaws they identified in the PCAST Report. The OSAC Subcommittee summarized its response as follows:

> The Firearms and Toolmarks Subcommittee of OSAC fundamentally disagrees with the conclusions regarding the firearm and toolmark identification discipline presented in the PCAST report. Four major points have been put forth in this response. First, we disagree with the premise that a structured black-box study is the only useful way to gain insight into both the foundations of firearm and toolmark identification and examiner error rates. Taken collectively, the published studies support the underlying principles of firearm and toolmark examination and the fact that examiner error rates are quite low. PCAST's critique of these studies included several misunderstandings. Second, PCAST's dismissal of methods employing a subjective component discounts the core scientific methods that have been used for hundreds of years. Third, PCAST misunderstands and misquotes the ATFE Theory of Identification. PCAST's summary of the AFTE Theory of Identification leaves out important provisions. Fourth, PCAST minimizes the value of training and experience. The training received by firearm examiners includes both subjective and objective components and is comparable to the domain-specific rigor of other applied scientific fields.
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> We do not agree that firearm identification "…falls short of the criteria for foundational validity." However, we do agree that the hallmark of any scientific endeavor is ongoing research and technology development. Indeed, our subcommittee, which is tasked with writing standards and providing guidance to the profession, would not exist if it was believed that the field of firearm identification is flawless and requires no improvement. As such, we are hopeful that the path forward from the PCAST report is a renewed commitment to research in the forensic sciences, continued testing of foundational principles, and a more robust collaboration between the academic and forensic practitioner communities.

organizations. PCAST subsequently issued an addendum which did not vary substantively from the original report.

[5] See https://www.nist.gov/topics/forensic-science.

Notably, defendant acknowledges the qualifications and expertise of forensic practitioners working with NIST and OSAC in his original motion, (Mot. p. 10-11) experts who now have specifically rejected PCAST's methodology, "research," and conclusions.

29. Recently, Dr. Bruce Budowle issued a statement which is fatal to defendant's motions. In his statement in support of the government's response to a defense motion in *United States v. Benito Valdez*, 2016 CF1 002267 (D.C. Sup. Ct.), which is similar to the original motion at bar, Dr. Budowle outlined some of the numerous failings in the PCAST Report and made clear that the PCAST Report is not a scientifically valid or authoritative document. Dr. Budowle is uniquely qualified to comment on the scientific impact of the PCAST report because he: 1) is the most widely published forensic geneticist in the world; 2) has been at the forefront of every major development of forensic DNA methodologies -- the "gold standard" of forensics -- including authoring the Quality Assurance Standards that are followed in the United States and most of the world; 3) is widely cited by the PCAST Report as a noted expert;[6] and 4) is the forensic geneticist who discovered the errors associated with the application of the Combined Probability of Inclusion (CPI) statistical analysis in connection with DNA mixture interpretation at the D.C. Department of Forensic Sciences (DFS) and elsewhere throughout the United States – a topic discussed under the DNA section of the PCAST Report.

30. While Dr. Budowle initially "considered writing a critique about the failing of the PCAST Report to assist the community," he did not believe that such an effort was worthwhile because "the problems with this report were so obvious." However, because the defendant in *Valdez*, like defendant in this case, relied so heavily on the PCAST Report for scientific support, Dr. Budowle thought it necessary **"*to address the serious limitations of the PCAST Report and convey that it is an unsound, unsubstantiated, non-peer reviewed document that should not be relied upon for supporting or refuting the state of the forensic sciences*."** *Id.* (Emphasis added).

[6] Dr. Budowle is the scientist at the FBI that is mentioned as PCAST co-chair Dr. Eric Lander's co-author to bolster Dr. Lander's credentials in the forensic sciences at footnotes 17 and 20 of the PCAST Report. Dr. Budowle's work is also cited in footnotes 33, 149, 183, 185, 187, and 209 of the report.

31. Dr. Budowle's statement directly refutes the claims in defendant's motion and establishes that the PCAST Report provides nothing to undermine the admissibility of firearms and toolmark identification evidence. As noted by Dr. Budowle, the most published forensic geneticist in the world, the PCAST Report itself would *not* have survived the very peer-review process advocated by its authors and even missed the mark on its evaluation of DNA, the "gold standard" of forensics. In evaluating the overall impact of the report on the scientific community, Dr. Budowle does not mince words: "the PCAST Report 1) is **not** scientifically sound, 2) is **not** based on data, 3) is **not** well-documented, 4) misapplies statistics, 5) is full of inconsistencies, and 6) does **not** provide helpful guidance to obtain valid results in forensic analyses." Dr. Budowle's statement regarding the PCAST Report demonstrates that defendant's motion is entirely baseless.

32. In January 2021, The United States Department of Justice released a statement on the PCAST report roundly criticizing the underpinnings of PCAST's conclusions.[7] In its statement, the DOJ concluded that PCAST inaccurately classified forensic pattern analysis in the scientific discipline of metrology (measurement science); however forensic pattern examiners including firearms examiners visually compare the individual features in two samples, they do not measure them resulting in a conclusion that is stated in words, not magnitudes or measurements. Additionally, the DOJ criticized PCAST's conclusion that forensic pattern analysis can only be validated using its non-severable set of nine experimental design criteria. This conclusion is inconsistent with international laboratory standard and authorities in experimental design. Contrary to PCAST's assertion, there is no single scientifically recognized means for validating a scientific method. Further, the DOJ concluded that PCAST's conclusion surrounding the error rate are fundamentally flawed as it is not scientifically valid to generalize the error rate derived from a small subset of studies utilizing a single type of experimental design to all laboratories examiners and casework. The DOJ concluded that when considering all relevant studies within the firearms and toolmarks discipline, the false positive error rate is around 1% or less in most cases. The DOJ

[7] DOJ report available at: Justice Department Publishes Statement on 2016 President's Council of Advisors on Science and Technology Report | OPA | Department of Justice (last accessed 2/10/2021).

further concluded that the risk of error is far more significant than the rate of error and that firearms examinations, which are non-consumptive in nature, allow for the opportunity to retest the evidence.

33. In sum, the PCAST report does not demonstrate that there has been a scientific advance in the methodology of microscopic comparison of firearms evidence such that a renewed review of the discipline for general acceptance is warranted or appropriate. Nor does the PCAST report demonstrate the rejection of firearms examination evidence by the scientific community. Rather, the PCAST report constitutes the commentary of only 19 individuals from varying backgrounds and disciplines *outside* of the field of forensic firearms comparisons and identifications. Defendant's critiques and complaints regarding the scientific underpinnings of this particular forensic field may present issues of weight for the trier of fact to consider at trial, but they do not support his requested departure from established Illinois precedent regarding the general acceptance and admissibility of firearms identification evidence in Illinois. As such, this Court should deny defendant's motion in its entirety.

DEFENDANT HAS NOT MET HIS BURDEN OF DEMONSTRATING THAT THE PROBATIVE VALUE OF THE CHALLENGED EVIDENCE IS SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE SUCH THAT EXCLUSION OR LIMITATION UNDER RULE OF EVIDENCE 403 IS REQUIRED.

34. Defendant's argument in support of exclusion under Rule of Evidence 403 should likewise be rejected. Relevant evidence may be excluded as unduly prejudicial under Illinois Rule of Evidence 403, but only where "its probative value is *substantially* outweighed by the danger of unfair prejudice[.]" Ill. R. Evid. 403 (emphasis added). Under Rule 403, defendant bears the burden of demonstrating that the danger of unfair prejudice substantially outweighs the probative value of the evidence. See, i.e., *United States v. Tse*, 375 F.3d 148, 164 (1st Cir. 2004) (the burden under Rule 403 is on the party opposing admission).

35. In this case, defendant has offered only speculative assertions that testimony about firearms examinations/comparisons *in general* are unduly prejudicial under Rule 403. Indeed, defendant fails to identify anything specific to the expert testimony about firearms evidence in this case that would be "unduly prejudicial" at trial. Questions of relevance and admissibility under Rule 403 are necessarily case specific and cannot be

advanced in the abstract about an entire forensic discipline. See Mot. p. 58, n.283 (where even cases defendant cites to support his request for exclusion under Rule 403 involve examination of particular evidence offered in individual cases).[8] Even considered in the abstract, defendant's arguments are conclusory and merely repetitive of defendant's *Frye* arguments. Defendant's entire argument regarding prejudice is misplaced and should be rejected by this Court.

36. In any event, defendant has not established that the probative value of the challenged evidence is *substantially* outweighed by the danger of unfair prejudice such that exclusion is justified under Illinois Rule of Evidence 403. The trier of fact is entitled to be presented with all relevant evidence and it is within their province to determine what weight to afford such evidence. See Ill. R. Evid. 402. Testimony from a qualified forensic scientist about whether firearms evidence could have been fired from a weapon is unquestionably relevant in this murder case. All of defendant's complaints about the field of microscopic examination of firearms evidence and the examinations and conclusions specific to this case can be adequately explored both on cross-examination of the State's witnesses and through the presentation of a defense expert witness, if defendant so chooses. The topic of what weight to give any forensic evidence is also properly addressed during argument.

37. Defendant's alternative request for this Court to limit the terminology utilized by the forensic scientist in this case likewise is based entirely on his speculative claims that the firearms examiner in this case will make unwarranted claims of certainty and "elide

[8] The People are compelled to note that defendant's citation to and discussion of Illinois case law ostensibly in support of his request for the rejection of firearms evidence in general under Rule 403, is misplaced. Indeed, neither *People v. Baynes*, 88 Ill.2d 225 (1981), (Mot. p. 62, 63 n. 298, 304) nor *People v. Zayas*, 131 Ill. 2d 284 (1989) (Mot. p. 63 n.304), excluded evidence under Rule 403. Rather, the *Baynes* Court continued to treat polygraph evidence as *sui generis* and considered whether such evidence, which had not been recognized as gaining general acceptance and was barred by statute in criminal cases, was admissible by agreement of the parties. The *Baynes* Court reaffirmed that polygraph evidence was inadmissible, even via stipulation, and discussed the concept of probative value and prejudice within a *plain error* analysis. *Baynes*, 88 Ill. 2d at 241-245. The *Zayas* Court adopted a *per se* rule of inadmissibility for hypnotically induced recall evidence under *Frye*, not Rule 403, and in fact noted that a balancing of probative value and prejudicial effect is done on a case-by-case basis in the discretion of the trial judge. *Zayas*, 131 Ill.2d at 294-296. Defendant's citation to an order entered in *United States v. St. Gerard* (7 June 1010, United States Army Trial Judiciary, Fifth Judicial Circuit, Germany), fares no better because, in that order, the military judge limited only the firearms expert's testimony about the "level of certainty of the origin of the marks" under Rule 403. (Mot. p. 58 n.284)

mention" of the alleged "various pitfalls that diminish the reliability and precision of firearms examination." (Mot. p. 63) Indeed, defendant points to nothing from the ISP Lab reports or casefile related to the examination of firearms evidence in this case to support his blanket assertions about how a forensic scientist will present and explain his opinions at trial. As it is defendant's burden to demonstrate that the risk of undue prejudice substantially outweighs the probative value of the evidence, his request should be rejected.

38. Defendant's specific request to "limit the testimony of the State's firearms examiner by precluding conclusions phrased in terms of 'practical certainty,' instead permitting only testimony that the firearms examiner could not exclude any particular gun as the source of any particular cartridge casing" (Mot. p. 65) is nonsensical. The State will not elicit any statements of certainty from the forensic scientist who examined the firearms evidence in this case on direct examination. While some courts, such as *Robinson* and cases discussed therein, have precluded statements related to "certainty" during the testimony of firearms examiners, defendant's request extends beyond such types of statements to the expert's actual opinion/conclusion statements about the comparison of firearms evidence in this case.

39. Defendant essentially asks this Court to put defendant's choice of words in the State's expert witness's mouth or effectively tell the expert what his opinion is and how to explain that opinion to the factfinder. However, defendant's complaints about the use of any particular term by the expert and clarification about its scientific meaning or significance are areas that can and should be addressed directly by the defense at trial — during cross-examination of the State's witness and/or the presentation of competing testimony from a defense expert witness — not indirectly by ordering an expert to announce *defendant's* opinion about the firearms evidence to the factfinder, rather than the actual *expert's* opinion about the firearms evidence. Notably, the casefiles and documentation attendant to examination of the firearms evidence in this case have been tendered in discovery and thus the evidence may be re-examined and analyzed by a firearms examiner of defendant's own choosing.

40. In sum, the forensic evidence at issue is relevant and admissible under Illinois law and all of defendant's arguments speak to the issue of what weight should be afforded the evidence — an issue appropriately addressed via advocacy and an issue properly

resolved by the trier of fact. Defendant has failed to demonstrate that the expert testimony related to firearms evidence should be excluded or limited under Illinois Rule of Evidence 403 or that a *Frye* hearing is appropriate under Illinois law. His motion should therefore be denied.

WHEREFORE, The People of the State of Illinois respectfully request this Honorable Court deny defendant Winfield's "Motion to Exclude Firearms Examination Opinion Testimony."

Respectfully Submitted,

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