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IN THE CIRCUIT COURT OF THE  
SECOND JUDICIAL CIRCUIT, IN  
AND FOR LEON COUNTY, FLORIDA

STATE OF FLORIDA,

CASE NO: 2008CF697

v.

SPN. NO: 197149

GARY MICHAEL HILTON,

Defendant.

**MOTION IN LIMINE NUMBER THIRTEEN**  
**TO EXCLUDE EVIDENCE REGARDING TOOLMARK**  
**IDENTIFICATION OF AN US M7 BAYONET, IMPERIAL BRAND ON THE TIRE**

Defendant, Gary Michael Hilton, by and through undersigned counsel, moves this Court to exclude the testimony or any report of any witness regarding the toolmark identification of an US M7 Bayonet, Imperial Brand on the tire from consideration at the trial of this cause. As grounds, Defendant states:

1. The State will call witnesses to testify as to the toolmark identification of an US M7 Bayonet, Imperial Brand on the tire.

2. This testimony, as well as any report the witness produces, is scientific evidence and must be subjected to analysis under Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

3. In order to be used as evidence in this case, the methodology utilized to determine the toolmark identification must satisfy the test for admissibility established by Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). The methodology regarding the toolmark identification in this case by the State's witnesses does not satisfy the Frye standard.

4. In order for scientific evidence to be admissible in Florida, the evidence must be generally accepted in the field to which it belongs. This general acceptance standard, known as the

Frye test, was adopted by the Florida Supreme Court in Stokes v. State, 548 So. 2d 188 (Fla. 1989). When admitting into evidence the opinion testimony of an expert witness concerning a relatively new scientific principle, trial courts must determine whether the particular witness is qualified to present opinion testimony on the subject of issue, whether the testimony is based on scientific principles that are sufficiently established to have gained general acceptance in the relevant field, and whether such testimony will assist the jury in understanding the evidence. Ramirez v. State, 651 So.2d 1154, 1166 (Fla. 1995) (Ramirez II). In applying the Frye criteria, general scientific recognition requires the testimony of impartial experts or scientists. Ramirez v. State, 810 So. 2d 836 (Fla. 2001) (Ramirez III). The burden is on the proponent of the evidence to prove the general acceptance of both the underlying scientific principle and the testing procedures used to apply that principle. Ramirez v. State, 651 So. 2d at 1167.

5. According to the Association of Firearm and Toolmark Examiners (AFTE), a match is determined if a specific set of toolmarks demonstrates sufficient agreement in the pattern of two sets of marks. See, National Research Council of the National Academies, *Strengthening Forensic Science in the United States: A Path Forward* (2009). Sufficient agreement must exceed the best agreement demonstrated between toolmarks known to have been produced by different tools and be consistent with the agreement demonstrated by toolmarks known to have been produced by the same tool. AFTE standards acknowledge that these decisions involve subjective, qualitative judgments and that the accuracy of an examiner's assessments is highly dependent upon their skill and training. The examiner is expected to draw on his or her own experience. Even with new technology, the decision of the toolmark examiner remains a subjective decision based on unarticulated standards and no statistical foundation for estimation of error rates. A fundamental problem with toolmark identification is the lack of a precisely defined process for reaching identifications. National

Research Council of the National Academies, Strengthening Forensic Science in the United States: A Path Forward (2009) pp. 153-155.

6. In the instant case, no objective identification standards were utilized by the State to come up with a toolmark identification as required by Ramirez. Here, the decision of the toolmark examiner is a subjective decision based on unarticulated standards. The field of toolmark identification does not have enough studies, conducted to scientific standards, to give a statistical foundation for estimation of error rates. Moreover, there is no numerical, statistical criteria or database for identification purposes.

7. In the instant case, the State's witness does not have sufficient training, experience, and expertise with regard to knife/tire toolmark analysis to qualify him to give an opinion that the knife in this case is identified as the knife which made the cut on the tire.

8. Moreover, the vast majority of articles and publications in the field of toolmark identification have not been the subject of any peer reviewed publications outside the AFTE Journal which is a publication created by and intended for members of AFTE and is not widely available throughout the scientific community. In Ramirez v. State, 810 So.2d 836, 850 (Fla. 2001), in holding that a firearms and toolmarks examiner's identification of the defendant's knife as the one who stabbed the victim did not meet the Frye standard, the court reasoned that none of the AFTE Journal articles undertook the kind of searching, critical review that is the sine qua non of scientific acceptance. See, also, United States v. Smallwood, 2010 WL 4168823 (WD Ky. Oct. 12, 2010)(excluding the testimony by an ATF firearms toolmark examiner that the defendant's knife slashed the tires based on Daubert v. Merrill Dow Pharm, Inc., 509 US 579 (1993).


9. Additionally, the match determination in this case will be effectively insulated from any meaningful cross-examination by the inability of the FDLE analyst to produce photographs


representative of what an examiner sees under the actual comparison microscope. No photograph in this case represents the actual identification. The inability to conduct meaningful cross-examination weighs strongly against admissibility. Smallwood, supra.

**WHEREFORE**, Defendant requests this Court to grant this Motion to Exclude Evidence Regarding Toolmark Identification of the US M7 Bayonet, Imperial Brand on the Tire.

Respectfully submitted,

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