

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 13 CR 774-3
	)	Judge John J. Tharp
GREGORY CHESTER, <i>et al.</i> ,	)	
(PARIS POE)	)	
	)	
Defendant.	)	

**DEFENDANTS’ SECOND JOINT RENEWED MOTION TO EXCLUDE  
EXPERT TESTIMONY REGARDING FIREARM TOOLMARK ANALYSIS**

Defendant **PARIS POE**, by his attorneys, **PATRICK W. BLEGEN** and **PAUL M. BRAYMAN**, and also on behalf of codefendants **GREGORY CHESTER, ARNOLD COUNCIL, GABRIEL BUSH, STANLEY VAUGHN, WILLIAM FORD** and **DERRICK VAUGHN**, pursuant to Fed. R. Evid. 702, *Daubert v. Merrell Dow*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), hereby renews his request for the Court to exclude expert testimony regarding firearm toolmark analysis.

In support thereof, Defendant, through counsel, shows to the Court the following:

1. Prior to the receipt of expert disclosures from the government, the defense moved to exclude expert testimony related to firearm identification through forensic toolmark analysis. The defense provided a lengthy analysis of the issue, and noted that the Seventh Circuit has not yet weighed in on the admissibility of such testimony. Dkt. 333.<sup>1</sup>

2. On May 12, 2016, the Court entered its order denying Defendant’s motion without prejudice to it being re-raised after receipt of expert disclosures.

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<sup>1</sup> In order to avoid repeating the analysis and argument set forth in this motion, Defendant incorporates that pleading as though fully set forth herein.

3. On August 8, 2016, after receiving the government's expert disclosures, Defendant renewed its motion to exclude expert testimony on firearm toolmark analysis. Dkt. 699.<sup>2</sup> In that motion, the defense argued that the level of certainty proposed by the government's expert disclosures was unsupportable, and that the discipline as a whole was unreliable. (*Id.*)

4. The Court denied Defendant's renewed motion. In its Order, the Court noted that the government had agreed not to elicit a number of the problematic statements contained in its disclosures regarding the firearms examiners' level of certainty. The Court also found that the AFTE methodology was reliable. (Dkt. 781)

5. On September 20, 2016, the President's Council of Advisors on Science and Technology ("PCAST") released a report to the President entitled "Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature Comparison Methods." A copy of that report is attached as Exhibit A. One of the feature comparison methods discussed in the report is firearms toolmark analysis.

6. In summary, the report finds,

Firearms analysts have long stated that their discipline has near-perfect accuracy; however, the 2009 National Research Council study<sup>3</sup> of all the forensic disciplines concluded about firearms analysis that "sufficient studies have not been done to understand the reliability and reproducibility of the methods"—that is, that the foundational validity of the field had not been established.

Our own extensive review of the relevant literature prior to 2009 is consistent with the National Research Council's conclusion. We

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<sup>2</sup> Defendant also incorporates this pleading as though fully set forth herein.

<sup>3</sup> Defendant relied on the NRC study in his renewed motion to exclude expert testimony on firearms toolmark examination. In denying that motion, the Court noted that "[e]ven a sympathetic reading of the [related] 2009 report, however, indicates its primary purpose was to serve as a catalyst for reassessing the scientific premises underlying the various fields of forensic science and to summarize the current state of the research in those fields relative to the challenges raised in the report. It was not its purpose to opine on the long-established admissibility of tool mark and firearms testimony in criminal prosecutions, and indeed the NRC authors made no recommendations in that regard." Dkt. 781, p. 3, *quoting State v. Langlois*, 2013-Ohio-5177, P24 (Ohio Ct. App. 2013). Significantly, the PCAST Report *has* reassessed the scientific premise of firearms toolmark identification, and opines that the foundational validity of the field had not been established.

find that many of these earlier studies were inappropriately designed to assess foundational validity and estimate reliability. Indeed, there is internal evidence among the studies themselves indicating that many previous studies underestimated the false positive rate by at least 100-fold.

We identified one notable advance since 2009: the completion of the first appropriately designed black-box study of firearms. The work was commissioned and funded by the Defense Department's Forensic Science Center and was conducted by an independent testing lab (the Ames Laboratory, a Department of Energy national laboratory affiliated with Iowa State University). The false-positive rate was estimated at 1 in 66, with a confidence bound indicating that the rate could be as high as 1 in 46. While the study is available as a report to the Federal government, it has not been published in a scientific journal.

The scientific criteria for foundational validity require that there be more than one such study, to demonstrate reproducibility, and that studies should ideally be published in the peer-reviewed scientific literature. *Accordingly, the current evidence still falls short of the scientific criteria for foundational validity.*

Ex. A, pp. 11-12. (emphasis added)

7. The report recognizes that the decision on whether to deem firearms toolmark evidence admissible ultimately belongs to the Court. However, the report cautions that “[i]f firearms analysis *is* allowed in court, the scientific criteria for validity as applied should be understood to require clearly reporting the error rates seen in the one appropriately designed black-box study. Claims of higher accuracy are not scientifically justified at present.” Ex. A, p. 12.

8. Based on the information contained in the PCAST report, Defendant submits that the field of firearms toolmark analysis is unreliable, and should be excluded pursuant to Fed. R. Evid. 702, *Daubert v. Merrell Dow*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

9. Alternatively, the court should require the government's expert witnesses to qualify their opinions using the false positive error rate described in the PCAST report.

WHEREFORE, the defense respectfully requests that the Court preclude the admission of expert testimony related to forensic toolmark analysis, conduct a *Daubert* hearing, or limit the testimony of government witnesses to the extent set forth herein.

Respectfully submitted,

s/ Patrick W. Blegen  
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Attorneys for Defendant Paris Poe.

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