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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KITSAP

STATE OF WASHINGTON,)	Case No: 15-1-00972-7
)	
Plaintiff,)	MEMORANDUM OF LAW IN
)	SUPPORT OF MOTION TO
vs.)	RECONSIDER FRYE MOTION
)	
GERALDO DeJESUS,)	
)	
Defendant.)	

A. Procedural History

On February 19, 2016, Mr. DeJesus filed a motion for a *Frye* hearing on the admissibility of firearm toolmark evidence. The Court ultimately denied this motion, ruling that Washington has admitted similar evidence in the past.

On September 1, 2016, counsel advised the Court that a bootleg copy of an impending report had been leaked to the LA Times. The report is from the President’s Council of Advisors on Science and Technology (PCAST) and is titled “Forensic Science in the Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods” (hereinafter “PCAST Report”). Because

MEMORANDUM OF LAW RE: MOTION TO
RECONSIDER FRYE - 1

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1 the final report had not yet been approved, the draft report was not citable at
2 the time. On the afternoon of September 1, 2016, the Council took a final
3 vote on the report and unanimously approved it.

4 The PCAST Report comes at a serendipitous time in Mr. DeJesus'
5 trial. The State's firearm toolmark expert, Kathy Geil, is scheduled to testify
6 on September 6 and the defense experts are scheduled to testify later in the
7 week. Although the jury has heard about the discovery of MSN-008 on
8 March 30, 2016 and the fact that it is a test fire shell casing, they have not
9 heard any evidence tying MSN-008 to the crime scene shell casings. Mr.
10 DeJesus moves to reconsider its earlier ruling denying a *Frye* hearings and to
11 suppress evidence of firearm toolmarking.
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13 14 B. Analysis

15 The PCAST Report is a potential game changer in the area of forensic
16 science. The goal of the Report is to improve forensic science as it is
17 portrayed in the courtroom. Because forensic identification, including DNA,
18 fingerprinting, bite marks, or firearm toolmarking, has a high likelihood of
19 being heavily relied upon by jurors, it is essential that only reliable and
20 scientifically defensible methods be used. Consequently, PCAST
21 recommends that "[w]here there are not adequate empirical studies and/or
22 statistical models to provide meaningful information about the accuracy of a
23 forensic feature-comparison method, [courts] should not offer testimony based
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1 on the method.” PCAST Report, 117. To the extent that such an approach is
2 in tension with case law, the Report says, “When new facts falsify old
3 assumptions, courts should not be obligated to defer to past precedents: they
4 should look afresh at the scientific issues.” PCAST report, 119.

5 Regarding the reliability of firearm toolmark evidence, the Report
6 begins by noting that the “theory” is circular and “explicitly states that
7 conclusions are subjective.” PCAST Report, 82. The Report looked at all the
8 reported studies on the topic and concluded only a single study employed
9 proper methodology and that particular report has yet to be subjected to peer
10 review and publication. PCAST Report, 88. Because of this, “the current
11 evidence falls short of the scientific criteria for foundational validity.” PCAST
12 Report, 88. Before firearm toolmark evidence is admitted court, scientists and
13 technicians need to find a way “to convert firearm analysis from a subjective
14 method to an objective method.” PCAST Report, 89.

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17 Toolmark examiners acknowledge the subjectivity of firearm toolmark
18 examination but frequently rely on their “training and experience” to make an
19 identification. Training and experience are rejected by PCAST as
20 scientifically valid, saying, “‘Experience’ is an inadequate foundation for
21 drawing judgments about whether two sets of features could have been
22 produced by (or found on) different sources..” PCAST Report, 41. The
23 PCAST Report then goes further and says, “‘Training’ is an even weaker
24 foundation. The mere fact that an individual has been trained in a method does
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1 not mean that the method itself is scientifically valid nor that the individual is
2 capable of producing reliable answers when applying the method.” PCAST
3 Report, 42.

4 While the conclusions reached by PCAST are similar to those
5 presented in Mr. DeJesus’ February 19 motion, the existence of a report
6 published by the President’s Commission gives further weight to the
7 arguments presented then. Based upon the conclusions of PCAST, Mr.
8 DeJesus urges this Court to reconsider its earlier ruling and suppress Kathy
9 Geil and her anticipated testimony of firearm toolmark identification.
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11 If this Court does permit Ms. Geil to testify, the next question is what
12 she should be permitted to testify to. The Court has already indicated it will
13 not permit her to testify in a manner that implies a “100% certainty” or “zero-
14 error rate,” and that is consistent with both pre-existing precedent and the
15 PCAST Report. The State indicates it wants her to testify that her conclusions
16 are to a “reasonable degree of scientific certainty.” The PCAST Report
17 recommends that phrase also be disallowed in courtrooms, commenting, “This
18 phrase has no generally accepted meaning in science and is open to widely
19 differing interpretations by different scientists. Moreover, the statement may
20 be taken as implying ‘certainty.’” PCAST Report, 11.
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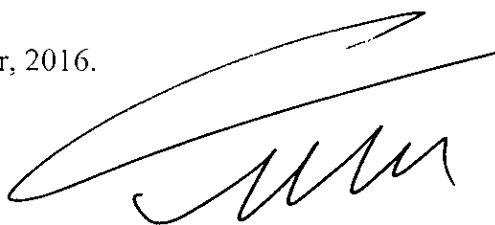
22 Mr. DeJesus objects to any opinion that creates any aura of certainty.
23 The most that can be scientifically and forensically supported is that, in the
24 opinion of the examiner, the firearm that fired the shell casings found at the
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1 scene cannot be eliminated as the firearm that also fired the shell casing MSN-
2 008.

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5 A. Conclusion

6 This Court should suppress evidence of firearm toolmark identification.
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9 Dated this 6th day of September, 2016.

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12 _____
13 Thomas E. Weaver
14 WSBA #22488
15 Attorney for Defendant
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