IN THE KITSAP COUNTY SUPERIOR COURT

STATE OF WASHINGTON, Plaintiff, v. GERALDO CASTRO DEJESUS, Age: 31; DOB: 09/26/1984, Defendant.	No. 15-1-00972-7 MEMORANDUM OF AUTHORITIES IN SUPPORT OF THE STATE'S MOTION TO DENY DEFENSE REQUEST FOR *FRYE* HEARING

COMES NOW the Plaintiff, STATE OF WASHINGTON, by and through its attorney BARBARA O. DENNIS, Deputy Prosecuting Attorney, with the following Memorandum of Authorities in Support of the State's Motion to Deny Defense Request for *Frye* hearing–

A. ISSUE(S) PRESENTED

1. Issue One:

Is the defendant entitled to a hearing under *Frye* to re-litigate the admissibility of scientific ballistic evidence, when that issue has long been decided by our appellate courts?

***Answer:* No.**

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B. STATEMENT OF THE CASE

Anticipated Facts

On March 28, 2015 about 2:18 a.m., the defendant shot and killed his ex-girlfriend, Heather Kelso, at her residence in the Kariotis mobile home park in Kitsap County, Washington. The defendant then entered the home and fired multiple shots at Kelso's guest, Matthew Dean, who was able to escape by breaking through a bedroom window after being shot once in the buttocks. Dean survived his injuries. The defendant followed Dean through the home into the bedroom from which Dean escaped, where defendant shot and killed 2-year-old K.L., the son of Kelso's roommate. KL's mother, Jalisa Lum, was not shot.

Law enforcement recovered multiple bullet fragments and spent cartridge casings from the crime scene that were sent to the Washington State Patrol Crime Lab for testing. The fragments removed from the bodies of Kelso and KL were also sent to the crime lab.

A search warrant was conducted at the residence of the defendant's ex-wife, where he had been staying since Kelso obtained a no-contact order restraining him from having contact with her. At that residence, the defendant's 9 MM Smith and Wesson gun case was located, but the gun was not. Inside the gun case was a manufacture test-fired round from the firearm. The test-fired round was also sent to the crime lab for comparison to the fragments and shell casings. To date, the murder weapon has not been recovered.

Washington State Patrol Crime Lab Forensic Scientist Kathy Geil performed the ballistics comparisons in this case. She conducted microscopic examination and comparison of the seven fired bullets and concluded that they had all been fired from the same firearm. She conducted microscopic examination and comparison of the ten cartridge cases collected from the crime scene to the manufacturer's test-fired round and was able to conclude that they had all been fired from the same firearm.

The defense paid two academics to submit affidavits opining that firearm toolmark comparison /ballistic evidence is insufficiently reliable to be admitted into evidence and that it doesn't meet the requirement of *Frye* of being generally accepted in the relevant scientific community. Neither of the defendant's "experts" have examined any piece of evidence in this case, to the State's knowledge; most certainly, their affidavits did not reflect any such examination having occurred. Nevertheless, both were quick to dismiss the reliability of Kathy

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Geil's conclusions using this type of scientific evidence and to ignore that firearms and toolmark identification have long been established as admissible in courts employing the *Frye* test. Furthermore, defendant's argument overlooks the vast body of case law, here and throughout the country, cataloguing the near-universal acceptance of pattern matching throughout the relevant scientific community.

C. ARGUMENT

1. The Frye Test is Unnecessary if the Evidence Does Not Involve New Methods of Proof or New Scientific Principles

In determining the admissibility of evidence based upon novel scientific theories or methods, Washington courts employ the "general acceptance" standard set forth in *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923). Once a particular theory or principle has been approved by the appellate courts, it is normally unnecessary to relitigate the *Frye* issue in later cases.[1] Appellate courts in Washington and around the country have already determined that *Frye* hearings are not required to determine the admissibility of ballistics evidence. [2] Firearms and toolmark identification is not a new or novel scientific theory. The defendant, Mr. Tobin, and Mr. Spiegelman all rely heavily upon two reports issued by the National Research Council of the National Academy of Sciences: one in 2009 entitled "Strengthening Forensic Science in the United States: A Path Forward"[3] and one in 2008 entitled "Ballistics Imaging"[4]. They propose that these reports are proof that firearm identification evidence is no longer reliable and should no

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[1] *See, e.g.* 5B K. Tegland, Washington Practice, Evidence Law and Practice §702.18, at 12 (4th ed. 2005 Pocket Part); see also *State v. Gore,* 143 Wn. 2d 288, 305, 21 P.3d 262 (2001), overruled on other grounds by Blakely v. Washington, 124S.Ct. 2531 (2004) ("we conclude that a *Frye* hearing on admissibility of the typing techniques was not necessary in this case, and will not be necessary for similar PCR-based systems in the future.")

[2] See *State v. Lizarraga,* 191 Wn. App 530, 564-65 (2015); *United States v. Williams,* 506 F.3d 151, 161 (2d Cir. 2007) (holding that government expert's firearms identification methodology matching particular guns to particular bullets was not pseudoscience); *United States v. Hicks,* 389 F. 3d 514, 526 (5thCir. 2004) (holding that matching ballistics testing of shell cases is accepted methodology); *Fleming v. State,* 194 Md. App. 76, 1 A.3d 572, 586, 590 (2010) (holding microscopic "[f]irearms toolmark identification" and analysis is generally accepted in scientific community); *Al Amin v. State,* 278 Ga. 74, 597 S.E.2d 332, 344 (2004) (holding that ballistic and tool marks evidence is not novel).

[3] Hereinafter referred to as "the 2009 NAS report".

[4] Hereinafter referred to as "the 2008 NAS report".

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longer be admitted into evidence as scientific evidence.[5]

It should be noted that, subsequent to the publication of the 2009 NAS report, a barrage of similar motions were filed by the defense bar across the nation, arguing unsuccessfully for the wholesale exclusion of ballistic evidence from courts of law. Yet despite all of those efforts, the defendant was **unable to cite to even <u>one</u> case** wherein a court in recent years has suppressed ballistics evidence as insufficiently reliable to be admitted. The State also has been unable to find a single case wherein a court has ruled that ballistics evidence is no longer reliable. The defendant cites some cases in his motion that he claims "question the use of ballistics identification evidence"[6], but his conclusion as to what those cases stand for is erroneous.

The first case cited by the defendant is *United States v. Green,* 405 F.Supp 2d[7] 104 (D. Mass. 2005), where the court cautioned other courts from admitting toolmark evidence without requiring a basic showing of proficiency testing, expertise, and reliability of methods.[8] In *Green,* the "firearm expert" was a Detective Sergeant with the police department who had never had any formal training in firearm identification, had never been formally tested by a neutral proficiency examiner, and neither he nor the laboratory he worked in had been certified by any professional organization.[9] He testified that to the extent there were protocols for toolmark examination, he did not follow them in this case. He took no notes or pictures, and did not rely on or refer to any database or reference materials.[10] With the underlying facts as described, the court's statement quoted by the defendant is not contrary to the State's position in the slightest. Indeed, it serves to reiterate the common knowledge that courts admit firearm identification evidence because of its reliability when presented by a **<u>qualified</u>** expert. The defendant also cites *United States v. Williams,* 506 F.3d 151 (2nd Cir. 2007), *United States v. Cazares,* 788 F.3d 956 (9th Cir. 2015), and *United States v. Diaz,* 2007 WL 485967 (N.D. Cal. 2007) as being other courts that have "cautioned against the use of ballistic evidence"[11].

In *Williams,* the appellate court found no abuse of discretion by the trial court's denial of

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[5] Defense brief and attached affidavits.
[6] Defense Memorandum of Law re: Frye Motion, p. 5, line 14.
[7] Defendant's memorandum had this case mis-cited in that he did not include the '2d'.
[8] *Id.* p.5 line 18.
[9] *Green,* 405 F.Supp.2d @ 107.
[10] *Id.*
[11] Def's Memorandum, p.5, line 19.

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the defendant's request for a *Daubert* hearing to challenge the ballistics. In *Cazares*, the challenge was not to the admissibility of ballistics evidence at all, instead it was to the use of the term "scientific certainty" when describing the test results, which the court allowed. On appeal the court found that, even though it was very crucial evidence to the government's case, and therefore highly prejudicial to the defendant, any error was harmless because the expert was subject to cross-examination. In *Diaz*, the court, using a *Daubert* standard, denied the defendant's motion to exclude evidence regarding ballistics, but did limit the expert from using the phrase "to the exclusion of all other firearms in the world".

There has been no case cited, and as mentioned no case found by the State, where any court of law in this country has excluded ballistics evidence on a general, overall theory of unreliability.

2. Ballistics Evidence is Well Established and Accepted in the Relevant Scientific Community

As mentioned above, firearm and toolmark identification is not a new science subject to a *Frye* hearing. In addition, the traditional method of pattern matching utilized by the firearms examiner in this case enjoys general acceptance in the relevant scientific community. Defendant's efforts to create a scientific controversy ignores a vast body of case law throughout the country reflecting the acknowledgement and acceptance of ballistics evidence. The defendant wants the court to rely solely on Mr. Tobin's unfounded assertions that ballistics evidence is no longer generally accepted in the scientific community since the 2008 and 2009 NAS reports were published. However, there are a plethora of cases that have reviewed, and rejected, the NAS reports' conclusions. One such case in Washington is *State v. Lizarraga,* 364 P.3d 810 (2015). This case comes from Division I of the Court of Appeals, from a case tried in King County Superior Court. It so happens that the state's expert witness in the case was WSP crime lab forensic analyst Kathy Geil. Lizarraga requested a *Frye* hearing on the fingerprint comparison evidence[12], citing the 2009 NAS report in support of its motion. Lizarraga requested that opinion testimony on ballistics comparison "be limited to illustrating similarities without conclusion as to a connection with individualized pistol" and that the State's witness not give an

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[12] 364 P.3d @ 829.

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opinion "as to probability or degree of certainty"[13]. The trial court denied the motion for a *Frye* hearing and declined to limit the expert's testimony[14], and the Court of Appeals affirmed both decisions[15].

In *U.S. v. Otero,* 849 F.Supp2d 425 (2012), the court acknowledged that other courts have observed that the Association of Firearm and Toolmark Examiners theory of firearms and toolmark identification is "widely accepted in the forensic community and, specifically, in the community of firearm and toolmark examiners.[16] It goes on to recognize that even courts which have criticized the bases and standards of toolmark identification have nevertheless concluded that the AFTE theory and its identification methodology is widely accepted among examiners as reliable and have held the expert identification evidence to be admissible[17].

Defendant is asking the court to rely on Mr. Tobin's oft-repeated assertion that firearms identification is no longer accepted in the "true (mainstream) scientific community", ignoring a vast body of case law finding the opposite to be true. Mr. Tobin's list of his "colleagues and collaborators from the true (mainstream) scientific community" that support his position notably ***does not include one single scientist or firearms expert.***[18] Instead, the group is a list of academics like himself, mostly professors and/or professional witnesses. As such, their opinion is not probative and doesn't change decades of court decisions that have found firearms and toolmark identification to be admissible.

D. CONCLUSION

Firearm and toolmark identification is not a new area of science, it is well-established as reliable, and it is widely accepted in the ***relevant*** scientific community. Accordingly, this Court should grant the State's Motion to Deny Defense Request for *Frye* hearing. Furthermore, as the shadows attempting to be cast by the defendant on the State's expert properly go to weight, and

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[13] *Id.*

[14] The court ruled ballistics testing evidence "has long been held to be generally accepted in the scientific community" and defense counsel did not cite any "lawful authority" to support limiting the experts' testimony.

[15] *Id.*

[16] 849 F. Supp.2d @ 435, citing *U.S. v. Diaz*, No. 05-167, 2007 WL 485967, at *11 (N.D. Cal. Feb 12, 2007).

[17] *Id.*, citing *United States v. Taylor,* 663 F.Supp 2d 1170, 1178 (D.N.M. 2009); *United States v. Green,* 405 F.Supp2d 104, 122-24 (D. Mass 2005).

[18] Tobin's affidavit, page 12-13.

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not admissibility of the evidence, the court should deny defendant's motion to suppress. These issues will be properly vetted out during cross-examination.

RESPECTFULLY SUBMITTED this 23rd day of February, 2016.

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Prosecutor's File Number–15-143920-5

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