SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA BARBARA

SANTA MARIA BRANCH; MILLER STREET DIVISION

DEPARTMENT SM-8 HONORABLE JOHN F. MCGREGOR, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, -vs- JUAN CARLOS LOZANO MEMBRENO, TRANQUILINO ROBLES MORALES, LUIS GERMAN MEJIA ORELLANA, JUAN CARLOS URBINA SERRANO, and MARCOS MANUEL SANCHEZ TORRES, Defendants.	NO. 1501755

REPORTER'S TRANSCRIPT RE: PEOPLE'S MOTION AND COURT'S RULING AS TO ADMISSIBILITY OF FIREARMS EXPERT TESTIMONY

Friday, July 16, 2021

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Official Court Reporter

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8:40 a.m.

THE COURT: Thank you. Okay, we're here today for the argument and ruling on the People's request to admit firearms testimony and the defense's in limine motion to limit it.

Argument, People.

MS. BRAMSEN: Well, Your Honor, the first step in this process is to determine whether or not it falls under *Kelly*, *Kelly-Frye*, and when you look at the California cases of *People vs. Cowan*, (2010) 50 Cal.4th, 401, and *People vs. Azcona*, A-Z-C-O-N-A, (2020) 58 Cal.App.5th, 504, both the California Supreme Court, and later, the California Court of Appeal, have held that ballistic comparison evidence does not fall within *Kelly*. However, the People believe the Court should be looking at it under 801 and 802 of the Evidence Code and the recent case of *Sargon Enterprises*. It's the Court's duty as the gatekeeper to determine what is appropriate for the expert's opinion based on the field and the validity.

When you look at *Cowan*, the expert in that particular case compared markings on a mold of a barrel that he made from the gun to bullets retrieved from autopsy and concluded the bullets were fired from that gun. In *Azcona*, the expert compared cartridge case from

scene A to cartridge case from scene B and determined that the cartridge cases were fired from the same firearm.

Now, the Court and the expert made an error in *Azcona* in that the Court allowed the expert to do exactly what he shouldn't do. The expert tried to quantify that opinion by saying that he could exclude all other guns by giving some statistics, by telling the jury that the studies showed that it couldn't be another gun. That is the part of *Azcona* that was improper, and that is exactly what Ms. Peck is not going to do. In fact, you heard her agree with all of the recommendations of the Department of Justice.

So the scientific community, we had Todd Weller testify, and in his declaration and testimony, he opined as to who the relevant scientific community is with a number of different groups included, from firearms examiners, to mainstream scientists, engineers, statisticians. In his opinion, the field has more than reached foundational validity, and the Court should look at what he bases his opinion on. He was very articulate, and he was able to explain exactly why he's come to that conclusion.

In his declaration, there's a number of different sources that he relied on, but I'm just going to address what he talked about in court for today. So, PCAST in 2016, a group of premier scientists in the field, found that the Ames-I or Baldwin study established

the first step towards foundational validity for ballistics. They set forth exactly what kind of study the field should do in the future, and that only one additional study is needed. The chair of PCAST, Eric Lander, not only opined that in PCAST, but again in 2018, one more study is needed.

Well, Todd Weller is relying on three additional studies that meet the black box criteria set forth by PCAST, and they're all after PCAST and after the Eric Lander statement in 2018. Later that year, Keisler published their study in 2018 with a very low error rate. These are all accuracy studies. Can examiners do what they say they can do, and what is the error rate? PCAST recommended it be below five percent. In all of the post-PCAST black box studies, it's well below five percent, often below one percent.

Then you have Chapnick. Chapnick was the 2020 study where Weller is actually a co-author, and, interestingly, the lead scientist on that is Dr. Lilien. Now, that is one of the chair members of PCAST. So a founding member of PCAST does a study that meets the exact requirements PCAST set forth, and Mr. Weller calculated the error rates for that study, which were, again, very low.

Then you have the Ames-II or Ohio State F.B.I. study from 2021. That's the most extensive, comprehensive study in the field. They studied not only accuracy, but repeatability and reproducibility. In the

Ames study, the statistics are very low for error rates, and repeatability for identification was 90 percent across the board. In all the studies, they found that a very small group of analysts were making any of the false positive errors, and in the Ames-II under reproducibility, when they had a second analyst look at the same evidence, the false positive errors were zero.

He bases his opinion on all of these studies, and he talked a lot about the different ways to calculate error rates. So whether you use the PCAST gold standard of taking inconclusives out of the equation, or you use the calculation that the authors of the studies used, which is just including them in the total number, the error rates are well below two percent in all of the studies, and often below one percent.

In the Ames study, he relied on the fact that high repeatability exceeds the statistical expected margin by a wide amount. The studies don't have in place any quality control. So Mr. Weller relied on the fact that the studies show low error rates. But even better than that, in an accredited laboratory in case work in the real world, there are far more checks and balances. There's procedures, there's all kinds of different reviewing, both outside and inside, and, most importantly, on any given case, there is at least one more examiner that's qualified, another expert in the field, that reviews each and every piece of evidence, just like we have in this particular case, before even a

report can be issued.

Then you have yet another opportunity to make sure it's done right, because there's no consumption of evidence with ballistics. It's there now and forever. The defense at any time can always hire an outside private expert. Just like Ms. Peck talked about, she's had many outside private experts review her work. That's a third protection on the defendants' rights to make sure that the experts got it right.

So then the question turns to what can Ms. Peck say? We heard from Todd Weller and from Ms. Peck how under the D.O.J. guidelines and AFTE -- they're really relatively similar, if not exactly the same -- it is foundationally valid for a firearms expert to opine that, based on in their opinion, a cartridge case was fired from gun A. Now, they can't say they can exclude all guns in the world. They can't give it any kind of a statistical figure. They can't do anything that would make it seem like there's no possibility that it could be another gun. And Ms. Peck has never done that and has no intention of doing that. In fact, she said, "I would never say that, and I've never said that."

So then you turn to what other evidence has the Court heard. We had Dean Faigman, and you have his declaration and C.V., and he has very little to no experience in the firearms field. He has very little experience in actually designing studies. He did one when he was in college, one when he had a master's, and

then the State Bar study doesn't have any scientific relatability. And because of that, you see some real errors in his opinion.

So in his study design, he recommends that you take AFTE examiners to examine fired bullets to come to conclusions, whether they are identification, inconclusive, or elimination, then use that as ground truth to test the subjects. Well, what does that mean? That means that he believes AFTE examiners can do what they say they can do, because it's his recommendation that you use the examiners to form ground truth to do the examination, and then you rely on this group's opinion in determining whether the right answers are inconclusive or not in your study group.

The other part of his opinion that doesn't make any sense is he says he thinks any field needs multiple validation studies before they can testify to any opinions. Yet, he says that you should allow the examiner to talk about class characteristics. If you look in his declaration and his testimony, there's not a single validation study on class characteristics. All of the validation studies had the same class, because you can't do a microscopic analysis if they're not the same class. So he wants the Court to allow an opinion in that he has not provided any validation studies for.

He also is far outside mainstream science. He's on an island. He has created his own theory that has no scientific validity and no scientific support.

His theory on calculation of error rates is not what PCAST recommended. And as an adviser to PCAST, interestingly, he never told them he thought they were wrong. Yet, he now has decided that, randomly, you should use inconclusives as wrong answers, despite the fact that he concedes in case work, in the real world, that is and could be a correct answer.

Another interesting thing he does is he misuses statistics. We have very qualified statisticians in the studies that he talked about, and the statisticians actually caution the reader of the study to not use the statistics in the very way that Dean Faigman does. He attempts to count the inconclusives as wrong, and in doing so, the reason he believes they're wrong is because there's no, quote, "ground truth".

But think about that for a moment. So the study designers know what gun bullet 1 was fired from, and bullet 700, for that matter. What they don't know is which bullets between 1 and 700 are not marked well. The study participants don't have any idea what they received as far as is it marked well or not marked well before they do their examination, and, most importantly, they only have one bullet to compare.

We heard from both Ms. Peck and Mr. Weller that a qualified examiner's most difficult task is elimination, and when they only have one bullet to compare, it is very difficult to know if it is poorly marked and, therefore, an inconclusive, or if there's

enough information to eliminate. If there is insufficient information on the bullet, the correct answer is "inconclusive", which is why the test-takers, you see a higher number of inconclusives. They're doing their job as an AFTE examiner and looking at the information in front of them not knowing the ground truth, not knowing any more. They don't have a gun to test-fire more rounds so they can see what kind of bullets the gun's producing more consistently. So "inconclusive" is, again, the correct answer.

Interestingly, Dean Faigman talked about how he took his idea to some organizations for studies and they didn't fund it. He admitted that multiple other scientists, including the Beiderman article, has looked at this speculative way of calculating error rates and disagreed with it. He admitted Dr. Morris disagrees with it. And he admitted that PCAST also didn't do it that way.

Finally, he has his own threshold for validity. He couldn't tell us what that is. He couldn't say how many studies. His own study design doesn't really make any sense, but he'll know it when he sees it. He is hired to come in and attack the opponent's expert report by the top minds in the field. Just like his son-in-law's endeavor with him on JuriLytics said they're going to "savage your opponent's expert by using top minds in the field". The problem is he's not a top mind in this field. He's very accomplished in other fields,

but not here. And the problem is he's so far outside the scientific community that his opinion has no validity.

I'd ask the Court to allow Ms. Peck to testify just like she did in front of you, making sure that she qualifies her opinion by telling the jury she cannot exclude it to all guns in the world, and she cannot give it any kind of statistical support. Thank you.

THE COURT: Mr. Balash.

MR. BALASH: Yes, Your Honor. I guess I have a more pragmatic approach. After all the words and testimony that we heard these last two days, admittedly, there is an error rate. Even -- how would you like to be sitting in San Quentin and say, "Oh, well, you're only one percent"? But that -- there's an error rate. This is not beyond a reasonable doubt, which is what we're working with. And that's the problem we have.

Ms. Peck testified she -- I don't know if she would qualify each statement in court, but she said, "This bullet came from that gun." The jury is going to sit there and accept that as truth, and it's not. They can't get away from the fact that you have one study after another, and they always come up with error rate. Might be low, but there is an error rate. And that's the danger of this evidence.

As far as Dr. Faigman is concerned, at least the Supreme Court of California thought his studies were worthwhile, because they relied on it in a decision, as he testified. As we look at this, as the Department of

Justice found, the conclusion or report is ultimately an examiner's decision and is not based on statistically derived or verified measurement or comparison to all other firearms or toolmarks. It's subjective.

I believe that Ms. Peck has been doing this for a long time. I'm sure she's looked through a lot of microscopes. But it's still subjective. It's her opinion. And it's dangerous to allow this in. If it were limited to class of firearms -- they keep trying to bring this out that it would -- Mayra Ortega's gun would not have been eliminated if you only used class. But it's not limited to that gun. It eliminates 20,000 pistols, and so it's not going to hurt her at all, in fact, the way it was found.

The District Attorney covered *Azcona*, as well. I'm sure the Court is familiar with that case. You are a gatekeeper here, and you can't allow evidence in that contains an error rate, because even though we have the examiner who's testifying, she's been trained to testify, did the exam the way she did it. There's that flaw in the methodology. It's not a hundred percent, and we need to deal with a hundred percent.

Submitted, Your Honor.

THE COURT: Okay. Mr. Dunkle.

MR. DUNKLE: Just on one small point, Your Honor. I'd certainly join in Mr. Balash's comments. There had been in the questioning this issue brought up that Mr. Balash references regarding the fact that

Ms. Peck's ability to testify to individual characteristics also has the effect in some instances of eliminating firearms in a way that's arguably exculpatory in this case.

I would just make the small point that that issue of the practical effect is really irrelevant. The Court's gatekeeping function is not to determine what the end result will look like, but to look at whether or not the science is there for making these identifications or eliminations based on whether or not the science is valid to the extent that it allows someone to say, "This is the same gun." So it doesn't matter. If the science isn't there, then the practical effect is irrelevant.

With that, I'll submit based on Mr. Balash's comments.

THE COURT: Mr. Jennings.

MR. JENNINGS: Your Honor, I do join in Mr. Balash's motion to limit the -- Ms. Peck's opinion. The only thing that I would add is, during Mr. Weller's testimony, he did testify that the Ames-II study had not been peer-reviewed and published in scientific literature as of yet. The PCAST report did note that they need two studies that have been peer-reviewed and published, and the Ames-I study had that accomplished through the PCAST report scientists, but there has not been that scrutiny of the Ames-II study yet. We did hear some testimony that that's in the process, but since it has not occurred yet, I think that's an issue

for the Court to grapple with as to whether there is foundational validity since that hasn't happened yet.

And with that, I'll submit.

THE COURT: Mr. Ames.

MR. AMES: Yes, Your Honor, thank you. Just a few points. I also join in Mr. Balash and the other co-counsel's objections.

THE COURT: Mr. Ames, I think you need to move your microphone over.

MR. AMES: Is this better?

MS. BRAMSEN: You have to talk like right into it.

MR. AMES: Is this better?

THE COURT: We're getting there, yes.

MR. AMES: Your Honor, I join in everything that's been said by co-counsel and their motions. Part of my issue is that the studies use inconclusive as an easy out because there's no repercussions to that answer. In fact, it does nothing more than bolster the accuracy rate, as these noncommittal answers still count as part of the whole of their findings.

My client deserves a process that is decisive, not a supposition. Firearm examinations are performed by law enforcement agencies who essentially draft their own policies and verify their own work with their own people. There is no third-party unbiased check and balance system. In fact, we heard testimony that some are trained entirely in-house and rely on their own in-house

training and experience, which is in-house, and knowledge learned and gathered, which is in-house, in order to make their findings.

Ms. Peck stated that she could compare two items and find agreement based on a single marking even if she's using a microscope. As we know, this is subjective and humans are fallible. Now, it's anticipated that Ms. Peck will testify that she would not expect two firearms to have the same microscopic imperfections, although, she cannot rule out all firearms, because all other firearms have not been tested. And while on the surface that may seem to be helpful, it may seem to be fair, this isn't restrictive enough, in my opinion. In fact, the more firearms that are out there or that it's alluded to are out there, that could actually increase the accuracy of the examinations in the jurors' minds, very much so like including inconclusive answers do in the studies.

The scientific community and the courts have already begun to tailor down and restrict the language that examiners are allowed to testify with. Our judicial system demands better. I'm asking for better for Mr. Orrellana. As has already been said under *Sargon*, the Court is the gatekeeper.

And with that, I'll submit, Your Honor.

THE COURT: Mr. Andrade.

MR. ANDRADE: Thank you, Your Honor. And I, too, join in my co-counsel's arguments on behalf of

their clients on behalf of my client. Focusing on what we have listened to for the last several days about studies and whether or not they're scientific, what it really boils down to, Your Honor, is that the assessment that Ms. Peck is making is a subjective assessment. And it became pretty clear to me when I asked her in comparing two bullets -- or, two bullet fragments, what -- she had expected variations and that there were expected variations between two, in comparison of two bullets. What I asked her was, "Well, what -- how many variations are acceptable?" entirely focusing on her subjective view of what it is that she is doing, because what she is doing is using her perspective on whether or not something looks like something else and whether or not there are some variations, few variations. And so I asked her, "Can you quantify that for us so that it appears that it would be more scientific the approach that you're undertaking as opposed to very subjective?" and she said, "No, I can't quantify that. I can't say how many variations between two bullets or two cartridges are acceptable." She can't tell us what the standard is. All it is is a standard that's in her head. And some of the studies have suggested that just because you have experience, there's no correlation between experience and accuracy.

And so this is a subjective determination. These are very serious charges. If she's wrong -- and I submit, Your Honor, that she couldn't answer the

variation question. If she's wrong, then this evidence is going to lead to very tragic ends, and so I would ask the Court to be very cautious, limit the testimony, clarify what it is that she's actually doing, and give us our decision.

Thank you.

THE COURT: Okay. Any response from the People?

MS. BRAMSEN: Just briefly, Your Honor. So a couple of points. Mr. Balash is attempting to equate a one percent error rate with beyond a reasonable doubt. That is a completely improper attempt to misrepresent and to quantify reasonable doubt. The two things don't equate, and they don't have the same meaning.

Now, Mr. Dunkle cautioned the Court that the science is one thing and the practical effect is the other. Not true. There is scientific validity for the microscopic individual characteristics. And the practical effect in this case is alarming. That .38 caliber revolver that we know based on her expertise did not fire any rounds in this case, the jury will be left with the thought that it could have, because it now fits gun 6. She no longer can exclude it. So the practical effect actually has just the opposite problem. We're creating a false fact for the jury and leaving them with the idea that that might be the gun when we know it's not.

There is not a single court in the U.S. that

has excluded this testimony, and there's only three federal courts that have limited it. When you look at the dates of those opinions, they're all prior to 2018. They're all before the field did more black box studies.

The remedy, if the defense is so concerned, is to hire an expert. The evidence is there. We'll make it available. The proper way for the Court to limit her opinion is exactly how she testified, exactly how AFTE and D.O.J. recommend, and this is cross-examination. She will be in front of the jury available for cross. When you look at like 1368, for example, and you have a jury trial, or 1026 is another example with a jury trial, you have experts in psychology, a very subjective field. Even Dean Faigman admitted that on both sides. So someone's wrong every single time. That's at least a 50 percent error rate.

In forensic ballistic comparison, there's scientific validity. There's a very low error rate. As the gatekeeper, you can control the opinion, unlike the judge in *Azcona* did, and allow cross-examination.

Submitted.

MR. AMES: Your Honor, if I may for one quick second address something?

THE COURT: Sure, Mr. Ames.

MR. AMES: The District Attorney's Office has alluded a few times that if we want to remedy this issue that we can simply hire our own expert. That's not going to fix anything. As we heard, the problem is not

with Ms. Peck's eyesight. The problem is that the whole methodology, the whole process, is subjective. So we could hire two or three more experts, but, again, now we're relying on the subjectivity of a different human being. That is the problem that we are outlining here.

THE COURT: Okay. First issue is application of *Kelly-Frye*. *People vs. Cowan* (2010), 50 Cal.App.4th, 401. *Kelly* is intended to prevent lay jurors from being unduly influenced by procedures which seem scientific and infallible, which actually are not, and does not apply to such things as fingerprint, shoe track or ballistics comparisons, which jurors can essentially see for themselves.

When continuing admissibility of scientific evidence is at issue, the burden shifts to the opposing party to present new evidence showing it no longer is. *People vs. Bolden*, 29 Cal.4th, 515.

The testimony regarding reports by N.S.C. and the 2016 PCAST reports, which criticize visual analysis of firearm toolmarks as unreliable, lacking objective standard, and either lacking an error rate, or, according to Dean Faigman, had an unacceptably high error rate for scientific analysis, have been heard by the Court. Defendants presented legitimate criticism from credible sources which undermine the reliability of a method and cast some doubts on the prosecution's expert's conclusions that particular bullet casings or bullets came from the same firearm.

This is quoting from *Azcona*, *People vs. Azcona*, (2020), 58 Cal.App.5th, 504 at 510 to 514.

"Dr. Weller's description of repeatability and the Ames reports' necessity to break down error rates both by examiner clusters and by three distinct cohorts of test-firing, even without reliance on including inconclusives in the numerator calculation, is significant. Dean Faigman's inclusion of errors in the numerator seems to be outside of the scope of general scientific opinion. Trial courts have a critical gatekeeping beyond determining whether the expert may testify. The analysis must be admissible under 801. It must be of a type that reasonably may be relied on by an expert in forming an opinion on the subject. The Court must act as the gatekeeper to ensure the opinions offered by the expert are not" -- and this quote, this particular quote, is from *Sargon Enterprises vs. University of Southern California*, (2012), 55 Cal.4th, 747 at 771 -- "'based on reasons unsupported by the material on which the expert relies'" was the Supreme Court quoting Dr. Faigman. "But *Sargon* goes on to say, 'The courts must be cautious in excluding expert testimony. The trial court's gatekeeping role does not involve choosing between competing expert opinions. The gatekeeper's focus must be solely on the principles and methodology, not on the conclusions.'"

The Court is not convinced that limiting firearms expert testimony to class characteristics is

appropriate. Not only could that lead to inappropriate inclusions, but the evidence presented did not sufficiently undermine the conclusions of firearms examination expert's ability to match and eliminate bullets and shell casings. The expert may testify as to exclusions and inclusions, but must identify the limitations of her opinion that, one, it does not exclude all firearms, two, that it is not presented as a scientific certainty, and three, that they will give no numerical or statistical calculation.

In order to make sure the jury understands these limitations, I will direct the People to review those limitations with the experts prior to introducing the case-specific testimony.

Does either side wish to be heard regarding the Court reading the expert testimony instruction prior to the jury receiving the expert testimony? People.

MS. BRAMSEN: Submitted.

COUNSEL IN UNISON: Submitted, Your Honor.

THE COURT: Okay. I think that that might be a second clarifying method. Okay, there is another issue raised by *Azcona*.

MR. DUNKLE: Sorry, Judge. I think there's an issue with the audio.

MR. ANDRADE: Here, too.

(OFF THE RECORD.)

THE COURT: One other point. I understand

Mr. Ames' position regarding outside experts, but there's two points I'd like to make as to that. One, the evidence is available for examination. Two, even without other examination, the defense can present expert testimony casting question on the accuracy of the scientific method. It is true that there is a -- that there is subjectivity to firearms identification analysis. That is undoubtedly true. That is why the expert will be required to couch the findings in terms of her opinion based upon -- and the basis for her opinion, which is exactly what 801 and 802 require the expert to do.

The next issue identified in *Azcona* that we heard testimony about to some length yesterday is verification, and the particular problem identified is the hearsay nature of testimony regarding the in-house verification process.

Ms. Bramsen.

MS. BRAMSEN: So I don't think that there's any hearsay with the verification process. However, if she were to give the conclusion of the other examiner, then that would be hearsay unless we call the verification examiner. And they are on the witness list.

THE COURT: Okay. Is it the People's intention to call the verification examiner?

MS. BRAMSEN: We put them on the witness list. It is a possible intention. I haven't made that

decision yet. But, yes, they are on the witness list if that's necessary.

THE COURT: Okay. In *Azcona*, the testimony of the expert was that their individual conclusions were verified by a second examiner.

MS. BRAMSEN: I think they went farther than that. The problem with the testimony in *Azcona*, the hearsay portion, is that not only was it verified by a second examiner, but the second examiner came to the same conclusions.

THE COURT: Well --

MR. ANDRADE: And it raises some confrontation issues, as well, Your Honor.

THE COURT: Well, I think that's the whole -- both the hearsay and confrontation, because there's no -- the testimonial nature of these reports is not disagreed to by the People, I'm assuming.

MS. BRAMSEN: Not at all. In fact, we took the reports out of the exhibits for that very reason so the jury won't have them. And, Ms. Peck, I do intend on eliciting the process of the laboratory, but not the opinion of the verifier. And I do have -- the verifier is on the witness list and, if necessary, they will testify.

THE COURT: Okay. Anything further from the defense?

MR. BALASH: No.

THE COURT: Okay, thank you.

REPORTER'S CERTIFICATE

State of California)
)
County of Santa Barbara)

I, CRAIG E. BARNETT, CSR NO. 6720, OFFICIAL COURT REPORTER, DO HEREBY CERTIFY:

That the foregoing pages 4 through 24 contain a true and correct transcript of the proceedings had in the within and above-entitled matter as by me taken down in shorthand writing at said proceedings on Friday, July 16, 2021 and thereafter reduced to typewriting by computer-aided transcription under my direction.

In compliance with section 8016 of the Business and Professions code, I certify under penalty of perjury that I am a certified shorthand reporter, with license number 6720 in full force and effect.

DATED: SANTA MARIA, CALIFORNIA, 9/17/21

_____
CRAIG E. BARNETT, CSR NO. 6720
OFFICIAL COURT REPORTER