MESA COUNTY DISTRICT COURT 125 N. Spruce Street Grand Junction, CO 81501	DATE FILED: July 7, 2023 9:28 AM CASE NUMBER: 1992CR95
The People of the State of Colorado v. James Genrich	▲COURT USE ONLY ▲ Case Number: 1992CR95 Division: 11

ORDER RE: DEFENDANT'S PETITION FOR POSTCONVICTION RELIEF PURSUANT TO CRIM.P. 35(c)

This matter is before the Court on Defendant's Petition for Postconviction Relief Pursuant to Crim. P. 35(c) filed February 5, 2016, on remand from the Colorado Court of Appeals. *People v. Genrich*, 2019 COA 132M, 471 P.3d 1102, *as modified on denial of reh'g* (Nov. 27, 2019).[1] After considering the evidence presented at the evidentiary hearing, the parties' subsequent briefs, responses, their proposed orders and their respective proposed findings of fact and conclusions of law, as well as the file, the Court of Appeals decision, and the applicable law, the Court issues this order.

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[1] This case was remanded for the Court to hold an evidentiary hearing on the post-conviction motion and for the Court to apply the Colorado Supreme Court's holdings in *People v. Rodriguez*, 914 P.2d 230, 292 (Colo. 1996); *People v. Gutierrez*, 622 P.2d 547, 559 (Colo. 1981); *People v. Scheidt*, 187 Colo. 20, 22, 528 P.2d 232, 233 (1974); and *Digiallonardo v. People*, 175 Colo. 560, 568, 488 P.2d 1109, 1113 (1971). *People v. Genrich*, 2019 COA 132M, ¶ 3.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Introduction

Defendant was found guilty after a jury trial held between April 5, 1993, and May 7, 1993. The jury found him guilty of three counts of Use of an Explosive or Incendiary Device to commit a felony; one count of Third-Degree Assault against Dennis Lamb; and two counts of First-Degree Murder – Extreme Indifference, for the murders of Maria Delores Gonzales and Henry Ruble.[2]

Defendant has petitioned the Court for a new trial under Crim. P. Rule 35(c)(2)(V) ("That there exists evidence of material facts, not theretofore presented and heard . . . which requires vacation of the conviction or sentence in the interest of justice") and C.R.S. § 18-1-410(1)(e). The new evidence is a rejection, by the scientific community, of the underlying methodology of toolmark analysis and, moreover, a rejection of the propriety of the conclusions drawn from that methodology by the People's toolmark expert, John O'Neil—that several of the tools and wires from several of the bombs matched. R. Tr. (April 21 and April 22, 1993) pp. 2632:8-11; 2637:19-25; 2638:1-3; 2644:13-16; 1002:8-14; 2831:5-8; 2832:2-5; 2833:20-21.

The People oppose the petition, arguing that the rejection by the scientific community is an impeachment of the People's expert and is thus immaterial; insufficient to make the testimony of John O'Neil inadmissible and insufficient to "probably bring about an acquittal verdict if presented at another trial." *People v. Muniz*, 928 P.2d 1352, 1357 (Colo. App. 1996).

II. Factual Background

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[2] On Appeal, the Colorado Court of Appeals held that only the Defendant's murder convictions are excepted from the three-year time limitation for collateral attacks on felonies other than class 1 felonies. *People v. Genrich*, 2019 COA 132M, ¶¶ 35-36, 471 P.3d 1102, 1108, *as modified on denial of reh'g* (Nov. 27, 2019).

Between 1989 and 1991 Grand Junction, Colorado was beset by a series of pipe bombings/attempted bombings. The first bomb was discovered undetonated outside the LaCourt Motor Hotel on April 14, 1989. *See* R. Tr. (April 12, 1993), pp. 1108-1109. In February, March, and June of 1991, three additional bombs exploded in Grand Junction. Law enforcement concluded that the 1989 bomb and the 1991 bombs were "signature" bombs, meaning that they were all of the same unique design and made by the same person. R. Tr. (April 26, 1993), p. 3416:4-6. Eventually, investigators identified the Defendant based on a tip, interviewed him multiple times, and searched his residence, once with his permission, and once pursuant to a warrant.

When police searched Mr. Genrich's room at a Grand Junction boarding house, they found: two pairs of slip-joint pliers, a pair of needle-nosed pliers, a multi-tool with a wire cutter, some wires, an electrical circuit board, and two fuses. R. Tr. (April 15, 1993), pp. 1954-1955. The police sent these tools to Agent John O'Neil of the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") for comparison with evidence recovered from the four bombs. R. Tr. (April 22, 1993), p. 2964:11-13. Agent O'Neil opined that three of Mr. Genrich's tools were the only tools in the world that could have made certain marks found on pieces from the four bombs.[3] Based in part on Agent O'Neil's opinion, the prosecution convened a grand jury, which indicted Mr. Genrich for the crimes stemming from the four bombings. *See generally* Indictment (filed February 17, 1992).

Before trial, the People hired two toolmark examiners, Agents Evan Hodge, and James Berglund to verify Agent O'Neil's conclusions. Upon reviewing Agent O'Neil's work, both

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[3] Agent O'Neil was provided with a lengthy narrative from the investigating officers. R. Tr. (April 21, 1993), pp. 2790:22-2791:5.

examiners disagreed with Agent O'Neil's conclusions as to all but one of his six matches. However, they did agree with one of his conclusions, a match of a mark of less than 0.01 inches on a portion of the 0.06-inch diameter wire from the 1991 Two Rivers bomb site. *See* R. Tr. (April 22, 1993), pp. 2877-78; R. Tr. (April 20, 1993), pp. 2356-2357.

A. The Trial

At trial, the People relied heavily on the testimony of Agent O'Neil, noting Agent O'Neil's "certainty" and "individualization" testimony, first during their opening statement, then multiple times during direct examination, and finally again in closing argument. *See, e.g.*, R. Tr. (April 9, 1993), p. 1000:16-17 (prosecutor's opening statement explaining, "[Agent O'Neil] will say these tools cut these wires, to the exclusion of any other wire cutters."); *id.* at p. 1001:1-2 (same regarding multi-tool wire cutter and pliers). The People also argued that the Defendant had failed to rebut Agent O'Neil's testimony. See R. Tr. (May 4, 1993), p. 4742:20-24 ("There are 700 people who make their livings doing this. Agent O'Neil told you the number of courts in which he's testified. And you have heard no one come and sit in that stand and say that John O'Neil is wrong because John O'Neil was right.").

The content of Agent O'Neil's testimony was composed of, his opinion, showing the jury photos of the alleged matches, and showing a video of his matching process. *See, e.g.*, R. Tr. (April 21, 1993), pp. 2632-33, 2638-39, 2699-2702, 2714-29; 2732-33. Agent O'Neil explained the analytic basis for his opinion, stating that the "assumption under which all firearms and toolmark examiners operate" is that "[i]t is proven that each tool is individual unto itself, as each person is." R. Tr. (April 22, 1993), p. 2971.

Most significantly for purposes of the instant petition, Agent O'Neil testified that the Defendant's tools were the only tools in the world that could have made the marks on the

evidence. R. Tr. (April 21, 1993), p. 2632:12-17 ("Q. What do you mean by the phrase 'to the exclusion of any other tool,' sir? A. That the individual jaw, the location within that jaw on that particular side, was identified as having cut the wire in question to 10 a degree of certainty to exclude any other tool."); *id.* at p. 2648:13-16 ("Q. Sir, when you say 'to the exclusion of any other tool,' are you saying that no other pliers or gripping tool could have made those tool marks? A. That is correct, sir, in my opinion."); *id.* at p. 2638:1-3 ("My opinion is that Government's Exhibit 8A cut Government's Exhibit 25A, to the exclusion of any other tool.").

Specifically, Agent O'Neil opined that the following matched:

(1) Mr. Genrich's needle-nosed pliers to two wires from the 1989 LaCourt Motor Hotel unexploded bomb, R. Tr. (April 21, 1993), p. 2632.

(2) Mr. Genrich's slip-joint pliers to three end cap fragments found at two different fatal bombings in 1991, R. Tr. (April 21, 1993), p. 2648; and

(3) Mr. Genrich's multi-tool wire cutter, with a cutting blade of 0.6 inches, to a small mark on a wire with a diameter of only 0.06 inches, from the 1991 Two Rivers bomb (the bomb that injured Dennis Lamb). R. Tr. (April 21, 1993), p. 2638 (Agent O'Neil's purported match); R. Tr. (April 21, 1993), p. 2638 (Agent O'Neil's purported match); R. Tr. (April 22, 1993), p. 2831 (wire diameter); R. Tr. (April 21, 1993), p. 2722 (toolmark on wire is even smaller than wire and most of surface is very rough).

Also at the trial, the following evidence, independent of the toolmark analysis, was introduced:

(1) there were numerous similarities between the four pipe bombs, including that each lacked a safety mechanism, was a boobytrap device triggered by movement, was powered by a

battery with wires soldered to it, used the same type of powder, and used Coin brand end caps.

(2) Defendant lived within easy walking distance of the locations where two of the three 1991 pipe bombs were detonated.

(3) Defendant had been seen near some of the areas where the 1991 bombs were detonated.

(4) Defendant had threatened in the past to kill people out of frustrations with women and a perceived lack of respect.

(5) Defendant was familiar with the Anarchist Cookbook, which includes descriptions of how to make bombs.

(6) Defendant lived five blocks from, and was seen in, Surplus city, the only hardware store of twenty-five in the area that carry the type of Coin brand end caps used in the bombs.

(7) two Buss type fuses were recovered from Defendant's apartment, and that is the type of fuse used in the 1989 bomb.

(8) the bombs employed an electronic detonation system, and Defendant was familiar with electronics from coursework at DeVry Technical Trade Institute; and

(9) Defendant had tools capable of making the marks that appeared on certain of the wires and caps used in the bombs.[4]

***Genrich*, 2019 COA 132M.**

To counter the testimony of Agent O'Neil, the Defendant called Dr. Donald Searls, a professor in graduate statistics courses at the University of Northern Colorado testify as an expert in the field of statistics and scientific methods. R. Tr. (April 21, 1993), p. 3468:2-5; p. 3484:11-

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[4] This summary of evidence independent of the toolmark identification is quoted from the Colorado Court of Appeals Order, issued August 29, 2019.

15. Dr. Searls was qualified based on his Master of Science in economics, his Ph.D. in statistics and having taught courses in designing experimental design, sampling methods, probability theories, and quality control. *Id.* pps. 3468-69. He had given presentations and conducted seminars on scientific methods, statistics, and probability theories. *Id.* He wrote articles for very large associations and both national and international journals. *Id.* p. 3469: 4-13. To introduce Dr. Searls, the defense, in their opening statement remarked, "[the jury] will hear that in this process of matchology there are no accepted standards by toolmark people. There's no agreement about what makes a match. There are no statistics, no validation. And [Agent O'Neil] will make statements about something called extrusion marks on wire that there is absolutely no research to support anywhere in the literature." R. Tr. (April 9, 1993), p. 1032:11-16. On the stand, Dr. Searls opined that Agent O'Neil's toolmark analysis and conclusions lacked scientific credibility, because he did not use either a database of known toolmarks made by different brands of tools or blind testing. R. Tr. (April 27, 1993), pp. 3488-96.

Dr. Searls testified to being familiar with the Association of Firearms and Toolmark Examiners (AFTE) and was critical of the AFTE journal for containing only "non-juried" articles. i.e., articles he described as being for "a regional group or a local group that you're trying to disseminate some information to." R. Tr. (April 27, 1993), p. 3471:11-24. He testified that he wrote articles on the fundamental aspects of the experimental process. *Id.* p. 3474:11-16. He testified to consulting with the following national entities: pharmaceutical company Abbot Laboratories; pharmaceutical company Mead Johnson; the U.S. Patent Office; the U.S. Post Office; Money Magazine; Beech Aircraft in its role as a subcontractor for NASA; as well as working for interests in agriculture, mining, and mining experimentation. *Id.* pps. 3475-76. Dr. Searls testified to the need to perform "blind studies" for real scientific experimentation, stating:

"A blind study is important any time you have a subjective appraisal." *Id.* p. 3485:6-7. He testified that John O'Neil's opinions were "subjective." He emphasized, "A blind study is to eliminate the possibility of bias on the part of the evaluator." He described the "placebo effect" as the "unconscious desire to get the outcome you are looking for." *Id.* pp. 3485-86. Dr. Searls was critical of the science of toolmark examination, noting the lack of "large databanks demonstrating that [the assumption that all tools from moment of manufacture are different from every other tool]." *Id.* p. 3488: 2-9. He expressed the need for large databanks like fingerprint databanks. He stated the need to see "millions of tools" in the databanks *Id.* p. 3488:10-24. Dr. Searls testified to "the acceptable probability of error or scientific certainty." He gave opposing examples of error rates that mattered and those that did not matter, specifying a new design for Michelob beer cans (error rate not important) versus the probability of disaster on the space shuttle Challenger (error rate important). *Id.* pp. 3491-93. For toolmark examination, Dr. Searls discussed the need to have multiple numbers of tools that were similar for a successful scientific experiment, including tools of the "same brand, similar make, similar amount of wear, and for the investigator not to be aware of which one was the suspect's tool." *Id.* p. 3494:2-6. Dr. Searls pointedly criticized the work of O'Neil for knowing which pair of pliers belonged to James Genrich "because of the potential for bias and the placebo effect." Dr. Searls further criticized the work of the independent examiners Bergland and Hodge, for looking at the slides of test cuts that had been prepared by the first examiner O'Neil. He described that O'Neil "took his slides and showed them to them." From Searls' point of view, they were looking at "O'Neil's subjective analysis." *Id.* p. 3498:5-14. He criticized the process used by the independent examiners because it was both biased and yet still showed lack of agreement: Q: "Okay. Tell us, as a statistician, in your expert opinion, what the reports of Mr. Bergland and Mr. Hodge add to

the hopper?" A: "Oh, what they tell us is that even in this biased situation, there is a lot of variation in what people see. Q: "And, why does it tell us that?" A: "There was not – there was not agreement. I would have expected to see agreement." Q: "And why would you expect to see agreement?" A: "They're examining a colleague's results and they know that he found a match with those results, they didn't see it." Q: "And so five out of six times, what kind of variation does that statistically turn into? A: "That implies that there is a lot of potential for mismatch." *Id.* pp. 3498-99.

In addition, defense counsel emphasized the small size of the marks analyzed by Agent O'Neil. R. Tr. (April 21, 1993), pp. 2759-60. And defense counsel questioned Agent O'Neil as to whether he knew the history of the evidence before he issued an opinion. In response to this line of questioning, he made the jury aware of his familiarity with the evidence logs in the case. *Id.* p. 2791-92.

On May 7, 1993, after deliberating for four days, *see* R. Tr. (May 4, 1993), pp. 4760:19-20, 4766:10 (noting jury began deliberation at 10 a.m.); R. Tr. (May 5, 1993), pp. 4775-76 (continued deliberation); R. Tr. (May 6, 1993), pp. 4780-81 (continued deliberation); R. Tr. (May 7, 1993), pp. 4786-93 (verdict read at about 2 p.m.), the jury convicted the Defendant of multiple felonies, including two counts of first degree murder. The Defendant was sentenced to life imprisonment without the possibility of parole on May 12, 1993. After timely appeal, this judgment was affirmed, and mandate issued on January 16, 1997.

b. Post-Conviction Background

In 2014, the People had Agent Dale Higashi from the Colorado Bureau of Investigation perform an additional examination of the single agreed-upon identification from the Two Rivers bomb site. Agent Higashi confirmed the identification. Def.'s Hearing Ex. N at pp. 6 and 21.

After Agent Higashi concluded that the identification was correct, Agent Julie Knapp, his colleague, verified his conclusions. *Id.* at 15. However, neither Agent Higashi nor Agent Knapp made a report detailing any specific basis for their conclusions.

On February 5, 2016, Defendant filed a motion for a new trial pursuant to Rule 35(c). On March 8, 2016, the Court denied the Defendant's motion. After the Defendant's motion for reconsideration was denied April 15, 2016, the Defendant appealed, and the case was eventually remanded back to this Court with instructions to hold an evidentiary hearing. *People v. Genrich*, 2019 COA 132M. In the Court of Appeals decision and in the concurrence, there are several significant statements made that guide this Court's determinations in this case. The first, from the conclusion of the Court of Appeals decision, states, "[w]ithout a developed record, we cannot hold that Genrich's allegations, if true, are likely to bring about an acquittal, but we conclude that they dramatically increase his chances of obtaining an acquittal." *Id. at* ¶ 64. The second is, "[g]iven the proffered expert testimony presented in Genrich's Rule 35(c) motion, which, if true, would undermine the cornerstone of the prosecution's case, we conclude that Genrich is entitled to an evidentiary hearing. *Id.* at ¶ 68. In addition, in the concurring opinion, Judge Berger wrote:

> . . . the new evidence alleged is material to the issues involved because it would gut the strongest evidence supporting Genrich's conviction — the individualization testimony. It is not cumulative because, although Genrich did present the testimony of a statistician at his trial that O'Neil's methods were not scientifically reliable, the testimony of a single defense expert with admittedly no experience in toolmarks is decidedly different in character and impact than a report of the National Research Council that represents the conclusions of dozens of experts in the field and the testimony of one of its authors applying those conclusions specifically to the evidence in this case.
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> The alleged new evidence does more than impeach O'Neil's individualization testimony because it is relevant not only to credibility, but also reliability. Credibility determinations are a function of the jury. *Hildebrand v. New Vista Homes II, LLC*, 252 P.3d 1159, 1166 (Colo. App. 2010). Reliability determinations are at least initially a function of the court, and for expert testimony to be admissible, the court must conclude the scientific principles

> underlying it are reliable under CRE 702. *Kutzly v. People*, 2019 CO 55, ¶¶ 10-12, 442 P.3d 838. This determination is separate and apart from any attempt by a party to impeach a witness. If the trial court determines under CRE 702 that the opinions are unreliable, the jury would not hear them at all.
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> Fourth, because, taking the allegations in Genrich's motion as true, the alleged new evidence would likely result in the exclusion of O'Neil's individualization testimony, it would significantly increase the probability of an acquittal.

Id. at ¶¶ 117-119. In addition, he wrote, "accepting Genrich's allegations as true, there were at the time of trial, and there are now, no scientific principles underlying O'Neil's individualization testimony. Therefore, based on a straightforward application of CRE 702, O'Neil's individualization opinions are not reliable, and that testimony is inadmissible." *Id.* at ¶ 121. Lastly, he wrote, "again accepting Genrich's allegations as true, there are no expert qualifications that would render someone competent to testify that only one tool in the world could have made a certain mark. And finally, expert testimony that is unreliable has no probative value, and therefore would not be useful to a jury." *Id.* ¶ 128.

c. *The Newly Discovered Evidence.*

The Court held an evidentiary hearing on January 24, 25, 26, and 31, 2022. At that evidentiary hearing, Defendant provided the Court with his newly discovered evidence: (1) the 2008 National Research Council's (NRC) Report; (2) the 2009 National Academy of Sciences NAS Report; (3) the 2016 President's Commission on Applied Science and Technology (PCAST) Report,[5] and (4) the evidence from three expert witnesses, who provided testimony at the January evidentiary hearing.

i. Background on toolmark identification

[5] These reports were admitted at the motions hearing as Defense Exhibits B, C, and D, respectively and are hereafter referred to as the NRC Report, the NAS Report, and the PCAST Report.

Toolmark identification is a discipline of forensic science allowing for a determination as to whether two or more toolmarks share a common source. People's Exhibit 2-RN-1 (filed January 25, 2022). According to AFTE, four different opinions may be offered by an expert performing toolmark identification: identification, inconclusive, elimination, or unsuitable. *Id.* at 4. "[A]n identification is defined as agreement of a combination of individual characteristics and all discernible class characteristic where the extent of agreement exceeds that which can occur in the comparison of toolmarks made by different tools." *Id.* at 5. "[F]or an examiner to offer an opinion of identification, the similarity or agreement observed must exceed at least that which an examiner would expect in a situation in which toolmarks were made by different tools." *Id.*

"[A]n elimination is defined as significant disagreement of discernible class characteristics and/or individual characteristics." *Id.* "[A]n elimination is supported when the class characteristics are different." *Id.* "[W]hen class characteristics are similar, it is very difficult to offer an opinion of elimination." *Id.* at 6. An inconclusive result is appropriate when there is insufficient data upon which to base an opinion. It is defined in one of three ways: (1) Significant agreement of individual characteristics and all discernible class characteristics, but insufficient for an identification; (2) Significant agreement of all discernible class characteristics without significant agreement or disagreement of individual characteristics due to an absence, insufficiency, or lack of reproducibility; (3) Agreement of all discernible class characteristics and significant disagreement of individual characteristics, but insufficient for an elimination. *Id.*

ii. The hearing

Defendant asserted that the People's experts in the area of toolmark analysis utilize the Association of Firearm and Toolmark Examiner's Theory of Identification, and that this method is "circular and subjective, and allows examiners to find sufficient agreement without any

reference to external standards or guidelines or numbers. It is based entirely on an examiner saying that they found sufficient agreement based on their own experience and training." Hr'g Tr. p. 6 (January 24, 2022).

The first expert witness was Dean David L. Faigman, Chancellor & Dean and John F. Digardi Distinguished Professor of Law at the University of California Hastings College of Law, and Professor of Psychiatry at the University of California, San Francisco School of Medicine. *See id.* at p. 13. The Court found Dean Faigman qualified to testify as an expert in scientific methodology, research design, and statistics and applied science. *Id.* at p. 41:9-15. Dean Faigman provided an overview of the emergence and development, between the time of Mr. Genrich's trial and today, of the critique of toolmark analysis, including the "arc of reports" between 2008 and 2017 authored by three committees—the National Research Council, the National Academy of Sciences, and the President's Council of Advisors on Science and Technology, to which he was an advisor. *Id.* at p. 49. He also explained the reasons for and the requirement of "foundational validity" of a field of science or analysis, and the critique of existing studies and related literature regarding toolmark analysis. He testified that there is a lack of reliability and significant criticism of toolmark analysis and explained that the foundational validity of toolmark analysis is entirely suspect. *Id.* at p. 68-69.

Defendant also called Itiel Dror, Ph.D. Dr. Dror is Honorary Senior Researcher at the Centre for the Forensic Sciences at University College London. Dr. Dror studies cognitive neuroscience and is a leading researcher on the impact of cognitive bias on forensic science, having published more than 150 articles on this and related subjects. He was qualified as an expert in cognitive bias in forensic science. Hr'g Tr. p. 182:24-183:1 (January 24, 2022). Dr. Dror has provided over forty-five trainings in the field of cognitive bias for prosecutors, judges

in the United States and around the world, law enforcement agencies, and forensic examiners, including a 2012 workshop at the Colorado Bureau of Investigation in Denver. *See* App'x A to Mr. Genrich's Bench Brief on Remand (Summary of Proposed Testimony of Dr. Itiel Dror), PC-9, at p.1 (filed Jan. 20, 2022). He explained that cognitive bias is an unavoidable and unintentional factor in any forensic examination, no matter how well-intentioned the expert, but that basic steps can and should be taken to avoid or at least mitigate the impact of bias on a forensic examination. Then, through a series of case-related hypotheticals, he explained that none of these measures was implemented in any of the examinations in this case.

Defendant's third expert witness was Jeff Salyards, Ph.D. Dr. Salyards is the Principal Analyst with Compass Scientific Consulting and, among other positions, a Member of the Senior Advisory Board for the Center for Statistics and Applications in Forensic Evidence at Iowa State University. Among other positions, Dr. Salyards spent five years as Executive Director of the Defense Forensic Science Center. He was qualified as an expert in forensic science standards, to include validation, research design, and case documentation. Hr'g Tr. p. 18:25-19:3 (January 25, 2022). He explained that, although the scientific soundness was relatively unchallenged at the time of Mr. Genrich's trial, *id.* p. 43:22-24, important experimental developments within the scientific community (including the "Ames I" study that he helped design) have since revealed that the assumptions underlying toolmark examination have simply not been scientifically validated. Dr. Salyards further explained that toolmark examination in the context of handheld tools is distinct from—and even less reliable than—in the firearms context. *See id.* p. 49-57.

d. The People's witnesses.

The People called three witnesses; Dale Higashi, Julie Knapp, and Ronald Nichols. Notably, the People did not proffer anyone, nor were any of the People's witnesses qualified as an expert in (i) scientific methodology, (ii) research design, or (iii) statistics.

Agent Higashi's testimony reaffirmed his opinion confirming the positive identification made by Agent O'Neil. He stated: "the wire strippers did indeed cause the toolmark found on . . . the wire." *Id.* p. 129:12-13. In addition, Agent Higashi provided testimony regarding bias, disputing the claims of bias toward simply confirming Agent O'Neil's identification. *See* Hr'g Tr. pp. 211:23-212:22 (January 24, 2022).

Agent Knapp testified that she verified Agent Higashi's work in 2014. Agent Knapp confirmed the matching of the wire to the wire strippers. Hr'g Tr. p. 65:16-17 (January 26, 2022). She testified that prior to confirming the identification, she had no prior knowledge of Agent Higashi's conclusion. She stated: "We have a 100% verification policy at the Colorado Bureau of Investigation. So, regardless if I make an elimination, an identification or an inconclusive, it has to be verified by another qualified examiner." *Id.* p. 65:1-5. She also testified that she knew nothing about the case at the time of her verification: she did not know it was a bombing case, nor that two people died, nor that there had been a conviction and the case was pending appeal. *Id.* pp. 66:14-67:13.

In addition, Agent Knapp testified that there are low error rates for tool mark to tool matching. *Id.* pp. 80:18-81:12.

Agent Knapp testified that critiques by such nationally recognized, independent scientists are not relevant, and that only the views of the practitioners of any particular field are appropriately considered in assessing its scientific validity—an opinion that she went so far as to extend to the field of phrenology (a fake science that pretends to predict people's mental traits

based on bumps in their skull). *Id.* at 190:20-191:4 (Knapp testimony); *see also* Hr'g Tr. p. 180:7-13 (January 25, 2022) (Higashi testimony). On the other hand, despite disagreeing with the ultimate conclusions of NAS and PCAST, the State's main subject-matter witness, Mr. Nichols, agreed that these groups were comprised of distinguished scholars, and that the opinions of scientists and others outside the toolmark examination community—such as experts in study design, human cognition, and statistics—are indeed highly relevant to understanding the validity of the field. Hr'g Tr. pp. 98:11-99:18; 100:1-106:7; 107:7-108:9 (January 31, 2022).

Mr. Nichols, the State's main subject-matter witness, testified that the principle that individual tools leave unique toolmarks is valid. Hr'g Tr. p. 26:9-13 (January 26, 2022). He stated:

> The value of the machine-based study is that these toolmarks are made by these tools, they are acquired using a hardware and then they are assessed using an algorithm developed by the researchers to produce quantitative data that assesses the similarity of the marks that are created whether they be from different sources or by the same sources. . .
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> In addition, and one final addition, is that it (computer studies) has the ability to deal with thousands and tens of thousands and hundreds of thousands of data points whereas that would take a human examiner much longer to generate.

Id. p. 251:1-17.

Furthermore, while agreeing that toolmark experts no longer use the language "to the exclusion of every other tool," Mr. Nichols explained that the toolmark community no longer uses the language because "It's not possible to look at every other firearm or tool in the world, so, therefore, the language is simply inappropriate." Hr'g Tr. p. 26:1-3 (January 31, 2022).

In summation, Mr. Nichols indicated that although Agent O'Neil used the phrase "to the exclusion of every other tool", the underlying claim—that individual tools produce unique mark—does not lack foundational validity.

Agent O'Neil identified wires from the 1991 bombs as having been manufactured on the same wire-making machine, R. Tr. (April 21, 1993), pp. 2670-71. However, the People's toolmark subject-matter expert, Ronald Nichols, testified at the evidentiary hearing that no research exists to support such a "match." *See* Hr'g Tr. p. 40:11-17 (January 31, 2022) ("Q. In your opinion, do you feel that there was a scientific basis for Mr. O'Neil's testimony that the pieces of wire came from or were from within 1500 feet of each other? A. I have never seen any published reports indicating the distance with which that can be affirmed. So, I don't know where he got the 1500 feet from.").

III. The Applicable Law

"Whether to grant new trials upon the discovery of new evidence undermining confidence in the reliability of criminal convictions is largely a matter of policy, requiring a balance between the need for finality and the state's interest in ensuring the fairness and accuracy of its proceedings." *Farrar v. People*, 208 P.3d 702, 706 (Colo. 2009) (citing *People v. Schneider,* 25 P.3d 755, 762 (Colo. 2001).

To warrant a new trial based on newly discovered evidence, a defendant must show that (1) the new evidence was discovered after trial; (2) the defense exercised due diligence to discover all possible evidence favorable to the defendant before and during trial; (3) the new evidence is material, not merely cumulative or impeaching; and (4) the newly discovered evidence would probably produce an acquittal if offered at a retrial. *People v. Muniz*, 928 P.2d 1352, 1357 (Colo. App. 1996).

Motions for new trial based on newly discovered evidence are not looked on with favor, and a denial of such a motion will not be overturned absent a showing of clear abuse of discretion. *People v. Gutierrez*, 622 P.2d 547, 559 (Colo. 1981) (citing *People v. Scheidt*, 187

Colo. 20, 528 P.2d 232 (1974) and *Digiallonardo v. People*, 175 Colo. 560, 488 P.2d 1109 (1971)).

Newly discovered evidence is material if it is of "sufficient consequence for reasons other than its ability to impeach, or cast doubt upon, the evidence already presented at trial." *Farrar v. People*, 208 P.3d 702, 707 (Colo. 2009). Additionally, the court's determination as to whether the newly discovered evidence is of a character that would probably bring about an acquittal "should be premised on whether the new evidence, as developed in trial, when considered with all the other evidence is such that a reasonable jury would probably conclude that there existed a reasonable doubt as to defendant's guilt and thereby bring about an acquittal verdict." *People v. Rodriguez*, 914 P.2d 230, 292 (Colo. 1996) (emphasis omitted) (quoting *People v. Estep*, 799 P.2d 405, 407 (Colo. App. 1990)).

The Court of Appeals decision in this case provided guidance on how the Court should analyze whether the newly discovered evidence is material. Therein, the Court of Appeals suggests that the *Brady* standard, for undisclosed exculpatory evidence, is informative. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The *Brady* standard provides that "'withheld evidence that is material may be that which impeaches a witness where the issue of the witness' reliability and credibility is crucial.'" *State v. Behn*, 375 N.J.Super. 409, 868 A.2d 329, 345 (N.J. Super. Ct. App. Div. 2005) (quoting *State v. Henries*, 306 N.J.Super. 512, 704 A.2d 24, 35 (N.J. Super. Ct. App. Div. 1997)). The Court of Appeals in their decision indicated that the crucial test is whether the new newly discovered evidence would "have effectively neutralized the testimony of a key expert in the prosecution's case . . . ." *Genrich*, 2019 COA 132M, ¶ 58.

Relevant to whether newly discovered evidence would neutralize key expert testimony is whether that testimony would lead to the expert's testimony being inadmissible, in part or in whole. *Id.* at ¶ 63. In Colorado, courts employ a four-part test in determining the admissibility of expert testimony under CRE 702, the test requires: (1) the scientific principles underlying the testimony must be reasonably reliable; (2) the expert must be qualified to offer the testimony; (3) the testimony must be helpful to the jury; and (4) the evidence must satisfy CRE 403. *People v. Shreck*, 22 P.3d 68, 77-79 (Colo. 2001).

The first part of the test, requiring the Court to inquire into the reliability of the scientific principles underlying the testimony, is an inquiry into the totality of the circumstances. *See Kutzly v. People*, 2019 CO 55, ¶ 12, 442 P.3d 838 ("[whether] expert testimony is reasonably reliable requires considering the totality of the circumstances surrounding the proposed expert testimony and is not contingent on any specific list of factors."). The standard for admitting expert testimony is liberal because any admitted testimony will be further vetted through vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof. *Shreck*, 22 P.3d at 78.

A trial court's inquiry is focused on excluding junk science, recognizing that two experts may have conflicting but nevertheless equally admissible opinions on a particular issue. *See Estate of Ford v. Eicher*, 220 P.3d 939, 942 (Colo. App. 2008), *aff'd*, 250 P.3d 262 (Colo. 2011); *Farmland Mut. Ins. Cos. v. Chief Indus., Inc.*, 170 P.3d 832, 835 (Colo. App. 2007). In this way, a trial court acts only as a gatekeeper, not the arbiter of which expert's opinion is true or more credible. *Trujillo v. Vail Clinic, Inc.*, 2020 COA 126, ¶ 13, 480 P.3d 721, 724, *cert. denied sub nom. Vail Clinic, Inc. v. Trujillo by & through Chaparro-Leyva*, No. 20SC800, 2021 WL 537812 (Colo. Feb. 8, 2021).

IV. Discussion

Defendant argued that the methods employed by the People's toolmark expert have been so thoroughly rejected by the scientific community that a new trial is warranted. The People disagreed, arguing that the alleged rejection is merely impeachment evidence, insufficient for grant of a new trial. The Court agrees that some of the toolmark evidence would still be admissible, but that the conclusion that Defendant's tool created the toolmark to the exclusion of all other tools would not. The expert's testimony, that the tool made the marks to the exclusion of all other tools, is exactly the kind of evidence that a jury might rest its decision on, and it strikes directly at the People's burden of proof beyond a reasonable doubt. The expert's conclusion was to the exclusion of all other tools. Those who testified at the hearing agreed this was an improper conclusion.

The primary determinations the Court must make are whether the third and fourth elements of the *Muniz* test are met (the People essentially conceded the first and second elements in their Opening Brief Regarding Defendant's Motion for a New Trial, P. 3-4 (hereafter People's Opening Brief). What is left for this Court's determination are the third and fourth *Muniz* elements; that is (3) whether the new evidence is material, not merely cumulative or impeaching and (4) whether the newly discovered evidence would probably produce an acquittal if offered at a retrial. 928 P.2d at 1357.

a. The materiality of the evidence

Certainly, the evidence is material if it would have led to the inadmissibility of Agent O'Neil's testimony. Thus, whether all or a portion of Agent O'Neil's testimony would no longer be admissible is paramount. To make this determination, the Court employs the four-part *Shreck* test for determining the admissibility of expert testimony under CRE 702, requiring: (1) the

scientific principles underlying the testimony must be reasonably reliable; (2) the expert must be qualified to offer the testimony; (3) the testimony must be helpful to the jury; and (4) the evidence must satisfy CRE 403. P.3d 68, 77-79.

In this case, the Court finds that some of the evidence presented by Agent O'Neil would likely be admissible even considering the newly discovered evidence. The newly discovered evidence is essentially a set of indicators that there are foundational issues with the science of toolmaking. However, these foundational issues may not be as damning as the Defendant suggests.

In Colorado, an expert may be qualified "by knowledge, skill, experience, training, or education." CRE 702. By the time of the 1993 trial in this case, Mr. O'Neil had spent the prior 16 years as a firearms and toolmark examiner in Rockville, Maryland, at an accredited laboratory. Ex. 6, TR p. 2506, ln 9-13. Ex. 6, TR p. 2509, ln 16-22. Mr. O'Neil testified as to his extensive training in the field of toolmark examination at the following laboratories: FBI Laboratory in Washington, D.C.; FBI National Academy in Quantico, VA; Maryland State Laboratory; New Jersey State Laboratory; Pennsylvania State Laboratory; New York State Laboratory; and the United States Army Laboratory in Fort Gilham, Virginia. He also trained at city laboratories in Baltimore, Philadelphia, New York, and Chicago. Ex. 6, TR p. 2506, ln. 25 thru p. 2507, ln 10. Further, Mr. O'Neil testified that he had been a member of the Association of Firearms and Toolmark Examiners (AFTE) since 1972. AFTE began in 1969. Ex. 6, TR p. 2514, ln. 1-16.

Mr. O'Neil's work in the field led him to conduct "tens of thousands" of firearms and toolmark examinations. Ex.6, TR p. 2507, ln. 13-14. He also testified against police officers during his career. Ex. 6, TR p. 2508, ln 13-15. Mr. O'Neil stated that he had testified as an expert

in the following jurisdictions: District of Columbia Superior Court; U.S. District Court for District of Columbia; Virginia; Massachusetts; New York; New Jersey; Delaware; Maryland; Florida; Alabama; Mississippi; Tennessee; Indiana; Illinois; Missouri; Kansas; Colorado; California; Hawaii; and, the U.S. Virgin Islands. Ex. 6, TR p. 2508, ln 19 thru p. 2508, ln 3. He also testified that he had trained numerous others in toolmark identification. Ex. 6, TR p. 2538, ln. 18 thru p. 2539, ln 14.

Agent O'Neil's knowledge, skill, experience, training, and education as a toolmark expert are substantial. However, if the scientific rinciples underlying his testimony were not reasonably reliable based on the material, newly discovered evidence, then the testimony would not be admissible. That is the case, at least insofar as the absolute statements as to the match made by Agent O'Neil during the trial.

The *Shreck* factors for whether the scientific principles underlying the expert's testimony are reliable include, as relevant here: (i) the technique's known or potential rate of error, and the standards controlling the technique's operation; (ii) whether the technique has been generally accepted, and the relationship of the technique to more established modes of scientific analysis; (iii) whether the technique can be and has been tested; (iv) whether the technique has been subjected to peer review and publication, and whether there is specialized literature dealing with the technique; (v) the non-judicial uses to which the technique is put; and (vi) whether such evidence has been offered in previous cases to support or dispute the merits of a particular scientific procedure. *Shreck*, 22 P.3d at 77-78.

i. The technique's known or potential rate of error, and the standards controlling the technique's operation.

Handheld toolmark examinations use subjective standards. Hr'g Tr. pp. 52:1-24 (January 31, 2022) (Nichols's testimony); Hr'g Tr. pp. 213:25-214:7 (January 25, 2022) (Higashi testimony); Hr'g Tr. pp. 113:23-114:1 (January 26, 2022) (Knapp testimony). However, Agent Knapp explained the long history of validation studies and error rates for toolmark analysis: "Typically when we do error rates. . .we have to talk about it in terms of potential error rate. And, these validation studies have been conducted for a very long time. They're set up in different multitude of ways. Generally speaking, we will get tools and we will create tool marks and we will create a test set and send it out to the general community." Hr'g Tr. pp. 78:9-16 (January 26, 2022). Agent Knapp testified that even with a multitude of studies set up in different manners, the validation studies show error rates typically around 1 percent. *Id.* at 81:13-15. These error rates are consistently low despite a multitude of studies that use different variables, including using random tools; using consecutively manufactured tools that are more likely to be similar; using tools that mark poorly; using substrates that mark poorly; using ammunition that marks poorly; and using substrates for toolmarks that are softer or harder. *Id.* pp. 80:18-81:12.

Furthermore, Mr. Nichols presented thirty-nine studies, twenty-eight of which dealt with "the ability of a trained toolmark examiner to reliably discern among the similarities and differences known to exist between toolmarks made by the same and different tools and offer accurate opinions with respect to whether two or more toolmarks may share a common source." Defendant's Ex. 2-RN at p. 19. Only four of these studies concerned handheld tools. Defendant's Ex. 2-RN-D. The studies were published by AFTE, prior to the AFTE Journal adopting double-blind peer-review, the studies were independently reviewed and found to be insufficient to validate toolmark matching, Hr'g Tr. 65:1-23 (January 24, 2022); *see also id.* at 72:2-10, the studies involved extremely small sample sizes and are not generalizable, and those studies that

were more properly designed (using a "black box" design, though none of these studies were on handheld tools) found high error rates, when "inconclusives" were marked as incorrect answers. *Id.* at pp. 74:20-75:20.

The Defendant asserted that, at present, there exist no scientifically valid studies establishing that AFTE's toolmark examination methodology creates repeatable and reproducible results, particularly as to handheld tools, and particularly as to tiny marks such as the ones at issue here. Defendant's Ex. C at p. 154; Defendant's Ex. D. at pp. 11-12, 104-113; Hr'g Tr. pp. 105:14-106:13 (January 24, 2022); Hr'g Tr. at 63:7-64:1 (January 25, 2022) (Salyards' testimony) (discussing the problems with attempting to match small marks).

Defendant argued that because inconclusive results were categorized as being correct, these studies are flawed. However, an inconclusive in a toolmark analysis is not positive evidence of guilt in a case where a toolmark analysis is presented to a jury. As such, for purposes of determining whether this method is reasonably reliable, it strikes the Court as odd for an inconclusive to be marked as being essentially a correct answer here. However, the goal of this matching science is to minimize the risk of false positive identification and counting inconclusive results as correct comports with this intent.

The Court finds that this factor is established given the number of studies, regardless of the dispute regarding errors.

ii. Whether the technique has been generally accepted, and the relationship of the technique to more established modes of scientific analysis.

The parties disagreed as to whether the technique of toolmark matching is generally accepted. In their Opening Brief, the People provided a substantial number of case citations for the proposition that the technique of toolmark analysis, and ballistic analysis in particular, is generally accepted by the scientific community. However, as Defendant argued in his Opening

Brief, the general acceptance among practitioners is not general acceptance among the scientific community at large. If the Court were to agree that a practice widely used by various law enforcement bodies throughout the United States is insufficient to constitute general acceptance it would raise the bar for general acceptance too far. However, the Court agrees with the Defendant that Agent O'Neil's opinions "to the exclusion of every tool in the world," is now renounced as "inappropriate" by the relevant community.

As to this factor, the national reports call into question the technique for lack of validity. Certainly, Toolmark examiners believe toolmark examinations are valid and toolmark identification is a valid science, there is a dearth of evidence as to whether toolmark identifications such as the one in this case are valid. Toolmark identification is a term used for the examination/identification of tools. The bulk of the information cited by the People in this case refers to firearms and ballistics examinations. The science of toolmark examinations/identification to the extent it is a science,[6] is accepted within the community of toolmark examiners but is questioned by others – particularly within the general scientific community. The People will be able to establish through knowledge, training, and experience how such examinations are performed so the Court on balance accepts that it is generally accepted at least within the law enforcement and toolmark examiner communities.

iii. Whether the technique can be and has been tested

The lack of reproducibility was one of the main criticisms raised by the Defendant. Ex. C at p. 154; Ex. D. at pp. 11-12, 104-113; 1/24 Faigman Tr. at 105:14-106:13; 1/25 Salyards Tr. at 63:7-64:1. The People's evidence was not persuasive on how the techniques employed in this

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[6] Testimony established that the examination of tools fell generally within the science of metallurgy.

case could be accurately tested. As such, the Court finds that this factor leans in favor of the Defendant and toward inadmissibility.

iv. Whether the technique has been subjected to peer review and publication, and whether there is specialized literature dealing with the technique.

As the Seventh Circuit has found,

> "The AFTE method has been tested and subjected to peer review. Three different peer-reviewed journals address the AFTE method, and several reliability studies have been conducted on it. Although the error rate of this method varies slightly from study to study, overall it is low—in the single digits—and as the district court observed, sometimes better than algorithms developed by scientists.

United States v. Brown, 973 F.3d 667, 703 (7th Cir. 2020), *cert. denied*, 208 L. Ed. 2d 638, 141 S. Ct. 1253 (2021), and *cert. denied sub nom. Arnold Council v. United States*, 142 S. Ct. 243 (2021), and *cert. denied sub nom. Poe v. United States*, 211 L. Ed. 2d 110, 142 S. Ct. 245 (2021), and *cert. denied sub nom. Vaughn v. United States*, 211 L. Ed. 2d 112, 142 S. Ct. 248 (2021), and *cert. denied sub nom. Chester v. United States*, 211 L. Ed. 2d 616, 142 S. Ct. 932 (2022). This is evidence favoring admissibility. However, the Court notes that the Defendant here has presented flaws that go to both the validity and the bias injected into those AFTE studies, most notably, the lack of affirmation of those studies outside of the AFTE community. Notwithstanding that, the Court finds that this factor is in favor of admissibility generally.

v. The non-judicial uses to which the technique is put.

Little evidence was presented as to this factor, so the Court does not find anything as to this factor, though it does appear that the purpose of AFTE and the method employed by Agent O'Neil using the AFTE technique is investigative/judicial.

vi. Whether such evidence has been offered in previous cases to support or dispute the merits of a particular scientific procedure

The People presented a litany of recent cases where the AFTE method has been used. However, the overwhelming majority of those cases involved testing of other tools and toolmarks. Therefore, the Court finds that this factor supports a finding that the testimony would likely not be admissible.

Considering these factors, the Court finds that some of Agent O'Neil's testimony would be admissible even considering the newly discovered evidence, with one crucial exception. Agent O'Neil testified that it was his opinion that Defendant's tools cut the wires from the bombs "to the exclusion of any other tool" R. Tr. (April 21, 1993), p. 2638:1-3. This opinion is not supported by any of the above factors.

Each of the State's witnesses agreed that Agent O'Neil's trial testimony that Mr. Genrich's tools matched the marks on evidence "to the exclusion of all other tools," (i) was "common language used at the time", Hr'g Tr. at 24:6-18, 26:4-8 (January 31, 2022) (Nichols' testimony), but (ii) is no longer appropriate expert testimony. *See* Hr'g Tr. at 24:8-18 (January 31, 2022) (Nichols' testimony); 1/25 Higashi Tr. at 195:4-8 (January 25, 2022) (Higashi's testimony) (agreeing that "in today's world .... [the] testimony that was given in this case, [] that said that Mr. Genrich's tool made this one one-hundredth of an inch mark to a degree of certainty to exclude any other tool would be inappropriate testimony."); Hr'g Tr. at 76:8-15 (January 31, 2022)(Nichols's testimony) ("Q. Now, in your opinion, no examiner should ever make an identification to the exclusion of all other tools in the world, right? A. Correct. Q. And what if I told you that that is precisely what the examiner testified to at trial in this case? A. It was an inappropriate statement to make."); Hr'g Tr. at 159:7-10 (January 26, 2022) (Knapp's testimony) (agreeing that such individualization testimony would be inappropriate).

The consensus of the "arc of reports" and the expert scientific evidence presented by Mr. Genrich is that Agent O'Neil's individualization testimony was not appropriate and is not scientifically valid. *See, e.g.*, Defendant's Hr'g Ex. D (2016 PCAST Report) at p. 19 ("[C]ourts should never permit scientifically indefensible claims such as … "to the exclusion of all other sources."); Hr'g Tr. at 67:10-17 (January 24, 2022) (Faigman's testimony) ("[T]he concept of individualization doesn't exist as a concept in science."); Hr'g Tr. at 66:19-67:10 (January 25, 2022) (Salyards's testimony).

b. The probability of producing an acquittal if offered at a retrial

Having considered the third element of the *Muniz* test, the Court turns to the fourth element, whether the newly discovered evidence would probably produce an acquittal if offered at a retrial. As the Court of Appeals put it, the newly discovered evidence "undermine[s] the cornerstone of the prosecution's case" *Genrich*, 2019 COA 132M ¶ 68. The Court finds that the conclusion that the Defendant's tools caused the cuts to the wires from the bombs to the exclusion of every other tool was a crucial piece of evidence in the Defendant's case, and without it, the People's case would have been almost entirely circumstantial. Furthermore, while much of Agent O'Neil's testimony might still be admissible, a jury would have the opportunity on retrial to hear the substantial amount of newly discovered evidence that calls into question the validity of toolmark analysis and would hear evidence as to the potential bias that can be injected into toolmark analysis.

V. Conclusion

Defendant alleged the assertions and methods employed by the People's toolmark expert have been so thoroughly rejected by the scientific community that a new trial is warranted. The People disagreed, arguing that the alleged rejection is merely impeachment evidence, insufficient for grant of a

new trial. The Court agrees with the Defendant that the individualization testimony of the People's expert was inappropriate and would be inadmissible at a new trial. The newly discovered evidence not only impeaches that testimony but demonstrates that the testimony of the expert was unreliable because there are no scientific principles underlying or supporting Agent O'Neil's opinions that would render such testimony reliable and thus admissible under CRE 702. Because of this, absent some other persuasive evidence being presented at a new trial, the individualization testimony and opinions would be inadmissible since, as stated by Judge Berger in his concurring opinion, "expert testimony that is unreliable has no probative value, and therefore would not be useful to a jury." *Id.* ¶ 128. As a result, the newly discovered evidence "effectively neutralized the testimony of a key expert in the prosecution's case . . .." *Genrich*, 2019 COA 132M, ¶ 58. Additionally, introduction of this unreliable individualization testimony violated Defendant's due process right to a fair trial.

Because the People's case rested largely upon the testimony and individualization opinions of the toolmark expert the Court finds that without those opinions the result would likely be "an acquittal verdict if [there were] another trial." *People v. Muniz*, 928 P.2d 1352, 1357 (Colo. App. 1996). This is because the newly discovered evidence when considered with all the other evidence, is such that a reasonable jury would probably conclude that there existed a reasonable doubt as to defendant's guilt which would likely result in a verdict of acquittal.[7]

Accordingly, Defendant's Petition for Postconviction Relief Pursuant to Crim. P. 35(c) is granted as to the First-Degree murder counts. The parties are to appear for a status conference on July 28, 2023, at 11:30 a.m. via Webex. The People are to prepare a video writ for Defendant's virtual appearance.

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[7] While the court recognizes that the original trial jurors considered weeks of testimony and it cannot be known what they considered important in their deliberations it is not insignificant that they deliberated over four days.

DONE AND ORDERED this 6th day of July 2023.

Richard T. Gurley
District Court Judge