**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA**
**CRIMINAL DIVISION—FELONY BRANCH**

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| **UNITED STATES OF AMERICA** | ) | **Case No: 2021 CF1 000968** |
| | ) | |
| **v.** | ) | |
| | ) | **Judge Marisa Demeo** |
| **DELONTA STEVENSON,** | ) | |
| **Defendant.** | ) | **Trial: October 23, 2023** |

# ORDER

Before the Court is *Defendant Delonta Stevenson's Motion to Preclude, or in the Alternative, Limit the Testimony of Toolmark Examiner Chris Monturo and Incorporated Points and Authorities*, filed on April 16, 2023, the Government's *Opposition to Defendant's Motion to Preclude, or in the Alternative, Limit Firearm and Toolmark Identification Testimony*, filed on May 8, 2023, and oral arguments on May 12, 2023. For the reasons stated below, Defendant Stevenson's motion is **DENIED.**

## I. Background

The Defendant is charged by indictment related to a triple shooting that occurred on or about January 18, 2021. *See* Indictment. The indictment charges the Defendant, along with co-defendants Vorreze Thomas and Brianca Phillips, with Conspiracy, First Degree Murder While Armed, three counts of Possession of a Firearm During Crime of Violence, two counts of Assault with Intent to Kill, and Unlawful Possession of a Firearm. *Id.* The Government alleges that Defendant Stevenson conspired to shoot and kill Troy Williams and, in the process thereof, killed Terrence Allen and assaulted Troy Williams and James Fye. *Id.*

On April 5, 2023, the Government notified Defense of its intent to elicit testimony from Christopher Monturo, an expert in the field of firearms and toolmark examination and

identification. Gov't Discovery Letter at 7 (Apr. 5, 2023). The notice explained that Mr. Monturo is expected to testify to the following:

1. The recovered firearms evidence from the crime scene, including bullets, cartridge casings, projectiles, fragments, and/or cartridges.
2. The conclusions contained in the report dated June 17, 2021, and the supplemental report dated March 24, 2023. *See* Gov't Ex. 1 and 1a.
3. A general discussion on the basic principles of firearms, semi-automatic handguns, bullets, and ammunition, including what they are, their parts, what happens to a firearm or ammunition when it is fired, and the different types of firearms.

On April 16, 2023, the Defendant filed the instant motion, seeking to preclude, or in the alternative, limit the testimony of Mr. Monturo pursuant to *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), *Motorola Inc. v. Murray*, 147 A.3d 751 (D.C. 2016) (en banc), and *Williams v. United States*, 210 A.3d 734 (D.C. 2019) ("*Williams II*"). Def's Mtn. at 1. Additionally, the Defendant asserts that, should the Court allow the expert's testimony, the Government should "be barred from eliciting testimony that specific projectiles or casings were fired from the same or a particular firearm." *Id.* at 11.

On May 8, 2023, the Government filed its *Opposition*, which was accompanied by an excess of 900 pages of supplemental material. In its *Opposition*, the Government argues that the examiner's testimony is reliable and will comply with the U.S. Department of Justice's Uniform Language for Testimony and Reports, law in the District of Columbia, and case law in the United States. *See* Gov't Opp. at 15-17. The Government expects that the testimony will consist of descriptions of how cartridge cases and bullet/bullet fragments were microscopically compared,

which led the examiner to conclude that specific bullets/cartridge casings were fired from a specific firearm. *Id*. at 14-16.

On May 12, 2023, the Court made a partial ruling that the firearm examiner would not be precluded from testifying and would issue a written order explaining the basis for that ruling as well as setting forth any limitations to the Government's proposed language. *See* Motion Hearing (May 12, 2023).

## II. Legal Analysis

### *A. Daubert Legal Standards*

The Defendant challenges the reliability of the Government's expert, arguing that the "results of firearm and toolmark examinations do not stand up to [the] scientific rigors [of *Daubert*]" and Rule 702. Def. Mtn. at 8. In its *Opposition*, the Government provided significant data and case law that undermine the Defendant's claim.

In *Motorola*, the DCCA adopted Rule 702 and rejected the *Dyas/Frye* tests. 147 A.3d 751, 756-57 (D.C. 2016); *Lewis v. United States*, 263 A.3d 1049, 1059 (D.C. 2021)(explaining that this court abandoned the *Dyas/Frye* "general acceptance" test governing the admissibility of expert testimony and instead, adopted the reliability-based standards of admissibility set forth in Rule 702, as interpreted in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*); *Dyas v. United States*, 376 A.2d 827 (D.C. 1977); *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). In applying this new test, the Court is now a "gatekeeper" and has "considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Id.* at 755 (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999)).

Federal Rule of Evidence 702 provides that:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

*Daubert* set forth a non-exhaustive checklist for trial courts to use in assessing the reliability of scientific expert testimony. These factors include but are not limited to: (1) whether the expert's technique or theory can be or has been tested; (2) whether the discipline has been subject to peer review and publication; (3) the known or potential rate of error; (4) the existence and maintenance of standards and controls; and (5) the discipline's general acceptance in the scientific community. *Daubert*, 509 U.S. at 593-95; *see also*, *Kumho*, 526 U.S. at 146.

Courts nationwide have accepted the admissibility of firearm and toolmark identification. *See, e.g., United States v. Johnson,* 2019 U.S. Dist. LEXIS 39590, 43-44 (S.D.N.Y. 2019)(concluding that toolmark identification analysis — at least as performed by [the detective] — is sufficiently reliable to be presented to the jury.); *United States v. Ashburn*, 88 F. Supp. 3d 239, 244 (E.D.N.Y 2015*)*; *United States v. Hylton*, Case No. 2:17-cr-00086-HDM-NJK, 2018 U.S. Dist. LEXIS 188817, at *6 (D. Nev. Nov. 5, 2018); *United States v. White*, 17 Cr. 611 (RWS), 2018 U.S. Dist. LEXIS 163258, at *5 (S.D.N.Y. Sept. 24, 2018); *United States v. Johnson*, Case No. 14-cr-00412-TEH, 2015 U.S. Dist. LEXIS 111921, at *11 (N.D. Cal. Aug. 24, 2015).

The case law concerning the admission of testimony from a firearm or toolmark expert has evolved over the past several years, but the District of Columbia Court of Appeals' two most recent

cases are instructive. In *Gardner v. United States*, 140 A.3d 1172 (D.C. 2016), the Court of Appeals held that a firearm and toolmark expert "may not give an unqualified opinion, or testify with absolute or 100% certainty, that based on ballistics pattern comparison matching a fatal shot was fired from one firearm to the exclusion of all other firearms." *Id.* at 1177. The Court further noted that its holding was limited "in that it allows toolmark experts to offer an opinion that a bullet or shell casing was fired by a particular firearm, but it does not permit them to do so with absolute certainty," and noted that it had doubts as to whether toolmark experts should be allowed to state their opinions "with a reasonable degree of certainty." *Id.* at 1184, n.19.

In *Williams v. United States*, 210 A.3d 734 (D.C. 2019), the Court of Appeals stated, "[W]e do not question the admissibility of the firearms and toolmark examiner's testimony generally." *Id.* at 742. The Court reiterated that it is error to allow a firearm and toolmark examiner to "provide unqualified opinion testimony that purports to identify a specific bullet as having been fired by a specific gun via toolmark pattern matching." *Id.* at 743. The Court of Appeals did not resolve the Government's argument that *Gardner* only prohibited certainty statements and otherwise continued to authorize opinion testimony identifying a specific bullet as having been fired by a specific gun, because the examiner in that case had given a certainty statement. *Id.* at 741-42.

In addition, two relatively recent trial court decisions are informative. In *United States v. Tibbs*, Judge Edelman, after conducting an extensive evidentiary hearing, precluded the government from eliciting testimony identifying the recovered firearm "as the source of the recovered cartridge casing," and instead ruled that the government's expert must limit his testimony to a conclusion that "based on his examination of the evidence and the consistency of the class characteristics and microscopic toolmarks, the firearm cannot be excluded as the source of the casing." 2019 D.C. Super LEXIS 9 at *3 (D.C. Super. Ct. Sept. 5, 2019).

By contrast, in *United States v. Harris*, 502 F. Supp. 3d 28 (D.D.C. 2020), Judge Contreras disagreed with Judge Edelman's analysis, after conducting an evidentiary hearing, and held that the Government's firearm and toolmark expert could testify that casings were fired from the same firearm when all class characteristics were in agreement and "the quality and quantity of corresponding individual characteristics is such that the examiner would not expect to find that same combination of individual characteristics repeated in another source and has found insufficient disagreement of individual characteristics to conclude that they originated from different sources." *Id.* at 45.

There, the defendant challenged the admission of the toolmark testimony, arguing that it lacked a "reliable scientific basis and is not premised on sufficient facts or data, is not the product of reliable principles and methods, and was not applied properly by [the expert]." *Id.* at 32-33. The District Court disagreed, finding that "these issues are for cross-examination, not exclusion, as recent advancements in the field in the four years since the PCAST Report address many of Mr. Harris's concerns." *Id*. To come to this conclusion, the *Harris* court analyzed the scientific validity of the firearm and toolmark identification discipline and whether it met the reliability standard under *Daubert*. *Id.* at 36-43. It considered much of the same evidence that is presented before the Court in this case, to include: the PCAST report, Judge Edelman's findings in *Tibbs,* various Association of Firearm and Tool Mark Examiners (AFTE) journal articles, the Keisler and Heat Map studies, and various academic reports and findings relating to the firearm and toolmark identification.

Judge Contreras also noted with approval that the Government had agreed that its expert would not use terms such as "match" or state his opinion with any level of statistical or scientific certainty or to the "exclusion of all other firearms." *Id.* at 44.

### *B. Analysis*

Here, the Defendant argues that the examiner's testimony "will opine that individual characteristics are unique to individual firearms," which is an "unqualified conclusion prohibited by both *Williams* and *Tibbs*." Def. Mtn. at 11. The Government agrees that the examiner will not use unqualified terms such as "match," not state his opinion "with any level of statistical certainty, much less 100% or absolute certainty," will not render an opinion "to the exclusion of all other firearms" or use the phrase "to a reasonable degree of scientific certainty." *See* Gov't Opp. at 15-16. However, the Government's expert will testify that he made a "source conclusion" and that it is his opinion that there is "extremely strong support for the proposition that the two toolmarks – i.e., the firearm and bullet/cartridge case – originated from the same source." *Id.* at 16. The Government argues that the expert should not be constrained to only testify that "particular items cannot be excluded from having been fired from the same or a particular firearm," as Defense argues. Def. Mtn. at 11-12. *See generally* Gov't Opp. at 23-24.

Here, the Court finds the analysis in *Harris* persuasive as well as consistent with *Gardner* and *Williams*. The Court finds that the Government's proposed firearm and toolmark identification testimony meets the parameters laid out in *Daubert*. Further, the Court concludes that the issues the Defendant raises are best handled on cross examination and do not warrant the exclusion of the Government's expert.

First, the Court must find whether the discipline is testable. "[V]irtually every court that has evaluated the admissibility of firearms and toolmark identification has found the AFTE method to be testable and that the method has been repeatedly tested." *Tibbs*, 2019 D.C. Super. LEXIS 9, 2019 WL 439486 at *7. A number of courts have examined this factor in depth and concluded that firearm toolmark identification can be tested and reproduced. *See, e.g., United States v. Otero*, 849

F. Supp. 2d 425, 432 (D.N.J. 2012)("The literature shows that the many studies demonstrating the uniqueness and reproducibility of firearms toolmarks have been conducted."); *United States v. Taylor*, 663 F. Supp. 2d 1170, 1175-76 (D.N.M. 2009)(noting studies "demonstrating that the methods underlying firearms identification can, at least to some degree, be tested and reproduced."); *United States v. Diaz*, No. CR 05-00167, 2007 U.S. Dist. LEXIS 13152, 2007 WL 485967, at *6 (N.D. Cal. Feb. 12, 2007) (holding that "the theory of firearms identification, though based on examiners' subjective assessment of individual characteristics, has been and can be tested.").

Likewise, this Court also finds that firearm and toolmark identification is testable. The data and literature submitted by the Government show that these identifications are consistent and can be reproduced. Specifically, the Court finds Todd. J. Weller's Declaration which discusses the testability of firearms to be particularly helpful. For example, he explains that the Heat Map Study, which included firearm examiners from fifteen different laboratories all conducting an independent assessment, were "mostly using the same amount and same location of microscopic marks when concluding identification." *See* Gov't Ex. 2. January 12, 2022, Decl. of Todd Weller at 20-21. The trained examiners also correctly reported 100% of known matches while reporting no false positives or false negatives. *Id.*

Second, the Court finds that the practice is sufficiently validated through peer-review. As Mr. Weller's declaration indicates, there are significant publications that have been published in journals to include the AFTE journal. *See* Gov't Ex. 2. The AFTE journal is a peer-reviewed publication that "publishes articles, studies, and reports concerning firearm and toolmark evidence." *Harris*, 502 F.Supp. 3d at 40 (citing *United States v. McCluskey*, No. CR 10-2734 JCH, 2013 U.S. Dist. LEXIS 203723, 2013 WL 12335325, at *6 (D.N.M. Feb. 7, 2013)). Additionally,

the journal undergoes a thorough and formal process for submissions, that is finally reviewed by the Editorial Committee prior to being published. *Id.* This weighs in favor of admissibility.

Third, the Court also finds that the toolmark identification is admissible because of its incredibly low known error rate. “The critical inquiry under this factor is the rate of error in which an examiner makes a false positive identification, as this is the type of error that could lead to a conviction premised on faulty evidence.” *Harris,* 502 F.Supp 3d at 39. For example, the Keisler Study, which examined 1512 true positive identifications, examiners were able to match 1508 casings to the correct firearm. *See* Gov’t Mtn. at 31, 35-37, and *Keisler et al*., Isolated Pairs Research Study, 50 AFTE J. 3, 56 (Summer 2018). Further, the Heat Map study found no false identifications. *See* Gov’t Ex. 2 at 201-21.

With regard to the fourth factor, the maintenance of standards and controls for the discipline, one of the primary challenges to firearms and toolmark identification stems from the methodology's lack of objective criteria for examiners to use in determining a “match.” *See*, e.g., *United States v. Romero-Lobato*, 379 F. Supp. 3d 1111, 1120 (D. Nev. 2019). As the Government acknowledges, courts have come to different conclusions regarding this factor. *See* Gov’t Mtn at 50, n. 53. While this factor weighs against admissibility, it does not bar it.

Lastly, *Daubert* instructs that the Court analyze whether the discipline has been generally accepted within the relevant scientific community. As noted above, many Courts, even those critical of toolmark identification as a whole, “enjoy general acceptance as a reliable methodology in the relevant scientific community of examiners.” *Harris*, 502 F.Supp.2d at 42. Thus, the Court also recognizes the general acceptance of the discipline within the larger community.

Though this Court finds the discipline to be a reliable one, case law from the D.C. Court of Appeals instructs that limitations be placed on the opinion of the expert. As described in *Gardner v. United States*, "a firearms and toolmark expert may not give an *unqualified opinion*, or testify with absolute or 100% certainty, that based on ballistics pattern comparison matching a fatal shot was fired from one firearm, to the exclusion of all other firearms." 140 A.3d 1172, 1184 (D.C. 2016)(emphasis added); *see also (Ricardo) Jones v. United States*, 27 A.3d 1130, 1138 (D.C. 2011)(holding (while still under *Frye*) that toolmark and firearms examiners could not "stat[e] their conclusions with 'absolute certainty excluding all other possible firearms.'").

As stated above, in this jurisdiction, firearm and toolmark experts can offer an opinion that a bullet or shell casing was fired by a particular firearm, but they are not permitted to do so with absolute certainty. They are not limited to the degree argued by the Defense – that is, they are not limited to saying "that particular items cannot be excluded from having been fired from the same or a particular firearm." Thus, the Court finds that the Government's expert may testify that he conducted the appropriate comparison, and it resulted in an identification. However, the expert is not permitted to make an unqualified opinion that specific bullets came from a specific gun to the exclusion of other firearms. The government's expressed limitations on the expert's testimony comport with current case law in this jurisdiction.

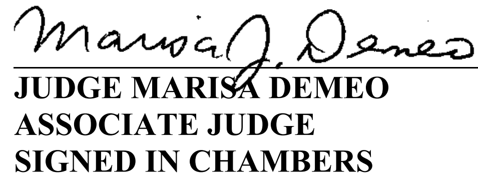
**III. Conclusion**

Upon consideration of the pleadings, the DCCA's rulings thus far, and the rulings in *Harris* and in other similarly situated jurisdictions, this Court finds that firearm and toolmark analysis is reliable and admissible. Mr. Monturo's testimony, however, must comport with current case law.

Accordingly, it is this 10th day of October, 2023 hereby

**ORDERED** that the Defendant's Motion is **DENIED**.

**SO ORDERED**.



**JUDGE MARISA DEMEO**
**ASSOCIATE JUDGE**
**SIGNED IN CHAMBERS**

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