

CR13-0667367-T	:	SUPERIOR COURT
CR13-0667365-T	:	
STATE OF CONNECTICUT	:	JUDICIAL DISTRICT OF
	:	HARTFORD
v.	:	
	:	AT HARTFORD
DONALD RAYNOR, JR.	:	
	:	March 5, 2015

**DEFENDANT’S MOTION FOR PORTER HEARING AND MOTION IN LIMINE**

The defendant in the above captioned matter moves for a hearing pursuant to *State v. Porter*, 241 Conn. 57, 698 A.2d 739 (1997) in anticipation of the testimony of James Stevenson. Based upon the anticipated testimony adduced at that hearing he additionally moves in limine to preclude Mr. Stevenson from testifying before the jury. He makes this request in accordance with the holdings set forth *Kumho Tire Co. v. Carmicheal*, 526 U.S. 137 (1999) and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and respectfully asks that Connecticut Rule of Evidence § 7-2 be read to include a similar reliability standard. Alternatively he asks that Mr. Stevenson’s testimony be drastically limited as set forth herein.

**I. FACTS**

It is anticipated that the state call will James Stevenson, a consultant in forensic tool mark analysis. Tool mark analysis, in essence, asks an examiner to account for the markings on two different spent bullets or shell casings and determine whether they are so similar as to have been fired for the same gun. It is further expected that Mr. Stevenson will testify that the shell casings recovered from the shooting of Delano Grey were fired from the same weapon as the shell

casings recovered from the attempted shooting of Deborah Parker based upon his forensic tool mark analysis of those casings.

In 2009 the National Academy of Sciences released a report calling into question the scientific methodology behind the, so-called, forensic sciences frequently offered in criminal prosecutions. See Committee on Identifying the Needs of the Forensic Sciences Community, National Research Council, "*Strengthening Forensic Science in the United States: A Path Forward*," National Academies Press (August 2009) (hereinafter "*NAS Report*") available at <https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf>. While laudable advancements in DNA technology have contributed greatly to truth and reliability in the administration of justice, those same advancements have revealed shortcomings in other areas of forensic sciences. *Id.* It noted specifically that, "substantive information and testimony based on faulty forensic science analyses may have contributed to wrongful convictions of innocent people.... Moreover, imprecise or exaggerated expert testimony has sometimes contributed to the admission of erroneous or misleading evidence." *Id.*

The *NAS Report* examined toolmark and firearm analysis specifically. *NAS Report*, 150-155.<sup>1</sup> The report noted the analysis' considerable shortcomings:

Because not enough is known about the variabilities among individual tools and guns, we are not able to specify how many points of similarity are necessary for a given level of confidence in the result. *Sufficient studies have not been done to understand the reliability and repeatability*

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<sup>1</sup> In fact it specifically examines nearly every area of criminal forensics counsel can conceive of.

*of the methods.* The committee agrees that class characteristics are helpful in narrowing the pool of tools that may have left a distinctive mark. Individual patterns from manufacture or from wear might, in some cases, be distinctive enough to suggest one particular source, *but additional studies should be performed to make the process of individualization more precise and repeatable.*

(Emphasis added) *Id.* 154-55. It went on to add that “[a]lthough some studies have been performed on the degree of similarity that can be found between marks made by different tools and the variability in marks made by an individual tool, *the scientific knowledge base for toolmark analysis is fairly limited.*

(Emphasis added). *Id.* 155.

## **II. LAW.**

### **A. Mr. Stevenson’s testimony is not scientific.**

In order for a witness to be qualified as an expert on scientific matters, the proponent of his testimony must establish that (1) “the subject of his testimony must be scientifically valid, meaning that it is scientific knowledge rooted in the methods and procedures of science...and is more than subjective belief or unsupported speculation,” and (2) “the scientific evidence must fit the case in which it is presented.” *State v. Sorabella*, 277 Conn. 155, 215 (2006). In this case, Mr. Stevenson does not offer scientific testimony.

The *NAS Report*, as set forth above, makes clear that toolmark analysis does not meet the rigors of the scientific method. Mr. Stevenson may not, for that reason, testify as a scientific expert. The Southern District of New York would agree with this contention. *United States v. Glynn*, 578 F.Supp. 2d 567, 570 (2008). The only court in the Second Circuit to examine this issue noted that three other federal district courts have reviewed, what they refer to as, ballistics

identification testimony and concluded that “it does not have sufficient rigor to be received as science.” *Id.* Though it has been admitted on other limited grounds, it is not scientific evidence.

**B. This Court Should Apply The Federal Standard Articulated in *Kumho Tire Co. v. Carmicheal* and exclude Stevenson’s testimony on that basis.**

The United States Supreme Court has recognized that a trial court’s duty to determine the fundamental reliability of expert testimony applies not only to scientific testimony “but also to testimony based on ‘technical’ and ‘other specialized’ knowledge.” *Kumho Tire Co. v. Carmicheal*, 526 U.S. 137, 141 (1999). While the Connecticut Supreme Court has not yet done so, the time has come. See *Sorabella*, supra, 277 Conn. 155, 216.

This Court should apply *Kumho Tire* for three reasons: the defendant is not aware of state appellate opprobrium for the rule, *Sorabella* precedes the *NAS Report*, and the state Supreme Court has recently shown solicitude for bona fide, over junk, science. First, *Sorabella* does not express an opinion on *Kumho Tire*: it simply declined to review the applicable claim because it was unpreserved. Second, the *NAS Report* is a relatively recent development and the defendant can point to relatively little legal accounting for it. Nonetheless, it is a comprehensive expression of concern from our nation’s high academy of science and warrants consideration. Finally, the state Supreme Court recently permitted expert testimony from psychiatrists on the fallibility of eyewitness identification and, in doing so, expressed growing concern that the bona fide scientific principles, rather than tradition or conventional wisdom, inform the search for

truth. *State v. Guilbert*, 306 Conn. 218 (2012). Additionally, the United States Supreme Court's rationale in *Kumho Tire* speaks for itself.

In *Kumho Tire*, the Supreme Court held that a federal district court may apply the factors set forth in *Daubert*, supra, 509 U.S. 579 to determine the reliability of a non-scientific expert's testimony. 526 U.S. at 152. Those factors include: "[w]hether a theory or technique can or has been tested; [w]hether it has been subjected to peer review and publication; [w]hether, in respect to a particular technique, there is a high known or potential rate of error and whether there are standards controlling the technique's operation; and [w]hether the theory or technique enjoys general acceptance within a relevant scientific community." (Internal quotations omitted) *Id.* 149 quoting *Daubert*, 526 U.S. at 592-594. These should apply to, for instance, an engineer's testimony because fundamental reliability concerns should apply to the admission of all testimony even where it is not scientific.

A *Porter* hearing, which applies *Daubert* principles, is necessary because it appears that Stevenson's testimony does not meet even this more flexible standard. True though it may be that the *Glynn* court did admit some tool mark identification testimony on a limited basis, the *NAS Report*, which post-dates *Glynn*, seriously calls this conclusion into question. *Supra*, 578 F.Supp. 2d 567, 575.

This Court should apply the *Kumho* standard and reject Stevenson's testimony.

### **C. Stevenson's Testimony Is More Prejudicial Than Probative.**

Stevenson's testimony should be excluded under the current standard. It is evident that the methodology upon which he relies is flawed. It will prejudice the defendant more than it will assist the jury because it will take a scientifically dubious proposition and given the imprimatur of the academe by virtue of Stevenson's qualification as a expert. Put differently, it asks the Court to vouch for evidence that is, at best questionable. The *Glynn* court put it best when it said that,

"[a]lthough effective cross-examination may mitigate some of these dangers, the explicit premise of *Daubert* and *Kumho Tire* is that, when it comes to expert testimony, cross-examination is inherently handicapped by the jury's own lack of background knowledge, so that the Court must play a greater role, not only in excluding unreliable testimony, but also in alerting the jury to the limitations of what is presented."

578 F.Supp. at 574. Accordingly, the defendant requests that Stevenson's testimony be excluded on this basis or that a limiting order and instruction, similar to that in *Glynn*, be granted.

### **III. Conclusion.**

Based upon the forgoing, the defendant respectfully requests that Stevenson's testimony be precluded. Alternatively, he requests that a limiting instruction, to be determined at oral argument and following a *Porter* hearing, be issued.

Respectfully submitted,

DONALD RAYNOR  
THE DEFENDANT

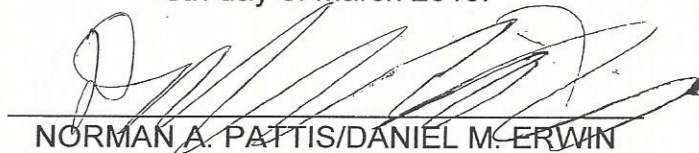
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**CERTIFICATION**

This is to certify that a copy of the foregoing has been served on counsel, the Office of the Chief State's Attorney for the Judicial District of Hartford in court this 5th day of March 2015.



NORMAN A. PATTIS/DANIEL M. ERWIN