CR13-0667367-T **CR13-0667365-T**	:	**SUPERIOR COURT**
STATE OF CONNECTICUT	:	**JUDICIAL DISTRICT OF HARTFORD**
v.	:	**AT HARTFORD**
DONALD RAYNOR, JR.	:	**March 17, 2015**

DEFENDANT'S REPLY TO STATES OPPOSITION TO MOTION FOR PORTER HEARING AND MOTION IN LIMINE

Neither the law of the state of Connecticut nor the law of the case demonstrate the reliability of tool mark analysis under *State v. Porter*, 241 Conn. 57, 698 A.2d 739 (1997). First, *State v. Legnani*, 109 Conn. App. 399, 415-21, cert. denied 289 Conn. 940 (2008), precedes the publication of the *NAS Report*. Second, the state did not even address the defendant's contentions regarding the application of *Kumho Tire Co. v. Carmicheal*, 526 U.S. 137 (1999). Finally, the defendant did not challenge the admission of Mr. Stephenson's testimony in the first trial thus there is no law of the case to apply.

I. ADDITIONAL BASIS FOR *PORTER HEARING*.

The defendant, first, wishes to place the court on notice of a second scientific basis in support of his request for a *Porter* hearing.

While it is not clear that scientific literature, within the *Porter* context, is an adjudicative fact the defendant, in an abundance of caution and pursuant to *State v. Edwards*, 314 Conn. 465, 477-483 (2014), wishes to alert the Court to a second National Academies report. In it, a committee explored the feasibility of creating national ballistics database for the purpose of tool mark identification of firearms. Committee to Assess the Feasibility, Accuracy, and Technical

Capability of a National Ballistics Database, "*Ballistics Imaging*," National Academies Press (2008) available at http://www.nap.edu/catalog/12162.html (hereinafter "*Ballistics Imaging*"). The report's authors noted:

> Underlying the specific tasks with which the committee was charged is the question of whether firearms-related toolmarks are unique: that is, whether a particular set of toolmarks can be shown to come from one weapon to the exclusion of all others. Very early in its work the committee found that this question cannot now be definitively answered.
>
> **Finding: The validity of the fundamental assumptions of uniqueness and reproducibility of firearms-related toolmarks has not yet been fully demonstrated.**
>
> Notwithstanding this finding, we accept a minimal baseline standard regarding ballistics evidence. Although they are subject to numerous sources of variability, firearms-related toolmarks are not completely random and volatile; one can find similar marks on bullets and cartridge cases from the same gun.

(Emphasis in original) *Id.* 3.

II. *STATE V. LEGNANI* IS INAPPLICABLE.

The *NAS Report* was released in August of 2009. *Legnani* was released in—and surely tried and briefed well before—July of 2008. The defendant has been unable to find an instance of a Connecticut court actually considering the *NAS Report*. This Court should do so now.

The defendant is unable to find an instance in which a Connecticut court has examined tool mark analysis in the *Porter* or *Frye* context. Clearly, the Appellate Court decided not to in *Legnani*. The *Legnani* court relied on *State v. Miles*, 97 Conn.App. 236, 239 (2006) and *State v. Miller*, 95 Conn.App. 362, 367, 896 A.2d 844, cert. denied, 279 Conn. 907 (2006) for the proposition that tool mark identification "has been well established and admissible evidence under prior case law." 109 Conn.App. at 421. *Miles*, however, merely notes that fact

that a tool mark examiner testified—the admissibility of his testimony was not the issue in the case nor does the decision note whether the evidence was ever challenged. 97 Conn.App. at 239. The fact that this evidence has been rarely, if never challenged, is not evidence that it meets the *Porter* standard. Nor, even if it has been challenged, does a dated holding negate scientific advancement—or in this case skepticism. *See Murphy v. State*, 24 So.3d 1220, 1222, 2009 Fla.App. LEXIS 203372 (2009)(holding that National Research Council report questioning comparative bullet lead analysis was, or could be, "newly discovered evidence"). Tradition is not an indicator of scientific reliability.

"In general, [Connecticut courts] look to the federal courts for guidance in resolving issues of federal law." *State v. Sebastian*, 243 Conn. 115, 139 (1997). Although this is not an issue of federal law *per se*, the fact that the *Porter* standard is essentially the *Daubert* standard makes for a powerful analogy. What the state dismisses as "a federal judge in the Southern District of New York" is in fact a federal judge who has done what, to the defendant's knowledge, Connecticut court's have not: examined the evidence. *See United States v. Glynn*, 578 F.Supp. 2d 567 (2008).[1] This is not entirely unlike what the state Supreme Court did in *State v. Guilbert*, 306 Conn. 218, 255 (2012): it relied, in part, on *State v. Henderson*, 208 N.J. 208, 27 A.3d 873 (2011) in which the New Jersey Supreme Court appointed a special master to review the literature on the science of eyewitness identification testimony. While this Court is not free to

[1] Additionally, the Second Circuit has upheld the admissibility of tool mark evidence but noted the it did "not wish this opinion to be taken as saying that any proffered ballistic expert should by routinely admitted." *United States v. Williams*, 506 F.3d 151,161 (2007). The *Glynn* decision, however, followed *Williams*.

overrule state precedents, as the *Guilbert* court did, it is permitted—as the finder of fact—to rely on the best, most timely evidence presented to it as well as persuasive authority. It should do so here.

Additionally, the state's citation to *State v. Martinez*, 143 Conn.App. 541 (2013) is similarly unavailing. It provides no analysis of the issue and merely explains a broader framework.

Another federal judge, after holding his nose and admitting tool mark identification evidence, wrote:

> I reluctantly come to the above conclusion because of my confidence that any other decision will be rejected by appellate courts, in light of precedents across the country, regardless of the findings I have made. While I recognize that the Daubert-Kumho standard does not require the illusory perfection of a television show (CSI, this wasn't), when liberty hangs in the balance—and, in the case of the defendants facing the death penalty, life itself—the standards should be higher than were met in this case, and than have been imposed across the country. The more courts admit this type of toolmark evidence without requiring documentation, proficiency testing, or evidence of reliability, the more sloppy practices will endure; we should require more.

United States v. Green, 405 F.Supp.2d 104, 109 (D.Ma., 2005). Now, the National Academy of Sciences recognizes what this federal judge did a decade ago. In light the most current science, it would be an abuse of discretion not to require more.

III. THE STATE DID NOT EVEN ADDRESS THE *KUMHO TIRE* STANDARD.

In the event that this Court finds that tool mark evidence is not scientific, the defendant, for the reasons stated in his principal motion, asks that the Court exclude Mr. Stephenson's testimony as unreliable under *Kumho Tire* as well.

IV. THE DEFENDANT DID NOT CHALLENGE MR. STEPHENSON'S TESTIMONY IN THE PRIOR CASE AND THEREFORE, THERE IS NO RULING TO FOLLOW.

The defendant did not previously challenge Mr. Stevenson's testimony in the previous case. There was not ruling, therefore, to apply in this case and the argument is without merit.

Respectfully submitted,

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By: _____

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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 17th day of March 2015.

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NORMAN A. PATTIS/DANIEL M. ERWIN