

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

STATE OF MARYLAND	:	
	:	
vs	:	CRIMINAL NUMBER: 120820
	:	
BRANDON JACKSON-GREEN	:	
	:	
DEFENDANT	:	
	:	

STATE'S ANSWER TO MOTION TO EXCLUDE OR RESTRICT FIREARMS TESTIMONY

COMES NOW, the State of Maryland, by and through John J. McCarthy, State's Attorney for Montgomery County, Maryland, and Karen M. McNeeley, and in opposition to the Motion to Exclude or Restrict Firearms Testimony filed by the defendant in the above-captioned case states that:

1. The Defendant is charged with First Degree Assault, Use of a Firearm in the Commission of a Crime of Violence and other related offenses. These charges arise from a shooting incident that occurred on February 17, 2012. The weapon in question was recovered during the execution of a search warrant at the Defendant's residence on April 24, 2012.

2. On the date of the shooting, the Montgomery County and Gaithersburg City Police Departments recovered several shell casings and bullets from the crime scene. These were submitted into evidence at the time. Upon recovery of the weapon via the search warrant, it was also submitted into evidence. All items of evidence were transported to the Bureau of Alcohol, Tobacco, Firearms and Explosives National Laboratory Center in Ammendale, Maryland for toolmark examination.

3. The toolmark examination was conducted by Arnold Esposito of the Firearms & Toolmark Section of the BATFE National Laboratory. His Curriculum Vitae is attached as Exhibit A.

4. During his examination, Mr. Esposito used the standard method of comparison that is used in the field; side by side or split screen comparison. As noted in his report, the fired cartridges and test cartridge casings were compared microscopically and "it was determined there is agreement of all discernible class characteristics and sufficient agreement of individual characteristics" to identify the items as having been fired from the weapon that was recovered in the search warrant of Defendant's home and submitted to the Laboratory. A copy of the report is attached as Exhibit B.

5. Along with his conclusions, Mr. Esposito provided, and the State provided to the Defendant via counsel, Mr. Esposito's case notes, firearm worksheet, cartridge case

worksheet, bullet worksheet, and notes relating to his examination. His findings were also peer reviewed, and that is evidenced on the documents provided.

6. The Defendant argues that this toolmark identification is a forensic method, and not a forensic science, based on a 2009 study conducted by the National Research Council.

7. In citing *United States v. Willock*, 696 F.Supp.2d 536 (2010), the Defendant states that the court limited the testimony of a firearms examiner based on the study above. The Defendant has failed to note that the limitation was due to the “lack of information about who conducted the individual examinations in the City Case, as well as the lack of information regarding the examiner’s qualifications, training, proficiency, and whether the examiner has been subject to annual proficiency CTS examination.” *Id.* at 573-574.

8. The facts of *Willock* are important and distinguishable from the facts in the case at hand. In *Willock*, there were two separate shooting events; one in Baltimore County and one in Baltimore City. There were toolmark examinations conducted by an examiner in each jurisdiction, however only one examiner was called as a witness and the qualifications of the second were not known. *Id.* at 546. In the case at hand, there is one examiner and he has provided his qualifications, methodology and notes relating to the examination. Therefore, the limitation that was placed on the testimony of the examiner in *Willock* is not relevant to the case against this Defendant.

9. In *Willock*, the court adopted a Report and Recommendation of United States Magistrate Judge Paul W. Grimm. Judge Grimm went into great detail regarding the study that Defendant is relying on and the methodology of toolmark examination. It was noted that the conclusion reached by the examiner is “only as good as the underlying photographs, sketches, and notes that support it, and those materials are critical to ensuring that juries are able to learn of any deficiencies that may exist at trial through effective cross-examination.” *Id.* at 572.

10. The Court of Special Appeals has addressed this issue in *Fleming v. State*, 194 Md.App. 76 (2010). The court had the benefit of the study that the Defendant is relying on in reaching its decision in *Fleming*. While the court found that any error by the trial court in their limitations placed on cross-examination of a toolmarks examiner was harmless, they examined the admissibility of such testimony.

11. In *Fleming*, the court stated, “So there is no misunderstanding, even if the admission of the State’s firearm expert testimony was not harmless, we would hold that the trial court did not err. We have not been directed to any court in the country which has excluded such testimony.” *Id.* at 99. The Court acknowledged that the testimony was admissible under *Frye-Reed* and that the method, which is the same method used in this case by Mr. Esposito, is the “method traditionally used in Maryland, by both the Maryland State Police and the forensic laboratories located in Maryland.” *Id.* at 100.

12. The study which the Defendant relies on points to an alternative method of comparison of toolmarks called CMS. The study states that it would provide more statistical analysis for the comparisons being conducted. However, the *Fleming* court stated that “the existence of an alternative, even one which aspires to improve upon the shortcomings of its forebear, does not undermine the generally accepted nature of the traditional method.” *Id.* at 108.

13. In addition to the cases in the Federal and State Courts in Maryland, this issue has been settled by the District of Columbia Court of Appeals in *Ricardo Jones v. United States*, 27 A.3d 1130 (2011). In *Jones*, there were two firearms toolmark examiners (one from North Carolina and one from the District of Columbia) who testified regarding their conclusions. *Id.* Each testified that their “level of certainty with respect to that conclusion’ was 100% or ‘to the exclusion of all other firearms.’” *Id.* at 1135. The Court did note that the testimony should be “only to a reasonable degree of certainty” rather than 100%, but found that the testimony was admissible and the degree of certainty allowed in trial was harmless error. *Id.* at 1139.

14. Based on the Federal and State case law, it is clear that Mr. Esposito utilized the generally accepted practice in comparing the toolmarks on the pieces of evidence submitted. His conclusions have been provided with all supporting documentation, including peer review. Mr. Esposito’s testimony is admissible under *Frye-Reed* and he should be permitted to testify to a reasonable degree of scientific certainty to his conclusions.

WHEREFORE, the State respectfully requests this Honorable Court to deny the Defendant's Motion to Suppress Evidence.

Respectfully submitted,

John J. McCarthy
State’s Attorney for
Montgomery County, Maryland

By:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this March 6, 2013, a copy of the foregoing State's Response to Defendant's Motion to Exclude or Restrict Firearms Testimony, was sent via email to Catherine Woolley, Esquire, attorney for the Defendant.

Karen M McNeeley
Assistant State's Attorney
Montgomery County, Maryland

KMM:KMM
01/07/2013

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STATE OF MARYLAND

vs

BRANDON JACKSON-GREEN

DEFENDANT

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CRIMINAL NUMBER: 120820

ORDER

Upon consideration of the Defendant's Motion to Exclude or Restrict Firearms Testimony, the State's Opposition thereto, and the arguments of counsel, if any, it is this _____ day of _____, 2013, by the Circuit Court for Montgomery County, Maryland,

ORDERED, that the Defendant's Motion to Exclude or Restrict Firearms Testimony is **DENIED**.

Judge of the Circuit Court
Montgomery County, Maryland