COUNTY COURT : COUNTY OF ORANGE
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK -against- JOSE GUADALUPE, Defendant.	AFFIRMATION AND MEMORANDUM OF LAW IN OPPOSITION TO THE DEFENDANT'S MOTION TO EXCLUDE FIREARMS IDENTIFICATION TESTIMONY Indictment No. 09-513

KAREN D. EDELMAN-REYES, an attorney admitted to practice for the Courts of this State, affirms under penalty of perjury that:

1. I am an Assistant District Attorney in Orange County assigned to this case and am familiar with its facts.

2. This affirmation and memorandum of law is submitted in opposition to defendant's motion to exclude firearms identification testimony.

3. Except where otherwise indicated, this affirmation is made upon information and belief and based upon inspection of the record in this case and the papers filed with this Court, as well as conversations with Assistant District Attorneys, discussions with experts in the area of firearms and tool markings, and testimony given by the witnesses before the grand jury.

4. At approximately 4:30 a.m. on August 30, 2008, victims Robert Unterman, Antonio Ramos, and Gerald Bien-Aime were standing in front of 14 Prince Street, City of Middletown, County of Orange, State of New York. At that time the defendant, and his co-defendant, Jose Bonilla, approached the three victims, displayed two separate .22 caliber semi-automatic pistols and demanded that the three victims empty their respective pockets. When victim Antonio Ramos did not immediately comply, he was shot two times, once in the chest and once in the abdomen. Ramos fled to an area behind 14 Prince Street, injured, and bleeding. Thereafter, the remaining

two victims, Unterman and Bien-Aime, fled their would-be robbers. The defendants then shot an additional sixteen (16) rounds in the direction of the flight taken by Unterman and Bien-Aime. Unterman was struck twice in the back as he ran, and crawled under an SUV parked nearby where he succumbed to his gunshot wounds and died. Bien-Aime was able to escaped into 14 Prince Street relatively unharmed.

5. The City of Middletown Police Department and the New York State Police responded to the area in front of 14 Prince Street almost immediately after the above-described events took place. They secured a crime scene and ultimately recovered eighteen (18) shell casings and one spent round from the crime scene (described as a deformed piece of lead). Ten (10) of the shell casings were described as Stinger .22 caliber cartridge cases, and eight (8) of the shell casings were described as Long Rifle .22 caliber cartridge cases. Additionally, two spent rounds were recovered from the body of Unterman during his autopsy (described as two (2) deformed .22 caliber projectiles), and one spent round was recovered from the person of Ramos (which was submitted as of January 6, 2010).

6. All of the above-described ballistics items were submitted to the New York State Police Forensic Investigation Center for the purposes of Firearms and Tool Mark examination by an expert in that field.

7. In the months following the murder of Unterman, through diligent police work, two weapons were recovered by law enforcement officials in their response to separate incidents. The weapons are described, respectively, as: 1) Sturm, Ruger & Co. Inc., .22 Long Rifle pistol, model Standard, serial number 11-41366, and 2) Colt .22 Long Rifle pistol, model Match Target, serial number 179149-S. Those firearms, too, were submitted to the New York State Police Forensic Investigation Center for the purposes of Firearms and Tool Mark examination by an expert in that field.

8. The Firearms Examiner determined that of the eighteen (18) shell casings submitted, six (6) were determined to have been discharged from the same firearm, and another seven (7) were determined to be consistent with having been discharged from the same firearm, but lacked sufficient individual characteristics necessary for a positive identification, but are determined to have been fired from a different firearm that the six (6) shell casings described above. The two (2) projectiles recovered from the body of Unterman were determined to be consistent with having been fired from the same firearm, but lacked sufficient individual characteristics necessary for a positive identification.

9. The Firearms Examiner determined that the seven (7) expended cartridges were consistent with having been discharged from the Sturm, Ruger & Co. Inc., .22 Long Rifle pistol, model Standard, serial number 11-41366, but lacked sufficient individual characteristics necessary for a positive identification, that six (6) expended cartridges were discharged from the Colt .22 Long Rifle pistol, model Match Target, serial number 179149-S, and that the two (2) projectiles recovered from body of Unterman were fired from the Colt .22 Long Rifle pistol, model Match Target, serial number 179149-S but lacked sufficient rifling characteristics necessary for a positive identification. The projectile recovered from Ramos has yet to be analyzed.

10. On August 17, 2009, Indictment #2009-513, and charged with the crimes of MURDER IN THE SEOND DEGREE, in violation of Penal (PL) § 125.25(1), MURDER IN THE SECOND DEGREE, in violation of PL § 125.25(3), ATTEMPTED MURDER IN THE SECOND DEGREE, in violation of PL § 110/125.25(1) (2 counts), ASSAULT IN THE FIRST DEGREE, in violation of PL § 120.10(1), ASSAULT IN THE FIRST DEGREE, in violation of PL § 120.10(4), ATTEMPTED ASSAULT IN THE FIRST DEGREE, in violation of PL §110/120.10(1), ATTEMPTED ASSAULT IN THE FIRST DEGREE, in violation of PL § 110/120.10(4), ATTEMPTED ROBBERY IN THE FIRST DEGREE, in violation of PL § 110/160.15(1), ATTEMPTED ROBBERY IN THE FIRST

DEGREE, in violation of PL § 110/160.15(2) (3 counts), ATTEMPTED ROBBERY IN THE FIRST DEGREE, in violation of PL § 110/160.15(4) (3 counts), CRIMINAL POSSESSION OF A WEAPON IN THE SECOND DEGREE, in violation of PL § 265.03(3) (2 counts), and ATTEMPTED ROBBERY IN THE SECOND DEGREE, in violation of PL § 110/160.10(1).

11. On December 22, 2009, defendant filed a motion, dated December 21, 2009, seeking an order from this Court to suppress ballistic and toolmark evidence proposed to be introduced at the trial of the above-captioned case by the People, or, in the alternative, to grant a Frye hearing on the reliability and the general acceptance of firearm and toolmark evidence. In his motion defendant claimed that the National Academy of Sciences expressed "concerns" regarding ballistic and toolmark examiners stating that a match exits, that the science of toolmark and firearms evidence possesses a "lack of a precisely defined process," and that the science lacks a scientific basis upon which the Court can rely.

12. The Frye standard governs the admissibility of *novel scientific evidence*. See People v. Lee, 96 N.Y.2d 157 (trial court may order Frye hearing to determine if expert testimony regarding eyewitness research is generally accepted); see also People v.Wesley, 83 N.Y.2d at 417; People v. Taylor, 75 N.Y.2d 277 (1990) (rape trauma syndrome generally accepted under Frye standard as reliable by relevant scientific community); People v. Middleton, 54 N.Y.2d 42 (1981) (bite marks evidence generally accepted as reliable under Frye standard); People v. Leone, 25 N.Y.2d 511 (1969) (lie detector not generally accepted under Frye standard as reliable).[1]

13. The long-recognized rule set forth in Frye states:

[1] To be sure, the dissent in People v. Mooney, 76 NY2d 827 (1990), opined in *dictum* that the Frye standard may not apply to psychological testimony regarding eyewitness testimony. Id. at fn. 1. However, in subsequent opinions, the Court of Appeals has repeatedly upheld the applicability of the Frye standard for new or novel scientific theories. See Lee, 96 N.Y.2d at 157; see also Wesley, 83 N.Y.2d at 417; People v. Jeter, 80 N.Y.2d 818 (1992). And the Court has applied the Frye standard to other types of psychological testimony. See, e.g., Taylor, 75 N.Y.2d at 277.

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Frye, 293 F. at 1014.

14. According to the Frye test, a novel scientific method, technique or theory will receive judicial recognition and be admissible only after there is general acceptance in the relevant scientific community that such method, technique or theory is capable of being performed reliably. See generally Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, A Half-Century Later*, 80 Colum. L. Rev. 1197, 1205-10 (1980) [hereinafter Giannelli] (discussing applicability of Frye test). Thus, when applying the Frye test to a scientific method, technique or theory, a court must first determine the relevant scientific community. The court must then determine if the method, technique or theory is generally accepted as being reliable by that scientific community. This Court should scrutinize the proffered evidence under the test set forth in Frye. The methodology used to conduct a firearms and toolmark identification has been generally accepted by the relevant scientific community for nearly a century. Thus, Frye has no application to the government's use of a firearms expert at trial. See J. Miller and M.M. McLean, *Criteria for identification of tool marks*, Journal of the Association of Firearms and Toolmark Examiners 30(1):15, at 40 (1998) ("Toolmark identification is not new or novel.").

15. Expert testimony is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror." People v. Taylor, 75 N.Y.2d at 288 (citing, DeLong v. County of Erie, 60 N.Y.2d 296, 307. "It is for the trial court in the fist instance to determine when jurors are able to draw

conclusions from the evidence based on their day-to-day experience, their common observation and their knowledge and when they would be benefited by the specialized knowledge of an expert witness." People v. Lee, 96 N.Y.2d 157, 162 (2001) (citing People v. Cronin, 60 N.Y.2d 430, 433 [1983]).

16. The defendant asks the Court to ignore longstanding general acceptance of expert testimony regarding the analysis of traditional pattern matching methodology by mischaracterizing the nature of the National Academy of Sciences Report. The section of the Report which discusses the area of Tookmark and Firearms Identification is comprised of a mere four (4) pages. Attached hereto as Exhibit 1. The report does not speak for the relevant scientific community because the Academy, 1) did not include any firearms examiners; 2) made no recommendations specific to firearms and toolmark identification, and 3) failed to undertake a comprehensive analysis of any issues in the field of firearms and toolmark identification. Additionally, the Report fails to cite to a single peer-reviewed piece of scientific literature that undermines the traditional pattern matching methodology, which ahs been utilized by examiners for nearly a century. The Academy's goal apparently is to encourage measures designed to elevate the proficiency and validation of all forensic disciplines to something resembling the forensic application of DNA science – through measures such as accreditation of laboratories, mandatory certification of practitioners, use of universal terminology and objective criteria, validation studies, and statistical frequencies to express the certainty of an identification. That goal is laudable, but attaining that goal is not a prerequisite to admission of forensic evidence, particularly in areas in which forensic evidence has been long admitted. See People v. Maille, 136 A.D.2d 829 (3rd Dept. 1988) (admission of evidence of a rifle matched to two scene shell casings); People v. La Torres, 186 A.D.2d 479 (1st Dept. 1992) (admission of two firearms to match them to spent shells found at scene); People v. Hawkins, 220 A.D.2d 365

(1st Dept. 1995) (admission of evidence that pistol recovered matched shell casings recovered from scene); People v. Shaffer, 105 A.D.2d 863 (3rd Dept. 1984) (admission of evidence of firearm and discharged shell casings matched due to firing pin markings on the spent casings); People v. Cross, 216 A.D.2d 407 (2nd Dept. 1995) (admission of evidence matching a spent shell found at the scene to two additional shells found on a roof top); and People v. Rivers, 282 A.D.2d 402 (1st Dept. 2001) (admission of evidence of a match of a loaded weapon and a shellcasing).

17. In a case such as this, where Ballistics and Toolmark testimony is generally accepted in the relevant scientific community, and has been found admissible, no hearing is required unless there is some significant indication that the relevant profession has modified its position to the extent that the theory is no longer generally accepted. Defendant has offered this Court no information, other that the Academy's recommendations that would lead this Court to conclude that Firearms and Toolmark evidence are no longer admissible in the State of New York. The Academy said no such thing. Additionally, should the Court grant a Frye hearing, the *defendant has offered no prospective witnesses, studies, theories or scientists* upon which the Court may expect to rely should the Court be in a position to evaluate the science.

18. The defendant is free, at trial, in the presence of the jury through cross-examination of the prosecution's experts or through the presentation of expert testimony during his direct case, to challenge the identity and condition of the evidence, the chain of custody of the firearms, shell casings, and projectiles, and to challenge the expertise of the offered witness.

19. For all of the forgoing reasons the People respectfully urge this court to deny defendant's application in its entirety.

Respectfully submitted,

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Karen D. Edelman-Reyes
Assistant District Attorney

Dated: Goshen, New York
April 11, 2011