IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff,	)	
	)	15 CR 14066-01
	)	
v.	)	
	)	Honorable Jennifer Coleman
RICKY WINFIELD,	)	Judge Presiding
	)	
Defendant.	)	

ORDER

This matter comes before the court on the State's motion to reconsider a previous order granting Defendant's motion to exclude firearms identification testimony. The State contends that the court erred as a matter of law when it granted Defendant's request for a *Frye* hearing. The State further submits that the court erred when it excluded not only the expert firearms identification testimony but also some of the physical firearms evidence. Defendant on the other hand, argues that the court's rulings were sound and that this court lacks the authority to reconsider the order because it was entered by a different judge. This Order follows.

Procedural History

Defendant Ricky Winfield ("Defendant") stands charged with the shooting deaths of Marellis Griffis and William Aikens. At trial, the State seeks to present firearms identification opinion testimony and the following physical firearms evidence:

- Evidence recovered at and near 10526 S. LaFayette where Aikens was found dead:
  - a .45 caliber semi-automatic gun recovered next to Aikens' body,
  - three fired bullets,
  - three bullet fragments,
  - ten .45 caliber fired cartridge cases, and
  - four 9 mm caliber fired cartridge cases.

- Fired bullet recovered by the Medical Examiner from the body of Martellis Griffin.
- A 9 mm Ruger handgun, recovered from an uncharged individual.

(State's Motion to Reconsider Exclusion of Firearms Identification Testimony, ¶¶ 4,6).

On January 21, 2021, Defendant filed a motion before this court with the Honorable Judge William H. Hooks then presiding, seeking to exclude the firearms identification opinion testimony on grounds that the testimony is not generally accepted in the scientific community and therefore inadmissible under *Frye.* Defendant also argued that firearms identification evidence is unreliable and therefore inadmissible under Illinois Rule of Evidence 403. Defendant requested a *Frye* hearing and asked, apparently in the alternative, to limit the examiner's testimony by precluding conclusions phrased in terms of "practical certainty." (Defendant's Motion to Exclude, p. 65). Nowhere in Defendant's motion did he request the exclusion of the physical firearms evidence.

Over the State's objection, on September 28, 2021, Judge Hooks (the prior judge) granted Defendant's request for a *Frye* hearing. In his ruling, the prior judge acknowledged that firearms identification is not new or novel, but found that "firearms ammunition, technology and science is light years from the way it was nine years ago..." (9/28/21 Transcript, pp. 5-6). Because of this, the prior judge reasoned, "courts seem to be taking a more open-minded and transparent analysis of many methods of scientific analysis which heretofore were not in question." *Id.* at p. 6. He then granted a *Frye* hearing to "allow the State to appropriately show that the scientific principles of firearms evidence is so scientifically sound that the presentation of such evidence remains firmly in the general acceptance camp even when confronted by zealous and well-prepared defense experts and advocates." *Id.* at p. 7.

The *Frye* hearing took place over the course of several days. The prior judge issued an oral ruling on January 11, 2023 granting Defendant's motion to exclude. A written order followed on February 8, 2023 ("2/8/23 Order") wherein the prior judge adopted the whole of "Defendant's

Post-*Frye*/Rule 403 Hearing Brief Against the Admissibility of Firearms Examination Evidence" (hereinafter, "Defendant's Brief") and "the whole of the references/citations included therein except as otherwise clarified or rejected..." (2/8/23 Order, fn. 2). Reference to the State's "Final Pre-Hearing Brief" was included "solely for the purpose of putting the Defense's Brief and this Court's ruling in their proper context." *Id.*

In the written order, and consistent with his oral ruling, the prior judge cited Defendant's Brief as evidence and concluded that the State failed to prove that expert firearms identification evidence is generally accepted. As a result, the prior judge excluded the expert testimony and all physical firearms evidence, with the exception of the .45 caliber gun, specified as follows:

- The testimony of Brian Parr, the firearms examiner linking the bullets and cartridge cases recovered at the scene to the .45 caliber gun recovered from the scene.
- The fired bullets and cartridge casings recovered from the scene.
- The 9 mm semiautomatic pistol.

(2/8/23 Order, p. 37).

On March 9, 2023, and within 30 days of the written order, the State filed a motion to reconsider. The defense filed a response on April 18, 2023. On June 20, 2023, the prior judge continued the State's motion to reconsider until July 11, 2023 for time to obtain the transcripts. (See, 6/20/23 Court Sheet). On June 30, 2023, before he could rule the prior judge was transferred from the Criminal Division on order of the Chief Judge of the Circuit Court of Cook County. That judge's court call was assigned to Judge Jennifer Coleman, the author of this Order, on July 5, 2024.

On August 1, 2024, Defendant moved to bar this court from ruling on the State's Motion to Reconsider. Defendant argued that this court as the successor judge lacks the authority to rule. This court heard arguments on this point on October 4, 2024. Thus, this Order begins with an analysis of this court's role as the successor judge.

Analysis

I. As the Successor Judge, This Court has the Authority to Rule on the State's Motion to Reconsider Judge Hooks' Ruling

Defendant argues that this court as the successor judge is prohibited from ruling on the State's motion to reconsider the prior judge's decision. Defendant reasons that the prior judge's rulings cannot be disturbed because the State has engaged in "judge shopping" and fails to present new evidence. According to Defendant, the appellate court provides the State with its sole avenue of relief. The State counters that not only does this court have the authority to address its motion as the successor judge, but that claims of judge shopping are completely unfounded.

Illinois caselaw has long established that a trial judge may review, modify, or vacate an interlocutory order at any time before final judgment, even if the original order was entered by another trial judge and regardless of whether the order was immediately appealable. *Lake Cty. Riverboat L.P. v. Ill. Gaming Bd.*, 313 Ill. App. 3d 943, 950, 246 Ill. Dec. 499, 504, 730 N.E.2d 524, 529 (2000). A court has the inherent authority to reconsider and correct its rulings and an interlocutory order may be modified or revised by a successor judge at any time prior to final judgement. *Russo v. Corey Steel*, 2018 IL App (1st) 180467, ¶28. "Another judge is capable of making that reassessment as well." *Id.* "It is of no consequence that the original order was entered by another circuit judge." *Id.* In fact, a successor judge "should reverse an erroneous order entered by a previous judge." *Russo v. Corey Steel,* 2018 Ill. App. (1st) 180467 at ¶26. See also, *McCaley v. Petrovic*, 2024 IL App (1st) 230918, ¶ 74; *People v. Brown*, 2018 IL App (4th) 160288; and *People v. Jenkins*, 2023 IL App (5th) 210085.

The defense relies on *People v. Williams*, 138 Ill.2d 377 (1990)[1] in support of the argument that the State's only option is to appeal the prior judge's order. In *Williams*, a trial judge granted the defense motion to suppress arrest and subsequent statements. The State did not file a motion to reconsider the original ruling but filed a notice of appeal, which they later withdrew. Subsequently, they filed a motion for attenuation before a successor judge, who reconsidered the original motion and found the statement voluntary. The appellate court reversed, finding that the original judge's order was final.

However, *Williams* differs from the case at bar in one critical respect: there the State did not file a motion to reconsider the original judge's decision. As the court noted, "(a)suppression order may be an appealable order... and, if it is, the State must either appeal or not. *Except for seeking timely reconsideration by the same or a successor judge* of the court in which the order was entered' the State could not retry the issue before a different judge. *Id* at ¶ 390 (Emphasis added). In fact, courts favor reconsideration to give the circuit court "the opportunity to reconsider final appealable judgments and orders within 30 days of their entry." *Id* at ¶505, quoting *People v. Heil*, 71 Ill. 2d 458, 461-62 (1978). Because the State here filed a timely motion to reconsider, the holding in *Williams* does not apply.

Defendant further argues that this court may not reconsider an original judge's discretionary order unless the State establishes new facts or circumstances and has not engaged in judge shopping. As he notes, if the order involves the exercise of a prior judge's discretion, the successor judge may overturn the order only where there is no evidence of judge shopping and where new facts or circumstances warrant such action. *Corey Steel*, at ¶ 28.

[1] Defendant provided only a partial and inaccurate citation 'People v. Williams, Ill. App.2d 377, 388 (1990),' which the court will consider a clerical error.

First, there is no evidence whatsoever here to support the claim that the State engaged in judge shopping. The case has remained on the same docket since Defendant's arraignment and the State has made no attempt to transfer it. The State filed a timely motion to reconsider before the prior, not successor, judge. Both parties fully briefed the prior judge on the motion to reconsider. The prior judge continued the matter to obtain transcripts but was then transferred as a matter of internal procedure before he could rule on the motion. Any argument of judge shopping is without basis.

Moreover, there is no requirement that the State provide new facts and circumstances for a successor judge to reconsider an order that is erroneous as a matter of law. In that case, the successor judge has the power to correct the previous order regardless of the existence of new matter. *Id.* at ¶ 28. In *Corey Steel,* the posttrial judge reversed the trial judge's ruling on the admissibility of an expert's opinion and granted the defendant's motion for new trial. The plaintiff appealed. The appellate court found that the successor judge had the power to exercise his discretion to undo the erroneous discretionary ruling of the prior judge. *Corey Steel,* at ¶ 32.

Corey Steel premised its holding on *McClain v Illinois*, 121 Ill. 2d 278 (1988). In *McClain,* the defendant filed several motions to dismiss on grounds of *forum non conveniens* which the circuit court judge denied. That judge was reassigned for administrative reasons leaving the defendant's latest motion to reconsider to be decided by a successor judge. Though the successor judge believed that precedent compelled ruling in the defendant's favor, he refused to overturn the first judge's ruling because the decision was vested in the trial judge's discretion. *McClain v Illinois*, 121 Ill. 2d at 287. The Supreme Court disagreed. It held that a court is not bound by the order of a previous judge and has the power to correct erroneous orders. *Id.*; *Towns v. Yellow Cab Co.*, 73 Ill. 2d 113, 120-21 (1978).

With careful consideration, this court now turns to address whether the prior judge's decisions were erroneous as a matter of law.

II. The Prior Court Erroneously Granted a *Frye* Hearing

Defendant requested a *Frye* hearing to test the admissibility of firearm identification testimony. Whether Defendant is entitled to a *Frye* hearing is a question of law. See, *Crim v. Dietrich*, 2020 IL 124318, ¶ 20 (a "question of law" is an issue "concerning the application or interpretation of the law that the court must decide").

The *Frye* test is a common-law evidentiary rule codified in Illinois Rule of Evidence 702. *People v. Prante*, 2023 IL 127241, ¶ 65. Rule 702 provides:

> Where an expert witness testifies to an opinion based on a new or novel scientific methodology or principle, the proponent of the opinion has the burden of showing the methodology or scientific principle on which the opinion is based is sufficiently established to have gained general acceptance in the particular field in which it belongs.

It is axiomatic that the *Frye* test is applicable only if the proffered evidence involves a new or novel scientific principle or methodology. *People v. McKown*, (*McKown II*), 236 Ill. 2d 278, 282-83 (2010). *Frye* requires that the methodology or scientific principle upon which the opinion is based be sufficiently established to have gained general acceptance in the particular field in which it belongs. *McKown II,* at 254; *People v. Rodriguez*, 2018 IL App (1st) 141379-B, ¶ 56.

A. General Acceptance

"General acceptance" of a methodology does not mean "universal acceptance." *In re Commitment of Simons*, 213 Ill. 2d 523, 530-31 (2004). Moreover, "general acceptance" does not require that the methodology "be accepted by unanimity, consensus, or even a majority of experts." *Id.* at 530; *People v. Luna*, 2013 IL App (1st) 072253, ¶ 50. "Instead, it is sufficient that the underlying method used to generate an expert's opinion is reasonably relied upon by experts in the relevant field." *Rodriguez*, at ¶ 56 quoting *Simons*, at 530. "A court may determine the general

acceptance of a scientific principle or methodology in either of two ways: (1) based on the results of a *Frye* hearing; or (2) by taking judicial notice of unequivocal and undisputed prior judicial decisions or technical writings on the subject." *Luna*, at ¶ 52 quoting *People v. McKown*, (*McKown I*), 226 Ill. 2d 245, 254 (2007). Under *Frye*, the court inquires as to the general acceptance of a methodology, not the particular conclusion reached by an examiner or the application of the methodology in a particular case. *Luna*, at ¶ 50.

B. New or Novel

A *Frye* hearing is necessary only where the scientific principle, test or technique offered by an expert to support his opinion is "new" or "novel." *People v. Robinson*, 2013 IL App (1st) 102476, ¶ 69. Accordingly, the threshold issue is whether firearms identification testimony is new or novel. A scientific technique is new or novel if it is "original or striking" or does "not resemble formerly known or used" techniques. *Robinson*, at ¶ 69, quoting, *Donaldson v. Central Illinois Public Service Co.*, 199 Ill.2d 63, 79 (2002).

Firearm identification evidence is not new or novel. *People v. Rodriguez*, 2018 IL App (1st) 141379-B, ¶¶ 57, 60. Illinois courts have allowed firearm identification evidence since at least 1930. *People v. Fisher*, 340 Ill. 216, 240-41 (1930). Since *Fisher*, firearm experts have testified for both the State and the defense. *People v. Rodriguez*, at ¶ 57.

Here, the prior judge specifically found that the methods and means of firearms identification are not new or novel – yet he ordered a *Frye* hearing. (9/28/21 Transcript, p. 5). Precisely because firearm identification testimony is not new or novel, the prior judge erred as a matter of law by granting Defendant's request for a *Frye* hearing.

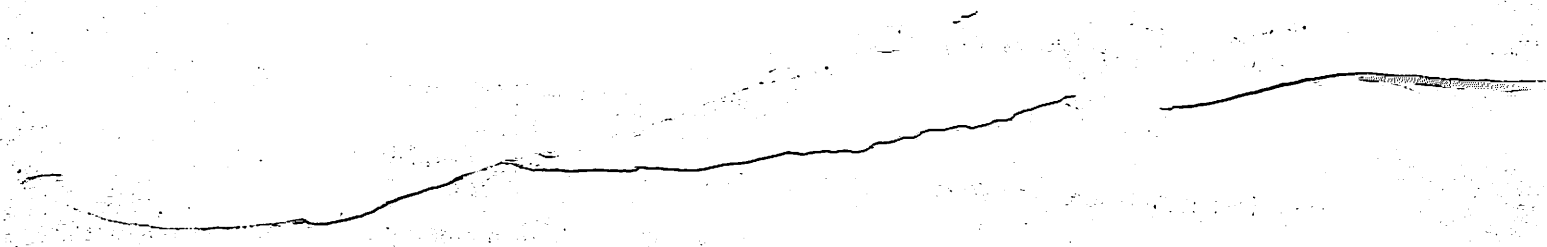
Contrary to his own finding and well-established case law, the prior judge accepted Defendant's argument that firearm evidence was new or novel based on arguments that it has never

been subject to a *Frye* hearing in Illinois, it involves subjective judgments, has a high rate of error, and does not reflect scientific advancements. Illinois courts have, however, rejected these very arguments as bases for granting a *Frye* hearing.

In *Rodriguez,* the defendant raised essentially the same arguments as Defendant Winfield. Like Defendant here, the *Rodriguez* defendant submitted reports critical of the Association of Firearms and Tool mark Examiners (AFTE) methodology at issue including a 2009 report authored by the National Research Council of the National Academy of Sciences entitled "Strengthening Forensic Science in the United States: A Path Forward" ("NAS Report"). *Rodriguez* acknowledged the 2009 NAS Report's conclusions that tool mark identification (1) has never been exposed to stringent scientific scrutiny, (2) involves subjective qualitative judgments by examiners, (3) is based on unarticulated standards, and (4) lacks statistical foundation for estimation of error rates. *Rodriguez*, at ¶ 54. (NAS Report, pp. 42, 153-54). Despite the concerns of the 2009 NAS Report regarding firearm identification testimony, *Rodriguez* held that it did not change the fact that "[t]oolmark and firearm identification evidence is not new or novel..." *Rodriguez*, at ¶ 61. Such criticisms go to the weight of the evidence, not its admissibility. *Rodriguez*, at ¶ 62.

Here, as in *Rodriguez*, Defendant relies on *People v. McKown* (*McKown I*) to argue that firearm identification evidence is new or novel because "there is no record that there has ever been a *Frye* hearing in Illinois to determine whether generally accepted scientific principles support [it]." *Rodriguez*, at ¶ 58. However, *Rodriguez* explicitly rejected this argument and found *McKown I* distinguishable.

In *McKown I*, the Supreme Court held that the Horizontal Gaze Nystagmus (HGN) test as an indicator of alcohol impairment was new or novel because it had been repeatedly challenged in courts around the nation *and remained unsettled. McKown I*, 226 Ill. 2d at 257 (Emphasis added.)



Moreover, a split in the Illinois Appellate Court existed regarding HGN's admissibility. *McKown I* held: "Given the history of legal challenges to the admissibility of HGN test evidence, and the fact that a *Frye* hearing has never been held in Illinois on this matter, we conclude that the methodology of HGN testing is novel for purposes of *Frye*." *Id.* at 258.

Rodriguez specifically found *McKown I* inapplicable because, unlike firearms identification evidence, the HGN test was "repeatedly challenged in court, with varying degrees of success" in Illinois and other courts. *Rodriguez*, at ¶ 58. Additionally, unlike firearms identification evidence, the Illinois Appellate Court had issued "'divergent opinions on the topic,' such that the general acceptance of the test 'remained unsettled.'" *Id.* at ¶ 58. Unlike the situation in *McKown I*, Illinois law is consistent in its admission of firearm identification evidence and is "[f]ar from being unsettled." *Rodriguez*, at ¶ 61. This fact remains true today. See also, *People v. Robinson*, 2013 IL App (1st) 102476, and *People v. Rodriguez*, 2018 IL App (1st) 141379-B (appellate court denied requests to exclude firearm identification evidence and/or order a *Frye* hearings). (The Appellate Court reached the same decision in unpublished orders as well: *People v. Smith*, 2014 IL App (1st) 121062-U, ¶¶ 28-30 and *People v. Dupree*, 2014 IL App (1st) 121179-U, ¶¶ 34-35[2].)

Similarly, in *People v. Luna*, 2013 IL App (1st) 072253, the court rejected the defendant's argument that fingerprint evidence should be deemed novel in light of scientific advances and because it has never been subject to a *Frye* hearing in Illinois. *Luna* reasoned that "until our supreme court decides otherwise, as it did with regard to HGN evidence in [*McKown I*], there is no authority in this state for the defendant's claim that that circuit court erred in rejecting the defendant's motion for a *Frye* hearing on the admissibility of fingerprint evidence." *Luna*, at ¶ 64.

[2] Pursuant to Illinois Supreme Court Rule 23, these unpublished decisions do not constitute precedent and are cited for persuasive value only.

Here, too, under the doctrine of *stare decisis*, this court is bound by Illinois precedent holding that firearms evidence is admissible and that a *Frye* hearing is not required unless and until the appellate or supreme court decides otherwise. See, *O'Casek v. Children's Home & Aid Society of Illinois*, 229 Ill. 2d 421, 440 (2008).

III. The Court Erroneously Barred Expert and Physical Evidence Pursuant to *Frye*

Even if this court were to assume for the sake of argument that the firearms identification is new or novel and that a *Frye* hearing was proper, the prior judge erred as a matter of law in finding, pursuant to *Frye*, that firearms identification evidence was inadmissible.

A. Generally Accepted

1. Illinois Law

"Expert firearms testimony has been generally admissible in Illinois courts for decades." *Robinson*, at ¶ 80; *Rodriguez*, at ¶¶ 59-60, *Fisher*, at 240-41. Ballistics evidence has achieved widespread acceptance. *Rodriguez*, at ¶ 60. There is no split in authority and no published opinion holding that firearm identification evidence is not generally accepted in the relevant scientific community. Despite challenges, no Illinois precedent has excluded firearms evidence on the basis of *Frye*. Criticisms of firearms evidence have not so undermined the reliability of ballistics evidence that it has ceased to be "generally accepted" in the scientific community. *Rodriguez* at ¶ 62; *Robinson,* at ¶ 90. Rather, the criticisms "go to the weight and not to the admissibility of such evidence." *Rodriguez*, at ¶ 62. Under the doctrine of *stare decisis*, this Court is bound by Illinois precedent holding that firearms evidence is admissible and that a *Frye* hearing is not required. Defendant has not cited a single Illinois case that held otherwise.

Despite Illinois precedent, the prior judge found that the State failed to meet its burden to prove general acceptance. This finding was based on a misunderstanding of the evidence

presented, the law surrounding the admission of firearms *Frye* generally, and the role of attorney arguments.

The 2/8/23 Order reflects a misunderstanding of what constitutes general acceptance. The prior judge pointedly, and incorrectly, asked: "Is *Frye* generally accepted? Well, *Frye* is generally accepted." (1/11/23 Transcript, p. 25). That is not the issue. The issue under *Frye* is whether firearms identification testimony is generally accepted in the relevant scientific community in which the field belongs. Binding precedent has answered this question: "Expert firearms testimony has been generally admissible in Illinois courts for decades." *Robinson*, *Rodriguez*, and *Fisher*. Yet, the prior judge ignored Illinois precedent and found that "what's generally accepted is not what State Appellate Courts have decided they are..." (1/11/23 Transcript, p. 18-19).

At the hearing, the State presented evidence that AFTE firearms identification evidence is generally accepted within the particular field in which it belongs. (3/1/22 Transcript, pp. 5 -6, 49, 89-90, 3/21/22 Transcript, p. 49). The prior judge apparently took issue with one of the State's witnesses, Mr. Weller, finding that he lacked credibility because he worked in the industry. Nowhere, however, does he articulate his own conclusions of the bias. Instead, he cut and pasted fourteen pages of the defense brief wherein they argue that the witness is biased. (2/28/23 Order, pp. 8-22). He also cited to the defense brief in his conclusion on this point as if it were evidence. (2/28/23 Order p. 34).

The prior judge also improperly relied on "Defense brief at 13 and – pages 13 through 26," as evidence that the "State failed to satisfy its burden and show consensus within the relevant scientific field." (1/11/23 Transcript, pp. 34, 35-36). In the written order, he cut and pasted pages 13-26 of Defendant's brief as evidence to support his conclusion that the State failed to establish the "general acceptability" of firearms identification evidence. (2/8/23 Order, p. 22). The prior

judge erred by relying on Defendant's post-hearing brief as substantive evidence (1/11/23 Transcript, pp. 55-56) as a lawyer's argument is not evidence.

Further evidence that the prior judge applied a misunderstanding of general acceptance is demonstrated by the following statements:

- "So I have to look at whether the definition of general acceptability is simply how many States go one way, how many States go another way, or whether there's something else to it other than just numerically looking at it and making a decision that Frye means that I can't decide anything. The jury has to decide it." (1/11/23 Transcript, p. 23).

- The test of whether, the reason for the hearing is to decide whether it's widely accepted or not. Widely accepted to this court has to have a broader definition than County jurisdictions that do it. Widely accepted has to consider due process. It also has to consider what civil courts are concerned with and don't need to be concerned with, and that's called burden shifting. (1/11/23 Transcript, p. 28).

- The other problem with the state of firearms identification evidence is that it creates an ethical dilemma for everybody involved in the process. (1/11/23 Transcript, p. 28).

As noted above, under *Frye*, the court inquires as to the general acceptance of a methodology, not the particular conclusion reached by an examiner or the application of the methodology in a particular case. *Luna*, at ¶ 50.

To further confuse matters, the prior judge inaccurately referred to Mr. Weller two separate times as the State's "sole live witness." (2/28/23 Order, pp. 8, 34). However, the State called a second witness at the hearing: Caryn Tucker. Ms. Tucker is firearms and tool mark examiner who has been working in the field since 1997, has a master's degree in forensic science, has been qualified to testify as an expert in this field approximately 75 times and teaches a masters-level course in this field. (3/31/22 Transcript, pp. 5-10). She is currently working as a supervisor and training coordinator in the Firearms Section of the Illinois State Police Crime Lab, the same lab in which the firearms in this case were analyzed. (3/31/22 Transcript, pp. 5-6). She was allowed to

testify, without objection, as an expert in this field at the hearing. (3/31/22 Transcript, p. 10). In the prior judge's ruling he found her to be credible (2/28/23 Order, p. 35), but somehow described her as a defense witness. What is never addressed in the order is the fact that Ms. Tucker, whom the prior judge found to be credible, testified unequivocally that the methodology that was used in this case is commonly accepted in the scientific community. (3/31/22 Transcript, p. 49)

2. Other Jurisdictions

Firearm and toolmark identification has been "almost uniformly accepted by federal courts." *United States v. Brown*, 973 F.3d 667, 704 (7th Cir. 2020). Defendant suggests that other courts in other jurisdictions have completely barred firearms evidence. Yet, in most of the cases he cites, the courts allowed the firearms testimony but limited the opinion testimony to something less than a scientific certainty. For example, Defendant argues that "five judges have concluded that firearms examinations methods fail under a general acceptance analysis." (Defendant's Response to People's Motion to Reconsider, p. 8 and footnote 32). That is not, however, what the cases he cites held.

Rather, the cases Defendant relies upon, like the out of state cases considered in *Rodriguez,* raised concerns about the reliability of firearms evidence, but "nonetheless held the methodology to be sufficiently reliable to be admitted, at least in some qualified form." *Id*, at ¶ 59. For instance, in *U.S v. Tibbs*, 2016 CF 1-19431 (D.C. Super. Ct., 2019), the testimony was admitted but the expert was permitted to testify only that the source could not be excluded. While *U.S. v. Adams*, 444 F.Supp.3d 1248 (D. OR, 2020), the court found the evidence not generally accepted, but limited his finding to the facts of the case, stating that his ruling was not "an indictment of forensic evidence or toolmark comparison writ [sic] large." In *U.S. v. Shipp*, 422 F. Supp. 3d 762 (ED NY, 2019), the court found the firearms identification testimony inadmissible, not on general

acceptance grounds, but because two examiners reached different conclusions regarding the same firearm.

Moreover, there have been a number of recent cases that have refused to follow the findings of the cases cited by the defense. See *United States v. Chavez*, 2021 U.S. Dist. LEXIS 237830, at 15-16 (N.D. Cal. Dec. 13, 2021), *United States v. Rhodes*, 2023 U.S. Dist. LEXIS 7528. In fact, a federal district court recently conducted a review of other jurisdictions and concluded "that the majority of courts" have found AFTE method enjoys general acceptance in the relevant scientific community. *U.S. v. Graham*, 4:23-cr-00006 (WD VA. 2024), *32. See also, *United States v. Hunt*, 464 F.Supp. 3d 1252, 1259 (WD Okla. 2020) aff'd 63 F.4th 1229 (10th Cir. 2023) (the AFTE method easily satisfies the general acceptance factor in *Daubert*); *U.S. v. Harris*, 502 F.Supp.3d 28, 42 (DC Dist. Ct. 2020) (toolmark identification enjoys widespread acceptance around the world); *U.S v. Ashburn* 88 F.Supp.3d 239, 246 (ED NY 2015) (AFTE methodology is undoubtedly widespread among the relevant community, as it is "the field's established standard").

B. The Relevant Scientific Community

The relevant scientific field includes forensic practitioners as well as those with a scientific background and training sufficient to allow them to comprehend and understand and form a judgment about a methodology. *Luna*, at ¶ 76. Consistent with *Luna*, the State presented evidence that the relevant scientific community included: (1) firearm and tool mark examiners, (2) forensic scientists who have expertise and knowledge about the overall process of evidence examination and appropriate forensic conclusions (this includes quality assurance and lab managers who oversee forensic science lab sections), and (3) research scientists who have actually done research in the field. (3/1/22 Transcript, pp. 88-89).

Nevertheless, the prior judge, citing the Defendant's Brief as support, rejected the State's evidence simply because the witnesses also work, and make a living, in the relevant field. In so doing, he inaccurately defined the relevant scientific accordingly:

> "[W]hile firearms examiners may constitute *part* of the relevant scientific community, the general acceptance standard requires more than their self-interested thumbs up: it 'requires the testimony of *impartial* experts or scientists' who have been convinced by practitioners to also believe in a method's legitimacy."

(2/8/23 Order, p. 9) He further stated that "...reliance on scientific practice, and the opinions of law enforcement agencies cannot carry the day under *Frye*." (1/11/23 Transcript, p. 35). No legal authority justifies this definition. Indeed, the relevant scientific community may be made up made up solely of forensic scientists. See, *People v. Eyler*, 133 Ill.2d 173, 215 (1989) (the relevant scientific community properly limited to forensic scientists) and *People v. Thomas*, 137 Ill.2d 500, 518 (1990) (relevant scientific community is the community of forensic scientists).

It appears that the prior judge judge relied on *Michigan v. Young* 391 N.W.2d 270 (1986) in support of his ruling that the testimony from witnesses working in the relevant field cannot satisfy the State's burden in a *Frye* hearing. (2/28/23 Order, p. 10). In this portion of the order (part of the fourteen pages of direct cut-and-paste from Defendant's brief) the court apparently adopted Defendant's argument and reliance on *Young* and held that allowing witnesses "whose reputation and livelihood depends on use of the new technique" would "undercut the scrutiny of the marketplace of general scientific opinion." (2/28/23 Order, p. 10).

However, the *Young* decision, a sharply divided 1986 Michigan Supreme Court case, has been criticized since its inception and is also distinguishable in important ways from the case at bar. Unlike here, the *Young* court's ruling was based on a completely new, novel, untested scientific application of electrophoresis of bloodstains. Unlike here, the scientific community at issue in the *Young* case had not reached a conclusion about its reliability.

Moreover, multiple courts have refused to follow the analysis in *Young*, finding the ruling to be flawed. See *State v. Fenney*, 448 N.W.2d 54, 60 (Minn. 1989), which held "The *Young* decision is flawed from the Minnesota perspective because of the court's requirement that witnesses qualified to testify as members of the relevant scientific community must be 'disinterested and impartial' experts whose 'livelihood [is] not intimately connected with the new technique.'

Most importantly, *Young's* analysis has already been rejected by the Illinois Supreme Court. *People v. Eyler*, 133 Ill. 2d 173 (1989). In *Eyler*, the Illinois Supreme Court rejected the analysis in *Young*, instead finding that "the relevant scientific community is forensic science and that testimony from experts within that community is sufficient to discharge the prosecution's burden." *Id.* at 216.

Recently, a federal district court addressed whether the relevant community of ballistics examiners may be limited to those whose professional standing and financial livelihoods depend on the discipline. *United States v. Graham,* 4:23-cr-00006 (WD Va., 2024). The court found that the relevant community is indeed made up of firearm-toolmark examiners. *Graham* reasoned that the "overall scientific community" lacked the intellectual rigor that characterizes the practice of an expert in the field. *Graham*, at 30.

While experts outside the forensic field are certainly welcome and may add valuable perspective in a *Frye* hearing, there is no basis in law to find that the court may not rely solely on the testimony of witnesses in the relevant forensic field. The prior court's ruling otherwise was erroneous as a matter of law.

C. Criticisms of the AFTE Methodology

The prior judge found firearms identification inadmissible under *Frye* primarily because of the criticisms of the methodology. As discussed above, the prior judge erred in granting a *Frye* hearing based on criticisms of firearms identification evidence and concluding that the criticism amounted a lack of general acceptance. (See, §II A, *supra*). Here again, this decision was based on a misunderstanding of the law.

Frye's "general acceptance" standard "tolerates criticism of a methodology from experts within the scientific community: '[g]eneral acceptance of methodologies does not mean 'universal' acceptance of methodologies.' [citations omitted]." *Luna*, at ¶ 80. A criticism of methodology "does not in itself establish a lack of general acceptance among the relevant scientific community or otherwise undermine the uniform body of precedent rejecting admissibility challenges..." *Id.* at ¶ 74. Despite criticism of the methodology, firearms identification evidence is generally accepted. *Robinson*, at ¶ 90; *Rodriguez*, at ¶ 62. The various critiques highlighted by Defendant go to the weight of the evidence, not to its admissibility. *See*, *Luna,* at ¶ 70.

This court acknowledges that there are criticisms of the methodology. However, "[u]nder Illinois law, the forum for these criticisms—directed at the examiner's stated conclusion regarding what his testing revealed—is trial, not a *Frye* admissibility challenge. *Donaldson v. Central Illinois Public Service Co.,* 199 Ill. 2d 63, 88 (2002), abrogated on other grounds by *People v. Simons*, 213 Ill. 2d 523, 530 (2004). Before the jury, the examining attorney "may expose shaky but admissible evidence by vigorous cross-examination or the presentation of contrary evidence." *Donaldson*, 199 Ill. 2d at 81; *Luna*, at ¶ 71. The court's role is to evaluate the underlying methodology used to generate the conclusion, not the conclusion reached by the examiner: "If the underlying method used to generate an expert's opinion [is] reasonably relied upon by the experts

in the field, the fact finder may consider the opinion—despite the novelty of the conclusion rendered by the expert." *Donaldson*, 199 Ill. 2d at 77; *McKown I*, 226 Ill. 2d at 255. Similarly, "[q]uestions concerning underlying data, and an expert's *application* of generally accepted techniques, go to the weight of the evidence, rather than its admissibility." (Emphasis in original.) *Luna*, at ¶ 70 quoting *Donaldson*, 199 Ill. 2d at 81.

Based on these principles, *Robinson* and *Rodriguez* addressed essentially the same criticisms presented in the case at bar and concluded that the critiques were insufficient to conclude that the methodology is no longer generally accepted. *Robinson*, at ¶ 90. *Rodriguez*, at ¶ 62. Not only did *Robinson* and *Rodriguez* consider many of the same arguments, but they also considered some of the same evidence presented by Defendant Winfield. For example, the prior judge relied heavily on the 2009 NCR report and 2016 report from the President's Council of Advisors on Science and Technology ("2016 PCAST"). (1/11/23 Transcript, pp. 36-37).

The 2009 NCR report criticizes firearm identification evidence because it has not been exposed to stringent scientific scrutiny; involves subjective qualitative judgments; is based on unarticulated standards; and lacks statistical foundation for estimation of error rates. *Robinson* found that federal and state courts considering the NCR Report and other materials nevertheless found firearm identification evidence generally accepted and declined to exclude the evidence. *Robinson,* at ¶ 90. Similarly, *Rodriguez* held that the NCR report does not so undermine the reliability of ballistics evidence that it has ceased to be generally accepted in the scientific community. *Rodriguez*, at ¶ 62. In 2023, a federal court in *United States v. Blackman*, 18CR00728, *12 (ND Ill. 2023), held that NCR Reports were not new as the courts have considered it "for well over a decade, and none has categorically excluded this type of testimony based upon these reports." *Id.*

Courts have also considered and rejected the 2016 PCAST report as a basis for excluding firearms examination. The PCAST Report has been criticized for its failure to include firearm and toolmark examiners or researchers in the field. *United States v. Harris*, 502 F. Supp.3d 28, 42-43 (D.C. 11/4/22). As recent as February 20, 2024, a federal district court found that since the 2016 PCAST's publication, no court has entirely excluded firearm identification evidence but have imposed limits on expert testimony. See, *United States v. Graham*, 4:23-cr-00006, *11-12. (WD Va., 2/20/24).

Accordingly, this court finds that criticisms of the methodology presented here have been considered and rejected by *Robinson* and *Rodriguez* (as well as other courts) and do not undermine the uniform judicial conclusion that firearms identification is generally accepted in the scientific community. These criticisms go to the weight of the evidence, not its admissibility.

D. Reliance on the Argument of Wrongful Convictions

The prior judge was particularly persuaded by Defendant's argument that the expert firearms evidence formed the basis for wrongful convictions, noting in his order:

> The areas of firearms identification evidence have been at the root of a disproportionate number of wrongful convictions which speak as a cry against any notion of general acceptability based upon *Frye* analysis. If such evidence is admitted in the instant matter, the process of penciling in Defendant Winfield's name should be made.

(Order 2/28/22, p. 36). While the court does not cite to any support for this conclusion, it apparently relies on the defense brief, which included summaries of various cases and articles critical of the use of forensic science. (Defense Post-Frye/403 Brief, pp. 1-3, 77-78). The court's conclusion is erroneous as it is unsupported by the brief or the evidence presented.

First, the finding that firearms evidence has been at the 'root of a disproportionate number of wrongful convictions' is not supported by the evidence, nor even the proffers in Defendant's

brief. While there was no evidence presented regarding the specifics of these cases it is clear from the summaries alone that most involved cases where other forensic evidence, not firearms evidence, was admitted. (See Defense Post-Frye/403 Hearing Brief, pp 77-79). They include cases involving comparisons of bite marks, DNA, lip print, and fingerprints. (See Defense Post-Frye/403 Hearing Brief, pp 77-79). There were also a number of articles cited that criticized forensic science as a whole, as well as various forensic methods in particular. (See Defense Post-Frye/403 Hearing Brief, p. 77-79). Nowhere in the summaries is it even alleged that firearms evidence is responsible for a "disproportionate number of wrongful convictions."

Moreover, this argument, and the court's reliance on it, represent a further misunderstanding of *Frye*. The one Illinois case on which the defense relies, and indeed is included in multiple filings, including in some detail the opening of their Post-Motion Brief, involved the conviction of a man named Patrick Pursley in 1994. (See Defense Post-Frye/403 Hearing Brief, ¶¶ 1-5 and Defense Reply to the State's Response to Defense Motion to Exclude, filed 4/13/21 at ¶ 2, footnote 4) Because of the court's reliance on the defense summary and the attendant argument that this case supports a finding that the methodology involved in firearms evidence is not valid under *Frye*, this Court will review the details of that case as gleaned from the unpublished court opinion.

In that case, the defendant was convicted of murder based in part firearms evidence where the examiner conducted a comparison in 1993 and testified at trial that the recovered bullets and casings were fired from the same gun "to the exclusion of all other weapons." *People v. Pursley*, 2018 IL App (2d) 170227-U, ¶ 33. A defense expert disagreed in part, opining that recovered items were fired from the same type of weapon but that the results of a match to that particular firearm were inconclusive. *Id.* The defendant was convicted.

The defense filed a post-conviction petition[3], which was ultimately advanced to a third stage hearing. At that hearing, the defense called two firearms examiners who testified to the methods that they used to make their comparisons, and to the fact that the microscopes that were used at the time they performed their comparisons were more powerful than those used during the trial some 12 years prior. Two defense experts opined that, with the help of the stronger microscopes, they were able to conclude the recovered casings and bullets were excluded as having been fired from the recovered firearm. Three State experts disagreed. The trial court granted a new trial.

A careful review of the history of the *Pursley* cases actually supports a finding that firearm forensic evidence is generally accepted in the scientific community. While the defendant there was convicted in part based on firearms evidence, he was also granted a new trial based on testimony from experts in the same field, using the same methodology, who reached a different conclusion. The fact that experts using the same methodology disagree with each other regarding the results is not a bases to exclude the evidence pursuant to *Frye*.

This is precisely and properly the purpose of a trial. Before the trier of fact, the examining attorney "may expose shaky but admissible evidence by vigorous cross-examination or the presentation of contrary evidence." *Donaldson*, 199 Ill. 2d at 81; *Luna*, at ¶ 71. Similarly, "[q]uestions concerning underlying data, and an expert's *application* of generally accepted techniques, go to the weight of the evidence, rather than its admissibility." (Emphasis in original.) *Luna*, at ¶ 70 quoting *Donaldson*, 199 Ill. 2d at 81.

---

[3] The post-conviction petition requested pursuant to 725 ILCS 5/116-3, that the firearm be admitted in the Integrated Ballistics Identification System (IBIS). Law enforcement agencies at that time used IBIS "to compare digital images of markings recovered from a crime scene against earlier entries in the IBIS system in a matter of hours." *Pursley* at 33. The IBIS system could produce matches between firearms, and a "high-confidence" match would lead a firearm examiner to confirm the match. *Id.* This system allowed law enforcement to link separate crime scene investigations where previously there was no known connection but still required an expert firearms examiner to confirm the results.

E. Improper exclusion of Physical Firearms Evidence under *Frye*

For the reasons stated above, the prior judge erred in excluding firearms identification testimony under *Frye*. The prior judge further erred by excluding almost all of the physical firearms evidence *sua sponte*. [4] The *Frye* standard applies only to "scientific" evidence, which is evidence that is "the product of scientific tests or studies." *People v. McKown I*, at ¶ 254. Here, that would mean the testimony of the expert witness regarding the results of his tests. However, scientific tests or studies are not required to determine it an object is a bullet, casing or gun. Accordingly, the physical firearms evidence does not constitute scientific evidence and should not have been excluded under *Frye*.

IV. The Court Erroneously Barred Expert and Physical Evidence Pursuant to Rule 403

The prior judge also barred the firearms identification testimony and physical firearms evidence pursuant to Illinois Rules of Evidence 401, 402 and 403. He reasoned that the firearms expert would be introduced for a "nothing proposition." (2/8/23 Order, p. 32). Accordingly, its probative value is a "big zero." At bottom, the prior judge's decision to bar the evidence was premised on his finding that firearms identification evidence is "junk science" (2/8/23 Order, p. 33) in complete disregard for well-established Illinois law and cannot stand.

A. Applicable Law

A defendant's guilt must be based on relevant and competent evidence, "uninfluenced by bias or prejudice raised by irrelevant evidence." *People v. King*, 2020 IL 123926, ¶ 43. Generally, evidence is relevant and admissible if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ill. Rs. Evid. 401, 402; *People v. Gilker*, 2023 IL App (4th) 220914, ¶

[4] The court order excluded all of the firearms evidence with the exception of one of the two guns recovered. It is unclear why this distinction was made.

64. Even relevant evidence may be excluded, however, "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Ill. R. Evid. 403; *Gilker,* at ¶ 64. The question, therefore, is not whether relevant evidence is more prejudicial than probative; instead, relevant evidence is inadmissible only if the prejudicial effect of admitting that evidence *substantially outweighs* any probative value. *Gilker,* at ¶ 64; *People v. Hanson*, 238 Ill. 2d, 74, 101 (2010). "Prejudicial effect" in this context means that the evidence in question will somehow cast a negative light upon a defendant for reasons that have nothing to do with the case on trial. *Gilker*, at ¶ 64. Unfair prejudice occurs when a "jury would be deciding the case on an improper basis, such as sympathy, hatred, contempt, or horror." *Id.*

B. Firearms Identification Testimony is Relevant and Admissible

Firearms identification testimony is generally accepted and admissible in Illinois. *Robinson* and *Rodriguez*. The prior judge ignored this precedent to conclude that such expert testimony is unreliable and based on junk science. Moreover, the prior judge erred in finding the firearms expert could conclude only that the "'bullets and cartridges cannot be eliminated from not being fired by these weapons' (or words to that effect)." (2/8/23 Order, p. 32). In support of this limit on the expert's testimony, the prior judge cites the Defendant's Motion to Exclude, page 65. Defendant's motion, however, offers no legal authority for limiting the opinion testimony in this manner – and none exists. For example:

- In *People v. Robinson*, the trial court denied the defendant's request for a *Frye* hearing but granted his motion to preclude the firearms examiners from testifying that their conclusions were within "a reasonable degree of scientific certainty." ¶¶ 7, 91.

- In *People v. Bradford*, 2019 IL App (4th) 170148, ¶ 9, the firearm examiner properly testified that it was her professional opinion that the fired bullets submitted as evidence were fired by the firearm seized from the defendant's residence.

- In *People v. Marchan*, 2019 IL App (1st) 160603-U, ¶ 5, (cited only for persuasive purposes), the trial court denied the defendant's request for a *Frye* hearing but ruled that the firearm expert could not opine that her conclusions were based on "a reasonable degree of scientific certainty." Instead, the expert could only frame her conclusions that the in light of her training, experience, background, and based upon her comparisons. The appellate court affirmed the expert's testimony that based upon her training and experience in methods commonly accepted in the forensic community for identification of firearms evidence, the two cartridge casings came from the defendant's rifle – a conclusion verified by another analyst.

- In *People v. Dupree*, 2014 IL App (1st) 121179-U, ¶ 35 (cited only for persuasive purposes) the trial court denied a *Frye* hearing. The experts testified that their conclusions were subjective opinions based on their comparisons of the characteristics of the bullets and fragments. Neither testified that their opinions were scientifically certain, and one expert specifically testified that he could not attach any type of probability to his identifications.

C. Physical Firearms Evidence is Relevant and Admissible

Based on a misunderstanding of the permissible scope of the expert's testimony, the prior judge *sua sponte* excluded physical firearms evidence. He concluded that "as a matter of law" the admission of "scary weapons, spent bullets, and death pictures without even a minimal connection would create an unfairly prejudicial effect that could lead to yet another wrongful conviction." (2/8/23 Order, p. 33). Defendant had not challenged the relevancy of this evidence and, as such, the State had no opportunity to be heard on the issue prior to raising the issue in its motion to reconsider.

This court has considered the State's offers of proof regarding the relevance of the physical firearms evidence. (See, State's Motion to Reconsider Exclusion of Firearms Identification Testimony, ¶¶ 4-6). Notably, Defendant does not argue in any of his submissions that the physical firearms evidence is inadmissible. This court finds that the physical firearms evidence is relevant to the crime charged. (See, *People v. Robinson*, 254 Ill. App. 3d. 906, 913 (1st Dist. 1993) (gun is relevant to the offense of murder). Any negative light cast upon Defendant is relevant and *not for reasons that have nothing to do with the case*. Illinois law permits the firearms examiner to offer

an opinion but precludes testimony that the opinion is based on a reasonable degree of scientific certainty. Subject to cross-examination, whether the State can sufficiently connect the recovered evidence to Defendant beyond a reasonable doubt is a question of fact for the trier of fact to decide at the trial.

Conclusion

For the reasons stated herein, this court grants the State's motion to reconsider and finds as follows:

1. The September 28, 2021 order granting a *Frye* hearing is vacated.

2. The January 11, 2023 oral ruling and the February 8, 2023 written order granting Defendant's motion to exclude are vacated.

3. Firearms identification evidence is generally accepted, admissible and relevant. The State is permitted to present expert firearms identification testimony. The expert(s) are precluded from concluding that their opinions are based on "a reasonable degree of scientific certainty."

4. Firearms physical evidence (fired bullets and cartridge casings, .45 caliber semiautomatic pistol and 9 mm caliber semiautomatic pistol) are admissible and relevant, subject to the proper foundation being made.

ENTERED: Jennifer Coleman 2341
Hon. Jennifer Coleman
Circuit Court of Cook County
Criminal Division

DATED: 12/18/24