

AN UPDATE ON THE CASELAW ON FIREARMS AND TOOLMARK
IDENTIFICATION
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United States v. Hicks, 389 F.3d 514, 525-26 (5th Cir. 2004) (Fifth Circuit uncritically accepts the identification of a suspect gun as the one that fired various cartridge cases, but implicitly endorses the conclusion, in *Sexton v. State*, 93 SW3d 96 (Tex. Ct. Crim. App. 2002), that identifications made in the absence of a gun are unreliable and inadmissible).

United States v. Green, 405 F. Supp. 2d 104 (D. Mass. 2005) (Judge Gertner decision excluding testimony identifying a particular gun as the one that fired various cartridge cases, but allowing prosecution experts to testify about similarities they observed between toolmarks. "I reluctantly come to the above conclusion because of my confidence that any other decision will be rejected by appellate courts 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.").

United States v. Monteiro, 407 F. Supp. 2d 351(D.Mass. 2006) (Judge Saris opinion reasoning that "[b]ecause an examiner's bottom line opinion as to an identification is largely a subjective one, there is no reliable statistical or scientific methodology which will currently permit the expert to testify that it is a 'match' to an absolute certainty, or to an arbitrary degree of statistical certainty," but holding that firearms and toolmark examiners "may give an opinion of a match to a reasonable degree of certainty in the ballistics field." The judge then reasoned that the task under *Daubert-Kumho* was to "evaluate the reliability of not only the general field of toolmark identification but also the application" of the principles of the field by the particular expert in the case, and excluded the particular testimony in the case for failing to comport with the standards of documentation and peer review of the field of firearms and toolmark identification).

Commonwealth of Massachusetts v. Meeks and Warner, NO. CRIM.A. 2002-10961, CRIM.A. 2003-10575, 2006 WL 2819423 (Mass.Super. Sep 28, 2006) (admitting firearms and toolmark identification testimony, but recognizing the need for documentation and peer review and that definite identifications cannot be made in the absence of a gun).

United States v. Diaz, Slip Copy, NO. CR 05-00167 WHA, 2007 WL 485967 (N.D.Cal. Feb 12, 2007) (J. Alsup opinion precluding testimony that "identifications can be made to the exclusion of all other firearms in the world," but following *Monteiro* in allowing testimony that identifications have been made to "a reasonable degree of certainty in the ballistics field." Court ignores J.

Saris's and Gertner's critiques of firearms and toolmark identification, and cites *Green* and *Monteiro* as evidence that no court has refused to admit firearms identifications. *Daubert* held to be satisfied despite "[t]he few critiques – such as the impossibility of calculating a true error rate and the fact that there can be no statistical, objective verification of an examiner's conclusions.")

United States v. Williams, 506 F.3d 151 (2d Cir. 2007) (holding that the district court's refusal to grant a hearing before admitting firearms and toolmark identification testimony was an abuse of discretion, but stating that "[w]e do not wish this opinion to be taken as saying that any proffered ballistic expert should be routinely admitted" and that "expert testimony long assumed reliable before [Rule 702](#) must nonetheless be subject to the careful examination that [Daubert](#) and [Kumho Tire](#) require").