

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. JAMES HOLMES, Defendant	JUN - 3 2015 σ COURT USE ONLY σ
DOUGLAS K. WILSON, Colorado State Public Defender Daniel King (No. 26129) Tamara A. Brady (No. 20728) Chief Trial Deputy State Public Defenders 1300 Broadway, Suite 400 Denver, Colorado 80203 Phone (303) 764-1400 Fax (303) 764-1478 E-mail: state.pubdef@coloradodefenders.us	Case No. 12CR1522 Redacted Division 26
MOTION TO PRECLUDE EXPERT OPINION TESTIMONY OF BOMB TECHNICIANS AND/OR ANY OTHER EXPLOSIVES EXPERTS, PURSUANT TO CRE 702 AND 403, DUE PROCESS, AND PEOPLE V. SHRECK, 22 P.3D 68 (COLO. 2001) [D-109]	

CERTIFICATE OF CONFERRAL

The District Attorney states that they object to the motion, and that they will file a response.

Mr. Holmes moves this Court for a hearing on, and/or an order precluding, expert opinion testimony concerning bombs and explosives, and states:

1. The prosecution has endorsed witness who are bomb technicians or others who may claim to potentially have specialized or technical knowledge and experience regarding bombs, explosives or incendiary devices. Mr. Holmes objects to the admission of any and all expert opinion testimony from such witnesses that the prosecution intends to introduce at trial. Mr. Holmes objects under CRE 702, 403, and *People v. Shreck*, 22 P.3d 68 (Colo. 2001) *Kumho Tire. Co. v. Carmichael*, 526 U.S. 137 (1995); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); and the state and federal due process clauses. U.S. Const. amends. V, XIV; Colo. Const. art. II, sec. 25.

General Legal Principles

2. Admissibility of expert testimony is governed by CRE 403, 702 and other pertinent evidentiary rules. The reliability of expert testimony (or lack thereof) also implicates due process. U.S. Const. amends. V, XIV; Colo. Const. art. II, sec. 25. The Colorado Supreme

Court has explained how a trial court must evaluate proposed expert testimony under CRE 702 and CRE 403:

We hold that CRE 702, rather than [*Frye v. United States*, 293 F. 1013(D.C. Cir. 1923)] is the appropriate standard for determining the admissibility of scientific evidence in Colorado. We hold that under this standard, the focus of a trial court's inquiry should be on whether the scientific evidence is reasonably reliable and whether it will assist the trier of fact, and that such an inquiry requires a determination as to (1) the reliability of the scientific principles, (2) the qualifications of the witness, and (3) the usefulness of the testimony to the jury. We also hold that when a trial court applies CRE 702 to determine the reliability of scientific evidence, its inquiry should be broad in nature and consider the totality of the circumstances of each specific case. In doing so, a trial court may consider a wide range of factors pertinent to the case at bar. The factors mentioned in [*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)] and by other courts may or may not be pertinent, and thus are not necessary to every CRE 702 inquiry. In light of this liberal standard, a trial court should also apply its discretionary authority under CRE 403 to ensure that the probative value of the evidence is not substantially outweighed by unfair prejudice. Finally, we hold that under CRE 702, a trial court must issue specific findings as it applies the CRE 702 and 403 analyses.

People v. Shreck, 22 P.3d 68, 74 (Colo. 2001).

3. Courts have a responsibility to ensure that evidence admitted at trial is sufficiently reliable so that it may be of use to the finder of fact who will draw the ultimate conclusions of guilt or innocence. That concern implicates principles of constitutional due process. "Reliability [is] the linchpin in determining admissibility" of evidence under a standard of fairness that is required by the Due Process Clause of the Fourteenth Amendment. *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253, 53 L. Ed. 2d 140, 154 (1977); U.S. Const. amend. XIV; Colo. Const. art. II § 25.

4. In addition, Mr. Holmes asserts that in assessing this evidence, the Court should consider the heightened reliability required in this case under the Eighth Amendment and section II, article 20 of the Colorado Constitution. *See, e.g., Beck v. Alabama*, 447 U.S. 625, 637 (1980) (risk of unreliable conviction "cannot be tolerated" in case where defendant's life is at stake); *Herrera v. Collins*, 506 U.S. 390, 434 (1993) ("The decision in *Beck* establishes that, at least in capital cases, the Eighth Amendment requires more than reliability in sentencing. It also mandates a reliable determination of guilt."); *People v. Young*, 814 P.2d 834, 846 (Colo. 1991); *People v. Rodriguez*, 786 P.2d 1079 (Colo. 1989).

5. Further, where there is a question regarding the reliability of certain types of expert evidence, not just scientific, the courts need to determine outside the presence of the jury

whether the evidence is unreliable and should not be presented to the jury. *See e.g. People v. Shreck*, 22 P.3d 68 (Colo. 2001) (“The focus of a Rule 702 inquiry is whether the scientific evidence proffered is both reliable and relevant”); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 142 (1999).

[T]he United States Supreme Court expanded *Daubert's* [*v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993)] general holding concerning the trial judge's gatekeeping function to testimony based not only on scientific knowledge, but also to testimony based on technical and "other specialized" knowledge. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 142 (1999).

People v. Shreck, 22 P.3d 68, 74 (Colo. 2001).

6. Under *Shreck*, *supra*, and CRE 702 where scientific, technical, or other specialized expert testimony and evidence is involved, a “trial court’s CRE 702 determination must be based upon specific findings on the record as to the helpfulness and reliability of the evidence proffered.” *Id.* at 78. The trial court must also make “specific findings” under CRE 403 as to whether the probative value of the proffered evidence is substantially outweighed by its prejudicial effect. *Id.* *Shreck* clearly requires the trial courts, before admission of expert testimony, to make “specific findings as it applies the CRE 702 and 403 analyses.” *Id.* at 70.

7. In *Goebel v. Denver Rio Grande Western Railroad Co.*, 215 F.3d 1083 (10th Cir. 2000) the district court denied the defendant’s request for a pretrial hearing under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), challenging the testimony of a medical doctor who said that the plaintiff’s brain damage was caused by exposure to diesel fumes. When the defendant objected to the testimony during trial, the district court said only “there is sufficient foundation here for the jury to hear this testimony.” *Goebel, supra*, at 1087.

8. On appeal, the Tenth Circuit reversed the case, finding that the district court failed to exercise its gatekeeping duties. The court distinguished between how the district court conducts its analysis under Rules 702 and 403, reviewed on appeal for abuse of discretion, and whether the district court fulfilled its gatekeeping function, reviewed on appeal de novo: “[w]hile the district court has discretion in the manner in which it conducts its *Daubert* analysis, there is no discretion regarding the actual performance of the gatekeeper function.” *Id.* Since the district court had never stated its reason for admitting the expert’s testimony, it could not be examined on appeal. The court held that “a district court, when faced with a party’s objection, must adequately demonstrate by specific findings on the record that it has performed its duty as gatekeeper.” *Id.* at 1088.

Bomb and Explosives Testimony

9. At the preliminary hearing in this case, Special Agent Gumbinner of the Federal Bureau of Investigation testified as a bomb technician. He was asked several times by the prosecution for his opinions based upon his “experience as a bomb technician” regarding things such as the results of certain chemical mixtures, the nature of certain devices as bombs,

explosives, or incendiary devices, the mechanics of certain aspects of fuses and explosives, his opinion as to what would or could have happened based upon the items located in Mr. Holmes' apartment and certain reactions or combinations of chemicals and materials, describing properties and reactions of certain substances, etc. Mr. Holmes expects the prosecution to offer similar testimony at trial from Agent Gumbinner and possibly others.

10. Mr. Holmes asserts that such scientific, technical and specialized techniques, and any opinions derived therefrom, must be determined to be reliable and admissible pursuant to *Shreck* and CRE 702 and 403 prior to any testimony related to such techniques and resulting opinions being presented to the jury. Admission of unreliable evidence and opinion testimony would not only violate the rules of evidence but also Mr. Holmes' constitutional right to due process of law under the state and federal constitutions. Further, this Court must determine whether any opinions derived from such techniques – if those techniques are determined to be reliable – are actually helpful to the jury under CRE 702 and admissible pursuant to CRE 403. Without such determinations, this Court should enter an order precluding the admission of any such expert testimony at trial.

11. In addition to proving reliability generally, the prosecution must establish that the actual procedures used are reliable *and* that the “experts” are qualified to render an expert opinion. This depends upon whether the proposed expert utilized procedures recognized as reliable in the field, and whether relevant personnel are properly trained and tested.

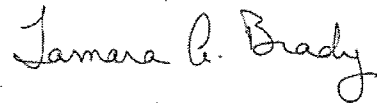
Request for a Hearing

12. Mr. Holmes moves for an evidentiary hearing on this motion.

Mr. Holmes files this motion, and makes all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, on the following grounds and authorities: the Due Process Clause, the Right to a Fair Trial by an Impartial Jury, the Rights to Counsel, Equal Protection, Confrontation, and Compulsory Process, the Rights to Remain Silent and to Appeal, and the Right to be Free from Cruel and Unusual Punishment, pursuant to the Federal and Colorado Constitutions generally, and specifically, the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitutions, and Article II, sections 3, 6, 7, 10, 11, 16, 18, 20, 23, 25 and 28 of the Colorado Constitution.



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Dated: June 3, 2013

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<p align="center">ORDER RE: MOTION TO PRECLUDE EXPERT OPINION TESTIMONY OF BOMB TECHNICIANS AND/OR ANY OTHER EXPLOSIVES EXPERTS, PURSUANT TO CRE 702 AND 403, DUE PROCESS, AND PEOPLE V. SHRECK, 22 P.3D 68 (COLO. 2001) [D-109]</p>	

Defendant's motion is hereby GRANTED _____ DENIED _____.

BY THE COURT:

_____ JUDGE

_____ Dated

I hereby certify that on June 3rd, 2013, I

mailed, via the United States Mail,

faxed, or

hand-delivered

a true and correct copy of the above and foregoing document to:

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Nava Lubatkin