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| DISTRICT COURT, LA PLATA COUNTY, COLORADO Court Address: 1060 East 2nd Avenue, Room 106, Durango, CO, 81301-5157 | | DATE FILED: NOVEMBER 20, 2018 |
| The People of the State of Colorado, Plaintiff, v. MARK ALLEN REDWINE, Defendant. | | Case Number: 17CR343 Division: 1 |
| MOTION OF THE INNOCENCE PROJECT FOR LEAVE TO FILE <i>AMICUS CURIAE</i> BRIEF IN SUPPORT OF DEFENDANT | | |

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*Not admitted in this Court

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The Innocence Project, Inc., by and through its counsel, respectfully moves this Court for leave to file an *amicus curiae* brief in the above-captioned matter on behalf of Defendant Mark Redwine, a copy of which is attached as Exhibit A. Both the federal and Colorado rules of criminal procedure are silent on the filing of *amicus* briefs at the trial court level. *See generally* Fed. R. Crim. P.; Colo. Crim. P. Nevertheless, Colorado's federal and state district courts have discretion to permit *amicus* briefs, and have a longstanding practice of permitting *amici* to file such briefs. *See* Stephen Masciocchi, *Overuse, Underuse of Amicus Briefs*, Law Week Colorado, Vol. 15, No. 23 (June 5, 2017). In addition, federal district court judges in Colorado have solicited *amicus* participation in cases involving novel questions of law or matters of significant public import. *See id.* Accordingly, the Innocence Project believes that the evidentiary issues implicated in this case concerning cadaver dog evidence raise important and relatively novel questions of law in the State of Colorado. *See id.* In support of this motion, the Innocence Project states the following:

1. The Innocence Project, Inc. (the "Innocence Project") is a national litigation and public-policy organization dedicated to exonerating wrongfully convicted persons through DNA testing, and improving the criminal justice system to prevent future miscarriages of justice. The Innocence Project has become keenly aware of the role that unreliable and improper scientific evidence has played in obtaining wrongful convictions. To date, 362 people in the United States have been exonerated by DNA testing, including 20 who served time on death row. The improper use of forensic science contributed to the original wrongful conviction in approximately half of these cases. Drawing on these lessons, the Innocence Project promotes study and reform designed to enhance the truth-seeking function of the criminal justice system and ensure that future wrongful convictions are prevented.

2. The Innocence Project offers this brief to the Court because this case involves important issues concerning the admissibility and reliability of so-called “cadaver dog” evidence in criminal investigations and judicial proceedings. The admissibility and reliability of such evidence is directly relevant to the Innocence Project’s mission of preventing wrongful convictions and future injustices, and ensuring that criminal convictions do not rest upon the inaccurate use of scientific evidence. The risk of a wrongful conviction based upon unvalidated and/or scientifically unfounded forensic evidence is particularly acute where, as here, the “cadaver dog” evidence upon which the Prosecution relies has not been subjected to rigorous scientific testing, and has had its accuracy, fairness, and reliability seriously called into question by courts, as well as academics and others in the scientific community.

3. In addition, the Innocence Project is particularly concerned with the proper role of testimony involving specialized instruments and investigative methods in the judicial process. Where appropriately grounded in evidence-based science, or where the particular instruments and methods sought to be introduced have been proven reliable and trustworthy, such testimony has the powerful ability to aid in the truth-seeking function of the courts. Yet, where such testimony is not properly grounded on firm scientific evidence, or where investigative instruments and methods have not been tested, certified, or otherwise deemed reliable, but are presented at trial as unmitigated fact, the weight that such evidence has with a lay jury presents a substantial and unacceptable risk of wrongful conviction.

4. The cadaver dog evidence sought to be admitted in this case is seriously flawed in several critical ways that compel its exclusion. The Innocence Project does not doubt the ability of dogs to detect scents imperceptible to human beings. What never has been proven with any degree of scientific reliability, however, is the ability of a dog to detect the scent of a particular object at a

specific location days, weeks, or months after that object has been removed. Yet, that is precisely the nature of the evidence on which the State seeks to base its case against Mr. Redwine. Therefore, to continue its advocacy on behalf of important public policy issues in the area of wrongful convictions and reliable scientific methods in criminal cases, the Innocence Project, as *amicus curiae*, respectfully submits this brief to educate this Court regarding the limitations of canine-indicated scent evidence, generally, and the serious evidentiary issues surrounding the potential admission of cadaver dog evidence in this case.

5. In this case, the State of Colorado is attempting to link Mr. Redwine to the disappearance of his son, Dylan Redwine, by proving, through questionable and unreliable handler testimony, that several cadaver dogs “alerted” to the presence of remains in various locations days, weeks, or months after he disappeared, despite the fact that no remains were found in the locations where the dogs allegedly alerted. There is nothing in the record that reveals with any degree of reliability that the dogs *in this case* were capable of achieving such feats. Therefore, the Innocence Project urges this Court to suppress any and all cadaver dog evidence in this case.

6. Colorado courts have never considered the admission of cadaver dog evidence. The only Colorado case that has addressed dog-sniff evidence, generally, was *Brooks v. People*, 975 P.2d 1105 (Colo. 1999). *Cf. People v. Martinez*, 51 P.3d 1029, 1032 (Colo. App. 2001), *aff’d on other grounds*, 69 P.3d 1029 (Colo. 2003) (the Colorado Court of Appeals held that the trial court committed harmless error in admitting the dog scent evidence, but the Supreme Court never reached the dog evidence issue). *Brooks*, however, was decided nearly twenty years ago, and the canine-indicated scent evidence in that case differs markedly from the cadaver dog evidence implicated here.

7. This brief illustrates that in the two decades since *Brooks* was decided, there has been a growing consensus that cadaver dog evidence is highly susceptible to error. Indeed, courts have recognized that “[t]he infallible dog . . . is a creature of legal fiction” and “the dog that alerts hundreds of times will be wrong dozens of times.” *Illinois v. Caballes*, 543 U.S. 405, 411-12 (2005) (Souter, J., dissenting). Several states have also recognized the inherent unreliability of cadaver dog evidence and have categorically refused to admit such evidence in criminal trials. Additionally, researchers within the academic and scientific communities have questioned the reliability of cadaver dog evidence, particularly as it relates to the unconscious cuing of handlers.

8. Courts across the country, including in Colorado, have held canine-indicated scent evidence, even kinds more reliable than that at issue here, to increasingly high levels of scrutiny. Based on these cases, and on the scientific consensus described in *amici*’s proposed brief, for cadaver dog evidence to be admissible, the dogs must also be able to detect accurately the historical presence of human remains, and adequately communicate to their handlers what it is they are identifying. In this case, however, there is no evidence that would suggest that these dogs were specifically trained and qualified to reliably detect the past presence of human remains, where no remains were ever found, let alone sufficiently communicate precisely what it was that they were identifying days, weeks, and months after Mr. Redwine’s son went missing. Thus, this Court should exclude any and all cadaver dog evidence, including specifically any evidence purporting to place at any given scene the historical presence of human remains, where no human remains were ever located.

9. This brief will also demonstrate that the dogs’ alerts were not corroborated sufficiently by other evidence linking the dogs’ purported findings to the eventual discovery of the remains. Many courts have ruled that canine-indicated scent evidence (including specifically cadaver dog

evidence), standing alone, is insufficient, and therefore must be corroborated by other evidence supporting the inferences that a jury would draw from such evidence. In this case, the canine-indicated scent evidence has not been corroborated sufficiently because of the absence of physical evidence where the dogs alerted, which would otherwise indicate that remains were found in the places the dogs searched.

10. Scientific research has proven that detection dogs, generally, are prone to false alerts, even when such dogs possess the proper training and certification credentials. Here, the dogs not only lack the proper training and certification, but also falsely alerted on objects that did not contain any residual blood or decaying human biological material, and failed to alert on objects that were later identified to contain such material. Given the lack of proper training and certification credentials of the dogs and their handlers; the numerous missed and false alerts by the dogs; the inability of the dogs to distinguish among different types of biological material; and the inability of the dogs' handlers to tell with any degree of certainty what, if anything, caused the dogs to alert—or if the dogs even alerted in the first place—there is simply no way to discern whether the dogs' actions were deliberate or innocuous, or if the handlers have properly and accurately interpreted the dogs' purported signaling.

11. Lastly, even if this Court finds that the proffered canine-indicated scent evidence is admissible under CRE 702, subjecting Mr. Redwine's liberty to the caprices of dog scent evidence is not only dangerous, but also highly prejudicial, which further calls for its exclusion. Flawed forensic evidence is a threat to a fair criminal trial. Improperly admitted cadaver dog evidence, in particular, can threaten criminal trials because, as mentioned previously, courts and academics have recognized the limitations inherent in dog scent detection abilities, and the scientific community's overall knowledge about such abilities is sparse. Additionally, jurors often ascribe

undue weight to cadaver dog evidence when evaluating its credibility, sometimes unconsciously accepting its reliability. In this case, Mr. Redwine's life and liberty should be decided only on sound and trustworthy evidence; not the unvalidated and unreliable handler testimony that the State is proffering, particularly where, as here, such evidence is used as the crucial link between a defendant and the commission of a crime.

WHEREFORE, I respectfully request that this Court grant the Innocence Project leave to file a brief as *amicus curiae* in support of Defendant Mark Redwine.

Dated: November 20, 2018

Respectfully submitted,



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CERTIFICATE OF SERVICE

True and correct copies of this document were served on all parties of record on November 20th, 2018 by placing copies in the DA's office inbox and the Public Defender's inbox at the La Plata County Courthouse. X 