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 LA PLATA COUNTY, COLORADO

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DISTRICT COURT, LA PLATA COUNTY, COLORADO Court Address: 1060 E. Second Ave., Durango, CO 81301 Phone Number: (970) 247-2304	
Plaintiff: PEOPLE OF THE STATE OF COLORADO Defendant: MARK ALLEN REDWINE	▲ COURT USE ONLY ▲
Christian Champagne - District Attorney, #36833 Matthew Durkin, Special Deputy District Attorney, #28615 Fred Johnson, Special Deputy District Attorney, #42479 P.O. Drawer 3455, Durango, Colorado 81302 Phone Number: (970) 247-8850 Fax Number: (970) 259-0200	Case Number: 17 CR 343
PEOPLE'S SUPPLEMENTAL BRIEF RE: COLORADO SUPREME COURT CASE LAW ON CANINE EXPERTS (P-14) [PUBLIC ACCESS]	

NOW COME the People, by and through Christian Champagne, District Attorney, in the County of La Plata, respectfully request that the Court deny a "Shreck" hearing on canine experts and consider *Brooks v. People* as to whether a reliability hearing is necessary to determine the admissibility of the experts. As support therefore, the People state the following:

Background

1. On December 3, 2018 through December 8, 2018, motions hearings were held in this case.
2. The Court indicated that it would take under consideration whether it needed to order further hearings on the admissibility of the People's proposed canine experts in this case.
3. In the context of these motions and discussions, the Defendant attempted to characterize the evidence as scientific evidence, including mention of an unnamed zoologist expert witness, leading to references being made regarding a potential *Shreck* hearing. Further, in the Defendant's briefs objecting to the expert testimony, references were made to the factors from *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) being applied in the admissibility analysis.
4. What was not acknowledged by the Defendant with regard to the nature of a potential admissibility hearing was the fact that canine evidence has been expressly addressed by the

Colorado Supreme Court in unambiguous language and that there is binding precedent guiding the admissibility of canine evidence in Colorado. Rather than acknowledging that he is asking the Court to act in contradiction to the Colorado Supreme Court precedent, the Defendant asserts that canine expert testimony in the area of one specific scent is categorically different than canine expert testimony regarding a different scent.

5. The purpose of this brief is not to get into a lengthy argument over this issue. Instead, the People simply put forth actual quoted language of the Colorado Supreme Court which should not and cannot be ignored, as it is binding law.
6. The plain language of the Colorado Supreme Court as cited below and the logic therein makes it clear canine expert testimony as to any scent is not the type of science requiring an admissibility analysis under *Daubert*, *Frye*, *Shreck*, or any other case applicable to a scientific process or instrument; it is experience based, specialized knowledge type testimony subject to a reliability finding and C.R.E. 702 analysis.

Law

7. In *Brooks v. People*, 975 P.2d 1105 (Colo. 1999), the Colorado Supreme Court expressly rejected a scientific analysis for canine expert testimony under *Frye*:

Brooks characterizes the evidence at issue here as implicating the sort of “Frye science” that would justify the invocation of the “general acceptance” test. In this regard, he attempts to analogize a bloodhound to a polygraph machine or voiceprint analysis - insisting that, like these procedures, scent tracking involves the manipulation of physical evidence with a scientific device or process. Here, it is suggested that the evidence being manipulated consists of scent particles, and that the “scientific device” responsible for said manipulation is none other than Yogi the dog. We are not persuaded. Instead, we agree with the court of appeals that “[t]estimony describing the use of a dog to track an individual by scent, and demonstrating the accuracy of the track, does not involve seemingly infallible scientific devices, processes, or theories.” *Brooks*, 950 P.2d at 652. In our view, the differences between a mechanical apparatus or standardized scientific procedure on the one hand, and a living, breathing, animate creature on the other, are weighty enough to take scent tracking outside the realm of processes ordinarily associated with the *Frye* standard. Although we acknowledge that Officer Nichols offered his thoughts on how bloodhounds might pick up scent, this was not the substantive thrust of his testimony. Instead, Nichols focused on Yogi's training, reliability, track record, and performance in the case at hand—all matters based on specialized knowledge he obtained as Yogi's handler. Contrary to Brooks' assertions, the reliability of scent tracking evidence is not dependent on the scientific explanation of canine olfaction. *Brooks*, 975 P.2d 1111-1112.

8. For purposes of this language, there is absolutely no meaningful difference amongst different scents where the Colorado Supreme Court has stated “the evidence is not dependent on the

scientific explanation of canine olfaction.” *Id.* at 1112. “Indeed, even if there were a universally accepted theory explaining the canine ability to track scent, such consensus would be of little use in analyzing the evidentiary validity of the tracking efforts of a specific dog, working with a particular handler, in a particular case.” *Id.*

9. The Colorado Supreme Court also expressly rejected a scientific analysis for canine expert testimony under *Daubert*:

We are unwilling to adopt *Daubert* here and apply it for the first time to experience-based specialized knowledge which is not dependent on scientific explanation. The *Daubert* court itself limited its holding to the scientific realm. *See Daubert*, 509 U.S. at 590 n. 8, 113 S.Ct. 2786. In doing so, the court acknowledged that “[r]ule 702 also applies to ‘technical, or other specialized knowledge,’ ” but limited its discussion “to the scientific context because that [was] the nature of the expertise” at issue in that case. *Id.* (emphasis added). Thus, the *Daubert* test originally addressed scientific evidence and not technical or other specialized knowledge. The factors listed by the court are grounded in the scientific process, and evaluate the quality of testing on an underlying scientific theory. Indeed, the *Daubert* court looked to external validation, as does the scientific process itself. However, like other nonscientific opinions, identification by scent tracking does not readily subject itself to external retesting. *See Edward J. Imwinkelried, The Next Step After Daubert*, 15 *Cardozo L.Rev.* 2271, 2283-84 (1994)(observing that “[n]either the essential test enunciated in *Daubert*, nor the factors listed by the Court are applicable to nonscientific opinion,” in part because “nonscientific principles do not lend themselves to external retesting”). In order to apply *Daubert*, it would be necessary to reformulate the factors developed there. Accordingly, without commenting on whether we would adopt *Daubert* to analyze scientific knowledge, we will not apply factors designed to ascertain scientific validity to analyze the experience-based specialized knowledge before us. *Id.* at 1113.

10. As the Court can see, the Colorado Supreme Court has stated over and over that canine scent evidence is “experience-based specialized knowledge which is not dependent on scientific explanation.” *Id.*
11. The Colorado Supreme Court went note that in reaching this decision they were aware of and considering *Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137 (1999):

Our conclusion on this point is not altered by the very recent United States Supreme Court decision in *Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). There, the United States Supreme Court concluded that *Daubert* “applies not only to testimony based on ‘scientific’ knowledge, but also to testimony based on ‘technical’ and ‘other specialized’ knowledge.” *Kumho*, 119 S.Ct. at 1169. However, the court dispelled any notion that the several factors listed in *Daubert* represent the exclusive test for all possible types of expertise. The court opined that trial courts “may” apply one or

more of the *Daubert* factors “when doing so will help determine ... reliability,” but cautioned that the “list of specific factors neither necessarily nor exclusively applies to all experts or in every case.” *Kumho*, 119 S.Ct. at 1171 (emphasis added). We decline to give any special significance to the *Daubert* factors in the context of experience-based specialized knowledge, and we do not require analysis of such evidence pursuant to *Daubert*. We believe it preferable to avoid disputes over whether or to what extent a court should apply the *Daubert* factors, and to focus instead on whether the evidence is reasonably reliable information that will assist the trier of fact. *Id.* at 1113-1114.

12. Finally, when *People v. Shreck*, 22 P.3d 68 (Colo. 2001) was decided, the Colorado Supreme Court did not overturn *Brooks* as it did the application of the *Frye* standard to scientific evidence, but rather acknowledged the nature of the evidence as experience-based specialized knowledge not dependent upon scientific explanation:

In *Brooks v. People*, 975 P.2d 1105, 1106 (Colo.1999), we declined to apply either *Frye* or *Daubert* to the determination as to whether testimony on the subject of scent tracking evidence was admissible. In doing so, we reasoned that the evidence in question did not involve the type of scientific devices, processes, or theories that are properly subject to *Frye* scrutiny. We were also unwilling to apply *Daubert* for the first time in that case, because we found that the scent-tracking evidence was experience-based specialized knowledge that was not dependent on scientific explanation, remarking that *Daubert* itself limited its holding to the scientific realm. We noted that the decision in *Kumho* applied *Daubert* to technical and other specialized knowledge and that it provided that the *Daubert* factors were not exclusive. However, we opined that it was preferable to avoid debating whether or to what extent *Daubert* was applicable and held instead that CRE 702 and CRE 403 governed our determination as to whether the experience-based knowledge at issue in that case was admissible. *Id.* at 75 (citations omitted).

13. Ultimately in *Shreck*, the Colorado Supreme Court went on to set forth a new standard for determining the admissibility of scientific evidence in Colorado. *Brooks* remained and still remains as controlling law in Colorado regarding the admissibility of experience-based specialized knowledge such as canine scent tracking evidence.
14. Therefore, for this type of evidence the Court should make the appropriate findings under *Brooks v. People* as outlined in the People’s briefs in response to D-36 through D-40.

Legal Argument

15. The question before the Court in this case is “not dependent on the scientific explanation of canine olfaction,” rather, the question before the Court relates to “the evidentiary validity of the tracking efforts of a specific dog, working with a particular handler, in a particular case.” *Id.* at 1112. The “tracking” was searching for Dylan Redwine’s scent on a pillow case to see

if he'd been present at the location where the Defendant stated he slept, and searching for the scent of human remains at locations to see if he was present there after he was deceased.

16. The premise behind a canine handler's expert testimony is the same regardless of the scent detected by the canine: canines can smell what humans cannot. It enables them to track an individual by determining if that individual's scent is present, to determine when a controlled substance is present at a location, to determine when an accelerant is present after a fire, and to detect the presence of human remains. They must be properly trained to do so, and if they are, they can indicate to humans what they smell.
17. The Colorado Supreme Court has declined to consider this a science based testimony or a type of evidence dependent upon a scientific principle.
18. Instead, the Court requires that the proponent of the evidence show that the canine and the handler are reliable in a controlled setting through training and training records, so that when indicating under unknown circumstances in the field, the meaning of those indications is sufficiently probative of the particular scent being present.
19. Here, for the three expert witnesses the People intend to call at this time, the People have provided CVs for the expert handlers, training records for the canines, and reliability percentages based on those training records. At trial, the Defendant may cross-examine on these records, however, it is clear that the handlers are qualified to testify as to specialized knowledge based on their training and experience in a way that is reliable enough to assist the trier of fact.
20. For the Court's convenience, the People have again attached CVs and reliability percentage charts for the three expert witness canine handlers they may call at trial (the voluminous training records themselves and reports of the canines' findings were previously provided with the People's Responses to D-36 through D-40 and are available upon request):
 - a. People's Exhibit 1: Handler Carren Corcoran's CV and canine Molly credentials
 - b. People's Exhibit 2: Carren Corcoran's canine Molly's reliability percentage
 - c. People's Exhibit 3: Handler Rae Randolph's CV and Selah's credentials
 - d. People's Exhibit 4: Rae Randolph's canine Selah's reliability percentage
 - e. People's Exhibit 5: Handler Katie Steelman's CV
 - f. People's Exhibit 6: Katie Steelman's canine Darc's reliability percentage

Conclusion

21. The Defendant citing to non-binding out of state cases or hand-picked science articles does not change the fact that the Colorado Supreme Court has decided this issue, and over the years since *Brooks* and *Shreck*, has not changed the law with regard to admissibility of canine experts.
22. If the testimony is relevant in that they will assist the trier of fact, and is reliable enough that the probative value is not substantially outweighed by the risk of unfair prejudice, provided it

is not the sole basis for conviction and there is some corroborating evidence, the testimony is admissible.

23. The experts need not be perfect, as they will be subject to cross-examination at trial; rather, the Court must find that they are qualified by possessing specialized knowledge a lay person would not have under C.R.E. 702 and they meet the foundational reliability requirements of *Brooks v. People*.
24. The People ask that the Court make the following findings, based on the substantial offers of proof and any supplemental testimony requested by the Court at a narrowly tailored hearing regarding one or more of the *Brooks* factors:
 - a. The witnesses are qualified under C.R.E. 702 because they have experience-based specialized knowledge that lay witnesses do not, as indicated by their CVs.
 - b. The canines are sufficiently reliable to assist the triers of fact, as indicated by their training records and reliability percentages.
 - c. When considering the factors in *Brooks v. People*, there is a proper foundation considering the following factors:
 - i. The breeds of the canines are those with acute power of scent,
 - ii. The training records of the canines and handlers are extensive,
 - iii. The canines have field experience indicating they are reliable,
 - iv. The canines were placed in a location where the victim was known to have been,
 - v. The findings are within the abilities of these canines, and further
 - vi. Carren Corcoran's canine Molly was certified in human remains detection and Rae Randolph's canine Selah was certified in scent tracking.
 - d. The case against the Defendant is not based solely on the indications of the canines but there is corroborating evidence as reviewed by the Court in the indictment and outlined in the People's previous briefs in response to D-36 through D-40, including the victim's blood in the living room and remains later located on a 4-wheel drive road with evidence of blunt force trauma injuries and human tampering.
 - e. Under C.R.E. 401, the evidence is relevant in that it makes it more likely that the Defendant killed the victim if he deceived police that the victim slept on the pillow case and the odor of human remains is in his house and truck.
 - f. Under C.R.E. 403, the probative values of this evidence is extremely high in a case with no eye-witnesses where the Defendant is alleged to have had time to move the victim's body from his residence because they were alone, clean up blood as indicated by the luminol reaction, and further conceal the injured head of the victim in his pick-up truck before anyone was aware the victim was missing.
 - g. Further, under C.R.E. 403, the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.
25. WHEREFORE, the People respectfully request this Honorable Court consider whether any hearing is necessary to make the proper findings under *Brooks v. People* given the substantial discovery and offer of proof before the Court in this case, and if a hearing is granted, order that the hearing be held in compliance with the Colorado Supreme Court's directives in

Brooks v. People. Further, the People request the Court narrowly tailor that hearing to only the factors for which the Court needs further evidence to make the proper findings under C.R.E. 401, C.R.E. 403, C.R.E. 702, and *Brooks v. People.*

Respectfully submitted this March 27, 2019.

CHRISTIAN CHAMPAGNE
DISTRICT ATTORNEY
6th JUDICIAL DISTRICT

/s/ Fred Johnson
Fred Johnson, #42479
Special Deputy District Attorney

CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2019, I delivered a true and correct copy of the foregoing to the parties of record via e-service.

/s/ Christian Champagne
Christian Champagne