

<b>DISTRICT COURT, LA PLATA COUNTY, COLORADO</b> Court Address: 1060 E. Second Ave., Durango, CO 81301 Phone Number: (970) 247-2304	
<b>Plaintiff: PEOPLE OF THE STATE OF COLORADO</b>  <b>v.</b>  <b>Defendant: MARK ALLEN REDWINE</b>	<div style="border: 2px solid black; padding: 5px;">           ORIGINAL FILED / REC'D            IN COMBINED COURT            LA PLATA COUNTY, COLORADO             OCT 30 2013             ▲ COURT USE ONLY ▲             DEPUTY CLERK         </div>
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: <b>17 CR 343</b>
<b>PEOPLE'S RESPONSE TO [D-51] MOTION TO SUPPRESS ALL EVIDENCE          PERTAINING TO BEAR BEHAVIOR AND TESTIMONY FROM HEATHER          JOHNSON RESEARCHER, UNGULATES/CARNIVORES COLORADO          DEPARTMENT OF PARKS AND WILDLIFE          [PUBLIC ACCESS]</b>	

NOW COME the People, by and through Christian Champagne, District Attorney, in the County of La Plata, and hereby respond to defense motion [D 51] and move this honorable Court to deny the defendant's motion, deny defendant's demand for a *Shreck* hearing, and grant an order that the expert's testimony is admissible, relevant, and reliable pursuant to C.R.E. 702 and C.R.E 401-403. AS GROUNDS for this response, the People state as follows:

1. The People previously endorsed expert Heather Johnson, an expert in Wildlife and Animal Behavior.
2. The defense has filed D-51, which seeks to have Ms. Johnson's testimony "suppressed." The defense motion argues that her opinion is unreliable because it was given without reference to any discovered scientific treatises, peer reviewed articles, or studies and because it does not meet the hybrid *Daubert*/multi-prong test the defense suggests as the proper analysis. See D-51, para. 2-30.
3. Although the defense motion does not specifically ask for a hearing under *People v. Shreck*, 22 P.2d 68, 70 (Colo. 2001), they allude to it indirectly, stating that "the prosecution must present testimony from Heather Johnson about bear and [sic]

behavior that demonstrates that evidence is reliable, relevant, or helpful to the jury.” D-51, para. 14.

4. As an initial matter, The defense is on notice of Ms. Johnson’s proposed testimony and her expertise in such matters; not only did they conduct an independent interview, her *curriculum vitae* were provided in discovery pages 19918-27 and a summary of her opinion was provided in discovery pages 6380-82. See D-51, para. 2, *Exhibits 1, 2*.
5. Furthermore, the bases of Ms. Johnson’s opinion have been discovered. Her opinion is based in part on the several articles on black bear behavior she authored or reviewed, which have been provided to defense in discovery pages 19829-74. See *Exhibits 3-9*. Her opinion is also informed by her extensive experience studying black bears in the Durango area; as noted by the defense, she has entered at least 200 black bear dens during her research and has made extensive observations of black bear behavior during that time. She is clearly an expert on black bear behavior and is qualified to opine on the matter, a fact which the defense motion does not challenge.
6. Instead, the defense motion argues that the expert’s opinion is unreliable because it was given without reference to any discovered scientific treatises, peer reviewed articles, or studies and because it does not meet the hybrid *Daubert*/multi-prong test the defense argues should apply. This argument is without merit as the test described by the defense is inapplicable and the expert is not required to cite to any scientific sources.
7. This is especially true when the expert has such vast experience in the field in which she is offering her opinion. This is known in Colorado law as an expert with “experienced based specialized knowledge,” a term derived from the Colorado Supreme Court’s opinion in *Brooks v. People*, 975 P.2d 1105, 1113 (Colo. 1999), a case directly cited by defense counsel, along with a concurring opinion, *Salcedo v. People*, 999 P.2d 833, 838 (Colo. 2000).
8. Under these cases, C.R.E. 401-403 and 702 form the critical analysis under which a witness with “experienced based specialized knowledge” may be qualified as an expert. *Id.* The focus of the court should be on whether (1) testimony on the subject would be useful to the jury and (2) that the witness is qualified to render an opinion on the subject. *Salcedo*, 999 P.2d at 838 (citing *Brooks*, 975 P.2d at 1114). In examining the first prong of the analysis, the court should consider C.R.E. 401-403 to determine whether the evidence is logically relevant and whether the probative value would not be substantially outweighed by the danger of unfair prejudice, confusion, or misleading to the jury or by consideration of undue delay waste of time, or being needlessly cumulative. See *Id.*, C.R.E. 401-403. This is the proper test regarding a witness with experienced based specialized knowledge.

9. The defense urges the court to create and apply "...a hybrid of a *Daubert* analysis as well as a multi-prong test..." involving hard-science based concepts such as whether the technique has been tested, has been subject to peer-review, the known or potential error rate, the existence of standards and controls. *See* D-51, para. 4, 16-26.
10. As noted in *Brooks*, attempting to apply hard-science based concepts to experience based specialized knowledge is inappropriate. *Brooks*, 975 P.2d at 1111-14. As the *Brooks* court stated:

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* [or *Daubert*] standard[s].

*Id.* One could just as easily substitute the phrase "black bear behavior" in place of "scent tracking" and apply this concept appropriately to the present matter.

11. When the court applies the proper analysis, it is clear that the evidence is admissible. Regarding the factors the court should consider, the People argue as follows:
  - a. **Whether testimony on the subject would be useful to the jury, i.e.:**
    - i. **Whether the evidence is logically relevant (C.R.E. 401):** The evidence regarding black bear behavior is relevant to the issue of the cause of death of the victim. The defense is a likely to argue that the victim's death was either caused or hastened by animal and wildlife predation, and this testimony is logically relevant to rebut such claims.
    - ii. **Whether the probative value is substantially outweighed by the danger of unfair prejudice, confusion, or misleading to the jury or by consideration of undue delay, waste of time, or being needlessly cumulative (C.R.E. 403):** The probative value from this evidence is high because it relates to cause of death, a critical issue in the case, and helps to preclude alternate theories regarding the victims' cause of death. There is little to no danger of unfair prejudice, confusion, or misleading the jury; it does not appeal to inadmissible concerns, it is not inflammatory or likely to induce undue sympathy or prejudice, and is not confusing or misleading. It is simply one piece of the evidence the jury will consider among many in reaching their verdict, and they can choose to accept it or

reject it as they please. It does not constitute an undue delay or waste of time, and is not cumulative of any other evidence.

**b. Whether the witness is qualified to render an opinion on the subject**

**(C.R.E. 702):** The record before the court shows the witness is clearly qualified to render an opinion on the subject. *See Exhibits 1-9, D-51, para. 2.* Furthermore, the defense motion does not challenge the expert's credentials to offer an opinion on this topic.

12. Regarding whether a *Shreck* hearing is mandatory, the defense argues that People "...must present testimony from Heather Johnson about bear and [*sic*] behavior that demonstrates that evidence is reliable, relevant, or helpful to the jury." D-51, para. 14. This is not an accurate statement of the law.
13. *People v. Shreck*, 22 P.2d 68, 70 (Colo. 2001) provides a liberal, inclusive approach in determining the admissibility of expert testimony, finding that C.R.E. 702 applies to all types of expert testimony. When an objection is lodged against an expert, the Court should act as a gatekeeper and only allow evidence that is reliable and helpful to the jury. *Id.*
14. The Court has discretion to rule on a *Shreck* hearing request based on the pleadings, and is not required to hold an evidentiary hearing if it has sufficient information before it to make specific findings under C.R.E. 702 and 401-403. *People v. Rector*, 248 P.3d 1196, 1201 (Colo. 2011) (citing *Shreck*, 22 P.3d at 77).
15. The discretion to rule without an evidentiary hearing "... comports with the trial court's need to "avoid unnecessary reliability proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted....'" *Id.* (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999); *see also People v. Wilson*, 318 P.3d 538, 545-46 (Colo. 2013)).
16. Furthermore, the Court may deny the *Shreck* hearing request if the moving party fails to state a specific challenge to the expert testimony. *Id.* In deciding whether a determination of admissibility requires a *Shreck* hearing, a trial court must consider the issues as framed in the motion before it. *Id.* As the Court in *Rector* noted:

A trial court cannot be expected to intuit the challenge brought by the parties. Rather, a party raising a challenge under *Shreck* to the admissibility of expert testimony must sufficiently identify the testimony and/or the witness being challenged.

*Id.* If the moving party's challenge is too general for the Court to identify a specific challenge to the expert testimony, the Court may deny the motion summarily. *Id.*

17. The People have provided substantial information in discovery and in the court record that undergirds the expert's opinion and supports the court making findings regarding the reliability of her opinions and her expertise in the field about which she is offering her opinion. *See Exhibits 1-9.*
18. The expert's opinion is based in large part on her experience and observations of bear behavior; this is not new or novel science, but rather evidence that represents "...an ordinary case where reliability is properly taken for granted," and for which a hearing is unnecessary.
19. Finally, the defense motion does not articulate a specific challenge to the expert's opinion, but rather meanders through a confused and muddled argument, ultimately landing on the generalized concept that the evidence is unreliable. As such, the defense motion requires the court to attempt to intuit the challenge brought by the defense and does not sufficiently identify the evidence being challenged.
20. The People request the Court to rule on the admissibility of this evidence without a *Shreck* hearing. The Court has sufficient information before it to make specific findings under C.R.E. 702 and 401- 403, the defense motion fails to clearly identify a specific and detailed challenge to the proffered testimony, and ruling without an evidentiary hearing "... comports with the trial court's need to "avoid unnecessary reliability proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted...." *See Id.*

WHEREFORE, the People request that the court OVERRULE the defendant's objection, DENY defendant's demand for discovery beyond Crim. P. Rule 16, DENY defendant's demand for a *Shreck* hearing, and GRANT an order that the expert's testimony is admissible, relevant, and reliable pursuant to C.R.E. 702 and C.R.E 403.

Respectfully submitted this October 30, 2018

CHRISTIAN CHAMPAGNE  
DISTRICT ATTORNEY  
6<sup>th</sup> JUDICIAL DISTRICT

/s/ Christian Champagne  
Christian Champagne #36833  
District Attorney

#### CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2018, I delivered a true and correct copy of the foregoing to the parties of record via e-service.

/s/ Christian Champagne  
Christian Champagne