

**DISTRICT COURT, LA PLATA COUNTY, COLORADO**  
Court Address: 1060 E. Second Ave., Durango, CO 81301  
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ORIGINAL FILED / REC'D  
IN COMBINED COURT  
LA PLATA COUNTY, COLORADO

NOV 16 2018

DEPUTY CLERK

**Plaintiff: PEOPLE OF THE STATE OF COLORADO**

v.

**Defendant: MARK ALLEN REDWINE**

▲ COURT USE ONLY ▲

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Case Number: 17 CR 343

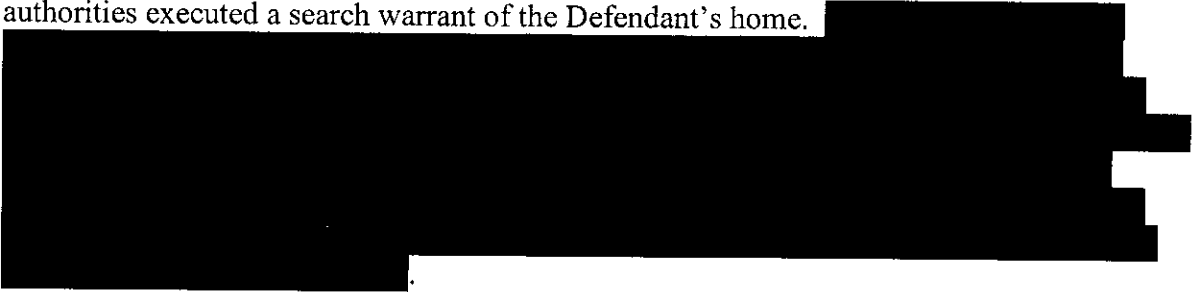
**PEOPLE'S RESPONSE TO [D-39] DEFENDANT'S MOTION TO SUPPRESS ALL EVIDENCE PERTAINING TO CADAVER CANINE SADIE AND HANDLER WENDY KESSINGER  
[PUBLIC ACCESS]**

NOW COME the People, by and through Christian Champagne, District Attorney, in the County of La Plata, respectfully request that the Court deny the Defendant's motion to suppress evidence related to canine handler Wendy Kessinger and canine Sadie at this time. As support therefore, the People state the following:

**Background**

1. On July 17, 2017, a grand jury was impaneled in La Plata County and began to hear and investigate evidence of the murder of Dylan Redwine. On July 20, 2017, the La Plata County Grand Jury indicted the Defendant for the crimes of Murder in the Second Degree and Child Abuse Resulting in Death.
2. The Defendant is currently set for trial on February 25, 2019.
3. The Defendant now motions the court to suppress material and incriminating evidence procured by canine handler Wendy Kessinger and canine Sadie. Sadie was one of three dogs that tested known scent articles from Dylan Redwine to determine if his scent was on the pillow case that the Defendant had told authorities Dylan Redwine had slept upon, and which the Defendant provided to Search and Rescue as a scent article; Dylan Redwine's scent was not on the pillow case.

## Facts

4. On November 18, 2012, the Defendant picked up Dylan Redwine from the Durango airport for a court ordered Thanksgiving visit and drove him to his home in Vallecito. The Defendant and Dylan Redwine were both seen on Walmart video surveillance stopping on the way to Vallecito. After the evening of November 18, 2012 no one ever saw Dylan Redwine alive again, and after an IPod text 9:37pm that evening, no one ever heard from Dylan Redwine again.
5. The Defendant confirmed in statements to police that on the evening of November 18, 2012, Dylan Redwine was in his living room. The Defendant claimed Dylan Redwine spent the night sleeping on the couch and that he was alive the next morning when the Defendant left around 7:30am. The Defendant further provided a pillow case to Search and Rescue employees that he claimed Dylan Redwine had slept upon so that they could track Dylan Redwine's scent.
6. On November 28, 2012, as part of the investigation into Dylan Redwine's whereabouts authorities executed a search warrant of the Defendant's home. 
7. During the investigation the Defendant's clothing from the night Dylan Redwine went missing was also collected, and confirmed to be the correct clothing by both the Defendant and the video footage at Walmart.
8. Cadaver dogs were deployed at the time of the search, and indicated the presence of human remains at several locations.
9. In late June of 2013, after the gates opened from the winter road closure, a search of Middle Mountain Road led to the discovery of several of Dylan Redwine's remains roughly 8 miles up the road from the Defendant's residence. Middle Mountain is an unpaved mountain road, and Dylan Redwine's remains were located roughly 100 yards off of the road into the woods, at a location which can be easily reached by following an ATV trail and established foot path. His skull was not located amongst the remains.
10. The Defendant had previously been seen up in the area of the closed gate by witness Mike Hall, driving his Dodge pick-up truck. He has also driven the Dodge truck into town to run errands the morning after Dylan Redwine went missing.

11. Following the discovery of the first of Dylan Redwine's remains during the search of Middle Mountain Road in late June of 2013, [REDACTED].
12. In August of 2013, La Plata County Sheriff's deputies obtained the assistance of experienced human remains detection dog handler Carren Corcoran and her canine Molly to complete a follow-up search of the Defendant's residence to determine if human remains had been present in the home. The Defendant gave consent for the search, and canine Molly indicated [REDACTED].
13. In November of 2015, hikers found Dylan Redwine's skull about ½ mile off of Middle Mountain Road, several miles further up from where his other remains had been located. Forensic Anthropologist Diane France noted perimortem injuries consistent with blunt force trauma on two locations on Dylan Redwine's skull, as well as tool markings consistent with human tampering by a sharp object. Wildlife experts opined that based on the locations of the two areas where remains were found, no known animals in the area would be responsible for moving Dylan Redwine's skull to the location where it was recovered.

#### **Offer of Proof**

14. The People have attached the following exhibits as an offer of proof to establish the reliability and qualification of handler Wendy Kessinger and canine Sadie:
  - a. People's Exhibit 1: Qualifications of Wendy Kessinger as they relate to her business Special Operations, Inc., to include trainings and some certificates/certifications related to herself and canine Sadie that have been provided to the People thus far.
  - b. People's Exhibit 2: The reports documenting the relevant work of Wendy Kessinger and Sadie in this case.
  - c. People's Exhibit 3: training records for Sadie and handler Kessinger.
  - d. People's Exhibit 4: field experience for handler Kessinger and her canines.
15. The People have requested a formal CV and further information regarding specific training of Sadie, and Wendy Kessinger has indicated she will provide more records to the People.
16. Additionally, the People hereby move to incorporate the transcripts and exhibits of evidence presented to the Grand Jury and reviewed by this Court for probable cause as an additional offer of proof in support of the attached offer of proof.
17. As the people are not yet within 35 days of trial, the People are waiting to receive all relevant

documentation before deciding if they will call Wendy Kessinger as an expert witness in this case.

### Law

18. The proper legal analysis in determining the admissibility of the experience based expert testimony of canine handler Rae Randolph is pursuant to C.R.E. 401, 403, and 702.
19. C.R.E. 401 defines relevant evidence as evidence that has any tendency to make the existence of a fact of consequence more probable or less probable.
20. C.R.E. 403 states that even when evidence is found to be relevant, it may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. A trial court has a responsibility to guard against prejudice and promote judicial efficiency by excluding evidence that is insufficiently probative to assist in the search for truth. *People v. Saiz*, 32 P.3d 441, 449 (Colo.2001). Unfairly prejudicial evidence has an undue tendency to suggest a decision on an improper basis, commonly but not necessarily an emotional one, such as sympathy, hatred, contempt, retribution, or horror. *Masters v. People*, 58 P.3d 979, 1001 (Colo. 2002).
21. C.R.E. 702 states that “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” Under C.R.E. 702, evidence that is reasonably reliable and that will assist the trier of fact should be admitted. *Brooks v. People*, 975 P.2d 1105, at 1114 (Colo. 1999).
22. The Colorado Supreme Court has previously found in *People v. Brooks* that scent tracking evidence is admissible. *Brooks*, 975 P.2d 1105. In *Brooks*, the Colorado Supreme Court determined that scent tracking evidence did not involve the scientific devices, processes, or theories; rather, it is an experience-based knowledge that was not dependent on scientific explanation. *Id.* at 1111-1112.
23. In doing so, the Court expressly rejected the application of the “general acceptance” standard of admissibility embodied in *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923), and expressly rejected the application of the scientific validation factors enumerated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), holding that these standards do not apply to scent tracking evidence.
24. The Court went on to say that when proposed expert testimony involving experience-based specialized knowledge like scent tracking evidence draws an objection from the opposing party on the grounds that the subject matter is not sufficiently reliable to be presented to the jury, the evidence should undergo a two-tiered analysis pursuant to C.R.E. 702. *Id.* at 1109.
25. First, the court should determine if the testimony on the subject indicated would be useful to the jury. *Id.* at 1114. If the court so concludes, and determines that the witness is qualified

to opine on the matter, the court must then apply its discretionary authority under CRE 403. *Id.*

26. In *Brooks*, the Court went further to identify factors specific for scent tracking dogs that could be applied in the analysis. However, *Brooks* did not involve cadaver dogs, and as explained below the court in *Brooks* was very careful to note that these factors should not supplant a more appropriate C.R.E. 702 and 403 analysis specific to each case. Some of the factors are nonetheless instructive in the context of cadaver dogs.
27. For scent tracking dogs, the Court adopted the majority rule that other courts have utilized specifically when determining if scent tracking evidence has evidentiary reliability: whether the dog is a breed that is characterized by acute power of scent; whether the dog has been trained to follow a track by scent; whether the dog was found by experience to be reliable in pursuing human tracks; whether the dog was placed on the trail where the person tracked was known to have been; and whether the tracking efforts took place within a reasonable time. *Id.* As it pertains to cadaver dogs, by way of example, a factor such as the training of the dog could be applied, whereas whether the dog was placed on the trail would not apply.
28. Further, in *Brooks*, specific to scent tracking dogs, the Court adopted the requirement from some other courts that the scent tracking evidence must be corroborated by some other independent evidence. In doing so, the Court cited to three cases, all of which stand for the proposition that a conviction based on the evidence of a scent tracking dog alone cannot stand without some other corroborating evidence in the case. *See id.* (citing to *State v. Wainwright*, 18 Kan.App.2d 449, 856 P.2d 163, 166 (1993); *People v. McPherson*, 85 Mich.App. 341, 271 N.W.2d 228, 230 (1978); *State v. Loucks*, 98 Wash.2d 563, 656 P.2d 480, 482 (1983)). It is an important distinction to note that in these scent tracking cases, the court was concerned with a conviction based on an identification of the defendant by a dog with no other corroboration in the case. As it pertains to cadaver dogs, they do not identify a suspect by his or her scent but instead indicate the presence of human remains within the context of a case that would require other evidence.
29. Finally, although *Brooks* is instructive as to defining the nature of the expert testimony and evidence, and makes clear that the analysis falls under C.R.E. 702 and 403, the factors outlined in *Brooks* are specific to scent tracking dogs. In fact, when adopting the factors and corroboration requirement the Court specifically cautioned as follows:

It is important to note that these foundational considerations are best utilized as a mechanism for conducting proper CRE 702 and CRE 403 analysis, and not as a substitute for the general philosophy embodied in our rules of evidence. As such, the emphasis the court might wish to afford each of these points might vary depending on the facts of a particular case. *Id.* at 1114-1115.
30. The Colorado Supreme Court's reasoning in *Brooks* indicates that expert testimony regarding canines is that of experience-based specialized knowledge which is not dependent on scientific explanation. As stated in *Brooks* in rejecting a *Frye* or *Daubert* analysis, the dog handler's expertise "is based on years of experience and individualized 'know-how' instead

of some purportedly universal scientific principle.” *Brooks*, 975 P.2d at 1112.

31. It should be noted that in *People v. Shreck*, 22 P.3d 68 (Colo. 2001), which was decided after *Brooks*, also referenced the decision in *Brooks* and reiterated that as an experience-based specialized knowledge that was not dependent on scientific explanation, C.R.E. 702 and C.R.E. 403 should be applied to determine whether canine scent tracking evidence is admissible. *Shreck*, 22 P.3d at 78.
32. In *Shreck*, the Court held that when determining whether scientific evidence is admissible under Rule 702, “the inquiry is whether the scientific evidence proffered is both reliable and relevant.” *People v. Shreck*, 22 P.3d 68, 77 (Colo. 2001). However, the *Shreck* opinion does not provide a blanket vehicle by which defendants may demand full evidentiary hearings before expert testimony can be admitted, even where the evidence at issue is novel and scientific in nature, which is not the case here. *Shreck*, 22 P.3d at 77. *Shreck* simply stands for the well-settled proposition that the trial court must make preliminary findings before admitting any kind of expert testimony to which the opposing party objects. *Id.*
33. Therefore, pursuant to the Colorado Rules of Evidence and also in consideration of *Brooks*, the proper analysis is whether the evidence is relevant under C.R.E. 401, whether there is an adequate foundation for expertise under C.R.E. 702 making the evidence reliable, and whether the evidence passes a C.R.E. 403 balancing test. The factors enumerated in *Brooks* may be considered in the analysis, including that there is some corroborating evidence in the case, but the Court should specifically tailor the C.R.E. 702 and C.R.E. 403 analysis to the specific case at hand. Where the requirements of C.R.E. 401, 403, and 702 are satisfied, the evidence is admissible at trial.

### Legal Argument

34. As a preliminary matter, Defendant’s motion in no way bears on his constitutional rights. Thus, while the Defendant cites provisions of the Federal and Colorado Constitutions in support of his motion, the relevant arguments are those relating to CRE 401, 403, 702, and *Brooks v. People*, 975 P.2d 1105 (Colo. 1999). Likewise, *Frye* and *Daubert* simply do not apply to this type of evidence or experience based testimony, and the Defendant’s assertion that the Court should construct a test which relies upon *Daubert* is legally incorrect under *Brooks* and *Shreck*.
35. Applying the proper analysis, first, under C.R.E. 401 the evidence that a scent identification canine ruled out Dylan Redwine’s scent on the pillow case provided by the Defendant is relevant. The Defendant is alleged to have murdered his 13 year old son in his home and transported his son’s body up Middle Mountain Road to hide the crime and evidence from detection. This would have had to occur in the nighttime and early morning hours of November 18-19, 2012. [REDACTED]
36. Second, the witness is qualified to testify as to specialized knowledge in the area of canine

handling and detection of human remains. Wendy Kessinger's CV will be forthcoming to establish that she has specialized training and experience with canines over many years. As such, Wendy Kessinger possesses specialized knowledge that the average person does not possess, and in this case it is specialized knowledge that will be helpful to a jury in their determination of the truth at trial.

37. Third, the high probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. [REDACTED]

[REDACTED]. These are contested facts that are essential to the People's proof of the allegations. Balanced against no prejudice under C.R.E. 403 in that the evidence is not confusing to the jury, misleading to the jury, or a waste of time, there is absolutely no reason to exclude this evidence.

38. Further, nothing about this specific evidence is more likely to have an undue tendency to suggest a decision on an improper or emotional basis. In fact, the Defendant's primary claim that prejudice would occur at all is based on his incorrect assertion that the evidence is unreliable. A C.R.E. 702 analysis in light of the People's offer of proof addresses this concern. His other assertions appear to be vague claims that the general public finds dogs persuasive or that their cross-examination of the evidence will take too long in the form of a mini-trial. Even if these claims are accurate, they do not necessarily create any prejudice where the evidence is reliable, and they certainly do not "substantially outweigh" the fact that a trained canine handler determined that Dylan Redwine's scent was not on the pillow case given to authorities for their search for Dylan Redwine.
39. With regard to an analysis under *Brooks*, the People are awaiting further documentation to determine if there are sufficient records related to canine Sadie to establish sufficient reliability at trial. The People will submit a subsequent offer of proof on this issue when the records are in their possession and control. However, at this time the People have provided the expert reports on the work done in this case and are not yet within 35 days of the trial date.
40. With regard to corroboration, though it is a requirement specifically in scent tracking based on traditional concerns about convictions based solely on scent tracking evidence, corroboration is nonetheless present here. With regard to scent identification on the pillow case, the phone records corroborate this evidence in a significant way. The Defendant claims that Dylan Redwine went to sleep for the night of November 18, 2012 on that pillow case, was alive the next morning when the Defendant left him there, and then when the Defendant returned Dylan Redwine was missing. However, phone records from every device and land line indicate Dylan Redwine never made a communication with anyone ever again after 9:37pm the night of November 18, 2012. This was despite the fact that he had plans at 6:30am on November 19, 2012 with a friend who was trying to reach him by 6:47am to see where he was. The logical conclusion, consistent with Dylan Redwine's scent being absent from the pillow case and the phone records, is that Dylan Redwine was killed before he ever went to sleep on that pillow case and the Defendant was misleading authorities by providing the

pillow case. [REDACTED]

41. Further, there is substantial circumstantial evidence in the case to further support the charges against the Defendant. The Defendant was the last person seen with Dylan Redwine alive. Dylan Redwine's electronic communications last occurred from the living room of the Defendant's home based on his statements and phone records, and the phone records cast doubt upon the Defendant's version of events about the next morning. The Defendant had a motive for the crime as articulated in the People's Notice regarding 404(b) evidence, but also based on the statements of several witnesses that the two were not getting along around that time. There is no other known person with a motive to murder Dylan Redwine, when his remains were recovered the defects on his skull confirmed human involvement in his death.
42. In summary, this case is not based solely on the evidence of a tracking dog or a human remains detection dog. Rather, the tracking dog and human remains detection dog simply corroborates all of the other evidence in the case in an extremely probative manner.
43. Therefore, even if the corroboration requirement in *Brooks* for scent tracking dogs making an identification of a suspect should be applied to human remains detection dogs, this is far from a case of a conviction being sought solely on the testimony of dog experts as was contemplated when the rule was created. Rather, in terms of corroboration it is consistent with everything in the case from the crime scene to the remains.

#### **Remaining Assertions by the Defendant**

44. The Defendant asserts that insufficient information has been presented in discovery to determine reliability of canine Sadie and handler Kessinger. The People are working to procure more records which will be put through discovery.
45. The Defendant asserts that the physical actions of the canines alerting to odors are hearsay and subject to the confrontation clause. It is obvious that there is no "out of court statement" or "declarant" at issue, only physical observations. In fact, C.R.E. 801 defines "Statement" for the purpose of hearsay as "(1) an oral or written assertion, or (2) nonverbal conduct of a person, if it is intended by him to communicate. The actions of the canines are not those of a person, nor are they written or oral assertions.
46. Further, as it relates to the confrontation clause, there is nothing testimonial about a dog's behavior as they have no concept of pending litigation. The Defendant cites no authority for this proposition, while simultaneously noting that handler testimony has been admitted in courtrooms in various contexts. Until he cites to legal authority that the actions of a canine implicate hearsay or the confrontation clause, it should be rejected.

#### **Defendant's Request for a Hearing Should be Denied**

47. The Defendant alludes to a requirement for a pretrial admissibility hearing, stating that the prosecution must provide testimony. There is no legal support for this request in his motion.



In fact, as discussed above the Defendant is incorrect in his attempt to apply *Daubert* factors and create a need for a hearing on what is really a C.R.E. 702 foundational analysis, combined with a C.R.E. 401 and C.R.E. 403 gatekeeping analysis. This is no different than any other experience based expert with specialized knowledge, except that the court in *Brooks* gives some guidance as to factors that can be considered. At the time the witness is called, the Defendant may conduct voir dire on the qualifications of the witness. At the time of cross-examination, the Defendant may inquire as to the issues raised in his motion which go to the weight of the testimony and not its admissibility.

48. As a side note, the Defendant asserts without factual or legal support that canine evidence is unreliable. He attaches no offer of proof, he has not endorsed any experts at this time who have asserted this in a report, and he makes no indication about how a hearing will establish this other than to ask questions in cross examination that will essentially be designed to acquire information he has not sought to acquire by other means.
49. Because no *Shreck* hearing is required for this type of evidence, and because *Brooks* expressly states that *Daubert* does not apply to this type of expert testimony, such a hearing would simply be an exercise in laying an adequate foundation which the People must do at trial anyway. The other arguments in the Defendant's motion go to weight, not admissibility, and are appropriate for cross examination. The Defendant's right to cross-examination in this context is a trial right, and since there are no constitutional challenges there is no need for a pretrial hearing. In this respect the situation is different than, for example, when police perform a warrantless search on an automobile based on probable cause developed from a canine. That is a Fourth Amendment issue where the burden is on the People to present evidence, whereas here, *Brooks* make it clear that the Colorado Rules of Evidence govern just as they would any other experience based expert witness.
50. Under these circumstances, and offer of proof is sufficient for the court to make threshold determinations under C.R.E 401, C.R.E. 403, and even C.R.E. 702, and a pretrial hearing is not required.

### **Conclusion**

51. If the People ultimately intend to call Wendy Kessinger as an expert witness at trial, the People will provide sufficient information through discovery and in an offer of proof to satisfy C.R.E. 401, C.R.E. 403, C.R.E. 702 *Brooks* at least 35 days prior to trial.
52. For these reasons, the People ask the Court to deny the Defendant's Motion to Suppress at this time provided that the People can submit sufficient documentation of the reliability of canine Sadie and handler Kessinger, and subject to the People laying the appropriate foundation at trial.

WHEREFORE, the People respectfully request this Honorable Court DENY Defendant's Motion to Suppress evidence related to canine Sadie and handler Wendy Kessinger at this time.

Respectfully submitted this March 14, 2019.

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

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

### **CERTIFICATE OF SERVICE**

I hereby certify that on November 16, 2018, I delivered a true and correct copy of the foregoing to the parties of record via e-service.

/s/ Christian Champagne  
Christian Champagne