

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	JUN - 8 2013 COURT USE ONLY
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. JAMES HOLMES, Defendant	Case No. 12CR1522 <div style="text-align: center; font-size: 2em; font-weight: bold; opacity: 0.5;">Redacted</div> Division 26
MOTION TO PRECLUDE EXPERT OPINION TESTIMONY CONCERNING HANDWRITING AND/OR QUESTIONED DOCUMENT ANALYSIS, PURSUANT TO CRE 702 AND 403, DUE PROCESS, AND PEOPLE V. SHRECK, 22 P.3D 68 (COLO. 2001) [D-111]	

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 and/or an order precluding expert opinion testimony concerning handwriting and/or questioned document analysis, and states:

1. The prosecution has endorsed witnesses (Lorie Gottesman, Shaneka Hall, and Peter J. Belcastro Jr. with the Federal Bureau of Investigation) who authored reports regarding questioned documents analysis in this case. Mr. Holmes objects to the admission of any and all expert opinion testimony concerning questioned documents analysis or handwriting comparison that the prosecution intends to introduce at trial through them or any other expert witness. Mr. Holmes objects under CRE 702, 403, and *People v. Shreck*, 22 P.3d 68 (Colo. 2001); *People v. Ramirez*, 155 P.3d 371 (Colo. 2007); *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.

Questioned Documents and Handwriting Analysis Testimony

9. Questioned documents examination and handwriting analysis testimony is expert testimony subject to CRE 702 and *Shreck, supra*. *See e.g. People v. Tidwell*, 706 P.2d 438 (Colo.

App. 1985) (pre-*Shreck* decision applying CRE 702 to preclude proposed expert testimony concerning questioned document examination).

10. Applying similar rules (such as FRE 702) and/or *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), a number of courts have in some circumstances either disallowed handwriting expert testimony entirely, or have prevented the handwriting expert from offering an opinion that a specific individual authored a questioned writing. See, e.g., *United States v. Saelee*, 162 F.Supp.2d 1097 (D.Alaska 2001) (excluding handwriting examiner testimony); *United States v. Fujii*, 152 F.Supp.2d 939 (N.D.Ill.2000) (accord); see also *United States v. Hidalgo*, 229 F.Supp.2d 961 (D.Ariz.2002) (permitting testimony from handwriting analyst regarding similarities between documents, but disallowing analyst from offering opinion regarding authorship); *United States v. Oskowitz*, 294 F. Supp. 2d 379 (E.D.N.Y. 2003)(accord); *United States v. Rutherford*, 104 F.Supp.2d 1190 (D.Neb.2000) (accord); *United States v. Hines*, 55 F.Supp.2d 62 (D.Mass.1999) (accord). See also Michael J. Saks, *Merlin and Solomon: Lessons from the Law's Formative Encounters with Forensic Identification Science*, 49 Hastings L.J. 1069 (April 1998).

11. 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.

12. 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.

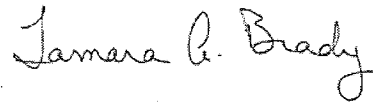
Request for a Hearing

13. 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.



Daniel King (No. 26129)
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Deputy State Public Defender

Dated: June 3, 2013

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	σ COURT USE ONLY σ
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. JAMES HOLMES, Defendant	
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ORDER RE: MOTION TO PRECLUDE EXPERT OPINION TESTIMONY CONCERNING HANDWRITING AND/OR QUESTIONED DOCUMENT ANALYSIS, PURSUANT TO CRE 702 AND 403, DUE PROCESS, AND PEOPLE V. SHRECK, 22 P.3D 68 (COLO. 2001) [D-111]	

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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Mona Johnston