

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	FILED JUN - 5 2013 DISTRICT COURT ARAPAHOE COUNTY, COLORADO
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. JAMES HOLMES, Defendant	σ COURT USE ONLY σ Case No. 12CR1522
DOUGLAS K. WILSON, Colorado State Public Defender Daniel King (No. 26129) Tamara A. Brady (No. 20728) Chief Trial Deputy State Public Defenders 1300 Broadway, Suite 400 Denver, Colorado 80203 Phone (303) 764-1400 Fax (303) 764-1478 E-mail: state.pubdef@coloradodefenders.us	Redacted Division 26
<p align="center"> MOTION TO PRECLUDE OPINION TESTIMONY CONCERNING CRIMINAL PROFILING, HOMICIDE “CLASSIFICATION”, OR CRIME SCENE BEHAVIOR ANALYSIS, PURSUANT TO CRE 702 AND 403, DUE PROCESS, AND PEOPLE V. SHRECK, 22 P.3D 68 (COLO. 2001) [D-105] </p>	

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 on, and/or an order precluding, opinion testimony concerning criminal profiling, homicide “classification”, and/or crime scene behavior analysis and states:

1. The discovery in this case indicates that local law enforcement consulted on one or more occasions with the Behavior Analysis Unit of the Federal Bureau of Investigation. In addition, it appears that members of the Behavior Analysis Unit were on scene at the Century 16 theaters, and also may have provided an opinion on the “type” of homicide and other opinions related to this case. As of this time, Mr. Holmes has not received any reports from the Behavior Analysis Unit in discovery; however, the prosecution has endorsed numerous agents from the Federal Bureau of Investigation, and counsel does not know if members of the Behavior Analysis Unit are included. The Behavior Analysis Unit frequently engages in psychological “criminal profiling” and behavioral crime scene analysis as an investigative technique. In this case, it appears they may have opined to law enforcement regarding, at least, the alleged nature of the crime in this case and characteristics of the alleged offender. Mr. Holmes objects to the admission of any and all opinion testimony concerning criminal profiling, homicide

“classification,” and/or crime scene behavior analysis that the prosecution intends to introduce at trial through any “expert” witness. Mr. Holmes objects under CRE 702, 403, and *People v. Shreck*, 22 P.3d 68 (Colo. 2001); *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.

2. Such testimony is unreliable and does not satisfy the concerns of CRE 702 and *Shreck, supra*, or the demands of the due process clauses. In addition, such testimony frequently includes an opinion on the mental state of the alleged actor that is not admissible under the CRE 702, 704, or 403, or the constitutions. *See e.g. In re: People v. Wilkerson*, 114 P.3d 874 (Colo. 2005).

General Legal Principles

3. 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).

4. 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.

5. 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).

6. 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).

7. 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.

8. 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.

9. 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.

10. “Rule 702’s ‘helpfulness’ standard requires a valid scientific connection to the pertinent inquiry as a precondition of admissibility.” *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591-92 (1993). *See also, e.g., People v. Lesslie*, 939 P.2d 443 (Colo. App. 1996) (finding expert testimony unnecessary to describe or interpret the crime’s setting); *see also Salcedo v. People*, 999 P.2d 833, 840 (Colo. 2000) (expert testimony based on drug courier profile inadmissible in part because “inherently subjective” and potentially misleading).

Criminal Profiling and Behavior Analysis Testimony

11. Several courts have found such psychological “profiling” and crime scene behavior analysis to be inadmissible and unreliable. In *State v. Stevens*, 78 S.W.3d 817 (Tenn. 2002), the Court found such testimony to be both improper opinion and insufficiently reliable, stating:

Inadmissibility of Behavioral Crime Scene Analysis

Turning to the facts in this case, we cannot conclude that the trial court erred in refusing to admit Mr. McCrary’s expert opinion regarding the behavior of the perpetrator of these crimes. This type of crime scene analysis, developed by the FBI as a means of criminal investigation, relies on the expert’s subjective judgment to draw conclusions as to the *type of individual* who committed this crime based on the physical evidence found at the crime scene. Although we do not doubt the usefulness of behavioral analysis to assist law enforcement officials in their criminal investigations, we cannot allow an individual’s guilt or innocence to be determined by such “opinion evidence connected to existing data only by the *ipse dixit*” of the expert. Essentially, the jury is encouraged to conclude that because this crime scene has been identified by an expert to exhibit certain patterns or telltale clues consistent with previous sexual homicides triggered by “precipitating stressors,” then it is more than likely that this crime was similarly motivated. ... Indeed, Mr. McCrary himself acknowledged that his analysis involves some degree of speculation, and he further negated the sufficiency of his own analysis when he conceded that each case is

“unique” and that criminals are often driven by any number of motives.

Moreover, we find that the FBI’s study revealing a seventy-five to eighty percent accuracy rate for crime scene analysis lacks sufficient trustworthiness to constitute evidence of this technique’s reliability.

* * *

Therefore, because the behavioral analysis portion of Mr. McCrary’s testimony does not bear sufficient indicia of reliability to substantially assist the trier of fact, we conclude that this testimony was properly excluded.

State v. Stevens, 78 S.W.3d 817, 835 -836 (Tenn. 2002) (citations and footnotes omitted).

12. In *State v. Roquemore*, 620 N.E.2d 110, 113-14 (Ohio App. 1993), the court analyzed the testimony of an expert witness, who was also a crime scene analyst. The witness classified crime scene assessment as part of the “profiling” analysis. He described “profiling” as:

“ * * * basically a method of examination which looks at the issue of motive. It ties to crime assessment, which basically examines the evidence set forth or the evidence known, which may include the photographs, the autopsy reports, the police reports, available information, and then one analyzes that based on probability for pattern in terms of development. Is there a sequence, is there an order, is that consistent with what has generally been established as recognized patterns in crime behavior? From that crime behavior then and that assessment, then one, again using probability, looks at the issues of the type of person and/or situation of which the crime was committed. * * * ”

State v. Roquemore, 620 N.E.2d 110, 113 (Ohio App. 1993). The court noted that: “A part of this ‘profiling’ review is the ‘crime scene assessment’, which is the review that was employed here”. *Id.* The court held that the testimony should have been excluded and was reversible error because, among other reasons, “there is little indication in the record that [profiles] can be said to be reliable for the purposes for which they were used by the state in the instant case.” *Id.* (citations omitted).

13. In *Masters v. People*, 58 P.3d 979 (Colo. 2002), the Colorado Supreme Court analyzed the admission of expert testimony the nature of sexual homicides and the type of sexual homicide reflected by the evidence in that case. The Supreme Court applied the principles in *Shreck, supra, Kumho, supra*, CRE 702 and 403 in determining the admissibility of the testimony. Applying that analysis to the circumstances in that case, the Court held it was permissible to allow the expert [Dr. Meloy] to testify regarding “the concept of sexual homicide and identify the characteristics that were consistent therewith.” *Id.* at 987. Significantly, however, “Dr. Meloy was not allowed to give opinions on ultimate issues of fact,” *id.*, and also

was prohibited from rendering opinions that were “essentially profile evidence being offered as substantive evidence of defendant’s guilt.” *Id.*

14. *Masters* is most instructive here for what it did not allow – opinions on ultimate issues of fact and opinions that were essentially “profile evidence” offered as substantive evidence of the defendant’s guilt. The Colorado Supreme Court repeatedly emphasized that such opinion testimony had not been allowed or presented to the jury in that case.

15. In addition, FBI profilers frequently rely upon an investigative tool called the Crime Classification Manual in rendering their opinions regarding criminal profiling, behavioral crime scene analysis, and homicide “classification.” *See e.g. Crime Classification Manual – A Standard System for Investigating and Classifying Crimes* by Douglas, Burgess, Burgess and Ressler (Jossey-Bass 1997). That manual (and any opinion derived from it) is not sufficiently reliable to pass muster under CRE 702 and *Shreck, supra*

16. The Crimes Classification Manual is not an official publication of the F.B.I or the U.S. Government. The authors of the manual state that “this is the first attempt of which we are aware to operationalize a decision-making process based on a well defined set of criteria. We want to emphasize at the outset that this rationally derived system has not yet been implemented or tested. Although we are in the rudimentary stage of model development, we have progressed to the point of advancing a testable system.” (*See e.g. Crime Classification Manual* p22). The authors further state that: “investigator profiling is best viewed as a strategy, enabling law enforcement to narrow the field of options and generate educated guesses about the perpetrator. In essence, we are forced to bootstrap, using crime-scene related data, to make our classifications. This bootstrapping process is referred to as profiling. At present, there have been no systematic efforts to validate these profile-derived classifications.” (CCM at pp21-22)

17. The authors themselves thus note that the classifications have not been tested or validated. Additionally, it does not appear to be generally accepted by the psychological community. “Although the FBI approach has gained public attention, some psychologists have questioned its scientific solidity. Ressler, Douglas, and the other FBI agents were not psychologists, and some psychologists who looked at their work found methodological flaws.” Winerman, Lea, Criminal profiling: the reality behind the myth, American Psychological Association, Monitor on Psychology, v. 35, No. 7, p66, July/August 2004. “The validity and reliability of the Crime Classification Manual have also been questioned, because of the absence of an underlying psychological theoretical framework.” Gregory, Nathan, Offender profiling: a review of the literature, The British Journal of Forensic Practice, Aug. 2005.

18. Further, the authors refer to the Manual as an investigative tool. Whatever the utility of the Manual to assist law enforcement in the process of investigating crimes, it is clearly not reliable nor intended to allow a witness to testify to some type of pseudo-scientific “diagnosis” of the crime for the jury. “Although we do not doubt the usefulness of behavioral analysis to assist law enforcement officials in their criminal investigations, we cannot allow an individual’s guilt or innocence to be determined by such ‘opinion evidence’ connected to existing data only by the *ipse dixit* of the expert.” *State v. Stevens, supra; see also State v. Roquemore, supra*, 620 N.E.2d 110, 113-14 (1993) (“there is little indication in the record that

[profiles] can be said to be reliable for the purposes for which they were used by the state in the instant case.”).

19. 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, 704, 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 704 and 403. Without such determinations, this Court should enter an order precluding the admission of any such expert testimony at trial.

20. 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.

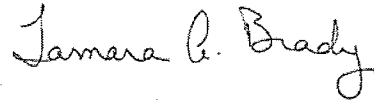
Request for a Hearing

21. 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)
Chief Trial Deputy State Public Defender



Tamara A. Brady (No. 20728)
Chief Trial Deputy State Public Defender



Kristen M. Nelson (No. 44247)
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	
DOUGLAS K. WILSON, Colorado State Public Defender Daniel King (No. 26129) Tamara A. Brady (No. 20728) Chief Trial Deputy State Public Defenders 1300 Broadway, Suite 400 Denver, Colorado 80203 Phone (303) 764-1400 Fax (303) 764-1478 E-mail: state.pubdef@coloradodefenders.us	Case No. 12CR1522 Division 26
<p style="text-align: center;">ORDER RE: MOTION TO PRECLUDE OPINION TESTIMONY CONCERNING CRIMINAL PROFILING, HOMICIDE "CLASSIFICATION", OR CRIME SCENE BEHAVIOR ANALYSIS, PURSUANT TO CRE 702 AND 403, DUE PROCESS, AND PEOPLE V. SHRECK, 22 P.3D 68 (COLO. 2001) [D-105]</p>	

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:

George Brauchler
Jacob Edson
Rich Orman
Karen Pearson
Office of the District Attorney
6450 S. Revere Parkway
Centennial, Colorado 80111
Fax: 720-874-8501

Nora Lubaton