

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	Filed JUN - 3 2013 DISTRICT COURT ARAPAHOE COUNTY COLORADO σ COURT USE ONLY σ
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. JAMES HOLMES, Defendant	Case No. 12CR1522 Redacted Division 26
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	
MOTION TO PRECLUDE “CRYPTANALYSIS” OPINION TESTIMONY, PURSUANT TO CRE 701, 702, 403, DUE PROCESS, AND PEOPLE V. SHRECK, 22 P.3D 68 (COLO. 2001) [D-101]	

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, any “cryptanalysis” opinion testimony, and states:

1. The prosecution has endorsed at least one witness (Melissa H. Adams with the Federal Bureau of Investigation) who is a “Cryptanalyst Forensic Examiner.” Ms. Adams apparently examined a symbol found on a calendar in Mr. Holmes’ apartment. Mr. Holmes objects to any opinion from Ms. Adams (or anyone else) based upon a forensic cryptanalysis examination as to the meaning or significance of the markings. Mr. Holmes objects to the admission of any and all such opinion testimony that the prosecution intends to introduce at trial through Ms. Adams or any other witness. Mr. Holmes objects under CRE 701, 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. Mr. Holmes does not believe Ms. Adams possesses any expertise that would enable her to opine regarding the meaning or significance of the markings on the calendar any more than any other lay witness or juror. As such, her testimony would be improper speculation and lay witness opinion testimony that should be inadmissible under CRE 701 and 403. *See also*

People v. Lesslie, 939 P.2d 443 (Colo. App. 1996) (finding expert testimony unnecessary to describe or interpret the crime’s setting). Consequently, any such speculation or opinion testimony should be excluded.

3. If the prosecution believes that Ms. Adams possesses scientific, technical, or specialized knowledge or training that would, in fact, enable her to render an expert opinion on the meaning or significance of the markings on the calendar, then Mr. Holmes requests an hearing and determination by this Court CRE 702, 403, and *People v. Shreck*, 22 P.3d 68 (Colo. 2001) regarding (1) the reliability of the scientific principles, (2) the qualifications of the witness, and (3) the usefulness of the testimony to the jury.

4. Mr. Holmes asserts such “cryptanalysis” opinion testimony is irrelevant, speculative, and improper lay opinion testimony that should be excluded under CRE 701 and 403. If the prosecution believes it is a proper subject for expert opinion, Mr. Holmes asserts that any such opinion must be determined to be reliable and admissible pursuant to *Shreck* and CRE 702 and 403, prior to any testimony related to expert 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.

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).

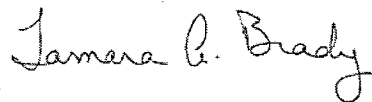
Request for a Hearing

6. Mr. Holmes moves for an evidentiary hearing on this motion.

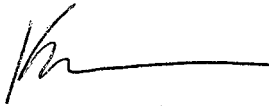
Mr. Holmes files this motion, and makes all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, on the following grounds and authorities: the Due Process Clause, the Right to a Fair Trial by an Impartial Jury, the Rights to Counsel, 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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Chief Trial Deputy State Public Defender



Kristen M. Nelson (No. 44247)
Deputy State Public Defender

Dated: June 3, 2013

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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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Jacob Edson
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