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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF MONTEREY

THE STATE OF CALIFORNIA,

Plaintiff,

vs.

PAUL RUBEN FLORES,

Defendant.

Case No. 22CR003712

CONDITIONALLY UNDER SEAL

NOTICE OF MOTION AND MOTION TO EXCLUDE DOG TESTIMONY IN OPPOSITION TO ANTICIPATED PROFFER BY PROSECUTION; MEMORANDUM OF POINTS AND AUTHORITIES

[Subject to application to file under seal]

Date: June 6, 2022
Time: 8:30 a.m.
Dept.: 4

Hon. Jennifer J. O'Keefe

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TO THE CLERK OF THE COURT AND TO THE DISTRICT ATTORNEY OF THE COUNTY OF SAN LUIS OBISPO AND DEPUTY DISTRICT ATTORNEY CHRISTOPHER PEUVRELLE:

PLEASE TAKE NOTICE that on June 6, 2022 at 8:30 a.m., or as soon thereafter as the case may be heard in the above-entitled Court, Defendant Paul Flores, will move the Court to proceed to a hearing under Evidence Code sections 402 and 403 and to issue an order to exclude any and all testimony related to the behavior of dogs or the interpretation of dog behavior by any witness on the grounds that the prosecution has the burden of establishing foundational facts sufficient to support said testimony and evidence. This motion is submitted in anticipation of the evidence to be proffered by the prosecution based on the testimony presented at the preliminary hearing in this matter and the Defense reserves the right to augment its response, by way of evidence or argument, at such time as the prosecution's proffer is made at the hearing on this motion.

This motion is made to protect Mr. Flores' rights to due process and a fair trial pursuant to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, article I, §§ 7 and 15 of the California Constitution, relevant statutory and case law.

The motion will be based on this Notice of Motion, the Memorandum of Points and Authorities served and filed herewith, such supplemental memoranda of points and authorities as hereafter may be filed with the Court, the transcript of the preliminary hearing, all pleadings and documents

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heretofore filed with the Court and such oral argument as may be presented at the hearing on the motion.

Dated: May 31, 2022

Respectfully submitted,

SANGER SWYSEN & DUNKLE
Robert M. Sanger
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By: 
Robert M. Sanger
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Paul Ruben Flores

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF RELEVANT FACTS

The defense anticipates that the prosecution will intend to attempt to introduce evidence that certain dogs "alerted" or demonstrated other behavior to claim that said alert or behavior is evidence of the presence of human remains. Under Evidence Code sections 402 and 403, the prosecution has the burden of proffering the evidence and the burden of producing evidence as to the existence of the preliminary facts necessary for the admissibility of said facts.

In order to provide the Court with briefing in advance of the hearing, the defense will refer to the testimony offered by the prosecution in the preliminary hearing. The defense is not conceding the validity or sufficiency of any of the preliminary hearing testimony but simply anticipates that it will be part of the prosecution's proffer regarding its burden to prove the preliminary facts.

Depending on the proffer of evidence by the prosecution, the defense may call other witnesses, including an expert, whose curriculum vitae and report will be provided in discovery to the prosecution. The defense will also make reference to the numerous other dog "alerts" and behaviors during the course of the investigation that led to searches and excavations on the Cal Poly campus, surrounding areas and remote areas including remote areas of the County of San Luis Obispo which resulted in false positives leading to no evidence or animal remains.

A. Adela Morris

Adela Morris was a dog handler who had dogs specializing in human remains detection. (6RT 1659.) When Ms. Morris first started, she trained in search and rescue. (6RT 1659-1660.) Ms. Morris published a few papers involving historic and prehistoric remains. (6RT 1661-1662.)

Ms. Morris founded the Institute for Canine Forensics around 1997. (6RT 1663.) She also founded the Canine Specialized Search Team in Santa Clara County. (6RT 1663-1664.) Ms. Morris and CSST came up with their own certification requirements for the organization. (6RT 1672.) In 2017, Ms. Morris was involved with the Alta Heritage Foundation Cremains Recovery Team in Santa Rosa after a big fire. (6RT 1664.)

Ms. Morris had a dog named Cholla from 1995 to 1999. (6RT 1673.) Ms. Morris discussed the certifications Cholla had but did not have any supporting documentation. (7RT 1812.) Cholla took the "cadaver test" with an organization called California Rescue Dog Association (CARDA), a private association of people who have rescue dogs. (6RT 1667; 7RT 1811.) Ms. Morris joined CARDA in 1986 and left about 15 years later. (6RT 1670.) CARDA had its own standards that it would use to test the dogs. (6RT 1671, 1673; 7RT 1818.) Cholla also went through Andy Rebmann's certification process. (6RT 1674) Andy Rebmann offered a certification after an eight-week course. (6RT 1671.) Ms. Morris said she had search-and-rescue-related certifications but did not know her certifications. (6RT 1667.)

Ms. Morris testified that she did not track the number of false positives or engage in proficiency testing. (7RT 1832.) Ms. Morris and Cholla were involved in several searches in which human remains or biological evidence was actually found as a result of the search in from 1995 to 2000. (6RT 1666, 1676-1678.)

Ms. Morris could provide no scientific explanation to support her contention that a deceased body starts to decompose immediately and that dogs can detect this immediate decomposition. (7RT 1840-1842.) Ms. Morris testified that she was not a chemist and, therefore, was not qualified to offer an opinion on this topic. (7RT 1860.) Ms. Morris testified that she is "not aware of papers that address the immediate death and what's – I could not

name those for you." (7RT 1860, 1944.) Ms. Morris also did not know what the composition of the scent was the dogs detect. (7RT 1940-1941.)

On June 29, 1996, Ms. Morris was called to Cal Poly by the San Luis Obispo Sheriff's Department. (6RT 1682.) First, she took her dogs to areas out by a reservoir. (6RT 1682.) Ms. Morris went to Santa Lucia Hall at around 10:00 a.m. (6RT 1683.) By then it was already a warm day which can affect the dogs. (6RT 1683; 7RT 1912.) Ms. Morris brought her dogs Cholla and Cirque. (6RT 1684.)

Cholla ran down the hall of the dorm, stopped at a door and then came back to Ms. Morris. (7RT 1885.) Law enforcement opened the door, Cholla went into the room, and she alerted on different areas on the bed on the left side of the room. (7RT 1886.) Cholla did not have any interest in the rest of the dorm. (7RT 1891.) At 1:00, Ms. Morris returned to the dorm with Cholla. (7RT 1893.) The mattress had been removed from the bed and Cholla alerted to the bed frame and desk. (7RT 1893.)

There was a garbage can on the left side of the dorm room between the bed and the desk to which Cholla alerted. (7RT 1894.) However, then "she wasn't as interested in it." (7RT 1894.)

Ms. Morris also brought her dog Cirque to the Santa Lucia dorm. (7RT 1896.) Ms. Morris claimed he had similar certifications to Cholla but was primarily Ms. Morris's husband's dog. (7RT 1896-1897.) Ms. Morris used Cirque primarily as her "second-opinion dog." (7RT 1898.) Cirque was trained for both human remains and live human detection. (7RT 1907.) Ms. Morris had used Cirque on several searches, but she could not "recall any time where he alerted at all on any of the searches that [she] took him on." (7RT 1908.) Ms. Morris did not have information about his false positive rate. (7RT 1908-1909.) In the Santa Lucia dorm, Cirque alerted to the same door as Cholla and, once inside the room, alerted to the left side of the room.

(7RT 1902-1903.)

Ms. Morris wrote Andy Rebmann a long letter in 1996 before she wrote her report after the search. (7RT 1826.) Andy Rebmann was an "experienced retired law enforcement officer" and Ms. Morris was "just running by him the facts, looking for any words of wisdom that he might have. . ." (7RT 1826.) Mr. Rebmann was not mentioned in her report. (7RT 1827.)

B. Gail Laroque

In 1996, Ms. Laroque was a dog handler with a dog named Torrey. (14RT 3910.) Ms. Laroque and Torrey trained with and were certified by CARDA. (14RT 3912, 3917.) One of the people who evaluated Ms. Laroque was Adela Morris. (14RT 3939.) Ms. Laroque was also involved with FEMA, Urban Search and Rescue, the Alameda County Sheriff's Department, Canine Specialty Search Associates and the Institute for Canine Forensics. (14RT 3918-3921.) The Canine Specialty Search Associates was founded by Andy Rebmann. (14RT 3940.) Torrey was certified to find both live and deceased humans. (14RT 3924.)

The prior searches Ms. Laroque discussed with Torrey involved finding actual live human beings, deceased humans or other biological evidence. (14RT 3923-27; 3955-3956.) Ms. Laroque testified that she would have recorded false positives in her training logs, but she did not have these documents. (14RT 3944-3945.) Ms. Laroque stated that she was aware of volatile organic compounds and that they "change from live to dead" but did not know the chemical makeup of decomposition. (14RT 3952.) Ms. Laroque testified that "[t]he minute that a body – a person passes away, the chemical composition changes then." (14RT 3953.) However, Ms. Laroque did not have peer-reviewed or scientific studies to support this claim. (14RT 3953-3954.)

On June 29, 1996, Ms. Laroque went to the Santa Lucia dorm to search

with her dog. (14RT 3968.) She had driven to San Luis Obispo with Adela Morris. (14RT 3991.) It was very hot, so she took the dog into the dorm's bathroom to cool down the dog. (14RT 3970.) After taking Torrey back to the entrance to the dorm and alerted to a door of Room 128 which had red tape on it. (14RT 3975-3976, 3993.) Ms. Laroque did not see any other doors with red tape on them. (14RT 3993.)

Inside the room, Torrey alerted to the bed and a plastic garbage can on the left side of the room. (14RT 3977-3978.) The garbage can was on the floor in the left corner of the room which was removed from the room. (14RT 3980.) Torrey then alerted to the floor where the garbage can had been. (14RT 3985.) Torrey then went into the hallway where there were three trash cans and alerted to one of the trashcans. (14RT 3988.)

Looking at Exhibits 9 and 14 taken by Detective Neufeld prior to the search, Ms. Laroque testified that the room looked different when she was there. In particular, she did not recall a chair being on the bed, there was a trash can on the floor on the left side and the mattress had been removed from the left bed. (14RT 4000-4001.)

C. Wayne Behrens

Mr. Behrens is a dog handler who got his first dog, Sierra, in 1990. (15RT 4209.) Around that time, he became involved with CARDA. (15RT 4209.) Sierra was certified to find live humans and human remains. (15RT 4210, 4224.) Mr. Behrens was involved with the Yosemite National Park, CARDA, Canine Specialized Support Team and the San Mateo County Sheriff's Office. (15RT 4213.) Sierra was certified in wilderness, urban disaster and cadaver searches with CARDA and also certified with CSST. (15RT 4217-4218.) CARDA is not a governmental agency. (15RT 4225.)

Mr. Behrens testified that he would have noted false positives in his training logs, but he did not have those logs. (15RT 4226.) Mr. Behrens

testified to numerous searches where Sierra's alerts resulted in human remains being found. (15RT 4220-4221.) Mr. Behrens had done fifteen to twenty searches with Adela Morris and Gail Laroque. (15RT 4258.) Adela Morris was his original sponsor for CARDA. (15RT 4258.)

On June 29, 1996, Mr. Behrens went to Cal Poly in San Luis Obispo to search with his dog. (15RT 4237-4238.) Outside of the Santa Lucia dorm, Sierra showed interest in the bushes and the window line of the northern wing of the dorm. (15RT 4239.) He eventually entered the dorm building with Sierra and she put her paws on a door that had police evidence tape on the door. (15RT 4243, 4262.) Inside the room, she alerted to the left side of the room, went to Mr. Behrens, and then went back to the bed on the left side of the room. (15RT 4243-4244.) Mr. Behrens testified that he did not remember their being anything in the space between the bed and desk on the left side of the room. (15RT 4267.)

Mr. Behrens testified that it was his opinion that when a person dies their scent changes after 30 minutes. (15RT 4275.) Mr. Behrens claimed that he participated in a study on this topic but could not give the name for it and said that "there was some work that was done to try to figure that question out." (15RT 4275.) Mr. Behrens also did not know what chemical compounds cause a dog to alert. (15RT 4227.)

D. Kristine Black

Ms. Black is a dog handler who was present for the March 15, 2021 search of Ruben Flores's house with her dog, Annie. (17RT 4831, 4832.) Annie was certified with CARDA, CSST and ICF. (17RT 4813, 4815.) Ms. Black mentioned some searches Annie had participated in all of which involved human remains being found. (17RT 4849-4852.)

At the March 15, 2021 search, Ms. Black and Annie searched after the other dog handler, Karen Atkinson, had completed her search. (17RT 4833.)

Ms. Black was asked to search a vehicle in the driveway and Annie did not alert to the vehicle. (17RT 4834.) Ms. Black then took Annie to the backyard where Annie showed a change in behavior while under the deck but did not alert. (17RT 4835-4836.) A change in behavior is not an alert. (17RT 4855.)

E. Karen Atkinson

Ms. Atkinson is a dog handler who was present for the March 15, 2021 search of Ruben Flores's house with her dog, Amiga. (17RT 4885.) Amiga was certified with the CARDA. (17RT 4868.) Ms. Atkinson was also affiliated with CSST and ICF. (17RT 4868.) Ms. Atkinson did keep records of false alerts that Amiga had in training and said that she had "five possibly." (17RT 4904.) Ms. Atkinson testified to several searches she conducted with Amiga, all of which resulted in finding actual human remains or biological evidence. (17RT 4872-4875.) Ms. Atkinson testified that she did not know of any peer-reviewed articles that state that an alert by itself is evidence without any independent evidence found as a result of an alert. (17RT 4878.)

At the March 15, 2021 search of 710 White Court, Ms. Atkinson started by taking Amiga to a car at which Amiga had no alerts. (17RT 4885.) Next, Ms. Atkinson went underneath the deck with Amiga who had a change of behavior but did not alert. (17RT 4887-4888, 4893.)

I. THERE IS INSUFFICIENT FOUNDATION TO ESTABLISH THE ADMISSIBILITY OF THE DOG "ALERTS" OR "CHANGES IN BEHAVIOR" AND THE TESTIMONY OF THE DOG HANDLERS IS OF NO EVIDENTIARY VALUE

There was an insufficient foundation to establish admissibility of a dog "alert" as at the dorm, other places on campus and in Huasna, nor to establish evidentiary value of a "change in behavior" that did not amount to an alert such as at Ruben Flores' house. The fundamental problem is that

there is no scientific basis for evidence of dog behavior itself unless it actually leads to physical evidence such as a fleeing individual or an actual body.

The admissibility of expert testimony in California is governed by the California Supreme Court decision in *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 770-772 (*Sargon*). The Court expressly acknowledged that judges are the "gatekeepers" with regard to a determination of the admissibility of expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579 (*Daubert*). The California Supreme Court set forth three criteria to determine the admissibility of this kind of testimony:

> "[U]nder Evidence Code sections 801, subdivision (b), and 802, the trial court acts as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative." (*Sargon, supra*, 55 Cal.4th at pp. 771-772.)

The Court also observed that "[o]ther provisions of law, including decisional law, may also provide reasons for excluding expert opinion testimony." (*Id.* at p. 772.)

As gatekeepers, courts must focus on the "'principles and methodology'" asserted by the proposed expert and not "'on the conclusions that they generate.'" (*Sargon, supra*, 55 Cal.4th at 772, quoting *Daubert, supra*, 509 U.S. at p. 595.) Thus, the "gatekeeper's role 'is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'" (*Sargon, supra*, 55 Cal.4th at p. 772, quoting *Kumho Tire Co. v. Carmichael* (1999) 526 U.S. 137, 152 (*Kumho Tire*).) These requirements apply to both scientific testimony as well as non-scientific expert testimony. (*Kumho Tire, supra,*

526 U.S. 137.)

It should be noted that the California Supreme Court in *Sargon* did not take a bold leap. The Court relied on the Evidence Code itself but also incorporated the *Kelly/Frye* analysis. Under *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*), there are three prongs: "First, there must be proof that the technique is considered reliable in the scientific community. Second, the witness testifying about the technique must be a qualified expert on the subject. Third, there must be proof that the person performing the test used correct scientific procedures." (*People v. Willis* (2004) 115 Cal.App.4th 379, 385 (*Willis*).) Therefore, under *Sargon*, Evidence Code sections 801 and *Kelly*, the court is the gatekeeper charged with the duty to exclude expert evidence unless a foundation is laid demonstrating that there is foundational validity to the technique employed and that it is valid as applied by a qualified expert using correct scientific procedures. This is consistent with the view of the scientific community as set forth in the PCAST report and other current scientific studies. (See President's Counsel of Advisors on Science and Technology (PCAST), *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* (2016).)

Here, the dog handlers involved in the search of the dorm room did not employ the intellectual rigor required by *Sargon* and *Kumho Tire*. The dog handlers made claims that they were unable to support with any academic or scientific studies. They did not establish the validity of the "'principles and methodology'" on which they based their conclusions. (*Sargon*, *supra*, 55 Cal.4th at 772, quoting *Daubert*, *supra*, 509 U.S. at p. 595.)

In addition to the fundamental law pertaining to admissibility of expert testimony, the courts of California have discussed evidence pertaining to dogs in the context of dog trailing. This is different than human remains detection and substantially different than attempting to lay a foundation for alerts that

did not result in the location of evidence. Dog trailing cases involve a claim that a particular person can be tracked from one place to another by scent but generally involve locating an actual person who has other connections to the alleged crime.

In *People v. Jackson* (2016) 1 Cal.5th 269 (*Jackson*), the California Supreme Court set forth the standard for the admissibility of dog-trailing evidence based on the Court of Appeal opinion in *People v. Malgren* (1983) 139 Cal.App.3d 234, 238 (*Malgren*). The Court established four factors that had to be satisfied by the proponent in order for the dog-trailing evidence to be admissible, namely: (1) whether 'the dog's handler was qualified by training and experience to use the dog'; (2) whether 'the dog was adequately trained in tracking humans'; (3) whether 'the dog has been found to be reliable in tracking humans'; (4) whether the dog was 'placed on the track where circumstances indicated the guilty party to have been.'" (*Jackson, supra*, 1 Cal.5th at p. 321, quoting *People v. Malgren, supra,* 139 Cal.App.3d at p. 238.) Furthermore, the dog-trailing evidence must be corroborated by either direct or circumstantial evidence. (*Jackson, supra,* 1 Cal.5th at p. 321.)

The *Jackson* Court held that a hearing under *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*), was not necessary to determine the admissibility of dog-trailing evidence. (*Jackson, supra,* 1 Cal.5th at pp. 317-320.) The Court found that dog-trailing evidence was not "so foreign to everyday experience that it would be unusually difficult for jurors to evaluate." (*Jackson, supra,* 1 Cal.5th at p. 317.) Moreover, the Court found that it was "also unlikely that a juror would believe that dogs are scientifically infallible, a risk that *Kelly* was intended to address." (*Ibid.*) To this point, the Court emphasized that the experts in the defendant's case repeatedly testified to this point and particular experts testified to their dogs' previous mistakes. (*Id.* at pp. 317-

318.)

The Court, however, emphasized that "dog-trailing procedures and experiments must comply with the laws of physics, chemistry, and biology" and if they do not, courts must exclude the testimony as "unfounded." (*Jackson*, *supra*, 1 Cal.5th at p. 318.) Trailing cases where someone is located and there is corroborating evidence are different than this case where the behavior of the dog is offered as evidence despite the fact that nothing was located and there is no corroboration.

The courts in *People v. Mitchell* (2003) 110 Cal.App.4th 772 (*Mitchell*) and *Willis*, *supra*, 115 Cal.App.4th 379, both recognized that there is an additional foundation required to establish the foundational validity of "scent discrimination" evidence, which involves a dog "sniffing the scent collected from an object a person is known to have touched and determining whether a second object has been touched by the same individual." (*Mitchell*, *supra*, 110 Cal.App.4th at p. 779.) In *Mitchell*, the court considered testimony by the dog handlers that a scent "will remain on an object for two to four months after it has been touched." This testimony was based on anecdotes regarding the dog's prior performances, but "no effort was made to present information from any academic or scientific sources, let alone peer review journals, regarding these testimonial assertions." (*Mitchell*, *supra*, 110 Cal.App.4th at p. 791.) The court was also concerned about similarly unsubstantiated claims that "every person has a scent so unique that it provides an accurate basis for scent identification lineup." (*Id.* at p. 791.) The court emphasized that neither of the dog handlers who testified had a background in science and neither were aware of scientific data supporting this claim. (*Id.* at p. 791.) Thus, the *Mitchell* court stated that these "assumptions" must be supported by more than "the mere experiences of one trainer and one dog." (*Id.* at pp. 793-794.)

Similarly, in *Willis*, the Court of Appeal stated that the "prosecution cannot rely solely on anecdotes regarding the dog's capabilities." (*Willis, supra*, 115 Cal.App.4th at p. 386.) The court in *Willis* summarized the factors considered in *Mitchell* as follows: "a foundation must be laid from academic or scientific sources regarding (a) how long scent remains on an object or at a location; (b) whether every person has a scent that is so unique that it provides an accurate basis for scent identification, such that it can be analogized to human DNA; (c) whether a particular breed of dog is characterized by acute powers of scent and discrimination; and (d) the adequacy of the certification procedures for scent identifications." (*Willis, supra*, 115 Cal.App.4th at p. 386.) The court in *Willis* also stated that a dog "showing interest" is "a far cry from tracking a suspect and giving an unambiguous alert that the person has been located." (*Id.* at p. 386.)

The foundation found to be insufficient for the admissibility of evidence in *Mitchell* and *Willis* is precisely what is involved here. For example, Adela Morris (7RT 1840-1842), Wayne Behrens (15RT 4275) and Gail Laroque (14RT 3953) each testified that a deceased body starts to decompose immediately after death and that dogs can detect this immediate composition. However, the dog handlers testified that they were not aware of any peer-reviewed scientific studies supporting this assumption. (7RT 1860, 1944 [Adela Morris]; 15RT 4275 [Wayne Behrens]; 14RT 3953-3954 [Gail Laroque].) The dog handlers were not even qualified to explain the process of decomposition or what their dogs were detecting. (See 7RT 1940-1941 [Adela Morris]; 15RT 4227 [Wayne Behrens]; 14RT 3952 [Gail Laroque].) Thus, the dog handlers could not articulate and did not understand the basic principles that they claimed were the basis for their conclusions.

Furthermore, the evidence in this case does not even meet the requirements of *Jackson/Malgren*. The first factor is whether "'the dog's

handler was qualified by training and experience to use the dog.'" (*Jackson, supra*, 1 Cal.5th at p. 321; quoting *People v. Malgren* (1983) 139 Cal.App.3d 234, 238 (*Malgren*).) Here, the dog handlers are not qualified by training and experience to use their dogs. The handlers were all qualified by the same private organizations – California Rescue Dog Association, Canine Specialized Search Team, Institute of Canine Forensics – which were run by the same people, primarily Adela Morris and Andy Rebmann. (6RT 1663-1664, 1667, 1672 [Adela Morris]; 15RT 4209, 4213, 4225 [Wayne Behrens]; 14RT 3912, 3917, 3939 [Gail Laroque].) As stated above, the dog handlers were also not able to answer questions about the basic principles of dog alerts, instead advancing unfounded theories. (See, e.g., 7RT 1860, 1944 [Adela Morris]; 15RT 4275 [Wayne Behrens]; 14RT 3953-3954 [Gail Laroque].)

The second and third factors are whether the dog was "'adequately trained'" and was found to be reliable. (*Jackson, supra*, 1 Cal.5th at p. 321; quoting *People v. Malgren* (1983) 139 Cal.App.3d 234, 238 (*Malgren*).) The dog handlers testified that the dog and handler are certified together as a "team." (7RT 1869.) Therefore, the qualification of the handler is tied directly to the qualification of the dog. In addition, the dog handlers could not provide information regarding the false positive rate of their dogs either because they did not keep such records, or they no longer had that information. (7RT 1832, 1908-1909 [Adela Morris]; 15RT 4220-4221 [Wayne Behrens]; 14RT 3944-3945 [Gail Laroque].) Thus, the dogs were not established to be adequately trained or reliable.

The fourth factor is whether the dog was "'placed on the track where circumstances indicated the guilty party to have been.'" (*Jackson, supra*, 1 Cal.5th at p. 321; quoting *People v. Malgren* (1983) 139 Cal.App.3d 234, 238 (*Malgren*).) Adapting this to the context of human remains

detection, the question would be whether the dog was taken to a place where circumstances indicated the deceased body of Ms. Smart had been. Here, there was no independent evidence indicating that Ms. Smart had been in the dorm room in Santa Lucia even though evidence established that the room previously shared by Mr. Flores and his roommate had been entered by numerous police officers and others and had been taped off. (See, e.g., 3RT 659 [Detective Kennedy testified that at the end of June, the room appeared to have been cleaned]; 6RT 1615 [Rick Neufeld's testimony that he processed the room for trace evidence on June 24, 1996 accompanied by Detective Kennedy]; 12RT 3313 [Investigator Hanley's testimony that he was in the room on June 26, 1996]; 14RT 3933 [Gail Laroque's testimony that on June 29, 1996, there was red tape on the door of Room 128].)

Furthermore, there was no independent evidence presented that corroborated the dog scent evidence. (*Jackson*, *supra*, 1 Cal.5th at p. 321.) There was no biological evidence found in the dorm room that established a basis for the dogs' alerts. In fact, there was no evidence found in the dorm room at all nor was there any evidence that Ms. Smart was in the dorm room at any point. The prosecution merely relies on speculation and innuendo. Thus, the alerts by themselves cannot be accorded evidentiary value under the *Jackson/Malgren* criteria.

Furthermore, as set forth in detail above, the *Jackson/Malgren* criteria apply to trailing cases in which a suspect is located and is found to have some connection to the alleged offense. Even where there is some evidence that could be claimed to be corroboration, it has to be substantial or it is not sufficient. For instance, in *People v. Gonzalez*, the prosecution relied on several pieces of circumstantial evidence to support the dog trailing evidence, including "footprints found intermittently upon the track, along with a shiny dime," and that the officer "saw a heavy-set Mexican mail suspect flee in the

direction taken by the dog" and that the suspect was "found lying face down in tall grass when found and refused to speak when confronted by the officer." (*People v. Gonzales* (1990) 218 Cal.App.3d 403, 415 (*Gonzalez*).) The court found all of that to be insufficient evidence to corroborate the dog trailing evidence. (*Ibid.*)

Of course, the present case is a case in which there is no evidence at all and, therefore, would be evaluated under *Mitchell* and *Willis*. The foundation does not meet those criteria. In addition, the overarching law under *Sargon*, *Daubert*, *Kumho Tire* and Evidence Code sections 801 and 802 require the Court to exercise its gatekeeping function. The only conclusion is that no scientific or expert foundation has been established. Therefore, the dog alert evidence is inadmissible.

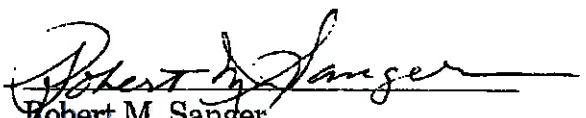
CONCLUSION

Reserving the right to present evidence and argument in response to the prosecutions attempt to carry its burden to establish the foundational facts necessary for admissibility, the defense submits that evidence of dog "alerts" or behavior or any interpretation thereof is not admissible under any circumstances as substantive proof and, in this particular case, the prosecution has failed to meet its burden.

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Respectfully submitted,

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