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SUPERIOR COURT OF CALIFORNIA

COUNTY OF MONTEREY

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| THE PEOPLE OF THE STATE OF CALIFORNIA,<br>Plaintiff,<br>vs.<br><br>PAUL RUBEN FLORES &<br>RUBEN RICARDO FLORES,<br>Defendant. | MONTEREY CASE NO. 22CR003712 & 22CR003713<br>SAN LUIS OBISPO CASE NO.: 21F-02402-A, B<br><br>MOTION TO ADMIT CADAVER DOG HANDLER TESTIMONY<br><br>Date: June 6, 2022<br>Time: 8:30 a.m.<br>Dept: 4 |

I

## STATEMENT OF THE CASE

During the Preliminary Hearing, the Honorable Judge Craig Van Rooyen admitted the testimony of all five dog handlers in this case finding that the *Malgren* factors were met. On January 21, 2022, the Honorable Judge Jacquelyn Duffy denied the defense 995 motion finding that the testimony of the five dog handlers was properly admitted and that the Malgren factors were met. The People seek to admit this same testimony at jury trial.

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II

## STATEMENT OF RELEVANT FACTS

Six California Rescue Dog Association (CARDA) human remains detection (HRD) certified dogs have been deployed during searches in this case: four were deployed during a 1996 search of defendant Paul Flores's dormitory room, and two were deployed at Ruben Flores's property in March 2021. All six dogs alerted to the presence of human remains.

1. The Search of Paul Flores's Dormitory Room

On June 29, 1996, detectives searched Paul Flores' dorm room. They used four dogs that were trained to detect human remains, commonly referred to as "cadaver dogs." The dogs were sent into the residence hall one at a time and out of sight of the others. The first dog reacted Paul Flores' room (number 128) in the Santa Lucia Hall. The dog had walked through two other residence halls without reaction. The second dog entered the room and indicated at the mattress and box spring cover on the bed belonging to Paul Flores. This dog pawed and bit the mattress. This dog had no other indications at any other location. The third and fourth dogs also alerted to the mattress. In total all four CARDA (California Rescue Dog Association) HRD (Human Remains Detection) certified dogs alerted on Flores' mattress.

Wayne Behrens is one of those handlers. He responded to Cal Poly on June 29, 1996, and suggested to detectives that they search the interior of the Santa Lucia dorm (Paul Flores's dorm hall) as his dog Sierra show interest on the exterior of the building underneath a window. He thought maybe a scent was traveling inside the dorm and coming out the window. As they entered the dorm, Sierra went ahead of him and went down a hall. She went in a doorway, then immediately returned to Behrens and alerted. She showed interest in a closed door. As he got closer, he saw crime scene tape on that door. Investigators opened the door and Sierra entered the room. She went left and then alerted on the bed. Behrens and Sierra backed out of the room and Behrens stated he was "stunned" at what he had just witnessed. He suggested the detectives use additional Human Remains Detection dogs to confirm Sierra's findings. He indicated that Sierra was very reputable and had found evidence

in several cold cases. Sierra is a "C1 Cadaver dog," meaning she is certified in "small scents." The mattress was the only location on which Sierra alerted during his entire search.

Adela Morris, one of the dog handlers, explained that the dogs are trained to alert on human remains as soon as decomposition begins at death. The dog alert indicates a strong possibility that a deceased person had been in the room. She used two CARDA certified dogs named Cholla and Cirque. She remembers seeing Behrens at the location. Detectives asked her to go inside Santa Lucia dorm, so she took Cholla in first. In her words, Cholla "went screaming down the hallway." Cholla alerted on one door in the hallway. Morris tried to walk Cholla a little more inside the hallway, but the dog continued to alert on that one door. Investigators opened the door and Cholla entered "intensely." Cholla could not "vacuum up the scent enough." Morris stated the scene appeared intense for Cholla. The dog alerted on the left side of the dorm room which included the mattress and a trash can. The mattress was an "intense scent sight" for Cholla. Cholla searched the remainder of the building and showed zero interest in anything else. Morris noted that Cholla was trained to locate human remains including bones, body parts, and blood.

Morris then brought her other dog, Cirque, to the entrance of the dorm room. She stated that Cirque did the same thing as Cholla and alerted on the same dorm room door. Cirque also alerted on the bed mattress in the same location that Cholla had alerted. It should be noted that Morris did not know the results of Behrens' search when she ran her two dogs through the dorm.

Gail Laroque is also a dog handler. She used a Boxer named Torrey who in her words was experienced. She was also present at the Santa Lucia dorm on June 29, 1996. She was unaware of the two previous searches at the time of her search. She let Torrey search the dorm building and Torrey immediately rand own the hall and did a "fish-hook" towards the door of room number 128. She stayed at the far end of the hall so as not to influence Torrey. Torrey scratched on the door of room number 128. Laroque entered the dorm room Torrey ran inside towards the bed frame and was very excited, sniffing the bed frame. Torrey also alerted on a grey trash can inside the dorm room, as well as the left side of the dorm

room where there was a desk and possibly a phone. Torrey continued to smell and alert on the bed frame. Afterwards, Laroque learned that investigators had removed the mattress after the three prior dogs had searched the room. Laroque said this explained why Torrey was doing "air searching" because she was looking for the primary source of the scent which was most likely the missing mattress. She asked investigators to remove the trash can from the dorm so Torrey would stop alerting on it in the room. When she took Torrey out of the room, there were three trash cans in the hallway. Torrey then alerted again on the trash can that had been in room number 128, grabbed the trash can and brought it to Laroque. Laroque stated this was a "double alert" on the trash can.

The mattress is still in evidence, but the trash was removed. All four handlers are alive and available to testify.

2. The Search of Ruben Flores's Property

In March 2021, investigators searched Ruben Flores's property at 710 White Court in Arroyo Grande.

CARDA certified dog handlers Kris Black and Karen Atkinson ran their dogs throughout the entire property, as well as around the Volkswagen. Both dogs showed a subtle change in behavior in the left northwest side behind the lattice under the deck. This is the area where ultimately human blood was found approximately four feet beneath the surface. This

Phil Hanes is a Senior Archeologist and Ground Penetrating Radar director for Natural Investigations Company. He utilized his GPR machine to map and grid certain areas of the property. He wrote in his report:

> Grid 1 was placed along the rear of the residence underneath the western most portion of the rear porch (Figure 1). The grid measured 36-feet east west by 4-feet north south. Analysis of the data from the grid showed minor disturbance throughout the grid consistent with soils to be expected underneath a residence and a large approximately 4-foot by 6-foot anomaly located at the western end of the grid. This anomaly showed significant soil disturbance from the surface to a depth of approximately 4-feet below surface with the most soil disturbance between 1.5-feet to 3.5-feet below surface. Based on the size, shape, and location of this anomaly this location was chosen for 710 WHITE COURT GPR 2 excavation (excavation 2) and represented the highest probability excavation target located within the survey.

The following photograph was provided by Mr. Hanes and shows the various areas mapped by Ground Penetrating Radar at Ruben Flores' house. It also shows the location of four excavations identified by the Archeologists as places to dig. As mentioned above, they were most enthusiastic about digging at Grid 1.




III

## LAW AND ARGUMENT

Cadaver dogs are trained to scent and alert to decomposing human remains. (*People v. Peterson* (2020) 10 Cal.5th 409, 419, fn. 5.)

> An alert ... is nothing more than the dog's signal to its handler that it has detected an odor it has been trained to locate. A dog can accomplish this by either a passive or aggressive alert. A passive alert generally consists of the dog merely sitting and looking at the area where it detects the source of the odor. An aggressive alert, as the name suggests, generally consists of the dog scratching or using some other active indication to the area where it detects the odor.

(Mark E. Smith, *Going to the Dogs: Evaluating the Proper Standard for Narcotic Detector Dog Searches of Private Residences*, (2009) 46 Hous. L. Rev. 103, 115.) Certified cadaver dogs and their handlers go through months of constant training to become a reliable search team. The admissibility of their alerts requires evidence of their training and reliability; however, the case-specific nature of dog scent evidence and its decades-long use places it outside the scope of the requirements of *People v. Kelly* (1976) 17 Cal.3d 24.

1. The *Kelly* Test

The admissibility of expert testimony based on a new or novel scientific technique is governed by rules adopted in the leading cases of *Frye v. United States* (D.C. Cir. 1923) 293 Fed. 1013 and *People v. Kelly* (1976) 17 Cal.3d 24 (abrogated by statute on another point as explained in *People v. Wilkinson* (2004) 33 Cal.4th 821, 845-848). Federal courts have since abandoned *Frye*. (*Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579; *People v. Cowan* (2010) 50 Cal.4th 401, 469, fn. 22.) But California has retained the *Kelly* test despite *Daubert*. (*People v. Leahy* (1994) 8 Cal.4th 587, 598-604, 612.)

Under the *Kelly* test, the proponent of the evidence must establish (1) the reliability of the method—that it is " 'sufficiently established to have gained general acceptance in the particular field in which it belongs,' " (2) that the witness is an expert qualified to give an opinion on the subject, and (3) that correct scientific procedures were used. (*Kelly*, *supra*, 17 Cal.3d at p. 30.) "The first and third prongs can be confused; the *Kelly* first-prong analysis applies only to a new technique or procedure, whereas the third prong is case specific. [Citation.]" (*People v. Stevey* (2012) 209 Cal.App.4th 1400, 1410.) "In determining whether there has been 'general acceptance,' '[t]he goal is not to decide the actual reliability of the new technique, but simply to determine whether the technique is generally accepted in the relevant scientific community.' [Citation.]" (*People v. Morganti* (1996) 43 Cal.App.4th 643, 656.) The purpose of these threshold requirements, often referred to as the *Kelly* test, is to protect against the risk of unproven or experimental science garnering an aura of certainty. (*Kelly*, *supra*, 17 Cal.3d at p. 32.)

Not all new scientific testing procedures or instruments are subject to the *Kelly* test. "The *Kelly* rule is frequently inapplicable to expert testimony because the testimony is often neither based on a new scientific technique nor likely to convey an aura of certainty. '[A]bsent some special feature which effectively blindsides the jury, expert opinion testimony is not subject to *Kelly*.' " (*In re O.D.* (2013) 221 Cal.App.4th 1001, 1006-1007, citing *People v. Stoll* (1989) 49 Cal.3d 1136, 1157.) The *Kelly* rule only applies to scientific instruments, machines and testing devices, not to other forms or types of tests or analyses normally performed by experts.

2. Dog Tracking and Dog Scent Evidence is Not a "Newly Developed Scientific Technique"

The admission of dog-trailing or dog-scent evidence was first approved more than forty years ago in *People v. Craig* (1978) 86 Cal.App.3d 905 (*Craig*), where the Court of Appeal explained that dog trailing does not involve standardized techniques and inanimate, fungible instruments whose accepted use in the scientific community may be established; rather, it involves the use of individual dogs, whose "ability and reliability [should] be shown on a case-by-case basis." (*Craig, supra*, 86 Cal.App.3d at p. 915; see also *People v. Westerfield* (2019) 6 Cal.5th 632, 706.) "As such, *Kelly* does not apply; the evidence is admissible if proper foundation is laid concerning the present ability of a particular well-trained dog to trail a human. This 'is a fact which, like other facts, may be proven by expert testimony.' " (*People v. Peterson* (2020) 10 Cal.5th 409, 444, citing *Craig, supra*, 86 Cal.App.3d at p. 915.)

In *People v. Jackson* (2016) 1 Cal.5th 269, the California Supreme Court agreed with the analysis in *Craig* when it found that dog scent evidence (specifically, scent trailing) did not require a *Kelly* hearing. (*Id.* at p. 320.) The Court found that scent trailing evidence is not "new," and is not so foreign that it would be unusually difficult for a factfinder to evaluate, as "[j]urors are capable of understanding and evaluating testimony about a particular dog's sensory perceptions, its training, its reliability, the experience and technique of its handler, and its performance in scent trailing, such as performed in this case." (*Id.* at pp. 317, 320.) It

is unlikely a factfinder would believe dogs are scientifically infallible, which was a risk that the *Kelly* (and *Daubert*) procedure was designed to address. (*Id.*)

In 2019, the California Supreme Court referred to this evidence more expansively as "dog scent" evidence when it affirmatively cited *Craig* and *Jackson* and analyzed the appropriateness of the jury instruction (CALJIC No. 2.16) for dog scent evidence overall and specifically for dog scent evidence involving cadaver dogs. (*People v. Westerfield* (2019) 6 Cal.5th 632, 706-709.)[1]

In 2020, the California Supreme Court affirmed its ruling in *Jackson* that dog trailing evidence does not require a hearing under the *Kelly* test. (*People v. Peterson* (2020) 10 Cal.5th 409, 444-446.)[2]

Based on the logic of *Craig*, *Jackson*, and *Peterson* and the expansive language of the California Supreme Court in *Westerfield*, dog scent evidence is not subject to the *Kelly* test given the animate nature of the dog and the case-by-case basis for admission of dog scent evidence. For dog scent evidence to be admissible in this case, the People must meet foundational requirements to demonstrate the training and reliability of the individual dog and its alert(s).

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[1] The relevant current jury instruction for dog tracking evidence is Judicial Council of California Criminal Jury Instruction (CALCRIM) number 374, which states,

> You have received evidence about the use of a tracking dog. You may not conclude that the defendant is the person who committed the crime based only on the fact that a dog indicated the defendant (or a location). Before you may rely on dog tracking evidence, there must be:
>
> 1. Evidence of the dog's general reliability as a tracker;
> AND
> 2. Other evidence that the dog accurately followed a trail that led to the person who committed the crime. This other evidence does not need to independently link the defendant to the crime.
>
> In deciding the meaning and importance of the dog tracking evidence, consider the training, skill, and experience, if any, of the dog, its trainer, and its handler, together with everything else that you learned about the dog's work in the case.

(*Id.*)

[2] Other jurisdictions have almost uniformly held that dog scent evidence from cadaver dog alerts is admissible subject to the proper foundation of the training and reliability of the individual dog. (See *Torrez v. State* (Fla. Dist. Ct. App. 2020) 294 So.3d 390, 402; *Castillo v. Commonwealth* (Va. Ct. App. 2019) 70 Va.App. 394, 436 [827 S.E.2d 790, 811]; *People v. Lane* (Mich. Ct. App. 2014) 308 Mich.App.38, 53 [862 N.W.2d 446, 457]; *Trejos v. State* (Tex. App. 2007) 243 S.W.3d 30; *Clark v. State* (Md. Ct. Spec. App. 2001) 140 Md. App. 540, 579 [781 A.2d 913, 936]; *State v. Brown* (1999) 266 Kan. 563 [973 P.2d 773, 780]; *People v. Lifrieri* (N.Y. App. Div. 1996) 230 A.D.2d 754 [646 N.Y.S.2d 172].)

3. Foundational Requirements for Dog Scent Evidence

After the Court of Appeal in *Craig* held that dog scent evidence is not subject to the *Kelly* test, the Court of Appeal in *People v. Malgren* (1983) 139 Cal.App.3d 234 (*Malgren*) elaborated on the foundation necessary for dog scent evidence. Specifically, the *Malgren* court identified five foundational requirements for the admissibility of dog trailing evidence:

> (1) the dog's handler was qualified by training and experience to use the dog; (2) the dog was adequately trained in tracking humans; (3) the dog has been found to be reliable in tracking humans; (4) the dog was placed on the track where circumstances indicated the guilty party to have been; and (5) the trail had not become stale or contaminated.

(*Id.*, at p. 238.)

When the issue was presented to the California Supreme Court in *Jackson* in 2016, the Court approved the admission of dog-scent evidence upon a sufficient showing of the first four *Malgren* requirements, holding that the fifth *Malgren* factor "is not an independent requirement; it is satisfied by evidence that establishes the other four factors." (*Jackson*, *supra*, 1 Cal.5th at p. 325-326.) "If a well-qualified handler trains a dog who has reliably trailed human scent and is well trained in ignoring or forgetting past smells and in indicating negative trails, then the dog will not trail if the scent on the scent item is stale or nonexistent, or if there is no trail that matches the scent on the scent item." (*Id.* at p. 325.) Evidence of the first four *Malgren* requirements ordinarily will suffice to support admission of dog trailing evidence. (*People v. Peterson*, *supra*, 10 Cal.5th at p. 445.)

In this case, the dog handlers will each testify to the dogs' training, reliability, and certification by CARDA, as well as the handlers' own training and the specific circumstances that led to the independent alerts by each dog.

4. The Probative Value Outweighs Any Unfair Prejudice

In this case, four cadaver dogs in Paul Flores's dorm room and two cadaver dogs at Ruben Flores's property independently of each other, alerted to locations associated with Paul Flores. No body was found. This case is substantially similar to the Texas homicide case

*Trejos v. State* (Tex.App.2007) 243 S.W.3d 30, where no body was recovered but two cadaver dogs independently alerted to the spot where the defendant said he had buried the body. The court in that case held that the probative value of the evidence substantially outweighed the danger of unfair prejudice, confusion of issues, or misleading the jury because the dogs' alerts corroborated other evidence (in that case, the defendant's incriminating statements). (*Id.* at pp. 38, 55.)

In this case, the proposed testimony of the handlers for the individual cadaver dogs is highly probative and is not unfairly prejudicial. (See Evid. Code, § 352.) The independent alerts of cadaver dogs to the presence of human remains on Paul Flores's mattress in his door room at or near the time of the crime and the independent alerts of cadaver dogs at 710 White court are highly probative to the issues of whether Kristin Smart was murdered and the identity of the perpetrator. Furthermore, other evidence that Kristin Smart is dead corroborates the cadaver dog evidence: Kristin Smart was last seen alive (walking with Paul Flores) on May 25, 1996, she has not contacted family or friends since May 24, 1996, the testimony that the family was very close and attended all familial events together she did not have access to a large sum of money, and she left her belongings behind. The testimony will not amount to an undue consumption of time, as the foundation for the admissibility of each dog's alerts also serves to provide context and weight for the alerts to be described and each independent alert corroborates the work of the other dogs and are relevant to the reliability of any alert by an individual dog.

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## IV

## CONCLUSION

For all of the above-referenced reasons, the People respectfully request the Court admit dog scent evidence of alerts by cadaver dogs after evidence establishing the dogs' and their handlers' specific training and reliability.

Date: May 31, 2022

Respectfully submitted,

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District Attorney

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| THE PEOPLE OF THE STATE OF CALIFORNIA,<br>Plaintiff,<br>vs.<br><br>PAUL RUBEN FLORES &<br>RUBEN RICARDO FLORES,<br>Defendants. | MONTEREY CASE NO. 22CR003712 & 22CR003713<br>SAN LUIS OBISPO CASE NO.: 21F-02402-A, B<br><br>AFFIDAVIT OF DEPUTY DISTRICT ATTORNEY CHRISTOPHER PEUVRELLE – REQUEST FOR ORDER AND ORDER SEALING RECORDS |

I am Christopher Peuvrelle, a Deputy District Attorney for San Luis Obispo County. I am the assigned prosecutor for the above-entitled case.

As the court and counsel for the defendant are well aware, there has been a great deal of public interest in this pending case. It has been the goal of all parties to this case to limit the amount of information disseminated to the public to maintain the integrity of the potential jury pool. Such efforts will help assure the defendant is able to receive a fair and impartial trial in which has now been moved to Monterey County.

In this regard, I have submitted a copy of Motion to Admit Cadaver Dog Handler Testimony to be heard on June 13, 2022. In accordance with Section 6255 of the California Government Code, I am requesting that this court order that the Motion to Admit Cadaver Dog

Handler Testimony be sealed until further order of this Court. I respectfully urge that, under Section 6255, the public interest served by not making such records public clearly outweighs the public interest served by disclosure of such records. I would further request that a copy of such reports be released only to counsel for the People and the defendant to prepare for the Jury Trial. Defense counsel represented in chambers with the Honorable Judge van Rooyen on April 15, 2021, that they agree with this request.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: May 31, 2022

Respectfully submitted,

Dan Dow
District Attorney

By: Christopher Peuvrelle
Deputy District Attorney