CAUSE NO. 1190523

STATE OF TEXAS	**§**	**IN THE 351st**
	§	
VS.	**§**	**DISTRICT COURT**
	§	
IVORY GIPSON	**§**	**HARRIS COUNTY, TX**

MEMORANDUM IN SUPPORT OF MOTION TO EXCLUDE TESTIMONY OF STATE'S EXPERT WITNESS, DEPUTY K. PICKETT BASED UPON T.R.E. 702 AND *KELLY/DAUBERT* FACTORS

Comes now the defendant Ivory Gipson, by and through counsel Daphne L. Pattison, and files this Memorandum in Support of Motion to Exclude Testimony of State's Expert Witness, Deputy K. Pickett based upon Texas Rule of Evidence 702 and *Kelly*/*Daubert* Factors.

STATEMENT OF FACTS

Ivory Gipson is accused of burglary of a habitation. The only evidence against him is a dog scent line-up performed by Deputy K. Pickett. The home burglarized belongs to Mr. Gipson's sister. Mr. Gipson has been in the house many times before. His scent will definitely be in the home, and as a family member his scent is likely to be similar to his sister's scent.

The State has indicated that it will offer at the trial of this matter the testimony of Deputy K. Pickett. Deputy Pickett has not provided a report; however, the offense report prepared by Officer Peters states that the line-up was performed by allowing the bloodhounds to smell an object containing the specific scent of an individual from a crime scene item the suspect has been in contact with and then matching that scent with the same scent present in the line-up. A sample of six gauze scent pads with one being

from a potential suspect and 5 other people are placed on the ground approximately 10 walking steps from each other. The line up is laid out so that the wind is perpendicular to the gauze scent pads. In this case, the scent pads were placed by HPD Officer Peters. The dogs were allowed to smell a scent pad from the headboard and armoire involved with the burglary and then walked by the gauze pads. The dogs alerted on Mr. Gipson scent pad.

STATEMENT OF LAW

A. Overview of Applicable Law

Courts of Appeal in Texas have erroneously held that dog scent evidence is not subject to a *Kelly/Daubert* analysis to determine whether the expert testimony is sufficiently reliable and relevant to help the jury in reaching accurate results. *Winston v. State*, 78 S.W.3d 522 (Tex.App.-Houston [14th Dist.] 2002).

In 1992, *Kelly v. Texas*, 824 S.W.2d 568 (Tex.Cr.App. 1992) laid out a test for determining the reliability of novel scientific evidence. "As a matter of common sense, evidence derived from a scientific theory, to be considered reliable, must satisfy three criteria…: (a) the underlying scientific theory must be valid; (b) the technique applying the theory must be valid; and (c) the technique must have been properly applied on the occasion in question." The case then set out factors that could be used by the Court to answer these questions. Those factors are:

> (1) the extent to which the underlying scientific theory and technique are accepted as valid by the relevant scientific community, if such a community can be ascertained; (2) the qualifications of the expert(s) testifying; (3) the existence of literature supporting or rejecting the underlying scientific theory and technique; (4)

> the potential rate of error of the technique; (5) the availability of other experts to test and evaluate the technique; (6) the clarity with which the underlying scientific theory and technique can be explained to the court ; and (7) the experience and skill of the person(s) who applied the technique on the occasion in question. *Id* at 573.

In 1993, about a year later, *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), the Supreme Court held that Fed. R. Evid. 702 imposes on the trial court the obligation, when dealing with expert witnesses, to ensure that scientific testimony is both relevant and reliable. Subsequently, the Texas Court of Criminal Appeals determined that the *Kelly* test is substantively identical to the inquiry mandated by *Daubert*. *Jordan v. State*, 928 S.W.2d 550, 554 (Tex.Crim.App. 1996).

Now, the next step is where the Texas Court of Criminal Appeals made its mistake. It decided a case called *Nenno vs. State*, 970 S.W.2d 549 (Tex.Crim.App. 1998). This case is decided six months before *Kumho Tire Company, LTD v. Carmichael*, 119 S.Ct. 1167 (1999) is argued before the Supreme Court. In *Nenno*, the Texas Court of Criminal Appeals decides that the factors outlined in *Kelly* may not apply to nonscientific expert testimony depending upon the context. *Nenno* at 560. *Nenno* sets forth an easier test for fields of study such as social sciences or fields that are based primarily upon experience and training as opposed to the scientific method. *Nenno* at 561. In this test there are three simple questions: "(1) whether the field of expertise is a legitimate one, (2) whether the subject matter of the expert's testimony is within the scope of that field, and (3) whether the expert's testimony properly relies upon and/or utilizes the principles involved in the field." *Id.*

Nenno bases its decision on federal case precedent noting that "the general approach of the Federal Rules-and by inference, the state rules that were patterned upon them…" *Nenno* at 561. *Nenno* then proceeds to cite *Daubert* and other federal cases to support its decision. *Id.* Clearly, *Nenno* meant to be following the same standard as federal courts in evaluating the admissibility of expert testimony. However, it misread the minds of the Supreme Court Justices.

In *Kumho Tire Co. v. Charmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999), the Supreme Court was required to determine how *Daubert* applies to the testimony of engineers and other experts who are not scientists. The Supreme Court decided that *Daubert* applies to all expert testimony including testimony based on technical and other specialized knowledge.

The importance and purpose of *Daubert*'s gatekeeping requirement was articulated as follows in *Kumho Tire Co.*:

> The objective of the requirement is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employees in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.

The proponent of an expert must prove that the testimony of the proposed expert is reliable. *Total Containment, Inc. v. Dayco Products, Inc.*, 2001 WL 1167506 (E.D. Pa. 2001); and *Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412 (3rd Cir. 1999). The test for reliability is an exacting one and the expert will be held to the intellectual rigor of his field. *Weisgram v. Marley Co.*, 528 U.S. 440, 120 S.Ct. 1011, 145 L.Ed.2d 958 (2000), *Kumho Tire*, 526 at 152 (1999); and *Total Containment, Inc. v. Dayco Products, Inc.* supra.

Without noticing the error, the Court of Appeals in Winston, decided that the easier test set forth in *Nenno* should apply to dog scent evidence. *Kumho Tire* requires that the Court analyze this case using the *Kelly/Daubert* factors.

B. Application of *Daubert/Kelly* Factors

Turning to the proffered evidence at hand and considering the *Kelly/Daubert* factors, dog scent evidence cannot possibly pass the test. Considering each factor in turn:

(a) The underlying scientific theory must be valid – There is no way to adequately examine the theory behind a dog's identification of a suspect. We have no way to interview the dog and determine what the dog is smelling, no way to examine the dog's biology to determine the mechanism employed, in short no way to understand the science. Is it scent pheromones? Does perfume affect the reliability? Are family members similar? These are just a few questions that should be able to be answered in evaluating a theory.

(b) The technique applying the theory must be valid – Since there is no way to comprehend the theory, there is no way to determine if the technique is valid. Independent research did not reveal any evaluation of error rates or peer reviews of the technique.

(c) The technique must have been properly applied on the occasion in question – Again, since the dog cannot be interviewed, it is impossible to determine if a reliable technique of any sort was applied much less applied properly.

Review of the offense report reveals absolutely no information regarding the

underlying data or science to support the methods used to form Deputy Pickett's opinion. Furthermore, the report does not provide any principles upon which his opinion is based. As stated by the *Supreme Court in General Electric v. Joiner*, 522 U.S. 136, 144, 118 S. Ct. 512, 139 L.Ed2d 508 (1997), an expert must explain both how and why he reached his opinion based upon the data relied upon, in order for the opinion to be admissible into evidence. The reason this information is missing from the State's report is that the one who really formed the opinion, the dog, cannot explain how and why he reached a decision.

All of this information is absent because the entire field is unfounded. Any testimony by Deputy Pickett would be strictly speculation founded upon the love of dogs rather than any tested methodology.

CONCLUSION

We cannot allow such speculative evidence to be the foundation for any verdict. As established above, dog scent evidence including but not limited to the testimony of Deputy K. Pickett fails to meet the requirements of *Daubert, Kumho Tire Co*., and T.R.E. 702. Deputy K. Pickett's opinion lacks the reliability required of an expert witness. In fact, there is no reliable means in which to review the science of his field. There is no methodology to adequately test the procedures used and no way to even determine the underlying data. Accordingly, Deputy K. Pickett should not be allowed to testify at the trial on the merits of this matter.

Respectfully Submitted,

IVORY GIPSON

By:_____
DAPHNE L. PATTISON

CERTIFICATE OF SERVICE

I, Daphne L. Pattison, Attorney of record for the Defendant, does hereby certify that a true and correct copy of the above and foregoing Motion was served upon the attorney for the State on the _____ day of _____, 2009.

SO CERTIFIED, this the _____ day of _____ _____, 2009.

_____
DAPHNE L. PATTISON

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