

IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

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UNITED STATES OF AMERICA,

v.

DYLAN M. WARD,

JOSEPH R. PRICE,

and

VICTOR J. ZABORSKY,

Defendants.

Criminal Nos. 2008-CF1-26996

2008-CF1-27068

2008-CF1-26997

Judge Lynn Leibovitz

Trial Date: May 10, 2010

**DEFENDANTS' JOINT MOTION IN LIMINE TO EXCLUDE
ALL EVIDENCE OF CADAVER DOG SEARCHES AND "ALERTS"**

Based on information and inferences upon which the government based its request for an arrest warrant in this case, defendants Dylan Ward, Joseph Price, and Victor Zaborsky have reason to believe that the government intends to introduce expert testimony and other evidence at trial relating to searches conducted of their former residence by so-called "cadaver dogs" and to "alerts" that the cadaver dogs allegedly exhibited at two locations at the residence. The defendants, by and through undersigned counsel, respectfully move in limine to exclude all evidence relating to the cadaver dog searches conducted in this case. Where, as in this case, a cadaver dog "alert" does not lead to scientific confirmation of the presence of biological evidence that verifies the significance of the dog's signal, testimony regarding the alleged "alert" must be excluded, both because it fails to qualify as admissible expert testimony under *Dyas v. United States*, 376 A.2d 827 (D.C.), *cert. denied*, 434 U.S. 973 (1977), and because the probative value of such testimony is outweighed by its danger of unfair prejudice.

Case: 2008 CF1 026997
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FACTUAL BACKGROUND

The Alleged Cadaver Dog “Alerts” at 1509 Swann Street, N.W.

On August 2, 2006, Robert Wone (“Wone”) died inside the residence located at 1509 Swann Street, N.W., as a result of three stab wounds to his torso. According to the *Affidavit in Support of an Arrest Warrant for Dylan Ward* filed by the government in this case (“*Arrest Warrant Affidavit*”), sometime after the Metropolitan Police Department (MPD) processed the scene and removed evidence from it, “a number of specially trained police dogs were brought to the Swann Street residence.” *Arrest Warrant Affidavit* at 11. One of those dogs was a “‘cadaver dog’ trained to detect human blood and human remains.” *Ibid.* With respect to the cadaver dog, the government asserts that the following events occurred:

[a] ‘cadaver dog’ trained to detect human blood and human remains was taken through the house. The dog alerted – indicating the presence of human blood or human remains – in two locations. The first location was the lint trap of a dryer located just outside the bathroom by Ward’s bedroom on the second floor. The second location was a drain situated within the secured courtyard area in the back of the residence, at the bottom of a set of stairs leading down to the rear entrance into the basement apartment of the residence

Ibid.

Based on the information that has been provided to the defense to date, both the MPD and the Federal Bureau of Investigation (“FBI”) processed the crime scene and neither entity identified evidence of human blood, human decomposition, or human remains at either of the two locations at which the cadaver dog allegedly “alerted.” Nonetheless, in the *Arrest Warrant Affidavit*, the government asserts that certain inferences can be drawn from the cadaver dogs “alerts” combined with two additional factual allegations: (1) the drain cover at the “second location” was “ajar” and (2) an “uncoiled” hose was located in the “same area.” *Arrest Warrant*

Affidavit at 11. Based on the cadaver dog “alerts” and those two additional factual allegations, the government asserts the following:

These facts are consistent (though not exclusively so) with the following inferential circumstances: an individual could have gone to the stairwell in the enclosed backyard area, used the hose to wash off and down the drain any blood that was on his person and clothing, then placed the wet clothing in to the clothes dryer resulting in any remaining blood being cycled through the lint trap of the dryer. . . . The cadaver dog alert on the rear stairwell drain and the lint filter of the clothes dryer suggest that bloody clothing or items were cleaned off in the backyard stairwell and then placed in the clothes dryer to dry. *Id.* at 11, 13.

Overview of the Investigative Use of Cadaver Dogs

Cadaver dogs are used to assist in searches for evidence of human remains. Alanna E. Lasseter et al., *Cadaver Dog and Handler Team Capabilities in the Recovery of Buried Human Remains in the Southeastern United States*, 48 *Journal of Forensic Science* 3 at 1 (2003) (“*Cadaver Dog and Handler Team Capabilities*”). “The term ‘cadaver’ can be misleading because the dog may not always locate an actual body, but may indicate on scavenged parts, body fluids, or the residual odor of a body.” Jonathan K. Dorriety, *Cadaver Dogs as a Forensic Tool: An Analysis of Prior Studies*, 57 *Journal of Forensic Identification* 5 at 1 (2007) (“*Cadaver Dogs as a Forensic Tool*”). Cadaver dogs are “trained to recognize the generic scent of human decomposition” and to give a physical “alert” when they “detect any type of human decomposition, whether it is a recently dead body or just remnants of fluid and tissue from a decomposed body.” *Id.* The form of a cadaver dog’s alert can be aggressive or passive: “An aggressive alert is one in which the dog digs at the site of the human remains [or decomposition]. A passive alert is when the dog lays down on the site of interest or jumps on the handler to indicate the remains are present.” *Cadaver Dog and Handler Team Capabilities* at 1. The subsequent discovery of positive evidence at the location of a cadaver dog’s “alert” confirms the “alert” and substantiates the dog’s reaction. *See e.g., Rebmann et. al, Cadaver Dog Handbook:*

Forensic Training and Tactics for the Recovery of Human Remains, CRC Press LLC: 2000, page 169 (“*Cadaver Dog Handbook*”).

The feasibility of utilizing cadaver dogs as a means of investigation in a given case depends on a variety of factors, including whether remains are actually present, whether remains are actually creating a scent, the nature of any air movement occurring between the scent and the dog, air temperature and other weather conditions, and handler skill, *i.e.*, whether the handler guides the dog to the correct area and correctly interprets the dog’s behavior. *Cadaver Dog Handbook* at 35. Changes or deficiencies in any of these factors can impair the ability of a cadaver dog to detect relevant scents and would minimize the significance of a purported “alert” reported by the dog’s handler. For instance, weather conditions have an “enormous” impact on a cadaver dog’s ability to detect the scent of human decomposition. *Cadaver Dog and Handler Team Capabilities* at 1. Water and wind can carry away scent molecules of human decomposition and inhibit the dog’s detection of those scents. *Cadaver Dog Handbook* at 97. The usefulness of a cadaver dog to a criminal investigation therefore will vary, depending upon the quality and carefulness of the human investigation that preceded the dog’s search, the handler’s skills, and the weather and environmental characteristics of the search area. *Id.*

A “false alert” occurs when a cadaver dog cues on something other than human remains or human decomposition. *Cadaver Dog and Handler Team Capabilities* at 1. Dogs can falsely cue on, among other things, dead wet animals, submerged debris that catches and holds a scent, decaying vegetation, or sewage. *Cadaver Dog Handbook* at 179-180. The handler’s behavior and body language also can cause a dog to signal a false alert: it is not uncommon for a handler, through his or her eagerness to advance an investigation, to subconsciously prompt a dog to give a strong, positive -- but ultimately false -- “alert.” *Id.*; Michael Zanoni *et. al*, *Forensic Evidence*

Canines: Status, Training, and Utilization, Paper presented at the annual meeting of the American Academy of Forensic Sciences at 6 (February 1998) (“*Forensic Evidence Canines*”) (“[t]here is a significant potential for a dog handler to offer unintentionally misleading or improper signals about the presence or absence of residual scent from decomposed human tissue”).

Expert Opinions
Concerning Uncorroborated Cadaver Dog Alerts

“Cadaver dog searching is far from exact science.” *Cadaver Dog Handbook* at 97. Mr. Mutter is a dog handler and trainer and specializes in cadaver dog searches and alerts, and Dr. Fairgrieve is a forensic anthropologist and specializes in human remains, human decomposition, and cadaver dog searches and alerts.¹ According to both experts, the consensus among dog handlers and scientists is that a cadaver dog’s “alert” should be deemed “positive” only if the presence of biological evidence at the alert location is confirmed through laboratory analysis. See Exhibit A at 6 (*Declaration of Bobby Mutter*); Exhibit B at 6 (*Declaration of Dr. Scott Fairgrieve*). Where a dog’s alert is not validated by scientific confirmation of the presence of human remains, no reliable conclusion can be drawn concerning what caused the dog to alert. Exhibit A at 6; Exhibit B at 6. An uncorroborated alert could be the result of handler error or may reflect ultrasensitivity of the dog and the breadth of its training, *e.g.*, a well-trained dog could “alert” upon a single strand of hair, a child’s tooth, or a toenail clipping, even though the presence of human remnants of those sorts is commonplace and not indicative of criminal activity. See Exhibit A at 6; Exhibit B at 6. In other words, the wide range of biological materials that *could* cause a cadaver dog to alert, and a dog’s inability to communicate with precision what *is* causing it to alert, require that evidence of an alert be considered positive and

¹ The Declarations and *curriculum vitae* of each expert are attached as Exhibits A and B, respectively.

probative *only* when the alert has been corroborated by scientific confirmation of the presence of biological material relevant to a criminal case. Without such validation, the consensus among experts in the field is that an “alert” is deemed to be negative. Exhibit A at 6; Exhibit B at 6.

The defense experts also opine that because the alleged “alerts” at the Swann Street residence were not corroborated by scientific confirmation of the presence of human remains or biological material at the alert locations, the alerts do not indicate with any degree of scientific reliability that human blood or remains ever were present at the locations. See Exhibit A at 6; Exhibit B at 6. The scholarly literature concerning the investigative use of cadaver dogs is consistent with their view that uncorroborated alerts are not reliable evidence of the presence of human remains or the occurrence of human decomposition. See e.g., *Cadaver Dog Handbook* at 169 (the subsequent discovery of positive evidence confirms the “alert” and substantiates the dog’s reaction); *Forensic Evidence Canines* at 5.

Relatedly, the defense experts opine that the consensus within their professional community is that a cadaver dog’s alert can be a helpful investigative tool but should *not* be considered admissible as evidence at a criminal trial when it has not been corroborated by scientific verification of the presence of human remains. See Exhibit A at 7; Exhibit B at 7. Accord, L. Oesterhelweg et. al., *Cadaver Dogs—A study on detection of contaminated carpet squares*, *Forensic Science International* 174 at 38 (2008) (*Cadaver Dogs*); *Forensic Evidence Canines* at 6. According to Mr. Mutter and Dr. Fairgrieve, the consensus within their field is that the admission into evidence of an uncorroborated alert is likely to impair, rather than further, the truth-seeking process at trial because of the danger that a factfinder will be misled concerning the accuracy of a dog’s alert and its significance to a criminal case. Exhibit A at 7; Exhibit B at 7. Accord *Forensic Evidence Canines* at 4 (explaining the danger of unfair prejudice that may

result from the admission of an uncorroborated cadaver dog alert in a criminal trial, including the potential that the dog “may be reacting to something other than residual scent from decomposed human tissue” or to a scent of human tissue that is present for legitimate reasons; further noting that “residual scent from decomposed human tissue persists in a closed building for many months at levels sufficient to cause a trained dog to alert”).

ARGUMENT

Evidence of the Uncorroborated Cadaver Dog “Alerts” That Allegedly Occurred at the Swann Street Residence Should Be Excluded at Trial

Because the cadaver dog “alerts” that allegedly occurred in two locations at the Swann Street residence were not corroborated by subsequent scientific confirmation of the presence of human blood or remains in those locations, evidence of the “alerts” should be excluded at trial on two related grounds. Testimony regarding the alerts, which presumably would be offered by the dog handler, (1) fails to qualify as admissible expert testimony in this jurisdiction, and (2) carries a danger of unfair prejudice that substantially outweighs its probative value.

A. Legal Principles Governing the Admissibility of Expert Testimony in the District of Columbia

The admissibility of expert testimony in this jurisdiction is assessed using “two levels of analysis.” *Ibn-Tamas v. United States*, 407 A.2d 626, 632 (D.C. 1979). First, the testimony must satisfy an admissibility threshold, for which a “three-fold test is applied.” *Ibid. Accord, Benn v. United States*, 978 A.2d 1257, 1269 (D.C. 2009). Second, if the admissibility threshold is satisfied, the expert testimony can be presented at trial only if the probative value of the testimony outweighs its prejudicial impact. *Ibn-Tamas*, 407 A.2d at 632.

The Court of Appeals first articulated the “three-fold test” for the admissibility of expert testimony in *Dyas v. United States*, 376 A.2d 827 (D.C.), *cert. denied*, 434 U.S. 973 (1977).

Under *Dyas*, for expert testimony to be admissible, the trial court must find, first, that the subject matter of the testimony is “so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman.” *Id.* at 832. Second, the trial court must conclude that the expert witness whose testimony is offered has “sufficient skill, knowledge, or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth.” *Ibid.* Third, the trial court must *exclude* expert testimony if “the state of the pertinent art or scientific knowledge does not permit a reasonable opinion to be asserted even by an expert.” *Ibid.*

One important component of evaluating the second *Dyas* criterion – *i.e.*, whether the expert opinion offered is likely to aid the trier of fact in its search for truth – is the well-established principle that, to be helpful to the jury, “[a]n expert’s ‘opinion must be based on fact or adequate data . . . [N]ot a mere guess or conjecture.’” *Haidak v. Corso*, 841 A.2d 316, 327 (D.C. 2004) (quoting *Sponaugle v. Pre-Term, Inc.*, 411 A.2d 366, 367 (D.C. 1980)). As the District of Columbia Court of Appeals recently explained in an opinion that reversed a medical malpractice verdict on the ground that the plaintiff’s expert “relied on too much speculation:”

The purpose of expert testimony is to avoid jury findings based on mere conjecture or speculation. Thus, the sufficiency of the foundation for expert opinions should be measured with this purpose in mind. An expert witness must be based on fact or adequate data . . . While absolute certainty is not required, opinion evidence that is conjectural or speculative is not permitted. Expert testimony may be excluded when the expert is unable to show a reliable basis for his theory.

Giordano v. Sherwood, 968 A.2d 494, 498 (D.C. 2009) (internal quotation marks, citations, and brackets omitted). *Accord Washington v. Washington Hospital Center*, 579 A.2d 177, 181 (D.C. 1990); *St. Lewis v. Firestone*, 130 A.2d 317, 319 (D.C. 1957) (It is “well settled that the facts on which expert opinion is predicated must permit reasonably accurate conclusions as distinguished

from guesswork or conjecture. The opinion must be in terms of the probable and not of the possible.” (footnote omitted)).

The third *Dyas* criterion -- whether the state of a pertinent field permits a reasonable expert opinion to be asserted -- most often becomes critical in cases that involve a new or novel scientific technique or method. See *Jones v. United States*, 548 A.2d 35, 39 (D.C. 1988); *Drevenak v. Abendschein*, 773 A.2d 396, 417-418 (D.C. 2001). In that context, District of Columbia courts apply the “general acceptance” test set forth in *Frye v. United States*, 54 U.S. App. D.C. 46, 293 F. 1013 (1923). See *Benn*, 978 A.2d at 1269. The *Frye* court articulated that test as follows:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Frye, 293 F. at 1014.² The third *Dyas* criterion “focuses on the general acceptance of a particular methodology in the [relevant] field.” *Ibn-Tamas*, 407 A.2d at 638. A party who seeks to introduce expert testimony bears the burden of demonstrating by a preponderance of the evidence that “[the] technology [or methodology] has been generally accepted in the relevant scientific community.” *United States v. Porter*, 618 A.2d 629, 633 (D.C. 1992). Although “unanimity is not required,” *id.* at 634, “general acceptance” of the reliability of the technology or methodology must be shown, *ibid.* (emphasis in original). Accordingly, “[i]f ‘scientists

² In *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), the United States Supreme Court “rejected *Frye*’s requirement of ‘general acceptance’ as a precondition to admissibility” of expert testimony. *Benn*, 978 A.2d at 1269 n.44. Accordingly, *Frye* does not apply in courts subject to the Federal Rules of Evidence. The more liberal standard of *Daubert* has not been adopted in this jurisdiction. *Ibid.* Accord, *Bahura v. S.E.W. Investors*, 754 A.2d 928, 943 n.15 (D.C. 2000); *United States v. Porter*, 618 A.2d 629, 633 (D.C. 1992).

significant either in number or expertise publicly oppose [a new technique] as unreliable,' then that technique does not pass muster under *Frye*." *Ibid.* (citation omitted). Stated differently, "[t]he very existence of a dispute [within the scientific community] precludes admission." *United States v. Jenkins*, 887 A.2d 1013, 1022 (D.C. 2005).

B. *Expert Testimony Concerning The Uncorroborated Cadaver Dog Alerts Must Be Excluded Under Dyas.*

If the government seeks to introduce evidence of the two uncorroborated cadaver dog "alerts" that allegedly occurred at the Swann Street residence as evidence of the alleged presence of human remains or fluids at the home, it will be entering territory that is uncharted in District of Columbia law and territory that, in analogous situations, has been determined to be outside the bounds of permissible expert testimony in other jurisdictions. This is not a case where a canine alert is offered merely as a basis for probable cause to conduct a search or make an arrest. *See e.g., Symes v. U.S.*, 633 A.2d 51 (D.C. 1993). Nor is it a case where dog-tracking evidence is introduced as corroborative proof tying a defendant to a crime scene or to explain the course of an investigation. *See, e.g., Starks v. United States*, 427 A.2d 437 (D.C. 1981). In this case, the government would be seeking to offer a dog's physical reaction as substantive evidence of the *presence* of incriminating biological evidence that, according to chemical analysis, *was not there*. As other courts have found, evidence of uncorroborated canine alerts fails to pass muster under *Frye* (and therefore *Dyas*) and presents a significant danger of unfair prejudice to criminal defendants. The evidence also fails to satisfy *Dyas*'s requirements that expert testimony aid the trier of fact in its search for truth and not be based on conjecture or speculation. The uncorroborated dog alerts therefore must be excluded.

The District of Columbia Court of Appeals has not addressed the admissibility of a cadaver dog alert. The only case in which the Court has addressed the admissibility of canine-

generated investigative evidence is *Starkes v. United States*, 427 A.2d 437 (D.C. 1981), where the Court held that testimony of the actions of a trained tracking dog can be admissible in a criminal trial if an adequate foundation is laid. In *Starkes*, an armed rape had occurred near a bus stop in front of a restaurant in Northeast Washington. *Id.* at 438. A tracking dog detected a scent at the crime scene shortly after the offense, followed it, and alerted on an empty chair in the restaurant where, witnesses confirmed, the defendant had been sitting minutes earlier. *Ibid.* In affirming the trial court's decision to admit trial testimony concerning the tracking dog's actions, the Court noted that "the capacity of trained dogs to follow a human's trail has long been known" and that an adequate foundation was laid for the testimony. *Id.* at 439 (internal quotation marks and citation omitted). That necessary foundation including testimony concerning the training and reliability of the dog and a corroborative showing that, in the search in question, the dog "was laid upon a trail which circumstances indicated was made by the accused." *Id.* at 439. The tracking dog evidence in *Starkes* also was corroborated by direct evidence of the defendant's identity at trial: the victim identified the defendant as her assailant in a post-crime photo array, at a lineup, and in court. *Id.* at 438. *Cf. Brooks v. People*, 975 P.2d 1105, 1114 (Colo. 1999) (adopting position of majority of courts that exclude scent tracking evidence as too prejudicial where it is not corroborated by other independent evidence) (*en banc*).

The uncorroborated cadaver dog alerts that the government seeks to introduce in this case are materially unlike the dog tracking evidence approved by the Court of Appeals in *Starkes* because their probative value is weaker (indeed, nonexistent) and their potential for prejudice is much higher due to the complete absence of corroborative evidence. Unlike the evidence in *Starkes*, the cadaver dog alerts alleged to have occurred at the Swann Street residence (1) are not

accepted in the scientific community as reliable evidence of the presence of human remains standing on their own, (2) are directly contradicted by scientific tests conducted by sophisticated law enforcement laboratories that revealed *no* human fluids or remains at the alert points on the crime scene, and (3) are unsupported by any foundational evidence that tends to establish that human remains ever existed at the points of alert at any time. If the Court of Appeals' recent admonition against the admission of expert testimony that "relic[s] on too much speculation" means anything, *see Giordano*, 968 A.2d at 498, it must mean that a physical signal of a fallible animal who cannot testify is not admissible to imply to the jury that incriminating biological evidence *is* present when, according to sophisticated chemical testing, that evidence is *not* present.

This is the conclusion that several courts have reached after analyzing the admissibility of uncorroborated canine alerts in the analogous context of arson dogs trained to detect the presence of accelerants. In *State v. Sharp*, 928 A.2d 165 (Super. Ct. N.J. 2006), the trial court ruled as a matter of first impression that, in the absence of laboratory confirmation of the existence of an accelerant, a fire marshal's opinion that an accelerant-detection canine's alert to a particular location is probative of the presence of an accelerant is inadmissible under the *Frye* "general acceptance" standard. After thoroughly reviewing scientific and legal writings in the field and judicial opinions, the court concluded:

In this case, the laboratory samples collected based on the dog alerting to particular locations at the fire scene all came back negative for the presence of an accelerant. [The fire marshals] agreed that the text upon which they rely call for laboratory confirmation, but instructed the court that between the industry manuals and the dog – they would both "trust the dog."

More than blind trust is necessary, however, to reach the reliability level required of scientific expert testimony . . .

The scientific theory at issue – that a dog’s nose is more accurate than laboratory equipment – is simply *not* supported by experts on fire causation, by scientific literature on the subject, or by judicial opinions. Such a tenuous scientific foundation must be subjected to intense scrutiny in a criminal trial where the liberty interests of the accused are at stake.

Id. at 170, 172 (citations omitted). *Accord People v. Aciri*, 662 N.E.2d 115 (App. Ct. Ill. 1996) (applying “general acceptance” standard of *Frye*, court concludes that arson dog alerts that are not confirmed by laboratory analysis are properly barred from evidence). Similarly, in *Carr v. State*, 482 S.E.2d 314 (Ga. 1997), the Supreme Court of Georgia reversed an arson conviction based on the erroneous and prejudicial admission of evidence of an uncorroborated alert by an accelerant-detection dog. As the court explained:

While the use of trained dogs can be a valuable part of investigative procedures and can provide important elements of probable cause to search, dog alerts to accelerants have not been shown . . . to have the scientific reliability necessary to permit their use as substantive evidence of the presence of accelerants.

Id. at 318 (citations omitted).

The same analysis applies to cadaver dog alerts that are not corroborated by scientific verification of the presence of human remains. As the defense experts establish, the investigative use of a cadaver dog to detect the presence of human remains is akin to a screening test or investigative tool. *See Exhibit A at 6; Exhibit B at 6.* A canine alert raises a possibility that human remains are present at the location. But that possibility does not mature into a probability, much less into a reasonable scientific certainty, unless the alert is verified through scientific testing. As the Court of Appeals observed over fifty years ago, an expert opinion “must be in terms of the probable and not of the possible.” *St. Lewis*, 130 A.2d at 319 (footnote omitted). Because an uncorroborated cadaver-dog alert does not cross the threshold into “probability,” it does not satisfy *Dyas*’s requirement that the state of the pertinent field “permit a reasonable opinion to be asserted” by an expert. *Dyas*, 376 A.2d at 832.

For the same reason, any opinion that a government expert may seek to offer based on the uncorroborated cadaver dog alerts that allegedly occurred in this case would fail the “general acceptance” test of *Frye*. Reliance on an uncorroborated alert is not a generally accepted methodology within the relevant scientific community for determining the presence of human remains or fluids. See Exhibit A at 6; Exhibit B at 6; *Cadaver Dogs* at 38 (a dog’s alert “may only be used as a strong indicative tool during the investigative process”); *Forensic Evidence Canines* at 5 (a dog’s alert is not direct evidence, but “rather an inference”). See also *Porter*, 618 A.2d at 634, 638-639 (lack of general acceptance of statistical methodology for determining possibility of random DNA match required exclusion of the expression of statistical significance offered by government; if scientists significant in number or expertise publicly oppose a new technique as unreliable, “then that technique does not pass muster under *Frye*”). Indeed, evidence of the uncorroborated cadaver dog alerts in this case fails even to satisfy the minimum threshold that, to be admissible, evidence must be “relevant” in that it “tends to make the existence or non-existence of a fact more or less probable than would be the case without that evidence.” *Jenkins*, 887 A.2d at 1025. As the defense experts opine, a cadaver dog alert provides only a basis for further investigation concerning the possible presence of human remains or fluid. See Exhibit A at 6; Exhibit B at 6. Only scientific testing indicating the presence of human remains can convert the alert into “relevant” evidence that, together with the laboratory analysis, “tends to make the existence” of human remains more probable than it would be without the evidence.³

³ The fact that the alleged alerts in this case occurred at an outdoor drain and a lint trap reinforces the irrelevance of those alerts standing alone. As the defense experts opine, alerts at outdoor drains and lint traps are common because those locations are likely to collect traces of commonplace human materials, including skin cells, fingernails, hair, feces, or urine, during their ordinary use. Particularly in this context, scientific verification of the type of human remains (if any) that are present is critical to establishing the relevance of an alert. See Exhibit A at 9; Exhibit B at 9.

The additional allegations of fact on which the government relies in the Arrest Warrant Affidavit do not change this analysis. The government alleges that the courtyard drain cover was “ajar” and a hose in the same area was “uncoiled.” As is obvious, those assertions of fact do not come close to making the presence of human remains in the courtyard drain “more probable” than it would be without the evidence. The allegations lack even a minimal temporal connection to the crimes alleged in this case; the drain cover may have been “ajar” and the hose “uncoiled” for days, weeks, or months preceding August 2, 2006, for all that can be gathered from the government’s allegations. These facts, like the uncorroborated dog alert, are simply irrelevant to the issue of whether human remains were present in the courtyard drain or in the lint trap. Contrary to the government’s suggestion, bundling several irrelevant assertions of fact together does result in relevant evidence. Zero plus zero equals zero. *Cf. Clark v. State*, 781 A.2d 913, 935 (Ct. Spec. App. Md. 2001) (approving of admission of cadaver dog alert corroborated by circumstantial evidence that a clandestine burial had occurred at the alert location, including evidence that the defendant “was present with his truck and shovel at the grave site” and that the alert site “matched the spot, marked by an asterisk found on a map” in the defendant’s truck).

C. *Expert Testimony Concerning the Uncorroborated Cadaver Dog Alerts Also Is Inadmissible Because The Probative Value of the Evidence is Outweighed By Its Prejudicial Effect*

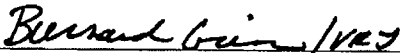
For the same reasons that the uncorroborated cadaver alerts in this case cannot form the basis for admissible expert opinion under *Dyas*, they also are inadmissible under the “second level of analysis,” *Ibn-Tamas*, 407 A.2d at 632, because the probative value of any expert testimony premised on the alerts would be outweighed by its prejudicial impact. As already discussed, an expert opinion based on the uncorroborated cadaver alerts in this case would have no probative value because it is widely accepted in this field of study that corroboration is


required before an alert becomes probative of any fact of consequence. Permitting expert testimony based on the inadequate foundation of an uncorroborated alert also would cause substantial prejudice to the defense by inviting the jury to rely unduly on the instincts and senses of what they may incorrectly perceive to be an “infallible dog,” see *Illinois v. Caballes*, 543 U.S. 405, 411 (2005) (“The infallible dog . . . is a creature of legal fiction.”) (Souter, J., dissenting), and minimize the importance of the lack of laboratory confirmation for the dog’s alert. See *Sharp*, 928 A.2d at 187 (concluding that uncorroborated arson dog alert was inadmissible under State version of Federal Rule of Evidence 403 because of “minimal” probative value and the “substantial risk” that such evidence would confuse the issues and mislead the jury). As the *Sharp* court concluded in analogous circumstances, “the prejudicial effect substantially outweighs the probative value of this testimony” and “a limiting instruction would [not] be sufficient to cure the problem.” *Id.*

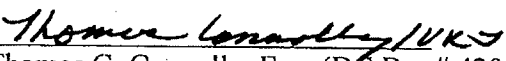
CONCLUSION

For these reasons, the defendants respectfully move to exclude all evidence of cadaver dog searches and “alerts.”

Respectfully Submitted,


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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendants' Joint Motion In Limine to Exclude All Evidence of Cadaver Dog Searches and "Alerts" was served, via email and first class mail, this 30th day of March, 2009 upon:

Glenn Kirschner, Esq.
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Veronica Jennings

IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

UNITED STATES OF AMERICA,

v.

DYLAN M. WARD,

JOSEPH R. PRICE,

and

VICTOR J. ZABORSKY,

Defendants.

Criminal Nos. 2008-CF1-26996

2008-CF1-27068

2008-CF1-26997

Judge Lynn Leibovitz

Trial Date: May 10, 2010

PROPOSED ORDER

Having considered the Defendants' Joint Motion in Limine to Exclude All Evidence of Cadaver Dog Searches and "Alerts," the response of the United States, and any argument relating to the motion, it is hereby ordered that the Defendants' Motion is GRANTED; and it is

FURTHER ORDERED that all evidence relating to cadaver dog searches and "alerts" is excluded from the trial in the above-captioned matter.

Dated: _____, 2010

Judge Lynn Leibovitz

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EXHIBIT A

**IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION**

UNITED STATES OF AMERICA,

v.

DYLAN M. WARD,

JOSEPH R. PRICE,

and

VICTOR J. ZABORSKY,

Defendants.

**Criminal Nos. 2008-CF1-26996
2008-CF1-27068
2008-CF1-26997**

Judge Lynn Leibovitz

Status Hearing – March 12, 2010

DECLARATION OF BOBBY MUTTER

I, Bobby Mutter, am over twenty-one years of age, have personal knowledge of the facts set forth in this Declaration, am competent to testify thereto, and swear under penalty of perjury that the following is true and correct:

1. I am a dog handler and dog trainer and have specialized in cadaver dog searches and alerts for over for over 20 years.

2. The opinions expressed are those of the undersigned, Bobby Mutter, and reflect my experience, education, and training related to dog handling, dog training, and cadaver dog searches and alters, and are held to a reasonable degree of scientific certainty and would be generally accepted by the scientific community.

3. I have reviewed what has been provided by the government to defense counsel in the above captioned case related to cadaver dogs, including the arrest warrant affidavit and cadaver dog certifications.

4. The feasibility of utilizing cadaver dogs as a means of investigation in a given case depends on a variety of factors, including whether remains are actually

present, whether remains are actually creating a scent, the nature of any air movement occurring between the scent and the dog, air temperature and other weather conditions, and handler skill, *i.e.*, whether the handler guides the dog to the correct area and correctly interprets the dog's behavior. Changes or deficiencies in any of these factors can impair the ability of a cadaver dog to detect relevant scents and would minimize the significance of a purported alert reported by the dog's handler. Weather conditions, as an example, have an enormous impact on a cadaver dog's ability to detect the scent of human decomposition. Water and wind can carry away scent molecules of human decomposition and inhibit the dog's detection of those scents. As a result of these factors, the usefulness of a cadaver dog to detect various substances as part of a criminal investigation therefore will vary, depending upon the quality and carefulness of the human investigation that preceded the dog's search, the handler's skills, and the weather and environmental characteristics of the search area.

5. A "false alert" occurs when a cadaver dog cues on something other than human remains or human decomposition. Dogs can falsely cue on, among other things, dead wet animals, submerged debris that catches and holds a scent, decaying vegetation, sewage, or human decomposition such as fingernails, hair, dead skin, and human secretions. Additionally, a handler's behavior and body language also can cause a dog to signal a false alert and that it is not uncommon for a handler, through his or her eagerness to advance an investigation, to inadvertently prompt a dog to give a positive -- but ultimately false -- "alert."

6. Reliance on an uncorroborated alert is not a generally accepted methodology for determining the presence of human remains or fluids. A cadaver dog

alert provides only a basis for further investigation. A cadaver dog's "alert" should be deemed "positive" only if the presence of biological evidence is confirmed through laboratory analysis. When a dog's alert is not validated by scientific confirmation of the presence of human remains, no reliable conclusion can be drawn concerning what caused the dog to alert. An uncorroborated alert could be the result of handler error or may reflect ultrasensitivity of the dog and the breadth of its training, *e.g.*, a well-trained dog could "alert" upon a single strand of hair, a child's tooth, or a toenail clipping, even though the presence of human remnants of those sorts is commonplace and not indicative of criminal activity. In other words, the wide range of biological materials that could cause a cadaver dog to signal an alert, and a dog's inability to communicate with precision what is causing it to alert, require that evidence of an alert be considered positive and probative only when the alert has been corroborated by scientific confirmation of the presence of biological material relevant to a criminal case. In Mr. Mutter's opinion, without such validation, an "alert" is deemed to be negative.

7. The consensus within the field of cadaver dog searches and alerts is that a cadaver dog's alert can be a helpful investigative tool but should not be considered admissible as evidence at a criminal trial when it has not been corroborated by scientific verification of the presence of human remains. Indeed, the consensus within the field is that the admission into evidence of an uncorroborated alert is more likely to impair, rather than further, the truth-seeking process at trial because of the danger that a factfinder will be misled concerning the accuracy of a dog's alert and its significance to a criminal case.

8. Because the alleged "alerts" at the Swann Street residence were not corroborated by scientific confirmation of the presence of human remains or biological material at the alert locations, the alerts do not indicate that human blood or remains ever were present at the locations.

9. The locations of the "alerts" at the Swann Street residence are especially prone to false alerts. The location of the first alert, the lint trap of a dryer, would contain human remains such as skin cells, hair, dead skin, and normal human secretions and acids, which could cause a dog to falsely alert. The location of the second alert, the drain situated within the outdoor courtyard area, would contain human remains, human decomposition, human waste, sewage, and/or dead, wet animals, all of which could cause a dog to falsely alert. Because these alerts were not corroborated by the subsequent discovery of human remains or biological materials, there is no evidence that any human remains or biological materials related to the death of Robert Wone were present at these locations.

10. I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Executed March 30, 2010


Bobby Mutter

EXHIBIT B

**IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION**

UNITED STATES OF AMERICA,

v.

DYLAN M. WARD,

JOSEPH R. PRICE,

and

VICTOR J. ZABORSKY,

Defendants.

Criminal Nos. 2008-CF1-26996

2008-CF1-27068

2008-CF1-26997

Judge Lynn Leibovitz

Status Hearing – March 12, 2010

DECLARATION OF SCOTT FAIRGRIEVE

I, Scott Fairgrieve, am over twenty-one years of age, have personal knowledge of the facts set forth in this Declaration, am competent to testify thereto, and swear under penalty of perjury that the following is true and correct:

1. I am a forensic anthropologist specializing in human remains and human decomposition. I have a Ph.D. in Anthropology, and I have specialized in cadaver dog searches for nineteen years.

2. The opinions expressed are those of the undersigned, Scott Fairgrieve, and reflect my experience, education, and training related to forensic anthropology, human remains and decomposition, and cadaver dog searches, and are held to a reasonable degree of scientific certainty and would be generally accepted by the scientific community.

3. I have reviewed what has been provided by the government to defense counsel in the above captioned case related to cadaver dogs, including the arrest warrant affidavit and cadaver dog certifications.

4. The feasibility of utilizing cadaver dogs as a means of investigation in a given case depends on a variety of factors, including whether remains are actually present, whether remains are actually creating a scent, the nature of any air movement occurring between the scent and the dog, air temperature and other weather conditions, and handler skill, *i.e.*, whether the handler guides the dog to the correct area and correctly interprets the dog's behavior. Changes or deficiencies in any of these factors can impair the ability of a cadaver dog to detect relevant scents and would minimize the significance of a purported alert reported by the dog's handler. Weather conditions, as an example, have an enormous impact on a cadaver dog's ability to detect the scent of human decomposition. Water and wind can carry away scent molecules of human decomposition and inhibit the dog's detection of those scents. As a result of these factors, the usefulness of a cadaver dog to detect various substances as part of a criminal investigation therefore will vary, depending upon the quality and carefulness of the human investigation that preceded the dog's search, the handler's skills, and the weather and environmental characteristics of the search area.

5. A "false alert" occurs when a cadaver dog cues on something other than human remains or human decomposition. Dogs can falsely cue on, among other things, dead wet animals, submerged debris that catches and holds a scent, decaying vegetation, sewage, or human decomposition such as fingernails, hair, dead skin, and human secretions. Additionally, a handler's behavior and body language also can cause a dog to signal a false alert and that it is not uncommon for a handler, through his or her eagerness to advance an investigation, to inadvertently prompt a dog to give a positive -- but ultimately false -- "alert."

6. Reliance on an uncorroborated alert is not a generally accepted methodology for determining the presence of human remains or fluids. A cadaver dog alert provides only a basis for further investigation. An "alert" should be deemed "positive" only if the presence of biological evidence is confirmed through laboratory analysis. When a dog's alert is not validated by scientific confirmation of the presence of human remains, no reliable conclusion can be drawn concerning what caused the dog to alert. An uncorroborated alert could be the result of handler error or may reflect ultrasensitivity of the dog and the breadth of its training, *e.g.*, a well-trained dog could "alert" upon a single strand of hair, a child's tooth, or a toenail clipping, even though the presence of human remnants of those sorts is commonplace and not indicative of criminal activity. In other words, the wide range of biological materials that could cause a cadaver dog to signal an alert, and a dog's inability to communicate with precision what is causing it to alert, require that evidence of an alert be considered positive and probative only when the alert has been corroborated by scientific confirmation of the presence of biological material relevant to a criminal case. In Dr. Fairgrieve's opinion, without such validation, an "alert" is deemed to be negative.

7. The consensus within the field of cadaver dog searches and alerts is that a cadaver dog's alert can be a helpful investigative tool but should not be considered admissible as evidence at a criminal trial when it has not been corroborated by scientific verification of the presence of human remains. Indeed, the consensus within the field is that the admission into evidence of an uncorroborated alert is more likely to impair, rather than further, the truth-seeking process at trial because of the danger that a

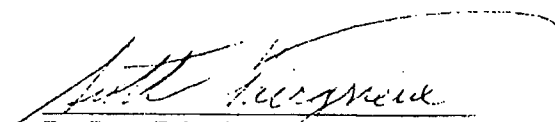
factfinder will be misled concerning the accuracy of a dog's alert and its significance to a criminal case.

8. Because the alleged "alerts" at the Swann Street residence were not corroborated by scientific confirmation of the presence of human remains or biological material at the alert locations, the alerts do not indicate that human blood or remains ever were present at the locations.

9. The locations of the "alerts" at the Swann Street residence are especially prone to false alerts. The location of the first alert, the lint trap of a dryer, would contain human remains such as skin cells, hair, dead skin, and normal human secretions and acids, which could cause a dog to falsely alert. The location of the second alert, the drain situated within the outdoor courtyard area, would contain human remains, human decomposition, human waste, sewage, and/or dead, wet animals, all of which could cause a dog to falsely alert. Because these alerts were not corroborated by the subsequent discovery of human remains or biological materials, there is no evidence that any human remains or biological materials related to the death of Robert Wone were present at these locations.

10. I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Executed March 30, 2010


Dr. Scott Fairgrieve