

Cause No. CR12234

THE STATE OF TEXAS

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V.

GORDON RAY LEWIS

IN THE DISTRICT COURT
355TH JUDICIAL DISTRICT
HOOD COUNTY, TEXAS

FILED FOR RECORD
HOOD COUNTY, TEXAS
2013 MAY 31 PM 4:50
JAMES R. MITCHELL
COURT CLERK

Defendant's Motion for Kelly/Daubert Hearing of State Expert Witness
James Jeffress

MAY IT PLEASE THE COURT:

COMES NOW GORDON LEWIS (Defendant), by and through his Attorney Richard Mitchell and Donald Davis, and files its Motion for *Kelly/Daubert* Hearing of State's Expert Witnesses. The Defendant would show the following:

I.

Gordon Lewis stands indicted for the offense of capital murder.

II.

The Defendant anticipates that during the trial of this case the States will call one or more witnesses who will offer opinions that are purportedly scientific in nature or are based upon personal training and experience. The admissibility of such opinions is governed by Tex. R. Evid. 702, 703, 705 and *Daubert v. Merrell Dow*, 509 U.S. 579 (1993), *Kumho Tire Company v. Carmichael*, 119 S.Ct. 1167 (1999), *Kelly v. State*, 824 S.W.2d 568,573 (Tex. Crim. App. 1992), *Jordan v. State*, 928 S.W.2d 550 (Tex. Crim. App. 1996), and *Nenno v. State*, 970 S.W.2d 549 (Tex. Crim. App. 1998) (overruled in part on other grounds).

III.

The proponent of scientific evidence bears the burden of demonstrating by clear and convincing evidence that the evidence is reliable. This is accomplished by showing: (1) the validity of the underlying scientific theory; (2) the validity of the technique applying the theory and (3) proper application of the technique on the occasion in question. *Kelly v. State*, 824 S.W.2d at 573.

Prior to the offer of scientific evidence, the court must conduct a hearing outside the presence of the jury to determine whether the proponent has established all three criteria. This preadmission determination is required whether the science at issue is novel or well established. *Jackson v. State*, 17 S.W.3d 664 (Tex. Crim. App. 2000).

IV.

This Court must find that the opinion evidence is not only reliable, but that it is relevant under Tex. R. Evid. 401, that it meets the standard set in Rule 702 and that it Assists the trier of fact [in] understanding the evidence [in] determining the fact in issue, *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 720 (Tex. 1998)(affirmed in part and reversed in part). If the trial judge finds the proposed expert testimony meets both the Rule 401 and Rule 702 requirements, then the judge must perform a Rule 403 analysis to determine whether the evidence should, in fact, be presented to the jury, *Morales v. State*, 32 S.W.3d 862 (Tex.Crim. App. 2000). This Court is the gatekeeper that must screen expert testimony for scientific reliability. Evidentiary reliability is based on scientific validity. *Jordan v. State*, 928 S.W.2d at 554.

V.

The Texas Court of Criminal Appeals, identified the following factors that the trial court could consider in performing its gatekeeper function:

- (a) 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;
- (b) the qualifications of the expert(s) testifying;
- (c) the existence of literature supporting or rejecting the underlying scientific theory and technique;
specifically, this Court
should be provided citations to empirical studies supporting the opinion and citations to articles or chapters in scientific treatises
or journals supporting the opinion;
- (d) the potential rate of error of the technique;
- (e) the availability of other experts to test and evaluate the technique;

(f) the clarity with which the underlying scientific theory and technique can be explained to the court; and

(g) the experience and skill of the person(s) who applied the technique on the occasion in question.

Kelly v. State, 824 S.W.2d at 573.

VI.

Should the Court determine that the testimony to be offered is in a field of science that is based upon experience and training, as opposed to a scientific method, the Court's review of the reliability of the science is even more important and the Court must find:

(a) whether the field of expertise is a legitimate one;

(b) whether the subject matter of the expert's testimony is within the scope of that field; and

(c) whether the expert's testimony properly relies upon and/or utilizes the principles involved in the field.

Nenno v. State, 970 S.W.2d at 561.

VII.

The Court of Criminal Appeals in *Nenno v. State*, said that not only were the criteria described in *Kelly v. State*, (peer review, rate of error, etc.) not categorically ruled out when reviewing the reliability of opinions based on a soft science but, in addition, the Court listed the following additional criteria for the trial court to consider:

(i) interviews conducted by the witness while in the field in which he is to express an opinion;

(ii) the facts of cases in which he conducted those interviews;

(iii) statistical research performed in the field in which the witness is to express an opinion.

Specifically, the witness should provide to the Court data collected by the witness or those under his or her supervision and provide the data collection instruments that were used, the data collection procedures and the statistical analysis applied to the data in forming the opinion to be proffered.

VIII.

The United States Supreme Court has held that the reliability standard announced in *Daubert* applies to all expert testimony regardless of whether it is scientific testimony or clinical expert

testimony. *Kumho Tire*, 119 S.Ct. 1167. All of the material that is sought by this motion is relevant to reliability of opinions based on a soft or hard science testimony. The Supreme Court of Texas has held that *Daubert* and therefore, *Robinson*, applies to all expert testimony-whether the expert would opine on economic valuation, advertising psychology, or engineering, application of the *Daubert* factors is germane to evaluating whether the expert is a hired gun or a person whose opinion in the courtroom will withstand the same scrutiny that it would among his professional peers, *Gammill* 972 S.W.2d at 725.

IX.

So as to aid the Court in it's a gatekeeper function to determine the reliability of the offered opinion, the State should be required to provide the Court, at least 30 days prior to trial, the following:

- (a) a concise and specific statement of each expert opinion the State intends to introduce at trial;
- (b) the name, address, and curriculum vitae of each witness the State intends to introduce at trial;
- (c) all literature supporting or rejecting the underlying theory, methodology or technique used or relied upon by each State's witness that will provide opinion testimony at trial. This information will allow the Court to determine if the relevant theory, methodology or technique has been subjected to review by the witness peers and if the purported science is generally accepted in the field.
- (d) the results of any tests that have been performed on the science or methodology relied upon by each State's witness that will provide opinion testimony at trial. This information will allow the Court to determine if the basis for the opinion has been or can be subjected to testing to determine its reliability;
- (e) the names of each person about whom a witness to be called by the State has expressed an opinion in the past and the opinion expressed by the State's witness. This information will allow the Court to determine if a known or potential rate of error exists;
- (f) a listing of any standards that control the technique or methodology used to arrive at any opinion that may be expressed at trial. This will allow the Court to determine if there is an accepted protocol for gathering relevant information and interpreting that information in arriving at an opinion;

(g) the qualifications that allow the witnesses to form and express the opinions. This will allow the Court to determine if the opinion of the witness is based on scientific knowledge and training or is merely an opinion based on personal belief, bias or prejudice;

(h) a list of each interview conducted by the witness while in the field in which he it to express an opinion;

(i) the facts in each of the cases in which he conducted those interviews; and

Said items listed a-i shall include but not be limited to the following specific items and/or documents with respect to the opinion of James Jeffress as an expert.

Any notes, question list, diagrams, recordings, whether audio or video, pictures, summations, outlines, reports, related to James Jeffress work in this matter, authority and scientific basis for the procedure used to conduct any testing, a listing of each and every occasion when James Jeffress has testified in a criminal prosecution expert, copies of all notes and reports for each time James Jeffress has testified in a criminal prosecution in the last 10 years which are public court records, a listing and breakdown of the times that James Jeffress has been hired, worked for a lab or appointed, as a an expert and copies of any notes and reports related to such requests and appointments which are public court records, a detailed history of James Jeffress' educational and professional history and a listing of any and all associations for which James Jeffress is an active and participating member and any and all articles or any other published material which James Jeffress has authored.

The Court said in *Nenno*:

To the extent that a fact finder could decide that the absence of peer review casts doubt on the credibility of the testimony, such affects the weight of the evidence rather than its admissibility. *Nenno v. State*, 970 S.W.2d at 562. If some of the described material goes to the weight that a jury should give the testimony, as is stated in *Nenno*, then it should be provided to the Defendant as impeachment material under *U.S. v. Bagely*, 473 U.S. 667(1985). In addition and as provided in the Texas Code of Criminal Procedure article 39.14(a) counsel for the Defendant should be given the opportunity to not only examine, but to copy any documents that are provided to the Court pursuant to its Order.

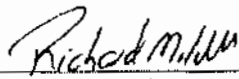
X.

WHEREFORE, PREMISES CONSIDERED, Counsel for the Defendant prays that the Court:

- (1) Order the State to provide to the Court those documents that have been identified in this motion as being important to the Court's gatekeeping function;
- (2) Order that counsel for the Defendant be allowed to photocopy each of the documents, if any, produced by the State in support of the witness opinion testimony;
- (3) Order that this matter be set for a pre-trial hearing at which the State be required to establish, under the cited authority, the reliability of any opinions that are to be offered at trial;
- (4) Order that this hearing be set sufficiently in advance of trial so that the Defendant can arrange for necessary rebuttal testimony should any of the State's opinion testimony be found to be scientifically reliable and helpful to the trier of fact;
- (5) Such other and further relief to which the Defendant may show they are entitled to.

Respectfully submitted,

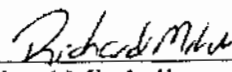
RICHARD MITCHELL
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 Richard Mitchell
 Attorney at Law
 State Bar No. 24047319

CERTIFICATE OF SERVICE

A copy of the foregoing document will served upon opposing counsel after being file stamped by the Hood County District Clerk on 31 May 2013.



 Richard Mitchell

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THE STATE OF TEXAS

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V.

355TH JUDICIAL DISTRICT

GORDON RAY LEWIS

HOOD COUNTY, TEXAS

ORDER FOR A SETTING

If the Defendant is found to be entitled to a hearing, it is ORDERED that a hearing on this motion is set for _____, at _____, am/pm.

Signed on _____, 2013

JUDGE PRESIDING