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September 7, 2023

Allison Wood, Clerk
Washington County Superior Court
85 Court Street
P.O. Box 526
Machias, Maine 04654-0526

FILED VIA SHAREFILE

Re: State of Maine v. Kailie Brackett & State v. Donnell Dana
Docket Numbers: CR-22-20121, CR-22-21020

Dear Allison:

Enclosed for filing please find State's Motion in Limine in the above- referenced matters.

Thank you for your attention to this matter.

Sincerely,

/s/ Donald W. Macomber

Donald W. Macomber
Assistant Attorney General
Criminal Division

DWM/tlc
Enclosure

cc: David Bate, Esq. (w/encs.)
Jeff Toothaker, Esq. (w/encs.)
Jeff Silverstein, Esq. (w/encs.)

SEP 7 2023 10:04
WASHINGTON COUNTY STAG

STATE OF MAINE
WASHINGTON, ss.

SUPERIOR COURT
CRIMINAL ACTION
DOCKET NOS. CR-22-20120
CR-22-20121

STATE OF MAINE)
)
 v.)
)
 KAILIE BRACKETT &)
 DONNELL DANA,)
 Defendants)

STATE'S MOTION
IN LIMINE
(M.R. Evid 702, Dr. Nirenberg)

The State of Maine, by and through Assistant Attorneys General Donald W. Macomber and Leane Zainea, moves this Court in limine to allow expert testimony at trial from Dr. Michael Nirenberg regarding the results of his forensic podiatry evaluation that the Court ordered the defendants to submit to.

BACKGROUND

Partial bloody footprints were left on a carpeted stairway at the scene of the crime. The Maine State Police consulted with an expert, Dr. Michael Nirenberg, a forensic podiatrist, to attempt to identify who may have left the footprints. On June 2, 2023, this Court granted the State's motion for discovery, which asked the Court to order the defendants to submit to the doctor's protocol for conducting a forensic podiatry evaluation (including footprint exemplars and scaled photographs). The defendants complied with the order and Dr. Nirenberg prepared a report and provided a copy of his CV.¹ In his opinion, there is a moderate level of support for the conclusion that Kailie Brackett left the footprints on the stairway carpet, and moderately strong level of support for the conclusion that Donnell Dana did not leave those footprints.

¹ The report and CV have been provided to the defense. Copies are attached to this motion and incorporated herein.

DISCUSSION

The standard governing the admission of an expert witness's opinion is grounded in the Maine Rules of Evidence. Rule 402 provides that "[a]ll relevant evidence is admissible," except as otherwise limited by the Rules. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." M.R. Evid. 401. In addition, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." M.R. Evid. 702.

The genesis of the test for determining whether expert testimony is admissible is the Law Court's decision in *State v. Williams*, 388 A.2d 500 (Me.1978). The Court held that the "proponent of expert testimony must establish that (1) the testimony is relevant pursuant to M.R. Evid. 401, and (2) it will assist the trier of fact in understanding the evidence or determining a fact in issue." *Searles v Fleetwood Homes of Pa., Inc.*, 2005 ME 94, ¶ 21, 878 A.2d 509, 515–16 (citing *Williams*, 388 A.2d at 504). Before engaging in this two-prong inquiry, the trial court must make a preliminary finding that the testimony meets a threshold level of reliability. *Id.* ¶ 22, 878 A.2d at 516.

Forensic podiatry is "the application of sound and researched podiatry knowledge and experience in forensic investigations to show the association of an individual with a scene of crime or to answer any other legal question concerned with the foot or footwear that requires knowledge of the functioning foot." Vernon & McCourt, *Forensic podiatry – a review and definition*, British Journal of Podiatry, vol. 2, No. 2, May 1999, at pp. 45-48. Forensic podiatry and/or podiatrists in their capacity as forensic experts have been accepted by courts in Arizona, California, Connecticut, Iowa, Georgia, Massachusetts,

Oregon, Virginia, and Wisconsin, as well as by forensic organizations, educational institutions, government entities, legal/attorney organizations, textbooks, periodicals, and scientific journals, including among others the International Association for Identification and the American Academy of Forensic Sciences.

Doctor Michael Nirenberg is a forensic podiatrist and podiatric physician who has been in private clinical practice for more than 30 years. He is president of the American Society of Forensic Podiatry and served on the Forensic Podiatry Subcommittee of the International Association for Identification. He is the co-editor of the textbook "Forensic Gait Analysis: Principles and Practice," and the author of dozens of published articles about forensic podiatry. He has also lectured on forensic podiatry extensively in the United States and around the world. Doctor Nirenberg has testified as an expert in forensic podiatry in the courts of Wisconsin, Massachusetts, and Virginia.

Doctor Nirenberg's testimony is reliable, relevant, and will assist the jury in determining a fact in issue, namely who may have left the bloody footprints in the stairway at the scene of the crime.

CONCLUSION

The State moves in limine that the Court allow Doctor Nirenberg to testify as an expert pursuant to M.R. Evid. 702 regarding his forensic podiatry evaluation of the defendants.

Dated: September 7, 2023

/s/ Donald W. Macomber
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FILED VIA SHAREFILE