

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION**

ROBERT G. SWOFFORD, JR., an  
individual, and his wife,  
SHARON L. SWOFFORD, an  
individual,

Plaintiffs,

vs.

CASE NO.: 6:08-cv-00066-MSS-DAB

DONALD ESLINGER, in his official  
capacity as the Sheriff of Seminole  
County, State of Florida; WILLIAM  
MORRIS, JR., in his individual capacity;  
and RONALD REMUS, in his individual  
capacity,

Defendants.

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**PLAINTIFFS' MOTION TO EXCLUDE OR LIMIT  
THE TESTIMONY OF KENNETH WALLENTINE  
WITH INCORPORATED MEMORANDUM OF LAW**

Plaintiffs, ROBERT G. SWOFFORD ("Mr. Swofford") and SHARON L. SWOFFORD ("Mrs. Swofford") (collectively "the Swoffords"), pursuant to the Amended Case Management and Scheduling Order ("CMO"), Federal Rules of Civil Procedure 26, Federal Rules of Evidence 702 and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) and its progeny, respectfully move this Honorable Court for entry of an Order precluding Defendants' expert, Kenneth Wallentine ("Wallentine"), from offering certain opinions in this action and for cause state as follows:

1. Wallentine prepared an expert report and was deposed on January 16, 2009.
2. The Court should strike Wallentine's report and preclude him from testifying at trial, because his testimony is inadmissible under the standards established in

*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

3. Rule 702 of the Federal Rules of Evidence provides, "If 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." The Supreme Court's *Daubert* decision "requires that trial courts act as 'gatekeepers' to ensure that speculative, unreliable expert testimony does not reach the jury." *McCorvey v. Baxter Healthcare Corp.*, 298 F.3d 1253, 1256 (11th Cir. 2002).

4. The gatekeeping obligation imposed by *Daubert* applies not only to scientific testimony, but to all expert testimony. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 148 (1999).

5. Under *Daubert*:

Expert testimony may be admitted into evidence if: (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable ... and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

*City of Tuscaloosa v. Harcross Chemicals, Inc.*, 158 F.3d 548, 562 (11th Cir. 1999) (*citing Daubert*, 509 U.S. at 589).

6. Certain portions of Wallentine's report fail to satisfy Federal Rules of Civil Procedure 26(a)(2)(B) and Section I.E. of the CMO by not providing detailed substantive rationale with respect to the basis and reasons for some of the proffered opinions.

7. As such, Wallentine's testimony on these issues will not assist the trier of fact to understand evidence or determine a fact in issue and any marginal relevance of such testimony is substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury.

8. Accordingly, based on Federal Rules of Civil Procedure 26, Federal Rules

of Evidence 702 and *Daubert*, 509 U.S. 579 and its progeny, Wallentine's report should be stricken and his testimony excluded at trial.

9. The reasons and authority supporting the exclusion of certain portions of Wallentine's report and excluding his testimony are more fully set forth in the Swoffords' Memorandum of Law in support of this Motion, which is hereby incorporated by reference.

### **MEMORANDUM OF LAW**

#### **I. STATEMENT OF THE CASE**

This is an action for personal injury and violation of civil rights arising from a shooting involving two deputies that occurred on April 20, 2006, in the Swoffords' backyard. While Mr. Swofford was checking his property in the early morning hours for suspected prowlers and burglars due to a rash of prior break-ins and thefts, he encountered two Seminole County Sheriff's Office deputies who had gained access to his property without announcing themselves by kicking down the Swoffords' privacy fence (See Exhibit "C") and who claimed to be in pursuit of fleeing suspects. Under the cover of nighttime (See Composite Exhibit "D" - depicting what was visible by Swofford, please discount the camera and flash), while shining one or two Stinger flashlights with beams of 15,000 to 40,000 candlepower in his face, with additional cover in the trailer and the Dodge Ram SUV sitting nearby (See Composite Exhibit "E"), with no warning and without Mr Swofford raising the firearm he was carrying to protect himself, his family, and his property, the two deputies gunned him down. As a result, Mr. Swofford received severe physical, mental and emotional damages from which he still suffers to this day. Mrs. Swofford has lost the companionship and services of her husband. This action seeks damages under Florida law and Section 42 U.S.C. § 1983 ("Section 1983").

#### **II. REQUEST FOR *DAUBERT* EXAMINATION**

While *Daubert* examinations are not required by law or by rules of procedure, they

are almost always fruitful uses of the court's time and resources in complicated cases involving multiple expert witnesses. *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 564 n.21 (11th Cir. 1998), *cert. denied*, 528 U.S. 812 (1999); *see also Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412, 417 (3d Cir. 1999) ("We have long stressed the importance of *in limine* hearings under Rule 104(a) in making the reliability determination required under Rule 702 and *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993)."); *Manual For Complex Litigation 3d* 123-24 (Fed. Jud. Ctr. 1995) ("Pretrial rulings are also advisable with respect to proffered expert testimony that maybe pivotal. The court may rule on the basis of written submission, but an evidentiary hearing under Fed. R. Evid. 104(a) may be necessary to determine whether the evidence is admissible under Rules 702 and 703"). Accordingly, the Swoffords request that this Honorable Court conduct an *in limine* examination (whether by written submission or after a hearing) to assess the admissibility of Wallentine's testimony and offers this Memorandum of Law on why such an examination is necessary.

### III. WALLENTINE'S OPINIONS IN THIS LITIGATION

The Swoffords hereby seek to preclude or limit the testimony of Defendants' K-9 expert Kenneth Wallentine. Wallentine's various opinions are best set forth in his report, but the opinions that are the subject of this motion are the following:

- (1) Strike performed well in his tracking training exercises during his in-service training.
- (2) Based on Strike's performance in achieving notable titles, his performance in training exercises in which Strike tracked, and Strike's successes in tracking multiple suspects, including multiple suspects from the same incident in the challenging environment of a residential area, and Deputy Morris' previous observations of Strike's tracking behavior, Deputy Morris reasonably believed that Strike was tracking the suspects

from the Barrington at Mirror Lake Apartment complex to and across the Swofford property on April 20, 2006.

(3) Strike made a transition from tracking behavior to handler protection behavior when he detected Mr. Swofford moving rapidly toward his handler.

(4) Strike's tracking led Deputy Morris and Deputy Remus onto the Swofford property.

(5) It would have been an unreasonable decision for Deputy Morris to deploy Strike to apprehend Mr. Swofford as Mr. Swofford moved toward the deputies with a gun in his hand. Deputy Morris reasonably believed that deploying Strike to apprehend Mr. Swofford would result in drawing gunfire from Mr. Swofford toward Deputy Morris and/or the death of Strike before Strike could reach Mr. Swofford.

A copy of Wallentine's report is attached hereto as Exhibit "A." Plaintiffs' seek to preclude or limit Wallentine's testimony as to the aforementioned opinions as Wallentine fails to provide detailed substantive rationale with respect to the basis and reasons for each of these proffered opinions, in contravention of Federal Rules of Civil Procedure 26(a)(2)(B) and Section I.E. of the CMO.

#### **IV. STANDARD OF REVIEW**

##### **A. *Daubert* Rule and Federal Rules of Evidence 702**

Rule 702, Federal Rules of Evidence, governs the admissibility of expert testimony and provides as follows:

If 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, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

As background, opinion testimony from “experts” is highly influential on a jury. In fact, some commentators note that juries bestow too much reliance on expert testimony when deciding a case:

[T]he everyday meaning of the word “expert” causes juries to give more weight to such testimony than it may deserve merely because in the everyday meaning and use of the term, every human being’s ears pick up on the word “expert,” giving the “expert” witness more attention and credence than any other witness or evidence. In other words, to the jury an “expert” is just an unbridled authority figure, and as such he or she is more believable. Thus, in normal parlance, stating that someone is an “expert” not only speaks to his or her credentials, but also vouches for his or her credibility. This does not comport with fundamental fairness.

Hon. Charles Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word “Expert” Under the Federal Rules of Evidence in Criminal and Civil Jury Trials*, 154 F.R.D. 537, 544 (1994).

Because of the importance with which juries regard “expert” testimony, the Court’s role as “gatekeeper” of expert testimony and its concurrent duty to make a preliminary assessment of the reliability of such testimony is of utmost importance. Thus, as the “gatekeeper” of expert testimony, the Court is tasked with preventing the admission of “junk science.” See *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). “Simply put, expert testimony may be assigned talismanic significance in the eyes of lay jurors, and, therefore, the District Courts must take care to weigh the value of such evidence against its potential to mislead or confuse.” See *Cook v. Sherriff of Monroe County*, 402 F.3d 1092, 1111 (11th Cir. 2005) (quoting *United States v. Frazier*, 387 F.3d 1244, 1263 (11th Cir. 2004) (en banc)).

The Eleventh Circuit has interpreted *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, (1993) and its progeny by setting forth a three-part inquiry to determine the admissibility of expert testimony under Federal Rule of Evidence 702. The Eleventh Circuit considers the following factors:

1. whether the expert is qualified to testify competently regarding the matters he intends to address;

2. whether the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and

3. whether the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

*See Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333,1340 (11th Cir. 2003).

The admissibility of an expert's opinion is a matter of law to be determined by the trial court. *See, e.g., McCorvey v. Baxter Healthcare Corp.*, 298 F.3d 1253, 1256 (11th Cir. 2002). As mandated by the Supreme Court, when performing its gate-keeping function, a court must determine if the proffered testimony is both relevant and reliable. *Daubert*, 509 U.S. at 589. The Supreme Court has emphasized that the test for reliability is an "exacting" one, *Weisgram v. Marley Co.*, 528 U.S. 440 (2000), and that the expert will be held to the intellectual rigor of his field. *Kumho Tire Co., Ltd.*, 526 U.S. at 137.

In the instant case and as proponents of evidence they seek to have admitted before the jury, the Defendants have the burden of laying a proper foundation for the admission of the expert testimony by a preponderance of the evidence. *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004) ("The burden of establishing qualification, reliability, and helpfulness rests on the proponent of the expert opinion..."), *cert. den.*, 125 S. Ct. 2516 (2005); *McCorvey v. Baxter Healthcare Corp.*, 298 F.3d 1253, 1256 (11th Cir. 2002). Although Defendants need not prove that Wallentine's opinions are correct, they are required to prove, by a preponderance of the evidence, that Wallentine's testimony is

reliable. *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1312 (11th Cir. 1999); *Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412, 418 (3d Cir. 1999).

Thus, for Wallentine's opinions to be admissible, they must pass the reliability tests as set forth in Rule 702 and the Supreme Court's and Eleventh Circuit's standards interpreting the Rule.

### **B. Federal Rules of Evidence 403**

Because of the powerful and potentially misleading effect of expert evidence, *see Duabert*, 509 U.S. at 595, sometimes expert opinions that otherwise meet the admissibility requirements may still be excluded by applying Federal Rule of Evidence 403. Rule 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Indeed, "the judge in weighing possible prejudice against probative force under Rule 403... exercises more control over experts than over lay witnesses." *Frazier*, 387 F.3d at 1263 (internal citation omitted). Thus, even if some of Mesloh's opinions in dispute are admissible, this Court should nonetheless exclude them if their probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

### **V. ANALYSIS**

An expert report must contain some discussion of the reasoning and thought process that led to the ultimate conclusion. *See United States v. GC Quality Lubricants, Inc.*, WL 34376587, \*2 (M.D. Ga. Sept. 27, 2002); *see also Cohlma v. Ardent Health Services, LLC*, 254 F.R.D. 426, 430 (N.D. Okla. 2008); *Upsher-Smith Laboratories, Inc. v. Mylan*



*Laboratories, Inc.*, 944 F. Supp 1411, 1440 (D. Minn. 1996). A proffered expert's testimony in the form of conclusory statements devoid of factual or analytical support is simply not enough. See *Furmanite America, Inc. v. T.D. Williamson, Inc.*, 506 F. Supp.2d 1126, 1130 (M.D. Fla. 2007)(citing *Cook ex rel. Estate of Tessier v. Sheriff of Monroe County*, 402 F.3d 1092, 1113 (11th Cir.2005)). An expert's failure to explain the basis for an important inference mandates exclusion of his or her opinion. See *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329, 1344 (11th Cir. 2003). Nothing in either *Daubert* or the Federal Rules of Evidence requires a District Court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. See *Furmanite*, 506 F. Supp.2d at 1130 (citing *Cook*, 402 F.3d at 1111). "A court may conclude that there is simply too great an analytical gap between the data and the opinion offered." *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997). Therefore, a trial court may exclude expert testimony that is "imprecise and unspecific," or whose factual basis is not adequately explained. *Cook ex rel. Estate of Tessier v. Sheriff of Monroe County*, 402 F.3d 1092, 1111 (11th Cir.2005); *United States v. Frazier*, 387 F.3d 1244, 1266 (11<sup>th</sup> Cir. 2004)(finding no abuse of discretion when the trial court concluded that an "imprecise and unspecific" expert opinion would not assist the jury, and observing that the expert's "imprecise opinion easily could serve to confuse the jury, and might well have mislead it").

When an expert report fails to comply with the standards set forth in Rule 26, a District Court has the discretion to sanction the non-complying party.<sup>1</sup> *GC Quality Lubricants*,

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<sup>1</sup> Fed. R. Civ. P. 26(a)(2)(B) states in pertinent part: "Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report — prepared and signed by the witness — if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain: (i) a complete statement of all opinions the witness will express and the basis and reasons for them...."

*Inc.*, WL 34376587 at \*2.

Here, Wallentine's report contains the following conclusory, unsubstantiated, misleading opinions in contravention of *Daubert* and the Federal Rules of Evidence which mandates their exclusion from trial.

(1) **First Opinion - Strike performed well in his tracking training exercises during his in-service training.** (Wallentine Report at p. 12.)

Wallentine concludes that Strike performed well in his tracking training exercises during his in-service training based upon the fact that Strike successfully completed one (1) tracking exercise on April 5, 1006 under Deputy Morris' supervision and successfully tracked burglary suspects in a deployment a few days prior to the April 20, 2006 incident at the Swoffords' residence. However, this conclusory assertion is unsubstantiated and unspecific. It is presented without any supporting factual foundation, analysis, or explanation and it is simply too great an analytical leap between the data and the opinion offered. Wallentine does not discuss or analyze any facts pertaining to the training exercise that Strike allegedly completed successfully or how Wallentine concluded that Strike completed the exercise successfully. Nor does he provide a factual foundation of analysis to explain how he could reach the conclusion that Strike performed well in training and tracking exercises based on only these two events. This opinion also does not take into account any of the other tracking exercises Morris trained Strike in, whether and how Morris can read Strike's behavioral changes to determine whether Strike is actually tracking, the adequacy or accuracy of the information contained in Morris' training logs as to Strike's abilities in these sessions, the fact that Morris trained Strike without supervision and completed all training logs himself, or that Strike failed to locate any suspects at all in at least two deployments.

If the Defendants were permitted to introduce this opinion at trial it could easily confuse and mislead the juries' understanding of Strike's true tracking abilities and Morris' ability to detect whether Strike is actually tracking, which could lead the jury to posit that on the night in question, Strike properly tracked the two Hispanic suspects onto Swofford's property because Wallentine opined that he performed well in training and tracking activities. *Frazier*, 387 F.3d at 1263 (saying exclusion of expert witness opinion under Fed.R.Evid. 403 is appropriate if the probative value of otherwise admissible evidence is substantially outweighed by its potential to confuse or mislead the jury). Accordingly, this opinion should be excluded.

**(2) Second Opinion - Based on Strike's performance in achieving notable titles, his performance in training exercises in which Strike tracked, and Strike's successes in tracking multiple suspects, including multiple suspects from the same incident in the challenging environment of a residential area, and Deputy Morris' previous observations of Strike's tracking behavior, Deputy Morris reasonably believed that Strike was tracking the suspects from the Barrington at Mirror Lake Apartment complex to and across the Swofford property on April 20, 2006.**  
(Wallentine Report at p. 13.)

Wallentine relies on his First Opinion above at p. 5 and the few facts he cherry-picked to support it to reach the Second Opinion. Like the First Opinion, his Second Opinion is unsubstantiated and unspecific. It is presented without any supporting factual foundation, analysis, or explanation. There is simply too great an analytical gap between the data and the Second Opinion. Wallentine does not discuss or analyze why Deputy Morris would reasonably believe that Strike was tracking on the night in question or at any time prior or why the Schutzhund III and IPO III titles Strike was awarded from dog sport organizations, one successful training exercise, and one successful deployment is sufficient for Deputy Morris to believe that Strike is successful at tracking. In fact, Wallentine admits that the sporting dog titles Strike obtained were with another K-9 handler, not Morris, so why would these titles lead Morris to believe that Strike was successful at

tracking. Deposition of Kenneth Wallentine, attached hereto as Exhibit "B," at p. 124, lines 18-25 ("Wallentine Depo."). This opinion also does not take into account

- a. any of the other alleged exercises involving Morris and Strike;
- b. if and how Morris can read Strike's behavioral changes to determine whether Strike is actually doing;
- c. the adequacy, accuracy or validity of the information contained in Morris and Strike's training logs;
- d. the fact that Morris trained Strike without supervision and completed all training logs himself;
- e. the fact that Strike failed to locate any suspects at all in at least two deployments.

If the Defendants were permitted to introduce this opinion at trial it could easily confuse and mislead the juries' understanding of Strike's true tracking abilities and Morris' ability to detect whether Strike is actually tracking, which could lead the jury to posit that on the night in question, Strike properly tracked the two Hispanic suspects onto Swofford's property because Wallentine opined that he performed well in training and tracking activities. *Frazier*, 387 F.3d at 1263 (saying exclusion of expert witness opinion under Fed.R.Evid. 403 is appropriate if the probative value of otherwise admissible evidence is substantially outweighed by its potential to confuse or mislead the jury). Accordingly, this opinion should be excluded.

**(3) Third Opinion - Strike made a transition from tracking behavior to handler protection behavior when he detected Mr. Swofford moving rapidly toward his handler.** (Wallentine Report at p. 14.)

Wallentine's only support for this opinion is that "[a]ny police service dog that had been trained in apprehension and handler protection work would have done the same without any command from the handler, particularly as the persons present began to shout

excitedly.” Wallentine Report at p. 14. There is virtually no discussion of the reasoning or thought process, or any factual or analytical support included in Wallentine's report that supports this conclusion. At his deposition, Wallentine testified that this conclusion is based upon the description provided by Deputy Morris who gave statements as to Strike's behavior that night. Specifically Morris stated Strike transitioned to an upright position, with his haunches forward and head up and was barking and pulling forward which indicated to Wallentine that the dog had transitioned to handler mode. Wallentine Depo. at p. 150, lines 2-25; p. 151, lines 1-5. But he fails to provide any supporting factual foundation or analysis as to why these changes in Strike show that Strike transitioned from tracking to handler protection. This failure to explain the basis for an inference mandates exclusion of this opinion.

**(4) Fourth Opinion - Strike's tracking led Deputy Morris and Deputy Remus onto the Swofford property.** (Wallentine Report at p. 14.)

Wallentine reaches this conclusion without any supporting factual foundation, analysis, or explanation as to why Strike led the deputies onto the Swofford property. There is virtually no discussion of the reasoning or thought process, or any factual or analytical support included in Wallentine's report that supports this conclusion. He simply offers that even if a police dog had not been present to track, any reasonable police officer would have entered onto Swofford's property to search for the fleeing suspects as Remus saw them fleeing in this direction. However, this does not explain how Strike properly tracked the suspects or how his tracking led the deputies onto Swofford's property. *Daubert* requires Wallentine to explain the basis for this opinion and to provide factual support and analysis to support it. The Defendants may, in their response to this motion, argue that this opinion is based on Wallentine's prior opinions that Strike performed well in tracking, but this is insufficient. Wallentine must articulate the facts upon which he relies

to reach his conclusions. Moreover, Plaintiffs have argued that these earlier opinions are devoid of factual or analytical support as well.

**(5) Fifth Opinion - It would have been an unreasonable decision for Deputy Morris to deploy Strike to apprehend Mr. Swofford as Mr. Swofford moved toward the deputies with a gun in his hand. Deputy Morris reasonably believed that deploying Strike to apprehend Mr. Swofford would result in drawing gunfire from Mr. Swofford toward Deputy Morris and/or the death of Strike before Strike could reach Mr. Swofford.** (Wallentine Report at p. 18-19.)

This opinion is presented without any supporting factual foundation, analysis, or explanation. Wallentine does not provide any facts in support of these statements or explain why it would be unreasonable to deploy Strike or why Deputy Morris believed that deploying Strike would result in gunfire from Swofford. He states that under these circumstances it would be unreasonable to deploy Strike because Morris was holding both his flashlight and Strike's leash in his left hand and to deploy Strike he would have to drop the flashlight which, in his opinion, would result in Strike being shot by Swofford and Morris shooting Swofford. But again, he does not explain why this would be the outcome.

In deposition testimony, Wallentine stated that it would have been an unreasonable decision for Deputy Morris to deploy Strike to apprehend Swofford unless there was a reasonable likelihood that the dog could disarm or disable Mr. Swofford which he does not believe to be the case. Wallentine Depo. at p. 165, lines 11-15. He admitted, "I don't know how quickly Strike could cover the 25 or so, give or take, feet, between Deputy Morris and Mr. Swofford." Wallentine Depo. at p. 165, lines 23-25. Yet Wallentine did not conduct any research into whether K-9 Strike could have covered 25 feet and apprehended Swofford in lieu of Morris employing deadly force against him. Nor does he offer any reasoning, analysis, or factual support to substantiate these blanket observations.

To be admissible, Wallentine must provide scientific, technical or other specialized knowledge to assist the trier of fact. *See* Fed.R.Evid. 702. Wallentine has not conducted a

study or otherwise provided a reliable methodology upon which this opinion is based.

Rather, Wallentine relies primarily upon his self-proclaimed knowledge and experience. "If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply 'taking the expert's word for it.'" See Advisory Committee Notes to 2000 amendments to Federal Rules of Evidence, Fed. R. Evid. 702; see also *McDowell v. Brown*, 392 F.3d 1283 (11<sup>th</sup> Cir. 2004) (recognizing that the reliability prong of the *Daubert* analysis requires that proffered expert testimony be "scientific," i.e. grounded in methods and procedures of science, and constitute "knowledge," i.e. be something more than subjective belief or unsupported assumptions). Wallentine fails to provide such explanation, resorting instead to bare legal conclusion and unsupported statements of opinion.

This Court may strike such testimony as it is nothing more than conclusory statements of fact. *Maldonado v. Snead*, 168 Fed.Appx. 373, 385 - 86 (11<sup>th</sup> Cir. February 23, 2006). Here, Wallentine's subjective opinion is not substantiated by facts or analysis and is therefore subject to exclusion. *Cook ex rel. Estate of Tessier v. Sheriff of Monroe County, Fla.*, 402 F.3d 1092, 1112 (11<sup>th</sup> Cir. 2005) (finding that trial court acted within its discretion in excluding expert opinion where the "opinion is unsubstantiated by any proffered facts, explanation, or analysis;" the opinion was "another conclusion that 'is connected to existing data only by the ipse dixit of the expert.'").

Moreover, unsubstantiated opinions are inadmissible. See *Omar v. Babcock*, 177 Fed.Appx. 59, 63 n.5 (11<sup>th</sup> Cir. April 18, 2006) ("[I]f the jury does not need the assistance of an expert to understand the case, or if the witness simply recounts the facts and then offers an opinion as to the conclusion which the jury should reach, such expert testimony is

not permitted.") (citing *Montgomery v. Aetna Cas. & Sur. Co.*, 898 F.2d 1537, 1541 (11th Cir. 1991)); *Cook ex rel. Estate of Tessier v. Sheriff of Monroe County, Fla.*, 402 F.3d 1092 (11th Cir. 2005) (conclusory statements devoid of factual or analytical support are insufficient to meet the proponent's burden of laying the proper foundation for admission of expert testimony); *U.S. v. 0.161 Acres of Land, more or less, situated in City of Birmingham, Jefferson County, Ala.*, 837 F.2d 1036 (11th Cir. 1988) (court should exclude expert testimony that amounts to nothing more than mere guess or speculation).

Notwithstanding the concern that the jury may attach unwarranted significance to Wallentine's unsupported conclusions, Wallentine's report and deposition testimony is devoid of reasoning and thought process, or any other factual or analytical support, to back up his critically important purported opinions. Nowhere in his report, or in his deposition testimony, does he provide an explanation of his reasoning or thought process, or any other sufficient factual or analytical support to back up his conclusions. This is a prime example of opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. See *Furmanite*, 506 F. Supp.2d at 1130 (citing *Cook*, 402 F.3d at 1111). This failure is in clear contravention of Federal Rules of Civil Procedure 26(a)(2)(B) and Section I.E. of the CMO. As such, these portions of Wallentine's report should be excluded and Wallentine should be precluded from testifying to them at trial.

## VI. CONCLUSION

For the reasons set forth herein, Plaintiffs, Robert G. Swofford and Sharon L. Swofford, respectfully move this Honorable Court for an order excluding the portions of Wallentine's report that contain the opinions excluding the portions of Wallentine's report that contain the opinions referred to below and barring Wallentine from testifying regarding the same opinions.

- (1) Strike performed well is his tracking training exercises during his in-service



training.

(2) Based on Strike's performance in achieving notable titles, his performance in training exercises in which Strike tracked, and Strike's successes in tracking multiple suspects, including multiple suspects from the same incident in the challenging environment of a residential area, and Deputy Morris' previous observations of Strike's tracking behavior, Deputy Morris reasonably believed that Strike was tracking the suspects from the Barrington at Mirror Lake Apartment complex to and across the Swofford property on April 20, 2006.

(3) Strike made a transition from tracking behavior to handler protection behavior when he detected Mr. Swofford moving rapidly toward his handler.

(4) Strike's tracking led Deputy Morris and Deputy Remus onto the Swofford property.

(5) It would have been an unreasonable decision for Deputy Morris to deploy Strike to apprehend Mr. Swofford as Mr. Swofford moved toward the deputies with a gun in his hand. Deputy Morris reasonably believed that deploying Strike to apprehend Mr. Swofford would result in drawing gunfire from Mr. Swofford toward Deputy Morris and/or the death of Strike before Strike could reach Mr. Swofford.

#### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that this 2<sup>nd</sup> day of March, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send a Notice of Electronic filing to: Thomas W. Poulton, Esquire, and D. Andrew DeBevoise, Esquire.

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UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION

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ROBERT G. SWOFFORD &	:	
SHARON L. SWOFFORD,	:	
Plaintiffs,	:	
	:	Case No. 6:08-CV-00066-PCF-DAB
vs.	:	
	:	
DONALD ESLINGER, <i>et al.</i> ,	:	Report of Kenneth R. Wallentine
Defendants.	:	

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The following report of Kenneth R. Wallentine is submitted after review of the following documents, pleadings, records, and reports: reports of the Florida Department of Law Enforcement, Seminole County Sheriff's Office, proficiency examinations, quarterly evaluations, training and deployment records and certificates of Deputy William Morris and PSD Strike; Seminole County Sheriff's Office Policies relating to police service dog use; plaintiff's amended complaint and defendants' answers; photographs of the incident scene, evidence and plaintiff's clothing and effects; statements of William Morris (April 20 and 26, 2006), Ronald Remus (April 20 and 26, 2006), and Robert Swofford (July 5, 2006); American Working Dog Federation scorebook for PSD Strike; helicopter video recording; reports of R. Ernest, K. Overall, L. Myers, B. Pettingill, Jr., C. Lichtblau, R. Hall, R. Wright, S. Rothlein, S. Zadrozny, W. Weimaur; various certification standards for tracking dogs and dispatch audio recording.

*Swofford v. Eslinger, et al.*  
*Report of Kenneth R. Wallentine*

**EXHIBIT "A"**

Kenneth R. Wallentine states as follows:

1. I am a ~~law enforcement officer in the State of Utah~~. My primary employment is for the Utah Attorney General, where I serve as Chief of Law Enforcement. I was formerly employed as a Bureau Chief at the Utah Department of Public Safety, Peace Officer Standards and Training Division, where I supervised investigations into allegations of improper and excessive force, officer integrity, and criminal acts alleged to have been committed by law enforcement officers and supervised in-service training administration and certification for all peace officers in the State of Utah, and ~~supervised the Police Service Dog training and certification program~~. I also had responsibility for ~~policy drafting and review for the parent agency~~, the Utah Department of Public Safety. I was certified as a law enforcement officer in the State of Utah in 1982. My duties include direct supervision and command of three Investigation Sections, supervising approximately thirty-five law enforcement officers, forensic specialists, and technicians, as well as a number of part-time employees. I command the State of Utah Child Abduction Response Team. I command the State of Utah Officer-Involved Fatality Investigation Team.

2. I was formerly responsible for providing delivery of the Basic Training Curriculum related to all legal subjects, as well as certain tactical subjects, at the Utah Law Enforcement Academy. I continue to teach at the Utah Law Enforcement Academy. ~~I am the author of the police academy curriculum currently in use for several subjects, including, but not limited to, use of force, reasonable force, use of force and police service dog teams, search and seizure, search and seizure for police service dog teams, and use of force/firearms instructor liability.~~ I regularly teach in the Basic Training programs of the Utah State Police Academy. I regularly teach in the following specialized courses: Advanced Officer Course, Firearms Instructor Course, Utah Drug Academy,

Utah Crime Scene Investigators Academy, Utah Sheriffs' Association Command College, First Line Supervisor Course, POST K9 Unit Administrator Course, POST Patrol Dog Handler Course, POST Narcotics Detector Dog Course, and others. I am a former police service dog handler and worked with the Utah County Sheriff's K9 Unit from 1995 to 2001. I continue to provide instruction and evaluation services for the POST Police Service Dog program. I am a certified POST Firearms Instructor, often serving as the lead instructor for POST Firearms courses. I am a certified TASER® Instructor. I am a certified Excited Delirium and Sudden Death Investigation Instructor.

3. I am a licensed attorney, having practiced law since 1990. I am admitted to practice before the United States Supreme Court, the Courts of Appeals for the Fifth and Tenth Circuits, and the State and Federal courts in the State of Utah. I am a Master of the Bench of the American Inns of Court, Inn One, where I also serve as immediate past-President of the Inn of Court. I serve as an Administrative Law Judge for the State of Utah and for various counties and cities in Utah, providing hearing officer and appellate hearing services for hearings involving allegations of police officer misconduct for a variety of state agencies and municipalities.

4. In addition to my primary employment, I occasionally consult and provide expert witness opinions on police procedures, and use of force issues. I am on the adjunct faculty of Excelsior College, teaching Criminal Procedure, Evidence and Management Strategies for Public Safety. I occasionally perform in-custody death investigations and officer-involved shooting death investigations for agencies which may lack the requisite expertise. I am a consultant to the Utah Risk Management Mutual Association, the state's largest insurer of public safety agencies, on matters of officer conduct and discipline, hiring and screening practices, use of force, and police

pursuit policies. I am the co-founder of, and legal advisor to, a best practices advisory group that developed comprehensive model policies and best practices under the authority of the Utah Chiefs of Police Association, the Utah Sheriffs' Association and various state law enforcement agencies. These policies serve as a model for all Utah public safety agencies. I occasionally perform in-custody death investigations and officer-involved shooting death investigations for agencies which may lack the requisite expertise. I am the author of a number of model policies for law enforcement agencies, and have provided policy drafting and policy review services for several agencies, including policy drafting responsibility for large law enforcement agencies. I am a program and grant reviewer for the Office of Justice Programs, United States Department of Justice. I have also served as a contract consultant to the United States Department of Justice, assigned to provide technical assistance and management consulting to various public safety entities in the United States.

5. I participate and serve in a number of community and professional capacities. I am a member of the Scientific Working Group on Dog and Orthogonal Detector Guidelines, a national scientific best practices organization sponsored by the Federal Bureau of Investigation, the Department of Homeland Security, and the Transportation Security Administration, with support coordinated by the International Forensic Research Institute at Florida International University. Other professional activities pertinent to law enforcement include serving as a Past-President of the Utah Peace Officers Association, former Board Member of the Utah SWAT Association, member of the International Association of Law Enforcement Educators and Trainers Association, member of the International Association of Chiefs of Police and the Utah Chiefs of Police Association, member of the National Tactical Officers Association, member of the

International Association of Law Enforcement Firearms Instructors, member of the International Association of Directors of Law Enforcement Standards and Training, member of the International Law Enforcement Educators and Trainers Association, member of the K9 Section of the Utah Peace Officers Association, member of the ~~United States Police Canine Association~~, and Chairman of the Utah Law Enforcement Legislative Committee. I formerly served as a gubernatorial appointee to the Council on Peace Officer Standards and Training. I currently frequently serve as a member *pro tem* of the Council on Peace Officer Standards and Training.

6. Since 1994, I have been a consultant with the ~~K9 Academy for Law Enforcement and the International Police Canine Conference~~. My principal responsibilities are to provide use of force training, civil liability instruction, and search and seizure instruction. In the past few years, I have restricted my travel outside the State of Utah, but have continued to provide use of force, civil rights liability, and search and seizure law enforcement training in Arizona, Iowa, and California. Over the past several years, I have lectured and trained police officers and administrators from Wyoming, Arizona, Connecticut, Florida, North Carolina, South Carolina, Texas, Utah, Colorado, Alabama, Louisiana, Nevada, New York, New Hampshire, Vermont, Rhode Island, Maine, Delaware, Wisconsin, Michigan, Indiana, Washington, Oregon, Nebraska, Georgia, California, Nevada, and Idaho.

7. I have previously published a number of other professional articles, many of which have been subjected to peer review. My most recent book, *The K9 Officer's Legal Handbook*, was published by Lexis/Nexis Matthew Bender in December 2008. Another recent book, *Street Legal: A Guide to Pre-trial Criminal Procedure for Police, Prosecutors, and Defenders* was published in 2007 by the American Bar Association Publishing Division. It is a treatise on public

safety and criminal procedure, and includes chapters on use of force by police officers and police service dog use of force. My other published works, limited to the past ten years, include:

*Acknowledging Gender in Fitness Standards for Police: An Invitation to Liability?*, The Municipal Lawyer, January 2008; ~~*K9 Court Testimony*~~, Police ~~K9~~, December 2006; *United States Supreme Court Review for Corrections Managers*, Corrections Managers Report, October 2006; *Criminal Procedure: The Street Cop's Guide* (Aspen Press 2005); *Conduct Unbecoming an Officer*, The Municipal Lawyer, January, 2005; *Limits on Off-Duty Police Employment*, The Municipal Lawyer, Spring 2004; *Conjugal Prison Visits*, Corrections Manager, March, 2003; *Life in the Law* (BYU Press 2002), co-author; *Investigating In-Custody Death*, Corrections Manager Report, October 2002; *Police Canine Risk Management*, The Municipal Lawyer, July 2002; *The New Paradigm of Firearms Training*, IADLEST News, Spring 2001; *Use of Deadly Force Instructor Curriculum* (monograph), POST, Spring 2001; *Pepper Spray as Use of Force*, Police, October 2000; *Are Drug Courts the Wave of the Future?*, Police, April 2000; *Legal Risks of Tactical Operation*, Police, April 1999; ~~*Dogs of War (K9 Use of Force)/FLSA & K9 Handlers*~~, Police, December 1998/January 1999; ~~*No-knock & Nighttime Searches*~~, Police, September 1998; *The Respectable Roadblock Ruse*, Police, June 1998; *If at First You Don't Succeed . . .*, Clark Memorandum, Fall 1998; and a variety of columns addressing law enforcement issues and published by PoliceOne.com. I am the author of a reference book currently in use in the Utah Law Enforcement Academy, as well as other police academies throughout the United States, titled *Criminal Procedure: The Street Cop's Guide* (Aspen Press 2005). This book discusses detention and arrest of persons, use of force (including canine use of force), and search and seizure of persons and property, among other subjects.

8. I charge a fee for private consultation services and court testimony. For those matters which progress beyond an initial brief consultation, I charge \$150.00 per hour for all activities outside of court testimony, a travel fee of \$500.00 per day, plus actual expenses, for travel to western states and \$1,000.00 per day for all other states, and \$250.00 per hour when offering testimony. I have testified and/or provided depositions in the following cases which may be generally related to the subject of the instant litigation in the past four years: *Becker v. Bateman*, Case No. 2:07-CV-311 PGC, United States District Court of Utah, Central Division, 2008. ~~Deposition testimony given on behalf of the defendants.~~ Subject matter: excessive force. *Salva v. Kansas City Board of Police Commissioners*, Case No. 07-CV00194-JTM, United States District Court of Missouri, Western Division, 2008. ~~Deposition testimony given on behalf of the~~ ~~defendants.~~ Subject matter: Wrongful death. *Turnbow v. Ogden City et al.*, Case No. 1:07-CV-114, United States District Court of Utah, Central Division, 2008. Deposition testimony given on behalf of the ~~defendants.~~ Subject matter: Wrongful death. *Nielson v. South Salt Lake City & Burnham*, Case No. 2:06-CV-335, United States District Court of Utah, Central Division, 2008. Deposition testimony ~~given on behalf of the defendants.~~ Subject matter: sexual misconduct. *Trammell v. Jacksonville Beach City Police Department*, Case No. 3:06-CV-984-J-16MMH, United States District Court of Florida, Jacksonville Division, 2008. Deposition testimony given on behalf of the ~~plaintiffs.~~ Subject matter: excessive force. *Harman & Overton v. Utah Department of Public Safety*, Case No. 2:03CV00558TC, United States District Court of Utah, Central Division, 2007. Deposition testimony given on behalf of the ~~defendants.~~ Subject matter: wrongful execution of a search warrant, negligent investigation. *Herring v. City of Colorado Springs*, Civil No. 04-CV-024229-PAC-BNB, United States District Court of Colorado, 2005.

*Swofford v. Eslinger, et al.*  
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Deposition testimony given on behalf of the defendants. Subject matter: excessive use of force, wrongful death. *Walker v. Orem Department of Public Safety*, Case No. 2:02-CV-0253, United States District Court of Utah, Central Division, 2004. Deposition testimony given on behalf of the defendants. Subject matter: excessive use of force, wrongful death

9. In the instant matter, I have relied upon the documents, photographs, pleadings, records, reports, and statements previously described. I have formed a number of opinions based upon the aforementioned, as well as my experience, education, and familiarity with professional publications. I have relied on a variety of professional publications, including, but not limited to, my own publications and court decisions cited therein. Those opinions, and a summary of the circumstances known or reported to me upon which those opinions are based, are set forth herein as follows:

a. Summary of reported facts and conclusions:

On April 20, 2006, in the early morning hours, Deputy Ronald Remus was on bicycle patrol in the Barrington at Mirror Lake Apartment complex. Deputy Remus was patrolling this area due to previous car burglaries in the apartment complex parking lots. At approximately 0235, Deputy Remus saw two Hispanic males inside a car in the apartment complex parking lot. Deputy Remus believed that the suspects were burglarizing the car. When the suspects saw Deputy Remus, one of them exclaimed, "oh, shit" and the suspects fled to the north and east. Deputy Remus pursued them and called for assistance. He lost sight of them as they went to a fence that marks the border of the apartment complex and the Swofford property. The apartment complex is adjacent to the east side of the Swofford property.

At the same time that the two suspects fled on foot, a dark-colored Honda sedan left the area, suggesting that the driver of the Honda sedan and the two suspects who fled on foot might be jointly engaged in criminal activity. Upon losing sight of the two men, Deputy Remus followed the Honda sedan. Sergeant Jan Kloth, arriving from to assist, stopped the Honda sedan upon confirming via radio with Deputy Remus that it was the same car that Deputy Remus saw leaving the complex. Sergeant Kloth arrested the driver, Bienvenido ("Bennie") Oscar Lendebol. Deputy Remus had already called for other officers that could establish a containment perimeter and returned to the place where he last saw the two suspects and he awaited the arrival of a Sheriff's police service dog team.

Deputy William Morris and Police Service Dog Strike arrived at the apartment complex. Deputy Remus directed Deputy Morris to where he had seen the two suspects fleeing. Deputy Morris initiated a canine track with Strike. Strike tracked along a wooden fence that borders the Swofford property. After tracking approximately twenty-five to thirty yards, Strike moved through a small hole at the bottom of the fence. Deputy Morris did not believe that he would fit through the hole in the fence. He pulled Strike back through the fence and found a place with some broken fence slats where Strike, Deputy Morris and Deputy Remus could more easily and safely breach the fence. They crossed through the fence into a large open field with vegetation, plant irrigation pipes, a large enclosed cargo trailer, and cars awaiting restoration work. Deputy Morris then took Strike back along the interior side of the fence to the same hole through which Strike had initially entered and Strike began to track again. Strike, Deputy Morris and Deputy Remus walked to the rear of the large trailer and through a portion of the field.

At the same time, Mr. Robert Swofford was asleep in a chair in his home. He was awakened by the barking of his dog. Mr. Swofford retrieved an unholstered handgun and went outside, believing that cats may have aroused his dog. Mr. Swofford walked toward the deputies. Deputy Morris and Deputy Remus saw Mr. Swofford holding his handgun. They identified themselves as Deputy Sheriffs and shouted multiple commands at him to drop the gun. Mr. Swofford did not drop the gun and he continued to walk aggressively toward the deputies. Mr. Swofford began to raise his gun in the deputies' direction and they both continued to shout at Mr. Swofford that they were Deputy Sheriffs and that he should drop his gun. As Mr. Swofford raised up the gun toward a firing position, the deputies fired upon him, striking him. Mr. Swofford then went to the ground.

- b. On the day of the incident, investigators from the Florida Department of Law Enforcement ("FDLE") interviewed Deputy Morris and Deputy Remus. Deputy Morris told the FDLE investigators that Strike was tracking and that Strike led Deputy Morris along the wood fence. Deputy Morris reported that, once through the fence, Strike reinitiated the track and continued to lead Deputy Morris on the track.
- c. Deputy Morris reasonably believed that PSD Strike was tracking the prowling suspects as he moved along the fence bordering Mr. Swofford's property and across Mr. Swofford's field.
- d. Strike was certified by the trainer, Robert Gailey, on January 26, 2006. Deputy Morris participated as the police service dog handler during Strike's training course. Prior to his assignment as Strike's handler, Deputy Morris was already trained and experienced as a

police service dog handler, having previously worked as the handler to another Sheriff's Office police service dog.

- e. ~~Though the FDLE does not evaluate/certify police service dogs' tracking abilities, the FDLE does certify police service dogs' abilities in patrol dog work. On December 15, 2005, Deputy Morris and Strike successfully completed all components of the FDLE evaluation.~~
- f. Deputy Morris maintained Strike's training records during and after Strike's initial course of training administered by Robert Gailey. Though Gailey maintained the curriculum records, Deputy Morris, and presumably other handlers with dogs in the class, ~~maintained their own dogs' performance record.~~ This is often done because the training performance records are generally maintained by the dog's owner or handler. Strike performed well during the initial training provided by Robert Gailey.
- g. ~~Strike was trained in tracking and performed well in tracking.~~ Strike achieved both ~~Schutzhund and IPO titles.~~ Schutzhund titles, designated I through III, are awarded upon performance of certain ~~strictly administered trials.~~ The Schutzhund international trial standards are used by dog sport organizations, including police service dog organizations, in various countries all over the world. In the United States, Schutzhund trials may be ~~administered by qualified judges from the American Kennel Club, the German Shepherd Dog Club of America, the United Schutzhund Club of America, and other organizations.~~ To obtain the prestigious Schutzhund III title, ~~a dog must have successfully completed all of the requirements for the Schutzhund I and II titles and must pass a rigorous trial.~~ The Schutzhund III trial includes a ~~tracking component in which the dog must follow a track~~

that was laid by a stranger and has aged at least fifty minutes. The dog and handler remain out of sight when the track is laid. The track has four turns, compared with two turns for Schutzhund I and II, and there are three objects that the dog must locate along the track. Strike successfully completed the tracking, as well as obedience and protection, components of the trial and Strike was awarded a Schutzhund III title.

- h. Strike also held an IPO III title. The Federation Cynologique Internationale ("FCI"), translated as "World Kennel Club," administers the IPO, or International Trial Rules, trial standards. The IPO III title trial includes a tracking component similar to the Schutzhund III trial. Though IPO III trials are similar to Schutzhund III trials, they are judged with a higher measure of precision. Dogs such as Strike who achieve these either or both or these titles must demonstrate exacting proficiency in tracking.
- i. Strike performed well in his tracking training exercises during his in-service training. Strike successfully completed a tracking exercise on April 5, 2006. Strike also performed well in the operational field. Just a few days prior to April 20, 2006, Strike demonstrated his tracking proficiency in tracking burglary suspects in two separate tracks. Strike tracked from the location of the burglary through a residential area and lead Deputy Morris to a car with suspects. These suspects later admitted to the burglary and stolen items were found in the car to which Strike tracked. Strike also tracked another suspect in the same burglary along the path that she followed to flee the burglary. Strike located this suspect and Deputy Morris took her into custody. She, too, admitted to participating in the burglary.

- j. Based on Strike's performance in achieving notable titles, his performance in training exercises in which Strike tracked, and Strike's successes in tracking multiple suspects, including multiple suspects from the same incident in the challenging environment of a residential area, and Deputy Morris's previous observations of Strike's tracking behavior, ~~Deputy Morris reasonably believed that Strike was tracking the suspects from the Barrington at Mirror Lake Apartment complex to and across the Swofford property on April 20, 2006.~~
- k. ~~It was reasonable for Deputy Morris to start Strike on the track at the location selected. Deputy Morris was reasonably relying Deputy Remus's indication that the location was the last place that the two suspects were seen.~~ It was an area with vegetative growth as well as pine needles and other vegetation on the ground surface. This would have presented a good environment for tracking and a reasonable police service dog handler who learned that the suspects had very recently been seen at such a location would ~~reasonably choose that point to initiate a track.~~
- l. I found no evidence in the materials provided to me that Deputy Remus or any other person contaminated the area of the track prior to Strike's deployment. While Deputy Remus initially pursued two suspects fleeing on foot while Deputy Remus was mounted on his bicycle, it does not appear that he dismounted and walked through the area where the suspects were last seen. The claim that Deputy Remus may have contaminated the track is inconsistent with Strike's tracking along the fence line to the hole in the fence where Deputy Remus had not yet traveled. Deputy Remus acted as a reasonable officer would under similar circumstances. He pursued the two suspects fleeing on foot, called

for assistance, and then turned his attention to the fleeing car. If, as it seems probable, the fleeing pedestrian suspects were associated with Benny Lendebol (the suspect who fled in the Honda sedan) it would be reasonable to believe that Lendebol would rendezvous with the two pedestrian suspects. Deputy Remus coordinated Lendebol's apprehension by radio contact with Sergeant Kloth. Deputy Remus also called for additional help, which included the police service dog unit and other deputies who were moving into positions to create a containment perimeter. Deputy Remus's response to the apparent vehicle burglary suspects fleeing in different directions was reasonable and was consistent with generally accepted police practices.

m. ~~Strike made a transition from tracking behavior to handler protection behavior when he detected Mr. Swofford moving rapidly toward his handler. There is nothing particularly remarkable about the transition. Any police service dog that had been trained in apprehension and handler protection work would have done the same without any command from the handler, particularly as the persons present began to shout excitedly.~~

n. Strike's tracking led Deputy Morris and Deputy Remus onto the Swofford property. However, even if a police service dog had not been present to track, ~~any reasonable police officer would have entered onto the Swofford property to search for the fleeing suspects.~~ Deputy Remus saw the suspects fleeing in the direction of the Swofford property and ~~last~~ ~~saw them near the fence bordering the Swofford property.~~ Even without a police service dog, the deputies would certainly have searched along the fence, located the hole, located the place of the other broken slats where the deputies eventually entered the property, and the deputies would certainly have searched the Swofford property for the two suspects.

To have failed to do so would have been unreasonable and would have been a dereliction of their duty to try to find the suspects and apprehend them for the apparent attempted car burglary, as well as to protect the area residents from further criminal behavior. Though a helicopter was available and did respond, an examination of the photographs of the Swofford property shows many locations where the suspects could easily hide from aerial observation.

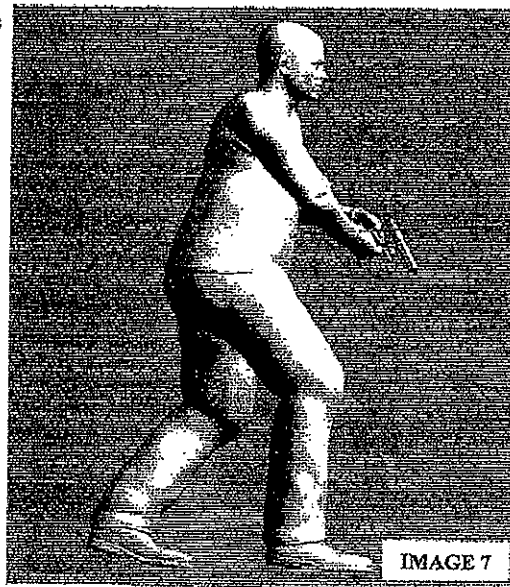
- o. Mr. Swofford's decision to go into his field, armed with a handgun was unreasonable and was negligent. A fundamental premise of firearms safety is that firearms should not be handled by a person who has consumed drugs and/or alcohol. For example, the National Rifle Association's firearms safety training curriculum states that a gun owner should "never use alcohol or over-the-counter, prescription or other drugs before or while shooting." The Florida Hunter Safety Education course teaches that one must "avoid drugs and alcoholic beverages" when in possession of a gun. Mr. Swofford held a Florida concealed weapons permit, and had likely completed one of the several alternative training courses to qualify him to hold a permit. I am familiar with such firearms courses and have instructed them for over twenty years both for law enforcement officers and civilians. I am familiar in particular with the recommended National Rifle Association firearms safety course and the Florida Hunter Safety Education course, having completed both, and other similar courses. All teach that guns and drugs, even lawfully consumed drugs, don't mix safely. It is simply axiomatic that one should not possess a gun when under the influence of alcohol or controlled substances. Alertness and motor coordination are critical to the reasonable, safe and proper use of a firearm.



- p. Mr. Swofford could have easily called on the Seminole County Sheriff's Office to investigate the cause of his dog's barking. He had done so on numerous prior occasions. He knew that the Sheriff's deputies patrolled the area, having seen them in the vicinity and having seen them flash their lights as they patrolled past his property. Mr. Swofford's security guard, Orlando Velez, also reported seeing Sheriff's deputies patrolling in the area. Calling the Sheriff's Office would have been a reasonable alternative to going into the field and stalking the deputies while under the influence of controlled substances.
- q. Mr. Swofford acted unreasonably in failing to identify the uniformed Sheriff's deputies before beginning to raise his handgun toward them and in failing to confirm his identity as the property owner to them. Prior to moving rapidly toward the deputies, Mr. Swofford had already identified one of the deputies as a uniformed person dressed in a dark uniform such as those worn by Sheriff's deputies. Mr. Swofford saw that the deputies were carrying flashlights as they walked along the fence and through the field, consistent with the behavior expected of a uniformed police officer and inconsistent with the behavior of a typical prowler or burglar. Target identification is a vital component of any reasonable firearms training course, particularly those meeting the requirements for a Florida Concealed Weapons permit. Mr. Swofford had received military combat arms training. I am personally aware that basic training provided by the United States Army includes the necessity of proper target identification and confirmation prior to using deadly force.
- r. Based on the circumstances presented to Deputy Morris and Deputy Remus at the time that Mr. Swofford advanced toward them, his gun held in a two-handed firing grip and raising the gun toward the deputies, it was reasonable for Deputy Morris and Deputy

Remus to fire their guns upon Mr. Swofford. The deputies had shouted repeatedly at Mr. Swofford, identifying themselves, they had ordered him to drop his gun, and he responded by continuing to aggressively advance upon them and to raise his gun toward them.

s. ~~Accepting as accurate the position and stance for Mr. Swofford posited by Richard Ernest, as illustrated in Mr. Ernest's Image 7 attached to his report, a reasonable officer would perceive this to be an aggressive movement that would immediately precede offensive gunfire by the person illustrated in Image 7. The hand position illustrated in Image 7 is generally referred to as the~~



~~“ready” or “ready gun” position.~~ Officers are taught to use this position when they are moving toward or confronting a threat and the necessity to shoot may be imminent. The time required to move from the ready gun position illustrated in Image 7 to a classic standing shooting position with the muzzle aimed directly ahead is almost incalculably small. It would require an average person no more than a mere fraction of a second to move the muzzle of the gun from the ready gun position into a position to fire the gun directly at a person standing twenty to twenty-five feet away. Deputy Morris stated that he fired at the time that Mr. Swofford “leveled off” his handgun at Deputy Morris’s chest level. A reasonable officer faced with a person holding a gun in either the ready gun position illustrated in Image 7 or leveled directly at the officer, and who has given several

commands identifying himself or herself as an officer and commanding the person to drop the gun, would perceive an imminent threat of deadly force and would fire upon the person holding the gun.

t. It would have been unreasonable for Deputy Morris or Deputy Remus to deploy a TASER® to apprehend Mr. Swofford as Mr. Swofford moved toward the deputies with his gun in hand. TASER® International-approved law enforcement end user training teaches that a TASER® should generally not be deployed on a person holding a firearm. The neuromuscular interruption effect of an electronic control device may cause a person holding the gun to involuntarily contract muscles and thereby pull the trigger. The electronic control device may not be effective in preventing the person holding the gun from intentionally aiming and firing the gun. I recently directed the investigation of an officer-involved shooting where multiple applications of an electronic control device were applied and the suspect was able resist the effects of the device and to aim a handgun directly at the face of an officer standing approximately twenty-five feet away. Moreover, to reach the optimum effective range for a TASER® probe spread (seven to fifteen feet) would have required either deputy to decrease the distance between the deputy and Mr. Swofford. That would have been a tactically unreasonable move.

u. It would have been an unreasonable decision for Deputy Morris to deploy Strike to apprehend Mr. Swofford as Mr. Swofford moved toward the deputies with the gun in hand. Deputy Morris reasonably believed that deploying Strike to apprehend Mr. Swofford would result in drawing gunfire from Mr. Swofford toward Deputy Morris and/or the death of Strike before Strike could reach Mr. Swofford. Had Deputy Morris

deployed Strike and had Mr. Swofford reacted with gunfire, Deputy Morris would have most probably drawn fire toward himself, necessitating that Deputy Morris return defensive fire, and perhaps even placed Strike in a position to be an obstacle to effective defensive fire. In some circumstances it is reasonable to deploy a police service dog to apprehend a person holding a gun, particularly if there is the option of a planned distraction, an offset angle of approach so that the person wielding the gun did not immediately see the police service dog approaching, effective cover for officers, and other circumstances. Such circumstances were not present in the instant case. Deputy Morris was holding both his flashlight and Strike's leash in his left hand, as one would expect a typical police service dog to do in this situation. To send Strike would have required Deputy Morris to take the time to drop or move his flashlight to his belt or other hand, release the leash and send Strike. The most likely scenario that would follow deploying Strike to apprehend Mr. Swofford as he held the gun in hand would be that Strike would have likely been shot by Mr. Swofford, that Mr. Swofford would have likely been shot by Deputy Morris and Deputy Morris would have likely been shot by Mr. Swofford.

These observations and opinions are preliminary, insofar as additional information may be provided to me through the course of discovery and other incidents of the litigation process.

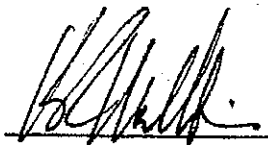
They are based on the best information presently known to me. I have assumed the general accuracy of the documents, statements, and reports, excepting those expressed as opinions and those conflicting one with another and/or conflicting with physical evidence, that were provided to me. The opinions herein may be supplemented and/or revised upon receipt of additional information, including, but not limited to, further deposition testimony, consideration of any

further report submitted by plaintiff's experts, and further investigation. I anticipate supplementing this report upon completion of depositions of witnesses in this matter and/or upon being provided with other investigative documents, and/or video and photographs.

My trial testimony may be supported by exhibits that include the pleadings, documents, statements, depositions, diagrams, photographs, and reports listed herein, as well as illustrative evidence such as a visual presentation of computer-generated slides and visual images projected onto a screen charts, graphs, or illustrations created to better illustrate the aforementioned documents.

#### CONCLUSION

Deputy Morris reasonably believed that Police Service Dog Strike was tracking suspects from the Barrington at Mirror Lake Apartment complex along the Swofford property fence and across the Swofford property. Deputy Morris and Deputy Remus reasonably believed that Mr. Swofford posed a threat of death or serious bodily injury as he moved toward them, failed to respond to their shouting identifying themselves as law enforcement officers and failed to comply their commands to drop his gun. Deputy Morris and Deputy Remus acted reasonably in firing their weapons at Mr. Swofford.



Kenneth R. Wallentine  
December 7, 2008

Kenneth R. Wallentine  
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## KENNETH R. WALLENTINE

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December 7, 2008

Tom Poulton  
DeBevoise & Poulton  
1035 South Semoran Blvd. #1010  
Winter Park, Florida 32792

*In the Matter of Swofford v. Eslinger, et al.*

Statement for services rendered:

November 13, 2008	.3 Telephone conference with Tom Poulton.	\$45.00
November 23, 2008	1.5 Review FDLE investigation report.	\$225.00
November 24, 2008	1.2 Review Ernest ballistics report; telephone conference with Tom Poulton	\$180.00
November 28, 2008	3.5 Complete review of FDLE report, Swofford, Morris (initial and supplemental), Remus (initial and supplemental) statements.	\$525.00
November 29, 2008	4.0 Review Myers, Gallagher, Overall reports.	\$600.00
December 1, 2008	4.5 Review photographs, scene diagrams, helicopter video; certification trial records for Strike; Seminole County SO policies; Rothlien, economic expert reports.	\$675.00
December 2, 2008	.6 Telephone conference with Tom Poulton.	\$90.00
December 3, 2008	4.0 Review training records, FDLE K9 evaluation trial records, Dr. Hall, Dr. Wright reports.	\$600.00
December 4, 2008	3.5 Draft report.	\$525.00
December 6, 2008	7.5 Draft report.	\$1,125.00
December 7, 2008	2.7 Edit report, telephone conference with Tom Poulton.	\$405.00

*Total due:* \$4,995.00

Please remit to:

Kenneth R. Wallentine  
Public Safety Solutions  
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Kenneth R. Wallentine  
Disclosure information for Fed. R. Civ. P. 26  
October 2008

*Curriculum vita*

1. I am a law enforcement administrator in the State of Utah. My primary employment is for the Utah Attorney General, where I serve as Chief of Law Enforcement. I was formerly employed as Investigations Bureau Chief at the Utah Department of Public Safety, Peace Officer Standards and Training Division, where I supervised investigations into allegations of improper conduct, excessive force, officer integrity, and criminal acts alleged to have been committed by certified and certifiable law enforcement officers. I also had responsibility for policy drafting and review for the parent agency, the Utah Department of Public Safety. I was certified as a law enforcement officer in the State of Utah in 1982. My present duties include direct supervision and command of three Investigation Sections, supervising approximately thirty-five full-time and ten part-time law enforcement officers, forensic specialists, accountants and technicians directly in my employ, as well as several other law enforcement officers assigned to my agency in cooperative interagency agreements or task forces. I oversee the State of Utah Child Abduction Response Team and administer related training programs and grant funding for local entities.
2. I was formerly responsible for providing delivery of the Basic Training Curriculum related to all legal subjects, as well as certain tactical subjects, and a variety of In-service subjects, at the Utah Law Enforcement Academy. I continue to teach at the Utah Law Enforcement Academy. I am the author of the police academy curriculum currently in use for several subjects, including, but not limited to, use of force, reasonable force, use of force and police service dog teams, search and seizure, search and seizure for police service dog teams, internal affairs investigations legal issues, officer misconduct and discipline, and use of force/firearms instructor liability. I regularly teach in the Basic Training and In-service programs of the Utah State Police Academy, and occasionally teach in other law enforcement academies. I regularly teach in the following specialized courses: Advanced Officer Course, Employee Discipline and Administrative Procedures Course (formerly known as Internal Affairs), Firearms Instructor Course, First Line Supervisor Course, POST K9 Unit Administrator Course, POST Patrol Dog Handler Course, POST Narcotics Detector Dog Course, and others. I created the curriculum and served as a principal instructor for the Utah POST Command College. In cooperation with the Utah Sheriffs Association and the Utah Jail Commanders Association, I teach employee selection, employee discipline and internal affairs courses to county law enforcement and corrections command staff.
3. I am a licensed attorney, having practiced law on at least a part time basis since 1990. I am admitted to practice before the United States Supreme Court, the Courts of Appeals for the Fifth and Tenth Circuits, and the State and Federal courts in the State of Utah. I am a Master of the Bench of the American Inns of Court, Inn One, where I also serve as President of the Inn of Court. I am an appointed Administrative Law Judge for the State of Utah. I have served both as a Hearing Officer and as the advising Administrative Law Judge for appeals before the Utah Career Service Review Board. I also am an Administrative Law Judge appointed in certain counties and cities in Utah, providing hearing officer and appellate hearing services for hearings involving allegations of police officer misconduct.
4. In addition to my primary employment, I occasionally consult and provide expert



opinions on police procedures, and use of force issues. I am on the adjunct faculty of Excelsior College, teaching Criminal Procedure and Management Strategies for Public Safety and a variety of other undergraduate courses in the School of Liberal Arts, Criminal Justice Department, and teach the occasional course for the English Department. I provide law enforcement academy curriculum consulting and accreditation review services for the United States Department of Justice. I am a program and grant reviewer for the Office of Justice Programs, United States Department of Justice. I have also served as a contract consultant to the United States Department of Justice, assigned to provide technical assistance and management consulting to various public safety entities in the United States.

5. I am a consultant to the Utah Risk Management Mutual Association, the state's largest insurer of public safety agencies, on matters of officer conduct and discipline, hiring and screening practices, use of force, and police agency policies. I am the co-founder of, and legal advisor to, a best practices advisory group charged with developing model policies and best practices under the authority of the Utah Chiefs of Police Association, the Utah Sheriffs' Association and various state law enforcement agencies. I occasionally perform in-custody death investigations and officer-involved shooting death investigations for agencies which may lack the requisite expertise. I am the author of a number of model policies for law enforcement agencies, and have provided policy drafting and policy review services for several agencies, including full policy drafting responsibility for one of the state's larger law enforcement agencies.

6. I participate and serve in a number of community and professional capacities. I am a member of the Scientific Working Group on Dog and Orthogonal Factors, a national standards organization facilitated by the Federal Bureau of Investigation, the Department of Homeland Security, and the Transportation Security Administration, with research and peer review coordinated by the International Forensic Research Institute at Florida International University. Other professional activities pertinent to law enforcement include serving as a Past-President of the Utah Peace Officers Association, former Board Member of the Utah SWAT Association, member of the International Association of Law Enforcement Educators and Trainers Association, member of the International Association of Chiefs of Police and the Utah Chiefs of Police Association, member of the National Tactical Officers Association, member of the International Association of Law Enforcement Firearms Instructors, member of the International Association of Directors of Law Enforcement Standards and Training, member of the International Law Enforcement Educators and Trainers Association, and member of the United States Police Canine Association. I have served as co-Chairman or Chairman of the Utah Law Enforcement Legislative Committee for the past six years. In that capacity, I have been involved with all major law enforcement legislative initiatives in the State of Utah for the past six years. I formerly served as a gubernatorial appointee to the Council on Peace Officer Standards and Training, under Governor Michael Leavitt, where I heard many dozens of contested disciplinary matters.

7. Since 1994, I have been a staff member of the K9 Academy for Law Enforcement and the International Police Canine Conference. I am a former police service dog (patrol and narcotics) dog handler. My principal responsibilities are to provide use of force training, civil liability instruction, and search and seizure instruction. In the past few years, I have restricted my travel outside the State of Utah, but have continued to provide use of force, civil rights liability, and search and seizure law enforcement training in Arizona, Iowa, and California. Over the past several years, I have lectured and trained police officers and administrators from Wyoming,

Arizona, Connecticut, Florida, North Carolina, South Carolina, Texas, Utah, Colorado, Alabama, Louisiana, Nevada, New York, New Hampshire, Vermont, Rhode Island, Maine, Delaware, Wisconsin, Michigan, Indiana, Washington, Oregon, Nebraska, Georgia, California, Nevada, and Idaho.

8. I have previously published a number of other professional articles, many of which have been subjected to peer review. My most recent book, *Street Legal: A Guide to Pre-trial Criminal Procedure for Police, Prosecutors, and Defenders* was published in late 2007 by the American Bar Association Publishing Division. It is a treatise on public safety and criminal procedure. My other published works include: *Acknowledging Gender in Fitness Standards for Police: An Invitation to Liability?*, *The Municipal Lawyer*, January 2008; *K9 Court Testimony*, *Police K9*, December 2006; *United States Supreme Court Review for Corrections Managers*, *Corrections Managers Report*, October 2006; *Criminal Procedure: The Street Cop's Guide* (Aspen Press 2005); *Conduct Unbecoming an Officer*, *The Municipal Lawyer*, January, 2005; *Limits on Off-Duty Police Employment*, *The Municipal Lawyer*, Spring 2004; *Conjugal Prison Visits*, *Corrections Manager*, March, 2003; *Life in the Law* (BYU Press 2002), co-author; *Investigating In-Custody Death*, *Corrections Manager Report*, October 2002; *Police Canine Risk Management*, *The Municipal Lawyer*, July 2002; *The New Paradigm of Firearms Training*, *IADLEST News*, Spring 2001; *Use of Deadly Force Instructor Curriculum* (monograph), POST, Spring 2001; *Pepper Spray as Use of Force*, *Police*, October 2000; *Are Drug Courts the Wave of the Future?*, *Police*, April 2000; *Legal Risks of Tactical Operation*, *Police*, April 1999; *Dogs of War (K9 Use of Force)/FLSA & K9 Handlers*, *Police*, December 1998/January 1999; *No-knock & Nighttime Searches*, *Police*, September 1998; *The Respectable Roadblock Ruse*, *Police*, June 1998; *If at First You Don't Succeed . . .*, *Clark Memorandum*, Fall 1998; *Preparing and Executing Search Warrants* (UPOA 1998); *Taking a Real Bite Out of Crime: Successful Risk Management for K9 Programs*, *Utah Peace Officer*, Summer 1996; *Lobbying, PACs and Campaign Finance* (West Publishing 1994), co-author; *Heeding the Call: Search and Seizure Jurisprudence Under Article I, Section 14, of the Utah Constitution*, *17 Utah Journal of Contemporary Law* 267 (1991); *RICO & the Prime: Taking a Bite out of Crime?*, *2 Utah Bar Journal* 7 (1991); *Margaret Bush Wilson and Shelley v. Kraemer*, *4 B.Y.U. J. Pub. Law* 207 (1990); *Wilderness Water Rights: The Status of Reserved Rights After the Tarr Opinion*, *4 B.Y.U. J. Pub. Law* 357 (1989); *Negligent Hiring: The Dual Sting of Pre-Employment Investigation*, *8 Utah B.J.* 15 (1989), and a variety of columns addressing law enforcement issues and published by PoliceOne.com. I am the author of a reference book currently in use in the Utah Law Enforcement Academy, as well as other police academies throughout the United States, titled *Criminal Procedure: The Street Cop's Guide* (Aspen Press 2005).

#### *Four year litigation history*

I have testified and/or provided depositions in the following cases which are generally related to the subject of the instant litigation in the past four years: *Salva v. Kansas City Board of Police Commissioners*, Case No. 07-CV00194-JTM, United States District Court of Missouri, Western Division, 2008. Deposition testimony given on behalf of the defendants. Subject matter: Wrongful death. *Turnbow v. Ogden City et al.*, Case No. 1:07-CV-114, United States District Court of Utah, Central Division, 2008. Deposition testimony given on behalf of the defendants. Subject matter: Wrongful death. *Nielson v. South Salt Lake City & Burnham*, Case No. 2:06-CV-335, United States District Court of Utah, Central Division, 2008. Deposition testimony

given on behalf of the defendants. Subject matter: sexual misconduct; *Trammell v. Jacksonville Beach City Police Department*, Case No. 3:06-CV-984-J-16MMH, United States District Court of Florida, Jacksonville Division, 2008. Deposition testimony given on behalf of the plaintiffs. Subject matter: excessive force; *Harman & Overton v. Utah Department of Public Safety*, Case No. 2:03CV00558TC, United States District Court of Utah, Central Division, 2007. Deposition testimony given on behalf of the defendants. Subject matter: wrongful execution of a search warrant, negligent investigation; *Herring v. City of Colorado Springs*, Civil No. 04-CV-024229-PAC-BNB, United States District Court of Colorado, 2005. Deposition testimony given on behalf of the defendants. Subject matter: excessive use of force, wrongful death; *Walker v. Orem Department of Public Safety*, Case No. 2:02-CV-0253, United States District Court of Utah, Central Division, 2004. Deposition testimony given on behalf of the defendants. Subject matter: excessive use of force, wrongful death. This list is accurate for dates between October 1, 2004, and October 1, 2008. Deposition and/or trial testimony in additional cases are presently scheduled for 2008.

*Consultation and Expert Witness fees, effective January 1, 2008 through December 31, 2008*

I charge a flat rate of \$150.00 per hour for document review, witness and officer interviews, report preparation, testimony preparation, and consultation, and \$250.00 per hour for administrative tribunal, deposition or court testimony. I bill for actual travel expenses and a flat rate of \$500.00 per day for travel to western states and \$1,000.00 per day outside the intermountain west. Payment for travel and travel expenses must be paid in advance of booking. I do not charge for initial consultation and preliminary review of the primary police reports.

# KENNETH R. WALLENTINE

## Employment

Chief of Law Enforcement, Utah Attorney General, 2005- present.  
 Adjunct Professor, Criminal Justice, Excelsior College, Albany, New York, 2004-present.  
 Bureau Chief, Investigations Bureau, Utah Peace Officer Standards & Training, 2005.  
 Administrative Counsel, Utah Peace Officer Standards & Training, 2001-2005.  
 Curriculum Development Supervisor, Utah Department of Public Safety, 2000-2001.  
 Chief Deputy Uintah County Attorney, 1994-2001.  
 Deputy Sheriff (Reserve), Uintah County Sheriff, 1994-2001. K9 handler 1997-2001.  
 Adjunct Professor, Criminal Justice & Police Academy Instructor, Colorado Northwestern Comm. College, 1994-99.  
 Attorney, concentrating on public employment and police liability law, Parsons Behle & Latimer, 1992-94.  
 Judicial Clerk to the Honorable Edith H. Jones, U.S. Court of Appeals for the Fifth Circuit, 1991-92.  
 Judicial Clerk to the Honorable Gregory K. Orme, Utah Court of Appeals, 1990-91.  
 August 1982 to July 1987: Officer, Provo City Police. Assignments included patrol, vice and burglary task force.  
 While at the police department, completed undergraduate studies in Italian and Justice Administration. Recipient of four Commendations of Merit.

## Publications

2008.

Xiphos Legal Update, biweekly editor in chief, 2006-present.  
 Acknowledging Gender in Fitness Standards for Police: An Invitation to Liability?, *The Municipal Lawyer*, January 2008.  
*Street Legal: A Guide for Police, Prosecutors & Defenders*, 2007.  
 Supreme Court Review, *Corrections Manager*, May 2006.  
*Criminal Procedure: The Street Cop's Guide*, 2005.  
 Conduct Unbecoming an Officer, *The Municipal Lawyer*, January 2005.  
 Constitutional Limits on Off-duty Police Employment, *The Municipal Lawyer*, Spring 2004.  
 Conjugal Prison Visits, *Corrections Manager*, March 2003.  
*Life in the Law*, co-author, BYU Press 2002.  
 Investigating In-Custody Death, *Corrections Manager*, October 2002.  
 Police Canine Risk Management, *The Municipal Lawyer*, July 2002.  
 The "New" Paradigm of Firearms Training, IADLEST News, Spring 2001.  
 Use of Deadly Force Instructor Curriculum (monograph), POST, Spring 2001.  
 Pepper Spray as Use of Force, *Police*, October 2000.  
 Are Drug Courts the Wave of the Future?, *Police*, April 2000.  
 Legal Risks of Tactical Operation, *Police*, April 1999.  
 Dogs of War (K9 Use of Force), *Police*, December 1998/January 1999.  
 No-knock & Nighttime Searches, *Police*, September 1998.  
 The Respectable Roadblock Ruse, *Police*, June 1998.  
 If at First You Don't Succeed . . ., Clark Memorandum, Fall 1998.  
 Taking a Real Bite Out of Crime: Successful Risk Management for K9 Programs, *Utah Peace Officer*, Summer 1996.  
 Preparing and Executing Search Warrants (monograph UPOA pub. 1998).  
*Lobbying, PACs & Campaign Finance*, co-author, West Publishing, 1994.  
 Apostles of Equality, Clark Memorandum (Fall 1992).  
 Heeding the Call: Search and Seizure Jurisprudence Under Article I, Section 14, of the Utah Constitution, 17 Utah Journal of Contemporary Law 267 (1991).  
 RICO & the Prime: Taking a Bite out of Crime?, 2 Utah Bar Journal 7 (1991).  
 Margaret Bush Wilson and *Shelley v. Kraemer*, 4 B.Y.U. J. Pub. Law 207 (1990).  
 Wilderness Water Rights: The Status of Reserved Rights After the *Tarr Opinion*, 4 B.Y.U. J. Pub. Law 357 (1989).  
 Negligent Hiring: The Dual Sting of Pre-Employment Investigation, 8 Utah B.J. 15 (1989).

## Activities Continuing Legal Education Commission, Utah State Bar, 2000-present.

President, Inn I, American Inns of Court, 2006-07.  
 Board of Directors, Utah Legal Services Corporation, 2006-present.  
 President, Utah Peace Officers Association, 2003-04.  
 Chair, Utah Law Enforcement Legislative Committee, 2003-2008.  
 Vice-Chair, Utah Prosecution Council, 2004-2005.  
 Master of the Bench, American Inns of Court, A. Sherman Christensen Inn (Inn I) 1994-present.  
 Board of Directors, Utah SWAT Association, 1999-2002.  
 2001 Amicus Curiae Award for Excellence in Education, Utah Judicial Council.  
 Chair, Utah Peace Officers Standards & Training Legal Curriculum Committee, 1998-2000.  
 Chair, Firearms Specialist Advisory Group, Utah Peace Officer Standard & Training, 1999-present.  
 International Association of Law Enforcement Firearms Instructors, 2001-present.  
 Staff, Firearms Instructor Certification Course, 2000-present.  
 Law Enforcement Training Camp Advanced Firearms Instructor Techniques, 2001, 2002.  
 Chair, Eighth Judicial District Drug Court Committee, 1996-2001.  
 Lecturer, New Hampshire Dep't of Public Safety McDuffee Homicide Seminar, 1996-2000.  
 Police Ethics/Cultural Relations Lecturer, Utah Humanities Council, 1994-present.  
 Adjunct Instructor, Salt Lake Community College, 2000-2007.  
 Trial Advocacy Faculty, National Highway Traffic Safety Institute, 1996-present.  
 Consultant & Legal Instructor, International Police Canine Conference, 1997-present.

Seminar Faculty, Southern Utah University Governor's Honors Academy, 1994-present.  
Chair, Diversity in the Profession Committee, Utah Young Lawyers Section, 1990-91.  
Government & Politics Legal Society, Chair, Criminal Law Section, 1988-90.  
Board of Directors, Salt Lake Branch, NAACP, 1990-94.  
Salt Lake City Police Department Disciplinary Review Board Hearing Officer, 1993-94.  
UPOA President's Award For Exemplary Service to Law Enforcement, 1994.

*Education*

Brigham Young University, J. Reuben Clark Law School, Juris Doctor, *cum laude*, April 1990.  
Editor-in-Chief, B.Y.U. Journal of Public Law, 1988-89.  
University Honor Student Award, March 1990.  
John Welch Writing Award, March 1990.  
West Publishing National Award for Outstanding Scholastic Achievement, 1988-89.  
American Bar Association, Award for Achievement in Government Law, March 1989, and March 1990.  
First Place Winner, American Bar Association Writing Competition, July, 1989.  
Listed in Who's Who in American Law Students, 1989-91.

1 Office?

2 A. My understanding is -- when you say  
3 "trained", do you mean trained as a police service  
4 dog?

13:49:27

5 Q. No.

6 A. Trained at all?

7 Q. Yes.

8 A. Yes. I do believe that he was.

9 Q. Do you know how he was trained?

13:49:34

10 A. I believe --

11 Q. Or what he was trained in?

12 A. Yes, I believe that a private individual  
13 had trained him in the basic disciplines of obedience,  
14 apprehension, location and tracking sufficient to the  
15 point that Strike was able to go through the processes  
16 and be titled both as an IPO III and Schutzhund III  
17 dog.

13:49:48

18 Q. Do you know who his handler was at these  
19 trainings?

13:50:09

20 A. At the Schutzhund and IPO?

21 Q. Yes.

22 A. I'm sorry, I don't recall. I believe I  
23 saw that in the record but I don't recall that.

24 Q. Do you know if it was Deputy Morris?

13:50:18

25 A. I do not believe it was.

**EXHIBIT "B"**

1 Q. M as in Mary.

2 A. That's my conclusion based on the  
3 description of all of the persons telling me -- or all  
4 of the persons who gave statements talking about  
14:49:07 5 Strike's behavior.

6 Q. What is that based on?

7 A. The fact that he's gone from showing  
8 tracking behaviors as described by Deputy Morris,  
9 particularly having nose to the ground, typically the  
14:49:31 10 ears -- and I believe Deputy Morris says this  
11 somewhere -- ears erect and tail is rigid.

12 Typically the tail will be up when  
13 tracking to head up, body posture forward, haunches  
14 moving forward.

14:49:47 15 It's very unusual for a dog that is  
16 tracking to bark. A common misperception. People see  
17 movies like Oh brother Where Art Thou. I've never  
18 seen the entire movie, but I have been shown the parts  
19 of the bloodhounds where dogs are barking and they  
14:50:11 20 think the dogs are on the track.

21 In fact, it's quite counterintuitive,  
22 isn't it, because how is the dog taking in large  
23 volume of air?

24 So the fact that the dog has transitioned  
14:50:23 25 to an erect upright, haunches forward, head up, ears

1 are -- I don't know if I would describe the ears at  
2 that moment. So I can't say.

3 But the barking and the pulling forward,  
4 all of that indicates to me that the dog has made the  
14:50:40 5 transition to a protective mode.

6 MR. POULTON: Could we take a break real  
7 quick?

8 (Brief recess.)

9 Q. (By Ms. Webb) You state here that: "Even  
15:00:12 10 if a police service dog had not been present to track,  
11 any reasonable police officer would have entered onto  
12 the Swofford property to search for the fleeing  
13 suspects. Deputy Remus saw the suspects fleeing in  
14 the direction of the Swofford property and last saw  
15:00:24 15 them near the fence bordering the Swofford property."

16 Why do you state that any reasonable  
17 police officer would have entered the Swofford  
18 property to find the fleeing suspects?

19 A. I say that from a couple of different  
15:00:40 20 angles. First, the officer has a duty to apprehend  
21 these burglars. A crime has been committed. Property  
22 crime, to be sure. But a serious property crime.

23 The officer has the opportunity to  
24 apprehend and should apprehend these persons. I know  
15:01:12 25 I'm not here to talk about property rights, but I



1 A. Being on target means that the muzzle of  
2 the weapon is aimed directly at where it's intended to  
3 hit -- the bullets are intended to impact.

4 Q. You state in paragraph U: "It would have  
15:51:01 5 been an unreasonable decision for Deputy Morris to  
6 deploy Strike, to apprehend Mr. Morris" -- I'm  
7 sorry -- "Mr. Swofford as Mr. Swofford moved towards  
8 the deputies with the gun in hand."

9 Why was it unreasonable for them to deploy  
15:51:15 10 Strike in that circumstance?

11 A. At that distance, it would have been  
12 unreasonable to deploy any dog unless there were a  
13 reasonable likelihood that the dog could disarm or  
14 disable Mr. Swofford. I don't believe that to be the  
15:51:35 15 case.

16 Moreover, given the positioning, relying  
17 on Mr. Swofford's statements and Deputy Morris's  
18 statements, Deputy Remus's statements, the diagram  
19 presented to me by the Florida Department of Law  
15:51:53 20 Enforcement report, it appeared to me that Mr.  
21 Swofford and Deputy Morris were directly facing one  
22 another at a relatively short distance.

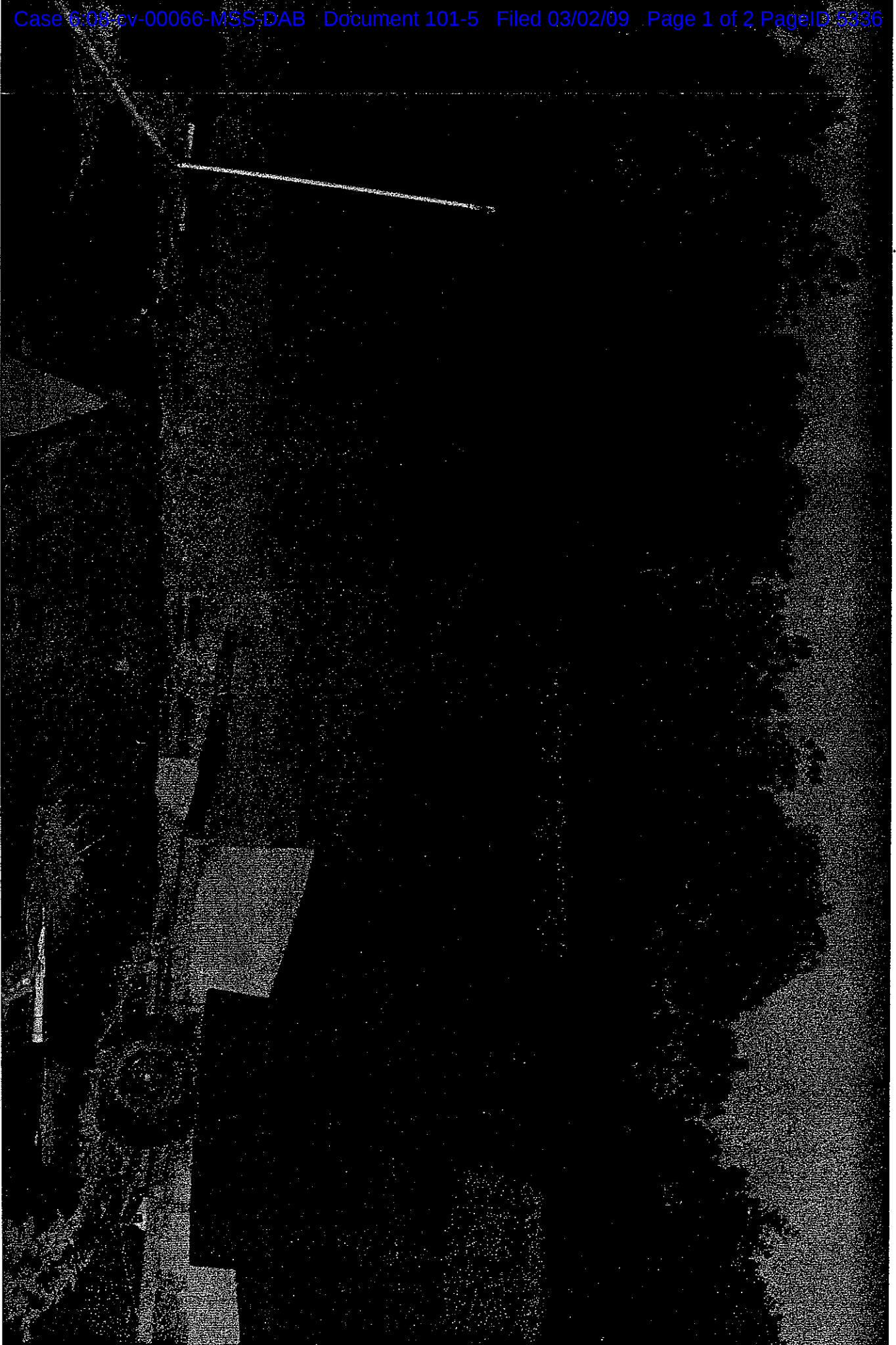
23 I don't know how quickly Strike could  
24 cover the 25 or so, give or take, feet, between Deputy  
15:52:14 25 Morris and Mr. Swofford.

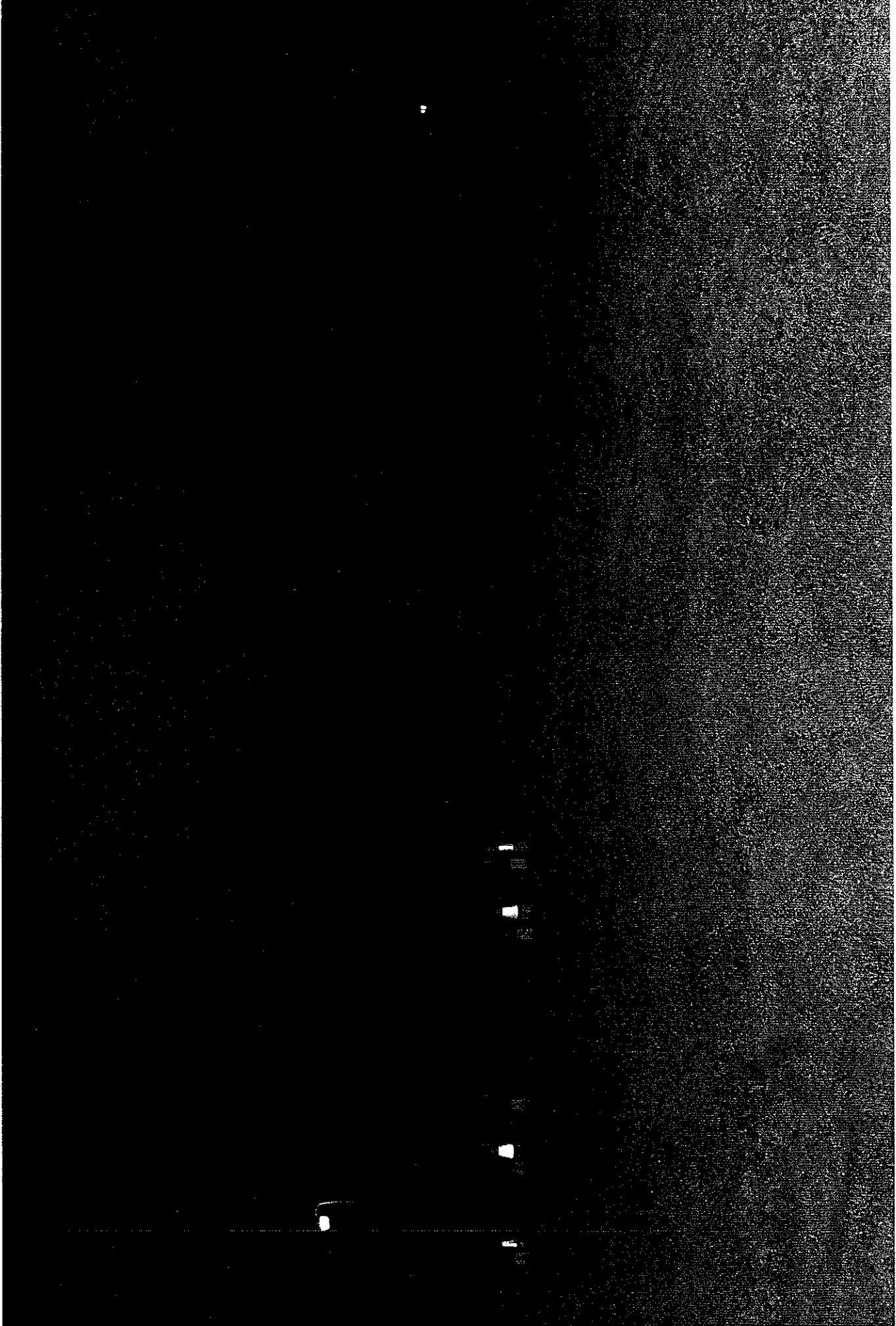


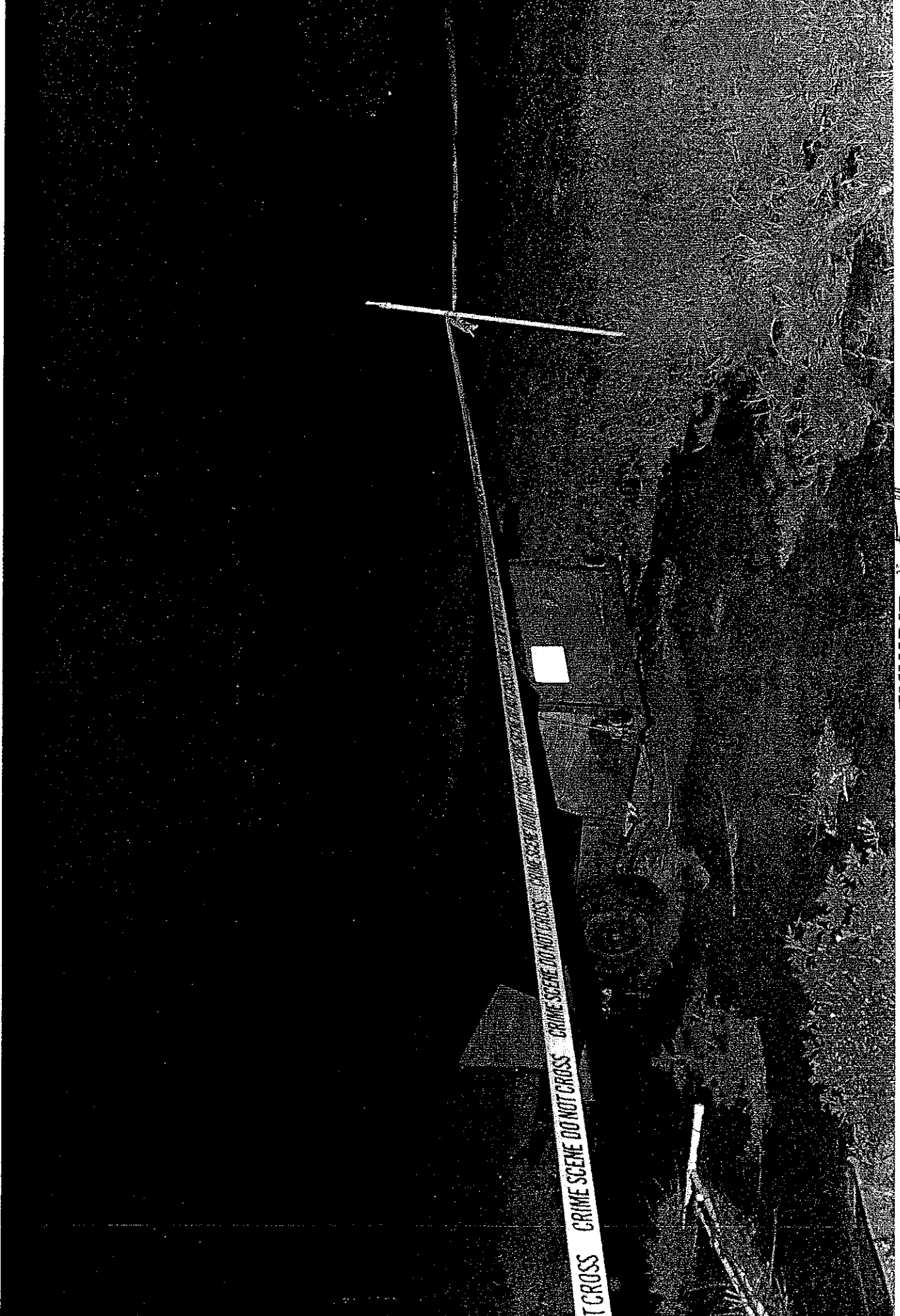
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EXHIBIT "C" PL

COMPOSITE EXHIBIT "D"







COMPOSITE EXHIBIT "E"

