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| DISTRICT COURT, LA PLATA COUNTY, COLORADO Court Address: 1060 E. Second Ave., Durango, CO 81301 Phone Number: (970) 247-2304 | | <div style="border: 1px solid black; padding: 5px; text-align: center;"> ORIGINAL FILED / RECD IN COMBINED COURT LA PLATA COUNTY, COLORADO JUN - 9 2019 DEPUTY CLERK </div> |
| Plaintiff: PEOPLE OF THE STATE OF COLORADO v. Defendant: MARK ALLEN REDWINE | ▲ COURT USE ONLY ▲ Case Number: 17 CR 343 | |
| Christian Champagne - District Attorney, #36833 Matthew Durkin, Special Deputy District Attorney, #28615 Fred Johnson, Special Deputy District Attorney, #42479 P.O. Drawer 3455, Durango, Colorado 81302 Phone Number: (970) 247-8850 Fax Number: (970) 259-0200 | | |
| PEOPLE'S MOTION FOR ORDER REGARDING SCOPE OF DEFENSE WITNESS TESTIMONY BASED ON DEFENSE EXPERT DISCLOSURES, OR IN THE ALTERNATIVE, TO COMPEL FURTHER DISCOVERY OF REPORTS AND OPINIONS (P-25) [PUBLIC ACCESS] | | |

NOW COMES the People, by and through Christian Champagne, District Attorney, in the County of La Plata, and respectfully submit the following Motion regarding the scope of the Defendant's expert testimony at the upcoming *Brooks* hearing on human remains detection canines:

Legal Background

On February 11, 2019, the Court ruled that the Colorado Supreme Court case *Brooks v. People*, 975 P2d 1105 (Colo. 1999), set forth the proper standard for the pretrial determination of whether dog sniff evidence is admissible at trial. Accordingly, the Court ordered a pretrial hearing on the reliability factors in *Brooks*. In conjunction with ordering the *Brooks* hearing, the Court ordered that both the prosecution and the defense provide witness disclosures.

C.R.Crim.P 16(II)(b)(1) and (2) provide that the Court may order the Defendant to disclose to the prosecution any reports or statements of experts, including the witness's opinions and bases and reasons therefor. "The intent of this section is to allow the prosecution sufficient meaningful information to conduct effective cross-examination under C.R.E. 705." *Id.*

Here, the Court ordered in C-28 that the parties disclose the witnesses they intend to call at the hearing, along with the "reports" and the "interviews" of those witnesses.

Facts

The Defendant has endorsed two expert witnesses in this case, Dr. James Ha and Dr. Mary Cablk. For the Court's convenience in evaluating those endorsements and disclosures regarding proposed expert testimony, the People have attached both endorsements and the disclosures by the Defendant as People's Exhibits 1 and 2, respectively. These are the only reports or summaries the People have received for these experts. Curriculum Vitae were also included with the Defendant's endorsements.

Regarding Dr. James Ha, the Defendant filed an Expert Endorsement and Disclosure on February 25, 2019 which included a "Written Summary of Testimony," written by counsel and not by the witness, and essentially only stating that Dr. Ha would opine on aspects of the *Brooks* factors.

Notably, counsel's summary did not include any actual opinion of the application of the *Brooks* factors to the facts of this case or the handlers in the case.

This provided the People with absolutely no information to prepare for the hearing. It is a given that the witness will talk about the *Brooks* factors as anything else would be subject to a relevance objection. However, what he has to say about the *Brooks* factors is what would constitute an expert opinion subject to disclosure.

No reports or interviews with the expert witness were included, pursuant to Court Order C-28.

In an effort to prepare for the last hearing, the People reached out to Dr. Ha only to have him tell the People that he had been instructed by the defense that all correspondence with him had to be directed through the defense. Setting aside whether it is appropriate for counsel to affirmatively obstruct access to a witness in a case (and to be fair, this was Dr. Ha's account of what he was told, so the People do not intend this as an accusation in the event he was mistaken), the People did reach out to the Defendant's attorneys' office months ago in the interests of being efficient and cooperative. The office of the Defendant's attorneys indicated they would provide dates and times to meet, however, to date the People have still not been given the dates or any access to the expert.

Finally, Dr. Ha confirmed that at the time of that communication regarding scheduling, which was after the "Written Summary of Testimony" was prepared by defense counsel, he had not actually reviewed any materials in the case. In other words, it appears that defense counsel's "Written Summary of Testimony" cannot be attributed to Dr. Ha in any meaningful way in terms of preparing cross-examination for the hearing.

The People had anticipated that further reports or interviews with the expert might be provided if the Defendant still wished to call him as a witness prior to the May 27th deadline, however, they were not, compelling the People to file this motion essentially for clarification.

Regarding Dr. Cablk, the Defendant filed an endorsement on May 24, 2019 which included an

expert opinion written by the expert witness. In essence, it is a summary by what appears to be a "blind expert," discussing human remains detection canines' abilities in general and best practices for training and deploying human remains detection canines.

The endorsement does not include any expert opinion regarding the facts of this case. The endorsement does not include any other reports or interviews with the witness regarding the handlers in this case.

As such, the People are on notice of a blind expert consistent with the summary and will be requesting that the Court limit the witness to the subject matter included in the "blind expert" report for this hearing.

In the alternative, if the Defendant does intend to call the witness for any other purpose, the People have received no disclosures of the expert's opinions on any specific handler or as to any challenge to a specific factor under *Brooks*.

Concerns With Expert Disclosures

Of specific concern to the People are statements such as appear in the "Written Summary of Testimony" for Dr. Ha (according to the witness himself, prepared by defense counsel before the expert had reviewed any discovery in the case):

- 1) He will provide testimony as to the training of the specific dogs in this case related to detection of lingering cadaver scent, both large source and trace source.
- 2) He will testify as to the experiential reliability of the cadaver dogs in this case.
- 3) He will testify as to the abilities of the cadaver dogs in this case to identify cadaver scent given the timing cadaver dogs were used in relation to the disappearance of Dylan Redwine.

See D-108 Expert Endorsement And Disclosure.

The summary does not contain an actual opinion, however, as to any of these areas. It does not identify a specific handler of the three the People are calling at the hearing, Katie Steelman, Rae Randolph, or Carren Corcoran. It does not say what will be the basis for the opinions in terms of training records or facts in the case. There are only categories outlines in the words of a lawyer, and no meaningful information disclosed as to what the expert will say in testimony as far as his conclusions on the factors under *Brooks*.

If the Defendant's experts have any expert opinions on the facts of this case or the handlers in this case, those opinions have not been disclosed to the People at this time.

For example, there is no report asserting that a specific handler failed to meet the *Brooks* requirements because the training records indicate an inadequacy in a specific training procedure for human remains detection work, and what records provided in discovery the expert has reviewed to lead the expert to that conclusion. To say that a specific handler didn't use a specific training technique that the handler should have used, making the canine unreliable, would be an

expert opinion and should be disclosed.

If such opinions will be introduced, they fall squarely under C.R.Crim.P. 16 discretionary disclosures ordered by the Court in C-28, as they would be "reports" or "interviews" wherein such opinions were given to the Defense. Further, in C-28 the Court specified both "interviews" and "reports," indicating that if the Defendant were to choose to have his experts not write reports with their opinions for a tactical advantage those opinions are still subject to written documentation and disclosure to the People.

The "Written Summary of Testimony" provided in this case is in the language of the defense attorney and so vague as to only create a buffer between the witness and the People. C.R.Crim.P. 16(II)(b)(2) requires more: "[i]f a report has not been prepared by that expert to aid in compliance with other discover obligations of this rule, the court may order the party calling that expert to provide a written summary of the testimony *describing the witness's opinions and bases and reasons therefor....*" (emphasis added). As the Court can see from the Defendant's written summary, there is no indication whatsoever as to if or why the expert will opine that any specific canine handler fails to meet any specific *Brooks* factors.

Relief Requested

The People are trying to avoid a situation where the defense tries to introduce undisclosed opinions at the hearing, the People object based on lack of notice in violation of C-28 and C.R.Crim.P. 16(II)(b)(1) and (2), and the opinions are either excluded or allowed without notice to the People.

If, as the expert disclosures indicate, the Defendant's expert have no opinions on the case itself but are only going to testify as "blind experts," then the People are not requesting that the court issue any further orders.

The People do request that the Court order the Defendant to turn over any expert reports with actual expert opinions on this case. If reports were not generated but "interviews" and discussions were had that involved opinions that will be introduced at the hearing, then pursuant to C-28 the People are asking the Court order those be put into writing as the appropriate expert disclosure required by the rule and the Court's previous order.

Even though the deadline has passed, the People can be prepared if these are turned over with at least two weeks of notice. If not, the People will be forced to request the Court exclude such testimony for a violation of C-28 and C.R.Crim.P. 16(II)(b)(2).

At this point in time, the People can only assume that the expert testimony and opinions offered by the Defendant will be very limited as were the expert opinion disclosures by the Defendant. The People understand at this time that the experts have no specific opinions to offer on any of the facts of this case and are only blind experts. Any other experts' opinions, unless disclosed as soon as possible, should be excluded from the hearing.

Wherefore, the People respectfully request that the Court take notice of the limited scope of the

expert disclosures given to the People by the Defense, hold the Defendant to those limited areas of testimony, or in the alternative, order the Defendant to disclose any other specific expert opinions and their basis from reports or interviews no later than June 11, 2019 so that the People have a fair and adequate opportunity to prepare pursuant to C-28 and C.R.Crim.P. 16.

Respectfully submitted this June 9, 2019.

CHRISTIAN CHAMPAGNE
DISTRICT ATTORNEY
6th JUDICIAL DISTRICT

/s/ Christian Champagne
Christian Champagne #36833
District Attorney

CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2019, I delivered a true and correct copy of the foregoing to the parties of record via e-service

/s/ Christian Champagne
Christian Champagne