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DISTRICT COURT OF OTERO COUNTY STATE OF COLORADO 13 West 3 rd Street, Rm. 207 La Junta, CO 81050	DATE FILED: May 8, 2015 11:36 PM
Plaintiff: PEOPLE OF THE STATE OF COLORADO v. Defendant: JAMES ADAM PATRICK ASHBY	▲ COURT USE ONLY ▲
Attorneys for Defendant: BRUNO, COLIN & LOWE, P.C. Michael T. Lowe, #33489; mlope@brunolawyers.com Carrie L. Slinkard, #40288; cslinkard@brunolawyers.com 1999 Broadway, Suite 4300 Denver, Colorado 80202 Telephone: (303) 831-1099 Facsimile: (303) 831-1088	Case No. 2014CR217 Division: A Courtroom 206
DEFENDANT'S MOTION FOR A PRETRIAL HEARING REGARDING THE LIMITATIONS ON THE SCOPE OF ANTICIPATED TESTIMONY AND THE PRESENTATION OF EVIDENCE RELATING TO FORENSIC DIGITAL EVIDENCE AND COMPUTER STORED INFORMATION AND DATA D-8	

COMES NOW, Defendant James Adam Ashby, by and through his undersigned counsel, and respectfully requests a pretrial hearing regarding the content and the scope of any anticipated testimony by forensic cellular telephone examiners at trial, and further, given the nature of the digital evidence in this case and the charges pending against the Defendant, undersigned counsel additionally respectfully requests a pre-trial hearing on the admissibility and limitations on any testimony and/or forensic digital evidence to be presented at trial, without inconveniencing the jurors who will be sworn in on this case. As grounds therefore, the Defendant states the following:

Certification of Conferral Pursuant to C.R.C.P. 121, §1-15(8)

Undersigned counsel hereby certifies that he made good faith efforts to confer with the District Attorney regarding this Motion. Undersigned counsel conferred about general objections with the District Attorney on May 6, 2015, noticing that he would thereafter call to confer on the remaining motions. Telephone messages were left for the District Attorney on the afternoon of May 8, 2015, for conferral on Defendant's remaining motions, but, counsel were not able to confer prior to filing this Motion. Counsel will continue to attempt to confer, and if any of Defendant's motions are unopposed notification of the same will be filed with the Court

1. Defendant is concerned about the admissibility of evidence in two forms: a) the admissibility of any testimony by an investigator for the State being offered by the

People as expert testimony, and 2) the admissibility of evidence regarding the content of any text messages, call log records, call detail records, and any other cell phone records or computer evidence recovered by the State during the course of their investigation into the above captioned case. The Defendant therefore moves this Court to hear evidence and make findings regarding the scope of any anticipated expert testimony on the matter, including and the qualifications of any State investigator to opine on matters relating to forensic digital evidence and the examination and analysis of any computer or cellular telephone based media.

2. As is the case with evidence in other forms, the principles applicable to the admissibility of digital evidence depend largely on where the evidence came from, how it was created, and the underlying purpose of the evidence as presented by the during the trial. For example, digital evidence being offered by the prosecution as substantive evidence of guilt in this case and/or as substantive proof of the existence or non-existence of a material fact disputed by the parties, should be evaluated differently with respect to its admissibility than digital evidence being offered at trial only for illustrative or impeachment purposes. In that regard, the Defendant seeks an order requiring the People to identify, with specificity, any digital evidence they intend to admit as substantive proof of a fact or circumstance during the trial in this case. If the People do intend to introduce any digital or other computer-based evidence at trial, the Defendant requests a hearing on those issues, for the reasons further described below.
3. Before any cellular telephone records in this case can be deemed admissible during trial, this Court must determine whether the content of the digital evidence constitutes a "statement" for hearsay purposes, as defined by the Colorado Rules of Evidence.¹ Of course, once the Court determines whether or not the digital evidence involved falls within the core definition of hearsay, the evidence may nevertheless be exempted from the definition. The Rules further specify several categories of statements that, although made out of court and offered to prove the truth of the matter asserted, are nevertheless declared not to be hearsay. Potentially at issue before this Court with respect to the present case is the applicability of the business records exception to forensically downloaded cellular telephone evidence collected by State investigators during the pendency of this case.
4. To establish the necessary foundation for this exception, the prosecution must be able to demonstrate the trustworthiness of the source of the digital information and the method or circumstances under which such evidence was prepared. This may be accomplished by showing that:
 - a. The equipment (both the hardware and the software) on which the record was stored is recognized as standard in the field and is reliable;

¹ C.R.E. 801(a) defines a "statement" as "an oral or written assertion or conduct that is intended to be communicative."

- b. The data were entered in the regular course of business at or reasonably near the time of the occurrence of the event recorded; and
 - c. The sources on which the record was based, as well as the method and time of preparation, indicate the record is trustworthy and that its admission is otherwise justified.
5. This foundation may be established through the testimony of the custodian of the record or by a person who is familiar with the methods by which it was prepared. In support of establishing trustworthiness, the prosecution must show:
 - a) company reliance on the data,
 - b) protection of the accuracy of the data,
 - c) prevention of loss or alteration of the data while in storage, and
 - d) provision for integrity of data output.
6. There is considerable overlap between the foundation required for authentication and the foundation required to establish the availability of the business records exception to the hearsay rule. Like any other record, computer-stored records can involve multiple levels of hearsay, because even the act of data entry alone is itself an out-of-court statement as defined by C.R.E. 801(a). Further, the underlying data included within the digital evidence entered may also contain hearsay "statements," which must themselves qualify for a hearsay exception or exemption.
7. *Computer-stored* evidence includes documents and other records that were created by a human being but simply happen to be stored in electronic form. Examples of this include word-processing files, e-mail messages, and Internet chat room logs. This kind of evidence may raise both authentication and hearsay issues, as opposed to *computer-generated* evidence, which consists of the direct output of computer programs alone. Examples of computer generated output include the login record of an ISP, automated telephone call records, and automatic teller receipts. Though such records raise authentication issues, they are not properly regarded as hearsay because they do not the statements of a person. The complications in establishing the admissibility and authentication of digital evidence prior to its publication at trial for the jury, relate generally to records that contain a combination of computer-stored and computer-generated evidence. For example, a financial spreadsheet contains both input data that originated by a person, as well as output data created by the computer-program itself.
8. Under C.R.E. 1006, where the contents of voluminous writings, recordings, or photographs cannot be conveniently examined in court, a party may present them in the form of a chart, summary, or calculation - subject to limitations, including making the originals or duplicates available to the opposing party for inspection or copying. Digital evidence can be so voluminous that a summary of the data is required at trial simply for convenience.

9. That said, authentication requirements remain a prerequisite to the admissibility of digital evidence. Authentication requirements obligate the prosecution to show that the records stored in a computer are what the prosecution claims them to be, and key issues usually center around identifying the author or authors of a computer-stored record, in addition to setting forth a foundation to establish that the record has not undergone any significant change.
10. Of course, the defense is entitled to challenge authenticity by alleging that the computer records could have been altered after they were created, which emphasizes the ease with which computer records may be modified, even unintentionally. Apart from the ease with which computer data can be tampered with, whether intentional or unintentional in nature, or by persons or other computer or digital applications, there are additional concerns relating to preliminary foundational requirements, including: the completeness of the record, the input procedures used, and the specific input method used (accurate data conversion). When these matters are at issue, the prosecution must be prepared to present a witness or witnesses to address them.
11. Given the complexity of the hearsay issues involved in digital evidence cases, especially when that evidence is being used in a substantive fashion at trial, any evidentiary issues relating to precursors for admissibility will be best resolved at the pre-trial stage, outside the presence of the jury. This allows a court to not only identify the nature and scope of the digital forensic evidence at issue, but further, allows the parties and the Court to avoid lengthy oral argument in the middle of trial, after the jurors have been sworn in.
12. “The Colorado Rules of Evidence (CRE) provide the modern guidelines for the admissibility of expert testimony.” *People v. Ramirez*, 155 P.3d 371, 378 (Colo. 2007)(*en banc*). CRE 702 governs the testimony of experts, over which “the trial court possesses broad discretion” that will not be overturned “absent a showing of manifest error.” *People v. Lanari*, 926 P.2d 116, 120 (Colo. App. 1996). To make an informed exercise of discretion, however, “a trial court must be sufficiently apprised of the nature and substance of the proposed testimony.” *Id.*
13. In 2007, the Colorado Supreme Court laid out the modern, multi-step analysis trial courts should perform under the Rules of Evidence. “While CRE 401 and CRE 402 reflect liberal admission of evidence, CRE 702 and CRE 403 temper that broad admissibility by giving courts discretion to exclude expert testimony if it is unreliable, irrelevant, or its probative value is substantially outweighed by the danger of unfair prejudice.” *Ramirez*, 155 P.3d at 378 (citing *People v. Martinez*, 74 P.3d 316, 322-323).
14. As noted in *Ramirez*, the Colorado Supreme Court held in *People v. Schreck*, 22 P.3d 68, 77 (Colo. 2001), “that scientific evidence is admissible under CRE 702 if the testimony is reliable and relevant.” *Id.*

15. In making a determination of reliability, a trial court should consider “whether the scientific principles underlying the testimony are reasonably reliable, and whether the expert is qualified to opine on such matters.” *Id.* “[S]peculative testimony that would be unreliable, and therefore inadmissible under CRE 702, is opinion testimony that has no analytically sound basis. Admissible expert testimony must be grounded in ‘the methods and procedures of science rather than subjective belief or unsupported speculation.’” *Id.* (quoting *Gallegos v. Swift & Co.*, 237 F.R.D. 633, 639 (D.Colo. 2006)).
16. Although a proponent of expert testimony “need not prove that the expert is [i]ndisputably correct...a court may reject expert testimony that is connected to existing data only by a bare assertion resting on the authority of the expert.” *Id.* at 378-379.
17. If a trial court deems expert testimony reliable, it must then determine whether the testimony is relevant. “To determine relevancy under CRE 702, the court should consider whether the testimony would be useful to the fact finder.” *Id.* In *Lanari v. People*, the Colorado Supreme Court laid out several factors to be considered: “the nature and extent of other evidence in the case, the expertise of the proposed expert witness, the sufficiency and extent of the foundational evidence upon which the expert witness’s ultimate opinion is to be based, and the scope and content of the opinion itself.” 827 P.2d 495, 504 (Colo. 1992); *see also Ramirez*, 155 P.3d at 379.
18. Even if expert testimony is deemed both reliable and relevant under CRE 702, the court must still examine the proffered testimony in light of CRE 403. *See Id.* at 382. Under CRE 403, “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.
19. Furthermore, the prosecution has an obligation to identify, preserve, and reveal exculpatory evidence to the defense. The prosecutor must determine whether the examiner looked for all relevant evidence, including that which could be potentially exculpatory, because failure to look for and record all relevant digital data may affect the credibility of the examiner’s testimony. This is especially true if additional information is found at the time the defense examines the media involved. Digital evidence must be handled carefully to avoid destroying exculpatory material during either the collection or analytical processes, and a defense attorney is authorized to seek to compel access to such evidence for a defense examiner to analyze.
20. At this time, the Defendant not only requests access to the duplicate digital evidence presumably gathered and stored by the prosecution in accordance with industry standards, but additionally, the Defendant requests access to the *exact* forensic extraction device used by the State investigators in this case during the course of the Cellebrite extraction of Darleen Gonzalez’s cellular telephone. Further, the

Defendant requests a pre-trial hearing on the issues presented in this Motion hereinabove, as the hearing will not prejudice either party but rather, will save both the Court and the sworn jurors on the case significant time with respect to the presentation of testimony at trial.

DATED this 8th day of May, 2015.

Respectfully Submitted,

BRUNO, COLIN & LOWE, P.C.

By: *s/Michael T. Lowe* _____

Michael T. Lowe

Carrie L. Slinkard

Attorneys for Defendant

In accordance with C.R.Crim.P. 49.5(g), a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by the other parties, or the Court upon request.

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2015, a true and correct copy of the foregoing **DEFENDANT'S MOTION FOR A PRETRIAL HEARING REGARDING THE LIMITATIONS ON THE SCOPE OF ANTICIPATED TESTIMONY AND THE PRESENTATION OF EVIDENCE RELATING TO FORENSIC DIGITAL EVIDENCE AND COMPUTER STORED INFORMATION AND DATA D-8** was e-filed and e-served via ICCES E-System, addressed to the following:

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s/Marla A. Brock _____

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