



U.S. Department of Justice

United States Attorney

Eastern District of Pennsylvania

Robert J. Livermore
Direct Dial: (215) 861-8464
Facsimile: (215) 861-8618
E-mail Address: robert.j.livermore@usdoj.gov

615 Chestnut Street
Suite 1250
Philadelphia, Pennsylvania 19106-4476
(215) 861-8200

September 5, 2018

The Honorable Joel H. Slomsky
United States District Court
Eastern District of Pennsylvania

**Re: United States v. Wayde McKelvy
15-CR-398-3
Government's Response to Defendant's
Motion for Ruling on Applicability of
Discovery Provision in Scheduling Order**

Dear Judge Slomsky:

On May 1, 2018, the district court granted the defendant's motion to continue the trial date and entered an order (hereinafter the "Trial Order") granting that motion. The Trial Order set trial in the matter to commence on September 24, 2018 and set a timeline for pretrial motions and other pretrial notices. Regarding expert witnesses, the Trial Order stated:

5. In the event a party intends to call an expert witness at trial, the party shall deliver to the opposing party the expert's curriculum vitae and the expert report no later than twenty (20) days before trial.

Therefore, the Court set a deadline of September 4, 2018 for the parties to provide the expert's curriculum vitae and the expert report.

On September 4, 2018, defendant WAYDE MCKELVY, through counsel, filed the instant motion asking the Court to allow him to disregard this portion of the Trial Order. The government avers that the Court should enforce the terms of the Trial Order to prevent the defendant from ambushing the government at trial with expert witnesses without notice.

The terms of the Trial Order are clear and unmistakable. The defendant did not object to the Trial Order when the Court issued the order. The government notes that this case has been continued on multiple occasions and on each occasion the Court has issued a nearly identical Trial Order concerning expert disclosure. The defendant did not object to the Trial Order on any of those occasions.

In his motion, the defendant now objects to the Trial Order because it may exceed the

requirements of Rule 16. However, the law is clear that the district court may regulate discovery as it sees fit. Rule 16(d) specifically provides: “the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief.” Many courts have upheld the authority of the district court to regulate discovery beyond the boundaries of Rule 16. See, e.g., United States v. Wilson, 493 F.Supp.2d 484, 487-88 (E.D.N.Y. 2006) (finding that the defendant’s failure to provide notice of expert witness pursuant to the court’s trial order imposed a “separate and independent basis” apart from Rule 16 for precluding the defense expert’s testimony); United States v. Currie, 16-20089-01-JAR, 2017 WL 3190401, at *1 (D. Kan. July 26, 2017) (granting defendant’s motion to exclude government expert for failing to provide notice pursuant to court’s trial order); United States v. Torres, 11-CR-151A, 2014 WL 3548935, at *7 (W.D.N.Y. July 17, 2014) (denying defendant’s motion to voir dire government expert by finding that the government complied with “the District Court’s standard pre-trial order and the timing of expert summaries.”)

The purpose of the district court’s Trial Order is clear. As the court stated in Wilson when describing the rationale behind a similar trial order:

The court imposed that deadline because “one of counsel’s most basic discovery needs is to learn that an expert is expected to testify. This is particularly important if the expert is expected to testify on matters which touch on new or controversial techniques or opinions.” Fed.R.Crim.P. 16, Advisory Committee Notes to 1993 Amendments (citations omitted). Having thwarted the Government’s efforts to fulfill its basic discovery needs, thereby violating the Federal Rules of Criminal Procedure and an Order of this court, Wilson cannot expect to introduce a controversial expert opinion which the Government cannot possibly prepare to rebut.

Wilson 493 F. Supp. 2d at 488; see also United States v. Brien, 59 F.3d 274 (1st Cir. 1995) (under Fed. R. Evid. 705, as a matter of fairness, the trial court has discretion to insist on disclosure of information underlying expert opinion before expert testifies to aid the Court in making a preliminary ruling on admissibility). This Court should apply the same analysis here and order defense counsel to provide the defense experts’ curriculum vitae and expert reports immediately.

Sincerely,

WILLIAM M. McSWAIN
United States Attorney

/s/

Robert J. Livermore
Sarah M. Wolfe
Assistant United States Attorneys

cc: Walter Batty, Esq.
William Murray, Esq.