

COÖS, SS.

SUPERIOR COURT

State of New Hampshire

v.

Volodymyr Zhukovskyy

214-2019-CR-078

Motion in Limine RE: Timing of William Howerton’s Involvement

The Defendant Volodymyr Zhukovskyy, by and through counsel, Jay Duguay and Steve Mirkin, Esq., respectfully requests this Honorable Court exclude any and all testimony or argument related to the timing of Mr. Howerton’s involvement in this matter.

In support of this motion the Defendant States the following:

1. In August of 2019, the Defense retained an accident reconstruction expert to evaluate the evidence and offer an opinion regarding the accident in this matter. In November of 2021, the parties were prepared to select a jury and proceed to trial with that expert as the Defense expert in the field of accident reconstruction.
2. On the eve of the final pretrial conference scheduled for November 9, 2021, the State provided approximately 1500 pages of additional discovery related to the Defense expert and his time in the Massachusetts State Police Accident Reconstruction Unit.
3. Based on that new discovery, it appeared that the Defense Expert may have made misrepresentations during his deposition on September 30, 2021. As a result of that revelation, the Defense discharged the expert and requested a continuance to retain a new reconstruction expert. The Court granted that continuance.
4. The expert’s discharge was in no way related to his opinion or analysis in the case.
5. The Defense then retained William Howerton of Scientific Boston in January of 2022 to review the case and offer an expert opinion regarding accident reconstruction.

6. Mr. Howerton issued a report of his findings in early April of 2022.
7. During individual *voir dire* the State asked potential jurors about their views on expert testimony. They talked specifically about questioning the integrity of an expert who was a “hired gun” who had come in more than 2 years after the accident and gave a favorable opinion. They suggested that the delay in the expert’s involvement should negatively impact that expert’s credibility and call into question their findings.

The timing of William Howerton’s involvement in this case is not relevant under 401

8. It is clear from the *voir dire* questions posed by the State that they intend to introduce evidence of the delay in retaining William Howerton and argue that the jury should view his testimony unfavorably or question his credibility because he was only involved in the case in January of this year.
9. Under normal circumstances, the evidence and argument regarding a delay in retaining an expert witness would be debatably relevant. However, under the circumstances of this case it is completely irrelevant under Rule 401 and would likely create a misleading impression that the timing of his retention is related to something other than the last-minute discharge of the prior Defense expert due to circumstances outside of Defense Counsel’s control.
10. The explanation for the timing of Mr. Howerton’s involvement in this case is well known to the Court and the State. Mr. Howerton was retained shortly after counsel became aware that the case could not proceed with the prior expert without risking ineffective assistance of counsel, and robbing Mr. Zhukovskyy of a fair trial. Nothing about the timing of Mr. Howerton’s involvement gives rise to any indication that his testimony would be unreliable or raises any legitimate question about his credibility. Accordingly,

the evidence related to the timing of his involvement is irrelevant; further, any argument that the timing of his involvement suggests that he is not credible cannot be allowed because it attempts to capitalize on a misleading inference that the timing is related to something other than the unique circumstances of this case.

The probative value of the timing of Mr. Howerton involvement in the case is far outweighed by the danger of misleading the jury and confusing the issues under Rule 403.

11. To the extent that there is any probative value to this evidence, it is substantially outweighed by the danger of misleading the jury and confusing the issues.
12. Here, the Defense was forced to discharge the prior expert on the eve of trial based on the last-minute discovery provided by the State. The sole purpose in discharging that expert was to protect the constitutional rights of the Defendant and ensure that he had a fair trial. The discharge was beyond the control of counsel as failure to do so would have undoubtedly been ineffective assistance of counsel.
13. If evidence of the timing is allowed at trial, that evidence would give rise to the misleading inference that there was something nefarious about the timing of Mr. Howerton's involvement, or that his late entry into the case indicates untrustworthiness. Further, if the State is allowed to capitalize on that misleading inference by arguing that the Jury should take a negative inference from the timing of his involvement, the unfair prejudice of that misleading inference would be compounded.
14. Introduction of evidence creating this misleading inference or argument by the State aimed to advance that misleading inference would require rebuttal testimony to counter that misleading impression. That testimony would have to come from a member of the prosecution team regarding the disclosure of the discovery leading to the prior expert's

discharge, and from a member of the Defense team regarding the true reason for that discharge. Such a diversion would inevitably result in a “trial within a trial” about the discharge of the prior expert and likely confuse the jury as to the issues in this case.

15. It would also implicate Rule of Professional Conduct 3.7 and necessitate withdrawal as counsel for the attorneys needed for testimony.

Conclusion

16. For the reasons stated above the Court should prohibit testimony regarding the timing of Mr. Howerton’s involvement in this case and any argument designed to advance the misleading impression that timing of his involvement suggests that his testimony is untrustworthy.

Wherefore, Mr. Zhukovskyy respectfully requests this Honorable Court:

- A. Exclude from evidence any reference to the timing of Mr. Howerton’s involvement in the case;
- B. Exclude any argument that the jury should take any adverse inference from the timing of Mr. Howerton’s involvement in the case; and.
- C. All other relief deemed just.

Respectfully submitted,

/s/Jay Duguay
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been forwarded this 21st day of July, 2022, to John G. McCormack, Esq., Coös County Attorney, and Scott Chase, Esq. and Josh Speicher, Esq., Assistant Attorneys General.

/s/Jay Duguay _____
Jay Duguay