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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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Ruth Bradburn Mitchell, individually and
as personal representative of the Estate of
Kenneth Mitchell; Kenneth Christopher
Mitchell,

CV 11-08140-PCT-FJM

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ORDER

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Plaintiffs,

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vs.

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City of Flagstaff; Roy Taylor; Jane Doe
Taylor,

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Defendants.

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The court has before it plaintiffs' motion to substitute expert witness (doc. 52),
defendants' response (doc. 61), and plaintiffs' reply (doc. 69). We also have before us
plaintiffs' motion for order to release and transfer custody of evidence for inspection and non-
destructive testing (doc. 67), defendants' response (doc. 73), and plaintiffs' reply (doc. 74).¹

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I

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This action arises out of the shooting of Kenneth Mitchell, plaintiffs' husband and
father, by Officer Taylor of the Flagstaff Police Department. Plaintiffs engaged James Serpa
as an expert witness in November 2011. Our Rule 16 scheduling order, issued in December
2011, set plaintiffs' expert disclosure deadline as April 20, 2012 (doc. 25). On April 5, 2012,

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¹ Both parties failed to comply at various points with this Court's two-page limit on
discovery motions, responses, and replies (doc. 25 at 3).

1 plaintiffs contacted defendants to request that certain physical evidence (bullets and a
2 shotgun recovered from the scene) be shipped to Serpa's office for inspection and testing.
3 Defendants denied the request on April 6, 2012, indicating that the evidence would only be
4 available for inspection and testing at the Flagstaff Police Department. Next, plaintiffs sent
5 a formal request for production of the items pursuant to Rule 34, Fed. R. Civ. P., which was
6 also denied. In the meantime, the parties arranged for Serpa's inspection of the evidence at
7 the Flagstaff Police Department on April 16, 2012. Defendants' expert arrived at the
8 Flagstaff Police Department on April 16, 2012 and, using his own equipment, tested the
9 evidence. Serpa, however, did not show up.

10 Serpa's expert report, which is dated April 18, 2012 and was timely disclosed, states
11 that because he has "not had the opportunity to conduct non-destructive examinations of the
12 physical evidence in this case," he is "unable to render any conclusions or opinions in the
13 matter." Resp. to Mot. to Substitute, ex. K at 1. Plaintiffs have continued to request release
14 of the evidence to their expert, requests which defendants have refused, citing chain of
15 custody issues and Flagstaff Police Department protocol. In the meantime, Serpa
16 unexpectedly quit on May 2, 2012.

17 II

18 Plaintiffs have identified a new expert, Ronald Scott, and move for his substitution
19 as expert witness. Defendants oppose the request. They argue that the motion is an attempt
20 to circumvent the scheduling order, because Scott will effectively be permitted to disclose
21 new expert opinions after the deadline, in violation of our Rule 16 scheduling order.
22 Defendants argue that Serpa's expert report is deficient under Rule 26(a)(2)(B), Fed. R. Civ.
23 P. because it does not contain opinions, conclusions, results, or data. Thus, they argue that
24 Scott's testimony should be barred under Rule 37(c)(1), Fed. R. Civ. P.

25 The issue of whether or not Scott's opinions will be admissible is a separate issue
26 from whether or not he should be permitted to substitute in for the now-absent Serpa.
27 Because there is no motion to exclude expert opinions pursuant to Rule 37(c)(1) before us,
28 our discussion of whether a failure to sufficiently disclose opinions was substantially justified

1 or harmless would be premature. Defendant does not dispute, however, that Serpa's abrupt
2 abandonment of this case was out of plaintiffs' control. Under these circumstances, we find
3 that plaintiffs should be permitted to substitute Ronald Scott as their expert witness, and will
4 grant plaintiffs' motion to substitute. This ruling should not be construed, however, as an
5 indication as to whether any of Scott's expert opinions will be admissible.

6 III

7 Plaintiffs move for a second time for the release and transfer of custody of evidence
8 to their expert for inspection and non-destructive testing pursuant to Rule 37, Fed. R. Civ.
9 P.² Their counsel's communications attached to the motion argue that plaintiffs' expert
10 requires the evidence to be released to him for testing at his own facility using his own
11 equipment, and that travel to Flagstaff for inspection and testing would be inconvenient and
12 expensive. See Mot. for Release, ex. G. Defendants oppose the request. They argue that
13 they have substantially complied with plaintiffs' requests by making the evidence available
14 for testing at the Flagstaff Police Department, including an offer for plaintiffs' expert to bring
15 his own equipment for testing. Defendants offer an affidavit from a sixteen-year veteran of
16 the Flagstaff Police Department, who cannot remember any time when evidence was released
17 to a non-government entity for testing, and that such an action would be inconsistent with
18 department procedure. Resp. to Mot. for Release, ex. D.

19 Plaintiffs argue that defendants' opposition is unjustified because their expert is
20 qualified to properly handle and transport the evidence. That may be the case. However,
21 plaintiffs have not persuasively established why the release of evidence to their expert is
22 necessary. It was plaintiffs' choice to retain an expert outside of Flagstaff. And plaintiffs
23 have not explained why permitting their expert to bring his own equipment to the police
24 department for testing would be insufficient, other than vague assertions that the equipment
25 might be damaged if moved, and that the equipment at the police department is "likely"

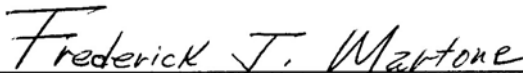
27 ² Plaintiffs' first request was denied on April 18, 2012 for failure to comply with
28 LRCiv 7.2(j) (doc. 47).

1 insufficient. Moreover, defendants state (and plaintiffs have not rebutted) that police
2 department policy for chain of custody prevents the transfer of evidence to non-government
3 entities. Accordingly, we deny plaintiffs' motion for release and transfer.

4 **IV**

5 **IT IS ORDERED GRANTING** plaintiffs' motion to substitute expert witness (doc.
6 52). **IT IS FURTHER ORDERED DENYING** plaintiffs' motion for order to release and
7 transfer custody of evidence for inspection and non-destructive testing (doc. 67).

8 DATED this 19th day of June, 2012.

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 Frederick J. Martone
12 United States District Judge
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