DISTRICT COURT, LA PLATA COUNTY, COLORADO 1060 East Second Avenue Durango, Colorado 81301	ORIGINAL FILED / RECD IN COMBINED COURT LA PLATA COUNTY, COLORADO APR - 2 2019 COURT USE ONLY
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff, v. **MARK REDWINE,** Defendant	
Megan Ring, Colorado State Public Defender Justin Bogan, Attorney No. 33827 John Moran, Attorney No. 36019 Deputy Public Defender 175 Mercado Street, Suite 250, Durango, CO 81301 Phone: (970) 247-9284 Fax: (970) 259-6497 E-Mail: Justin.Bogan@coloradodefenders.us Email: John.Moran@coloradodefenders.us	Case Number: 17CR343 Division: 1

[D-111]
MOTION TO VIEW THE EVIDENCE CONFIDENTIALLY AND FOR THE LA PLATA COUNTY SHERIFF TO BE ISSUED A GAG ORDER AS TO THE EVIDENCE VIEWING OF THE DEFENSE OR IN THE ALTERNATIVE THAT THE DEFENSE BE NOTIFIED AND PRESENT AT ALL EVIDENCE VIEWINGS BY ANY MEMBER OF LAW ENFORCEMENT OR ANY AGENT OF THE LA PLATA COUNTY DISTRICT ATTORNEY'S OFFICE [PUBLIC ACCESS]

Mark Redwine, by and through Counsel, requests the Court Order that the defense be allowed to confidentially view the evidence held by law enforcement in the above-captioned case, or in the alternative, that the defense be notified and present at all evidence viewings by any member of law enforcement or any agent of the La Plata County District Attorney's Office, and in support, so states:

PROCEDURAL HISTORY

1. On September 20, 2018 Mr. Redwine filed motion D-45, seeking a motion to have specific items of evidence released to his defense team for independent testing. That motion specifically enumerated twenty (20) items / groups of items requested to be released. The Prosecution objected to the motion. The Prosecution did not aver that releasing the evidence would cause them practical problems. The Prosecution did not aver that releasing the evidence would not materially aid the Defense. The Prosecution did not aver that releasing the evidence would unduly burdensome. The Prosecution did

offer a recitation of some caselaw regarding their obligation to preserve evidence, including the statement, "The Colorado Supreme Court has held that due process requires "at most, an entitlement of access to evidence and witnesses that would be both constitutionally material and favorable to the accused." People v. Baltazar, 241 P.3d 941, 944 (Colo. 2010); See Arizona v. Youngblood, 488 U.S. 51, 55, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988)."

2. The Prosecution relied on People ex rel. Gallagher v. District Court, 656 P.2d 1287, 1291 (Colo. 1983), and People v. Gomez, 198 Colo. 105, 596 P.2d 1192 (1979) in their response. In Gallagher, the prosecution failed to preserve the decedent's hands so they could be tested for trace evidence by the defense. The Colorado Supreme Court found a Due Process violation and as a sanction for failing to preserve the evidence, the trial court reduced the first degree murder charge to second degree murder. The basis for the Court's ruling was that the Defense was deprived of forensic testing that could have yielded exculpatory evidence.

3. In Gomez, The Colorado Supreme Court affirmed the trial court's suppression of several prosecution exhibits in a heroin distribution case because the prosecution engaged in destructive/consumptive testing that deprived the Defendant of his right to independently test the alleged heroin. The Court stated, "the failure of the state to collect and preserve evidence, when those acts can be accomplished as a mere incident to a procedure routinely performed by state agents, is tantamount to suppression of that evidence. It is incumbent upon the state to employ regular procedures to preserve evidence which a state agent, in the regular performance of his duties, could reasonably foresee ' "might" be "favorable" to the accused. Again, the basis of the Court's ruling was the Defendant's right to independently observe and test evidence held by the prosecution.

4. This Court denied Mr. Redwine's motion for release of evidence on February 26, 2019, without a hearing. This Court found that Mr. Redwine was only entitled to representative samples of the prosecution's evidence, not entire pieces of evidence. This Court also found that releasing evidence would be unduly burdensome and cause practical problems for the Prosecution. This Court further ordered that Defense would be permitted to observe and take photos of evidence under the supervision of the Colorado Bureau of Investigation or any agency holding such evidence.

5. The Defense cannot take representative samples from the cranium in this matter to conduct independent testing and observation. Defense requires the entire cranium to investigate the claims by prosecution experts that several specific features on the cranium are inculpatory, and to identify exculpatory features on the cranium.

6. The agencies holding said evidence the Defense needs to examine are actively working with the Prosecution to convict Mr. Redwine.

7. The Court's Order does not say "under the supervision of the prosecution."

8. Mr. Redwine's defense team contacted the La Plata County Sheriff's Department to schedule an evidence viewing of the skeletal evidence in this matter. The viewing was scheduled for 9:30 a.m on March 20, 2019. Members of the Defense team arrived at the Sheriff's Department to view the items and were politely greeted by the Evidence Technician, Kailla Myers. Mr. Champagne, the elected District Attorney prosecuting this case arrived shortly thereafter. Apparently, the Sheriff's Department informed Mr. Champagne of our scheduled time to view the evidence. Undersigned Counsel informed Mr. Champagne he was not invited to be present for our viewing and investigation. Mr. Champagne responded that the Evidence Area was a public space and he was therefore permitted to be present for the evidence viewing. He also stated that we was allowed to be present during the Defense investigation based upon "precedent." He did not refer to any statutes or cases, but did say it was the precedent in this jurisdiction. Investigator Ezzel responded to the situation and did not ask Mr. Champagne to leave and presented as unsure on how to go forward. Mr. Redwine's defense team left the Sheriff's Department and is now seeking a Court Order on this issue.

MR. REDWINE'S RIGHT TO HAVE HIS DEFENSE TEAM INDEPENDENTLY OBSERVE EVIDENCE

1. Mr. Redwine has the right for counsel and defense experts to confidentially view the evidence in this case pursuant to the due process, confrontation, and effective assistance of counsel provisions of both the Constitution of the State of Colorado and the United States Constitution.

2. The prosecution will suffer no prejudice as a result of the defense being allowed to confidentially view the evidence in this case (other than being unable to be gain access to confidential defense communications and strategy).

3. The prosecution may express concern that that without its agents reporting back to the district attorney's office that the evidence would in some way be compromised. This concern is unfounded.

4. Defense Counsel in order to ensure that the evidence is not tampered with or altered is requesting that an evidence technician be present during the viewing. It is assumed that the law enforcement agency has appropriate mechanisms and protocols in place to handle this type of evidence and all necessary regulations and protocols will be followed.

5. Counsel is requesting that this evidence technician be ordered to keep completely confidential anything that is said or done while the defense is viewing the evidence in order to ensure that no work product or privileged information be transferred to the District Attorney. Counsel further makes this request so that Mr. Redwine is afforded her rights pursuant to the due process, confrontation, and effective assistance of counsel provisions of both the Constitution of the State of Colorado and the United States Constitution.

6. Counsel must view the evidence in order to effectively represent Mr. Redwine. Those present for the defense at the viewing will want to discuss what is being viewed. Any discussions among the defense team of the evidence is both privileged communications and work product.

WORK PRODUCT

1. Allowing the prosecution to have a member of the prosecution team present while the defense views and inspects the evidence will interfere with the Work Product Doctrine that affords the defense a "zone of privacy" while it prepares Mr. Redwine's defense.

2. In *Hickman vs. Taylor*, the Supreme Court of the United States of America recognized:

> **In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.**

329 U.S. 495, 510-511 (1947).

3. The Work Product Doctrine grants attorneys "a zone of privacy within which to prepare the client's case and plan strategy, without undue interference." *In re San Juan Dupont Plaza Hotel Fire Litig.*, 859 F.2d 1007, 1014 (1st Cir. 1988). The Work Product doctrine applies in criminal as well as civil cases. *United States v. Nobles*, 422 U.S. 225, 236 (1975). "Although the [Work Product Doctrine] most frequently is asserted as a bar to discovery in civil litigation, **[the Work Product Doctrine's] role in assuring proper functioning of the criminal justice system is even more vital.**" *Id.* at 238 [emphasis added].

4. An informative discussion concerning the Work Product Doctrine's application in criminal cases is found in *United States v. Horn*, 811 F.Supp. 739 (D. NH. 1992). In *Horn*, the government stored 10,000 discovery documents at a private company's offices where the defendants could inspect the documents and arrange for copying. Defense counsel and an expert consultant went to review the documents for the purpose of locating material for cross-examination, preparing defense witnesses, and to develop defense trial tactics and strategy. The defense selected twenty-two pages to be copied. Unbeknownst to the defense, an extra copy of the requested documents was made for the government. The court held

that the government conduct intruded on the attorney work product privilege and the defendant's Sixth Amendment right to counsel.

5. *Horn* noted the following regarding the Work Product Doctrine:

> **Work product includes ordinary work product and opinion work product. Ordinary work product consists of documents and tangible things prepared in anticipation of litigation by or for an opposing party. In the civil context, courts generally afford ordinary work product only a qualified immunity, subject to a showing of substantial need and undue hardship. Opinion work product, consisting of the mental impressions, conclusions, opinions, or legal theories of an attorney, deserves special protection.**
>
> **Courts have held that defense counsel's selection and compilation of documents in preparation for pretrial discovery fall within the highly-protected category of opinion work product. ...[The] selection process itself reveals counsel's mental impressions as to how evidence relates to issues and defense in the litigation.**

Horn, 811 F. Supp., at 745-46 (citations omitted).

6. The government's copying of the selected documents prejudiced the defense because those documents "might have never been noticed or discovered by the government from among 10,000 documents, or, if noticed, their significance might never have been apparent or recognized." *Id.*

7. The same considerations come into play when an agent of the prosecution stands over the defense team while defense team inspects, views, considers, photographs, diagrams, and/or discusses any tangible or physical evidence at a police station.

8. Mr. Redwine does not agree to waive the attorney-client privilege or the confidentiality associated with the Work Product Doctrine.

9. Counsel does not agree to violate the Colorado Rules of Professional Responsibility by violating the attorney-client privilege and/or the Work Product Doctrine.

ADAM WALSH ACT

10. The Adam Walsh Act's provisions are offered as persuasive material in this motion, though obviously, it is not in play in this matter.

11. The United States Adam Walsh Act has a provision related to child pornography prosecutions that requires the government or the court to maintain control of evidence consisting of illegal child pornography. The Adam Walsh Act further requires that the court deny any Fed.R.Crim.P. 16 request for defense duplication, copying, and so forth of the material "so long as the Government makes this property or material reasonably available to the defendant." 18 USC § 3509(m)(2)(A). "[P]roperty or material shall be deemed to be reasonably available to the defendant if the Government provides **ample opportunity** for inspection, viewing, and examination at a Government facility" to the defendant, his attorney, and/or experts. § 3509(m)(2)(B) [emphasis added].

12. In *U.S. v. Flinn*, the court found an "ample opportunity" requires, (1) "the government [to] supply reasonably up-to-date tools (hardware and software) and facilities [in order to] construct a reasonable, available forensic defense," (2) "ability of a defense expert to utilize his or her hardware or software", and (3) "that the analysis be performed in a situation where attorney-client privilege and work product will not be easily, accidentally exposed to the government, and in a facility which is open to the defense at its request during normal working hours, and to the extent feasible, during non-working hours." 521 F. Supp. 2d 1097 (E.D. Cal. 2007).

13. The *Flinn* court ordered – to ensure due process and to protect the Work Product Doctrine – that (1) the expert was to be given private space without direct surveillance; (2) the expert must either have access to the available software at the site or be permitted to bring his own; (3) the expert is to have full access at all open hours and be reasonably accommodated for after-hours access; (4) the government may not inspect the material the expert takes off site so long as the expert certifies." *Id.*

14. This is the level of protection needed in any criminal case where evidence is stored at a government facility in order to ensure the accused receives the rights to due process, confrontation, compulsory process, and effective assistance of counsel as guaranteed by the Constitution of the State of Colorado and the United States Constitution. Mr. Redwine requests similar accommodations in order to ensure she receive these rights in her case.

ALTERATION OF THE EVIDENCE

15. The prosecution may without specificity claim it wants to limit Mr. Redwine's access to the evidence because it fears the evidence could be somehow altered.

16. The reasoning behind such a claim reduces to the absurd. Investigators working at the direction of the Prosecution have already destroyed and altered the very evidence in this matter the Defense seeks to view. Specifically, the Prosecution's agents at UNITECH ***removed a substantial piece of the partial cranium, pulverized it into powder, and destroyed the powder conducting DNA tests. Dr. France, an endorsed Prosecution expert, constructed a mold of the partial cranium, and in doing so left residual plaster on the cranium, forever changing its features, including the two injuries she alleges are consistent with sharp force trauma.*** The prosecution and their agents are the only parties to this litigation that have destroyed evidence.

17. Law enforcement and the prosecution know full-well that the evidence is altered and changed from the way it was found at the scene of the alleged crime. This is why the evidence is photographed before it is collected. This is why it is photographed before any destructive testing is done at the police department. It is not feasible to encircle a residence or other location with crime-scene tape and leave the evidence exactly as it was found – unaltered – until trial. Some alteration and change must happen in order that the parties can collect, inspect, view, and test the evidence.

18. If the Court were to follow the prosecution's reasoning, the defense should be entitled to multiple sanctions related to alteration and destruction of evidentiary value of any and all evidence in this case where law enforcement moved it even so slightly from where it was found at the scene of the alleged crime.

19. Mr. Redwine requests a hearing on this motion.

WHEREFORE, Mr. Redwine respectfully requests the Court Order that the defense may confidentially view the evidence with the evidence technician present subject to the above-discussed conditions, or in the alternative, Order that the defense be notified and allowed to be present for any and all evidence viewing or testing done by the prosecution, law enforcement, or any of its agents.

Dated: April 2, 2019

/s/ Justin Bogan
Justin Bogan, No. 33827
Deputy State Public Defender

/s/ John Moran
John Moran, No. 36019
Deputy State Public Defender

Certificate of Service
I hereby certify that on April 2, 2019 I served the foregoing document by e-filing same to all opposing counsel of record.
/s/ Justin Bogan /s/ John Moran