DISTRICT COURT, LA PLATA COUNTY, COLORADO Court Address: 1060 E. Second Ave., Durango, CO 81301 Phone Number: (970) 247-2304	ORIGINAL FILED / REC'D IN COMBINED COURT LA PLATA COUNTY, COLORADO APR 19 2019 DEPUTY CLERK
Plaintiff: **PEOPLE OF THE STATE OF COLORADO** **v.** **Defendant:** **MARK ALLEN REDWINE**	▲ COURT USE ONLY ▲
Christian Champagne - District Attorney, #36833 Matthew Durkin, Special Deputy District Attorney, #28615 Fred Johnson, Special Deputy District Attorney, #42479 P.O. Drawer 3455, Durango, Colorado 81302 Phone Number: (970) 247-8850 Fax Number: (970) 259-0200	Case Number: **17 CR 343**

PEOPLE'S RESPONSE TO [D-111]
[PUBLIC ACCESS]

NOW COME the People, by and through Christian Champagne, District Attorney, in the County of La Plata, and respond to defense motion [D-111], and move this honorable Court to deny the defense request. AS GROUNDS for this response, the People state as follows:

1. On March 20, 2019, the People's prosecutor appeared for a pre-scheduled viewing of the evidence in this case, scheduled for the defendant's benefit and at his request. Also present were Mr. Justin Bogan and Mr. Grady King of the Public Defender's office and Captain Jim Ezzell and Evidence Technician Kaila Myers of the La Plata County Sheriff's Office. Despite the fact the People's prosecutor had specifically been invited to attend the evidence viewing by Capt. Ezzell, Mr. Bogan attempted to exclude the People, stating "You're not invited." The People indicated that we had, in fact, been invited, that it was the Sheriff's building and evidence, and they could invite whomever they wanted. Mr. Bogan soon became visibly angry and red-faced, pointed a finger in the prosecutor's face, and barked "I'm not going to let you watch my investigation!" whereupon he stormed off, promising to get a court order to exclude the People from the evidence viewing.

2. On April 2, 2019, the defense filed D-111. The motion has five distinct sections:

   a. **"Procedural History":** Here, the defense describes the litigation surrounding D-45, a request from the defendant to take possession of the state's evidence and submit it to scientific testing. The defense argued that they needed to take

possession of the state's most sensitive and precious piece of evidence in the case, Dylan Redwine's cranium, in order to examine it. They also cite to the People's response to D-45, which the People incorporate by reference herein.

b. **"Mr. Redwine's Right to Have his Defense Team Independently Observe Evidence":** In this section, the defense argues that he has a right to confidentially view the physical evidence held by law enforcement. Notably, the defendant cites no statutes, cases, or other authority which stand for the proposition that the defense may have unfettered and private access to the state's evidence. The defense requests that an evidence technician be present to observe the event, but that the Court order this law enforcement officer to be "gagged" and prohibited from speaking about their observations.

c. **"Work Product":** The defendant argues that unless they are given unfettered and unlimited access to the state's physical evidence in the case, the work product doctrine is violated. The defense cites cases which stand for the proposition that attorney's should be given a "zone of privacy" in which to prepare their client's case without "undue and needless interference." *See* D-111, §3, ¶¶, 2, 3. Defense argues that unless they are given unfettered access to the state's physical evidence, their right to privacy over their "opinion work product" would be violated.

d. **"Adam Walsh Act":** The defense attempts to analogize this situation to that of child pornography, which, under the Adam Walsh Act, cannot be duplicated for discovery purposes by the State, and must be made available to the defense for private inspection by defense counsel and their experts.

e. **"Alteration of the Evidence":** This section of the pleading claims that evidence is altered and modified from its original condition by the State during the collection and testing of the evidence, therefore any concern about the defense altering or modifying the evidence is unfounded. They further argue that because the evidence is altered and modified during the collection and testing, the State should be subject to sanction for destruction of evidence.

DEFENDANT HAS NO CONSTITUTIONAL RIGHT TO DISCOVERY, BUT SHOULD BE ALLOWED ACCESS TO MATERIAL EVIDENCE UNDER REASONABLE CIRCUMSTANCES

3. The Colorado Supreme Court has unequivocally held that there is "...no general constitutional right to discovery in a criminal case." *People In Interest of E.G.*, 368 P.3d 946, 953–54 (Colo. 2016). Instead, discovery is a statutory creation; "the doctrine of discovery is ... a complete and utter stranger to criminal procedure, unless introduced by appropriate legislation." *People v. Baltazar*, 241 P.3d 941, 943-44 (Colo. 2010).

4. More specifically, neither the Due Process Clause nor the Confrontation Clause confer a right to discovery. *Id.*; *see also Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977); *Pennsylvania v. Ritchie*, 480 U.S. 39, 52, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).

5. Similarly, the Sixth Amendment's right to the effective assistance of counsel includes an entitlement to "...no more than a thorough investigation, limited by reasonable professional judgments." *Baltazar*, 241 P.3d at 944; *Strickland v. Washington,* 466 U.S. 668, 690 (1984).

6. In *Brady v. Maryland,* 373 U.S. 83, 87 (1963), the Court held that a defendant has a right to obtain material, exculpatory evidence from the prosecution, which "if suppressed, would deprive the defendant of a fair trial." *See also United States v. Bagley,* 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (holding that regardless of whether the defense makes a request, constitutional error results from government suppression of favorable evidence). But *Brady* and its progeny did not give defense counsel the "right to conduct his own search of the State's files." *Ritchie,* 480 U.S. at 59. Instead, these cases stand for the proposition that a defendant has a right of "access" only to favorable evidence that is in the government's possession or control. *Bagley,* 473 U.S. at 675; *Brady,* 373 U.S. at 87; *Baltazar,* 241 P.3d at 944.

7. Crim. P. 16 delineates the defendant's right to access to material evidence in more detail. It has been described by the Colorado Supreme Court as follows:

> By providing additional means for disclosure, Colorado's rules of criminal procedure to some extent compensate for the limitations on the protection afforded criminal defendants under the *Brady* doctrine.
>
> In addition to the material automatically disclosed to the defense where the requirements of Crim.P. 16(I)(a)(1) and Crim.P. 16(I)(a)(2) are met, Colorado courts have the discretion to order disclosure to the defense of "relevant material or information not covered by [Crim.P. 16](I)(a), (b), and (c) upon a showing by the defense that the request is reasonable." Crim.P. 16(I)(d)(1).
>
> **Crim.P. 16(I)(d)(1) further requires a showing by the defense that its request is reasonable**, including a showing that the material or information sought is unavailable from any source other than the prosecution. **Final determination of the reasonableness of the request, as of the relevance of the material sought, rests in the discretion of the trial court.** Crim.P. 16(I)(d)(1).

People v. District Court of El Paso County, 790 P.2d 332, 338 (Colo. 1990) (emphasis added).

THE PROSECUTION HAS A SOLEMN AND BINDING OBLIGATION TO PROTECT THE DEFENDANT'S RIGHTS BY PROTECTING THE INTEGRITY OF THE EVIDENCE

8. The People have a duty to preserve the integrity of evidence collected. *People v. Greathouse*, 742 P.2d 334, 337 (Colo. 1987). Indeed, one of the most important duties of the prosecution in a criminal case is to "...**promulgate and enforce rigorous and systematic procedures designed to preserve all discoverable evidence gathered in the course of a criminal case.**" *People v. District Court of Colorado's Seventeenth Judicial District*, 793 P.2d 163, 167 (Colo. 1990) (emphasis added).

9. Regarding the prosection's duty to preserve and protect evidence, one commenter noted:

> "The prosecutor has two essential responsibilities when it comes to scientific evidence. First, he is responsible for ordering testing of this evidence, which includes determining the type of testing, how much testing is necessary, and whether certain evidence will be tested at all. Second, and perhaps more importantly, he is responsible for preserving evidence." Kathryn Kelly, *Prosecutor's Role and Ethical Responsibilities with Regard to the Testing of Scientific Evidence*, 25 Geo. J. Legal Ethics 609-610 (2012); see also § 8.3.State's duty to collect and preserve evidence, 14 Colo. Prac., Criminal Practice & Procedure § 8.3 (2d ed.) citing LaFave, et al., 4 Criminal Procedure § 20.6(b), n.54 (2d ed.).

10. The prosecution's failure to protect and preserve evidence is sufficiently egregious to incur the suppression of the evidence or other sanctions under the exclusionary rule, a sanction reserved for the most severe violations of the defendant's right. "[W]hen evidence can be collected and preserved in the performance of routine procedures by state agents, the failure to do so is tantamount to suppression of the evidence." *People v. Braunthal*, 31 P.3d 167, 172 (Colo. 2001); *Greathouse*, 742 P.2d 334.

THE WORK PRODUCT DOCTRINE ACTS AS A BAR TO OVERREACHING DISCOVERY REQUESTS

11. The work product doctrine exists as a bar to discovery and "...shelters the mental processes of the attorney," *U.S. v. Nobles* 422 U.S. 225, 239 (1975).

12. Most frequently, the prosecution invokes the work product doctrine in an effort to prevent discovery of their private notes, strategies, research, and other thoughts in preparation of a criminal case. *See District Court of El Paso County,* 790 P.2d at 335. The Colorado Rules of Criminal Procedure have even gone so far as to codify a

prosecutorial work product "privilege." *Id.;* Crim.P. 16 (I)(e)(1). However, when the prosecution's work product contains discoverable information, the court is eventually called in to ensure the propriety of the disclosure or non-disclosure of the information. *Id.* Indeed,

> Resolution of discovery issues, including the determination of what material is work product and therefore not discoverable, generally is committed to the sound discretion of the trial court.

Id.; see Bond v. District Court, 682 P.2d 33, 40 (Colo.1984); *Neusteter v. District Court,* 675 P.2d 1, 4 (Colo.1984); *see also* Annotation, *Right of Accused in State Courts to Inspection or Disclosure of Evidence in Possession of Prosecution,* 7 A.L.R.3d 8, § 5(a) (1966 & Supp.1989) (citing cases).

13. The trial court's determination of that issue will not be overturned on review absent an abuse of discretion or infringement of the constitutional rights of the accused. *District Court of El Paso County,* 790 P.2d at 335.

ANALYSIS AND ARGUMENT

14. As a preliminary issue, the People believe the defendant should be given access to the physical evidence held by the La Plata County's Sheriff's office. As noted above, they have a "right to access" the evidence and the State has never attempted to block their access to the evidence.

15. However, as also noted above, the People have a solemn and binding obligation to protect the integrity of the evidence in the matter. The State has sought to live up to this obligation by seeking to "promulgate and enforce rigorous and systematic procedures designed to preserve all discoverable evidence gathered in the course of a criminal case." *See District Court of Colorado's Seventeenth Judicial District,* 793 P.2d at 167.

16. One of the rigorous and systematic procedures designed to preserve the integrity of the discoverable evidence in criminal cases is that when a defendant seeks to conduct an evidence viewing, law enforcement routinely extend an invitation to the prosecution team to be present. This is done in order to live up to the People's mandate to protect the integrity of the evidence. This has been the precedent in this jurisdiction for decades, has never resulted in constitutionally infirm outcomes in the past, and is certainly no surprise to defense counsel.

17. Now, the defense is attempting to reframe the issue to create a dilemma for the prosecution. If we relent and allow them unfettered access to the evidence, we cannot ensure the integrity of the evidence, thus jeopardizing the People's ability to successfully prove the case and failing to protect the rights of the defendant (as noted

in *Braunthal*, such a failure is "...tantamount to suppression of the evidence."). However, if we live up to our obligation to protect the evidence, they would claim we are compromising their ability to protect their work product and provide effective assistance of counsel.

18. The duty to preserve evidence is rooted in protecting the defendant's right to utilize all the evidence the state has collected, both inculpatory and exculpatory, in order to assist in preparing a defense, for post-conviction proceedings, and again in a re-trial if such a situation should come to pass. Similarly, the People have a strong interest in protecting the evidence as it forms an integral part of their ability to prove the case beyond a reasonable doubt. Thus, protecting the integrity of the evidence is a bedrock principle of the criminal justice system and serves both parties in a criminal case.

19. Because of the People's burden of proof and duty to collect the evidence in the first place, as well as their increased ability to protect and preserve it, the burden of protecting the evidence rightfully falls on the State's shoulders. Were the opposite true, i.e. if the defendant were burdened with protecting the evidence against him, the outcome would be absurd. The defendant has the opposite interest of the State, and the weaker the evidence against him, the stronger his position in the proceedings. The situation would be rife with incentive for the defendant to compromise, alter, or destroy the evidence against him.

20. In essence, this is what the defendant is requesting. The defendant's request for unfettered access to the State's evidence is akin to the parable of the fox guarding the henhouse. It is true that defense counsel has an ethical duty to not destroy or alter physical evidence, and the People do not assert that defense counsel would intentionally destroy or alter the evidence. However, the burden to truly protect and preserve the evidence rightfully falls on the People, not defense counsel (whose main duty is to act in his client's interests, not the State's).

21. Even an unintentional act can have dire consequences for the integrity of the evidence. For instance, in this very jurisdiction, in the case of *People v. Tommy Lee Mitchell*, La Plata County case 12CR165, during an evidence viewing, defense counsel demanded that DNA swabs be removed from their protective packaging so they could be inspected. This obviously endangered the integrity of the evidence and exposed it to significant risk of contamination, but was clearly justified in the defense attorney's mind as part of a thorough investigation. Thankfully, a member of the prosecution team was present and refused to allow the requested inspection. This is just one example of a myriad of possibilities justifying the presence of a prosecutor during a defense evidence viewing.

22. The defense request to have an evidence technician present for the viewing is insufficient to protect the integrity of the evidence. An evidence technician is not trained in the intricate and nuanced legal issues that may arise during a private defense evidence viewing and not prepared to anticipate and prevent the myriad of

unforeseeable ways in which the integrity of the evidence may be assailed, even unintentionally.

23. Not only is this a dangerous idea, but it is unjustified and unnecessary. The work product doctrine is generally a principle that prevents an overreaching discovery request. However, here the defense attempts to exaggerate what the work product doctrine requires to justify their overreaching discovery request. As noted by the defense, all the work product doctrine requires is a "zone of privacy" for defense counsel to work freely. The People are happy to provide defense counsel with a "zone of privacy" during their supervised evidence viewing, wherein they are free to discuss and debate work product among themselves. Or they could simply talk in low voices or use written communication. Moreover, defense counsel is free to inspect all the evidence, or whatever portion of it they choose, in an attempt to hide their intentions regarding which pieces of evidence they consider most important. *See U.S. v. Horn*, 811 F.Supp 739 (D.NH. 1992); *D-111*, §3, ¶7.

24. As stated above, it is notable that the defense failed to cite any statue case or authority to justify the position that they have a right to a private evidence viewing. It is notable because no such authority exists in Colorado law (or elsewhere, based on the People's research). Again, the People do not dispute their right to access the evidence, only that the work product doctrine justifies private and unfettered access to the State's critical physical evidence.

25. The defendant's analogy to the Adam Walsh Act is misplaced. In that situation, digital evidence is copied, and defense inspection of the copy is allowed, provided that the evidence remains within law enforcement custody. The Act merely places a prohibition on the *discovery* of the illicit material to the defendant or his counsel. As such, the Adam Walsh Act is inapplicable.

26. The Sixth Amendment's right to the effective assistance of counsel includes an entitlement to "...no more than a thorough investigation, limited by reasonable professional judgments." *Baltazar*, 241 P.3d at 944; *Strickland v. Washington,* 466 U.S. 668, 690, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Crim.P. 16(I)(d)(1) allows the Court to authorize discretionary disclosures if the defense shows that its request is reasonable; final determination of the reasonableness of the request, rests in the discretion of the trial court. *People v. District Court of El Paso County*, 790 P.2d 332, 338 (Colo. 1990) (emphasis added).

27. Here, the People are requesting that the Court exercise its reasonable professional judgement and deny the defendant's request for a private and unfettered access to the People's physical evidence as unreasonable. Their premise is faulty; the work product doctrine does not justify the requested relief, and is inferior to the State's duty to protect the integrity of the evidence and the rights of both parties. The People can both be present to protect the evidence and allow the defense sufficient privacy to conduct their investigation.

WHEREFORE, the People seek an order denying the defense requests in D-111.

Respectfully submitted this April 24, 2019.

CHRISTIAN CHAMPAGNE
DISTRICT ATTORNEY
6th JUDICIAL DISTRICT

/s/ Christian Champagne
Christian Champagne #36833
District Attorney

CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2019, I delivered a true and correct copy of the foregoing to the parties of record via e-service.

/s/ Christian Champagne
Christian Champagne