DISTRICT COURT, LA PLATA COUNTY, COLORADO 1060 East Second Avenue Durango, Colorado 81301	DATE FILED: September 20, 2018 9:32 AM FILING ID: A3FD52CBD800D CASE NUMBER: 2017CR343
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff, v. MARK REDWINE, Defendant	σ COURT USE ONLY σ
Douglas K. Wilson, Colorado State Public Defender John Moran, Attorney No. 36019 Justin Bogan, Attorney No. 33827 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

[D17]

OBJECTION TO PEOPLE'S MOTION FOR SCENE VIEW (P-3)

Mr. Redwine objects to the prosecution's extraordinary request that the jury be allowed to be brought onto private property to see the condition of the premises as it is today and geographical features - more than five and a half years after D.R. went missing. There is an abundance of photographs taken shortly after D.R. disappeared, and video which together show the set-up, dimensions, furnishings, tools, appliances, lighting, lack of blood or any other evidence of violence. There are multiple videos of the path being walked from the house to the sites where remains were found. For a variety of reasons, Mr. Redwine objects as the Prosecution's request is inappropriate and has an enormous potential to unfairly prejudice Mr. Redwine, waste the time of the jury and the Court, possibly endanger jurors, to confuse the issues, risk decision-making on evidence not presented at legal proceedings and deny Mr. Redwine a public trial. The prosecution has not and cannot demonstrate a compelling justification for the extraordinary relief it seeks. Appellate review of this Honorable Court's denial of the request would be reviewed for abuse of discretion. Any potential problem occurring as a result of this extraordinary request would almost certainly be structural error.

I. Facts

The prosecution filed a pretrial motion to allow the jury to view scene where the victim's body was discovered. (CF, p.105-07) The motion claimed that

> The spatial relationship and proximity to the [B's] home of the area where the body was found cannot be adequately depicted and appreciated by the diagram or photographs. The jury would benefit from the ability to view the home, location of the body, and the path/s most likely taken to dispose of the victim.

(Id.)

II. Argument & Authorities

1. It is well established that a court properly denies a motion for a jury view where the evidence of the condition is apparent through other means, such as photographs, diagrams, videos, exemplars, maps or models and witness testimony. *See eg United States v. Chiquito*, 175 Fed. Appx. 215, 217 (10th Cir. 2006); *King v. Emerson Elec Co*, No. 93-3355, 1995 U.S. App. (10th Cir. 1995); *United States v. Sanford*, 173 Fed. Appx. 943, 948 (3rd Cir. 2006); *Auto Owners Ins Co v. Bass*, 684 F.2d 764, 769 (11th Cir. 1982) (trial court properly refused jury view of fire scene when trial was 16 months after the fire and photographs taken shortly after the fire depicted the scene). There are many photographs, plenty of videos and an abundance of firsthand witnesses that will more than adequately depict the scene.

2. Moreover, a court is also within its discretion in denying a motion for jury view when the scene no longer depicts the facts at the time of the incident over which the jury is the fact finder. *United States v. Crochiere*, 129 F.3d 233, 236 (1st Cir. 1997); *see also United States v. Culpepper*, 834 F.2d 879, 883 (10th Cir. 1987) (trial court properly refused jury view because the condition of the scene had changed and photographs were available). The house has sat empty. It has been repeatedly vandalized and it has been foreclosed upon since 2012. The degree to which the

scene has changed is simply unknown and may not be known until it is too late and the jury has been confused by viewing a scene that no longer depicts relevant facts.

3. One of the key considerations is whether the jury view would confuse jurors or be logistically difficult. Crochiere, 129 F.3d at 236. District Attorney Champagne's request presents both problems. The house is at least an hours' drive from the nearest court house, a court house which incidentally should not be used because it would deny Mr. Redwine a fair trial. See[D11] Motion for Change of Venue. There is no way to control what would be seen by the jury covering that vast distance. The current trial setting raises the risk that there would be inclement weather along the way. The neighbors around Mr. Redwine's home are hostile to him. They would be within their rights under the First Amendment to make their opinions known by way of placard or protest.

4. In District Attorney Champagne's motion for a scene view he cites four Colorado cases addressing scene view. People v. Cisneros, 720 P.2d 982, 984 (Colo. App. 1986)(credibility of witness on matters related to distance does not necessitate scene view where defendant could provide diagram or measurements showing distances); People v. Favors, 556 P.2d 72, 75-76 (Colo. 1976)(scene view not necessary where other means of exemplifying matter available); Day v. People, 381 P.2d 10, 12 (Colo. 1963)(scene view would have to resolve disputed fact); People v. Garcia, 981 P.2d 214, 218 (Colo. App. 1998)(movant could obtain needed evidence through alternative means such as photos of a re-creation of the scene, and movant already had the services of an investigator who took photographs). In each case the request for scene view was denied. The need for scene view in each case was legally and factually weightier as they were requests from defendant's predicated on the right to due process.

5. District Attorney Champagne proposes going to the scene to show: 1) animals could not have moved the remains as Mr. Redwine suggested; 2) D.R. could not have walked to the sight where remains were found because it is 1.52 miles to 5.7 miles from the house and 1,500 feet of elevation gain. The distances a jury would view would have no impact on the behavioral science issues on predators or scavengers moving the remains. Diagrams, maps and common sense are sufficient on the issue of whether D.R. walked a steep incline or along a dirt road. Moreover, law

enforcement officials walked the incline and can describe the experience. The law enforcement official who took the walk filmed it. Mr. Redwine filmed and posted himself doing the steep 1.52 mile walk.

6. The prosecution proposes having the La Plata County Sheriff's Office provide "transportation, and provisions for all involved." Mr. Redwine objects to a party to the case transporting jurors and giving them snacks.

7. Lastly, Colorado courts have recently viewed with increasing disfavor and deeming it structural error the practice of excluding the public by closing a courtroom. **People v. Hassan**, 351 P.3d 418 (Colo. 2015); **In the Interest of G.B.**, 2018 WL 2436823, Ct. of App. May 31, 2018); **People v. Hassan**, 351 P.3d 418 (Colo. 2015). The United States and Colorado Constitutions guarantee a criminal defendant the right to a public trial. U.S. Const. amends. VI, XIV; Colo. Const. art. II, § 16. Violation of this right is a structural error requiring reversal without any showing of prejudice. **See, eg, Neder v. United States**, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); **Waller v. Georgia**, 467 U.S. 39, 49, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). Going in Sheriff's Office vehicles to Middle Mountain would not be something Mr. Redwine's family or the public could join in on. The prosecution has not offered the services of the Sheriff's Office to transport the public but if such an offer were forthcoming Mr. Redwine would object.

8. To close a courtroom or exclude the public without violating a defendant's public trial right, four requirements must be met. **Waller v. Georgia**, 467 U.S. 39, 49, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). First, "the party seeking to close the [proceeding] must advance an overriding interest." **Hassan**, ¶ 9 (quoting **Waller**, 467 U.S. at 48, 104 S.Ct. 2210). Second, "the closure must be no broader than necessary to protect that interest." **Id.** (quoting **Waller**, 467 U.S. at 48, 104 S.Ct. 2210). Third, "the trial court must consider reasonable alternatives to closing the proceeding. **Id.** And fourth, the trial court "must make findings adequate to support the closure." **Id.** (quoting **Waller**, 467 U.S. at 48, 104 S.Ct. 2210). The prosecution is not able to make the necessary showing because there is no overriding interest particularly where historically adequate means of proof are available.

9. "Allowing the public access to all aspects of a criminal trial 'enhances the quality and safeguards the integrity of the fact-finding process, with benefits to both the defendant and to society as a whole.'" **Sarasota Herald-Tribune v. State**, 924 So. 2d 8, 12 (Fla. Dist. Ct. App. 2005) (quoting **Globe Newspaper Co. v. Superior Court**, 457 U.S. 596, 606 (1982)).

10. Furthermore, "[w]hen the media attends a trial and reports on the proceedings, a larger segment of the public is afforded this important access.

> The open trial thus plays as important a role in the administration of justice today as it did for centuries before our separation from England. The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that **anyone** is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system. Richmond Newspapers, Inc. v. Virginia, 448 U.S. at 569–571, 100 S.Ct. 2814."

Press-Enter. Co. v. Superior Court, 464 U.S. 501, 508 (1984).

11. Violation of the right to a public trial is a structural error and requires reversal without a showing of prejudice. **Neder v. United States**, 527 U.S. 1, 8 (1999); **Waller**, 467 U.S. at 49. However, "[d]efendants in Colorado affirmatively waive their right to public trial by not objecting to known closures." **Stackhouse v. People**, 386 P.3d 440, 446 (Colo. 2015). "This has been the law in Colorado since [the supreme court] decided **Anderson** in 1971." **Id.** at 443 (citing **Anderson v. People**, 490 P.2d 47, 48 (1971)).

12. An attorney's failure to object to a courtroom closure may constitute ineffective assistance of counsel. **See, eg, Johnson v. Sherry**, 586 F.3d 439, 446-47 (6th Cir. 2009) (remanding for federal district court to hold an evidentiary hearing on whether defense counsel's failure to object to a courtroom closure was deficient performance, and holding that if so, then prejudice would be presumed); **Owens v. United States**, 483 F.3d 48, 63-64 (1st Cir. 2007) (defense counsel's failure to notice or object to a courtroom closure may show that his or her performance fell below an objective standard of reasonableness; "On the record before us and without the benefit of an evidentiary hearing, we do not see how the failure to object to the closure could have been sound trial strategy.").

III. Conclusion

13. Ultimately, such a procedure would be an enormous undertaking, consume a great deal of time, involve serious safety risks and presents a substantial risk of undue prejudice and confusion. The prejudice involves Mr. Redwine's Constitutional protections and threatens structural error in what will prove to be a complicated trial. On the other hand, not only is the condition of the scene available for the jury in the form of photographs, diagrams, maps, common sense and witness testimony, without the myriad attendant potential disasters. Since the alternative evidence better represents the conditions of the scene closer in time to the disappearance, a jury view presents a variety of risks that the jury will be confused or prejudiced, and the logistics of such an extraordinary procedure would involve substantial danger, consume a great deal of time and expense, the Court should deny District Attorney Champagne's motion in its entirety. If what he has proposed goes perfectly an appellate court would apply an abuse of discretion standard to reviewing this decision. Should something relatively foreseeable come up it would almost certainly be structural error requiring reversal and further drawing out the expense and burden of this case. Denying the request because it serves negligible utility at best will also be reviewed for an abuse of discretion.

WHEREFORE, Mr. Redwine makes this motion pursuant to the Due Process, Trial by Jury, Right to Counsel, Equal Protection, Cruel and Unusual Punishment, Confrontation,

Compulsory Process, Collateral Estoppel, Double Jeopardy, Right to Remain Silent and Right to Appeal Clauses of the Federal and Colorado Constitutions, and the First, Fourth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitutions and Article II, Sections 3, 6, 7, 10, 11, 16, 18 20, 23, 25 and 28 of the Colorado Constitution.

Respectfully submitted,

/s/ John Moran
John Moran, No. 36019
Deputy State Public Defender
Dated: September 20, 2018

/s/ Justin Bogan
Justin Bogan, No. 33827
Deputy State Public Defender
Dated: September 20, 2018

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I hereby certify that
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/s/ John Moran
/s/ Justin Bogan