

DISTRICT COURT, LA PLATA COUNTY, COLORADO Court Address: 1060 E. Second Ave., Durango, CO 81301 Phone Number: (970) 247-2304	DATE FILED: July 3, 2019
Plaintiff:       PEOPLE OF THE STATE OF COLORADO v. Defendant:     MARK ALLEN REDWINE	▲ COURT USE ONLY ▲
	Case Number: 17CR343
ORDER REGARDING THE DEFENDANT’S MOTION FOR RELIEF DUE TO THE STATE’S DESTRUCTION AND ALTERATION OF PHYSICAL EVIDENCE (D-117)	

The defendant is charged with murder in the second degree and child abuse resulting in death in relation to the death of the defendant’s thirteen-year-old son, Dylan. During the investigation, law enforcement recovered a partial cranium that was later identified through DNA analysis as belonging to Dylan. During the analysis of the cranium by prosecution experts, a rectangular portion of the cranium was removed for DNA analysis. Additionally, a forensic anthropologist identified what appeared to be two unnatural kerf marks in the cranium that appeared to have been created by tools and not natural predation or scavenging. While analyzing the alleged toolmarks, one of the forensic anthropologists unsuccessfully attempted to create a silicon mold of one of the toolmarks. This attempt left a portion of the toolmark covered by silicon in what a defense expert who examined the cranium described as resembling a “snowball in a gutter.”

The defense has filed a motion for sanctions due to the destruction and damaging of the cranium for the reasons stated above and because a semicircular flake of cranium that appeared in early photographs of Dylan’s cranium above one of the alleged toolmarks is not present in

subsequent photographs of Dylan's cranium. The parties stipulated that the hearing would be conducted based upon offers of proof and upon the motion and response filed with the Court. During the argument concerning this motion on June 26, 2019, it was suggested to the Court that the Court look at the photographs of the cranium when ruling upon the motion. Neither side filed exhibits with their motions. The only photographs of the kerf marks that the Court has seen was embedded in the prosecution's response to the motion. While the defense offered to allow the Court to examine additional photographs of the cranium, if the Court so desired, at the time of the hearing the Court did not know what photographs had already been made part of the record, nor does the Court believe it appropriate or fair to inform either side of a lawsuit as to whether that side has presented enough evidence to convince the Court of its position. The Court has therefore only seen figure 1 and figure 2 on pages 2 and 4 of the prosecution's response to the motion.

The failure to preserve evidence exculpatory to the accused is a violation of the due process clause of the Fifth and Fourteenth amendments of the United States Constitution.

*California v. Trombetta*, 467 U.S. 479, 104 S. Ct. 2528, 81 L.Ed.2d 413 (1984). In order to establish a constitutional violation, the defendant must establish:

1. evidence was suppressed or destroyed by the prosecution;
2. the evidence possessed an exculpatory value apparent before it was destroyed; and,
3. the defendant cannot obtain comparable evidence by other reasonably available means.

*People v. Humes*, 762 P.2d 665, 667 (Colo. 1988), citing *People v. Greathouse*, 742 P.2d 334 (Colo. 1987).

With regard to the two kerf marks that the prosecution alleges were toolmarks, one of the two kerf marks still exist in substantially the same condition as when the cranium was originally

recovered. The Court has not been presented with any information or argument why it is material to the defense case that **both** kerf marks be in substantially the same condition as when the cranium was first found. The reasons for the change of appearance of one of the two toolmarks has not been explained to the Court.

While the defense hypothesis in its motion that the “. . . forceful application of liquid silicone into and around the markings in question, and then the forcible removal of the mold therefrom . . .” (D-117, para. 5, p. 2) caused the changes in one of the kerf marks, the defendant has not provided the Court with any evidence or expert opinion to support such a hypothesis. According to paragraph 9 on p. 3 of the prosecution’s response to the motion, the molding of such kerf marks is standard practice by one of the prosecution’s experts that she has used for decades without damage to the material being tested. According to the prosecution’s offer of proof at the hearing on June 26, 2019, silicon molding of kerf marks in bone is “. . . a well-recognized practice. . .” in the field of forensic pathology. There has been absolutely no evidence alleged to exist that the liquid silicon was forcefully applied and then forcibly removed other than the allegation in the defendant’s motion.

The cranium had apparently been outside exposed to the elements in a mountainous environment from November of 2012 when Dylan disappeared until it was found in November of 2015. The Court has not been presented any evidence as to whether the changes in one of the two kerf marks was due to natural processes that continued after the cranium was recovered from being exposed to harsh elements for three years or due to the application of silicon into the kerf marks or due to mishandling of the cranium by prosecution and/or its experts.

Over 100 photographs were taken of the cranium and those photographs, along with the current condition of the cranium, have been sufficient for successive experts to reach the same

opinion as earlier experts that the kerf marks were caused by a sharp instrument. See the prosecution's response, para. 17, p. 4. There has been no showing to the Court that the silicon that remains in one of the two kerf marks in any way prevents defense experts from rendering an expert opinion as to whether the kerf mark was caused by a tool as opposed to natural processes. The Court cannot find that the remaining silicon obscures a significant portion or all of the kerf mark. If the remaining silicon does obscure enough of the kerf mark to require its removal by the defense so a defense expert can render an opinion, the defense can file an appropriate motion and the issue can be litigated.

As to the alleged semicircular flake that the defense argues is present in the first photograph of the cranium but not in the second photograph as they appear in the response to the motion, the Court has not been presented with any argument or offer of proof as to why such flake is material evidence that is necessary for the defense. In addition, the prosecution disputes that such a flake is missing from the cranium, or if it exists at all, arguing that the photographs were taken with different lighting and from different angles which may explain the discrepancies between the two photographs. There two photographs in the record that are alleged to depict the two kerf marks in question. While the two kerf marks are obviously visible in figure 1, the photograph depicted in figure 2 was taken at a different angle and with a different magnification or from a different distance to the cranium. With these differences in the two photographs, the Court is unable to discern the two kerf marks at issue in figure 2. The Court does see in figure 1 the semicircular flake the defense mentioned in its oral argument and also sees a small bony protrusion in Figure 2 which may or may not look semicircular from a different angle and/or a different magnification. For the same reasons stated above, the Court cannot tell if the changes in the two photographs are due to natural deterioration of the cranium due to being exposed to

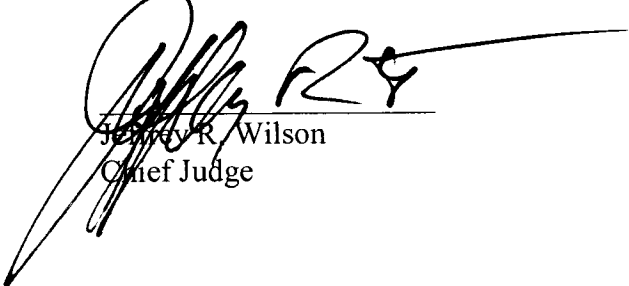
the elements for three years or due to the actions of the prosecution and/or their experts or whether there is any material change to the cranium at all.

Finally, the defense argues that the rectangular portion of the cranium that was removed was a violation of the defendant's due process rights. Initially, the Court notes that the materials that were removed, although crushed, have not been consumed. A segment of the crushed portion of the cranium was used by the State to identify the cranium as being Dylan's through DNA analysis, and according to the offer of proof, a sufficient amount of crushed remains exist to allow the defense to conduct its own DNA analysis. The defense argued at that hearing on June 26, 2019, that there were markings of interest on the portion of the cranium that was removed for DNA testing that cannot be analyzed. The defense made the assertion that this area contained scavenger marks by the defense's examination of photographs that were taken before the portion of Dylan's cranium was removed for testing in 20016. According to the prosecution's response, that area chosen for DNA testing was determined by a forensic anthropologist "[t]o minimize the effect of the DNA sample necessary for testing. . . ." Prosecution's response, para. 10, p. 3. The prosecution also argued at the hearing on June 26, 2019, that significant other evidence of scavenging and/or predation continue to exist on the cranium. Based upon the offers of proof, the Court finds that the defense has not shown that the removal of a portion of the cranium for DNA testing has deprived the defense of evidence due to the photographic record that exists, and even if such evidence has been lost or destroyed, the defense has not shown that such evidence was material to the defense.

For the foregoing reasons, the defendant's motion for relief due to the State's destruction and alteration of physical evidence (D-117) is denied in its entirety.

DONE this 3<sup>rd</sup> day of July, 2019.

BY THE COURT:



Jeffrey R. Wilson  
Chief Judge