DISTRICT Court, LA PLATA County, Colorado 1060 E 2nd Ave, Durango, CO	DATE FILED: May 3, 2019 5:16 PM FILING ID: D042BF4947755 CASE NUMBER: 2017CR343
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff, v. MARK REDWINE, Defendant	COURT USE ONLY
Megan Ring, Colorado State Public Defender Justin Bogan #33827 John Moran #36019 Deputy Public Defender 175 Mercado Street, Suite 250 Durango, Colorado 81301	**Case No. 17CR343** **Division : 1**
REPLY TO PROSECUTION'S RESPONSE TO D-111 PUBLIC ACCESS	

1. As the prosecution concedes in paragraph one of their motion, the attorneys for the prosecution were not invited by defense counsel to defense counsel's investigation and attempt to view physical evidence on March 20, 2019. The elected District Attorney was invited by Captain Ezzell, without the consent of defense counsel and without the Captain even providing notice to defense counsel. Over the course of this case the prosecution has collected, viewed, transported, and discussed physical evidence with law enforcement and their experts – defense counsel has not been invited by the prosecution nor law enforcement to any of those events.

2. Mr. Champagne's comparison of Mr. Bogan to a dog that "barked" in Mr. Champagne's face is patently false, offensive and a view into the prosecution's efforts to weaponize it's presence during defense counsel's investigation.

3. Mr. Champagne's statement about the color of Mr. Bogan's skin illustrates why he should not be in the room and impeding defense counsel's investigation.

4. Mr. Champagne has impeded defense counsel's investigation interfering with Mr. Redwine's right to present a defense.

THE PARTIAL CRANIUM

5. The prosecution avers, and the defense does not contest, that the partial cranium in this matter is a sensitive and precious piece of evidence.

6. Defense Counsel will approach it as such notwithstanding the treatment it has received in the hands of the state.

7. All the prosecution's experts who have examined the partial cranium have taken notice of the abundant evidence of damage caused to the cranium by animals. The partial cranium therefore is exculpatory evidence favorable to the Defendant in this matter.

8. After the partial cranium was discovered, it was transported to Headquarters of the La Plata County Sheriff's Department to be photographed. The next day, it was transported to Dr. Mulhern's office at Fort Lewis College for examination. Three days after that it was checked into evidence at the La Plata County Sheriff's Department. The day after, it was then transported to Colorado Bureau of Investigation (hereinafter "CBI"). CBI refused to accept the partial cranium apparently based on sloppy record-keeping by La Plata County Sheriff's Department and it was returned to the Sheriff the next day. Seven days after that it was transported to Ft. Collins, Colorado to Dr. France's office. It was transported back to the La Plata County Sheriff's Department the next day. Four days after that, it was transported back to Ft. Collins to Dr. France. Two days later it was transported back to the Sheriff's Department. Six days after that, it was again transported to Ft. Collins, where Dr. France then tried, and failed, to make a cast and mold of the cranium. Captain Ezzell then transported the cranium from Ft. Collins to Ft. Worth Texas - this took three days - where he delivered it to University of North Texas Center for Human Identification ("UNTCHI"). The cranium remained with UNTCHI for almost six months. The team at UNTCHI cut a 2 ½ inch x 1 ½ inch rectangle out of the cranium and pulverized it for DNA testing. See Exhibit A. Captain Ezzell picked up the cranium and transported it back to the Sheriff's Department almost six months after he dropped it off. The same day it was returned, Investigator Golbricht released it to Dr. Mulhern at Fort Lewis College. The cranium was returned to Investigator Golbricht a week later. Investigator Gabbard then hand delivered the cranium to the Federal Bureau of Investigation in Quantico, Virginia, seven months later. The cranium was accepted back into evidence three months after the F.B.I. took possession of it though Investigator Golbricht had concerns about how it was packaged and shipped. Roughly six months after that, the cranium was examined by prosecution endorsed expert Dr. Kurtzman at the Colorado Mesa University Forensic Investigation Research Station while Captain Ezzell observed.

9. The cranium, at the behest of law enforcement and the prosecution, traveled through no less than ten states and traveled no less than 3600 miles. It has been repeatedly examined, photographed, x-rayed, molded, cast, cut, and pulverized. None of the prosecutors attended any of the examinations nor transports of the cranium described above, despite their declared duty to preserve evidence. As noted in D-111, the only damage and alteration to the skull resulted at the hands and direction of prosecution agents and experts.

REPLY TO THE PROSECUTION'S POINTS AND AUTHORITIES

10. The Prosecution starts its analysis by relying on case law discussing a defendant's right to discovery. This issue at bar is not about access to discovery nor any request for discovery. The issue before the Court is the right of Mr. Redwine's counsel to conduct our own investigation and analysis of the evidence in this matter without opposing counsel watching our investigation and bearing witness to our thoughts, theories, strategies and work product.

11. The Prosecution proclaims that Mr. Redwine does not have a constitutional right to discovery, but cites Brady v. Maryland, 373 U.S. 83 (1963) in their pleading. The United States Supreme Court was clear in its holding that when **the prosecution withholds information favorable to the Defendant that speaks to guilt or punishment, that it is, in fact, a Constitutional violation**:

> We agree with the Court of Appeals that suppression of this confession was a violation of the Due Process Clause of the Fourteenth Amendment. Id at 86. We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Id. at 87.

12. The Prosecution also relies upon Pennsylvania v. Ritchie, 480 U.S. 39, to draw an analogy between Mr. Redwine's attorneys seeking to view evidence without prosecution attorneys watching them and the defendant in Ritchie. In Ritchie, the defendant sought access to the Pennsylvania Department of Youth Services' ("DYS") file on the minor victim of an alleged sex assault. The information sought was in the possession of DYS, and therefore the Supreme Court ruled that the trial court must review the file in camera to determine what if any information the Defendant was entitled. This analogy falls flat and this Court should find it unpersuasive. Mr. Redwine is not seeking access to additional materials - he is requesting that his counsel be able to investigate the physical evidence in this case without the prosecution interfering.

13. The prosecution states in their reply "neither the Due Process Clause nor the Confrontation Clause confer a right to discovery," (citing Weatherford v. Bursey, 429 U.S. 545, 559). Actually, Weatherford states[t]here is no ***general*** constitutional right to discovery in a criminal case, and Brady did not create one . . . Id. 559.

14. Weatherford notes that Brady acknowledges the constitutional right of defendants to favorable information in the prosecution's possession. However, Brady, as Weatherford notes, does not create a general right to discovery beyond information in the prosecution's possession that is favorable to the defendant.

15. The Prosecution, in error relies on People v. District Court of El Paso County, 790 P.2d 332. The issue in that case was whether defense counsel was entitled to portions of the prosecutor's notes documenting a witness interview, and more specifically, what discretionary portions of CRCP 16 would permit disclosure of portions of the notes. The issue of defense access to physical evidence - the issue defense counsel raised in D-111 - was not discussed.

16. The Colorado Supreme Court stated in El Paso that defense was entitled to disclosure based upon three separate parts of CRCP 16. The first portion discussed by the Court was CRCP 16(I)(a)(1). Items under this part of CRCP 16 are subject to mandatory disclosure. This portion of CRCP 16 addresses the physical evidence in this matter in CRCP 16(I)(a)(1)(IV), which mandates the disclosure of "tangible objects" to the defense. The physical evidence held by law enforcement in this matter are tangible objects subject to mandatory disclosure. The rest of the opinion in El Paso, addresses whether the prosecutor's notes are subject to the discretionary discovery portions of CRCP 16. Because the physical evidence in this matter are "tangible objects" subject to mandatory disclosure, defense counsel does not have to request their disclosure and the discretionary language in CRCP 16(I)(d)(1) is not triggered.

17. It is important to note that Defense Counsel is not making a request for discretionary disclosure in D-111. Defense is requesting a protective order that prohibits the Prosecution from bearing witness to our inspection of tangible items subject to mandatory disclosure. Therefore, the Prosecution's argument that our request to exclude them from our investigation is a request for discretionary disclosures subject to this Court's determination of the reasonableness is misplaced. Further, statements such as "the defense attempts to exaggerate what the work product doctrine requires to justify their overreaching discovery request" are off point.

18. The Prosecution outlines, briefly, their duty to preserve evidence in this matter in paragraphs 8 through 10 of their pleading. Again, as addressed in People ex rel. Gallagher v. District Court, 656 P.2d 1287 and People v. Gomez, 596 P.2d 1192; that duty flows from the Defendant's right to inspect and analyze said evidence. The duty to preserve evidence does not act as an admission ticket to observe defense counsel's investigation.

19. Nowhere in the Prosecution's pleading is there any reasonable claim that permitting a prosecutor to be present during defense counsel's inspection of evidence serves any purpose in preserving evidence. Nor does the Prosecution provide the court with any written rigorous and systematic procedure it has promulgated to preserve discoverable evidence. They merely refer to "precedent" without citing precedent, and claim that law enforcement "routinely" invites prosecutors to defense evidence viewing.

20. Likewise, the Prosecution claims, without any documentation or evidence, that "this has been the precedent in this jurisdiction for decades." This statement is without support and

further is devoid of any legal merit – the list of criminal procedures that existed for decades or even centuries that were eventually found to be illegal or unconstitutional is too long to include in this pleading; but prominent examples include: separate but equal, indigent clients being denied the right to counsel and the right to a jury of one's peers regardless of their race. *See* Plessy v. Ferguson, 163 U.S. 537 (1896); Gideon v. Wainwright, 372 U.S. 335 (1963); Batson v. Kentucky, 476 U.S. 79 (1986).

21. Undersigned counsel have inspected evidence at the Sheriff's Department in other serious felony matters and the prosecution did not attend to enforce any rigorous and systematic protection procedures.

22. Further, the Prosecution has not offered any written rigorous and systematic procedures that were followed when the partial cranium was transported from Middle Mountain to Durango to Ft. Lewis College to Durango to Ft. Collins to Durango to Ft. Collins to Texas to Virginia to Durango.

23. In D-111 defense counsel requests that the La Plata County Evidence Technician be present for all evidence viewing by defense counsel. This is to ensure that: (1) there will be a non-party witness present to observe defense counsel not touching the evidence, (2) to enforce the Sheriff's policy that defense counsel is not permitted to touch evidence is enforced.

24. The Prosecution, without any justification, evidence, or reason, is asking this court to assume, that unless prosecutors are present to observe and police defense counsel during evidence viewing, that defense counsel will destroy and alter evidence.

25. This specious speculation is not only unjustified - it is offensive and patently false. The prosecution's argument that "the defendant's request for unfettered access is akin to the parable of the fox guarding the hen house" is a baseless aspersion that should be completely disregarded by this Court and should not act as an excuse for the prosecution to observe defense counsel's investigation.

26. Because the prosecutor arbitrarily attends evidence viewings, has no written protocol regarding this issue, and has not shown up in other cases where undersigned counselors viewed evidence, the claim that his bearing witness to our evidence viewing is necessary part of a rigorous procedure to preserve the evidence is meritless.

27. The Prosecution's recollection of what happened in the *Mitchell* matter, 12CR165, is incorrect and that portion of the Prosecution's motion should be subject to a testimonial hearing if this Court believes at another pending matter in La Plata District Court, carries any precedential weight in this motion. In the *Mitchell* matter, defense counsel requested that all the evidence be unwrapped and removed from brown paper bags and boxes so defense counsel could see the evidence. Initially, the Prosecution claimed on the record there was a Colorado Bureau of Investigation policy that would not permit defense counsel to see evidence outside of its packaging prior to forensic testing. CBI had no such policy. Defense Counsel was still denied by the prosecution and law enforcement no less than four times to merely see the evidence. Defense

Counsel in the *Mitchell* matter was expected to investigate the physical evidence in the matter while it remained in its opaque paper packaging.

28. Based on all of the above, and pursuant to his federal and state rights to due process, fair trial, confrontation, effective representation, attorney-client privilege and to a confidential defense investigation, Mr. Redwine moves this Court for an order allowing his attorney and investigator a confidential viewing of the items in evidence in this case, and for a hearing on the matter. Mr. Redwine acknowledged in D-111 the presence of the evidence technician will be necessary.

29. In addition to the authority cited above, Mr. Redwine makes this motion, and all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, on the following grounds and authorities: due process, trial by jury, right to counsel, equal protection, cruel and unusual punishment, confrontation, compulsory process, 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 State Constitution and article II §§ 3, 6, 7, 10, 11, 16, 18, 20, 23, 25 and 28 of the Colorado Constitution.

Respectfully submitted,

/s/ Justin Bogan
Justin Bogan, No. 33827
Deputy State Public Defender
Dated: May 3, 2019

/s/ John Moran
John Moran, No. 36019
Deputy State Public Defender
Dated: May 3, 2019

Certificate of Service
I hereby certify that on May 3, 2019
I served the foregoing document by e-filing
same to all opposing counsel of record.
/s/ Justin Bogan /s/ John Moran