District Court, Teller County, Colorado Court Address: 101 West Bennett Avenue Cripple Creek, CO. 80813	DATE FILED: December 21, 2018 3:14 PM
People of the State of Colorado vs. **Defendant: Patrick Frazee**	▲ COURCCR330RT USE ONLY ▲
Deputy District Attorney: ELIZABETH REED Address: 105 E. Vermijo, Colorado Springs, CO. 80903 Phone Number: 719-520-6000 Attorney Registration #: 35210 District Attorney: Daniel H. May, #11379	Case #: 18CR330 Division #: 11 Courtroom #:

PEOPLE'S RESPONSE TO DEFENDANT'S MOTION FOR PRESERVATION AND PRODUCTION OF LAW ENFORCMENT NOTES, RECORDINGS, AND OTHER EVIDENCE (P-1)

Comes now, the People of the State of Colorado, by and through the Fourth Judicial District Attorney Daniel H. May and his duly appointed Lead Deputy District Attorney Elizabeth Reed, and hereby respond to the Defendant's Motion for Preservation and Production of Law Enforcement Notes, Recordings, and Other Evidence, as follows:

1. The People understand the provisions of Rule 16 of the Colorado Rules of Criminal Procedure as these provisions may relate to police notes and recordings.

2. The People will comply with the Rule and associated case law regarding discovery.

3. The People have no objection to the preservation of police notes and recordings.

4. The People will provide police notes, recordings and dictation recordings upon further request from the Office of the Public Defender as agreed upon by Deputy State Public Defender Office Supervisor Rosalie Roy.

5. However, the People object to the Defendant's overbroad and unreasonable request for preservation and production of "emails, text messages, instant messages, and any other correspondences, whether in paper or electronic form" as requested in Paragraph 3 of his motion.

6. The material and information that a prosecutor is obligated to provide to the Defendant is defined under Crim. P. 16 Part I (a). The method and timing of that disclosure is defined under Crim. P. 16 Part I(b), and the disclosure of material held by other agencies is defined by Crim. P. 16 Part I(c).

7. The People are cognizant of the provisions of Rule 16 of the Colorado Rules of Criminal Procedure, and the case law, including *Brady v. Maryland*, 373 U.S. 83

(1963) in support of it. The People have, and will continue to, abide by this important rule.

8. Material not covered by the mandatory disclosure provisions of Rule 16 are subject to discretionary disclosure by the Court. The discretionary disclosure provision of Crim. P. 16(I)(d) provides that the court *may*, in its discretion, "require disclosure to defense counsel of *relevant* material and information not covered by Parts I(a), (b), and (c), upon a showing by the defense that the request is *reasonable*." (Emphasis added.)

9. The issue, then, is not whether the disclosure the Defendant wishes is required, by any constitution, statute, or rule, but rather whether his request for the information is "relevant, reasonable" and should be granted in the exercise of this Court's discretion. In exercising this discretion, the rule provides that,

> The court may deny disclosure authorized by this section if it finds that there is substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or *unnecessary annoyance* or embarrassment, resulting from such disclosure, *which outweighs any usefulness* of the disclosure to defense counsel. (Emphasis added.)

10. First, the Defendant has failed to make any showing that this request is relevant or reasonable for the Court to impose in light of the prosecution's discovery obligations under Rule 16.

11. Furthermore, the Defendant has failed to define what would be included under the catchall phrase "other correspondences." Does this include transcripts from phone calls between attorneys, or between attorneys and witnesses, or attorneys and police officers, etc., voicemail messages on work phones, voicemail messages on personal phones? The Defendant's request is vast in implication, and there has been no reasonable basis presented justifying the production of such items.

12. Even if the Defendant were able to find some basis for this request, preservation and disclosure of these materials would place an enormous "unnecessary annoyance" under Crim. P. 16 Part I (d)(2). The burden placed on the People would far outweigh any purported usefulness to the Defendant pursuant to Crim. P. 16 Part I (d)(2).

13. Further, if the People are ordered to preserve and discover emails, text messages, instant messages and other correspondence, both paper and electronic, the People's ability to effectively prosecute this case will be circumscribed. The amount of communication of this type that passes among members of a homicide prosecution team during the course of a homicide case is enormous.

14. In this era of electronic communication, the preferred methods of communication for the prosecution team are emails, text messages, and instant messages. These communication capabilities also apply to other attorneys, paralegals, secretaries, law enforcement, and investigators that are part of the prosecution team. The sheer volume of messages that are transmitted via email, text, and instant messaging (primarily email) are great in most felony cases, let alone a homicide case. Monitoring and printing out emails would shift focus away from case preparation and strategy. The Prosecution, rather, would spend its energy and focus complying with this expanded disclosure order.

15. Some examples of communication that would be impacted by this request may include something as mundane as an instant message that sets up meeting times for attorneys and staff to walk over to the courthouse for an appearance on this case. A text message may be sent to a Victim Advocate after court to update the Victim family about what happened. An email may be sent to law enforcement to let them know the next court date and make sure they have received subpoenas. The danger for the prosecution, however, is not these routine correspondences, but the release of non-mundane emails, text message, and instant messages that encompass thoughts, opinions, and investigative strategies. The Defendant has shown no reason that he is entitled to the former, and he is clearly not entitled to the latter.

16. Another unnecessary burden involves the People's ability to preserve and disclose some of these communications. An email or instant message can be printed out, however, a text message, a voicemail, and a phone conversation cannot. Various attorneys and staff from the District Attorney's office may be required to subpoena their own text message records in order to produce a written copy to ensure compliance with the Court's current order. Witnesses may need to provide a transcript from a phone call in the event it falls under the heading of other correspondences. Recordings may be required of voice messages. In addition, text messages and voice messages are only preserved for a determinate period, approximately 21 days, and may be deleted before the People can obtain the records. An order that requires disclosure of email, text messages and instant messages would place an unreasonable burden on the People because it is incredibly onerous to comply with.

17. Most importantly, the preservation and disclosure of these materials should be denied because these types of correspondence routinely contain work product.

18. Pursuant to Crim.P.16 Part (e)(1):

> Disclosure *shall not be required of legal research or of records, correspondence, reports, or memoranda* to the extent that they contain the opinions, theories, or conclusions of the prosecuting attorney or members of his legal staff. (Emphasis added).

19. The work product doctrine has evolved through statute, rule, and case law, and is designed to protect an attorney's mental processes reflected in "interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible . . . materials" *People v. Martinez*, 970 P.2d 469, 474-75 (Colo.1998) (*quoting Hickman v. Taylor*, 329 U.S. 495, 511 (1947)). The work product doctrine includes the work of investigators and other agents of counsel. *Martinez*, 970 P.2d at 474.[1]

20. The United States Supreme Court has recognized the importance of the work product doctrine in *Hickman*, 329 U.S. at 510-11, stating that

> [I]t 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 . . . . Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten . . . . Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

21. The People use email, text messages, and the other correspondence the Defendant seeks to have discovered, for precisely the purposes discussed in *Hickman* and *Martinez.* The People, as a matter of business and practice, use these forms of communication with other members of the prosecution team and law enforcement, to deliver opinions or theories about the merits or weaknesses of a case, discuss what happened at court hearings and the possible implications of those court hearings, to discuss the legal pros and cons about proceeding with one prosecution strategy as opposed to another. The work product doctrine in inextricably intertwined with how the prosecution uses these forms of communication.

22. Other El Paso County District Court Judges have considered this very issue and have denied the request. In *People v. Marko*, El Paso County District Court Case Number 08CR4173, the Honorable Judge Schwartz ruled that this was work product. In *People v. Peters*, El Paso County District Court Case Number 11CR615, the Honorable Judge Kennedy denied this same request. In *People v.*

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[1] Law enforcement's "decision making process" is also protected under the "governmental deliberative process privilege." The Colorado Supreme Court recognized this privilege and applied it in *City of Colorado Springs v. White*, 967 P.2d 1042 (Colo. 1998). Thus, deliberative process information and work product communications between the Sheriff's office and the prosecution team, no matter what the form, are not discoverable under Rule 16.

Craighead, El Paso County District Court Case Number 09CR1649, the Honorable Judge Crowder denied this same request except with request to, according to the Court's records "civilian info gathered as part of investigation."

WHEREFORE, the People respectfully request this Court deny the Defendant's motion with respect preservation of emails, text messages, instant messages, and other correspondences, both in paper and electronic form, as an unreasonable burden under Crim.P.16 Part I(d)(2) and as protected work product under Crim.P.16 Part I(e)(1).

Dated: December 21, 2018

/S/: Elizabeth Reed #35210
Lead Deputy District Attorney
(Original Signature on File)

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December , 2018, I mailed a true and correct copy of the foregoing, first class mail, postage prepaid and e-notified through Colorado Courts E-Filing to the following interested party:

Adam Steigerwald, Public Defender's Office

_____

/S/: Karen Johnston
Senior Legal Assistant
District Attorney's Office
(Original Signature on File)

This document has been electronically filed and served via the Integrated Colorado Courts E-Filing System (ICCES). Pursuant to C.R.C.P. 121 §1-26*, the duly signed original remains on file at the Office of the 4th Judicial District Attorney's Office.*