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25 **Attorneys for Defendant**

16 **MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY**

17 STATE OF MONTANA,) Dept. No. 1
18)
19 Plaintiff,) Cause No. DC-14-252
20)
21 -vs.-) **MOTION FOR DUE PROCESS**
22) **IN DEFENSE INVESTIGATION**
23 MARKUS KAARMA,)
24)
25 Defendant.)
 _____)

I. Introduction

Historically in Missoula, Montana the County prosecutor is the gatekeeper disallowing the defense to interview witnesses outside the presence of the State. This pattern and practice impedes a defense investigation by silencing defense investigators and lawyers from revealing too much defense strategy when interviewing witnesses in the State's presence. Specific to this homicide case, the State's actions are impeding the defense investigation; resulting in a violation of due process as well as fundamentally interfering with the duties of the defense, and their preparation for trial.

II. Witnesses

The State's substantial interference with the testimony of its own witnesses can violate the Due Process Clause." *U.S. v. Juan*, 704 F.3d 1137, 1141-1142 (9th Circ. 2013). Witnesses to a crime are the property of neither the prosecution nor the defense. *Gregory v. United States* (D.C. Cir. 1966), 369 F.2d 185, 188. A witness belongs to neither party, and neither party should obstruct the other party's access to witnesses." *State v. Smith*, 235 Mont. 99, 103, 765 P.2d 742, 744 (1988). The prosecution therefore may neither sequester nor insulate witnesses from the defense

1 on his own initiative. *State v. Pecora*, 190 Mont. 115. 190 Mont. 115, 619
2 P.2d173, 1980 Mont. LEXIS 857.
3

4 Under both U.S. Supreme Court and Montana Supreme Court
5 decisions, prosecutors are shielded by immunity, but they are not
6 shielded by absolute immunity for absolutely every function performed in
7 the scope of their duties. When a prosecutor performs the investigative
8 functions normally performed by a detective or police officer, it is neither
9 appropriate nor justifiable that, for the same act, immunity should protect
10 the one and not the other. *Buckley*, 113 S.Ct. at 2616.
11
12

13 "The prosecutorial nature of an act does not spread backwards like
14 an inkblot, immunizing everything it touches." *Imbler*, 424 U.S. at 431
15 96 S.Ct. at 996; *Burns*, 500 U.S. at 492-96, 111 S.Ct. at 1942-45.
16
17

18 In a 1997 case in Montana, Judge Robert Olson of the 9th Judicial
19 District ruled that the State cannot demand to attend defense interviews.
20 In fact, Judge Olson ordered that the prosecution was specifically
21 excluded from participating in or attending defense interviews. *State v.*
22 *Grimes*, 1997 Mont. Dist. LEXIS 918.
23
24

25 In this case, the defense investigator Sharon Parks- Banda has
been thwarted in several ways by the witnesses being advised not to

1 speak with her outside the presence of the prosecutor Andrew Paul.

2 See attached Affidavit of Sharon Parks- Banda.

3
4 The defense has discussed this with Andrew Paul who relies on the
5 witnesses' rights to request the State's presence when being
6 interviewed. However, the subtle yet equally damaging consequence is
7 that, in general, the witness will first meet with a prosecutor prior to being
8 interviewed by the defense. This "preparatory" primer by the State is an
9 insidious poisoning of a witnesses' objectivity and creates an
10 insurmountable bias against the defense. The unsophisticated lay
11 witness concludes the prosecutor is "their" lawyer and the loyalty to the
12 State is difficult to overcome.

13
14 The State further opines that the only reason the defense wants to
15 interview witnesses outside their presence is to "hide the ball" or "play"
16 some sort of cat and mouse game. This attitude that the defense is up to
17 no good may inform a prosecutor's ignorance of what it means to have a
18 fair trial and strong defense.

19
20 Perhaps more common and no less egregious is the police refusal
21 to meet with the defense without a prosecutor present. This has been
22 made clear in this case so far; through unanswered emails, phone

1 messages to the defense investigator to "arrange the interview through
2 Andrew Paul", and surprise appearances by the prosecutor at previously
3 arranged defense interview times.
4

5 This pervasive and accepted practice defies the separation of the
6 duties and responsibilities of both the police and prosecutorial functions.
7 Although the police and the prosecutor may be bound by a fraternal
8 sense of shared vision, neither agency works for the other, is paid by the
9 same entities nor should their friendly alliance impede a defense
10 investigation.
11

12 In fact, Montana statutes expressly require a duty by a peace
13 officer to investigate and disclose all evidence. (MCA § 45-3-112). The
14 law does not require the prosecutor to hold the hands of the police while
15 they meet their statutory requirements.
16

17

III. Duty to Investigate

18 The plain language of MCA § 45-3-112 reads as follows:
19

20 When an investigation is conducted by a peace officer of an incident
21 that appears to have or is alleged to have involved justifiable use of
22 force, the investigation must be conducted so as to disclose all
23 evidence, including testimony concerning the alleged offense and
24

1 that might support the apparent or alleged justifiable use of force.

2 The language of MCA § 45-3-112 is plain and clear on its face. It
3 reinforces the State's burden to disclose all exculpatory and *impeaching*
4 evidence and also puts an additional burden on the peace officer to do
5 the same. This is consistent with the disclosure obligations upon
6 prosecutors and law enforcement officers arising from the *Brady* case. It
7 is consistent with Montana statutory and case law. *State v. Cooksey*,
8 2012 MT 226, 2012 MT 226, 366 Mont. 346,
9 286 P.3d 1174, 2012 Mont. LEXIS 298.

10
11
12
13 The problem arises when the police and/or the State unilaterally
14 decide what is exculpatory and impeachable. The duty of the police is to
15 collect and disclose the evidence/witnesses. It is the duty of the defense
16 to ascertain what may be exculpatory or impeachable. When defense
17 access to witnesses and evidence is impeded, the ability to effectively
18 represent our client is compromised.

19
20
21 On April 28, 2014, a police officer met with a neighbor of Mr.
22 Kaarma, Leslie Wozniak, to discuss four surveillance cameras positioned
23 at the exterior of her residence. The cameras are set up to capture 180
24 degrees from the position of her garage. The officer viewed some

1 footage for about 30 minutes then concluded "After reviewing the video
2 recording, I determined that due to the poor quality and the lack of any
3 light that this video served no evidentiary value."
4

5 The police had an affirmative duty to collect and disclose that
6 surveillance footage to the defense. With current advanced technology,
7 video and audio enhancements can easily render a "poor quality" to
8 something possibly exculpatory.
9

10 **IV. Impending an Investigation**
11

12 MCA § 46-15-330 provides that:

13 "Except as to matters to which discovery is restricted and except as
14 to the defendant's counsel advising the defendant, a party or agent
15 of a party may not discourage or obstruct communication between
16 any person and any party or otherwise obstruct a party's
17 investigation of the case."
18

19 In this case, the only "restricted" discovery are items currently
20 warehoused at either the State Crime Lab or the Police Evidence storage.
21 Access to those items by the defense team has been mostly managed by
22 both parties. There is no trauma induced victim to protect from an
23 aggressive defense investigation. All that is remaining are the many
24
25

1 pieces of the investigative puzzle; primarily witnesses that had no
2 previous alliance with either the deceased nor the Defendant prior to the
3 incident.
4

5 Yet, these "objective" witnesses are being insulated by the
6 prosecution from independent access by the defense.
7

8 The State has continued to hold the reins on defense access to
9 possible exculpatory evidence. On May 30, 2014, counsel and defense
10 investigator met with Andrew Paul, Detective Guy Baker and Property
11 Officer Walt Dinges, to review evidence maintained at the Police
12 Department. Out of 54 items seized, 14 items remained at the Police
13 Department, while 43 had been sent to the State Crime Lab. Currently in
14 evidence is the deceased's cell phone. (Police report #3666, item # 17).
15
16

17 Counsel requested this phone be forensically analyzed for texts,
18 phone calls, media, and video. Counsel requested this phone be
19 fingerprinted. The State advised they would neither analyze the phone
20 nor release it to defense experts to be analyzed. The State professed
21 privacy interests of the deceased. The State's failure to either have the
22 phone analyzed or allow the defense to do so is obstructing and impeding
23 the defense investigation.
24
25

The State and the police are discouraging witnesses from meeting with the defense investigator and in doing so are obstructing Mr. Kaarma's rights to a fair trial and an effective defense.

DATED this 24th day of June, 2014.

ATTORNEYS FOR DEFENDANT

By Lisa B. Kauffman
Lisa B. Kauffman, J.D., M.Ed., C.W.L.S.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 24th day of June, 2014, to:

Hand-Delivered

Andrew Paul
Missoula County Attorney's Office
200 West Broadway
Missoula, MT 59802

By Lisa B. Kauffman)

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2 **Nate S. Holloway**
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27 STATE OF MONTANA,) Dept. No. 1
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31 -VS.-) **AFFIDAVIT OF**
32) **SHARON PARKS-BANDA**
33 MARKUS KAARMA,)
34)
35 Defendant.)
36 _____

37 25

1 STATE OF MONTANA) :ss
2 County of Missoula)
3

4 I, Sharon Parks-Banda, being first duly sworn upon her oath, depose
5 and states as follows:

6 1. I am a licensed, private investigator (PSP-PI-LIC-13899) in the
7 State of Montana, doing business as PBI Security Consultants, Inc.

8 2. I have been retained by the law firm of Paul Ryan &
9 Associates, PLLC, to investigate the facts in *State v. Markus Kaarma*,
10 Missoula County District Court, Cause No. DC-14-252.

11 3. On June 3, 2014, at 3:45 p.m., I met with a witness listed by
12 the State named Tanya Colby at her place of employment, Great Clips,
13 located at 3800 South Russell St., Missoula, Montana. I took notes of our
14 conversation that included significant exculpatory information.

15 4. On June 13, 2014, I contacted Tanya Colby by phone to
16 request a follow up interview to obtain a recorded statement reflecting
17 what she had already explained to me on June 3rd. She scheduled an
18 appointment with me for June 18, 2014.

19 5. On June 17, 2014, I stopped by Great Clips to confirm our
20

1 appointment for the following day, and she advised me that her boss,
2 Heather Vines called her and told her not to speak with me until they
3 spoke with the prosecutor, Andrew Paul.

4
5 6. On June 14, 2014, I traveled to Clinton, Montana, to speak
6 with another witness named Falene Sherbondy, who did not answer the
7 door, so I left my card with a note asking her to contact me.

8
9 7. On June 15, 2014, Falene Shebondy called me at 8:00 p.m.
10 We scheduled an appointment to meet on June 17, 2014 at 10:00 a.m.

11
12 8. On June 17, 2014, at 9:55 a.m., I arrived at Ms. Sherbondy's
13 home, with an intern, Adam Wade, employed by the offices of Paul Ryan
14 & Associates, PLLC. All curtains were closed, a car was in the driveway,
15 but there was no response to our knocking on the door. We attempted to
16 call several times with no response, and eventually left.

17
18 9. On June 18, 2014, I attempted to contact Ms. Sherbondy at
19 her home again, and left an additional message for her to contact me.

20
21 10. On June 9, 2014, I telephoned another witness listed by the
22 State, named Heather Vines, and left a message.

23
24 11. On June 11, 2014, at 4:00 p.m., Ms. Vines returned my call. I
25 requested documentation regarding a list of all employees and customers

1 who may have been present at the Great Clips Salon on the day that Mr.
2 Kaarma was getting a haircut. Ms. Vines explained she had already
3 "downloaded" all the information and gave it to a Detective at the
4 Missoula Police Department.

5 12. To date, the defense team for the Defendant has not been
6 provided with any documents described by Ms. Vines as already
7 "downloaded" to the Missoula Police Department, provided by Great
8 Clips.

9 13. On June 18, 2014, Heather Vines called me and stated that
10 Falene Sherbondy and Tanya Colby had met with the prosecutor Andrew
11 Paul earlier that day. She indicated that "it was decided" that they would
12 all speak to me but only in the presence of Andrew Paul.

13 14. I asked her what prompted the appointment with Andrew Paul,
14 and she stated that the detective told her not to speak to anyone until she
15 had spoken with the prosecutor.

16 15. On June 15, 2014, I received a telephone message from
17 Michael Frellick, a neighbor who lived by Mr. Kaarma, asking me why I left
18 a card requesting him to call me.

1 16. On June 17, 2014, I telephoned Mr. Frellick who indicated he
2 was interviewed by detectives from the Missoula Police Department, and
3 that he would not speak with me.
4

5 17. Later that day, Mr. Frellick telephoned me to explain that he
6 contacted Andrew Paul and would agree to meet with me, but only in the
7 presence of Andrew Paul.
8

9 18. On June 12, 2014, I scheduled an interview with the Missoula
10 Police property clerk, Walter Dinges. Unbeknownst to me, Mr. Dinges
11 had contacted Andrew Paul who appeared at the interview.
12

13 19. Later, Mr. Dinges advised me that Andrew Paul wanted to be
14 included in all conversations with cases that are "this important". I was
15 unable to ask certain questions due to Mr. Paul's uninvited presence.
16

17 20. In the State's disclosure of discovery, there is an interview
18 with a 16 year old eye witness named Dylan Wozniak, and his mother
19 Leslie Wozniak. In the interview, the mother states, "I don't even know if
20 this, w-would be helpful, but, um, we have a surveillance camera on our
21 house and one of the, one of the cameras points, you know, in a certain
22 direction."
23
24

1

2 **CERTIFICATE OF SERVICE**

3

4 I, the undersigned, hereby certify that a true and correct copy of the
foregoing was hand-delivered, this 24 day of June, 2014, to:

5 Andrew Paul
6 Missoula County Attorney's Office
7 200 West Broadway
8 Missoula, MT 59802

9

10 By Sharon Parks-Banda

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