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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH Plaintiff, v. BRIAN SCOTT REID, Defendant.	**DEFENDANT'S OBJECTION TO STATE'S MOTION FOR DISCOVERY AND MEMORANDUM IN SUPPORT** Case No. 151906548 Honorable James Blanch

Brian Reid, by and through counsel, Wojciech Nitecki, hereby objects to points 4, 5 and 6 of the State's Motion for Discovery on the grounds that the requests for "[c]opies of any reports prepared by the defense investigators during the course of the prosecution of this case" and "[c]opie of any reports prepared by defense investigators where the defense intends to call the particular investigator as a witness" violate the attorney/client privilege as defined in Utah Code Ann. § 78B-1-137 and require the disclosure of attorney work product, protected by Utah Rule of Civil Procedure 26(b)(3). In addition, the State's requests in points 4, 5 and 6 violate the defendant's right against self-incrimination as guaranteed to him by Fifth Amendment to the United States Constitution and by Article I, Section 12 of the Utah Constitution.

ARGUMENT

If the defense decides to call one of its investigators to testify at trial and this investigator prepares a report concerning the subject matter of their anticipated testimony, the defense will provide such a report to the State in advance of the jury trial. However, the State's requests in points 4 and 5 are too broad and violate attorney-client privilege. This privilege is codified in section 78B-1-137 of Utah Code Annotated. It states, in relevant part:

> There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate.
> . . .
> (2)An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him or his advice given regarding the communication in the course of his professional employment. An attorney's secretary, stenographer, or clerk cannot be examined, without the consent of his employer, concerning any fact, the knowledge of which has been acquired in his capacity as an employee.

Utah Code Ann. § 78B-1-137(2). In addition:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purposes of facilitating the rendition of professional legal services to the client between the client and the client's representatives, lawyers, lawyer's representatives, and lawyers representing others in matters of common interest, and among the client's representatives, lawyers, lawyer's representatives, and lawyers representing others in matters of common interest, in any combination.

Utah R. Evid. 504(b). At the same time, defense counsel must disclose to the prosecutor "evidence which the court determines on good cause shown should be made available[,]" "[e]xcept as otherwise provided or as privileged." See Utah R. Crim. P. 16(c) (emphasis added).

The information which the State is requesting from the defendant would require the violation of the attorney/client privilege because it would likely have emanated from private, confidential discussions between the defendant and his attorney. The information which leads to the defense investigation will often come directly from a defendant during his/her conversations with defense counsel; most often, it is the defendant who reveals his defense to the charges, as well as the names of potential witnesses. Defense counsel relays that information to the investigator and asks that the witnesses be interviewed, and that the defense be investigated and developed.

When the defense calls its investigator to testify about their findings and the witness has prepared a report about this subject matter, the defense and the defendant arguably make a conscious decision to disclose information which is otherwise privileged. That in turn opens the door allowing the opposing party to test the basis of the testimony; the witness' contemporaneous report. But it does not warrant access by the State to all reports prepared by the same investigator in the particular case.

To hold otherwise would also be forcing the defense to provide attorney work product to the prosecution. Under Utah's work-product doctrine,

> a party may obtain discovery of documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative . . . only upon a showing that the party seeking discovery has substantial need of the materials . . . and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions,

> or legal theories of an attorney or other representative of a party concerning the litigation.

Utah R. Civ. P. 26(b)(3) (emphasis added). United States Supreme observed the following about the doctrine:

> "a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it 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/her legal theories and plan his strategy without undue and needless interference . . . Were [work product] materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. 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."

United States v. Nobles, 422 U.S. 225, 236-37 (1975) (citing Hickman v. Taylor, 329 U.S. 495, 510-11 (1947)); see Salt Lake Legal Defender Assoc. v. Uno, 932 P.2d 589, 590 (Utah 1997) (holding work-product doctrine preserves adversary system by providing attorneys with a zone of privacy permitting effective client advocacy); Gold Standard v. American Barrick Resources Corp., 805 P.2d 164, 167 (Utah 1990) (citation omitted) (finding that the underlying theme of [work-product doctrine] is the preservation of the adversarial system by the protection of the privacy of an attorney's files prepared in anticipation of litigation from encroachments of opposing counsel)

The work-product doctrine applies in criminal cases. See Utah R. Civ. P. 81(e)

(noting rules of civil procedure shall also govern in any aspect of criminal proceedings where there is no other applicable statute or rule, provided, that any rule so applied does not conflict with any statutory or constitutional requirement); Uno, 932 P.2d at 590 (applying work-product doctrine to a criminal case). In fact, the doctrine's "role in assuring the proper functioning of the criminal justice system is even more vital" because "[t]the interests of society and the accused in obtaining a fair resolution . . . demand that adequate safeguards assure the thorough preparation and presentation of each side of the case." Nobles, 422 U.S. at 238 (footnote omitted); Uno, 932 P.2d at 590-91 (holding files/documents not discoverable in post-conviction proceeding).

"At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." Nobles, 422 U.S. at 238 - 39. In addition the "doctrine protect[s] material prepared by agents for the attorney as well as those prepared by the attorney himself." Id. This contains "interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible" items. Id. at 237. In Utah, "[t]here are three essential requirements for materials to be protected by the work product doctrine under rule 26(b)(3): (1) the material must consist of documents or tangible things, (2) prepared in anticipation of litigation or for trial, (3) by or for another party or by or for that party's representative". Gold Standard, 801 P.2d at 910. "If these requirements are met, the privilege applies unless the party seeking discovery can show a need for the information and that it cannot be obtained without

substantial hardship". Id. (citations omitted). Finally, "if the documents convey the mental impressions, conclusions, opinions or legal theories of an attorney or party, the documents will be afforded heightened protection as 'opinion work product'". Gold Standard, 801 P.2d at 910 (citations omitted).

The reality of the indigent defense in our county is that no single attorney at SLLDA has more than one investigator working on a case. That investigator is often asked to interview witnesses or collect evidence which may not ultimately have the weight a defendant thinks it does. Some of the assignments an investigator may also be tasked with are the administration of the polygraph, evaluating of the witness' or defendant's demeanor during a police interview and evaluating areas of concern in the law enforcement investigation. Those types of reports are prepared in anticipation of a trial and in response to the attorney's trial strategy, to aid in cross–examination.

Not only will the requested disclosures violate the attorney/client privilege and the work product doctrine, but they could also violate the defendants' protection against self-incrimination under the United States and Utah constitutions. See U.S. Const. amend. V (providing that "[n]o person shall be . . . compelled in any criminal case to be a witness against himself"); Utah Const. art I, § 12 (providing that "[t]he accused shall not be compelled to give evidence against himself"). Utah Rule of Criminal Procedure 16 obligates prosecution and defense to timely disclose "'evidence which the court determines on good cause shown should be made available to [the other side] to adequately prepare [its case].'" State v. Spry, 2001 UT App 75, ¶23, 21 P.3d 675 (citing Utah R. Crim. P. 16(a)(5), (c)) (alterations in the original).

However, "a defendant's protection against self-incrimination prevents extensive prosecution discovery and is paramount to Rule 16(c) of the Utah Rules of Criminal Procedure." Spry, 2001 UT App 75 at ¶23 n.6 (citations omitted).

Take a simple example where the defense investigator is asked to measure the distances at the crime scene and to interview a potential alibi witness. The defense then calls the investigator to testify about the measurements. It is hard to imagine that the defense could be required to disclose a potentially incriminating report about the purported alibi witness.

As to the request contained in point 6, for "[c]opies of that portion of any reports prepared by the defense investigators during the course of the prosecution of this case[,]" the defense will provide the State with contact information for all of the subpoenaed witnesses I advance of trial. The defense should not be obligated, however, to create potential impeachment evidence for the State. An extreme example of that is when the defense asks its investigator to interview the defendant; to document a prior consistent statement or to provide the attorney with a comprehensive version of the defendant's anticipated testimony. Certainly the defense may not be obligated to disclose the defendant's own statements made to aid in his defense.

CONCLUSION

For the reasons stated above, the Defendant respectfully requests that this Court deny the State's Request for Discovery in part.

Respectfully submitted this *15th* day of October, 2014

By */s/ Wojciech Nitecki*
Wojciech Nitecki
Attorneys for Defendant

CERTIFICATE OF DELIVERY

I hereby certify that I have caused to be delivered via the Court's electronic filing system a copy of the foregoing to the District Attorney's Office, 111 East Broadway, Suite 400, Salt Lake City, Utah 84111, this *15th* day of OCTOBER, 2015.

/S/ KW