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IN THE THIRD DISTRICT COURT, WEST JORDAN DEPARTMENT  
IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

<p>THE STATE OF UTAH,  Plaintiff,  -vs-  BRIAN SCOTT REID,  Defendant.</p>	<p><b>STATE'S MEMORANDUM IN SUPPORT OF DISCOVERY MOTION</b></p> <p>Case No. 151906548</p> <p>Honorable JAMES BLANCH</p>
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The State of Utah, by and through its counsel, MELANIE M. SERASSIO, Deputy District Attorney, respectfully submits the following Memorandum in support of its Motion to Discover:

**POINT I.**

**AUTHORITY FOR DISCOVERY**

Rule 16(c), Utah Rules of Criminal Procedure, provides that “the defense shall disclose to the prosecutor . . . any other item of evidence which the court determines on good cause shown to be made available to the prosecutor in order for the prosecutor to adequately prepare his case.” Utah R. Crim. P. 16(c). In State v. Spry, 2001 UT App 75, ¶¶ 21-25, 21 P.3d 675, the Utah Court of Appeals upheld the trial court’s order granting the State’s request for discovery, and held that the good cause requirement applies equally to both the prosecution and the defense, and requires only a showing that “disclosure of requested evidence is necessary to proper preparation.” Id. At ¶¶ 20-23. The Court in Spry held that “all of the State’s requested disclosures were material, as they involved information on witnesses and documents which Defendant intended to use at trial.” Id.

At ¶ 24. The State's request in this case is identical to the request filed in Spry and, therefore, seeks disclosure of material information.

In State v. McNearney, the Utah Court of Appeals held that granting the State's discovery request did not violate the defendant's right against self-incrimination, due process rights, right to full representation of counsel, the work product doctrine, or the attorney-client privilege. State v. McNearney, 2005 UT App 133, ¶¶ 12-16. The State's discovery request in McNearney was identical to the request in Spry, and the Court reaffirmed that rule 16(c) provides "that when requesting discovery from the defense, the prosecution need only demonstrate 'the materiality of the evidence to the issues to be raised at trial.'" McNearney at ¶ 11 (citations omitted).

The defendant in McNearney claimed that the trial court violated his right against self-incrimination by ordering him to disclose the identity of his witnesses. The Court stated that "the privilege against compulsory self-incrimination 'adheres to the person, not the information that may incriminate him.'" McNearney at ¶ 13 (citing United States v. Nobles, 422 U.S. 225, 233 (1975)). Accordingly, the Court ruled that the defendant's right against self-incrimination was not violated by simply ordering him to reveal the names of witnesses he may call to testify at trial. Id. The defendant in McNearney also claimed that the discovery order violated his right to due process because it failed to ensure that discovery was reciprocal. Id. at ¶ 14. The Court noted that the defendant "was not ordered to disclose a category of information that the State was not required to disclose" and, therefore, there was no due process violation. Id.

Case law prior to Spry and McNearney also support granting discovery to the State. The Utah Supreme Court has often quoted the following passage with respect to discovery issues: "A criminal proceeding is more than adversarial contest between two competing sides. It is a search for the truth upon which a just judgment may be predicated. Procedural rules are designed to promote that objective, not frustrate it." See e.g., State v. Carter, 707 P.2d 656 (Utah, 1985).

Historically, as with discovery for a defendant, the criminal law did not permit discovery of a defendant's case by the prosecution. Statutory provisions have obligated a defendant to provide notice only when an entrapment, alibi or diminished mental defense is contemplated. (See

§§76-2-303 and 305 U.C.A., §§77-14-1 et seq. U.C.A.) However, present law provides that a prosecutor may receive the benefit of court ordered discovery upon a showing of good cause. See Utah R. Crim. P. 16(c); Spry, supra; McNearney, supra.

The courts have upheld notice requirements imposed on defendants notwithstanding claims of Fifth Amendment violations so long as reciprocal discovery provisions applied to the State. The remedy of excluding "surprise" alibi witnesses has been upheld since the right against self incrimination is personal to the defendant. It is unclear whether the extreme sanction of exclusion of evidence can be applied to a defendant's testimony under this rationale. See Williams v. Florida, 399 U.S. 78 (1970); Wardius v. Oregon, 412 U.S. 470 (1973); United States v. Nobles, 422 U.S. 225 (1975); State v. Bundy, 684 P.2d 58 (Utah, 1984). However, it is now beyond dispute that the exclusionary sanction is an appropriate remedy for any other evidence offered by the accused. See Taylor v. Illinois, 484 U.S. 400, 98 L.Ed.2d 798 (1988).

The United States Supreme Court discussed prosecutor discovery in the case of United States v. Nobles, 422 U.S. 225, 45 L.Ed.2d 141, 95 S.Ct. 2160 (1975):

The dual aim of our criminal justice system is 'that guilty shall not escape or innocence suffer,' (citation omitted). To this end, we have placed our confidence in the adversary system, entrusting to it the primary responsibility for developing relevant facts on which a determination of guilt or innocence can be made. (Citation omitted).

While the adversary system depends primarily on the parties for the presentation and exploration of relevant facts, the judiciary is not limited to the role of a referee or supervisor. Its compulsory processes stands available to require the presentation of evidence in court or before a grand jury. (Citation omitted). As we recently observed in United States v. Nixon, supra, 418 U.S. 683 at 709, 41 L.Ed.2d 1039, 94 S.Ct. 3090:

'We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgment were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the

framework of the rules of evidence. To ensure that justice is done, **it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.**' [emphasis added] Decisions of this Court repeatedly have recognized the federal judiciary's inherent power to require the prosecution to produce the previously recorded statements of its witnesses so that the defense may get the full benefit of cross-examination and the truth-finding process may be enhanced. (Emphasis added).

In Taylor v. Illinois, the Court has continued to apply this reasoning to the State's right to discover the defendant's case in light of objections under the Sixth Amendment:

The defendant's right to compulsory process is itself designed to vindicate the principle that the 'ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts.' *United States v. Nixon*, 418 U.S. at 709, 41 L.Ed.2d 1039, 94 S.Ct. 3090. Rules that provide for pretrial discovery of an opponent's witnesses serve the same high purpose. Discovery, like cross-examination, minimizes the risk that a judgment will be predicated on incomplete, misleading, or even deliberately fabricated testimony. The 'State's interest in protecting itself against an eleventh hour defense' is merely one component of the broader public interest in a full and truthful disclosure of critical facts.

484 U.S. 400 at 410. The request for discovery in this case does not ask for privileged matters. Although the defendant has a personal Fifth Amendment privilege, it does not extend to any witness he intends to call.

## **POINT II.**

### **THE REQUESTED ITEMS OF DISCOVERY SHOULD BE MADE AVAILABLE IN ORDER FOR THE PROSECUTION TO ADEQUATELY PREPARE ITS CASE.**

The State's request is simple and minimal, but it goes to the very heart of case preparation: the ascertainment of who will testify and give evidence; the ascertainment of what that evidence will be; the ascertainment of the veracity of the witnesses and the reliability of their testimony; the ascertainment of impeachment evidence; and the ascertainment of witnesses or evidence that will be necessary to meet the contentions of the proposed defense witnesses. People v. Bocclair, Ill., 519 N.E.2d 437, 449-50 (1987).

As noted by State Courts, discovery by the prosecution of the defense's non party witness statements not only serves a truth-enhancing function, Com. v. Paszko, Mass., 461 N.E.2d 222, 237 (1984), but also, without prior disclosure, if a devastating surprise witness were to testify for the defense, the State would be entitled to a continuance to meet the testimony. Pretrial discovery would thus avoid such surprise, and aid the administration of the trial and provide an orderly resolution of the charges. States v. Dist. Ct. of Thirteenth Jud. D., Mont. 746 P.2d 604, 607 (1987).

The items requested by the State are identical to items requested by the defense in their Motion to Discover. Before the defense's request for these items can be ordered by the Court to be provided, good cause must be shown. (Rule 16(c) of the Utah Rules of Criminal Procedure.) Because the information sought to be discovered is identical to that routinely requested by the defense, whatever good cause is advanced by the defense would be equally applicable to the State's request. If the defense's request is granted, not only would it demonstrate that good cause exists for the discovery by the prosecution, but principles of fairness and reciprocity would seem to require the granting of a similar order for the State. Foote v. Hart, Mo. App., 728 S.W.2d 295, 298 (1987).

Finally, Rule 16(d) of the Utah Rules of Criminal Procedure provides that the defense attorney shall make all disclosures at least ten days before trial or as soon as practicable and that he has a continuing duty to make disclosure. (See Rule 16(d) of the Utah Rules of Criminal Procedure.)

**CONCLUSION**

The foregoing demonstrates good cause warranting disclosure of items material to the State's ability to properly prepare for trial in this matter. Accordingly, the State respectfully requests that the Court grant its request for discovery. Further, the State respectfully requests that the Court order the Defendant to provide all discovery to the State as soon as practicable, but no less than ten days prior to trial.

DATED this 7th day of October, 2015.

SIM GILL  
District Attorney for Salt Lake County

/s/ Melanie Serassio

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MELANIE M. SERASSIO  
Deputy District Attorney

**DELIVERY CERTIFICATE**

I hereby certify that a true and correct copy of the foregoing STATE'S MEMORANDUM IN SUPPORT OF DISCOVERY MOTION was delivered to Wojciech Nitecki, Attorney for the defendant, Brian Scott Reid, via the Court's efilng system, on the 7th day of October, 2015.

/s/ Melanie Serassio

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