DATE FILED: August 6, 2020 10:04 PM
FILING ID: 4B2D37873B14B
CASE NUMBER: 2020SA178

SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	
Pueblo County District Court Case Number 17CR2491 Honorable Thomas Fletcher, Judge	
In Re: **The People of the State of Colorado**, Plaintiff-Respondent, v. **Donthe Lucas**, Defendant-Petitioner.	▲ COURT USE ONLY ▲
Norman R. Mueller, Atty. Reg. #5853 HADDON, MORGAN AND FOREMAN, P.C. 150 East 10th Avenue Denver, CO 80203 (303) 831–7364 nmueller@hmflaw.com *Tenth Circuit Vice Chair, Amicus Committee* *National Association of Criminal Defense Lawyers* Amy D. Trenary, Atty. Reg. #46148 APPEAL TO JUSTICE, LLC P.O. Box 7593 Broomfield, CO 80021 (720) 560–3439 amy@appealtojustice.com *Attorney for Amici Curiae Colorado Criminal Defense Bar and National Association of Criminal Defense Lawyers*	Case No: 20SA178

BRIEF OF *AMICI CURIAE* COLORADO CRIMINAL DEFENSE BAR AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF DEFENDANT-PETITIONER

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all requirements of C.A.R. 21, 28, 29, and 32, as applicable, including all formatting requirements set forth in these rules. It contains 5,750 words.

s/ Amy D. Trenary
Amy D. Trenary, #46148

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Constitutional Provisions

Other Authorities

INTEREST OF *AMICI CURIAE*

The Colorado Criminal Defense Bar (CCDB) is Colorado's only statewide organization devoted solely to the representation of persons accused of having committed crimes. It provides crucial services and support to private criminal defense practitioners, public defenders, paralegals, and investigators. It is committed to providing its members with the tools they need to better represent their clients, and to the improvement of Colorado's criminal justice system.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers.

Both CCDB and NACDL ("Amici," collectively) are dedicated to advancing the proper, efficient, and just administration of justice. The Amici file numerous amicus briefs each year in the United States Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system. The Amici have a particular interest in this case because a Sheriff's disclosure of what would otherwise be confidential defense information is a persistent, ongoing concern that habitually affects the manner in which the Amici's members practice criminal defense throughout the state of Colorado.

SUMMARY OF THE ARGUMENT

The right to prepare a defense in secret is a necessary corollary to a defendant's constitutional rights to due process, equal protection, and the effective assistance of counsel. That is why states that require defendants to seek expert funding from the court typically conduct such proceedings *ex parte*. When the prosecution prematurely learns the identity of defense experts, the defendant's strategy and trial theory can easily be ascertained and the prosecution unfairly gains the upper hand in trial preparation,

rendering not only the pretrial investigation but the trial itself fundamentally unfair. And because a Sheriff can only provide this information when the defendant is incarcerated pretrial, this practice denies equal protection to indigent and otherwise non-bondable defendants.

This Court should expressly recognize that defendants must be granted a fair opportunity to prepare their defense with sufficient secrecy to protect their pretrial strategy from disclosure, regardless of their incarceration. Such a holding would be in keeping with the Crim. P. 16 reciprocal discovery rules, which are constitutional only because they preclude the defendant from having to disclose consulting experts unless he decides to call them as trial witnesses. It would also be consistent with the attorney work-product doctrine, the purpose of which includes protecting theories and strategy from disclosure and encouraging thorough investigation and analysis.

Finally, criminal defense lawyers are rendered constitutionally ineffective when denied the necessary latitude for developing a defense by consulting with experts merely because the defendant remains jailed pretrial. Counsel must not be forced by the government's actions to forego

the assistance of experts or other defense practices in order to avoid giving the prosecution a strategic advantage and ultimately diminishing its burden of proof.

ARGUMENT

A. This Court should help to ensure that jailed defendants have a meaningful ability to obtain expert assistance without having to forego the opportunity to prepare their defense in secret.

In jurisdictions where indigent defendants must seek trial court approval for funding to pay expert consultants, the proceedings are typically conducted *ex parte*. Such proceedings protect the defendant from having to prematurely reveal elements of his defense, such as identifying his desired experts or explaining their necessity. The same rationale explains why Sheriffs should be precluded from disclosing defense experts to the prosecution before trial. Defendants, whether indigent or not, must have the opportunity to prepare their defense in secret as a means of protecting their constitutional rights. It is fundamentally unfair to subject defendants to such disclosure solely because they are under the custody and control of a Sheriff who cooperates with the prosecution to provide otherwise confidential information about which experts are visiting the defendant in jail.

Jurisdictions throughout the country have recognized that a defendant's constitutional rights to the assistance of counsel and to prepare a defense necessarily involve a certain amount of secrecy. This line of authority stems from the United States Supreme Court's holding in *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985), that the Fourteen Amendment's due-process guarantee of fundamental fairness requires that an indigent defendant be given access to a mental health expert upon showing that his sanity will be a significant fact at trial. In *Ake*, the Court held that the State must provide the defendant with "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." 470 U.S. at 83; *accord McWilliams v. Dunn*, 137 S. Ct. 1790, 1799–1800 (2017). Most courts have held that the rights propounded by *Ake* are not limited to mental-health expert assistance. *See* Theodore J. Greeley, *The Plight of Indigent Defendants in a Computer-Based Age: Maintaining the Adversarial System by Granting Indigent Defendants Access to Computer Experts*, 16 Va. J.L. & Tech. 400, 417 n.147 (2011) (citing collected cases).

Following *Ake*, a substantial majority of courts have also acknowledged that "[a]lthough the Supreme Court did not incorporate mandatory *ex parte* procedures into its holding, it did recognize the appropriateness of such procedures in dicta." *Putnal v. State*, 814 S.E.2d 307, 310 (Ga. 2018); *see Ake*, 470 U.S. at 82–83 ("When the defendant is able to make an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent."). Courts and legislatures have affirmed that the *ex parte* procedure mentioned in *Ake* is necessary to protect the defendant from having to reveal his theory or strategy in his effort to demonstrate that he is entitled to expert assistance. *See* 18 U.S.C. § 3006A(e)(1); *Moore v. State*, 889 A.2d 325, 341–42 (Md. 2005) (discussing the majority of jurisdictions that have adopted this view); Justin B. Shane, *Money Talks: An Indigent Defendant's Right to an* Ex Parte *Hearing for Expert Funding*, 17 Cap. Def. J. 347 (2005); Kimberly J. Winbush, *Right of Indigent Defendant in*

State Criminal Prosecution to Ex Parte *In Camera Hearing on Request for State-Funded Expert Witness*, 83 A.L.R.5th 541 (2000).[1]

Federal circuit courts have recognized that the "manifest purpose" of requiring that defense funding inquiries be conducted *ex parte* is "to ensure that the defendant will not have to make a premature disclosure of his case." *Marshall v. United States*, 423 F.2d 1315, 1318 (10th Cir. 1970); *see also United States v. Abreau*, 202 F.3d 386, 390–91 (1st Cir. 2000) (collecting federal cases). These *ex parte* portions of pretrial proceedings are "not intended to protect the defendant from opposition from the prosecutor" but rather "to shield the theory of the defense from the prosecutor's scrutiny." *United States v. Meriwether*, 486 F.2d 498, 506 (5th Cir. 1973); *People v. Anderson*, 43 Cal.3d 1104, 1132 (Cal. 1987) (provision for proceeding *ex parte* was "intended to prevent the prosecution from learning of the application for funds and thereby improperly anticipating the accused's defense").

In addition, proceeding *ex parte* is crucial to ensuring the equal protection of indigent defendants:

[1] Such hearings are no longer required in Colorado because expert funding for indigent defendants is now handled by the Office of the Public Defender and the Office of the Alternate Defense Counsel.

> The names of witnesses to be called by the defendant could easily aid the government in determining the strategy the defendant plans to use at trial. The government should not be able to obtain a list of adverse witnesses in the case of a defendant unable to pay their fees when it is not able to do so in the cases of defendants able to pay witness fees. When an indigent defendant's case is subjected to pre-trial scrutiny by the prosecutor, while the monied defendant is able to proceed without such scrutiny, serious equal protection questions are raised . . . .

Id. (error to allow prosecutor to remain present during indigent defendant's oral application for subpoenas issued at government expense); *see also Moore*, 889 A.2d at 341 ("Indigent defendants seeking state funded experts should not be required to disclose to the State the theory of the defense when non-indigent defendants are not required to do so."); *Williams v. State*, 958 S.W.2d 186, 193 (Tex. Crim. App. 1997) (ex parte hearing is required so defendant is not "forced to choose between either forgoing the appointment of an expert or disclosing to the State in some detail his defensive theories about weaknesses in the State's case"); *McGregor v. State*, 733 P.2d 416, 416 (Okla. Crim. App. 1987) (state's participation or even presence during *Ake* hearing "would thwart the Supreme Court's attempt to place indigent defendants, as nearly as possible, on a level of equality with nonindigent defendants").

The Alabama Supreme Court has recognized that requiring an indigent defendant to prematurely disclose evidence in the presence of the prosecution also encroaches on the privilege against self-incrimination. *Ex Parte Moody*, 684 So.2d 114, 120 (Ala. 1996) (holding indigent defendants are entitled to *ex parte* expert-funding hearing under Fifth, Sixth and Fourteenth Amendments). "The privilege against self-incrimination 'does not merely encompass evidence which may lead to criminal conviction, but includes information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution.'" *Id*. (quoting *Maness v. Meyers*, 419 U.S. 449, 461 (1975)); *see also Andrews v. State*, 243 So.3d 899, 902 (Fla. 2018) (adopting this reasoning). Depending on the reason for the expert's involvement, a defendant may be forced to reveal self-incriminating information by doing no more than identifying that expert. *Andrews*, 243 So. 3d at 902. Moreover, the defendant has a right, based on the Fifth Amendment, "to compel the State to investigate its own case, find its own witnesses, prove its own facts, and convince the jury through its own resources." *State v. Touchet*, 642 So. 2d 1213, 1218 (La. 1994).

When confronted with whether an indigent defendant may proceed *ex parte* and under seal on his funding request for investigative or expert assistance,[2] the Supreme Court of Georgia reasoned:

> Identification of the right which is at stake here is more complicated than acknowledging the right of the indigent defendant to obtain the expert assistance necessary to assist in preparing his defense. While exercising that right, **the defendant also has the right to obtain that assistance without losing the opportunity to prepare the defense in secret**. Otherwise, the defendant's "fair opportunity to present his defense," acknowledge in *Ake*, will be impaired.

Putnal v. State, 814 S.E.2d 307, 311 (Ga. 2018) (quoting *Brooks v. State*, 385 S.E.2d 81, 84 (Ga. 1989) (emphasis added)); *accord Zant v. Brantley*, 411 S.E.2d 817, 818–19 (Ga. 1992) (when defendant files motion for new trial alleging ineffective assistance of counsel in failure to obtain the assistance of necessary experts and failure to obtain competent assistance from those who

[2] Although Colorado does not require indigent defendants to seek expert funding from the trial court, the issue presented by Mr. Lucas nevertheless implicate the same rights and protections. *Putnal v. State*, 814 S.E.2d 307, 311 (Ga. 2018) (rejecting the prosecution's contention that *Brooks* had no application because the defendant need not have applied to the trial court for funds).

were retained, "it is similarly important that the defendant's theory of his case not be revealed to the prosecution").

The pretrial revelation of the names of consulting experts, whether by an expert funding request or by Sheriff disclosure, has substantial potential to expose the defendant's defense to prosecutorial review. As the court in *Touchet* explained regarding *ex parte* expert funding hearings—the reasoning of which applies here:

> First, . . . [i]t is simply a reflection of the truth known by every litigator: the more known of the opposing side's case, the better. Second, such disclosure could lead the prosecution to emphasize certain evidence in anticipation of contrary evidence to be presented by defendant. Third, it could lead the prosecution to deemphasize, or to omit, certain evidence in anticipation of damaging impeachment evidence to be presented by defendant. Moreover, it could help the prosecution during voir dire and in structuring its opening statement. Indeed, if the theory of a defendant's defense is revealed to the prosecution prior to trial, it seems likely that the prosecution could fashion its strategy as to best discredit and undermine that revealed defense.

Id. (quoting *People v. Loyer*, 425 N.W.2d 714, 722 (Mich. Ct. App. 1988) (internal quotation marks omitted)). Thus, the quality of his defense, and fairness of his trial, may well depend upon the defendant's ability to conceal

the identity of his consulting experts until he must identify his testifying experts. *See Loyer*, 425 N.W.2d at 722.

This Court recently recognized that an order requiring a defendant to disclose trial exhibits to the prosecution before trial "rests on shaky constitutional ground because it improperly risks lessening the prosecution's burden of proof." *People v. Kilgore*, 2020 CO 6, ¶ 29. As the Court explained:

> The disclosure order compels [the defendant] to reveal exculpatory evidence and to tip his hand vis-à-vis his investigation and the theory of his defense. In effect, it forces [the defendant] to share with the prosecution his trial strategy—i.e., how he plans to defend against the charges brought against him. This is problematic. Gaining access to [the defendant's] exhibits prior to trial may help the prosecution meet its burden of proof.

Id. This same reasoning applies to the involuntary and indirect—yet just as problematic—disclosure at issue here.

There is no legitimate reason why a Sheriff needs to share the identity of defense expert consultants with the prosecution. This practice functions only to give the State the upper hand on trial strategy and insight into the defense theory and strategy that should remain confidential and privileged.

A Sheriff who supplies this information is essentially an unwanted "spy in the camp" of the defense. *See United States v. Massino*, 311 F. Supp. 2d 309, 313 (E.D.N.Y. 2004 (citing *Weatherford v. Bursey*, 429 U.S. 545, 548 (1977)). This vitiates the opportunity for incarcerated defendants to prepare their cases "free from unnecessary intrusion" by government actors and with the secrecy required to protect their constitutional rights. *People v. Trujillo*, 15 P.3d 1104, 1107 (Colo. App. 2000).

B. The opportunity to prepare a defense in secret is in harmony with the discovery rules in Rule 16 and the attorney work-product doctrine.

This Court has long recognized that, as both a legal and practical matter, a "defense expert's relationship with the defendant and counsel has been protected from intrusions by the state." *Hutchinson v. People*, 742 P.2d 875, 881 (Colo. 1987). Accordingly, "[t]he law has recognized several doctrines that afford a degree of confidentiality to the expert-defense relationship." *Id*. (citing applications involving attorney-client privilege, work-product rule, discovery obligations, and privilege against self-incrimination). The Court's express acknowledgment of a defendant's right to secretly prepare his defense would be wholly consistent with the

discovery process in the Rules of Criminal Procedure and the protections of the attorney work-product doctrine.

Rule 16 was adopted with the intent to provide for liberal discovery procedures, albeit with reciprocity requirements tempered to accommodate the defendant's constitutional rights. *People v. Dist. Court*, 531 P.2d 626, 629 (Colo. 1975); *see also Richardson v. Dist. Court*, 632 P.2d 595, 599 (Colo. 1981) (court's authority to order defense disclosures is expressly "[s]ubject to constitutional limitations" under Crim. P. 16(II)). Rule 16 "reflects a purposeful decision to prevent the impairment of constitutional rights that could arguably result from a rule permitting the court to enlarge the categories of prosecutorial discovery on the basis of an ad hoc evaluation of each case." *Richardson*, 632 P.2d at 599.

To pass constitutional muster, discovery rules must limit defense disclosures to "those matters which would eventually be revealed at trial." *Dist. Court*, 531 P.2d at 629 (citing *Williams v. Florida*, 399 U.S. 78 (1970)); ABA Standards for Criminal Justice, Discovery and Trial by Jury, Standard 11–2.2(a)(ii), Commentary at p.39 (3d ed. 1996) (when limited to the defendant's

trial evidence, a pretrial disclosure rule is constitutional).[3] Constitutionally-sound discovery rules function only to compel the defendant "to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that the [defendant] from the beginning planned to divulge at trial." *Williams*, 399 U.S. at 85. "The nature of our adversary system of justice is such that in the course of trial, a defendant voluntarily divulges the information sought at the time of trial, and for that reason alone, it is proper and reasonable to allow the district attorney to have advance access to it." *Dist. Court*, 531 P.2d at 629.

The defendant must disclose to the prosecution the nature of his defense. However, such disclosure is limited to only those "which the defense intends to use at trial" and need not be accomplished until no more than 35 days before trial. Crim. P. 16(II)(c); *accord* ABA Standards for Criminal Justice, Discovery and Trial by Jury, Standard 11–2.2(a)(ii) (3d ed. 1996). Rule 16 does not confer on the prosecution any right to discover the identity of experts that the defense *does not* intend to use at trial. In fact, the

[3] *Available at* https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/discovery_trialbyjury.pdf.

Rule "was carefully drafted and limits discovery to the nature of any defense and the names and addresses of witnesses intended to be offered at trial in support thereof." *Richardson*, 632 P.2d at 599.

The distinction embedded in Rule 16 would be rendered meaningless if the prosecution may obtain from the Sheriff the identity of all defense consulting experts. By discovering the identity of potential defense experts through the Sheriff, the prosecution can effectively execute an end-run around Rule 16. This conflicts with the Court's precedents strictly limiting defense discovery obligations to those prescribed by Rule 16. *Kilgore*, ¶ 25; *People v. Chard*, 808 P.3d 351, 354–55 (Colo. 1991); *Richardson*, 632 P.2d at 599.

Relatedly, attorney work product is excluded from discovery obligations. *See* Crim. P. (I)(e)(1) (precluding prosecution work product from discovery); *Fox v. Alfini*, 2018 CO 94, ¶ 44 (Hood, J., specially concurring) (under analogous civil rule, certain work-product materials "may never be discovered"). Materials that are sacrosanct under the work-product doctrine include any "legal theories" concerning the litigation. C.R.C.P. 26(b)(3). This Court has recognized that the work-product doctrine, "although most frequently asserted as a bar to discovery in civil litigation, applies with

equal, if not greater, force in criminal prosecutions." *People v. Angel*, 2012 CO 34, ¶ 21; *People v. Dist. Court*, 790 P.3d 332, 335 (Colo. 1990) (quoting *United States v. Nobles*, 422 U.S. 225, 236, 238 (1975)).

The work-product doctrine "derives from judicial interpretation" and "has evolved through statute, rule, and case law." *People v. Martinez*, 970 P.2d 469, 474–75. In *Nobles*, the U.S. Supreme Court explained the vital policy interests underlying the work-product doctrine—which apply as well to the type of back-door disclosures at issue here:

> [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. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests.

Nobles, 422 U.S. at 237 (quoting *Hickman v. Taylor*, 329 U.S. 495, 510–11 (1947)); *see also People v. Martinez*, 970 P.2d 469, 474 n.12 (Colo. 1998) (citing the reasoning of *Hickman* as the basis of the work-product doctrine in Colorado). The work-product doctrine "is an intensely practical one,

grounded in the realities of litigation in our adversary system." *Nobles*, 422 U.S. at 238. The goal "is to protect the attorney's thought process from discovery and, therefore, afford him or her the opportunity to prepare a case free from unnecessary intrusion by opposing parties and counsel." *Trujillo*, 15 P.3d at 1107, *disagreed with on other grounds by Craig v. Carlson*, 161 P.3d 648, 654 (Colo. 2007).

The Supreme Court recognized that an attorney's work product is reflected in "countless . . . tangible and intangible ways," and discussed the likely consequences of rendering such materials discoverable:

> 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.

Hickman, 329 U.S. at 511. This Court has thus acknowledged that a rule allowing for the discovery of work product would have a chilling effect on an attorney's incentive to thoroughly analyze a case. *Angel*, ¶ 22 (citing *Hickman*, 329 U.S. at 511).

The California Supreme Court has held that the work-product privilege protects an attorney's decision whether to call a particular expert:

> Work product encompasses the investigation of defendant's mental state to assess both the favorable and the unfavorable aspects of the case. It also encompasses counsel's impressions and conclusions regarding witnesses who would be favorable and those who would not be so. It follows that the party's decision that an expert who has been consulted should not be called to testify is within the privilege.

People v. Coddington, 23 Cal. 4th 529, 606 (2000), *overruled on other grounds by Price v. Superior Court*, 25 Cal. 4th 1026, 1070 n.13 (2001). In *Coddington*, even though the prosecution had learned the identities of defense consulting experts through its own investigation, the court found a violation of the work-product doctrine. "Regardless of how the information is obtained, . . . if a party were permitted to use information about pretrial investigations that reveals opposing counsel's thought processes and reasons for tactical decisions, thorough investigation would be discouraged." *Coddington*, 23 Cal.4th at 606.

Other courts have similarly held that not only the opinions, but also the *identity* of a party's experts is privileged work product "unless they are going to testify at trial." *Schreiber v. Estate of Kiser*, 22 Cal.4th 31, 37 (1999);

accord Hernandez v. Superior Court, 112 Cal.App.4th 285, 297 (2003); *Muldrow v. State*, 787 So. 2d 159, 160 (Fla. Dist. Ct. App. 2001). Such disclosure is not required while the defense "has not yet determined whether it would use any of the experts it had consulted" and while "there is still substantial pretrial preparation and evaluation pending." *South Tahoe Pub. Utility Dist. v. Superior Court*, 90 Cal.App.3d 135, 138 (1979). "Even if the defendant is only required to disclose the expert's name and area of expertise, that is information that the State would otherwise not be entitled to know at that stage." *Andrews*, 243 So. 3d at 902.

One court has explained that limitations on pretrial discovery of a consulting expert's opinion is required because such knowledge "often provides strong clues to the theories, thoughts, and tactics of opposing counsel." *Hernandez*, 4 Cal. Rptr. 3d at 894. The stated policy considerations underlying this discovery rule are "to preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of such cases," as well as "to prevent an attorney from taking undue advantage of his adversary's industry or

efforts." *South Tahoe*, 90 Cal.App.3d at 138. This rationale applies equally to the mere *identity* of such experts. Disclosure of the names of consulting experts during trial preparation would discourage full investigation of the factual circumstances due to the substantial likelihood that the prosecution could ascertain the defendant's trial strategy (and alter its own) based solely on the defendant's selection of experts. *Id*. Disclosure of defense consulting experts is thus "contrary to the work-product doctrine because it would serve to highlight the thought processes and legal analysis of the attorneys involved." *Andrews*, 243 So. 3d at 901–02.

In recognition of the government's power and the "virtually limitless resources of government investigators," as well as the prosecutorial advantage over the defense in a criminal case, the law affords the accused a variety of rules and procedures intended to "even the playing field." *Wardius v. Oregon*, 412 U.S. 470, 480 (1973) (Douglas, J., concurring in the result). Discovery regimens should be similarly responsive to this imbalance of power. *Wardius*, 412 at 475–76 n.9 ("the State's inherent information-gathering advantages suggest that . . . any imbalance in discovery rights . . . should work in the defendant's favor"); *see also Com. v. Perez*, 698 A.2d 640,

643–44 (Pa. Super. Ct. 1997) ("the more liberal the discovery rules become, the greater the advantage the Commonwealth has in prosecuting its case"). If this Court turns a blind eye to practices among the Sheriff and prosecution that undermine both Rule 16's carefully crafted discovery requirements and the work-product doctrine, it would serve only to exacerbate this imbalance of power and thus further disadvantage the most vulnerable criminally accused: those who remain incarcerated before trial.

C. Criminal defense lawyers provide constitutionally ineffective assistance when forced to alter their strategies for consulting with experts solely because the defendant is jailed pretrial.

When a pretrial detainee's counsel knows or even suspects that the Sheriff will disclose the identity of defense consulting experts to the prosecution, the practice of criminal defense may be altered—including to the point of constitutional ineffectiveness.

Criminal defense lawyers have a constitutional obligation to conduct reasonable investigations. *Strickland v. Washington*, 466 U.S. 668, 691 (1984); U.S. Const. amends. VI, XIV; Colo. Const. art. II, 16. When an attorney decides *not* to pursue some particular investigation, that choice must too be a reasonable one. *Strickland*, 466 U.S. at 691. A critical component of the

investigation of many criminal cases involves reliance on experts, sometimes to testify but sometimes only to consult with the defense, analyze certain evidence, assist with trial preparation, and help counsel prepare to cross-examine prosecution experts and other witnesses.

"Modern civilization, with its complexities of business, science, and the professions, has made expert and opinion evidence a necessity." *Ake*, 470 U.S. at 82 n.8 (quoting 2 I. Goldstein & F. Lane, *Goldstein Trial Techniques* § 14.01 (2d ed. 1969)). As a result, "[i]n an increasing number of cases, proper trial preparation requires a defense attorney to consult an expert." *Hutchinson*, 742 P.2d at 881 . Indeed, in some cases, "the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both." *Harrington v. Richter*, 562 U.S. 86, 106 (2011). As this Court has understood since long before *Harrington*:

> Criminal cases commonly involve complex issues revolving around medical, psychiatric, scientific or accounting concepts. Frequently, in these types of cases, it is not only desirable—but absolutely vital—that a defense attorney consult an expert for guidance and interpretation. Without such assistance, an attorney may be unable to rationally determine technical and evidentiary strategy or to

> properly prepare for cross-examination of the prosecution's witnesses or for presentation or rebuttal of physical evidence. In some instances, an expert may be needed as a defense witness to establish a defense or to rebut a case built upon the powerful investigative arsenal of the state. Consequently, it cannot be denied that a defense counsel's access to expert assistance is a crucial element in assuring a defendant's right to effective legal assistance, and ultimately, a fair trial.

Hutchinson, 742 P.2d at 881 (internal citations omitted).

To safeguard a defense attorney's ability to provide constitutionally effective assistance, "it is essential that he be permitted full investigative latitude in developing a meritorious defense on his client's behalf." *Id.* at 883. "This latitude will be circumscribed if defense counsel must risk a potentially crippling revelation to the State of information discovered in the course of investigation which he chooses not to use at trial." *Id*. Thus, defense counsel "should be completely free and unfettered in making a decision as fundamental as that concerning the retention of an expert to assist him." *Id*. With no guarantee that the identity of consulting experts will remain confidential, "the attorney might well forego seeking such assistance, to the consequent detriment of his client's cause." *See id*.

"Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." *Strickland*, 466 U.S. at 686. Expert disclosures made by Sheriffs are likely to violate the right to effective assistance because knowledge of this practice will almost certainly interfere with defense counsel's ability to independently decide whether and which experts should visit with an incarcerated defendant. Counsel may feel compelled to refrain from consulting with certain experts if doing so would detrimentally expose the defendant and his strategy, or refrain from permitting experts to personally meet with the defendant. Counsel may also feel compelled to select an expert whose area of expertise is not as particularized in order to temper potential prosecution insights, thereby depriving the defendant of the ability to investigate his defense.

Every bit of information obtained about the experts who visit jailed defendants can help the prosecution to divine information about defense strategy. While learning the area of expertise of a defense expert provides obvious insights, the identity of an expert will alone frequently reveal the purpose and substance of the defendant's defense strategy. *See Cmty. Hosp.*

Ass'n v. Dist. Court, 570 P.2d 243, 245 (Colo. 1977) (disclosure of patient's name violates physician-patient privilege where doing so reveals confidential information such as the patient's ailments); *Smith v. Superior Court*, 173 Cal. Rptr. 145 (Cal. Ct. App. 1981) (disclosure of psychotherapist's patient's name violates privilege because it inevitably reveals that the patient suffers from mental or emotional problems). With no more than the name of a defense expert, the prosecution gains access to a host of information that would not otherwise be available. For example, suppose the defense hires a forensic odontologist who must visit the defendant in the jail to make a mold of his teeth. Given this highly specialized expertise, knowing only the expert's name could provide the prosecution with highly particularized insight into the defense theory and strategy. Even if the prosecution were unaware of a particular consultant's area of expertise, such information is readily available with little more than a few keystrokes. And when a Sheriff provides other information beyond the expert's name—such as the date, time, number, and duration of visits—that provides even more and different insights into the defendant's otherwise privileged investigation.

Knowing that a particular expert visited the defendant but then was not endorsed to testify can signal that a particular defense strategy has been abandoned. This may lead the prosecution to pursue investigation consistent with the non-testifying consultant's expertise in hopes of finding useful evidence for its case in chief or damaging cross-examination material for questioning defense witnesses. For example, the prosecution could be informed that a handwriting expert visited a defendant jailed in a bank robbery case in which there is uncertainty whether he wrote the hold-up note. If the defendant did not eventually endorse that expert as his trial witness, the prosecution would have reason to believe that the defendant opted not to present the expert's opinion because it was unfavorable to his case. The prosecution would thus gain insight into the defendant's likely defense theory and trial strategy, which could help the prosecution ascertain whether the defendant is likely to testify and decide whether to hire its own handwriting expert. Disclosure of no more than the existence of a particular consulting defense expert would thus give the prosecution an unfair tactical advantage in shaping its own trial strategy. But no such discovery is possible when the expert could meet confidentially with a defendant free on bond.

Defense attorneys are most frequently—and perhaps most troublingly—required to alter their strategies for handling mental-health experts. A Sheriff's decision to tell the prosecution that a psychiatrist, psychologist, or neuropsychologist provides the prosecution with confidential information. It signals to the prosecution that the defendant's mental state was an issue that was explored.

For the prosecution, disclosures received from Sheriffs serve not only to illuminate the defendant's strategy but to ease the prosecution's pretrial preparation and ultimately lighten the burden of proof. The sole purpose of such disclosures is to provide the prosecution with insights into the defendant's strategy, evidence, and potential witnesses. This provides not only a powerful tool but an unneeded and unfair advantage to the State.

Unlike Mr. Lucas, many defendants do not learn of a Sheriff's disclosure of experts until the proverbial cat is already out of the bag.[4] There is no effective remedy when that happens. Even if the defense hired new experts and the trial court ordered that their identity be kept confidential,

[4] Some defendants may never be privy to this knowledge and may proceed to trial under the false presumption that they had the opportunity to prepare their defense under a cloak of privacy.

the prosecution would already know the subject matter and thus likely defense strategies being pursued. This Court's endorsement of the authority of trial courts to issue protective orders precluding such disclosures will encourage a practice where the defense can seek such an order *before* bringing experts into the jail to consult with the defendant.

CONCLUSION

This Court should resolve its show-cause order by reversing the district court's order denying the protective order Mr. Lucas needs to prevent the Sheriff from further disclosure of any other consulting experts who visit him at the jail. Moreover, the Court should provide guidance to trial courts, prosecutors, and Sheriffs, as well as defendants and their counsel, about how to balance the reality of pretrial detention with the defendant's need to prepare his defense in secret to preserve his constitutional rights.

DATED: August 6, 2020.

s/ Amy D. Trenary
Amy D. Trenary, #46148
Counsel for Amici Curiae
CCDB and NACDL

CERTIFICATE OF SERVICE

I certify that on August 6, 2020, this BRIEF OF *AMICI CURIAE* COLORADO CRIMINAL DEFENSE BAR AND NATIONAL ASSOCIATION OF CRMIINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER was filed with the Colorado Supreme Court and a true and accurate copy was served by the Colorado Courts E-Filing System on all parties of record.

s/ Amy D. Trenary
Amy D. Trenary, #46148