IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, STATE OF FLORIDA
CRIMINAL DIVISION

STATE OF FLORIDA,
Plaintiff,

v.

CURTIS J. REEVES,
spn 00683538 Defendant.
_____ /

Case No.: CRC-1400216FAES

Division: 1

**RESPONSE TO STATE'S MOTION TO COMPEL ADDITIONAL DISCOVERY RELATING TO DEFENSE EXPERT DR. PHILIP HAYDEN**

COMES NOW, the Defendant, CURTIS J. REEVES, by and through Undersigned counsel, and responds to the State's Motion to Compel Additional Discovery Relating to Defense Expert Dr. Philip Hayden ("State's Motion"), and as grounds therefore states as follows:

Effective assistance of counsel requires a zone of privacy around the communications and activities between attorneys, expert witnesses, clients, law firm staff members, and others employed for the purposes of preparing for litigation. This is because these privacy protections help keep secure the legal theories, opinions and strategies of litigants from improper disclosure to the opposing party. This very sacred and indispensable rule of law is commonly referred to as the work product doctrine.

As the Florida Supreme Court stated with great admiration, the United States Supreme Court opined "[w]ith words which have not lost their poignancy" that:

> **[i]n performing his various duties, ... 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 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. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways-aptly though roughly termed ... the "work product of the lawyer." Were such 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. *Northup v. Acken*, 865 So. 2d 1267, 1269 (Fla. 2004) (quoting *Hickman*, 329 U.S. at 510-11) (emphasis added).

*Hickman*, as in this case, pertained to a demand for oral statements made to an attorney. In *Hickman*, the United States Supreme Court held that:

> **oral statements** made by witnesses to … [the attorney], whether presently in the form of his mental impressions or memoranda, we do not believe that any showing of necessity can be made under the circumstances of this case so as to justify production. Under ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. No legitimate purpose is served by such production. The practice forces the attorney to testify as to what he remembers or what he saw fit to write down regarding witnesses' remarks. Such testimony could not qualify as evidence; and to use it for impeachment or corroborative purposes would make the attorney much less an officer of the court and much more an ordinary witness. The standards of the profession would thereby suffer. *Hickman*, at 511-513. (emphasis added).

Since the issuance of *Hickman*, Florida courts have repeatedly and consistently held that "oral statements taken by attorneys from witnesses… are nondisclosable work product." *Horning-Keating v. State*, 777 So. 2d 438, 443-444 (Fla. 5th DCA 2001) (citing other appellate decisions with a similar holding).

Florida courts recognize two categories of work product: fact work product and opinion work product. Fact work product, which pertains to factual information prepared or gathered in connection therewith, concerns what the attorney did and what he learned in his role as attorney. *Id.* at 444. Fact work product can be obtained by a moving party only upon a demonstration of "need" and "hardship". *Id.* Bare assertions of need and undue hardship are insufficient to require

the production of fact work product. *Id.*, citing *Prudential Ins. Co. of America v. Florida Dept. of Ins.*, 694 So. 2d 772 (Fla. 2d DCA 1997). Opinion work product, which "involves a lawyer's impressions, conclusions, opinion and theories of her client's case… is an absolute, or nearly absolute, privilege." *Id.*

Here, any statements made by Dr. Hayden to any members of the Defense team would constitute opinion work product because they would, given his status and expertise, necessarily implicate and relate to undersigned counsel's (and other members of the Defense team's) impressions, opinions, legal theories, perspectives and interpretations of evidence, and ultimate trial strategy.

To avoid any needless litigation with the State, undersigned counsel makes clear that he is well aware of *Kidder v. State* and his reciprocal discovery obligations under Fla. R. Crim. P. 3.220(d)(1)(B)(ii). This latter provision, which states that "reports or statements of experts" must be shared with prosecution, means written reports or statements of experts. *Snow v. Fowler*, 662 So. 2d 1295, 1297 (Fla. 3d DCA 1995). The case law is clear that Dr. Hayden's oral statements to the Defense pertaining to this case are protected by the work product doctrine.

The State's motion to compel additional discovery relating to the Defense's expert is a legally impermissible attempt to obtain information that is protected by the work product doctrine. This motion to compel creatively, but unlawfully, requests a court order directing the defense's experts to perform analysis and work for the prosecution's benefit – thereby helping the state to obtain the functional equivalent of an expert report at Mr. Reeves' expense. For the reasons explained below, the State's motion to compel should be denied.

Having described the applicable law, undersigned counsel corrects, clarifies and/or addresses the State's numerous incorrect factual and legal claims in the below paragraph-by-paragraph Response.

***State's Motion – Paragraph 1 (Dr. Hayden)***

*1. On September 11, 2015 the Defendant filed his Notice of Reciprocal Discovery listing in paragraph B. expert witnesses he expects to call, including Dr. Philip P. Hayden. Fla. R. Crim. P. 3.220(d)(l)(A). The notice failed to identify a report or a statement by Dr. Philip P. Hayden. The notice also failed to identify the results of physical or mental examinations and of scientific tests, experiments, or comparisons. Fla. R. Crim. P. 3.220(d)(l)(B)(ii). Further, the notice failed to identify any tangible papers or objects the defendant intends to use in any hearing or trial. Fla. R. Crim. P. 3.220(d)(l)(B)(iii).*

**Defense's Response to Paragraph 1 of State's Motion (Dr. Hayden)**

Pursuant to his obligations under Fla. R. Crim. P. 3.220(d)(1)(B), undersigned counsel has already stated in his two Notices of Reciprocal Discovery that there is nothing from Dr. Hayden that needs to be either noticed or shared with the prosecution.

Notably, there is no legal mandate or obligation for the Defense to have an expert like Dr. Hayden prepare a formal report or written statement. Accordingly, the State did not cite to any such rule compelling the creation of such a report or statement because none exists.

In any event, given Mr. Reeves' status as a retired law enforcement officer, it is unrealistic and infeasible for him to pay for an expert report or written statement. Mr. Reeves's primary source of income is his Tampa Police Department pension and social security benefits. Perhaps there is a defendant in a different case with boundless resources who can pay his experts to prepare multiple reports or statements. Mr. Reeves, however, is of modest means and cannot afford to obtain gratuitous expert witness materials.

Obtaining an expert report or written statement would further serve no purpose because the State both has not completed their investigation and continues to provide undersigned counsel notices of new witnesses and other discovery. For example, the State recently advised the Defense that lead Detective Proctor and Detective Smith have resumed their investigation into this case. The State in September 2015 obtained a court order to enter the premises of the movie theater

where the underlying incident occurred to conduct some sort of experiments or tests. The prosecution recently further noticed the Defense of a Federal Bureau of Investigation expert that will be performing an unidentified forensic video analysis of the movie theater surveillance system footage. To date, the Defense has not received any such forensic video analysis.

Similarly, the Defense has started, but not yet completed, the deposition of the State's previously identified forensic video expert Agent Weyland. On the day of his originally scheduled deposition, Agent Weyland handed to the Defense videos the prosecution was previously required to give to the Defendant under Rule 3.220(b). The deposition could therefore not be completed, as the Defense needed to review and examine said videos. At this time, Agent Weyland is not available for completion of the deposition due to a reported illness.

Though this is a sampling, and not a comprehensive list of the activities the State and the Defense are conducting, it is clear that there would be no functional or useful purpose to obtaining an expert report or written statement from Dr. Hayden. Said report or statement may become partially or fully obsolete or unusable upon further investigation by the State or the Defense.

Given that the State has not completed their investigation and the Defense continues to depose witnesses, it should also not be a surprise that undersigned counsel did not "identify any tangible papers or objects the defendant intends to use in any hearing or trial." *State's Motion*, ¶ 1. The Defense cannot be reasonably or realistically expected to identify which tangible papers or objects they intend on using at trial when the investigation is ongoing and the deposition process has not yet been completed.

***State's Motion – Paragraph 2 (Dr. Hayden)***

*2. As has become the practice in Florida since Kidder v. State, 117 So.3d 1166 (Fla. 2d DCA 2013), criminal defense attorneys are frequently asking defense expert witnesses not to complete reports. The State does not anticipate a report or statement from Dr. Philip P. Hayden. The fact that no "report" will be forthcoming from him does not relieve the Defendant from providing the*

*results of any physical or mental examinations and of any scientific test, experiments, or comparisons that would normally be summarized in his "report".*

**Defense's Response to Paragraph 2 of State's Motion (Dr. Hayden)**

Although Dr. Hayden has not prepared a "formal report," *Snow*, 662 So. 2d at 1297, or a *written* statement, it is not because undersigned counsel is following the purported "practice in Florida since *Kidder v. State*" and not having such a document created. Criminal defense attorneys have routinely not requested reports from their experts due to the fact that the rules of discovery did not require one and because they serve the defendant no useful purpose. Further, such reports and statements are extremely expensive to generate.

***State's Motion – Paragraph 3 (Dr. Hayden)***

*3. The State knows through defense pleadings that Dr. Philip P. Hayden was provided with the following non-work product: a complete copy of police reports and photographs from the Pasco County Sheriff's Office, video footage of the shooting, the Defendant's Tampa Police Department and Bush [sic] Gardens personnel files and various State witness defense deposition transcripts*

**Defense's Response to Paragraph 3 of State's Motion (Dr. Hayden)**

Despite being under no legal obligation to do so, the Defense voluntarily provided the State notice that these aforementioned items were provided to Dr. Hayden.

***State's Motion – Paragraph 4 (Dr. Hayden)***

*4. The Defendant obtained a court order to enter Cobb Theater to conduct his own examination of the crime scene. The State reasonable [sic] believes that Bruce E. Koenig or another representative from Bek Tek was present along with Michael Knox, Knox & Associates, Forensic Consulting or another representative from Knox & Associates and Dr. Philip Hayden. The State reasonable [sic] believes that the purpose was to conduct an onsite evaluation to record visual information of the theater, including the evaluation of equipment that cannot be removed from the theater (Infra-red cameras & DVRs). The State also reasonable [sic] believes that photographs, measurements, notes, sketches and videos were made and will be used by these experts to support their opinions or to create demonstrative aids the experts, including Dr. Philip P. Hayden will use to explain their testimony to the court or to the jury.*

**Defense's Response to Paragraph 4 of State's Motion (Dr. Hayden)**

What the State believes Dr. Hayden did or did not do at the movie theater is pure speculation. There is no basis for undersigned counsel to first seek information from the expert, then inform the State, prior to taking depositions, of the expert's activities. Undersigned counsel is further aware of his obligations under Fla. R. Crim. P. 3.220(d)(1)(B)(ii) and will comply with it.

***State's Motion – Paragraph 5 (Dr. Hayden)***

*5. The State reasonable [sic] believes that material issues relating to the shooting event are being examined by defense experts Bruce Koenig, (Video expert), Michael Knox (Crime Scene Expert), Vemard Adams, M.D. (Forensic Pathologist), Dr. Philip Hayden (Use of force expert) and Michael Foley, M.D. (Forensic Radiologist) The State reasonable [sic] believes that the expertise of each defense expert is sufficiently interwoven that the work of one expert can be used by one or more of the other defense experts in an attempt to support their respective conclusions and/or opinions or to general [sic] explain a particular concept or issue to the trier of fact.*

**Defense's Response to Paragraph 5 of State's Motion (Dr. Hayden)**

What the State believes Dr. Hayden did or did not do in conjunction with the other defense experts is pure speculation. There is no basis for undersigned counsel to first seek information from one of its expert, then inform the State, prior to taking depositions, of the expert's activities.

***State's Motion – Paragraph 6 (Dr. Hayden)***

*6. The State anticipates Dr. Philip P. Hayden[,] retired FBI Special Agent will be called by the Defendant as an expert in police use of force*

**Defense's Response to Paragraph 6 of State's Motion (Dr. Hayden)**

The Defense has no objection to the State taking a deposition of Dr. Hayden. Further, the Defense has no objections to the State's questioning of Dr. Hayden regarding his ultimate opinion on the case or evidence, the basis of his opinion, and what he may have done or not done in this case. The State, of course, will need to assume full financial and logistical responsibilities for any deposition of Dr. Hayden or any other defense expert.

***State's Motion – Paragraph 7 (Dr. Hayden)***

*7. On a showing of materiality, the court may require such other discovery to the parties as justice may require. Fla. R. Crim. P. 3.220(f).*

**Defense's Response to Paragraph 7 of State's Motion (Dr. Hayden)**

Rule 3.220(f) states that "[o]n a showing of materiality, the court may require such other discovery to the parties as justice may require." Fla. R. Crim. P. 3.220(f). Florida courts have held that "[i]n the discovery context, material means reasonably calculated to lead to admissible evidence." *Demings v. Brendmoen*, 158 So. 3d 622, 624-625 (Fla. 5th DCA 2014) (quoting *Franklin v. State*, 975 So. 2d 1188, 1190 (Fla. 1st DCA 2008)). A mere demonstration that certain information or items may be useful is insufficient to demonstrate that the interests of justice compel their disclosure under Rule 3.220(f). *Franklin*, at 1190.

***State's Motion – Paragraph 8 (Dr. Hayden)***

*8. The State anticipates the defense will attempt to use Dr. Philip Hayden to explain general concepts of self-defense to the trier of fact and/or to render [an] opinion that touch[es] upon the ultimate issue in this case[:] self-defense*

**Defense's Response to Paragraph 8 of State's Motion (Dr. Hayden)**

The Defense has no objection to the State taking a deposition of Dr. Hayden. Further, the Defense has no objections to the State's questioning of Dr. Hayden regarding his ultimate opinion on the case or evidence, the basis of his opinion, and what he may have done or not done in this case. The State, of course, will need to assume full financial and logistical responsibilities for any deposition of Dr. Hayden or any other defense expert.

***State's Motion – Paragraph 9(a) (Dr. Hayden)***

*9. Justice requires that the below-described material be provided to the State by the Defendant prior to the taking of the discovery deposition of defense expert Dr. Philip Hayden.*

*a. Current C.V. for Dr. Philip Hayden and all other individuals who in any way provided any services of any kind regarding the work requested by the Defendant.*

**Defense's Response to Paragraph 9(a) of State's Motion (Dr. Hayden)**

Undersigned counsel is not obligated under any rule or law to provide the State with the C.V. of an expert. The defense, however, will voluntarily provide Dr. Hayden's C.V. to the State as a courtesy.

The prosecution failed to establish how obtaining the C.V.s for each and every individual who "in any way" provided "any services" of "any kind" regarding the work requested by the Defendant is reasonably calculated to lead to discoverable evidence. They also failed to explain or allege that the interests of justice compel the production of every C.V. of every individual who has had any contact – no matter how tangential – to this case. Taken to the extreme, the State's request, if granted by this Court, would require that any receptionist, college intern, secretary, technician of the lowest level, or other person would need to provide their C.V. to the State. The State's failure to satisfy the materiality and interest of justice requirements compels this Court to deny the production of all of the remaining C.V.s.

***State's Motion – Paragraph 9 (b) (Dr. Hayden)***

*b. All material, including but not limited to reports, photographs, letters, correspondence, emails, submissions, sketches, diagrams, videos, [and] crime scene mapping Dr. Philip Hayden received from Michael Knox, Knox & Associates (Forensic Consulting), Dr. Vernard I. Adams (Forensic pathologist) and/or Bruce Koenig (Video Expert)*

**Defense's Response to Paragraph 9 (b) of State's Motion (Dr. Hayden)**

Although undersigned counsel listed the items provided to Dr. Hayden in its October 6, 2015 *Defendant's Second Notice of Reciprocal Discovery*, the State now requests disclosure of any items received from any other defense experts. There are no items responsive to this request.

Undersigned counsel notes, however, that the State nonetheless has not satisfied the materiality and in the interest of justice prerequisites for this request.

***State's Motion – Paragraph 9 (c) (Dr. Hayden)***

*c. All material, including but not limited to reports, photographs, videos, letters, correspondence, emails, submissions, sketches, diagrams Dr. Philip Hayden sent to Michael Knox, Knox & Associates (Forensic Consulting), Dr. Vernard I. Adams (Forensic pathologist) and/or Bruce Koenig (Video Expert)*

**Defense's Response to Paragraph 9 (c) of State's Motion (Dr. Hayden)**

Dr. Hayden has not provided any of these listed items to either the other experts or undersigned counsel. *October 6, 2015 Defendant's Second Notice of Reciprocal Discovery.*

***State's Motion – Paragraph 9 (d) (Dr. Hayden)***

*d. Any and all written or tapped [sic] statements of individuals who have information that is relevant to the State or the defense that was provided to Dr. Philip Hayden*

**Defense's Response to Paragraph 9 (d) of State's Motion (Dr. Hayden)**

The Defense has already voluntarily provided the State a list of the items given to Dr. Hayden. *October 6, 2015 Defendant's Second Notice of Reciprocal Discovery.* Undersigned counsel notes, however, that the State nonetheless has not satisfied the materiality and in the interest of justice prerequisites for this request.

***State's Motion – Paragraph 9 (e) (Dr. Hayden)***

*e. All defense deposition transcripts provided to Dr. Philip Hayden to include but not limited to: Angela Hamilton, Anthony Colello, Elaine Ajamian, Garry Houston, Gladys Perez, Luis Perez, Mary Houston, Robert Kerr, Sylvia Keer [sic] and [sic] Vincent Redfern, Det. Alan Hamilton, Dep. Aaron Smith, Nicole Oulson, and Det. William Proctor*

**Defense's Response to Paragraph 9 (e) of State's Motion (Dr. Hayden)**

It is utterly remarkable that given the circumstances of this case, the State claims that the interests of justice compel the Defendant to produce copies of deposition transcripts to the prosecution. First, the aforementioned individuals are prosecution witnesses. Second, a prosecutor (taking extensive notes) was present at every deposition of every state witness. Third, in his October 6, 2015 Defendant's Second Notice of Reciprocal Discovery, undersigned counsel gratuitously both advised the State that Dr. Hayden was provided a copy of the relevant deposition

transcripts and provided the contact information of the court reporter, from whom they can order a copy of the transcript at a reasonable rate.

Fourth, the State attempts to circumvent the pending litigation before the Second District Court of Appeal (2D15-4082) by asking this Court to direct the Defendant to provide to the prosecution free copies of deposition transcripts of prosecution witnesses. As this Court was served a copy of the pending Petition for Writ of Certiorari, it is well aware that the Defendant's Petition alleges that the filing of deposition transcripts has great and irreparable constitutional ramifications for Mr. Reeves. As no ruling has been issued by the Second District Court of Appeal, it would be improper and counterproductive for this Court to order production of any deposition transcript. The interests of justice would not be served if the Defense is forced to file another legal challenge to the State's latest attempt to get free deposition transcripts.

Saving the State some money at the expense of Mr. Reeves' constitutional rights to a fair trial is unjust. *Palm Beach Newspapers, Inc. v. Burk*, 504 So. 2d 378 (Fla. 1987). This request should therefore be denied.

***State's Motion – Paragraph 10 (Dr. Hayden)***

*13. Further, in order to be able to take a meaningful, economical discovery deposition of Dr. Dr. Philip Hayden, the State is requesting the Defendant to provide to the State any tangible papers or objects that the defendant intends to use at any hearing or trial, including but not limited to the above-described items the State reasonably believes is specific and unique to defense expert Dr. Philip Hayden. Fla. R. Crim. P. 3.220 (d)(l)(B).*

**Defense's Response to Paragraph 10 of State's Motion (Dr. Hayden)**

As explained above, it is neither reasonable, realistic, nor feasible for the Defense to finalize the list of tangible papers and objects that will be used at a future hearing or trial. The State is still conducting their investigation and providing information and discovery to the Defense. The Defense is still conducting depositions. Some depositions – including of prosecution expert witnesses – have not been fully completed.

As noted above, undersigned counsel is familiar with his reciprocal discovery obligations. When he can, in good faith, provide a list of tangible papers and objects that he intends on using at trial, he will.

WHEREFORE, the Defendant, CURTIS J. REEVES, respectfully requests this Honorable Court to DENY the Motion to Compel.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Hand Delivery/Facsimile to the Office of the State Attorney, Dade City, Florida this 22nd day of October, 2015.

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[redacted]

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