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7 IN THE CIRCUIT COURT OF THE STATE OF OREGON  
8 FOR THE COUNTY OF LANE  
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10 STATE OF OREGON, )

11 Plaintiff, )

12 v. )

13 \_\_\_\_\_, )  
14 Defendant. )

Case No. \_\_\_\_\_

MOTION FOR PRODUCTION BEFORE  
THE COURT, *IN CAMERA* REVIEW,  
AND PROTECTIVE ORDER RE:  
ACCUSER'S SMART  
PHONE(S)

(Oral Argument Requested: 30 minutes)

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18 COMES NOW the Defendant, \_\_\_\_\_, by and through his attorney Michael J.  
19 Buseman, and motions the Court to authorize a pretrial subpoena duces tecum for production to  
20 the court of the complaining witnesses' smart phone for *in camera* inspection, as well as for  
21 forensic imaging of the complaining witnesses' smart phone, pursuant to a protective order based  
22 on the authority found in the Sixth and Fourteenth Amendments to the United States Constitution,  
23 Article I, section 11 of the Oregon Constitution; ORS 136.580(2); State v. Bray, 281 Or App 584  
24 (2016); State v. Lammi, 278 Or App 690 (2016) and State v. Cartwright, 336 Or 408 (2004).  
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I. Factual Basis

The defendant is charged with Rape in the First Degree, Sexual Abuse in the Second Degree x 2, Sodomy in the First Degree and Unlawful Sexual Penetration in the First Degree x 2, by Indictment dated September 28, 2018.

The parties in this case were known to each other and communicated with one another via electronic devices prior to the incident date and after the incident date. It is my understanding that the defendant's smart phone is in the possession of law enforcement and a complete "forensic imaging" of the device has been completed. It is also my understanding that the complaining witnesses' smart phone *was* in the possession of law enforcement, that there *was not* a complete "forensic imaging" of the device, and that it was subsequently returned to the complaining witness. The complaining witness may have been "asked" to not delete anything from her cell phone.

As part of the communication via electronic device, the application "Discord" was utilized. The complaining witness downloaded the "Discord" application on her smart phone. The defendant downloaded the application "Discord" on his personal computer. The application "Discord" allows for parties to communicate via the application by text, voice and image.

The defendant has not received discovery from the complaining witnesses' smart phone involving communication prior to the alleged incident date. It is unclear if those communications were preserved by law enforcement and there is no court order in place requiring the complaining witness to preserve that evidence. It is my understanding that the complaining witness has been requested by law enforcement to not delete any information on her smart phone.



1 The leading case on pretrial subpoenas duces tecum for electronic devices and digital evidence  
2 in the possession of an alleged crime victim is State v. Bray, 281 Or App 584 (2016). The  
3 *Bray* court held that the trial court erred in denying defendant’s motion to compel the  
4 alleged crime victim to comply with a subpoena duces tecum. The Court of Appeals in Bray  
5 found that the defendant’s request did “not run afoul of any state or federal limitations on  
6 criminal defendant’s subpoena power.” *Id.* at 614. The request was for the opportunity to  
7 conduct a forensic examination, conducted pursuant to a protective order that limits the scope of  
8 the examination to the targeted material and prohibits the use of any discovered evidence beyond  
9 the purpose of litigation. The court found that the subpoena was authorized by statute, was  
10 limited in scope and the information sought was relevant. *Id.*

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13 The information sought by the defendant is limited in scope to the communications with  
14 the defendant in the four weeks leading up to the alleged incident date. This includes, but is not  
15 limited to, communications using the application “Discord.” The defendant is also seeking any  
16 communications after the alleged incident date that reference the defendant and/or the alleged  
17 incident. This information is relevant and material because it shows the complaining witness’  
18 state of mind leading up to the incident, it will show the effect on the defendant’s state of mind, it  
19 may be used for purposes of impeachment, and it will show any motivation and or bias towards  
20 the defendant.  
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23 The defendant is seeking the digital information stored in the complaining witnesses’  
24 smart phone. The Bray court recognized that in order to accomplish such a task the party seeking  
25 the data will need to obtain a forensic examination of the computer and a report of the  
26 examination. Bray at 44. A court ordering such an examination and report must impose  
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1 conditions necessary to protect against any unreasonable invasion of the person's privacy. Id.  
2 The Court should prescribe the contours of the examination and terms of any protective orders.  
3 Id. If the party seeks information protected by privilege or statute, the Court should consider an  
4 *in camera* review. Id.  
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10 MOVED this \_\_\_\_ day of November, 2018.  
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13 \_\_\_\_\_  
14 Michael J. Buseman, OSB# 971196  
15 Attorney for Defendant  
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