

COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE EX REL. LAVON THOMAS AND FELICIA KELLY,	:	
Relators,	:	
v.	:	No. 108633
JUDGE WILLIAM T. MCGINTY,	:	
Respondent.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: WRIT DISMISSED
DATED: December 10, 2019

Writ of Prohibition
Motion No. 529677
Order No. 533873

Appearances:

Ohio Crime Victim Justice Center and Elizabeth Well, *for relator.*

Law Office of Timothy Farrell Sweeney and Timothy F. Sweeney, *for respondent.*

MARY J. BOYLE, P.J.:

{¶ 1} On May 31, 2019, the relators, Lavon Thomas and Felicia Kelly, commenced this prohibition action against the respondent, Judge William McGinty, to prohibit him in the underlying case, *State v. Counts*, Cuyahoga C.P. No. CR-18-

634510-A, from enforcing his discovery order that permits the defendant's counsel to inspect, measure, and photograph their residence, which is a crime scene. On June 25, 2019, the respondent moved to dismiss this prohibition action, and on July 10, 2019, the relators filed their brief in opposition. The court has reviewed the filings, and the matter is ripe for resolution. For the following reasons, this court grants the judge's motion to dismiss and dismisses the application for a writ of prohibition.

FACTUAL AND PROCEDURAL BACKGROUND

{¶ 2} As gleaned from the filings in the present case and the underlying case, in the fall of 2018, Kaylynn Counts, a college student, was staying in the home of a family member, Lavon Thomas, a 72-year-old woman and the mother of Felicia Kelly. On November 9, 2018, Thomas and Kelly told Counts to leave the home. It is alleged that in the ensuing altercation Counts assaulted Thomas and stabbed Kelly. Counts has maintained that she acted in self-defense.

{¶ 3} On December 3, 2018, the grand jury indicted Counts for the attempted murder of Kelly and four counts of felonious assault. During discovery, the state gave Counts's attorneys copies of all its pictures and body camera footage of Thomas's home taken during the investigation.

{¶ 4} Nevertheless, Counts's attorneys on April 1, 2018, filed a "Motion for Criminal Rule 16 entry upon land for inspection and photograph" of Thomas's home. The lawyers alleged that their ability to inspect and photograph the residence is necessary to the preparation of the defense and that the materials released by the

state were insufficient for that purpose. They invoked Crim.R. 16(B)(3), which allows for discovery, inter alia, of building and places.

{¶ 5} In its April 16, 2018 brief in opposition, the state argued that defense counsel and their investigators have no right to enter Thomas's home "to inspect it for any permissible purpose under current Ohio law." (State's brief in opposition, pg. 2.) Crim.R. 16(B), the state continued, is conditioned upon the state providing discovery. Because the state already released dozens of photographs of the home, as well as the body camera footage, the recently amended rule prevented Counts's attorneys from conducting their own inspection and invading a 72-year-old woman's home. The state also invoked the Fourth Amendment in arguing that the trial court had no authority to grant the motion.

{¶ 6} The respondent judge conducted a hearing on the motion on May 16, 2019. Defense counsel argued that the materials provided by the state showed images of the injuries and their client being subdued and arrested; these images would not allow them to forensically recreate the incident. Similarly, the county's blueprints were not helpful, just some rectangles. Their inspection would be no more intrusive than the state's or a jury view. Defense counsel also contested the state's interpretation of Crim.R. 16. Counsel further opined that it would be malpractice on their part if they did not move to inspect the crime scene.

{¶ 7} The state countered that Crim.R. 16 does not permit inspection beyond what the state provided, that the material provided during discovery adequately shows the home, and that because Counts had lived there, the defense

would know the lay of the house. Moreover, it would be wrong to allow such an invasion into a person's home, much less a 72-year-old woman's home.

{¶ 8} On May 20, 2019, the respondent judge granted the discovery motion as follows:

The court finds that the defendant's motion for Criminal Rule 16 entry upon land for inspection and photograph is granted. The court orders: The parties communicate to provide 3 available days with a specific time to allow state to confer with homeowner. The state will indicate to defense counsel the date of discovery. The court orders that bailiff shall be the court representative and be present at all times while the defendant, defense counsel, and their experts are within the residence. At all times, the defendant, defense counsel and their expert shall be within the view of the bailiff. The court orders that a sheriff's deputy shall assist bailiff in this procedure. The victim shall not be in the residence once the discovery process commences. The court further orders that Cleveland Police Department and County Prosecutor personell [sic] may be present, but may not be within the residence when the discovery is ongoing.

{¶ 9} The state sought leave to appeal this decision the next day, *State v. Counts*, 8th Dist. Cuyahoga No. 108564. In seeking leave to appeal, the state argued that the trial court lacked authority to order access to a victim's home under the specific provision of Crim.R. 16. The state also invoked the victim's right of privacy and the protection of the Fourth Amendment. On June 11, 2019, this court summarily denied the motion for leave to appeal.

{¶ 10} On May 31, 2019, Thomas and Kelly's counsel, contemporaneous with filing this prohibition action, filed a notice of appearance in the underlying case and moved the respondent judge to stay proceedings. In this motion, Thomas and Kelly argued that the Ohio Constitution, Article I, Section 10a (hereinafter "Section

10a”), which gives victims the right to refuse an accused’s discovery request; the specific wording of Crim.R. 16 and 17; the Fourth Amendment right to be free of unreasonable governmental intrusion; and the constitutional right to privacy deprived the trial court of the authority to order the inspection of the home.

{¶ 11} On June 28, 2019, the state sought to appeal this court’s decision of the denial of leave to appeal to the Supreme Court of Ohio. In trying to establish that this case presented issues of great public or general interest, the state noted the difficulty a crime victim has in enforcing rights under Section 10a. The victim is not a party to the criminal case and, thus, may not be able to file protective motions or file an appeal. In *State v. Hughes*, 8th Dist. Cuyahoga No. 107697, 2019-Ohio-1000, in which a crime victim sought to appeal an order in a criminal case requiring her to provide the names of medical providers, the lead opinion stated that victims lacked standing to appeal from an order in a criminal case and indicated that extraordinary writs may be the appropriate remedy to effect Section 10a. Therefore, the state’s appeal was appropriate to determine the means to enforce Section 10a. The Supreme Court summarily declined to accept the case for review.

DISCUSSION OF LAW

{¶ 12} In their complaint for prohibition, the relators argue that Section 10a’s provisions protecting a victim’s privacy and the right to refuse discovery requests, as well as the Fourth Amendment right to be free from unreasonable government intrusion into residences, deprived the trial court of the jurisdiction to issue the May 20, 2019 discovery order. In their motion for stay of proceedings, the

relators also argue that the limited scope of the Ohio Criminal Rules for discovery, Rules 16 and 17, does not vest the respondent judge with the authority to order the inspection of the home. Thus, the relators propose that a victim's unilateral invocation of a right under Section 10a deprives a court of the subject matter jurisdiction to issue a discovery order in a criminal case. This court again confronts the problem of whether Ohio's current remedies — appeal, mandamus, prohibition, procedendo, forcing contempt and then appealing and seeking a stay, declaratory judgment and/or injunction — provide adequate means to effect Section 10a.

{¶ 13} The principles governing prohibition are well established. Its requisites are (1) the respondent against whom it is sought is about to exercise judicial power, (2) the exercise of such power is unauthorized by law, and (3) there is no adequate remedy at law. *State ex rel. Largent v. Fisher*, 43 Ohio St.3d 160, 540 N.E.2d 239 (1989). Prohibition will not lie unless it clearly appears that the court has no jurisdiction of the cause that it is attempting to adjudicate or the court is about to exceed its jurisdiction. *State ex rel. Ellis v. McCabe*, 138 Ohio St. 417, 35 N.E.2d 571 (1941), paragraph three of the syllabus. “The writ will not issue to prevent an erroneous judgment, or to serve the purpose of appeal, or to correct mistakes of the lower court in deciding questions within its jurisdiction.” *State ex rel. Sparto v. Juvenile Court of Darke Cty.*, 153 Ohio St. 64, 65, 90 N.E.2d 598 (1950). Furthermore, it should be used with great caution and not issue in a doubtful case. *State ex rel. Merion v. Tuscarawas Cty. Court of Common Pleas*, 137 Ohio St. 273, 28 N.E.2d 641 (1940). Nevertheless, when a court is patently and

unambiguously without jurisdiction to act whatsoever, the availability or adequacy of a remedy is immaterial to the issuance of a writ of prohibition. *State ex rel. Tilford v. Crush*, 39 Ohio St.3d 174, 529 N.E.2d 1245 (1988); and *State ex rel. Csank v. Jaffe*, 107 Ohio App.3d 387, 668 N.E.2d 996 (8th Dist.1995). However, absent such a patent and unambiguous lack of jurisdiction, a court having general jurisdiction of the subject matter of an action has authority to determine its own jurisdiction. A party challenging the court's jurisdiction has an adequate remedy at law via an appeal from the court's holding that it has jurisdiction. *State ex rel. Rootstown Local School Dist. Bd. of Edn. v. Portage Cty. Court of Common Pleas*, 78 Ohio St.3d 489, 678 N.E.2d 1365 (1997). Moreover, this court has discretion in issuing the writ of prohibition. *State ex rel. Gilligan v. Hoddinott*, 36 Ohio St.2d 127, 304 N.E.2d 382 (1973).

{¶ 14} Section 10a provides in pertinent part as follows:

(A) To secure for victims justice and due process throughout the criminal and juvenile justice systems, a victim shall have the following rights, which shall be protected in a manner no less vigorous than the rights afforded to the accused:

(1) to be treated with fairness and respect for the victim's safety, dignity and privacy;

* * *

(6) except as authorized by Section 10 of Article I of this constitution, to refuse an interview, deposition, or other discovery request made by the accused or any person acting on behalf of the accused;

* * *

(B) * * * If the relief sought is denied, the victim or the victim's lawful representative may petition the court of appeals for the applicable district, which shall promptly consider and decide the petition.

{¶ 15} Article I, Section 10 provides in pertinent part as follows:

* * * In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy trial by an impartial jury of the county in which the offense is alleged to have been committed; * * *.

{¶ 16} Crim.R. 16 provides in pertinent part as follows:

(A) This rule is to provide all parties in a criminal case with the information necessary for a full and fair adjudication of the facts, to protect the integrity of the justice system and the rights of defendants, and to protect the well-being of witnesses, victims, and society at large.
* * *

(B) Upon receipt of a written demand for discovery by the defendant,
* * * the prosecuting attorney shall provide copies or photographs, or permit counsel for the defendant to copy or photograph, the following items related to the particular case * * * and which are material to the preparation of a defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant, within the possession of, or reasonably available to the state, subject to the provisions of this rule:

* * *

(3) * * * all laboratory or hospital reports, books, papers, documents, photographs, tangible objects, buildings, or places;

* * *

(5) Any evidence favorable to the defendant and material to guilt or punishment;

* * *

(J) The following items are not subject to disclosure under this rule:

* * *

(3) Materials that by law are subject to privilege, or confidentiality, or are otherwise prohibited from disclosure.

* * *

(L) (1) The trial court may make orders regulating discovery not inconsistent with this rule. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, * * * or it may make such other order as it deems just under the circumstances.

{¶ 17} Crim.R. 17(C) provides that

[a] subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein; but the court, upon motion made promptly and in any event made at or before the time specified in the subpoena for compliance therewith, may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that the books, papers, documents, or other objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time they are offered in evidence, and may, upon their production, permit them or portions thereof to be inspected by the parties or their attorneys.

{¶ 18} The court further notes that a trial court may order a jury view pursuant to R.C. 2945.16.

{¶ 19} Relators' argument is direct. Section 10a allows a crime victim to refuse a discovery request. In the present case, the discovery request is a court order pursuant to Crim.R. 16 allowing the defendant, her counsel, and investigators to enter, inspect, measure, and photograph the home. Although this provision of

Section 10a is subordinate to Article I, Section 10 of the Ohio Constitution, the specific guaranties of Section 10 – the right to appear and defend in person and with counsel, to confront witnesses, to have compulsory process, and to a speedy trial – do not explicitly cover inspection of the crime scene, especially when it is the victim’s home. Therefore, the victim’s right to refuse the discovery request is not limited by Article I, Section 10. Section 10a’s enumerated right to refuse the discovery request of inspection prohibited the trial court from enforcing the order. The relators also invoke the Fourth Amendment’s right of the people to be secure in their persons and houses against unreasonable searches and the Tenth Amendment’s right to privacy to bolster the argument.

{¶ 20} In their motion for stay, the relators contend that the language of Ohio’s criminal discovery rules do not permit the trial court to issue the inspection order. Crim.R. 16 only pertains to materials in the prosecution’s possession or reasonably available to the state. Because the relators are in possession of the home and the state is not, the inspection is outside the scope of the rule. Crim.R. 17 authorizes subpoenas for the production of objects. However, Counts did not seek a subpoena or invoke Crim.R. 17. Therefore, the respondent judge may not claim that Crim.R. 17 grants him the power to issue the inspection order.

{¶ 21} The relators rely on a Colorado case to support their position. In *People ex rel. E.G.*, 2016 CO 19, 368 P.3d 946, the criminal defendant moved the trial court to allow his attorney and investigator to view the crime scene, which was the defendant’s grandmother’s house. The trial court denied the motion because

Colorado law granted no authority to allow such a search. On appeal, the Colorado Supreme Court affirmed. It noted that under the Fourth Amendment the grandmother had the right to be free from an unreasonable search by the defense. Only if Colorado law explicitly allowed such a search, could it be conducted. The court then noted Colorado remains one of the few states that holds to the traditional doctrine that courts lack power to grant discovery outside of discovery statutes and rules. The court then held that because Colorado Crim.R. 16 permits access to only materials and information in the government's possession, that rule would not allow a search. Similarly, Colorado Crim.R. 17 and the Sixth Amendment's right to compulsory process provides the right to compel witnesses to testify and to bring tangible evidence to court; it does not provide a trial court with the authority to order a non-party to allow access to her private home. Nor does the Due Process Clause provide a right to use the government's power to conduct a defendant's investigation. The Confrontation Clause provides a trial right, not a right of pretrial discovery. The Colorado Supreme Court concluded that "a defendant may not use the power of the court to transgress the constitutional rights of private citizens in order to build his defense." 2016 CO 19, ¶ 30.

{¶ 22} The relators also rely on *Howard v. State*, 232 Md. App. 125, 156 A.3d 981 (2017). In this case, the defendant moved to inspect the interior of a private home where the crimes were committed. The trial judge denied the motion holding that Maryland law does not authorize a court in a criminal action to order a non-party to allow entry upon his land for inspection. The Maryland court of appeals

affirmed. It reasoned that Maryland law strictly limits discovery to that which is permitted by statute, court rule, or mandated by constitutional guarantees. The general rule, comparable to Ohio Crim.R. 16, requires the state to disclose materials under its possession or control. Because the private residence was not under the state's control, it was exempt from the scope of discovery. Similarly, the provision for subpoenas does not apply to real property. The court considered whether the constitutional rights of due process, confrontation, and effective assistance of counsel required the discovery of the home. It concluded that assuming, without deciding, that those constitutional provisions did grant the trial court the authority to order inspection, there was no error in denying the discovery motion, because the defense did not show the need for the inspection.

{¶ 23} Several other states have also upheld the right of individuals to refuse discovery requests. In *State ex rel. Beach v. Norblad*, 308 Ore. 429, 781 P.2d 349 (1989), the defendant in a murder case sought the inspection of the crime scene, the home of the murder victim's widow. The defendant obtained a court order to allow the inspection, because he alleged a fair trial required that his investigator be able to observe the crime scene. The widow then obtained a writ of mandamus requiring the trial judge to vacate the order, because the trial judge lacked authority to issue such an order. Similarly, in *State ex rel. Glode v. Branford*, 149 Ore.App. 562, 945 P.2d 1058 (1997), an Oregon court in a mandamus action ruled that a discovery order requiring a third party to disclose personal records exceeded the trial judge's authority.

{¶ 24} In *State v. Lee*, 929 N.W.2d 432 (Minn.2019), Lee was convicted, inter alia, of domestic violence arising from a fight with his spouse that took place throughout their home. His defense counsel moved to inspect the residence arguing that he needed to know the layout of the house and the items therein to be able to cross-examine the wife. He claimed that the scope of Minnesota’s Crim.R. 16, the right to due process, and the right to effective assistance of trial counsel allowed the court to order such an inspection. In Lee’s appeal to the Minnesota Supreme Court after the trial court denied the motion and Lee was found guilty, the supreme court ruled that under Crim.R. 16, which requires the state to allow inspection of matters within its control, the state cannot be required to do something that is not within its control. Thus, the court “is not empowered to force third parties to make private property available for inspection. Requiring otherwise would ignore the right of the property owner * * * to exclude persons from his or her property.” 929 N.W.2d at 439.¹

{¶ 25} Thus, the relators argue that the constitutional provisions, especially Section 10a, and the limited scope of Ohio’s discovery rules deprive the respondent judge of the power to order the inspection of their home.

{¶ 26} However, under Ohio law, the trial court has broad discretion, and thus the jurisdiction, over discovery matters, such that the writ of prohibition will not lie. In *State ex rel. Corrigan v. Griffin*, 14 Ohio St.3d 26, 470 N.E.2d 894 (1984),

¹ The Minnesota Supreme Court declined to review the constitutional arguments, because any error in denying the motion to inspect was harmless.

before the broadening of the scope of discovery, the trial judge in a capital case ordered the prosecutor to disclose information in the prosecutor's file. The prosecutor sought a writ of prohibition to prevent the disclosure. In affirming the denial of the writ, the Supreme Court of Ohio held that "[t]he trial court has authority to enter pretrial orders regarding discovery." 14 Ohio St.3d at 27. The supreme court affirmed that proposition in *State ex rel. Mason v. Burnside*, 117 Ohio St.3d 1, 2007-Ohio-6754, 881 N.E.2d 224, in which the trial court in a capital case ordered the prosecutor to provide all police reports and witness statements to defense counsel. The supreme court reasoned that "[i]t is unquestioned that 'courts have broad discretion over discovery matters.' * * *. (Citation omitted.) Given the discretionary authority vested in Judge Burnside in discovery matters, 'an extraordinary writ will not issue to control her judicial discretion, even if that discretion is abused.'" *Id.* ¶ 11. *State ex rel. Herdman v. Watson*, 83 Ohio St.3d 537, 1998-Ohio-296, 700 N.E.2d 1270 —, prohibition would not lie to prevent the trial court from ordering discovery of possible privileged information. In *State ex rel. Lighttiser v. Spahr*, 18 Ohio St.3d 234, 480 N.E.2d 779 (1985), and *State v. Landrum*, 52 Ohio St.3d 107, 559 N.E.2d 710 (1990), the supreme court ruled that under Crim.R. 16 granting discovery beyond what the rules require is at the trial court's discretion.

{¶ 27} In *State ex rel. The Ohio Bell Telephone Co. v. Williams*, 63 Ohio St.2d 51, 407 N.E.2d 2 (1980), the trial court authorized the Columbus Police Department to install a monitoring device to record the telephone numbers for all outgoing calls

made from a specific residence as part of a criminal investigation and ordered the telephone company to aid in the installation. When the telephone company failed to aid in the installation, the trial court set the matter for a contempt hearing. The telephone company then sought a writ of prohibition to prevent the trial court from enforcing its order. In affirming the denial of the writ of prohibition, the Supreme Court of Ohio ruled that the “Court of Common Pleas has the inherent authority to order appellant’s assistance in the matter. Ohio Courts of Common Pleas, being trial courts of general jurisdiction with a combination of legal and equitable powers, have the authority to order appellant to assist in the implementation of a pen register order which is in the nature of a warrant.” *Id.* at 56. Thus, the court indicated that the court of common pleas may order non-parties to assist in criminal investigations.

{¶ 28} The Ohio Courts of Appeals have also confirmed the broad authority trial courts have over discovery. In ruling on a defense request for police investigatory files, the Twelfth District stated: “[t]he language of Crim.R. 16 does not suggest that the rule was intended to be an all-encompassing declaration of the entire scope of permissible pretrial discovery. * * * it is generally accepted that it is within the trial court’s discretion to grant any discovery beyond the scope of that required by Crim.R. 16.” *State v. Simmons*, 87 Ohio App.3d 290, 292, 622 N.E.2d 22 (12th Dist.1993), and *State v. Wallace*, 12th Dist. Brown Nos. CA2017-o9-011 and CA2017-11-014, 2019-Ohio-442.

{¶ 29} This court has held that an Ohio Court of Common Pleas has the basic subject matter jurisdiction over discovery, sanctions, and contempt. *State ex rel. Capital One Bank v. Karner*, 8th Dist. Cuyahoga No. 96739, 2011-Ohio-6439. In that case, the court declined to issue the writ of prohibition when an out-of-state company sought relief from an order requiring disclosure of financial records. In *Yidi, L.L.C. v. JHB Hotel, L.L.C.*, 8th Dist. Cuyahoga No. 103872, 2016-Ohio-6955, ¶ 15, this court ruled: “For purposes of pretrial discovery, trial courts possess jurisdiction over nonparties through the issuance of a subpoena.” In the present case, a failure to invoke Crim.R. 17 does not negate the underlying jurisdiction of the respondent judge.

{¶ 30} In summary, as a matter of Ohio discovery law, the respondent judge has the jurisdiction to issue the order. The remaining issue is whether the invocation of Section 10a deprives him of that power. This court rules, consistent with *Hughes*, 8th Dist. Cuyahoga No. 107697, 2019-Ohio-1000, at least in this case, invoking the right in an extraordinary writ, as compared to trying to appeal the order, is a timely and good faith invocation.

{¶ 31} There are few cases that examine whether a criminal defendant upon court order may inspect a private residence that is also the crime scene. The general consensus is that in weighing the defendant’s constitutional rights to due process, to a fair trial, to confrontation, and to effective assistance of counsel against the private citizen’s constitutional right to privacy and to be free from unreasonable searches, the trial court may order the inspection upon a showing of justification. Thus, the

court in the interest of justice has the power, the jurisdiction, to order the inspection; the individual's right to privacy does not unilaterally deprive the trial court of jurisdiction upon invocation.

{¶ 32} *State in Interest of A.B.*, 219 N.J. 542, 99 A.3d 782 (2014), is perhaps the most instructive case. Like Ohio, New Jersey has a constitutional provision, the Victim's Rights Amendment that guarantees that a crime victim shall be treated with fairness, compassion and respect. A New Jersey statute, N.J.S.A. 52:4b-36(c), provides that a witness shall be free from intimidation, harassment, or abuse by any person including the defendant or the defendant's attorney. Like Ohio, New Jersey's criminal discovery rules provides automatic access to a wide range of evidence, including building or places within the possession or control of the prosecutor. Like Ohio, New Jersey criminal discovery law recognizes that trial courts have power to order discovery when justice so requires, even beyond the stated provisions of the rules.

{¶ 33} In *A.B.*, a 17-year-old juvenile was accused of sexually molesting his six-year-old cousin at his cousin's home. Although the defense attorney had access to all the photographs and material the prosecutor had, counsel sought his own inspection. He argued that the inspection was necessary to prepare for trial. The inspection would allow him to determine, inter alia, whether the alleged acts were subject to easy detection. The trial court allowed the search, limiting the search to 30 minutes, allowing an investigator from the prosecutor's office to be present,

prohibiting the parents from participating but allowing them to be in another part of the house and to determine the time of the inspection.

{¶ 34} In affirming the decision of the trial court, the New Jersey Supreme Court framed the issue under an abuse of discretion standard and noted that it required the balancing of the right to a fair trial and the right of the alleged victims to privacy in their home. The supreme court reasoned that the purpose of pretrial discovery is to ensure a fair trial and that a trial in which a defendant does not have access to the raw materials to build a defense is fundamentally unfair. The supreme court also noted that visiting a crime scene can be critical in preparing a defense. A trial attorney must know what the crime scene looks like to be able to interview witnesses and prepare direct and cross-examination. Indeed, the failure to investigate a crime scene could constitute ineffective assistance of counsel. The supreme court affirmed the privacy rights of victims and families but concluded that the competing rights are not mutually exclusive but must be harmonized, especially through limitations set by the trial judge. There was never any question that the trial judge did not have the power to issue the order.

{¶ 35} Like New Jersey and Ohio, Hawaii also has a constitutional provision protecting privacy. Article I, Section 6 provides: “The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest.” Nevertheless, the Hawaii Supreme Court held that the right to due process and the right to effective assistance of counsel provide a defendant with the right to access a crime scene, even if it is on private property. The right to privacy is

protected by the trial court's time, place, and manner restrictions. The supreme court noted a broad consensus that competent defense counsel should access a crime scene to obtain the materials necessary to build a defense, unless the facts indicate such an inspection is unnecessary. *State v. Tetu*, 139 Haw. 207, 386 P.3d 844 (2016).

{¶ 36} In *State v. Gonsalves*, 661 So.2d 1281 (Fla.App. 1995), a defendant charged with burglary obtained an order to inspect the crime scene, the victim's home. The trial court reasoned that inspection and photographs would provide materials for possible cross-examination and impeachment. The trial court so ruled over the victim's objections that such an inspection could facilitate another burglary. The court of appeals upheld the inspection order reasoning that the "very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts * * * . To insure 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." *Id.* at 1282, quoting *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). The court concluded: "Although we respect the victim's right to privacy in her home, we concluded that it is outweighed by the defendant's right to due process here." 661 So.2d at 1282.

{¶ 37} The Virginia Court of Appeals held that the due process rights of the Virginia Constitution "give a criminal defendant a right to view, photograph, and take measurements of the crime scene, provided that the defendant makes a showing that a substantial basis exists for claiming that the inspection and

observation will enable the defendant to obtain evidence relevant and material to his defense * * * ” *Henshaw v. Commonwealth*, 19 Va. App. 338, 346, 451 S.E.2d 415 (1994). In so ruling, the court noted the need for a defendant to assemble evidence to mount a defense and that under special circumstances a private citizen’s constitutional right to privacy may outweigh the accused’s right to view the home. Nevertheless, the trial court had the jurisdiction to order the inspection based on a showing of a need.

{¶ 38} In *Commonwealth v. Matis*, 446 Mass. 632, 915 N.E.2d 212 (2006), the defendant was accused of raping a 15-year-old girl in the living room of her family’s home. The defendant moved that his attorney and investigator be allowed to inspect, measure, and photograph the interior of the home. In upholding the granting of the motion, the Supreme Judicial Court of Massachusetts ruled “that the judge had authority to allow the motion and order access to a crime scene in a private residence, on the basis of a showing that the information obtainable at the scene was evidentiary and relevant to the defense * * *.” 446 Mass. at 633. The court based its decision on the defendant’s right, under the Sixth Amendment to obtain relevant evidence. The court further noted that such inspection orders must be carefully tailored to protect the privacy interests involved.

{¶ 39} The Supreme Court of Vermont noted that a “defendant’s need for access to a crime scene controlled by a private third party must be balanced against the property occupant’s right to privacy. Courts have generally struck that balance by requiring a defendant to make some showing that the requested intrusion is

relevant and material to the defense.” *State v. Muscari*, 174 Vt. 101, 114, 807 A.2d 407 (2002). In that particular case, the supreme court ruled that the trial court did not err in denying the inspection order because the defendant did not make a showing of relevance.

{¶ 40} In *State v. Brown*, 306 N.C. 151, 293 S.E.2d 569 (1982), the defendant was charged with first degree murder, and police had cordoned off the murder scene. The trial court had denied defense counsel’s request to view the crime scene. On appeal, the Supreme Court of North Carolina held that on the peculiar facts of the case, it was “a denial of fundamental fairness and due process for the defendant to be denied, under police prosecutorial supervision, a limited inspection of the premises of the crime scene.” 151 N.C. at 163-164. Nevertheless, the error was harmless beyond a reasonable doubt.

{¶ 41} When confronted with the issue of whether a person accused of attempted murder could inspect the crime scene, the apartment he formerly shared with his estranged wife, the Supreme Court of New York, Bronx County, stated that “[t]he constitutional right to compulsory process give the defendant a right to compel discovery from a private third party if justification exists which would outweigh the rights and legitimate interests of the third party.” *People v. Nicholas*, 157 Misc.2d 947, 948, 599 N.Y.S.2d 779 (1993). After examining the facts and arguments, the court concluded “that defendant has failed to demonstrate any compelling reasons for access to complainant’s residence sufficient to outweigh complainant’s constitutional right to privacy.” *Id.* at 952-953.

{¶ 42} These cases are persuasive. A person’s right to privacy; the right to be secure in persons, houses, papers, and effects against unreasonable searches and seizures; and the right, as stated in Section 10a, to refuse a discovery request must be weighed against a criminal defendant’s rights to due process, to confront witness, to have compulsory process to obtain evidence, and to effective assistance of counsel, especially in preparation, all to the end that justice be effected. The concurring opinion in *Hughes* stated that “the insertion of the exception clause referencing the accused’s trial rights indicates that victim’s rights are not absolute when discovery is involved. In certain instances, state enactments must give way to the rights of the accused,” such as the Fourteenth Amendment right to due process and the Sixth Amendment right to confrontation. *Hughes*, 8th Dist. Cuyahoga No. 107697, 2019-Ohio-1000, at ¶ 39. The corollary to these principles is that the trial court has the jurisdiction, the authority, to order an inspection of a crime scene, even if it is a private residence.

{¶ 43} Additionally, this court notes that in *State ex rel. Mason v. Burnside*, 117 Ohio St.3d 1, after the Supreme Court of Ohio denied the prosecutor’s application for a writ of prohibition because Ohio courts have broad discretion over discovery, it also held that appealing a contempt order is an adequate remedy at law that precludes a writ of prohibition. Although holding that a victim of crime must force contempt and then appeal seems harsh and against the spirit and intent of Section 10a, the new constitutional provisions do not grant this court license to rewrite

centuries of law. This court again asks the legislature to provide guidance on how to effect Section 10a.

{¶ 44} Accordingly, this court grants the respondent's dispositive motion and dismisses the application for a writ of prohibition. Under Ohio law, the respondent has broad authority over discovery, including the authority to order discovery beyond the specific limits of Crim.R. 16 and 17. The constitutional rights of a crime victim must be balanced against the corresponding rights of a criminal defendant to a fair trial. The respondent judge, thus, was not patently and unambiguously without jurisdiction to issue the subject discovery order. Relator to pay costs. This court directs the clerk of courts to serve all parties notice of this judgment and its date of entry upon the journal as required by Civ.R. 58(B).

{¶ 45} Writ dismissed.

MARY J. BOYLE, PRESIDING JUDGE

PATRICIA ANN BLACKMON, J., and
ANITA LASTER MAYS, J., CONCUR