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DISTRICT COURT, COUNTY OF ARAPAHOE, STATE OF COLORADO 7325 S Potomac Street Centennial, Colorado 80112	♦ COURT USE ONLY ♦
Plaintiff: <b>People of the State of Colorado</b>  v.  Defendant: <b>James Holmes</b>	Case No. 12CR1522  Division: <b>22</b>
<p align="center"><b>ORDER RE: DEFENDANT'S MOTION TO ALLOW CONFIDENTIAL DEFENSE EXPERTS TO BE PRESENT FOR SCIENTIFIC TESTING OF EVIDENCE (D-6)</b></p>	

This matter comes before the Court on Defendant's Motion to Allow Confidential Defense Experts to be Present for Scientific Testing of Evidence (D-6), filed July 23, 2012; and the People's Response to Defendant's Motion to Allow Confidential Defense Experts to be Present for Scientific Testing of Evidence (D-6), filed August 8, 2012. Having reviewed the pleadings and applicable authorities, the Court FINDS and ORDERS as follows:

Defendant requests the opportunity to have his own expert present during any scientific testing of the evidence in this case by the People, including testing of biological samples, firearms, bullets, and shell casings. Defendant states that without an expert present during testing to observe the People's experts' methods and procedures he will lose any realistic ability to confront the People's evidence as to such testing. Defendant also asserts that due process requires that Defendant have a confidential expert present during scientific testing because the People's testing of evidence may destroy or alter the evidence.

The People argue that the Colorado legislature allows the presence of a defendant's representative only in the limited circumstance of destructive testing of evidence, and therefore the Court does not have the authority to allow confidential defense experts to be present during scientific testing of non-consumptive or non-destructive testing of the evidence. The People assert that there is no support to find that, because any scientific testing of the evidence has the potential to be destructive, all scientific testing of the evidence is destructive in some way and thus a defendant should be allowed an expert to be present for all scientific testing of the evidence. The People contend such a finding would fly in the face of standard scientific testing practice and would render C.R.S. § 16-3-309 meaningless.

The Court hereby makes the following FINDINGS and ORDERS:

**I. COLORADO RULES AND STATUTES**

The prosecution has an obligation to preserve and make available evidence for a defendant in a criminal case. Colo. R. Crim. Pro. 16 (2012). A failure by the prosecution to



preserve evidence may result in a due process violation. *See California v. Trombetta*, 467 U.S. 479, 486 (1984); *People v. Greathouse*, 742 P.2d 334, 337 (Colo. 1987) (stating “when the police conduct scientific tests, they must preserve samples to permit the defendant to accomplish independent testing, permit the defendant’s experts to monitor the police testing, or provide some other suitable means” to allow the defendant to verify the procedures and testing accuracy). C.R.S. § 16-3-309 codifies the constitutional considerations pertaining to consumptive or destructive testing. C.R.S. § 16-3-309 (2012); *see also People v. Wartena*, 156 P.3d 469, 471–72 (Colo. 2007). Under C.R.S. § 16-3-309, the state must preserve a sufficient sample of evidence for the defendant’s expert to utilize where the defendant has made a specific request to preserve such a sample. C.R.S. § 16-3-309(2)(f). If the amount of evidence to be tested is small, or where the state’s duty to preserve evidence is “otherwise enhanced,” the state should contact the defendant to determine if the defendant wishes to have an expert present during that testing. C.R.S. § 16-3-309(2)(g); *see Wartena*, 156 P.3d at 472 (quoting C.R.S. § 16-3-309(2)(g)) (stating if the prosecution “has reason to suspect that the sample will be destroyed during testing, the state has the duty to contact the defendant so that his expert may be present during testing”). The prosecution is also required to make available to the defense “any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons.” Colo. R. Crim. P. 16(I)(a)(1)(iii).

A trial court’s role prior to testing is to oversee the preservation of evidence. *Wartena*, 156 P.3d at 472. “The authority of the court to supervise the preservation of evidence originates in the court’s role to protect the ‘civilized standards of procedure and evidence.’” *Id.* (quoting *McNabb v. United States*, 318 U.S. 332, 340 (1943)). Such authority allows courts to avoid or mitigate failure to preserve evidence by prohibiting certain testing or ordering that the evidence not be destroyed. *Wartena*, 156 P.3d at 473. However, except in unusual circumstances, a trial court does not have the authority to dictate procedures to a particular laboratory. *Id.*

While the Court intends to oversee the preservation of evidence prudently, outside of the statutory exception for consumptive or destructive testing, the Court FINDS that it has no statutory authority to order the People to allow Defendant a confidential expert be present during the People’s scientific testing. The People must comply with the disclosure requirements of Colo. R. Crim. P. 16 and with the requirements of C.R.S. § 16-3-309 regarding destructive or consumptive testing. The People are to give Defendant 48 hours’ notice before conducting consumptive or destructive testing in fulfilling the requirements of C.R.S. § 16-3-309.

## II. UNITED STATES AND COLORADO CONSTITUTIONS

Defendant argues that scientific testing of any evidence without the presence of Defendant’s experts will deprive Defendant of a realistic ability to confront and rebut testimony under the Confrontation Clause of the United States Constitution and the Colorado Constitution, but Defendant does not cite any case law to support this contention. The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the Sixth Amendment to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668, 684–85 (1984). Every criminal defendant has the right “to be confronted with witnesses against him.” U.S. Const. amend. VI. Similarly, the Colorado Constitution provides

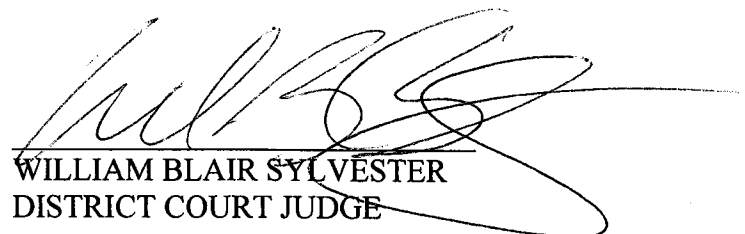
that the accused “shall have the right . . . to meet the witnesses against him face to face.” Colo. Const. art. II, § 16. The primary purpose of the Confrontation Clause is to secure for a defendant a meaningful opportunity of cross-examination. *Hinojos-Mendoza v. People*, 169 P.3d 662, 668 (Colo. 2007) (citing *Crawford v. Washington*, 541 U.S. 36 (2004)). The opportunity for cross-examination is a basic element of a fair trial; a fair trial is “one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.” *Strickland*, 466 U.S. at 685.

“The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness.” *People v. Fry*, 92 P.3d 970, 978 (Colo. 2004); *see also People v. Ray*, 252 P.3d 1042, 1048 (Colo. 2011). While a defendant’s Sixth Amendment rights apply at pretrial stages, “the right to confrontation is a trial right—not a constitutionally compelled rule of pre-trial discovery.” *People v. Baltazar*, 241 P.3d 941, 944 (Colo. 2010); *Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987) (plurality opinion). The Colorado Rules and Statutes provide Defendant with certain pre-trial discovery rights as well as with specific rights regarding confrontation of scientific testing of evidence. Defendant has the right to inspect any reports or statements of the People’s experts who perform the scientific testing of the evidence in this case under Colo. R. Crim. P. 16, and Defendant may request, with notice of at least fourteen days, that any employee or technician who performs scientific testing of the evidence testify in person at trial under C.R.S. § 16-3-309. Additionally, Defendant has the right to independently test any scientific evidence, and may call witnesses at trial to testify as to the scientific testing results. *See generally* Colo. R. Crim. P. 16; C.R.E. 702; C.R.S. § 16-3-309. These rules and statutes provide Defendant with ample opportunity to subject any scientific testing of evidence to adversarial scrutiny, and such opportunity is sufficient to fulfill the requirements of the Confrontation Clause and to guarantee a fair trial.

The Court FINDS that, while Defendant has the right at trial to confront any state experts or examiners involved in scientific testing of the evidence, Defendant does not have the right to have a confidential expert present during the People’s scientific testing of all evidence. Defendant’s Motion to Allow Confidential Defense Experts to be Present for Scientific Testing of Evidence is GRANTED as to consumptive or destructive testing and DENIED as to non-consumptive testing.

The Motions, any Responses, and this Order are not subject to the Order Regarding Motion to Unseal Court File (Including Docket) (“Suppression Order”) (C-4c) and shall be available to any person.

DATED this 15th day of August, 2012.

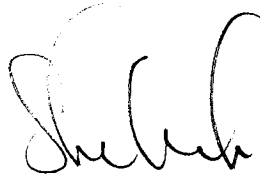
  
WILLIAM BLAIR SYLVESTER  
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on AUGUST 16, 2012, a true and correct copy of **ORDER RE: DEFENDANT'S MOTION TO ALLOW CONFIDENTIAL DEFENSE EXPERTS TO BE PRESENT FOR SCIENTIFIC TESTING OF EVIDENCE (D-6)** was served upon the following parties of record.

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