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 IN COMBINED COURT
 LA PLATA COUNTY, COLORADO

NOV 13 2010

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DISTRICT COURT, LA PLATA COUNTY, COLORADO Court Address: 1060 E. Second Ave., Durango, CO 81301 Phone Number: (970) 247-2304	
Plaintiff: PEOPLE OF THE STATE OF COLORADO Defendant: MARK ALLEN REDWINE	▲ COURT USE ONLY ▲
Christian Champagne - District Attorney, #36833 Matthew Durkin, Special Deputy District Attorney, #28615 Fred Johnson, Special Deputy District Attorney, #42479 P.O. Drawer 3455, Durango, Colorado 81302 Phone Number: (970) 247-8850 Fax Number: (970) 259-0200	Case Number: 17 CR 343
PEOPLE'S RESPONSE TO [D-45] DEFENDANT'S MOTION TO RELEASE PHYSICAL EVIDENCE FOR INDEPENDENT DEFENSE EXAMINATION AND TESTING [PUBLIC ACCESS]	

COME NOW the People, by and through Christian Champagne, District Attorney in and for the Sixth Judicial District of the State of Colorado, respectfully requests this Honorable Court deny the defendant's motion to release physical examination for independent defense examination and testing (D-45). AS GROUNDS for this motion, the People state as follows:

DISCOVERY RIGHT GENERALLY

1. "The Supreme Court has found there to be no general constitutional right to discovery in a criminal case, and more specifically, that the right to confrontation is a trial right-not a constitutionally compelled rule of pre-trial discovery." *People v. Baltazar*, 241 P.3d 941, 943-44 (Colo. 2010); *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977); *Pennsylvania v. Ritchie*, 480 U.S. 39, 52, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).
2. "Apart from serving to secure witnesses and evidence for in-court presentation, the Compulsory Process Clause, as distinguished from the Due Process Clause, has never been found by the Court to guarantee access to evidence more generally." *People v. Baltazar*, 241 P.3d 941, 943-44 (Colo. 2010).
3. "Under the Sixth Amendment, a criminal defendant has the right "to be confronted with the witnesses against him." However, "the right to confrontation is a trial right; it is not 'a constitutionally compelled rule of pretrial discovery.'" ... Moreover, it is well established

that “the Confrontation Clause does not guarantee ‘access to every possible source of information relevant to cross-examination.’ ” ... “The ability to question adverse witnesses ... does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony.” *People In Interest of E.G.*, 368 P.3d 946, 953–54 (Colo. 2016).

4. The Colorado Supreme Court has held that due process requires “at most, an entitlement of access to evidence and witnesses that would be both constitutionally material and favorable to the accused.” *People v. Baltazar*, 241 P.3d 941, 944 (Colo. 2010); *See Arizona v. Youngblood*, 488 U.S. 51, 55, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988) (“[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.”); *United States v. Bagley*, 473 U.S. 667, 675, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (stating that, under *Brady*, “the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial”); *United States v. Valenzuela-Bernal*, 458 U.S. 858, 874, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982) (due process violation occurs where government deports defense witness “only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact”).
5. Similarly, the Sixth Amendment right to the effective assistance of counsel includes an entitlement to no more than a thorough investigation, limited by reasonable professional judgments. *People v. Baltazar*, 241 P.3d 941, 944 (Colo. 2010); *Strickland v. Washington*, 466 U.S. 668, 690, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

DUTY TO PRESERVE

6. The People have a duty to preserve the integrity of evidence collected. *People v. Greathouse*, 742 P.2d 334, 337 (Colo. 1994); citing *People ex rel. Gallagher v. District Court*, 656 P.2d 1287, 1291 (Colo. 1983), *People v. Gomez*, 198 Colo. 105, 596 P.2d 1192 (1979).
7. “Science has become an important tool for the criminal justice system not only because it can be used to help determine guilt or innocence, but also because it has become an expected part of a criminal trial . . . While some of the burden to determine reliability is placed on the judicial system . . . most of the burden rests on the prosecutor to ensure that a defendant is given a fair trial based on reliable evidence . . . The prosecutor has two essential responsibilities when it comes to scientific evidence. First, he is responsible for ordering testing of this evidence, which includes determining the type of testing, how much testing is necessary, and whether certain evidence will be tested at all. Second, and perhaps more importantly, he is responsible for preserving evidence.” Kathryn Kelly, *Prosecutor's Role and Ethical Responsibilities with Regard to the Testing of Scientific Evidence*, 25 Geo. J. Legal Ethics 609-610 (2012); see also § 8.3.State's duty to collect

and preserve evidence, 14 Colo. Prac., Criminal Practice & Procedure § 8.3 (2d ed.) citing LaFave, et al., 4 Criminal Procedure § 20.6(b), n.54 (2d ed.) (emphasis added).

8. Colorado has recognized that “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 independently the appropriateness of the procedures and the accuracy of the results of the testing.” *People v. Greathouse*, 742 P.2d at 337; citing *Gallagher*, 656 P.2d at 1292.
9. The Colorado Supreme Court has upheld the principle that a Court’s “supervisory role” with respect to testing of evidence is triggered only in situations involving consumptive or destructive testing. *People v. Wartena*, 156 P.3d 469, 472 (Colo. 2007).
10. The prosecution has a responsibility to preserve DNA evidence beyond the investigation and trial. The Colorado General Assembly mandated that a law enforcement agency preserve DNA evidence which can only be disposed of under limited circumstances. Section 18-1-111, et. seq., C.R.S.

ARGUMENT

11. The defendant seeks to take possession of evidence, which is far afield from the limits set forth by the Colorado Supreme Court. The defendant’s request is well beyond samples that have been preserved for independent testing pursuant to precedent.
12. The parties have already litigated issues related to consumptive testing. (See P-7 Notice of Consumptive Testing, D-13 Objection to Destructive Testing). The defendant does not seek samples that had been preserved for independent testing, nor is the request made due to consumptive testing. Rather, the request to take possession of evidence, is far afield from the limits set forth by the Colorado Supreme Court.
13. In his motion, the defendant misstates caselaw. Specifically, the Colorado Supreme Court has not bestowed the defendant unlimited access to evidence. In *People v. Harris*, 424 P.2d 1223, 1225 (Colo. 1971), the police did not test a substance on the defendant’s knife, and found that “there is nothing in the law which requires the police to follow every lead which is developed in the course of a criminal investigation.” They further found that the defendant was aware of the substance, and if he wanted to test a sample of the substance to determine if it was human or animal blood, he could have. *Id.* The Colorado Supreme Court contrasted those circumstances from the Due Process violation in *Miller v. Pate*, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690 (1967), where the prosecution admitted evidence that contained blood and not paint, and resisted the defendant’s requests for testing. *Id.*

14. In *People v. Viduya*, 703 P.2d 1281, 1288-89 (Colo. 1985), the Colorado Supreme Court found no due process violation in a vehicular homicide trial, when a second sample of the defendant's blood was taken, analyzed, but subsequently destroyed. As a remedy, the district court ordered the remainder of the first sample be tested. This decision is limited to samples of blood taken for the purposes of testing and independent testing. At no time was a sweeping right to an "independent analysis of physical evidence" established.

15. In *People v. Garries*, 645 P.2d 1306, 1307-8 (Colo. 1982), the issue of consumptive testing was addressed. This case pre-dates modern DNA analysis, and involves the inability of the defense expert to conduct independent testing on eight blood stains, due to their minimal size. To resolve the issue the Colorado Supreme Court analyzed whether the loss or destruction of evidence is a due process violation:

- (1) Whether the evidence was suppressed or destroyed by the prosecution;
- (2) Whether the evidence is exculpatory; and,
- (3) Whether the evidence is material to the defendant's case.

Garcia v. District Court, 589 P.2d 929 (1979); *People v. Morgan*, 606 P.2d 1296 (1980); *People v. Gomez*, 596 P.2d 1192 (1979).

16. Simply stated, it is inconsistent to argue that the Court create an additional due process right pursuant to the Sixth Amendment, which creates a duty to the prosecution to preserve evidence, demand its release, and then argue that the three-prong analysis to determine if a due process violation for destruction of evidence.

WHEREFORE, the People request this Honorable Court deny the defendant's motion for release of physical evidence for independent defense examination and testing. This motion is made without legal authority and is inconsistent with well established precedent.

Respectfully submitted this November 13, 2018.

CHRISTIAN CHAMPAGNE
DISTRICT ATTORNEY
6th JUDICIAL DISTRICT

/s/ Matthew Durkin
Matthew Durkin, #28615
Special Deputy District Attorney

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2018, I delivered a true and correct copy of the foregoing to the parties of record via e-service.

/s/ Christian Champagne
Christian Champagne