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DISTRICT COURT OF OTERO COUNTY STATE OF COLORADO 13 West 3 rd Street, Rm. 207 La Junta, CO 81050	DATE FILED: May 8, 2015 11:36 PM
Plaintiff: PEOPLE OF THE STATE OF COLORADO v. Defendant: JAMES ADAM PATRICK ASHBY	▲ COURT USE ONLY ▲
Attorneys for Defendant: BRUNO, COLIN & LOWE, P.C. Michael T. Lowe, #33489; mloew@brunolawyers.com Carrie L. Slinkard, #40288; cslinkard@brunolawyers.com 1999 Broadway, Suite 4300 Denver, Colorado 80202 Telephone: (303) 831-1099 Facsimile: (303) 831-1088	Case No. 2014CR217 Division: A Courtroom 206
DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO PRESERVE AND/OR DESTRUCTION OF EXCULPATORY EVIDENCE D-6	

COMES NOW, the Defendant, James Adam Ashby, by and through his attorneys, Michael T. Lowe and Carrie L. Slinkard, and hereby submits his Motion to Dismiss for Failure to Preserve and/or Destruction of Exculpatory Evidence, and AS GROUNDS THEREFORE WOULD STATE THE FOLLOWING:

Certification of Conferral Pursuant to C.R.C.P. 121, §1-15(8)

Undersigned counsel hereby certifies that he made good faith efforts to confer with the District Attorney regarding this Motion. Undersigned counsel conferred about general objections with the District Attorney on May 6, 2015, noticing that he would thereafter call to confer on the remaining motions. Telephone messages were left for the District Attorney on the afternoon of May 8, 2015, for conferral on Defendant's remaining motions, but, counsel were not able to confer prior to filing this Motion. Counsel will continue to attempt to confer, and if any of Defendant's motions are unopposed notification of the same will be filed with the Court

I. STATEMENT OF FACTS

Former Rocky Ford police officer James Ashby is charged with second degree murder and criminally negligent homicide as the result of an officer-involved shooting that occurred in Rocky

Ford, Colorado on October 12, 2014. The shooting resulted in the death of Jack J. Jacquez. At the moment Mr. Ashby fired his weapon, Mr. Jacquez was wielding a baseball bat in a manner which Mr. Ashby reasonably believed posed an immediate threat of death or serious bodily injury to himself, and that Mr. Jacquez was going to strike him with the bat. Although Mr. Ashby immediately rendered lifesaving aid to Mr. Jacquez, followed by paramedics, Mr. Jacquez died at the scene. On October 13, 2014, an autopsy was performed on Mr. Jacquez by the El Paso County Coroner's Office. The autopsy revealed, in relevant part, that the bullet entered the body seventeen and one-half inches below the top of the head, perforating the T10 vertebra, spinal cord, aorta, pericardium, posterior left ventricle, lower left lung, and the anterior fifth rib, and came to rest just below the skin beneath the left nipple. This information was incorporated into the Affidavit for Arrest Warrant (hereinafter "Affidavit").¹ Moreover, the Affidavit states that based on the bullet trajectory as found by the autopsy, "the barrel of the gun was pointed at a 90 degree angle to Jacquez's back." The Affidavit further states that based on "the trajectory path of the bullet," Mr. Jacquez's "back was fully exposed to Officer Ashby and not turning to either side. Thus, at the time Officer Ashby shot Jacquez, Jacquez was facing away from Officer Ashby and not an immediate threat."² It is obvious from the context of the Affidavit that if the angle of bullet trajectory through the body indicated that Mr. Jacquez was not "facing away from" Mr. Ashby at the time of the shot, the evidence would have shown that Mr. Jacquez was, indeed, a threat to Mr. Ashby, and probable cause for Mr. Ashby's arrest and charging would have been lacking. Thus, the actual trajectory path of the bullet through the body is critical to Mr. Ashby's defense, as he has consistently maintained that the shooting was in response to Mr. Jacquez threatening to hit him with a baseball bat.

During the October 13, 2014 autopsy, a photographic record of the course of the autopsy was maintained, provided to the defense in this case during discovery, and are attached to this motion as Exhibits 1-5. These photos reveal that after the bullet was excised from its position just beneath the skin of the left nipple, the medical examiner, in the presence of law enforcement personnel and prosecuting attorneys, pushed a straight metal probe through the body from one wound to the other.³ It is also clear from the photographs that this procedure was done prior to the body being opened for examination. Thus, the true path of the bullet through the body – and concomitantly, the angle of entry and any evidence of alterations of the bullet's trajectory – were destroyed by insertion of the probe.⁴

¹ The Affidavit alternately states that the entrance wound is either forty-seven and one-half inches or forty-eight and one-half inches from the bottom of the heel, while the autopsy report states that it is an inch higher, at forty-eight and one-half inches from the bottom of the heel.

² There is no indication in the autopsy report – nor from any other source disclosed to the defense in this case – that bullet trajectory evidence can support a conclusion that a body was "not turning to either side" at the moment of impact.

³ It is unknown whether the probe was inserted from front to back or back to front through the body, as the medical examiner did not make a record of the process.

⁴ It should be noted that the medical examiner did not record the thickness of the body in any photographs taken during the autopsy, nor as part of the autopsy report. Although the position of the entrance wound and the distance from the body's midline of the position of the bullet are

II. ARGUMENT

It is well established that the prosecution's failure to preserve material evidence which is favorable to an accused and relates to either guilt or punishment violates due process of law. People v. Greathouse, 742 P.2d 334, 337 (Colo. 1987) (citing Brady v. Maryland, 373 U.S. 83 (1963)). To prove that a due process violation has occurred, it must be shown that (1) evidence was suppressed or destroyed by the prosecution; (2) the evidence possessed an exculpatory value apparent before it was destroyed; and (3) the defendant cannot obtain comparable evidence by other reasonably available means. People v. Humes, 762 P.2d 665, 667 (Colo. 1988) (citing Greathouse, 742 P.2d at 337). In the instant case, all three of these prongs are met, and the prosecution's destruction of and failure to preserve the evidence of bullet trajectory through the body in this matter violates Mr. Ashby's due process rights and mandates dismissal of the charges against him.

With respect to the first prong of the test, when material evidence "can be collected and preserved in the performance of routine procedures by state agents, failure to do so is tantamount to suppression of the evidence." People v. Sheppard, 701 P.2d 49, 52 (Colo. 1985); see also People v. Erickson, 883 P.2d 511, 515 (Colo. App. 1994); People v. Humes, 762 P.2d 665, 667 (Colo. 1988). Furthermore, "the state must employ regular procedures to preserve evidence that a state agent, in performing his duties, could reasonably foresee might be favorable to the accused." Sheppard, 701 P.2d at 52 (emphasis added) (citing, *inter alia*, People ex rel. Gallagher v. District Court, 656 P.2d 1287 (Colo. 1983)). As noted above, the charges against Mr. Ashby in this case are based substantially on the bullet trajectory through the body. Therefore, the true and actual trajectory of the bullet is critical not only to the existence of probable cause to charge Mr. Ashby, but to his defense as well. That evidence was in possession of the prosecution through the entirety of the autopsy procedure in this case, up to the point that it was destroyed by insertion of the probe. See *Exhs. 1-5*. More importantly, the likelihood that insertion of bullet probes in the body will result in damage to the bullet trajectory evidence is so well-established that it is taught as a basic precaution in conducting autopsies. See, e.g., *Forensic Pathology: Principles and Practice*, Dolenak, M.D., et al., Elsevier Academic Press 2005, at pp. 188, 200.⁵ As a result of the medical examiner in this case pushing the probe through the body prior to examination of the internal cavity, the true path of the bullet was destroyed, and there is no longer any manner in which to determine the original path of the bullet, and/or distinguish between the original bullet path and artifactual injury caused by the probe. In light of these circumstances, as well as the fact that the insertion of the probe prior to dissection was performed in the presence of the prosecution and CBI Agents, it is clear that the prosecution failed "to employ regular procedures to preserve evidence

indicated, the lack of information of body thickness prevents the defense from ascertaining the true angle of the bullet through the body.

⁵ "... the dissection *must come first to prevent artifactual injury by the probe*. ... Wounds on the torso may be probed as far as through the chest and abdominal walls, but not any deeper into the body cavities until after the organs and tissues have been examined *in situ* and the injuries photographed. ... *Don't ... Put probes through the head, chest, or abdomen before examination of the organs in situ. [Don't] Push probes through loose tissue because this can result in artifactual tracks with incorrect directionality.*" (Emphasis added)

that a state agent could reasonably foresee might be favorable to the accused,” Gallagher, supra, but also failed to prevent the destruction of the bullet path evidence despite the fact that such preservation procedures is part and parcel of the routine procedures for conducting autopsies on gunshot victims. Thus, Mr. Ashby has demonstrated that the exculpatory bullet path and trajectory evidence was destroyed by state action, and the first prong of the test is satisfied.

With respect to the second prong of the test, Mr. Ashby has consistently maintained that the shooting was in response to a threat of potentially deadly physical force by Mr. Jacquez, because Mr. Jacquez was about to strike Mr. Ashby with a baseball bat. In contrast, the central basis for the charges against Mr. Ashby are that the bullet trajectory demonstrates that Mr. Jacquez was “facing away” from Mr. Ashby at the time of the shot, was “not turning to either side,” and that Mr. Jacquez was therefore “not a threat” at the time of the shot. The true trajectory of the bullet through the body, then, had intrinsic and critical exculpatory value apparent to any reasonable person at the time it was destroyed, because it was at least as likely that the bullet trajectory – properly preserved and analyzed – would demonstrate a greater angle than that shown by the probe, and thus demonstrate that Mr. Jacquez was not “facing away” from Mr. Ashby as maintained by the prosecution.⁶ Thus, the original, undamaged bullet path through the body clearly had exculpatory value which was apparent before its destruction, and Mr. Ashby has satisfied the second prong of the test as well.

With respect to the third prong of the test, now that the bullet path evidence has been destroyed by insertion of the probe, there is simply no other means by which Mr. Ashby might obtain evidence comparable to that which was present at the time of the autopsy and prior to insertion of the probe. The sole source of the evidence of the true bullet trajectory was the body itself. That evidence, in its original state, prior to the insertion of the probe, can no longer be determined, and there is no other source from which Mr. Ashby can reasonably obtain that evidence. The third prong of the test is therefore satisfied.

In light of the foregoing, Mr. Ashby has demonstrated that the destruction of the bullet trajectory evidence during the autopsy in this case amounts to a deprivation of his due process right to disclosure of exculpatory evidence. See California v. Trombetta, 467 U.S. 479, 485 (1984). In such circumstances, a criminal defendant is entitled to have sanctions imposed against the prosecution for its failure to preserve material evidence. People v. District Court, 808 P.2d 831, 836 (Colo. 1991). In fashioning a sanction to achieve the goal of eliminating a due process violation, a court must strive to restore, as nearly as possible, the level playing field that existed before the violation. Id. at 837. Where, as here, potential exculpatory evidence cannot be obtained

⁶ This probability is highlighted by the statement in the Affidavit that based on the bullet trajectory, Mr. Jacquez’s back was “at a 90 degree angle” to Mr. Ashby’s weapon at the time of the shot. This statement is clearly inaccurate. Even the improperly placed probe in the autopsy photographs shows that the bullet trajectory was well off of ninety degrees through the body. *See Exhs. 2, 4*. Thorough and proper examination of the undamaged bullet path through the body would likely show an even greater angle than that demonstrated by the probe.

even with the aid of a court order, the court may have little choice but to dismiss the charges. Id. Indeed, no other remedy can cure the prejudice to the defendant in these circumstances. Id.

Moreover, the sanction of dismissal is justified even in circumstances where the chance that destroyed evidence was in fact exculpatory is relatively small. Like the autopsy procedures at issue in this case, the Colorado Supreme Court has upheld the trial court's sanction against the prosecution for failing to preserve evidence which the prosecution had an affirmative duty to retain and investigate. The Court emphasized in People v. Gallagher, 656 P.2d 1287 (Colo. 1983), that "when evidence can be collected and preserved in the performance of routine procedures by state agents, failure to do so is tantamount to suppression of the evidence. . .". Id. at 1291. In Gallagher, the court noted that "although the likelihood that the trace metal test would have shown that the victim held the gun is slight, such a showing would be highly material to the Defendant's claim that the gun was held by the victim and discharged during the struggle." Id. at 1293. The court then pointed out that the exculpatory value of the test should have been apparent at the time of the incident. Id. In the instant matter, the exculpatory value of the bullet trajectory evidence is even greater than that of the trace metal evidence in Gallagher, and its exculpatory value should have been apparent from the very beginning of the investigation – especially in light of the state's reliance on it in the Affidavit and the basis for murder charges. Moreover, given this fact, the exculpatory nature of the bullet trajectory evidence should have been so obvious to the investigators present at the autopsy, that the effect of the failure to preserve such clearly potentially exculpatory evidence rises to the level of a violation of Mr. Ashby's right to due process of law.

WHEREFORE, for the reasons more specifically set forth hereinabove, Defendant James Ashby would respectfully move this Honorable Court for an Order dismissing the charges of second degree murder and criminally negligent homicide pending against him.

DATED this 8th day of May, 2015.

Respectfully Submitted,

BRUNO, COLIN & LOWE, P.C.

By: s/Michael T. Lowe

Michael T. Lowe

Carrie L. Slinkard

Attorneys for Defendant

In accordance with C.R.Crim.P. 49.5(g), a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by the other parties, or the Court upon request.

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2015, a true and correct copy of the foregoing **DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO PRESERVE AND/OR DESTRUCTION OF EXCULPATORY EVIDENCE** was e-filed and e-served via ICCES E-System, addressed to the following:

James R. Bullock
District Attorney
Sixteenth Judicial District
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s/Marla A. Brock

Marla A. Brock, Paralegal
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<p style="text-align: center;"> EXHIBITS 1 THROUGH 5 TO DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO PRESERVE AND/OR DESTRUCTION OF EXCULPATORY EVIDENCE D-6 </p>	

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EXHIBITS 1 THROUGH 5