County Court, El Paso County, Colorado

P.O. Box 2980

Colorado Springs, CO 80901-2980

719-448-7577

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff,

v.

\*\*\*\*\* \*\*\*\*\*,

Defendant.

COURT USE ONLY

Case No:

Div: Courtroom:

# MEMORANDUM OF LAW IN SUPPORT OF MOTION TO COMPEL DISCOVERY OR, IN THE ALTERNATIVE, TO DISMISS THE CASE

\*\*\*\*\* \*\*\*\*\*, the accused, through counsel Timothy R. Bussey respectfully requests that the court compel the prosecution to disclose the records and information listed in Attachment A or, in the alternative, to dismiss the charges:

**PERTINENT FACTS**

1. Cynthia Burbach is the Toxicology Laboratory Supervisor at the Colorado Department of Public Health and Environment.

2. The defense has learned that on March 21, 2012, Ms. Burbach issued an email to Chris Halsor, who is a representative of the Colorado District Attorneys Counsel. (*See* "Attachment B")

3. In her email of March 21, Ms. Burbach stated it had been "brought to my attention" that a CDPHE laboratory technician named Mitchell Fox-Rivera had committed laboratory error affecting at least "several" chemical blood tests. No underlying information as to how this was “brought to” her attention was provided in the email.

4. Ms. Burbach stated that Mr. Fox-Rivera had conducted approximately 1,700 chemical BAC tests, and that the Department intended to re-test them all.

5. She advised Mr. Halsor that any prosecutors whose cases involved lab results produced by Mr. Fox-Rivera could contact CDPHE to obtain a re-test.

6. Through an article in the *Denver Post*, the defense has also learned that the technician, Mr. Fox-Rivera, was dismissed from his employment at CDPHE. *See* http://www.denverpost.com/news/ci\_20518200/colo-lab-tech-blames-boss-mistakes-dui-blood (last accessed May 3, 2012).

7. The *Post* further reports that Mr. Fox-Rivera is contesting his dismissal as improper. *Id*.

8. According to the *Post*, Mr. Fox-Rivera was hired as a recent college graduate by the CDPHE in October of 2011, and he is blaming the erroneous BAC reports on his supervisor, Cindy Burbach. Mr. Fox-Rivera reportedly stated:

Because the procedures require that I perform the initial review, and the toxicology supervisor review all the data, it was anticipated that mistakes would occur and be corrected. . . . It was not my role to review the data for forensic and litigation needs.

*Id*.

9. In her email of March 21, as well as in an affidavit concerning these matters, Ms. Burbach herself has twice acknowledged that Mr. Fox-Rivera was responsible only for what she termed the "initial" analysis of BAC evidence.

10. That Mr. Fox-Rivera was responsible only for "initial" analysis is also consistent with the "Rules Pertaining to Testing for Alcohol and Other Drugs." These regulations refer at several places to distinctions between a "testing analyst" and a "supervising analyst," and to the duty of the supervising analyst to oversee testing analysts and maintain documentation concerning the compliance of testing analysts with standard operating procedures. *See* *e.g.*, 5 CCR 1005(1.5) (definitions); Appendix 2C (Laboratory Certification Onsite Evaluation Standards).

11. Despite Ms. Burbach's apparent role as supervising analyst who has signed-off on all or most of Mr. Fox-Rivera's chemical BAC reports, she has attempted to shift and spread blame away from herself.

12. In addition to dismissing Mr. Fox-Rivera from his job, Ms. Burbach has issued an affidavit placing responsibility for laboratory error solely upon him. (*See* "Attachment C")

13. Other than dismissing Mr. Fox-Rivera, the only corrective measure specified by Ms. Burbach has been to secure independent re-testing of blood samples initially tested by Mr. Fox-Rivera.

14. Ms. Burbach’s April 20, 2012, Revised Affidavit, is troubling. In the Affidavit Ms. Burbach swears, “As of this date, April 20th, 2012…No retest has resulted in a lower actual BAC than was reported.”

15. On April 18th, 2012, Ms. Burbach signed off on an Amended Report concerning the BAC of Jamie Justesen. (See Attachment D)

16. Mr. Justesen’s original BAC was reported at .146. His amended report, sigend off by Ms. Burbach on April 18th, 2012 shows a result of .134. Clearly lower than the originally reported test result.

17. The representation that all of the test results were lower than retests is not true.

**APPLICATION TO THE LAW**

**A. The government must disclose all material records in its possession:**

18. The controlling constitutional standard is very well settled. In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (Emphasis added); *accord In re Attorney C.*, 47 P.3d 1167 (Colo. 2002).

19. Generally, evidence is material and exculpatory if (1) it possesses exculpatory value that is apparent before the evidence is destroyed; and (2) it is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. *California v. Trombetta,* 467 U.S. 479 (1984); *People v. Eagen*, 892 P.2d 426 (Colo. App. 1994).

20. “Material” evidence includes that which may be used for impeachment. *See* *People v. District Court*, 790 P.2d 332 (Colo. 1990) (“Indeed, the significance of impeachment evidence in determining the outcome of a criminal prosecution often matches that of substantive or exculpatory evidence”); *People v. Doss*, 782 P.2d 1198 (Colo. App. 1989) (“Any distinction between impeachment and exculpatory evidence has been rejected, and both fall within the *Brady* rule since such evidence, if disclosed and used effectively, may make the difference between a conviction or an acquittal”) (*citing United States v. Bagley*, 473 U.S. 667 (1985)).

21. It also bears emphasis that the prosecution’s duty to disclose material evidence that is in its control is virtually absolute, without exception. Two cases, *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), and *Exline v. Gunter*, 985 F.2d 487 (10th Cir. 1993), are perfectly illustrative of this. In *Ritchie* and *Exline*, the government sought to withhold governmental records pertaining to sexual abuse of children. There could scarcely be any area in which legitimate concerns about privacy are stronger. Yet both *Ritchie* and *Exline* hold that even this otherwise privileged information must be disclosed to the accused, because it is in the government’s possession. These cases thus demonstrate that virtually no governmental privilege over "material" evidence within its possession may be exercised against the accused, while the government is prosecuting the accused for alleged crime. *See also* *People v. Walker*, 666 P.2d 113 (Colo. 1983) (holding that police officer's usual privilege in personnel records must yield to the defendant's always "compelling" interest in accessing material evidence possessed by the government).

22. When the accused moves for disclosure of material evidence, the burden of the defense to establish that the Department's records are likely "material" is minimal.

23. After all, when evidence is solely within the government's possession, it follows that a defendant cannot prove the specific content of what has been withheld. *United States v. Valenzuala-Bernal*, 458 U.S. 858 (1982); *Ritchie, supra*. Thus, in requesting access to governmental records, the duty of the accused is no higher than to "at least make some plausible showing" that the records contain information "both material and favorable to his defense." *Ritchie*, 480 U.S. at n.15; *accord People v. Morgan*, 606 P.2d 1296 (1980).

**B. The records are inherently exculpatory and bear upon the reliability of chemical BAC test results, which is the linchpin of any DUI prosecution:**

24. In M\*. \*\*\*\*\*'s case, the relevance and exculpatory value of the internal affairs investigation and the personnel file are obvious. The government seeks to prosecute M\*. \*\*\*\*\* on the basis of a chemical BAC results reported by a CDPHE-certified laboratory.

25. A chemical BAC result reported by a CDPHE laboratory is the linchpin of any criminal prosecution for DUI.

26. In establishing its statutory system for chemical BAC testing, the legislature has charged the CDPHE with the responsibility for designing and maintaining a testing system that produces results that are reliable. § 42-4-1301(6)(c), (i)(I), C.R.S. The Department's regulations are so prominent in the statutory scheme that the mere certification of compliance with these regulations is generally a sufficient foundation for admitting chemical BAC evidence in a criminal trial. § 42-4-1301(6)(g). Moreover, if Department-certified testing indicates a driver's BAC is .08 or greater, the evidence shall be deemed *prima facie* evidence of DUI *per se*. § 42-4-1301(2)(a). If testing compliant with Department regulations indicates a driver's BAC is at a level below .05 or between .05 and .08, then mandatory and permissible inferences arise on which the jury will predicate its verdicts. § 42-4-1301(6)(a).

27. In addition to these statutory consequences, the Department's and certifications of chemical BAC testing carry simple but undoubted prestige and persuasive value in the minds of jurors. Certified testing results are persuasive because they have the imprimatur of a governmental agency. *Cf. Wilson v. People*, 743 P.2d 415 (Colo. 1987) (observing that some forms of prosecutorial misconduct are especially prejudicial, due to the prestige of the district attorney's status as a public official).

28. Yet by the admission of the laboratory supervisor, Ms. Burbach, there has been systemic error affecting virtually every test conducted at her lab by Mr. Fox-Rivera.

29. The systematic failure of the laboratory's testing analyst to comply with the Department's standard operating procedures, and the likewise systematic failure of the laboratory's supervising analyst to identify and correct such errors prior to a run of 1,700 cases, strongly impeaches the reliability of any laboratory result.

30. Such impeachment may well, moreover, serve as the basis for excluding chemical BAC evidence or for eliminating the statutory presumption supporting guilt in a criminal trial.

31. When error is repetitious, it casts strong doubt on any claim that the error was random or the result of isolated mistake. *See e.g., People v. Spoto*, 795 P.2d 1314 (Colo. 1990) (discussing the doctrine of chances); *People v. Rath*, 44 P.3d 1033 (Colo. 2002) (explaining that *modus operandi* and common schemes tend to negate a claim of mistake or accident).

32. Thus, the circumstances described above obliterate any notion that Ms. Burbach's certified laboratory maintains regular compliance with the Department's prescribed standard operating procedure, or that error by any testing analyst will be identified and corrected when Ms. Burbach signs-off on results as the "supervising analyst."

33. Nor could the exculpatory value of this evidence be eclipsed by self-serving assurances from Ms. Burbach, who has become a self-interested and conflicted party.

34. The security of her position as laboratory supervisor for the CDHPE would be threatened by disclosure of systemic laboratory error beyond those cases initiated by Mr. Fox-Rivera.

35. She purports that the lab's problems will be sufficiently resolved through independently conducted re-tests of all of all cases initiated by Mr. Fox-Rivera. But by declining to examine the integrity of results in other cases, she is effectively shifting and spreading blame away from herself and onto Mr. Fox-Rivera. The self-serving inference from such a limited investigation is that only the initial analyst is at fault when erroneous BAC results are obtained, while she and any other "supervising analyst," are blameless.

36. Such limited, self-serving investigatory measures by a conflicted party cannot be deemed sufficient to assure the reliability of testing procedures where the laboratory's results are offered as grounds for a presumption against the accused. When two or more people are implicated in misdeeds, the tendency of one to shift and spread blame to the other is common, and this makes self-serving assurances inherently unreliable. *Lilly v. Virginia*, 527 U.S. 116, 131 (1999); *see also* *Davis v. Alaska*, 415 U.S. 308 (1974) (evidence bearing on a witness' bias and motivation to fabricate is a prototypical form of impeachment).

37. In light of the foregoing, it is much more than merely "plausible," *see Ritchie, supra*; that records relating to laboratory error at Ms. Burbach's laboratory have exculpatory value in M\*. \*\*\*\*\*'s case. The information relates to chemical BAC testing, which is the linchpin of the case, and it is inherently exculpatory.

**CONCLUSION**

For the foregoing reasons, M\*. \*\*\*\*\* requests that the court compel the prosecution to disclose the records and information listed above or, in the alternative, to dismiss the charges:

Respectfully submitted this \_\_\_\_\_\_ day of May 2012.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Memorandum was placed in the U.S. Mail postage prepaid, first class, this \_\_\_\_\_ day of May 2012, addressed to:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

County Court, El Paso County, Colorado

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Colorado Springs, CO 80901-2980

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THE PEOPLE OF THE STATE OF COLORADO,

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# ORDER RE: MEMORANDUM OF LAW

THIS MATTER having come before the Court upon Defendant’s Memorandum, and the Court being fully advised;

HEREBY GRANTS Defendant’s request\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

HEREBY DENIES Defendant’s request\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

DATED this \_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_, 2012.

BY THE COURT:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

County Court Judge

Attachment A

Please produce any and all memoranda, records, electronic mail, or other media concerning:

* the CDPHE Toxicology Laboratory (hereafter, referred to as the Tox Lab) quality assurance system, to include, but not limited to standard operating procedure procedures, manuals, and policy for the quality assurance system for blood alcohol testing.
* the Tox Lab’s internal investigations or quality assurance system reviews in 2010, 2011, and 2012 including, but not limited to, reports of inaccurate blood alcohol test results to include inter-office and intra-office communications.
* communication between the Tox Lab and the Laboratory Services Division or any other accrediting agency concerning the quality assurance system since 2010 to present to include but not limited to any communications concerning laboratory errors or inaccurate blood alcohol results
* communications between the Tox Lab and any other agencies concerning an external and independent investigation into the possible causes of inaccurate readings relating to the Tox Lab.
* an Internal Affairs investigation concerning the inaccurate readings at the Tox Lab.
* inaccurate blood alcohol tests at the Tox Lab in 2010, 2011, 2012 including, but not limited to, the inaccurate tests that have been identified, to include forensic reports and litigation packets from each inaccurate blood test result.
* communications between the Tox Lab and the any District Attorney’s Office or any other agencies concerning inaccurate blood alcohol results at the Tox Lab.
* communications for the years 2010, 2011, and 2012 between the Tox Lab and the distributor and/or manufacturer of blood testing equipment including, but not limited to, Agilent Technologies.
* any lapses in the Tox Lab’s certification or applications for certification to any accrediting agency for 2010, 2011, and 2012.
* inaccuracies, misreporting, and errors in analysis of blood alcohol tests in 2010, 2011 and 2012.

* information regarding any laboratory testing for inaccurate blood tests at the Tox Lab including, but not limited to:

a. The name, training, experience, and certification of the person who manages the laboratory and of all persons who handled, processed, and tested material in erroneous reported alcohol blood results and the Tox Lab.

b. Certificates of compliance with accrediting agencies for the previous five years for the Tox Lab.

c. Internal audits, logs, and reports concerning blood alcohol testing for the last two years for the Tox Lab.

d. The litigation packets of any blood alcohol results deemed to be “erroneous” from the Tox Lab.

* Pursuant to the CDPHE (Colorado Department of Public Health and Environment) regulations, provide the following information for the blood alcohol tests at the Tox Lab for the last two years, to include:

a. Personnel qualifications, to include curriculum vitae’s.

b. Standard operating procedure manual for testing blood for alcohol for the Tox Lab.

c. Analytical process for the Tox Lab blood alcohol testing.

d. Proficiency testing for the Tox Lab blood alcohol testing.

e. Quality control for the Tox Lab blood alcohol testing.

f. Security for the Tox Lab blood alcohol testing.

g. Chain of custody procedure for blood alcohol testing for the Tox Lab.

h. Specimen retention for blood alcohol tests at the Tox Lab.

i. Records for any errors discovered for blood alcohol testing at the Tox Lab.

j. Results reporting for blood alcohol testing at the Tox Lab.

* All records concerning the laboratory's internal investigations from 2010 to the present bearing on the accuracy and reliability of chemical BAC tests
* All records concerning corrective actions taken or devised to remedy laboratory error subsequent to the investigation concerning Mitchell Fox-Rivera, and subsequent to other investigations since 2010
* Records of performance reviews and reports concerning Mitchell Fox-Rivera, as well as any records of responses by him or his representative
* Any correspondence with, or reports made to, any agency or organization providing the CDPHE Laboratory with any certification, license or accreditation, or to which the CDPHE has applied for the same in the past five years, reporting the mistakes referenced in Ms. Burbach’s e-mail
* Any protocol of the laboratory for informing prosecutors or defense counsel in individual cases when laboratory errors are detected