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|---|-----------------|
| 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. | |
| The Bussey Law Firm, P.C. Timothy R. Bussey, #23730 12 East Boulder Street Colorado Springs, CO 80903 719-475-2555; Fax 719-475-0046 tim@timothybussey.com | |
| 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, signed 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. Valenzuela-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.

The Bussey Law Firm, P.C.
Timothy R. Bussey, #23730
12 East Boulder Street
Colorado Springs, CO 80903
(719) 475-2555

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:

Office of the District Attorney
105 East Vermijo Street
Colorado Springs, CO 80903

| | |
|---|--|
| 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. | |
| The Bussey Law Firm, P.C. Timothy R. Bussey, #23730 12 East Boulder Street Colorado Springs, CO 80903 719-475-2555; Fax 719-475-0046 tim@timothybussey.com | COURT USE ONLY Case No: Div: Courtroom: |
| 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

From: Burbach, Cindy [<mailto:Cindy.Burbach@dphe.state.co.us>]
Sent: Wednesday, March 21, 2012 5:09 PM
To: Chris Halsor
Subject: Mitchell Fox-Rivera

Chris, on March 14th, 2012 the employment of Mitchell Fox-Rivera was terminated for unsatisfactory performance.

On Friday March 9th, 2012 it was brought to my attention that several blood samples analyzed by Mr. Fox Rivera were reported outside the appropriate reporting range. This was confirmed through independent testing by another analyst in the Forensic Toxicology Laboratory. As of today (March 21st, 2012) I know of 5 samples that were reported outside of the appropriate reporting range. Four of these samples have been re-tested and an amended report was issued to the submitting agency. The fifth sample is in process and once completed an amended report will be issued. The Toxicology Laboratory is in the process of re-analyzing approximately 1,700 samples that were initially analyzed by Mr. Fox-Rivera. Please ask all ODA's that have pending cases with Mr. Fox-Rivera to call the main lab 303-692-3680 or to email me to request a re-test. These samples are being moved to the front of the line.

Respectfully,

Cindy Burbach

Cynthia Silva Burbach
Toxicology Laboratory Supervisor
Colorado Department of Public Health and Environment
Laboratory Services Division
8100 Lowry Blvd
Denver, CO 80230-6928
Work-303-692-3491
Cell-303-916-8333
Fax-303-343-3697
cynthia.burbach@state.co.us



STATE OF COLORADO

John W. Hickenlooper, Governor
 Christopher E. Urbina, MD, MPH
 Executive Director and Chief Medical Officer

Dedicated to protecting and improving the health and environment of the people of Colorado

Laboratory Services Division
 8100 Lowry Blvd.
 Denver, Colorado 80230-6928
 (303) 692-3090

<http://www.cdphe.state.co.us/lr>



Colorado Department
 of Public Health
 and Environment

REVISED AFFIDAVIT OF CYNTHIA SILVA BURBACH

The affiant, being duly sworn, hereby affirms and attests as follows:

On March 9, 2012, it was brought to my attention that a retest of a blood sample originally analyzed by a particular technician [Hereinafter, "technician"], was retested by an independent laboratory with resulting blood alcohol content [BAC] that was significantly higher than the BAC reported by the technician. This blood sample was retested and confirmed the result of the independent laboratory.

As a result of this incident there is an ongoing systematic retest of approximately 1700 blood samples that were analyzed by the technician. As of this date, April 20th, 2012, about 250 of those blood samples have been retested. Of those approximately 250 blood samples, ten have been found to have an actual BAC significantly higher than reported by the technician. Those ten sample results are attached to this affidavit. To date, no retest has resulted in a lower actual BAC than was originally reported.

The error in technician's process has been found. The technician did not follow the standard operating procedure and failed to properly operate a standard piece of equipment. This resulted in a lower volume of blood being analyzed than is proper. This decreased volume, then resulted in a lower reported BAC than the actual BAC. Procedures are in place to ensure that this error is not repeated.

Cynthia Silva Burbach
 Toxicology Laboratory Supervisor
 Colorado Department of Public Health and Environment

[Handwritten signature]



Colorado Notary Public
 Subscribed and sworn to me this 20 day of April, 2012.

Notary Public
 My commission expires 2/1/2012

[Handwritten signature]

Mitch

| TOX Number | Retest BAC | Analyst | Reported BAC | DIFF % (reported:retest) |
|------------|------------|---------|--------------|-----------------------------|
| 2011009753 | 0.141 MD | | 0.082 | 71.95 |
| 2011009754 | 0.193 MD | | 0.12 | 60.83 |
| 2011009755 | 0.357 MD | | 0.217 | 64.52 |
| 2011009758 | 0.254 MD | | 0.181 | 40.33 |
| 2011008940 | 0.356 md | | 0.271 | 31.37 |
| 2011008948 | 0.152 md | | 0.121 | 25.62 |
| 2011008540 | 0.237 HK | | 0.184 | 28.80 |
| 2011008608 | 0.136 HK | | 0.108 | 25.93 |
| 2011008880 | 0.129 HK | | 0.104 | 24.04 |
| 2011008878 | 0.094 HK | | 0.053 | 77.36 |




Laboratory Services Division
8100 Lowry Boulevard, Denver CO 80230-6928
US Mail: PO Box 17123, Denver CO 80217
(303) 692-3680 fax (303) 343-3697

LABORATORY ID: TOX-2011009021

| SUBJECT INFORMATION | | SAMPLE INFORMATION | |
|---|--|---|--|
| 011551003 JAMIE JUSTESEN 10/2/1985 MALE Case Number: P1130784 Seal Number: 56900 | | Collection Date: 10/29/2011 2:48:00AM Collected By: KM Received Date: 11/7/2011 6:00:00AM Matrix: Blood Report Issue Date: 11/10/2011 | |
| CUSTOMER | | COMMENTS | |
| Police Dept - Durango 990 2nd Ave Attn Sgt Geary Parsons Durango CO 81301 Officer's Name R PAIGE | | Lab comments | |

| Test Name | Result | Date Analyzed | Detection Limit | Category | Method |
|---------------|--------|---------------|-----------------|----------------|--------|
| BLOOD ETHANOL | 0.146 | 11/9/2011 | 0.01g/100ml | CNS Depressant | GCFID |

Blood Ethanol Analyst: Mitchell Fox-Rivera

 Reviewed and Approved By: 
 Cynthia Silva Burbach, Toxicology Supervisor 11-16-11

Please Note: Unless alternate arrangements are made by you, the remainder of the submitted specimens will be discarded 12 months after the sample received date; and generated data will be discarded 5 years after the sample received date.

Results not for diagnostic purposes.

TNP = Test not performed. QNSC = Sample quantity not sufficient for confirmation. QNST = Sample quantity not sufficient for testing.

LSD Toxicology Internet Address: <http://www.cdphc.state.co.us/lr/Tox/index.htm>

(12/16/11) KS: 00012



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LABORATORY ID: TOX-2011009021

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| CUSTOMER | | COMMENTS | |
| Police Dept - Durango 990 2nd Ave Attn Sgt Geary Parsons Durango CO 81301 Officer's Name R PAIGE | | Lab comments | |

| Test Name | Result | Date Analyzed | Detection Limit | Category | Method |
|---------------|--------|---------------|-----------------|----------------|--------|
| BLOOD ETHANOL | 0.134 | 4/13/2012 | 0.01g/100ml | CNS Depressant | GCFID |

"AMENDED REPORT"

Blood Ethanol Analyst: Monte DiPalma

Reviewed and Approved By:

Cynthia Silva Burbach, Toxicology Supervisor

Cynthia Silva Burbach
4/16/12

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Results not for diagnostic purposes.

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LSD Toxicology Internet Address: <http://www.cdphe.state.co.us/lr/Tox/index.htm>

(04/26/12) KS: 00066

Email: Cindy Burbach to Chris Halsor

“Please have DDA’s...call the main lab...”

From: Burbach, Cindy [<mailto:Cindy.Burbach@dphe.state.co.us>]
Sent: Wednesday, March 21, 2012 5:09 PM
To: Chris Halsor
Subject: Mitchell Fox-Rivera

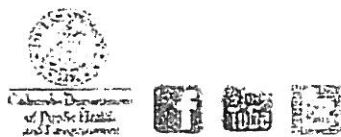
Chris, on March 14th, 2012 the employment of Mitchell Fox-Rivera was terminated for unsatisfactory performance.

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Respectfully,

Cindy Burbach

Cynthia Silva Burbach
Toxicology Laboratory Supervisor
Colorado Department of Public Health and Environment
Laboratory Services Division
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Denver, CO 80230-6928
Work-303-692-3491
Cell-303-916-8333
Fax-303-343-3697
cynthia.burbach@state.co.us



**Letter from Cynthia Burbach to Jennifer Kresel,
CDPHE Certification Unit**

STATE OF COLORADO

John W. Hickenlooper, Governor
Christopher E. Urbina, MD, MPH
Executive Director and Chief Medical Officer

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March 20th, 2012



Colorado Department
of Public Health
and Environment

Ms. Jennifer Kresel
Physical Scientist I
Colorado Department of Public Health and Environment
Laboratory Services Division
Certification Unit

RE: Mitchell Fox-Rivera Blood Samples

Dear Ms. Kresel,

On Friday March 9th, 2012 it was brought to my attention that several blood samples analyzed by Mr. Fox Rivera were reported outside the appropriate reporting range. This was confirmed through independent testing by defense counsel, and through another analyst in the Forensic Toxicology Laboratory. As of today (March 20th, 2012) I know of 5 samples that were reported outside of the appropriate reporting range. Four of these samples have been re-tested and an amended report was issued to the submitting agency. The fifth sample is in process and once completed an amended report will be issued. The Toxicology Laboratory is in the process of re-analyzing approximately 1,700 samples that were initially analyzed by Mr. Fox-Rivera.

Mr. Fox-Rivera did not inform his supervisor or work-leader with regard to his blood samples not yielding results in an acceptable range. In fact, the analyst did not recognize that the sample values were outside of the 20% range, which would indicate that a third analysis was necessary. Mr. Fox-Rivera did not seek advice from his supervisor, co-workers or work-leader with regard to this issue. In addition, he did not include the original results in the data packet for my review, and final approval, therefore I had no knowledge or indication that it was a re-do. In the future all re-analysis of samples will be dated and flagged for my review and final approval. All results will be compared to the prior results before being reported. This new procedure has been implemented as of Monday March 12th, 2012.

Once the re-analysis of Mr. Fox-Rivera's samples is complete a detail excel spreadsheet will be forwarded documenting the results of the re-analysis. This testing will be completed over the course of 2 months between two analysts. This time frame was chosen to ensure that the Toxicology Laboratory does not get back-logged in the analytical testing of blood alcohol samples.

Respectfully,

Cynthia Silva Burbach
Forensic Toxicologist
Toxicology Laboratory Director
Colorado Department of Public Health and Environment
Laboratory Services Division

Affidavit of Cynthia Burbach,

April 19, 2012

**“...About half (1700) of those blood samples have been
tested...”**

STATE OF COLORADO

John W. Hickenlooper, Governor
Christopher E. Urbina, MD, MPH
Executive Director and Chief Medical Officer

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AFFIDAVIT OF CYNTHIA SILVA BURBACH

The affiant, being duly sworn, hereby affirms and attests as follows:

On March 9, 2012, it was brought to my attention that a retest of a blood sample originally analyzed by a particular technician [Hereinafter, "technician"], was retested by an independent laboratory with resulting blood alcohol content [BAC] that was significantly higher than the BAC reported by the technician. This blood sample was retested and confirmed the result of the independent laboratory.

As a result of this incident there is an ongoing systematic retest of approximately 1700 blood samples that were analyzed by the technician. As of this date, April 19, 2012, about half of those blood samples have been retested. Of those approximately 850 blood samples, ten have been found to have an actual BAC significantly higher than reported by the technician. Those ten sample results are attached to this affidavit. To date, no retest has resulted in a lower actual BAC than was originally reported.

The error in technician's process has been found. The technician did not follow the standard operating procedure and failed to properly operate a standard piece of equipment. This resulted in a lower volume of blood being analyzed than is proper. This decreased volume, then resulted in a lower reported BAC than the actual BAC. Procedures are in place to ensure that this error is not repeated.

Cynthia Silva Burbach
Toxicology Laboratory Supervisor
Colorado Department of Public Health and Environment



Colorado Notary Public
Subscribed and sworn to me this 19th day of April, 2012.

Notary Public
My commission expires 10/9/2012

| TOX Number | Retest BAC | Analyst | Original BAC | | Reported BAC | DIFF % (reported:retest) |
|------------|------------|---------|--------------|-------|--------------|-----------------------------|
| 2011009753 | 0.141 MD | | 0.105 | 0.106 | 0.082 | 71.95 |
| | | | 0.122 | 0.124 | | |
| 2011009754 | 0.193 MD | | 0.164 | 0.166 | 0.12 | 60.83 |
| | | | 0.175 | 0.177 | | |
| 2011009755 | 0.357 MD | | 0.312 | 0.315 | 0.217 | 64.52 |
| | | | 0.294 | 0.298 | | |
| 2011009758 | 0.254 MD | | 0.224 | 0.225 | 0.181 | 40.33 |
| | | | 0.234 | 0.236 | | |
| 2011008940 | 0.356 md | | | | 0.271 | 31.37 |
| 2011008948 | 0.152 md | | | | 0.121 | 25.62 |
| 2011008540 | 0.237 HK | | | | 0.184 | 28.80 |
| 2011008608 | 0.136 HK | | | | 0.108 | 25.93 |
| 2011008880 | 0.129 HK | | | | 0.104 | 24.04 |
| 2011008878 | 0.094 HK | | | | 0.053 | 77.36 |

Revised Affidavit of Cynthia Burbach

April 20, 2012

**“... About 250 of those (1700) blood samples have
been retested.”**

STATE OF COLORADO

John W. Hickenlooper, Governor
Christopher E. Urbina, MD, MPH
Executive Director and Chief Medical Officer

Dedicated to protecting and improving the health and environment of the people of Colorado

Laboratory Services Division
8100 Lowry Blvd.
Denver, Colorado 80230-6928
(303) 692-3090

<http://www.cdphe.state.co.us/lr>



Colorado Department
of Public Health
and Environment

REVISED AFFIDAVIT OF CYNTHIA SILVA BURBACH

The affiant, being duly sworn, hereby affirms and attests as follows:

On March 9, 2012, it was brought to my attention that a retest of a blood sample originally analyzed by a particular technician [Hereinafter, "technician"], was retested by an independent laboratory with resulting blood alcohol content [BAC] that was significantly higher than the BAC reported by the technician. This blood sample was retested and confirmed the result of the independent laboratory.

As a result of this incident there is an ongoing systematic retest of approximately 1700 blood samples that were analyzed by the technician. As of this date, April 20th, 2012, about 250 of those blood samples have been retested. Of those approximately 250 blood samples, ten have been found to have an actual BAC significantly higher than reported by the technician. Those ten sample results are attached to this affidavit. To date, no retest has resulted in a lower actual BAC than was originally reported.

The error in technician's process has been found. The technician did not follow the standard operating procedure and failed to properly operate a standard piece of equipment. This resulted in a lower volume of blood being analyzed than is proper. This decreased volume, then resulted in a lower reported BAC than the actual BAC. Procedures are in place to ensure that this error is not repeated.

Cynthia Silva Burbach
Toxicology Laboratory Supervisor
Colorado Department of Public Health and Environment



Colorado Notary Public
Subscribed and sworn to me this 20th day of April, 2012.

Notary Public
My commission expires 10/9/2012

| TOX Number | Retest BAC | Analyst | Original BAC | Reported BAC | DIFF % (reported:retest) |
|------------|------------|---------|--------------|--------------|-----------------------------|
| 2011009753 | 0.141 MD | | 0.105 | 0.106 | 0.082 |
| | | | 0.122 | 0.124 | 71.95 |
| 2011009754 | 0.193 MD | | 0.164 | 0.166 | 0.12 |
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| 2011009755 | 0.357 MD | | 0.312 | 0.315 | 0.217 |
| | | | 0.294 | 0.298 | 64.52 |
| 2011009758 | 0.254 MD | | 0.224 | 0.225 | 0.181 |
| | | | 0.234 | 0.236 | 40.33 |
| 2011008940 | 0.356 md | | | 0.271 | 31.37 |
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Denver Post Articles

Colorado to retest 1,700 blood samples from DUI cases after lab employee's errors uncovered

By Felisa Cardona The Denver Post The Denver Post
Posted:

DenverPost.com

The state is retesting 1,700 DUI blood samples after a laboratory employee failed to follow proper procedures, which skewed the results of the tests.

The mistakes open the door for defense lawyers to challenge all of the blood testing in driving-under-the-influence cases conducted by the Colorado Department of Public Health and Environment's lab.

"There was a situation where an outside lab ran a sample that caused us to rerun a sample, and we were able to track that to a certain employee who was not following the standard operating procedures," health department spokesman Mark Salley said.

The lab processes DUI bloodwork for 225 law enforcement agencies in Colorado. Some law enforcement agencies, including Denver police, have their own labs. Others contract the bloodwork out to an independent lab.

So far, the state has tested 250 of the samples and found 10 with inaccurate results, Salley said.

Salley said the inaccurate results were in the defendants' favor because they showed a lower blood-alcohol reading than the second analysis. For example, a first, inaccurate reading on which a suspect's charges were based might have said the blood-alcohol content was a 0.10 percent, when in reality it was 0.17 percent.

"As soon as we were aware of the situation we took action," Salley wrote in an e-mail. "We are reanalyzing all samples using standard methodology and standards and controls. Once a retest is completed the appropriate district attorney's office is notified and they can pursue the case with a new analyst."

Colorado public defender Douglas Wilson said his office hasn't been notified of the laboratory errors.

"You would think somebody might share this with everyone," Wilson said. "I have not heard a peep."

The Denver Post obtained a March 21 e-mail written by lab supervisor Cynthia Silva Burbach that says lab employee Mitchell Fox-Rivera was fired for unsatisfactory performance March 14 and that the errors were discovered March 9.

Salley declined to confirm the name the employee but said the department is retesting all of the employee's work, which spans a period of about five months.

"Please ask all DDA's (prosecutors) that have pending cases with Mr. Fox-Rivera to call the main lab," Burbach wrote in her memo. "These samples are being moved to the front of the line."

Colorado Springs attorney Steven Katzman was notified that some of his client's cases were tested by Fox-

Rivera, and he plans to challenge the evidence.

"A judge or a jury is going to be entitled to know the full extent of what was reported, and you are going to wonder what is the discrepancy and can we trust anything?" he said.

Katzman said DUI laboratory errors occurred a couple of years ago at the Colorado Springs Police Department's lab and several samples had to be retested.

"In some situations, they had people who had pled to cases and they had to reopen some cases," Katzman said. "And in one or two cases, people shouldn't have been charged and it created a mess."

Felisa Cardona: 303-954-1219 or fcardona@denverpost.com

This story has been corrected in this online archive. Due to incorrect information provided by the state health department, the number of DUI blood tests retested was incorrect. 250 tests have been reexamined.

Colorado lab tech blames boss for mistakes on DUI blood sample tests

By Felisa Cardona The Denver Post The Denver Post

Posted:

DenverPost.com

A state toxicology lab tech fired for mistakes made on DUI blood samples is fighting to keep his job and blaming the supervisor who signed off on his work.

The state is retesting 1,700 driving-under-the-influence blood samples after Mitchell Fox-Rivera failed to follow standard operating procedures in the lab, which resulted in incorrect readings, according to an e-mail written by his supervisor that was obtained by The Denver Post.

Defense lawyers and DUI defendants who had bloodwork processed through the Colorado Department of Public Health and Environment's lab are challenging the tests in court.

In an e-mail to The Post, Fox-Rivera says he was a recent college graduate and a relatively new employee and that a review of his lab data was supposed to be overseen by supervisor Cynthia Silva Burbach.

Health-department spokesman Mark Salley declined to comment on Fox-Rivera's allegations Monday because it is a personnel matter.

Fox-Rivera was hired in October, five months after he graduated from the University of Colorado at Colorado Springs. He was fired March 14 after an outside lab ran a sample he had tested and found an error.

"According to our standard operating procedure, I was responsible for performing an 'initial review of the data,' " Fox-Rivera wrote. "I worked under the toxicology supervisor, Cynthia Burbach and her lead quality control employee."

Fox-Rivera wrote that Burbach was responsible for reviewing his work.

"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," he wrote. "It was not my role to review the data for forensic and litigation needs."

In a revised affidavit obtained by The Post on Monday, Burbach wrote that the "technician did not follow the standard operating procedure and failed to properly operate a standard piece of equipment."

Burbach's affidavit does not say whether she was supervising the technician at the time but says "procedures are in place to ensure that this error is not repeated."

The state lab processes DUI bloodwork for more than 200 law enforcement agencies in Colorado.

The state has completed retesting of 600 samples and has found 10 with inaccurate results, Salley said.

Colorado lab tech blames boss for mistakes on DUI blood sample tests

By Felisa Cardona The Denver Post The Denver Post

Posted:

DenverPost.com

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The state lab processes DUI bloodwork for more than 200 law enforcement agencies in Colorado.

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Colorado lab director says DUI errors aided suspects, but 2 retested lower

By Felisa Cardona *The Denver Post* *The Denver Post*

Posted:

DenverPost.com

A state health department lab director swore under oath that faulty DUI tests by her lab favored defendants, but at least two of those tests reported a higher blood-alcohol reading than the actual result.

The Colorado Department of Public Health and Environment is retesting 1,700 blood samples from driving-under-the-influence suspects after officials said a lab tech failed to follow standard operating procedures, resulting in incorrect readings.

So far, the state has retested 800 of the blood samples handled by the lab tech and found 10 with errors.

In an affidavit signed under oath April 20, toxicology lab supervisor Cynthia Silva Burbach claimed that among the samples that had been retested, 10 ultimately had a higher blood-alcohol content than reported by the lab tech.

"Ten (samples) have been found to have an actual BAC significantly higher than reported by the technician," she wrote. "To date, no retest has resulted in a lower actual BAC than was originally reported."

Mark Salley, a spokesman for the health department, told *The Denver Post* last month that the erroneous tests favored the defendants because they were reported at a lower blood-alcohol level than was reality, meaning defendants were not overcharged.

But defense attorney Steven Katzman said his client's initial blood-alcohol test showed a bad reading of 0.218 percent when it was tested Nov. 3. The retest conducted April 6 showed it was actually a 0.199 percent.

"Ms. Burbach's affidavit is inaccurate because she said no retests had resulted in a lower BAC than originally reported," Katzman said. "She didn't say there weren't any statistically lower. That is not accurate, and she knew that at least two weeks before because she signed the retest before the affidavit was done."

Burbach signed her affidavit 16 days after that defendant's test was redone.

Another defendant, who didn't want to be named because his case is pending, provided copies of his tests, which show the first erroneous result in November put his blood-alcohol result at 0.146 percent.

The second test, conducted in April 13 — seven days before Burbach signed the affidavit — shows his blood-alcohol content was at 0.134 percent.

Salley maintains there is no discrepancy in Burbach's affidavit because the difference in results is less than 10 percent, which he said is not scientifically significant.

"The standard operating procedure for the state lab allows for a 10 percent variation between results when

the same sample is run multiple times," he wrote in an e-mail. "Significant variation, in this case is any variation outside of 20 percent. The 10 samples referenced above are all outside the 20 percent variation. These samples were all originally reported out in the defendants favor, a lower Blood Alcohol Content."

But chemist Robert Lantz, director of Rocky Mountain Instrumental Laboratories, said the 20 percent variation does make a difference.

"The idea that a disagreement of 20 percent between assays of ethanol is acceptable is ridiculous," he wrote in an e-mail. "Ethanol is a very easy assay. Our agreement is generally +/- 0.003 between the four results that we obtain on each sample."

Katzman said the difference in his client's blood-alcohol result also affects jail time. In Colorado, jail time is mandatory for people convicted of DUI with a blood-alcohol content above 0.20 percent.

The lower and higher test readings are an indicator to Katzman that the health department doesn't know what caused the problems in testing.

The fired lab tech, Mitchell Fox-Rivera, is contesting his dismissal and puts part of the blame on his supervisor, Burbach, who signed off on his work.

"If you buy what she said in her affidavit, that (Fox-Rivera) wasn't using the proper volume of blood, then all of the samples should be wrong in the same way," Katzman said. "You shouldn't have some that were higher and some that were lower."

Felisa Cardona: 303-954-1219 or fcardona@denverpost.com

**CORA Request to CDPHE,
April 20, 2012**



12 East Boulder Street
Colorado Springs, CO 80903
Email: tim@timothybussey.com

TIMOTHY R. BUSSEY
ATTORNEY AT LAW

TELEPHONE
(719) 475-2555
Also admitted in Illinois

April 20, 2012

Ann Hause, Director, Office Legal and Regulatory Affairs
Colorado Department of Public Health and Environment
4300 Cherry Creek Dr. South
Denver, CO 80246

Sent via Facsimile/Email: 303-692-3090
ann.hause@state.co.us

Dear Ms. Hause,

It has come to my attention that blood samples from the CDPHE Toxicology Laboratory were reported outside of the appropriate reporting range. Pursuant to the Colorado Open Records Act (CORA), C.R.S. 24-72-201, I am requesting the following information:

1. Any and all memoranda, records, electronic email, or other media concerning the Colorado CDPHE Toxicology Laboratory (hereafter referred to as the "Tox Lab") quality assurance system, to include, but not limited to, procedures, manuals, and policy for the quality assurance system and testing methods.
2. Any and all memoranda, records, electronic email, or other media concerning the Tox Lab's internal investigations or quality assurance system reviews in 2010-present, including, but not limited to, reports of inaccurate blood test results to include inter-office and intra-office communications.
3. Any and all memoranda, records, electronic email, or other media concerning any internal affairs investigation including but not limited to inaccurate blood results or blood samples reported outside of appropriate ranges from 2010-present.
4. Any and all memoranda, records, electronic email, or other media concerning communications between CDPHE, law enforcement (to include District Attorney's Offices), courts and the defense bar or individual defense counsel (pro se), concerning information of an inaccurate blood results or blood sample reported out of range from 2010-present.

5. Any and all memoranda, records, electronic email, or other media concerning any Internal Affairs investigations concerning the inaccurate blood results or blood samples out of range for 2010-present at the Tox Lab.

6. Any and all memoranda, records, electronic email, or other media concerning inaccurate blood alcohol tests at the Tox Lab from 2010-present including, but not limited to, the inaccurate tests that have been identified, to include any forensic reports or memoranda from each inaccurate blood test result.

7. Any and all memoranda, records, electronic email, or other media concerning information regarding any laboratory testing for inaccurate blood tests at the Tox Lab including, but to limited to:

- a. The name, training, experience, and certification of the person who managed the laboratory and of all persons who handled, processed, and tested material in inaccurate blood result or blood samples reported outside appropriate ranges from 2010-present at 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 (as defined in 5 CCR 1005-2) of any blood samples deemed to be outside of appropriate ranges from 2010- present from the Tox Lab.

8. 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 to include:

- a. Personnel qualifications, to include curriculum vitae's.
- b. Standard operating procedure manual for testing blood samples at 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 for the last five years.

9. Any and all memoranda, records, electronic email, or other media concerning forensic analysis for ethyl alcohol used by the Tox Lab.

10. Any and all memoranda, records, electronic email, or other media concerning any lapses in the Tox Lab's certification.

11. Any and all memoranda, records, electronic email on other media concerning a corrective action taken or plans of corrective action concerning inaccurate blood testing or blood samples out of range for 2010-present at the Tox lab.

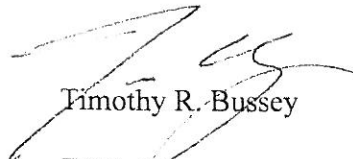
12. Any and all memoranda, records, electronic email, or other media identifying all personals who participated in the testing or signed off on tst results for any inaccurate blood testing or blood samples out of range for 2010-present.

13. Any and all memoranda, records, electronic email, or other media concerning inaccuracies, misreporting, and errors in analysis of blood alcohol tests in 2010-present.

14. Any and all information concerning Mitchell Fox-Rivera including but not limited to his resume, application for employment, personal records, performance reviews, and performance reports.

This CORA request pursuant to Article 72 of Title 24, COLORADO REVISED STATUTES, seeks copies of the materials in pdf, excel or text files. For materials not maintained in electronic format, paper may be provided for inspection and scanning/digitizing. Electronic files may be compressed into a sip file or files of less than 8 mb per e-mail and sent to tim@timothybussey.com or you may give notice of the availability of the material for inspection. If the anticipated cost is for than \$50.00, please contact me in advance to discuss the expected cost.

Sincerely,



Timothy R. Bussey

TRB:js

CORA Response from CDPHE

April 27, 2012

STATE OF COLORADO

John W. Hickenlooper, Governor
Christopher E. Urbina, MD, MPH
Executive Director and Chief Medical Officer

Dedicated to protecting and improving the health and environment of the people of Colorado

4300 Cherry Creek Dr. S. Laboratory Services Division
Denver, Colorado 80246-1530 8100 Lowry Blvd.
Phone (303) 692-2000 Denver, Colorado 80230-6928
Located in Glendale, Colorado (303) 692-3090
<http://www.cdphe.state.co.us>



Colorado Department
of Public Health
and Environment

April 27, 2012

Timothy R. Bussey
The Bussey Law Firm, P.C.
12 East Boulder Street
Colorado Springs, Colorado 80903

RE: Colorado Open Records Act Request

Dear Mr. Bussey:

The Colorado Department of Public Health and Environment (Department) is in receipt of your Colorado Open Records Act request dated April 20, 2012. A response to each request is set forth below. The responsive records will be provided to you on a CD upon receipt of payment as described in the attached invoice.

Request 1: Any and all memoranda, records, electronic email, or other media concerning the Colorado CDPHE Toxicology Laboratory (hereafter referred to as the "Tox Lab") quality assurance system, to include, but not limited to, procedures, manuals, and policy for the quality assurance system and testing methods.

Response: Standard operating procedures are being provided.

Request 2: Any and memoranda, records, electronic email, or other media concerning the Tox Lab's internal investigations or quality assurance system reviews in 2010-present, including but not limited to, reports of inaccurate blood test results to include inter-office and intra-office communications.

Response: See response to Request #1. A blank corrective action log is being provided. Corrective action logs are completed with regard to individual cases when blood alcohol results are outside of appropriate ranges.

Request 3: Any and all memoranda, records, electronic email, or other media concerning any internal affairs investigation including but not limited to inaccurate blood results or blood samples reported outside of appropriate ranges from 2010-present.

Response: The Department is not releasing its investigatory files pursuant to C.R.S. § 24-72-204(2)(a)(I). Additionally, these records contain deliberative process privileged information regarding an ongoing investigation, and as such are not subject to disclosure pursuant to C.R.S. § 24-72-204(3)(a)(XIII). Investigation materials that contain the personally identifying information, in this instance for defendants in criminal matters, are not subject to disclosure pursuant to C.R.S. § 24-72-204(3)(a)(IV). Finally, to the extent these investigatory materials contain information maintained pursuant to the employer-employee relationship, they constitute personnel files as defined in C.R.S. § 24-72-202(4.5) and are not subject to disclosure pursuant to C.R.S. § 24-72-204(3)(a)(II)(A).

Request 4: Any and all memoranda, records, electronic email, or other media concerning communications between CDPHE, law enforcement (to include District Attorney's Offices), courts and the defense bar or individual defense counsel (pro se), concerning information of an inaccurate blood results or blood sample reported out of the range from 2010-present.

Response: Emails to and from the Department to a third party regarding the results of blood alcohol testing are being provided.

Request 5: Any and all memoranda, records, electronic email, or other media concerning any internal affairs investigations concerning the inaccurate blood results or blood samples out of range for 2010-present at the Tox Lab.

Response: See responses to Requests 3 and 4.

Request 6: Any and all memoranda, records, electronic email, or other media concerning inaccurate blood alcohol tests at the Tox Lab from 2010-present including, but not limited to, the inaccurate tests that have been identified, to include any forensic reports or memoranda from each inaccurate blood test result.

Response: See responses to Requests 3 and 4.

Request 7: Any and all memoranda, records, electronic email, or other media concerning information regarding any laboratory testing for inaccurate blood tests at the Tox Lab including, but to limited to [sic]:

- a. The name, training, experience, and certification of the person who managed the laboratory and of all persons who handled, processed, and tested material in inaccurate [sic] blood result or blood samples reported outside appropriate ranges from 2010-present at the Tox Lab.

Response: Curricula vitae are being provided. Training records constitute information maintained because of the employer-employee relationship and are exempt from disclosure pursuant to C.R.S. § 24-72-204(3)(a)(II)(A).

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

Response: Certificates of compliance are being provided.

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

Response: Three responsive documents are being provided.

d. The litigation packets (as defined in 5 CCR 1005-2) of any blood samples deemed to be outside of appropriate ranges from 2010-present from the Tox Lab.

Response: Litigation packets contain personally identifying information and are not subject to disclosure pursuant to C.R.S. § 24-72-204(3)(a)(IV).

Request 8: Pursuant to CDPHE (Colorado Department of Public Health and Environment) regulations, provide the following information for the blood alcohol tests at the Tox Lab to include:

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

Response: Curriculum vitae and position descriptions are being provided.

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

Response: Standard operating procedures are being provided.

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

Response: Standard operating procedures are being provided.

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

Response: Proficiency tests are being provided.

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

Response: A quality control policy is being provided.

f. Security for the Tox Lab blood alcohol testing.

Response: A policy is being provided.

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

Response: A chain of custody procedure is being provided.

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

Timothy R. Bussey, P.C.
April 27, 2012

Response: A specimen retention procedure is being provided.

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

Response: Two responsive documents are being provided.

Request 9: Any and all memoranda, records, electronic email, or other media concerning forensic analysis for ethyl alcohol used by the Tox Lab.

Response: This request is overbroad and unduly burdensome. These records exist only at the individual test result level. The Toxicology Lab conducts approximately 800 blood alcohol tests per month, and cannot possibly go through each and every test result for purposes of responding to this request.

Request 10: Any and all memoranda, records, electronic email, or other media concerning any lapses in the Tox Lab's certification.

Response: The Department has no responsive documents.

Request 11: Any and all memoranda, records, electronic email on [sic] other media concerning a corrective action taken or plans of corrective action concerning inaccurate blood testing or blood samples out of range for 2010-present at the Tox Lab.

Response: Corrective actions are documented at the individual test result level, and contain personally identifying information, which is not subject to disclosure pursuant to C.R.S. § 24-72-204(3)(a)(IV).

Request 12: Any and all memoranda, records, electronic email, or other media identifying all persons [sic] who participated in the testing or signed off on test [sic] results for any inaccurate blood testing or blood samples out of range for 2010-present.

Response: The Department has no responsive documents.

Request 13: Any and all memoranda, records, electronic email, or other media concerning inaccuracies, misreporting, and errors in analysis of blood alcohol tests in 2010-present.

Response: See responses to prior requests.

Request 14: Any and all information concerning Mitchell Fox-Rivera including but not limited to his resume, application for employment, personal [sic] records, performance reviews, and performance reports.

Timothy R. Bussey, P.C.
April 27, 2012

Response: Mr. Fox-Rivera's resume, application, and performance rating are being provided. Personnel records and the content of the performance review, other than the performance rating, are exempt from disclosure pursuant to C.R.S. § 24-72-204(3)(a)(II)(A).

If you wish to receive a CD containing the responsive, public documents described above, please remit payment in accord with the attached invoice.

This concludes the department's good faith effort to respond to your Colorado Open Records request. If you have further questions, I may be reached at 303-692-3472 or ann.hause@state.co.us.

Sincerely,

Ann Hause, Director
Office of Legal and Regulatory Affairs

cc: Cindy Burbach, Laboratory Services Division
Dave Butcher, Laboratory Services Division
Jennifer Weaver, First Assistant Attorney General, State Services Section, Colorado Department of Law

**Sample Mix-Up Memo,
November 9, 2010**

STATE OF COLORADO

Bill Ritter, Jr., Governor
Martha E. Rudolph, Executive Director

Dedicated to protecting and improving the health and environment of the people of Colorado

Laboratory Services Division
8100 Lowry Blvd.
Denver, Colorado 80230-6928
(303) 692-3090

<http://www.cdphe.state.co.us/lr>



Colorado Department
of Public Health
and Environment

November 9, 2010

To: Jeff Groff
Certification
CDPHE, Lab Services Division

Subject: Sample Mix-up

CONCERN:

On Friday, October 1, 2010, the CDPHE Toxicology Laboratory was informed of a possible sample mix-up involving blood alcohol samples. Chematox had performed a second analysis and obtained a significantly different result than the CDPHE Toxicology Lab's on a specific sample. Initial re-analysis by another analyst indicated a mix-up between two samples had occurred on 3/23/10 on the Agilent 6890 gas chromatograph.

CAUSE ANALYSIS:

Analysis by a third analyst confirmed the mix-up of the two samples and amended reports were issued. No other samples were involved and analytical results for the other samples from March 23rd were within acceptable variance.

In addition, re-analysis of other work performed by the original analyst matched the original results. Samples checked included several analytical runs from before and after the March 23rd run. It also included re-analysis of recent work performed by the original analyst. The work of a second employee who analyzed blood alcohol samples around the March 23rd time frame was also re-analyzed. No mix-ups or other issues were found in over two hundred samples.

Analysis of the analytical process indicated two possible sources: 1) loading samples on the auto-sampler and 2) pipeting the blood.

Auto-sampler -

Several possible actions that might result in the mix-up were studied. No reasonable scenario could be determined that would have resulted in the observed problem.

Pipeting –

Samples could have been pipeted into the wrong headspace vials. This is unlikely because it would have been easily seen. Pipeting the wrong sample could have occurred if the analyst did not accurately check the sample tubes' lab ID numbers and the vial numbers. While no cause can be determined with absolute certainty, in part due to the elapsed time, this scenario is the most likely.

CORRECTION and PREVENTION:

Amended reports were issued.

Analysts have been re-trained to carefully check sample tube identification when pipeting. The importance of carefully checking sample identification has been discussed with all Toxicology personnel. Reminders to match seal numbers and vial numbers have been placed conspicuously on hoods used for pipeting.

cc:

C. Burbach

L. Peterson-Wright

Respectfully,

 11-11-10

H.L. Wells

Work Lead, CDPHE Toxicology Laboratory

Prior Court Order from CSPD Lab Litigation

To be "material" for constitutional purposes, information need not itself be admissible at trial. *People v. Gallegos*, 644 P.2d 920 (Colo. 1982).

The Court finds that the Defendant's motion is well taken and, pursuant to Criminal Rules of Procedure Rule 16, orders that the People produce the following within 10 days. Except with regard to the test for the Defendant's age, all names and personal information of other defendants shall be redacted or otherwise blocked. If applicable, the information disclosed by this order may be transmitted or made available to the Defendant's attorney by electronic media such as a DVD. Defense may not distribute or disseminate the material to any other person or party except their investigators or clients.

- The Colorado Springs Metro Crime Lab (hereafter, referred to as the Crime Lab) quality assurance system, to include, but not limited to, procedures, manuals, and policy for the quality assurance system.
- The Crime Lab's internal investigations or quality assurance system reviews for 2009, including, but not limited to, reports of inaccurate blood test results to include inter-office and intra-office communications.
- Any communications between the Crime Lab and the Colorado Department of Health concerning the quality assurance system.
- The Crime Lab's reporting of all blood alcohol tests in 2009 that erroneously reported a higher than true actual result of greater than 10%, including, but not limited to, the original reported results and any other results later reported on the suspect samples.
- Any communications between the Colorado Springs Police Department and the Colorado Bureau of Investigations (CBI) concerning an external and independent investigation into the possible causes of inaccurate readings relating to the Crime Lab.
- An Internal Affairs investigation concerning the inaccurate readings at the Crime Lab subject to in Camera review by the Court if requested.
- Inaccurate blood alcohol tests with a variance of greater than 10% at the Crime Lab in 2009
- Including, but not limited to, the inaccurate tests that have been identified, to include forensic reports from each inaccurate blood test result.

- All written or electronic communications between the Colorado Springs Police Department and the Fourth Judicial District Attorney's Office concerning inaccurate blood results at the Crime Lab.
- All written or electronic communications for the years 2008 and 2009 between the Colorado Springs Police Department and the distributor and/or manufacturer of blood testing equipment including, but not limited to, Agilent Technologies.
- Documentation for any lapses in the Crime Lab's certification.
- Information regarding any laboratory testing for inaccurate blood tests at the Crime Lab as follows:
 - 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 high blood results and the Crime Lab.
 - b. Certificates of compliance with accrediting agencies for the previous five years for the Crime Lab.
 - c. Internal audits, logs, and reports concerning blood alcohol testing for the last two years for the Crime Lab.
 - d. The number of blood tests conducted by the Lab for 2009 including the number of sample per "batch" samples retested per batch and name of the technician who did the testing.
 - e. All Gas Chromatograph data (electronic data file to include the electronic method) for the samples that were retested in each batch and deemed acceptable, to include the original test and retest.
 - f. All Gas Chromatograph data for all samples that had a variance of more than 10%, to include the original test and the retest.
 - g. Full litigation packet for the tests with more than a 10% variance.
 - h. Full litigation packet for the randomly retested samples that were deemed acceptable.

- Pursuant to the CDPHE (Colorado Department of Public Health and Environment) regulations, provide the following information for the blood alcohol tests at the Crime Lab to include:
 - a. Personnel qualifications, to include curriculum vitae's.
 - b. Standard operating procedure manual for testing blood for alcohol for the Crime Lab.
 - c. Analytical process for the Crime Lab blood alcohol testing.
 - d. Proficiency testing for the Crime Lab blood alcohol testing.
 - e. Quality control for the Crime Lab blood alcohol testing.
 - f. Security for the Crime Lab blood alcohol testing.
 - g. Chain of custody procedure for blood alcohol testing for the Crime Lab.
 - h. Specimen retention for blood alcohol tests at the Crime Lab.
 - i. Records for any errors discovered for blood alcohol testing at the Crime Lab.
 - j. Results reporting for blood alcohol testing at the Crime Lab.

DATED: March 5, 2010

BY THE COURT:

Stephen J. Sletta, Judge