County Court, Jefferson County, State of Colorado Jefferson Combined Court 100 Jefferson County Parkway Golden, CO 80401-6002 THE PEOPLE OF THE STATE OF COLORADO, Plaintiff, v. XXXXX XXXXX, Defendant.	COURT USE ONLY
Attorneys for the Defendant: The Orr Law Firm L.L.C. Rhidian D.W. Orr, Atty. Reg. No. 33738 Nathan Johnson, Atty. Reg. No. 42905 Shawn Gillum, Atty. Reg. No. 35682 Richard Hernandez, Atty. Reg. No. 30627 720 South Colorado Boulevard, Suite 1110-N Denver, Colorado 80246 303-818-2448 (Main) 303-845-9140 (Fax) orrlaw@orrlaw.com	Case Number: 11M6626 Division B Courtroom:
DEFENDANT'S REPLY TO PEOPLE'S MEMORANDUM OF LAW ON THE REQUIREMENT OF PROSECUTORIAL DISCOVERY PRODUCTION IN DRIVING UNDER THE INFLUENCE CASES	

Defendant, XXXXX XXXXX, submits this Reply to People's Memorandum of Law on the Requirement of Prosecutorial Discovery Production in Driving Under the Influence Cases.

On or about July 31, 2012, the People filed a Memorandum of Law on the Requirement of Prosecutorial Discovery Production in Driving Under the Influence Cases ("Memorandum"). Because the Memorandum was mailed to undersigned counsel's old office address, the defense did not receive the Memorandum until recently. Defendant now submits this Reply to the People's Memorandum.

I. The requested materials are within the "possession or control" of the People.

The People argue that the requested materials are not within the "possession or control" of the People. (Memorandum, p. 7). Materials are "in the possession or control" of the prosecution if the materials are "in the possession or control of members of his or her staff and of any other who have participated in the investigation or evaluation of the case and who either regularly report, or with reference to the particular case have reported, to his or her office." Crim. P. 16 (I)(a)(3) (emphasis added). The prosecution is required to "ensure that a flow of

information is maintained between the various investigative personnel and his or her office sufficient to place within his or her possession or control all material and information relevant to the accused and the offense charged." Crim. P. 16 (I)(b)(4). The records requested in Defendant's Motion to Compel Discovery are, therefore, within the possession or control of the prosecution. Law enforcement agencies in this jurisdiction routinely and exclusively submit blood samples to the CDPHE Laboratory Services Division for testing. The CDPHE lab analyzes those tests and reports the results to the prosecution. As such, the CDPHE lab participated in the investigation and evaluation of this case. The CDPHE lab regularly reports to the prosecution. And the CDPHE lab reported to the prosecution about this particular case. Therefore, the requested materials are within the "possession and control" of the People, and the Defendant is not required to issue subpoenas under Crim. P. 17, as the People suggest.

Even assuming, for the sake of argument, the materials were not in the possession or control of the prosecution, "the prosecuting attorney shall use diligent good faith efforts to cause such material to be made available to the defense…[u]pon the defense's request…of material…which would be discoverable if in the possession or control of the prosecuting attorney and which is in the possession or control of other governmental personnel." Crim. P. 16, Part I (c)(1).

II. The materials are neither privileged nor confidential

The People assert that "some of the requests" seek privileged or confidential information "that are not subject to discovery." (Memorandum, p. 8). The People do not identify which of the requested materials in Defendant's Motion to Compel Discovery are privileged or confidential.[1] Even if they did, the People's reliance on C.R.S. § 13-90-107 is misplaced. Rule 16 governs discovery in criminal cases. Section 13-90-107 governs who may or may not testify without consent. Testimonial privilege covers a husband-wife relationship, as well as communications with a lawyer, clergy, physician, surgeon, nurse, public officer, certified public accountant, licensed psychologist, interpreter, and so on. *See* C.R.S. § 13-90-107(1)(a)-(m). None of those situations are present in this case.

Secondarily, the People claim the materials are confidential under C.R.S. § 24-72-204(3)(a). (Memorandum, p. 9). The People do not identify which item in Defendant's Motion to Compel Discovery is allegedly confidential. Even if they did, Defendant seeks discoverable materials under Crim. P. 16 and *Brady v. Maryland*, 373 U.S. 83, 87 (1963), not the Colorado Open Records Act ("CORA"). Furthermore, CORA does not govern or control criminal justice records. C.R.S. § 24-72-202(6)(b)(I).

The People argue the materials are confidential because Mitchell Fox-Rivera, the former blood analyst with the Colorado Department of Public Health and Environment ("CDPHE"), is "the subject of an on-going internal investigation currently being performed by CDPHE" and "releasing this information at this stage of the investigation risks substantially jeopardizing the

[1] Indeed, the People do not identify which materials in Defendant's Motion to Compel Discovery they object to providing to the defense. And none of their arguments against disclosure identify which materials allegedly run afoul of their interpretation of the applicable rules or law. Therefore, the Reply must assume the People object to providing all of the materials in the Motion to Compel Discovery.

investigation by having a chilling effect on government self-evaluation and consequent program improvement efforts." (Memorandum, p. 9). However, the People allege in the same Memorandum that CDPHE discovered how Mr. Fox-Rivera "failed to properly operate a standard piece of equipment, specifically the pipette used to transfer a specific volume of blood from the phlebotomist's blood tube to the analyst's sample vial for [Gas Chromatography]." (Memorandum, p. 4). "Therefore, measures have been put in place by CDPHE after the departure of Mitchell Fox-Rivera to ensure consistency in the volume of sample transferred by pipette." *Id.* at p. 5. Furthermore, CDPHE terminated Mr. Fox-Rivera on March 14, 2012 – nearly 5 month ago. As such, the People cannot claim CDPHE found and corrected the alleged problem that Mr. Fox-Rivera created, terminated his employment, but that the situation is "the subject of an on-going internal investigation currently being performed by CDPHE." Either the problem was found and fixed, or the situation is still under investigation. The People cannot have it both ways. Regardless, the materials should be disclosed to the defense under Rule 16 and *Brady, supra*. The requested materials are neither privileged nor confidential.

III. The People have not provided Defendant with the entire Litigation Packet, as required under the Colorado Rules Pertaining to Testing for Alcohol and Other Drugs

The People say they "provided to Defendants a litigation packet including the gas chromatograph results, upon which the laboratory technician relied to calculate a Defendant's respective BAC or Drug Quantity, for the second analysis." (Memorandum, p. 6). However, the People have not provided the defense with a Litigation Packet for the second analysis in the following two cases: Thomas Ditch (11T13389) and Scott O'Brien (11M5289). And the Litigation Packets the People have provided to the defense are missing raw data and other information, which is required under 5 CCR 1005-2, § 1.5:

> 'Litigation Packet' – records requested for litigation purposes must include sufficient material to allow independent review by a qualified toxicologist. These records should include the request for analysis, chain of custody documents, all analytical data which supports identification, and if applicable, quantitation of the analyte(es) to include the limits of quantitation (LOQ). Where appropriate, <u>it should include not just the raw data and reports</u>, but worksheets, sequence tables, quality control data including target ranges. The material in the litigation packet should be complete and properly organized.

(Emphasis added).

Therefore, the People have not provided Defendant with all of the materials in the Litigation Packet, as defined under Colorado rules relating to blood testing for alcohol and request this Court to order the People to provide all of these materials by a date certain.

IV. Crim. P. 16(I)(a)(2) and *Brady* require disclosure of the requested materials and, in the alternative, Crim. P. 16(I)(d)(1) requires disclosure

Crim. P. 16(I)(a)(2) requires the prosecution to "disclose to the defense any material or information within his or her possession or control which tends to negate the guilt of the accused as to the offense charged or would tend to reduce the punishment therefore." (Emphasis added). "The rule is grounded in the due process requirements identified by the United States Supreme Court in *Brady v. Maryland*, 373 U.S. 83 (1963)." *People v. District Court of El Paso County*, 790 P.2d 332, 337 (Colo. 1990). Impeachment evidence "falls within the ambit of evidence favorable to the accused, and hence must be disclosed under *Brady*." *Id.* "Indeed, the significance of impeachment evidence in determining the outcome of a criminal prosecution often matches that of substantive or exculpatory evidence." *Id.*

The People rely on *United States v. Bagley*, 473 U.S. 667 (1985) to suggest that the defense must demonstrate the requested materials are "material" in that "there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different." (Memorandum, p. 14). But "[t]he *Bagley* materiality standard is couched in terms appropriate for use in appellate review." *District Court of El Paso County*, 790 P.2d at 338. The *Bagley* materiality standard provides only "general guidance" to courts evaluating disclosures under *Brady*. *Id.*

The People argue that they do not intend to introduce blood tests analyzed by Mr. Fox-Rivera at trial. However, "the determination of usefulness of evidence in this context [under *Brady*] is a defense function, not a prosecutorial function." *Goodwin v. District Court for the Tenth Judicial District*, 588 P.2d 87, 876 (Colo. 1979). Furthermore, whether the People seek to introduce blood results conducted by Mr. Fox-Rivera is irrelevant to this Court's inquiry:

> A criminal trial is not a game in which the State's function is to outwit and entrap its quarry. The State's pursuit is justice, not a victim. If it has in its exclusive possession specific, concrete evidence which is not merely cumulative or embellishing and which may exonerate the defendant or be of material importance to the defense – regardless of whether it relates to testimony which the State has caused to be given at trial – the State is obligated to bring it to the attention of the court and the defense.

People v. Smith, 524 P.2d 607, 611 (Colo. 1974) (internal citations omitted; emphasis added). *See also People v. Edgar*, 578 P.2d 666, 668 (Colo. App. 1978) (declining to "speculate on what the defendant might have done had the prosecution complied with the discovery order because the determination of usefulness of evidence in this context is a defense function.") (Internal citations omitted.)

The People label Defendant's requests as "purely speculative" and argue that Defendant has "failed to make any plausible showing with respect to many of the Defense Requests that, if granted, the materials sought would lead to either favorable or material evidence…or that would play a significant role in their respective defenses." (Memorandum, p. 15). When 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." *Pennsylvania v. Ritchie*, 480 U.S. 39, n. 15 (1987) (emphasis added); *see also People v. Morgan*, 606 P.2d 1296, 1299 (1980). 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, 871 (1982); *Ritchie, supra*.

Defendant has made more than a sufficient showing that the requested items are material and may be favorable to the accused or reduce the punishment for the charge of Driving Under the Influence of Alcohol ("DUI"). The requested materials relate to blood testing at the CDPHE lab. Blood results in DUI cases are the linchpin of DUI prosecutions. Blood analyses in a DUI case is a critical piece of evidence, because "blood testing can establish innocence as well as guilt." *People v. Gillett*, 629 P.2d 613, 618 (Colo. 1981). In establishing its statutory system for chemical BAC testing, the General Assembly charged CDPHE with the responsibility for designing and maintaining a testing system that produces results that are reliable. C.R.S. § 42-4-1301(6)(c), (i)(I). 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. C.R.S. § 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*. C.R.S. § 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. C.R.S. § 42-4-1301(6)(a). In addition to these statutory consequences, the Department's 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.

Defendant established in its initial discovery motions and briefs to this Court that there has been systemic error affecting virtually every test conducted at her lab by Mr. Fox-Rivera.[2]

Importantly, Cynthia Burbach, Mr. Fox-Rivera's supervisor, signed off an all of those tests, claiming she had reviewed and approved the results. 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 before a run of 1,700 cases, strongly impeaches the reliability of any laboratory result and of Ms. Burbach's approval of all other tests at the CDPHE.

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. Therefore, it is much more than merely "plausible" that records relating to laboratory error at Ms. Burbach's laboratory have exculpatory value in this case. S*ee Ritchie, supra*. The information

[2] Janine Arvizu, an expert in blood testing analysis and quality assessments of laboratories and their work product, will provide the Court with additional information during the August 10, 2012 hearing about why the actual lab's materials must be reviewed.

relates to chemical BAC testing, which is the linchpin of the case, and it is inherently exculpatory.

Assuming, for the sake of argument only, that the requested materials are not discoverable under Rule 16(I)(a)(2) and *Brady*, this Court has discretion may require discovery of "relevant materials and information…upon a showing by the defense that the request is reasonable." The decision about whether the requested materials are relevant under Rule 16(I)(a)(2) "rests with the trial court." *District Court of El Paso County*, 790 P.2d at 338. Defendant has filed motions in this case showing systemic errors with testing at the CDPHE lab, with the analyst who tested the sample in this case, and with the supervisor who approved the erroneous sample. As such, the requested materials are relevant. Although the People claim the production of the materials "would require a substantial amount of time to procure, prepare, and deliver at a substantial cost," those conclusions are not explained or supported with actual figures, numbers, or other similar facts to support the generic statement.

V. Defendant's testing of a second sample is not a remedy for failure to provide materials under Rule 16 and *Brady*

The People argue that "because a second sample of blood is available for testing, Defendants have a very simple way of obtaining information about the reliability of the results of the forensic analysis the People intend to introduce at trial – test this second sample." (Memorandum, p. 7). But the United States Supreme Court rejected a similar idea when the government advocated that a defendant should be required to initiate retesting. *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2718 (2011). "The prosecution, however, bears the burden of proof." *Id.* "The Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court." *Id.* Furthermore, testing the second sample will leave unanswered questions about what went wrong with the erroneous blood samples and how Supervising Analyst Cindy Burbach approved all of those samples (reported to be about 1,700 samples). This method will not provide the defense with the information that "tends to negate the guilt of the accused" or "tend to reduce the punishment therefore." *See* Rule 16(I)(a)(2) and *Brady*, *supra*. That is, allowing a different lab to test a blood sample will not provide information about the CDPHE lab.[3] The People will introduce at trial BAC results from a blood sample that was tested at the CDPHE lab, not a different lab.

[3] During the hearing, Ms. Arvizue will explain why testing a second sample does not show what happened at the actual lab testing a sample to be used in a criminal case against a defendant.

Respectfully submitted,

Dated: August 9, 2012

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CERTIFICATE OF MAILING

I certify that on 08/09/2012 the above-titled Motion was filed with the Court by [ ] mail using the United States Postal Service or [X] personal delivery to the below address; and a true and accurate copy was served on the First Judicial District Attorney's Office by fax to the following number: 303-271-6888.

Jefferson County Court
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Golden, CO 80401

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