

District Court, El Paso County, Colorado El Paso County Combined Courts 270 South Tejon Street, Colorado Springs CO 80903	DATE FILED: July 16, 2020
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff	DATE FILED: July 16, 2020 2:53 PM
v.	
LETECIA STAUCH, Defendant	σ COURT USE ONLY σ
MEGAN A. RING, Colorado State Public Defender Kathryn Strobel (No. 42850) Deputy State Public Defender 30 E Pikes Peak Ave Suite 200 Colorado Springs, Colorado 80903 C. Colette LeBeau (No. 43164) Deputy State Public Defender 132 W B St #200 Pueblo, CO 81003 Phone (720) 475-1235 Fax (719) 7475-1476 E-mail: Kathryn.strobel@coloradodefenders.us Colette.LeBeau@coloradodefenders.us	Case No. 20CR1358 Division 15S Ctrm: S403
[P-11 RESPONSE]	
DEFENSE OBJECTION TO CONSUMPTIVE TESTING OF DNA WITHOUT THE PRESENCE OF A DEFENSE OBSERVER FOR TESTING.	

On July 2nd, the Prosecution notified this court and defense counsel that they were requesting consumptive testing of two DNA samples. The defense requests that testing be moved to a lab that allows for the presence of a defense observer for testing. In the alternative, the defense requests that testing be stopped after the quantitation stage of testing to determine if testing will, in fact, be consumptive.

The defense requests more information be provided to the Court and to the Defense about the nature of this testing and the methods by which these samples were taken prior to authorizing any further testing of these samples. The prosecution indicated that each sample contains multiple swabs from various locations in the basement bedroom of the home in question. It is unclear how these swabs were collected, preserved, and packaged.

C.R.S. 16-3-309 states:

1. When evidence is seized in so small a quantity or unstable condition that qualitative laboratory testing will not leave a sufficient quantity of the evidence for independent analysis by the defendant's expert and when a state agent, in the regular performance of his duties, can reasonably foresee that the evidence might be favorable to the defendant, the trial court shall not suppress the prosecution's evidence if the court determines that the testing was performed in good faith and in accordance with regular procedures designed to preserve the evidence which might have been favorable to the defendant.
2. The trial court shall consider the following factors in determining, pursuant to subsection (1) of this section, whether the state has met its obligation to preserve the evidence:
 - a. Whether or not a suspect has been identified and apprehended and whether or not the suspect has retained counsel or has had counsel appointed for him at the time of testing;
 - b. Whether the state should have used an available test method more likely to preserve the results of seized evidence;
 - c. Whether, when the test results are susceptible to subjective interpretation, the state should have photographed or otherwise documented the test results as evidence;
 - d. Whether the state should have preserved the used test samples;
 - e. Whether it was necessary for the state agency to conduct quantitative analysis of the evidence;
 - f. Whether there is a sufficient sample for the defendant's expert to utilize for analysis and the suspect or defendant has made a specific request to preserve such sample;
 - g. If paragraph (f) of this subsection (2) cannot be complied with, in view of the small amount of evidence, or when the state's duty to preserve the evidence would otherwise be enhanced, whether it was reasonable for the state to have contacted the defendant to determine if he wished his expert to be present during the testing.

3. With regard to testing performed on blood, urine, and breath samples which form the basis for a conclusion upon which a statutory presumption arises, it is hereby declared to be the public policy of the state of Colorado that when the prosecution's evidence of test results is sought to be excluded from the trier of fact in a criminal proceeding because the testing destroyed evidence which might have been favorable to the defense, it shall be open to the proponent of the evidence to urge that the testing in question was performed in good faith and in accordance with regular procedures designed to preserve the evidence which might have been favorable to the defense, and, in such instances, the evidence so discovered should not be kept from the trier of fact if otherwise admissible.
4. For all other types of blood analysis, breath analysis, and urine analysis and for laboratory testing, such as serial number restoration, firearms testing, and gunpowder pattern testing, it is hereby declared to be the public policy of the state of Colorado that, when the prosecution's evidence of test results is sought to be excluded from the trier of fact in a criminal proceeding because of the destruction of evidence upon which the test was performed, it shall be open to the proponent of the evidence to urge that the testing in question was performed in a reasonable, good faith belief that it was proper and, in such instances, the evidence so discovered should not be kept from the trier of fact if otherwise admissible.
5. Any report or copy thereof or the findings of the criminalistics laboratory shall be received in evidence in any court, preliminary hearing, or grand jury proceeding in the same manner and with the same force and effect as if the employee or technician of the criminalistics laboratory who accomplished the requested analysis, comparison, or identification had testified in person. Any party may request that such employee or technician testify in person at a criminal trial on behalf of the state before a jury or to the court, by notifying the witness and other party at least fourteen days before the date of such criminal trial.
6. In no event shall evidence be suppressed which results from laboratory testing performed before identification of a suspect for the sole reason that the later identified suspect or his attorney was not present at the time of the testing.

7. This section is necessary to identify the characteristics of evidence which will be admissible in a court of law. This section does not address or attempt to prescribe court procedure.

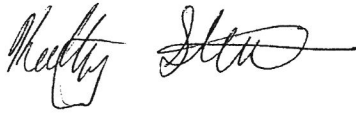
The defense moves the court to order that consumptive testing be moved to a lab that would allow an observer from the Defense to be present for the entire testing. The defense believes that the current procedure fails to address the factors outlined in C.R.S. 16-3-309 and the guidelines established by the Colorado Supreme Court in *Garcia v. District Court*, 197 Colo. 38, 589 P.2d 924, (1979), and *People v. Garries*, 645 P.2d 1306 (Colo. 1982).

Further, it may be that after the quantitation phase, it will be possible for the lab to preserve a sample or conduct a different method of testing that would preserve the ability for the defense to conduct their own testing at a later date. Without the quantitation results, it is unclear what method would best ensure the reliability of testing and availability of the sample for future defense testing. Thus, a more prudent approach is for the testing to pause after the quantitation stage, and for the prosecution to report back to the court regarding the actual amount of the sample that is available, and whether consumptive testing is truly necessary.

The Court does not have sufficient information at this point in the testing of these samples to make the appropriate decision as to how to proceed with testing. If testing will, in fact, be consumptive, the nature of testing, the methods, and the alternatives will be easier for the Defense to assess with their experts after the quantitation phase.

Allowing the Prosecution to proceed as they request in their P-11 motion would violate Ms. Stauch's right to Due Process Clause, the Right to a Fair Trial, and the right to Effective Assistance of Counsel, under the United States Constitution Fourth, Fifth, Sixth, and Fourteenth Amendments and the Colorado Constitution Article II, sections Six, Seven, Sixteen, Eighteen and Twenty-five because it would prohibit the defense from observation, recording, or independent testing of these samples in the future. Therefore, the Defense Objects and requests a hearing.

RESPECTFULLY SUBMITTED,



/ _____
Kathryn Strobel (No. 42850)
Deputy State Public Defender



_____ /
C. Colette LeBeau (No. 43164)
Deputy State Public Defender

Dated: July 16, 2020