COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, CO 80203	DATE FILED May 3, 2024 11:59 PM
Arapahoe County District Court Honorable Ryan J. Stuart, District Judge Case Number 20CR3054	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee, v. SAMUEL ISAIAH BIRCH, Defendant-Appellant.	▲ COURT USE ONLY ▲
Attorney for Defendant-Appellant: MARK G. WALTA, #30990* Goodreid Grant & Walta LLC 7761 Shaffer Parkway, Suite 105 Littleton, CO 80127 (303) 953-5999 (Telephone) mwalta@walta-law.com (Email) **Under Contract with Alternate Defense Counsel*	Case Number: 22CA928

OPENING BRIEF OF DEFENDANT-APPELLANT

Court of Appeals, State of Colorado **2 East 14th Avenue Denver, CO 80203** Name of Lower Court(s): Arapahoe County District Court Trial Court Judges(s): Honorable Ryan J. Stuart Case Number(s): 20CR3054 **Appellee(s): THE PEOPLE OF THE STATE OF COLORADO** **v.** **Appellant(s): SAMUEL ISAIAH BIRCH**	▲ ***COURT USE ONLY*** ▲
MARK G. WALTA, #30990 Goodreid Grant & Walta LLC 7761 Shaffer Parkway, Suite 105 Littleton, CO 80127 (303) 953-5999 (Telephone) mwalta@walta-law.com (Email)	Case Number: 22CA928

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32:

The brief complies with C.A.R. 28(g):

✓ It contains **8,381** words.

The brief complies with C.A.R. 28(a)(7)(A):

✓ The brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

✓ I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

s/ Mark G, Walta, #30990
Signature of attorney

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STATEMENT OF THE ISSUES PRESENTED

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II. Whether the trial court plainly erred, and deprived Mr. Birch of his constitutional right to present a defense and his due process right to a fair trial before an impartial jury, by incorrectly instructing the jury that self-induced intoxication does not apply to the crime of Tampering With Physical Evidence, as defined by section 18-8-610(1)(a), C.R.S. (2020).

III. Whether Mr. Birch's sentence of lifetime imprisonment without the possibility of parole (LWOP) for First Degree Murder-Felony Murder is constitutionally disproportionate under the state and federal constitutions, in light of recent changes to Colorado's Criminal Code reclassifying Felony Murder as a subset of Second Degree Murder subject to a potential sentencing range of 8 to 48 years imprisonment.

STATEMENT OF THE CASE

On December 15, 2020, the prosecution charged Mr. Birch by complaint and information with one count of First Degree Murder – Intent and After Deliberation, §

18-3-102(1)(a), C.R.S. (2020), a class 1 felony; one count of First Degree Murder – Felony Murder, § 18-3-102(1)(b), C.R.S. (2020), a class 1 felony[1]; two counts of Aggravated Robbery, § 18-4-302(1)(b), C.R.S. (2020), a class 3 felony; one count of Tampering with Physical Evidence, § 18-8-610(1)(a), C.R.S. (2020), a class 6 felony; two counts of Possession of a Weapon By a Previous Offender (POWPO), §§ 18-12-108(1), (2), C.R.S. (2020), one a class 5 and one a class 6 felony; one count of Carrying a Concealed Weapon, § 18-12-105(1)(a),(b), C.R.S. (2020), a class 2 misdemeanor; and, one count of Theft, § 18-4-401(1),(2)(d), C.R.S. (2020), also a class 2 misdemeanor. (CF, pp 19-23). The complaint alleged the offenses occurred on or about November 26, 2020. (CF, pp 21-22).

Mr. Birch eventually tried his case to a jury from March 3 through 10, 2022, which culminated in verdicts of guilty on all counts.[2] (CF, pp 495-99; TR 3/10/22 69-72).

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[1] In 2021, the General Assembly amended the First Degree Murder statute to reclassify Felony Murder as a form of Second Degree Murder punishable as a class 2 felony. *See* Ch. 58, §§ 1-2, 2021 Colo. Sess. Laws 235, 235-36. As will be discussed below, the amendments were not deemed retrospective.

[2] Prior to trial, the prosecution dismissed the misdemeanor counts of Carrying a Concealed Weapon and Theft, and later dismissed the POWPO counts (which had been merged into a single count and bifurcated for purposes of trial) following the jury's verdicts. (CF, pp 319-22, 364-66, 385-86; TR 3/1/22, pp 2-3; TR 3/10/22, p 72:17-20).

On April 22, 2022, the trial court sentenced Mr. Birch to a mandatory term of life imprisonment without parole (LWOP) on the counts of first degree murder, plus 50 years in the Department of Corrections.[3] (CF, pp 539-49; TR 4/22/22, pp 11-14).

This appeal followed. (CF, pp 546-53).

STATEMENT OF THE FACTS

On Thanksgiving Day – November 26, 2020 – at approximately 4:30 p.m., the Arapahoe County Sheriff's Office (ACSO) received a report that a Conoco gas station and convenience store had been robbed at gunpoint and that the suspect had fled the scene. (TR 3/7/22, pp 22-23). About two hours later, ACSO dispatch received a 911 call from a Circle K convenience store and gas station located a few miles from the Conoco reporting that a clerk had been shot during the course of a robbery. (TR 3/7/22, pp 30-31; EX #13).

A. *The Conoco Robbery*

A white male without glasses believed to be in his 30's, measuring approximately 5-and-a-half feet tall, and wearing a dark "hoodie" with some sort of stylized writing or insignia on the front, yellow gloves, and a black face mask, entered the Conoco convenience store and approached the counter. (TR 3/7/22, pp 57-58,

[3] The First Degree Murder counts merged into one another by operation of law, and the count of Aggravated Robbery associated with Felony Murder was likewise subsumed by that count. (CF, pp 539-40; TR 4/22/22, pp 11-14).

87-88; EX ## 28, 30, 31). The suspect brandished a black handgun – described as a "revolver" or a "tall gun" – and demanded that the clerk empty the register. (TR 3/7/22, pp 87-89). The clerk complied, but the suspect nevertheless fired a single round into the ceiling, and fled the scene with approximately $35 in cash.[4] (TR 3/7/22, pp 50-51, 67-69, 89-90).

The robbery was captured on surveillance video. (TR 3/7/22, pp 46-47; EX ## 173, 174). Moreover, a surveillance system mounted outside a fast food establishment nearby caught a black or dark-colored compact vehicle driving toward the Conoco just prior to the robbery, but did not record any footage of the vehicle leaving the area. (TR 3/9/22, pp 66-70; EX ## 4, 178). The identity of this vehicle would later become significant.

b. *The Circle K Robbery*

A few hours later, at approximately 6:30 p.m., a bespectacled white male wearing either a black-and-white plaid shirt over a gray "hoodie" or a black-and-white plaid hooded jacket, and sporting gray pants and donning a black face mask, entered the Circle K convenience store and politely asked the clerk – later identified as M.P. –

[4] A bullet fragment was subsequently recovered from the ceiling area of the Conoco. (TR 3/8/22, p 146:13-18).

for a carton of Marlboro cigarettes.[5] (TR 3/7/22, pp 30-31, 35-36, 121-22, 139-40). After some back and forth about which types of Marlboros were in stock, M.P. retrieved several packs of Marlboro Reds, at which point the suspect produced a handgun and ordered M.P. to empty the register. (EX # 176@00:15-01:15). The suspect said, "I can shoot you when I leave or I can shoot you right now," as the clerk was collecting the cigarettes and cash in a bag, and then proceeded to fire a single round into M.P.'s abdomen after he handed over the bag of loot. (EX # 176@01:15-2:00). The suspect absconded with the cigarettes and more than $220 in cash. (TR 3/7/22, pp 164-65). Customers who entered the premises shortly after the shooting immediately called 911. (TR 3/7/22, pp 122-24).

A deputy arrived and attempted to administer emergency aid, but it was clear that M.P. required serious medical intervention. (TR 3/722, pp 138-42). An ambulance transported M.P. to the hospital, but he did not survive. (TR 3/7/22, pp 34-35, 123-24). An autopsy determined that he died of gunshot wound to his lower abdomen. (TR 3/8/22, pp 59-65). The death was ruled a homicide. (TR 3/8/22, pp 70-71).

[5] This robbery was likewise captured on surveillance video. (TR 3/7/22, pp 35-36; EX # 176).

Subsequent investigation led authorities to conclude that the vehicle connected to both robberies was likely a black Ford Fiesta. (TR 3/9/22, pp 82-83).

c. *Mr. Birch and J.O.*

Mr. Birch had been in a relationship with J.O. a little over four years at the time of the events underlying this appeal. (TR 3/7/22, p 170:15-20). J.O. described Mr. Birch as a white male standing roughly 5 feet 7 to 8 inches tall, who preferred to smoke Marlboro Red cigarettes, always wore glasses, and drove a black Ford Fiesta with tinted windows.[6] (TR 3/7/22, pp 170-72, 201:8-15). J.O. also affirmed that Mr. Birch owned a handgun with a black handle. (TR 3/7/22, pp 188-89).

They lived in an apartment located in the general vicinity of the robberies. (TR 3/7/22, pp 172-73; EX # 1). The evidence suggested that Mr. Birch was grappling with addiction issues, and that the couple was financially strapped during this period. (TR 3/7/22, pp 174-75, 118:5-21; TR 3/9/22, pp 27-31; EX ## 197-199).

J.O. tested positive for COVID on Thanksgiving Day and isolated in the apartment. (TR 3/7/22, pp 174-75). Mr. Birch struck out on his own – evidently, in his car – sometime between 1:00 and 2:00 p.m. (TR 3/7/22, pp 175-76). J.O. proceeded to get drunk and fall asleep. (TR 3/7/22, pp 174-75, 212-13). She

[6] Official state identification documents list Mr. Birch's height as somewhere between 5 feet and 8-10 inches. (EX ## 14, 102, 162).

believed that Mr. Birch returned later that night or early the next day, woke her up, and showed her some cash. (TR 3/7/22, pp 176-77, 204-05). According to J.O., she rolled over in bed and essentially ignored Mr. Birch, because she "just couldn't believe it" or "didn't want to hear it." (TR 3/7/22, pp 176-77, 218-19).

On the morning of November 27, 2020, J.O. and Mr. Birch exchanged text messages that seemed to confirm that he'd come into possession of some money the day before, but had spent it on drugs. (TR 3/7/22, pp 180-81, 204-05; EX # 199). Although J.O. equivocated somewhat, she ultimately confirmed that at some point during the day he confessed to committing a robbery. (TR 3/7/22, pp 181:13-16, 204-05, 218-20). J.O. later confronted Mr. Birch with a news report that the clerk at the Circle K had been fatally shot, and Mr. Birch allegedly claimed that the clerk had a gun. (TR 3/7/22, pp 181-82, 205-06).

In the days that followed, Mr. Birch purportedly asked J.O. to assist him in destroying or altering evidence connected to the robberies:

- he may have directed her to paint over a stylized logo – "No Pain, No Jane" – on a dark hoodie he owned, (TR 3/7/22, pp 182-84; EX ## 103, 104, 105); and,
- she may have participated in, or witnessed, the burning of certain items – specifically, a plaid hooded sweatshirt, some shoes, and

cigarette boxes – in their fireplace. (TR 3/7/22, pp 185-87; TR 3/8/22, pp 29-30, 40-42; TR 3/9/22, pp 118-19).

J.O. furthermore reported that Mr. Birch told her he was going to get rid of his handgun. (TR 3/7/22, pp 188-89).

d. *The Hit and Run and Mr. Birch's Arrest*

On December 7, 2020, Douglas County Sheriff's deputies responded to a report of a hit and run involving a black or dark-colored Ford Fiesta. (TR 3/8/22, pp 75-76, 80-83, 87-88, 93-94; TR 3/9/22, pp 83-83). The suspect – later identified as Mr. Birch – fled the scene on foot and attempted to evade police by climbing a tree, but was quickly apprehended. (TR 3/8/22, pp 75-76). Following his arrest, Mr. Birch repeatedly asked deputies for a cigarette, stating somewhat cryptically that he was "going away for a long time." (TR 3/8/22, pp 83-84, 88-89; EX # 179). Responding deputies furthermore reported that Mr. Birch appeared intoxicated. (TR 3/8/22, pp 82-83).

The ensuing investigation confirmed that Mr. Birch owned the Ford Fiesta. (EX ## 161-162). A search of the vehicle yielded the following evidence:

- shotgun shells, (TR 3/8/22, pp 93-94, 127-32; EX # 146)
- .22 caliber ammunition and expended .22 caliber shells, (TR 3/8/22, pp 127-32; EX ## 139, 147, 148, 152, 154, 156);

- yellow or light tan work gloves, (TR 3/8/22, pp 127-32; TR 8/9/22, pp 85-87; EX ## 142-43), and,
- Marlboro cigarettes and cigarette boxes. (TR 3/8/22, pp 131-32; EX ## 144, 155).

Defendant and J.O.'s relationship deteriorated following his arrest. (TR 3/7/22, pp 189-90).

e. *J.O.'s Tip to Law Enforcement and the Ensuing Investigation*

A few days after Mr. Birch's arrest in connection with the hit and run, J.O.'s aunt and mother sent her still photos of the suspect in the Circle K and Conoco robberies that had been circulating on social media. (TR 3/8/22, pp 21-22, 29-30, 33-34). J.O. positively identified Mr. Birch as the individual in the photos and moreover admitted to her aunt and mother that she knew about, and had assisted Mr. Birch in destroying evidence related to, the robberies.[7] (TR 3/7/22, pp 190-93).

J.O. and her mother called the ACSO tip line and thereafter appeared at the sheriff's department for an interview on December 11, 2020. (TR 3/7/22, p 190:10-15). J.O. – based on a variety of factors, including the suspect's clothing, voice, physical characteristics, and Mr. Birch's own alleged admissions – identified defendant

[7] Although J.O claimed that Mr. Birch previously had confessed to committing the robberies, for some reason she texted him one of these photos and inquired if it was him – something he denied. (TR 3/7/22, pp 191-92, 220-21; EX # 200).

as the perpetrator of the robberies and furthermore confirmed that the black Ford Fiesta captured in surveillance videos belonged to him. (TR 3/7/22, pp 192-94, 199-203, 205:12-22, 213-14). J.O. initially downplayed her own role in destroying or altering evidence related to these crimes, and was never charged in connection with this matter. (TR 3/7/22, pp 199-200; TR 3/8/22, pp 43-44). Mr. Birch was taken into custody that same day. (TR 3/8/22, pp 46-50).

J.O. gave investigators permission to access and download the contents of her phone and furthermore consented to a search of the apartment she shared with Mr. Birch. (TR 3/7/22, p 196:2-7). The search of the apartment yielded several items:

- a dark hoodie, the front of which appears to be covered in dark paint,[8] (TR 3/8/22, pp 169-70, 176-77; EX ## 103-105, 121-23);
- packs of Marlboro cigarettes and other evidence establishing that someone in the apartment regularly smoked Marlboro cigarettes, (TR 3/8/22, pp 161-62, 178:7-22, 199-200: EX ## 89-90, 99-101, 107);

[8] Forensic examination of the hoodie could not determine what – if anything – was under the paint. (TR 3/8/22, pp 176-77).

- a flannel hoodie different than, but arguably similar to, the one worn by the suspect in the Circle K robbery, (TR 3/8/22, pp ; EX ## 94-95);
- detritus from the fireplace suggesting that evidence associated with the robberies may have been destroyed, (TR 3/8/22, pp 159-65, 174-75; TR 3/9/22, pp 161-62; EX # 81-82, 114-16);
- various pairs of gray pants, (TR 3/8/22, pp 178-79; EX ## 109-11, 117-18, 120, 128-29); and,
- a black face mask.[9] (TR 3/8/22, pp 161-62; EX # 92).

No gun was ever recovered in the course of the investigation, and there were no shell casings or bullets that could be connected to any of the ammunition found in Mr. Birch's possession. (TR 3/8/22, pp 110:2-15, 118:9-21, 125-26, 146:13-22, 182-83). There were no fingerprints or DNA that conclusively linked Mr. Birch to the robberies. (TR 3/8/22, pp 105-08, 214-18, 234-37). Cell phone location data likewise shed little light on Mr. Birch's whereabouts during the time of the robberies. (TR 3/9/22, pp 45-60). And, while a pair of yellow or light tan work gloves seized from Mr. Birch's vehicle – which likely belonged to him, based on DNA results – tested

[9] While perhaps self-evident, it should be noted that the robberies occurred in the midst of the COVID pandemic, and therefore the fact that someone was in possession of a face mask was hardly uncommon.

positive for gunshot residue, there were any number of reasonable explanations as to why the gloves may have come into contact with the chemical elements that could trigger a positive result. (TR 3/8/22, pp 188-94, 238-40).

Mr. Birch, for his part, attempted to cast doubt on the investigation by placing before the jury evidence that law enforcement hadn't pursued certain leads and had focused solely on defendant to the exclusion of other possible suspects, but the trial court largely precluded this defense on grounds that it amounted to improper alternate suspect evidence. (TR 3/9/22, pp 4-20, 34-35, 121-24). A jury convicted him of all counts. (CF, pp 495-99; TR 3/10/22 69-72).

SUMMARY OF THE ARGUMENT

I. Mr. Birch's defense was that he wasn't the individual who committed the robberies and homicide, that law enforcement didn't do an adequate job of investigating the crimes, and that law enforcement's failure to do its job gave rise to reasonable doubt as to whether he was guilty of the crimes charged. This is a common defense.

However, in cases where identity is at issue, an attack on the adequacy of the investigation into other suspects can begin to sound like an "alternate suspect" defense. In Colorado, such a defense triggers rigorous procedural requirements and

substantive hurdles. The issue here is whether such a challenge to the adequacy of an investigation amounts to an "alternate suspect" defense under Colorado law.

Mr. Birch asserts that it does not, and there is ample support for the proposition that a defense focused on the inadequacy of law enforcement's investigation is constitutionally warranted. The trial court's refusal to allow Mr. Birch to pursue this defense at trial cannot be deemed harmless beyond a reasonable doubt. Accordingly, the judgment of conviction must be reversed.

II. The trial court plainly erred in instructing jurors that voluntary intoxication does not apply to the crime of Tampering With Physical Evidence. The plain language of the governing statutes, as well as associated case law, confirm that this was error.

The error was not invited. It's clear that the parties and the trial court inadvertently overlooked that voluntary intoxication applied to the specific intent element of Tampering With Physical Evidence. The conviction must therefore be reversed.

III. Mr. Birch's sentence of life imprisonment without parole for Felony Murder should be deemed constitutionally disproportionate in light of the General Assembly's determination to reclassify Felony Murder as class 2 felony and to substantially reduce the level of punishment for that offense. Mr. Birch acknowledges that this claim is largely dependent on the outcome of the decision in *People v. Sellers*, 2022 COA 102,

521 P.3d 1066, *cert. granted*, No. 22SC738, 2023 WL 3479427 (Colo. May 15, 2023). He nevertheless asserts that the cause should be remanded for an extended proportionality review.

ARGUMENT

I. THE TRIAL COURT'S REFUSAL TO ALLOW MR. BIRCH TO PRESENT EVIDENCE THAT CALLED INTO QUESTION THE INTEGRITY AND ADEQUACY OF THE INVESTIGATION, BECAUSE IT PURPORTEDLY RAN AFOUL OF THE LIMITATIONS ON ALTERNATE SUSPECT EVIDENCE SET FORTH IN *PEOPLE v. ELMARR*, 2015 CO 53, 351 P.3D 431, ENCUMBERED HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE AND DIMINISHED THE PROSECUTION'S BURDEN OF PROOF.

A. PRESERVATION AND STANDARD OF REVIEW

This issue was extensively litigated below and is therefore preserved. (TR 3/9/22, pp 4-20, 34-35, 121-24).

A trial court's evidentiary decisions, including whether to admit alternate suspect evidence, are reviewed for an abuse of discretion. *People v. Shanks*, 2019 COA 160, ¶ 56, 467 P.3d 1228, 1242. A trial court abuses its discretion where its decision is manifestly arbitrary, unreasonable, or unfair, or "is based on an erroneous view of the law." *Id.* (quoting *People v. Elmarr*, 2015 CO 53, ¶ 20, 351 P.3d 431).

Because the exclusion of evidence favorable to a defendant's defense and directly relevant to an essential element of the crime charged implicates various constitutional rights and guarantees, the constitutional harmless error standard for

reversal applies. *People v. Johnson,* 2021 CO 35, ¶ 17, 486 P.3d 1154, 1158. Under this standard, "errors require reversal unless the reviewing court is 'able to declare a belief that [the error] was harmless beyond a reasonable doubt.'" *Id.* (quoting *Chapman v. California*, 386 U.S. 18, 24, 87 (1967)). That is, reversal is required if "there is a reasonable possibility that the [error] might have contributed to the conviction." *Id.* The State bears the burden of proving that the error was harmless beyond a reasonable doubt. *Id.*

B. DISCUSSION

1. Factual and Procedural Background

On the morning of third day of trial, the prosecution expressed concern that the defense may be seeking to pursue some sort of alternate suspect defense and therefore asked the court to conduct an inquiry pursuant to *Elmarr* to determine whether the proposed evidence should be excluded.[10] (TR 3/9/22, pp 4-5). The defense countered that it would not be "getting into alternate suspect evidence as it's laid out in *Elmarr*," but rather would be "questioning law-enforcement witnesses as to

[10] Mr. Birch would note that neither the defense nor the prosecution complied with the procedures set forth in *People v. Dye*, 2024 CO 2, 541 P.3d 1167, for litigating this issue. Although Mr. Birch obviously was prejudiced by the court's ruling precluding him from presenting this evidence, he did not specifically complain about the timing of the prosecution's motion *in limine*.

the lack of investigation. . . [and] [t]he failure to pursue certain leads." (TR 3/9/22, p 5:12-15).

Upon further questioning, the defense stated that, while it believed it should be allowed to present evidence concerning the names of specific individuals who were identified as potential suspects during the course of the investigation, it would generally be willing to limit its evidence to the fact that "law enforcement had a lead. . . as to a specific person. . . [t]hat person matched these aspects of a description… [and] law enforcement cleared them for reasons" that the defense believed were invalid. (TR 3/9/22, pp 5-6). The prosecution responded that this amounted to alternate suspect evidence and was therefore subject to rigid legal framework for introducing such evidence. (TR 3/9/22, pp 7-8).

The defense reiterated, in response to further questioning by the court, that its primary focus was not on whether particular individuals were in fact alternate suspects, but on law enforcement's failure to conduct the sort of investigation required to eliminate these individuals as potential suspects. (TR 3/9/22, pp 8-11). The prosecution responded that this was tantamount to an alternate suspect defense and that, absent a direct connection or nexus between particular individuals and the charged crimes, Mr. Birch should be precluded from pursuing this line of inquiry. (TR 3/9/22, pp 11-13).

The defense countered that, while it did not intend to present evidence concerning every tip, there were specific instances in which law enforcement failed to pursue what seemed to be solid leads, such as a tip about an individual who lived in the area of the robberies, met the exact height description, had the same glasses, was known to be armed and dangerous, and had a "shaky alibi." (TR 3/9/22, pp 13-14). The court ruled that the proposed evidence constituted alternate suspect evidence and was subject to the constraints imposed by *Elmarr* and its progeny, but offered the defense an opportunity to argue for the admissibility of the evidence under *Elmarr*. (TR 3/9/22, pp 15-16). The defense made a proffer as to one potential suspect, but was quick to point out that law enforcement's deficient investigation hindered Mr. Birch's ability to make a more complete record. (TR 3/9/22, pp 16-19). The prosecution argued that the potential suspect had no direct connection to the robberies. (TR 3/9/22, pp 19-20). The trial court reaffirmed its ruling that the proposed evidence was in the nature of alternate suspect evidence, and that it was barred under *Elmarr*. (TR 3/9/22, p 20:2-12).

The defense made additional offers of proof as to the sort of evidence it would have sought to elicit from witnesses had it not been precluded from doing so by the court. (TR 3/9/22, pp 34-35).

The court did, however, permit Mr. Birch to introduce evidence about an individual roughly matching the description of the suspect in the Circle K robbery who unsuccessfully attempted to pick up an online order from a Subway franchise located nearby at around the time of the robbery. (TR 3/9/22, pp 121-32). This evidence was admitted to undermine the adequacy of law enforcement's investigation. (TR 3/9/22, pp 121-32).

2. Applicable Law and Analysis

This case surfaces a tension between (i) recent precedent constricting the ability of criminal defendants to present alternate suspect evidence, and (ii) the "common trial tactic of defense lawyers. . . to discredit the caliber of the investigation" that led to the defendant being charged and prosecuted in the first place.[11] *Kyles v. Whitley*, 514 U.S. 419, 446 (1995) (quoting *Bowen v. Maynard*, 799 F.2d 593, 613 (10th Cir. 1986)). In this case, Mr. Birch proposed to place before the jury evidence that law enforcement had received several concrete tips in connection with the robberies, but failed to investigate those tips, because they were singularly focused on Mr. Birch as a suspect. The trial court largely refused to allow admission of this evidence on

[11] The tension between these two defenses – and the body of case law governing each – has been addressed at length in scholarly commentary. *See generally* Michael D. Cicchini, *An Alternative to the Wrong-Person Defense*, 24 Geo. Mason U. Civ. Rts. L.J. 1 (2013).

grounds that it constituted "alternate suspect evidence" and ran afoul of the limitations announced in *Elmarr*. Mr. Birch asserts that the exclusion of this evidence violates his constitutional rights.

a. Right to Present a Defense and Due Process

Our state and federal constitutions guarantee criminal defendants "a meaningful opportunity to present a complete defense." [12] *Rios-Vargas v. People*, 2023 CO 35, ¶ 20, 532 P.3d 1206, 1212 (quoting *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006)).

The right to present a complete defense also has roots in due process, which requires that criminal prosecutions "comport with prevailing notions of fundamental fairness." *Rios-Vargas,* ¶ 21 (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). In plain terms, this constitutional right encompasses "the right to present the defendant's version of the facts. . . to the jury so it may decide where the truth lies." *Id.* (quoting *Washington v. Texas*, 388 U.S. 14, 19 (1967)).

At the same time, due process of law requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged before the accused may be convicted and subjected to punishment. *E.g.*, *Hendershott v. People*, 653

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[12] The right to present a defense has roots in the Sixth Amendment to the United Sates Constitution and Article II, § 16 of the Colorado Constitution. *Rios-Vargas v. People*, 2023 CO 35, ¶ 20, 532 P.3d 1206, 1212.

P.2d 385, 390 (Colo. 1982) (citing *In Re Winship*, 397 U.S. 358, 363–64 (1970)), and other cases).

i. *Alternate Suspect Defense*

The right to present a defense includes presenting one or more forms of evidence that an alternate suspect committed the crime. *Rios-Vargas,* ¶ 22 (citing *Elmarr*, ¶ 30). The fundamental purpose of this evidence is to cast reasonable doubt on the material element of identity, which, in turn, might reasonably call into question the defendant's guilt. *Id.*

Regardless, the right to present a defense is not absolute; the Constitution requires only that the accused be permitted to introduce all relevant and admissible evidence. *People v. Salazar*, 2012 CO 20, ¶ 17, 272 P.3d 1067, 1071. Thus, a trial court may exclude evidence of an alternative suspect, "which has only the most minimal probative value, and which requires a jury to engage in undue speculation as to the probative value of that evidence." *Id.*

"[T]he admissibility of alternate suspect evidence ultimately depends on the strength of the connection between the alternate suspect and the charged crime." *Shanks*, ¶ 58 (quoting *Elmarr*, ¶ 22). The "evidence must create more than just an unsupported inference or possible ground for suspicion." *Id.* Instead, the evidence must establish a "non-speculative connection or nexus between the alternate suspect

and the crime charged." *Id.* Whether the requisite connection exists requires a case-by-case analysis considering all evidence proffered by the defendant to show that the alternate suspect committed the crime. *Id.* Our supreme court has held on numerous occasions that merely showing that an alternate suspect had the motive or the opportunity to commit the charged offense, without some additional proof connecting the alternate suspect to the offense, is insufficient to prove that necessary nexus. *Id.* at ¶ 59 (citing cases).

ii. *Inadequate Investigation Defense*

As noted, it's common for defense lawyers to try to discredit the adequacy or thoroughness of a criminal investigation in order raise the specter of reasonable doubt. *See Kyles,* 514 U.S. at 446; *see also People v. Bueno*, 2018 CO 4, ¶ 46, 409 P.3d 320, 330 ("While the evidence in question did not specifically reference the victim, at the very least, it was relevant to the manner in which the investigation was conducted. Undoubtedly, the defense would have questioned the investigators in this case on the use (or non-use) of the reports during the investigation. The scope of the investigation is highly relevant. . . [as to] the issue of the murderer's identity."); *People v. Norwood*, 37 Colo. App. 157, 162, 547 P.2d 273, 278 (1975) (acknowledging viability of defense theory that a more thorough investigation might have established reasonable doubt as to defendant's guilt or innocence).

As the Connecticut Supreme Court observed,

> "In the abstract, whether the government conducted a thorough, professional investigation is not relevant to what the jury must decide: Did the defendant commit the alleged offense? Juries are not instructed to acquit the defendant if the government's investigation was superficial. Conducting a thorough, professional investigation is not an element of the government's case." . . . **A defendant may, however, rely upon relevant deficiencies or lapses in the police investigation to raise the specter of reasonable doubt, and the trial court violates his right to a fair trial by precluding the jury from considering evidence to that effect. . .**

State v. Collins, 299 Conn. 567, 599–600, 10 A.3d 1005, 1025–26 (2011) (internal citations omitted) (emphasis added).

These so-called "inadequate investigation defenses"[13] are particularly well-suited to challenging the sufficiency of evidence in cases where identity is disputed and, moreover, where there are legitimate questions about the integrity and thoroughness of the underlying criminal investigation:

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[13] The defense is sometimes referred to as a "*Bowden* defense." *State v. King*, 965 N.W.2d 633, *4 (Iowa Ct. App. 2021) (unpublished). The defense takes its name from *Commonwealth v. Bowden*, 399 N.E.2d 482, 484 (Mass. 1980), which affirmed that a defendant is permitted to explore law enforcement's failure to conduct certain tests and to follow investigative procedures in order to raise a reasonable doubt as to the defendant's guilt in the minds of jurors.

> Recognizing that it can be unreasonable for police to investigate every potential lead, the defense focuses on deviations from reasonable investigation practices. The defense can be thought of as an investigative omission defense because it argues that omissions in the investigation make the investigation inadequate. **For example, the defense can point out that "investigators had the opportunity to gather information about other suspects, had information suggesting that the defendant was not the culprit, or had evidence that logically could have, and should have, been tested," and did not act on these opportunities. A reasonable doubt is then raised not just because certain evidence is missing, but because that evidence is missing due to investigatory failures. By showing gaps in the investigation, the defense suggests that the evidence from the investigation may not be reliable enough to prove guilt beyond a reasonable doubt because the investigation may have missed significant evidence of the defendant's guilt or innocence.** One expert aptly explains that the defense "is about mistakes--why an investigator made a decision that is flawed in hindsight, and why the fact-finder should find reasonable doubt in the lack of evidence caused by the decision." To many well-acquainted with criminal law, this is a well-recognized, familiar, and commonly accepted defense.[67]

Ethan Singer, *When Police Mess Up: The Lack of A Defense to Inadequate Police Investigations*, 54 Colum. Hum. Rts. L. Rev. 1168, 1180–81 (2023) (footnotes and citations omitted) (emphasis added).

b. Mr. Birch's Constitutional Rights Were Violated

This case not only hinged on identity, but on the adequacy of law enforcement's investigation. The surveillance videos of the robberies, coupled with the forensic evidence, are largely inconclusive on their own. Until J.O. came forward

with the information she provided, investigators were at a loss to identify the alleged perpetrator of these robberies. In fact, it appears that investigators received numerous, concrete tips about possible suspects, but either did not pursue – or did not fully explore – those leads. In addition to undermining J.O.'s credibility and the accuracy of her recollections, Mr. Birch's primary theory of defense was that investigators had "tunnel vision" and did not explore other credible leads that may have exculpated defendant or bolstered the case against him. The trial court's insistence on viewing Mr. Birch's proposed evidence through the prism of *Elmarr* was error. This was not alternate suspect evidence, and Mr. Birch was not running an alternate suspect defense.

Rather, he was simply trying to discredit the adequacy or thoroughness of a criminal investigation in order raise the specter of reasonable doubt. *See Kyles,* 514 U.S. at 446. Precluding Mr. Birch from pursuing this time-worn and well-established defense deprived him of his constitutional right to present a defense, as well as his due process rights to a fair trial and to demand proof beyond a reasonable doubt.

There is a reasonable possibility that this error might have contributed to Mr. Birch's conviction. *Johnson,* ¶ 17. Aside from J.O.'s statements to police – which were somewhat inconsistent and may have been colored by her recent breakup with Mr. Birch – there was actually scant evidence linking defendant to these crimes. To this

end, it appears that Mr. Birch was prepared to present evidence that law enforcement received a number of credible tips in the wake of the robberies, but either did not investigate – or failed to fully explore – these leads. The trial court prohibited him from doing so as a result of its erroneous application of *Elmarr* and its progeny. Under these circumstances, there is at least a reasonable possibility that the erroneous exclusion of this evidence might have contributed to Mr. Birch's conviction.

Accordingly, the judgment of conviction must be reversed.

II. THE TRIAL COURT PLAINLY ERRED, AND DEPRIVED MR. BIRCH OF HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE AND HIS DUE PROCESS RIGHT TO A FAIR TRIAL, BY INCORRECTLY INSTRUCTING THE JURY THAT SELF-INDUCED INTOXICATION DOES NOT APPLY TO THE CRIME OF TAMPERING WITH PHYSICAL EVIDENCE, AS DEFINED BY SECTION 18-8-610(1)(A), C.R.S. (2020).

A. PRESERVATION AND STANDARD OF REVIEW

The instruction on voluntary intoxication given by the trial court closely tracks the instruction tendered by the defense. (*Compare* CF, p 444 *with* CF, p 485). The prosecution agreed that an instruction on voluntary intoxication was warranted in light of the evidence, and largely accepted Mr. Birch's proposed instruction.[14] (TR 3/9/22 PM, pp 16-17).

[14] The only disputed aspect of the instruction was whether the jury should be advised that it "should" – as opposed to "may" – consider evidence of voluntary intoxication in evaluating the existence of specific intent. (TR 3/9/22 PM, pp 16-19). That semantic dispute is not at issue here. *See People v. Lucas*, 232 P.3d 155, 163 (Colo.

Neither the parties nor the trial court seemed to recognize that evidence of self-induced intoxication might apply to the charge of Tampering with Physical Evidence, and therefore the issue was neither raised nor addressed below. Accordingly, the issue is unpreserved.

Our courts review jury instructions de novo to determine whether the instructions as a whole accurately informed the jury of the governing law. *People v. Arzabala*, 2012 COA 99, ¶ 43, 317 P.3d 1196, 1207.

Where, as here, the defendant did not object to the jury instructions at trial, our courts review for plain error.[15] *Arzabala*, ¶ 45. Plain error is error that is both "obvious and substantial." *Id.* It is error that "so undermined the fundamental fairness of the proceeding as to cast serious doubt on the reliability of the judgment." *Id.*

To warrant reversal under a plain error standard in the context of jury instructions, the defendant must "demonstrate not only that the instruction affected a

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App. 2009) (rejecting argument that instruction's use of "may," as opposed to "should," was erroneous).

[15] It should be noted that the invited error doctrine is inapplicable in this instance. The instructional error at issue here was clearly the result of inadvertent oversight by both the parties and the court, and thus does not amount to invited error. *E.g., People v. Gross*, 2012 CO 60M, ¶ 9, 287 P.3d 105, 109; *but cf. People v. Gingles*, 2014 COA 163, ¶ 25, 350 P.3d 968, 973 ("Because defense counsel proposed the instruction, the invited error doctrine bars defendant's challenge to it on appeal.") (citing cases).

substantial right, but also that the record reveals a reasonable possibility that the error contributed to his conviction." *Id.*

B. DISCUSSION

1. Factual and Procedural Background

Evidence presented at trial that: (1) Mr. Birch was desperately searching for drugs on the morning on the robberies, (2) he likely acquired drugs prior to the Circle K robbery, and (3) spent whatever money he had shown J.O. the evening following the robberies on drugs. (TR 3/7/22, pp 180-81, 204-05; EX ## 197-99). There was at least inferential evidence that Mr. Birch

The jury was instructed as follows:

> The evidence presented in this case has raised the question of self-induced intoxication with respect to the offense of Murder in the First Degree (After Deliberation). For that offense, you may consider whether or not evidence of self-induced intoxication negates the existence of the element of "after deliberation and with intent." The prosecution has the burden of proving all the elements of the crimes charged beyond a reasonable doubt. If you find that Mr. Birch was intoxicated to such a degree that he did not act with the required mental state, you should find him not guilty of that offense. **However, you may not consider evidence of self-induced intoxication for purposes of deciding whether the prosecution has proved the elements of** Murder in the First Degree (Felony Murder), Aggravated Robbery, or **Tampering with Physical Evidence.**

(CF, p 485) (emphasis added). This instruction largely tracks the proposed instruction tendered by the defense. (CF, p 444).

The prosecution emphasized in their closing arguments that evidence of voluntary intoxication related only to the charge of First Degree Murder-Intent and After Deliberation. (TR 3/10/22, pp 20-21). The defense, for its part, did not address the issue of self-induced intoxication in closing. The jury evidently

2. Applicable Law and Analysis

As noted, our state and federal constitutions broadly guarantee criminal defendants "a meaningful opportunity to present a complete defense." *Rios-Vargas*, ¶¶ 20-21 (citing cases).

Moreover, it's an essential feature of a fair trial that the trial court correctly instruct the jury on all matters of law. *People v. Van Meter*, 2018 COA 13, ¶¶ 41-42, 421 P.3d 1222, 1231–32. A defendant's right to due process requires correct jury instructions when such instructions bear on the prosecution's burden to prove the defendant guilty beyond a reasonable doubt. *Id.*

Colorado statutes allow juries to consider evidence of a defendant's voluntary intoxication when it "is relevant to negative the existence of a specific intent if such intent is an element of the crime charged." *People v. Lucas*, 232 P.3d 155, 162 (Colo. App. 2009) (citing § 18-1–804(1), C.R.S. (2020)). That said, "[v]oluntary intoxication is not an affirmative defense"; rather, "the statute sets forth a rule concerning the admissibility of evidence of intoxication by the defendant to counter the prosecution's

evidence that the defendant had the requisite specific intent of the charged offense." *Lucas*, 232 P.3d at 162 (quoting *People v. Harlan*, 8 P.3d 448, 470-71 (Colo. 2000), *overruled on other grounds by People v. Miller*, 113 P.3d 743 (Colo. 2005)); *accord People v. Stone*, 2020 COA 23, ¶¶ 4-5, 471 P.3d 1148, 1151–52 (same). In short, the statute "absolves a defendant of liability only for a specific intent offense when the evidence of intoxication negates the existence of the specific intent." *Lucas*, 232 P.3d at 162.

The subsection of the Tampering With Physical Evidence applicable here states:

> (1) A person commits tampering with physical evidence if, believing that an official proceeding is pending or about to be instituted and acting without legal right or authority, he:
>
> (a) Destroys, mutilates, conceals, removes, or alters physical evidence **with intent to impair its verity or availability in the pending or prospective official proceeding**[.]

§ 18-8-610(1)(a) (emphasis added). Our courts have observed in passing – and in sometimes unrelated contexts – that "[v]oluntary intoxication may negate specific intent, and [that] tampering [is a] specific intent crim[e]." *People v. Snelling*, 2022 COA 116M, ¶ 14, 523 P.3d 477, 48; *Lucas,* 232 P.3d 162-63; *accord Frayer v. People*, 684 P.2d 927, 929 (Colo. 1984) ("We agree that the offense of tampering with physical evidence depends, to an important degree, on the defendant's conduct and intent."). This is

obviously true, based on the plain language of both sections 18-1–804(1) and 18-8-601(1)(a).

Although Mr. Birch finds no case directly on point, the plain language of the controlling statutes – as well as the operative case law – make clear that the crime of Tampering With Physical Evidence charged in this case was subject to the traverse of voluntary intoxication, and that the jury should have been instructed accordingly. This instructional error not only affected a substantial right, but likely contributed to Mr. Birch's conviction for Tampering With Physical Evidence. While the jury evidently wasn't persuaded that intoxication played a role in the fatal shooting at the Circle K, there was evidence that could have led a jury to conclude that Mr. Birch may have been intoxicated when he allegedly tampered with – or directed others to tamper with – physical evidence. There was evidence to suggest that Mr. Birch had spent all of the alleged proceeds from the robberies on drugs – which would have amounted to around $250 worth of narcotics – and there was further evidence that defendant was acting erratically in the days following the robberies, including

Accordingly, the conviction for Tampering With Physical Evidence must be reversed.

III. MR. BIRCH'S SENTENCE OF LIFETIME IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE (LWOP) FOR FIRST DEGREE MURDER-FELONY MURDER IS CONSTITUTIONALLY DISPROPORTIONATE UNDER THE STATE AND FEDERAL CONSTITUTIONS, IN LIGHT OF RECENT CHANGES TO COLORADO'S CRIMINAL CODE RECLASSIFYING FELONY MURDER AS A SUBSET OF SECOND DEGREE MURDER SUBJECT TO A POTENTIAL SENTENCING RANGE OF 8 TO 48 YEARS IMPRISONMENT.

A. PRESERVATION AND STANDARD OF REVIEW

Mr. Birch was convicted of First Degree Murder-Felony Murder and was sentenced to life imprisonment without the possibility of parole. That conviction and sentence merged into Mr. Birch's conviction for First Degree Murder-Intent and After Deliberation. (CF, pp 539-49; TR 4/22/22, pp 11-14).

Prior to sentencing, the General Assembly amended the First Degree Murder statute to reclassify Felony Murder as a form of Second Degree Murder punishable as a class 2 felony.[16] *See* Ch. 58, §§ 1-2, 2021 Colo. Sess. Laws 235, 235-36. Those changes became effective on September 15, 2021, and are applicable only to offenses committed on or after that date. *Id.* at § 6, 2021 Colo. Sess. Laws at 238. The presumptive sentencing range for Class 2 felonies is 8 to 24 years in the Department of Corrections, and the upper end of that range can be as high as 48 years under certain circumstances. *See* § 18-1.3-401(1)(a)(V)(A), C.R.S. (2021).

[16] Those changes are codified in section 18-3-103(1)(b), C.R.S. (2021).

There was no constitutional challenge to the proportionality of his sentence for Felony Murder. Therefore, this issue hasn't been preserved for review.

Our courts review de novo the legal question whether a sentence is grossly disproportionate. *Wells-Yates v. People* ("Wells-Yates I"), 2019 CO 90M, ¶ 35. Where, as here, a proportionality challenge is unpreserved, the standard for reversal is plain error. *People v. Walker,* 2022 COA 15, ¶ 60.

B. DISCUSSION

The United States and Colorado Constitutions prohibit the infliction of cruel and unusual punishments. *Walker,* 2022 COA 15, ¶ 61, 509 P.3d at 1075 (citing U.S. Const. amend. VIII and Colo. Const. art. II, § 20). This prohibition includes a proportionality principle, which is a "foundational 'precept of justice'" that dictates "the punishment should fit the crime." *People v. Wells-Yates* ("Wells-Yates II"), 2023 COA 120, ¶ 14. The inquiry is dynamic and must take account of "the evolving standards of decency that mark the progress of a maturing society." *Id.* at ¶ 14. Proportionality review is composed of two steps: in Colorado legal parlance, step one has become known as an "abbreviated proportionality review," while step two is referred to as an "extended proportionality review." *Wells-Yates I*, ¶ 10.

Step one of Colorado's proportionality review proceeds in two sub-parts. At sub-part one, the court must evaluate the gravity or seriousness of the offense, which

includes consideration of the harm caused or threatened to the victim or society and the culpability of the offender. *People v. Castillo*, 2022 COA 20, ¶ 39. However, Colorado law "allows a shortcut in some situations that [effectively] bypasses [the entire two-step] analysis" by declaring some crimes "inherently (or per se) grave or serious for proportionality purposes." *Wells-Yates I*, ¶¶ 13, 62. When such crimes are at issue, a court may skip step one and proceed directly to step two. *Id.* But, in virtually all instances, the step two inquiry is a mere formality, as a per se grave or serious designation "renders a sentence nearly impervious to attack on proportionality grounds." *Id.* at ¶ 62. Because designating a crime as "per se" grave or serious functionally ends the proportionality analysis, this Court has cautioned that such a designation "must be reserved for those rare crimes which, based on their statutory elements. . . would be grave or serious in **every potential factual scenario**." *Id.* (emphasis added).

If the crime is not deemed per se grave or serious, the sub-part one inquiry proceeds afoot. The inquiry has been characterized as "somewhat imprecise," but includes consideration of numerous factors, including any relevant "facts and circumstances surrounding th[e] offense." *Wells-Yates II*, ¶¶ 33-34. This inquiry is not binary: the question is not whether "the offense serious or not," but rather "one of

degree — **how** serious is the offense — as a precursor to the next step of balancing the seriousness of the offense against the harshness of the penalty." *Id.* at ¶ 36.

In addition, our courts will consider statutory amendments enacted after the date of the offense, because they are "the most valid indicia of Colorado's evolving standards of decency." *Id.* at ¶ 35 (quoting *Wells-Yates I*, ¶¶ 45, 48). Such amendments are not "determinative of whether an offense is grave or serious" but must be considered along with the "facts and circumstances surrounding the crime committed." *Id.* That said, the most reliable objective indicia of evolving standards of decency that reflect public attitudes toward a given sanction are statutes passed by elected representatives, and thus courts must consider legislative actions that alter the penalties for, and societal conceptions of the culpability that attaches to, certain crimes in resolving proportionality challenges. *Wells-Yates I*, ¶ 52.

At step two, the court must consider the harshness of the penalty, which includes consideration of the length of the sentence as well as parole eligibility. *Id.* at ¶ 40.

If the initial two-step analysis does not give rise to an inference of gross disproportionality, no further analysis is required, and the proportionality challenge fails. *Id.* at ¶ 41. If the analysis gives rise to an inference of gross disproportionality,

however, the court must conduct intra-jurisdictional and inter-jurisdictional comparisons. *Id.*

Bearing the above principles in mind, Mr. Birch asserts that his LWOP sentence for Felony Murder is constitutionally disproportionate.

Mr. Birch acknowledges at the outset that *People v. Sellers*, 2022 COA 102, 521 P.3d 1066, *cert. granted*, No. 22SC738, 2023 WL 3479427 (Colo. May 15, 2023), is contrary to his position, but also notes that the Colorado Supreme Court has granted review on this precise issue. While the supreme court will likely have the last word, this Court can chart its own course in the interim and needn't feel bound by *Sellers*. *E.g., Snelling*, ¶ 48 n.2 (citing cases).

As an initial matter, Mr. Birch respectfully submits that the division's opinion in *Sellers* is incorrect: (1) *Sellers*' determination that "[f]elony murder is a per se grave or serious offense because it necessarily involves committing a violent predicate felony that results in the death of a person," and "[t]hus, every factual scenario giving rise to a charge of felony murder will be grave or serious," rests on shaky foundations; and (2) its determination that nothing in the legislature's reclassification of felony murder suggests that an LWOP sentence is grossly disproportionate to the current range of 16 to 48 years reflects a fundamental misunderstanding of criminal sentencing. 2022 COA 102, ¶¶ 65-67, 521 P.3d at 1079-80.

First, *Sellers*' contention that "every factual scenario giving rise to felony murder will be grave or serious" is plainly incorrect. While there was violence or threats of violence associated with the aggravated robbery count upon which the conviction for Felony Murder was predicated in this case, there are myriad cases in which individuals convicted of Felony Murder literally played no direct role in the murder. *E.g.*, *Auman v. People*, 109 P.3d 647 (Colo. 2005). Hence, it cannot be that Felony Murder is "grave and serious" in every factual scenario.

Second, *Sellers* seriously downplays both the significance of the legislature's reclassification of felony murder and the tremendous disparity in penalties that has resulted from that legislative action. The only penalty the trial court could impose in this case was LWOP; now, a trial court can impose a sentence as short as 16 years for the same crime. Even the maximum sentence of 48 years would still give a person in Ms. Birch's position a meaningful opportunity at parole. The legislature has spoken clearly and unequivocally that LWOP is no longer a reasonable or appropriate penalty in **any** case of felony murder. The legislative history underlying the reclassification of felony murder makes abundantly clear that the General Assembly reached the considered judgment that mandatory LWOP sentencing for felony murder is out of step with both national norms and evolving standards of decency in Colorado. (Hearings on S.B. 21-124 before the H. Judiciary Comm. (Apr. 7, 2021), at 4:28,

4:23:41; 4:26:19, 5:22-23, 5:59:28). But, more than that, the legislature has spoken clearly and unequivocally that LWOP is no longer a reasonable or appropriate penalty in any case of felony murder. The Court should therefore reject *Sellers*.

Accordingly, the LWOP sentence associated with the count of Felony Murder cause should be reversed and the case remanded for extended proportionality review.

CONCLUSION

For the reasons set forth in Part I, Mr. Birch respectfully asserts that the judgment of conviction must be reversed. For the reasons set forth in Part II, the conviction for Tampering With Physical Evidence must be reversed. And, as set forth in Part III, Mr. Birch's LWOP sentence associated with his conviction for Felony Murder should be reversed and the cause remanded to the trial court for an extended proportionality review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on May 3, 2024, a copy of this **OPENING BRIEF OF DEFENDANT-APPELLANT** was delivered electronically via the Colorado Courts E-Filing (CCE) System to:

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