

<p>DISTRICT COURT, ALAMOSA COUNTY, COLORADO, 8955 Independence Way Alamosa, CO 81101</p> <hr/> <p>THE PEOPLE OF THE STATE OF COLORADO Plaintiff,</p> <p>v.</p> <p>BARRY LEE MORPHEW, Defendant.</p>	<p>DATE FILED April 13, 2026 8:10 PM</p> <p>▲ COURT USE ONLY ▲</p>
<p>JANE FISHER-BYRIALSEN, #49133 FISHER & BYRIALSEN, PLLC 4600 S. Syracuse Street, 9th Floor Denver, CO 80237 (202)256-5664 Jane@fblaw.org</p> <p>DAVID BELLER, #35767 RECHT KORNFELD, P.C. 1600 Stout Street, Suite 1400 Denver, CO 80202 (303)573-1900 Fax: (303) 446-9400 david@rklawpc.com</p>	<p>Case Number: 25 CR 128</p>
<p align="center">[D-013] MOTION FOR NOTICE AND OPPORTUNITY TO RESPOND PRIOR TO ANY CONSUMPTIVE TESTING</p>	

Mr. Barry Morphew, by and through counsel, moves this Court to require notice and opportunity to respond prior to any consumptive testing. In support, Mr. Morphew states:

1. The defense objects to any consumptive testing and moves the Court to order the prosecution provide defense counsel notice and opportunity to respond prior to the performance of any consumptive testing.

2. A consumptive test is one which prevents future independent testing of the object being examined. § 16-3-309(1), C.R.S. (2024) (“[w]hen 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”); *People v. Gomez*, 596 P.2d 1192, 1197 (Colo. 1979) (“[I]n those cases where the amount of material available for testing is small . . . it may be incumbent on the state to contact the defendant to

determine whether he wishes his expert to be present during the tests.”); *People v. Garries*, 645 P.2d 1306, 1310 (Colo. 1982) (“[t]he guidelines established in *Gomez* are applicable to all cases where the test sample is insufficient to allow independent analysis”). Alteration of the evidence, even if irreversible, does not constitute consumptive testing so long as the defendant is allowed an opportunity to conduct an independent analysis. *Gomez*, 596 P.2d at 1197–98.

3. The state must preserve at least equal amounts of any evidence tested by the prosecution, for defense testing. *People ex rel. Gallagher v. District Court*, 656 P.2d 1287, 1291–92 (Colo. 1983) (holding that when the police conduct scientific tests, they must preserve samples to permit the defendant to accomplish independent testing, permit the defendant’s experts to monitor the police testing, or provide some other suitable means to allow the defendant to verify independently the appropriateness of the procedures and the accuracy of the results); *People v. Garcia*, 627 P.2d 255 (Colo. 1980); *People v. Garries*, 645 P.2d 1306 (Colo. 1982); *People v. Thatcher*, 638 P.2d 760 (Colo. 1981); *People v. Gomez*, 596 P.2d 1192 (Colo. 1979).

4. Colorado law expressly allows defense experts to be present for consumptive testing and requires the prosecution to notify the defense and allow a reasonable opportunity for the defendant’s expert to be present. § 16-3-309, C.R.S. (2024). When determining whether the State has met its obligation to preserve evidence, the Court must consider statutory factors including: whether a suspect had been identified and had retained or been appointed counsel at the time of testing; whether the State should have used an available test method more likely to preserve evidence; whether the State should have photographed or otherwise documented test results susceptible to subjective interpretation; whether the State should have preserved the used test samples; and whether there was a sufficient sample for the defendant’s expert to analyze. § 16-3-309(2), C.R.S. (2024).

5. The testing of blood, bodily fluids, tissues, organs, hair or hair fragments, or other physical evidence may necessarily be consumptive and destructive of some critical evidence. The State is required to employ regular procedures to preserve evidence when it is reasonably foreseeable that such evidence might be favorable to the accused. *People v. Greathouse*, 742 P.2d 334, 337 (Colo. 1987); *People v. Gomez, supra*. Indeed, “[w]hen evidence can be routinely collected and preserved by state agents, failure to do so is tantamount to suppression of the evidence.” *People v. Humes*, 762 P.2d 665, 667 (Colo. 1988) (citing *Greathouse*, 742 P.2d at 337).

6. “[T]he court’s role prior to [potentially destructive] testing is to oversee the preservation of evidence. The authority of the court to supervise the preservation of evidence originates in the court’s role to protect the ‘civilized standards of procedure and evidence.’” *People v. Wartena*, 156 P.3d 469, 472 (Colo. 2007) (quoting *McNabb v. United States*, 318 U.S. 332, 430 (1943)).

7. “The trial courts’ supervisory role extends to remedies when addressing a failure to preserve material evidence.” *Id.* at 472.

8. The court may prohibit testing if the State cannot follow testing procedures it dictates. *Id.* at 472.

9. Under Crim. P. 16(I)(b)(4), the prosecutor has an independent obligation 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,” including preserving discoverable evidence gathered during the investigation. *See* Crim. P. 16(III)(g); *People v. Tippet*, 2023 CO 61, 34. The Colorado Supreme Court has made clear that courts possess broad discretion to impose sanctions—including severe ones—to enforce discovery obligations and protect the integrity of the truth-finding process. *People v. Tippet*, 2023 CO 61, ¶¶ 34, 37, 539 P.3d 547, 554–55; *see also* *People v. Whittington*, 2024 CO 65, 556 P.3d 805 (affirming trial court’s broad discretion to fashion appropriate Rule 16 sanctions); Crim. P. 16(III)(g). When fashioning a sanction, the court must impose “the least severe sanction that will ensure full compliance with the court’s discovery orders.” *Tippet*, 2023 CO 61, 37, 539 P.3d at 555 (quoting *People v. District Court*, 793 P.2d 163, 168 (Colo. 1990)).

10. Because consumptive testing may permanently deprive Mr. Morphey of the ability to conduct meaningful independent testing, the only adequate protection is prior notice and an opportunity to be heard before any such testing occurs—allowing the Court to exercise its supervisory authority to prescribe appropriate protocols, including requirements for the preservation of samples sufficient for defense expert analysis, and to ensure that any testing is conducted in a manner consistent with § 16-3-309(2), C.R.S. (2024).

WHEREFORE, Mr. Morphey respectfully moves this Court to require the prosecution to provide defense counsel with notice and an opportunity to respond prior to the performance of any consumptive testing, and further to hold a hearing before any such testing is authorized so that this Court may exercise its supervisory authority to prescribe the testing procedures and ensure the preservation of evidence for the defense.

Respectfully submitted this 13th day of April, 2026.

FISHER & BYRIALSEN, PLLC

/s/ Jane Fisher-Byrialsen
Jane Fisher-Byrialsen, #49133

RECHT & KORNFELD, P.C.

/s/ David Beller

David Beller, #35767

Certificate of Service

I hereby certify that on April 13, 2026, I caused the foregoing to be filed with the Alamosa County District Court and a copy of the same to be served on the Alamosa County District Attorney's office via CCE-File Service.

/s/ Abby Clement

Paralegal at Fisher & Byrialsen PLLC