

<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 8:22 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-015] MOTION FOR DISCOVERY - PRESERVATION OF MATERIAL FOR TESTING</p>	

COMES NOW Barry Morphey, by and through counsel, moves for an order compelling discovery and preservation of material tested in this case:

1. Under *People ex rel. Gallagher v. District Court*, 656 P.2d 1287, 1291–92 (Colo. 1983); *People v. Garcia*, 627 P.2d 255 (Colo. 1981); *People v. Garries*, 645 P.2d 1306 (Colo. 1982); *People v. Thatcher*, 638 P.2d 760 (Colo. 1981); *People v. Gomez*, 198 Colo. 105, 596 P.2d 1192 (Colo. 1979); § 16-3-309, C.R.S. (2024); and other authorities, the State must preserve at least equal amounts of any evidence tested by the prosecution for defense testing. 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. *Gallagher*, 656 P.2d at 1291–92. When evidence can be routinely collected and preserved by state agents, failure to do so is tantamount to

suppression. *People v. Humes*, 762 P.2d 665, 667 (Colo. 1988). 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). Mr. Morpew moves for the Court to enter an order requiring the State to preserve at least equal amounts of any evidence tested for the defense.

2. Additionally, Mr. Morpew moves for the Court to order that the State preserve any evidence with any potential exculpatory or impeaching value.

3. With regard to scientific testing or physical manipulation of evidence by law enforcement personnel, Mr. Morpew requests that the following procedures be used:

a. He be allowed to conduct confidential testing of any evidence held by the prosecution or law enforcement;

b. That no testing be consumptive or destructive without prior notice to the defense and an opportunity for a hearing. "[T]he court's role prior to [potentially destructive] testing is to oversee the preservation of evidence." *People v. Wartena*, 156 P.3d 469, 472 (Colo. 2007). The court may prohibit testing if the State cannot follow court-prescribed testing procedures. *Id.*; § 16-3-309(2), C.R.S. (2024) (specifying factors the trial court must weigh in evaluating whether the State has met its preservation obligation, including whether the State should have used an available test method more likely to preserve evidence, whether results susceptible to subjective interpretation should have been documented, and whether a sufficient sample exists for defense expert analysis); and,

c. To return the evidence and materials which have been sent to other agencies for testing or evaluation, so that such materials and evidence are available for any testing, examination and evaluation which Mr. Morpew needs to conduct in order to prepare his defense to the charges against him.

4. With regard to records of evidence storage, Mr. Morpew requests disclosure of all records and logs and receipts pertaining to the storage and movement of physical evidence. This request is with respect to the handling of all physical evidence up to this point as well as the continued handling of all physical evidence from this point forward.

5. It is well established that the prosecution's duty to ensure adequate procedures to disclose evidence implicates a criminal defendant's due process rights guaranteed under the United States and Colorado Constitutions. U.S. Const. amends. V and XIV; Colo. Const. art. II, section 25; *California v. Trombetta*, 467 U.S. 479, 480 (1984); *Brady v. Maryland*, 373 U.S. 83 (1963); *People v. Greathouse*, 742 P.2d 334, 337 (Colo. 1987). The government is under an obligation pursuant to the due process clause to preserve and disclose all exculpatory material

evidence. Colo. Const. Art. II, Sect. 25; U.S.C.A. V, XIV; *Brady*, 373 U.S. 83 (emphasis added). The prosecution must also promulgate and enforce rigorous and systematic procedures to preserve all discoverable evidence gathered during the criminal investigation, and this duty extends to all investigative agencies participating in the case. *People v. District Court*, 793 P.2d 163, 167 (Colo. 1990); *Solano v. Newman*, 2024COA93, ¶¶ 38–44 (Colo. App. 2024); Crim. P. 16(I)(b)(4).

6. In *People v. Bueno*, 2018 CO 4, ¶28, 409 P.3d 320, 326, the Colorado Supreme Court found that “Rule 16(I)(a)(2) codifies *Brady*’s constitutional disclosure requirement.” *Bueno* also outlines the three prongs of demonstrating a *Brady* violation: “that (1) the prosecution suppressed evidence, (2) that is exculpatory or favorable to the defendant and (3) that is material to the case.” *Id.*, ¶28. Accord *People v. Kilgore*, 2020 CO 2, ¶13, 455 P.3d 746, 750 (reaffirming that Crim. P. 16(I)(a)(2) is the mandatory vehicle for disclosure of evidence tending to negate guilt).

7. As to the first prong of suppression, it is the responsibility of the prosecution to preserve evidence that may be material to the defense, and failure to do so can constitute suppression. *People v. Braunthal*, 31 P.3d 167, 170 (Colo. 2001).

8. Specifically, “[w]hen it is reasonably foreseeable that evidence may be favorable to the accused, the prosecution must employ procedures to preserve such evidence.” *Id.* (citing *People v. Greathouse*, 742 P.2d 334, 337 (Colo. 1987)) (emphasis added). This preservation obligation is ongoing and enforceable against all agencies participating in the investigation. *Solano v. Newman*, 2024COA93, ¶42 (Colo. App. 2024) (affirming that Rule 16(I)(b)(4) imposes a duty on the prosecutor to maintain a flow of information with all investigative agencies such that evidence in their possession is constructively within the prosecutor’s control).

9. It violates due process when the police fail to preserve evidence which has “reasonably foreseeable exculpatory value.” *People v. Bachofer*, 192 P.3d 454, 459 (Colo. App. 2008); U.S. Const. amends. V and XIV; Colo. Const. art. II, section 25. Where the lost evidence was merely “potentially useful” rather than apparently exculpatory, the defendant must additionally show that state agents acted in bad faith. *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988); *Bachofer*, 192 P.3d at 459.

10. “In order to establish a due process violation for the prosecution’s failure to preserve evidence, a defendant must prove that the evidence was suppressed or destroyed by state action. . . .” *Braunthal*, 192 P.3d at 172 (citing *Greathouse*, 742 P.2d at 337-38).

11. The state must employ regular procedures to preserve evidence that a state agent, in performing his duties, could reasonably foresee might be favorable to the accused. *People ex rel. Gallagher v. District Court*, 656 P.2d at 1291 (1980); *People v. Sheppard*, 701 P.2d 49, 52

(Colo. 1985); *People v. Martinez*, 596 P.2d 1192 (1979); *Garcia v. District Court*, 589 P.2d 924 (1979); *People v. Shaw*, 646 P.2d 375 (Colo.1982).

12. When such evidence can be collected and preserved in the performance of routine procedures by state agents, failure to do so is tantamount to suppression of the evidence. *Id.* This is true even though the loss of the evidence is inadvertent and not the result of bad faith. *People v. Sheppard, supra*; *People v. Sams*, 685 P.2d 157, 162 (Colo. 1984); *People v. Holloway*, 649 P.2d 318 (Colo. 1982); *see also People v. Humes*, 762 P.2d 665, 667 (Colo. 1988) (“[w]hen evidence can be routinely collected and preserved by state agents, ‘failure to do so is tantamount to suppression of the evidence’”).

13. A due process violation exists if the State failed to collect evidence that possessed an exculpatory value that was readily apparent at the time of the police action at issue and the defendant would be unable to obtain comparable evidence by other reasonably available means. *People v. Humes, supra*; *see also People v. Scarlett*, 985 P.2d 36 (Colo. App. 1998).

14. As far as the second prong (the suppressed evidence must be exculpatory), evidence that “the defense might have used to impeach the Government’s witnesses” is exculpatory under *Brady*. *United States v. Bagley*, 473 U.S. 667, 676 (1985). *Bagley* holds that both exculpatory and impeachment evidence are governed by the same materiality standard. *Id.* at 682.

15. As far as the third prong (the suppressed evidence must be material), evidence is material for *Brady* purposes if it creates “a reasonable probability of a different result,” *Kyles v. Whitley*, 514 U.S. 419, 434 (1995), and if “its suppression undermines confidence in the outcome of the trial.” *Bagley*, 473 U.S. at 678. Materiality is assessed by considering the cumulative effect of all suppressed evidence, not item by item. *Kyles*, 514 U.S. at 436–37.

16. When a defendant’s due process rights are violated by the State’s failure to preserve material evidence, the defendant is entitled to have sanctions imposed against the prosecution. *People v. Enriquez*, 763 P.2d 1033 (Colo.1988). *See People v. Tippet*, 2023 CO 61, ¶37, 539 P.3d 547, 555; Crim. P. 16(III)(g).

17. Mr. Morphew makes this motion, and all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, as a continuing objection based upon (in addition to the above authority) the following grounds and authorities: the due process, trial by jury, right to counsel, equal protection, equal access to and administration of justice, right to defend life, cruel and unusual punishment, confrontation, compulsory process, right to remain silent, and right to appeal clauses of the federal and Colorado Constitutions, and the first, fourth, sixth, eighth, ninth, tenth, and fourteenth amendments to the United States Constitution, and article II, sections 3, 6, 7, 10, 11, 16, 18, 20, 23, 25, and 28 of the Colorado Constitution, Crim. P. 16, and RPC 3.8. Mr. Morphew

cross-references and incorporates by reference all pleadings filed or to be filed in this case, and caselaw cited therein and at oral argument.

WHEREFORE, Mr. Morpew respectfully moves this Court to enter an order (1) requiring the State to preserve at least equal amounts of any evidence tested for defense testing; (2) requiring preservation of all evidence with potential exculpatory or impeaching value; (3) prohibiting any consumptive or destructive testing without prior notice to the defense and an opportunity for a hearing; (4) requiring return of all evidence sent to other agencies for testing; and (5) requiring disclosure of all chain-of-custody records and evidence storage logs.

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