

disqualifiers to defendants and the Court. The DA's Office does not rely upon confidential information from law enforcement agencies to make these assessments, nor does the DA's Office request that law enforcement provide them with records on an ongoing basis of potential jurors in the district. The DA's Office regularly employs public databases, or databases accessible by the Public Defender's Office and attorneys designated as Alternate Defense Counsel, like the Defendant's attorneys here. Specifically, the People rely upon the DataAccess database at jbits.courts.state.co.us/pas/pubaccess/user.index.cfm to ascertain criminal conviction history for potential jurors. The Defendant has the same access to this information. The DA's Office may make assessments about jurors based upon knowledge and reputation in the community, but that information is not subject to any formal record and is not found in any criminal justice record. It is axiomatic that attorneys for both parties will use public information, where available, to assess potential jurors. That information and the assessment that follows is privileged work product. The People, as is the Defendant, are protected from disclosure of attorney work product.

LEGAL STANDARD AND ARGUMENT

Contrary to the Defendant's assertions, Colorado does not require *carte blanche* disclosure of juror investigation material. Similarly, Colorado does not require the Defendant to disclose the results of his attorney team's investigation into potential jurors. In making such a request, the Defendant misapplies and misinterprets the holding in *Losavio v. Mayber*. At the outset, it is critical to identify what material was actually at issue in *Losavio*. The Court in *Losavio* addressed records from a law enforcement agency that, at the time the decision was issued, were not publicly accessible and arguably "confidential" police records not subject to public disclosure pursuant to the Colorado Open Records Act or CORA. The records were not generated by the District Attorney. Rather, the records consisted of a yearly report generated by the police agency and provided to the District Attorney on an annual basis. The records were annotated potential juror lists. An officer in the police agency, without request by the District Attorney, was tasked with obtaining potential juror lists from the jury commissioner and then annotating them indicating which

jurors had criminal convictions based on the agencies review of confidential non-CORA disclosable records. After the annotated document was created, it was sent to the District Attorney only.

It is also critical to identify what *Losavio* did *not* address. The Supreme Court in that case did not address information related to “relationships and acquaintances” between the potential jurors and “members of the prosecutorial team or prosecutorial offices of those of the prosecutor’s agents, whether on a social, professional or other basis.” The decision did *not* address “record of service for either voir dire or service on a sitting jury.” The decision did not address “materials, reports, notebooks or other information” generated by the District Attorney’s Officer related to prospective jurors.

The distinction made above is particularly relevant in analyzing the actual holding in *Losavio*. The Court in *Losavio* affirmed the trial court’s ruling that the Pueblo Police Department was not obligated to provide police records showing “arrests, convictions, and other information about individuals” to the Public Defender’s Officer. These records were not public records. The Court did hold that the annotated list, or the juror list which contained notes from the Pueblo Police Department about potential juror convictions, should be disclosed. Nothing more. Moreover, the “list” provided on an annual basis to the District Attorney to use in *all* jury trials is not attorney work product, or material prepared specifically in advance of litigation. The holding in *Losavio* was narrowly tailored to the type of document at issue in that case. The DA’s Office does not possess that type of document.

By contrast, the Defendant seeks to expand *Losavio* to include all material the People compile in preparation for this specific case related to jurors. That is attorney work product and that is not discoverable. Importantly, the information that arguably is discoverable under *Losavio* is already available to the Defendant. Specifically, the Defendant has easy access to databases that did not exist when the Supreme Court decided *Losavio* that contain the information that the Pueblo Police Department provided to the District Attorney in *Losavio*. The Defendant has access not only to criminal convictions from databases like DataAccess and ICCISS, but data on criminal cases that did not result in conviction, civil matters a potential juror may have been involved with, domestic relations matter, and juvenile

matters. The Defendant can identify a juror's date of birth, possible addresses and other arguably confidential information.

The out of state cases that the Defendant cites do not support the Defendant's attempt to stretch the holding in *Losavio* here. Rather, the cases Defendant relies upon from other states support the People's position: the Court has discretion to order the People to produce material maintained in official state databases for which the Defendant does not have access. In *State v. Second Jud. Dist. Ct.*, a Nevada Supreme Court held that the Defendant should be provided the "raw information" that the prosecution "acquires from a government database that is unavailable to the defense." *State v. Second Jud. Ct. in & for Cnty. Of Washoe*, 143 P.3d 47, 51 (2018). The Court went on to distinguish that data from what the Defendant is seeking here: "Nor does this holding require the State to disclose *all* veniremember information it possesses – only criminal history information derived from databases unavailable to the defense." *Id.* The California Supreme Court in *People v. Murtishaw* cited by the Defendant similarly focused on information that was only available to the prosecution. Specifically, the prosecution in that case gathered information from data bases the defendant did not have access to and conducted official "field investigations" of the venirepersons. The court in *Murtishaw* focused on the utilization of state investigators to conduct formal, documented investigations of venirepersons, something the DA's Office does not do and does not intend to do in this case. Moreover, the California Court focused on a defendant's inability to afford that type of thorough investigation, a circumstance that the Defendant has not and cannot demonstrate exists here.

The Massachusetts Supreme Court held that the unavailability of certain data bases, a circumstance that does not exist in this case, required that the prosecution provide the "official record" information about venirepersons to the Defendant. Specifically, in *Com. v. Cousin*, the Massachusetts court held that a trial court could require juror criminal records gathered by the prosecution – information not available to the defendant – be disclosed to the defendant. *Com. v. Cousin*, 873 N.E.2d 742, 750 (2018). In New Hampshire, the Supreme Court held that "official information" not available to the defendant, specifically

criminal records of venirepersons, should be provided to the defendant *because the defendant did not have access to the data bases containing the information. State v. Goodale*, 740 A.2d 1026, 1031 (1999).

The cases the Defendant cites from other jurisdictions make clear one key point: information stored in state maintained data bases that a defendant does not have access to should be provided to the defendant if the state gathers such information in preparation for trial. Here, the Defendant cannot claim such a disparity of access. The one Colorado court that has addressed this issue, *Losavio*, does not support the type of expansion the Defendant seeks here.

Moreover, the extensive voir dire process this Court will no doubt employ is a sufficient information gathering process where the Defendant's attorneys can learn about all of the information they seek in this Motion. There is not Colorado precedent for mandating disclosure of the information the Defendant seeks. The Defendant is in no different position than any other criminal defendant in the San Luis Valley, and this case does not warrant special treatment.

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