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**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

<p>STATE OF IDAHO,</p> <p style="text-align: center;">Plaintiff,</p> <p>vs.</p> <p>CHAD GUY DAYBELL AND LORI NORENE VALLOW DAYBELL,</p> <p style="text-align: center;">Defendants.</p>	<p>Case No.: CR22-21-1623 Case No.: CR22-21-1624</p> <p>BRIEF IN SUPPORT OF MOTION FOR CONSUMPTIVE TESTING OF FORENSIC EVIDENCE</p>
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The State, by and through the Office of Prosecuting Attorney for Fremont County, provides this brief to the Court in support of its Motion for Consumptive Testing of Forensic Evidence of the following items:

1. Hairs on duct tape inside a body bag reported by Rexburg Police Department to have been used to transport the remains of JJ Vallow. This evidence is identified in Report Number 13 as Item 11.16.
2. Ridge detail on the adhesive side of tape reported by Rexburg Police Department to be associated with JJ Vallow's body as described above for trace/touch DNA.
3. Small dark spots on the handles of a shovel and pickaxe reported by Rexburg Police Department to have been recovered from a garage/barn. [The State does not intend to consume each of these spots, but to consume a sufficient amount to determine if they contain human DNA and/or any profile.] This evidence is identified in Report Number 10.

4. Swabs of tape areas associated with Items 11 and 13 evidence identified in Report Number 13.
5. Swabs reported by the Rexburg Police Department to be from Joshua J. Vallow's right hand fingernail(s) and reported to have been obtained during his autopsy. This evidence is identified in Report 13 as Item 1.

ARGUMENT

I. Case Law from other Jurisdictions and the American Bar Association Standards provide persuasive authority for the Court to Consider in Allowing Consumptive Testing.

While not binding on the Court, the American Bar Association provides guidelines on consumptive testing of DNA material in their Criminal Justice Standards, section 3.4:

- (a) When possible, a portion of the DNA evidence tested and, when possible, a portion of any extract from the DNA evidence should be preserved for further testing.
- (b) A laboratory should not undertake testing that entirely consumes DNA evidence or the extract from it without the prior approval of the prosecutor if a law enforcement officer is requesting the testing, or of defense counsel if the testing is requested by defense counsel or defense counsel's agent.
- (c) Before approving a test that entirely consumes DNA evidence or the extract from it, the prosecutor should provide any defendant against whom an accusatorial instrument has been filed, or any suspect who has requested prior notice, an opportunity to object and move for an appropriate court order.
- (d) Before approving a test that entirely consumes DNA evidence or the extract from it, the attorney for any defendant against whom an accusatorial instrument has been filed, or for any other person who intends to conduct such a test, should provide the prosecutor an opportunity to object and move for an appropriate court order.
- (e) If a motion objecting to consumptive testing is filed, the court should consider ordering procedures that would permit an independent evaluation of the analysis,

including but not limited to the presence of an expert representing the moving party during evidence preparation and testing, and videotaping or photographing the preparation and testing.

Caselaw regarding consumptive testing of DNA in Idaho is sparse. However, several cases in other jurisdictions provide guidance.

In *United States v. Kingsbury*, 317 F. Supp. 3d 476 (D.D.C. 2018) the Government notified the Defendant of its intent to consumptively test swabs of genetic material taken from a firearm and magazines. The Defendant objected and proposed the government be ordered to “cut each swab in half” and to extract DNA from only one of the two halves. *Id.* If the government determined there was enough DNA extract to proceed with testing, it would do so; if not, it could extract DNA from the remaining half, combine the two extractions, and then attempt to construct a DNA profile from the resulting combination. *Kingsbury*, 317 F. Supp. 3d 476, 478–80 (D.D.C. 2018). The Court in *Kingsbury* found the following:

Both the Due Process Clause of the Fifth Amendment and Federal Rule of Criminal Procedure 16 “impose duties on the Government to disclose certain materials and evidence to criminal defendants.” *United States v. Vega*, 826 F.3d 514, 533 (D.C. Cir. 2016) (citing *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)). The D.C. Circuit has recognized “a correlative duty to preserve that evidence,” *Id.*, which at one time extended to “all discoverable evidence gathered in the course of a criminal investigation.” *Id.* (quoting *United States v. Bryant*, 439 F.2d 642, 652 (D.C. Cir. 1971)).

While the Government has a duty to preserve evidence, that duty no longer extends to evidence for which the government has a valid scientific need to consume. In *Bryant* the Supreme Court “narrowed the Government's constitutional obligations regarding the preservation of evidence” considerably by finding that the government’s failure to preserve evidence violates the Due Process Clause only if the evidence is “material and exculpatory” or if the government destroys the evidence in bad faith. *Id.* The *Kingsbury* Court cited to *Arizona v. Youngblood*, wherein the Supreme Court stated “if ‘no more can be said’ about [certain] evidence ‘than that it could have been subjected to tests, the results of which might have exonerated the defendant,’ there is no denial of due process unless a criminal defendant can demonstrate the Government's bad faith.” 488 U.S. 51, 58, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988).

The Court in *Kingsbury* further found that Federal Rule of Evidence 16(a)(1)(E), (the federal discovery rule) did not require the government to split swabs prior to testing. Finally, the Court found that the defendant in *Kingsbury* was not without remedy even if the swabs were consumptively tested because there may be leftover material, he would have access to any tests, and he would be able to cross-examine any witnesses regarding the testing.

Similar to *Kingsbury*, in *United States v. Ausby*, the defendant objected to the government's request to consumptively test DNA material found on OCME slides on the grounds the testing would constitute "a violation of the Due Process Clause of the Fifth Amendment because (1) the government's consumption of biological material on the OCME slides would violate the government's duty to "preserve that material" and to allow him to independently test the evidence, (2) the government lacks a "scientific basis" for its consumption proposal, *Id.* at 10; and (3) permitting consumption would be "unjust," *Id.* at 13. *United States v. Ausby*, No. CR 72-67 (BAH), 2019 WL 3718942, at *3 (D.D.C. Aug. 7, 2019).

The Court in *Ausby* found those arguments lacked merit and allowed the government to proceed with the consumptive testing. *Id.* Specifically, the Court found the government's proposal to consume the swabs would only violate the Due Process clause if the evidence is "material and exculpatory" (Brady Material) or if the government acted in bad faith in performing the testing. *Id.* Absent a showing by the defendant that the material was exculpatory, the defendant was not entitled to split the swabs. Further, the request by the State was not in bad faith as it provided a proper scientific basis for the consumptive testing through an affidavit of its expert. *Id.* Finally, the testing would not be "unjust" as the lab the government used would retain and additional material, the testing would exclude anyone who was not the source of the material, and the testing would be subject to the defense's review, own tests, and cross-examination. *Id.*

In *United States v. Henderson*, the U.S. District Court for Nevada refused to issue an advisory opinion regarding consumptive testing in the absence of concerns related to *Youngblood*. "The *Youngblood* Court ruled that due process is not offended by failure to preserve 'potentially useful' evidence, as opposed to 'exculpatory' evidence under *Brady*, absent bad faith by the Government. The Court is aware of no criminal rule or common law procedural requirement for the Government to obtain permission to consume evidence in the first instance,

however, and the Court cannot issue an advisory opinion.” *United States v. Henderson*, 2016 U.S. Dist. LEXIS 43815 at page 2. (Internal citations omitted).

II. Based Upon the Affidavit from the Idaho State Lab, and Guidance from the ABA and Case Law from other Jurisdictions, the State should be Allowed to Proceed with Consumptive Testing.

Pursuant to ABA guidelines and guidance from caselaw, the State has not yet performed consumptive testing on any samples of DNA evidence or other genetic material identified above. However, the above samples cannot be effectively tested without being consumed. (Please see the attached affidavit of Ryleen Nowlin, Idaho State Lab.) The Defense in prior proceedings has informed the court of its objection to any consumptive testing. However, through the affidavit of Ms. Nowlin, the State has established a valid scientific purpose for consumptive testing. Absent a showing from the Defendant that the testing may destroy material and exculpatory evidence under *Brady* or are being consumed in bad faith, the Court should allow the consumptive testing of the samples which contain potentially useful evidence.

The Defendant Chad Daybell has informed the Court through counsel that the Defendant’s position is the State has failed to make an adequate discovery disclosure regarding the materials listed above. The State would request the Defendant provide the State with a detailed disclosure of what items the Defendant believes have not been provided so the State can properly respond. To date, the State has provided all material within its possession regarding any testing provided by the Idaho State Lab. Nevertheless, the State will continue to provide any additional information it receives from the Lab and will relay any further requests from the Defense to the Lab. Further, the Defendants may at any time make any inquiries they deem necessary from the Lab.

CONCLUSION

The State has yet to test any materials that require consumptive testing in good faith. The State now seeks to test those items. If the Defendant is unable to present evidence that the materials the State seeks to test would fall within the purview of *Brady* or are merely being consumed in bad faith, the Court should grant the State’s motion and allow the consumptive testing.

DATED this 18th day of July, 2022.

/s/ Lindsey A. Blake

Lindsey A. Blake
Fremont County Prosecuting Attorney

/s/ Rob H. Wood

Rob H. Wood
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CERTIFICATE

I HEREBY CERTIFY that on this 18th day of July, 2022, that a copy of the foregoing Brief was served as follows:

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