District Court, City and County of Denver, Colorado Lindsey-Flanigan Courthouse, Room 135 520 W. Colfax Ave Denver, CO 80204	DATE FILED: January 8, 2024 3:31 PM FILING ID: CBC2DA57FFE84 CASE NUMBER: 2006CR6594
Plaintiff: The People of the State of Colorado Defendant: **Jason Keith Groshart** **(DOB [redacted])**	▲ COURT USE ONLY ▲
McKenna Elizabeth Burke, Reg. No. 49550 Deputy District Attorney Dawn Weber, Reg. No. 23433 Senior Chief Deputy District Attorney Cold Case Unit For: Beth McCann, Reg No. 5834 District Attorney 201 W. Colfax Ave. Dept. 801 Denver, CO 80202 Phone Number: (720) 913-9000 Fax Number: (720) 913-9035	Case Number: D0162006CR006594 Div: Criminal Ctrm: 5B

PEOPLE'S RESPONSE TO "MR. GROSHART'S MOTION TO DISMISS DUE TO OUTRAGEOUS GOVERNMENT CONDUCT [D-4]"

Beth McCann, District Attorney, in and for the Second Judicial District, City and County of Denver, State of Colorado, by and through the undersigned Deputy District Attorney, respectfully submits the People's Response to "Mr. Groshart's Motion to Dismiss Due to Outrageous Government Conduct [D-4]" ("defense motion"). As grounds therefore, the People state as follows:

I. CHARGES & PROCEDURAL POSTURE

1. The defendant currently faces charges of Sexual Assault (F2), Second Degree Kidnapping (F2), First Degree Burglary (F3) and two crime-of-violence sentencing enhancers.

2. The date of offense in this case is March 30, 2004.

3. The matter is currently set for a motions hearing on January 12, 2024. No trial date has been set yet.

II. FACTS OF THE CHARGED CASE

1. On March 30, 2004, the defendant put on a mask and entered the northwest Denver home of the victim, A.R. He woke her up, handcuffed her, placed a mask over her face and sexually assaulted her at gunpoint in her bedroom. He wore gloves during the attack and kept his mask on - even when he compelled A.R. to shower with him - in order to destroy evidence.

2. He made her strip her bedsheets off the bed and collected her towels as a further means of destroying evidence. After the assault, A.R. made immediate outcry to the police and underwent a sexual assault exam the same day. The defendant had vaginally assaulted A.R. and semen and/or seminal fluid was collected as drainage from her body.

3. From that semen and/or seminal fluid, a male DNA profile was generated and uploaded into the Combined DNA Index System ("CODIS") database. No matches were produced. Additionally, a familial search conducted in the state of Colorado's state-level database ("SDIS") produced negative results.

4. In 2006, criminal charges were filed against that DNA profile as a "John Doe" case. In other words, the relevant statutes of limitation were preserved as to each charge but, since the defendant's identity was unknown at the time, the charges were filed against the perpetrator's DNA profile and not against him as a named defendant. That John Doe filing is the reason why a case being prosecuted in 2023 bears a 2006 CR case number.

5. The case remained unsolved for 18 years, from 2004 until 2022, when law enforcement utilized a technique called Forensic Investigative Genetic Genealogy ("FIGG") to identify the defendant.

6. After the FIGG investigation identified the defendant as the suspect, law enforcement agents travelled to Sedalia, Missouri for the purpose of collecting a surreptitious DNA sample from the defendant. On September 24, 2022, the agents sat one table over from the defendant and his family at a Chinese buffet restaurant. The agents were seated mere feet away in a booth. The agents discreetly placed a video camera on their table, pointing towards the defendant's table.

7. The agents recorded the defendant's meal, the use of various utensils by the defendant as well as the defendant's departure after he was finished eating.

8. At one point, the defendant finished drinking a soda and the server collected his cup and accompanying straw. Sergeant Vasquez then collected the straw and cup from that server.

9. Once the defendant had completed his meal, a fork and an additional straw were collected.

10. Special Agent McKone travelled with the two straws and fork back to Denver where he booked the items into property.

11. The following day, the items were submitted for forensic biology and DNA analysis by the Denver Crime Lab. The People will note that in his motion, defendant states this testing was completed by the Colorado Bureau of Investigation ("CBI"). The People believe that was simply an error but do wish to clarify that the testing was completed by the Denver Police Department Crime Lab for accuracy of the record.

12. It is common sense that the defendant had left the utensils behind with the expectation that others would gather them up and dispose of them; that is the main reason many people go out to eat in the first place (to avoid cleaning up after the meal).

13. The nature of the items themselves (utensils owned by the restaurant for one-time use by patrons), in combination with the commonsense proposition that one leaves one's mess behind at a restaurant, supports the legal conclusion that the saliva and utensils left behind were in fact abandoned by the defendant. Because they were abandoned, the defendant no longer possessed any Fourth Amendment interests in the items or the DNA material on them.

14. The single-source male DNA profile deposited by the defendant onto the straw matched that of the semen and/or seminal fluid evidence collected in 2004 from victim A.R.'s body. The investigative lead generated by the FIGG investigation was thus confirmed through Short Tandem Repeat DNA testing that is routinely admitted as evidence in criminal trials in Denver District Court and across the world.

15. More specifically, with regards to the confirmatory testing comparing the male DNA on the surreptitiously-collected straw to that from A.R.'s rape kit, the Denver Crime Laboratory reported that the rape kit DNA is consistent with one male contributor and matches the DNA profile obtained from the surreptitiously-collected straw.

16. A September 30, 2022 lab report indicated that the male DNA profile from the rape kit was estimated to be at least 30 octillion (the number "30" followed by 27 zeroes) times more likely if the sample originated from the donor of the male DNA obtained from the straw than if it originated from one unknown, unrelated person. The lab concluded that, based on that data, and in the absence of identical twins, the probability was greater than 99.9% that the male DNA obtained from the items could be attributed to the same source (the defendant).

17. Even though the defendant's identity as the assailant of A.R. had already been confirmed through state-of-the-art DNA testing, yet another confirmatory DNA swab was taken from the defendant on November 15, 2022 pursuant to a Rule 16(II)(a)(1) motion granted by the County Court. A lab report dated October 18, 2023 confirmed the earlier results and linked the defendant to a sperm fraction found on A.R.'s robe (which she put on after being sexually assaulted by the defendant), to the sperm fraction from her vaginal swabs and to the sperm fraction from the vaginal drainage.

18. The statistics of the October 18, 2023 report were the same as those contained in the September 30, 2022 report (set forth above).

III. OVERVIEW OF THE PEOPLE'S ARGUMENT

1. Defendant has advanced multiple challenges to the surreptitious collection of his DNA from the discarded restaurant utensils. The Fourth Amendment challenge has been addressed in a separate defense motion (D-3) and the People have filed a separate response to that pleading as well (*See People's Response to "Mr. Groshart's Motion to Suppress Evidence Obtained as a Result of an Illegal Search and Seizure of Mr. Groshart's DNA Material [D-3]*.

2. Here, the People respond to the defendant's challenge of the same conduct as "outrageous government conduct" as set forth in "Mr. Groshart's Motion to Dismiss due to Outrageous Government Conduct [D-4]".

3. The gist of the defense motion is that the surreptitious collection of the defendant's utensils, and the DNA testing and analysis that occurred thereafter, was "so outrageous that it deprived Mr. Groshart of due process of law."

4. Defendant asks this Court to dismiss the present case based upon the collection of abandoned items in which he lacked any reasonable expectation of privacy, repeatedly noting that law enforcement did not obtain a search warrant prior to collecting the items.

5. Because these items were abandoned and therefore not protected by the Fourth Amendment, the collection of the utensils was not a search and no search warrant was required. To build on that concept, the conduct of law enforcement agents in this case was not only in accord with the constitution, it also does not even come close to approaching outrageous governmental conduct.

IV. ANALYSIS & APPLICABLE LEGAL STANDARDS

1. "The United States Supreme Court has recognized that possibility that under certain circumstances, the conduct of law enforcement agents may be so outrageous as to violate a defendant's constitutional right to due process of law." *People in Interest of M.N.*, 761 P.2d 1124 (Colo. 1988) (citing *United States v. Russell*, 411 U.S. 423 (1973)).

2. Colorado also recognizes the due process claim of outrageous governmental conduct. *People v. Medina*, 51 P.3d 1006, 1011 (Colo. App. 2001) (citing *Bailey v. People*, 630 P.2d 1062 (Colo. 1981)).

3. "Outrageous governmental conduct, which bars prosecution under due process principles, is conduct that violates fundamental fairness and is shocking to the universal sense of justice." *Medina*, 51 P.3d at 1011.

4. Whether the circumstances presented bar prosecution under principles of due process is for the trial court to determine based upon the totality of facts in a given case. This determination lies within the trial court's discretion and will not be overturned on appeal absent an abuse of discretion. *Id.*

5. *People in Interest of M.N.* involved an officer working undercover as part of a high school undercover drug investigation who convinced a minor to commit several crimes (stealing tires and obtaining marijuana). Defense sought a dismissal based on the undercover officer's conduct, and the Colorado Supreme Court held that the undercover officer's conduct was not extreme and outrageous amounting to a denial of due process, and that the undercover officer's actions were not grounds for dismissal.

6. In *United States v. Russell*, the law enforcement behavior at issue was a government agent providing a legal drug to the defendant which the defendant then used to manufacture an illicit drug. The United States Supreme Court held that that the agent's contribution of the ingredient did not violate fundamental fairness shocking to a universal sense of justice as required by the due process clause of the Fifth Amendment.

7. Here, agents did not engage in any illegal behavior or "entrapment" when collecting the defendant's discarded eating utensils. The behavior at issue falls far short of undercover or entrapment-style policing tactics, and even the examples of such tactics employed in *People in Interest of M.N.* and *Russell*, did not rise to the level of outrageous governmental conduct violative of due process.

8. An example of what ***is*** considered outrageous governmental conduct can be found in *Rochin v. People of California*, 342 U.S. 165 (1952).

9. In *Rochin*, law enforcement agents entered the defendant's home after suspecting he was selling narcotics. Once inside, the agents forced open the defendant's bedroom door, observed him swallow two pills off his nightstand, and then forcibly jumped on him attempting to extract the pills which the defendant had just swallowed. When that was unsuccessful, the agents handcuffed the defendant and transported him to a hospital where they directed a physician to "pump" his stomach, forcing an emetic solution through a tube into the defendant's stomach to produce vomiting against his will. Two capsules containing morphine were produced in the vomit and were subsequently used to convict the defendant of possessing a preparation of morphine.

10. The United States Supreme Court reversed Rochin's conviction, citing the Due Process Clause of the Fourteenth Amendment in holding that a state's convictions cannot be brought about by methods that offend a sense of justice. *Id* at 172-173. The circumstances present in *Rochin* did "more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically." *Id.* at 172. Rather, the Court found that the conduct of the law enforcement agents in *Rochin* "shock[ed] the conscience." *Id.*

11. The circumstances before the Court in the present case stand in stark contrast to those in *Rochin.* Here, the defendant's home was not forcibly invaded by officers. His stomach contents were not forcibly extracted against his will. Rather, he was out at a public dining establishment eating a meal and voluntarily left behind biological material on his used and discarded eating and drinking utensils. Law enforcement agents in the present case did not have any interaction with the defendant prior to collecting his discarded utensils;

they were not forceful, coercive nor deceitful. They simply collected items that the defendant had abandoned after the defendant had finished his meal and left the restaurant.

12. As our Supreme Court held in *People v. Hillman*, 834 P.2d 1271 (Colo. 1992), a citizen does not have a reasonable expectation of privacy in garbage left for collection adjacent to a public sidewalk. In that opinion, the court noted that "[t]here is no invasion of privacy in the observation of that which is plainly visible to the public." *Id.* at 1277 *citing Hoffman v. People*, 780 P.2d 471, 474 (Colo. 1986).

13. Here, the defendant abandoned his DNA and his eating utensils (which were owned by the restaurant, not by him) in plain view of the public. There is no analytical difference between garbage abandoned next to a public sidewalk and garbage left behind on a restaurant table; it is all refuse, left behind for someone else to contend with.

14. In the present case, the agents acted in accordance with the constitution when collecting the surreptitious sample. They lawfully collected evidence which confirmed the identity of the defendant as the perpetrator, and then used that lawfully obtained evidence to form the basis for a probable cause warrant to arrest him.

15. The surreptitious collection at issue was an essential step to confirm the defendant was in fact A.R.'s assailant. It would have been imprudent to make an arrest for such a serious offense (or *any* offense) without first confirming the lead developed by the FIGG investigation. Only after the surreptitious sample confirmed his identity was the defendant arrested and extradited to Denver to face charges.

16. Furthermore, while the defendant took great care to conceal his identity by wearing a mask and gloves and collecting and removing evidence from the crime scene in 2004, the reality is that his DNA profile has been in the possession of law enforcement since A.R. collected her vaginal drainage after she was raped on March 30, 2004. The profile was simply unidentified.

17. The conduct at issue here falls far short of the type so outrageous as to shock the conscience. It is difficult to articulate a theory under which the conduct at issue could even be labeled as "overzealous police activity." Rather, the sample collection undertaken in this case is fairly commonplace – so much so that there is a term of art used to describe exactly what the agents did here – collected a "*surreptitious sample*." The People submit that the actions taken by law enforcement to solve this case and apprehend a violent rapist 18 years after the fact are far more likely to receive society's approval than shock the universal sense of justice.

WHEREFORE, the People respectfully request that this Honorable Court DENY defense motion D-4 "Mr. Groshart's Motion to Dismiss Due to Outrageous Government Conduct."

Dated: January 8, 2024

Respectfully submitted,
BETH MCCANN
District Attorney

By: */s/ McKenna E Burke*
McKenna Elizabeth Burke, Reg. No. 49550
Senior Deputy District Attorney

CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2024, a true and correct copy of the foregoing was:

☒ E-served through CCE to party of record listed below

☐ Placed in the United States mail to party of record listed below

☐ Filed with Denver County Court and emailed to party of record listed below

☐ Filed with Denver County Court and will be provided upon request for discovery

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By: /s/ *MCKENNA BURKE*