

DISTRICT COURT, WELD COUNTY, COLORADO P.O. BOX 2038 901 9 <sup>TH</sup> AVENUE GREELEY, COLORADO 80631 (970) 475-2400	DATE FILED: September 26, 2018
<b>THE PEOPLE OF THE STATE OF COLORADO</b>  vs.  <b>CHRISTOPHER LEE WATTS, DEFENDANT.</b>	<b>▲ COURT USE ONLY ▲</b>
	Case Number: 18CR2003  Division: 5
<b>ORDER C-16 GRANTING PEOPLE’S MOTIONS “K” &amp; “O” FOR NON-TESTIMONIAL IDENTIFICATION PROCEDURE PURSUANT TO COLORADO RULES OF CRIMINAL PROCEDURE, RULE 16 II (a)(1)</b>	

The Court has considered the People’s Motions, the defendant’s responses, and the People’s Reply. The People seek the collection of nontestimonial identification from the defendant, namely: (1) buccal swabs, (2) digital photographs of both right and left hands, (3) major case finger/palm/foot prints, and (4) a clear and visible Polaroid photograph. This Court has previously made a probable cause determination based on an affidavit in support of a warrantless arrest for the crimes contained in the criminal Information.

Once judicial proceedings against a defendant have been initiated, a prosecution request for nontestimonial identification evidence is governed by *Crim. P. 16 (II)(a)(1)*. *People v. District Court*, 664 P.2d 247 (Colo. 1983). *Crim. P. 16 (II)(a)* states:

Notwithstanding the initiation of judicial proceedings, and subject to constitutional limitations, upon request of the prosecuting attorney, the court may require the accused to give any nontestimonial identification as provided in Rule 41.1(h)(2).

*Crim. P. 41.1(h)(2)* defines “nontestimonial identification” which includes, but is not limited to, identification by fingerprints, palm prints, footprints, measurements, blood specimens, urine

specimens, saliva samples, hair samples, specimens of material under fingerprints, or other reasonable physical or medical examination, handwriting exemplars, voice samples, photographs, appearing in lineups, and trying on articles of clothing. “This rule does not require an affidavit or a showing of special circumstances to require a defendant to give nontestimonial evidence during a trial.” *People v. Angel*, 701 P.2d 149 (Colo. App. 1985).

### *Analysis*

The United States and Colorado Constitution protect individuals from unreasonable search and seizure of their person, homes, or property. See U.S. Const. amend. IV; Colo. Const. art. II, section 7. This constitutional protection extends to nontestimonial identification evidence such as saliva samples taken from a defendant for forensic testing. *People v. Lehmkuhl*, 117 P.3d 98, 101-102 (Colo. App. 2004). “To determine the constitutionality of a seizure we must balance the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interest alleged to justify the intrusion.” *Tennessee v. Garner*, 471 U.S. 1, 8 (1985); *People v. McCullough*, 6 P.3d 774, 779 (Colo. 2009). The question is whether the “totality of the circumstances justifies a particular sort of search or seizure.” *Garner*, 471 U.S. at 8-9. What constitutes a reasonable search “depends upon all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.” *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985).

In the present case the People seek buccal swabs, finger/palm prints, digital photographs of both the right and left hands of the defendant, a Polaroid photograph of the defendant, and the collection of inked foot prints of both the right and left feet of the defendant. Buccal swabs taken from the defendant will presumably result in the establishment of defendant’s deoxyribonucleic acid (“DNA”) profile. “DNA evidence has obvious value to the criminal

justice system”. *People v. Clark*, 214 P.3d 531, 536 (Colo. App. 2009). DNA evidence is a valuable tool in “preventing a significant number of violent crimes in Colorado and in solving a number of unsolved crimes in Colorado”. C.R.S. 16-23-102(1)(a)-(c).

The use of buccal swabs to collect DNA for forensic analysis is a minimal intrusion on a person. See *Boling v. Romer*, 101 F.3d 1336, 1340 (10<sup>th</sup> Cir. 1996) (finding use of saliva and blood tests to be “minimal intrusion” similar to fingerprinting). Likewise, the collection of finger/hand/foot prints and the taking of photographs of the defendant are minimal intrusions of his person.

The prosecution asserts that during the course of this criminal investigation, numerous items of evidence have been collected and are in the process of being sent to the Colorado Bureau of Investigation (“CBI”) for forensic testing. Additionally, upon receiving these items of evidence the CBI developed possible bare foot impressions using their normal latent print process for non-porous items. According to the prosecution these impressions were developed from a bag which was collected at the scene where the named victim’s bodies were located.

### ***Conclusion***

After considering the Affidavit in Support of Warrantless Arrest, the People’s motions, and the defendant’s objections this court concludes that the benefit to the People, and potentially to defendant, of complete and accurate forensic testing and analysis outweighs the minimal intrusion on defendant by submitting to the requested nontestimonial identification procedure. Based on the totality of the circumstances the collection of the requested nontestimonial evidence is justified. Probable cause exists for the collection of the requested items. The collection of this nontestimonial evidence will not constitute a violation of the defendant’s constitutional rights.

**WHEREFORE**, agent(s) from the Frederick Police Department and/or the District Attorney's Office are authorized to collect the requested nontestimonial evidence. The agents/investigators collecting the evidence shall not question the defendant. The agents/investigators are authorized to communicate with the defendant, through counsel, to the extent of providing instructions regarding the procedure. Additionally, the defendant shall submit to providing a clear and visible Polaroid photograph which will be attached to the original finger/palm/foot print card. The People shall provide counsel for the defendant reasonable notice of the date, time and location of the collection process. Counsel and/or their investigators for defendant may be present with the defendant during the collection procedures.

Dated: September 26, 2018

BY THE COURT:

A handwritten signature in black ink, appearing to read "Marcelo A. Kopcow". The signature is written in a cursive style with a large, sweeping flourish at the end.

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Marcelo A. Kopcow  
District Court Judge