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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**COUNTY OF SAN DIEGO, SOUTH COUNTY DIVISION**

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff

Vs.

\_\_\_\_\_

Defendant.

\_\_\_\_\_

) CASE NO. \_\_\_\_\_

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**MOTION TO EXCLUDE  
EVIDENCE NOT DISCLOSED  
PER PENAL CODE 1054 ET SEQ  
AND DISMISS THE CASE**

[i.e. Court Ordered Discovery has not been provided]

**Defendant's Motion in Limine No.  
\_\_ of \_\_**

Judge

Trial Date: January 11, 2010

Time: 8:30 a.m.

Dept: 16

**I.**

**INTRODUCTION**

On **October 27, 2009** Judge ..... ordered the prosecution to produce certain evidence (many items were stipulated to be provided by the prosecution, but the focus herein are the items **not** produced). The court transcript is attached hereto as Exhibit "A".

**II.**

**THE PROSECUTION HAS NOT PRODUCED THE FOLLOWING:**

**(NOTE:** These requests track the defense discovery Notice of Motion):

- A. **ITEM # 6:** All alcohol tests 30 days before this arrest – so 5/19/09 to 6/19/09).
- B. **ITEM # 7:** All subject use log numerical data 30 days before this arrest.
- C. **ITEM # 8:** All subject use data for this machine 30 days before this arrest.
- D. **ITEM # 9:** The EC/IR breath machine manual (not to be reproduced and to be retained after trial)
- E. **ITEM # 10:** All EC/IR compliance records, 30 days before this arrest.
- F. **ITEMS # 13 & 14:** Scientific articles and teaching literature were agreed to be produced but not received, neither has the identity of the scientific prosecution expert.

**III.**

**DEFENSE REQUESTS THAT ALL BREATH MACHINE EVIDENCE, INCLUDING NUMERICAL BREATH MACHINE TEST RESULTS FOR BE PRECLUDED AND BARRED FROM THIS TRIAL**

Defense Counsel requests all breath machine evidence be precluded and barred from this trial because the prosecution has failed to produce the evidence **ordered by Judge .....** on **October 27, 2009.**

The Defense also moves to **exclude untimely** evidence; in violation to **PC §1054 et seq;** and **in violation of** the **court's discovery motion orders** and **Due Process of Law.** Specifically, the defense moves to exclude breath machine numerical results for

\_\_\_\_\_.

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IV.

**THE DEFENSE MOVES TO DISMISS THE CASE FOR THE FOLLOWING REASONS:**

A. **DISMISSAL IS APPROPRIATE ( REFUSING TO COMPLY/ DESTROYED EVIDENCE)**

Dismissal is proper for refusing to comply with a discovery order when the effect of such refusal is to deny defendant's right to Due Process. (People v. Broome (1988) 201 Cal.App.3d 1479, 1479; Dell M. v. Superior Court (1977) 70 Cal.App.3d 782.)” (People vs. Brophy (1991) 5Cal.App.4<sup>th</sup> 932, 937.). Sanctions are also appropriate when the prosecution has lost or destroyed evidence. See *Arizona v. Youngblood* (1988) 488 US 51, 56; *Del M. v. Superior Court* (1977) 70 Cal App 3d 782. (dismissal is appropriate).

B. **INTENTIONAL DESTRUCTION WARRANTS DISMISSAL**

Material evidence that is destroyed requires a dismissal, even without proving bad faith. *California v. Trometta* (1984) 467 US 479.

C. **BAD FAITH DISTRUCTION VIOLATES DUE PROCESS AND WARRANTS DISMISSAL**

When bad faith destruction of evidence occurs (absent materiality) Due **Process** requires a **dismissal**. This includes the failure to preserve evidentiary material *Arizona v. Young Blood* (1988) 488 US 51. The San Diego District Attorney's office has been previously warned and chastised for such discovery violations. See *People v. Garcia* (1993) 17 Cal app 4<sup>th</sup> 1169.

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D. **FAILURE TO PRESERVE AND COLLECT EVIDENCE VIOLATES DUE PROCESS**

The failure to **collect** potentially exculpatory evidence violates the Due Process clause. *Miller v. Vasquez* (9<sup>th</sup> Cir 1989) 868 F 2d. 1116, 1120; *Arizona v. Youngblood* (1988) 488 US 51; *Commonwealth of the Northern Marinia Islands v. Joseph Bowie* (Jan. 10, 2001) 2001 Daily Journal D.A.R. 385 (Government failure not to investigate evidence violated Due Process) (Hereafter “Bowie”).

E. **THE PROSECUTOR HAS A DUTY TO LEARN THE TRUTH**

Prosecutors have a duty to learn of any favorable evidence known to the police. The prosecution must protect and preserve the integrity of the court and criminal justice system. *Harrison v. US*\_(1968) 392 US 219, 224; *Mooney v. Berger* (1935) 294 US 103, 104 (Suppression of impeachment evidence); *Alcorta v. Texas* (1957) 355 US 28 (false impression created by prosecutor).

**APPLICATION:**

Here on **October 27, 2009** the Honorable Superior Court Judge ..... **ordered** the prosecution to provide defense counsel discovery as indicated above and in the attached **Hearing Transcript** attached hereto as **Exhibit A**. Knowing this, the prosecution **still failed** to produce the discovery/evidence as ordered, including PAS device test results from the PAS test given by Defense Witness ....., PAS calibration logs, identification records, maintenance and repair records, manuals, subject use log numerical data, subject use data for 30 days prior to the arrest, all alcohol tests for

30 days before the arrest, or evidence of any kind of any prior bad acts of any Defense Witnesses.

**Consequently the defense moves that all breath machine evidence and untimely evidence, including all numerical breath machine test result for \_\_\_\_\_, be precluded and barred from this trial because the prosecution has failed to produce the evidence ordered by Judge..... on October 27, 2009, and that the case be dismissed.**

As stated in “*Bowie*”, supra, the government cannot sit idly by if potentially exculpatory evidence exists. Failing to investigate is illegal. They must collect evidence and they must provide it to defense counsel. The prosecution was put on notice, and in their refusal to comply with the Court Order, they failed to disclose evidence in their possession. This is bad faith, pure and simple. *Gilbert v. California* (1967) 388 US 263, 266-7; *US v. Mara* (1973) 410 US 19, 21; *US v. Thomann* (1<sup>st</sup> Cir 1979) 609 F 2d 560, 562.

**F. HARD BLOWS YES, FOUL BLOWS NO**

In conclusion, Justice Brandeis said, “*hard blows yes, foul blows no*”. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. *Olmstead v. US* (1928) 277 US 438, 485.

The authentic majesty in our constitution derives in large measure from the rule of law, principal and process instead of person. (“*Bowie*”, supra).

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*“Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the character of its own existence.” Mapp v. Ohio* (1961) 367 US 643, 649.

Respectfully Submitted,

Date: January 11, 2010

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**Richard L. Duquette, Esq.**  
Attorney for Defendant

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