DISTRICT COURT EL PASO COUNTY, COLORADO Court Address: 270 South Tejon Street Colorado Springs, CO 80903	DATE FILED April 28, 2026 1:54 PM CASE NUMBER: 2007CR5429
The People of the State of Colorado **v.** **DEBORAH NICHOLLS, Defendant**	▲ COURT USE ONLY ▲ Case Number: **2007CR005429** Division: **511**

COURT'S ORDER RE: DEFENDANT'S MOTION TO VACATE CONVICTIONS BASED ON ALLEGED RULE 16 AND BRADY VIOLATIONS

THIS MATTER comes before this Court for a hearing on Defendant's MOTION TO VACATE CONVICTIONS BASED ON ALLEGED RULE 16 AND BRADY VIOLATIONS. Having reviewed the Motion, Response, Reply, the Court's record and having received and considered the evidence, and being sufficiently advised in the premises, the Court enters the following Orders:

In 2003 the Defendant's husband, Tom Nicholls, was charged with burning down their house – murdering their three young children in the process – to collect insurance proceeds because the couple was experiencing financial problems and using drugs. The prosecution maintained that defendant conspired with her husband to commit the crimes. He was tried separately and convicted in an earlier proceeding.

The fire occurred around 2 a.m., while Defendant was at a bar operating her karaoke business. Defendant's husband was home with the children. He escaped and sustained a broken arm and non-life-threatening burns. Firefighters responded and found the living room engulfed in flames. They discovered the couple's three children. Two of the children died at the scene and the third child died the hospital.

Defendant arrived at the house after the fire was extinguished. She claimed to have left burning candles inside the house that her husband must have forgotten to put out. According to witnesses, she showed little concern for the children and did not attend their funerals. Investigators later found cans of Goof Off – a highly flammable solvent – in the house and shrubs. A trained fire detection dog alerted to several areas in the debris in the home where samples were taken for laboratory testing. Forensic experts testified that the fire had been intentionally set at several places in that room.

Defendant and her husband submitted insurance claims for loss of their house and personal property. They specifically inquired regarding "child-riders" to his life insurance policy that would have covered a child's accidental death. Defendant was particularly upset upon learning that the policy did not include such coverage.

The husband confessed to his cellmate that he acted with his wife to burn down the house, kill the children, and collect the insurance proceeds. The cellmate testified that the husband said defendant had sprayed the couch with Goof Off, he then had his pajama-clad children sit on the couch, and he later went downstairs and lit the living room on fire. The prosecution presented the husband's varied explanations of his actions and the fire.

The couple maintained that the fire was the accidental result of his not having extinguished candles left burning earlier that night. The cellmate's account of the fire and refuted the couple's explanation.

Defendant guilty at trial and was sentenced to three consecutive life terms for the murders, twenty-four years in prison for conspiracy, and one year each for possessing methamphetamine, using a controlled substance, and attempted theft, to be served consecutively.

The Defendant appealed her conviction. The Court of Appeals affirmed the judgment. The Supreme Court affirms the judgment of the Court of Appeals. The Mandate was issued July 6, 2017.

The Defendant has filed the Petition for Post- petitions for post-conviction relief on July 10, 2018, and three Supplemental pleading filed October 27, 2022, May 2, 2023, and April 15, 2024.

One of the issues raised in Defendant Petition was that the Prosecution withheld exculpatory evidence. Defendant's further claims that the Prosecution violated its constitutional duty to disclose the exculpatory evidence and is, therefore, entitled to a new trial under *Brady v.*

Maryland, 373 U.S. 83, 87 (1963). The suppression of evidence favorable to the accused constitutes a violation of due process when that evidence is material to guilt or punishment. *Brady.* A valid *Brady* claim requires proof of three elements: first, that the evidence in question is favorable to the accused, either because it is exculpatory or impeaching; second, that the State suppressed the evidence, whether intentionally or inadvertently; and third, that the defendant suffered prejudice as a result. *Stickler v. Greene*, 527 U.S. 263, 281–82 (1999); *Banks v. Dretke*, 540 U.S. 668, 691 (Colo. 2004).

The prejudice element is satisfied only where the suppressed evidence is material within the meaning of *Brady*. *Douglas v. Workman*, 560 F.3d 1156, 1173 (10th Cir. 2009) (per curiam) (quoting *Banks v. Dretke*, 540 U.S. at 691. Evidence is deemed material if there exists a reasonable probability that, had it been disclosed, the outcome of the proceeding would have been different. *Kyles v. Whitley,* 514 U.S. 419, 433 (1995)**.** Such a probability is present only when the nondisclosure undermines confidence in the verdict. *Id.* at 434. In assessing materiality, courts must consider the impact of the undisclosed evidence in light of the entire record. *United States v. Agurs*, 427
U.S. 97, 112 (1976). For materiality, the evidence cannot just be "cumulative," *United States v. Herrera*, 51 F.4th 1226, 1245 (10th Cir. 2022) (citing *Douglas*, 560 F.3d at 1174), or "additional impeachment evidence." *Nuckols v. Gibson*, 233 F.3d 1261, 1267 n.8 (10th Cir. 2000) (quoting *Tankleff v. Senkowski*, 135 F.3d 235, 251 (2d Cir. 1998)). To the contrary, the statements must "Significantly enhanc[e] the quality of the impeachment evidence." *Douglas*, 560 F.3d at 1174.

The prosecution is not required to disclose its legal research or records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the prosecuting attorney or members of his legal staff. *See People v. Dist. Court,* 790 P.2d 332, 335–36 (Colo.1990) (reasoning that the prosecutorial work product protection found in Crim. P. 16(I)(e)(1) mirrors the common law rule and thus applies to opinion work product created in anticipation of litigation). However, the work product doctrine is not absolute.

Colorado has adopted the proposition that the prosecution's communications with its consulting experts are not discoverable if they do not contain exculpatory and material information. "The protection of prosecutorial work product, under Crim. P. 16(I)(e)(1), extends to opinion work product prepared by the prosecution in anticipation of any criminal prosecution." *People v. Angel*, 277 P.3d 231, 233 (Colo. 2012). As the Colorado Supreme Court has clearly

recognized, "exculpatory material that is contained in prosecutorial work product is 'automatically discoverable.'" *People v. Angel*, 2012 CO 34, n.7, 277 P.3d 231, 238 (quoting *People v. Vlassis*, 247 P.3d 196, 198 (Colo. 2011).

The Defendant bears the burden of presenting evidence to establish a *Brady* violation. *See Foster v. Ward*, 182 F.3d 1177, 1191 (10th Cir. 1999). If the Defendant fails to establish ANY ONE of the prongs required, their claim fails, and the conviction stands.

This Order addresses Defendant's claim that the Prosecution violated its constitutional duty to disclose exculpatory evidence, thereby requiring a new trial under *Brady.* Defendant's Petition for relief pursuant to Crim. P. 35(c), along with its addendums, raises additional grounds for relief. However, for purposes of this Order, the Court will not consider those other grounds. While certain findings and conclusions set forth herein may be relevant to other claims, this Order does not resolve those claims, i.e., Newly Found Evidence and Ineffective Assistance of Counsel. The Court has not conducted a hearing on any issues outside the scope of the *Brady* claim addressed herein.

The exculpatory evidence relates to:

1. Information generated by Tom G. Griffin (Griffin), a Colorado Bureau of Investigation (CBI) chemist, and received by the Prosecution in 2007 before Defendant's trial, which was not disclosed to the Defendant until 2023.

2. Information in the form of an email from the prosecutor, Will Bain (Bain), to Timothy Nicholls' trial counsel before his trial. Neither the email nor its contents were ever disclosed to Defendant's counsel before her trial. It was disclosed to Defendant's counsel for the first time on March 27, 2024.

The Prosecution contends that Griffin's notes were created solely to assist the prosecution in trial preparation. According to the Prosecution, these notes contain no new information, facts, or exculpatory material, and are therefore not discoverable. They further assert that memoranda prepared by consulting experts exclusively to help the prosecution evaluate the opinions of a defense expert should not be subject to disclosure.

The Prosecution's position overlooks the direct impact Griffin's notes and Bain's email have on the credibility of key trial evidence. Clearly, based on the evidence at trial, the suppressed evidence is exculpatory, and it undermines the prosecution's material witness and supports the Defendant's expert analysis.

The evidence at trial fell primarily within three categories. One significant category of evidence involved the forensic findings collected and analyzed from the location of the fire. Investigators obtained physical samples from the scene, which were tested for the presence of accelerants and other indicators of arson. This scientific evidence played a crucial role in establishing the cause and intentional nature of the fire and provided and firmed up the other evidence that the fire was caused by an ignitable accelerant.

The second category of evidence centered on a confession made by the Defendant's spouse, Timothy Nicholls, to a fellow inmate. This confession included details of the crime and directly implicated the Defendant in the events leading to the fire and the resulting deaths.

The third category of evidence focused on the Defendant's behavior following the deaths of her children and the destruction of the home. Particular attention was given to how the Defendant responded to the tragedy and her apparent eagerness to pursue insurance benefits related to both the children's deaths and the fire. These actions were considered relevant in assessing motive and intent.

The evidence within these categories mutually reinforces each other's credibility. Similar to a three-legged stool, the evidence within these categories mutually reinforces each other's credibility. A three-legged stool is inherently balanced; however, if one leg is absent, diminished, or compromised, the entire structure becomes unstable and may collapse. The defendant asserts that the Prosecution possessed exculpatory evidence, which was not disclosed, that would have undermine the Prosecution's forensic evidence. Defendant further asserts if the defense had this information at the time of the trial, it would have potentially led to a different outcome at trial.

GRIFFIN'S NOTES

The suppressed Griffin's notes could have led to evidence by the defense to challenge the credibility or validity of the prosecution's case. Specifically, it could have addressed:

- The Reporting of Xylenes by Netwal
- Equating the finding of Xylenes to the finding of an ignitable liquid
- Canine Alerts and their admissibility
- Fire Investigators' opinions of arson
- Undermining Lentini's testimony because he opined there was contamination

The Reporting of Xylenes by Netwal

Griffin's notes were drafted by him to assist in trial preparation for the prosecution to understand the defense expert, John Lentini's (Lentini), report and analysis. Griffin also indicated

that, unlike retired CBI chemist Tom Netwal (Netwal), he would not have reported the presence of xylenes. Upon analysis, Griffin determined that the samples tested by CBI in 2003 did not contain ignitable liquids. His notes further show that he consulted with expert forensic chemist Reta Newman, who could have provided additional insight into the data and findings of chemists Netwal, Griffin, Crippen, and Lentini.

Griffin was employed by the Colorado Bureau of Investigation (CBI) from 1982 to 2009, where he worked in the Trace Elements Division and specialized in fire debris analysis. He worked alongside Netwal.

Griffin's role in the Defendant's case was to help the prosecution interpret data and prepare the prosecutor for trial concerning the scientific direct or cross-examination. Griffin compiled notes in 2007 of his preparation and contact and discussions with the prosecutor. These notes documented his opinions related to contamination and addressed the reliability of laboratory results. The materials specifically revealed that Griffin had concerns (1) regarding Newal reporting xylene in the tested debris and (2) regarding potential contamination the samples used by Western Forensics ("Western"), the laboratory that reported positive results for ignitable liquids.

Primarily the notes were drafted to assist in trial preparation for the prosecution to understand the defense expert, John Lentini's, report and analysis. Griffin's notes and scientific analyses bolstered opinions of defense expert Lentini. While the defense was aware of Lentini's belief there had been contamination that rendered Western's positive results unreliable, the defense was not aware that Griffin came to the same conclusion.

Griffin's notes revealed, unlike retired CBI chemist Netwal, Griffin would not have reported the presence of xylenes. Griffin determined that the samples test by CBI in 2003 did not contain an ignitable liquid. These notes were material because the defense could have scrutinized how Netwal detected and reported the presence of xylenes, potentially corroborating Lentini's testimony revealing the flaws or uncertainties in Netwal's findings and reporting his findings. Griffin's notes further show that he consulted with chemist Reta Newman (Newman), who could have also provided additional insight at trial into the data and findings of chemists Netwal, Griffin, Crippen, and Lentini.

Newman is the director of the Pinellas County Forensic Laboratory and the District Six Medical Examiner's Office in Largo, Florida. She has been doing fire debris analysis since 1991. Newman, based on information provided to her, would not have reported the presence of xylenes:

Q. So when you're saying, "I would be very leery of identifying -- and you put in big letters "anything"?

A. Anything.

Q. Would it be fair to say that includes calling Xylenes?

A. Absolutely.

Q. And in your professional career, have you ever written a report saying, "I found xylenes consistent with an ignitable liquid"?

A. I have had a report where I have reported a light aromatic product, which happened to contain a product like Goof Off but it was a liquid and it was super strong and there was no other matrix constituents.

Q. So you don't just give reports and say, "I found xylenes"?

A. No.

July 15, 2025, 35(c)Transcript, p. 104, ll 10-25.

Q. Okay. Okay. Let's talk about ASTM 1618?[1]

A. Yes.

Q. What is ASTM?

A. ASTM is an organization that makes standards for all kinds of activities. They're standards on how to make glass for your car windows. Well, there's also standards in fire debris -- or I'm sorry. In forensic science. It's call the E30 Committee on Forensic Science. And they publish standards for the identification and analysis of fire debris.

Q. And why do they need to publish the standards?

A. The importance of standards -- and this standard predates this report. But in 2005 the National Academy of Sciences issued a report on forensic science. And really kicked us in the teeth when it came to pattern sciences saying we don't have enough standardized methods. And the standardized methods that we do have are not detailed enough. And that's why the OSAC was made. We need to shore up forensic science from the science standpoint. So the role of ASTM is now and then was to improve forensic science by giving more clarity and more direction and trying to get more uniformity from one laboratory to another.

[1] ASTM E1618 is used at the laboratory level as the technical standard for one specific type of forensic analysis that may be needed during an investigation.

Q. Does ASTM 1618, and essentially Version .01, which is the earliest version. Does it specify how to report the results?

A. Version 2001 was a very, I'm going to call it a light version. It was 30,000 feet. And it really didn't give enough direction, but it does have a small area on reporting.

Q. And is Tom Griffin's report consistent with the standards of ASTM 1618-01?

A. No.

Q. Why is not consistent?

A. Because one of the cautions in that standard is that you should not report compounds or ignitable liquids consistent with. So to say something is consistent with Goof Off, or came from Goof Off, or are also found in Goof Off is considered prejuditory (sic).

Q. And so they specifically in the language say, "Do not use this language"

A. Yes, sorry. I've invented a word.

Q. So reporting and saying you're finding something consistent with an ignitable liquid, when you actually haven't found the ignitable liquid, can be misleading?

A. It's very misleading.

Q. Did you also have a chance to review Griffin's notes in this case?

A. Yes.

Q. And after you took a look at his notes, can you tell us if you agree with what Mr. Griffin was writing in his notes?

A. He had quite a lot of notes there. A lot of them said that he would not call these xylenes. He would not have reported them. I certainly agree with that. . .

July 15, 2025, 35(c)Transcript, p. 106 L. 7 to p. 109, l. 11

Equating the finding of Xylenes to the finding of an ignitable liquid

The apparent strategy of the prosecution was to equate the finding of xylenes in the debris to the finding of an ignitable accelerant, specifically Goof-Off.

The Prosecution in its opening state stated or implied the scientific testing verified that an accelerant was used:

> Goof Off is a hydrocarbon-based product. And you'll hear the chemistry behind it and you'll hear how that compares to the chemistry that was later determined from the samples 1 through 8.

Trial Transcript: Vol. VII, p. 59, ll 2-5.

> Again, think about Erin. Think about the eight spots that Erin identified as accelerants. And then as the investigators continued to look through the house, they went into the

defendant's bedroom and they found some men's clothing right here, shoes and pants. Shoes and pants that were sent to the lab, and **the chemist said that they tested positive for hydrocarbons, accelerants.** (emphasis added)

Trial Transcript: Vol. VII, p. 68, ll 20-25.

During the presentation of Netwal's testimony at trial, Netwal and the prosecution interchanged the "Goof-off" and "xylene":

Q. In terms of other products, the heavy to the light petroleum distillates, how quickly will xylene evaporate?

A. Well, this big picture being that they're in the light to lower molecular weight products, they will evaporate considerably faster and evaporate considerably faster than the heavy molecular weight products like in gasoline, the very heavy oils and tars, things that have -- they're almost solid in nature, almost like asphalt. You could -- asphalt we find from a petroleum product is -- also can be a flammable liquid accelerant, but it will be around for considerably a lot longer than something of small molecular weight like **Goof Off -- xylenes, I should say**.

Q. So will **Goof Off or xylenes** evaporate, in and of itself, at room temperature over a period of time?

A. They will initiate and evaporate in and of themselves, depending on the temperature, the quantity, the depth of the pool, the amount of heat that -- probably never mentioned the temperature heat. All of those can be factors that influence the rate of evaporation. (emphasis added)

Trial Transcript: Vol. XII, p. 123, pp. 3-21.

Q. Now, Mr. Netwal, you said predominantly xylenes. Can you give us an idea, in the chemical makeup of **Goof Off, how much of it is xylene**?

A. Well, virtually -- might use the term "virtually" all of it, except for the exception of the ethylbenzene. You see that there's hardly any other entities being displayed here. There's a little bit of possibly a trace of toluene or benzene, alkene. There's very little of anything but xylenes and ethylbenzenes displayed in that graph. Very simple graph. (emphasis added)

Trial Transcript: Vol. XII, p. 111, l. 22 to p. 112, l. 5

Another example of evidence introduced by the Prosecution to promote the concept that the finding of xylenes is proof of an ignitable liquid was the testimony at trial from Fire Investigator Kirk Schmitt:

Q. And how about the testing results from CBI? How did those factor in?

A. Most of the samples came back as being **positive for xylene**. I think number 4 and number 7 came back as not negative, but there just wasn't enough product there to get a determination on that. But they came back for xylene. **And we later found out**

that xylene was a base chemical in that Goof Off cans -- the product of Goof Off that we -- those cans that we had found earlier in our investigation.

Q. Now, Tom Netwal. Have you met Tom Netwal?

A. Yes, ma'am, I have.

Q. And he'll be the first to say, "Well, I can't tell you where those xylenes come from." So how is it that you use them in the fire investigation?

A. Well, keep in mind -- I mean, as we go through this process, the fact that we have the alert, that's one piece of the puzzle. **The fact that we have our samples come back and they're positive for a chemical that is consistent with the chemical that we've found in the house is another piece of the puzzle**. Our patterns are another piece of the puzzle. But no one -- I mean, no one piece of that puzzle is going to cause us to reach our determination. I mean, you have to look at all your evidence in this totally and say, "How does all this fit together?" So obviously the fact that we found a product that was consistent with xylene, we found a can outside, we found that small can downstairs in the family room, **Erin alerted on the furniture and on the floor around the furniture -- that particular alert appeared to contain a xylene-based product consistent with Goof Off --** I mean, those were all pieces of the puzzle that we used to factor in our overall conclusion. (emphasis added)

Trial Transcript: Vol. XII, p. 284, l. 25 to p. 286, l. 6

Jeffrey Berino (Berino) testified at trial for the prosecution. Berino is a senior fire investigator employed by Investigative Engineers out of Arvada, Colorado. Mr. Berino was originally hired by Tim and Defendant to provide an independent opinion on the cause and origin of the fire. He initially found the cause to be undetermined. However, he changed his opinion after obtaining materials from the prosecution, including the positive lab results for ignitable liquids from Western, which was not introduced at trial. In his report he stated that the ignitable liquid that was used was Goof-Off.

Dr. John DeHaan (DeHaan), a forensic scientist specializing in fire and explosion investigations. DeHaan had significate experience in fire investigation and chemical analysis of fire debris. The prosecution qualified him as an expert in fire investigation and fire reconstruction. DeHaan conclude that the fire was the result of an accelerant:

Q. Now, one of the things that you indicated that you reached your analysis-- or your final conclusion on was that **there was the presence of a volatile hydrocarbon product that matched a product found at the scene**, right?

A .**Yes**

Q. **And that's the xylene that we've talked about, correct?**

A. **Yes**

Q. The mere presence of xylene in fire debris in and of itself doesn't tell you that there was an accelerant, correct?

A. That's correct.

Q. So it was that, with the fact that **there was the can found at the scene, is what led you to at least part-- in part that conclusion, correct?**

A. **Yes.** (emphasis added)

Trial Transcript: Vol. XX p. 150, ll. 11-24

DeHaan also testified that the laboratory testing found that the debris was positive for an accelerant:

> There were also laboratory reports indicating **an ignitable liquid had been present**. (emphasis added)

Trial Transcript: Vol. XX p. 95 l. 19

The only laboratory result that was positive for an accelerant was from Western. That laboratory result was not introduced at trial. However, by testifying that test result positive and since the only laboratory results introduced at trial were from Netwal, the jury could draw a reasonable inference that Netwal's test result found an accelerant.

The defense could have used the suppressed Griffin notes to dispute the prosecution's assertion that xylenes automatically indicate an ignitable liquid, thereby weakening a core element of prosecution's case.

Canine Alerts and their admissibility

At trial there was substantial evidence of canine alerts of ignitable liquids. The issue arose during trial whether the canine alerts were reliable or unvalidated when the alerts are not corroborated by scientific testing. The prosecution introduced evidence that a trained canine had alerted at multiple locations in the living room to show that an ignitable liquid was used to deliberately start the fire.

Some of the Prosecution's Fire Investigators claimed that dogs were better than laboratory equipment at detecting ignitable liquids.

Fire Investigator Jerry Means claimed that dogs are better than laboratory equipment at detecting ignitable liquids:

> You talk to tons of chemists, including the chemists that work in the laboratory at the Colorado Bureau of Investigation, and **I have yet to come across a chemist that does not**

believe that the dog's nose is more sensitive than their laboratory equipment. So we don't 1 want-- but we still have to confirm those samples with the laboratory, so we don't want those unconfirmed samples. (emphasis added)

Trial Transcript: Vol. X, p. 23, l. 22 to p. 24, l. 2

Fire Investigator Kirk Schmitt made similar claims in response to a juror question:

Q. Have you ever seen Erin false alert?

A. I have not ever seen Erin false alert. There are occasions when Erin will alert on something and we pull a sample and the sample comes back that they can't find anything. But we don't consider that a false alert, because we -- it's a known, documented fact that the olfactory senses of a lab are sometimes much more sensitive than even most sensitive laboratory instruments. So often times, hypothetically, if we collect ten samples, Erin alerts on all ten samples, and one of those samples come back, the lab will actually put a notice on that particular sample that says, "We were not able to detect the presence of this substance, but that does not mean that the substance was not there at the time of the collection." Because even the lab technicians know that their instruments are not as sensitive as that dog's nose. So kind of a longer answer, but, no, I have never seen Erin false alert. I think her alerts are solid. Sometimes even more sensitive than we -- than we're able to test with laboratory equipment.

Trial Transcript: Vol. XII, p. 55, l. 17 to p. 56, l. 10

Robert Toth (Toth) , a certified fire investigator with the International Association of Arson Investigation, was called as a rebuttal witness at trial, after Lentini had testified that Netwal should have reported his results as negative. Toth was asked whether his arson opinion would change if CBI's results had been negative. Toth said his opinion would not change, because of the dog alerts at the scene and his belief that their sensitivity is higher than that of a laboratory.

Toth opined that Erin detected an accelerant regardless of the laboratory results.

However, DeHaan testified only lab testing can make the distinction between Pyrolysis byproducts (e.g., xylenes from burning plastics, foams, adhesives) and Ignitable liquid residues (e.g., gasoline, lighter fluid, kerosene), not canines, the state introduced evidence that laboratory testing of samples, taken from where the canine alerted, revealed the presence of xylenes.

The prosecution introduced evidence that laboratory testing of samples taken from areas where the canine alerted revealed the presence of xylenes. Even though the presence of xylenes does not necessarily indicate an ignitable liquid residue, the prosecution suggested that xylenes detected supports the canine alerts for accelerants. It further bolstered and validated the opinions of the Fire Investigators that Erin had detected an ignitable liquid.

The Guide for Fire and Explosion Investigations by the National Fire Protection Association (NFPA 921), is the premier fire investigation guide and is considered to embody the standards in the field. *See e.g. Farmland Mut. Ins. Companies v. Chief Indus., Inc.*, 170 P.3d 832, 836 (Colo.App. 2007); ***28** *United States v. Hebshie*, 754 F. Supp. 2d 89, 127 n 39 (D. Mass. 2010); *United States v. Aman*, 748 F. Supp. 2d 531, 536 (E.D. Va. 2010); National Fire Protection Association, Guide for Fire and Explosion Investigations (NFPA 921) (2017)

According to the NFPA 921, fire investigators should utilize a systematic approach "based on the scientific method." NFPA 921, §§4.1, 4.2. As part of this method, "[p]roperly trained and validated ignitable liquid detection canine/handler teams" may be used only to assist "in the location and collection of samples for laboratory analysis for the presence of ignitable liquids." NFPA 921, §§15.5.10, 17.5.4.7, 17.5.4.7.5, 17.5.4.7.6.

However, the Court of Appeals held that the fire investigators' deviations from NFPA 921 went to the weight of their testimony, not its admissibility." *People v. Perkins,* 533 P.3d 971, 981 (Colo. App. 2023), *cert. denied*, 2024 WL 358138 (Colo. Jan. 29, 2024). The Court further noted that "NFPA 921 expressly provides that it contains only nonmandatory provisions and merely sets guidelines and recommendations for fire investigations, not requirements." *Id.*

Thus, under Colorado law the Fire Investigator could opined that fire was the result of ignition of an accelerant regardless of the laboratory result. However, to the extent that the Fire Investigators' opinions at trial were based in part on laboratory results, Griffin's notes could have been used to impeach those opinions. In this way, the notes would serve as evidence challenging the Fire Investigators' trial testimony.

Had the defense been provided with Griffin's notes, Newman could have been called to impeach the concept that "dogs are more sensitive" testimony. Further, she could have offered evidence that the laboratory results were negative for ignitable accelerants, and the xylene should not have been reported and, therefore, counter the inference created by the prosecution case that dog alerts were confirmed by the laboratory results.

Newman testified at the 35(c) hearing about her peer reviewed research on the sensitivity of accelerant detection. While her article noted that, in a controlled experiment using clean samples and the best-trained canines, dogs alerted to gasoline at levels below her laboratory's detection limits. However, she emphasized that those findings cannot be extrapolated to real-

world fire scenes. In the field, canine alerts occur in contaminated environments where pyrolysis products abound, and it is unknown what the dog is actually detecting:

> **Q.** Have you heard fire investigators say that dogs are better than the labs?
>
> **A.** Of course. Dogs are cuter than the labs.
>
> **Q.** So is it accurate to say that the dogs are better than the labs?
>
> **A.** We can't say that. We can say -- we don't know what the dogs are hitting on. Even to this day there's all kinds of research to find out why they are indicating on some samples and not others. And there's still a lot of false positives. Not so much false negatives. But the National Fire Protection Agency, NFPA[2], who writes the standards for fire investigations came out with a statement. And they put into their NFPA 921 document that says unless the laboratory verifies it, you can't count on a canine hit. Because we have shown through various studies that they -- the same as I showed you, the exact same compounds that are in gasoline are in charred carpet and other things. So what are they hitting on and why or what combination? We don't know that and, therefore, we can't make that assumption. So the value in the canines – and they are very valuable -- is to find the samples for the lab. But it's not for determining if a ignitable liquid was actually present.

July 15, 2025, 35(c)Tr., p136, l. 17 to p137, l. 15.

The suppressed evidence could have raised questions about the reliability or interpretation of canine alerts, which the prosecution relied on to support their theory of arson.

Fire Investigators' opinions of arson

The Prosecution contend that the Fire Investigators Berino, Toth, and Schmitt testified at the 35(c) hearing that the substance of Griffin's notes and any opinions they contained would not have changed their own trial testimony or conclusions. The critical question is not whether Griffin's notes would have changed the investigators' opinions, but whether their nondisclosure deprived the defense of an opportunity to challenge those opinions at trial.

At trial, the fire investigators partially based their conclusions—that the fire was ignited by an accelerant—on laboratory results. If the defense had received Griffin's notes, it could have used them to impeach, or cast doubt on, the investigators' credibility by questioning the reliability of their methods and conclusions testified to at the trial, not a future trial. Such impeachment could have prompted the jury to question the basis for the investigators' opinions, potentially

[2] Colorado courts have recognized NFPA 921 as an accepted reference for fire investigators and a reliable scientific method.

affecting the jury's assessment of the prosecution's case. . Ultimately, the standard is whether there is a reasonable probability that disclosure of the evidence would have created enough doubt to undermine confidence in the outcome of the trial.

Undermining Lentini's testimony because he opined there was contamination

Lentini opined that Western Laboratory's results were invalid due to debris contamination before its testing. Because the prosecution did not call Crippin, the chemist from Western Laboratory, to present these results, the contamination issue was technically irrelevant. Nevertheless, despite Griffin agreeing with Lentini about the contamination, the prosecution still challenged Lentini's credibility based on his opinion regarding contamination:

> Q. Let's talk about that contamination. So what is it today, Mr. Lentini? Are they in the right ratios or not?
>
> A. They are not. They are not in the right ratios, but they're close.
>
> Q. When you submitted this report a year-and-a-half ago, to a court of law, you were not correct?
>
> A. That's correct.
>
> Q. All right. So now -- and then it's your opinion that somehow these children's clothes were contaminated?
>
> A. That's correct.
>
> Q. **What evidence do you have that they were contaminated?**
>
> A. They're all the same. They were not properly stored.
>
> Q. Okay. You'd agree with me that an allegation of contamination to a law enforcement agency is kind of a big one?
>
> A. It is. But you know what? As -- if we want to get into the contamination, I found a ton of contamination when I did the subsequent analysis of the strips and -- when I did the analysis of the strips from another laboratory that hasn't testified here. (emphasis added.)

Trial Transcript: Vol. XXVI, P. 209, ll. 4-23

Obviously, if the defense was in possession of Griffins notes they could have bolstered Lentini's opinion concerning contamination.

BAIN EMAIL

The Bain Email stated the following:

> Can you tell Dennis of some Brady information I got yesterday from Tom Netwal. Netwal said that the xylenes he found could also be consistent with background material from the fire. He, of course, also says it is consistent with the use of goof-off as an accelerant.
>
> Also, netwal (sic) say that he "probably" (it's been 4 years so he can't say for sure) reported the xylenes specifically because he knew about the goof-off. He probably wouldn't have reported it had he not known about the can of goof-off.

This email was attached to a pleading in Mr. Nicholls' case, but neither the email nor its contents were ever disclosed to Ms. Nicholls' counsel before trial.

The Will Bain email informed Mr. Nicholls' counsel of Netwal's statement that the xylenes he detected could be consistent with background material from the fire, and as he testified at Ms. Nicholl's trial is consistent with Goof Off. Of particular importance is Netwal's statement that "probably" would not have reported the xylenes if he had not known about the existence of the can of Goof Off at the scene. This information would have been beneficial and exculpatory in challenging Netwal's testimony that xylene was found in the fire debris analysis. Clearly, this information would have been beneficial and exculpatory in challenging Netwal's testimony.

The fact that Griffin disagreed with the results of a fellow CBI chemist, Netwal, and essentially agreed with Lentini, the suppressed evidence is exculpatory. Had this information been presented at trial, it could have cast doubt on Netwal's conclusions and bolstered the Defense's argument that Netwal should not have reported xylenes.

The evidence at trial included numerous references to "xylenes" from experts and the prosecution. Mr. Netwal, the prosecution's chemical expert, testified that he could not determine whether the xylenes found in the fire debris were evidence of an ignitable liquid or merely a byproduct of the fire itself. Despite this uncertainty, he also stated that xylenes were consistent with Goof Off, which may have led the jury to believe his findings supported the presence of an ignitable liquid. By presenting both possibilities without clear resolution, Mr. Netwal's testimony may have caused confusion among jurors, potentially leading them to infer that the presence of xylenes was definitive evidence of an ignitable liquid when it was not.

The prosecution conflating that the detection of xylenes to Goof-Off supported the claim that Goof-Off was used to start the fire. This bolstered and corroborated Hiram Church's

testimony that Tim Nicholls confessed to using Goof-Off, thereby increasing the reliability of his testimony.

Clearly, the suppressed evidence in question is favorable to the Defendant and is exculpatory and the prosecution suppressed the evidence believing it to be undiscoverable work product. The work product doctrine does not apply because the suppressed evidence is exculpatory pursuant to *Brady.*

SUPPRESSED EVIDENCE IS MATERIAL

Under *Brady* and subsequent cases, suppressed evidence is considered material if there exists a reasonable probability that, had it been disclosed, the outcome of the proceeding would have been different. This probability is present only when nondisclosure undermines confidence in the verdict (*Kyles*, 514 U.S. at 433–34; *Banks v. Dretke*, 540 U.S. 668, 691 (2004)). Courts assess materiality by evaluating the impact of the undisclosed evidence in the context of the entire trial record (*Douglas v. Workman*, 560 F.3d 1156, 1173 (10th Cir. 2009)).

Having established the importance of laboratory results in shaping expert testimony, it is crucial to examine how suppressed evidence would have impacted the credibility of these witnesses. The suppressed evidence would have fundamentally altered the examination and perceived reliability of both prosecution and defense expert witnesses. For example, defense expert John Lentini's testimony would have been bolstered by corroborating statements from other forensic scientists (Griffin and Newman), who agreed that the lab results did not support the presence of ignitable liquids and that reporting xylenes was scientifically inappropriate. Conversely, prosecution expert Tom Netwal's testimony would have been impeached, exposing confirmation bias and methodological flaws.

Regarding Fire Investigators, the issue is not whether Griffin's notes or Bain's email would have changed investigators' opinions. Rather, the key question is whether there is a reasonable probability that, if the evidence had been disclosed to the defense before trial, it could have been used to impeach the investigators' testimony at the trial in this matter. The laboratory results identifying xylenes or an ignitable liquid in the fire debris formed a central pillar of the prosecution's case. Fire Investigators relied on these results to support the theory of arson and to

link the defendant to the alleged use of an accelerant. The suppressed evidence directly undermines the credibility of the fire investigators' opinions as presented to the jury.

Regarding the dog alerts, the reliability of dog alert evidence and laboratory findings served as a fundamental basis for the prosecution's case and influenced the jury's perception of guilt. The People argue and the testimony at the 35(c), *Brady* Hearing, that Fire Investigators Berino, Toth, and Schmitt, stated that the content of Griffin's notes and any purported opinions therein would not have altered their opinions or testimony at trial. In hindsight that may be true. However, at trial the fire investigators relied, in part, on the laboratory results in their opinions that the fire was initially ignited by an ignitable liquid. The key question is whether there is a reasonable probability that, if the evidence had been disclosed to the defense before the trial, it could have been used to challenge the investigators' testimony at the trial in this matter, rather than at some future trial. The suppressed evidence goes directly to impeaching the opinions of the fire investigators testified to at trial.

The suppressed evidence directly undermines the credibility of the claim that the dog alerts identified locations where ignitable liquids were used to start the fire. Further. the suppressed evidence may have led to the exclusion of the dog alert evidence from consideration.

In its Opinion issued in the direct appeal, the Court of Appeals found that laboratory testing detected the presence of an accelerant, which was significant in refuting the defense's evidence in the case:

> Physical and forensic evidence corroborated the cellmate's account of the fire and refuted the couple's explanation. Chemical analysis performed on the children's pajamas, defendant's jeans, and debris from the fire confirmed the presence of an accelerant.

This finding by the Court of Appeals underscores the importance of this evidence in establishing the prosecution's theory of arson and linking it to the defendant. At trial, there were no laboratory results introduced that detected any accelerants in the debris. This finding also highlights the mistaken equivalency made between xylenes and ignitable liquids, which may have led the jury to incorrectly associate the presence of xylenes evidence at trial with intentional arson.

Disclosure of the suppressed evidence would have enabled the defense to challenge the validity and weight of laboratory findings, potentially precluding their admission or, at a minimum, undermining their credibility. This, in turn, would have weakened the prosecution's expert testimony regarding the presence of accelerants and diminished the perceived reliability of corroborating witnesses, such as Hiram Church. The suppressed evidence would have substantially weakened or eliminated the logical connection between laboratory results, canine alerts, and the prosecution's theory that Goof-Off was used as an accelerant. As a result, the prosecution's case would have been destabilized, undermining its overall credibility.

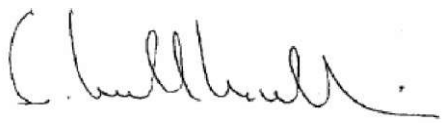
The materiality standard requires that suppressed exculpatory evidence must be of such significance that it could reasonably lead to an acquittal. Courts have consistently held that material evidence is that which, when considered alongside evidence presented at trial, is likely to create a reasonable doubt regarding the defendant's guilt (*People v. Tomey*, 969 P.2d 785, 787 (Colo. App. 1998)). The suppressed exculpatory evidence in this case undermines the core foundation of the prosecution's case—whether by neutralizing key witnesses or by demonstrating a lack of reliable laboratory confirmation—and thus meets the materiality standard. Accordingly, there exists a reasonable probability that the outcome would have been different had the evidence been disclosed, satisfying the prejudice element under *Brady*.

IT IS THEREFORE ORDERED that this matter shall be set for an evidentiary hearing for the Court to take evidence on the remaining issue so that the Court can resolve those issues.

IT IS FURTHER ORDERED that the parties set this matter for a status and setting conference.

SO ORDERED on this 28th day of April 2026.

BY THE COURT



R. MICHAEL. MULLINS
District Court Senior Judge