WORD COUNT: 3,774

COLORADO COURT OF APPEALS
101 W. Colfax Avenue, Suite 800
Denver, CO 80203

Denver County District Court
No. 07CR6091

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellee,
v.

WILLIAM DION WEBSTER,
Defendant - Appellant.

Case No. 09CA2304

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REPLY BRIEF

CERTIFICATE OF COMPLIANCE

COURT OF APPEALS, STATE OF COLORADO, 101 W. ColfaxAve., Denver, CO 80203 Denver County District Court No. 07CR6091 **THE PEOPLE OF THE STATE OF COLORADO**, **Plaintiff-Appellee,** **v.** **WILLIAM WEBSTER,** **Defendant - Appellant.**	
Eric A. Samler (#32349) Hollis A. Whitson (#32911) For the Defendant - Appellant **AS ALTERNATE DEFENSE COUNSEL** Samler & Whitson, P.C. 1127 Auraria Parkway, Suite 201B Denver, Co. 80204 303-670-0575 (phone) 303-534-5721 (fax)	Case No. 09CA2304

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g). It contains 3774 words.

Eric A. Samler

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ARGUMENT

I. THE TRIAL COURT ERRED IN NOT SUPPRESSING MR. WEBSTER'S STATEMENTS MADE TO POLICE.

Standard of Review

The People disagree with Mr. Webster's assertion that the Standard of Review adopted by The Colorado Supreme Court is that an appellate court is in as good a position as the trial court to review police interrogation videotapes and determine whether or not they indicate a voluntary waiver of rights. AB at 11-12, citing *People v. Madrid*, 179 P.3d 1010 (Colo. 2008). In order to dispel any confusion that may arise from both sides quoting mere phrases from the opinion, Mr. Webster provides it here:

> Ordinarily, we defer to the trial court's factual determinations in suppression cases, provided they are supported by competent evidence in the record. *People v. Gennings,* 808 P.2d 839, 844 (Colo.1991). However, '[w]hen the controlling facts are undisputed, the legal effect of those facts constitutes a question of law which is subject to *de novo* review.' *People v. Valdez,* 969 P.2d 208, 211 (Colo.1998). Thus, where the statements sought to be suppressed are audio- and video-recorded, and there are no disputed facts outside the recording controlling the issue of suppression, we are in a similar position as the trial court to determine whether the statements should be suppressed. *See People v. Platt,* 81 P.3d 1060, 1067 (Colo.2004); *People v. Al–Yousif,* 49 P.3d 1165, 1171 (Colo.2002); *People v. Dracon,* 884 P.2d 712, 719 (Colo.1994).
>
> Because Madrid's statements were audio- and video-recorded, because there are no disputed facts outside that record bearing on the issue of

> suppression, and because the trial court did not make detailed factual findings, we undertake an independent review of the facts of this case to determine whether Madrid's statements were properly suppressed in light of the controlling law.

Id., 179 P.3d at 1013-14. This standard was applied by this Court in *People v. Lucas*, 232 P.3d 155 (Colo.App. 2009), *cert. denied*, 09SC758 (Colo. 2010) and is now well-established.

The People agree that they have the burden of establishing a knowing, voluntary, and intelligent waiver of the right to remain silent. AB, at 12-13. *See Miranda v. Arizona,* 384 U.S. 436,475 (1966) (calling the government's burden "heavy").

Argument

A. THE PRE-VIDEOTAPE STATEMENTS

With respect to the exchange between Detective Palombi and Mr. Webster at and outside Mr. Webster's cell, the People argue: (1) that the exchange did not constitute "interrogation" or result in any pre-*Miranda* statement being admitted, but was merely a request to engage in an interview, AB at 15-16, citing *Taylor* and *Rhode Island v. Innis*, 446 U.S. 291 (1980); (2) that, if the exchange was interrogation, it was "by inadvertence," a failing in the wording used by the Detective that amounted to a "good faith *Miranda* mistake," AB at 1-17, and (3)

under *Colorado v. Spring*, 479 U.S. 564 (1987), it is not unconstitutional to mislead a defendant about the subject of investigation while *Mirandizing* the defendant. AB at 17-19.

1. Was the initial conversation "interrogation?" As to the first argument -- that the conversation did not constitute "interrogation" -- Mr. Webster covered this issue thoroughly in the Opening Brief and the People's brief requires no further response.

2. Does a "good faith *Miranda* mistake" make later *Miranda* warnings effective? As to the second argument -- the alleged "good faith *Miranda* mistake" -- Mr. Webster disputes that there is a "good-faith" exception that applies here. In *Missouri v. Siebert*, the Court discussed *Elstad v. Oregon*, 470 U.S. 298 (1985) and its use of the term "good-faith *Miranda* mistake." Such a mistake is

> not only open to correction by careful warnings before systematic questioning in that particular case, but posing no threat to warn-first practice generally. *See Elstad, supra,* at 309, 105 S.Ct. 1285 (characterizing the officers' omission of *Miranda* warnings as 'a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will')...

Missouri v. Seibert, 542 U.S. 600, 615 (2004). The *Siebert* Court set forth a number of factors that courts may consider in distinguishing "mistakes" from unconstitutional conduct that required suppression in *Siebert*:

> The contrast between *Elstad* and this case reveals a series of relevant facts that bear on whether *Miranda* warnings delivered midstream could be effective enough to accomplish their object: the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first. In *Elstad*, it was not unreasonable to see the occasion for questioning at the station house as presenting a markedly different experience from the short conversation at home; since a reasonable person in the suspect's shoes could have seen the station house questioning as a new and distinct experience, the *Miranda* warnings could have made sense as presenting a genuine choice whether to follow up on the earlier admission.

Id., 542 U.S. at 615-16. Thus, the focus is on the defendant, and whether or not the pre-*Miranda* conduct was of such a nature that the *Miranda* warnings were ineffective. There is no such thing as a free-standing "good faith *Miranda* mistake" that excuses police pre-advisement conduct, if such conduct actually tends to make the later warnings ineffective. Thus, if the later *Miranda* warnings would be expected to be ineffective as a result of the pre-warning police conduct, the defendant has a *Miranda* issue that is separate and distinct from any claimed

involuntariness of the statements themselves.

3. Was it is unconstitutional to mislead Mr. Webster? The People claim that it is acceptable for police to mislead the defendant about the subject matter of the investigation, so long as they accomplish this "trickery" through "mere silence." AB at 18, *quoting Colorado v. Spring*, 479 U.S. at, 576-577. But here, the "trickery" was not the result of silence; it was the result of direct statements on the part of the detective, i.e., mentioning that he was asking about "the case," and may have said "a robbery," and untrue statements about the course of the investigation. Tr. 6-19-08 p. 4-5, 49, 54-57, 58-59. At the outset of the video, the detective told Mr. Webster that he was being investigated for an aggravated robbery, but, again, did not tell him about the kidnaping charge. Tr. 6-26-08, p. 62, 64, 71. During the interview, the detective lied to Mr. Webster. He told him he had been identified by the victim, when in fact the detective knew that Mr. Odom had picked out a different photo from the array, not Mr. Webster's. Tr. 6-26-08 p. 65-66, 68-69. This type of deceit crosses the line. *See People v. Pease,* 934 P.2d 1374, 1378-1379 (Colo. 1997)(noting that *Colorado v. Spring, supra,* held that "sometimes affirmative misrepresentations by the police could invalidate a waiver....") (quoted in Opening Brief at p. 14). *See also People*

v.Vickery, 229 P.3d 278 (Colo. 2010) ("[t]he Court in [*Colorado v. Spring*, 479 U.S. 564, 576 n.8 (1987)] suggested, without deciding, that an affirmative misrepresentation by law enforcement officials as to the scope of the interrogation may affect a *Miranda* waiver's validity.").

The People say that Mr. Webster is imposing too onerous a burden on law enforcement -- i.e., the alleged burden to tell a defendant about each and every contemplated charge. AB at 20, n. 4. However, this is not true. Mr. Webster is not slicing hairs or urging ridiculous burdens on the police. There is a very, very substantial difference between robbery on the one hand, and kidnaping on the other. Kidnaping can carry a mandatory sentence of life imprisonment. It is qualitatively different to say that a person accuses the defendant of theft from the person, i.e. robbery, than to say that the person was kidnaped and then robbed.

B. THE VIDEOTAPED STATEMENTS.

Mr. Webster also argues that the People failed to meet their burden of proving that the waiver of his rights and his statement were involuntary. The People essentially respond that "a single police misrepresentation about the evidence against a suspect does not render his or her statement involuntary." AB at 23, *citing People v. Zamora*, 940 P.2d 939, 942 (Colo. App. 1996); *People v.*

Speer, 216 P.3d 18, 22 (Colo. App. 2007), *rev'd on other grounds,* 255 P.3d 1115 (Colo. 2011).

The People suggest that this Court should discount the import of *People v. Hopkins*, 774 P.2d 849 (Colo. 1989) because it does not mention the suspect's awareness of the subject of the police interrogation. AB at 19, n. 3. Yes, it does. The court explained that the defendant was being interrogated about his roommate's involvement in check frauds, and then the police distinctly changed the subject and clearly told the defendant that the new topic was burglaries he allegedly committed. He was then *Mirandized* after being made aware of that new subject.

The People are also wrong about *People v. Kaiser*, 32 P.3d 480 (Colo. 2001). AB at 19, n. 3. Prior to *Miranda* warnings, the defendant was told that the officers wanted to question her about the conduct of another person (Timothy Stead) in alleged sexual activity with a teenage boy. The defendant let the police in her house and then spoke with them about Stead. The police clearly then changed the subject to inquire about the defendant's sexual activity, including a photograph that the police had found that depicted the defendant in sexual activity with the teenager. The police were honest with the defendant about the subject of

the proposed interrogation at the time they read the *Miranda* warnings. Thus, both Hopkins and Kaiser demonstrate the correct protocol, in which the defendant is clearly told the nature of the allegations at the time he or she is *Mirandized*. Thus, the nature of the allegations, and what the defendant was told, is still a legitimate consideration within the totality of circumstances considered by courts in deciding whether a waiver of rights is knowing, voluntary, and intelligent.

It cannot be over-emphasized that the purposeful failure to mention a kidnaping charge was not a minor technicality: The detective was aware that this was a case involving charges that carry a mandatory life imprisonment, but essentially just advised Mr. Webster that he was being questioned about either a simple robbery or an aggravated robbery. This court must reverse the trial court on this element, because the evidence showed that the detectives relied upon physical or psychological pressure to elicit the statements.

The circumstances were reviewed in the Opening Brief, yet, the People answer only the one issue, i.e. the police failure to tell Mr. Webster the nature of the allegations and the proposed interrogation. *See* Opening Brief at 16-18. Even the comments made by Mr. Webster on the tape show his confusion about the circumstances as presented by the detective. *See ibid*. The *Lucas/Siebert*

factors weigh in favor of finding that there was sufficient continuity to find that the pre-videotaped interrogation in the hall, which was then followed by the video camera being turned on, was part of one continuous interrogation, and the later portion (recorded on videotape) was tainted by the illegality of the first part. The intervening *Miranda* warnings were insufficient to break the taint.

The People do not even attempt to argue that admission of the statements was harmless beyond a reasonable doubt. Of course, it was highly prejudicial, as noted in the Opening Brief.

II. THE TRIAL COURT PERMITTED PLAIN ERROR IN PERMITTING THE TESTIFYING DNA EXPERT TO TESTIFY ABOUT THE WORK AND REPORTS OF A NON-TESTIFYING EXPERT.

Standard of Review. The People believe that Mr. Webster was required to renew his objection at trial in order to raise this issue on appeal. AB at 26. In fact, that is not accurate. Mr. Webster has already said that plain error applies to this issue. However, the People's erroneous analysis should not go uncorrected.

The People rely on two cases for this proposition: (1) a 1994 Colorado Court of Appeals' case about the need to renew a motion for continuance, *People v. Ridenour*, 878 P.2d 23, 28 (Colo. App. 1994), and (2) a 1991 Tenth Circuit

case that is not the law in Colorado, *United States v. Sides*, 944 F.2d 1554, 1559 (10th Cir. 1991). Of course, both of those greatly predate the modern jurisprudence on application of the confrontation clause to testimonial hearsay. More importantly, they are inaccurate. In Colorado, filing of pretrial motions preserves issues for further review without the need for repetitive motions. *Uptain v. Huntington Lab, Inc.*, 723 P.2d 1322, 1330 (Colo. 1986). *See also United States v. Bedford*, 536 F.3d 1138 (10th Cir. 2008), *cert. denied*, 129 S.Ct. 1359 (Feb. 23, 2009) (defendant's motion in limine to exclude expert witness sufficiently preserved his objection for appellate review).

Argument. The People do not attempt to argue that admission of the non-testifying expert's report and information was proper. AB at 27-29. The only claim the People make is that the prejudice was not sufficient to require reversal. That is patently false.

"DNA evidence has obvious value to the criminal justice system." *People v. Clark*, 214 P.3d 531, 536 (Colo. 2009). In a case in which the defense is mis-identification, it defies logic to claim that admission of the DNA evidence was harmless. *See also District Attorney's Office v. Osborne*, __ U.S. ___, ___, 129

S.Ct. 2308, 2316 (2009) ("Modern DNA testing can provide powerful new evidence unlike anything known before.")

The People's theory is that because the nontestifying witness was only a foundational witness, and the results-witness would have still provided testimony that was so overwhelming, it would not have mattered whether or not the non-testifying witness actually testified. This argument, of course, assumes that the DNA evidence would still have been admitted. In fact, absent the nontestifying witness, there would have been no proper chain of custody and no DNA evidence at all. *Cf. People v. Valencia,* 257 P.3d 1203 (Colo. App. March 31, 2011) (reversing conviction because there was not a proper foundation for the DNA expert's testimony).

III. THE COURT ERRED IN NOT EXCLUDING THE DNA EVIDENCE AS A SANCTION FOR THE PEOPLE'S FAILURE TO ABIDE BY CRIM P. RULE 16

The trial court found that the delay in getting the profile from the latex glove was attributable to the People. 7/1/08, p. 11. The People characterize this finding as a "conclusion," and disagree with it. AB at 33. The People also argue that there was no prejudice from the delay caused by the People's failure to obtain a saliva sample from the defendant earlier than June 2008, because it made the

DNA comparison disclosure only six days late; this fact was allegedly because the lion's share of the time was taken up by the tardiness of the DPCL. AB at 33-34.

The People posit no reason to believe that the trial court clearly erred in entering its findings of fact about history of this issue. Those are set forth in the Opening Brief. *See* 7/1/08 p. 11. The issue in this appeal is the remedy. Mr. Webster disagrees with the court's "remedy," i.e., letting him move for a continuance but thereby lose his right to the protection of the Speedy Trial Act. 6/19/08 p. 12; 7/1/08 p. 11, 15-17.

Without citation to the record, the People state that the trial court had dates available within the speedy trial deadline, but that defense counsel did not. AB at 34. That is not Mr. Webster's reading of the record. After finding a discovery violation, the trial court said it would allow the defense to request a continuance and will set it within speedy trial "although [it has] no dates available." 7/1/08 p. 12. It was only at that point the defense counsel stated that he did not have any available dates either, *id.,* pp. 13-15, and the new trial was then set for November 17. 2008. *Id*., p. 17.

Both parties rely upon *People v. Lee*, 18 P.3d 192 (Colo. 2001) e.g. AB at 35, Amended OB at 24, 29. In the Opening Brief, Mr. Webster has already made his case for the remedy he seeks, and discussed the standards and applicability of *People v. Lee*. Had the trial court excluded the DNA evidence, Mr. Webster would not have been forced to waive his statutory speedy trial right in order to protect his consitutional right to effective representation of counsel. He had to give up his right to automatic dismissal under the Speedy Trial Act, Section 18-1-405, C.R.S. *See People v. Gallegos*, 946 P.2d 946, 949 (Colo. 1997), this Court should find that the court erred in allowing the evidence to be used and, if a continuance was the proper remedy, it should have been counted against the State for purposes of the Speedy Trial Act.

IV. THE COURT COMMITTED STRUCTURAL ERROR WHEN IT PERMITTED THE PROSECUTION TO AMEND THE CHARGES, IN THE ABSENCE OF THE DEFENDANT AND WITHOUT A PERSONAL WAIVER OF APPEARANCE FROM HIM.

The People relying on *People v. Mumford,* ___P.3d. ___(08CA0974. Mar. 18, 2010) , available at 2010 WL 961644 *cert. granted* on other issue, 2010 WL 4851476 (10SC295, Nov. 30, 2010) contend that Mr. Webster waived this claim. However, *Mumford* holds just the opposite:

> Defendant finally contends that he was improperly "excluded" from a mid-trial conference. In that conference, counsel and the court discussed an evidentiary issue and two instructional issues.
>
> In fact, defendant was never "excluded" from the conference. At the outset, the court inquired whether defense counsel was "waiving [his] client's prese I don't believe this is an essential stage of the trial."
>
> Defendant now seeks plain error review. But such review generally is available only for claims that have been inadvertently "forfeited" rather than affirmatively "waived." *See Olano,* 507 U.S. at 733, 113 S.Ct. 1770. Defendant contends, however, that only he personally and not counsel could waive a right to be present. This relies on dicta in *People v. Curtis,* 681 P.2d 504, 511 (Colo.1984) (citing dicta from *Penney v. People,* 146 Colo. 95, 360 P.2d 671 (1961)), but several courts have held that counsel may validly waive a defendant's right to be present at a hearing. *Clark v. Stinson,* 214 F.3d 315 (2d Cir.2000); *United States v. Shukitis,* 877 F.2d 1322, 1330 (7th Cir.1989); *United States v. Gunter,* 631 F.2d 583, 589 (8th Cir.1980); *contra State v. Matt,* 347 Mont. 530, 199 P.3d 244, 251 (2008). We will assume that defendant is entitled to plain error review because his claim was merely forfeited and not validly waived.

People v. Mumford, *5, 2010 WL 961644. Thus, as Mr. Webster stated in his Opening Brief, a plain error standard of review applies.

As the Court stated in *People v. Madden*, 111 P.3d 452(Colo. 2005)

> The United States and Colorado Constitutions guarantee a defendant the fundamental right to be notified of the charges made against him. *U.S. Const.* amend. VI; *Colo. Const.* Art. II, Sec. 16; *People v. Cooke,* 186 Colo. 44, 46, 525 P.2d 426, 428 (1974). In Colorado, notice is accomplished through the filing of an indictment, complaint, or information. § 16–5–101, C.R.S. (2004).

Madden, 111 P.3d at 455. The Sixth Amendment states as follows: "In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the

nature and cause of the accusation." U.S. Const. amend VI. A defendant is entitled to personal notice of the charges, and making an amendment on the day of trial, in the defendant's absence, should be regarded as impacting the fundamental fairness of the proceedings.

V. THE COURT ERRED IN GIVING A "MODIFIED ALLEN" INSTRUCTION.

The People's position appears to be that if the "Modified Allen" instruction tracks the approved language, the additional requirement that the court first inquire as to whether additional deliberation would be fruitful is always harmless. In support of this proposition they cite to *People v. Raglin,* 21 P.3d 419, 423 (Colo. App.2000) and *People v. Ragland*, 747 P.2d 4 (Colo. App. 1987). In *People v. Watson,* 53 P.3d 707, 713 (Colo. App. 2001) a division of this Court, citing to *Raglin*, stated that "A prerequisite to giving such a modified-*Allen* instruction is that the trial court inquire of the jurors whether further deliberations would be productive." In *People v. Gibbons,* ___ P.3d. ___(09CA1184,Sept. 15, 2011) *available at* 2011 WL 4089964 this Court stated that "Moreover, the [modified Allen] instruction may be given only in narrowly prescribed circumstances. The trial court must first determine whether there is a likelihood of progress towards a unanimous verdict upon further deliberations. The court must

then exercise its discretion in deciding whether the instruction should be given." To the extent that *Ragland, supra* and *Raglin*, *supra* hold otherwise, they are contrary to this Court's more recent pronouncement on the issue.

The reason for requiring the court to inquire as to whether further deliberations would be fruitful, is to ensure that a juror would not interpret the order from the court to contiue deliberations as being coercive. An Allen instruction both implicitly and explicitly tells the jury that it is their duty to reach a verdict. It had that effect here as it result in an additional conviction. The People's argument that the failure to ask the required question was harmless because the jury hung on two counts falls short. The juror or jurors who changed their position as a result of the instruction might very well have felt that it was their duty to reach a verdict. The insturction may not have the same effect on the juror or jurors who didn't change their votes on the other two convictions. The People's argument is premised on the assumptiont that the juror or jurors who change their vote to guilty, were the same jurors who voted not guilty on the other counts.

The purpose behind inquiring of the jury whether further deliberations might be fruitful is to assure that the jury is not simply "throwing in the towel"

because of the difficulty reaching a consensus. If the jury honestly believes that further deliberations would be helpful, then the Court can be assured that they do not feel compelled to return a verdict on as manny counts possible. The failure to ask the question cannot be harmless

CONCLUSION

Thus, Mr. Webster requests that this Court vacate his conviction and remand for a new trial.

Respectfully submitted this 21st day of November, 2011.

_____
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CERTIFICATE OF SERVICE

I certify that on the 21st day of November, 2011, I dispatched, by first-class mail, the foregoing Opening Brief to:

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