WORD COUNT: 9,302

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

Eric A. Samler, #32349
Hollis A. Whitson, #32911
For the Defendant - Appellant
AS ALTERNATE DEFENSE COUNSEL
Samler & Whitson, P.C.
1127 Auraria Pkwy, Suite 201 B
Denver, Co. 80204
303-670-0575 (phone) 303-534-5721 (fax)

OPENING 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 9302 words.

The brief complies with C.A.R. 28(k): It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

Eric A. Samler

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SUMMARY OF CASE

Mr. Webster and another man, Shane Snyder, were alleged to have kidnaped, beaten, and robbed Jess Odom on October 6, 2007, at the home of his grandparents, Herman and Elva Dexter. Mr. Webster was also convicted of burglary of the Dexter home. Mr. Webster's defense was alibi, and reasonable doubt as to whether he was the man involved in this incident with Shane Snyder.

v. I, p. 23. Mr. Webster was convicted of 1st degree kidnaping (v. I, p. 174), 1st degree assault/deadly weapon (v. I, p. 176), second degree burglary (v. I, p. 178), and impersonating a peace officer (v. I, p. 180), v. I p. 197, and sentenced to a mandatory term of life imprisonment without parole on the first degree kidnaping, and concurrent sentences on the other counts. *Ibid.*

STATEMENT OF FACTS

Mr. Odom's testimony

According to Mr. Odom, he met Mr. Snyder and gave him a ride to his cousin's house. The three men were doing crack cocaine in the car. *Id.*, p. 246-247, 249, 250-251. Mr. Snyder had him pull over and another man got in --- "Mike." Tr. 4-28-09, pp. 245-246, 257, 258, 319-320. See Tr. 4-28-09 p. 131 (testimony of Mr. Snyder). They ran out of drugs, and then went to Mr. Odom's house, where he got a drill and pawned it to get more drugs. *Id.*, p. 259-262, 321. Then they went to "Mike's" home, where he got more cocaine. *Id.*, p. 263. For a while they went to another house. *Id.*, p. 267-268. The men basically spent Thursday evening and then into Friday, driving around and smoking cocaine. *Id.*, p. 264-266, 321. "Mike" was trying to "get rid of" (i.e. sell) some crack, and so he

"guided" Mr. Odom and the other men where to go. *Id.*, p. 269-270. Eventually, Mr. Snyder drove and Mr. Odom fell asleep. *Id*., pp. 270-271.

When they were dropping off Mr. Snyder's cousin, Mr. Odom got out of his car and tried to stop a different car to get help, because he was tired and did not want to be with them anymore, but, he testified, Mike and Mr. Snyder prevented him from doing that. *Id*., p. 272, 319-320. Eventually, everything calmed down and they got back into his truck. *Id.*, p. 273-274. They went down a dead-end road and then Mike hit him. *Id*., p. 277, 328. Mr. Odom said that "Mike" took the keys and ordered him around so that they could get more money or sell drugs. *Id*., pp. 278-279. They made him get in the back seat and they would hit him if he tried to get up. *Id.*, p. 278-279, 323. Eventually, Mr. Odom offered them a shotgun if they would just leave him alone. *Id*., p. 281-282. Mike drove them to Mr. Odom's grandparents' house, *id.*, p. 285, where "Mike" forced him in and tied him up. *Id.*, p. 286-289, 292. Mr. Snyder, and then Mike, smothered Mr. Odom, and then Mike strangled him until he passed out. *Id.*, p. 292-294. When he woke up, there was a plastic bag on his head. *Id.*, p. 294.

Mr. Odom said the "Mike" was twice his size. Tr. 4-28-09, p. 325. He did not see "Mike" in the courtroom. *Id*., p. 296, 315. Mr. Odom picked a different

man's photo out of a photo array. Tr. of 4-28-09, p. 312-315, 335. *See also id.,* p. 47, Tr. 4-29-09 p. 234.

Shane Snyder's testimony

The defense argued that Shane Snyder was the culprit. Mr. Snyder is an admitted drug user and dealer. He pleaded guilty and was serving a four-year sentence for his role in this offense. Tr. 4-28-09 p. 68. Mr. Snyder testified that he asked Mr. Odom for a ride, and if he did drugs; Mr. Odom let him in, and they did drugs. *Id*., p. 70. When they ran out of drugs, Mr. Odom got more from his house. *Id*., p. 72. They ran out again, and then Mr. Odom got a drill from his house and pawned it. *Id.,* p. 74, 80. Mr. Snyder saw "Mike" and asked him for drugs. *Id.*, p. 76-77, 147. Then they went to "Mike's" home, where he got more cocaine. *Id.*, p. 81-82. They were driving around, smoking crack; when they ran out again, "Mike" bought some more crack. *Id.*, p. 85. Mr. Snyder said he was driving, but he wanted to get away from Mike and Mr. Odom was sleeping. *Id*., pp. 80, 89. Mr. Snyder said that Mr. Odom wanted to drive his truck, but they would not let him, and he tried to get help from a passer-by. *Id*., p. 91. So Mr. Snyder let Mr. Odom drive, and they were driving to drop Mike off at his house. *Id*., p. 93. Mr. Snyder said that, when Mr. Odom put the car in 'park,' Mike started

punching Mr. Odom, and said "you are going to smoke my dope and bounce?" *Id*., p. 94. Mr. Odom offered Mike a shotgun. *Id*., p. 94. Mike had Mr. Odom get in the back seat while Mike went into a house and told Mr. Snyder to watch Mr. Odom. *Id*., pp. 95-97. When he came back, he had rubber gloves and asked Mr. Snyder if he was "down to ride." *Id*., p. 99. Mike drove to Mr. Odom's house. *Id.*, p. 100-102. When they got to Mr. Odom's house, Mike tied up Mr. Odom and told Mr. Snyder to strangle him. *Id.*, pp. 106-108.

Mr. Snyder testified that Mike went into the great-grandparents room and told them that he was a cop, and that he was going to search the house. *Id*., p. 108-110. Mr. Snyder said that he found the shotgun and told Mike. *Id*., p. 110. Mike said to "murk" the people, meaning to kill them. *Id.*, pp. 110-111. Mr. Snyder smothered Mr. Odom with a pillow, but not hard, so then Mike did it too, *id*., pp. 112-113, and Mr. Snyder ran next door to a neighbor's house. In court, Mr. Snyder identified Mr. Webster as "Mike." Tr. 4-28-09 p. 132. Prior to trial, he had picked out Mr. Webster's photo from an array. *Id.*, p. 189-190, 204-205. The defense theory was that Mr. Snyder was the person who assaulted Mr. Odom. See Tr. 4-30-09, p. 96.

Other evidence

Mr. and Ms. Dexter testified that, in the middle of the night, they awoke to see a man in the home, saying that Mr. Odom had been caught dealing drugs and that the house needed to be searched. Tr. 4-30-09 p. 28, 29, 69. The man said that he had to interrogate Mr. Odom, and Ms. Dexter and her husband should wait in the bathroom. *Id*., 29-30. The man asked if there were guns in the house, and she told him where the guns were. *Id*., p. 32. When they came out, they found Mr. Odom tied with a plastic bag over his head. *Id*., p. 30. She discovered that her money and a credit card were missing, and the shotgun was also missing. *Id*., p. 42-43. Ms. Dexter picked out a photo that was not Mr. Webster. *Id*., pp. 55-56. In court, she was not asked whether or not Mr. Webster was the assailant.

Mr. Webster told Detective Palombi that he was the drug dealer that was hanging out with Mr. Odom and Mr. Snyder. Tr. 4-28-09, p. 39-40. Mr. Webster said that Mr. Odom was the man driving, and Mr. Snyder was the one who wanted the gun. *Id*., p. 39-40, 41. The detective testified that Mr. Webster said that he was dealing drugs the night of the incident, and that he was probably calling himself "Mike" or "Steve" or "something like that."

Police also found DNA on a tip of a rubber glove that was found inside the Dexter home. Tr. 4-30-09 at 14-15, 80, 83, 113. The DNA was a mixture. Tr. 4-30-09 p. 118, l. 9-11. The major component matched Mr. Webster's DNA. Tr. 4-29-09 p. 124, l. 10-12, p. 165. The statistics were that the chances of such a match from someone who was not Mr. Webster was one in 108 trillion. *Id*., p, 124, l. 23-25. The expert testified that, when DNA is found on an item, it cannot be known how the DNA got there, or if it was transferred from someone or somewhere else. *Id*., p. 134-138. She agreed that the presence of a major component does not even necessarily mean that the major contributor ever touched the item. *Id*., p. 153. The DNA from the pillowcase did not match either contributor to the DNA in the glove. *Id.*, p. 160.

The defense countered that the people were all sharing a crack pipe, and there was a distinct possibility of cross-contamination. Mr. Odom denied that he shared a pipe with anyone, although the other men were all sharing a pipe and passing it around. Tr. 4-28-09 p. 320. Mr. Snyder confirmed this. *Id.*, p. 79. See 4-30 pp. 135-137.

The parties stipulated that Mr. Odom was examined by a physician in the emergency room, and that he underwent surgery on his neck as a result of the injuries he sustained during the incident. Tr. 4-29-9, p. 4-5.

SUMMARY OF ARGUMENT

Because the police affirmatively mislead Mr. Webster about the purpose of the interrogation, his statements to the police were not knowing, voluntary, or intelligent and therefore the court erred in failing to suppress the statements.

Mr. Webster's right to confront the witnesses against him was violated when the court permitted the testifying DNA expert to testify about the work and reports of a non-testifying expert. Mr. Webster filed a request for live testimony pursuant to CRS §16-3-309 and therefore did not waive his rights of confrontation. The court should have excluding the DNA evidence as a sanction.

Mr. Webster had the right to be present when the prosecution, in open court, amended the charges against him and took up other matters as well. Because he did not waive his right to be present, the court committed structural error when it allowed these matters to occur outside of Mr. Webster's presence.

The giving of the modified *Allen* instruction was, under the circumstances, unduly coercive, and resulted in one additional conviction. Because it is unknown

which additional count the jury ended up "agreeing" on as a result of the coercive instruction, the Court must reverse all of the convictions and remand for a new trial.

ARGUMENT

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

Standard of Review

Trial courts determine the circumstances of the interrogation. *People v. Minjarez*, 81 P.3d 348, 353 (Colo. 2003), *citing People v. Matheny*, 46 P.3d 453, 464 (Colo. 2002); *Berkemer v. McCarty*, 468 U.S. 420 (1984). While appellate courts defer to a trial court's resolution of disputed facts, *People v. Miranda-Olivas,* 41 P.3d 658, 661 (Colo. 2001), when constitutional rights are involved, the appellate court's role is greater. *Matheny*, *supra*. The question is whether the court applied an erroneous legal standard or reached a conclusion of law that is inconsistent with or unsupported by the factual findings. *People v. Davis*, 187 P.3d 562 (Colo. 2008).

The 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. *People v. Madrid*, 179 P.3d 1010 (Colo. 2008); *accord*, *People v. Ferguson,* 227 P.3d 510, 513 (Colo. 2010).

Preservation. Detective Palombi interrogated Mr. Webster in police custody on October 11, 2007. Tr. 6-26-08 p. 45-46. The defense filed a motion to suppress statements. v. I, 7-9. See Tr. 6-19-08 (evidence), Tr. 6-26-08 (argument). The defense challenged the entire statement on grounds that it was involuntary, and, additionally, challenged certain statements as being taken in violation of *Miranda v. Arizona*. Tr. 6-26-08 p. 4. The Court denied the motion.

Argument.

The burden of establishing a knowing, voluntary, and intelligent waiver of the right to remain silent is on the People. *People v. Gennings*, 808 P.2d 839, 843 (Colo. 1991). In determining if a waiver is knowing and voluntary, the court must look at totality of circumstances, *Moran v. Burbine*, 475 U.S. 412, 421 (1986); *Colorado v. Connelly*, 479 U.S. 157, 166-68 (1986), to determine if there is an uncoerced choice, *Colorado v. Spring*, 479 U.S. 564, 573 (1987), and to assess if the waiver is not only voluntary, but also knowing and intelligent. *Edwards v. Arizona*, 451 U.S. 477 (1981). The People could not introduce Mr. Webster's statements taken without first showing that he made a voluntary, knowing, and

intelligent waiver of his right to counsel. *Miranda*, 384 U.S. at 475 (calling the government's burden "heavy").

1. Statements made prior to the videotape.

When he was arrested, Mr. Webster was told it was for a parole violation. Tr. 6-19-08 p. 49, 53, 58-60. He had been brought from his cell by an officer, and he stood in the hall, handcuffed; the detective approached him and identified himself as the detective investigating "the case." *Id*., p. 49. The dective asked if he wanted to tell his side of the story. Tr. 6-19-08 p. 4-5. *Id*., p. 54 ("it was, basically, you know, you want to tell me your side of what happened and he said, yes, I said okay, let's go down the hall."), 55. The detective did not remember much, but explained:

> I would have introduced myself, I would have said, I'm the one that's involved in the investigation, I probably would have possibly said a robbery and asked him if he wanted to tell me his side of what happened. I don't -- wouldn't have given him a great deal of information and we wouldn't have had a long question and answer thing, it would have been a simple do you want to tell me your side of what happened here or not. He has the choice.
>
> Q. You don't remember -- you said you may have told him possibly about a robbery but you don't remember?
>
> A. I may have said the word robbery. I don't recall.

Tr. 6-19-08 p. 56. When pressed, the detective explained:

> In the hallway I probably would have said nothing to him. In the room he was in, I would have introduced myself and advised him I was investigating the case, whatever the -- telling him that I was the detective investigating the case, whether I said robbery or not I don't recall, whether he wished to speak to me or not, he said he did, I probably asked him you want to tell me your side of what happened and we went down the hall.

Id., p. 57. The detective did not tell Mr. Webster that he was facing a kidnaping charge that carried a statutory mandatory minimum penalty of life imprisonment. *Id*., p. 60-61, 62. He could not remember if he said that the case was a "robbery." *Id*., p. 58-59.

Prior to a custodial interrogation, the Fifth Amendment requires that the police give a *Miranda* advisement. *Miranda v. Arizona,* 384 U.S. at 444; *People v. Ferguson, supra,* 227 P.3d at 513. In the absence of *Miranda* warnings, a defendant's statements made during the course of a custodial police interrogation are inadmissible. *People v. Wood,* 135 P.3d 744, 749 (Colo.2006); *People v. Platt,* 81 P.3d 1060, 1065 (Colo. 2004). It is undisputed that, prior to the videotaped portion of the interrogation, Mr. Webster was in custody, yet *Miranda* warnings were not given. The exchanges prior to the video camera being turned on were "interrogation" under the constitution. *Rhode Island v. Innis,* 446 U.S. 291, 300-01 (1980). *People v. Madrid*, *supra,* at 1014. *See People v. Gonzales,* 987 P.2d 239, 241 (Colo.1999).

2. Statements on videotape. At the outset of the video, the detective read a standard *Miranda* form. Tr. 6-26-08 p. 46-47. The detective said that he did not make any promisese or threats. *Id*., p. 50-51. The detective told Mr. Webster that he was being investigated for an aggravated robbery, but, again, did not tell him about the kidnaping charge. *Id.*, 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. *Id*., p. 65-66, 68-69.

Even if the waiver is valid, the statement can still be involuntary. "The fact that *Miranda* warnings precede a challenged confession does not insulate that confession from an inquiry into whether it was voluntarily given." *People v. Raffaelli,* 647 P.2d 230, 235 (Colo.1982), *quoted in People v. Humphrey* 132 P.3d 352, 360 (Colo. 2006). It is the People's burden to prove that the statements were voluntary. *Id*., *citing Gennings,* 808 at 843-44. Some of the factors to be considered are 1) was the defendant in custody; were Miranda warnings given and were they understood; 2) did the defendant have the opportunity to consult with counsel or any one else prior to being interrogated; 3) were the statements

volunteered or as a result of an interrogation; 4) was there any threat made overt or implied; the style of the interrogation; 5) the place of the interrogation; 6) the length of the interrogation; 7) defendant's mental and physical condition. *Gennings,* 808 P.2d at 844; *Colorado v. Connelly, supra*, at 167.

In *People v.Vickery*, 229 P.3d 278 (Colo. 2010), the Court stated that "[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." In *People v. Pease,* 934 P.2d 1374, 1378-1379 (Colo. 1997) this Court held the same:

> The Court [in *Spring*] noted that sometimes affirmative misrepresentations by the police could invalidate a waiver, but mere silence by law enforcement officials about the subject matter of an interrogation was not trickery which rendered the suspect's waiver involuntary. *Id.* at 576 & n. 8.

Any *Miranda* waiver was not voluntary, knowing or intelligent. The Court in *Humphrey, supra,* held that in determining the validity of a waiver of the 5th amendment right to remain silent, the Court must engage in a two part inquiry: whether the waiver was voluntary ("the product of a free and deliberate choice rather than intimidation, coercion, or deception") and whether it was knowing and intelligent ("whether the defendant was fully aware 'both of the nature of the right

being abandoned and the consequences of the decision to abandon it.'") In *People v. Chase* 719 P.2d 718, 721 (Colo.1986), the Court held that one of the factors to be considered is "the extent to which a suspect has been informed or is aware of the subject matter of the interrogation prior to its commencement." *See People v. Kaiser,* 32 P.3d 480, 484 (Colo.2001); *People v. Hopkins,* 774 P.2d 849, 852 (Colo.1989).

A *Miranda* waiver is not voluntary if coercive governmental conduct – whether physical or psychological – plays a significant role in inducing the defendant to make the confession or statement. *Platt,* 81 P.3d at 1065; *People v. May,* 859 P.2d 879, 883 (Colo. 1993). The voluntariness of a Fifth Amendment waiver depends an objective inquiry into police overreaching. *Connelly, supra,* 479 U.S. at 170. A voluntary statement is one that was not extracted by any sort of threats or violence or obtained by any direct or implied promises, however slight, nor by the exertion of improper influence. *Gennings, supra; People v. Freeman*, 668 P.2d 1371 (Colo. 1983). 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.

Here, the circumstances indicate that undue influence was placed on Mr. Webster. Police arrested him at his home, and they told him that he was being picked up on just a parole violation. While he was in the holding cell, a detective comes in and -- although the detective could not remember exactly -- may have told him they were investigating a robbery. The detective said that he was from the robbery unit and that he was there to talk with Mr. Webster about a robbery.

Based on Mr. Webster's comments on the tape, it appears that he is somewhat confused about what it is that he is being brought in to talk about. The first thing that is said by Mr. Webster on the tape is something to the effect of, "This isn't about the parole violation, is it," or "The officer came in to talk to me, but I think it doesn't have to do with the parole violation." Thus, when Mr. Webster was brought from the holding cell and brought to the interview room, he had been essentially misled about what it is that he was brought there to discuss. 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.

There were other indications on the videotape that Mr. Webster had already been asked -- off video -- about waiving his rights, and the detective -- on video -- was making it sound like signing the *Miranda* forms was a mere technicality and

that the two would then proceed to complete or do whatever they had already agreed to do.

Here, the police officers minimized significantly the seriousness of the suspect's criminal liability. Law enforcement told Mr. Webster that they were investigating a parole violation, or a robbery; but not until the end of the tape recording does the detective disclose that, in fact, Mr. Webster is suspected of kidnapping, burglary, and a host of more serious charges. What occurred here was more than "mere silence about the subject matter of an interrogation" but a deliberate attempt to mislead Mr. Webster regarding the nature of the interview.

Here, the detective makes false representations about police knowledge of other evidence that connects Mr. Webster to the crime. In our situation, Detective Palombi told Mr. Webster that he has brought a victim in and, in fact, that is why he took so long to get to the interview room; the detective then falsely said that he had just been interviewing the victim and that he picked Mr. Webster out of a lineup. The detective also mislead Mr. Webster about the victim's statements regarding tattoos; the detective essentially told Mr. Webster that the victim was identifying Mr. Webster's tattoos. There are repeated assertions that the suspect's guilt was obvious and the evidence was overwhelming.

When the Court in *Gennings,* tells courts to ask whether or not a defendant is aware of his situation, that should include the impact of police mis-representations on the defendant's overall awareness.

The interrogation that was videotaped was tainted by the illegality that preceded it in the hall and in the interrogation room, prior to the video camera being turned on. *See Missouri v. Siebert*, 542 U.S. 600 (2004); *People v. Lucas*, 232 P.3d 155 (Colo.App. 2009). The subject matter in the two conversations was identical. The *Lucas/Siebert* factors weigh in favor of finding that there was sufficient continuity to find that the interrogation at following 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 error in admission of these statements could not have been harmless beyond a reasonable doubt. During the interview, Mr. Webster said he had sold dope to four guys in a truck and made a number of incriminating statements. See statement of facts and Tr. 6-26-08 p. 66-67.

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. Because Mr. Webster did not object at trial, this Court reviews for plain error. *People v. Moore*, 08CA1805, __ P.3d ___ (Colo. App. Dec. 9, 2010), *available at* 2010 WL 5013681, *citing People v. Vigil,* 127 P.3d 916, 929 (Colo.2006); *People v. Gash,* 165 P.3d 779, 781 (Colo.App.2006).

Underlying facts. The DNA expert testified that Susan Berdine or someone else retrieved from the property bureau a tip of a blue glove that was recovered at the scene, and swabbed it. Tr. 4-29-09 p. 113-115. Defense counsel did not object. *Ibid.* The testifying expert testified that Ms. Berdine swabbed the material for testing, and she testified in some detail to the process that Ms. Berdine would have used. *Ibid*. She testified that Ms. Berdine also tested a pillowcase and found blood on it. *Id.*, p. 116. Without objection, the prosecutor introduced Susan Berdine's forensic lab report. *Id*., p. 127. While there was no objection at trial, Mr. Webster did file a request for live testimony pursuant to CRS §16-3-309, and therefore Mr. Webster did not waive his right to confront the witnesses against him.

Argument. In *Melendez-Diaz v. Massachusetts,* --- U.S. ----, 129 S.Ct. 2527 (2009), the Supreme Court held that sworn certificates by state laboratory analysts attesting that the substance they analyzed was cocaine were testimonial, and therefore the defendant had a constitutional right to confront them at trial. In *Melendez-Diaz,* the certificates at issue were functionally equivalent to affidavits. The Court determined that the affidavits were "testimonial," and therefore implicated the defendant's Sixth Amendment right to confront witnesses against him. *See Crawford v. Washington,* 541 U.S. 36 (2004). It explained that they were made for the purpose of establishing some material fact at the defendant's trial and under circumstances which would lead a reasonably objective witness to believe that the statements they contained would be available for use at a later trial. *Melendez-Diaz,* 129 S.Ct. at 2531-32.

Even before *Melendez-Diaz*, the Colorado Supreme Court had already reached the same conclusion with respect to laboratory reports identifying the nature of a tested substance, relying on *Crawford. Hinojos-Mendoza v. People,* 169 P.3d 662, 666-67 (Colo.2007).

The significance of *Melendez-Diaz* is not its ultimate holding, which was already the law in Colorado, but in its further elucidation of its prior pronouncements in *Crawford* and its expansion of the type of evidence subject to

confrontation. As relevant here, the Court observed, in the course of discussing the interplay between the evidentiary rules governing both business and official records and the constitutional right of an accused to confront witnesses against him:

> Respondent also misunderstands the relationship between the business-and-official-records hearsay exceptions and the Confrontation Clause. As we stated in *Crawford:* "Most of the hearsay exceptions covered statements that by their nature were not testimonial-for example, business records or statements in furtherance of a conspiracy." . . . **Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because - having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial - they are not testimonial. Whether or not they qualify as business or official records, the analysts' statements here - prepared specifically for use at petitioner's trial - were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment.**

Melendez-Diaz, 129 S.Ct. at 2538-39 (internal citations omitted) (emphasis added).

The Court clarified that even if evidence technically falls within the realm of "non-hearsay" evidence by virtue of its classification as a business or official record, it may nevertheless trigger the right to confrontation under the Sixth Amendment, if it is prepared specifically for use at a defendant's trial and is admitted for the purpose of establishing or proving some fact of consequence.

The fact that the non-testifying expert's report was admitted through the testimony of an expert does not make it less of a constitutional violation. Nor does it satisfy Mr. Webster's request pursuant to CRS §16-3-309 that the technician testify. In *People v. Williams*, 183 P.3d 577 (Colo. App. 2007), this Court was faced with a similar issue. In *Williams*, the defendant had filed a request under CRS §16-3-309. The technician was not available for trial, and in an attempt to circumvent the properly filed request, the People called as an expert witness in the field of forensic chemistry the supervisor of the lab. The court admitted the laboratory report as a business record under CRE 803(6). Although this Court reasoned that the properly filed request under CRS §16-3-309 trumped the hearsay exception, *Williams*, 182 P.3d at 580, the Supreme Court, in *Melendez-Diaz*, went one step further in holding that the consitution trumps the hearsay rules in holding that business or public records that are testimonial are subject to confrontation under the 6th amendment. *Melendez-Diaz*, 129 S.Ct. at 2539. The admission of the non-testifying expert's report was a violation of Mr. Webster's rights under the confrontation clause, the Rules of Evidence, and CRS §16-3-309.

Admission of the evidence could not have been harmless, even under the plain error standard of review. DNA was a very important part of the prosecution's case, and was a major contributor to the convictions.

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

Standard of Review: "The choice of an appropriate sanction for a violation of a discovery rule lies within the sound discretion of the trial court. *People v. Daley,* 97 P.3d 295, 298 (Colo.App.2004)." *People v. Moore,* 226 P.3d 1076 (Colo. App. 2009). If the trial court's finding that the discovery violation was "inadvertent" is supported by the record, the Appellate Court should defer to it. *Id., citing People v. Lee,*18 P.3d 192 (Colo. 2001). If it is not supported by the record, the Court should not defer.

Underlying facts: On June 19, 2008, 32 days before the scheduled trial date, the People informed the court that on that date they received a report from the Denver Crime lab indicating that they had found a DNA profile from the tip of a rubber glove found at the scene. 7/1/08, pp2-3; 6/19/08 p. 3-4; 6/26/08 p. 24. On June 20, 2008, a buccal swab was taken from Mr. Webster, and on June 27, 2008, the lab provided a report stating that Mr. Webster was the major contributor of the DNA mixture found on the glove. 7/1/08 p. 5. The June 27th report was provided

25 days prior to the scheduled trial date. *Ibid*. The evidence was first submitted to the lab for analysis on February 12, 2008. 6/19/08 p. 6.

Mr. Webster argued that because of the late disclosure he could not adequately prepare for trial, obtain the necessary expert witness, or hold the necessary motions hearings regarding the reliability of DNA mixture evidence. *Id.* pp. 6-7. Mr. Webster further argued that the evidence had been in the hands of the prosecution since the date of the offense in October, 2007, yet they took no steps to have the evidence tested until four months later in February 2008. Mr. Webster argued (after the Court ruled the evidence admissible) that an appropriate sanction would be the dismissal of count one, first degree kidnaping. *Id*., p. 12. After the court denied that request and only because a new trial date could not be set within the speedy trial deadline, Mr. Webster waived his right to a speedy trial "given the circumstances that DNA is now coming in." 7/1/08 p. 15.

In its ruling, the court set forth the following timeline: the offense occurred on October 6, 2007; Mr. Webster was arrested on October 15, 2007; on January 29, 2008, he was bound over to district court; his first appearance was March 20, 2008 and jury trial was scheduled for July 21, 2008 with motions hearings to be heard on June 19, 2008. The court concluded that it "cannot condone how the prosecution proceeded in this case. This is a class one felony. The DNA testing

should have been in a more timely fashion. And additionally the sample from the defendant should have been taken in a more timely fashion." 7/1/08 p. 11. However, the court concluded that exclusion was too drastic a remedy because "there's been no showing of bad faith or willful misconduct or a pattern of negligence on the behalf of the People." *Ibid*. This conclusion was made despite the court's finding that it was the policy of the lab to set the mandatory disposition date as the date the report is due, a policy that the court specifically disapproved. 7/1/08 p. 11. The court then found that there was a discovery violation, because the results could have been provided at least 30 days before trial and that as a "remedy" it will allow the defense to request a continuance and will set it within speedy trial "although [it has] no dates available." *Id*., p. 12. Defense counsel also had no available dates (*id.,* pp. 13-15). The case was then set for November 17. 2008. *Id*., p. 17.

Argument: The requirement for disclosure of potentially exculpatory information is based upon constitutional principles first enunciated in *Brady v. Maryland*, 373 U.S. 83 (1963)*; People v. District Court,* 808 P.2d 831 (Colo. 1991). This duty is not limited to exculpatory evidence. The defense is entitled to disclosure of inculpatory information, such as the evidence here, that will be of material

assistance in preparing the defense. *See People v. Bachofer,* 192 P.3d 454, 461 (Colo. App. 2008). *Cf. People v. Jowell*, 199 P.3d 38 (Colo. App. 2008).

The requirement for disclosure goes beyond the individual prosecutors assigned to this case. Crim.P. 16(I)(a)(3) provides that

> [t]he prosecuting attorney's obligations under this section (a) extend to material and information in the possession or control of members of his staff *and of any others who have participated in the investigation or evaluation of the case and who either regularly report, or with reference to the particular case have reported, to his office.*"

(emphasis added.) *Brady* suppression occurs when the government fails to turn over even evidence that is "known only to police investigators and not to the prosecutor." *Kyles v. Whitley*, 514 U.S. 419, 438 (1995).

Failure to disclose to the defense evidence favorable to the accused violates due process "where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady,* 373 U.S. at 87. This principle is applicable to trials in state courts under the Fourteenth Amendment. *People v. District Court,* 808 P.2d at 834. The confrontation clause of the United States Constitution and the Constitution of State of Colorado also require the discovery such information so that effective cross examination and confrontation can take place at trial. *Davis v. Alaska*, 415 U.S. 308 (1974); *Pennsylvania v. Ritchie,* 480 U.S. 39, 51 (1987). The Colorado Constitution

provides at least as great a protection. *People v. Bradley,* 25 P.3d 1271 (Colo. App. 2001).

This case involves not a complete failure to disclose the evidence, but instead an inordinate delay in performing the requisite testing which then resulted in the delay in providing Mr. Webster with the test results. By the time the existence of the evidence was revealed to Mr. Webster, it was 33 days before trial. This is despite the fact that the evidence had been in the prosecution's possession since the day of the offense, some eight months earlier. The People then wished to perform additional tests on the evidence. Those test results were provided 25 days before the scheduled trial. After finding a discovery violation, Mr. Webster was then given the option of going forward with a new trial date within the 60 days left for speedy even though the court did not have available dates and his attorney did not have available dates, or waiving his statutory right to be tried within six months so he could obtain effective assistance of counsel. Being put in this rather untenable position, Mr. Webster had no option but to waive speedy trial.

In *People v. Lee, supra,* the Court stated that the purpose of sanctions, according are two fold– they should "protect[] the integrity of the truth finding process" and "deter[]discovery-related misconduct." *Lee*, 18 P.3d at 196. The Court established the following factors to consider when fashioning a remedy:

> (1) the reason for the delay in providing the requisite discovery; (2) any prejudice a party has suffered as a result of the delay; and (3) the feasibility of curing such prejudice by way of a continuance or recess in situations where the jury has been sworn and the trial has begun.

Lee, supra. While the granting of a continuance could be construed as a reasonable remedy for the late disclosure, here Mr. Webster was forced to waive his statutory right to a speedy trial in the process. If he had refused to waive that right, the court would have allowed the evidence to be admitted and forced him to go to trial.

Mr. Webster waived his right to a speedy trial only after the court had ruled that it would allow the People to present DNA evidence even though the People were tardy in requesting that the evidence be tested, the lab was tardy in completing the testing, and the People were tardy in requesting a bucchal swab from Mr. Webster so his DNA profile could be obtained. The court, by allowing the DNA evidence to be admitted, effectively forced Mr. Webster to waive his statutory speedy trial right in order to protect his consitutional right to effecitve representation of counsel. Thus he had no alternative at that point but to waive speedy trial. This does not make the waiver voluntary.

While a trial is "a search for truth," in this process, the scales must be balanced in such a way that the rights of the accused are not ignored. An accused has a statutory right to brought to trial within six months and that right is

sacrosanct. In *People v. Gallegos*, 946 P.2d 946, 949 (Colo. 1997), the Colorado Supreme Court made clear that the "language of section 18-1-405(1) is mandatory and leaves no discretion for the court to make exceptions to the six-month rule beyond those delineated in section 18-1-405(6). A dismissal is mandated regardless of the strength of the People's case or the seriousness of the crime. Forcing a defendant to waive those rights or be unable to challenge the evidence against her when the late disclosure of the evidence was the result of the People's lack of diligence violates the spirit of Section 18-1-405, and this Court should find that the court erred in allowing the evidence to be used.

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.

Standard of Review

The Colorado Supreme Court has ruled that harmless error analysis applies to allegations of error regarding denial of the right to be present. *Luu v. People,* 841 P.2d 271, 274-275 (Colo. 1992)(interpreter absent during closing argument and jury instructions). *See also People v. Grace*, 55 P. 3d 165 (Colo. App. 2001) (judge read to the jury an answer to a jury question). *See also Arizona v. Fulminante,* 499 U.S. 279 (1991) and *Rushen v. Spain*, 464 U.S. 114

(1983)(applying harmless error review to defendant's absence from an unrecorded *ex-parte* communication between the trial judge and a juror).

However, defense counsel did not object to proceeding in Mr. Webster's absence, Tr. 4-27-09 p. 7-8, so this issue is reviewed to determine whether there is plain error. Under the "plain error" standard, "the defendant must demonstrate that the error affected a substantial right and that the record reveals a reasonable possibility it contributed to [his] conviction." *Lehnert v. People,* 244 P.3d 1180 (Colo. 2010)(finding plain error in a COV verdict form).

Preservation of Error

On April 27, 2009, the Court, prosecutor, and defense counsel took up the matter of amendments to the charges, in the absence of Mr. Webster. The following transpired:

> PROSECUTION: One other thing we might be able to do without the defendant here. I don't know if they want to waive his appearance. We were going to ask to amend the burglary charge that the Court reads to the jury, to allege intent to commit robbery, instead of intent to commit theft. The reason was, when I was preparing the instructions, I noticed we don't have theft charged, we have robbery charged. I think it is simpler for the jury not to have to define theft, as well, when it is not charged. I think we are increasing our burden. I don't know if the defense objects or not, but that is what I am asking to do.
>
> THE COURT: First of all, do you agree to take this up without Mr. Webster being present?

DEFENSE: Yes, that's fine, your Honor.

Tr. 4-27-09 p. 7-8. When defense counsel was asked her position, she stated:

> I think I will defer to the Court on this. It is the morning of trial. We prepared everything based on the charges listed at this point. I am inclined to object to this, but I am not going to jump up and down over it.

Tr. 4-27-09 p. 8. In the absence of a stipulation, the court denied the motion to amend. *Id.,* p. 9.

The court took up the prosecution's motion to Amend Count 3 (discussed, *supra,* in the previous section of this brief). The following occurred:

> COURT: One thing we have not taken up on the record, that we might as well address, is a Motion to Amend Count 3. Would you be willing to address that outside the defendant's presence?
>
> MS. RODARTE: Yes, your Honor.

Tr. 4-27-09 p. 9. The Court said that it had already granted the motion on April 23, but gave defense counsel an opportunity to object. Tr. 4-27-09 p. 9.

Defense counsel objected, saying that they had not received any notice of a sharp object, but only injuries related to blunt trauma. Tr. 4-27-09 p. 9-10. The Court asked whether there was anything in discovery that had indicated a sharp object was used, and the prosecutor replied, candidly, no, there was not. *Id*., p. 10.

He alleged, however, that it was "very clear there were puncture wounds to the neck." *Id*., p. 10. The following occurred:

> THE COURT: All right. So that has been the case for some time, that that information has been available.
>
> MS. RODARTE: That's true.
>
> THE COURT: Based on that, the Court perceives no prejudice in allowing this. The Court grants the Motion to Amend the complaint to add Count 3, references hands and/or sharp object.

Id., p. 10-11 (L. 4-10). The charges were amended to include the allegation that a sharp object was used against the victim.

After the charges were amended, the Court continued, saying:

Following this, the court continued discussing matters, and stated:

> THE COURT: Let me address a few more housekeeping matters. At any point you feel we are discussing something we need to take up in the presence of the defendant, you let me know. Does that work for the defense?
>
> MS. RODARTE: Yes, your Honor.

Id., p. 12-13. Thereafter, the court had discussions about (1) the legal standards that would apply to the hearing to suppress any in-court identification of Jesse Odom, *id.*, p. 14-18;[1] (2) whether jurors could ask questions of the witnesses

[1]During his testimony, he did not identify anyone in the courtroom as being his assailant.

(neither party objected), *id*., p. 19; and (3) prospective juror seating configurations and voir dire procedures, *id*., p. 20-22.

Argument

The U.S. Supreme Court recognized the fundamental nature of a criminal defendant's right to be present at the criminal proceedings as far back as 1892: "A leading principle that pervades the entire law of criminal procedure is that after indictment found, nothing shall be done in absence of the prisoner." *Lewis v. United States*, 146 U.S. 370, 372 (1892). "The [federal] constitutional right to presence is rooted to a large extent in the Confrontation Clause of the Sixth Amendment, but ... [that] right is protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him." *United States v. Gagnon*, 470 U.S. 522, 526 (1985)(per curiam) (citation omitted); *Illinois v. Allen,* 397 U.S. 337, 344, 338 (1970). *See also United States v. Fontanez*, 878 F.2d 33, 34, 35 (2nd Cir.1989) (stating that "[t]he right to be present at all stages of one's trial constitutes a foundational principle underpinning the entire law of criminal procedure"); *Fisher v. Roe*, 263 F.3d 906 (9th Cir. 2001) (state court procedure of reading back to jury portions of the trial testimony in the absence of the defendant found to violate federal law).

Sometimes, the defednant's absnece does not not violate the due process clause. *See e.g. Kentucky v. Stincer*, 482 U.S. 730, 745 (1987)(exclusion from a witness competency hearing); *Hale v. Gibson*, 227 F.3d 1298 (10th Cir. 2000)(hearing where counsel discussed his motion to withdraw). However, the law is clear that "a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." *Kentucky v. Stincer, supra*, at 745; *Shields v. United States*, 273 U.S. 583, 589 (1927); *Gagnon, supra*. See C.R.Cr.P. Rule 43 (a) (defendant shall be present at every stage of the trial).

In *Larson v. Tansy*, 911 F.2d 392 (10th Cir. 1990), the Tenth Circuit addressed the issue of whether the defendant's absence from the courtroom during the instruction of the jury, closing arguments and the rendering of the verdict violated his due process rights. When the Court determined that the exclusion violated the defendant's due process rights, the next step was to evaluate whether the violation was harmless. The Court ruled that the error was not harmless because the defendant, who had been held to be competent to stand trial, was presumptively capable of assisting counsel but was unable to do so because he was not present. There was a reasonable possibility of prejudice to the defendant

because his absence precluded him from providing any assistance to his attorney and from exerting any psychological influence on the jury during that time.

The accused has a right to be present "whenever his presence has a reasonably substantial relation to fullness of opportunity to defend against the charge." *Snyder v. Massachusetts*, 291 U.S. 97 (1934), *overruled in part on other grounds by Malloy v. Hogan*, 378 U.S. 1 (1964). U.S. Const., Amends. VI and XIV; Colo. Const., art. II, § § 16, 25. *See also Smith v. People*, 8 Colo. 457, 8 P. 920, 921 (1885); *Luu v. People, supra.*

In *Luu* , the Supreme Court found harmless error when the court failed to provide an interpreter during closing arguments. Here, however, the issue was more significant: amendment of the charges against the defendant. 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. Thus, the error can be regarded as "plain," because it impacted the fairness of the proceedings, and fundamental rights belonging to Mr. Webster.

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

STANDARD OF REVIEW

A court's decision to give a modified *Allen* instruction[2] is reviewed for an abuse of discretion. *People v. Watson,* 53 P.3d 707, 713 (Colo. App. 2001).

FACTUAL BACKGROUND

The jury began deliberations in this case on April 30, 2009. On the afternoon of May 1, 2009, the jury sent a note to the court indicating that it had reached an agreement on three of the six counts and inquired as to whether they had to agree on all six counts or whether they could present the three verdicts they agreed upon and end as a hung jury on the other three counts. 5/1/09 p. 2. The court advised the jury as follows: "In response to your inquiry of whether you have to agree on all six verdicts to return any verdicts, the Court instructs you to please resume your deliberations." *Id.* p. 2, 3. The jury continued deliberating. deliberations. On Monday, May 4, 2009, the jury sent out an additional note again indicating that "We cannot reach aan unanimous decision on all six counts. We are at an impasse." 5/4/09 p. 13. The court inquired as to whether a modified *Allen* Instruction was appropriate, and Mr. Webster objected, arguing that at three

[2] *Allen v. People,* 660 P.2d 896 (Colo.1983)

o'clock on the previous day of deliberation the jury indicated that it had agreed on three counts and was deadlocked on three other, and now at 1:00 p.m. on the next day of deliberations, the jury indicates it is in the same position and the giving of an *Allen* instruction could have the effect of coercing the jury into returning with a verdict. 5/04/09 pp. 13-14. The People disagreed, however, the People did state that it was their belief that the court first had to inquire of the jury whether further deliberations would be beneficial. *Id*. p. 15. Mr. Webster agreed that the court needed to first inquire. *Id*. p. 16. The court ruled that in its belief, it was not required to engage in any sort of colloquy with the jury inquiring as to whether it feels that progress is being made towards a unanimous verdict. *Id*. p. 20. The court said it believed there was a reasonable likelihood of progress, that it could not tell from the last note whether the jury was in the same place it was when it sent out the previous note indicating that they were at an impasse, and that it would be appropriate to give a modified *Allen* Instruction. *Id*. pp. 20-21. Over objection, the Court gave the following instruction:

> Ladies and gentlemen, since it appears to the Court that your deliberations have been somewhat lengthy without a verdict being reached, the Court wishes to suggest a few thoughts which you should consider in your deliberations along with the evidence in the case and all of the instructions previously given.
>
> It is your duty as jurors to consult with one another and to deliberate with a view to reaching a verdict. If you can do so without

> violence to individual judgment, each of you must decide the case for yourself but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and to change your opinion, if convinced it is erroneous ... but do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict. You are not partisans, you are judges, judges of the facts. Your sole interest is to ascertain the truth form the evidence of the case.
>
> So, ladies and gentlemen, with that instruction, I'll invite you to return to the jury room again.

5/4/09 pp. 29-30 The jury then came back once again indicating that they were deadlocked. *Id*. p. 32. The Court then sent back an inquiry, agreed on by both parties, inquiring if the jury had reached a unanimous verdict on any if the charges, and if so, they were to mark the appropriate verdicts and bring them when they are summoned back to court, and if they had not reached a unanimous verdict on any of the charges, they would receive further instructions. *Id*. pp. 33-34. The jury returned guilty verdicts on four of the six counts: first degree kidnaping, second degree assault, burglary, and impersonating a police officer. They were unable to reach a verdict on attempted first degree murder or any of the lessers, or aggravated robbery.

ARGUMENT

The court refused to inquire of the jury whether further negotiations would be helpful before giving the modified *Allen* instruction and sending them back to dleiberate further. The court was incorrect. As this Court stated in *Watson, supra* "A prerequisite to giving such a modified-*Allen* instruction is that the trial court inquire of the jurors whether further deliberations would be productive. *People v. Raglin,* 21 P.3d 419, 423 (Colo.App.2000)." In *Watson, supra* this Court set forth the standards for such an instruction:

> Upon receiving information that a jury cannot agree on a verdict, a trial court may not give an instruction with a potentially coercive effect, but may, in its discretion, give a "modified-*Allen*" instruction. Such an instruction informs the jurors that: (1) jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement if it can be done without violence to individual judgment; (2) each juror must decide the case for himself or herself, but only after impartial consideration with fellow jurors; (3) in the course of deliberation, a juror should not hesitate to re-examine his or her own views and change an opinion if convinced it is erroneous; and (4) no juror should surrender an honest conviction as to the weight and effect of the acts solely because of the opinion of fellow jurors or for the mere purpose of returning a verdict. *Allen v. People,* 660 P.2d 896, 898 (Colo.1983); *see* CJI-Crim. 38:14 (1983).

Watson, 53 P.3d at 713.

Here, the jury indicated on two separate occasions that it was unable to reach a unanimous verdict on all charges. Rather than inquiring as to whether further

deliberations would be useful, the court sent the jury out for further deliberations, telling them it was their duty to reach a verdict, if they could do so without surrendering their own individual beliefs. The jury was initially deadlocked on three put of six of the counts but ended up returning verdicts on four out of six of the counts, indicating that the *Allen* instruction had the effect of coercing an additional conviction from the jury. This can be seen from the fact that when the jury was simply told to deliberate further and not given any sort of instructions that it was their responsibility to return a verdict, they continued to be deadlocked on three of the counts, Of course it is unknown which additional count the jury ended up "agreeing" on as a result of the coercive instruction. Therefore, this Court must reverse all of the convictions and remand for a new trial.

CONCLUSION

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

Respectfully submitted this ___ day of February, 2011.

_____

Hollis Whitson (#32911)
Eric Samler (#32349)
SAMLER & WHITSON, PC

AS ALT. DEFENSE COUNSEL
1127 Auraria Pkwy, Suite 201B
Denver, CO 80204
Telephone: 303 670-0575

CERTIFICATE OF SERVICE

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

Appellate Division
Office of the Colorado Attorney General
1525 Sherman Street, 5th Floor
Denver, Co 80203

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