

District Court, City and County of Denver, Colorado Lindsey-Flanigan Courthouse, Room 135 520 W. Colfax Ave Denver, CO 80204	▲ COURT USE ONLY ▲
Plaintiff: The People of the State of Colorado v. Defendant: Jason Keith Groshart (DOB [REDACTED])	
Dawn Weber, Reg. No. 23433 Senior Chief Deputy District Attorney McKenna Elizabeth Burke, Reg. No. 49550 Deputy District Attorney For: Beth McCann, Reg No. 5834 District Attorney 201 W. Colfax Ave. Dept. 801 Denver, CO 80202 Phone Number: (720) 913-9000 Fax Number: (720) 913-9035	Case Number: D0162006CR006594 Div: Criminal Ctrm: 5B
THE PEOPLE’S <i>EX PARTE</i> SUBMISSION PURSUANT TO CRIM. P. RULE 16, PART III (D), (E) AND (F) & REQUEST FOR <i>EX PARTE</i>, <i>IN CAMERA</i> HEARING	

Beth McCann, District Attorney, in and for the Second Judicial District, City and County of Denver, State of Colorado, by and through the undersigned Deputy District Attorney, respectfully submits **THE PEOPLE’S *EX PARTE* SUBMISSION PURSUANT TO CRIM. P. RULE 16, PART III (D), (E) AND (F) & REQUEST FOR *EX PARTE*, *IN CAMERA* HEARING** and as grounds therefore states as follows.

The People move to have the attached Exhibit 1 held under seal until the Court rules on this issue.

The People here notify the Court and defense counsel that the People are in possession of information pertaining to Forensic Investigative Genetic Genealogy (“FIGG”) in this case. The People assert that this information is not discoverable pursuant to Colorado law. The information does not fall within the parameters of Rule 16, is not exculpatory, would not tend to reduce the

punishments for the crimes with which the defendant has been charged and does not contain potential impeachment information.

STATEMENT OF FACTS

The Defendant is charged with Sexual Assault (F2), Kidnapping (F2), Burglary (F3) and two crime-of-violence sentencing enhancers.

In 2004, a masked rapist entered the home of the victim, A.R. He woke her up, handcuffed her, placed a mask over her face and sexually assaulted her at gunpoint in her bedroom. The assailant wore gloves during the attack and kept his mask on, even when he compelled A.R. to shower with him in order to destroy evidence. The attacker also made her strip her bedsheets off the bed and collected her towels as a means of hampering evidence collection. After the assault, A.R. made immediate outcry to the police and underwent a sexual assault exam the same day. The victim had been vaginally assaulted by the attacker and semen and/or seminal fluid was collected as drainage from her body. From that semen and/or seminal fluid, a DNA profile was generated and uploaded into the Combined DNA Index System (“CODIS”) database. No matches were produced. Additionally, a familial search conducted in the state of Colorado’s state-level database (“SDIS”) produced negative results.

Despite a dogged investigation by the Denver Police Department, the case remained unsolved for 18 years, from 2004 until 2022, when law enforcement utilized a technique called Forensic Investigative Genetic Genealogy (“FIGG”). FIGG was applied to this particular case under federal grant funding awarded specifically for the purpose of using FIGG to solve and prosecute violent crime cold cases.

As described in a number of highly publicized cases such as California’s Golden State Killer, FIGG involves developing a specific type of DNA profile from crime scene evidence (here,

from the semen and/or seminal fluid collected from the victim's body as drainage) that is then uploaded into publicly-accessible genealogical databases. The DNA profile required for FIGG differs from the Short Tandem Repeat ("STR") DNA typing universally accepted and used by forensic scientists and crime laboratories - including Denver's Crime Lab - for comparison and/or submission to the CODIS database.

The goal of a FIGG investigation is to identify individuals who may be related to the suspect; once identified, law enforcement uses traditional police investigative techniques and resources to build family trees that may lead law enforcement to the perpetrator.

Identification of a potential suspect in this manner provides law enforcement **only** with an investigative lead, not conclusive proof of the suspect's identity. If a suspect lead emerges, it is then incumbent upon law enforcement to perform a direct comparison of the suspect's known DNA profile to the DNA profile developed from the crime scene evidence. In this way, the lead developed by FIGG is analogous to that generated by a tip from a member of the public or from a confidential informant. Put another way, it is a lead that must be confirmed - or disconfirmed - using well-established STR DNA testing.

In the present case, the Denver Crime Lab, working in concert with a genetic genealogy investigator ("GGI"), used the above-described FIGG process to produce an investigative lead identifying defendant Jason Groshart as a possible suspect. Ultimately, a **direct DNA comparison** confirmed the defendant as the suspect in the 2004 attack on A.R. That confirmation was achieved when law enforcement agents travelled to where Mr. Groshart was living in Missouri in September of 2022 and surreptitiously collected eating utensils and a straw used by Mr. Groshart when he was dining out at a restaurant there. The single-source male DNA profile deposited by Mr. Groshart onto the straw matched that of the semen and/or seminal fluid evidence collected in 2004

from victim A.R.'s body. The investigative lead generated by the FIGG investigation was confirmed through STR DNA testing of the sort that is routinely admitted as evidence in criminal trials in Denver District Court.

More specifically, with regards to the testing comparing the male DNA on the surreptitiously-collected straw with that from A.R.'s rape kit, the Denver Crime Lab reported that the rape kit DNA is consistent with one male contributor and matches the DNA profile obtained from the surreptitiously collected straw. The lab further reported that the male DNA profile from the rape kit is estimated to be at **least 30 octillion (30E27) times more likely** if the sample originated from the donor of the male DNA obtained from the straw than if it originated from one unknown, unrelated person. *Based on this data, and in the absence of identical twins, the probability is greater than 99.9% that the male DNA obtained from these items can be attributed to the same source, Jason Groshart.*

Even though the defendant's identity as the assailant of A.R. has already been confirmed through state-of-the-art DNA testing, yet another confirmatory DNA swab was taken from the defendant on November 15, 2022 pursuant to a Rule 16(II)(a)(1) motion granted by the county court. The lab results concerning the direct comparison of the Rule 16 DNA sample to the evidence in this case remain pending. Those results will serve as a **second** confirmation that the defendant is the source of the semen/seminal fluid evidence collected from A.R.'s body.

SUMMARY OF THE PEOPLE'S SUBMISSIONS & REQUESTS

1. The People make this submission in an abundance of caution, recognizing our discovery obligations as well as the relative novelty of this issue and FIGG methods. The People submit the following for the Court's review:

a. **Sealed Exhibit 1: Jason Groshart Summary of Facts & Forensic Genetic Genealogy Summary**

This document, **submitted under seal**, is a detailed summary of the FIGG investigation that developed the defendant as an investigative lead in this case. This document was prepared by the prosecution team during the course of this investigation, prior to the defendant being arrested or charged. Its purpose was to provide the FBI with information necessary to facilitate their assistance in collecting a surreptitious DNA sample from the defendant in Missouri.

This summary has not been disclosed to the defense.

The People submit this summary to the court because it details the FIGG techniques utilized in the present case, including the identities of persons revealed to have a genetic association (i.e., *some* amount of shared DNA) with the DNA profile developed from the semen/seminal fluid collected from the victim's body (which was entered into a publicly-available genetic genealogy database).

b. **Exhibit 2: United States Department of Justice Interim Policy on Forensic Genetic Genealogical DNA Analysis and Searching**

Because this case is being investigated and prosecuted under federal grant funding, the People are bound by the *United States Department of Justice Interim Policy on Forensic Genetic Genealogical DNA Analysis and Searching*, a copy of which is being provided for the Court's information and review. The policy instructs law enforcement agencies to treat FIGG information and data as **confidential government information**. *Id. at p. 7*. To date, the People have done so and, through this pleading and associated in-court proceedings, endeavor to continue to do so in compliance with their federal grant funding.

This policy has been provided to the defense in discovery and is **not submitted under seal.**

2. **The People also seek an *ex parte, in camera* hearing outside the presence of the defense** to address the issues raised in this motion, and the anticipated forthcoming defense motion for discretionary disclosure of this material. This will provide an opportunity for the People to educate the Court about FIGG techniques, possibly via witness testimony, and to respond to any concerns or questions that may arise.
3. **Finally, and with the Court's permission, the People would invite the defense to submit questions in advance of that *ex parte, in camera* hearing** to be asked of the witness(es) by the Court in the defense's absence. This will enable the defense to highlight information and/or concerns for the Court despite not being present for the *ex parte, in camera* hearing.

APPLICABLE LEGAL AUTHORITY

Crim. P. Rule 16, Part I outlines the prosecution's discovery obligations to the defense. It requires disclosure of the following material and information in the possession or control of the prosecuting attorney concerning the pending case:

- (I) Police, arrest and crime or offense reports, including statements of all witnesses;
- (II) With consent of the judge supervising the grand jury, all transcripts of grand jury testimony and all tangible evidence presented to the grand jury in connection with the case;
- (III) Any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons;
- (IV) Any books, papers, documents, photographs or tangible objects held as evidence in connection with the case;
- (V) Any record of prior criminal convictions of the accused, any codefendant or any person the prosecuting attorney intends to call as a witness in the case;
- (VI) All tapes and transcripts of any electronic surveillance (including wiretaps) of conversations involving the accused, any codefendant or witness in the case;

- (VII) A written list of the names and addresses of the witnesses then known to the district attorney whom he or she intends to call at trial;
- (VIII) Any written or recorded statements of the accused or of a codefendant, and the substance of any oral statements made to the police or prosecution by the accused or by a codefendant, if the trial is to be a joint one.

In this case, the FIGG material does not contain any police, arrest, crime or offense reports relating to the charged crimes; it also does not contain any witness statements. The material does not consist of expert reports or statements made in connection with the case, nor does it contain results of physical or mental examination or scientific tests, experiments or comparisons in connection with the particular case.

The FIGG material does not contain any tangible or “real evidence.” It contains genealogical information, compiled through researching familial histories from a wide variety of publicly accessible, or “open”, sources which allow investigators to build the family trees that may lead to a suspect. These sources may include official records of births, deaths or marriages, old newspaper articles or Facebook postings. In other words, information that, from a legal standpoint, contains multiple layers of hearsay that would be inadmissible, and irrelevant, in court and which the People will not elicit in trial. This open-source information was, nevertheless, crucial in uncovering a familial relationship that led to the discovery of the defendant’s identity.

The material does not contain or relate to prior criminal convictions of the defendant or any witness who will testify at trial or whose credibility will be at issue in the case. It does not contain tapes or transcripts of electronic surveillance involving the accused or any witness in the case. The FIGG material is clearly not a statement of the defendant and there are no co-defendants involved in this case.

The FIGG material does not contain the names or addresses of any witnesses the People intend to call at trial. ***To be clear, the People do not intend to present any evidence at trial related to the FIGG material.*** The People will simply offer evidence that the defendant was determined

to be a person of interest during this investigation and that his reference DNA was ultimately collected and compared to the DNA profile developed from the bodily fluid collected from A.R.'s body. This is precisely what happens in trial when a "cold hit" from the CODIS database identifies a potential suspect to law enforcement. The "hit" itself constitutes only an investigative lead, and the fact of the "hit" never comes into the courtroom – indeed, in most cases defense seeks to exclude it for fear it might be prejudicial as suggestive of prior criminal history on the part of the defendant.

In sum, it is clear from the statutorily enumerated categories setting forth prosecutorial discovery obligations that there is no basis for required disclosure of this information under Rule 16.

DUE PROCESS & *BRADY*

A criminal defendant is also entitled to disclosure of evidence in the prosecution's possession that is both favorable to the accused and material either to guilt or to punishment. *Brady v. Maryland*, 373 U.S. 83 (1963). The People turn, then, to the broader analyses under *Brady* and Crim. P. Rule 16, Part I(a)(2).

Here, the FIGG material is certainly not exculpatory in any way. Indeed, it is inculpatory. It was the FIGG lead that pointed law enforcement in the direction of the defendant to begin with, and which prompted them to obtain a surreptitious sample of his DNA to confirm that lead. The DNA profile from that surreptitious sample, in turn, corroborated the genealogical information obtained by law enforcement from public sources.

Because the FIGG information is not relevant to any witness to be called at trial and because it is not exculpatory under *Brady*, the law is clear that it need not be discovered. In essence, the performance of an IGG search based on some measure of genetic sharing (which sharing

became known through the highly-sophisticated, genetic-genealogy-specific DNA “snip” testing) is analogous to an investigation prompted by a tip provided to police by an informant or anonymous tipster who may or may not have direct knowledge of a crime or who committed it, but who has perhaps heard rumors on the street. The police may choose to act on such a tip, though it is completely uncorroborated hearsay, by surreptitiously recovering an abandoned item of evidence in compliance with Fourth Amendment search and seizure law, as happened here. If DNA typing on that abandoned item results in a DNA match to the DNA profile generated from the relevant crime scene evidence, that match can serve as the basis for a warrant and an arrest.

Just as law enforcement has the discretion to act on anonymous or uncorroborated tips, so, too, can law enforcement use information from public-access databases (be they genetic genealogical websites or otherwise), to move investigations forward and to confirm those leads with conventional, STR DNA testing. Indeed, law enforcement would be remiss if they did not use all available lawful tools and methodologies to solve crimes such as the violent attack on A.R.

Just as law enforcement is under no obligation to disclose the identity of an anonymous tipster whose information led to evidence that was otherwise corroborated and confirmed (if the prosecution does not intend to call that tipster at trial), likewise, law enforcement should not be made to disclose the identities of those who have chosen to use genetic genealogy websites for benign purposes such as building family trees to understand their heritage.

Additionally, court-ordered disclosure of the FIGG material will not assist the defense in this case at trial. That is because, by the time the case goes to trial, the defendant will *twice* have been confirmed to be the donor of the semen/seminal fluid collected from A.R.’s body (once from comparison of his DNA from the restaurant straw and once from the comparison of the Rule 16 DNA sample to that of the rape kit).

That the defendant's identity was learned via FIGG (rather than, say, from a CODIS hit or an anonymous tip) has no bearing on the defense at trial. That is because the People do not intend to tell the jury *how* the defendant got identified as a suspect. The People's case will consist of an explanation of the case facts, plus what investigative steps were taken after the defendant was identified.

If the FIGG material were disclosed to the defense or if the defense were to reconstruct the family trees that led to the defendant, **that would do nothing to negate the highly damning DNA evidence from the straw and Rule 16 comparisons.**

The purpose of the *ex parte, in camera* proceeding is to satisfy any concerns the court may have about the lawfulness of law enforcement's conduct here and to persuade the court of the irrelevance of how the defendant was identified in light of the subsequent (anticipated) double confirmation of his identity as the attacker.

CONCLUSION

The People anticipate the defense may file a motion seeking discretionary disclosure of FIGG information prior to the Court ruling on this pleading. Should that occur, the People respectfully request that the People be heard *ex parte* and *in camera* prior to the court ruling on any such defense motion. Moreover, the People respectfully request an opportunity to respond to any such motion once the defense has articulated a theory as to why the FIGG material is relevant and why a request for disclosure is reasonable.

The People respectfully move this Court to review the attached exhibits *in camera* and to set an *ex parte, in camera* hearing on the issue of whether the contents of the FIGG materials are subject to discovery.

WHEREFORE, the People respectfully submit **THE PEOPLE'S *EX PARTE***
SUBMISSION PURSUANT TO CRIM. P. RULE 16, PART III (D), (E) AND (F) &
REQUEST FOR *EX PARTE, IN CAMERA* HEARING.

Dated: May 3, 2023.

Respectfully submitted,
BETH MCCANN
District Attorney

By: */s/ McKenna Elizabeth Burke, Reg. No. 49550*
Senior Deputy District Attorney

CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2023, a true and correct copy of the foregoing was:

- X E-served through CCE to party of record listed below
- Placed in the United States mail to party of record listed below
- Filed with Denver County Court and emailed to party of record listed below
- Filed with Denver County Court and will be provided upon request for discovery

Steven Graziano
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By: */s/ MCKENNA BURKE*