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FIRST JUDICIAL DISTRICT COURT  
COUNTY OF SANTA FE  
STATE OF NEW MEXICO

STATE OF NEW MEXICO  
Plaintiff,

NO. D-0101-CR-201700250

vs.

MANSOOR KARIMI  
Defendant.

**STATE'S RESPONSE TO DEFENDANT'S  
MOTION TO COMPEL PRODUCTION AND EXAMINATION OF CELLULAR  
TELEPHONES OR IN THE ALTERNATIVE, MOTION TO DISMISS**

The State of New Mexico, by and through Deputy District Attorney Kent Wahlquist, respectfully asks that the Court deny Defendant's motion based on the following grounds:

**BACKGROUND**

On December 16, 2016, Christopher Bryan was driving his Chevrolet cobalt with Ian Sweatt in the passenger seat. The Cobalt was travelling on Plaza Verde when it stopped at a 4-way stop sign at the intersection of Plaza Verde and Camino Carlos Rey. After coming to a complete stop at the 4-way stop sign, the Cobalt began to make a left-hand turn towards the north-bound lane of Camino Carlos Rey. The Defendant, driving his BMW southbound on Camino Carlos Rey at more than twice the posted speed limit of 25 miles per hour, ran through the intersection of Camino Carlos Rey and Plaza Verde, without stopping, and struck the Cobalt containing Christopher Bryant and Ian Sweatt. Christopher Bryan and Ian Sweatt died as a result of the crash.

At least one cellphone was in the cobalt. No cellphone was entered into evidence nor was any cellphone searched by law enforcement.

## APPLICABLE LAW AND ARGUMENT

Rule 5-501 NMRA, dealing with “Disclosure by the State”, requires the State to timely disclose several categories of evidence that are “within the possession, custody or control of the State.” A violation of Rule 5-501 NMRA would be a violation of the Defendant’s right to due process.

Here, there is no disclosure violation, and therefore no violation of the Defendant’s due process rights, because the State is not withholding any evidence. No cellphone has been searched in relation to this case and no cellphone has been entered into evidence. There is nothing related to a cellphone for the State to disclose.

“The law recognizes three general circumstances that give rise to a claim that the State violated a criminal defendant’s right to due process by failing to provide evidence to the defense which is within, or potentially within, the State’s purview.” State v. Ware, 1994 NMSC 091, ¶14, 881 P.2d 679 (internal quotation marks and alteration omitted). Those circumstances are: (1) when the State withholds evidence after the defendant has requested it or “when it otherwise becomes material to the defense”; (2) when the State “destroys, loses, or fails to preserve evidence that has previously been collected during the investigation of a crime[;]” and (3) “when the State fails to collect evidence from the crime scene in the first place.” Id. at ¶14-16.

The present case may fall under the situation in which the State failed to collect evidence.

“Usually, the failure to gather evidence is not the same as the failure to preserve evidence, and that the State generally has no duty to collect particular evidence at the crime scene.” Ware, at ¶16 (citing March v. State, 859 P.2d 714, 716 (Alaska Ct. App.

1993) (the State's duty to preserve evidence attaches at the time the State has gathered and taken possession of the evidence). The New Mexico Supreme Court recognized the "distinction between a failure to preserve material evidence after it has been seized, and the failure to gather evidence in the first instance when police officers are investigating a crime scene." Ware, at ¶18. The Supreme Court noted that Courts should not 'second guess' the actions of investigating officers." Id. at ¶19 (quoting Trimble v. State, 1965 NMSC 055, 402 P.2d 162).

In Ware, the Supreme Court of New Mexico lays out a two part test for evaluating whether an investigative agent's failure to gather a particular item into evidence amounts to a due process violation. Where a violation is found, Ware also lays out guidelines for determining the appropriate remedy. In Ware, the Defendant was charged with three counts of aggravated battery with a deadly weapon. The alleged deadly weapon was a rock with which the victim had been bludgeoned. Investigative agents of the state opted not to collect the weapon itself into evidence, and instead photographed the rock. The defendant moved to have all testimony and photographs of the rock suppressed at trial due to the state's failure to preserve the actual rock itself, alleging a due process violation.

The Ware Court employed a two part test in denying the motion. "First, as a threshold matter the evidence that the [s]tate failed to gather from the crime scene must be material to the defendant's defense.... [Second,] if the evidence is material to the defendant's defense, then the conduct of the investigating officers is considered." Id. at ¶ 25. Each part is taken up below.

First, as a threshold matter, this Court must determine whether the cellphone is material to Defendant's defense. The determination of evidence materiality is a question of law for the court. Materiality in this context is different from mere relevance and has a specialized meaning. "Evidence is material only if there is a reasonable probability that, had the evidence been available to the defense, the result of the proceeding would have been different.... A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at ¶ 25 (internal citations removed). Here materiality is identical to its use in the Brady exculpatory evidence and Chouinard lost evidence contexts, requiring that the missing evidence itself be so important that its absence undermines our confidence in a verdict. This is no small bar, and is decidedly higher than mere relevance.

The State disputes that the cellphones are relevant to this proceeding. Nothing found during the search of the cellphone could possibly contradict the physical evidence: that the victim Cobalt came to a complete stop at the 4-way stop sign of Plaza Verde and Camino Carlos Rey, that the cobalt was making a reasonable left-hand turn through the intersection, when the Defendant, driving his BMW at more than twice the speed limit, ran the stop sign and crashed into the cobalt.

Perhaps the most telling fact with respect to the difficulty of establishing materiality by the Defense relates to the Supreme Court's own analysis in Ware. Faced with an aggravated battery with a deadly weapon case where the state entirely failed to collect and preserve the weapon, the court just barely concludes that it is material. Id. ¶ 27. The weapon necessary to prove an element of the offense of aggravated battery with a deadly weapon was barely material in Ware. That court noted that their conclusion was "a close

call.” If a weapon that would establish the element of the offense is a “close call” in terms of materiality, it would be very reasonable for this Court to conclude that a cellphone found in victim vehicle, when the physical evidence clearly indicates what happened, has no materiality.

If this Court concludes that the cellphone is somehow material, it must then turn to an inquiry into the conduct of the investigating officer. Id. at ¶ 26. Where the officer’s conduct is in bad faith, in a deliberate attempt to prejudice the defendant’s case, then suppression is appropriate. Id. If instead the officer was grossly negligent, then the trial court may instruct the jury that it may “infer that the material evidence not gathered from the crime scene would be unfavorable to the state.” Id. Finally, where the officer’s conduct is “merely negligent, an oversight, or done in good faith, sanctions are inappropriate....” Id. (emphasis added). The Defendant may still “examine the prosecution’s witnesses about the deficiencies of the investigation and argue the investigation’s shortcomings against the standard of reasonable doubt.” Id.

There is no reason to interpret law enforcement’s failure to preserve and search a cellphone as anything other than mere negligence or an oversight. In Ware, the court found that the missing deadly weapon was material, but that the state’s failure to gather and preserve it was “certainly not anything more than mere inadvertence or ordinary negligence on the part of the police.” The defendant in Ware was entitled to no remedy at all because the officer’s conduct did not amount to more than mere negligence. At most, that is the case here.

WHEREFORE, the State respectfully requests that the Court deny Defendant’s Motion.

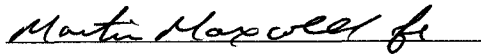
Respectfully submitted,



Kent Wahlquist  
Deputy District Attorney  
P.O. Box 2041  
327 Sandoval St.  
Santa Fe, NM 87504

**Certificate of Service**

I hereby certify that I caused to be delivered a true and correct copy of the foregoing pleading to defense counsel, Tom Clark, on this 16<sup>th</sup> day of November, 2018.



Kent Wahlquist  
Deputy District Attorney