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| **COUNTY COURT**  GILPIN COUNTY, COLORADO  2960 Dory Hill Road, Suite 200 Black Hawk, CO 80422 | DATE FILED: December 20, 2016 FILING ID: 6FCEB68E28819 CASE NUMBER: 2016T169 |
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| **Plaintiff(s):**  PEOPLE OF THE STATE OF COLORADO |  |
| **Defendant(s):**  ROBERT FRIEDLANDER | COURT USE ONLY |
| **ATTORNEYS FOR THE DEFENDANT**  FIFE LUNEAU, P.C. CHARLES L. FIFE, #17799 DANNY LUNEAU, #43639 | Case Number: 16 T 169  Division: 1 |
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| **MOTION FOR JUDICIAL DETERMINATION OF THE ADMISSIBILITY OF DEFENDANT’S PRIVATE PORTABLE BREATH TEST RESULT** | |

COMES NOW, the Defendant, above named, by and through his undersigned attorneys, Fife Luneau, P.C., and request a judicial determination of the admissibility of Defendant’s private portable breath test result. As grounds, Defendant states as follows:

1. C.R.S. § 42–4–1301(6)states:

1. The results of this preliminary screening test may be used by a law enforcement officer in determining whether probable cause exists to believe such person was driving a motor vehicle or vehicle in violation of this section and whether to administer a test pursuant to section 42-4-1301.1(2).
2. Neither the results of such preliminary screening test nor the fact that the person refused such test shall be used in any court action except in a hearing outside of the presence of a jury, when such hearing is held to determine if a law enforcement officer had probable cause to believe that the driver committed a violation of this section. The results of such preliminary screening test shall be made available to the driver or the driver's attorney on request.
3. It is clear that under C.R.S. § 42–4–1301(6), a law

enforcement officer’s portable breath test (PBT) is not admissible in a jury trial. Moreover, the Colorado Supreme Court in *People v. Cain*, 327 P.3d 249 (Colo. 2014), clarified that a law enforcement officer’s PBT is not admissible under any circumstances, including impeachment or the “opening the door” exception.

1. In this case, Mr. Friedlander owned his own (PBT) that he used prior to arrest in this case. Mr. Friedlander’s PBT recorded a blood alchol content (BAC) under .05.
2. C.R.S. § 42–4–1301(6)and *Cain* do not address or prohibit the use of a private PBT. Mr. Friedlander wishes to use this PBT result during his trial.
3. A defendant’s right to present a defense pursuant to the Due Process Clauses of the Colorado and United States Constitution cannot be unreasonably restricted by a statute or rule. Courts have repeatedly held that where a defendant seeks to introduce reliable exculpatory evidence it is a violation of his Due Process rights for that evidence to be excluded based upon a rule or statute that would otherwise prohibit the admission of such evidence. *Holmes v. South Carolina,* 126 S.Ct. 1727 (2006)(State rule that prohibited admission of evidence of third party guilt unless it raised a reasonable inference of the defendant’s guilt violated defendant’s due process rights), *Rock v. Arkansas,* 483

U.S. 44, 107 S.Ct. 2704 (1987)(state rule prohibiting admission of hypnotically refreshed testimony violated defendants right to present a defense under the Due Process clause), *Crane v. Kentucky,* 476 U.S. 683, 106 S.Ct. 2142 (1986)(exclusion of testimony regarding circumstances of defendant’s confession on the grounds that the issue of voluntariness was resolved against the defendant at the pretrial hearing denied the defendant his right to Due Process of law and a fair trial ), *Chambers v. Mississippi,* 410 U.S. 284, 93 S.Ct. 1038 (1973)(exclusion of hearsay statements where third party confessed violated defendant’s right to Due Process of law.

1. Other states that have evaluated this question have held that even where the results are not admissible by the prosecution, if the results are exculpatory they may be admitted by the defense. *Patrick v. State,* 750 S.W.2d 391 (1988)(where PBT is admissible for purpose of determining probable cause they should be considered reliable enough to be admitted as exculpatory evidence).
2. The probative value of this evidence is very high as it confirms that Mr. Friedlander was not under the influence or driving while ability impaired at the time he was driving. Given that there is minimal chance that the PBT result was falsely lower than actual BrAC, there is no unfair prejudice to the prosecution in admitting this evidence. To the extent that the PBT may have read lower than the actual BrAC, the prosecution can

elicit this information either through cross examination or a rebuttal witnesses.

WHEREFORE, Defendant requests a judicial determination as to the admissibility of his PBT during trial.

Respectfully submitted,

/s/Danny Luneau Charles L. Fife Danny Luneau

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF MAILING

I do hereby state and affirm that a copy of the foregoing **MOTION FOR JUDICIAL DETERMINATION OF THE ADMISSIBILITY OF DEFENDANT’S PRIVATE PORTABLE BREATH TEST RESULT** was served, via

ICCESS, this 20th day of December, 2016:

Office of the District Attorney County of Gilpin

/s/Danny Luneau