

<b>DISTRICT COURT, LA PLATA COUNTY, COLORADO</b> 1060 East Second Avenue Durango, Colorado 81301	DATE FILED: July 26, 2018 8:57 AM FILING ID: 1F84C18ED5B7A CASE NUMBER: 2017CR343  <b>COURT USE ONLY</b>
<b>THE PEOPLE OF THE STATE OF COLORADO,</b> Plaintiff,  v.  <b>MARK REDWINE,</b> Defendant	Case Number: 17CR343  Division: 1
<b>[D13]</b>  <b>OBJECTION TO CONSUMPTIVE TESTING OR DESTRUCTIVE TESTING OF “HAIRS” AND “ALL EVIDENCE”</b>  <b>DEMAND TO OBSERVE ANY CONSUMPTIVE TESTING ALLOWED OVER DEFENSE OBJECTION</b>	

Mr. Redwine requests that this Court ensure that his counsel has sufficient time to investigate and test the physical evidence, specifically hair the prosecution intends to destroy. He objects to any further testing of hair as consumptive or destructive testing. As grounds for this request he relies upon the following:

**THE GOVERNMENT IS REQUESTING DESTRUCTIVE TESTING**

1. In a July 12, 2018 filing the prosecution informed the Court, in compliance with an earlier ruling, that it intends to do destructive testing. The prosecution, in taking issue with the Court’s ruling requiring notice, asserts that the order was based on something, “the defendant asked the Court, without authority...” The prosecution’s assertion, in its notice, about lacking authority is mistaken. The relevant portion of the redundant documents filed with the prosecution’s notice demonstrate authority recognized by CBI allowing notice and presence for destructive testing. *See* Prosecution Exhibit 2 – Consumptive Testing – CBI Policy Consumptive Testing of Minimal Evidence Samples. CBI has the policy in place because it comports with previous court orders, Colorado case law and basic principles of fairness i.e. authority. *See generally*, Due Process, Right to Counsel, Confrontation, and Compulsory Process Clauses of the Federal and Colorado Constitutions, Article II, Sections 3,

6, 16 and 28, of the Colorado Constitution, and Article I, Section 9 and the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution; *People v. Brown*, 194 Colo. 553, 555, 574 P.2d 92, 94 (1978); *People v. Wartena*, 156 P.3d 469 (Colo. 2007); CRS 16-3-309(2)(g); ABA Standards for Criminal Justice 16-3.4.

2. The prosecution has not identified all of what it will be testing. It mentions at one point in an unnumbered document titled, "PEOPLE'S SECOND RESPONSE TO D-6 AND NOTICE OF CONSUMPTIVE TESTING", that "CBI must reanalyze *all* of the original samples. CBI has informed the District Attorney that this testing may be consumptive in nature and therefore destructive." (Emphasis added).

3. The hairs found on Middle Mountain have been in the possession of law enforcement since June 24, 2013. The hair found on a tool in Mr. Redwine's truck was seized February 13, 2014. Other evidence that fits under "all" evidence has been in the possession of the government for longer.

4. The prosecution has failed to identify where the testing will occur. Defense has not been informed whether the agency to conduct the testing will be Colorado or federal.

5. The prosecution provides no explanation for why it will only provide 48 hours' notice to defense prior to testing items in the government's possession for more than four years. There is no explanation for why information about testing will be unknown or unavailable until 48 hours beforehand.

6. CBI has implemented a standard operating procedure (hereinafter SOP) with specific steps to follow where a request, as here, for analysis observation occurs. *See* Prosecution Exhibit 1 – Consumptive Testing – CBI Policy Responsibility to the Customer, 3(a), page 3 of 7 (Dec. 4, 2014). **This motion is a specific request/demand to be present.** The procedures to be followed upon such a demand are likely to take more than 48 hours. *Id.* 3(a)-(j), page 3 of 7. CBI may determine that they want to challenge the demand through the Attorney General's Office. *Id.* 4., page 4 of 7. Such a challenge contemplated by CBI SOPs is likely to take more than 48 hours. If the federal government requires a similar demand Mr. Redwine hereby makes said request.

7. It is critical that the defense have time to make sure an expert be present if the Court allows any such additional testing. Mr. Redwine requests that the Court avoid a due process violation and order that if the People engage in further testing the defense expert be present and sufficient notice be provided about when and where testing will be completed. There is no prejudice to the prosecution to require 15 days advanced notice for testing that has been delayed for years.

### **MR. REDWINE'S CONSTITUTIONAL RIGHTS TAKE PRECEDENT OVER THE PROSECUTION'S UNEXPLAINED NEED TO PROVIDE MARGINAL NOTICE**

8. The government has provided no authority for the proposition that its desire to provide notice 48 hours before testing at an unnamed facility by an unidentified agency, trumps Mr. Redwine's rights to due process, effective assistance of counsel, his right to confront witnesses, his right to present a defense, and his right to a fair trial.

10. To render effective assistance of counsel, an attorney must investigate his or her client's case. *See People v. White*, 182 Colo. 417, 514 P.2d 69 (1973); *People v. Dillon*, 739 P.2d 919 (Colo. App. 1988). The Supreme Court has observed that “[o]nly through pre-trial preparation can the defendant be assured that facts will be discovered which will disclose potential defenses to a reasonably diligent and competent defense counsel. In the absence of adequate pre-trial investigation—both factual and legal—knowledgeable preparation for trial is impossible. Without knowledgeable trial preparation, defense counsel cannot reliably exercise legal judgment and, therefore, cannot render reasonably effective assistance to his client.” *White*, 514 P.2d at 71. Relying upon *White*, the Court of Appeals has similarly held that the, “Defendant [is] entitled to a pretrial investigation of sufficient thoroughness to develop potential defenses, to reveal weaknesses in the prosecution’s case, and to uncover all facts relevant to the issues of guilt and/or penalty.” *See Dillon*, 739 P.2d at 922.

11. Effective investigation and review of the evidence in this case is necessary to promote and protect, among other important constitutional rights, the effective and complete cross-examination of witnesses called to testify against an accused, particularly those witnesses who may testify on behalf of the state as expert witnesses. *See C.R.E.* 705.

12. In *People v. Wartena*, 156 P.3d 469 (Colo. 2007) the Supreme Court vacated a trial court order suppressing DNA evidence where the trial court ordered the prosecution to pay for the defense expert. In reaching that conclusion, the Court opined in considering the applicability of §16-3-309: “[t]he touchstone of the statute is the reasonableness of the state’s conduct. Thus, when the sample is destroyed the court may be asked to suppress the test results as a sanction for unreasonable state conduct. Under these circumstances, the statute requires that the court consider whether the state performed the testing in good faith and gave the defendant an opportunity to have an expert present during destructive testing.” *Wartena* at 472 citing *People v. Brown*, 194 Colo. 553, 555, 574 P.2d 92, 94 (1978) (when state acts unreasonably in destroying evidence, the court may impose an appropriate sanction).

13. Mr. Redwine moves this court for an order requiring the prosecution to: 1) provide two weeks’ notice before consumptive testing; 2) provide the location where the testing will be completed as soon as available but no later than two weeks before testing; 3) as soon as available, but no later than two weeks before contemplated testing, notice about what agency will complete the testimony. Denial of this request would violate Mr. Redwine’s rights to the effective assistance of counsel, to due process, to present a defense, to confrontation, to cross-examination, to trial by jury, to compulsory process under the Constitutions. U.S. Const., amends. V, VI, XIV; Colo. Const., art. II, §§ 3, 6, 7, 10, 11, 16, 18, 20, 23, 25, and 28 of the Colorado Constitution, and Crim. P. 16.

Respectfully submitted,

/s/ John Moran

John Moran, No. 36019

Deputy State Public Defender

Dated: July 26, 2018

/s/ Justin Bogan

Justin Bogan, No. 33827

Deputy State Public Defender

Dated: July 26, 2018

Certificate of Service

I hereby certify that on July 24,  
2018, I served the foregoing  
document by e-filing same to all  
opposing counsel of record.

/s/ John Moran

/s/ Justin Bogan