

DISTRICT COURT, LA PLATA COUNTY, COLORADO 1060 East Second Avenue Durango, Colorado 81301	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff,	DATE FILED: September 20, 2018 2:32 PM FILING ID: 5D682ADBBFF61 CASE NUMBER: 2017CR343
v.  <b>MARK REDWINE,</b> Defendant	σ COURT USE ONLY σ
Douglas K. Wilson, Colorado State Public Defender John Moran, Attorney No. 36019 Justin Bogan, Attorney No. 33827 Deputy Public Defender 175 Mercado Street, Suite 250, Durango, CO 81301 Phone: (970) 247-9284 Fax: (970) 259-6497 E-Mail: Justin.Bogan@coloradodefenders.us Email: John.Moran@coloradodefenders.us	Case Number: 17CR343  Division: 1
<b>[D45]</b>  <b>MOTION TO RELEASE PHYSICAL EVIDENCE FOR          INDEPENDENT DEFENSE EXAMINATION AND TESTING</b>	

Mr. Redwine, through counsel, moves the Court to order

- the prosecution, La Plata County Sheriff's Office (LPCSO), and any other governmental organization, e.g. Colorado Bureau of Investigation, possessing or controlling evidence related to this case
- to release any physical evidence requested by the defense to
- defense investigators and/or experts so that the defense may conduct unsupervised examination and/or testing of the evidence.

The specific evidence items requested at this time listed according to LPCSO item number and short form description are as follows:

- a) Item 23 band aid found in front
- b) Item 59 single blk ankle sock fnd
- c) Item 93 pillow case from Mark

- d) Item 184 Bone @N37 28.879 W 107 31.902
- e) Item 185 Bone @ N37 28.876 W 107 31.895
- f) Item 186 Bone @N37 28.887 W107 31.900
- g) Item 188 Bone @N37 28.851 W107 31.887
- h) Item 189 Plastic bag CDOW that bone
- i) Item 190 bone (smaller one) that was
- j) Item 191 Black plastic bag that bone
- k) Item 192 Bone (bigger one) that was
- l) Item 193 Black plastic bag that bone
- m) Item 194 Black Jordan tennis shoe
- n) Item 195 Small bones found-Floyd M
- o) Item 196 Black Fila sock w/gry and blue
- p) Item 197 Bone @N37 29.15 W107 33.408
- q) Item 208 Feces && bone w/nail on it
- r) Item 211 Bone, collar-clavicle
- s) No. 24376 human skull
- t) All bones whether deemed human or non-human

As grounds, Mr. Redwine asserts:

1. The State has collected numerous pieces of physical evidence in this case. Since its collection and seizure, all of the evidence has been in the exclusive custody and control of the government. The prosecution, through CBI, has sought or conducted numerous tests on the evidence.

2. The defense requires access to the evidence beyond mere visual inspection for it to perform its own independent evaluation and testing.
3. The defense may need to transmit evidence to consulting experts for purposes of independent testing at its own expense.
4. It is well established in Colorado that defendants have the right to independently examine and test physical evidence. The Colorado statute governing the admissibility of state laboratory test results clearly contemplates that, when there is a sufficient quantity of physical evidence available, the defendant's expert may conduct an independent analysis of the evidence. C.R.S. § 16-3-309(1) & (2)(f). The defense does not intend to engage in any destructive testing without prior notice to the prosecution and the court.
5. For decades, Colorado courts have recognized that defendants may conduct independent analysis of physical evidence in order to seek information that would potentially support an acquittal. See, e.g., Harris v. People, 174 Colo. 483, 488, 484 P.2d 1223, 1225 (1971) (defendant charged with stabbing two women had the right to conduct a chemical analysis of the substance found on his knife, which he claimed was animal blood). Thus, it is common practice for evidence in the custody of the state to be provided to the defense for independent testing and analysis. See, e.g., People v. Viduya, 703 P.2d 1281, 1289 (Colo. 1985) (district court ordered laboratory used by police to deliver remainder of sample of defendant's blood to defense expert for analysis); People v. Garries, 645 P.2d 1306, 1307-08 (Colo. 1982) (eight items of physical evidence thought to contain human blood stains – including pieces of cardboard, a trunk lock from a car, and stair treads – “were delivered to the defendant's expert . . . for independent examination.”).
6. Furthermore, destructive testing by state agents without notice or involvement of the defense requires suppression of the evidence precisely because such destructive testing render the evidence “unavailable for independent testing by defendant's subject.” People v. Gomez, 198 Colo. 105, 107, 596 P.2d 1192, 1193 (1979) (citing Garcia v. Dist. Court,

197 Colo. 38, 589 P.2d 924 (1979). As the Colorado Supreme Court has recognized, “The trial of a criminal case is not a game of fox and hounds in which the state attempts to outwit and trap a quarry. It is, instead, a sober search for truth, in which not only the resources of the defendant, but those readily available to the state must be put to work in aid of that search.” Garcia, 197 Colo. at 47, 589 P.2d at 930.

7. Indeed, even inadvertent destruction of physical evidence may require dismissal of criminal charges where there is “no adequate substitute for independent examination by a defense expert.” People v. Sheppard, 701 P.2d 94, 54 (Colo. 1985) (towing company’s destruction of vehicle violated due process and required dismissal of vehicular homicide charge because defense expert was unable to examine vehicle to determine whether the accident was due to mechanical defects rather than human error). Similarly, in People ex rel. Gallagher v. District Court, 656 P.2d 1287, 1292 (Colo. 1983), a murder case, the prosecution allowed a mortician to cleanse the hands of the victim’s body without first allowing the defense to obtain an independent test for trace metals to support his self-defense theory that the victim had held the murder weapon, a gun. Although the record demonstrated that, even if the victim had held the gun as defendant claimed, there was only a four percent chance that testing would reveal this fact, the Colorado Supreme Court deemed it appropriate that the prosecution be sanctioned with a reduction in charge from first degree murder to second degree murder. Id. at 1291-93.

8. In sum, Colorado law supports the defense request that the evidence held by the state in connection with this case be provided to the defense for independent testing.

9. Mr. Redwine believes access to this evidence is directly required by Brady as this evidence may contain exculpatory information relevant to show a lower level of culpability and otherwise mitigate the charges in this case.

The accused makes this motion and all other motions and objections during all proceedings in this case, whether or not explicitly stated at the time of the motion or objection, pursuant to Due Process, Equal Protection, the Right to Counsel, the Right to Confrontation, Ex Post Facto, the Right to Trial by Jury, the Right to Appeal and the prohibition against Cruel and Unusual Punishment of the Federal and Colorado Constitutions, and Article II, §§ 3, 6, 7, 10, 11, 16, 18, 20, 23, 25, and 28 of the Colorado Constitution, and the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitution.

Respectfully submitted,

/s/ John Moran

John Moran, No. 36019  
Deputy State Public Defender  
Dated: September 20, 2018

/s/ Justin Bogan

Justin Bogan, No. 33827  
Deputy State Public Defender  
Dated: September 20, 2018

Certificate of Service

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

/s/ John Moran

/s/ Justin Bogan