<table>
<tr><td>DISTRICT COURT, LA PLATA COUNTY, COLORADO
1060 East Second Avenue
Durango, Colorado 81301</td><td rowspan="2">DATE FILED: September 20, 2018 2:19 PM
FILING ID: 756696D48844B
CASE NUMBER: 2017CR343

σ COURT USE ONLY σ</td></tr>
<tr><td>THE PEOPLE OF THE STATE OF COLORADO, Plaintiff,

v.

MARK REDWINE,
Defendant</td></tr>
<tr><td>Douglas K. Wilson, Colorado State Public Defender
John Moran, Attorney No. 36019
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Division: 1</td></tr>
<tr><td colspan="2">[D42]
MOTION TO SUPPRESS EVIDENCE DERIVED FROM SEARCH WARRANT SUPPORTED BY AFFIDAVIT GENERATED THROUGH ILLEGAL POLICE CONDUCT</td></tr>
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Mr. Redwine, through counsel, respectfully requests this Court the subsequent search warrant and suppress all law enforcement observations, statements, and any additional evidence derived from the unlawful entry into the home by law enforcement. As grounds for the request, Mr. Redwine states:

FACTS

1. La Plata County Sheriff's Office Investigator Golbricht crawled through the second floor window of Mark Redwine's home on August 5, 2013. She accessed the window from the roof of a vehicle Inv. Cowing pulled up to the house. After climbing in the window and unlocking the door, the house was searched by La Plata County Sheriff's Office Deputies and a canine handler team Carren Corcoran and Molly. Carren Corcoran and her dog were directed by La Plata County Sheriff's Office deputies and acted as their agents. Moreover, Carren Corcoran is a

police officer with the Madison, Wisconsin Police Department though it appears when acting as an agent of the La Plata County Sheriff's Office she is freelancing.

2. La Plata County Sheriff's Office deputies and Carren Corcoran claim that they had permission from Mark Redwine. They say they were given permission over the phone. The conversation was not recorded. There was no written consent to enter provided. Mr. Redwine was away for work in Texarkana, Texas when he allegedly received the call. Inv. Cowing made promises to Mr. Redwine to induce him to allow the search. Counsel is unaware of anything provided to Mr. Redwine that would have made him aware of his right to refuse the search.

3. The probable cause alleged in the search warrant relied heavily on a canine that had allegedly alerted on the house before and after La Plata County Sheriff's Investigator Golbricht broke an entrance into the home. (*See* [D23] MOTION TO SUPPRESS EVIDENCE OBTAINED AS A RESULT OF AN AUGUST 5, 2013 WARRANTLESS ENTRY OF MR. REDWINE'S HOME EFFECTED BY A LAW ENFORCEMENT OFFICIAL CRAWLING THROUGH A SECOND FLOOR WINDOW WHILE MR. REDWINE WAS IN TEXARKANA, TEXAS). Aside from the canine information and information gained through breaking an entry there was no new material information in the affidavit for search warrant than had been previously provided when law enforcement went back in Mr. Redwine's house for a rug (*see* 14SW91), couch (*see* 14SW103), loveseat couch (*see* 14SW103), a coffee table (*see* 14SW103).

4. The affidavit for search warrant did not give the court notice of any of the limitations of the canine relied on for the successive search. The omission was material.

Law

5. Both the United States and Colorado Constitutions prohibit the issuance of a search warrant except upon a showing of probable cause supported by oath or affirmation particularly describing the place to be searched and the things to be seized. U.S. Const. Amend. IV; Colo.

Const. Art. II, §7. The "fruit of the poisonous tree" doctrine has been consistently applied to invalidate searches based on warrants where the warrant was obtained through an affidavit containing facts illegally obtained. The Colorado Supreme Court in *People v. Diaz*, 53 P.3d 1171 held that:

> Evidence is not admissible under the inevitable discovery exception to the warrant requirement based on speculation that the evidence would have been discovered anyway; prosecutor must establish that there was a reasonable probability that the evidence would have been discovered in the absence of police misconduct, and that the police were pursuing an independent investigation at the time the illegality occurred.

6. A prior illegal search cannot be used as a basis for a warrant. The State cannot insulate an illegal search by including the product of that search in an affidavit. *See United States v. Wanless*, 882 F.2d 1459, 1465-66 (9th Cir.1989); *see also United States v. Gray*, 302 F.Supp.2d 646, 653 (S.D.W.Va.2004) ("Regardless of whether an officer concealed or confessed the circumstances of the predicate search, he should bear responsibility for any illegality occurring prior to the issuance of the warrant. A magistrate's chambers is not a confessional in which an officer can expiate constitutional sin by admitting his actions in a well-drafted warrant application.").

7. "The ability to obtain a lawful search warrant after an illegal search has occurred does not satisfy the inevitable discovery exception requirements; the prosecution must show that the challenged evidence would probably have been ultimately or inevitably discovered by lawful means through an independent investigation taking place at the time the illegality occurred." *People v. Nelson*, 296 P.3d 177, (Colo. App 2012).

8. While there is an exception upon which the prosecution can rely to justify admission of evidence obtained from the searches of the residence, the burden is on the prosecution to prove by a preponderance of the evidence that officers would have sought the warrant for the subsequent search even absent the information gained by the initial illegal entry. *People v. Schoondermark*, 759 P.2d 715 (Colo. 1988). The prosecution must demonstrate that the seizures resulting from the subsequent search is "genuinely independent of an earlier, tainted one." This is known as the "independent source" exception to the exclusionary rule. Under this doctrine, items seized as a result of an initial unlawful search may be admitted at trial nonetheless. *Id.* at 719. The doctrine sanitizes the taint of the initial illegal entry because it, in effect, renders the initial unlawful entry mere redundant.

9. A subsequent search pursuant to a warrant "would not be a genuinely independent source of the challenged evidence if the decision to seek the warrant was prompted by what was observed during the initial entry or if the information obtained during that entry was relied upon by the magistrate issuing the warrant." *Id.*

9. C.R.S. §16-3-301, *et seq.*, and Crim. P. 41 embody the statutory and rule requirements by which the state legislature and the Colorado Supreme Court have sought to secure the constitutional right of an individual to be free from unreasonable searches and seizures. Rule 41(b) states that a search warrant may be issued to search for and seize any property:

> (1) which is stolen or embezzled; or
>
> (2) which is designed or intended for use as a means of committing a criminal offense; or
>
> (3) which is or has been used as a means of committing a criminal offense; or

(4) the possession of which is illegal; or

(5) which would be material evidence in a subsequent criminal prosecution in this state or in another state; or

(6) the seizure of which is expressly required, authorized, or permitted by any statute of this state; or

(7) which is kept, stored, maintained, transported, sold, dispensed, or possessed in violation of a statute of this state, under circumstances involving a serious threat to public safety or order, or to the public health.

10. Rule 41(c)(1)(IV) states that the probable cause affidavit must relate facts sufficient to establish probable cause to believe that the property to be searched for, seized, or inspected is located at, in, or upon the premises to be searched.

11. Rule 41(e) states that a person aggrieved by an unlawful search and seizure may move the district court for return of the property seized and to suppress its use as evidence where, among other things, the warrant is insufficient on its face, or the property seized is not that described in the warrant, or there was not probable cause for believing the existence of the grounds on which the warrant was issued.

12. The judge issuing the warrant must confine the determination of probable cause to the four corners of the supporting affidavit. *People v. Varrieur*, 771 P.2d 895, 897 (Colo. 1989). The "four-corners" rule prohibits the police from rehabilitating a defective warrant by introducing evidence not contained in the affidavit for search warrant. *People v. Dailey*, 639 P.2d 1068, 1073 (Colo. 1982).

13. The omission of material facts known to the affiant at the time the affidavit was executed may cause statements within the affidavit to be so misleading that a finding of probable cause based on such statements may be deemed erroneous. *Peo. v. Fortune*, 930 P.2d 1341, 1345 (Colo. 1997), citing *People v. Winden*, 689 P.2d 578, 583 (Colo. 1984).

14. Vague Allegations: An affidavit is inadequate when it contains only vague allegations speculating that the defendant engaged in illegal activity and when the affidavit fails to establish a nexus between the alleged criminal activity and the place to be searched. *People v Randolph, 4 P.3d 477, 482* (Colo. 2000); *see People v. Leftwich*, 869 P.2d 1260, 1270-71 (Colo. 1994). A "bare bones" affidavit is one containing "wholly conclusory statements devoid of facts from which a magistrate can independently determine probable cause" and is insufficient to support a finding of probable cause. *People v. Altman*, 960 P.2d 1164, 1170 (1998). The alert of the canine is a vague allegation. The canine alerts to blood, hair and decaying tissue at parts per trillion. None of those scents is illegal. Mr. Redwine does not stipulate they were present in his home.

15. Probable Cause is Lacking Where Particularity is Insufficient: There was insufficient description of any other location to allow search outside the laundry room. A warrant must particularly describe the place to be searched, and the persons or things to be seized. U.S. Const., amends. IV; Colo. Const., art. II, §7; *see People v. Randolph*, 4 P.3d 477, 482 (Colo. 2000); § 16-3-303 (1); Crim. P. 41(d). The particularity requirement serves to "prevent general searches." *Maryland v. Garrison*, 480 U.S. 79, 84 (1987); *People v. Staton*, 924 P.2d 127, 131 (Colo. 1996). A search warrant must be particular enough to enable individuals conducting the search to identify the specific items sought. *Steele v. United States*, 267 U.S. 498 (1925); *Staton*, 924 P.2d at 131; *People v. Roccaforte*, 919 P.2d 799, 803 (Colo. 1996); Crim. P. 41(c). The items here were amorphous scents.

16. The Material Facts That Law Enforcement Omitted Render the Affidavit Misleading: "The omission of material facts known to the affiant at the time the affidavit was executed may cause statements within the affidavit to be so misleading that a finding of probable cause based on such statements may be deemed erroneous." *People v. Eirish* 165 P.3d 848, 856 (Colo.App. 2007);

People v. Winden, 689 P.2d 578, 583 (Colo.1984); *People v. Fortune,* 930 P.2d 1341, 1345 (Colo. 1997). "An omitted fact is material for purposes of vitiating an entire affidavit only if its omission rendered the affidavit substantially misleading to the judge who issued the warrant." *Eirish,* 165 P.2d at 856; *People v. Unruh,* 713 P.2d 370, 381 (Colo.1986). Intentional omissions of material facts in an affidavit submitted in support of a search warrant may render the affidavit lacking in probable cause and can also result in the imposition of sanctions. People v. Winden, 689 P.2d 578, 582 (Colo. 1984). An omitted fact is material for purposes of vitiating an entire affidavit only if its omission rendered the affidavit substantially misleading to the judge who issued the warrant. People v. Unruh, 713 P.2d 370, 381 (Colo. 1986). Law enforcement materially omitted the limitations of the canine and failed to tell the court the dog would alert on non-contraband. *See People v. McKnight,* 2017 WL 2981808 (Co. Ct. App. 2017)

17. Officer Good Faith Test: Even though a reviewing court issued the warrant, "[a]n officer may not automatically assume that a warrant is valid because a reviewing magistrate has executed it." *Randolph,* 4 P.3d at 483; *see also People v. Altman,* 960 P.2d 1164, 1170 (Colo.1998) (stating that in an ideal system, no magistrate would approve a defective warrant, but that because ours is not an ideal system, an officer must exercise his or her own judgment). "The test for good faith is 'whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization, taking into account all of the circumstances surrounding the issuance of the warrant." *Pacheco,* 175 P.3d at 96 (quoting *U.S. v. Leon,* 468 U.S. 897, 922-23 n. 23 (1984)). A reasonable person in the position of Inv. Golbricht would be well aware the information omitted, the non-criminal items to be seized, the non-particularized area to be searched and her illegal entry prior to seeking warrant sould exclude her actios from good faith.

18. The Colorado Supreme Court described the circumstances where an officer will not be protected by the presumption of good faith as provided by CRS 16-3-308 in *Randolph*:

> The officer who conducted the investigation and failed to corroborate the details provided by the informant was the same officer that prepared the deficient affidavit. The language in the warrant mirrored the language in the

> affidavit. Therefore, the officer either knew, or should have known, that the warrant was lacking in probable cause, and it was not objectively reasonable for him to rely on it.

Id. at 484.

19. At each stage the submitting officer has an obligation to scrutinize the information and affidavit to assure himself the information is sufficient. *Id.*

20. Evidence Obtained As The Fruit Of Illegal Police Conduct Must Be Suppressed: Evidence which is obtained by police as the result of their improper or illegal conduct must be suppressed as a "fruit of the poisonous tree." Wong Sun v. United States, 371 U.S. 471 (1963); People v. Corpany, 859 P.2d 865 (Colo. 1993); People v. Sprowl, 790 P.2d 848 (Colo. App. 1989). Any evidence which was obtained as a consequence of illegal police activity must be suppressed as a product of the police illegality. A search made pursuant to an invalid warrant is unlawful. *People v. McKinstry*, 843 P.2d 18, 20 (Colo. 1992). Should law enforcement officials conduct an unconstitutional search or seizure, any illegally obtained evidence is subject to the exclusionary rule which seeks to deter such wrongful action. *Id.*; *People v. Pacheco*, 175 P.3d 91, (Colo. 2006); *People v. Randolph*, 4 P.3d 477, 483 (Colo. 2000).

WHEREFORE, Mr. Redwine, through counsel, respectfully requests that this court suppress evidence seized upon execution of the search warrant in this case, pursuant to the above-stated facts and law. Mr. Redwine makes this motion, and all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, on the following grounds and authorities: federal and state constitutional rights to bail, the due process, trial by jury, right to counsel, equal protection, cruel and unusual punishment, confrontation, compulsory process, right to remain silent, and right to appeal clauses of the federal and Colorado Constitutions, and the first, fourth, sixth, eighth, ninth, tenth, and

fourteenth amendments to the United States Constitution, and article II, sections 3, 6, 7, 10, 11, 16, 18, 20, 23, 25, and 28 of the Colorado 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