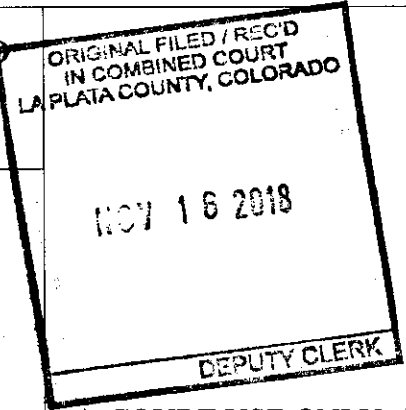


DISTRICT COURT, LA PLATA COUNTY, COLORADO
Court Address: 1060 E. Second Ave., Durango, CO 81301
Phone Number: (970) 247-2304



Plaintiff: PEOPLE OF THE STATE OF COLORADO

v.

Defendant: MARK ALLEN REDWINE

▲ COURT USE ONLY ▲

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Case Number: 17 CR 343

**PEOPLE'S RESPONSE TO [D 47] MOTION TO SUPPRESS STATEMENTS OF
MARK REDWINE OBTAINED THROUGH HIS APPEARANCE ON THE DR. PHIL
TELEVISION SHOW
[PUBLIC ACCESS]**

NOW COME the People, by and through Christian Champagne, District Attorney, in the County of La Plata, and respond to defense motion [D 47], and move this honorable Court to deny the defense request. AS GROUNDS for this response, the People state as follows:

1. The defendant asserts that his voluntary appearance on the Dr. Phil television show on February 20-21, 2013, was somehow involuntary and orchestrated by law enforcement, thus making Dr. Phil an agent of the State of Colorado. The defense cannot and will not offer any factual support whatsoever for its pleading, and it should be denied without a hearing.

I. LEGAL AUTHORITY

A. STATE AGENT

2. Constitutional violations resulting in the exclusion of evidence generally do not apply to evidence obtained by private parties or evidence resulting from the conduct of private parties. *People v. Lopez*, 946 P.2d 478, 482 (Colo. App. 1997) (citing *Colorado v. Connelly*, 479 U.S. 157, 167 (1986)).

3. An exception to this rule exists when private persons become agents of the police by virtue of their suggestion, order, request, or participation for purposes of criminal investigation. *Id.*; *People v. Henderson*, 559 P.2d 1108 (Colo. App. 1976).
4. “The burden of establishing government involvement...rests on the party objecting to the evidence.” *U.S. v. Snowadzki* 723 F.2d 1427 (9th Cir. 1984).
5. Determination of whether an individual is acting as an agent of the police requires examination of the totality of the circumstances. *People in Interest of P.E.A.*, 754 P.2d 382, 385 (Colo.1988). Critical factors in determining whether a private citizen is a state actor include “(1) whether the government knew of and acquiesced in the intrusive conduct, and (2) whether the party performing the search intended to assist law enforcement efforts or to further his own ends.” *Coolidge v. New Hampshire*, 29 L.Ed.2d 564, 567 (1971);
6. In situations where the person is not paid by a public agency, the courts have found they were not a state actor and the statements made were admissible. *People v. Chastain*, 733 P.2d 1206 (Colo.1987) (holding that a hospital security guard was not a state actor). Similarly, when a defendant is questioned without an investigative purpose, but simply out of curiosity, the questioner was deemed to not be a state actor. *United States v. Morales*, 834 F.2d 35 (2nd Cir.1987) (statements made to a physician's assistant at a correctional facility were held admissible because the physician's assistant had no investigative purpose, had no responsibility to investigate, and was only questioning the defendant out of curiosity.) When a person has no duty to report the statements made by a defendant, he is deemed to not be a state actor. *State v. Olson*, 449 N.W.2d 251 (S.D.1989) (a counselor at a prison was deemed not to be a state actor.)

B. INVOLUNTARINESS

7. Involuntary statements are inadmissible in trial, except for impeachment purposes. *See Dickerson v. United States*, 530 U.S. 428, 433 (2000).
8. The defense has the burden of proof to make a prima facie *evidentiary* showing that the statements at issue were involuntary. *People v Zadran*, 314 P.3d 830, 833 (Colo. 2013); *People v. McIntyre*, 325 P.3d 583, 587 (Colo. 2014) (emphasis added). If able to do so, the burden of preponderance then falls on the prosecution to establish that the statements were voluntary. *Id.*

9. Coercive conduct is a “necessary predicate to the finding that a confession is not ‘voluntary,’” *Connelly*, 479 U.S. at 167, and must “play[] a significant role in inducing a confession or an inculpatory statement....” *People v. Medina*, 25 P.3d, 1216, 1222 (Colo. 2001). Such activity can take the form of overt physical abuse and threats or subtle forms of psychological coercion. *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991); *People v. Gennings*, 808 P.2d 839 (Colo.1991).
10. Where coercive government conduct plays a significant role in inducing the inculpatory statement or statements, the statement is deemed involuntary. *Id.*
11. In determining whether government coercion induced the defendant to incriminate himself, the Court should weigh “the circumstances of pressure against the power of resistance of the person confessing.” *Medina*, 25 P.3d at 1222. As part of those circumstances, the court may consider:
 - a. whether the defendant was in custody or was free to leave and was aware of his situation;
 - b. whether *Miranda* warnings were given prior to any interrogation and whether the defendant understood and waived his *Miranda* rights;
 - c. whether the defendant had the opportunity to confer with counsel or anyone else prior to the interrogation;
 - d. whether the challenged statement was made during the course of an interrogation or instead was volunteered;
 - e. whether any overt or implied threat or promise was directed to the defendant;
 - f. the method and style employed by the interrogator in questioning the defendant and the length and place of the interrogation;
 - g. and the defendant's mental and physical condition immediately prior to and during the interrogation, as well as his educational background, employment status, and prior experience with law enforcement and the criminal justice system.

Gennings, 808 P.2d at 844.

12. Additionally, the official misconduct must be causally related to the confession or statement. *See Connelly*, 479 U.S. at 164, 107 S.Ct. 515. And, “[e]ven where there is a causal connection between police misconduct and a defendant's confession, it does not automatically follow that there has been a violation of the Due Process Clause.” *Id.* at 164 n. 2 *See also People v. Wickham*, 53 P.3d 691, 694 (Colo.App.2001).

II. ARGUMENT

13. Simply put, there is no proof whatsoever that Dr. McGraw or his staff were acting at the direction of any state agency. Because there was no state action, the exclusionary rule does not apply and there should be no sanction or suppression of the evidence. *See Lopez*, 946 P.2d at 482; *see also Connelly*, 479 U.S. at 167.
14. To that end, the People present Exhibit 1, affidavit of Lieutenant Jim Ezzell. Lt. Ezzell is and was the lead investigator and supervisor over the investigation into Dylan Redwine's death at all times since his disappearance in 2012, and affirmatively states under oath that neither he nor any member of the law enforcement team investigating this case, including other agencies acting at his direction, ever directed or instructed Dr. McGraw or any member of his staff to interrogate Mark Redwine on behalf of law enforcement. *See Exhibit 1 – Affidavit of Lt. Jim Ezzell.*
15. Furthermore, the statements were not involuntary. Mr. Redwine was invited by Dr. McGraw to attend the taping of this television show and chose to do so of his own free will. Although the questioning by Dr. McGraw and his associated was at times direct and confrontational, at no time was his will overborne such that he was coerced into making any statements. He was not in custody of law enforcement, was not denied counsel, was not induced to speak through promises or threats, his physical and mental condition were not at issue, nor were his educational level or employment status, and he was fully aware that this type of interview might have confrontational aspects, including surprise guests and events, such as the chance to As further evidence of the fact that his will was not overborne, the defendant maintained his ability to refute taking a . . . and made no outward admissions regarding the crime, despite what the defense characterizes as coercive questioning by Dr. McGraw and his staff. *See Exhibits 2, 3, 4, 5* (transcripts of the Dr. Phil recordings from 2/20/13-2/21/13).

WHEREFORE, because the defense cannot carry its burden to show state action, and because the statements made by the defendant were not involuntary, the People request this court to DENY the defense motion without a hearing, unless the defense can make an offer of proof regarding its ability to meet its burden that satisfies the court.

Respectfully submitted this November 18, 2018.

CHRISTIAN CHAMPAGNE
DISTRICT ATTORNEY
6th JUDICIAL DISTRICT

/s/ Christian Champagne

Christian Champagne #36833
District Attorney

CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2019, I delivered a true and correct copy of the foregoing to the parties listed below via e-service.

/s/ Christian Champagne
Christian Champagne