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IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, v. TYLER JAMES ROBINSON, Defendant.	**STATE'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR AN ORDER PROHIBITING VCM AND METALLURGY TESTING (**docket # 284) Case No. 251403576 Judge Tony F. Graf, Jr.

The State asks the Court to DENY Defendant's motion prohibiting virtual comparison microscopy and metallurgy testing.

BACKGROUND

The State intends to pursue virtual comparison microscopy (VCM) and metallurgy testing because it may further tie the bullet recovered from Charlie Kirk to the weapon found near the crime scene. This testing will not consume the evidence. Nor will it prevent Defendant from conducting his own similar testing. However, it may result in the following potential alterations:

1. VCM testing may require folding back portions or "petals" of the bullet jacket fragment to expose underlying surfaces that may contain rifling markings. Ex. 1, Affidavit of Brandon

Reynolds, ¶ 4. This will allow greater comparison with the rifling of the recovered firearm. *Id.* This folding-back process could detach a petals or petals. *Id.*

2. Metallurgy testing is not expected to require surface preparation of the jacket material. Ex. 2, Affidavit of Justin Dolph, ¶ 6. However, it may require cleaning a small area to expose it for examination. *Id.*
3. Metallurgy testing may require cleaning or scraping a small portion of one of the lead fragments recovered at autopsy to expose a clean underlying surface for examination. *Id.*
4. Up to four of the 39 .30-06 cartridges recovered from Defendant's residence will be used for VCM and metallurgy comparisons.

One bullet jacket fragment and four lead fragments were recovered from the body of Charlie Kirk during his autopsy. The bullet jacket fragment was deformed from having struck Mr. Kirk. Samantha Karner from the ATF cleaned the bullet jacket fragment, photographed it, and used pliers to peel back the petals of the deformed fragment to expose land and groove impressions necessary for comparison. PHT, 7.9.2026, 171-72. After that preparation work, Ms. Karner took additional photographs. *Id.* Ms. Karner then evaluated the fragment to determine its class, subclass, and individual characteristics. *Id.* at 173.

Ms. Karner was able to identify several characteristics of the bullet, including that it was of the .30 caliber class which could have been fired by several firearms in that class, *id*. at 177, including .30-06 caliber weapons. Given the limited detail that Ms. Karner observed, she could not include or exclude the fragment as having been fired from the recovered rifle. *Id*. at 194. She testified that there was "no further testing that [she] could do" to try to reach a conclusive result. *Id.* at 220. However, she noted "the possibility of using a 3D system to visualize the individual characteristics on the bullet," to obtain more conclusive results. *Id.* Her lab does not have the capability to conduct that testing. *Id.* But the FBI does. *Id.* at 221.

In December of 2025, the State notified defense counsel of its intent to submit the fragment to the FBI lab to conduct this analysis, known as Virtual Comparison Microscopy, or VCM, as well as metallurgy analysis. Defendant objected to the testing.

Virtual Comparison Microscopy. The FBI lab intends to conduct VCM analysis on the bullet jacket fragment to examine any markings that the rifle imparted to the fragment. This analysis is non-destructive and uses 3D technology to capture multiple scans of the object. The scan data will be preserved and provided to the defense for their own analysis.

To obtain a useful scan of the bullet jacket fragment, the examiner may need to clean it and fold back portions of the jacket to expose surfaces that contacted the rifle's barrel. Ex. 1, ¶ 4. Where possible, soft-tipped tools will be used for this work. *Id.* While this process could leave marks on the surfaces of the fragment, the examiner will document those marks and, if possible, ensure that the marks do not interfere with the areas to be examined and compared. *Id.* This process will alter the shape of the jacket fragment and could cause portions of the jacket to detach. *Id.*

Regardless of the potential of detaching parts of the bullet jacket fragment, peeling the petals back will increase – not decrease – the ability to perform comparisons by more fully exposing rifling marks. *Id.* The examiner will photograph and document the items before and after peeling back the petals. *Id.* All items and documentation will be preserved for future review and analysis, including any potential detachments.

During VCM testing, the examiner will etch an identifier (a letter or number) near each land and groove on the bullet jacket fragment. *Id.* The purpose of the etching is to identify the areas compared. *Id.* While this marking will alter the item, it will not affect any comparison analysis because the etching will be made on the edge of the fragment which did not touch the rifling of the firearm. *Id.*

Finally, the examiner will use the rifle recovered from the crime scene to fire test rounds for comparison. The FBI intends to use ammunition in its stock for the test fires. *Id.* at ¶

5. However, it may be necessary to use ammunition recovered from Defendant's home to ensure comparison of like ammunition. *Id.* Thirty-nine cartridges were seized from Defendant's residence. J. Faumuina report, Bates 3997, p. 162. As a result, while firing some test rounds of that ammunition will certainly alter those rounds, others will remain.

Metallurgy. The State also intends to conduct metallurgical testing on the bullet jacket fragment and at least one of the recovered lead fragments. The testing on the jacket fragment may require cleaning a small area on the jacket fragment. Ex. 2, ¶ 6. This cleaning will occur only if necessary and will not alter the fragment in a way that will preclude further analysis. *Id.* at ¶ 6. After any necessary cleaning, the examiner will use x-ray fluorescence spectrometry to analyze and compare the material. *Id.* at ¶ 4. X-ray fluorescence spectrometry will not damage or alter the item. *Id.* at ¶¶ 6-7.

Testing on the lead fragment may also require surface preparation. This preparation could involve cleaning or scraping the fragment to expose a clean surface for analysis. *Id.* at ¶¶6-7. The examiner will document the area affected, *id.* at ¶ 8, and will not take a scraping from an area that would affect later analysis, *id.* at ¶ 7. After exposing a clean surface, the examiner will analyze and compare the material.

Finally, the examiner will disassemble and sample or cross-section one of the cartridges found in Defendant's residence to compare with the jacket and lead fragments recovered from Mr. Kirk's body. *Id.* at ¶ 6.

Neither VCM nor metallurgical testing will prevent future testing. Additionally, an independent expert may review the data from which the FBI's experts drew their conclusions, which will be documented, preserved, and provided to the defense.

ARGUMENT

The State has the duty to investigate and prosecute crime. *See* Utah Code 17-18-501. Defendant cannot impede that investigation. At the same time, Defendant's due process rights prevent the State from destroying evidence helpful to the defense where

doing so would violate principles of fundamental fairness. In this case, the proposed testing of the bullet jacket fragment and lead fragments will not destroy the evidence. It will remain for defense analysis and testing. As a result, the typical due process concerns arising from destruction of evidence do not apply here and the testing should be allowed.

But even under a destruction of evidence analysis, the testing passes muster. The testing is for a legitimate purpose – to provide additional evidence that the bullet that killed Mr. Kirk was fired from Defendant's rifle. Any prejudice to the defense is speculative because there is no apparent exculpatory value of the evidence, the bullet fragments will only be altered if necessary to conduct the State's investigation, they will not be destroyed, and they will be (and have already been) extensively documented which will permit review by defense experts. Therefore, the Court should allow the State to test the evidence.

Defendant's request for access to testing should be denied because it creates a risk to the integrity of the testing processes and presents other concerns. After the State has completed its testing, Defendant can review the extensive documentation of the FBI analysts' work. Furthermore, the items will remain available for Defendant's inspection.

1. The testing will not destroy or consume the evidence.

The VCM testing in this case will alter the evidence by bending the petals of the jacket fragment so that the underlying surface which may contain rifling markings may be viewed for comparison. This will not destroy the evidence. The items will remain in the custody of the State after the testing. Even if a petal of the jacket fragment detaches in this process, it will be preserved for further analysis in case it has evidentiary value. As a result, the impact on the ability to conduct later analysis will be minimal, if any.

The process of cleaning the jacket fragment and scraping a section of one of the lead fragments to conduct a metallurgy analysis will have no impact on the ability to conduct further analysis. Neither the cleaning of the jacket fragment nor the scraping of

the lead fragment will damage any surfaces containing rifling markings. The scraping of the lead fragment will leave adequate material for future metallurgy analysis.

Because these processes will not destroy the evidence, they do not raise the due process concerns addressed in destruction of evidence cases. Accordingly, the Court should allow the testing.

2. Even under destruction of evidence case law, the State can test the fragments.

"The prosecution must be allowed to investigate and prosecute crime, and due process does not require that it forego investigation in order to avoid destroying potentially exculpatory evidence." *People v. Griffin*, 761 P.2d 103, 107 (Cal. 1988). However, the State may not destroy evidence where it would violate strictures of due process. In this case, the testing will not violate either federal or state due process rights.

2.1. The testing procedures will satisfy Defendant's federal due process rights.

In *California v. Trombetta,* 467 U.S. 479, 485 (1984) police obtained a breath sample from the defendant, which was tested in an Intoxilyzer machine for alcohol content. The breath sample was not preserved. *Id*. The trial court allowed the admission of the Intoxilyzer results and, after conviction, the defendant appealed, arguing that the failure to preserve the breath sample for additional testing deprived him of due process. *Id.* at 483. The Court rejected the argument and held that, "whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense." *Id*. at 489. The evidence must "possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* The court held that because of the reliable methodology used by the Intoxilyzer, "the chances are extremely low that preserved samples would have been exculpatory." *Id*.

In *Arizona v. Youngblood,* 488 U.S. 51 (1988), a child was sexually assaulted and biological samples were tested but did not yield evidence of the perpetrator's identity. The state did not store the samples and clothing in a way that preserved them for future testing. *Id.* The state provided all lab reports and materials documenting the collection and testing of the clothing. *Id*. at 55. The Court found that while *Brady* held that the good or bad faith of the State is irrelevant when analyzing the failure to disclose material exculpatory evidence, when the evidence is merely *potentially* exculpatory, the defendant must show bad faith on the part of police. *Id*. at 57-58. The court reasoned, "requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it." *Id.* Ultimately, the court held that the failure to refrigerate the samples and clothing did not amount to bad faith.

Following *Trombetta* and *Youngblood*, courts throughout the country rejected arguments that destruction of evidence during the State's investigations violated federal due process rights. For example, in *People v. Griffin,* 761 P.2d 103, 107 (Cal. 1988), the State's analyst conducted testing that consumed a biological sample that identified the defendant as the perpetrator of a murder and sexual assault. The analyst testified that she consumed the entire sample during her testing because "she did not think she could get a reliable result from a smaller fluid sample." *Id*. at 108. The court noted a substantial body of case law from many jurisdictions which held that necessary consumption of evidence during investigation does not violate due process. *Id.* at 107-108. Despite a defense expert's opinion to the contrary, the court held that the State adequately demonstrated that the consumption of the evidence was necessary. Accordingly, the court found that destruction of the sample did not deny due process. *Id.*

In *State v. Bakalov*, 1999 UT 45, ¶¶ 46-47, 979 P.2d 799, the State conducted biological testing which may have consumed a DNA sample. Nonetheless, some material

remained, and the defendant moved the trial court to allow him to test it. The trial court denied the motion because the defendant refused to provide a sample for comparison, and the Utah Supreme Court upheld this decision. *Id.* at ¶ 54. The court recognized that investigative testing can consume evidence, precluding other tests. *Id.* at ¶ 50. The court also acknowledged that "the strictures of due process accommodate this reality, recognizing that the 'failure to preserve potentially useful evidence does not constitute a denial of due process' unless the criminal defendant can show bad faith on the part of the State." *Id.* at ¶ 53 (citing *Youngblood*, 488 U.S. at 58).

The availability of other means to challenge test results acts as an additional safeguard to an accused's due process rights. In *In re Al Baluchi*, 952 F.3d 363, 371 (D.C. Cir. 2020) the court recognized that "substituting documentation for physical evidence is an accepted, even routine, evidentiary practice." (Finding no due process violation where buildings with evidentiary value were destroyed after they had been thoroughly documented.) Indeed, the court noted, "the simplest and perhaps least controversial way to preserve a scene or object is by taking pictures of it." *Id*. (citation omitted); *Holcomb v. Sadler*, 658 S.E.2d 562, 566 (W.Va. 2008) (no due process violation where state consumes biological evidence in good faith, but "the government must preserve as much documentation of the test as is reasonably possible to allow for a full and fair examination of the results by a defendant and his expert").

In this case, testing and even destruction of the evidence would not violate due process under *Trombetta* because the evidence does not "possess an exculpatory value that [is] apparent." There is no reason to believe the bullet fragments contain exculpatory evidence. To the contrary, all the evidence points to the inculpatory value of the fragments: Defendant admitted to shooting Charlie Kirk with the rifle found on scene, the rifle contained only one spent cartridge and three unspent cartridges – consistent with the single gunshot fired at Mr. Kirk, testing to date has found that the bullet recovered from Mr.

Kirk's body was consistent with (although not conclusively identifiable to) the .30-06 rifle found on scene, and video evidence from UVU and etchings made with the Dremel found at Defendant's apartment support the rifle as the murder weapon.

Additionally, testing and even destruction of the evidence would not violate due process under *Youngblood* and *Bakalov* because any alteration of the evidence will not be done in bad faith. First, testing the items, including preparing them by bending the petals back or cleaning the fragments, will be done to conduct legitimate investigation into the offense – to more firmly tie the fragments to Defendant's rifle. Second, the handling and evaluations of the items will be done by qualified analysts in accredited laboratories. Analysts will alter the evidence only if it is necessary. All efforts will be made to avoid altering the evidence in any way that will affect future review or analysis of the items, including using soft-tipped tools to avoid creating tool marks on the items where possible, handling the items on areas that will not affect comparisons as much as possible, and documenting the items at every stage.

Because the bullet fragments do not possess any apparent exculpatory value and because the testing will be done in good faith, the testing requested does not violate Defendant's federal due process rights. The extensive documentation of the evidence and tests and results – as well as the preservation of the items themselves – further ensure Defendant has an adequate opportunity to challenge the evidence.

2.1. The testing satisfies Defendant's state due process rights.

In *State v. Tiedemann*, 2007 UT 49, ¶¶ 7-9, 162 P.3d 1106, the defendant was charged with murder but was found incompetent to stand trial. *Id.* While he was committed to the State Hospital, police destroyed evidence pursuant to routine protocols. *Id.* The defendant was later restored and the State resumed prosecution. *Id.* The defendant moved to dismiss based on the destruction of the evidence. *Id.* Rather than following the *Youngblood* approach, the court adopted a different analysis under the Utah Constitution:

> In cases where a defendant has shown a reasonable probability that lost or destroyed evidence would be exculpatory, we find it necessary to require consideration of the following: (1) the reason for the destruction or loss of the evidence, including the degree of negligence or culpability on the part of the State; and (2) the degree of prejudice to the defendant in light of the materiality and importance of the missing evidence in the context of the case as a whole, including the strength of the remaining evidence.

Id. at ¶ 44. With this guidance, the Supreme Court remanded the case to the trial court.

The court clarified the *Tiedemann* analysis in *State v. DeJesus*, 2017 UT 22, 395 P.3d 111. In *Dejesus* the prison video system captured a fight which resulted in charges of assault on a police officer. *Id*. at ¶¶ 3-6. The video was deleted due to routine protocols, *id*., and the defendant moved to dismiss the case. *Id.* at ¶ 9. The defendant claimed that *Tiedemann* did not require a threshold showing that the evidence would have been exculpatory. *Id.* at ¶ 18. The court disagreed and explained,

> [In *Tiedemann*] we established a two-step analysis. First, the defendant must demonstrate a reasonable probability that the lost evidence would have been exculpatory—the threshold requirement. Once a defendant has done so, the court must balance the culpability of the State and the prejudice to the defendant in order to gauge the seriousness of the due process violation and to determine an appropriate remedy.

Id. at ¶ 27. The court held that the defendant satisfied the threshold requirement by testifying that she was trying to kick another inmate, not the officer, and that the video recording would have shown as much. *Id*. at ¶ 46.

In this case, Defendant has not made the showings required by *Tiedemann.* First, the defendant has not "shown a reasonable probability that lost or destroyed evidence would be exculpatory." As explained above, all circumstances, not the least of which is Defendant's own admission to Lance Twiggs that he used the rifle to shoot Charlie Kirk, indicate that the results from the testing will be inculpatory, not exculpatory. Because Defendant has not satisfied his threshold burden, the analysis under the Utah Constitution

goes no further. Nonetheless, the State addresses the remaining *Tiedemann* factors: the reason for the alteration and the prejudice to the defendant.

Any potential alteration of the evidence is for legitimate investigation – to attempt to more firmly tie the fragments to Defendant's rifle. Qualified analysts in an accredited lab will handle the items with care and only alter them where necessary, taking all precautions to avoid any impact on the evidentiary surfaces of the items. The analysts will photograph and document the evidence and the testing process at every step of the testing. They will also preserve the data the tests produce as well as the items themselves.

Finally, there will be no prejudice. Bending the petals back for VCM analysis will *enhance* the jacket fragment's evidentiary value by exposing more of the relevant surfaces so that rifling markings can be seen and recorded. The items will not be destroyed and if a petal or a part of the jacket fragment detaches it will be documented and preserved. Similarly, surface preparation of the jacket and lead fragments for metallurgy testing will not affect future testing. Accordingly, the Court should deny Defendant's motion and allow the State to test its evidence.

3. Due process does not require the access Defendant requests.

Defendant asks that the Court either (1) allow the defense to examine and photograph the evidence before it is tested; or (2) allow a defense expert to observe the preparation and testing or require video recording of the process. Def. Mot. 2.

Rule 16 of Criminal Procedure does not require this type of access. Rule 16 merely requires discovery of evidence obtained through forensic testing. Similarly, the Utah Code only speaks to the issue in terms of providing expert notice, Utah Code §77-17-13, not giving access to testing facilities. And the Utah Rules of Evidence address the issue only as it relates to the admissibility of the evidence. Because, as a rule of statutory construction, courts "presume all omissions to be purposeful," *Marriott v. Wilhelmsen,* 2025 UT 35, ¶ 32, 575 P.3d 1106, the Court should presume that the legislature and rule-

making bodies overseen by the Supreme Court intentionally left investigation of criminal acts and their accompanying forensic testing to the State, within the bounds of due process described above.

The closest Utah authority to this issue is the Utah Supreme Court's statement in *State v. Bakalov*, 1999 UT 45 ¶ 52. There, court stated:

> We acknowledge that fundamental fairness may in some cases be violated when a criminal defendant ... is denied the opportunity to have an expert of his choosing, bound by appropriate safeguards imposed by the Court, examine a piece of critical evidence whose nature is subject to varying expert opinion.

Id. (cleaned up). The court did not expound on which circumstances would violate fundamental fairness, except to hold that *Bakalov* did not. Further, *Bakalov* based this statement on language from *Barnard v. Henderson*, 514 F.2d 744, 746 (5th Cir. 1975), where the defense expert was foreclosed from conducting his own ballistics inspection where the ballistics evidence was "one of the most damaging pieces of evidence" in the case.

Unlike *Barnard*, none of the State's proposed testing here will prevent a defense expert – upon a proper showing – from conducting his own independent testing. Rather, the testing will facilitate that analysis by exposing relevant surfaces of the bullet jacket fragment. Moreover, the ballistics evidence here does not appear to be as crucial as it was in *Barnard,* given Defendant's confessions, the DNA evidence, the video surveillance, the fact that the recovered rifle belonged to Defendant's grandfather, and the additional evidence linking Defendant to the rifle and the cartridges it contained. Further, neither *Barnard* nor *Bakalov* addressed the value of alternative evidence like the extensive documentation of the testing here.

Neither *Barnard* nor *Bakalov* addressed Separation of power or evidence integrity issues arising from Defendant's proposal. The State has the prerogative to investigate criminal acts. Separation of powers principles leave the manner and details of

investigation to the executive and prevent the courts from directing how the government should investigate and prosecute crime. In *People v. Wartena,* 156 P.3d 469, 473 and 477 (Colo. 2007) the Colorado Supreme Court made clear that the court's authority over evidence "does not extend to dictating procedures to a particular laboratory." Indeed, "Federal and state courts alike have concluded that the Due Process Clause places no constraints on the good faith consumptive or destructive testing of evidence by the prosecution." *Id*. at 475-76 (Coats, J. concurring).

Other courts have rejected motions to allow defense experts to be present for testing because "it would not materially aid the defendant in challenging the reliability of the test. Defendant retains the ability to challenge the testing procedures by cross examining the government's expert or by impeaching the reliability of her methods." *U.S. v. Rogers*, 2010 WL 5015329 (D. Kan. 2010) (attached).

The Court jeopardizes its role as an objective arbiter when it dictates the manner of investigation. Instead of issuing orders about *how* to conduct an investigation, the Court must remain neutral and rule on *whether* the State has satisfied due process and the rules of evidence. Moreover, the Court does not have the expertise of accrediting bodies who verify compliance with sound scientific practices. Appellate courts recognize the "interest in having judges be guided by scientists …, not the other way around." *Com v. Foley*, 38 A.3d 882 (Pa. Super. Ct. 2012). Imposing conditions on forensic laboratories that depart from their adopted standards, which are part of their accreditation, could create negative consequences for the evidence in this case, evidence in other cases, and the lab in general.

3.1. Allowing Defendant to inspect and photograph the evidence before testing carries risk without reward.

Defendant asks to inspect and photograph the items before the testing takes place. This risks breaking the chain of custody, damaging the evidence in a way that could preclude further testing, and creating other less likely dangers like losing the evidence.

See U.S. v. Drake, 2025 WL 2613805, *2 (D. Utah 2025) (Attached). Where the State loses or damages evidence, or loses links in the chain of custody, due process gives the benefit to the defendant. Such a benefit may be exclusion of evidence, an adverse inference instruction to the jury, or even, in some circumstances, dismissal of the case. *DeJesus,* 2017 UT 22, ¶¶ 55, 62. If the defense mishandles the State's evidence, on the other hand, there is no similar benefit to the State.

While there are obvious risks to allowing the defense to inspect the evidence, there is little benefit. The items have already been photographed and otherwise documented, as Ms. Karner explained at the preliminary hearing. This extensive documentation, coupled with the documentation the FBI lab will do at each stage of its testing is enough. *See In re Al Baluchi*, 952 F.3d 363, 371 (D.C. Cir. 2020) ("substituting documentation for physical evidence is an accepted, even routine, evidentiary practice.")

3.2. FBI Policies prevent the FBI Lab from allowing video recording or a defense expert to be present for testing.

As part of the FBI lab's accreditation, the FBI must comply with its access restriction policies. Ex. 3, Affidavit of Marsha Karas. The policy prohibits outside access to the lab for purposes of viewing lab activities. Ex. 3, ¶ 3. The reasons for these policies are obvious: to avoid personnel who do not know how to behave in the laboratory setting, to avoid contamination of evidence, to avoid accidents, and to avoid cross-contamination of evidence. Ex. 3, ¶ 4. In addition, because the FBI lab handles classified material, it must restrict access to those who hold proper clearances. *Id*.

FBI lab policies do not allow video recording. *Id.* ¶¶ 3, 5. This policy avoids the risk of recording classified materials. *Id.* ¶¶ 4-5. In addition, the lab's standard operation procedures, which were part of the lab's accreditation, do not account for video recording and video recording equipment. *Id.* ¶ 5. Introducing this equipment into the process adds a variable that was not considered in the accreditation. *Id*. Issues such as where the camera

is positioned, how it is set up, how it is operated, the risk of it falling or malfunctioning, and what the camera will actually capture are all variables which the lab has not considered, for which it has not adopted policies, and which the accrediting body has not approved. *Id.* ¶¶ 5-6.

In addition, it is unclear how the video camera would capture anything meaningful. Much of the work is done with specialized tools like microscopes, magnifying equipment, and x-ray fluorescence spectrometry. And much of the work – particularly the portions which form the basis of the opinions – will be captured anyway. Photographs, 3D scans, data from spectrometry equipment, and other material which will form the basis for the analysts' testimony will be provided to the defense whose analysts can perform their own review. The FBI analysts will also be subject to cross-examination.

After the State has concluded its testing and Defendant has been provided the extensive documentation, and after his experts review the materials to determine whether additional inspection would be helpful, Defendant may move to inspect the items. But the State must be permitted to conduct its inspection first because it has the burden of proof. Defendant's motion, therefore, is more properly made after the State's testing is complete and after his experts review the extensive documentation of the State's testing to determine whether their own independent analysis will be necessary or helpful to their own opinions.

Dated November 16, 2026.

Utah County Attorney's Office

s/ Ryan McBride
Deputy Utah County Attorney
Counsel for Plaintiff

Exhibit 1, Affidavit of Brandon Reynolds

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. TYLER JAMES ROBINSON Defendant.	AFFIDAVIT OF BRANDON REYNOLDS Case No. 251403576 JUDGE TONY F. GRAF

While under oath or affirmation, I swear to the truthfulness of the following facts:

1. My name is Brandon Reynolds. I am a Physical Scientist/Forensic Examiner (PSFE) in the Firearms/Toolmarks Unit (FTU) at the FBI Laboratory in Quantico, Virginia, which is an accredited laboratory.

2. I am a qualified forensic examiner in the field of firearm and toolmark identification within the FTU of the FBI Laboratory. To become a qualified examiner in this field at the FBI Laboratory, I successfully completed an extensive training program to demonstrate competency, which included written tests, practical exercises, casework-like examinations, oral boards, moot court exercises, competency tests, and supervised casework. During the training program, I also toured ammunition, firearm, and tool manufacturing facilities and attended several professional conferences. I successfully completed oral boards and competency tests on firearms and toolmarks identification, including performing pattern examinations using light comparison microscopy (LCM) and virtual comparison microscopy (VCM). Since being qualified as a forensic

examiner, I have demonstrated continued proficiency in my authorized disciplines through successful completion of performance monitoring exercises pursuant to the Laboratory Quality Assurance Manual. I have performed firearm and toolmark examinations in hundreds of criminal cases.

3. Firearm identification is an examination to determine whether or not a bullet, cartridge case, or other ammunition component was fired by a particular firearm. The surfaces of a firearm that make contact with ammunition components, like the breech face, firing pin, or barrel, have random microscopic imperfections and irregularities that are produced incidental to manufacturing, even when manufactured to rigorous specifications, as well as subsequent wear and tear during use. When a firearm is fired, these random, microscopic imperfections can be transferred to different areas of the fired ammunition components. By comparing these phenomena, a forensic examiner is able to form conclusions as to whether ammunition components were or were not fired from the same firearm. These observations are done in part by performing microscopic comparisons with LCM and/or VCM between questioned items (bullets and cartridge cases) and known items (test fires). In this case, I anticipate using VCM. VCM involves the use of a three-dimensional (3D) topographical instrument with built-in comparison software. Scanning the questioned and known items into the 3D topographical instrument generates detailed 3D images of the surface(s) of each item. Surface preparation may be necessary to enable items to be entered into the 3D topographical instrument. The built-in software allows a forensic examiner to conduct pattern examinations by comparing 3D images of each item side-by-side to determine whether or not they were produced by the same source.

4. Surface preparation may be necessary to enable entry into the 3D topographical instrument. The optical head of the 3D topographical instrument needs a direct line of sight of the bearing surface. The bearing surface is the portion of the bullet that contacts the interior of the firearm's barrel and acquires toolmarks from that contact. Prior to any surface preparation, the bullet will be documented in the condition received. Then, the bearing surface will be cleaned and any bullet material that is obscuring the bearing surface will be bent back to expose the toolmarks underneath. The selection of tool to accomplish this bending will be based on the hardness of the material. Typically, tools like pliers or tweezers that have plastic gripping surfaces are used since the tool surface is softer than the bullet material and prevents damage to the bullet. If harder tools are needed due to the material, such as with a bonded bullet, they would only be used on portions of the bullet with no toolmarks present. While bending alters the bullet from the condition it was received in, bending will not alter, consume, or destroy any evidentiary toolmarks of interest. It is possible that during the bending process the bullet may separate, especially at areas of the bullet that are thin or are already damaged, although attempts will be made to avoid separation. Separation does not prevent documentation and scanning of toolmarks. Any separation will also be documented and the fragments retained as subdivided evidence. If the separated fragments have rifling present, they can also be 3D scanned. It is important to note that the optical head never makes physical contact with the bullet. It is also important to note that these 3D images are retained along with the physical evidence and can be examined by other Examiners in the future, even if the bullet specimens are not physically present. Thus, entry into a 3D topographical instrument for VCM increases

the visibility, comparability, and repeatability of pattern examinations, especially for damaged bullets.

When an evidence item is received in FTU, it is permanently labeled with the laboratory number, item number, and the initials of the examiner using a metal scribe tool in a location where there are no toolmarks present. These markings are typically made very small and are necessary to identify each item during examination and transfers throughout the Laboratory. Additionally, evidence can be marked using a non-permanent method, such as with ink or indirectly (a tag or container). Unless there are factors preventing permanent marking of an item, such as damage or size, scribing is the best practice to ensure identifiers are preserved.

Prior to entry into a 3D topographical instrument, FTU personnel will scribe the base of each land and/or groove impression that is scanned with an identifier (such as "L1" and "G1"). This will allow anyone who examines the 3D image and the bullet to link each area on the bullet to that exact area within the 3D image. While non-permanent ink markings appear in the live images that are captured by the 3D topographical instrument, they are not visible in the 3D image, which is why scribing identifiers is preferred. Scribed areas are typically on the edge of the bullet at the base and not on tool marked areas. Scribing identifiers is a common quality assurance process to allow reviewing or repeat testing by another examiner.

5. Cartridges from FTU's standard ammunition stock will be fired with the submitted evidentiary firearm to collect test-fired bullets (i.e., known items). If during

examination it becomes necessary to test fire the evidentiary cartridges, a maximum of two evidentiary cartridges will be test-fired and retained as secondary evidence.

6. All evidence that is received by FTU undergoes examination according to our E3CV methodology, as outlined in FTU's technical procedure: Evaluation, Classification, Comparison, Conclusion, and Verification.

First, the evidence undergoes Evaluation. During this stage, the evidence is assessed and documented in its received condition, which includes notes, photographs, and the addition of item identifiers. During evaluation, test-fires from the firearm would be collected (secondary evidence) and scanned into a 3D topography instrument for VCM analysis, along with the evidentiary bullet(s). This stage is when the evidence would undergo any surface preparation (e.g., cleaning and bending) to enable entry of the evidence into the 3D topographical instrument. The evidence would then move to the Classification stage, also known as a Level 1 Analysis. Here, the evidence will be analyzed to determine if the toolmarks present bear similar or different class characteristics through measurement and/or observation. During this stage, instruments such as a stereoscope or a light comparison microscope can be used to visualize and compare the class characteristics between different items. Items with different class characteristics can be Excluded, which is the conclusion that two toolmarks did not originate from the same source. Items with similar class characteristics proceed to the Comparison stage of examinations. During the comparison stage, also known as a Level 2 Analysis, the 3D images of the evidence bullet and test-fired bullets will be compared side-by-side with VCM to assess the quality and/or quantity of agreement in

individual characteristics. The next stage is Conclusion. At this stage, the Examiner can render one of three conclusions: Exclusion (see Level 1 Analysis above), Inconclusive, or Identification. An Identification conclusion is the opinion that two or more toolmarks originated from the same source. An Inconclusive conclusion is the opinion that while class characteristics are in agreement, there is an insufficient quality and/or quantity of corresponding individual characteristics to identify or exclude. If an Identification or Exclusion (based on discernable or measurable differences in class characteristics) is made, the items move into the final stage: Verification. During a verification, a second qualified Examiner will conduct an independent comparison of the evidence to verify the original Examiner's conclusion.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on: November 4, 2026,

Signed: BR
Brandon Reynolds

On this date, I certify that Brandon Reynolds, who presented satisfactory identification in the form of a driver's license, has, while in my presence and while under oath or affirmation, voluntarily signed this document and declared that it is true.

November 4, 2026, Signed: Jennifer Catherine Davenport
Name of Notary Public: Jennifer Catherine Davenport

Notary Seal:

JENNIFER CATHERINE DAVENPORT
NOTARY PUBLIC
REG. #7935924
COMMONWEALTH OF VIRGINIA
MY COMMISSION EXPIRES MAY 31, 2029

Exhibit 2, Affidavit of Justin Dolph

IN THE FOURTH JUDICIAL DISTRICT COURT UTAH COUNTY, STATE OF UTAH	
STATE OF UTAH, Plaintiff, vs. TYLER JAMES ROBINSON Defendant.	AFFIDAVIT OF JUSTIN DOLPH Case No. 251403576 JUDGE TONY F. GRAF

While under oath or affirmation, I swear to the truthfulness of the following facts:

1. My name is Justin Dolph. I am a Forensic Examiner at the FBI Laboratory in Quantico, Virginia, which is an accredited laboratory.

2. My education and previous work experience are contained in my Curriculum Vitae. To become a qualified forensic examiner, I was required to successfully complete an extensive training program at the FBI Laboratory to demonstrate competency, which included written tests, practical exercises, casework-like examinations, oral boards, moot court exercises, competency tests, and supervised casework. I was required to successfully complete oral board(s) on the topics of instrumentation, metallurgy theory, and forensic examiner practices, and pass competency tests in instrumental and analysis techniques. Since being qualified as a forensic examiner, I have demonstrated continued proficiency via successful completion of performance

monitoring exercises pursuant to the Laboratory Quality Assurance Manual. I have performed forensic metallurgy analysis and interpretation on several criminal cases.

3. Metallurgy is the study of the physical and chemical behavior of metallic elements and their mixtures, known as alloys. This field covers the extraction of metals from mined ores, the manufacturing methods used to produce metal products, the modification of alloy properties such as strength and ductility to optimize an alloy for use in a given application, and failure analysis. In the FBI Laboratory, forensic examiners in the metallurgy discipline apply these scientific methods and knowledge to analyze metallic evidence.

Metallurgy comparisons can be based on physical features, mechanical properties, or elemental composition, or on a combination of such characteristics. Items suspected of being from common sources are compared against each other in their relevant compositional and physical characteristics using those examination techniques that are most appropriate. Ammunition products such as bullets are constructed of one or more metal alloys. There can be variation between product types in their design and in the alloys used for their construction. As such, the physical and chemical properties as well as the design elements and production characteristics present on bullets and bullet fragments can be used during comparison examinations to demonstrate an inclusion or exclusion.

4. Metal comparison examinations are completed following the METAL-210 technical procedure using those examination techniques that are most appropriate for the items received. In this case, the anticipated examinations include photographic documentation of the as-received condition of the items, visual and microscopic examinations, and chemical composition by microspot x-ray fluorescence and associated surface preparation for chemical composition analyses. However, the techniques used may vary depending on the condition of the received evidence and what is observed during the examinations.

5. In this case, the bullet fragments will be compared to a bullet extracted from an evidentiary cartridge. The comparison analysis can result in the following possible conclusions:
    a. Inclusion: Examiner's conclusion that two or more metallurgy items or materials could have originated from the same source or process.
    b. Exclusion: Examiner's conclusion that the metallurgy items or materials could not have originated from the same source or process.
    c. Inconclusive: Examiner's conclusion that no determination can be reached as to whether two or more metallurgy items or materials could have originated from the same source or process.

6. The chemical composition analysis is anticipated to be completed by microspot x-ray fluorescence spectroscopy, which does not alter the evidence. Alterations to the jacket

and bullet core fragments for metallurgy examinations are anticipated to be limited to surface preparation for chemical composition analysis. The appropriate surface preparation methods on metal items are determined during the examinations and are selected to minimize alteration of the evidence while allowing satisfactory instrument response.

It is anticipated that examinations will not require surface preparation on the jacket material. If surface preparation is required on the jacket material, it is anticipated that the cleaning methods would be brush cleaning, aqueous rinse, or solvent cleaning of a small area large enough to permit examinations.

Surface preparation may be required on the bullet core material. It is anticipated that the surface preparation method required will be scraping with a scalpel blade in one or more very small areas of the bullet core material to expose a fresh surface large enough to permit chemical composition examinations. The cleaning methods listed in the preceding paragraph may be necessary in addition to scraping or, if deemed sufficient to allow satisfactory instrument response, as an alternative. To minimize alteration of evidence, surface preparation is completed on areas that do not contain visual information (e.g., design elements, possible rifling marks).

The alterations to the bullet extracted from an evidentiary cartridge are anticipated to be either cross-sectioning or sampling of the bullet core material with a scalpel blade.

The alteration type will be determined to minimize alteration.

7. Since alterations are not anticipated on the jacket materials, there are no anticipated effects on future testing. If surface preparation is required, the jacket materials are expected to remain unaltered beyond localized removal of surface deposits. Such alterations are not anticipated to affect future metallurgical or firearm identification testing.

   Anticipated alteration(s) on the bullet core fragment materials are limited to the surface preparation. Such alterations are not anticipated to affect future metallurgical or firearm identification testing.

   Anticipated alteration(s) to the bullet extracted from an evidentiary cartridge are not anticipated to affect the ability to conduct future metallurgical or firearm identification testing using either a new bullet of known origin or using the same cross-sectioned bullet or bullet core material sample.

8. Case notes on the examinations will be contemporaneously prepared. There will be photographic documentation of the as-received condition of the items. The visual and microscopic examinations will be documented in the case notes and with photographs. The chemical composition examinations by microspot x-ray fluorescence will be documented in the case notes and the resulting spectra will also

be retained. Any electronic data will also be retained. Any evidence alterations will be documented in the case notes and there will be photographic documentation of the before and after conditions.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on: November 4, 2026,

Signed: Justin Dolph
Justin Dolph

On this date, I certify that Justin Dolph, who presented satisfactory identification in the form of a driver's license, has, while in my presence and while under oath or affirmation, voluntarily signed this document and declared that it is true.

November 4, 2026, Signed: Jennifer Catherine Davenport
Name of Notary Public: Jennifer Catherine Davenport

Notary Seal:

JENNIFER CATHERINE DAVENPORT
NOTARY PUBLIC
REG. #7935924
COMMONWEALTH OF VIRGINIA
MY COMMISSION EXPIRES MAY 31, 2029

Exhibit 3, Affidavit of Marsha Karas

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. TYLER JAMES ROBINSON Defendant.	AFFIDAVIT OF MARSHA KARAS Case No. 251403576 JUDGE TONY F. GRAF

While under oath or affirmation, I swear to the truthfulness of the following facts:

1. My name is Marsha Karas. I am a Physical Scientist at the Federal Bureau of Investigation (FBI) Laboratory in Quantico, VA.
2. I serve as the FBI Laboratory's Quality Manager (QM). I am responsible for quality and accreditation matters relating to laboratory operations. This includes
    - implementation, maintenance, and improvement of the quality system.
    - ensuring the FBI Laboratory's conformance to national and international standards, Department of Justice (DOJ) and FBI policy as it pertains to the quality system, and the U.S. Attorney General mandate to maintain accreditation.
    - ensuring conformance to requirements of the applicable accrediting body including American National Standards Institute (ANSI) National Accreditation Board (ANAB) and the FBI Laboratory Quality System (e.g., ISO 17025, ANAB AR 3125).

3. Consistent with the FBI Laboratory Quality Assurance Manual (QAM), FBI policy, and FBI Laboratory Director directives, access to the FBI Laboratory to observe laboratory activities is prohibited and video recording of laboratory activities will not be permitted. Access to the FBI Laboratory to observe laboratory activities is expressly prohibited in the FBI Laboratory's QAM. Video recording of laboratory activities will not be permitted as the FBI Laboratory Director will not authorize such recording due to confidentiality, technical, and resource considerations and in accordance with FBI policy.[1]

4. DOJ entities that provide forensic science services are required to maintain accreditation.[2] The FBI Laboratory has been accredited since 1998. As to the disciplines of Firearms and Toolmarks, and Metallurgy (under ANAB discipline of Materials (Trace)), the FBI Laboratory is currently accredited by ANAB.[3] To obtain and maintain accreditation, the FBI Laboratory must meet applicable accreditation requirements and standards, which are designed to ensure the reliability and quality of laboratory results. The FBI Laboratory meets the applicable accreditation requirements

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[1] FBI Security Division, Image Capturing Devices within FBI Controlled Facilities, 0335D (Apr. 16, 2026). Relevant excerpts below:
Section 2. Purpose. "… In order to protect classified and sensitive information, the use and handling [of] image capturing devices and their components in FBI controlled facilities needs to be strictly controlled.
Section 5. Policy Statement. 5.4.1. "FBI owned or controlled image capturing devices and associated storage media are to be used only for official government business…"
Section 6. Roles and Responsibilities. 6.4. "Heads of Divisions must… Enforce this policy and ensure that image capturing devices are used only as necessary to support the FBI mission…"
[2] U.S. Attorney General, Memorandum re: Recommendations of the National Commission on Forensic Science Announcement for NCFS Meeting Eight (November 23, 2015), available at: https://www.justice.gov/archives/opa/file/797541/dl?inline=%5d.
[3] FBI Laboratory ANAB Accreditation Certificate and Scope of Accreditation, available at: https://search.anab.org/public/organization_files/United-States-Federal-Bureau-of-Investigation-Laboratory-Cert-and-Scope-File-10-06-2026_1791287019.pdf.

and standards in part by maintaining its quality system, which is documented through a series of quality documents.[4]

The FBI Laboratory quality system provides a mechanism for identifying and/or implementing the policies and procedures that support consistent, accurate and reliable forensic products and services as well as the competence and impartiality of FBI Laboratory personnel. The FBI Laboratory quality system applies to FBI Laboratory[5] personnel and is composed of quality-supporting requirements. These FBI Laboratory requirements are based on required adherence to accreditation requirements and standards.[6]

FBI Laboratory QAM, Revision 7 (issued November 2, 2026), Section 1.8 G. states: "Due to security, classification issues, and the sensitivity of cases, the FBI Laboratory Director restricts access to the FBI Laboratory facilities to only FBI Laboratory personnel, authorized non-FBI Laboratory personnel, and others when escorted by the FBI Laboratory personnel. Accordingly, the FBI Laboratory Director prohibits access to the FBI Laboratory for the purpose of viewing laboratory activities." This FBI Laboratory QAM provision addresses International Standards Organization (ISO) including ISO 17025, and ANAB Accreditation Requirement (AR) 3125 requirements/standards necessitating that accredited

[4] FBI Laboratory Quality System Documents, available at: https://fbilabqsd.fbi.gov.
[5] FBI Laboratory Quality Assurance Manual section 1.4.2.
[6] International Standard ISO/IEC 17025:2017 General requirements for the competence of testing and calibration laboratories, clauses 4.1.1, 4.1.2, 4.1.3, 4.2.1, 4.2.2, 4.2.3, 4.2.4, 6.3.4, 6.4.1, 7.4.1, 8.1, 8.1.1, 8.1.2, 8.2.1, 8.2.2, 8.4.1, 8.4.2 and ANAB AR 3125 Accreditation Requirements For Forensic Testing and Calibration (2023), clauses 4.1.3.1, 6.2.2.2.c and 6.3.4.1, available at: https://anab.qualtraxcloud.com/ShowDocument.aspx?ID=12371.

entities implement facility security and access controls.

FBI Laboratory QAM, Section 1.8 G.'s prohibition is supported by and helps implement other QAM provisions and quality system documents that address security, evidence integrity, confidentiality, and impartiality requirements. Access to areas affecting laboratory activities and those where laboratory activities are performed are limited and controlled to prevent contamination, interference, or adverse influences on laboratory activities. The access controls are also intended to ensure security of all laboratory personnel, evidence, equipment, and laboratory files.[7]

FBI Laboratory QAM, Section 1.6 establishes confidentiality requirements that limit the FBI Laboratory's release of information to contributors who have a need to know.[8] FBI Laboratory areas affecting laboratory activities and those where laboratory activities are performed are designed to enable FBI Laboratory personnel to work in shared spaces on their assigned cases while maintaining the integrity of the evidence and the laboratory activity. FBI Laboratory areas affecting laboratory activities and those where laboratory activities are performed are capable of storing classified national security information up to the SECRET level. Per Executive Order 13526, access to classified national security information requires individuals to have the appropriate security clearances and a need to know. Prohibiting access to the FBI Laboratory for purposes of observing laboratory

[7] FBI Laboratory Quality Assurance Manual sections 1.8 D, 1.8 E, 1.8 F, 1.8 G; FBI Laboratory Operations Manual sections 1 A, 1.2 A, 1.2 B.
[8] FBI Laboratory Quality Assurance Manual sections 1.6 A, 1.6 B.

activities prevents exposing confidential and classified information to those without a need to know.

FBI Laboratory QAM, Section 1.5 establishes impartiality requirements that mandates the FBI Laboratory perform and manage its laboratory activities in a manner to safeguard impartiality. It further requires that FBI Laboratory personnel remain objective and impartial while performing laboratory activities. It also necessitates that the FBI Laboratory does not allow commercial, financial, or other pressures to compromise the integrity of laboratory activities. Prohibiting access to the FBI Laboratory for purposes of observing laboratory activities safeguards impartiality by preventing individuals with interests in the outcome of laboratory activities (both governmental and non-governmental) from potentially compromising or influencing laboratory activities.[9]

5. Video recording of laboratory activities will not be permitted as the FBI Laboratory Director will not authorize such recording due to confidentiality, technical, and resource considerations and in accordance with FBI policy.[10] The confidentiality considerations are the same ones articulated above in discussing the prohibition on access for observing laboratory activities. Video recording laboratory activities will not be permitted to prevent potentially exposing confidential and classified information related to other cases to those without a need to know. Furthermore, it would strain FBI Laboratory resources to facilitate the performance of the laboratory activities in this

[9] FBI Laboratory Quality Assurance Manual sections 1.5 A, 1.5 B, 1.5 C, 1.5 D, 1.5 E.
[10] See footnote 1 above.

case in an area where no other laboratory activities are occurring as doing so would require either cessation of all other activities being performed in the area or moving all necessary laboratory equipment and instrumentation to a new area. Such resource strain would negatively impact the FBI Laboratory's ability to operate and meet FBI mission needs.

The FBI Laboratory QAM and other quality documents that are applicable to the anticipated laboratory activities in this case do not expressly permit video recording of such activities nor establish procedures or protocols for the recording of such activities. Introducing video recording to laboratory activities without established procedures or protocols potentially increases the risk of nonconformities occurring which may negatively impact the evidence and/or results of laboratory activities.

6. A nonconformity is the non-fulfillment of a requirement (i.e., any aspect of laboratory activities or results that do not conform to procedures). Nonconformities impacting laboratory activities performed in a case must be recorded in the laboratory file for the case.[11] Additionally, events or nonconformities that could substantially affect the integrity of laboratory activities and relate to accreditation requirements must be disclosed to the appropriate accrediting body.[12] Such events and nonconformities may have negative impacts on a laboratory's accreditation status. The FBI Laboratory losing its accreditation would put it in violation of the U.S. Attorney General mandate and

[11] FBI Laboratory Quality Assurance Manual section 5.4.1.
[12] FBI Laboratory Quality Assurance Manual section 1.7 G.

result in federal prosecutors not being able to use the FBI Laboratory in federal prosecutions.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on: November 6, 2026

Signed: Marsha Karas
Marsha Karas

On this date, I certify that Marsha Karas, who presented satisfactory identification in the form of a driver's license, has, while in my presence and while under oath or affirmation, voluntarily signed this document and declared that it is true.

November 6, 2026, Signed: Jennifer Catherine Davenport
Name of Notary Public: Jennifer Catherine Davenport

Notary Seal:

JENNIFER CATHERINE DAVENPORT
NOTARY PUBLIC
REG. #7935924
COMMONWEALTH OF VIRGINIA
MY COMMISSION EXPIRES MAY 31, 2029

Unpublished Decisions

2025 WL 2613805
Only the Westlaw citation is currently available.
United States District Court, D. Utah.

UNITED STATES of America, Plaintiff,

v.

Roger DRAKE, Defendant.

Case No. 4:24-cr-00056-AMA-PK
|
Signed September 10, 2025

Attorneys and Law Firms

Thaddeus J. May, Assistant U.S. Attorney, U.S. Attorney's Office, Salt Lake City, UT, Luisa R. Gough, Assistant U.S. Attorney, U.S. Attorney's Office, St.George, UT, for Plaintiff

Wojciech S. Nitecki, Federal Public Defender, Salt Lake City, UT, Shane Brill, Federal Public Defender, St. George, UT, for Defendant.

MEMORANDUM DECISION AND ORDER DENYING DEFENDANT'S MOTION FOR COURT ORDER ALLOWING TESTING OF THE EVIDENCE BY DEFENSE EXPERT

PAUL KOHLER, United States Magistrate Judge

***1** This matter is before the Court on Defendant's Motion for Court Order Allowing Testing of the Evidence by Defense Expert. For the reasons discussed below, the Court denies the Motion.

I. BACKGROUND

Defendant is charged with second degree murder and discharging a firearm in relation to a crime of violence. These charges stem from the shooting death of M.L. (the "decedent"). The Indictment alleges that on June 2, 2024, Defendant shot and killed the decedent. The night before the incident, Defendant and the decedent were involved in an altercation. The decedent then obtained a pipe but was ultimately subdued. At the end of the altercation, the decedent threatened that he would kill Defendant and burn down his house. Soon thereafter, Defendant's house was on fire.

Sometime that night, Defendant obtained a gun and gun belt from his brother's house. Early in the morning of June 2, Defendant walked to the decedent's residence where there was a confrontation. Defendant shot the decedent multiple times at close range as the decedent started coming toward Defendant. Defendant confessed to the shooting in a mirandized interview with law enforcement.

In support of a proposed claim of self-defense, Defendant has retained an expert to perform a shooting event examination and reconstruction. Through this Motion, Defendant seeks the firearm collected in this case, all rounds of ammunition from the firearm (both fired and unfired), and all additional cartridges from the gun belt. Defendant proposes that his expert be allowed to expend four of the cartridges recovered from the gun belt in his testing. Defendant proffers that this analysis will allow the expert to analyze stippling patters to narrow down the range from which the firearm had been fired and offer an opinion as to the origins of stippling on the decedent's back.

II. DISCUSSION

Unlike civil cases, "[a] criminal defendant is entitled to rather limited discovery."[1] Discovery in criminal cases is governed by the provisions of Federal Rules of Criminal Procedure 6, 12, 16, and 26.2; the Jencks Act, 18 U.S.C. § 3500; and the holding of *Brady*[2] and its progeny. The Supreme Court has made clear that "[t]here is no general constitutional right to discovery in a criminal case, and *Brady* did not create one."[3]

Defendant's Motion relies on the Due Process Clause of the Fifth and Fourteenth Amendments and Rule 16. Each are discussed in turn. The Supreme Court has noted that "the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded."[4] However, due process is violated if the prosecution suppresses evidence favorable to an accused.[5] Yet the police do not have to "use a particular investigatory tool" and "do not have a constitutional duty to perform any particular tests."[6] Thus, the Due Process clause does not require the prosecution to conduct the type of testing Defendant seeks[7] and Defendant points to nothing to suggest that the Due Process clause requires the government to turnover and permit the use

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(and potential loss) of important physical evidence in its possession.

***2** Federal Rule of Criminal Procedure 16 does require the government to disclose certain evidence. Relevant here, Rule 16(a)(1)(E) requires, upon a defendant's request, the government allow

> the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and: (i) the item is material to preparing the defense; (ii) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant.

Here, Defendant does not seek to inspect or copy the firearm and ammunition. He seeks to take possession of them, utilize them, and expend four shell casings. This goes beyond what is required under Rule 16. While courts have allowed defendants to conduct independent tests of small amounts of controlled substances,[8] allowing such tests is generally "negligible and can be handled by means of a stipulation as to the amount, weight, or percentage of the substance removed or destroyed for testing purposes."[9] Further, such tests are "subject to a variety of procedural safeguards aimed at preserving the integrity of the Government's evidence."[10]

Here, not only does Defendant's request go beyond what is called for by Rule 16, it would allow for the turnover of key evidence—the alleged murder weapon and associated ammunition—with little in the way of procedural safeguards, except that the packaging containing the evidence be signed for. With such minimal precautions, this critical evidence could be lost or contaminated in transit or during testing. Put simply, the risks of allowing such turnover are simply too great to permit Defendant's request.

Even if Defendant's request fell within the confines of Rule 16, he has failed to demonstrate materiality. Under Rule 16, "a criminal defendant enjoys a right to discovery of information that is 'material to preparing the defense.' "[11] Generally speaking, "[e]vidence is 'material' if it would be helpful to the defense."[12] In other words, there must be "a strong indication that [the evidence] will play an important role in uncovering admissible evidence, aiding witness preparation, ... or assisting impeachment or rebuttal."[13] "Although the materiality standard is not a heavy burden, the [g]overnment need disclose Rule 16 material only if it enables the defendant significantly to alter the quantum of proof in his favor."[14]

***3** Defendant vaguely asserts that the testing "will educate the jury about the distance from which [Defendant] shot [the decedent] and it will help the jury understand if there was another shot which missed [the decedent]."[15] Defendant argues that "[t]he more the jury learns about the struggle between the two men, the better it can assess the imminence and the nature of the danger [Defendant] was facing, and the reasonableness of [Defendant's] belief that he needed to shoot [the decedent] to protect himself."[16]

However, there is no dispute that Defendant shot the decedent at close range; Defendant admitted as much to law enforcement,[17] as did a witness. And the medical examiner has similarly noted that the shooting was likely at close range.[18] It is unclear how a more precise measurement of the distance between Defendant and the decedent would significantly alter the quantum of proof in Defendant's favor. Therefore, the Court cannot conclude that Defendant's request, even if permitted by Rule 16, would meet the requirement of materiality.

III. CONCLUSION

It is therefore

ORDERED that Defendant's Motion for Court Order Allowing Testing of the Evidence by Defense Expert (Docket No. 40) is DENIED. The time from the filing of the Motion—August 13, 2025—to the date of this Order is excluded under the Speedy Trial Act pursuant to 18 U.S.C. § 3161(h)(1)(D).

All Citations

Slip Copy, 2025 WL 2613805

Footnotes

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1 *Degen v. United States*, 517 U.S. 820, 825 (1996).

2 *Brady v. Maryland*, 373 U.S. 83 (1963).

3 *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977).

4 *Wardius v. Oregon*, 412 U.S. 470, 474 (1973).

5 *Brady*, 373 U.S. at 87.

6 *Arizona v. Youngblood*, 488 U.S. 51, 59 (1988).

7 *Armijo v. Tapia*, 288 F. App'x 530, 534 (10th Cir. 2008) (stating that "the *Brady* line of cases does not stand for the proposition that the prosecution must perform any forensic tests that may inure to the benefit of the accused").

8 *United States v. Gaultney*, 606 F.2d 540, 545 (5th Cir. 1979) ("In cases involving a controlled substance, courts have held a concomitant part of the examination or inspection to be the right of the accused to have an independent chemical analysis performed on the seized substance.") (collecting cases).

9 *United States v. Carrell*, No. CR 05-1484 MCA, 2006 WL 8427721, at *1 (D.N.M. Aug. 2, 2006).

10 *Id.*

11 *United States v. Simpson*, 845 F.3d 1039, 1056 (10th Cir. 2017) (quoting Fed. R. Crim. P. 16(a)(1)(E)(i)).

12 2 Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Pro. § 254 n.13 (4th ed. 2022) (citation omitted); *see* *Simpson*, 845 F.3d at 1056–57.

13 *United States v. Cates*, 73 F.4th 795, 812 (10th Cir. 2023) (quoting *United States v. Graham*, 83 F.3d 1466, 1474 (D.C. Cir. 1996)).

14 *Id.* (quoting *Graham*, 83 F.3d at 1474).

15 Docket No. 43, at 5.

16 *Id.*

17 Docket No. 42, at 5–7.

18 *Id.* at 19 n.9.

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2010 WL 5015329
Only the Westlaw citation is currently available.
United States District Court, D. Kansas.

UNITED STATES of America, Plaintiff,

v.

Carlis D. ROGERS and Jacques D. Dubose, Defendants.

No. 10–10140–01–JTM.

Dec. 3, 2010.

Attorneys and Law Firms

Matthew T. Treaster, Office of United States Attorney, Wichita, KS, for Plaintiff.

MEMORANDUM AND ORDER

J. THOMAS MARTEN, Judge.

***1** Presently before this court is the government's Motion to Consume Physical Evidence in Furtherance of the Investigation (Dkt. No. 22). The court held a hearing on November 3, 2010, in which it ruled from the bench. For the reasons detailed on the record and summarized below, the court grants the motion. The government may consume the entire sample only to the extent necessary to obtain a useful DNA profile. If consumption of the entire sample is not necessary, the government must preserve the remaining sample and make it available to the defendant for testing.[1]

I. Factual Background

The following facts were taken primarily from the government's motion (Dkt. No. 22). On September 10, 2010, at around 9:43 a.m., three black males, two of whom used guns, robbed Legacy Bank on north Woodlawn, in Wichita Kansas. This robbery was similar to several recent robberies in the area. Police immediately broadcast the robbery over police dispatch. Soon thereafter, the Wichita Police Department, Sedgwick County Sheriffs Office and the FBI responded to Jacques Dubose's home—one of the suspects—who lived at 1557 N. Kenmar in Wichita. Lieutenant McLaurian was the first to respond. Once there, he witnessed a white Ford Expedition parked in front of Dubose's home that appeared to be running. A few minutes later, he saw two black males carrying backpacks cross the street from the east toward Dubose's home. The two men placed the backpacks in the Expedition and went inside the house. Several minutes later, a black male walked out of the house and got in the driver's seat of a red Chevy Avalanche parked in the driveway. A second black male got into the passenger seat. Eventually, the car backed out of the driveway and drove west on 14th St. After the driver failed to signal at two intersections, McLaurian initiated a traffic stop. The driver was Jacques Dubose and the passenger was Carlis Rogers. The tag on the car had been altered, and Dubose was arrested. The Wichita police arrived and learned there was a warrant out on Rogers, and he was arrested. As an officer removed Rogers from the car, the officer saw a wadded up shirt that partially concealed a semi-automatic handgun and a wad of cash in Roger's lap.[2] The same day, September 10, the police executed a search warrant on the Avalanche and found a handgun, a loaded magazine, and $4,055 in cash. Eight of the bills matched bills stolen from Legacy Bank. The officers also searched Dubose's home and found $4,699 in cash. Eleven bills matched those stolen from Legacy Bank.

Later the same day, Kevin Harrison, who lives across the street from Dubose, went to the police and told them that on September 9, Dubose had asked Harrison if he could stay at his house on September 10. Harrison agreed and left his door unlocked so Dubose could enter the house. Harrison played golf with his father on September 10, and was not home while Dubose was there. Harrison allowed a search of his home but the officers found nothing. On September 13, Harrison contacted the police to inform them of the "full" story of what had happened. Harrison said that when he returned home after his golf game he found a black trash bag containing several hooded sweatshirts, a bank bag, two bank trays, and a nylon bag that matched the description of a bag taken from the bank during the robbery. He then searched the rest of his house and found two guns that did not belong to him. He hid the bag and the guns before the officers searched his home on September 10. One of the guns was a Smith and Wesson .44 magnum and the other was a Tec .22 that was missing the magazine. A Tec .22 magazine was found outside Legacy Bank on the day of the robbery.

***2** On September 14, Dubose confessed to the robbery but would not identify the other participants. He also admitted using Harrison's house to divide the money and to hide the guns and clothing. Surfaces of all the guns and clothing were swabbed for future DNA analysis and comparison. The swabs

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were sent to the Sedgwick County Regional Forensic Science Center (Center). Dr. Shelly Steadman, a forensic scientist at the Center, notified the government that the DNA swabs from the guns might be so small that the lab would need to consume (that is, destroy the physical properties of the DNA swab) the entire sample in order to best perform analysis. She also said there was additional potential for mixed or multiple contributors, which would increase the need to consume the whole sample. She requested the government seek permission of the court before continuing with the testing.

At the hearing, Dr. Steadman reaffirmed and elaborated her early statements to the government. She described the process she takes when analyzing a DNA sample as it relates to the issue of consumption. First, she testified that it is generally protocol for the Center to either get permission from the detective, prosecutor, or sometimes even the court before testing a sample. Next, she takes the DNA swabs (which are generally taken shortly after the item is seized) and uses those swabs to extract a liquid DNA sample. At that point, she performs a quantitative analysis on the sample to estimate how much DNA is present in the liquid extract. However, the amount of DNA in a given extract does not always correlate with the ability to create a useful DNA profile. A small DNA extract may yield a highly discriminatory DNA profile and a large DNA extract may not provide a useful DNA profile. The quantitative analysis only provides an estimate on the amount of DNA present, not the quality of the profile. There is no way to discern the quality of the sample until after she performs the test. If the liquid DNA sample is large enough, she may decide that it is not necessary to consume the entire sample. But, she stated that she frequently must consume the entire sample and that complete consumption provides the best chance of creating a useful DNA profile. Dr. Steadman specifically testified that consumption of the entire sample is appropriate in most cases because the DNA present in the sample is often limited in nature; therefore, consumption provides the greatest opportunity of generating a discriminating profile that can either exclude the defendant or match the defendant's DNA with that found on the evidence. Dr. Steadman also testified that dividing the sample is an option. However, she stated that dividing the sample decreases the possibility of generating a useful DNA profile. Dividing a sample also creates a transfer loss, that is, losing a greater percentage of the sample than would otherwise occur from a single undivided sample. Last, dividing a sample creates another opportunity for contamination of the sample.

***3** The government argues that it should be allowed to consume the entire sample in order to get a more useful DNA profile. Defendant argues that the government should not be allowed to consume the entire sample because to do so would violate the defendant's due process rights. In the alternative, defendant argues that the court should either order the government to split the sample so both parties can conduct independent tests or allow the defendant's expert to observe the government's scientist as she conducts the test. The issue for this court becomes, whether defendant's due process rights will be violated if the government consumes the entire sample.

II. Legal Standard and Analysis

"The principles articulated in *California v. Trombetta,* 467 U.S. 479 (1984), and *Arizona v. Youngblood,* 488 U.S. 51 (1988), regarding the Due Process Clause and the government's destruction or loss of evidence prior to a criminal trial guide our analysis." *United States v. Bohl,* 25 F.3d 904, 909 (10th Cir.1994). Each case articulates a different standard. Under *Trombetta,* "evidence must both (1) possess an exculpatory value that was apparent before the evidence was destroyed, and (2) be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." 467 U.S. at 489 (alterations added). A court should only use this standard when the evidence possesses exculpatory value that was apparent before it was destroyed. *Id.* Under the *Youngblood* standard, "unless a criminal defendant can show bad faith on the part of the police, failure to preserve *potentially useful evidence* does not constitute a denial of due process of law." 488 U.S. at 58 (emphasis added). A court should use this standard when the evidence possesses potentially exculpatory evidence. *Id.* Potentially exculpatory evidence is evidence that could be subjected to testing, the results of which might exonerate the defendant. *Id.* at 57.

First, a court should analyze the evidence and determine whether to apply *Trombetta* or *Youngblood. Bohl,* 25 F.3d at 910. Defendant argues that:

> [T]he defense reasonably believes the evidence from the DNA swabs will be favorable to him. It is worth noting that two of the three firearms, which were allegedly brandished at the scene of the crime, were recovered from a third party's residence. Additionally, the Government has not disclosed the presence of any fingerprint evidence recovered from the firearms that might link them to Mr. Rogers.

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The defendant has not shown that the evidence has apparent exculpatory value. Defendant argues only that he "reasonably believes" the evidence will be favorable to him, not that it will exonerate him. The fact that two of the guns were found at a third party's home does not give the evidence apparent exculpatory value. Also, simply because the government has not linked the defendant to the guns by fingerprint is not really relevant to what DNA testing might show and does not mean the evidence will be exculpatory. More importantly, the evidence obtained from the guns or clothing is not exculpatory because no matter the result it will not prove the defendant was or was not involved in the robbery. Because the evidence does not have apparent exculpatory value, the court must determine if the evidence is potentially exculpatory under *Youngblood*. *See Bohl,* 25 F.3d at 910.

***4** The court finds that defendant's arguments more reasonably show that the evidence is potentially exculpatory.[3] At this stage, the government has not tested the DNA, and neither party knows what the results will show. The best the defendant can show is that if the evidence is tested, it might exonerate him; thus, under *Youngblood,* defendant must also establish that if the government consumes all the DNA evidence it would constitute bad faith. *See* 488 U.S. at 58. When determining bad faith courts looks at the following factors:

> (1) whether the government had explicit notice that [defendant] believed the [evidence] was exculpatory; (2) whether the claim that the evidence is potentially exculpatory is conclusory, or instead "backed up with objective, independent evidence giving the government reason to believe that further tests of the [destroyed evidence] might lead to exculpatory evidence"; (3) whether the government could control the disposition of the evidence once [defendant] indicated that it might be exculpatory; (4) whether the evidence was central to the case; and (5) whether the government offers any innocent explanation for its disposal of the evidence.
>
> *United States v. Smith,* 534 F.3d 1211, 1224–25 (10th Cir.2008) (alterations added). First, the government does have explicit notice that the defendant believes the DNA swabs will be favorable to him. That the evidence will be exculpatory, as discussed above, is not an issue because the test results will not, on its own, prove that the defendant was or was not involved in the robbery. The second factor weighs in favor of the government for similar reasons and for the reasons that follow. Defendant only claims that he "reasonably believes" the evidence will be favorable and argues that because two guns were found in a third party's house, the evidence is likely to be exculpatory. While this is not a conclusory argument, it is not enough to give the government reason to believe further tests by the defendant would uncover exculpatory evidence. Additionally, the government has circumstantial evidence that defendant was involved in the robbery. Lieutenant McLaurian saw two black men walk from across the street with backpacks (possibly from Harrison's house) into Dubose's house. Dubose and defendant then walked out of Dubose's house and got into the Chevy Avalanche, which McLaurian stopped shortly thereafter. When defendant was arrested, he had a gun and money wrapped up in a shirt on his lap or near his body. Eight of the bills matched those stolen from Legacy Bank. There is no objective, independent evidence that indicates further testing would lead to potentially exculpatory evidence.

Factors 3–5 weigh in favor of the government to the extent it is possible to evaluate those factors before consumption. The government currently controls the disposition of the evidence and has decided to wait for this court's order before testing the DNA sample. This on its own indicates the government's good faith attempt to refrain from consuming the evidence in violation of the defendant's due process rights. Factor 4 is neutral because the value of the evidence will not be determined until after the testing. Additionally, whether the defendant held the gun or not is not really central to the case because that fact alone does not connect or disconnect him to the robbery. Further, the possible result could be only partially discriminating and, thus, not beneficial to either party. Factor five is not directly applicable because the government has not yet disposed of the evidence. But, the government does offer an innocent explanation for its request to consume the entire sample. The government argues that it seeks to consume all the evidence because that is the only way sufficiently to test the sample, it does not seek to consume the evidence for the purpose of thwarting defendant's ability to test the DNA. Dr. Steadman bolstered the credibility of this argument when she testified that obtaining a useful DNA profile often requires complete consumption. Testing this type of sample is a one shot deal because there is no way to increase the sample and retest it. Thus, although the evidence has not been destroyed, the government does offer an innocent explanation for seeking to consume the entire sample; thus, this factor weighs in favor of the government. After evaluating these factors, this court finds that each favor's the government and collectively show a lack of bad faith.

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***5** The Third Circuit's opinion in *United States v. Stevens,* 935 F.2d 1380 (3d Cir.1991) is also helpful. In *Stevens,* the government and the defendant agreed that the government would not destroy saliva samples during testing so the defendant could also test the samples. *Id.* at 1387. However, when the government gave the sample to the defendant there was not enough left to test sufficiently. *Id.* In evaluating bad faith, the Third Circuit, adopting the ruling of the district court, held the defendant failed to show bad faith because "the fact that there was [an] insufficient sample, the fact that [the] sample did not yield of definate [sic] conclusions, I think does not bespeak of bad faith. It just indicates that unfortunately, there wasn't a sufficient sample and quality to arrive at a determination." *Id.* at 1387–88.

Similarly, the government here is trying to make a good faith attempt not to destroy the evidence if it would violate the defendant's due process rights. The fact that the evidence may be insufficient to support DNA testing by both sides is unfortunate, but it does not constitute bad faith. The defendant seeks to have the government preserve the evidence before its exculpatory value is known. This is not possible. And, as the *Youngblood* Court stated, "[t]he presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." 488 U.S. at 56, n. (citing *Napue v. Illinois,* 360 U.S. 264, 269 (1959). Because the government cannot know the exculpatory value of the evidence before it is tested, consuming all the evidence, if necessary to create a useful DNA profile, cannot constitute bad faith.

The defendant's alternative arguments—that the government should split the sample or allow the defendant's expert to oversee the testing—are not necessary to preserve the defendant's due process rights. In order to get a reliable test, Dr. Steadman testified she likely will need to consume the entire sample. If the court accepts defendant's argument of splitting the sample, it is likely neither sample would be sufficient to generate a useful DNA profile. However, if it is possible to split the sample and not compromise the reliability of the testing, the government must split the sample and provide the defendant with a sample so he can conduct an independent test if he wishes. The court also finds that it is unnecessary for defendant's expert to be present during the testing because it would not materially aid the defendant in challenging the reliability of the test. Defendant retains the ability to challenge the testing procedures by cross examining the government's expert or by impeaching the reliability of her methods. *See Trombetta,* 467 U.S. at 489–90 (providing that both methods are sufficient to protect defendant's due process rights).

IT IS ACCORDINGLY ORDERED this 3rd day of December, 2010, that the government's Motion to Consume Physical Evidence in Furtherance of the Investigation (Dkt. No. 22) is granted. IT IS FURTHER ORDERED that if the government can obtain a valid DNA profile without consuming all the DNA, it is required to preserve the rest of the sample so the defendant may test it if he wishes to do so.

All Citations

Not Reported in F.Supp.2d, 2010 WL 5015329

Footnotes

1 For the purposes of this Order, the court uses the word "defendant" to refer to Carlis D. Rogers and not Jacques Dubose.

2 The defendant disputes whether the wadded up shirt with the gun and money was found on his lap.

3 It is not obvious that the evidence is even potentially exculpatory because, even if the tests are inconclusive or negative, that does not necessarily mean defendant did not participate in the robbery or use one of the guns. Nevertheless, it is fair to characterize the evidence as "potentially exculpatory."

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