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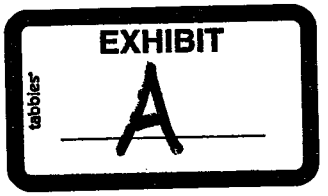
MONTANA SECOND JUDICIAL DISTRICT COURT, SILVER BOW COUNTY

STATE OF MONTANA, Plaintiff, vs. AMANDA ROSE LAVERDURE, Defendant.	Cause No.: DC-17-276 **DEFENDANT'S MOTION TO SUPPRESS EVIDENCE AND SUPPORTING BRIEF**

Pursuant to Section 46-13-302, MCA, Defendant, AMANDA ROSE LAVERDURE, by and through the undersigned counsel, hereby moves to suppress evidence in this cause; and in support hereof states:

INTRODUCTION

The evidence at issue in this cause violates Defendant's inalienable right to defend her life and liberty protected by Article II, Section 3 of the Montana State Constitution; Defendant's right to due process of law protected by Article II, Section 17 of the Montana State Constitution; and Defendant's right to privacy, protected by Article II, Section 10 of the Montana State Constitution. *See also: Section 46-5-101, MCA.*



Article II, Section 10 of the Montana State Constitution provides that, "The right of individual privacy is essential to the well being of a free society and shall not be infringed without the showing of a compelling state interest." The Montana Supreme Court held in *State v. Hill*, 2004 MT 184, P19, that:

> "When analyzing search and seizure question that specially implicate the right of privacy," Sections 10 and 11 [of the Montana Constitution] are read together. *State v. Boyer*, 2002 MT 33, P19, 308 Mont. 276, P19, 42 P.3d 771, P19. This conjunction leads us to examine the legality of a search or a seizure by determining whether there has been an unlawful governmental intrusion into one's privacy. *See Boyer*, P20.

See also: State of Montana v. Smith, 323 Mont. 466, 469, 97 P. 3d. 567 (2004), citing *Boyer, supra*, at P18; *State v. Van Haley*, 199 Mont. 522, 649 P. 2d. 1311 (1982) (the judicial system must not become an accomplice to constitutional violations by admitting illegal evidence).

STATEMENT OF FACTS

Ms. Laverdure was arrested on October 13, 2017, in this matter. On November 20, 2017, Ms. Laverdure was charged by Information with: Count I: Criminal Possession of Dangerous Drugs with Intent to Distribute (methamphetamine); Count II: Criminal Possession of Dangerous Drugs (heroin); Count III: Use of Property Subject to Forfeiture (cash $213.00); and Count IV: Criminal Possession of Drug Paraphernalia.

On October 20, 2017, the Montana State Crime Lab received from Butte-Silver Bow Law Enforcement Department certain samples of suspected controlled substances allegedly in possession of Ms. Laverdure. These suspected controlled substances were analyzed by Montana State Crime Lab Chemist, Derek Thrush.

Counsel for Defendant just recently was informed that felony charges have been filed against Chemist Derek Thrush in the Fourth Judicial District Court, in and for Missoula County,

Cause No. DC-18-101[1], for being in possession of and using methamphetamine stolen from the crime lab, as well as charges for theft and official misconduct.

Chemist Derek Thrush analyzed the suspected controlled substances in this cause. *See*: "Chemical Analysis Report," dated November 18, 2017, attached hereto as "Exhibit A."

On February 21, 2018, the Department of Justice, by and through the Administrator of the Forensic Science Division, issued a letter confirming Mr. Thrush's "misconduct" based on "remove[ing] portions of drug evidence submitted to the lab for analysis." A copy of the Division's letter is attached hereto as "Exhibit B." The employee, Mr. Thrush, was "terminated from employment and the Missoula County attorney office is handling the prosecution of the individual." *Id.*

ARGUMENT

While this case presents a non-typical search and seizure question, applicable Montana law governing search and seizures is set forth in Section 46-5-101 and 46-5-103, MCA, still is pertinent for the Court's consideration under the totality of the circumstances:

> **46-5-103. When search and seizure not illegal.** (1) A search and seizure, whether with or without a warrant, may not be held to be illegal if:
>
> (a) the defendant has disclaimed any right to or interest in the place or object searched or the evidence, contraband, or person seized;
>
> (b) **a right of the defendant has not been infringed by the search and seizure; or**
>
> (c) **any irregularity in the proceedings has no effect on the substantial rights of the accused.**
>
> (2) Evidence, contraband, or persons lawfully seized are admissible as evidence in any prosecution or proceeding whether or not the prosecution or proceeding is for the offense in connection with which the search was originally made. (Emphasis added.)

[1] Counsel for Defendant has ordered a copy of the charging documents against Mr. Thrush, which must be requested, and are provided, only by mail and are not yet received as of the date of the filing of this motion.

Discovery has been timely provided by the State in this cause. Chain of custody reports internal to the State Crime Lab have been requested by letter from defense counsel to the State. The internal chain of custody reports are necessary to determine whether the evidence has not been further affected, lost, tampered with, added to, deleted from, mishandled, or tainted, such that the evidence would be inadmissible at trial in this cause.

Derek Thrush was the analyst who examined the alleged samples purportedly obtained from Ms. Laverdure. *Exhibit A.* Newspaper articles counsel was able to glean from the press on this matter, subject to receipt of the actual charging documents, as referenced in Footnote 1, above, regarding Mr. Thrush's admitted unlawful behavior are attached hereto as "Exhibit C." The articles confirm that Mr. Thrush allegedly admitted to stealing testing samples from the lab, personally using the stolen drugs by oral injection, and keeping the stolen drugs in his desk drawer and his home:

> A Missoula detective and an investigator from the Montana Department of Justice spoke to Thrush on Feb. 14, when he allegedly admitted he had been using meth that he took from the crime lab.
>
> Thrush allegedly said he would take small amounts of meth leftover [sic] from samples that were submitted to the lab for testing. He told investigators that the drug testing process used at the lab occasionally does not use all of the test sample, and that while the remainder is supposed to be destroyed, he would take it for his own use.
>
> He said he would store the remaining meth in a vial that he would take from the lab, and that he would use an oral syringe to inject the meth after mixing it with water.
>
> Two supervisors at the crime lab told investigators that they found a vial of meth in Thrush's desk drawer while doing an inventory of the facility. His desk was not in the same place that drug testing takes place, and no drug evidence should have been there, they said. *Exhibit C.*

Indeed, the Department of Justice letter confirms that "an inventory of all evidence in [Thrush's] possession" was being conducted to determine whether "any cases may have been

affected by [Thrush's] actions." *Exhibit B.* In addition, certain workplace "deterrent methods" were put in place by the Division. *Id.* For Ms. Laverdure, however, these steps are too little, too late.

Reportedly, a different "breach of drug evidence" occurred at the State Crime Lab in 2015, when a former evidence technician such as Mr. Thrush "stole opioids that were being stored as evidence." *Exhibit C.* That "breach" led to charges against some sixty-nine (69) defendants being dismissed. *Id.*

Mr. Thrush's breach of professional responsibility as it pertains to the Laverdure samples, and whether they were tampered with, stolen, misplaced, or mixed with other samples, supports suppression of his report and testimony in this case. His actions are highly suspect, at best. Based on the facts asserted herein, there is a complete lack of veracity and reliability of any testimony by Derek Thrush. Moreover, it is unlikely that Mr. Thrush would be available to testify about the subject samples; and the impeachment and character attack to which he will be subjected are not proper considerations for a jury when they can be analyzed and determined by the Court in advance, so as to save time, cost and delay and to ensure judicial economy.

Defendant moves this Court to suppress any testimony or report by Derek Thrush. He is the one who tested the materials; therefore, another chemist or supervisor may not testify to the testing or the results. Any such other chemist or supervisor, who may have knowledge of testing techniques and protocol generally, would have no personal knowledge of the instant samples and the instant testing. Therefore, the foundation for any testimony by Mr. Thrush is questionable, at best. The foundation for any testimony by another chemist or a supervisor is non-existent. In addition, any such testimony likely would be laden with and/or reliant upon hearsay.

Mr. Thrush's report also is inadmissible hearsay under Rule 803(6), M.R.Evid., because the State has failed to "notif[y] the court and opposing parties in writing of its intention to offer such report or reports in evidence at trial in sufficient time for the party not offering the report or reports to (1) to obtain the depositions before trial of the person or persons responsible for compiling the reports, or (2) to subpoena the attendance of said persons at trial." *Id.*

Defendants' motion to suppress evidence affects the underpinnings of the State's case against Ms. Laverdure, including but not limited to the critical evidence required to prove the elements of the very charges against Ms. Laverdure. The evidence from the State Crime Lab, clearly, is tainted by Mr. Thrush's admitted illegal conduct, such that it will result in unlawful prejudice against Ms. Laverdure. The above constitutional safeguards protect Ms. Laverdure's, and all citizens', right to a fair trial.

The Montana Rules of Evidence clarify the types of evidence admissible at trial. Rule 401, M.R.Evid., defines relevant evidence:

> Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Relevant evidence may include evidence bearing upon the credibility of a witness or hearsay declarant.

Rule 402, M.R.Evid., limits evidence at trial to "relevant" evidence:

> All relevant evidence is admissible, except as otherwise provided by constitution, statute, these rules, or other rules applicable in the courts of this state. Evidence which is not relevant is not admissible.

Moreover, Rule 403, M.R.Evid., provides that certain relevant evidence may be excluded on the grounds of prejudice, confusion, or waste of time and states:

> Although relevant, evidence may be excluded if its **probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury**, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. (Emphasis added.)

Thus, this motion seeks to prevent the introduction of evidence which is unfairly prejudicial. Accordingly, the authority to grant or deny this motion rests in the inherent power of the Court to admit or exclude evidence and to take such precautions as are necessary to afford a fair trial for both parties. It is within the Court's discretion to do so. *State v. Oman*, 218M 260, 707 P.2d 1117 (1985).

Evidence may be excluded, even if relevant, if its probative value substantially is outweighed by the danger of unfair prejudice. *Wallin v. Kinyon Estate*, 164 Mont. 160, 19 P.2d 1236 (1974), *Kimes v. Herrin*, 217 Mont. 330, 705 P.2d 108 (1985).

The Supreme Court of Montana has ruled that it "leave[s] the determination of whether evidence is relevant and admissible to the sound discretion of the trial judge." *State v. Gollehon*, 262 Mont. 293, 864 P.2d 1257 (1993); *State v. Stinger*, 271 Mont. 367, 897 P.2d 1063 (1995); *State v. Passama*, 261 Mont. 338, 863 P.2d 378 (1993); *State v. Crist*, 253 Mont. 442, 883 P.2d 1052 (1992).

Ms. Laverdure respectfully requests that the subject evidence be excluded under the totality of the circumstances as substantially unfairly prejudicial to Ms. Laverdure. Said evidence will cause confusion of the issues and will mislead the jury, as well. *Rules 402, 403, M.R.Evid.*

The ultimate probative value of this evidence is substantially outweighed by the danger of unfair prejudice to Ms. Laverdure in this cause, particularly in light of the afore-referenced constitutional guarantees. *Rule 403, M.R.Evid. See also: State v Pittman*, 2005 MT 70, P25, which provides:

> Relevant evidence may be excluded, however, if its probative value is substantially outweighed by the danger of unfair prejudice or by needless presentation of cumulative evidence.

Therefore, Defendant submits that good cause exists to grant her Motion to Suppress Evidence in this cause, may it please the Court.

In making this determination in the interest of justice, the Court should consider "balancing the interest of the state against fundamental fairness to a defendant with the added ingredient of the orderly functioning of the Court system." *State v. Alt* (2000), 2000 ML 1750, 6th Jud. Dist. Court, Park County, citing *State v. Moriwake* (Hawaii 1982), 65 Haw. 47, 56, 647 P.2d 705, 712, citing *State v. Braunsdorf*, 98 Wis. 2d. 569, 297 N.W. 2d 808, 817.

Ms. Laverdure respectfully requests the Court to find, based on the totality of the circumstances, that the report and testimony by Derek Thrush at issue in this case should be suppressed as a matter of fairness to the defendant; as a matter of judicial economy; and to avoid a costly and time consuming trail featuring issues that will confuse and mislead the jury.

CONCLUSION

The courts are empowered to suppress evidence to deter unlawful police or state facility activities and to preserve the integrity of the judiciary. *State v. Long,* 216 Mont. 65, 700 p2d 153 (1985); *State v. Malkuch,* 2007MT 60, 336 Mont 219, 154 P3d 558 (2007). *See also: Wong Sun v. U.S.,* 371 U.S. 471 (1963).

Under the afore-referenced facts and law, and in accordance with the totality of the circumstances and fundamental fairness to the defendant, as well as the orderly functioning of the legal system, the testimony and lab report of Derek Thrush in this cause should be suppressed.

The undersigned counsel for Defendant has contacted the Deputy County Attorney and is authorized to represent that the State of Montana objects to this motion.

WHEREFORE, Defendant, AMANDA ROSE LAVERDURE, respectfully requests that the Court enter an order to suppress any testimony by State Crime Lab Chemist Derek Thrush and the lab report generated by Mr. Thrush, in this cause.

Dated this _____ day of _____, 2018.

Respectfully submitted,

KRUER LAW FIRM, P.C.

_____
Stephanie Gehres Kruer
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of _____, 2018, a true and correct copy of the foregoing has been provided by electronic transmission to the following:

Ann Shea
Deputy County Attorney
Butte-Silver Bow County Attorney Office
155 W. Granite
Butte, Montana, 59701

_____
Stephanie Gehres Kruer
Attorney for Defendant

Montana Department of Justice
Forensic Science Division
2679 Palmer Street, Missoula, MT 59808
Ph. 406-728-4970 Fax 406-549-1067

'17 NOV 7:54

TYLER COSTELLO
BUTTE-SILVER BOW LED
225 NORTH ALASKA ST.
BUTTE, MT 59701

Lab Case #: FSD-17-007121
Agency Case #: 217CR0026743
SUSPECT: LAVERDURE, AMANDA ROSE

CHEMICAL ANALYSIS REPORT

EVIDENCE:

Item	
002	SUSPECTED CONTROLLED SUBSTANCE(S) - Received October 20, 2017 *One glass vial, with a cork stopper, containing a gray powder.*
003	SUSPECTED CONTROLLED SUBSTANCE(S) - Received October 20, 2017 *One zip-top plastic bag containing three zip-top plastic bags each containing miscellaneous tablets. One of the inner zip-top plastic bags was selected for analysis as item 003.01.*
003.01	One zip-top plastic bag containing miscellaneous tablets including eight white with orange specks capsule shaped tablets (examined as item 003.01.01) and seven white capsule shaped tablets (examined as item 003.01.02).
003.01.01	Eight white with orange specks capsule shaped tablets. One tablet was selected for examination as item 003.01.01.01.
003.01.01.01	One white with orange specks capsule shaped tablet inscribed with a stylized "V" on one side and "3604" on the opposite.
003.01.02	Seven white capsule shaped tablets. One tablet was selected for examination as item 003.01.02.01.
003.01.02.01	One white capsule shaped tablet inscribed "176" on one side and a score on the opposite.
004	SUSPECTED CONTROLLED SUBSTANCE(S) - Received October 20, 2017 *One plastic pouch containing crystalline material.*

Note: Analyst item description in *italics* if applicable.

RESULTS AND CONCLUSIONS:

002 NO CONTROLLED SUBSTANCES IDENTIFIED
Weight received: 0.55 gram(s) Weight returned: 0.23 gram(s)

EXAMINATIONS PERFORMED: PRESUMPTIVE TESTS
INFRARED SPECTROSCOPY
GAS CHROMATOGRAPHY/ MASS SPECTROMETRY

003.01.01.01 ACETAMINOPHEN/HYDROCODONE
SCHEDULE II
Approximately half of the tablet was retained for analysis; the other half will be returned.

EXAMINATIONS PERFORMED: PHYSICAL IDENTIFICATION
GAS CHROMATOGRAPHY/ MASS SPECTROMETRY

The tablet was listed on the Ident-A-Drug and Drugs.com websites as containing 325 mg of acetaminophen and 5 mg of hydrocodone.

Effective September 25, 2015, hydrocodone combination products were up-scheduled to a Schedule II controlled substance by the Administrative Rules of Montana 24.174.1412.

EXHIBIT
tabbies
A

003.01.02.01 ACETAMINOPHEN/HYDROCODONE
SCHEDULE II

Approximately half of the tablet was retained for analysis; the other half will be returned.

EXAMINATIONS PERFORMED: PHYSICAL IDENTIFICATION
GAS CHROMATOGRAPHY/ MASS SPECTROMETRY

The tablet was listed on the Ident-A-Drug and Drugs.com websites as containing 325 mg of acetaminophen and 10 mg of hydrocodone.

Effective September 25, 2015, hydrocodone combination products were up-scheduled to a Schedule II controlled substance by the Administrative Rules of Montana 24.174.1412.

004 NO CONTROLLED SUBSTANCES IDENTIFIED
Weight received: 1.97 gram(s) Weight returned: 0.95 gram(s)

EXAMINATIONS PERFORMED: PRESUMPTIVE TESTS
INFRARED SPECTROSCOPY
GAS CHROMATOGRAPHY/ MASS SPECTROMETRY

Dimethyl sulfone (noncontrolled) was identified during the analysis.

Items were chosen for chemical analysis according to the Chemical Analysis Unit Interim Sampling Protocol. The balance measurement uncertainty is available upon request. All evidence will be returned to the submitting agency. For further inquiry, please contact the Chemical Analysis Unit at DOJChem@mt.gov.

Date of Report: 11/18/2017

DEREK THRUSH, CHEMIST

STATE OF MONTANA

DEPARTMENT OF JUSTICE

FORENSIC SCIENCE DIVISION

Tim Fox
Attorney General

2679 Palmer Street
Missoula, MT 59808

February 21, 2018

Last week an investigation into misconduct at the Forensic Science Division determined an employee removed portions of drug evidence submitted to the lab for analysis. The employee has been terminated from employment and the Missoula County attorney office is handling the prosecution of the individual.

The following steps are now being taken:

1. We are currently confirming the inventory of all evidence in his possession to determine if any cases may have been affected by this individual's actions.
2. We will reach out to each County or City Attorney with a list of cases that the employee worked in that jurisdiction.
3. In cases that have a pending trial date, the lab will request the evidence be returned to the lab to be re-worked by another analyst. In addition, the lab will re-work any case when requested by prosecutors or defense attorneys.
4. A percentage of historical cases will be sent out to a reference laboratory to confirm the previous results.
5. The following deterrent methods are being initiated.
    a. A workplace drug testing policy was introduced earlier this month with quarterly random testing.
    b. Physical and procedural changes will be implemented at the Chemistry section of the laboratory.
    c. A full review of all drug handling policies in the division.

At this time, we are not aware of any inaccuracies with the results in our final reports, but we will have to complete our investigation before we know the full parameters of this situation. Please contact me or Prosecution Services Bureau Attorneys at 406-444-2026 for assistance in answering any questions you may have regarding impacted cases.

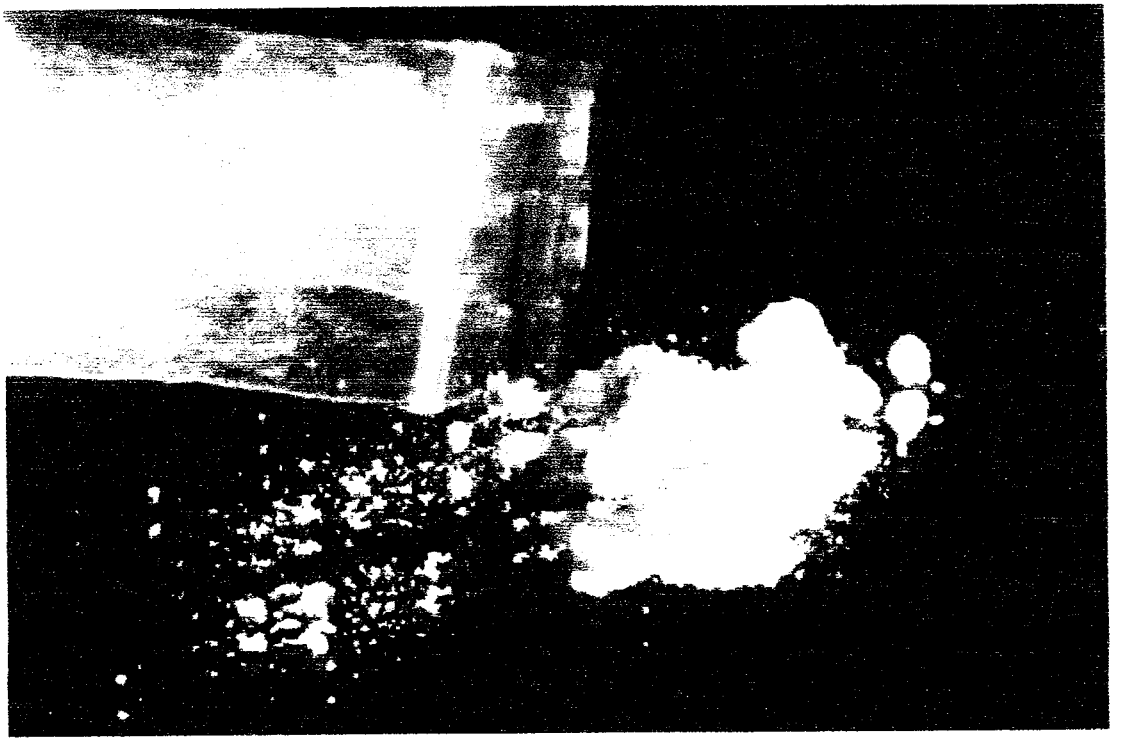
Scott Larson
Administrator
Forensic Science Division and State Medical Examiner's Office
406-329-1179
slarson@mt.gov

missoulian.com

Former Montana State Crime Lab scientist accused of stealing meth | Crime

Dillon Kato

4-5 minutes



Nine charges have been filed against a former forensic scientist accused of stealing drugs from

the Montana State Crime Lab in Missoula.

Derek Thrush faces three felony counts of drug possession as well as three misdemeanors for theft and another three for official misconduct.

On Thursday, the Montana Department of Justice sent a letter to county attorneys across the state, informing them that the Montana State Crime Lab concluded an internal investigation last week and found that an employee had taken drug evidence that had been submitted to the lab.

In charging documents filed by the Missoula County Attorney's Office on Friday, prosecutors said Thrush's brother-in-law told Missoula police earlier this month that he was concerned Thrush was using methamphetamine that he was taking from the lab.

The brother-in-law told a detective that Thrush confessed to having stolen meth from the lab, and that Thrush's wife found meth in their home in December.

A Missoula detective and an investigator from the

Montana Department of Justice spoke to Thrush on Feb. 14, when he allegedly admitted he had been using meth that he took from the crime lab.

Thrush allegedly said he would take small amounts of meth leftover from samples that were submitted to the lab for testing. He told investigators that the drug testing process used at the lab occasionally does not use all of the test sample, and that while the remainder is supposed to be destroyed, he would take it for his own use.

He said he would store the remaining meth in a vial that he would take from the lab, and that he would use an oral syringe to inject the meth after mixing it with water.

Two supervisors at the crime lab told investigators that they found a vial of meth in Thrush's desk drawer while doing an inventory of the facility. His desk was not in the same place that drug testing takes place, and no drug evidence should have been there, they said.

Thrush has yet to make a court appearance on

the charges.

In 2015, a different breach of drug evidence occurred at the state crime lab in Missoula, when a former evidence technician stole opioids that were being stored as evidence. That breach led to charges against 69 defendants across the state being dropped.

The Forensic Services Division, which runs the crime lab, said in Thursday's letter they are working to determine if any cases have been affected by Thrush's actions.

FOX MONTANA

Montana state crime lab chemist charged with stealing meth

By Associated Press

Posted: Feb 24, 2018 3:53 PM MST

Updated: Feb 24, 2018 3:54 PM MST

MISSOULA, Mont. (AP) — A former chemist at Montana's state crime lab in Missoula charged with taking meth left over after testing for suspected drugs in criminal cases

Court records say the chemist's brother-in-law told police the man confessed to using taken from the lab.

The chemist told investigators the lab's drug testing process does not use the entire s The remainder was supposed to be destroyed.

He faces three counts each of felony criminal possession of dangerous drugs, misde theft and misdemeanor official misconduct. Missoula County prosecutors asked that be issued a summons to appear in District Court.

Court records say investigators used data from the man's Fitbit to note an elevated he at the times the man said he used meth.

Lab officials are working to determine if any criminal cases have been compromised.

COMMENTS

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