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DISTRICT COURT, EL PASO COUNTY, COLORADO 30 East Pikes Peak Avenue, Suite 200 Colorado Springs, Colorado 80903	DATE FILED: November 22, 2022 9:21 AM
PEOPLE OF THE STATE OF COLORADO, Plaintiff v. ANDERSON ALDRICH , Defendant	<input type="checkbox"/> COURT USE ONLY <input type="checkbox"/>
Megan Ring, Colorado State Public Defender Joseph Archambault #41216 Chief Trial Deputy Michael Bowman #48652 Deputy State Public Defender 30 East Pikes Peak Avenue, Suite 200 Colorado Springs, Colorado 80903 Phone: (719) 475-1235 Fax: (719) 475-1476 Email: springs.pubdef@coloradodefenders.us	Case No. 22CR6008 Division 21
<p align="center">MOTION FOR PRESERVATION OF DISCOVERABLE MATERIAL AND PHYSICAL EVIDENCE TO ENSURE EVIDENCE IS NOT ALTERED OR DESTROYED BEFORE BEING PRODUCED TO OR INSPECTED BY THE ACCUSED AND HIS DEFENSE TEAM</p> <p align="center">[D-09]</p>	

Mx. Aldrich¹, and through counsel, moves this Court to enter an order requiring the prosecution, and all law enforcement agencies involved in the investigation of this case, to ensure the preservation of all evidence and documentation associated with the criminal investigation and prosecution. Such materials are subject to mandatory and discretionary disclosure under Crim. P. Rule 16. Further, the government is required to preserve and produce all exculpatory evidence pursuant to the due process clauses of the Colorado and United States constitutions. Colo. Const. Art. II, sec. 25; U.S. Const. Amends. V, XIV. *See also Brady v. Maryland*, 373 U.S. 83 (1963), and *People v. Bueno*, 409 P.3d 320 (Colo. 2018).

Mx. Aldrich seeks a further order from the Court prohibiting the prosecution from engaging in destructive, consumptive, or other testing of physical evidence that will alter its original condition or appearance.

The grounds of this motion are as follows:

¹ Anderson Aldrich is non-binary. They use they/them pronouns, and for the purposes of all formal filings, will be addressed as Mx. Aldrich.

1. The Colorado Supreme Court has observed the centrality of discovery to the truth seeking function and fundamental fairness of our judicial system:

The trial of a criminal case is not a game of fox and hounds in which the state attempts to outwit and trap a quarry. It is, instead, a sober search for truth, in which not only the resources of the defendant, but those readily available to the state must be put to work in aid of that search.

Garcia v. District Court, 589 P.2d 924 (Colo. 1979).

2. Crim P. Rule 16 establishes an on-going self-executing disclosure process by which the government must produce a broad range of materials to the defense.
3. The Colorado and United States constitutions further mandate the government's disclosure of exculpatory evidence to ensure due process of law and fundamental fairness. *Brady v. Maryland*, 373 U.S. 83 (1963), and *People v. Bueno*, 409 P.3d 320 (Colo. 2018). The destruction of materially exculpatory evidence works a constitutional violation, sometimes in a manner that cannot be repaired, as it directly undermines an accused's ability to defend themselves against the pending accusation. See e.g. *People v. District Court, City and County of Denver*, 808 P.2d 831 (Colo.1991).
4. Governmental compliance with the provisions of Crim. P. Rule 16 and *Brady* principles is necessary to preserve an accused's state and federal constitutional rights to due process of law, fundamental fairness, to present a defense, to effective assistance of counsel, to exercise compulsory service of process, and to prepare and present a defense.
5. These disclosure obligations have little to no meaning when the government is not diligent in identifying, and preserving these materials in their original form, even if a government agent later transmutes the raw material into an official written report.
6. Early, thorough preservation is particularly critical where, although it is law enforcement and the prosecution compiling these materials, Colorado law provides the defense is in the best position to determine the relevance and materiality of any evidence obtained during the course of a criminal investigation:
 - a. "A witness' statement, to be relevant, need not contain information admissible at trial, as long as the contents of the statement are relevant to the conduct of the defense." *People v. Gallegos*, 644 P.2d 920 (Colo.1982)
 - b. "Determination of usefulness of evidence...is a defense function, not a prosecutorial function, as only the defense can determine what will be material and helpful to its case." *People v. Smith*, 185 Colo. 369 (1974)
7. At this time, the exculpatory nature of any material collected is unknowable to the defense or the prosecution. The only way to ensure that exculpatory material evidence is not willfully or inadvertently destroyed is for this Court to enter orders requiring the prosecution to ensure all material generated during the investigation and all physical evidence seized is protected in its original state and timely disclosed to the defense.

8. While law enforcement maintains actual physical custody of tangible evidence, the government must not be entitled to preferential access to this type of evidence which is often critical to crimes such as the one charged against Mx. Aldrich.
9. To ensure a level playing field with respect to access to physical evidence, the defense must be allowed to observe, photograph, and document all physical evidence before it is altered through government testing or manipulation. While physical evidence is not subject to the same form of production as documentary or recorded evidence, access to this evidence remains subject to the mandatory disclosure provisions of Crim. P. Rule 16.
10. In filing this preservation demand, Mx. Aldrich cannot possibly anticipate every piece of evidence the government and various law enforcement agencies have collected or will collect over the course of investigating and prosecuting this case. As such, the specific items referenced by the defense in this motion serve merely as examples of evidence or types of evidence frequently associated with a serious investigation of this type. This motion is not intended to limit the government's on-going duty to preserve and disclose particular pieces of evidence or documentation not specifically mentioned herein but simply to serve as a notice that the defense seeks preservation of all materials within the possession of the government.
11. With that caveat, Mx. Aldrich explicitly moves the Court enter an order that from this point forward, the prosecution and law enforcement agents involved in the investigation of this case must take steps to identify, locate, and preserve the following in their original form for subsequent production/inspection to the defense:
 - a. Law enforcement handwritten notes² irrespective of whether the officer intends to or does include what they consider to be the substance of the notes in a formal report;
 - b. All emails, text messages, instant messages and other correspondence, whether in paper or electronic form, between law enforcement, expert witnesses, lay witnesses, lay witness' lawyers and the prosecution relating to the investigation of this case.
 - c. Should the prosecution believe that a communication initiated by them with a law enforcement officer, expert witness, lay witness, or witness' attorney is protected by work product privilege, Mx. Aldrich moves this Court to order:
 - i. The prosecution to alert the defense to the existence of the purportedly privileged communication;
 - ii. The prosecution to produce the communication to the court under seal for *in camera* review;
 - iii. The disclosure of all non-privileged material to the defense without undue delay following an *in camera* review and that the court maintain copies of any non-disclosed materials for purposes of appeal should any conviction ensue;

² In this jurisdiction, it has occurred that law enforcement has destroyed notes despite requests and court orders that not.

- d. All police investigator dictation tapes that officers may intend to later transcribe into written notes or formal police reports. These tapes are recorded witness statements and must be preserved, irrespective of any later non-verbatim incorporation into police reports.
 - e. All audio recordings (including but not limited to 911 and dispatch audio) relating to the instant accusation;
 - f. All video recordings, photographs, and body-worn camera footage relating to the instant accusation;
 - g. All physical evidence collected by law enforcement must be maintained in its original condition, without any alteration through testing, so that the defense may inspect it prior to any testing. The defense asks this Court order the prosecution provide the defense with notice of any presumptive or destruction testing prior the testing allowing sufficient time for the defense to view the evidence in its original state prior to testing and/or for the defense to seek a hearing on the issues.
12. All materials Mx. Aldrich seeks to preserve through this motion are covered by the mandatory disclosure provisions of Crim. Rule 16, and are potentially constitutionally protected pursuant to *Brady*.

Mx. Aldrich, by and through counsel, moves this Court to enter an order requiring the prosecution, and all law enforcement agencies involved in the investigation of this case, to ensure the preservation of all evidence and documentation associated with the criminal investigation and prosecution.

MEGAN A. RING
COLORADO STATE PUBLIC DEFENDER



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Chief Trial Deputy



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Deputy State Public Defender

Dated: November 22, 2022

Certificate of Service

I certify that on November 22, 2022, I served the foregoing document electronically through Colorado Courts E-Filing to all opposing counsel of record.
s/skoslosky