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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 THE COURT TO ORDER THE PROSECUTION TO PROVIDE ON-GOING DISCLOSURES TO THE DEFENSE PURSUANT TO BOTH THE MANDATORY AND DISCRETIONARY PROVISIONS OF CRIM. P. RULE 16 REGARDING POTENTIAL EXPERT TESTIMONY TO ALLOW THE DEFENSE TO INVESTIGATE ANY SUCH EXPERT AND HIS/HER OPINION AND FOR THE COURT TO HOLD A PRETRIAL HEARING ON THE ADMISSIBILITY ANY SUCH PROFFERED TESTIMONY</p> <p align="center">[D-06]</p> | |

Mx. Anderson Aldrich¹ moves this Court to order the prosecution to provide, on an on-going basis, the defense with endorsements and discovery regarding any anticipated prosecution expert witness necessary to fully effectuate his Colorado and federal constitutional rights to confront and cross-examine the witnesses against them, to prepare and present a defense, to due process of law, to effective assistance of counsel, and to compulsory process. Colo. Const. Art. II, §§ 16, 23, 25; U.S. Const. Amendments V, VI, XIV.

Further, Mx. Aldrich moves that the Court order such disclosures be made as such witnesses become known to the prosecution, but that expert witness endorsements and completed disclosures be made no later 45 days prior to any evidentiary hearing in this case to allow the defense to request, and the Court to conduct a pretrial hearing regarding the admissibility of any

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.

such proffered testimony once the identify of any expert, and the proposed scope of her/his testimony is known. Additional grounds for this motion are as follows:

1. Although Mx. Aldrich does not yet have discovery in the case, even when it is produced, undersigned counsel cannot determine from discovery, nor should they be required to guess, from whom and in what form the prosecution will seek to elicit expert testimony pursuant to C.R.E. 702, 703, and 705.

2. Crim. P. 16(a)((1)(VII) requires the prosecution to provide a written list of the names and addresses of all witnesses then known to the district attorney whom he intends to call at trial. The rule requires that this information be disclosed “as soon as practicable but not later than twenty calendar days after the defendant’s first appearance at the time of or following the filing of charges.” Crim. P. 16(b)(1).

3. By its very nature, expert testimony is based on specialized knowledge and training, and poses unique challenges for defense counsel. *See* C.R.E. 702.

4. The Rules of Criminal Procedure recognize additional disclosures to the defense may be necessary in situations involving prosecution expert witnesses. *See* Crim. P. Rule 16 (I)(a)(III)(any reports or statements of experts written or oral are subject to mandatory disclosure); Crim. P. Rule 16 (I)(a)(d)(the court, upon motion may require disclosure to the defense of material not covered by other parts of the rule, including compelling a written summary of expert testimony to include the underlying bases).

5. Unless the proposed testimony is in the area of criminal law which is not likely in this case, any prosecution expert’s testimony is not likely something within the general sphere of defense counsel’s knowledge. As a consequence, defense counsel must educate themselves through substantial investigation to address this type of testimony.

6. This pretrial investigation may require requests for specific additional discretionary discovery unique to the particular individuals endorsed that cannot be anticipated by the defense at this time.

7. In addition, such investigation may require the use of Mx. Aldrich state and federal constitutional rights to compulsory process to procure additional materials related to the expert witness that cannot be obtained through other means. Defense counsel must take these steps to prepare for confronting and cross-examining these individuals at trial, and to provide Mx. Aldrich with effective assistance of counsel.

8. Therefore, as a preliminary matter, Mx. Aldrich moves that this Court order the prosecution, pursuant to the discretionary provisions of Rule 16 and Mx. Aldrich’s state and federal constitutional rights to confront and cross-examine the witnesses against them, to effective assistance of counsel, and to prepare and present a defense to produce a written endorsement for any expert to include the expert’s name, address, and an offer of proof regarding the scope of any testimony the purported expert will offer at trial.

9. C.R.E. 705 provides that a qualified expert may testify at trial in the form of opinion or inference, and may give reasons for their opinion without first testifying to the underlying facts or data unless the court requires otherwise.

10. Pursuant to this rule, “the expert may...be required to disclose the underlying facts or data on cross-examination.” C.R.E. 705. In order to effectively confront and cross-examine the expert witness in an area of specialized knowledge, defense counsel must have access to the underlying facts or data in advance of trial.

11. Beyond simply confronting the expert testimony at trial, pursuant to *People v. Schreck*, and C.R.E. 403, 702, Mx. Aldrich has a right to challenge the very admissibility of the testimony. This type of litigation is part and parcel of Mx. Aldrich’s state and federal constitutional rights cited in other sections of this motion – due process of law, effective assistance of counsel, compulsory process, and confrontation.

12. Prior to admitting expert opinion testimony, the trial court must make specific findings regarding the admissibility of expert testimony before it is admitted at trial. *People v. Schreck*, 22 P.3d 68 (Colo. 2001). The Court must make specific findings pursuant to C.R.E. 702 which indicate:

- (a) The reliability of the scientific principles;
- (b) The qualifications of the witness;
- (c) The usefulness of the testimony to the jury. *Ibid*, ¶ 48.

The Court’s inquiry in support of these findings is to be broad in nature, and consider the “totality of the circumstances of each specific case.” *Ibid*, ¶48.

13. The Court must make further findings about the admissibility of expert testimony pursuant to C.R.E. 403 as to whether or not the probative value of the evidence is substantially outweighed by its prejudicial effect. *Ibid*, ¶47, citing *Brooks v. People*, 975 P.2d 1105 (Colo. 1999).

14. Given the standards of admissibility established under *Shreck*, in order to provide Mx. Aldrich with effective assistance of counsel, undersigned counsel have an obligation to investigate and prepare to challenge the expertise of any proffered expert witness, as well as to investigate any conclusions she/he may draw.

15. The *Schreck* opinion raised concerns that the new standard of admissibility could lead to the admission of invalid scientific assertions at trial. However, the Court ultimately concluded that these concerns were “mitigated by “[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof.” *People v. Shreck*, 22 P.3d 68, ¶47 (Colo. 2001) citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, (1993).

16. In order to adequately prepare for pretrial litigation regarding the admissibility of any proffered expert testimony, and to ensure the type of vigorous cross-examination and presentation of contrary evidence that was anticipated by the Colorado Supreme Court in *Schreck*, Mx. Aldrich moves that the materials requested in this motion be disclosed to them in sufficient time to allow for investigation of the prosecution's witnesses, and to potentially identify, consult, and retain their own experts to challenge the opinion testimony of prosecution experts.

17. Mx. Aldrich further requests the Court order the following discretionary disclosures for any witness from whom the prosecution endorses as an expert and from whom they will seek to elicit an expert opinion:

- a. Curriculum vitae for including a listing of any degrees, certificates, organizational memberships, training sessions attended or conducted for purposes of professional development or accreditation, and writings;
- b. Any other information or documents, generated, collected or preserved during the course of any testing conducted in connection with the test, including information regarding the type of testing that was used;
- c. Any agency protocols associated with testing conducted by the endorsed expert;
- d. A written report disclosing the nature and scope of the opinion to be rendered at trial, and any underlying facts or data supporting the opinion in that particular case of an expert endorsed as a witness;
- e. A **list, not copies or originals**, of articles or studies upon which the witness has specifically relied in forming their opinion or will cite at trial as support for their expert opinion or conclusion;
- f. A list of cases and the courts in which the expert has been qualified as an expert in the last five years with information sufficient to allow the defense to obtain transcripts of any such testimony;

18. Crimp. 16 (d) (2) allows the Court to only deny a defense request that will cause substantial risk to any person of physical harm, intimidation, bribery, economic reprisal, or unnecessary annoyance or embarrassment which outweighs the usefulness of the disclosure to defense counsel. None of these considerations is likely to be applicable under these circumstances. Further, it is the prosecution's burden to demonstrate that one of these exceptions is met such that no order for disclosure is warranted.

19. The defense request in this case is reasonable and narrowly drawn in scope. The information should be readily available to the expert witness and so also to the prosecutor who has retained and endorsed the witness. Should the expert not maintain the lists of materials

requested above, it should not be unduly burdensome for the witness to compile such lists to provide to the defense.

20. A court order mandating the prosecution to disclose the information requested in this pleading is necessary in this case to ensure Mx. Aldrich's right to effective assistance of counsel, to prepare and present a defense, to due process of law and to face to face confrontation of any expert witness against them. Colo. Const. Art. II, §§16, 18, 25; U.S. Const. Amendments V, VI, XIV.

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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

Dated: November 22, 2022