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DISTRICT COURT, EL PASO COUNTY, COLORADO 30 East Pikes Peak Avenue, Suite 200 Colorado Springs, Colorado 80903	DATE FILED: February 8, 2023 1:43 PM
PEOPLE OF THE STATE OF COLORADO, Plaintiff v. **ANDERSON ALDRICH**, Defendant	σ COURT USE ONLY σ
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**

MOTION TO CONTINUE PRELIMINARY HEARING AND PROOF EVIDENT PRESUMPTION GREAT HEARING
[D-23]

Mx. Anderson Aldrich[1], by and through counsel moves the court to continue the currently scheduled preliminary hearing and proof evident presumption great hearing. In support of this motion Mx. Aldrich states the following:

Factual Background

1. On December 6, 2022, Mx. Aldrich appeared in-custody for filing of charges on this case. At that time, the state brought three-hundred and four individual counts against Mx. Aldrich, including ten-counts of first-degree murder against five individual victims indicating two theories of prosecution for each.

2. The Court then inquired as to how the case should be set, at which point, defense counsel indicated, ". . . we have a lot of obligations already, both of us, where it would make it difficult to get something scheduled in early spring. So the defense request would be to accept the dates that the Court's staff had offered us. I think its May 31 through June 1st and June 2nd. Tr. 12/06/2022 p. 5 l. 1-6.

3. The Court then turned to the prosecution, DA Mike Allen made no objection, so long as "the defense makes that appropriate waiver." *See* Tr. 12-06-2022 p. 5 l. 15.

[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.

4. The district attorney continued its record without stating an objection to the May dates, ". . . it seems to make sense giving a proper waiver to set this out to some degree into the future. Obviously, we have talked to the Court offline and looked at some dates which I think would be appropriate." Tr. 12/6/2023 P. 5 l. 21-25.

5. The Court then pushed back, "the date that my staff suggested to counsel was in February. . ." *Id* at p. 6 l. 3-4.

6. The Court continued to push for the February date, despite no objection coming from the State to setting the case in May. *See Id.* at p. 6-8.

7. Defense counsel then attempted to make clear the impossibility of the date considered in February:

> "Your honor, Mr. Bowman obviously isn't here with me. We would not be ready to proceed to preliminary hearing on those February dates *due to some obligations we have for our other clients in other cases that we have to be either in or preparing to do*. I myself have a trial that starts early march that's a four-week trial, homicide trial. That I have and some other important *preliminary hearings in other homicides in February.*

Id. at p. 8 l. 11-19.

8. The court then stated,

> "I appreciate your argument, but I'm not convinced. I'm going to go ahead and schedule this proof evident, presumption great hearing on those dates in February that my staff provided to you. I believe we can do this hearing in two days. And I'm familiar with how your office generally litigates this type of case, and I'm certain that they have the resources to make sure that you're available on that date."

Id. at p. 8-9.

9. As defense counsel continued to express its concern and objected to the February date, the Court left open the door to re-raise the issue. It stated, "as you receive discovery and you're able to form concrete opinions about what it is you need to do in preparation for that hearing, I will entertain future motions on the subject." *Id.* at p. 9 l.15-18.

10. On January 13, 2023, the case was again on the docket to address pending motions. At that hearing, defense counsel once again raised its concern about the volume of discovery in this case and its ability to be prepared for preliminary hearing and proof-evident presumption great. *See* Tr. 1-13-2023 p. 8-9 ln. 19-23.

11. The Court then responded by detailing what is and what is not before the court for the purposes of a preliminary hearing. *See* Tr. 1-13-2023 p. 9-10 ln. 24-16.

12. The Court continued that, "If [the office of the public defender] have assigned the wrong attorney to the case given that – given your schedule, then I suggest you have that

conversation with your supervisors so that they can reassign the case so that Anderson Aldrich has adequate counsel." Tr. 1-13-2023 p. 10 ln.11-16. Following that exchange, the conversation shifted to discovery matters now addressed in other motions. The Court denied defense counsel's motion to continue.

13. As of February 2, 2023, the total amount of discovery has risen to over eleven-thousand pages of paper discovery and over thirteen-thousand-eight-hundred gigabytes of digital or media discovery. This is an increase of over 5000 pages and 12 Terabytes of data[2] since January 13, 2023. The media discovery is made up of surveillance of Mx. Aldrich, surveillance from Club Q, recorded witness statements, audio, videos, digital forensics, photographs, Leicia/FARO scan and files[3], and lab reports. Mx. Aldrich is only represented by two attorneys from the Public Defender's Office, whereas the prosecution is represented by four different District Attorneys.

Law and Analysis

14. At a preliminary hearing, the prosecution bears the burden of proving probable cause and the defendant has the right to cross-examine witness called and to introduce evidence, if the prosecution fails to meets its burden the judge must discharge the defendant and dismiss the charging document. *See* Crim. P. 5(a)(4)(II); Crim. P. 7 (h)(4); *Harris v. District Court of City and County of Denver*, 843 P.2d 1316 (Colo. 1993). The prosecution must present evidence sufficient to induce a person of ordinary prudence and caution to form a reasonable belief that the defendant committed the crime charged. *See People v. Walker,* 975 P.2d 304 (Colo. 1984).

15. The preliminary hearing gives a defendant an opportunity at an early stage in the criminal proceedings to challenge the sufficiency of the prosecution's evidence before a impartial judge. *People ex. rel. Farina v. District Court*, 522 P.2d 589 (Colo. 1974) (*citing to People v. Quinn*, 516 P.2d 420 (Colo. 1973)). "In this way, a preliminary hearing serves to 'prevent hasty, malicious, improvident, and oppressive prosecution, to protect the person charged from open and public accusations of crime, to avoid both for the defendant and the public the expense of a pubic trial, to save the defendant from the humiliation and anxiety involved in public prosecution, and to ...[ensure that] there are substantial grounds upon which a prosecution may be based'." *In re People v. Subjack*, --- P.3d --- 2021 CO 10, (Colo. 2021) (*citing to* Wayne R. LaFave, 4 Crim. Proc. § 14.1(a) (4th. Ed. 2020)).

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[2] One thousand terabytes = 1 gigabyte ,one terabyte is the equivalent of one thousand (1000) copies of the Encyclopedia Britannica or three hundred (300) hours of video. *United States v. Salyer,* 2011 WL 1466887 at fn. 2. A terabyte of information could fill twelve floors of library shelves. *United States v. Ganias,* 824F.3d 199, 217-218 (2nd Cir. 2016) (en banc). A terabyte of information is, as a conservative estimate, millions of pages. *Kissing Camels Surgery Center, LLC v. Centura Health Corporation,*2016 WL 27721 at *2 (D. Colo. 2016).

[3] These are digital files that contain depiction of different aspects and evidence found within the crime scenes in this case. They are made using a survey type laser scanner of a scene and the objects found within it. These files are very large, hard to download, and maneuver within to view the depictions they create.

16. Every person *accused* of a class 1, 2, or 3 felony . . . in a felony complaint has the right to demand and receive a preliminary hearing to determine whether probable cause exists to believe that the offense charged in the felony complaint was committed by the defendant. Crim. Pro. R. 5 (4) *(emphasis added).*

17. Although all persons shall be bail-able for any offenses bond can be denied for capital offenses when proof is evident or presumption is great. Colo. Const. Art. II. Sec 19. (1)(a). If bail is to be denied the prosecution must come forward and present evidence that proof is evident or the presumption great that the crime charged occurred. *See People ex rel Dunbar v. District Court*, 500 P.2d 358 (Colo. 1972).

18. The burden is on the prosecution to show the constitutional exception of proof evident or presumption great on a capital offense, for the bail to be properly denied. *Gladney v. District Court*, 535 P.2d 190 (Colo. 1975)."By definition, the standard which the constitution requires before bail may be denied is greater than probable cause though less than that required for a conviction. *Orona v. District Court*, 518 P.2d 839, at 840 (Colo. 1974) (*citing to In Re Losasso*, 24 P. 1080 (Colo. 1890)).

19. "[O]nce counsel is appointed, the attorney-client relationship is no less inviolable than if the counsel had been retained by the defendant." *People v. Rainey*, 491 P. 3d 531, (Colo. App. 2021) (citing *People v. Shari*, 204 P.3d 453, 460 (Colo. 2009)). "[T]he right to continued representation means that an indigent defendant has a right to proceed with his specific appointed lawyer, not just any appointed lawyer from the public defender's office. *Id.* at 536. "If . . . the attorney-client relationship between an indigent defendant and his appointed counsel is no less violable than the relationship between a non-indigent defendant and his retained counsel, then the Sixth Amendment limits the district court's power to replace a defendant's appointed lawyer with another from the same firm or organization. *Id.*

20. *People v. Brown*, 322 P.3d 214 (Colo. 2014), addressed the tension that can exist between counsel's request to continue, substitution or replacement of counsel, and an accused's rights to counsel. The "public interest" in that case however, was centered on a scheduled trial date, with various subpoenas having been served, and the case being continued several times. *See generally, People v. Brown*, 322 P.3d 214 (Colo. 2014). Nevertheless, the court set out several factors that must be considered that provide guidance in this situation. The *Brown* court held that courts should consider whether: (1) the continuance would inconvenience witnesses, the court, counsel, or the parties; (2) other continuances have been granted; (3) legitimate reasons warrant a delay; (4) the defendant's actions contributed to the delay; (5) other competent counsel is prepared to try the case; (6) rejecting the request would materially prejudice or substantially harm the defendant's case; (7) the case is complex; and (8) any other case-specific factors necessitate or weigh against further delay. *See Id.* at 220. *Rainey* ultimately extended the *Brown* analysis to situations similar to that now before the court. *See generally*, 491 P.3d 531 (Colo. App. 2021)

21. The denial of a continuance is error when "the [trial] court's decision was arbitrary or unreasonable and materially prejudiced the defendant." *People v. Brown*, 322 P.3d 214 (Colo. 2014) (citing *United States v. Simpson*, 152 P.3d 1241, 1251 (10th Cir. 1998).

22. The Court has not made detailed findings about why defense can be ready despite counsel's previous scheduling conflicts and best efforts. Instead, the Court has repeated that the case could be reassigned, or that counsel's organization could provide the "resources" to make counsel available.

23. When considering the *Brown* factors, it is clear that a continuance should be granted, and denying it would result in error. There exists no stated inconvenience here, in fact, the district attorney did not object to counsel's request originally to set the hearing in May, when this issue was addressed on December 6th. Only after the Court denied counsel's request, did the district attorney then lodge any objection at the hearing on January 13, 2023. At the time of the original request, no hearing was set, and therefore any inconvenience now attributable to rescheduling cannot be placed at the feet of Mx. Aldrich. Additionally, counsel has made this request early, and makes it again fourteen days before the hearing in order to address those concerns. No other continuances have been granted in this case. As to the second factor, Counsel made itself available for first appearance and the case is currently set without an appearance ever being scheduled twice.

24. As outlined in this motion, and in all previous requests to continue, the reasons for the request here are legitimate, serious, and implicate Mx. Aldrich's due process rights.

25. The fourth factor also weighs in favor of granting the continuance as none of the reasons listed for the continuance can be attributable to Mx. Aldrich. Counsel has repeatedly made requests for discovery it felt were missing, relevant, and nevertheless undisclosed. Counsel has written letters to the district attorney's office throughout this process with concerns in an effort to alleviate them, and received no response. Mx. Aldrich has done nothing via their own actions, or counsels, that has caused additional or unnecessary delay. *See* Attached Exhibit A, January 20, 2023 letter seeking attorney-client privileged material from District Attorney, which was never responded to, also was filed as [D-15] Exhibit A; *see also* attached Exhibit B, January 18, 2023 letter to District Attorney seeking ALL of the Club Q surveillance, letter was never responded do, also was [D-20] Exhibit C. Counsel has also filed motions about the discovery violations and even with the Court setting a hearing to address these matters on February 10, 2023, the prosecution has still not complied. *See* Motion to Compel Immediate Disclosure of Jail Surveillance that contains attorney-client privilege material and impose sanctions for violation of the prosecution's discovery obligations, [D-20]; Motion to Compel Immediate Disclosure of All Club Q Surveillance in Law enforcement possession and impose sanctions for violation of the prosecution's discovery obligations, [D-21].

26. "Although there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor, if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge. When the prosecutor receives a specific and relevant request, the failure to make any response is self, if ever, excusable." *United States. Agurs*, 427 U.S. 97, at 106 (1976).

27. Crim. P. 16 is self-executing, Mx. Aldrich's counsel should not spend time, which they did not have any to spare; sending letter after letter, with no response, or spend time filing any motions, in attempts to get the prosecution to comply with the constitutional obligations to discover material to the defense.

28. As it relates to the fifth *Brown* factor, the court is obviously aware that counsel is not fungible. *See generally, Rainey* 391 P.3d 531. Public Defenders are under no less obligation to develop relationships and trust with their clients than any private attorney. Despite continually telling the Office of the Public Defender to reassign the case, the Court has failed to identify how that would alleviate the problem or allow the case to proceed sooner than with currently assigned counsel. The Court is surely aware that any attorney or set of attorneys who would be assigned the case would likely enter their appearance and immediately request to continue in order effectively assist Mx. Aldrich.

29. The Court's record thus far is ripe with the idea that *Rainey* can be skirted by simply placing the onus back upon the public defender's office. That if the court isn't forcing the reassignment, but merely pushing a case over the objection of counsel, it can force the Office of the Public Defender to be reassign counsel lacking the timing and preparation conflicts it has created for the current defense team. It has, on more than on occasion, seemingly put forth the proposition that Mx. Aldrich in this situation, must choose between their attorney-client relationship, and their due process rights to effective assistance of counsel.

30. The point that seems lost, however, is that this is an issue of timing. The Court, in denying the motion to continue on January 13, 2023, warned defense counsel against making an ineffective assistance argument. The explicit instruction from the court was for counsel to discuss with their supervisors the case being reassigned. In giving that instruction, the court prioritized its schedule and perceived need to push forward this case, over Mx. Aldrich's constitutional rights without further discussion or recognition of the relationship that exists between attorney and client. As indicated previously on the record, there is no other competent counsel who would be able to proceed on the court's timeline. Counsel's supervisors have been consulted about this issue and they cannot and will not appoint different attorneys from the public defenders office to represent Mx. Aldrich.

31. As to the sixth *Brown* factor, the hearings currently scheduled on February 22, 2023 are not a mere formality. The determinations the court must make are not simply a race to the goal-post of probable cause. Mx. Aldrich is allowed to present their own evidence, call witnesses, and cross-examine those called by the prosecution and ultimately, contest the evidence presented. Crim. P. 7(h)(1). The trial court at a proof evident presumption great/preliminary hearing is not functioning as a singular grand jury.

32. The hearing on whether the proof is evident, or the presumption great is Mx. Aldrich's only chance for the Court to consider a bond in this case. It is, once again, a higher burden on the prosecution than probable cause. While the Court is correct in its assessment of affirmative-defenses at a preliminary hearing, proof evident requires the Court to consider the likelihood of conviction, and in doing so, requires the court to consider potential outcomes from evidence that may be asserted at trial.

33. Finally, the decision regarding proceeding to preliminary hearing implicates Mx. Aldrich's rights, and counsel's ethical obligations regarding attempts to resolve this case short of a jury trial. As the court knows, the district attorney's office in this jurisdiction regularly uses a person's decision on whether to proceed to preliminary hearing against them in negotiations. As a result, the decision on whether to proceed to preliminary hearing requires a full assessment of outcomes, options, and a thorough review of the evidence to that end. Forcing the defense to proceed despite those added complications further implicates Mx. Aldrich's Sixth Amendment rights. Rejecting the request to continue therefore, would materially prejudice Mx. Aldrich's case.

34. The seventh *Brown* factor, in this matter, speaks for itself. Mx. Aldrich is facing over three-hundred and twenty counts. Several counts of first-degree murder, against five separate victims and bias-motivated crime counts which all warrant a deep analysis of not only the actions on the night alleged, but the days, months, and longer time frame of events that existed before the night in question. As discussed above, to call discovery in this case voluminous would be an understatement. Based on the current data numbers, this case accounts for over 50% of all active case data the Office of the Public Defender manages in the Colorado Springs Office.

35. To date, the court has made no record on why the continuance would be inappropriate, what the prejudice might be, or upon whom the prejudice would fall. The timeline repeated by the Court in denying the request to continue is a timeline afforded to the accused. While Rule 5 allows for either party to request a preliminary hearing, it was Mx. Aldrich who made that request in this case. *See* Tr. 12-06-2022 p. 4 ln. 20.

36. Counsel has never stated, nor is it arguing, that at no point, given the volume of discovery and complexity of this case, will they ever be effective or adequately prepared for proof evident or preliminary hearings in this matter. What counsel requires is time. As counsel attempted to prepare for this hearing, they have repeatedly been stifled by the discovery issues discussed in other motions. As noted above, the district attorney has been consistent in its willful lack of response and unwillingness to communicate with defense counsel. The lack of response to letters and almost total absence of out of court communication has only further compounded the issues raised here.

37. Counsel believes given the additional time of only three or four months, Counsel will be effective and prepared to proceed to preliminary hearing in this case. The considerations outlined above demonstrate that a continuance is not only warranted but required.

WHEREFORE, Mx. Aldrich requests this court grant this motion to continue the currently scheduled preliminary hearing and proof evident, presumption great hearing on February 22, 2023, and reset this matter at a time to be coordinated by the parties.

MEGAN A. RING
COLORADO STATE PUBLIC DEFENDER

Joseph Archambault #41216
Chief Trial Deputy

Michael Bowman #48652
Deputy State Public Defender

Dated: February 8, 2023

Certificate of Service
I certify that on 2/8/23, I served the foregoing document electronically through Colorado Courts E-Filing to all opposing counsel of record.
s/skoslosky