

<p>DISTRICT COURT, TELLER COUNTY, COLORADO</p> <p>Court Address: 101 WEST BENNETT AVENUE CRIPPLE CREEK, CO 80813</p> <hr/> <p>THE PEOPLE OF THE STATE OF COLORADO,  v.  KRYSTAL JEAN LEE KENNEY, Defendant.</p>	<p>DATE FILED: February 5, 2019 10:33 AM</p> <p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p>
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<p><b>DISCOVERY DEMAND</b></p>	

Ms. Kenney, by and through undersigned counsel, hereby requests and demands that her fundamental right to full discovery is protected pursuant to her statutory and Colorado and Federal constitutional right to a reliable and fair trial. Ms. Kenney also files this motion to ensure absolute fairness and integrity prior to and during trial. Whereby, Ms. Kenney makes the following specific demands:

**I. GENERAL DISCOVERY REQUEST**

1. Ms. Kenney requests this Court to order the discovery, preservation, and immediate production of the following materials:
  - a. Police handwritten or typed or dictated notes and tapes of any and all contacts and statements of all people contacted or interviewed regarding this case, and all police handwritten or typed or dictated notes and tapes of all police activities and commentary and statements regarding this case.
  - b. The tapes of dictations police investigators dictate from their notes that are or are not transcribed into police reports.

- c. All records, experiments, 911 tapes, dispatch tapes, and all other audiotapes and/or videotapes and/or other media of recordings.
  - d. Duplicates of all photographs, videotapes and/or audiotapes.
2. These materials should be preserved and made available to defense counsel pursuant to Crim.P. 16(I)(a) and (c).
  3. This discovery is required by the Fifth, Sixth, and Fourteenth Amendments, Art. II, §§ 16 and 25 of the Colorado Constitution; Crim.P. 16, Part I; *Brady v. Maryland*, 373 U.S. 83 (1963) and *Wearry v. Cain*, 136 S. Ct. 1002 (2016). This information and material is exculpatory, material and relevant.
  4. The preservation and production of requested items are material to the preparation of the defense in this case and is reasonable.
  5. Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the U.S. Constitution.

## **II. DISCOVERY DEMAND FOR WITNESS IMPEACHMENT MATERIAL**

1. Disclosure of the prior convictions and adjudications of the witnesses the prosecution will call.
2. Evidence that a prosecution witness has a motive or bias because he or she has entered into an agreement with the prosecution, received leniency from the state, or has outstanding litigation or cases with a prosecutorial agency, including juvenile cases, or parole or probation proceedings. *See Davis v. Alaska*, 415 U.S. 308 (1974); *People v. Bowman*, 669 P.2d 1369 (Colo. 1983); *People v. Pate*, 625 P.2d 369 (Colo. 1981).
3. Evidence of misdemeanor convictions of a prosecution witness that are probative of untruthfulness or dishonesty. *See People v. Armstrong*, 704 P.2d 877 (Colo. App. 1985) (cross-examination of witness concerning his prior conviction for the misdemeanor offense of making a false police report is permissible).
4. Any deferred judgment and sentence plea entered into by any witness that is not yet finished at the time the witness has made statements or appeared at a court proceeding. *See People v. Vollentine*, 643 P.2d 800, 802-803 (Colo. App. 1982).
5. Any grants of immunity to prosecution witnesses. *Giglio v. United States*, 405 U.S. 150, 154-55 (1972) (due process is violated where the prosecution fails to disclose the grant of immunity to a prosecution witness).
6. Any payments made to a prosecution witness for services to the police or prosecutorial authority. *See United States v. Shaffer*, 789 F.2d 682, 687-89 (9th Cir. 1986).
7. Any evidence or records that relate to the untruthful reputation of the prosecution witnesses, or evidence of specific instances of untruthfulness of the witness. C.R.E. 608.

8. Information concerning alternative suspects considered by the police or prosecution. *See Bowen v. Maynard*, 799 F.2d 693, 611 (10th Cir. 1986), *cert. denied*, 479 U.S. 962 (1986) (state violated due process by failing to disclose list of other suspects because a released suspect resembled the accused and matched the description of the perpetrator); *see also, People v. Flowers*, 644 P.2d 916, 918 (Colo. 1982) (an accused may prove his innocence by establishing the guilt of another).

9. Any other evidence relevant to the motive, bias, or interest of the witnesses. *See Merritt v. People*, 842 P.2d 162, 166 (Colo. 1992) (a defendant is allowed broad cross-examination of the bias and motive of prosecution witnesses); *People v. Pate, supra*.

10. If the witnesses have waived confidentiality, any and all records and information concerning the prior psychiatric or psychological treatment, evaluation, or hospitalization of all prosecution witnesses since evidence of the mental condition of a witness is admissible as bearing on the credibility of the witness. *People v. Schuemann*, 190 Colo. 474, 548 P.2d 911, 913 (1976); *People v. Vorrelli*, 624 P.2d 900, 904 (Colo. App. 1980).

11. Any and all information concerning drug and alcohol use, evaluation, or treatment of prosecution witnesses since the use or abuse of alcohol or drugs could have impaired the prosecution witness' ability to perceive or recollect. *See People v. Roberts*, 37 Colo. App. 490, 553 P.2d 93 (1976).

12. Materials in possession of all law enforcement agencies that have participated in the investigation or provided reports concerning the case which are constructively in the "possession or control" of the prosecuting attorney under Crim. P. 16(I)(a)(1). *People v. District Court*, 793 P.2d 163 (Colo. 1990) (the prosecuting attorney's obligations extend to material and information in the possession or control of staff or others that have participated in the investigation); *Chambers v. People*, 682 P.2d 1173, 1180 n.13 (Colo. 1984); *Ortega v. People*, 162 Colo. 358, 426 P.2d 180 (1967); *People v. Lucero*, 623 P.2d 424 (Colo. App. 1980); Crim. P. 16(I)(c). The prosecution must make efforts to locate and deliver copies of this material to the defense and "[i]t is incumbent upon the prosecutor to promulgate and enforce rigorous and systematic procedures designed to preserve all discoverable evidence gathered in the course of the criminal investigation." *People v. District Court*, 623 P.2d 424 (Colo. App. 1980); Crim. P. 16(I)(b)(4).

### III. DISCOVERY DEMAND FOR INVESTIGATOR NOTES

1. The handwritten and/or typewritten notes of investigators and victim witness advocates must be preserved and disclosed to the defense if they contain the substance of recitals of oral statements made by witnesses. *See People v. Shaw*, 646 P.2d 375, 381 (Colo. 1982); *People v. Thatcher*, 638 P.2d 760, 767 (Colo. 1981). Although the work product of a prosecuting attorney is not discoverable, see Crim. P. 16(I)(e)(1), non-discoverable material may be excised and the remainder provided to the accused. *People v. District Court*, 780 P.2d 332, 336 (Colo. 1990).

2. Because the witnesses' versions of events are all told differently to each party involved, anything that is stated regarding the alleged incident is potential impeachment. *Giglio v. United States*, 405 U.S. 150(1972); *People v. District Court, City and County of Denver*, 808 P.2d 831(Colo. 1991); *People v. District Court for the 17th Judicial District*, 793 P.2d 163 (Colo. 1990); *People v. Doss*, 782 P.2d 1198 (Colo. 1989).

3. It is improper for the prosecution to attempt to circumvent its obligations by deliberately avoiding taking notes or reducing statements to writing. *People v. Anderson*, 837 P.2d 293 (Colo. App. 1992); *US v. Van Nuys*, 707 F.Supp. 465 (D. Colo. 1989).

4. In fact, the defense moves for the Court to order that any and all future discussions or interviews with witnesses in this case, about the events of the case, be tape-recorded by law-enforcement or by the agent of the prosecution. The defense will purchase a hand-held tape-recorder for the prosecution to make certain that resources are not an issue, and that all interviews are taped for future accuracy and verification.

#### **IV. MS. KENNEY MOVES FOR COMPLIANCE WITH RULE 16 TIMELINES, INCLUDING EXPERT DISCLOSURES**

1. Ms. Kenney demands and moves for compliance with Crim.P. 16, including but not limited to the maximum time limits for production of discovery under part (I)(b). Ms. Kenney demands and requests duplicates of all duplicable materials.

2. This request includes disclosure of the expert witnesses the prosecution intends to call at trial, as well as the written reports, opinions, and results of testing, any notes taken by the expert before and after the testing, the experts' resumés, curriculums vitae, history of testimony, opinions or summary of opinions, list of published articles, list of lectures, trainings attended, and certifications. *Venalonzo v. People*, 2017 CO 9 (February 6, 2017).

#### **V. MS. KENNEY MOVES FOR CHAIN OF CUSTODY DISCOVERY**

1. Pursuant to Crim. P. 16 and the Due Process Clauses of the United States and Colorado Constitutions, Ms. Kenney requests disclosure of all records and logs and receipts pertaining to the storage and movement of physical evidence.

#### **VI. DEMAND FOR IN-PERSON TESTIMONY**

1. Ms. Kenney demands, pursuant to C.R.S. § 16-3-309 (5) and the Due Process, Right to Counsel, Confrontation, and Compulsory Process Clauses of the Federal and Colorado Constitutions, that all criminalistics and laboratory personnel, employees and technicians testify in person as to the results of any laboratory procedures used in obtaining evidence presented in any court proceedings, including but not limited to hearings on motions, trial, and sentencing.

#### **VII. DEMAND FOR LIST OF EXHIBITS AND EVIDENCE PROSECUTION INTENDS TO ADMIT AT TRIAL**

Ms. Kenney demands and moves for this Court to order the state to produce and allow her to examine all exhibits and evidence that the state has possession or control of, or which it intends to present at trial, and for the state to prepare and submit a listing of its exhibits and evidence as soon as possible, but no later than 45 days before trial, for the following reasons:

1. Crim.P. 16 (I)(a)(1)(IV) requires that the state provide to the accused all "tangible objects held as evidence in connection with the case." This must be done as soon as practicable but no later than 20 days after the first appearance. Crim. P. 16 (I)(b)(1).

2. Although the Rule is mandatory in its terms, in order to comply with its obligations and to facilitate the process of the trial, and in order to enable Ms. Kenney to prepare for trial and to avoid surprise, the state should be ordered to perform the tasks set forth above. By requiring the state to provide a listing of exhibits that it intends to present as evidence, the Court will expedite the trial process and will enable Ms. Kenney to avoid wasted time and resources.

3. This demand and motion necessarily includes any charts, graphs, photos, and any other tangible physical objects the state might use as evidence at trial, or which is being held as evidence.

4. This demand and motion specifically includes the photographs that the state or its agents, the various police forces involved in this case, possess. It is imperative that Ms. Kenney immediately be provided with copies of these photographs.

### **VIII. LEGAL SUPPORT FOR IMMEDIATE PRODUCTION OF THE REQUESTED DISCOVERY**

1. The prosecution has a duty to provide discovery of any material that may be meaningful to the defense, regardless of whether it is exculpatory or will relate to testimony the prosecution intends to present at trial. *People v. Thatcher*, 638 P.2d 760, 768 (Colo. 1981); *People v. Smith*, 185 Colo. 369, 524 P.2d 607 (1974).

2. Crim. P. 16(I)(a) and C.R.P.C. 3.8(d) imposes the duty that must be automatically performed by the prosecution (without a request from the defense) in a timely manner. *See People v. District Court*, 790 P.2d 332, 337 (Colo. 1990); *People v. Alberico*, 817 P.2d 573 (Colo. App. 1991); *In re Attorney C*, 47 P.3d 1167, 1170 (2002), *citing United States v. Bagley*, 473 U.S. 667 (1985).

3. The duty is *continuing* – and the prosecution shall disclose additional information as it is discovered. Crim. P. 16(III)(b); *see Mooney v. Holohan*, 294 U.S. 103, 108 (1935) (due process violated where the prosecutor learned that a witness committed perjury during the trial, but did not disclose this fact to the defense counsel).

4. It does not matter that the information may or may not be material today, what matters is that the information will be material to the outcome of the trial, then "the prosecutor must disclose that evidence in advance of the next critical state of the proceeding – whether the evidence would particularly affect that hearing or not." *In re Attorney C*, *id.* at 1171.

5. In this case, the use of discovery material for a defendant's impeachment purposes at the preliminary hearing, arraignment, motions, plea-bargaining position and trial implicates the due process and confrontation rights of the accused. *People v. Thatcher*, 638 P.2d 760, 768 (Colo. 1981); *Goodwin v. District Court*, 197 Colo. 6, 688 P.2d 874 (1979); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *U.S. Const.*, amends. V, VI, XIV; *Colo. Const.*, art II, §§ 16, 25.

6. It is not the role or function of the prosecution to determine what information obtained during the course of the interview with a witness is useful to the defense. That responsibility is left to the defense and the Court. *People v. Smith*, 524 P.2d 607 (Colo. 1974); *People v. District Court*, 790 P.2d 332 (Colo. 1990). In the instant case, almost every version of the Accuser's statement has been contradicted by another version. This leaves every statement made to anyone worthy of impeachment.

7. If the prosecution refuses to provide the defendant with material evidence, which is favorable to the accused, and relates to either the guilt or punishment of the accused, the prosecutor violates his or her ethical duty and due process is denied. *See Brady v. Maryland*, 373 U.S. 83 (1963); *People v. Greathouse*, 742 P.2d 334 (Colo. 1987); *People v. Mucklow*, 35 P.3d 527 (2000); *U.S. Const.*, amends. V, XIV; *Colo. Const.*, art. II, § 25; Crim. P. 16(I)(a)(2); C.R.P.C. 3.8(d). It is irrelevant whether or not the prosecution acted in good faith in suppressing the evidence.

**IX. REVOCATION OF ALL RELEASES AND WAIVERS AND ASSERTION OF ALL RIGHTS AND PRIVILEGES**

Ms. Kenney hereby revokes and rescinds all releases, waivers and authorizations for the release of information which she may have heretofore made, and she hereby asserts all of her rights and privileges under Colorado's privilege rules, statutes and principles including, but not limited to, C.R.S. § 13-90-107, and the Due Process, Right to Counsel, Confrontation, Right to Remain Silent, Privilege Against Self Incrimination, Compulsory Process, Ex Post Facto, Trial by Jury, Equal Protection, Right to Appeal, and Cruel and Unusual Punishment Clauses of the Federal and Colorado Constitutions, and Article II, §§ 3, 6, 7, 10, 11, 16, 18, 20, 23, 25, and 28, of the Colorado Constitution, and Article I, § 9, and the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the U.S. Constitution.

WHEREFORE, Ms. Kenney makes all of these motions, and all other motions and objections during all proceedings in this case, whether or not explicitly stated at the time of the making of the motion or objection, under the Due Process, Right to Counsel, Confrontation, Right to Remain Silent, Privilege Against Self Incrimination, Compulsory Process, Ex Post Facto, Trial by Jury, Equal Protection, Right to Appeal and Cruel and Unusual Punishment Clauses of the Federal and Colorado Constitutions, and Article II, §§ 3, 6, 7, 10, 11, 16, 18, 20, 23, 25, and 28, of the Colorado Constitution, and Article I, § 9, and the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the U.S. Constitution. All authorities and citations noted apply to and support all requests for relief herein.

Respectfully submitted this 5<sup>th</sup> day of February, 2019.

**EYTAN NIELSEN LLC**

/s/ Dru Nielsen

Dru R. Nielsen, #28775

**CERTIFICATE OF SERVICE**

I hereby certify that on this 5<sup>th</sup> day of February, 2019, a true and correct copy of the foregoing **DISCOVERY DEMAND** was served via CCE as follows:

4<sup>th</sup> Judicial District Attorney's Office  
105 E Vermijo Ave  
Colorado Springs, CO 80903

*s/ Ashli Pyles*  
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Ashli G. Pyles