

DISTRICT COURT, BOULDER COUNTY, COLORADO Court Address: 1777 SIXTH STREET P.O. BOX 4249, BOULDER, CO, 80306-4249	DATE FILED: March 26, 2021 11:39 AM
THE PEOPLE OF THE STATE OF COLORADO v. <b>Defendant(s)</b> AHMAD AL ALIWI ALISSA	<p style="text-align: center;"><b>△ COURT USE ONLY △</b></p> Case Number: 2021CR497 Division: 13                      Courtroom:
<b>Order: MOTION FOR ACCESS TO THE SCENE (D-009)</b>	

The motion/proposed order attached hereto: MOOT.

The parties have conferred regarding Defendant's Motion and have agreed that the Motion is moot. Prior to law enforcement releasing the Scene, the People will ensure that counsel for Defendant and their agents will be allowed access to inspect the Scene, while it is still controlled and monitored by law enforcement, for up to six hours

Issue Date: 3/26/2021



THOMAS FRANCIS MULVAHILL  
 District Court Judge

District Court, Boulder County, Colorado Court Address: 1776 6 <sup>th</sup> Avenue Boulder, CO 80306	<p style="text-align: center;">σ COURT USE ONLY σ</p>
THE PEOPLE OF THE STATE OF COLORADO  v.  Ahmad Alissa, Defendant.	
Megan Ring, Colorado State Public Defender Samuel Dunn #46901 Senior Deputy State Public Defender Kathryn Herold #40075 Supervising Deputy State Public Defender Boulder Regional Public Defenders 2555 55TH Street D-200, Boulder, CO 80301 Phone: (303) 444-2322 Fax: (303) 449-6432 E-mail: boulder.defenders@state.co.us	Case No. 21CR497  Division 13
<b>MR. ALISSA'S MOTION FOR ACCESS TO THE SCENE (D-009)</b>	

Mr. Alissa moves for a court order preserving and granting counsel and their agents access to inspect the crime scene at the King Soopers, 3600 Table Mesa Drive, Boulder, CO, and the surrounding area, to include the parking lot and all property at this address enclosed by the public right-of-way, pursuant to the Fifth, Sixth and Fourteenth Amendments to the Colorado Constitution, as well as Article II, sections 16, 18 and 25 of the Colorado Constitution. The scene is currently under law enforcement's control. In support of this motion, Mr. Alissa states:

1. The King Soopers at 3600 Table Mesa Drive is a licensed business that is open to the public. At present, it is under law enforcement's exclusive control as law enforcement investigates the matter.
2. The defense requests that this Court issue an order directing the Boulder Police Department and the other law enforcement agencies involved to preserve and refrain from releasing the scene to afford the defense team and defense experts the opportunity to inspect and observe the scene.
3. Inspection of the scene prior to its release is necessary to Mr. Alissa's defense. The arrest affidavit filed in this matter is five pages, and does not contain specific information which would otherwise be useful in determining what are critical and necessary investigatory steps to provide effective assistance of counsel to Mr. Alissa. Mr. Alissa will be charged with 10 counts of first degree murder, according to the information available to the defense at this time, and at least a single count of attempted first degree murder. One of the deceased was a Boulder police officer. Numerous law enforcement agencies—including the Boulder police department—are investigating the shootings

and entering the scene. It is unknown how many of these officials are actively participating in the scene investigation, and what measures they are taking to ensure the integrity of the scene for other investigation, namely the defense's. From the news reports, the scene covers multiple distinct parts of a large, commercial area that is well travelled. This location is heavily trafficked by the larger Boulder community on a daily basis. Once law enforcement presence leaves, it will be nearly impossible to investigate the scene properly, without interference from private citizens in these public spaces. It appears that parts of this incident occurred near cars in the parking lot, close to front of the store but outside the store, within the entry way of the store, and other various areas throughout this large grocery store. The location of witnesses, victims, and tangible pieces of evidence, as in every single serious criminal case, are crucial pieces of evidence. In this case, the location and vantage point of any potential witnesses and any potential piece of evidence is critically important, as it appears from the affidavit that varying and seemingly contradictory reports were provided to law enforcement during the incident. Without being able to view, and document these various aspects of this scene, without interference from the public, Mr. Alissa will be unable to effectively prepare a defense in the case.

4. The area sealed off by police is extensive, spanning the entire property, including the parking lot, and even areas that are adjacent to the parking lot. According to news reports, multiple shots were fired, windows were destroyed, many law enforcement officers entered the store, and many shoppers and employees were inside the store. The extent of damage to the store is likely significant, and such damage is necessary to document to understand what happened inside the store.

5. Counsel requires access to document the precise location of various pieces of evidence relevant to the defense, the state of such evidence, and to document relevant evidence overlooked by the local, state, and federal law enforcement agents. Relevant pieces of evidence would include projectiles, casings, entry and exit holes on any items within the store, the precise location of these items before they are moved and removed by law enforcement.

6. Law enforcement has denied counsel and their agents access to the scene. Counsel tried to access the scene on March 23, 2021 at approximately 8:44AM. Agents of the Boulder Police Department denied access, namely Ofcs. S. Byars and Xu. On March 22, 2021, law enforcement agencies used patrol vehicles to create a wide perimeter around King Soopers, and officers were outside their vehicles to stop pedestrians from approaching the shopping center area where King Soopers is located.

7. Absent a court order granting counsel access, counsel will not be able to access, investigate, or document the scene.

8. The United States and Colorado Constitutions grant criminal defendants the right to investigate, prepare, and present a defense free from unreasonable governmental interference. See U.S. Const. amends. V, VI, and XIV; Colo. Const., art. II, §§ 16, 18, 25.

9. Moreover, the concept of fundamental fairness embedded in the Due Process Clause entitles a defendant to a general right of access to evidence. See *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (“[A] criminal trial is fundamentally unfair if the State proceeds against [a] . . . defendant without making certain that he has access to the raw materials integral to the building of an effective defense.”); *California v. Trombetta*, 467 U.S. 479, 485 (1984) (to safeguard right to present a complete defense embodied in Due Process Clause, “the Court has developed ‘what might loosely be called

the area of constitutionally guaranteed access to evidence.” (citation omitted)); *United States v. McClelland*, 141 F.3d 967, 971 (10th Cir. 1998) (“A defendant’s Fourteenth Amendment due process rights include a general right to access evidence.”).

10. In addition, counsel is obligated under the Sixth Amendment and Article II, section 16 of the Colorado Constitution to conduct a thorough and independent pretrial investigation. See *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948) (“Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved . . . .”); *Powell v. Alabama*, 287 U.S. 45, 57 (1932) (noting that “thorough-going investigation and preparation” by defense counsel is “vitaly important”); *People v. Tackett*, 742 P.2d 957, 959 (Colo. App. 1987) (“A defendant is entitled to a pretrial investigation of sufficient thoroughness to develop potential defenses and uncover facts relevant to guilt and punishment.”). In order for counsel to provide effective representation to Mr. Alissa, they must have access to the scene to investigate. *Strickland v. Washington*, 466 U.S. 668 (1984); *State v. Tetu*, 386 P.3d 844, 852-55 (Haw. 2016) (collecting authorities). Counsel may not defer to the prosecution and its agents to perform the factual investigation necessary to defend against these serious charges, which includes the death of one of its agents. *Id.*; *Tetu*, 386 P.3d at 852-55; see also *People v. Guzman-Rincon*, 369 P.3d 752, 757 (Colo. App. 2015) (rejecting the prosecution’s assertion that nothing in its ex parte conference with the judge harmed the defendant’s rights because “[i]t is not the role of the prosecution to determine whether a defendant’s rights are violated.”).

11. Finally, Crim. P. 16, I (a)(1)(IV) requires the prosecution to “make available to the defense . . . [a]ny . . . tangible objects held as evidence in connection with the case.” This obligation extends beyond the prosecuting attorney to “any others who have participated in the investigation or evaluation of the case and who either regularly report, or with reference to the particular case have reported, to his or her office.”

12. Counsel is willing to abide by all reasonable conditions that may be placed on the inspection of the scene for the purposes of preserving the integrity of the physical evidence.

13. On the basis of the foregoing authorities and Mr. Alissa’s weighty interest in exploring and gathering relevant and material evidence in his defense, the Court should order that the Boulder Police Department and the other law enforcement agencies involved should preserve and hold the scene to allow counsel an opportunity to access and inspect it, subject to such reasonable limitations and restrictions as the Court may impose.

MEGAN A. RING  
COLORADO STATE PUBLIC DEFENDER

\_\_\_\_\_/s/Samuel Dunn\_\_\_\_\_  
Samuel Dunn #46901  
Senior Deputy State Public Defender

\_\_\_\_\_/s/Kathryn Herold\_\_\_\_\_  
Kathryn Herold #40075

**Certificate of Service**

Supervising Deputy State Public Defender

I hereby certify that on March 23, 2021, I served the foregoing document by E filing same to all opposing counsel of record.

\_/s/ Sam Dunn\_\_\_\_\_

Dated: March 23, 2021

Attachment to Order - 2021CR497