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Original Proceeding, Weld County District Court Honorable Allison Esser Case No. 2020CR1057		
IN RE: PEOPLE OF THE STATE OF COLORADO, Plaintiff-Respondent, v. VERONICA SANCHEZ, Defendant-Petitioner.		▲ COURT USE ONLY ▲
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PEOPLE'S RESPONSE TO RULE TO SHOW CAUSE		

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

1. The brief complies with the word limits set forth in C.A.R. 28(g). It contains 5,243 words.
2. I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.



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STATEMENT OF THE ISSUE

Whether the district court erred in ordering the Defendant to either make a pretrial offer of proof to establish a non-speculative connection to an alleged alternate suspect in order to present the information to the jury in opening statements or to refrain from informing the jury of this alleged evidence until a non-speculative connection is established during the trial.

STATEMENT OF THE CASE AND FACTS

The Defendant, Veronica Sanchez, is charged with Leaving the Scene of an Accident (involving death), a class three felony, pursuant to C.R.S. Section 42-4-1601(1),(2)(c); Vehicular Homicide, a class four felony, pursuant to C.R.S. Section 18-3-106(1)(a); Tampering with Physical Evidence, a class six felony, pursuant to C.R.S. Section 18-8-610(1)(a); Violation of Bail Bond Conditions, a class three misdemeanor, pursuant to C.R.S. Section 18-8-212(2); and Driving Under Restraint – Alcohol Related Offense, an unclassified misdemeanor, pursuant to C.R.S. Section 42-2-138(1)(d). *See Resp., App. 5.* The preliminary hearing for the three felony counts was held on January 29, 2021, February 18, 2021, and February 24, 2021. *See Resp., App. 1-3.* The People admitted PH1 through PH12 during the preliminary

hearing. *Ibid.* The following evidence was presented during the three-day preliminary hearing:

Fort Lupton Police Officer Miraglia testified that on May 19, 2020 at approximately 7:35 p.m. she was dispatched to a vehicle on the side of the road with its hazard lights on and what the reporting party believed to be a deceased male in a ditch. Resp., App. 1, TR 1/29/21, pp 7:22-8:15. Upon arrival, Officer Miraglia confirmed that there was a Honda CRV pulled over on the shoulder of the roadway on Highway 52, which was unoccupied and had its hazard lights on. Resp., App. 1, TR 1/29/21 p 9:1-8. Officer Miraglia also saw a male in the ditch who appeared to be deceased approximately 40 feet southeast of the vehicle. *Id.* at p 9:1-9:12. The body in the ditch was wearing a bright greenish yellow reflective shirt. *Id.* at pp 10:18-11:9. The victim was declared deceased at the scene. *Id.* at p 11:10-15. Officer Miraglia also observed that there were various vehicle parts found near the Honda CRV that did not belong to the vehicle. *Id.* at pp 12:7-14:14. The vehicle parts had serial numbers that identified the run vehicle as a white Toyota Rav4. *Ibid.* There was not any physical evidence from the scene that indicated a third vehicle was involved in the collision. Resp., App. 2, TR 2/19/21 p 14:3-22. Fort Lupton Police

officers ultimately identified the suspect who was driving the run vehicle (i.e. the white Toyota Rav4) as the Defendant. Resp., App. 1, TR 1/29/21 p 17:12-22.

Subsequently, Fort Lupton Officers interviewed the Defendant's father Ray Sanchez (hereinafter, Mr. Sanchez) who indicated that he saw the Defendant pull up to his house in the white Toyota that was very damaged. Resp., App. 1, TR 1/29/21 pp 17:24-18:10. Mr. Sanchez indicated that the Defendant told him she was driving down Highway 52 when she saw a man waving outside of his car. *Ibid.* She said she misjudged the distance of the man and struck him with her vehicle. *Id.* at p 18:6-14. Mr. Sanchez indicated that the Defendant directed both him and Brian Hernandez to move her vehicle into the garage. Resp., App. 2, TR 2/19/21 pp 16:15-17:3. Mr. Sanchez claimed that the Defendant told him that she was going to go to the police right before she left his residence on May 19, 2020. Resp., App. 2, TR 2/19/21 p 9:2-5. Fort Lupton Police received a tip from Josh Cook, a witness who observed two cars in the area, a white SUV and a tan Chevy SUV. Resp., App. 1, TR 1/29/21 pp 28:12-29:13. Mr. Cook indicated that a male was driving the tan Chevy SUV. *Ibid.*

Investigator Palissa testified that another citizen called in having surveillance footage of the run vehicle arriving at Mr. Sanchez's house in Fort Lupton. Resp., App. 1, TR 1/29/21 pp 37:18-38:18. Investigator Palissa indicated that the video

footage showed Ms. Sanchez pulling up to the residence in the white Toyota, exits the vehicle, speaks with Brain Hernandez and Mr. Sanchez, and then goes into her house. Resp., App. 2, TR 2/19/21 p 10:11-23. Investigator Palissa also believes the video showed Ms. Sanchez entering the same vehicle and leaving the residence before she arrived back at her father's house in the vehicle. *Id.* at pp 10:24-11:2.

Investigator Palissa executed a search warrant at Ray Sanchez's house where the run vehicle was located. Resp., App. 2, TR 2/19/21 p 39:1-12. Investigator Palissa testified that he observed significant damage on the front passenger side of the vehicle and paint transfer on the hood that was light yellow which was consistent with the color of the shirt that the victim was wearing. *Id.* at p 40:8-16. Ultimately, swabs were taken of a substance that appeared to be human fluids located on the run vehicle. *Id.* at pp 40:17-41:8. The swabs were submitted to the lab and ultimately the lab determined that the DNA profile developed was 6.1 trillion times likely to have come from the victim. *Id.* at pp 41:8-43:13.

Investigator Palissa interviewed the Defendant two days after the scene was discovered, during that interview the Defendant admitted that she was driving the white Toyota Rav4 on Highway 52 that day and that she was the only person driving the Toyota Rav4 that day. Resp., App. 2, TR 2/19/21 pp 44:17-46:6. Subsequently,

Investigator Palissa interviewed the Defendant's cellmate. *Id.* at pp 14:23-15:9. The cellmate indicated that the Defendant admitted she "nicked a guy and then he flew into the ditch." *Id.* at p 15:10-12.

On February 24, 2021, the Honorable Thomas Quammen found that the People had met their burden at the preliminary hearing and bound over each of the felony counts. Resp., App. 3, TR 2/24/21 pp 17:20-20:24. The Honorable Judge Quammen specifically noted that Count 3 – tampering was based upon a complicity theory with the defendant's father (Mr. Sanchez) and boyfriend (Brian Hernandez). *Id.* at pp 19:24-20:20. At that time, the Defendant's father already pled guilty to tampering with physical evidence. *Id.* at p 11:11-14.

Upon the Court's ruling at the Preliminary Hearing, Ms. Sanchez entered a plea of not guilty and the case was set for trial on July 19, 2021. Resp., App. 3, TR 2/24/21 pp 21:4-22:2. Based upon Defendant's motion for a continuance, the jury trial was rescheduled to January 3, 2022. *See* Pet., App. I. The Court scheduled a motions hearing for September 24, 2021 to address the contested redactions to the Defendant's numerous statements. *Ibid.* The Honorable Judge Thomas Quammen retired on July 31, 2021 and the case was transferred to the Honorable Judge Allison Esser. *Ibid.*

On September 13, 2021, Defendant endorsed an expert in domestic violence. *See Resp., App. 4.* At the September 24, 2021 hearing, Defense counsel voluntarily informed the Court that the defense they intended to present was alternate suspect, specifically naming Brian Hernandez. *See Pet., App. D, TR 9/24/21 p 12:16-22.* Defense Counsel told the Court that “Ms. Sanchez was more easily taken advantage of to lie to law enforcement about her involvement with the case and cover up for her boyfriend at the time. He was manipulating her to take the fall for a crime that he committed.” *Id.* at 11:12-16.

Three days after hearing these comments made in open court, the People filed DD – People’s Objection to Defendant’s Oral Notice of Intent to Introduce Alternate Suspect Evidence. *See Pet., App. E.* The Defendant filed a response the following day. *See Pet., App. F.* The Court heard oral argument on this issue at the hearing on September 29, 2021. *See generally Pet., App. A, TR 9/28/21.* Ultimately the Trial Court recognized that there was an apparent connection between the Defendant’s endorsement of a domestic violence expert and the alternate suspect defense specifically naming Brian Hernandez. *Id.* at p 30:15-20. The People noted during this argument that “there is no evidence that the People have or are aware of that suggests that at time that the vehicle struck the victim in this case, that Brian

Hernandez was the driver.” *Id.* at p 33:20-23. Further the People noted that “[t]he argument... that the Defendant and Mr. Hernandez switched drivers immediately prior to causing the death, and immediately subsequent to it, is not supported.” *Id.* at pp 33:24-34:3. The Honorable Judge Esser responded that she reviewed the transcripts from the preliminary hearing and the exhibits submitted and wanted a timeframe of the video evidence. *Id.* at p 34:6-11. The People indicated that the video surveillance “shows Ms. Sanchez getting into her car by herself and driving away from the scene... about twenty minutes prior to the accident.” *Id.* at p 36:1-5. The People also noted:

“We then have testimony that she drove to a gas station in the Frederick-Firestone area, turned around, headed back east towards Fort Lupton as Brian Hernandez trailed her. So, his phone is further west than hers is east. As they enter into Downtown Fort Lupton, they are both caught on camera driving their own separate vehicles by just a commercial location surveillance footage of the street. And then, they both pull up in separate vehicles, traveling by themselves, in front of Mr. Ray Sanchez's house, and are seen exiting that. I believe all of that occurs within a half hour...”

Id. at p 36:6-16. The People then confirmed that the video shows the Defendant leaving her father’s home at 6:11 p.m. and returning at 6:36 p.m., an elapsed time of twenty-five minutes. *Id.* at p 41:3-5. The People also noted that the Victim’s last steps occurred at 6:25 p.m. *Id.* at 41:6-8.

During oral argument, Defendant's counsel conceded that "yes, it is important to determine the admissibility of some of these things so that, for example, the parties do know how to present an opening statement." Pet., App. A, TR 9/28/21 p 37:4-8.

Ultimately the Court noted that there is a difference "between a general denial and saying, the People cannot prove that Ms. Sanchez was the one driving, versus naming an alternate suspect and saying the person who was driving was Brian Hernandez or anybody else." Pet., App. A, TR 9/28/21 p 42:1-4. The Court went onto note that the "Court has to make a determination of whether the alternative suspect evidence establish[es] a non-speculative connection or a nexus between the alternate suspect and the crime charged...that can be done in a couple of different ways." *Id.* at p 42:11-18. The Court then gave the Defendant two options. Option one:

"if the Defense does not want to give -- proffer ahead of trial, then [the Court] would essentially have to reserve ruling on whether alternate suspect evidence could be admitted until such time as the testimony was heard before the jury. What that would mean is [the Court] would then not allow the Defense to open by saying, there is an alternate suspect, or, Brian Hernandez was driving, or anything like that. And then, at such time that the Defense felt they had met that threshold of establishing a non-speculative connection through the evidence that was presented, there would need to be a bench conference or the jury would need to leave the courtroom for that argument to be held, and to determine whether the Defense could then argue that later on."

Pet., App. A, TR 9/28/21 pp 42:19-43:6. Option two:

“Alternatively, there can be an offer of proof provided prior to trial for [the Court] to make that determination. I understand the Defense concern about not wanting to disclose anything. But, frankly, this is information that is also going to be relevant to, I imagine, any potential objections about relevance of the Defense expert, which is required to be disclosed in advance.”

Id. at p 43:7-13. The Court then explained how each option would work and what restrictions would be put in place:

“[I]f the Defense is going to wait until trial, understanding that then that cannot be part of voir dire, that could be -- not be part of opening until that non-speculative connection is established. If the Defense is going to give an offer of proof prior to trial, I don't think that needs to be extensive. It has to be what's laid out in *Elmarr*. There has to be a proffer of what is the non-speculative connection. What is the information. It's really that minimal, the non-speculative connection that [the Court] would need to find. In addition, and I don't know whether or not the Defense would be intending to submit this, but if the Defense is intending to submit other acts evidence regarding Mr. Hernandez or any out of-court statements by Mr. Hernandez, then under *Elmarr*, I believe I would also need an offer of proof about that so I can make a determination there. What I'm inclined to do is schedule -- if there is going to be an offer of proof prior to trial, I would schedule that deadline... the same date as the expert disclosures were due. And again, I'm picking that date because I think it's going to be relevant to questions that may arise regarding the expert.”

Pet., App. A, TR 9/28/21 pp 43:23-44:19. The Court set the deadline for the offer of proof as November 15, 2021. *Id.* at p 46:3-4. On November 12, 2021, Defense file

a motion for an extension to make the alternate suspect offer of proof. *See* Resp., App. 6. On November 15, 2021, the Court granted the Defendant's motion and set the new deadline as November 22, 2021. *See* Pet., App. G. This Court issued an order on November 22, 2021, indicating that pursuant to C.A.R. 21(f)(2), all further proceedings are stayed.

SUMMARY OF THE ARGUMENT

Defendant asks that this Court find a routine ruling on a motion *in limine* to be an extraordinary circumstance worthy of this Court's intervention. The People respectfully disagree and believe the issue can be appropriately addressed on appeal when there is a complete record. The trial court has broad discretion to make evidentiary rulings, and may require an offer of proof to do so pursuant to C.R.E. 103. Alternate suspect evidence must comply with both C.R.E. 401 and C.R.E. 403 in order to be admissible. The Defendant's evidence is inadmissible until a non-speculative connection is established. At this time, there is not a good faith basis for the Defendant to present the inadmissible evidence to the jury in her opening statement. The Defendant's constitution rights are not impeded by the trial court's ruling since she is not prohibited from proceeding with her defense, just restricted from presenting inadmissible speculative alternate suspect evidence to the jury.

ARGUMENT

I. Relief Under C.A.R. 21 is Inappropriate on this Motion *in Limine*.

Relief under rule 21 governing the Supreme Court's exercise of its original jurisdiction is an **extraordinary remedy** that is limited in both purpose and availability. *People v. Vanness*, 458 P.3d 901, 904 (Colo. 2020) (emphasis added). Such relief will be granted only when no other adequate remedy, including relief available by appeal. *Ibid*.

Motions *in limine* are frequently filed in cases and serve to provide fair and expeditious trials. See *United States v. Peters*, 687 F.2d 1295, 1298 (10th Cir. 1982) (trial court has authority to enforce *in limine* orders to provide fair and expeditious trial). Trial courts have broad discretion in determining the admissibility of evidence based on its relevance, its probative value and its prejudicial impact. *People v. Ibarra*, 849 P.2d 33, 38 (Colo. 1993). While no statute or court rule specifically deals with motions *in limine*, the trial court has the authority implicitly permitted by Rules 102 through 104 of the Colorado Rules of Evidence. See C.R.E. 102-104. The standard of review for evidentiary rulings is for an abuse of discretion. *People v.*

Stewart, 55 P.3d 107, 122 (Colo. 2002). A trial court abuses its discretion where its ruling is “manifestly arbitrary, unreasonable, or unfair.” *Ibid*.

A motion *in limine* is designed to aid the trial process by enabling the court to rule in advance of trial on the relevance of certain forecasted evidence as to issues that are definitely set for trial, without lengthy argument at, or interruption of, the trial. *In re Buckner*, 271 B.R. 213 (B.A.P. 10th Cir. 2001). Specifically, Colorado Rules of Evidence Rule 103 provides:

“In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.”

C.R.E. 103(c).

Original relief by the Supreme Court may be sought where the trial court has abused its discretion and where appellate remedy would not be adequate, and relief is entirely within Supreme Court's discretionary authority. *People v. Darlington*, 105 P.3d 230, 232 (Colo. 2005). When evidentiary rulings are made pursuant to a motion *in limine* and preserved, they are routinely handled via post-trial appellate relief. *See Uptain v. Huntington Lab, Inc.*, 723 P.2d 1322, 1330–31 (Colo. 1986) (pretrial

motion *in limine* sufficiently preserves issue for appeal; contemporaneous trial objection unnecessary); *People v. Dinapoli*, 369 P.3d 680, 684 (Colo. App. 2015) (When an opponent acts contrary to a pretrial order, a party must contemporaneously object to preserve an appellate argument). The consistent exception is when the prosecution is limited from presenting evidence that would significantly impede the prosecutor's case and where forcing the prosecution to wait for post-acquittal appellate relief would preclude retrial on double jeopardy grounds. *See generally*, *People v. Smith*, 254 P.3d 1158 (Colo. 2011); *People v. Baez-Lopez*, 322 P.3d 924 (Colo. 2014), reh'g denied.

This is not an extraordinary circumstance, the basis for the Defendant's petition is to challenge the trial court's ruling on the People's motion *in limine* regarding alternate suspect evidence. The People raised concerns about the admissibility of the Defendant's alternate suspect evidence on the basis of relevance and undue prejudice pursuant to the *Elmarr* case. *See* Pet., App. E. The Defendant has not yet made a pretrial offer of proof to demonstrate relevance and the probative value. The relevance and value of any alleged evidence indicating that Brian Hernandez committed acts of domestic violence against the Defendant is not apparent from the context of information presently available. The trial court ruled in

the least restrictive manner, preventing the jury from hearing potentially inadmissible evidence during voir dire and opening statements until an offer of proof was made or the relevance was made apparent through witness testimony. Pet., App. A, TR 9/29/21 pp 42:1-44:19. The trial court's ruling is directly in line with C.R.E. 103. The order being challenged by the Defendant's petition is a routine evidentiary ruling by the trial court, it is not extraordinary and standard post-trial appellate relief is available. Accordingly, this Court should deny the Petition.

II. The Trial Court Properly Limited the Defendant from Presenting her Alternate Suspect Defense Until There is a Non-speculative Connection Between the Individual and the Charged Crimes.

The admissibility of alternate suspect evidence ultimately depends on the strength of the connection between the alternate suspect and the charged crime. *People v. Elmarr*, 351 P.3d 431, 438 (Colo. 2015). To be admissible, alternate suspect evidence must be relevant (under C.R.E. 401) and its probative value must not be sufficiently outweighed by the danger of confusion of the issues or misleading the jury, or by considerations of undue delay (under C.R.E. 403). *Ibid*. The touchstone of relevance in this context is whether the alternate suspect evidence establishes a non-speculative connection or nexus between the alternate suspect and

the crime charged. *Ibid.* The alternate suspect evidence must create more than just an unsupported inference or possible ground for suspicion. *People v. Perez*, 972 P.2d 1072, 1074 (Colo. App. 1998), citing *People in Interest of R.L.*, 660 P.2d 26 (Colo. App. 1983). Speculative blaming intensifies the grave risk of jury confusion, and it invites the jury to render its findings based on emotion or prejudice. *See United States v. Jordan*, 485 F.3d 1214, 1219 (10th Cir. 2007); *see also People v. Elmarr*, 351 P.3d 431, 438 ([E]ven relevant alternate suspect evidence may be excluded if its probative value is substantially outweighed by countervailing policy considerations under C.R.E. 403, such as the danger of confusion of the issues or misleading the jury, or by considerations of undue delay.).

Furthermore, where the evidence concerns other acts by the alternate suspect, a court must look to whether all the similar acts and circumstances, taken together, support a finding that the same person probably was involved in both the other act and the charged crime. *People v. Elmarr*, 351 P.3d 431, 438 (Colo. 2015). CRE 404(b) principles guide this analysis. *Ibid.* Trial courts must, pursuant to *Spoto* and C.R.E. 104(a), find by a preponderance of the evidence that proffered prior acts of domestic violence actually occurred before admitting them pursuant to § 18-6-801.5. *People v. Ma*, 104 P.3d 273, 275 (Colo. App. 2004), rev'd on other grounds (citing

People v. Spoto, 795 P.2d 1314 (Colo. 1990).). The trial court does not need to hold an evidentiary hearing on the matter, however, if the offer of proof itself satisfies the preponderance standard. *Ibid*.

An offer of proof must make the substance of the evidence known to the court and inform the trial judge what counsel expected to prove by the excluded evidence. C.R.E. 103(a)(2). The offer must sufficiently apprise the trial court of the nature and substance of the testimony to enable it to exercise its discretion pursuant to the rules of evidence, and it must establish a basis in the record for appellate review of the trial court's ultimate ruling. *See Lanari v. People*, 827 P.2d 495, 503 (Colo.1992). The defendant must establish a sufficient foundation for the admission of evidence that provides an alternative explanation, “presumably before trial or at least outside the jury’s presence,” before the evidence will be introduced. *People v. Prentiss*, 172 P.3d 917, 923 (Colo. App. 2006). It is proper for the Court to exclude evidence, when the Defendant fails to make an offer of proof and it is not apparent from the context what the substance of the proposed testimony would have been. *People v. Hoover*, 165 P.3d 784, 793 (Colo. App. 2006).

An opening statement has a long recognized purpose which is simple and single – to inform. *Thompson v. People*, 336 P.2d 93, 97 (Colo. 1959). The

information to be conveyed by the maker of the statement should be a clear, direct and factual presentation of the matters he expects to prove. *Ibid.* The American Bar Association Standards indicate that the content of an opening statement must be based upon a good faith belief that the evidence will be available, offered, and admitted at trial. *ABA Standards Relating to The Prosecution Function Section 3-5.5; The Defense Function Section 4-7.4; See also Colorado Rules of Professional Conduct, Rules 3.3, 3.4.* A trial court's determination of what will be allowed in an opening statement will not be overturned absent an abuse of discretion. *People v. Rodriguez*, 799 P.2d 452, 454 (Colo. App. 1990) (citing *People v. Bustos*, 725 P.2d 1174 (Colo. App. 1986).).

The People filed a pretrial motion *in limine* titled People's Objection to Defendant's Oral Notice of Intent to Introduce Alternate Suspect Evidence. *See* Pet., App. E. As pointed out in that motion and pursuant to the *Elmarr* case, the Defendant's alternate suspect must have a non-speculative connection to the charged crimes. Brian Hernandez does not. The People challenged the relevance and probative value of any evidence that the Defendant may attempt to bring before the jury in order to avoid a mistrial. The People fear the Defendant will disclose inadmissible evidence to the jury during opening statements, especially now that

the Defendant endorsed a domestic violence expert. *See* Resp., App. 4. There is no evidence in the record about domestic violence acts, proof that they actually occurred, or anything demonstrating how any alleged acts would be relevant to a traffic collision trial. The trial court properly prevented the Defendant from tainting the jury with this speculative evidence until there is a sufficient offer of proof to establish the non-speculative connection.

In *People v. Chavez*, the Defense sought to admit evidence of the victims' gang affiliation, which the trial court denied. *People v. Chavez*, 318 P.3d 22, 29 (Colo. App. 2012). *Chavez* elected to make an offer based on generalities about gang membership and not on specific facts. *Ibid.* Specifically, *Chavez* argued that gang culture and gang membership could show bias or motive and that gang affiliation was necessary to establish that the victims colluded to implicate him. *Ibid.* *Chavez* argued that it was relevant because the police gang unit investigated the incident. *Id.* at 29-30. In *Chavez*, the defense failed to argue that the victims were members of a gang that was out to get him. *Id.* at 30. This is analogous to the Defendant's argument for alternate suspect evidence relating to Brian Hernandez. Defendant repeatedly states that Brian Hernandez is a co-defendant who has been listed as a suspect since the start of the investigation. *See* Pet., pp 22-23. Further, Defendant notes that in

addition to be listed as a “suspect” by law enforcement, law enforcement had a be-on-the-lookout issued for him immediately after the collision, and a warrant issued for his arrest. Petition, p. 23. Notably, no citation to the record is provided for this additional information. More importantly, this argument is as generalized as the one in *Chavez*. There is a void in these statements, specifically any indicating of what crime Brian Hernandez was suspected of committing or what the warrant listed as his alleged offenses. *See* Pet.; *see also* Pet., App. A-I. As noted by the Honorable Judge Quammen, only the tampering charge is based on a complicity theory with the Defendant’s boyfriend, Brian Hernandez. Resp., App. 3, TR 2/24/21 pp 19:24-20:20. This only further demonstrates that there is a lack of any apparent non-speculative connection between Brian Hernandez and the offenses of hit and run resulting in death and vehicular homicide.

The trial court reviewed the materials already available from the preliminary hearing and heard oral arguments before making her informed decision to give the Defendant two options: 1) provide the court with an offer of proof for a pretrial ruling regarding the non-speculative connection between Brian Hernandez and the charged crimes, or 2) wait until there is apparent sufficient evidence supporting a non-speculative connection between Brian Hernandez and the crimes and then

present the information to the jury via questioning of the witnesses. This ruling is appropriate given the information available to the trial court and counsel, coupled with Defense Counsel's obligation to only including evidence in the opening statement for which there is a good faith basis. Offers of proof are not a new concept and are routinely used by trial courts to make informed evidentiary rulings in cases.

The trial court properly precluded the Defendant from presenting evidence about an alleged alternative suspect with alleged domestic violence history to the jury during voir dire and opening statements without an offer of proof.

III. The Court's Ruling Does Not Infringe on the Defendant's Constitutional Rights.

The Defendant contends that she has a fundamental right to present a defense of alternate suspect without making any pretrial disclosure since an offer of proof forces her to reveal her 'hand' to the prosecution. *See* Pet., pp. 19-20 (citing *People v. Kilgore*, 455 P.3d 746, 751 (Colo. 2020)). The People disagree. A defendant has a fundamental right to present a complete defense, but a defendant does not have a fundamental right to disregard the rules of evidence and present an irrelevant defense without any connection to the charged crime. *See People v. Madison*, 176 P.3d 793, 801 (Colo. App. 2007) (The right to present a defense requires only that the accused

be permitted to introduce all relevant and admissible evidence.); *People v. Grant*, 174 P.3d 798, 807 (Colo. App. 2007) (A defendant’s fundamental right to present a defense does not allow [her] to present evidence that is neither relevant nor admissible.). The right to present a defense is generally subject to, and constrained by, familiar and well-established limits on the admissibility of evidence. *People v. Elmarr*, 351 P.3d 431, 438 (Colo. 2015).

An evidentiary error precluding a defendant from presenting evidence may be of constitutional magnitude “only where the defendant was denied virtually his [or her] only means of effectively testing significant prosecution evidence.” *People v. Brown*, 360 P.3d 167 (Colo. App. 2014), quoting *Krutsinger v. People*, 219 P.3d 1054, 1062 (Colo. 2009). To show that a defendant was unconstitutionally denied the right to present relevant evidence, a defendant must demonstrate that: (1) the importance of the evidence to the defense outweighed the interests of the state in excluding the evidence, and (2) the defendant was denied fundamental fairness, such that the act complained of necessarily prevented the defendant from having a fair trial. *People v. Krutsinger*, 121 P.3d 318, 322 (Colo. App. 2005). Under the second criterion, the defendant must show the materiality of the excluded evidence; specifically, that the evidence would have affected the outcome of the trial.

Richmond v. Embry, 122 F.3d 866, 872 (10th Cir. 1997). It is impossible to conduct this analysis at this juncture given the complete lack of information the Defense has provided the trial court into what the evidence is and what it will show. Relevance, probative value and materiality cannot be determined without an offer of proof.

Unlike the order in *People v. Kilgore* that required the disclosure of the defendant's exhibits thirty days ahead of trial, the order issued in this case gave the Defendant options regarding the timing and form of the disclosure. Pet., App. A, TR 9/29/21 pp 42:1-44:19. The Defendant is thus free to select either of the two options that provide for two separate timelines of revealing her trial strategy, she is not formed to reveal her "hand" at this juncture. The Defendant in *Kilgore* was not given any options and was told any failure to disclose would result in suppression. *People v. Kilgore*, 455 P.3d 746, 748 (Colo. 2020). With option one, the Defendant can make an offer of proof to establish a non-speculative connection, thus demonstrating that there is a good faith basis to include the alternate suspect defense in her opening statement. With option two, the Defendant can wait to make any disclosures until mid-trial when a non-speculative connection has been established via testimony, then during a bench conference can obtain permission to present evidence that did not have any apparent relevance until that point. As discussed above, the trial court

had the authority to issue this discovery ruling pursuant to C.R.E. 103. Furthermore, as the trial court noted in her oral ruling, the alternate suspect issue was going to be relevant as it related to the defense expert disclosures (regarding alleged domestic violence). Pet., App. A, TR 9/29/21 p 43:7-13. Unlike trial exhibits in *Kilgore*, expert disclosures are explicitly included in Rule 16(II). The trial court's order does not infringe on the Defendant's constitutional rights by enforcing the rules of evidence.

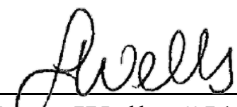
CONCLUSION

For the above reasons and authorities, the People respectfully ask this Court to deny the Petition and remand the case to the district court for further proceedings.

Respectfully submitted,

MICHAEL J. ROURKE
District Attorney
19th Judicial District

Dated: January 18, 2022



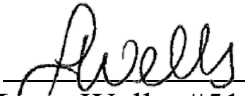
Lacy Wells, #51695
Deputy District Attorney

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the **PEOPLE'S RESPONSE TO RULE TO SHOW CAUSE** has been electronically served via ICCES to:

Megan Bishop & Gracen Short, Deputy State Public Defenders & Petitioner's Counsel of Record

Dated: January 18, 2022

By: 

Lacy Wells, #51695
Deputy District Attorney