SUPREME COURT, STATE OF COLORADO Colorado State Judicial Building 2 East 14th Avenue Denver, Colorado 80203	DATE FILED August 19, 2025 4:29 PM FILING ID: 5D2AA17B725F9 CASE NUMBER: 2025SA179
Adams County District Court Honorable Brett Martin Case No. 20CR1055	
In Re: **Plaintiff:** The People of the State of Colorado v. **Defendant:** Juan Manuel Castorena	σ **COURT USE ONLY** σ
Jud Lohnes Korey Wise Innocence Project University of Colorado School of Law Wolf Law Building, 401 UCB Boulder, CO 80309 Phone: 303-492-8489 Email: jud.lohnes@colorado.edu Atty. Reg. # 33208	Case Number: 25SA179

Brief of *Amicus Curiae* Korey Wise Innocence Project in Support of Respondent Juan Castorena

CERTIFICATE OF COMPLIANCE

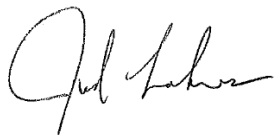
I hereby certify that this brief complies with all requirements of C.A.R. 28, 29, and 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

This brief complies with the applicable word limit set forth in C.A.R. 21(k)(2), 28(g), and 29(d).

It contains 4,063 words.

This brief need not comply with the standard of review requirement set forth in C.A.R. 28(a)(7)(A). *See* C.A.R. 29(c)(3).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28, 29 32.



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STATEMENT OF INTEREST OF AMICUS CURIAE

The Korey Wise Innocence Project ("KWIP") is a nonprofit legal organization that provides pro bono legal and investigative services to people serving time in Colorado prisons for crimes they did not commit. KWIP advocates for legal rules that improve the administration of justice and prevent wrongful convictions.

KWIP has an interest in this case because it involves DNA analysis, official misconduct, and discovery rules. DNA analysis has an unmatched capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual. Misconduct committed by laboratory analysts undercuts the reliability of this uniquely discriminating evidence. Discovery rules should ensure that defendants, courts, and juries have the information needed to determine whether DNA testing is trustworthy despite an analyst's pattern of misconduct. Moreover, this case raises issues of statewide concern because the Colorado Bureau of Investigation (CBI) conducts forensic testing for judicial districts throughout Colorado.

INTRODUCTION

CBI analyst Missy Woods intentionally altered DNA testing data in 1,022 cases, often to hide her contamination of evidentiary and reference samples. *See* CBI, *Yvonne "Missy" Woods Investigation.*[1] Based on Woods's misconduct, the state charged her with 102 felony counts, including charges of cybercrime, perjury, attempt to influence a public servant, and forgery. *See* First Judicial District Attorney's Office, *Former CBI Lab Analyst Missy Woods Facing Criminal Charges.*[2]

Ms. Woods opened, handled, and tested crime scene evidence *and* Juan Castorena's reference samples in her workspace at CBI. The misconduct underlying the government's charges against her is material to the reliability of the DNA evidence that will be presented at Castorena's trial. The trial court had an obligation under Rule 16 to order that this material evidence be disclosed to the parties.

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[1] Available at https://cbi.colorado.gov/news-article/colorado-bureau-of-investigation-releases-internal-affairs-report-into-former-forensic (visited Aug. 11, 2025).

[2] Available at https://firstda.co/news-update/former-cbi-lab-analyst-missy-woods-facing-criminal-charges/ (visited Aug. 11, 2025).

SUMMARY OF THE ARGUMENT

When ordering the First Judicial District Attorney's Office (Petitioner) to produce its investigative file in *People v. Yvonne Woods*, the court followed the procedures required by Crim. P. 16 (I)(c). It ruled that: (1) the material and information Mr. Castorena sought "would be discoverable if in the possession or control of the prosecuting attorney," Crim. P. 16(I)(c)(1); (2) the prosecution was unable to obtain the material through "diligent good faith efforts," Crim. P. 16(I)(c)(1-2); and (3) the materials sought and governmental personnel were "subject to the jurisdiction of the court," Crim. P. 16(I)(c)(2). The court entered a suitable order under Crim. P. 16(I)(c)(2) and further ordered the defense to serve the order on Petitioner.

However, the trial court erroneously ruled that discovery should be regulated under Crim. P. 17(c) and *People v. Spykstra*, 234 P.3d 662 (Colo. 2010). A court's authority to regulate discovery is found in Crim. P. 16(III). Under that Rule, Petitioner has the right to object to disclosure, request excisions of nondiscoverable material, and to make such requests during *in camera* proceedings.

ARGUMENT

I. Crim. P. 16(I)(c) was promulgated for cases like Mr. Castorena's, where "other governmental personnel" possess material that must be disclosed to the defense.

Crim. P. 16(I)(c) is intended to provide an uncontroversial, streamlined process for the parties to obtain discoverable material that is outside the possession of the prosecuting attorney but is in the possession of other governmental personnel. In most cases, a prosecuting attorney wants discoverable material to be disclosed to the defense, both to ensure a fair trial and to protect against reversal. And other governmental personnel are generally willing to help a prosecuting attorney achieve justice. When cooperation fails, the court has a duty under Crim. P. 16(I)(c) to order the other governmental personnel to disclose the material to the defense.

A. Principles of interpretation of rules of criminal procedure.

In construing the Colorado Rules of Criminal Procedure, this Court employs "the same interpretive rules applicable to statutory construction." *People v. Fuqua*, 764 P.2d 56, 58 (Colo.1988). It reads the language of a rule consistently with its plain and ordinary

meaning. *Id.* at 59. It avoids interpretations that render any words or phrases superfluous or lead to illogical or absurd results. *People v. Null*, 233 P.3d 670, 679 (Colo. 2010).

B. Crim. P. 16(I)(c) ensures that defendants obtain "discoverable" material and information held by "other governmental personnel."

Crim. P. 16(I)(c) is part of a comprehensive scheme that ensures defendants are granted access to discoverable material, including *Brady* material, even if it is not in the hands of the prosecuting attorney.

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Court held that "the suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good or bad faith of the prosecution." Moreover, exculpatory and impeachment evidence is treated the same for *Brady* purposes. *United States v. Bagley*, 473 U.S. 667 (1985). As this Court has explained:

> The State's pursuit is justice, not a victim. If it has in its exclusive possession specific, concrete evidence which is not merely cumulative or embellishing and which may exonerate the defendant or be of material importance to

> the defense—regardless of whether it relates to testimony which the State has caused to be given at the trial—the State is obliged to bring it to the attention of the court and the defense.

People v. Smith, 524 P.2d 607, 611 (Colo. 1974) (quoting *Giles v. Maryland*, 386 U.S. 66, 100 (1967) (Fortas, J., concurring)).

"Crim. P. 16 governs discovery in criminal cases." *People v. Dye*, 2024 CO 2, ¶ 36. Crim. P. 16(I)(a)(1) lists several types of case-related materials and information that the prosecuting attorney must disclose to the defense. Crim. P. 16(I)(a)(2) codifies the prosecuting attorney's disclosure obligations under the Due Process Clause and *Brady* and its progeny. *See People v. Bueno*, 2018 CO 4, ¶ 28; U.S. Const. amend. XIV; Colo. Const, art. II, § 25. This obligation includes disclosing evidence or material that would be "useful to a defendant for impeachment purposes." *Bueno*, 2018 CO 4, ¶ 31. Crim. P. 16(I)(a)(3) extends the prosecuting attorney's obligations to material and information listed in Crim. P. 16(I)(a)(1-2) that is in the possession or control of "members of his or her staff and of 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."

Crim. P. 16(I)(c), "Material Held by Other Governmental Personnel," covers situations where "discoverable" material under Crim. P. 16(I)(a)(1-2) is not in the possession or control of the prosecuting attorney under Crim. P. 16(I)(a)(3), but is in the possession and control of "other governmental personnel." In this situation, the prosecutor "shall" use "diligent good faith efforts" to make the discoverable material or information available to the defense. Crim. P. 16(I)(c)(1). If the prosecutor's efforts fail, the trial court "shall issue suitable subpoenas or orders" to make "such material or other governmental personnel" available to the defense. Crim. P. 16(I)(c)(2). The word "shall" means that the court has a "mandatory duty" to act. *Bd. of Cnty. Comm'rs of Saguache Cnty. v. Edwards*, 468 P.2d 857, 859 (Colo. 1970).

Here, the defense, the prosecuting attorney, and the trial court complied with the plain language and intent of Crim. P. 16(I)(c). The defense requested and designated material that would be discoverable if it was in the possession and control of the

prosecuting attorney. The prosecuting attorney made diligent good faith efforts to obtain the discoverable materials from the First Judicial District Attorney's Office. And when the prosecuting attorney's efforts failed, the court fulfilled its mandatory duty to order "other governmental personnel" to make the discoverable materials available to the defense.

If this Court believes the language of the rule is ambiguous, it should resolve the ambiguity by considering the intent of Crim. P. 16(I)(c) and the fundamental purposes of the Colorado Rules of Criminal Procedure "to provide for the just determination of criminal proceedings" and "to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay." *Peterson v. People*, 113 P.3d 706, 708 (Colo. 2005) (citing Crim. P. 2). The Court should also consider the American Bar Association (ABA) standard and commentary from which Crim. P. 16(I)(c) was derived. *See People By & Through VanMeveren v. Dist. Ct. In & For Larimer Cnty.*, 531 P.2d 626, 630-31 (Colo. 1975). These interpretive aids confirm the trial court correctly applied the Rule.

First, the trial court applied the straightforward, fair, and efficient interpretation of Crim. P. 16(I)(c) required by Crim. P. 2. It correctly determined that Crim. P. 16(I)(c) provides rights to the defense and confers obligations on the prosecuting attorney and the court. And, because "discoverable" material was at issue, it entered an order under Rule 16, which governs "Discovery and Procedure Before Trial," rather than issuing a subpoena under Rule 17(c), which is "not a tool for broad discovery." *Spykstra*, 234 P.3d at 672. The court recognized that it would be unjust for the state to charge Missy Woods with 102 felony counts based on her laboratory misconduct while simultaneously withholding from Mr. Castorena the material and information that demonstrated the depth and breadth of her misconduct. Accordingly, it ruled that material information in Petitioner's Missy Woods case file was discoverable.

Second, the trial court's ruling follows the "liberal discovery procedures" recommended in the primary source for Rule 16(I)(c), the 1970 edition of the ABA Standards Relating to Discovery and Procedure Before Trial." *See VanMeveren*, 531 P.2d at 629. Crim. P.

16(I)(c) is derived nearly verbatim from the first edition of ABA Standard 2.4, which provides:

> 2.4 Material held by other governmental personnel.
>
> Upon defense counsel's request and designation of material or information which would be discoverable if in the possession or control of the prosecuting attorney and which is in the possession or control of other governmental personnel, the prosecuting attorney shall use diligent good faith efforts to cause such material to be made available to defense counsel; and if the prosecuting attorney's efforts are unsuccessful and such material or other governmental personnel are subject to the jurisdiction of the court, the court shall issue suitable subpoenas or orders to cause such material to be made available to defense counsel.

ABA, *Standards Relating to Discovery and Procedure Before Trial*, standard 2.4 with commentary, pp. 83-84 (1st ed.1970) (included as Appendix A to this brief).

The commentary to Standard 2.4 makes clear that the term "other governmental personnel" refers to "agencies other than the agency investigating the criminal charge[.]" *Id.* at 84. Further, it explains that the standard is not "intended to enlarge the scope of

discovery," but merely to ensure defense access "to material or information 'which would be discoverable if in the possession or control of the prosecuting attorney.'" *Id.* at 84. This makes perfect sense. "A prosecutor's obligation under *Brady* does not stop at the border of their district." *United States v Shetty*, 2024 WL 4979830 at * 4 (W.D. Wash. 2024).

Moreover, standard 2.4 provides defendants with a discovery right that is wholly distinct from the right to compel the production of evidence under a subpoena:

> A requirement of application to the court in the first instance (see FED. R. CRIM. P. 17(c), which gives the court discretion to order the production before trial of subpoenaed material) is regarded as unsatisfactory. Insofar as other governmental agencies are involved, the material can usually be obtained with the least difficulty by request of the prosecutor. Where this fails, the standard does require the court to lend its assistance within the scope of its powers.

ABA, *Standards Relating to Discovery and Procedure Before Trial*, standard 2.4 with commentary, p. 84.

Although the trial court's discovery order sits neatly within Crim. P. 16(I)(c), Petitioner asserts that several considerations outweigh defendants' rights under Rule 16 and the Due Process Clauses of the U.S. and Colorado constitutions. As discussed below, Petitioner's arguments are unpersuasive.

C. Petitioner's objections to the trial court's order are unavailing.

In the trial court, Petitioner objected to the discovery order by arguing that Crim. P. 16 creates discovery obligations only for the Seventeenth Judicial District Attorney, and so the Court had no "jurisdiction" over it. Petition, Appendix 2, ¶¶ 2-5. Petitioner claimed that only through a Rule 17(c) defense-issued subpoena duces tecum could the defense gain access to discoverable material and information in its case file. *Id.*, ¶ 7.

In this Court, Petitioner appears to have somewhat tempered that position. Petitioner primarily claims that Crim. P. 16(I)(c)(2) has no "mechanism" to require it to make this *Brady* material available to the defense. Petition, p. 7. Petitioner argues that a court's authority under Crim. P. 16(1)(c)(2) can only be executed through

ordering the defense to issue a subpoena under Crim. P. 17(c) that is governed by the limitations in *Spykstra*.

Petitioner's interpretation of Crim. P. 16(I)(c)(2) would render it meaningless. Its arguments against interpreting Crim. P. 16(I)(c)(2) according to its plain and ordinary meaning are unavailing.

1. As a governmental entity in possession of discoverable material, Petitioner is covered by Crim P. 16(I)(c)(2).

Crim. P. 16(I)(c)(2) expressly authorizes a district court to issue "suitable subpoenas or orders" to cause "other governmental personnel" to produce "discoverable" material. As Petitioner acknowledges, the First Judicial District Attorney and her staff are "government personnel." Petition, p. 11; *People v. Dist. Ct., In & For Tenth Jud. Dist.*, 632 P.2d 1022, 1024 (Colo. 1981) ("The district attorney belongs to the executive branch of the government."). And Petitioner does not dispute that its Missy Woods casefile contains material and information that would be "discoverable" if in the possession of the Seventeenth Judicial District Attorney's Office.

2. Rule 16(1)(c)(2) provides a mechanism: namely, "suitable subpoenas or orders."

Petitioner appears to acknowledge that Crim. P. 16(I)(c)(2) authorizes the Seventeenth Judicial District Court to order it to produce the discoverable material in its possession, but asserts that the Rule is without a "mechanism" to do so. It says that Rule 16 requires the district court to "order" the prosecution or defense to issue a Rule 17(c) subpoena duces tecum. Petition, p. 13, n.3.

Petitioner's argument is misplaced. Rule 16(I)(c)(2) has a mechanism, and it is plainly stated: "suitable subpoenas or orders" issued by the court. This case is a far cry from *People v. Silva-Jaquez*, 2025 CO 11, where the district court issued a discovery order devoid of textual support in Rule 16. Petitioner's claim ignores the "cardinal rule" of interpretation that a statute or rule says what it means and means what it says. *Cowen v People*, 2018 CO 96, ¶12 (citing and quoting *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992)).

3. The Petitioner is "subject to the jurisdiction of the court"

In the trial court, Petitioner argued, "This Court has no jurisdiction over the First Judicial District Attorney's Office or its investigative files." Petition, Appendix 2, ¶ 5.

The trial court addressed this objection in two ways. First, it explained, "District Courts have state-wide jurisdiction." Petition, Appendix 3, p. 1. In support of its ruling, the court cited *Bacher v. District Court*, 527 P.2d 56, 58 (Colo. 1974), which held, "Our state judicial system is designed for the efficacious administration of justice. The district courts of this state have state-wide jurisdiction." Second, the court noted that Petitioner conceded that the court had statewide jurisdiction to enforce a Rule 17(c) subpoena duces tecum. If courts have statewide "jurisdiction" to enforce a subpoena under Rule 17, reasoned the court, they have statewide "jurisdiction" to issue "orders or subpoenas" under Rule 16(I)(c)(2). Petition, Appendix 3, p. 1.

In this Court, Petitioner argues that the trial court did not have jurisdiction over the First Judicial District Attorney's Office

"absent the proper service of a subpoena pursuant to Crim. P. 17." Petition, p. 9. Petitioner notes that Rule 17 contains detailed rules for service, but "[n]one of those provisions appear in Rule 16." Petition, p. 12. Petitioner's arguments are misplaced.

First, the trial court specifically ordered, "Counsel for Mr. Castorena shall serve this Order on the First Judicial District Attorney's Office within 7 days." Petition, Appendix 1, ¶ 2. Petitioner merely contends that it was not served with "a subpoena in accordance with Crim. P. 17." Petition, pp. 1, 14. Petitioner never contends it was not served with the court's Rule 16 order.

Second, it is true that Rule 16(I)(c)(2) does not have specific instructions concerning service of process, but that does not strip courts of their duty to "issue suitable subpoenas or orders." Defendants and prosecutors can serve Rule 17(c) subpoenas on *any* third-party, including victims, parents of victims, and businesses. By contrast, courts can issue Rule 16(I)(c)(2) subpoenas and orders only on governmental personnel in their official capacities. The absence of specific rules for service for Rule 16(I)(c)(2) orders is best understood as a judgement that such rules are unnecessary

because a court oversees the process. *See Well Augmentation Subdistrict of Cent. Colorado Water Conservancy Dist. v. City of Aurora*, 221 P.3d 399, 419 (Colo. 2009) (holding, "When the General Assembly includes a provision in one section of a statute, but excludes the same provision from another section, we presume that the General Assembly did so purposefully.")

Moreover, the rules of criminal procedure specifically account for situations where precise instructions for implementation are not prescribed in a rule:

> If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these Rules of Criminal Procedure or with any directive of the Supreme Court regarding the conduct of formal judicial proceedings in the criminal courts, and shall look to the Rules of Civil Procedure and to the applicable law if no Rule of Criminal Procedure exists.

Crim. P. 57(b). Here, the court proceeded in a "lawful manner" by ordering the defense to serve the order on Petitioner.

* * *

So, what is the controversy in this case? If it is the requirement for personal service of the trial court's order, Petitioner has it. The court ordered the defense to serve the order. The court never suggested it would act without service of the order. To the contrary, it ruled that Petitioner "is entitled to both notice and to be heard." Petition, Appendix 3, p. 2.

As explained below, it appears the real dispute is whether the scope of disclosure will be governed by Rule 16 or Rule 17(c).

II. Petitioner's disclosures under the court's Rule 16(I)(c)(2) order should be governed by the discovery rules in Rule 16.

Missy Woods's misconduct presents a major crisis for Colorado's criminal justice system. She intentionally altered the results of DNA testing in hundreds of criminal cases during her three-decade career. The CBI's failure to detect and address her misconduct is equally troubling, as it calls into question the quality control procedures for the entire crime lab. Although Missy Woods worked on cases from judicial districts across the state, the district attorneys of Colorado have decided that all felony counts against her will be prosecuted in one of them. There may be practical

reasons for this choice, but it means that the First Judicial District Attorney's Office effectively has a monopoly on material and information regarding Missy Woods's misconduct. Meanwhile, prosecutors in other districts continue to prosecute cases in which Missy Woods conducted forensic testing.

KWIP's primary concern is that Mr. Castorena and similarly situated individuals obtain the discovery needed to secure their rights to a fair trial and effective assistance of counsel. To secure these rights, the scope and regulation of disclosures under a Rule 16(I)(c) order should be governed by Rule 16 itself.

A. Rule 16 contains appropriate limits and controls on Petitioner's disclosure obligations.

Petitioner is understandably concerned about the scope of disclosures required by the court's Crim. P. 16(I)(c)(2) order, as well as the court's authority to regulate such disclosures. The trial court attempted to address these concerns by ruling that it would "consider the factors set forth in *Spykstra* in determining whether the materials should be disclosed[.]" Petition, Appendix 3, p. 2. The

court correctly perceived that it had authority to regulate discovery, but it erred by finding this authority in Rule 17(c) and *Spykstra*.

Rule 16 contains provisions that both define the scope of disclosures and give courts the appropriate authority to regulate discovery.

First, Crim. P. 16(I)(c) contains a concrete limitation on the scope of disclosures required by other governmental personnel. Disclosure is limited to "material or information that would be discoverable if in the possession or control of the prosecuting attorney." Crim. P. 16(I)(c)(1). In other words, if the material or information falls within the scope of Rule 16(I)(a)(1-2), the court "shall" issue suitable orders to other governmental personnel to make it available to the defense. If the material or information falls outside the scope of Rule 16(I)(a)(1-2), the court cannot issue an order to make it available to the defense.

Second, the court has authority to regulate discovery under Rule 16(III), titled "Regulation of Discovery." Materials furnished in discovery "may only be used for purposes of preparation and trial of the case and may only be provided to others and used by them for

purposes of preparation and trial of the case[.]" Crim. P. 16(III)(c). Upon a showing of cause, a court may "order that specified disclosures be restricted or deferred[.]" Crim. P. 16(III)(d). When "some parts of certain material are discoverable" and "other parts are not discoverable," the "nondiscoverable material" may be excised. Crim. P. 16(III)(e).

Importantly, courts the authority to regulate discovery during *in camera* hearings:

> **(f) In Camera Proceedings.** *Upon request of any person*, the court may permit any showing of cause for denial or regulation of disclosures, or portion of such showing, to be made *in camera*. A record shall be made of such proceedings. If the court enters an order granting relief following a showing *in camera*, the entire record of such showing shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

Crim. P. (III)(f) (first italics added). Other provisions of Rule 16 allocate rights and duties to the "defense," "defense counsel," the "prosecution," the "prosecuting attorney," or a "party." Rule (III)(f) is unique because it provides a right to "any person." This means that

"other governmental personnel"—including the representatives of the First Judicial District Attorney's Office—are entitled to an *in camera* hearing to argue that some of the materials in its file are nondiscoverable.

B. Discovery should not be regulated under Crim. P. 17(c) and Spykstra.

The problem with applying the *Spykstra* factors to pretrial discovery is that Rule 16 requires the government to disclose a broad class of favorable "material and information," whereas Rule 17(c) allows defendants to request a narrow class of "evidence."

Crim. P. 16(I)(a)(2) requires the prosecuting attorney to disclose any material or information "favorable to the accused," including impeachment evidence. *People v. Dist. Ct. of El Paso Cnty.*, 790 P.2d 332, 337 (Colo. 1990). Moreover, in the pretrial setting, "the government must always produce any potentially exculpatory or otherwise favorable evidence without regard to how the withholding of such evidence might be viewed—with the benefit of hindsight—as affecting the outcome of the trial." *United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005).

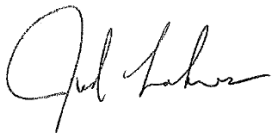
In contrast, Rule 17(c) subpoenas duces tecum are primarily a tool for compelling the production of "evidence" for trial or formal hearings, not "discovery." *See Spykstra*, 234 P.3d at 668. They may be served on private parties, including—as was the case in *Spykstra*—the parents of an alleged victim of sexual assault on a child. *Id.* at 664. Accordingly, this Court has placed a heavy burden on defendants to demonstrate the need for a subpoena duces tecum, including proving that the subpoenaed documents and objects "are evidentiary and relevant." *Id.* at 669.

Applying *Spykstra* to Crim. P. 16(I)(c) orders would deprive defendants of the favorable evidence to which they are constitutionally entitled. It would create an intolerably high risk that Mr. Castorena and similarly situated defendants would be wrongfully convicted.

CONCLUSION

This Court should uphold the trial court's valid order under Crim. P. 16(I)(c)(2). However, it should rule that the scope of disclosure under the trial court's order is governed by Crim. P.

16(I)(a)(1-2). Further, the trial court's regulation of discovery should be governed by Crim. P. 16(III).



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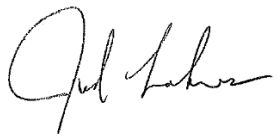
CERTIFICATE OF SERVICE

I certify that, on August 19, 2025, a copy of this Amicus Brief and Appendix was electronically served through Colorado Courts E-Filing on the Adams County District Court, Jeffrey Simonek and John Walsh of the Office of the State Public Defender, Todd Bluth and Michael Whitney of the Seventeenth Judicial District Attorney's Office, and Rebecca Adams of the First Judicial District Attorney's Office.



The standards in this Tentative Draft of May 1969, with amendments as shown in a supplement of October 1970, were approved by the ABA House of Delegates in August 1970, and may be cited as "Approved Draft, 1970."

AMERICAN BAR ASSOCIATION PROJECT ON
MINIMUM STANDARDS FOR CRIMINAL JUSTICE

STANDARDS RELATING TO

Discovery and Procedure Before Trial

INSTITUTE OF JUDICIAL ADMINISTRATION

APPENDIX A

Tentative Draft

AMERICAN BAR ASSOCIATION PROJECT ON
MINIMUM STANDARDS FOR CRIMINAL JUSTICE

STANDARDS RELATING TO

Discovery and Procedure Before Trial

Recommended by the

ADVISORY COMMITTEE ON PRETRIAL PROCEEDINGS

Alfred P. Murrah, *Chairman*
Daniel G. Gibbens, *Reporter*

May 1969

APPENDIX A

dard, there may be others in which the basis for challenge is unknown to the prosecutor, *e.g.*, where the defendant claims a proprietary interest in the object seized. In order not to impose impractical burdens on the prosecutor, he becomes obligated to make disclosures encompassed by this standard, subject to the exceptions set forth in sections 2.6 and 4.4, only after the defense has requested such disclosures and specified the searches and seizures or the statements or the persons involved. The disclosures required to be made under section 2.1 ought to be sufficient to alert defense counsel as to the need for such a request and the basis for such specification. Note particularly the requirement of section 2.1(b) as to the disclosure of clues by the prosecutor.

2.4 Material held by other governmental personnel.

Upon defense counsel's request and designation of material or information which would be discoverable if in the possession or control of the prosecuting attorney and which is in the possession or control of other governmental personnel, the prosecuting attorney shall use diligent good faith efforts to cause such material to be made available to defense counsel; and if the prosecuting attorney's efforts are unsuccessful and such material or other governmental personnel are subject to the jurisdiction of the court, the court shall issue suitable subpoenas or orders to cause such material to be made available to defense counsel.

Commentary

This standard is a part of the attempt to delineate the scope of the prosecutor's responsibilities for obtaining the information which he is obligated to disclose to the defense. It complements the requirement, set forth in section 2.2(c), that he ensure the flow of information between himself and investigative personnel. See Commentary to § 2.2, *supra*. Since the obligations of the prosecutor are not limited by section 2.2(c) and other standards to revealing only what happens to come within his possession or control, it is expected that, under those other standards, he will attempt to obtain for purposes of disclosure material not within his possession but of which he has knowledge. Accordingly this standard is primarily concerned with material of

which he does not have knowledge but of which the defense is aware; and therefore the burden is upon defense counsel to make the request and to designate the material or information which he wishes to inspect. In the area of business crimes particularly, where the defendant's activities may have been subject to regulation by agencies other than the agency investigating the criminal charge, it avoids placing the burden on the prosecutor in the first instance of canvassing all governmental agencies which might conceivably possess information relevant to the defendant. Moreover, where the existence of such information is known to the prosecutor but its quality as matter which he is obligated to disclose is not apparent to him, this standard permits a challenge by the defendant to the prosecutor's conclusion.

A requirement of application to the court in the first instance (see FED. R. CRIM. P. 17(c), which gives the court discretion to order the production before trial of subpoenaed material) is regarded as unsatisfactory. Insofar as other governmental agencies are involved, the material can usually be obtained with the least difficulty by request of the prosecutor. Where this fails, the standard does require the court to lend its assistance within the scope of its powers.

It should be noted that the standard is not intended to enlarge the scope of discovery but merely to deal with problems of implementation. Accordingly it is limited, by its terms, to material or information "which would be discoverable if in the possession or control of the prosecuting attorney."

2.5 Discretionary disclosures.

(a) Upon a showing of materiality to the preparation of the defense, and if the request is reasonable, the court in its discretion may require disclosure to defense counsel of relevant material and information not covered by sections 2.1, 2.3 and 2.4.

(b) The court may deny disclosure authorized by this section if it finds that there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals or unnecessary annoyance or embarrassment, resulting from such disclosure, which outweighs any usefulness of the disclosure to defense counsel.