

COLORADO SUPREME COURT STATE OF COLORADO 2 East 14th Street Denver, CO 80203	DATE FILED: January 29, 2021 3:04 PM FILING ID: BF1CDC6DDC312 CASE NUMBER: 2021SA33
Appeal from: Denver County District Court District Court Judge David H. Goldberg District Court Case No. 20CR2989 In Re the Case of: Plaintiff: The People of the State of Colorado vs. Defendant: EDWARD R. SANDOVAL	▲ COURT USE ONLY ▲
Filing Party: Edward Sandoval Address: Denver County Jail 10500 Smith Road Denver, Colorado 80239 <i>Attorneys for Petitioner:</i> Mitch Geller, Esq. THE LAW OFFICE OF MITCH GELLER 1890 GAYLORD STREET Denver, Colorado 80206 Phone: (720) 696-7897 Fax: (303) 322-3423 Email: mgeller@estreet.com Attorney Reg. No. 9739	Supreme Court Case No.
PETITION TO ISSUE RULE TO SHOW CAUSE PUSUANT TO RULE 21 OF THE COLORADO APPELLATE RULES	

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The Petitioner, Edward R. Sandoval, Jr., the defendant below, moves this honorable Court for an Order to Show Cause to the District Court for the City and County of Denver, the Honorable David Goldberg presiding, pursuant to Rule 21 of the Colorado Appellate Rules, ordering the District Court to show cause why it should not be ordered, by making the Rule Absolute, to grant the Petitioner's Motion for State Pay of Expert Witnesses and Investigator. As grounds, the Petitioner states:

Identity of Parties

The Petitioner is Edward R. Sandoval the defendant below. The Respondent is the Denver District Court, the honorable David H. Goldberg, presiding over case number 20CR2989, entitled The People of the State of Colorado, Plaintiff, vs. Edward R. Sandoval, Defendant. This case is in Division 5C of the Denver District Court,

The Petitioner, Edward R. Sandoval is represented by Mitch Geller and The Law Office of Mitch Geller, 1890 Gaylord Street, Denver, CO 80206, telephone number: 720-696-7897; fax number: 303-322-3423. Counsel's email is mgeller@estreet.com.

The Respondent court is located in the Lindsey-Flanigan Courthouse at 520 West Colfax Avenue, Denver, CO 80204. The Division 5C phone number is 720-337-0667. There is no fax number. The court's email address is: 02courtroom5c@judicial.state.co.us.

In the action below the People of the State of Colorado are represented by Deputy District Attorney Joshua Nathaniel of the Denver District Attorney's Office, located at 201 W. Colfax Ave., Fl 8, Denver, CO 80202. His phone number is 720-913-9000. The fax number is 720-913-9035. Mr. Nathaniel's email address is JAN@denverda.org.

Background and Pertinent Facts

The defendant below and Petitioner here, Edward R. Sandoval, d/o/b 11/21/00, was 20 years old at the time of this alleged incident. The factual allegations are that on May 10, 2020 at a family gathering for Mother's Day at the home of the defendant, his mother, Yolanda Jiron, his stepfather, Dennis Lazoya, and the defendant's two sisters, an argument between the defendant and his stepfather escalated into mutual threats between the two.

Both the defendant and his stepfather were armed and the allegation is that the defendant fired 16 shots from an assault weapon, striking Dennis Lazoya with at least 15 rounds in the left arm and back, killing him.

The defendant is charged with 5 counts: **Count 1:** Murder in the First Degree (F1), an alleged violation of C.R.S. 18-3-102(1)(a); **Count 2:** Aggravated Robbery (F3) an alleged violation of C.R.S. 18-4-302(1)(D); **Count 3:** Crime of Violence (SE), an alleged violation of C.R.S. 18-1.3-406(2)(A)(I)(A); **Count 4:** Crime of Violence (SE), an alleged violation of C.R.S. 18-1.3-406(2)(A)(I)(A); and **Count 5:** Crime of Violence (SE), an alleged violation of C.R.S. 18-1.3-406(2)(A)(I)(A), (7)(A).

The aggravated robbery count is based on an allegation that, after the shooting, the defendant removed the victim's gun and took it with him when he left the scene.

At a combined Preliminary Hearing and Bond Hearing on November 13, 2020, the court found probable cause existed for the charges brought and the case was bound over for arraignment. The court also found proof evident and presumption great and the defendant was denied bond.

The defendant remains in custody and has been in custody since he turned himself in the day following the incident. He is currently awaiting an arraignment set for February 26, 2021.

The defendant is indigent and is unable to produce income to assist in his defense. Counsel for the defendant is privately retained by the defendant's mother. However, during the week before Thanksgiving of 2020, the defendant's mother contracted COVID-19 and was hospitalized for approximately a month. She was in intensive care and on a ventilator and lost her ability to earn income and stay current with her bills, including her attorney fees. Counsel has, however, agreed to stay on this case.

The defendant's mother has no ability to produce the funds necessary for the support services needed to represent her son.

On or about December 15, 2020, the defendant filed a Motion for State Pay of Expert Witnesses and Investigator (herein after referred to as the Motion) (copy attached as Exhibit 1).

On December 21, 2020, the court issued an Order requiring the defendant to provide more information regarding rates and estimates of time within 10 days (copy attached as Exhibit 2).

On December 30, 2020, the defendant filed his Response to Order Regarding Motion for State Pay of Expert Witnesses and Investigator, providing the court with all information that was at that time available (copy attached as Exhibit 3). Copies of the resumes/*curricula vitae* and fee agreements and estimates were attached to the Response (copies attached as Exhibit 4).

On January 15, 2021, Judge Goldberg issued the order for which the Defendant now asks the issuance of a Rule to Show Cause pursuant to C.A.R. 21. The court denied the defendant's motion without making any findings or citing any authority. Rather, the court erroneously stated, "The Court is not in a position to order state funds be used for expert witness fees where a Defendant has retained private counsel."

That ruling is inconsistent with Colorado law.

Nature of Relief Requested

The Petitioner asks this court to issue a Rule to Show Cause, pursuant to Rule 21 of the Colorado Appellate Rules, to the District Court for the City and County of Denver, the honorable David H. Goldberg presiding, compelling the Respondent court to show cause why the ruling issued on January 15, 2021 should not be reversed. The Petitioner seeks to have his Motion granted.

No Other Adequate Remedy Exists

If this court does not issue a Rule to Show Cause and ultimately require the Respondent court to grant the Petitioner's Motion for State Pay of Expert Witnesses and Investigator, an appeal after a trial would not serve to cure the problem. No other remedy exists for this defendant except for current counsel to withdraw and either the Colorado Public Defender's Office be appointed to represent him, or that it be referred to Alternative Defense Counsel (ADC) who would then have to ask, once again, for state pay for experts and an investigator. That, of course, simply results in an even greater expenditure of state funds.

More importantly, however, current counsel has been representing the defendant on this case since the defendant was arrested. The discovery is massive, involving video interviews of witnesses, investigative reports, an autopsy report, scientific and forensic reports and literally thousands of photographs. Counsel has kept up with this discovery and handled all proceedings to date and has been working this case for about nine months.

Appointment of new counsel would severely disrupt the defense and new counsel starting from scratch would require additional delays while the defendant remains in custody. It would unfairly prejudice the defendant in his pursuit of a timely resolution of this case.

Issues

1. Did the District Court for the City and County of Denver, the honorable Judge David H. Goldberg presiding, abuse its discretion in failing to grant the defendant's Motion for State Pay of Expert Witnesses and Investigator?

Argument

The Defendant's need for Expert Witnesses:

This is a 1st Degree Murder case, and, of course, conviction mandates a life sentence without parole pursuant C.R.S. 18-1.3-401(1)(a)(V)(A.1). The defendant is barely 21 years old and was 20 years old at the time he is alleged to have committed this offense.

It is incumbent on counsel to explore all possibilities to determine what defenses would be appropriate to raise on his behalf.

The defendant has a history of seizures triggered by severe emotional distress and those seizures are followed by a "post-ictal" period that refers to a state of mind that is unclear and confused. On September 18, 2019, the stress and emotional strain of a mediation on a custody matter involving his 2-year-old daughter triggered a seizure for which he was taken by ambulance from the Denver City and County Building (the scene of the mediation). Counsel and the defendant's father were both present at that time and witnessed the seizure and the defendant's confused and detached mental condition preceding the seizure.

Attached as Exhibit 5 are medical records that were provided to the district court at the time the defendant filed his Motion. The court is referred to page 8 of the exhibit and the paragraph labeled “Medical Decision Making” for a concise statement of the nature of his hospitalization and treatment. These records are from the seizure described herein.¹

The discovery in this case also contains statements from other attendees at the Mother’s Day barbecue indicating that the defendant had left to pick up his daughter from her mother—the party with whom he is involved in the custody dispute. When he returned, these witnesses described him as “out of it” to such an extent that he could not handle his child’s needs. They assumed he was drunk, but there is no evidence the defendant consumed any alcohol or drugs that could cause such a condition.

Based on this history, and statements made to counsel by the defendant which counsel cannot disclose due to the attorney-client privilege, it became clear that a psychiatric evaluation of the defendant is necessary. Counsel can state that there is significant concern about the defendant’s ability to accurately perceive events.

¹ On April 23, 2019 at a hearing before Judge Jennifer Torrington of the Denver District Court on case number 19DR143, the custody case hereinabove referred to, the Petitioner here fell into a dissociative state that prompted Judge Torrington to question his competency. There are no medical records from this incident.

The defendant also has a history that includes a serious automobile accident when he was nine years old. After consulting with medical professionals, counsel determined that a neurological examination of the defendant may also be necessary.

The expert witness counsel proposed to the district court is board certified in both psychiatry and neurology (see Exhibit D, the *curricula vitae* of Dr. Doris Gunderson).

These examinations are necessary to determine if defenses of insanity or impaired mental condition are appropriate. Pursuant to C.R.S. 16-8-103(1)(a). (1/5)(a) and 16-8-103.5(1), such pleas must be entered at the time of arraignment (though, for good cause shown, may be allowed at any time prior to trial), which is currently set for February 26, 2021 at 8:30 a.m.

Need for an Investigator:

As noted above, this incident occurred at a family gathering for Mother's Day at the home of the defendant, the decedent, the decedent's wife and the defendant's sisters. Many members of the extended family also attended as did their significant others.

None of them were eyewitnesses to the shooting, but many of them witnessed the interaction of the parties before-hand and immediately afterward. They need to be interviewed as potential trial witnesses.

Many of these witnesses knew the defendant and the decedent for years and have important information regarding the nature of their relationship and history. The decedent, Dennis Lazoya, was a gang member and had a history of violence. He was

often armed and was a very dangerous man. After arguing with the defendant in the basement of the home, he came up the stairs with a gun in his hand and threatened to “put a bullet in his head” (speaking of the defendant).

Establishing the decedent’s history and his propensity for violence is necessary for the defendant to pursue possible defenses of self-defense and defense of others. It provides a reasonable basis for the defendant’s belief that he, his girl friend and his daughter were in danger—particularly in light of specific threats the decedent made to shoot all of them.

These facts were established and discussed at the preliminary hearing and the court was aware of the potential application of these defenses.

It is clear that the defendant cannot be provided with a competent defense without an investigator to gather critical information to assist defense counsel in preparing.

Legal Argument:

Petitioner asserts the court abused its discretion in denying his request for state pay of support services (an expert and investigator). The court’s ruling was manifestly arbitrary, unreasonable and unfair and was apparently based on an erroneous understanding or application of the law.

Colorado courts have long held that a trial court has discretion to grant a motion for support services to a defendant. The court of appeals acknowledged in *People v. Tafoya*, 703 P.2d 663 (Colo. App. 1985) that: “An indigent defendant is entitled to the

basic ‘tools of an adequate defense’.” *Tafoya* at 667 quoting *Britt v. North Carolina*, 404 U.S. 226, 92 S.Ct 431, 30 L. Ed. 2d 400 (1971). The *Tafoya* court cautioned, however, that “a trial court’s discretionary refusal to grant an indigent defendant’s request for investigatory or other services will be upheld absent a showing that the services sought were reasonable, necessary and helpful to the defense”, *Tafoya* at 667.

In *People v. Orozco*, 210 P.3d 472 (Colo. App. 2009), the Colorado Court of Appeals addressed a case in which a defendant, who was indigent as a result of his incarceration, had private counsel retained for him by his sister. Private counsel remained on the case when the sister could no longer afford counsel. The defendant moved for state pay for an expert investigator to testify in a sexual assault on a child case. His motion was denied by the trial court which found that the state had no funds from which to pay an expert. The Court of Appeals reversed, and provided an extensive analysis of the applications of Chief Justice Directives, specifically CJD 04-04 § IV(D) which provided, in pertinent part:

D. Court Costs of Indigent Party Not Appointed Counsel

In certain circumstances, a defendant’s costs may be paid by the Judicial Department even though the defendant is not being represented by state-funded counsel (i.e., Public Defender, Alternate Defense Counsel; Judicial-paid counsel). Payment by the court is appropriate if any of the following statements apply:

...

- c) The defendant is receiving private counsel but becomes indigent during the course of the case, and the court has determined that there are insufficient funds to pay for court costs, and that it would be too disruptive to the

proceedings to assign the Public Defender or Alternate Defense Counsel to the case.

CJD 04-04 was amended in November of 2014 effective July 2018, but this amendment did not change the language cited above.²

In *People v. Stroud*, 356 P.3d 903 (Colo. App. 2014), the Colorado Court of Appeals reaffirmed its prior holdings in *Orozco* and *Tafoya, supra*. The court held that an indigent defendant is entitled to the basic tools of an adequate defense and a trial court has discretion to grant a motion for support services to an indigent defendant represented by retained private counsel.

The *Stroud* court relied heavily on *Orozco* and its analysis of Chief Justice Directive 04-04 § IV(D)(1) in examining C.R.S. 18-1-403 which provides that all indigent persons charged or held for a crime are entitled to legal representation and supporting services at state expense to the extent provided for in articles 1 and 2 of Title 21.

The *Stroud* court stated, at page 907, the following:

In *Orozco*, a division of this court relied on the CJD to conclude that a trial court has discretion to determine whether a defendant represented by private counsel is entitled to receive support services at the state's expense. See 210 P.3d at 476. Thus, in applying CJD 04-04 § IV(D)(1)(c), the division held that the trial court abused its discretion in denying the defendant's request for funding to hire an expert because

² Counsel has negotiated lower rates from both the expert witness and the investigator, but, in fairness to the court, it must be stated that the district court was unaware of this at the time it issued its ruling as the negotiations had not yet completed.

the defendant became indigent during the course of his case and demonstrated that he had insufficient funds to hire an expert. *Id.*

Here, Stroud's attorney filed a motion for appointment of an expert witness at state expense and the court held a hearing on this matter. In both his motion and the hearing, defense counsel informed the court that Stroud was indigent due to his incarceration and that he was previously found indigent in two other district court cases. Defense counsel stated that when he entered his appearance, Stroud's wife had agreed to provide funding for an expert witness to review the medical evidence and to determine whether R.S.'s injuries were the result of nonaccidental trauma. However, after the couple separated, Stroud lacked funding to obtain an expert. Therefore, though defense counsel stated he was "willing to proceed with his representation," he requested the court to appoint an expert witness at the state's expense to assure Stroud a fair trial.

Ultimately, the Stroud court stated: "We conclude that the trial court abused its discretion in denying Stroud's motion." *Stroud* at 907.

In the instant case, when counsel entered his appearance the defendant was in custody and indigent. He remains so. The defendant's mother, who executed the fee agreement, promised to pay for necessary experts and an investigator but was never able to raise the money for that purpose. And then, she contracted COVID-19 which resulted in an extensive hospital stay and all but destroyed her finances. She struggles now to meet her financial obligation to not only counsel, but also to her landlord (she is not a property owner), and to support her family.

While counsel did not take this case with an agreement to perform work *pro bono*, he has agreed to stay on this case despite the fact that Yolanda Jiron, the

defendant's mother is massively behind on payment of her fees. As a practical matter, counsel is *pro bono*.

Co-counsel has already withdrawn, and it will be impossible to provide this Petitioner with what is necessary to guarantee he receives a fair trial without the expert witness and investigator. The consequences to the defendant could be dire, and it is appropriate to take these real-life problems into account when determining whether the district court ruling was an abuse of discretion.

As Justice Samour stated in *People v. Lucy*, 467 P.3d 332, 334 (Colo. 2020), “COVID-19, the highly contagious and potentially deadly illness caused by the novel coronavirus, has triggered a global pandemic the likes of which we haven't experienced in over a century. Unsurprisingly, it has wreaked havoc on just about every aspect of our lives. The criminal justice system has not been spared from the ravages of the malady...”

Conclusion

The defendant in this case is incarcerated and indigent. He seeks funds to hire an expert witness and an investigator to guarantee his right to a fair trial. His sole source of funds for his case and his attorney is his mother, who contracted the COVID-19 virus and simply does not have the funds necessary to hire the necessary expert and investigator. His motion for state pay of those fees adequately demonstrated the need for these services satisfying the necessity and reasonableness requirements of the law.

The Petitioner respectfully requests that this court issue a Rule to Show Cause to the District Court for the City and County of Denver pursuant to Rule 21 of the Colorado Appellate Rules. The Petitioner further requests a finding that the District Court abused its discretion and asks for an order granting his request for state paid fees for expert witnesses and an investigator.

Dated this 28th day of January, 2021.

Respectfully submitted,

/s/ Mitch Geller
MITCH GELLER, #9739
Attorney for Defendant-Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I filed by ICCES the foregoing PETITION TO ISSUE RULE TO SHOW CAUSE PUSUANT TO RULE 21 OF THE COLORADO APPELLATE RULES on January 28, 2021 and served via ICCES the following individuals:

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The Honorable David Goldberg
Denver District Court
02courtroom5c@judicial.state.co.us

/s/ Bonnie Sauer
Bonnie Sauer, Paralegal