

District Court, Weld County, Colorado Court Address: 910 10 th Ave, Greeley, CO 80631	DATE FILED: September 28, 2021 5:20 PM FILING ID: 76999B20939C2 CASE NUMBER: 2020CR1057
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. VERONICA SANCHEZ, Defendant	▲ COURT USE ONLY ▲
Megan Bishop, #50348 Gracen Short, #53954 Deputy State Public Defenders 822 7th Street, Ste. 300 Greeley, CO 80631 Phone Number: (970) 353-8224 Fax Number: (970) 352-8293 E-mail Address: megan.bishop@coloradodefenders.us	Case Number: 20CR1057 Courtroom: 15
(D-40) MS. SANCHEZ’S RESPONSE TO PROSECUTION’S MOTION DD, “OBJECTION TO DEFENDANT’S ORAL NOTICE OF INTENT TO INTRODUCE ALTERNATE SUSPECT EVIDENCE”	

MS. SANCHEZ, by and through counsel, respectfully submits this response to the prosecution’s motion DD:

1. **Ms. Sanchez has a constitutional right to present alternate suspect evidence in support of her defense.** *E.g., People v. Elmarr*, 351 P.3d 431, 438 (Colo. 2015) (“Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.”); *Washington v. Texas*, 388 U.S. 14, 19 (1967) (“Just as an accused has the right to confront the prosecution’s witnesses for the purposes of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.”); *People v. Bueno*, 626 P.2d 1167, 1169 (Colo.App.1981).
2. **An alternate suspect defense is a defense of general denial.** “In a criminal prosecution, identity is a material element of any charged crime.” *People v. Elmarr*, 351 P.3d 431, 438 (Colo. 2015). The rudimentary defense of alternate suspect is intended to create reasonable doubt as to the material element of identity. *Id.*

3. ***Elmarr*'s application of CRE does not justify pretrial disclosures.** Just like all evidence, Ms. Sanchez's right to present alternate suspect evidence can be limited by the Colorado Rules of Evidence. *Elmarr*, 351 P.3d at 439 (the evidence must conform to the rules of relevancy, hearsay, and a 403 analysis). These are not heightened nor novel standards. *Elmarr*'s requirement that alternate suspect evidence have a "non-speculative connection or nexus between the alternate suspect and the crime charged" is nothing but a common-sense application of CRE 401 – 402.¹ *Id.* There is nothing to justify the prosecution's cry for a special pretrial offer of proof. Ms. Sanchez asks that this Court not take what are standard gatekeeping rules and convert them into unnecessary pretrial disclosures. As the new seminal case providing the framework for the admissibility of alternate suspect evidence, *Elmarr* does not address when findings of admissibility must be made, nor the propriety of a pretrial hearing on the matter. Suffice to say, a pretrial hearing that forces the defense to disclose all of the evidence that supports its defense theory deprives Ms. Sanchez of due process and fundamental fairness. U.S. CONST. AMEND. V, VI, XIV; COLO. CONST. ART. II, sec. 16, 25. Colorado law does not require the defense make such disclosures pretrial, let alone months before the trial date.
4. **The alternate suspect has been known to the prosecution.** Despite the prosecution's claim that "it is extremely unlikely that there is anything more than an unsupported inference for [suspecting]," the alternate suspect in this case, Brian Hernandez is a co-defendant who has been listed as a suspect since the start of the investigation.
5. **Defense doesn't have to endorse alternate suspect.** Statutes and case law requiring disclosures from the defense to the prosecution are based on concerns about notice. Colorado courts and legislature have decided that with some things, justice does require defense put the prosecution on notice of its intent. *See, e.g.*, Colo. R. Crim. P. 16(II) (alibi, rape shield, some expert disclosures). Alternate suspect evidence has never been on that list. There is no legal authority standing for the proposition that alternate suspect evidence must be disclosed to the prosecution. Similarly, no law requires the defense give pretrial notice of its intent to run alternate suspect. To the contrary, the law says otherwise. *People v. Castro*, 854 P.2d 1262 (Colo. 1993); *Elmarr*, 351 P.3d at 438. The prosecution must prove, beyond a reasonable doubt, that the *defendant* (as opposed to someone else) committed the charge crime. *Elmarr* at 438–439. Evidence indicating that someone else committed the crime tends to make the *defendant's* identity as the perpetrator less probable and, thus, creates reasonable doubt as to the defendant's guilt. *Id.* In other words, alternate suspect is not a specific or affirmative defense the way "alibi" or

¹ A non-speculative connection is established when "the alternate suspect evidence... create[s] more than just *an unsupported inference* or possible grounds for suspicion." *Id.* (emphasis provided).

“choice of evils” is.² Instead, it is a general denial defense that simply negates the material elements the prosecution has to prove. For defenses like these, no pretrial notice is required. Rule 16 lays out when pretrial notice of certain defenses is required from the defense. “Subject to constitutional limitations, the defense shall disclose to the prosecution the nature of any defense, other than alibi, which the defense intends to use at trial.” Colo. R. Crim. P. 16(II)(c). The “subject to constitutional limitations” language is important – it protects against unnecessary disclosures that would provoke violations of due process and fundamental fairness, i.e., the disclosures the prosecution is requesting in its Motion DD.

6. **Ms. Sanchez Requests a Specific Offer of Proof.** So that Ms. Sanchez knows how to proceed, she is requesting this Court make a ruling on whether an offer of proof will be compelled, what that offer of proof must consist of, and at what point the offer of proof must be made.

WHEREFORE, Ms. Sanchez respectfully submits this reply to the prosecution’s motion DD.

MEGAN A. RING
COLORADO STATE PUBLIC DEFENDER

/s/ Megan Bishop
Megan Bishop #50348

s/ Gracen Short
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Deputy State Public Defenders

CERTIFICATE OF SERVICE

I certify that on 9-28-21, I served the forgoing document by delivering same to all opposing counsel.

/s/ Megan Bishop

² Article 1 of Title 18 of the Colorado Revised Statutes lists out defenses aside from “general denial.” § 18-1-502–805, C.R.S. Alternate suspect, mis-ID, and general denial are not included anywhere in Article 1 of Title 18.