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REALTIME UNCERTIFIED ROUGH DRAFT

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1 MORNING SESSION - MARCH 8, 2022

2 * * *

3 (The following proceedings commenced in open
4 court at the hour of 9:03 a.m. with all parties present,
5 the defendant appearing in custody:)

6 * * *

7 THE COURT: We're on the record in 20CR6669,
8 People v. Estes. My I have appearances of counsel.

9 MR. DILLON: Khoury Dillon and Isaam
10 Shamsid-Deen for the People.

11 MR. MUHAISEN: Good morning, Your Honor. Wadi
12 Muhaisen with my client, Mr. Estes, who appears in
13 custody.

14 THE COURT: Good morning. The matter is set
15 for trial this morning. We have a panel of 100 jurors
16 downstairs who would be ready to come up shortly. At
17 8:47 p.m. last night, March 7th, I received a
18 communication from Mr. Muhaisen that was shared with --
19 sent to the prosecution advising that yesterday within
20 24 hours of trial the prosecution had discovered to the
21 defense what was referred to as many gig bites of
22 previously undisclosed discovery. I sent an e-mail back
23 to Mr. Muhaisen copied to the prosecution, thanking him
24 for the heads-up. Mr. Muhaisen indicated he wanted to
25 address that issue and anticipated moving for a

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1 continuance.

2 Mr. Muhaisen?

3 MR. MUHAISEN: Thank you, Your Honor. Your
4 Honor, just to give the Court a time line of the
5 particular disclosures that the defense received, on
6 March 6th there was six discovery disclosures made by
7 the prosecution. Those were smaller in size than the
8 ones that we received yesterday. But there were still
9 six disclosures made -- six bundles I would say. Now,
10 yesterday, March 7th I received notice by e-mail from
11 Denver discover either Evidence.com or the other
12 service they used. I received one notice at 1:04, one
13 at 1:53, one at 1:59, one at 2:06, one at 3:58. I was
14 in federal court yesterday afternoon as I received these
15 links so I wasn't able to ascertain what they were or
16 what size they were.

17 Last night after I was done with federal
18 court, I attempted to download all five of the new
19 disclosure bundles. The first one was 1.9 gigabytes,
20 the second was 399 megabytes, the third one was 5.4
21 gigabytes, the fourth was 1 gigabyte, and then the final
22 one was 1.38 gigabytes.

23 At the end of the day right before the close
24 of business I e-mailed the DAs as this was all
25 downloading to ask what it was, and the response I got

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1 at 6:46 was that this was also their first time going
2 through them. I asked at 5:30, "How much of this is
3 new?" And the response I got was "All of it."

4 Immediately I had my investigator Eric
5 Hamilton start going through it. It was not possible
6 since last night for us to completely index and I cannot
7 provide the court a full list of what each item is. But
8 I can represent to the Court that as of my last update
9 from him this morning, he was at seven hours of new
10 media, that included Chinese conversations that perhaps
11 may be needed to be translated he indicates there is all
12 new surveillance from at least one of the locations.
13 He's still going through those. There may be more of
14 those.

15 There were victim interviews related to at
16 least three of the victims. And all of the facts that
17 were provided have new body-worn camera, which includes
18 statements made by witnesses and accusers. We haven't
19 had a chance to even index what is all in there but I
20 think it's uncontroverted there's brand new discover
21 being provided to the defense literally on the 11th hour
22 before trial. 400 days after the Rule 16 deadline to
23 disclose such discovery.

24 I have not had the time to even index what is
25 in this discovery much less analyze it for further

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1 investigation, legal strategy, confer with my client on
2 issues, and my investigator hasn't had a chance to
3 investigate based on this new information.

4 This is a total of 9.728 gigabytes of
5 discovery that were provided the night before trial. I
6 know both prosecutors personally. I'm not at all
7 claiming that this was done intentionally or
8 maliciously. But the law is very clear the buck stops
9 with them. And Rule 16 required them to provide this
10 discovery to the defense a long time ago. As soon as
11 practical but not later than 21 days after the
12 defendant's first appearance at the time of or following
13 the filing of charges per Rule 16 1B1. And that was in
14 November of 2020, I believe.

15 And as the court of appeals has made clear as
16 recently as April of 2021, in People v. Grant, 492 P.3d
17 345, the prosecution's disclosure obligations apply to
18 information in the possession or control of any others
19 who have been part of a case's investigation and who
20 with reference up to the particular case have reported
21 to the prosecution, Criminal Rule Procedure 16IA3.

22 (Court reporter clarification.)

23 MR. MUHAISEN: Simultaneously, Criminal
24 Procedure Rule 16 IB4 makes it incumbent on the
25 prosecution to ensure that information flows between the

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1 prosecutor's office and the various investigative
2 personnel so that the prosecution will have all material
3 and information relevant to the accused and the offense
4 charged in its possession.

5 And if the prosecution represents to the Court
6 they just got this from there Denver Police Department,
7 clearly under the rule of Denver Police Department and
8 their investigators and officers fall within this rule.
9 In order for the defense team to be competent and
10 effective per Rules 1.1 and 1.3 of the Rules of
11 Professional Conduct and in order for Mr. Estes to
12 receive effective counsel pursuant to the Sixth
13 Amendment, the defense is requesting that the Court, out
14 of the Rule 16 list of possible sanctions that it may
15 impose, grant a continuance to the defense so that we
16 can get up to speed on what all this discovery is and
17 per sue any investigative leads based on that and also
18 to prepare for trial.

19 Rule 16 sets out a list of possible sanctions
20 the Court may impose. Such as ordering the prosecution
21 to permanent the discovery or inspection of materials
22 not previously disclosed, granting a continuance,
23 prohibiting the prosecution from introducing in evidence
24 the material not disclosed, or crafting a different
25 sanction has the Court deems just under the

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1 circumstance.

2 I only know that I can ask for a continuance
3 out of those four Your Honor, I would ask leave to
4 supplement my request with a written motion for
5 additional sanctions based on what we find out from
6 what's in the discovery. Remember, Your Honor, this
7 trial was supposed to start the last day of January, I
8 believe. Had we gone forward, the defense would have
9 gone forward without all of this information. And so I
10 think that we need a continuance just to make sure we
11 have everything.

12 We don't have the confidence that even with
13 this disclosure we have everything based on a 400 day
14 delay by the People in this case. So based on all of
15 the above and on Mr. Estes's right to effective counsel,
16 due process, Rule 16, and the case law and discovery
17 disclosures, we are requesting a continuance of the
18 trial so that we can effectively represent our client.
19 Thank you.

20 THE COURT: Thank you, Mr. Muhaisen.

21 Mr. Dillon, Mr. Shamsid-Deen?

22 MR. DILLON: Thank you, Judge. I offer this
23 Court no excuses. I can only provide an explanation.
24 As this Court is aware, in January of this year the lead
25 prosecutor in this case was resigned from our office and

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1 I was asked to take over this case. This case has
2 consumed me since the beginning of February. This case
3 consists of seven separate GO reports, general offense
4 reports, from two different jurisdictions.

5 How it works is all of the cases are to be
6 linked through the Denver Police Department's computer
7 symptoms and everything is sent over to our office for
8 discovery to defense. As I have been diving into this
9 case, every week, usually a couple times a week, I have
10 found witnesses that were not endorsed, items from the
11 police department that were not discovered and as I
12 discovered those things, I immediately endorsed
13 witnesses or sent over items in discovery.

14 Most recently on February 26th we learned in
15 one of the GO reports that was a Denver case when we
16 were doing a query for some evidence that we knew should
17 be there and did not have, our investigator went into
18 the Denver Police Department system and found some items
19 in Evidence.com that were inexplicably not sent over to
20 us and not linked to the other cases that we already
21 had discovery so. So we sent that over in February but
22 I understand defense didn't get it until March
23 because --

24 Or was it --

25 -- March 6th because the link was sent

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1 improperly.

2 Yesterday as we were looking for some
3 photographs that aware referenced in a crime scene
4 analyst report, our investigator found those photos in
5 addition to some body-worn camera that had not come
6 over. So we immediately disclosed those yesterday.

7 Frankly, Judge, I don't know what a gigabyte
8 or megabyte is, but I can tell you the information that
9 was sent over to the defense involves a case that
10 happened on November 9th where there were three alleged
11 victims. There are a total of 22 minutes of body-worn
12 camera interviews that were disclosed. The contents of
13 those interviews are, of course, contained in those
14 officers' statements, but the body-worn camera we had
15 not seen. In the discovery we found yesterday with the
16 alleged victim Haiyan Yi, there are 35 minutes worth of
17 body-worn camera from three different police officers.
18 Again, information that was included in their statements
19 but we did not have the body-worn camera.

20 There's also a video recording of the showing
21 of photo arrays and, of course, that is documented in
22 the reports that the arrays were shown. The arrays were
23 discovered, but the actual video taping of the showing
24 of those arrays was sent over.

25 There's also external video of a neighboring

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1 store that shows a white Pontiac driving in a parking
2 lot, which Denver Police Department believed was the
3 defendant's vehicle.

4 So this was all sent over late in violation of
5 Rule 16. And we have spoken with Mr. Muhaisen about
6 potential remedies. We won't use the the information --
7 select the jury, give them questionnaires and give them
8 today and tomorrow to review the videos but that's
9 simply not adequate in his view and I think that's fair.

10 So I don't think we can object to a
11 continuance. We are prepared to go forward today, but
12 this information was turned over late.

13 THE COURT: Thank you.

14 To say that I am distressed and appalled is
15 understating it. For context, let me explain since we
16 resumed jury trials after the last COVID pause, out of
17 the last three cases, this is the second time this has
18 happened in this courtroom on a case that was supposed
19 to start trial in February literally the day before
20 trial. 179 photos, if my memory serves correctly, of
21 the alleged crime scene in an attempted murder case,
22 which had not been previously discovered to the defense
23 was discovered, necessitating a continuance.

24 The information that Mr. Muhaisen has recited
25 that you have recited, including the surveillance victim

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1 interviews, body-worn camera interviews of both the
2 alleged victims and witnesses, photos, although referred
3 to or perhaps mentioned in the reports or supplemental
4 reports of the DPD are not in the Court's view a
5 substitute for actually being able to observe the videos
6 or surveillance or interviews themselves because what
7 may seem significant to a police officer or detective in
8 his, her, or their summary of something, whether it's a
9 presentation of a photo ID lineup or a spontaneous
10 statement that an alleged victim or witness may have
11 made that didn't strike the officer as that important
12 but may from the context of the lawyer be critical is
13 something that in the Court's view cannot be substituted
14 for or discounted by simply saying, Well, they had
15 reports that this stuff was done but did the have the
16 actual body-worn camera interviews, statements of
17 witnesses and alleged victims, surveillance, photos, et
18 cetera.

19 I don't know the reason why in two of three
20 cases that this Court has -- serious cases that this
21 Court has tried to get to trial in the last six weeks.
22 This precise problem has happened. Someone needs to get
23 to the root of it. I am going to communicate with the
24 district attorney to let her know, and whether that is
25 further communications and fixing issues with Chief

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1 Pazen of the police department or their IT department or
2 Evidence.com or whatever the answer is, I don't pretend
3 to know. But this is simply unacceptable. Plain and
4 simple, unacceptable, gentlemen.

5 I have 100 people sitting downstairs who
6 wasted their morning, time, gasoline, their parking
7 money who are going to be discharged today. We have
8 interpreters both in the Chinese language interpreters,
9 both in Cantonese and Mandarin, who have been paid for
10 their service during the trial, where that money will
11 literally be burned and wasted, not to mention counsel
12 time and preparation, not to mention the difficulty of
13 resetting cases on a Court's already overwhelming
14 docket, and inconvenience to everybody.

15 I am simply nonplussed that this should be a
16 second time in a matter of weeks that this precise issue
17 occur and we're not talking about one piece of paper or
18 one supplemental report or something. We're talking
19 about chunks, large amounts of important evidence that
20 the prosecution didn't even know about and I cannot
21 fathom how that could be, and whoever was handling the
22 case is before -- before you became involved, Mr. Dillon
23 and Mr. Shamsid-Deen, that there are references to
24 body-worn camera, if anybody had bothered to read the
25 reports, they would know they didn't have that

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1 information and should have asked.

2 And in my view, there is absolutely no excuse.
3 I know everybody is busy. But there's no excuse for
4 saying, "Gee, this report references a body-worn camera
5 interview of alleged victim number one, but we don't
6 have that anywhere in our files. Where is it? Let's go
7 ask." That clearly did not occur and was either the
8 result of somebody in the DA's office not reading the
9 reports or if the reports were read, not acting on them.
10 Both equally excusable.

11 This is a very serious case for Mr. Estes.
12 It's a very serious case for the victims. And under
13 different circumstances I would simply dismiss the case
14 at this point for the, what I view, as inexcusable and
15 unjustifiable disclosure of these large amounts, chunks
16 of information, less than 24 hours before trial is set
17 to begin. I think that might be an overreaction on my
18 part to simply dismiss the case, but I thought about it
19 it, because I'm frankly that angry that here I am --
20 here we are for the second time in six weeks dealing
21 with precisely the same issue, huge chunks of
22 information that were obvious.

23 We're not talking about a video from someone's
24 door bell three blocks away that was serendipitously
25 discovered or that low and behold someone comes into

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1 awareness of it the day before trial. We're talking
2 about stuff that was obvious that by simply reading the
3 reports and comparing it to what video or body-worn
4 camera video or interviews were available, someone
5 should have and clearly could have said, "We don't
6 have," and they didn't do it.

7 And I don't know where the responsibility --
8 precisely on whose shoulder or shoulders the
9 responsibility lies, but it is apparent to me that it
10 would be a -- would be manifestly unfair to the defense
11 and to Mr. Estes to say that Mr. Muhaisen should review
12 large amounts one interview, 22 minutes, and I assume
13 that's just scraping the bottom of the barrel, between
14 while doing jury selection, while reviewing jury
15 questionnaires, while picking a jury and be ready to
16 start with the trial tomorrow with great reluctance
17 because of all the wasted time and money, which is
18 ultimately not mine, not the judicial department's.
19 It's the people's money, and it's just been thrown out
20 the window for no legitimate reason except sloppiness or
21 laziness. Those are the only two explanations.

22 The Court feels compelled to grant the motion
23 for the continuance. And I do appreciate the
24 prosecution's candor as well as the prosecution's
25 acknowledgment that a continuance was essential in this

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1 case to avoid doing a grave injustice not only to
2 Mr. Estes but to the alleged victims and most
3 importantly to the system.

4 I'm speaking, Mr. Estes.

5 And if there's anything that needs to be said,
6 your lawyer can tell him, and he can say it to me. I
7 will grant the motion for continuance. I said I don't
8 want to do things behind people's back or look like I'm
9 being a crotchety old man and going and tattletaling to
10 the district attorney, but with this being the second
11 occurrence in three trials over the last several weeks,
12 I am sending District Attorney McCann an e-mail.
13 Counsel will be copied on it so you know what's said and
14 letting her know I am nonplussed that this has occurred
15 the second time just in this courtroom.

16 And, golly, if it's occurring in Courtroom 5H,
17 I can't fathom or believe in the other eight or nine
18 criminal divisions that they've all been free from this
19 type of situation. And it's up to the district
20 attorney's office and the Denver Police Department to
21 fix this problem, to address why this has happened, to
22 do a root-cause analysis and to fix it and make sure it
23 doesn't happen again.

24 If we get to a new trial date and something
25 similar occurs in Mr. Estes's case, I'm putting the

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1 prosecution on notice right now that I will give very
2 serious consideration to simply dismissing the case and
3 dismissing all charges against Mr. Estes.

4 I don't think that is necessarily the
5 appropriate or just result, but I think Rule 16 embodies
6 the principles of Brady versus Maryland and the fact
7 that our system cannot function and cannot go forward
8 without a fair and complete and full disclosure to the
9 defense of all potentially exculpatory as well as
10 inculpatory information and that is in the possession of
11 the district attorney or by extension the police
12 department, and I just want everybody on notice that I
13 expect that evidence pertaining to this case will be
14 reviewed with a metaphorical fine tooth comb, and we'll
15 not have any similar occurrence when the case is reset
16 for trial.

17 Carol, if you can let the jury commissioner
18 know to excuse the jurors.

19 The Court, having granted the continuance,
20 notes a new speedy trial date of September 8th, 2022.
21 And it's not ideal, but I simply don't have any place to
22 slot this trial because of the COVID backup and the fact
23 that I'm set with anywhere between two to six cases per
24 week through mid August including on each of those weeks
25 except for next week, and I don't think next week would

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1 give you enough time to be prepared, Mr. Muhaisen?

2 MR. MUHAISEN: Absolutely not.

3 THE COURT: All right. That's the only other
4 option I have, but I have either a first-degree murder
5 case, an attempted first-degree murder, sexual assault
6 or sexual assault on a child case every single --
7 included in those two to five to six cases every week
8 per week until mid August. So the best date I can give
9 you, and I hope this will work with Mr. Muhaisen, is
10 August 23rd and I know that's close to speedy, but
11 that's the best I can do.

12 MR. MUHAISEN: Defense is available.

13 THE COURT: We'll set the case for two-week
14 trial beginning August 23rd, 2022. We'll set the case
15 for a pretrial conference on August 7th at 8:30.

16 The Court grants Mr. Muhaisen's request for
17 leave to request additional sanctions. I'm not saying I
18 will or won't grant them, but will certainly consider
19 additional sanctions once the appropriate people get to
20 the bottom of why something this significant with this
21 much information should raise -- should have raised it
22 less than 24 hours before trial and will consider any
23 other appropriate sanctions that may be indicated under
24 Rule 16.

25 Was there anything else the prosecution wanted

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1 for the record today?

2 MR. DILLON: Only that, Judge, I did not mean
3 to be ambiguous in any way. It is my responsibility.
4 So the Court's anger and its frustration should be
5 directed at me, as I agreed to take on this case. So in
6 your communications with my boss, Ms. McCann, I want to
7 be clear this was my responsibility and the -- these
8 things not happening timely is my fault.

9 THE COURT: Well, yes and no, Mr. Dillon, in
10 the sense I know you just got assigned or took over the
11 case in February. This is stuff that -- those who were
12 previously involved in the case including Ms. Drasan,
13 Ms. Forest, as I said, there's -- there are only two
14 possible explanations, and I think those were the two
15 primary attorneys involved in the case. Ms. Forest and
16 Ms. Drasan, neither who are still with the Denver
17 District Attorney's Office, but there are only two
18 possible explanations that I see.

19 Explanation number one is that the written
20 reports weren't read, and the discovery wasn't reviewed
21 to realize that things as significant as a 22-minute
22 interview of an alleged victim who will be testifying in
23 the case hadn't been discovered, and that is either
24 sloppiness or simply not doing your job in terms of not
25 even bothering to read the discovery on a case where the

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1 prosecution is attempting to convict Mr. Estes of
2 charges which if convicted of, will likely result in
3 incarceration for the remainder of his life. I find
4 that inexcusable. I appreciate you acknowledging your
5 responsibility and I'm not disagreeing with you,
6 Mr. Dillon, I agree.

7 But I think this case reflects that
8 Mr. Estes's first appearance before this Court was on
9 November 23rd, 2020, a year and a half ago. And there's
10 absolutely nothing that in my mind were those in
11 references are in the reports but the actual interviews,
12 body-worn camera, surveillance, photographs, all of
13 that, were not obtained until less than 24 hours before
14 trial. Doesn't just fall on your shoulders.

15 Was there anything the defense wanted for the
16 record?

17 MR. MUHAISEN: Your Honor, what was the
18 pretrial conference you said?

19 THE COURT: August 7th at 8:30, but if that
20 doesn't work with you, I will reset that.

21 MR. MUHAISEN: If I'm not mistaken, that's a
22 Sunday.

23 THE COURT: I'm sorry. It may be. I don't
24 have the August calendar up, so I was looking on my
25 phone.

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1 MR. MUHAISEN: Monday --

2 THE COURT: I was looking at 2023. I
3 apologize. That would be August 8th. Thank you for
4 catching that and correcting me.

5 Let me make sure I didn't mess up. August
6 23rd is a Tuesday. So that will be our trial date.
7 Thank you, folks.

8 (The proceedings concluded at 9:41 a.m.)

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