

COLORADO SUPREME COURT  
2 East 14<sup>th</sup> Avenue  
Denver, Colorado 80203

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Original Proceeding under C.A.R. 21

Arapahoe County District Court, No. 06CR697  
Hon. Gerald Rafferty, District Judge

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**IN RE:**

**PEOPLE OF THE STATE OF COLORADO,**  
Plaintiff-Respondent

v.

**ROBERT RAY,**  
Defendant-Petitioner

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**Case No. 2013SA94**

**BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL  
DEFENSE LAWYERS AND COLORADO CRIMINAL DEFENSE BAR IN  
SUPPORT OF PETITIONER**

**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief complies with the requirements of C.A.R. 28, 29, and 32, including all applicable formatting requirements set forth in these rules. The brief complies with the word-limit requirement of C.A.R. 28, as it contains 3,938 words.

/s/Blain D. Myhre  
Blain D. Myhre  
*signed original maintained at  
the office of Blain Myhre LLC*

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## I. STATEMENT OF INTEREST OF *AMICI CURIAE*

*Amicus curiae* National Association of Criminal Defense Lawyers

(NACDL) is a nonprofit voluntary professional bar association that seeks to ensure justice and due process for persons accused of crime or misconduct. NACDL, founded in 1958, has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. Its members also include military defense counsel, law professors, and judges. The American Bar Association recognizes NACDL as an affiliated organization and awards it representation in its House of Delegates.

NACDL is dedicated to advancing the proper and efficient administration of justice in all criminal proceedings, including post-conviction matters. NACDL files numerous briefs each year in the United States Supreme Court and other courts throughout the nation, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, defense lawyers, and the criminal justice system as a whole.

*Amicus curiae* Colorado Criminal Defense Bar (CCDB), formed in 1979, is a nonprofit organization with over 800 members. CCDB is an organization of criminal defense practitioners, including attorneys, paralegals, and investigators in

both the public and private sectors, who are dedicated to the effective representation of criminal defendants.

CCDB works to ensure that the criminal justice system embraces the principles of liberty, justice, and equality. CCDB promotes policies and laws that safeguard criminal defendants from injustice and ensure that persons charged with or convicted of crimes are treated fairly, equitably, and humanely. CCDB also provides training and support to practitioners and has recently presented continuing legal education programs on the duties and obligations of post-conviction attorneys.

CCDB and NACDL have a particular interest in these cases because there is a crucial need for discovery in post-conviction proceedings, in order to ensure post-conviction proceedings are conducted fairly and to provide confidence in the integrity of proceedings and their outcomes.

## **II. SUMMARY OF ARGUMENT**

Crim. P. 16 applies and should apply in post-conviction proceedings in Colorado. The prosecution's duty to disclose potentially exculpatory material continues after conviction and throughout post-conviction proceedings. At the same time, post-conviction counsel must render effective assistance, which includes the duty to fully investigate the case and not simply rely on the record

previously made. In order to fulfill this duty, post-conviction counsel must be able to engage in reasonable discovery. Applying Crim. P. 16 in post-conviction proceedings ensures that post-conviction counsel can fully investigate the case and thereby render effective assistance of counsel.

Crim. P. 16 provides certainty, consistency, and efficiency in post-conviction proceedings. It enables the parties and the courts to know exactly what their rights and obligations are with regard to disclosing material in post-conviction proceedings. It ensures that all courts will apply the same standards to post-conviction disclosure and discovery. It promotes efficiency because the courts and counsel in Colorado are used to applying it in criminal cases, and applying it in post-conviction matters reduces unnecessary discovery and disclosure litigation.

Applying Crim. P. 16 helps to ensure the fundamental fairness of the criminal justice system and thereby protects the integrity of that system.

### **III. ARGUMENT**

Crim. P. 16 applies and should apply to post-conviction proceedings. This court has held that the rules of criminal procedure apply to post-conviction proceedings. No sound basis exists for excluding Crim. P. 16 from post-conviction matters.

The prosecution's duty to disclose potentially exculpatory material continues

after conviction and remains ongoing throughout post-conviction proceedings. That duty should not be diminished or diluted in post-conviction matters. Indeed, many seminal cases have granted post-conviction relief based on material discovered or turned over after conviction. Permitting the prosecution to turn a blind eye to concealment of potentially exculpatory material simply because a conviction has been obtained is antithetical to the integrity of the judicial system and its principles of fundamental fairness in the administration of criminal justice. The prosecution's brief essentially ignores these principles.

Post-conviction matters should not be a game of "hide-and-seek." *See Garcia v. Dist. Ct.*, 589 P.2d 924, 930 (Colo. 1979) (the "trial of a criminal case is not a game of fox and hounds in which the state attempts to outwit and trap a quarry"); *see also Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976) ("after a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction"). As the Supreme Court concluded in *Brady v. Maryland*, 373 U.S. 83, 87 (1963), "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Amici* therefore encourage this court to take a broad view of post-conviction discovery and disclosure in order

to ensure fundamental fairness to defendants, protect the integrity of the judicial system, and inspire public confidence in the criminal justice system and its outcomes.

**A. Applying Crim. P. 16 in post-conviction proceedings ensures that post-conviction counsel can fully investigate the case and thereby render effective assistance of counsel.**

The Colorado General Assembly “has recognized the inherent infirmity in an unconstitutional conviction by granting every person convicted of a crime the right to make application for post-conviction review, notwithstanding the fact that no appeal was taken from the conviction or, if taken, that the appeal was unsuccessful.” *People v. Germany*, 674 P.2d 345, 350 (Colo. 1983), citing C.R.S. § 18-1-410(1). Section 18-1-410(1) provides that “*every* person convicted of a crime is entitled *as a matter of right*, to make applications for postconviction review.” (Emphasis added.)

The statutory right to post-conviction review in Colorado necessarily implies the need for post-conviction counsel to be effective. In *Silva v. People*, 156 P.3d 1164 (Colo. 2007), this court held that a limited statutory right to post-conviction counsel exists, and that “to give meaning to this limited statutory right, postconviction counsel must provide effective assistance of counsel as measured by the *Strickland* standard.” *Id.* at 1167. In order for post-conviction counsel to

render effective assistance, counsel must have the ability to fully investigate the case and circumstances surrounding the conviction. To fully investigate the case, post-conviction counsel must have the ability to engage in discovery.

The United States Supreme Court has recognized that “[i]neffective-assistance claims often depend on evidence outside the trial record.” *Martinez v. Ryan*, 132 S. Ct. 1309, 1318 (2012); *see also Trevino v. Thaler*, 133 S. Ct. 1911, 1917-18 (2013). *Martinez* emphasized that claims of ineffective assistance at trial “often require investigative work and an understanding of trial strategy.” 132 S. Ct. at 1317. Thus, for post-conviction counsel to fulfill their duty to give effective assistance, they must have the ability to engage in a meaningful post-trial investigation. Without some means for conducting post-conviction discovery, that ability is severely hampered.

The American Bar Association has also recognized the need for discovery in post-conviction proceedings: “Discovery techniques, specially adapted for postconviction proceedings, should be utilized for assistance in advancing a case toward disposition by exploring and narrowing issues of fact.” ABA Criminal Justice Standards Relating to Post-Conviction Remedies § 22-4.5(a). The ABA standard notes that an “effective procedure should be established for the production of documents, including the relevant parts of the transcript of the original trial, or

tangible things, for taking depositions of witnesses, and for the service of requests for admissions or written interrogatories on the opposing party.” Standard 22-4.5(a)(ii).

While the People complain about “abuses” of post-conviction discovery—without providing record support and without any findings by the trial court—the People must acknowledge that this court has recognized that post-conviction counsel has the obligation to thoroughly investigate the case and cannot simply rely on the existing record. In *In re People v. Ray*, 252 P.3d 1042, 1049 (Colo. 2011), this court noted, “[p]ost-conviction counsel in a death penalty case must ‘continue an aggressive investigation of all aspects of the case.’ ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 10.15.1(E)(4) (2003).” The court explained, “[p]ost-conviction counsel cannot rely on the record because: (1) trial counsel may not have conducted an adequate investigation; (2) the prosecution may have concealed evidence; (3) witnesses may have falsely testified; (4) and the forensic evidence may have been inadequate. . . . Therefore, post-conviction counsel must reinvestigate the facts underlying the conviction and sentence, the mitigating evidence, and trial counsel's performance.” 252 P.3d at 1049; *see also Silva*, 156 P.3d at 1169 (post-conviction counsel must at least be minimally effective in order to give any meaning to the limited statutory

right to post-conviction counsel, and therefore the *Strickland* test applies to post-conviction counsel).

Post-conviction counsel's obligation to investigate the entire case must include looking outside the record. *See Martinez*, 132 S. Ct. at 1318; *Trevino*, 133 S. Ct. at 1917-19. Therefore, post-conviction counsel *must* engage in discovery outside the record in order to properly discharge the duty to aggressively investigate all aspects of the case. Without the ability to conduct such discovery, post-conviction counsel cannot fully discharge that duty. Accordingly, post-conviction discovery must be permitted.

The simplest and most common sense method for permitting such discovery is to apply Crim. P. 16 to post-conviction proceedings. The People recognize that, under *Bresnahan v. District Court*, 434 P.2d 419 (Colo. 1967), the Rules of Criminal Procedure apply to post-conviction proceedings. Answer Brief at 15; *see also People v. Hickey*, 914 P.2d 377, 379 (Colo. App. 1995) (same); Crim. P. 1 (“These Rules govern the procedure in all criminal proceedings in all courts of record with the exceptions stated in Rule 54.” Rule 54 does not except post-conviction proceedings). But the People assert that Crim. P. 16 relates only to “trial” proceedings and thus does not apply in post-conviction matters. Answer Brief at 15-16.

Applying Crim. P. 16 to post-conviction proceedings will help ensure that post-conviction counsel is able to fully investigate the case and thereby render effective assistance of counsel. *See Silva and Martinez, supra.* Crim. P. 16 recognizes a continuing duty to disclose. *See* Crim. P. 16(III)(b). Under the People’s view, however, that obligation ceases after trial. This “shut-the-door” policy is contrary to the view, expressed by both the Supreme Court and this court, that criminal prosecutions should not be “a game of fox and hounds.” While the trial court certainly must have discretion to control and police discovery, to leave the right to discovery solely to judicial fiat (*i.e.*, leaving it solely to the trial court’s exercise of its inherent authority) fails to provide an even-handed, consistent policy and creates the danger of disparate treatment of post-conviction defendants. To ensure uniformity and fundamental fairness to defendants in post-conviction matters, concrete standards and procedures must be employed. Applying Crim. P. 16 in post-conviction proceedings accomplishes that.

Post-conviction and habeas cases illustrate the need for discovery procedures. In *Banks v. Dretke*, 540 U.S. 668 (2004), the Supreme Court granted habeas corpus relief to a death row inmate where the prosecution had concealed impeachment evidence that showed a key prosecution witness had been a paid police informant. That information was never disclosed by the state before or

during trial. It was only during discovery and an evidentiary hearing authorized by the federal court in the habeas proceeding that the long-suppressed evidence came to light. *See* 540 U.S. at 675. Without the discovery, that evidence may never have seen the light of day, and habeas relief might thereby have been denied, possibly leading to the defendant's execution with the evidence remaining concealed. Such potential outcomes cannot be tolerated if the judicial system is to maintain its integrity and fundamental fairness.

As the Supreme Court noted in *Banks*, a rule “declaring ‘prosecutor may hide, defendant must seek,’ is not tenable in a system constitutionally bound to accord defendants due process.” 540 U.S. at 696. Thus, prosecutors have an ongoing duty to disclose exculpatory material after conviction at trial. Permitting post-conviction defense counsel to engage in reasonable discovery serves to ensure that prosecutors fulfill this duty, that defense counsel discharge their duty to fully investigate the case and not simply rely on the existing record, and that post-conviction proceedings are fair and thorough.

*Kyles v. Whitley*, 514 U.S. 419 (1995), also illustrates the need for post-conviction discovery. In that case, the Supreme Court noted that under *Brady*, the state's obligation to disclose evidence favorable to the defense turns on the cumulative effect of all such evidence suppressed by the government. The Court

held in *Kyles* that “the prosecutor remains responsible for gauging that effect regardless of any failure by the police to bring favorable evidence to the prosecutor’s attention.” *Id.* at 421.

In *Kyles*, after direct appeal, during state collateral review, it was discovered that the state had failed to disclose evidence favorable to the defense. The Supreme Court granted habeas relief to the defendant, who had been sentenced to death. Following habeas relief, the state re-tried *Kyles* several times, but after several mistrials ultimately abandoned the effort to prosecute him. Had the disclosed evidence not come to light, *Kyles* likely would have been executed. The need for discovery as a safeguard to ensure that all favorable evidence comes to light could not be more apparent. As the Court in *Kyles* noted, “Unless, indeed, the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial’s outcome as to destroy confidence in its result.” *Id.* at 439.

*Kyles* also noted the salutary effect of imposing the obligation on prosecutors: “This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. . . . This is as it

should be. Such disclosure will serve to justify trust in the prosecutor as ‘the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.’ *Berger v. United States*, 295 U.S. 78, 88, 79 L. Ed. 1314, 55 S. Ct. 629 (1935). And it will tend to preserve the criminal trial, as distinct from the prosecutor’s private deliberations, as the chosen forum for ascertaining the truth about criminal accusations.” 514 U.S. at 439-40; *see also Smith v. Cain*, 132 S. Ct. 627 (2012) (reversing conviction for *Brady* violation of failing to disclose detective’s notes containing impeachment material).

Thus, case law demands disclosure. It is common sense, therefore, for defined procedures to be in place to facilitate full disclosure, including post-conviction discovery, to ensure that both the process and the results obtained are fair and reliable. The integrity of the criminal justice system is at its highest when all parties and the public can have confidence that the results are accurate and the process fair.

In a previous death sentence case, this court addressed the need for disclosure of possibly exculpatory evidence. *People v. Rodriguez*, 786 P.2d 1079 (Colo. 1989). There, this court noted, “In a capital case, there is a strong presumption that possibly exculpatory evidence should be given to the defendant.”

*Id.* at 1082. Evidence should be disclosed even if the trial court concludes the evidence is not material, if the prosecution has not shown a compelling interest to withhold it. *Id.* at 1082, citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 59-61 (1987). In a later proceeding in the same case, this court ordered that the “possibly exculpatory evidence must be disclosed to the defense.” *People v. Rodriguez*, 794 P.2d 964, 964 (Colo. 1990).

Similarly, in *People v. Tenneson*, 788 P.2d 786 (Colo. 1990), this court concluded that “in order to achieve constitutional validity, a capital sentencing scheme must allow the sentencing body to consider any relevant mitigating evidence regarding the defendant’s character and background and the circumstances of the offense.” *Id.* at 790.<sup>1</sup> As part of achieving such validity, all evidence that is potentially exculpatory or mitigating must be given to the defense. To ensure that the post-conviction process as a whole is fair and open, discovery consistent with Crim. P. 16’s procedures should be permitted in post-conviction proceedings.

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<sup>1</sup> In capital cases, *Brady* is not limited to questions of guilt or innocence but includes any material that could lessen the defendant’s sentence.

The state's duty to disclose is ongoing and continues throughout all stages of the judicial process. *See, e.g., Whitlock v. Brueggemann*, 682 F.3d 567, 588 (7<sup>th</sup> Cir. 2012) (*Brady* continues to apply to an assertion that one did not receive a fair trial because of the concealment of exculpatory evidence known and in existence at the time of trial); *Smith v. Roberts*, 115 F.3d 818, 820 (10<sup>th</sup> Cir. 1997) (“the duty to disclose is ongoing and extends to all stages of the judicial process”); *High v. Head*, 209 F.3d 1257, 1265 (11<sup>th</sup> Cir. 2000) (state's duty to disclose exculpatory material is ongoing); *State v. Bennett*, 81 P.3d 1, 9 (Nev. 2003) (state's affirmative duty to provide favorable evidence “exists regardless of whether the State uncovers the evidence before trial, during trial, or after the defendant has been convicted”). To protect the integrity of the process, post-conviction discovery is necessary to ensure compliance with this duty.

Applying Crim. P. 16 in the post-conviction setting is consistent with principles from state and federal case law to require disclosure of potentially exculpatory and mitigating evidence and the requirement that post-conviction counsel render effective assistance. Applying Crim. P. 16 causes no hardship but benefits the system as a whole, not only by enhancing the integrity of the system and public confidence in it, but also because it provides certainty, consistency, and efficiency in post-conviction proceedings.

**B. Applying Crim. P. 16 in post-conviction proceedings provides certainty, consistency, and efficiency.**

The beneficial effects of a defined procedure for post-conviction discovery cannot be overstated. Under the People’s approach, post-conviction discovery is left to the “inherent authority” of the trial court, thus leading to an ad hoc, case-by-case approach that will vary greatly from case to case and from judge to judge. Ironically, the People’s approach inevitably will lead to greater litigation over post-conviction discovery and disclosure precisely because the ad hoc approach lacks defined procedures or guidelines for the courts or counsel. Applying Crim. P. 16, a well-known, routine procedural rule, to post-conviction matters avoids such problems and aids the post-conviction process.

First, applying Crim. P. 16 enables the parties, counsel, and the courts to know exactly what their rights and obligations are with regard to disclosing material in post-conviction proceedings. Prosecutors and defense attorneys in Colorado are used to complying with the rule. Trial courts know it and use it every day. Thus, applying the rule in post-conviction matters works no great hardship on anyone in post-conviction matters. Instead, it provides certainty and familiarity to the parties in post-conviction proceedings.

Second, applying Crim. P. 16 leads to greater consistency. All courts will apply the same standards to post-conviction disclosure and discovery. Leaving post-conviction disclosure and discovery solely to the trial court's discretion, without providing any guidance to the court on how to exercise that discretion will lead to widely varying, and unequal, discovery during post-conviction proceedings. This ad hoc approach is a recipe for inconsistency and an increase in litigation in both the trial and appellate courts, as any guidance from the appellate courts will have to develop solely on a case-by-case basis. Criminal procedure in Colorado (as elsewhere) benefits greatly by having uniform rules and guidance for the lower courts in how to address criminal procedures from first appearance through post-conviction matters. Implementing such uniform procedures in the post-conviction process helps protect the defendants' rights to post-conviction review. *See* C.R.S. § 18-1-410 and Crim. P. 35.

Under an ad hoc approach, consistency is lacking, which means similarly-situated defendants will be treated differently simply by being before different judges or being opposed by different prosecutors. Uniformity is vital to the integrity of the process and to the public's perception of whether the system is fair. Applying Crim. P. 16 in post-conviction matters gives that uniformity and helps eliminate arbitrarily disparate treatment of defendants. It thereby provides a fair

and level playing field for defendants, which in turn makes the results of the post-conviction process more reliable—a benefit not only to Colorado’s post-conviction scheme, but also to federal habeas review of Colorado cases.

As this case illustrates, having concrete procedures for disclosure and discovery in post-conviction matters will also improve litigation efficiency. Here, the parties are vigorously litigating numerous issues of discovery and disclosure. Were concrete procedures in place to define the parties’ rights and obligations, much of this litigation might be avoided. That is not to say that all discovery or disclosure litigation would be eliminated. But it would focus that litigation on core issues of real dispute—disputes that raise legitimate questions of materiality, safety, work product, and the like, rather than disputes that are targeted at finding and obtaining guidance from the trial court on the scope of discovery and disclosure obligations. Defining procedures by rule, rather than defining them through piecemeal, ad hoc hearings in a busy trial court is infinitely more efficient. That is precisely why this court has adopted and promulgated the Rules of Criminal Procedure.

Applying Crim. P. 16 to post-conviction matters also has the salutary effect of erring on the side of disclosure, and thereby eliminating a lot of guesswork for prosecutors. As the Supreme Court noted, the “prosecutor anxious about tacking

too close to the wind will disclose a favorable piece of evidence.” *Kyles*, 514 U.S. at 439. The goal of having the prosecution be liberal in its disclosures, particularly on “close-calls,” is to be encouraged. *See id.* at 440 (“The prudence of the careful prosecutor should not therefore be discouraged”). Giving the prosecution rules to follow and abide by goes a long way to taking the guesswork out of the decision whether to disclose or not, and leads to greater efficiency.<sup>2</sup>

#### IV. CONCLUSION

The ultimate goal of the criminal justice system is to search for and find the truth as fairly and consistently as possible. Convictions obtained after fair procedures, full disclosures, and protection of defendants’ rights are an indicator of the strength and integrity of the system. Where the system fails to implement such fair processes, or allows defendants to be treated differently depending on the whim of the prosecution or trial judge, the system itself fails. The need for fair discovery and disclosure in post-conviction proceedings is not simply another tactic for defendants to employ. Instead, it is a process necessary to ensure the fundamental fairness of the criminal justice system. Without it, the integrity of the

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<sup>2</sup> Also, if Crim. P. 16 were not to apply to post-conviction proceedings, then the prosecution would have no codified work-product privilege post-trial, which would have the potential to cause havoc in post-conviction proceedings. Conversely, applying Crim. P. 16 gives the prosecution that privilege and the certainty the courts and the parties need in that regard.

system suffers. With such a process, however, the integrity is sound and the public may be confident that the process rests on notions of fundamental fairness, based on fairly-applied regulations and procedures.

*Amici Curiae* therefore encourage the court to apply Crim. P. 16 to this and other post-conviction proceedings in Colorado to ensure that the post-conviction process is fundamentally fair, and to improve the certainty, consistency, and efficiency of that process. Accordingly, *Amici* ask the court to make the rule to show cause absolute.

Respectfully submitted this 19<sup>th</sup> day of July, 2013.

/s/Blain D. Myhre

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**Attorneys for Amici**

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the office of Blain Myhre LLC*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 19<sup>th</sup> day of July, 2013, a true and correct copy of the above and foregoing **BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND COLORADO CRIMINAL DEFENSE BAR IN SUPPORT OF PETITIONER** was served upon the following via ICCES (if available) or via email:

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