DISTRICT COURT, ALAMOSA COUNTY, COLORADO, 8955 Independence Way Alamosa, CO 81101 THE PEOPLE OF THE STATE OF COLORADO Plaintiff, v. BARRY LEE MORPHEW, Defendant.	DATE FILED April 13, 2026 10:00 PM ▲ COURT USE ONLY ▲
JANE FISHER-BYRIALSEN, #49133 FISHER & BYRIALSEN, PLLC 4600 S. Syracuse Street, 9th Floor Denver, CO 80237 (202)256-5664 Jane@fblaw.org DAVID BELLER, #35767 RECHT KORNFELD, P.C. 1600 Stout Street, Suite 1400 Denver, CO 80202 (303)573-1900 Fax: (303) 446-9400 david@rklawpc.com	Case Number: 25 CR 128

[D-026] MOTION FOR DISCOVERY AND ONGOING FULL DISCLOSURE OF ANY RECORDS, MATERIALS, OR INVESTIGATION OF PROSPECTIVE JURORS

Barry Morphew, through undersigned counsel, moves this Court to require that the prosecution provide to defense counsel any materials, reports, notebooks, or other information regarding prospective jurors that the prosecution has obtained or will obtain, including but not limited to criminal histories, record of service for either voir dire or service on a sitting jury, relationships or acquaintances with members of the prosecutorial team or prosecutorial offices or those of the prosecutor's agents, whether on a social, professional or other basis, and any other information regarding the prospective jurors that is in the possession or control of the prosecution or its agents, including any "good or bad juror lists," "previously-served lists" or the equivalent. AS GROUNDS, Mr. Morphew states:

1. The prosecutors and their staff and agents, and many of the investigators and others associated with the prosecutor's team, have long-standing ties with the Alameda County community and the broader community in this Judicial District.

2. The prosecution has a vast number of taxpayer-funded resources that it may use to investigate prospective jurors. In addition, the prosecution may use those same taxpayer-funded resources to develop information within its office about prospective jurors, prior service of jurors, criminal histories, and other information that it intends to use to assist it in its attempt to obtain jurors who would be favorable to the prosecution and to entering a conviction.

3. This Court has inherent authority to order the prosecution to share its information with the defense in order to ensure a fair jury selection process and seating of a fair and impartial jury, as well as to ensure that Mr. Morphew could intelligently utilize his peremptory challenges.

4. The right to exercise peremptory challenges, provided by Colorado statutes and long-standing caselaw, has been called "one of the most important of the rights secured to the accused," *Swain v. Alabama*, 380 U.S. 202, 219 (1965), quoting *Pointer v. United States,* 151 U.S. 396, 408 (1894).

5. The Colorado Supreme Court has ruled that the State has no special right to the results of its investigations of prospective jurors and that "defense attorneys are entitled to obtain this type of information from the prosecution in accordance with Colo.Crim.P. Rule 16(c) if such information is in the possession of the prosecution. The requirements of fundamental fairness and justice dictate no less." *Losavio v. Mayber*, 178 Colo. 184, 190, 496 P.2d 1032, 1035 (1972).

6. In *Losavio v. Mayber*, the Public Defender in Pueblo requested that the Sheriff provide to them the same information that was provided to the District Attorney, and the Supreme Court ruled that the Public Defenders were entitled to it:

> [T]hey [the public defenders] were seeking no more from these records than what was provided to the district attorney. As thus framed, the request of the petitioners is eminently reasonable, just and fair. In our view, the reasons advanced for denying these annotated lists of prospective jurors to the public defender's office, or, for that matter, to any defense attorney, are completely devoid of merit.
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> Once these lists are given to the prosecution, they can no longer be classified as 'internal matters,' or as affecting only the internal operations of the police department. [citations]. Neither are they in any conceivable way 'work product.'

Losavio v. Mayber, 178 Colo. 184, 188-89, 496 P.2d 1032, 1034 (1972).

7. Underpinning the Colorado Supreme Court's ruling in *Losavio v. Mayber* is the concern that the prosecution does not have the upper hand simply because it is the prosecution:

> The not altogether unspoken assumption underlying the position of the district attorney and the chief of police appears to be the unwarranted view that the employees of the public defender's office would use these lists in some improper or illegal manner. Not only are both the district attorney's office and the public defender state agencies, but, far more importantly, the attorneys employed by both offices are members of the bar of this state and officers of the court. Therefore, all have an ethical and legal duty to use any such information in an ethical and legal manner. There is absolutely no more basis for an assumption by this court or by the trial court that the public defender would make any improper use of the information than there is for assuming that the district attorney would make any such improper use. In this respect, the two offices must be treated as equals, each having the same ethical and legal responsibilities to the court and to the public at large. As to the extracted information, both the district attorney and the public defender are likewise to be treated as equals.

Losavio v. Mayber, supra, at 189, 496 P.2d at 1034-35.

8. Other state courts have also exercised their inherent authority to counterbalance the unfair advantage that comes with the prosecution's ability over time to marshal taxpayer resources for this purpose. In *People v. Murtishaw,* 29 Cal.3d 733, 175 Cal.Rptr. 738, 631 P.2d 446 (1981), the California Supreme Court ruled that the defense was entitled to information concerning the jurors in the hands of the prosecution and law enforcement agencies. In Murtishaw, the trial court denied the defendant's motion for discovery of prosecutorial investigations of prospective jurors. Despite the district attorney's acknowledgement "that his office had conducted field investigations of prospective jurors and maintained records showing how the jurors had voted in prior cases and whether they had arrest records," the trial court denied the defendant's motion. On review, the California Supreme Court observed that

> [w]hen courts ... deny defendants who cannot afford similar investigations access to the prosecutor's records, the result is that prosecutors in case after case will have substantially more information concerning prospective jurors than do defense counsel. Such a pattern of inequality reflects on the fairness of the criminal process.

Id., 29 Cal.3d at 766–767, 175 Cal.Rptr. at 757, 631 P.2d at 465. Accordingly, the court held that in future cases trial courts would have "discretionary authority to permit defense access to jury records and reports of investigations available to the prosecution." *Ibid. See also State v. Bessenecker*, 404 N.W.2d 134 (Iowa 1987), in which the Iowa Supreme Court – relying in part

on the Colorado Supreme Court's decision in *Losavio v. Mayber* – also favored disclosure to the defense:

> We agree with the reasoning of those courts that generally have allowed defendants equal access to jurors' rap sheets obtained by the county attorney. We believe that considerations of fairness and judicial control over the jury selection process requires this result.

Id., at 138. Other states agree with Colorado. S*ee also e.g. State v. Second Jud. Dist. Ct. in & for Cty. of Washoe*, 134 Nev. 770, 431 P.3d 47 (2018) (upon a motion by the defense, the district court must order the State to disclose any venire member criminal history information it acquires from a government database that is unavailable to the defense); *State v. Bessenecker*, 404 N.W.2d 134, 138 (Iowa 1987) ("[C]onsiderations of fairness and judicial control over the jury selection process requires" the if the prosecution obtains a court order permitting it to obtain the rap sheet of a prospective juror, the prosecution must share that with the defense.); *Commonwealth v. Smith,* 350 Mass. 600, 215 N.E.2d 897, 901 (1966) ("The public interest in assuring the defendant a fair trial is, we think, equal to the public interest in assuring such a trial to the Commonwealth," so the results of a police investigation into jurors should be provided to the defense as well.); *Com. v. Cousin,* 449 Mass. 809, 818, 873 N.E.2d 742, 750 (2007) (If the prosecutor checks jurors' criminal records, the information must be shared immediately with defense counsel.); *State v. Goodale,* 144 N.H. 224, 740 A.2d 1026, 1031 (1999) (fundamental fairness requires that official information concerning prospective jurors utilized by the State in jury selection be reasonably available to the defendant).

9. Commentators also agree, as in, for example, this statement by Ira P. Robbins, the Barnard T. Welsh Scholar and Professor of Law and Justice, at the Washington College of Law at American University:

> The judicial system in the United States is adversarial. Particularly in criminal cases, when prosecutors, who already hold enormous power, are permitted to put their thumbs on the scale of justice during jury selection, the entire system suffers--the rights of potential jurors, the rights of the defendant, the reliability of the outcome of the proceedings, and the appearance of justice.

Ira P. Robbins, "*Bad Juror" Lists and the Prosecutor's Duty to Disclose*, 22 Cornell J.L. & Pub. Pol'y 1, 52 (2012). Based on *Losavio v. Mayber*, Robbins accurately places Colorado on the list of states that provide for full disclosure and urges other states to follow suit.

10. Courts that have required disclosure to the defense of the prosecution's "bad juror lists" or similar documents have done so rightfully, because the entire purpose of these lists is to

“exclude particular citizens from jury service,” and “[n]ot only does this practice interfere with an open and fair jury-selection process, thus implicating a defendant's right to be tried by a jury of his or her peers, but it also violates potential jurors' rights to serve in this important capacity.” Ira P. Robbins, *supra*, at 51.

11. Protecting the prosecutor’s right to investigate prospective jurors and keep private its dossiers on them creates the untoward image of a system in which the opportunity to rationally exercise peremptory challenges and the ability to uncover prospective juror bias or respond to allegations of it made by the prosecution are heavily weighted toward the prosecution.[1] Placement of a thumb on the prosecution’s side of the scale is repugnant to the most fundamental principles attendant to the right to due process.

12. When a prosecutor conceals information about a juror's biases (or lack thereof), the prosecutor violates his or her obligations pursuant to the Due Process Clause of the State and federal constitutions, as well as the principles of equal access to justice and the right to defend life that underlie Article II, Sections 3 and 6 of the Colorado Constitution. Because there is neither a compelling governmental interest nor a rational reason to permit the prosecution access to this information but not defense counsel, the practice would also violate the equal protection and substantive and procedural due process clauses.

13. The logic of *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, and *Losavio v. Mayber, supra*, support this request, and there are no legitimate countervailing reasons to deny it. As the United States Supreme Court stated in another context, “the State's inherent information-gathering advantages suggest that if there is to be any imbalance in discovery rights, it should work in the defendant's favor.” *Wardius v. Oregon*, 412 U.S. 470, 475 n. 9 (1973).

14. The fact that a jury questionnaire is provided is not dispositive. One aspect of the right to a fair and impartial jury is the defendant’s right to challenge a juror for cause if the juror has been dishonest on the jury questionnaire. In *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), the Court held that the failure of a juror to correctly answer a question during voir dire may entitle a defendant to a new trial, provided the defendant shows both that the juror failed to answer honestly a material question on voir dire and that an accurate or correct response would have provided a valid basis for a challenge for cause. *Accord, Black v. Waterman*, 83 P.3d 1130 (Colo. App. 2003); *People v. Rudnick*, 878 P.2d 16 (Colo. App. 1994). As Justice O’Connor wrote in her concurring Opinion in *Greenwood*: “I also agree that, in most

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[1] There is no question that the defense has the authority and responsibility to investigate the prospective jurors. This practice goes back to pre-colonial days and is deeply rooted in constitutional tradition. See, e. g., 4 W. Blackstone, <u>Commentaries</u> 351-352 (1778), citing early statutes. This motion merely raises the question of whether the prosecution must share the results of its investigation with defense counsel.

cases, the honesty or dishonesty of a juror's response is the best initial indicator of whether the juror in fact was impartial." *Greenwood, supra*, at 556-557 (O'Connor, J., concurring).

15. This Court has an independent interest in protecting the integrity of the jury system. This Court can and should order the prosecution to share its discovery about the background of venirepersons with the defense. This Court's sense of fundamental fairness requires placing Mr. Morphew's counsel upon an equal footing by requiring disclosure of the prosecutor's investigatory reports, dossiers, "bad juror lists" or the equivalent, records of prior service of prospective jurors, notebooks, and other such material regarding the prospective jurors.

16. Mr. Morphew makes this motion, and all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, as a continuing objection based upon (in addition to the above authority) the following grounds and authorities: the due process, trial by jury, right to counsel, equal protection, equal access to and administration of justice, right to defend life, cruel and unusual punishment, confrontation, compulsory process, right to remain silent, and right to appeal clauses of the federal and Colorado Constitutions, and the first, fourth, sixth, eighth, ninth, tenth, and fourteenth amendments to the United States Constitution, and article II, sections 3, 6, 7, 10, 11, 16, 18, 20, 23, 25, and 28 of the Colorado Constitution, Crim. P. 16, RPC 3.8, CREs 401, 402, 403, 404, 608, 701, 702, 703, 801, 802, 901, and other applicable Rules of Evidence or Criminal Procedure. Mr. Morphew cross-references and incorporates by reference all pleadings filed or to be filed in this case, and caselaw cited therein and at oral argument.

Respectfully submitted this 13th day of April, 2026.

RECHT KORNFELD, P.C.

/s/ David Beller
David Beller, #35767

FISHER & BYRIALSEN, PLLC

/s/ Jane Fisher-Byrialsen
Jane Fisher-Byrialsen, #49133

Certificate of Service

I hereby certify that on April 13th 2026, I caused the foregoing to be filed with the Alamosa County District Court and a copy of the same to be served on the Alamosa County District Attorney's office via CCE-File Service.

/s/ Abby Clement
Paralegal at Fisher & Byrialsen PLLC