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| District Court, Arapahoe County, Colorado Arapahoe County Courthouse  7325 S. Potomac St., Englewood, CO 80112 DA | TE FILED: January 16, 2018 3:30 PM LING ID: E594DB9EE92DD  ASE NUMBER: 2017CR988   COURT USE ONLY  |
| THE PEOPLE OF THE STATE OF COLORADO, FI  Plaintiff C  v.  ANGELA INGA,  Defendant |
| Douglas K. Wilson, Colorado State Public Defender Sara S. Hildebrand, Deputy State Public Defender Att’y Reg. No. 45268  Arapahoe County Public Defenders 12350 E. Arapahoe Road, Suite A Centennial, CO 80112  Phone (303) 799-9001  Fax (303) 792-0822  E-[mail: sara.hildebrand@coloradodefenders.us](mailto:sara.hildebrand@coloradodefenders.us) | Case No. 17CR988  Division 309 |
| **DEFENSE #9**  **MOTION FOR FINDING OF SEVERAL RULE 16 VIOLATIONS AND FOR SANCTIONS, DUE TO AN ESTABLISHED PATTERN AND PRACTICE OF DISCOVERY VIOLATIONS** | |

Ms. Inga, by and through counsel, moves this Court to dismiss this case as a sanction for the District Attorney’s repeated failure to provide Ms. Inga discovery that Due Process and Rule 16 require, both in this case and in multiple other cases. In support of this motion, Ms. Inga states:

# I. Factual Background:

1. The original complaint and information was filed with the Court in this case on April 7, 2017.
2. On September 1, 2017, Ms. Inga entered a plea of not guilty in this case. It is currently set for a preliminary hearing and a motions hearing on January 17, 2018 and for trial to begin on February 5, 2018.
3. On December 1, 2017, the people sent Ms. Inga a copy of the only photos that were taken of Ms. Yurivilea-Arellana’s alleged injuries in this case, apparently taken when she made the police report back on April 6, 2017. That same day, the prosecution sent Ms. Inga’s counsel a copy of Dr. Cushing’s CV.
4. On December 21, 2017, Ms. Inga counsel received in discovery a copy of Dr. Kaplan’s CV and an email with an attachment that contains a list of the cases in which Dr. Kaplan has testified.
5. Also on December 27, 2017, the people moved to amend the complaint in this case by adding a crime of violence sentence enhancer count. Ms. Inga, through counsel, asked the court to set a preliminary hearing on the same date as the motions hearing in this case as a result of the court granting the people’s motion to add the crime of violence sentence enhancer.
6. On December 28, 2017, Ms. Inga, through counsel, filed a motion for an order that the prosecution disclose information in discovery related to any witness’s application for a U-Visa.
7. After undersigned counsel filed that motion, Ms. Hayden, who is prosecuting this case, indicated that her office was aware that Ms. Yurivilca-Arellana submitted a U-Visa application and that documentation related to that application would be sent over in discovery as soon as possible. No documentation related to that application has been received by Ms. Inga in discovery.
8. The district attorney’s office has not provided Ms. Inga with any documentation related to that or any other U-visa application.
9. To date, the prosecution has not provided Ms. Inga with criminal histories for any of the witnesses it endorsed in this case except Mirian Yurivilca-Arellana, the complainant in this case, and it did not provide Ms. Inga with all the information to which it has access about her, some of which is impeachment material. There was also no criminal history information in discovery for Bessy Betanco-Cruz, a purported eye witness to some alleged events in this case or for Silvia Reyes, the person who translated for Ms. Yurivilca-Arellana at the police station when a report was made in this case.

# LEGAL AUTHORITY

* 1. **COLO. R. CRIM. P. 16 and the U.S. and Colorado Constitutions Mandate**

**Production of Discovery to Protect a Defendant’s Constitutional Rights**

1. It is well-established that “ the suppression by the prosecution of evidence favorable to the an accused upon request violates due process when the evidence is material either to guilt or to punishment, irrespective of the good faith of bad faith of the prosecution.” *Brady v. Maryland*, 373 U.S. 83, 87 (1963).
2. In 1972, the United States Supreme Court clarified that *Brady* applies to evidence that undermines witnesses’ credibility. *Giglio v. United States*, 45 U.S. 150 (1972). *Wearry v. Cain,* 136 S. Ct. 1002, 1006 (2016).
3. In-fact, “[c[ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.” *People v. Bowman*, 669 P.2d 1369, 1374 (Colo. 1983) (citing *Davis v. Alaska*, 415 U.S. 308 (1974)).
4. In his guide to cross examination, *Cross Examination: Science and Techniques,* Larry Pozner writes:

One of the hallmarks of cross-examination is the act of impeachment. Cross examination exposes the weakness of the opposing party’s witness. One of the best methods to expose those weaknesses is through impeachment. There are many forms of impeachment, including bias, interest, prejudice, inconsistency with another witness, inconsistency with the physical evidence, cataloging things not done, inconsistency with common sense, and the revelation of omissions and inconsistent statements.

Pozner, Larry; Dodd, Roger. *Cross Examination: Science and Techniques; 2d ed.* (Lexis Nexis, 2004).

1. The prosecution must furnish a defendant with the items set forth in Part(I)(a)(1)(I) (includes statements of all witnesses), (IV) (any books, papers, documents, photographs or tangible objects held as evidence in connection with the case), (VII) and (VIII) of COLO. R. CRIM. P. 16(V)(a) as soon as practicable, but not later than 21 days after the defendant's first appearance at the time of or following the filing of charges, except that portions of such reports claimed to be non-discoverable may be withheld pending a determination and ruling of the court under Part III but the defense must be notified in writing that information has not been disclosed. Colo. R. Crim. P. 16 (I)(b)(1).
2. Rule 16 (I)(a)(1)(V) requires the prosecution to provide the defense with “[a]ny record of prior criminal convictions of the accused, any codefendant or any person the prosecuting attorney intends to call as a witness in the case.”
3. The prosecution must furnish all other information required under Colo. R. Crim. P. 16 (I)(a)(1) (items not specifically enumerated in subsection (I)(b)(1)) as soon as practicable, but not later than 35 days before trial. Colo. R. Crim. P. 16(I)(b)(3).
4. The prosecuting attorney shall disclose to the defense any material or information within his or her possession or control which tends to negate the guilt of the accused as to the offense charged or would tend to reduce the punishment therefor. Colo. R. Crim. P. (I)(a)(2).
5. The prosecuting attorney’s obligations under (16)(I)(a) “extend to material and information in the possession or control. . .of any others who have participated in the investigation or evaluation of the case and who either regularly report, or with reference

to the particular case have reported, to his or her office.” Colo. R. Crim. P. 16(I)(a)(3). Material in possession of the police is constructively in the possession of the prosecution. *People v. Lucero*, 623 P.2d 424, 430 (Colo. App. 1980).

1. Portions of reports claimed to be nondiscoverable may be withheld pending a determination and ruling of the court, but the defense must be notified in writing that information has not been disclosed. Colo. R. Crim. P. 16(I)(b)(1). *Accord, People v. Alberico*, 817 P.2d 573, 574 (Colo. App. 1991).
2. Any material, in the possession of law enforcement agencies that have participated in the investigation or provided reports concerning the case, is constructively in the "possession or control" of the prosecuting attorney under Crim. P. 16(I)(a)(1). *People v. District Court*, 793 P.2d 163, 167 (Colo. 1990) (the prosecuting attorney's obligations extend to material and information in the possession or control of his staff or others that have participated in the investigation*); Chambers v. People*, 682 P.2d 1173, 1180 n.13 (Colo. 1984); *People v. District Court*, 664 P.2d 247, 252 (Colo. 1983); *Ortega v. People*, 162 Colo. 358, 426 P.2d 180 (1967); *People v. Lucero*, 623 P.2d 424 (Colo. App. 1980); *Crim. P*. 16(I)(c).
3. The prosecution must make efforts to locate and deliver copies of this material to the defense and "[i]t is incumbent upon the prosecutor to promulgate and enforce rigorous and systematic procedures designed to preserve all discoverable evidence gathered in the course of the criminal investigation." *District Court*, 793 P.2d at 167; *Crim. P.* 16(I)(b)(4)
4. The prosecution has a duty to timely comply with its discovery obligations. Crim. P. 16(I)(b)(1); *see People v. Terry*, 720 P.2d 125, 130-31 (Colo. 1986). The constitutional right to counsel includes a guarantee that defense counsel shall have sufficient time to prepare effectively in order to protect his or her client's constitutional rights. *See Reece v. Georgia*, 350 U.S. 85, 89-91 (1955); *People v. Meyers*, 617 P.2d 808, 813 (Colo. 1980); *U.S. Const*., amend. VI, *Colo. Const*., art. II, § 16.
5. In addition, the prosecution is under a continuing duty to disclose additional information as it is discovered. *Crim. P.* 16(III)(b); *see Mooney v. Holohan*, 294 U.S. 103, 108 (1935) (due process is violated where the prosecutor learned that a witness committed perjury during the trial, but did not disclose this fact to defense counsel).

# The Determination of the Usefulness of Witness Statements is to be Made by

**the Defense, Not the Prosecution**

1. The determination of usefulness of evidence for the defense is a defense function, not a prosecutorial function. *People v. Smith*, 524 P.2d 607, 611 (Colo. 1974). In certain cases, even an in camera hearing imposes unfairness on the defense, as only the defense can determine what will be material and helpful to its case. *Id.* (citing *Alderman v. United States,* 394 U.S. 165 (1969)).
2. In *Smith, supra*, it was reversible error when the prosecution failed to turn over a statement made by the only eyewitness, other than the defendant. The prosecution

claimed the witness statement would not have been helpful to the defense. *Id*. The Colorado Supreme Court said it was up to the defense and not the prosecution to know if the statement would have been helpful or not and how it would have impacted the defense’s case. *Id.* The Court further explained that the defense should have been given a chance to review the statement prior to trial to make an intelligent decision about calling the witness to the stand or not. *Id.*

# Pattern and Practice of Rule 16 and Due Process Violations by the 18th Judicial

**District Attorney’s Office**

1. There have been a significant number of discovery violations in this jurisdiction for years.
2. On December 16, 2013, the Honorable Judge Christopher Cross found a discovery violation in 12CR895, *People v. Mendinghall*, and dismissed Count 1 and reduced Count 2 to a Misdemeanor as a sanction for that violation.
3. This was in the same year that the conviction and death sentence of Mr. David Bueno was overturned based on the prosecution’s failure to provide exculpatory evidence to the defense. *People v. Bueno*, 2013 COA 151, ¶ 16 (Court of Appeals, Div. 5, November 21, 2013) *cert. granted People v. Bueno*, No. 13SC1017, 2014 WL 6617181 (Colo. Nov. 24, 2014).
4. The extreme sanction imposed in *Mendinghall* appeared to have no impact on the 18th Judicial District Attorney’s office’s practices regarding discovery. Rather, discovery violations continued to happen with regularity.
5. For example, various Judges in this jurisdiction have found discovery violations of varying degrees of severity in the following cases over the past several years:
   1. 12CR2305, *People v. Dion Rankin*, failure to preserve law enforcement’s notes after order by court to do so; turned over 455 jail calls w/in 35 days of trial
   2. 13CR2140, *People v. Jose Peru,* police searched for proof complaining witness saw police outside window, stopping assault. No police were in area. Not discovered to defense or prosecution.
   3. 13CR1577, *People v. James Hicks*, 911 call never discovered and destroyed.
   4. 14CR592, *People v. Jon Harrington,* statements of witness not disclosed
   5. 14CR2822, *People v. Carlos Barge,* plea agreement of co-defendant which included a clause to truthfully testify not turned over
   6. 14M1099, *People v. Gary Taylor*, body cam video destroyed
   7. 14M3846, *People v. Joshua Hensley*, dispatch records and reports not disclosed by prosecution, defense had to obtain from police department after disclosure deadline
   8. 15T4663, *People v. Sarah Archuleta¸* discovery not produced to defense
   9. 15T10210, *People v. Zachary Tuthill*, 911 call not produced to defense
   10. 15T14040, *People v. Samson Gebeyoh*, body camera recording not produced to defense
   11. 15M1952*, People v. Thomas Kennedy*, photos not produced to defense, Court ordered photos to be disclosed by Aug. 17, 2015, not disclosed until Friday before trial on Sept. 25, 2015
   12. 15M3008, *People v. Tyler Nevonen*, recordings from dispatch not produced to defense within disclosure deadline
   13. 15M1398, *People v. Joshua Pulmage*, failure to turn over photos of complaining witness
   14. 15M2966, *People v. Brian Shlelton*, failure to produce 911 call and police reports with disclosure deadline from arraignment; not produced until six days prior to motions hearing
   15. 15M267, *People v. Floyd Hamilton*, police officer had written report that complaining witness intoxicated – not produced by prosecution until during trial and after testimony began
   16. 15M387, *People v. Claude Stepney*, body camera footage not discovered to defense
   17. 15CR1663, *People v. Steven Mize*, witness statements not disclosed by disclosure deadline
   18. 15M1748, *People v. Jowan Willrich*, 911 tape not disclosed in timely manner
   19. 15T5824, *People v. David Flores*, dash camera video destroyed
   20. 15M1294, *People v. Nicky Ngo*, witness statements not produced in timely manner
   21. 15CR505, *People v. Christopher Porter*, failure to disclose new statements made by the complaining witness – defense discovered this after trial began
   22. 15CR2634, *People v. Emanuel Hernandez*, recording of defendant’s entire conversation with law enforcement at jail not discovered to defense
   23. 16T1374, *People v. Raul Garcia,* failure to turn over witness statements – case dismissed as sanction
   24. 17CR171, *People v. Will Freddy Ramirez-Reyez*, failure to provide photographs and body camera within disclosure deadline from arraignment; not provided until day of preliminary hearing
   25. 17M120, *People v. Maia Snake-Cusak*, discovery not produced despite repeated settings to produce – case dismissed as sanction
   26. 16CR2415, *People v. Daryon Palmer*, surveillance video of offense not disclosed until day of preliminary hearing

aa. 17CR206, *People v. Silvano Rodriguez*, body cam footage of investigating officer’s conversation with complaining witness not produced

bb. 16CR3478, *People v. Roderick Williams*, body cam footage not produced

cc. 15CR387, *People v. Lewis Kelly*, audio recording not produced; not disclosing experts in timely manner and not disclosing experts change of opinion regarding SBI in a timely manner; not producing photographs in timely manner; and not disclosing former prosecution of complaining witness

dd. 15CR3038, *People v. George Fields*, body camera not timely produced

ee. 14CR3167, *People v. Khalid Jama*, day of trial and no DNA report produced

ff. 15CR2833, *People v. Christopher Hutchinson*, failed to disclose expert summary and report

gg. 15CR2737, *People v. Daniel Sergeant*, audio recording not produced

hh. 14CR3262, *People v. David Gonzalez*, interviewed complaining witness three days before trial and exculpatory information produced in untimely manner

ii. 16CR662, *People v. Paul Nagy*, 330 pages of discovery produced the night before the motions hearing

jj. 14CR830, *People v. Taumaoe Tuilaepa*, failure to produce police reports

kk. 13CR2499, *People v. Michael Rogers*, prosecution did not promptly obtain disclosures of the search warrant affidavits from Denver, did not use due diligence to follow up

ll. 13CR2449, *People v. Charles Johnson*, failure to timely disclose benefits conferred upon witness during first trial

mm. 15CR601, *People v. Phillip Hines*, report from complaining witness not produced until two days before trial; and second violation for not producing a report that was done on January 15th until July 25th, the day before trial

nn. 15CR3176, *People v. Kevin Canada*, exculpatory statements not timely disclosed

oo. 15CR821, *People v. Michael Hall*, failure to disclose reports and body camera and interview with a defendant.

1. In *People v. Lewis Kelly,* 15CR387, Judge Chase found four separate discovery violations in a hearing on January 26, 2017 due to the prosecution’s failure to turn over discoverable material over the course of several months. Judge Chase also found a pattern and practice, and ultimately imposed a sanction of reducing the lead charge if there was a conviction at trial; the trial was continued again because of the discovery violations.

# REMEDIES FOR RULE 16 AND *BRADY* VIOLATIONS

1. Because of the many different considerations involved, and the uniqueness of each case, great deference is given to trial courts in their decision to impose sanctions and an order imposing a discovery sanction will not be disturbed on appeal unless it is manifestly arbitrary, unreasonable, or unfair. *People v. Lee*, 18 P.3d 192 (Colo. 2001); (*citing to People v. Castro*, 854 P.2d 1262, 1265 (Colo. 1993)). Among the factors that a trial court should consider in fashioning the appropriate sanction are (1) the reason for the delay in providing the requisite discovery; (2) any prejudice a party has suffered as a result of the delay; and (3) the feasibility of curing such prejudice by way of a continuance or recess in situations where the jury has been sworn and the trial has begun. *Lee, supra*.
2. Exclusion of evidence, or outright dismissal, can be the appropriate remedy when there has been willful misconduct *or a pattern of neglect demonstrating a need for modification of the prosecution’s discovery practices*, when the prosecution has violated the rules of discovery.” *Id at* 196-197. (Emphasis added) “When a sanction primarily designed to deter is not appropriate, the goal must be to cure any prejudice resulting from the violation.” *Id.* at 197.
3. **Due Process of Law.** “It is well-settled that a prosecuting attorney has both a statutory and a constitutional obligation to disclose to the defense any material, exculpatory evidence he possesses.” *Salazar v. People,* 870 P.2d 1215, 1220 (Colo.1994) (citing Crim. P.

16(I)(a)(2); *Brady,* 373 U.S. at 86–88). “[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady,* 373 U.S. at 87.

1. “There are three components to a *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.” *Strickler v. Greene,* 527 U.S. 263, 281–82 (1999).

# MOTION FOR SANCTIONS

In this case, the Court is presented with three clear violations of the prosecution’s obligations under Rule 16 of the Colorado Rules of Criminal Procedure. At least one of those violations is also a clear *Brady* violation.

* 1. The first Rule 16 violation stems from the prosecution’s failure to provide Ms. Inga with photos that were taken of the purported injuries sustained by the complaining witness in this case, taken in early April 2017, within the time frame required in Rule 16. These photographs have been available to the prosecution since early April 2017 and were due to Ms. Inga on or before April 28, 2017. They were not provided to her until December 1, 2017, six months after they were due.
  2. The second violation in this case, the failure to provide ANY criminal history information for all but one prosecution-endorsed witness in this case, is a clear Rule 16 violation and may be a *Brady* violation, depending on what is contained in those criminal histories. Ms. Inga was to be provided with a copy of each prosecution witness’s criminal history as soon as practicable but no later than 35 days before trial in this case. There is no reason this information could not have been provided to Ms. Inga with the first batch of discovery and supplemented as long as the case is pending. Because Ms. Inga has no way of knowing whether any of the prosecution witnesses have criminal histories outside the state of Colorado, she cannot articulate the precise burden that will be upon her with respect to the prosecution’s failure with respect to this evidence or whether the failure to provide this information constitutes a *Brady* violation. Accordingly, she respectfully moves the Court for permission to supplement this motion after these criminal histories are provided to her counsel.
     1. Through the Colorado Bureau of Investigation report that the prosecution can run for any person, information about that person’s name, date of birth, place of birth, scars and marks are included. That document was not provided to Ms. Inga with respect to Ms. Yurivilca- Arellana. Information in that document is impeachment information in this case because (a) Ms. Yurivalca-Arellana’s place of birth is likely Peru, a fact that underscores a potential motive for her to fabricate allegations in this case; and (b) she may have scars or marks on that documentation

that would serve as fodder for cross-examination in this case, one in which she claims she sustained injuries.

* 1. The final and most egregious Rule 16 violation in this case, the prosecution’s failure to provide any documentation related to Ms. Yurivilca-Arellana’s U-Visa application, is also a *Brady* violation that violates Ms. Inga’s right to due process of law in this case. The prosecution was on notice that such paperwork existed at the end of December 2017, and has failed to make efforts to provide it to Ms. Inga’s counsel. It clearly provides a motive for Ms. Yurivilca-Arellana to fabricate the allegations against Ms. Inga in this case in order to benefit her own immigration status and is therefore impeachment material. The evidence was suppressed by the state, as recounted above, despite a specific request by Ms. Inga for it and acknowledgment by the prosecution that it exists. Ms. Inga has already suffered prejudice because of this violation. Without that documentation, Ms. Inga’s right to have her counsel effectively investigate the information contained in it, seek out supporting documentation through use of subpoena power or discovery procedures is hampered and her right to have her counsel effectively cross-examine witnesses in relation to the documentation is completely undermined by this violation. The possibility to effectively cross-examine Ms. Yurivilca-Arellana at trial in this case depends on that documentation, which goes directly to her motive and bias to testify in a certain way in this case.

1. The extreme prejudice placed upon Ms. Inga with respect to these discovery and *Brady*

violations supports her motion for the Court to dismiss all charges in this case.

1. There is exculpatory information that was made known to the prosecutor in this case, Ms. Hayden, evidenced by her mention of it to undersigned counsel in late December 2017. This information and documentation is clearly within the possession and control of law enforcement, who report to Ms. Hayden for this case. Nonetheless, that exculpatory information has *still* not been disclosed to Ms. Inga.
2. The problematic nature of the discovery violations in this case is only exacerbated context of the over 40 different cases in which this District Attorney’s Office has violated Rule 16. Cases have been dismissed for discovery violations in this jurisdiction and, evidenced by continued violations in this case, that office has not received the message that it must comply with Rule 16.
3. Clearly, no practices at the 18th Judicial District Attorney’s office have been affected by the aforementioned discovery sanctions, and if the past is any guide, nothing will change in the future without a severe discovery sanction in this case. A deterrent sanction is needed at this point to get that office to comply with those obligations and breathe life into defendants’ constitutional rights. A pattern of neglect has been shown in this case alone. A pattern of significant Rule 16 discovery violations has been shown in this case alone. A pattern and practice of discovery violations by this district attorney’s office has been established based on years of history. Accordingly, Ms. Inga, through counsel, moves this Court to dismiss this case, both as a sanction for the repeated pattern of

discovery violations in this case and because of the ever-increasing number of cases where discovery violations are happening across this jurisdiction.

1. If this Court is not inclined to dismiss this case entirely, Ms. Inga, through counsel, asks this Court to Dismiss Count One and the corresponding Crime of Violence sentence enhancer, leaving only a third degree assault charge pending in the case.

Wherefore, Ms. Inga, through counsel, respectfully requests the Court dismiss this case due to the pattern and practice of neglect and discovery violations by the 18th Judicial District Attorney’s office.

Respectfully submitted this 16th day of January, 2018,

/s/ Sara S. Hildebrand Deputy State Public Defender

**Certificate of Service** I hereby certify that on 1/16/2018 I served the foregoing document by efiling same to all opposing

counsel of record.

/s/ Sara S. Hildebrand