|  |  |
| --- | --- |
| District Court, Arapahoe County, Colorado Arapahoe County Courthouse  7325 S. Potomac St., Englewood, CO 80112 DATE | FILED: December 28, 2017 4:37 PM NG ID: E415466B950A1  NUMBER: 2017CR988   COURT USE ONLY  |
| **THE PEOPLE OF THE STATE OF COLORADO**,FILI  Plaintiff CASE  v.  **ANGELA INGA**,  Defendant. |
| Sara S. Hildebrand, Att’y Reg. No. 45268 Deputy State Public Defender  Douglas K. Wilson, Colorado State Public Defender 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.: **2017CR988**  Division: **309** |
| **DEFENSE #8**  **MOTION FOR ORDER THAT PROSECUTION DISCLOSE U VISA INFORMATION** | |

Ms. Inga, through counsel, respectfully moves this Honorable Court to order the prosecution to disclose to her counsel any and all information about any witness in this case who has inquired about, petitioned for or expressed interest in petitioning for “U” nonimmigrant status under 8 U.S.C. §§ 1367 and 1154 and 8 C.F.R. § 214.14(e)(1) . The grounds for this motion are as follows:

1. Gaining a “U-Visa” or U nonimmigrant status permits a crime victim and, in some cases their relatives, legal status to enter or remain in the United States when that person may not otherwise have legal authority to do so. U visas can be granted to eligible victims if they show they are willing to help law enforcement in the investigation or prosecution of the crime. Victims of domestic violence are eligible to qualify for U nonimmigrant status.
2. A petition for U nonimmigrant status must also contain a *certification of helpfulness* in the form of a U Nonimmigrant Status Certification (Form I-918, Supplement B) from a certifying law enforcement agency. This document demonstrates the petitioner "has been helpful, is being helpful, or is likely to be helpful" in the investigation or prosecution of the criminal activity. State and local law enforcement agencies, prosecutors and judges are valid certifying entities for purposes of a certification of helpfulness.
3. The prosecution is constitutionally compelled to disclose any material evidence which is favorable to the accused and relates to either the guilt or punishment of the accused, otherwise the accused person’s due process rights are violated. *See Brady v. Maryland*, 373 U.S. 83 (1963); *People v.*

*Greathouse*, 742 P.2d 334 (Colo. 1987); U.S. Const. Amends. V, XIV; Colo. Const, Art. II, § 25; COLO. R. CRIM. P. 16(I)(a)(2), 16(I)(d)(1); C.R.P.C. 3.8(d).

1. Evidence is relevant, and must be disclosed under the standard, which tends to negate the guilt of the accused or would tend to reduce the punishment thereof, regardless of the whether the evidence is admissible at trial. *People v. District Court*, 790 P.2d 332 at 338 (Colo. 1990).
2. Generally, defense counsel is the appropriate party to make the determination that a statement or piece of evidence is relevant to the defense. *People v. Gallegos*, 644 P.2d 920 (Colo. 1992). Determination of its usefulness under COLO. R. CRIM. P. 16 is a defense function, not a prosecutorial function, as only the defense can determine what will be material and helpful to its case. *People v. Smith*, 524 P.2d 607 (Colo. 1974).
3. Any evidence of material importance to the defense is subject to disclosure in Colorado under the *Brady* doctrine, whether it is substantive, *impeachment* or exculpatory, regardless of whether it is ultimately admissible at trial, or whether the prosecution intends to offer the evidence at all. *People v. Shaw*, 646 P.2d 375 (Colo. 1982); *People v. District Court*, 790 P.2d 332 (Colo. 1990). Consequently, the prosecution is *required* to disclose evidence that might enable the defense to impeach prosecution witnesses. *United States v. Bagley*, 473 U.S. 667 (1985); *People v. District Court*, 790 P.2d 332 (Colo. 1990) (impeachment evidence is material under the *Brady* doctrine); *People v. Thatcher*, 638 P.2d 760 (Colo.1981) (use of discovery material for impeachment purposes implicates a defendant’s due process rights).
4. The individual prosecutor who is prosecuting a given case has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police. *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995). Prosecutors’ offices must establish procedures and regulations to ensure communication of all favorable evidence to the defense and to each prosecutor on a given case. *Id.* (quoting *Giglio v. U.S.*, 405 U.S. 150, 154 (1972)); COLO. R. CRIM. P. 16(I)(b)(4).
5. Courts and police officers cannot discharge the prosecution’s obligation to conduct a *Brady* review to determine what disclosure if any must be made to the defense. *See Id.* at 438-39. The prosecuting attorney has the obligation to conduct a timely search for *Brady* material, a thoughtful review of that material and to make timely disclosure of it, and cannot keep itself ignorant or compartmentalize information to avoid this obligation. *Cf. In re Sealed Case No.* 99-3096, 185 F.3d 887, 892 (D.C. Cir. 1999); *Banks v. Reynolds*, 54 F.3d 1508, 1517 (10th Cir. 1995); *Carey v. Duckworth*, 738 F.2d 875, 878 (7th Cir. 1984); *People v. Anderson*, 837 P.2d 293, 299 (Colo. App. 1992).
6. Furthermore, the prosecution must disclose not only the existence of exculpatory material, but the contents of any such material to the defense, regardless of whether the defense knew or should have known of its existence. *See People v. Lucero*, 623 P.2d 424, 429-430 (Colo. App. 1980); *cf. Banks*, 54 F.3d at 1517.
7. In *Kyles*, the United States Supreme Court reviewed whether a defendant was denied due process of law when the prosecution failed to disclose exculpatory information prior to a trial at which he was convicted. 524 U.S at 422-33. The prosecution argued that it should not be held accountable for evidence known only to the police and not the prosecutor at the time of trial. *Id.* at

438. The Court held that “the prosecutor remains responsible for gauging the effect [of *Brady* evidence suppressed by the government] regardless of any failure by the police to bring favorable evidence to the prosecutor’s attention.” *Id.* at 421. The Court reasoned that the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government’s behalf in the case. *Id.* at 437.

1. Several United States Circuit Courts of Appeals have further clarified the prosecution’s *Brady* obligations. The United States Seventh Circuit Court of Appeals stated, when discussing the prosecution’s *Brady* obligations that “a prosecutor’s office cannot get around *Brady* by keeping itself in ignorance, or compartmentalizing information about different aspects of a case.” *Carey*, 738 F.2d at 878 (followed by discussion of *Giglio*, 405 U.S. 150 (1972)).
2. The District of Columbia Circuit Court of Appeals held that the United States Supreme Court’s language in *Strickler*, 527 U.S. 263 (1999), demonstrates that “both the failure to search for *Brady* material and the failure to produce it” are *Brady* violations. *In re. Sealed Case*, 185 F.3d at 892.
3. The Tenth Circuit Court of Appeals held the prosecution’s obligation to turn over *Brady* material stands independent of a defendant’s knowledge of the exculpatory evidence. *Banks*, 54 F.3d at 1508. Whether defense counsel knows or should know about *Brady* material is irrelevant to whether the prosecution has an obligation to make a disclosure. *Id*.
4. Two decisions of the Colorado Court of Appeals demonstrate that the prosecution must discharge their discovery obligations, cannot consciously avoid them, and cannot pass their duty to discharge discovery obligations to the defense. When discussing that the prosecution when acting in good faith does not have any duty to reduce oral interviews to writing, the Court held that “the prosecution cannot circumvent an obligation to disclose exculpatory information by deliberately avoiding taking notes or reducing statements to writing.” *Anderson*, 837 P.2d at 299. In *People v. Lucero*, a prosecution witness made a pretrial statement to police during a polygraph that could not be located, so the Court ordered the prosecution to make further efforts to provide this discovery. 623 P.2d at 426-27. It was never provided and the defendant was convicted. *Id.* In rejecting the argument that defense did not show the statement was material, the Court reasoned:

The [prosecution] misconceive[s] the function of discovery. Where, as here, the matter sought to be discovered is in the exclusive knowledge, possession, and control of the prosecution, defense counsel would have to be clairvoyant to know whether exculpatory matter is involved Accordingly, it was incumbent on the

prosecution to provide the defendant with information as to the existence and contents of the purported statement. The trial’s court failure to enforce the prosecution’s obligation in this regard constituted error.

*Id.* at 429-430.

1. It is proper to cross-examine a witness about immigration status as a motive to lie as demonstrated by the reasoning of the Colorado Court of Appeals in *Doumbouya v. County Court of City & County of Denver*, 224 P.3d 425 (Colo. App. 2009).
2. While U-Visa information is protected and confidential subject to exceptions, 8 C.F.R. § 214.14(e)(1)(ix) demonstrates that U Visa application and information is subject to constitutional *Brady* provisions. C.F.R. § 214.14(e)(1)(ix) allows disclosure to “federal prosecutors to comply with constitutional obligations to provide statements by witnesses and certain other documents to defendants in pending federal criminal proceedings.” It is clear, however, that *Brady* obligations apply to state prosecutors as they do to federal prosecutors.
3. A witness may apply for the U-Visa even after the criminal case is closed if they provided assistance to law enforcement and/or the prosecution in the case. A witness may also apply while a case is pending.
4. An application for a U-visa and inquiry by a witness about the possibility of gaining lawful immigration status both constitute clearly exculpatory information, as does the content of conversations that law enforcement, district attorneys, or agents of either agency have had with any witness in this case regarding the ability to apply for a U-visa during or after a case has concluded. Accordingly, Ms. Inga, through counsel, respectfully moves the Court to order the prosecution to provide her with notice of any such information that may exist in relation to any witness in this case. She makes this motion pursuant to her rights to due process under U.S. CONST. Amends. V, XIV; COLO.CONST. Art. II §25; and COLO. R. CRIM. P. 16(I)(a)(2); 16(I)(d)1); C.R.P.C. 3.8(d).

/s/ Sara S. Hildebrand

|  |  |
| --- | --- |
| Deputy State Public Defender Dated: December 28, 2017 | **Certificate of Service**  I hereby certify that on December 28, 2017, I served the foregoing document via ICCES to all opposing counsel of record.  /s/ Sara Hildebrand. |