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| District Court, Arapahoe County, Colorado Arapahoe County Courthouse  7325 S. Potomac St., Englewood, CO 80112 DA | TE FILED: January 18, 2018 4:15 PM LING ID: 480F40B75D151  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 #10**  **SUPPLEMENTARY MOTION FOR SANCTIONS, DUE TO AN ESTABLISHED PATTERN AND PRACTICE OF DISCOVERY VIOLATIONS** | |

Ms. Inga, by and through counsel, hereby supplements her motion 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, with the following facts.

# FACTS

1. On January 18, 2018, undersigned counsel received pages 183-216 in paper discovery in this case. The following documents were contained in those pages:
   1. Victim Impact Statement filled out by Miriam Yurivilca-Arellana, the complainant in this case, with the assistance of an interpreter, that is left blank. There is a place checked on the form indicating that Ms. Yurivilca-Arellana “chose not to complete this form.” That form indicates that the next event in Ms. Inga’s case was April 10, 2017, the filing of charges date in this case.
   2. An email from Brigitte Burgess, a victim witness secretary, to Rory Devlin, who prosecuted this case before Ms. Hayden, sent on August 4, 2017. That email indicated that their office was in possession of a U-Visa application that was submitted by Ms. Yurivilca-Arellana and that Ms. Burgess would route the application to Mr. Devlin for determination about what should be discovered.
   3. A letter from the Meyer Law Office dated July 28, 2017 to Mr. Devlin at the district attorney’s office in which it requested a U-Visa certification (a U-Visa nonimmigrant law enforcement certification) based on a “felonious assault” of which Ms. Yurivilca-Arellana was purportedly a “direct victim” and during which she suffered “substantial physical abuse” and “was helpful to law enforcement agencies in the investigation and prosecution of the qualifying crime.”
      1. That letter also asserts that “a certification by your law enforcement agency would allow Ms. Yurivilca to apply for temporary status and work authorization, which would provide her greater security, safety and permanency in consideration of the harms she has endured and her assistance to law enforcement in the investigation of a serious crime.”
      2. That letter also includes a statement, presumably made by Ms. Yurivilca, about the allegations underlying this case that had never before been provided to Ms. Inga.
      3. The letter requested that a certifying official from Mr. Devlin’s sign the attached From I-918 Supplement B.
      4. That letter asserts that “Law enforcement certification in the form of an I- 918 Supplement B, signed by your office, is an integral part of Ms. Yurivilca’s U-visa application.”
      5. The Form I-918 Supplement B is attached to the letter; in that form is a statement in which Ms. Yurivilca-Arellana relies upon the allegations she makes in this case in support of her U-Visa application.
   4. A 4 ½ page long affidavit, written by Detective McDonald, the case filing detective in this case, that was written on April 6, 2017. This report was previously provided to Ms. Inga in discovery.
2. It is unclear whether the prosecution in fact signed and returned the From I-918 Supplement B. If the prosecution executed and sent this completed form back to the Meyer Law Office for Ms. Yurivilca-Arrelano, Ms. Inga has the right to be provided with a copy of that documentation. Ms. Hayden indicated that she does not think anyone from her office has executed this form. Undersigned counsel asked her to inquire about this matter.
3. In the originally filed Motion for Sanctions filed by undersigned counsel she indicated that Ms. Hayden first provided photos of Ms. Yurivilca-Arellana, taken in April 2017 on December 1, 2017. Undersigned counsel hereby corrects the record in that those photos were downloaded by the office of the public defender on November 29, 2017, not December 1, 2017. Those photos were provided to Ms. Inga only after undersigned counsel sent Ms. Hayden an email on November 29, 2017 indicating they had not yet been provided to Ms. Inga in discovery.

# 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).
6. 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).
7. 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).
8. 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)
9. 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.
10. 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*.

1. 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.
2. **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.
3. “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).

# SUPPLEMENTAL MOTION FOR SANCTIONS

By failing to provide Ms. Yurivilca’s victim impact statement, the letter from the Meyer law office and its attached form, and its failure to provide the email showing that the DA’s office had been in possession of Ms. Yurivilca’s U-visa application materials and the related letter since July 2017, the people violated their obligations to afford Ms. Inga discovery under Rule 16 and have violated her right to due process of law.

The victim impact statement, which contains a statement by Ms. Yurivilca, was due to Ms. Inga within 21 days of the filing of charges setting in this case, so by the end of April 2017. That statement, which is blank and indicates that Ms. Yurivilca was not interested in making a written statement in the case, was provided nearly nine months late. At this late hour, Ms. Inga is prejudiced in the time she has to investigate the meaning of the fact that Ms. Yurivilca left this form blank through a follow-up interview with her.

The materials related to Ms. Yurivilca’s U-Visa application are a clear discovery violation and violation of Ms. Inga’s right to due process. Those materials were due to Ms. Inga as soon as practicable but no later than 35 days before trial. These documents should have been provided to Ms. Inga in discovery immediately after they were received by Mr. Devlin; instead, the people at worst negligently and at worst purposefully sat on these documents until now, two weeks before this case is set for a jury trial. These documents contain proof that Ms. Yurivilca had, and potentially continues to have a motive to fabricate her allegations in this case in order to obtain nonimmigrant status vis a vis a U-Visa and avoid deportation to Peru. This is clear impeachment information to which she was entitled under Rule 16 and *Brady*. Provision of these

documents about six months after they were due to Ms. Inga prejudices her ability to investigate the contents of the documents and to investigate the status of her application.

These discovery violations, in conjunction with those set forth in Ms. Inga’s first motion for sanctions for violations of Rule 16 and her due process rights, warrant a deterrent sanction to show the prosecution that it is unacceptable to disadvantage Ms. Inga and others in her position by sitting on mandatory discovery for months and months. As a supplement to her previously filed motion she, through counsel, respectfully renews her motion to dismiss this case or in the alternative to dismiss the second degree assault charge as a sanction for the many and in one case purposeful discovery violations.

Wherefore, Ms. Inga, through counsel, respectfully moves the Court to 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 18th day of January, 2018,

/s/ Sara S. Hildebrand Deputy State Public Defender

**Certificate of Service** I hereby certify that on 1/18/2018 I served the foregoing document by efiling same to all opposing

counsel of record.

/s/ Sara S. Hildebrand