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| DISTRICT COURT, EAGLE COUNTY, COLORADO885 Chambers AvenueEagle, Colorado 81631**Plaintiff:** PEOPLE OF THE STATE OF COLORADO**Defendant:** KOBE BRYANTPamela Robillard Mackey (No. 15136) Harold A. Haddon (No. 1596)Ty Gee (No. 19772)HADDON, MORGAN, MUELLER, JORDAN, MACKEY & FOREMAN, P.C.150 East 10th AvenueDenver, Colorado 80203Telephone: (303) 831-7364Facsimile: (303) 832-2628E-Mail: pmackey@hrnfl.aw.com*AITORNEYS FOR DEFENDANT* | !:Ii 1:1"\ Iii.I TU·C-COMBINED CLERKS OFFICEAUG 3 1 2004EAGLE .T'ix22:.ORADOBY I *l* <**A** COURT USE ONLY **A**Case No. 03 CR 204Division I |
| **MR. BRYANT'S MOTION TO DISMISS AND/OR TO IMPOSE SANCTIONS AGAINST THE PROSECUTION FOR INTENTIONAL VIOLATIONS OF CRIM. P. 16 AND *BRADY,* AND THIS COURT'S DISCOVERY ORDERL11** |

KOBE BRYANT, through his attorneys, Haddon, Morgan, Mueller, Jordan, Mackey & Foreman, P.C., moves to dismiss this action, and to impose sanctions against the prosecution for intentional violations of Crim. P. 16 and the due process clauses of the Colorado and United States Constitutions.

1This pleading is being filed publicly because on August 16, 2004, this Court directed the parties to address the issue of disclosure of exculpatory information relating to expe1is in open court, without referring to the specific infonnation sought. *See* EXHIBIT A,at 31-32; *see also Notice [from the Court] to Parties Regarding Filings* (Aug. 18, 2004) (cautioning parties against unnecessary filing of sealed pleadings, and noting '"[i)t is apparent that some [of the sealed pleadings] are not appropriate to have been filed under seal"). Accordingly, references to such specific information is submitted with this *Motion* under seal in EXHIBIT B.

## Introduction

l. This prosecution is a credibility contest. As the prosecution well knows, physical evidence corroborating or undermining the accuser's statements is critical. The accuser claims she was sexually assaulted, and that during the assault she suffered injuries.

1. The defense has previously brought to the Court's attention that the prosecution has failed to provide exculpatory information in a timely way, and resisted the defense's attempts to obtain exculpatory information.
2. Now, on the eve of trial, the defense has discovered that the prosecution has

suppressed ***critical exculpatoey information*** that:

#### the defense *had specifically and repeatedly requested orallv and in written*

**Brady *and Crim. P. 16 motions and letters;***

* this Court on August 16 ***specifically ordered the prosecution to disclose forthwith;***
* prosecutor Easter ***specifically denied in open court was held by the prosecution;***
* the prosecution in two pleadings ***specifically denied was in its possession;***

#### the prosecution *has never told the defense it has and has never provided to* the defense.

1. One of the prosecution's experts, a forensic pathologist, was endorsed by the prosecution to provide expert rebuttal testimony on, *inter alia,* the accuser's alleged injuries, which she alleged Mr. Bryant caused. After months of consulting with this forensics expert, the prosecution on July 15 suddenly de-endorsed him. Despite a Court Order compelling the prosecution to disclose all exculpatory information relating to that expert, the prosecution repeatedly denied it had any such exculpatory information.

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1. As discussed in EXHIBIT Band below, on August 27, 2004, this expert disclosed to the defense that he had *provided exculpatory information to the prosecution* that *undermined* the accuser's allegations and the prosecution's case, and *corroborated* Mr. Bryant's defense on a central issue-the cause and significance of the accuser's alleged injuries. These opinions were never disclosed to the defense.
2. A person's life and liberty are at stake. The game of hide-the-ball, find-it-if­ you-can discovery is intolerable. This Court must vindicate Mr. Bryant's constitutional rights and impose meaningful sanctions against the prosecution.
3. Because of the prosecution's willful and egregious violations of his constitutional rights, the criminal rules governing discovery, and this Court's explicit Order requiring disclosure of exculpatory information relating to the prosecution­ endorsed expert, Mr. Bryant requests that this criminal action be dismissed with prejudice. In the alternative, this Court should bar the prosecution from introducing any expert testimony on the subjects of the expert's exculpatory statements-relating to the accuser's alleged injuries-and instruct the jury that the prosecution suppressed expert opinions from its own expert that conflict with the opinions of other prosecution experts.
4. **Procedural Background**
5. This prosecution is grounded on the accuser's allegation that Mr. Bryant sexually assaulted her, and that she was physically injured during the alleged assault. *See* Complaint, at [2] (charging Mr. Bryant with violation of C.R.S. *§* 18(3)(402)(1)(a) and 4(a), alleging that he "caus[ed] submission of [the accuser] by means of sufficient consequence reasonably calculated to cause submission against [the accuser's] will" and "caused submission of the victim through the actual application of physical force or

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physical violence").

1. The defense has stated that the accuser and Mr. Bryant had consensual sex and that Mr. Bryant at no time caused her to "submit" to sex. Further, the defense has stated, among other things, that any injuries the accuser suffered may have been caused by other persons with whom the accuser had sex immediately before and after Mr. Bryant's encounter with her; in any event the evidence of alleged injuries was wholly inconclusive of the question of"submission" and in no way undermined the defense of consent.
2. *As* the Court is aware, the prosecution and defense have engaged medical experts to analyze evidence of the accuser's alleged injuries and their alleged cause. The defense notified the prosecution that its now de-endorsed forensics expert would testify about the alleged injuries.
3. **The prosecution's endorsement of the now de-endorsed expert.** The prosecution endorsed the expert, a forensic pathologist, as an expert to rebut, *inter alia,* anticipated testimony of defense experts relating to the accuser's alleged injuries.
4. The parties' rebuttal expert reports were due on April 23, 2004.
5. The prosecution failed to disclose rebuttal expert reports on that date. The Court granted the prosecution until May 7, to provide the defense with the reports.
6. On May 7, the prosecution disclosed in an expert witness summary that the now de-endorsed expert would testify regarding the accuser's alleged injuries.

EXHIBIT C (submitted with this *Motion* under seal).

1. On May **14,** Mr. Bryant moved to exclude the expert's anticipated

testimony concerning, *inter alia,* the accuser's alleged injuries. The Court, finding that the

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prosecution had failed to respond to the motion and that the disclosures as to the expert were inadequate, granted the motion and ordered that the expert be precluded from testifying.

1. On May 27, the Court at a hearing vacated its order striking the expert and

granted the prosecution additional time to make an adequate rebuttal expert disclosure of the expert's opinions and conclusions regarding the accuser's alleged injuries. The Court ordered the prosecution to make an adequate disclosure by June 7. As of June 8, the prosecution had made no disclosure as ordered by the Court.

1. On June 8, Mr. Bryant moved again to strike the expert's testimony because of the prosecution's failure to comply with the Court's May 27 Order.
2. On June 16, the prosecution-in *direct contradiction ofits May* 7 *expert*

*disclosure-in* response to the June 8 motion *denied* that it had endorsed the expert to opine on issues relating to the accuser's injuries. EXIIlBIT D**1** I (filed June 16, 2004) (emphasis supplied; submitted with this *Motion* under seal).

1. On July 15, the prosecution abruptly- de-endorsed the expert. It gave no reason. *See Prosecution 's Notice re Endorsement of [the Expert] [Filed Under Seal]* (filed July 15, 2004), attached as EXHIBIT E (submitted with this *Motion* under seal).
2. **The defense's request for Crim. P. 16 and *Brady* materials.** On July 26,

the defense by letter asked the prosecution to provide "all information and/or opinions related to you by [the de-endorsed expert] which may tend to be exculpatory." EXHIBIT F

2Eight days earlier, on July 8, the prosecution had argued-in response to Mr.

Bryant's motion to exclude or **limit** the expert's testimony-that theissue relating to the expert's testimony was not ripe until the Court issued its order regarding the rape shield statute. Yet, without awaiting the order, which was entered on July 23, the prosecution on July 15 de-endorsed the expert.

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(submitted with this *Motion* under seal). The prosecution never responded.

1. At a hearing on July 30, the defense raised the issue of exculpatory information relating to the expert. The prosecution made no assertion and gave no assurances that all exculpatory information relating to the expert had been provided to the defense. EXHIBIT G, at 52-57 (transcript of July 30, 2004, *in camera* hearing) (submitted with this *Motion* under seal).
2. On August 2, Mr. Bryant moved for discovery and exculpatory information relating to the expert.3 The motion requested that this Court order the prosecution "to disclose all information and/or opinions related to the prosecution by [the expert] that may tend to be exculpatory, as well as any other discoverable or exculpatory information that the prosecution has not yet disclosed to Mr. Bryant." EXHIBIT H, at [I] (Exhibit H is a pleading originally filed under seal, but the subject of the pleading was discussed in open court on August 16. *See This Motion,* at [l] n.l).
3. **The prosecution's representations to the Court and the defense.** On August 5, the prosecution responded to the *Motion for Discovery* by denying that it had any exculpatory information relating to the expert. *See Prosecution ·s Resp. to Mot. for Discovery [Filed Under Seal],* at [1] (filed Aug. 5, 2004) (emphasis supplied), attached as EXHIBIT I (submitted with this *Motion* under seal).

3Although the focus of Mr. Bryant's *Motion for Discovery and Exculpatory Information [Filed Under Seal]* (filed Aug. 2, 2004) [hereinafter *"Motion for Discovery"],* attached as EXHIBIT H, was the de-endorsed expert, it also requested all exculpatory information relating to another prosecution expert witness who was de­ endorsed, Dr. Robert Gaensslen. *See* EXHIBIT H,at [3] (Exhibit His a pleading originally filed under seal, but the subject of the pleading was discussed in open court on August 16. *See This Motion,* at [I] n.l); *Prosecution's Notice of Withdrawal of Endorsement of Dr.*

*Robert Gaensslen* (publicly filed Aug. 2, 2004).

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1. On August 16, the Court addressed the *Motion for Discovery* at a hearing.

### The following is an excerpt from the hearing:

MR. HADDON: Your Honor, this motion simply requests that any exculpatory information in the possession of the prosecution, which was learned from the withdrawn experts who were first endorsed and then withdrawn, be provided to us. And we understand that the prosecution claims that there is none. We nevertheless request an order that if any exists, it be immediately provided to us, given the backdrop of this case, as you may well know....

THE COURT: Response.

MS. EASTER: And I could just tell the Court I would

reiterate what is inmy motion. *We have no exculpatory information regarding that witness or coming from that witness.* We understand our duties under Rule 16 and *Brady v. Maryland,* and will continue to comply with them.

### THE COURT: And there are actually two that are specifically referenced, but obviously Rule 16 and *Brady* apply to any witnesses.

MS. EASTER: Absolutely.

THE COURT: *The Court will grant the Motion for Discovery and Exculpatory Information relating not only to the two witnesses specified, but also any other witnesses that have previously been identified. And of course that goes to any opinions or evidence that may tend to be exculpatory, as well as any other discoverable information.* The response specifically referred to one of the witnesses, and you just now mentioned one ofthem. *J iust want to make sure that i(there is any with regard to the other witnesses, that you seek out that information and respond by, oh, tomorrow at 5:00.*

### EXHIBIT A, at 31-33 (emphasis supplied).

1. On August 17, the prosecution responded to the Court's August 16 Order by denying that it bad any exculpatory information relating to the expert. *Prosecution 's Resp. to Court Order Regarding Discovery of Exculpatory Information [Filed Under*

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*Seal]* [hereinafter *"Response To Court Order"],* at [l] (filed Aug. 17, 2004) (emphasis supplied), attached as EXHIBIT J(submitted with this *Motion* under seal).

### To date, the prosecution has never provided any exculpatory information relating to the expert.

1. **The defense's discovery of the expert's exculpatory information.**

[Because this portion of this Motion necessitates discussion of details of exculpatory expert information the prosecution intentionally and improperly withheld, it is being filed under seal as EXHIBIT B.]

**Ill. The prosecution has breached its constitutional duties and violated Mr. Bryant's constitutional rights.**

1. The prosecution has an "affirmative duty to disclose evidence favorable to a defendant." *Kyles v. Whitley,* 514 U.S. 419,432 (1995); *accord, e.g., Brady v. Maryland,* 373 U.S. 83, 86 (1963); *People v. Gann,* 724 P.2d 1318, 1320 (Colo. 1986). Moreover, "the individual prosecutor 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. But whether the prosecutor succeeds or fails in meeting this obligation ... , the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." *Kyles,* 514 U.S. at 437-38.
2. Crim. P. 16(I)(a)(2) "incorporates the holding of *Brady . .* . by requiring the prosecution to disclose to the defense any evidence within the prosecution's possession or control that *tends to negate the guilt of the accused as to the offense charged,* or tends to reduce the punishment therefor." *People v. Bradley,* 25 P.3d 1271, 1276 (Colo. Ct. App. 2001) (emphasis supplied); *see Salazar v. People,* 870 P.2d 1215, 1221 (Colo. 1994)

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(holding that prosecutor has statutory and constitutional obligation to disclose to defense any exculpatory evidence she possesses). Crim. P. 16(I)(a)(2) provides as follows: "The prosecuting attorney shall disclose to defense counsel any material or information within his 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." (Emphasis supplied.)

1. Disclosure of exculpatory information to the defense must be immediate.

*See, e.g., In re Attorney* C, 47 P.3d 1167, 1171 (Colo. 2002) ("'A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused '")(emphasis omitted; quoting ABA *Standards for Criminal*

*Justice: Prosecution Function and Defense Function* 3-3.1l(a) (3d ed.1993); *People v. Mucklow, 35* P.3d 527, 535 (Colo. O.P.D.J. 2000) (''The prosecutor is required to provide exculpatory information and materials to the defense as soon as it is practicable or feasible to do so.").

1. The facts set forth above and in EXHIBIT B conclusively demonstrate that

the prosecution has:

* intentionally and deliberately withheld exculpatory information relating to

the expert;

* made affirmative representations to this Court and the defense that conflict

with the expert's statements to defense counsel; and

* violated this Court's August 16 Order mandating the disclosure of all *Brady*

material.

1. There can be no question that the prosecution knew the exculpatory nature of this information.

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* 1. **First,** the prosecution has known from the commencement of this action that submission and consent are critical issues, since the accuser has claimed she was sexually assaulted and injured, and the defense has denied these claims and asserted that the accuser and Mr. Bryant engaged in consensual sex.
	2. **Second,** after learning that the defense had endorsed experts to testify regarding the accuser's alleged injuries, the prosecution endorsed the expert to testify specifically about those alleged injuries and their alleged cause. EXHIBIT C.
	3. **Third,** after repeated tries, and even after the Court *ordered* the prosecution to provide by June 7 an adequate disclosure relating to the expert, the prosecution *failed to disclose any report by June 8.*
	4. **Fourth,** after the defense on June 8 again moved to strike the expert's testimony for failure to provide an adequate report, the prosecution on June 16 *contradicted its initial summary o(the expert's testimony.* Without so much as

acknowledging that its summary of the expert's testimony said he would be providing expert rebuttal testimony on the accuser's alleged injuries and their

alleged cause, the prosecution reversed field and stated: "The People *did not endorse* [the expert]" with regard to the accuser's alleged injuries and their alleged cause. EXHIBIT D iJ **1.**

* 1. **Fifth,** on July 15, the prosecution abruptly and tersely de-endorsed the

expert. EXHIBIT E.

* 1. **Sixth,** the prosecution refused to respond to informal requests by

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### defense counsel for exculpatory information relating to the expert.

* 1. **Seventh,** after the defense formally moved for exculpatory information

relating to the expert, the prosecution stated in its response that it had no such information. EXHIBIT I 13. The prosecution repeated this statement

twice-once in open Court on August 16 and again in its pleading filed August

17 (EXHIBIT J ,1 1).

* 1. **Eighth,** in both its *Response to Motion for Discovery* (EXHIBIT I) and *Response to Court Order* (EXHIBIT J), the prosecution affirmatively advised the Court and the defense that the decision to abruptly de-endorse the expert had to do with strategy and had nothing to do with any exculpatory information the

expert had or might provide in trial testimony. *See* EXHIBIT I ,r 4; EXHIBIT J,r 3.

### The expert's candid remarks to defense counsel on August 27 compellingly explain why the prosecution:

* + first endorsed, and then de-endorsed the expert, as an expert on the accuser's alleged injuries and their alleged cause;
	+ then bizarrely claimed that to the Court that it had never endorsed him on the subjects of the alleged injuries, EXHIBIT D ,r 1; and
	+ finally abruptly de-endorsed him altogether as a rebuttal expert.
1. Because this is a case that centers on the credibility of two

witnesses-accuser and accused-the corroborative or damaging effect of physical evidence on credibility could be "the difference between conviction and acquittal," *United States v. Bagley,* 473 U.S. 667,676 (1985).

### There is no question the now de-endorsed provided information to the prosecution that-as this Court stated in ordering disclosure of *Brady* material relating to

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theexpert-"may tend to be exculpatory," EXHIBIT A, at 33, and that the prosecution had

an "affirmative duty," *Kyles,* 514 U.S. at 432, to immediately disclose.

## IV. This Court should impose meaningful and forceful sanctions against the prosecution.

1. "Where the prosecution has failed to meet [its duty to disclose exculpatory information], the trial court has traditionally been given broad discretion in fashioning remedies." *People* v. *Millitello,* 705 P.2d 514, 519 (Colo. 1985). "The imposition of sanctions serves the dual purposes of protecting the integrity of the truth-finding process and deterring the prosecutor and the police from [misconduct]." *People* v. *District Court,* 656 P.2d 1287, 1293 (Colo. 1983). The type of sanction the trial court may impose ranges from suppressing evidence offered by the prosecution to dismissing the criminal action. *See People v. District Court,* 808 P.2d 831,836 (Colo. 1991).
2. The circumstances of this case warrant a meaningful and forceful sanction. As this Court is well aware, this is not the first time in this case when the prosecution has failed to discharge its duties under *Brady* and Crim. P. 16. As noted in Mr. Bryant's *Motion for Discovery* (EXHIBIT H),4 the prosecution waited nearly *two months* before disclosing to the defense other exculpatory information provided to Ms. Easter, and then only after a protracted discovery battle in which the prosecution stubbornly resisted disclosure.
3. The prosecution's conduct regarding the de-endorsed expert's exculpatory information was intentional and calculated. It was well aware of its *Brady* and Crim. P. 16 duties to disclose exculpatory information. It violated this Court's Order directing the

4Exhibit His a pleading originally filed under seal, but the subject of the pleading was discussed in open court on August 16. *See This Motion,* at [1] n. l.

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### prosecution to disclose exculpatory information relating to the expert. It repeatedly

refused to honor defense requests specifically seeking exculpatory information relating to

the experts. And it claimed in pleadings that the decision to abruptly de-endorse the expert

### had nothing to do with exculpatory information and was based solely on "strategy." All of this occurred within 30 days of trial; as a result, the defense did not discover the *Brady* and Crim. P. 16 violations until August 27, as jury selection began. A more aggravated violation of *Brady,* Crim. P. 16 and this Court's direct, specific Order regarding exculpatory information would be difficult to imagine.

1. The Colorado Supreme Court has held that the willfulness of a prosecutor's failure to disclose exculpatory information is irrelevant to whether *Brady* and Crim. P. 16 have been violated, but it is highly relevant "in fashioning an appropriate remedy," *District Court,* 793 P.2d at 167, *quoted with approval in District Court,* 808 P.2d at 838; *see People* v. *Shaw,* 646 P.2d 375,381 n.10 (Colo. 1982) ("the degree of governmental culpability involved in the loss or destruction of the evidence and the need to deter such conduct in the future" are factors in fashioning *Brady* violation remedy).
2. The failure of the prosecution to comply with a court order warrants dismissal of the criminal case. *See People v. Alberico,* 817 P.2d 573, 576 (Colo. Ct. App. 1991) (affirming dismissal of prosecution based on "egregious violation of Rule 16," and holding that '"in appropriate cases, dismissal is a proper sanction for the People's failure to comply with a court's discovery order"); *People v. Vigil,* 729 P.2d 360, 368 (Colo.

*'See, e.g., Bagley,* 473 U.S. at 681 ('"When the prosecutor receives a specific and relevant request [for available exculpatory information], the failure to make any response is seldom, if ever, excusable."') (quoting *United States v. Agurs,* 427 U.S. 97, 106 (1976)).

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1986) (dismissal for failure to comply with court order to produce confidential informant for *in camera* hearing); *People v. Martinez,* 658 P.2d 260,262 (Colo. 1983) (dismissal for failure to comply with court order to disclose identity of confidential informant); *People*

# *v. Rodriguez,* 645 P.2d 851 (Colo. 1982) (dismissal for prosecutor's failure to make

reasonable efforts to locate informant in accordance with trial court's disclosure order).

1. In the event the Court declines to dismiss this case, at a minimum the Court should bar the prosecution from introducing any expert testimony on the subjects of the expert's exculpatory statements-relating to the accuser's alleged injuries-and instruct the jwy that the prosecution illegally suppressed these exculpatory statements relating to the accuser's alleged injuries and their alleged causes.

WHEREFORE, Mr. Bryant respectfully requests that this Court dismiss this criminal case for willful violation of this Court's explicit Order requiring disclosure of exculpatory information relating to the expert or, in the alternative, preclude the prosecution from introducing any expert testimony relating to the accuser's alleged injuries and their alleged causes, and instruct the jury about the prosecution's misconduct as requested in paragraph 42, above.

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### Dated: August 31, 2004.

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**CERTIFICATE OF SERVICE**

I hereby certify that on Augus 2004, a true and correct copy of the foregoing *Motion to Dismiss and to ! ;•Sanctions Against The Prosecution For Intentional Violations of Crim. P. 16 And Brady, And This Court's Discovery Order [Under Seal]* was duly served upon the following by facsimile transmission:

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