

Dolores County Combined Courts, Colorado Court Address: 409 Main St. Dove Creek, CO 81324 970-677-2258	DATE FILED: March 2, 2022 10:17 AM
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff, v. RONALD MOROSKO, Defendant	<input type="checkbox"/> COURT USE ONLY <input type="checkbox"/>
KENNETH PACE, No. 41214 Pace & Little, LLC 679 E. 2 nd Ave. #3, Durango, CO 81301 Phone: (970) 247-5282 Fax: (970) 247-5284 E-Mail: Kenneth.pace@paceandlittle.com	Case Number: 21CR11
DEFENSE #11: MOTION REGARDING DISCOVERY VIOLATION, REQUEST FOR ADDITIONAL DISCOVERY, REQUEST FOR SANCTIONS AND RESERVATION OF RIGHTS	

Mr. Morosko, through counsel, respectfully moves the Court to dismiss this case or, in the alternative, to impose sanctions for the government’s willful failure to discover exculpatory evidence in violation of the Colorado and United States Constitutions, Rule 16 of the Colorado Rules of Criminal Procedure, and for how this conduct coerced the Defendant into waiving his rights to both remain silent and his right to confidentiality in attorney-client work-product under both the Colorado and United States Constitutions.

AS GROUNDS for this motion, Mr. Morosko asserts the following:

FACTUAL BACKGROUND

1. On 09/17/21 around 8:30 AM Gregory John Gabrisch of Houston, TX, was killed in an apparent hunting accident in Dolores, CO.

2. Ronald Morosko from Elizabeth, PA, reported the incident to the Dolores County Sheriff’s Office, and then asserted his right to remain silent, and his right to an attorney to law enforcement that same day.

3. On September 22nd, 2021, undersigned counsel filed an Entry of Appearance in this case, in which counsel requested, “Pursuant to Rule 16, C.R.Cr.P., Please provide our office with discovery in the above mentioned case.”

4. On October 26th, 2021 Defense hired expert Michael Van Durme and provided him with all discovery that had, to date, been provided to defense counsel. On October 29th,

2021, Captain Van Durme indicated that it might be of some value to try to get back up the site of the accident with the Defendant so that he could re-acquaint himself with the scene and more fully recollect and account for how the accident may have occurred. He noted at that early stage that he was astonished at the lack of thorough investigation and the lack of information with which a thorough opinion could be generated. At that time, the defense team targeted a mid-November trip to the scene to be able to review it.

5. On November 2nd and 3rd, 2021, and again on November 9th and 10th, 2021 snow blanketed the area of the accident, changing the appearance of the site drastically from the conditions as they were on September 17th, 2021. It was determined that it would not be productive to conduct a site review unless a window of snow melt could be achieved long enough to arrange for the expert to fly in from New York and the Defendant to fly in from Pennsylvania.

6. Over the next two weeks it was determined that it was unlikely that a window of opportunity would present itself until the following Spring or Summer in which the area would not be covered in snow. It was also discussed after the December 14th, 2021 Court appearance that no further continuances would likely be granted by the Court, as the Court indicated as such at that appearance.

7. The defense team reviewed the very minimal investigation conducted and produced by law enforcement and the prosecutor at that time and concluded that any lack of specificity with regards to measurements, distances, angles, location data, etc. was the product of a shoddy investigation, and would be to the detriment of the prosecution's case, not the defendant's, and thus a report should be conducted based upon the information available and to the best recollection that the Defendant could come up with, rather than make further efforts to try to access the scene to conduct further investigation prior to the production of reports. The Defendant then expended over \$5,000 paying for Captain Van Durme's report to be produced.

8. On October 25th, 2021 Defense counsel also reached out to several trauma experts in Southwest Colorado to identify an expert in the field of Trauma Response. On November 8th, 2021, counsel engaged Lillian Ramey as an expert in trauma response, however due to personal matters that prevented Ms. Ramey from conducting her investigation and report, this expert was later changed to Dr. Rita Baker in December of 2021. Dr. Baker was also in need of all discovery on the case, as well as statements from the Defendant, in order to conduct a full review and report. All information in defense's possession was thus provided to Dr. Baker.

9. On January 21st, 2022 a Plea Hearing was held in this case. At that time, counsel requested a continuance of the case to complete investigations with the two retained expert witnesses, both of whom were working with defense on opinions related to this case, and both of whom were in receipt of confidential defense work-product statements made by the Defendant. The Court denied this continuance and demanded a plea be entered, resulting in the setting of the matter for trial. This also set into motion deadlines for expert disclosures for the defense, as well as a plea deadline orally stated by the DA's office that plea negotiations would not remain open if the case proceeded to a Motions Hearing.

10. Also on January 21st, 2022, at the Plea Hearing in this matter, the parties reviewed all discovery provided in this case on record, with the Court, and the Court inquired as to whether there were any discovery issues. Of note, no issues were disclosed by the prosecution at that time.

11. On February 4th, 2022, undersigned counsel and the Defendant discussed and weighed a cost/benefit analysis of disclosing work-product and Constitutionally protected statements, and decided to disclose to the prosecution a report from Captain Van Durme related to this case that contains confidential attorney-client work product and analysis based upon Mr. Morosko's statements to counsel and the expert. The decision to disclose this report was based upon the available information, discovery, assertions of the DA's office related to discovery and based upon the self-fulfilling obligations contained in Rule 16 of the C.R.Cr.P. and the Defendant's Constitutional Rights to Effective Assistance of Counsel, the Right to Remain Silent, and the Right to Present a Defense. In effect, the Defendant "put his cards on the table" and provided the prosecutor with the intimate details of his trial strategy which includes not only his Constitutionally protected statements about the offense, but also includes a detailed analysis by the expert as to the lack of scene preservation and investigation and how this inevitably results in reasonable doubt as to what occurred on September 17th.

12. On February 24th, 2022 undersigned counsel and the Defendant disclosed to the prosecution a report from Dr. Rita Baker related to this case that contains even further confidential attorney-client work product and specific statements by Mr. Morosko counsel and the expert related to the case and the events of September 17th, 2021. The decision to disclose this report was based upon the available information, discovery, assertions of the DA's office related to discovery and based upon the self-fulfilling obligations contained in Rule 16 of the C.R.Cr.P. and the Defendant's Constitutional Rights to Effective Assistance of Counsel, the Right to Remain Silent, and the Right to Present a Defense. Defense expended over \$3,000 on this expert and report.

13. On Friday, February 25th, 2022, approximately 10 days prior to the scheduled Motions Hearing in this matter, and over a month after the parties had, on the record, reviewed discovery disclosures and stated there were no discovery issues, defense counsel received discovery of DA #14, a 3D program file called Scene2GO which apparently was created back on September 17th 2021, or sometime shortly thereafter.

14. This program file appears to contain a computer-generated 3D image of the scene where the hunting accident occurred. Although undersigned counsel is unfamiliar with this software program and has never worked with the program, the Scene2Go corporate website indicates that the 3D images are created using a "FARO Focus Laser Scanner to accurately capture evidence at crime scenes." Presumably, this would mean that some form of equipment was taken to the crime scene on September 17th, 2021 and used to scan the scene and create the file.

15. No report regarding a FARO Focus Laser Scanner, the program Scene2Go, or the fact that a 3D model of the scene might exist, was ever provided the defense in the preceding 5 months of litigation.

16. To the extent this file was created on September 17th, 2021, it was never shared with defense counsel until over five months later, on the eve of the Motions Hearing in this matter. In the meantime, the Defendant has exhausted significant time and financial resources hiring expert witnesses to assess the crime scene, conduct available reconstruction of the incident, and otherwise assess the merits of the case, as well as prepare a complete defense strategy and trial notebook.

17. At this point, undersigned counsel is not sure what evidentiary value the late-discovered evidence contains, whether it is exculpatory or inculpatory, and how it might impact expert opinions and analysis that has already been conducted at length and shared with the prosecuting attorney.

18. In fact, said evidence was produced shortly after defense counsel submitted to the Court Defense Motions 4 and 5 with attached Exhibit which detailed the significant lack of crime scene evidence in the case and the problems that this created for both the defense and prosecution in assessing what happened, and further request for sanctions based upon the lack of preservation of evidence.

19. Of significant concern to undersigned counsel is that in the process of preparing for Motions Hearing and Trial, undersigned counsel made a strategic decision to release to the prosecutor expert opinions which contain statements from the Defendant related to the facts of this case, in light of the Prosecutor's motion requesting disclosure of the Defendant's statements to those experts.

20. To the extent this late-discovered evidence might be used to impeach the Defendant's account of the events of September 17th, 2021, withholding the evidence from counsel can be viewed only as an intentional coercion of a waiver his right to remain silent or make statements in his defense, and coercion on counsel to provide confidential and protected attorney-client work-product based upon the state of the evidence then known to counsel. Such a violation of the Defendant's fundamental Constitutional rights requires the most severe possible sanctions available to this Court to both remedy the violation of his rights, and to discourage the same in the future.

21. In addition, this evidence is discovered to counsel at a time when neither counsel, nor his expert witness, is prepared to fully assess the value of the evidence with regards to already filed and prepared motions issues, nor determine the scientific nature of such evidence, evaluate the source codes for the software and program that creates the evidence, or identify any possible issues with the evidence prior to the scheduled motions hearing or jury trial in this matter.

REQUESTED RELIEF

22. Counsel requests the immediate dismissal of this case based upon the discovery violation detailed above.

23. If this Court is not prepared to dismiss these charges based upon this grievous violation of Mr. Morosko's rights to a fair trial, right to remain silent, right to effective-assistance of counsel, and right to attorney-client privileges, Counsel requests the immediate reduction of charges to misdemeanor charges as a sanction for the violation.

24. If the case is not fully dismissed, counsel further requests discovery of a full report documenting when and how law enforcement created this evidence, to be made a matter of the record for appellate review, and the immediate suspension of proceedings for Rule 21 relief to be requested.

25. Counsel further reserves the right to request further discovery related to this evidence, and the right to file additional motions based upon this evidence, once the Defendant and his retained expert have had opportunity to review the evidence fully and assess its value. To the extent additional financial resources are not needed to be able to produce new reports or hire new experts based upon this late-discovery, Counsel requests the state bear the burden of these additional costs.

LEGAL AUTHORITY & ARGUMENT

A. THE DISTRICT ATTORNEY'S AFFIRMATIVE DISCLOSURE DUTIES

1. Constitutional Obligations

26. The United States Supreme Court held “[t]he suppression by the prosecution of evidence favorable to the accused upon request violates due process whether the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.” Brady v. Maryland, 373 U.S. 83, 87 (1963).

27. The Colorado Supreme Court confirmed that discovery in a state criminal trial implicates due process. See People v. Thatcher, 638 P.2d 760, 768 (Colo. 1981)(holding that the use of discovery material for impeachment purposes implicates the due process rights of the defendant).

28. The prosecution has a duty to preserve and provide discovery of any material that may be meaningful to the defense, regardless of whether it is exculpatory or will relate to testimony the prosecution intends to present at trial. Thatcher, 638 P.2d at 768; People v. Smith, 524 P.2d 607 (1974); People ex rel. Gallagher v. District Court, 656 P.2d 1287 (Colo. 1983) (defendant’s due process rights violated by prosecution’s failure to conduct scientific test on victim’s hand or to preserve the hand for defense testing).

29. “[T]he individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government’s behalf in the case, including police.” Kyles v. Whitley, 514 U.S. 419, 437 (1995). Material in the possession of all 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. See Chambers v. People, 682 P.2d 1173, 1180 n.13 (Colo. 1984).

30. “A witness statement, to be relevant, need not contain information admissible at trial, as long as the contents of the statement are relevant to the conduct of the defense. Generally, defense counsel is the appropriate party to make that determination. See A.B.A. Standards, *supra*, Commentary at 11.15. As we noted in People v. Smith, 185 Colo. 369, 524 P.2d 607 (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. See Alderman v. United States, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176. 524 P.2d at 611.”

People v. Gallegos, 644 P.2d 920, 924 (Colo. 1982).

31. The prosecution has a duty under the United States and Colorado constitutions to preserve evidence which is material to the case and which may be exculpatory to the defendant. See California v. Trombetta, 467 U.S. 479 (1984); People v. Greathouse, 742 P.2d 334 (Colo. 1987).

32. The state has a duty to preserve evidence which might be expected to play a significant role in an individual’s defense. People v. Thomas, 916 P.2d 582, 584 (Colo. App. 1995).

33. **A defendant is entitled to sanctions** if his right to due process has been violated by the prosecution’s failure to preserve or produce material evidence. People v. Enriquez, 763 P.2d 1033, 1036 (Colo. 1988). **The trial court enjoys broad discretion in determining an appropriate sanction to impose.** *Id.*

34. Whether a due process violation has occurred requires an evaluation of all of the evidence. *Id.*

2. Crim. P. 16 Obligations

35. Crim. P. 16(I)(a) delineates the prosecutor’s mandatory disclosure obligations. This Rule requires the Prosecution to disclose all “police, arrest and crime of offense reports, including statements of all witnesses;” “any books, papers, documents, photographs or tangible objects held as evidence in connection with the case;” “any record of prior criminal convictions of...any person the prosecuting attorney intends to call as a witness in the case;” “all tapes and transcripts of electronic surveillance...of conversations involving the accused, any codefendant or witness in the case;” and “a written list of the names and addresses of the witnesses then known to the district attorney whom he or she intends to call at trial.” COLO. CRIM. P. 16(I)(a)(I), (IV), (V), (VI), (VII).

36. It is the prosecutor's duty to "ensure that a flow of information is maintained between the various investigative personnel and his office sufficient to place within his possession or control all material and information relevant to the accused and the offense

charged." COLO. CRIM. P. 16(I)(b)(4); *see also* People v. District Court, 793 P.2d 163, 167 (Colo. 1990); Chambers v. People, 682 P.2d 1173, 1180 (Colo. 1984).

37. The prosecution has an obligation to make timely disclosure to defense counsel of all information and material known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense. Crim. P. 16(I)(a)(2); R.P.C. 3.8(d).

38. Crim. P. 16(I)(a) imposes duties that must be automatically performed by the prosecution in a timely manner. *See* People v. County Court, 790 P.2d 332, 337 (Colo. 1990); People v. Alberico, 817 P.2d 573 (Colo. App. 1991). In addition, the prosecution is under a *continuing* duty to disclose additional information as it is discovered. COLO. CRIM. P. 16(III)(b); *see* Mooney v. Holohan, 294 U.S. 103, 108 (1935).

39. **Material in the possession of all 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 (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); 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).

a. Effective Assistance of Counsel

40. The U.S. and Colorado Constitutions guarantee a criminal defendant the right to effective assistance of counsel. U.S. Const. Amend. VI; Colo. Const. Art. II § 16. The Rule of Professional Conduct also demand that counsel take whatever lawful and ethical steps are necessary to vindicate a client's endeavors. Rules of Prof.Cond., Rule 1.3, Comm. 1.

41. Because the prosecutor's duty to disclose is mandatory, and the defendant and his counsel have no burden of requesting discovery, an attorney who alerts the prosecution of evidence that might convict a client would violate that client's constitutional right to effective assistance of counsel and the Rules of Professional Conduct. Alerting the prosecution to evidence that could lead to a conviction, when defense counsel has no affirmative duty to do so, would be the opposite of effectiveness and duty of good faith to a client.

3. NECESSITY OF SANCTIONS

42. Rule 16 permits a trial court to fashion a sanction against a party for failing to comply with mandatory discovery obligations. COLO. CRIM. P. 16(III)(g). It is within the trial court's discretion to determine the appropriate sanction to impose. People v. Lee, 18 P.3d 192, 196 (2001); People v. Moore, 226 P.3d 1076, 1092 (Colo. App. 2009).

43. "The imposition of discovery sanctions generally serves the dual purposes of protecting the integrity of the truth-finding process and deterring discovery-related misconduct." Lee, 18 P.3d at 196. Where there is willful misconduct or a pattern of neglect in a party's

discovery practices, a deterrent sanction is appropriate. See Id. In the absence of willful misconduct or a pattern of neglect, the court should fashion a remedy that cures the prejudice resulting from the discovery violation. Id.

44. In some cases, a dismissal can be a proper remedy to assure compliance with mandatory discovery requirements. Id.; People v. Thurman, 787 P.2d 646, 655 (Colo. 1990) (finding that the prosecution's willful refusal to comply with discovery orders merited a dismissal of the criminal charges); People v. Dist. Ct., 664 P.2d 247, 252 (Colo. 1983) (upholding an order excluding evidence due to prosecution's failure to comply with a discovery order).

45. Punitive sanctions are appropriate because the 22nd Judicial District Attorney's Office and the law enforcement agencies with whom they work have a pattern and practice of gross negligence and willful discovery violations. Just recently undersigned counsel had to file a similar motion in a case that this Court presided over, in which the MCSO failed to produce surveillance footage, which resulted in the confession of discovery violations and dismissal of that case. That case has since been sealed, however it should be noted the charges in that case carried more significant penalties than the charges in the pending case.

46. Additionally, the sanction this Court fashions must remedy the harm that this discovery violation has caused. The fact that expert opinions containing defendant's confidential statements were provided to the prosecutor was a strategic decision made based upon the assertions of the DA's office made on January 21st, 2022, and based upon the self-fulfilling obligation to produce all evidence in law enforcement's possession. That bell cannot be un-rung. The Defendant cannot now reconstruct or redo the last four months of defense-expert investigation, report writing, trial preparation, and make a new decision on whether or not to provide the prosecutor with information that the prosecutor now already has in his possession and will color the way he and law enforcement approach the case. Nor can the Defendant afford the extraordinarily high legal and expert witness expenses to re-do all of the work that has been done on this case up to this point. Any remedy short of complete dismissal would fail to remedy the harm caused by this violation.

47. Complete and total suppression of this evidence for any use at trial, including any reference to the mere existence of such evidence, or impeachment of the Defendant's statements regarding the scene or his recollection of angles, distances or sight lines, or bolstering of law enforcement's investigation efforts upon the defense's attack on said efforts, or prosecution witnesses' references to distances, angles, what the Defendant could or could not see, etc. would still be an insufficient sanction to remedy for this discovery violation. This is because it would create a situation in which prosecution witnesses would essentially have to lie under oath regarding their investigation, as attacking the substance of that investigation has been a cornerstone of the defense trial strategy and expert opinions to this point.

WHEREFORE, the Defendant, through counsel, requests this court to dismiss this case or, in the alternative, impose severe sanctions for the District Attorney's violations of Crim. P. 16 and the United States and Colorado Constitutions. In addition, any sanction less than absolute dismissal would require the further request that all proceedings in this matter be continued to

allow defense counsel significant time to interpret this withheld evidence and incorporate said evidence into a defense strategy that has been 5 months in the making.

Respectfully submitted,

/s/ Kenneth Pace
KENNETH PACE No. 41214
Pace & Little, LLC

Certificate of Service

I hereby certify that on 3/2/2022, copies of the foregoing document were served on all opposing counsel of record. /s/ Kent Pace