District Court, Fremont County, Colorado 136 Justice Center Road Canon City, CO 81212	DATE FILED: February 23, 2022 3:38 PM FILING ID: 3084B8F65A5F5 CASE NUMBER: 2022CR47
THE PEOPLE OF THE STATE OF COLORADO **vs.** **BARRY MORPHEW,** Defendant	☐ **COURT USE ONLY** ☐
Linda Stanley Eleventh Judicial District District Attorney, # 45298 District Attorney's Office 104 E. Crestone Ave Salida, CO 81201 Phone Number: (719)539-3563	Case No: D0082022CR000047 Div: 1 Courtroom:

RESPONSE TO DEFENSE SUPPLEMENT TO MOTION FOR SANCTIONS[D-17(c)]

COMES NOW, the People of the State of Colorado, by and through Linda Stanley, District Attorney for the Eleventh Judicial District, by and through her duly appointed Deputy District Attorney and respectfully submits to this Honorable Court the People's Response to Defense Supplement to Motion for Sanctions [D-17(c)]:

1. The defendant has been charged with one count each of First Degree Murder, Tampering with a Deceased Human Body, Tampering with Physical Evidence, Possession of a Dangerous Weapon and Attempt to Influence a Public Servant for events that happened on or about May 9, 2021.

2. The People have produced tens of thousands of pages of discovery and hours of video and audio recordings. The People have conferred with the defense on multiple occasions and provided discovery in a timely manner. It should be noted that it appears the defense has stopped trying to confer with the People as their last request for discovery was made directly to the Court before the last hearing. Despite this, the defense persists on filing discovery motions asking this Court for the draconian sanction of dismissal for what amounts to disagreements among law enforcement in timing.

3. In the defense's latest motion, they are asking the Court to dismiss a First Degree Murder case because a former CBI Agent, who has been thoroughly discredited, has opined on the timing of arresting the defendant in this case. The defense contends that if they had known about this opinion, they could have cross examined the agent and the case would not have

been bound over for trial. This is utter nonsense. Of course these attorneys have also have advocated preposterous notion to this Court that the 11th Judicial District DA's Office, the FBI, CBI and Chaffee County Sheriff's Office are in some grand conspiracy to suppress discovery that we have already timely provided.

FACTS

4. On December 10, 2021, the People received what is referred to as a *Brady* letter from the Colorado Bureau of Investigation regarding one of their agents, Joe Cahill. The letter indicated the impact on Mr. Cahill's credibility was the result of an accidental discharge of a firearm and was unrelated to this case. The People immediately turned that letter over to the defense. On multiple occasions, the defense demanded the People provide the Internal Affairs investigation (IA) on Mr. Cahill. Each time, the People informed the defense that we were not in possession or control of the file, and they would need to file a subpoena duces tecum to obtain the information. Finally, the defense did just that (although the SDT was very broad and was looking for information previously denied the defense by Judge Murphy). Pursuant to Colorado law, the Court took the IA file to determine if any information was relevant to this case. On February 3, 2022 the Court released a copy of the IA to the People and defense.

5. The defense has taken bits and pieces out of context in the IA to claim there is a discovery violation. Arguing that because Mr. Cahill opined on when the defendant should have been arrested it is exculpatory and should have been discovered. The defense uses the statement that Mr. Cahill said, "the arrest of the suspect now as the worst decision that could have been made." Mr. Cahill also indicated in his IA that he thought, "the arrest of the suspect in this investigation was premature" and that the arrest was "hasty." It also appears Mr. Cahill was put out because he could not be present at the arrest due to him attending the arrest, even though he "spent a year of his life putting together the investigation." At no time did Mr. Cahill say that he did not think there was probable cause to arrest or that he thought the defendant was not guilty of murdering his wife.

CASELAW

6. The Colorado Supreme Court and United States Supreme Court have been explicit in the limitations of discovery in criminal cases. "In general, discovery in criminal cases is governed by Crim.P. 16. This rule describes each party's obligations and imposes deadlines for disclosure of certain items and information." *People v. Jowell*, 199 P.3d 38, 41 (Colo. App. 2008). Discovery is limited to these principles:

   a. "There is no general constitutional right to discovery in a criminal case and *Brady* did not create one." *People in the Interest of E.G.*, 369 P.3d 946, 952 ¶ 22 (Colo.

2016); *People v Spykstra*, 234 P.3d 662, 670 (Colo. 2010) citing *Weatherford v Bursey*, 439 U.S. 545 (1977), *Brady v Maryland*, 373 U.S. 83 (1963); see also *People v Baltazar*, 241 P.3d 941, 943 (Colo. 2010); *People ex rel A.D.T.*, 232 P.3d 313, 316 (Colo.App. 2010).

b. As a constitutional matter, *Brady* and its progeny only require disclosure of exculpatory, impeaching, and mitigating evidence. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v United States*, 450 U.S. 150, 154 (1972); *United States v Bagley*, 473 U.S. 667, 674-675 (1985). *Bagley* set forth a materiality standard: "evidence is material only if there is a reasonable probability that the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 473 U.S. at 682; *Pennsylvania v Ritchie*, 480 U.S. 39, 56-57 (1987).

c. Otherwise, discovery is limited to the dictates of Crim.P. Rule 16. "Colorado remains one of the few states that has never deviated from the traditional doctrine holding that courts lack power to grant discovery outside of those statutes or rules." *People in the Interest of E.G.*, 368 P.3d 946, 949 ¶ 12 (Colo. 2016) (delinquency case); *People v Chavez*, 368 P.3d 943, 946 ¶¶ 30-32 (Colo. 2016) (holding that neither the Constitutions, Rules of Criminal Procedure, nor any statute gives the trial court authority to order access to a private residence to the defense). "By providing additional means for disclosure, Colorado's rules of criminal procedure to some extent compensate for the limitations on the protection afforded defendants under the Brady doctrine." *People v District Court of El Paso County*, 790 P.2d 332, 338 (Colo. 1990). "Thus, under Colorado law, district courts have "no freestanding authority to grant criminal discovery beyond what is authorized by the Constitution, the rules, or by statute." E.G. 368 P.3d at 950 ¶ 13 and cited in In re *People v Kilgore*, 2020 CO 6 ¶ 15.

d. The right to confrontation is a trial right and not a rule of pretrial discovery. *People in the Interest of E.G.*, 368 P.3d 946, 953 ¶ 28 (Colo. 2016); *People v Spykstra*, 234 P.3d 662, 670 (Colo. 2010). "Accordingly, in guaranteeing an opportunity for effective cross-examination, the Confrontation Clause does not guarantee every possible source of information relevant to cross-examination." *Spysktra*, 234 P.3d at 670, citing *Pennsylvania v Ritchie*, 480 U.S. at 53-54; and see *People v Turner*, 109 P.3d 639, 646-647 (Colo. 2005), *People v Baltazar*, 241 P.3d 941, 943-944 (Colo. 2010).

e. The Due Process Clause does not provide discovery other than *Brady* and the defendant has no right to use court-provided investigative tools to provide discovery. *People in the Interest of E.G.*, 368 P.3d 946, 952 ¶ 25 (Colo. 2016). "The

Due Process Clause has little to say regarding the amount of discovery which the parties are afforded . . . ." *Weatherford v Bursey*, 429 U.S. 545, 559, citing *Wardius v Oregon*, 412 U.S. 470, 474 (1973). "With regard to the dictates of due process, the (United States Supreme) Court has found, at most, an entitlement of access to evidence and witnesses that would be both constitutionally material and favorable to the accused." *People v Baltazar*, 241 P.3d at 944, citing *Arizona v Youngblood*, 488 U.S. 51, 55 (1988).

7. *Brady* and cases following it require the discovery of items that are favorable to the defendant because they are exculpatory, impeaching, or mitigating. *Brady* is substantially incorporated in Crim.P. Rule 16 (a)(2). The Rule requires the prosecution to disclose "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 thereof."

8. The Rule provides time limits for disclosure of discoverable materials. First, as to sections (I) police, arrest and crime or offense reports including statements of all witnesses; (IV) books, papers, documents, photographs or tangible objects held in evidence; and (VII) a written lists of names and address of the witnesses, the discovery must be provided as soon as practicable but not later than 21 days after at the first appearance or following the filing of charges. Rule 16(I)(b)(1).

9. All other enumerated discovery is due "as soon as practicable but not later than 35 days before trial." Rule 16(I)(b)(3). Implicitly Rule 16 recognizes then that ongoing discovery obtained by the People and submitted to the defense in advance of the 35 day deadline is reasonable as a generality.

10. To the extent that the Motion complains of not receiving information prior to when reports were written and evidence actually obtained, oral statements are not required to be disclosed. There is no requirement that oral statements be reduced to writing or discovered. *People v Denton*, 91 P.3d 388, 391 (Colo.App. 2003) citing *People v Garcia*, 627 P.2d 255 (Colo.App. 1980), *People v Graham*, 6787 P.2d 1043, 1047 (Colo.App. 1983). The *Denton* Court held "In our view, the current Crim. P. 16(I)(a)(1)(I) only requires the prosecution to provide the defense with the written statements of witnesses or any written reports that quote or summarize oral statements made by witnesses. If the supreme court had intended the amendment of Crim. P. 16(I)(a)(1)(I) to require the disclosure of unrecorded oral statements, then it would have so specified as it did elsewhere in Crim P. 16. See, e.g., Crim. P. 16(I)(a)(1)(VIII) (the prosecuting attorney shall make available "the substance of any oral statements made to the police or prosecution by the accused or by a codefendant, if the trial is to be a joint one")" *Id.*

11. To the extent that the Motion seeks dismissal, the Supreme Court in *United States v Russell*, 411 U.S. 423, 431-32 (1973) held that "the conduct of law enforcement agents (might be) so outrageous that due-process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." The conduct, the Court held, would need to be "shocking to the universal sense of justice." *Id* at 432. The Colorado Court of Appeals adopted the standard and held that only where the conduct "violates fundamental fairness and is shocking to the universal sense of justice" would there be "outrageous government conduct." *People v Medina*, 51 P.3d 1006, 1011 (Colo. App. 2001) (holding that it was not outrageous government conduct to misstate the law, although improper).

12. Instances in which trial courts have found outrageous governmental conduct in Colorado are rare. See e.g., People v Cowart, 244 P.3d 1199, 1206-07 (Colo. 2010) (holding no outrageous conduct where there was a violation of the defendant's Fifth and Sixth Amendment rights on two occasions); People v Bergen, 883 P.2d 532, 542 (Colo. App. 1994) (holding that even where there violations of the rule and statute involving grand jury procedure, such violations did not amount to outrageous government conduct); *People v. Auld*, 815 P.2d 956, 959 (Colo. App. 1991) (finding outrageous governmental conduct and affirming the dismissal of a case based on a fictitious complaint filed against a fictitious defendant in order to investigate a later retained defense attorney), *People in Interest of M.N.*, 761 P.2d 1124, 1129 (Colo. 1988) (finding no outrageous governmental conduct when an undercover officer convinced a minor to steal tires and obtain marijuana for him and then shared the marijuana with the minor), and *People v. Morley*, 725 P.2d 510, 515 (Colo. 1986) (finding no outrageous governmental conduct when an undercover operation discovered evidence linking an attorney with prostitution-related activity). There is no reported case in Colorado that has found outrageous government conduct in discovery violations. Yet it appears the defense wants this Court to go where the Supreme Court and Court of Appeals will not tread.

13. In *People v Burlingame*, 2019 COA 17, 434 P.3d 794, the Court held:
"Outrageous governmental conduct is conduct that violates fundamental fairness and is shocking to the universal sense of justice." (*People v.) Medina*, 51 P.3d (1006) at 1011. Instances where trial courts have found outrageous government conduct in Colorado are vanishingly rare, and the threshold for such a finding appears to be exceedingly high. In fact, we found only one such case where a Colorado appellate court upheld a finding of outrageous government conduct. *People v. Auld*, 815 P.2d 956, 959 (Colo. App. 1991) (upholding the dismissal of charges based on a finding of outrageous government conduct because the prosecution filed fake charges against an undercover agent and therefore "dup[ed the] court into becoming an accomplice" to their nefarious actions)."
The Court of Appeals reversed the trial court's order and remanded directing that charges be reinstated.

ARGUMENT

14. The defense, in this motion and others and in argument, repeatedly refers to discovery provided as "highly exculpatory" and that there are "massive amounts of exculpatory evidence", yet provides no specifics as to what is exculpatory, let alone "highly exculpatory." These unsubstantiated statements should be considered as simply sartorial embellishments and dismissed out of hand. Certainly, if the defense counsel calls an accusation of perjury for a witness on the stand as in the "heat of the moment", these hyperbolic, unsubstantiated statements should be considered the same. The only discovery that should be considered with this motion are the statements made by Joe Cahill as a part of his internal affairs investigation.

15. The defense has provided Exhibit A, which outlines statements made by Mr. Cahill and potential questions the defense could have asked. This also should be disregarded. As mentioned above, "the Confrontation Clause does not guarantee every possible source of information relevant to cross-examination." *Spysktra*, 234 P.3d at 670, citing *Pennsylvania v Ritchie*, 480 U.S. at 53-54. Further under *Rex v. Sullivan*, 575 P.2d 408 (Colo. 1978) a defendant has no constitutional right to unrestricted confrontation of witnesses and to introduce evidence at a preliminary hearing. Essentially, just because the defense could have asked questions based upon discovery provided after the hearing, that does not mean the Constitution is violated because they were not able to ask these questions. Looking through the list of questions the defense would have asked, it is clear that they are not material and would have had no effect on the outcome of the preliminary hearing. Such questions as to timing and when and who he told his opinion do not go to probable cause, but rather are a discovery fishing expedition.

16. The defense also persists on claiming, as a part of their grand discovery conspiracy, that Mr. Cahill's reassignment within the Colorado Bureau of Investigation after the preliminary hearing was the result of pressure by District Attorney Linda Stanley after Mr. Cahill's testimony at preliminary hearing. The defense opines that this would have affected the outcome of the preliminary hearing. This is preposterous in that all these events happened after preliminary hearing and so even if true would not have affected its outcome. The People are respectfully asking this Court to not allow the defense to question witnesses on this matter. It is a fishing expedition that goes to nothing and feeds into the preposterous notion that we are engaged in some grand discovery conspiracy.

17. The defense contends that they have not seen "a single email, document, text or report documenting that Mr. Cahill" communicated the information that he disagreed with the timing of the arrest. The defense contends that Mr. Cahill's opinion is exculpatory. Mr. Cahill communicated his concerns verbally, so there is no documentation of his opinion. Further, when or how a person is arrested are issues that are procedural in nature. They do

not implicate whether there was probable cause, but merely how to comply with the Court's finding of probable cause and order to arrest. Therefore, any disagreement between law enforcement as to these procedural issues is not exculpatory. It certainly is not exculpatory if officers disagree whether they should arrest a person at their home versus at work. Likewise, disagreements as when to execute the court's order is not exculpatory.

18. Mr. Cahill opining on the timing of the arrest is also not material. The standard as outlined in *Bagley* is that "evidence is material only if there is a reasonable probability that the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 473 U.S. at 682. It is clear that one law enforcement officer opining about the timing of the arrest would not have affected the outcome of the preliminary hearing. As mentioned above, opinions as to the timing of the arrest are merely procedural and conflicts between law enforcement agencies as to procedure, although not common, happen with regularity. Nothing would have changed at the preliminary hearing should this procedural disagreement between law enforcement have been brought to light.

19. Although there is nothing to suggest, as the defense speculates, that Mr. Cahill thought there was no probable cause or he didn't think the defendant murdered his wife, assuming *arguendo* that Mr. Cahill had opined that he thought there was no probable cause at the time of the arrest, it still would have not been material. In a preliminary hearing, the standard is probable cause, and the evidence must be viewed in the light most favorable to the People with all conflicts in evidence to be resolved in favor of the People. *People v Hall*, 999 P.2d 207 (Colo. 2000). This is the standard followed assiduously by Judge Murphy at the preliminary hearing. He specifically mentioned the unknown DNA found on the victim's SUV and, using preliminary hearing standards, discounted it in favor of evidence viewed in the light most favorable to the People. One law enforcement officer opining that there was no probable cause to arrest would not change this, especially since Judge Murphy had found probable cause at the time of the arrest by signing the arrest warrant. But as mentioned earlier, there is no evidence that opinion by Mr. Cahill.

20. The defense also contends that the "arrest warrant affidavit contains falsehoods and misrepresentations," but does not provide any specifics again. They rely on blanket accusations with no basis in fact. Leaving out the disagreements about timing of arrest, is not "falsehoods and misrepresentations."

21. The defense attorneys also have proposed the sanction of dismissal and repeats their contention that if Mr. Cahill's statements had been known then probable cause would not have been found by Judge Murphy. As outlined above, this is preposterous. An opinion of timing of arrest would not invalidate four days of testimony, especially with the preliminary hearing standard. The defense contends that the People "withheld massive amounts of

exculpatory evidence prior to the Preliminary Hearing." A couple of statements by one officer certainly does not constitute "massive amounts" of discovery. Of course, these are the same defense attorneys that have alleged a grand conspiracy between multiple state and federal jurisdictions.

22. It is also telling that the defense is not asking to rehear the preliminary hearing as a sanction. If, as the defense contends, the hearing "violated [the defendant's] due process rights" and with the latest information "it is certain that probable cause would not have been found." Then the natural remedy is to rehear the Preliminary Hearing. The reason is clear why they do not want to redo the PH, because any judge will still find probable cause even with Mr. Cahill's statements. In fact, it is arguable that a judge would more easily find probable cause, since we can now show that the three CODIS hits presented at preliminary hearing are not connected to this case.

23. It is clear there has been no discovery violation on the part of the People at it relates to the statements made by Mr. Cahill and the defense Supplement should be denied.

WHEREFORE, the People respectfully ask this Court to deny the defendant's Motion for Sanctions in all its forms.

Respectfully submitted this 23d day of March, 2022.

Respectfully submitted,
LINDA STANLEY
11th Judicial District Attorney
/s/ Mark Hurlbert
Mark Hurlbert, #24606
Deputy District Attorney

CERTIFICATE OF SERVICE

I certify that on February 23, 2022 a true and correct copy of the foregoing Motion was served via Colorado Courts E-Filing on all parties who appear of record and have entered their appearance herein according to Colorado Courts E-Filing.

By: /s/ Mark Hurlbert