DISTRICT COURT, FREMONT COUNTY, COLORADO 136 Justice Center Rd., Canon City, CO 81212 Court Phone: (719) 269-0100	DATE FILED: February 9, 2022
THE PEOPLE OF THE STATE OF COLORADO, v. BARRY LEE MORPHEW, Defendant.	▲ COURT USE ONLY ▲
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SUPPLEMENT TO MOTION FOR SANCTIONS
[D-17(c)]

Based on discovery received during and after the hearing on this motion, Barry Morphew supplements his Motion for Discovery Sanctions and for Punitive Contempt Sanctions as follows:

I. INTRODUCTION

1. During the January 2022 hearings on this matter, the defense received over 23,000 pages of discovery, much of it highly exculpatory. Most of this late-provided discovery should have been disclosed eight months ago, well before the Preliminary Hearing and the multiple discovery sanctions hearings in this case. Indeed, the court long ago ordered disclosure of this material.

2. Following issuance of a defense subpoena duces tecum, this Court conducted an in camera review of Joseph Cahill's internal affairs file. Following that review, disclosures were made to the defense. The defense received the flash drive containing the SDT'd disclosures on Monday, February 7, 2022 and were able to open the drive on February 8, 2022. As a result of this disclosure, it is revealed that much more exculpatory evidence had not been produced to the defense prior to the Preliminary Hearing, that would have changed the outcome of the hearing. The SDT disclosure also reveals that much more exculpatory evidence has still not been produced to date. Additionally, Mr. Morphew's attorneys received an operable electronic storage device and first had access to the material on February 2, 2022. Highly exculpatory information was contained in that device as well.

II. ADDITIONAL EXCUPLATORY MATERIAL COVERED BY NEW DISCLOSURES

CAHILL: Arresting Mr. Morphew now "is the worst decision that you can make."

3. Mr. Cahill and CBI Agent Graham were the co-lead investigators of the year-long Morphew investigation. On December 2, 2021, Mr. Cahill was interviewed by Internal Affairs ("IA"). In that interview Cahill stated he told many law enforcement witnesses in this case that arresting Mr. Morphew was premature, and the "worst" decision that could be made. He also stated the case was not remotely ready for anybody to move the case forward ("put this forward"). *See* Exhibit A, chart of exculpatory statements made by Mr. Cahill during the IA interview and questions that would have been asked at Preliminary Hearing, and Exhibit B, 12-3-21 Cahill IA Investigations Report, pgs. 23-24.

4. In the interview Mr. Cahill also stated that he shared these opinions and reasons for his opinions with Agent Graham. Mr. Cahill suggests in the interview that Agent Graham agreed with his view. Agent Cahill's two supervisors, CBI Deputy Director Chris Schaefer and CBI Agent Kemper talked with Chaffee County Sheriff John Spezze about the concerns expressed by Agents Cahill and Graham. Mr. Cahill stated that Sheriff Spezze did not heed CBI's advice or opinions and moved forward with Mr. Morphew's arrest. Mr. Cahill summed up by saying it "is what it is." *See* Exhibit A.

5. The Affidavit in support of the arrest of Mr. Morphew, which was attested to by District Attorney Linda Stanley, then-Chief Deputy District Attorney Jeff Lindsey, and Investigator Alex Walker, states that Agents Cahill and Graham reviewed the entire affidavit and implies that they supported the arrest of Mr. Morphew. *See* Exhibit A. Aside from Mr. Cahill's misrepresentations about how little of the Affidavit he reviewed (*See* Exhibit C, Preliminary Hearing Transcript of August 24, 2021, pp. 53-57), Mr. Cahill's statements made during his IA interview, that he did not believe the arrest should have been made also directly contradict the affirmations made by the District Attorney's Office in the Affidavit to Arrest Mr. Morphew.

6. In discovery thus far, the prosecution has not provided a single email, document, text, or report documenting that Mr. Cahill and/or Agent Graham (and other CBI supervisors) communicated this *exculpatory* information to other law enforcement witnesses and individuals at

the DA's office, which includes CBI's opinion that Mr. Morphew's arrest was premature and was the "worst" decision that could be made. Nor has there any discovery produced by a single member of the prosecution team disclosing *the basis and underlying reasons* for CBI's opinion that more investigation and evidence was needed to be obtained before (if ever) arresting Barry Morphew.

7. Due to the lack of production of this information prior to the following critical hearings in 2021: August 9, 10, 23, 24, September 17, October 13, November 9th, and the following hearings in 2022: January 23, 24, and February 1st, the defense was unable to reveal or present in court the fact that the arrest warrant affidavit contained falsehoods and misrepresentations. The defense was unable to investigate and present this highly exculpatory information in the Preliminary Hearing and in the multiple hearings on the motions for sanctions.

III. THIS COURT HAS BROAD DISCRETION TO IMPOSE SANCTIONS, INCLUDING DISMISSAL OF THIS CASE.[1]

8. In *People v. Lee*, 18 P.3d 192 (Colo. 2001), the Colorado Supreme Court affirmed that if this court finds a discovery violation, "the decision whether to impose a sanction is within the sound discretion of the trial court." *Id*., at 196. The Supreme Court makes it crystal clear that, "[u]nder certain circumstances, the exclusion of evidence ***or even complete dismissal*** can be proper remedies to assure compliance with discovery orders." *Ibid*. (emphasis added). The Court cites cases in which it upheld sanctions imposed by district courts, including:

- *People v. Thurman*, 787 P.2d 646, 655 (Colo.1990) (holding that trial court did not abuse its discretion in dismissing criminal charges pursuant to Crim. P. 16(III)(g) in response to prosecution's willful and continuing refusal to disclose confidential informant's address and place of employment notwithstanding court order to do so);

- *People v. District Court (2nd Jud. Dist.)*, 664 P.2d 247, 252 (Colo. 1983) (approving trial court's sanction excluding fingerprint evidence implicating defendant where district attorney failed to comply with a specific discovery order or obtain defendant's fingerprints for nearly nine months, causing a mistrial).

9. To these cases cited in *People v. Lee*, the court could have added:

- *People ex rel. Gallagher v. Dist. Ct. In & For Arapahoe Cty., State of Colo*., 656 P.2d 1287, 1293 (Colo. 1983) (upholding the trial court's discovery sanction, i.e., its reduction of the charge from first-degree murder to second-

[1] On February 2, 2022, the prosecution filed a list of cases that it denominated "P-41." It appears that the prosecution may intend that filing to apply to D-17. Mr. Morphew has filed this day a "response" to that list, and he incorporates by reference that Response to P-41. For convenience, Mr. Morphew also sets forth part of that response herein.

degree murder as a reasonable remedy for the loss of material evidence as the result of a due process violation).

- *People v. Alberico*, 817 P.2d 573, 575–76 (Colo.App.1991)(upholding the trial court's dismissal of charges when the prosecution failed to share exculpatory victim interviews that were materially inconsistent with the victim's testimony at trial until after the prosecution's case-in-chief).

- *People v. Auld*, 815 P.2d 956, 959 (Colo. App. 1991) (affirming the district court's dismissal of the case and stating: "We conclude that when the integrity of the court is compromised, as here, by overzealous prosecution, dismissal of the case is an appropriate remedy.").

- *People v. Edgar*, 40 Colo. App. 377, 380, 578 P.2d 666, 668 (1978) (reversing conviction where there was "massive non-compliance" with proper discovery procedures by the prosecution).

10. Additional cases reveal that convictions have been vacated because of prosecutorial discovery violations, *see e.g. People v. Bueno*, 409 P.3d 320, 328 (2018)(affirming grant of a new trial in a homicide case); *Wearry v. Cain,* 577 U.S. 385 (2016)(vacating capital murder conviction and death sentence because the State's failure to disclose material evidence including inmates' statements casting doubt on credibility of State's star witness violated the defendant's due process rights).

11. Dismissal is the proper remedy when a discovery violation infects the Preliminary Hearing. *See e.g. Hooker v. Eighth Jud. Dist. Ct. of State ex rel. Cty. of Clark*, No. 65016, 130 Nev. 1189, 2014 WL 1998741 (Nev. May 12, 2014)(table) (prosecution's discovery violation at the Preliminary Hearing warranted dismissal of the DUI/controlled substance charge).[2] *See also e.g. People v. Gutierrez*, 214 Cal. App. 4th 343, 153 Cal. Rptr. 3d 832 (2013) (affirming dismissal of charges because the prosecutor violated his due process duty to disclose exculpatory evidence before the Preliminary Hearing). The court found a "*Brady* violation," and that it was reasonably

[2] In *Hooker,* at the start of petitioner's Preliminary Hearing, the prosecutor filed an amended criminal complaint that expanded the original charge. The prosecutor assured the defendant that there was no new discovery, and petitioner relied upon this assurance when he informed the justice court that he had no objection to the amended criminal complaint. The prosecutor also assured the justice court that the amended complaint was "based on original discovery, and discussions with witnesses in the case." But as the Preliminary Hearing proceeded, it became obvious that the toxicology report had not been included with the original discovery. "The Preliminary Hearing transcript plainly reveals that the prosecutor misrepresented his actions by maintaining that the amended complaint was not based on new discovery. At worst, the prosecutor's behavior was intentional, and, at a minimum, it was reckless." *Id*., at *2. The Nevada Supreme Court ruled that the amended charge should have been dismissed because of the discovery violation and the prosecutor's false statement to the court that was reckless, if not intentional.

probable the outcome of the Preliminary Hearing would have been different if the exculpatory evidence had been produced.

12. The bottom line is that, as stated in *People v. Lee* and other cases, where there is "willful misconduct or a pattern of neglect demonstrating a need for modification of a party's discovery practices," there is a rationale for a deterrent sanction. *People v. Lee, supra*, at 196.

13. Ultimately, it is up to this Court whether or not a deterrent sanction is appropriate. As the Supreme Court stated in *People v. Lee*:

> Because of the multiplicity of considerations involved and the uniqueness of each case, great deference is owed to trial courts in this regard, and therefore an order imposing a discovery sanction will not be disturbed on appeal unless it is manifestly arbitrary, unreasonable, or unfair.

14. *People v. Lee*, *supra,* at 196. In courts all over Colorado, sanctions are imposed for discovery violations that never wind up in reported cases. In a case like this, where there are indisputably willful, intentional violations of *Brady v. Maryland*, Crim. P. Rule 16, and orders of the district court, as well as a demonstrated pattern of willful, reckless, and/or negligent violations, this Court has broad discretion to impose a sanction.

IV. THE CUMULATIVE IMPACT OF THE RAMPANT CONTINUING DISCOVERY VIOLATIONS WARRANT THE MOST SEVERE SANCTION.

15. At the hearing on this motion, Mr. Morphew requested a meaningful remedy from this Court. After reviewing the newly-provided information, Mr. Morphew is convinced more than ever that the only just remedy is dismissal of this case in its entirety. Had the withheld information been available at the Preliminary Hearing, it is certain that probable cause would not have been found.

16. Thus, either as a function of this Court's authority to dismiss the case as a discovery sanction, for Outrageous Governmental Conduct, or through the vehicle of reconsidering the ruling at the Preliminary Hearing, this Court should dismiss this case.

17. The facts of this case, as this Court has seen through the submissions, exhibits, and evidence, warrant the most severe sanction. There is no way to remedy the damage that the governmental misconduct has caused. The Preliminary Hearing indisputably violated Mr. Morphew's due process rights and would not have resulted in a finding of probable cause had the evidence not been withheld. The intentionality and pattern that have been demonstrated cry out for a powerful and severe sanction to deter the outrageous government conduct witnessed here.

18. This Court should find powerful guidance in the Court of Appeals' words in *People v. Auld*, when the court stated: "We conclude that when the integrity of the court is compromised, as here, by overzealous prosecution, dismissal of the case is an appropriate remedy." 815 P.2d 956,

959 (Colo. App. 1991).[3] In this case, the integrity of the court has been compromised by repeated presentation of false and misleading evidence at the Preliminary Hearing (and even at the hearing on the motions for sanctions/dismissal). The only appropriate remedy is vacation of the fraudulently-obtained result at the Preliminary Hearing -- dismissal.

19. The circumstances in this case are like those that compelled dismissal in *People v. Alberico*, 817 P.2d 573, 575–76 (Colo.App.1991). There, the prosecution failed to share victim interviews that were materially inconsistent with the victim's testimony at trial until after the prosecution's case-in-chief. Here, the prosecution failed to share critical exculpatory information until after the prosecution witnesses testified at the Preliminary Hearings, and then continued that intentional pattern of nondisclosure, repeatedly waiting until just after critical hearings and stages before turning over impeachment material that would have been highly exculpatory had it been received before – not after – the witness testified. See also *People ex rel. Gallagher v. Dist. Ct. In & For Arapahoe Cty., State of Colo*., 656 P.2d 1287, 1293 (Colo. 1983) (upholding the trial court's discovery sanction, i.e., its reduction of the charge from first-degree murder to second-degree murder as a reasonable remedy for the loss of material evidence as the result of a due process violation).[4] All exculpatory evidence must be disclosed before any critical stage in the proceeding, which includes a Preliminary Hearing or proof evident presumption great hearing. *In re Attorney C*., 47 P.3d 1167, 1172 (Colo. 2002).

20. Based on the evidence and submissions before this Court, there can be no doubt that, at the very least, the prosecutor has been involved in this misconduct from early on in the investigation. Mr. Morphew's attorneys have been left to "scavenge for hints of undisclosed *Brady* material" even after the prosecution has repeatedly represented that such material had been disclosed. *People v. Bueno*, 409 P.3d 320, 328 (2018). See also *People v. Terry*, 720 P.2d 125, 130 (Colo. 1986) (finding misconduct when the prosecutor failed to timely inform the court or defense counsel of false testimony)(citing *Napue v. Illinois,* 360 U.S. 264, 269 (1959) (conviction obtained through use of false testimony violates due process where prosecutor, while not soliciting the testimony, allows it to go uncorrected when it appears)). See also *People v. Bueno*, *supra* (affirming grant of a new trial in a homicide case); *People v. Edgar*, 40 Colo. App. 377, 378, 578 P.2d 666, 666 (1978)(reversing convictions for arson and conspiracy); *Wearry v. Cain,* 577 U.S. 385 (2016)(vacating capital murder conviction and death sentence because the State's failure to disclose material evidence including inmates' statements casting doubt on credibility of State's star witness violated the defendant's due

[3] In *Auld*, the District Attorney prosecuted a "fake" defendant who hired an attorney and then served as an undercover agent in an investigation of that attorney. The Court of Appeals was particularly concerned with the fact that the court was indirectly enlisted in the scheme because the court presided over the "fake" case and accepted a plea from the "fake" defendant. While the misconduct in Mr. Morphew's case is different, it also involves the court, to the extent the court was presented with false, incomplete, and misleading evidence in the affidavit for the arrest warrant, at the Preliminary Hearing, and even before this Court at the hearing on this motion.

[4] After *Gallagher*, the Colorado test for relief when evidence is destroyed changed to conform to intervening U.S. Supreme Court cases. However, *Gallagher*'s rulings about bad faith and the appropriateness of sanctions did not.

process rights).

21. Under the circumstances of this case, no remedy short of dismissal is appropriate. The promise of *Brady v. Maryland* -- that the due process clause will protect a defendant from a prosecutor who withholds exculpatory information -- ring hollow when a prosecutor disregards her obligations in the hopes that no one will find out. If the deterrent sanction of dismissal is not appropriate in this case, when would it be?

22. It is abundantly clear that had the prosecution not intentionally withheld massive amounts of exculpatory evidence prior to the Preliminary Hearing, probable cause would not have been found. The only just remedy is dismissal of the case. This can be accomplished as a discovery sanction, see Crim. P. 16(III)(g),[5] a sanction for outrageous governmental misconduct, or as a reconsideration of the result of the Preliminary Hearing.

Respectfully submitted this 9th day of February 2022.

EYTAN NIELSEN LLC

s/ Iris Eytan
Iris Eytan, #29505

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of February 2022, a true and correct copy of the foregoing **[D-17(c)]** was served via CCE to the 11th Judicial District Attorney's Office, 101 Crestone Ave., Salida, CO 81201

s/ Tonya Holliday
Tonya Holliday

[5] "If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed or **enter such other order as it deems just under the circumstances**.")(emphasis added).