DISTRICT COURT, FREMONT COUNTY, COLORADO Court Address: 136 Justice Center Rd., Rm. 103 Canon City, CO 81212 Court Phone: (719) 269-0100	DATE FILED: March 8, 2022 4:31 PM
THE PEOPLE OF THE STATE OF COLORADO, v. BARRY LEE MORPHEW, Defendant.	▲ COURT USE ONLY ▲
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SUPPLEMENT TO MOTION FOR DISCOVERY SANCTIONS – FEBRUARY 28, 2022 - MARCH 8, 2022 DISCOVERY PRODUCTION [D-17 (e)]

Mr. Morphew, by and through undersigned counsel, renews and supplements his Motion for Discovery Sanctions and for Sanctions, resulting from the prosecution's egregious violations of Colorado Rule of Criminal Procedure 16, the Court's June 2, 2021 Case Management Order ("CMO"), and the Colorado and United States Constitutions. The prosecution just produced additional evidence that should have been produced months ago. It reveals not only past violations, but a pattern of continuing violations.

The prosecution has trickled out information that has been in their possession since May 2020 over the past week, rather than complying all at once in a timely fashion. As a result, the evidence of the continuing pattern of violations is often disclosed immediately before or just after the relevant evidentiary hearing. Thus, the information that has just come to light was not provided in time to use at the preliminary hearings, or 2021-2022 hearings on Mr. Morphew's various motions for sanctions, e.g. D-17 and its supplements and D-28.

FACTUAL BACKGROUND

As of today, multiple additional items of information favorable to the defense have not been produced to the defense, or have been withheld for months, and then produced after multiple discovery sanctions hearings. Certainly, the discovery is not being produced as "soon as practicable" pursuant to Rule 16. The late and or not produced favorable discovery are enumerated as follows:

1. In a February 28, 2022 email to the prosecution, defense requested Range Rover PowerPoint and .ogb file. *See* Exhibit A, email titled, "Range Rover PP and Ogb File – Conferral". The prosecution did not respond, and on March 2, 2022, the defense filed D-17(d), Supplement to Motion for Sanctions - Range Rover Data. Then in court on March 4, 2021, Mr. Hurlbert advised the Court that the defense never conferred with them prior to filing D-17(d). This statement was false as evidenced by the February 28th email attached as Exhibit A hereto.

2. After the March 4, 2022 hearing, on March 6, 2022, the defense once again emailed DDA Hurlbert with the February 28, 2022 conferral email and once again requested this data, and to date there has been no response. *See* Exhibit B, March 6, 2022 email from Ms. Eytan to Mr. Hurlbert.

3. On February 24, 2022, DDA Robert Weiner represented to this Court that a dart cannot be fired from a regular firearm. This was flatly contradictory to a statement the prosecution attested to in documents filed in this Court. See e.g. D-58 People's Response Motion to Sever Counts for Trial (filed Jan. 18, 2022), p. 3, para. 6 ("These darts can be shot from the dangerous weapon. See Affidavit."). *See also id.*, p. 2 ("the possession of the short rifle is one method that

the Defendant may have used in the murder"). In open court on February 24, 2022, Mr. Weiner confirmed that the statement in the prosecution's D-58 response was not accurate.

4. The evidence that a dart cannot be shot from that gun is highly favorable to the defense. On February 25, 2022, the defense requested the documentation of this statement and favorable evidence. *See* Exhibit C to this motion. The prosecution did not respond. The defense followed up requesting this information again as part of the March 6, 2022 email. *See* Exhibit B, paragraph 4. The prosecution has not responded to either request.

5. On March 3, 2022, the day before the Motion for Sanctions Hearing on D-17(c), the prosecution provided additional discovery identified as discovery packet 24. As a result of the late production, arriving the day before the scheduled March 4, 2022 hearing, the defense was unable to do anything but skim through the discovery prior to the next day's sanctions hearing. After the March 4, 2022 hearing, the defense was able to read the material provided and learned that, in violation of Rule 16 and this Court's orders, it included material such as emails that were created as long ago as May 2020 and which were given to the prosecution sometime between November 2021 and January 18, 2022. But these texts and emails were not produced to the defense until March 3, 2022. This is 4 to 22 months after they were created.

6. The discovery received on March 3, 2022 includes a CBI email indicating they have self-determined that they will produce electronic correspondences on a two month cycle. *See* Exhibit E, January 13, 2022 email from Stephanie Trahey, discovery page 15A-02281-32. On this email string, there is an email which indicates CBI's emails would be consolidated and sent to the DDA in the case to determine what is material ***for the prosecution*** in the case. *See* Exhibit E to this Motion. Notably, the email does not establish the actual constitutional standard: i.e., ***that material favorable to the defense must be disclosed.***

7. Because of the CBI-District Attorney self-created and self-instituted policy about how emails were to be disclosed, the CBI-produced emails and texts to the prosecution that were created in May 2020, and collected between November 2021 and January 18, 2022, were not disclosed until March 3, 2022. By design and implementation, the prosecution's plan appears to be that the defense will receive CBI's notes, emails and texts (if the DA deems them relevant) on a delay – at least four (4) months after they are created.

8. This procedure is flatly contrary to Rule 16 and the Court's Order of June 3, 2021, p. 2: "Therefore it is ordered that any electronic communications created or received by law enforcement officers related to this case must be disclosed to the defense if they are material to the

prosecution of the case or if they contain any evidence that would be in any way favorable to the defense." See also Crim. P. Rule 16 (Part I)(a)(2) and (3).[1]

9. A representative sample of the favorable information produced on March 3, 2022 – months after it was supposed to be disclosed – include the following:

a. May to July 2020: Text string between multiple CBI agents (and possibly CCSO deputies) involved early on in the investigation, which include:

i. June 29, 2020, Agent Kevin Koback writes to nine-ten law enforcement agents: "I have had multiple conversations with Andrew Moorman over the last few days. Andy as you know has changed his direction in the investigation and fully believes Cody Cox is involved with the disappearance/murder of Suzanne." *See* Exhibit F, discovery page 15A-0229376. The court may recall that Andrew Moorman, Suzanne Morphew's brother has written numerous victim impact statements to this court about his fear that Mr. Morphew murdered his wife.

ii. May 18, 2020,[2] text from Agent Koback to nine-ten law enforcement agents stating "can we give access to the SO to Google Drive? Or Smart Force? to store synopsis of interviews? That everyone can see." *See* Exhibit G, discovery page 15A-022900. So, as early as May 2020 the Smartforce database was created. At present, the SmartForce database has *still* not been produced to the defense.

As the Court may recall, it was Mr. Cahill who disclosed to the defense the existence of the Smartforce database in the surreptitiously recorded interview on November 3, 2021.

On January 27, 2022, the defense received discovery indicating that Mr. Hurlbert was added to the Smartforce database in November 2021. *See*

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[1] "(2) 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.
(3) The prosecuting attorney's obligations under this section (a) extend to material and information in the possession or control of members of his or her staff and 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." *See also id.*, Part I (b)(3), requiring that the above obligations must be performed "as soon as practicable." Clearly, delaying disclosure for 4 to 22 months is not "as soon as practicable."

[2] This date is a guess based on the discovery received.

Exhibit H, Discovery page 21066. Law enforcement relies upon and utilizes the Smartforce database regularly. *See* Exhibit I, Discovery pages 15A-13419, 18696, 18844. All law enforcement witnesses and the District Attorney's office have access to this database that originated in May 2020. But the contents of the Smartforce database has *still* not been produced to the defense.

iii. May 12, 2020 text from Joe Cahill to the many other agents: "Unfortunately, there is no cell service at the house." *See* Exhibit J, discovery page 15A-022861. As the Court knows, the reliability of the cell service is a highly debated issue in this case as a result of the collection of GPS and cell data. Here, Mr. Cahill confesses this fact on Day Two (2) of the Morphew investigation.

iv. May 11, 2020 6:30 a.m. text from an unknown to "Dave", (12 hours after Ms. Morphew was identified as missing) that the sheriff already suspected foul play and the husband's involvement. *See* Exhibit K, discovery pg. 15A-022833. This is clearly exculpatory in the sense that it shows that law enforcement had blinders on from the very beginning of the case and hung their hat on the cliche that if the wife is gone it must be the husband who did it.

b. November 2021: There is an unresolved match from 27.1 (the DNA on the glovebox) to DNA in Maryland. The Maryland DNA data was produced to CBI, but not produced to the defense. And, the conclusion reached by CBI and Maryland CODIS representatives was that the match would remain unresolved.[3]

c. November 2021: Deputy Director Chris Schaefer convened a CODIS Briefing/Morphew Meeting for November 18, 2021. This meeting appeared to be a briefing regarding the testimony of CBI Agents Duge and Rogers on November 9, 2021. Multiple members of CBI investigative and Lab personnel were present. *See* Exhibit L, discovery pages 15A-022824 and 15A-022847. It is believed that Mr. Hurlbert and/or Commander Walker attended the meeting or were apprised of the meeting.

d. There were very nondescript hand-written notes dated 11/18/21 titled "Morphew hearing debrief". In those notes, the bottom of the note regarding the Morphew Hearing is blacked out. *See* Exhibit M, discovery page 15A-022991.

[3] The defense did not have a chance to thoroughly review the new discovery. On March 4, 2022, in Court, the defense stated this unresolved match was from Michigan, but it was from Maryland.

e. Also produced were handwritten notes with the date 11/18/21 and the name Chris Schaefer at the top of the notes. *See* Exhibit N, discovery page 15A-02299. The handwriting appears to be different from the handwriting in Exhibit M (discovery page 15A-022991). The ambiguity and Shaefer's name can mean only one of two things: either these are his notes, or he was an attendee.

The meeting invite and notes represent that more than ten CBI agents were involved in a discussion about CODIS, emails and impartiality standards. Additionally, there was discussion about CBI communication log entries, which have been the primary source of relevant and material discovery to the defense as law enforcement and the prosecution claim not to take notes in their meetings regarding the CODIS/and other investigation in this case.

It appears that of the 10 agents invited to the Morphew meeting, the defense received notes from two different attendees. Those two attendees' notes were not produced to the defense until March 3, 2022 – almost four months later. These are clearly violations of the discovery rules and order(s).

f. Neither the fact of the meeting nor the witness statements made at the meeting appear in the communications log. The communications log which by CBI policy requires that "Care must be taken to accurately record ***any*** communication relevant to the case". *See* Exhibit O, CBI Forensics Services Communications Log Policy (emphasis added).

The reason for this void appears to be that these notes state that "per Lance/Lisa not adding this meeting to comm log." *See* Exhibit N (handwritten notes reflecting Schafer's name). Notably, the Communications Log came to light and was testified about extensively at the November 9, 2021 hearing, just days before this substantial yet undisclosed meeting and just days before the undisclosed notes (attached in Exhibits M and N).

This material demonstrates an active decision to keep out of the Communications Log (perhaps because it was to be disclosed to the defense) any information about the meeting of November 18, 2021. Although intent is not necessary prior to imposition of sanctions, this material tends to demonstrate intentional steps being taken to avoid the defense learning of this highly exculpatory information.

g. Also produced on March 3, 2022 were Agent Trahey's November 1, 2021 handwritten notes of Ms. Eytan's interviews of Agents Duge and Rodgers. *See* Exhibit P, discovery pgs. 15A-022975 to 15A-22990.

It is defense counsel's communications with CBI agents that are recorded, shared with the prosecution, and disclosed to the defense months later. This includes the production of the transcript from the surreptitious recording (not the recording itself) of Ms. Eytan's November 3, 2021 interview of Mr. Cahill.

Strangely, the defense has not received any of CBI's notes or reports from meetings they have conducted with the DA's regarding the Morphew investigation from their multiple briefings known to commence in August 2021. This Court should view with great incredulity some testimony presented that participants at such meetings take no notes and see no one else taking notes.[4] The snippets of notes received on March 3, 2022 belie that outlandish suggestion but do reveal that the notes that are taken are not being disclosed and certainly have not been disclosed timely.

h. There was a post-it note produced by Agent Trahey which states: 11/24 at 5:04 p.m. Mark Hurlbert and on the same post-it note "*CODIS concern". *See* Exhibit Q, discovery page 15A-22993. There are no handwritten notes, or a report from this 11/24 purported communication with Mr. Hurlbert.

This information, individually and cumulatively with the information provided in this Supplement, D-17, and the D-17 Supplements, demonstrate a widespread effort to withhold and intentionally not record investigation efforts and briefings that would be helpful to the defense.

10. On March 4, 2022, CBI Agent Derek Graham testified that he reviewed the lab report regarding Mr. Rowe, one of the possible suspects associated with the Phoenix CODIS Match. Derek Graham testified that Mr. Rowe was excluded from the DNA on the glovebox ("27.1"). Both the DA (see Response to D-17c, p. 8, para. 22, stating "we can now show that the three CODIS hits presented at preliminary hearing are not connected to this case").

11. However, no such expert opinions, or underlying data have been produced to date, making it impossible for the defense to analyze, confirm or refute. As demonstrated, through this pattern, the prosecution continues to hide the CODIS investigation from the defense and convince this court that the CODIS matches are irrelevant.

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[4] Given the testimony, the documentation Mr. Morphew has attached to D-17 and its supplements, and the testimony this Court has heard in the evidentiary hearing, this court must also reject the suggestion that, at all of these meeting, no exculpatory oral statements were made.

12. On March 8, 2022, after asking Mr. Hurlbert for the results from the DNA testing related to Mr. Rowe, Mr. Hurlbert uncharacteristically quickly responded that he would get that information to the defense, pursuant to Rule 16, "as soon as practicable" after he receives it from CBI. *See* Exhibit D, March 8, 2022 email from Iris Eytan to Mark Hurlbert.

13. All the witnesses that testified on March 4, 2022 provided exculpatory and impeaching statements to DDA Hurlbert regarding their testimony. Their statements were not produced prior to their testimony, which made it impossible for the defense to challenge many of the witnesses' first-ever statements regarding the issues before the Court.

LEGAL AUTHORITY

Rule 16 places responsibility for disclosure squarely upon the prosecution under circumstances like this: "The prosecuting attorney shall ensure that a flow of information is maintained between the various investigative personnel and his or her office sufficient to place within his or her possession or control all material and information relevant to the accused and the offense charged." Rule 16 (Part 1) (b)(4). *See also id.*, (Part I)(c)(1), which requires "the prosecuting attorney shall use diligent good faith efforts to cause such material to be made available to the defense."

As noted above, the procedure the prosecution has instituted is flatly contrary to Rule 16 and the Court's Order of June 3, 2021, p. 2: "Therefore it is ordered that any electronic communications created or received by law enforcement officers related to this case must be disclosed to the defense if they are material to the prosecution of the case or if they contain any evidence that would be in any way favorable to the defense." See also Crim. P. Rule 16 (Part I)(a)(2) and (3) which state:

> (2) 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.
>
> (3) The prosecuting attorney's obligations under this section (a) extend to material and information in the possession or control of members of his or her staff and 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." *See also id.*, Part I (b)(3), requiring that the above obligations must be performed "as soon as practicable." Clearly, delaying disclosure for 4 to 22 months is not "as soon as practicable."

The prejudice is manifest. Had the defense been given this information on a timely basis, it would have been powerful impeachment and rebuttal at the preliminary hearing. In addition, it will be an important factor at trial, and receiving this notice just weeks before trial – months after it should have been disclosed – is substantially prejudicial for Mr. Morphew's investigation, trial preparation, and endorsement of witnesses.

This Court should find a severe discovery violation and add this to the long, long list of violations that form the pattern of continuing violations in this case.

As Mr. Morphew has stated repeatedly, and the prosecution has never disputed, this Court has substantial authority to enter sanctions when a violation is intentional, or when a pattern of violations is shown. *People v. Lee*, 18 P.3d 192 (Colo. 2001), affirms 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 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. 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.

The *Lee* 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 the 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).

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-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).

Mr. Morphew has set forth the governing caselaw that authorizes this Court to enter severe sanctions, up to and including dismissal of the case.[5] Mr. Morphew believes that, under the circumstances of the pattern in this case, the only fair result is dismissal of this case.

EXHIBITS

The following exhibits are filed with this Motion:

Exhibit A, 2/28/2022 email from Iris Eytan to Mark Hurlbert, titled, Range Rover PP and .Ogb File - Conferral.

Exhibit B, 3/6/2022 email from Iris Eytan to Mark Hurlbert.

Exhibit C, 2/25/2022 email from Iris Eytan to Mark Hurlbert

[5] See e.g., Transcript of July 22, 2021, pp. 29-44; D-16 Motion (filed 6/24/2021), D-16 Reply (filed 7/7/2021), Motion for Show Cause Order (filed July 6, 2021), D-17, Renewed Motion for Discovery Sanctions (filed August 2, 2021), D-17 Reply (filed August 3, 2021), D-17a Supplement (with exhibits)(filed August 3, 2021), D-17b Supplement (with exhibits)(filed August 4, 2021), D-17c Supplement (filed February 9, 2021), D-17c Amendment to Supplement (filed Feb. 14, 2021); D-20 Motion (filed August 7, 2021), D-20a Supplement (filed) D-20b Reply (filed Oct. 13, 2021); D-28 Motion (filed Oct. 11, 2021), D-28 Reply (filed Jan. 17, 2022); D-57 Status Report (filed Jan. 6, 2022); [P-41][D-28][D-17][D-17-Supp] Response To Prosecution's Caselaw List [P-41][D-28][D-17][D-17-Supp] (filed Feb. 9, 2022); D-62 Motion to Strike Experts (filed Feb. 22, 2022), D-62a Motion to Strike witness disclosed on Feb. 23, 2022 (filed Feb. 23, 2022).

Exhibit D, 3/8/2022 email Iris Eytan to Mark Hurlbert

Exhibit E, 1/13/2022 email from Stephanie Trahey, discovery page 15A-02281-32

Exhibit F, discovery page 15A-0229376.

Exhibit G, 5/18/2020 (estimated) text from Agent Koback to ten law enforcement agents regarding Google Drive, SmartForce, and "synopsis of interviews", discovery page 15A-022900.

Exhibit H, indicating that Mr. Hurlbert was added to the Smartforce database in November 2021, discovery page 21066.

Exhibit I, discovery pages 15A-13419, 18696, 18844, showing that Law Enforcement utilizes the Smartforce database regularly.

Exhibit J, 5/12/2020 text from Joe Cahill to the many other agents: "Unfortunately, there is no cell service at the house," discovery page 15A-022861

Exhibit K, 5/11/2020 (6:30 a.m.) text from an unknown to "Dave", discovery page 15A-022833.

Exhibit L, 11/18/2021 meeting to discuss the testimony of CBI Agents Duge and Rogers from 11/9/202, discovery pages 15A-022824 and 15A-022847.

Exhibit M, 11/18/2021 hand-written notes titled "Morphew hearing debrief" with portions about the Morphew Hearing blacked out, discovery page 15A-022991.

Exhibit N, 11/18/2021 hand-written notes (different from those in Exhibit M, discovery page 15A-022991), discovery page

Exhibit O, CBI Forensics Services Communications Log Policy

Exhibit P, 11/1/2021, Agent Trahey's November 1, 2021 handwritten notes of Agent Trahey, regarding Iris Eytan's interviews of Agents Duge and Rodgers, discovery pgs. 15A-022975 to 15A-22990.

Exhibit Q, 11/24/2021 post-it note referencing "*CODIS concern", discovery page 15A-22993.

Respectfully submitted this 3rd day of March, 2022.

EYTAN NIELSEN LLC
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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March, 2022, a true and correct copy of the foregoing **[MOTION - D-17(e)]** was served via CCE as follows: 11th Judicial District Attorney's Office, 101 Crestone Ave., Salida, CO 81201

s/ Tonya Holliday
Tonya Holliday