

COUNTY COURT, EAGLE COUNTY,
COLORADO

885 Chambers Avenue
Eagle, Colorado 81631

OCT 14 2003

BY 

Plaintiff: PEOPLE OF THE STATE OF COLORADO

Defendant: KOBE BRYANT

▲ COURT USE ONLY ▲

Pamela Robillard Mackey (No. 15136)
Harold A. Haddon (No. 1596)
HADDON, MORGAN, MUELLER, JORDAN, MACKEY
& FOREMAN, P.C.

150 East 10th Avenue
Denver, Colorado 80203
Telephone: (303) 831-7364
Facsimile: (303) 832-2628
E-Mail: pmackey@hmflaw.com
hhaddon@hmflaw.com

Case No. 03 CR 204

Division 1

ATTORNEYS FOR DEFENDANT

**DEFENDANT'S RESPONSE TO PROSECUTION'S MOTION TO CLOSE
REMAINDER OF PRELIMINARY HEARING**

DEFENDANT, through his counsel, Harold A. Haddon and Pamela Robillard Mackey, of the law firm of Haddon, Morgan, Mueller, Jordan, Mackey & Foreman, P.C., submits the following response to the prosecution's belated motion to conduct the remainder of the preliminary hearing *in camera*.

1. **THE PROSECUTION'S LAST-MINUTE MOTION REPUDIATES ITS AGREEMENTS REACHED ON THURSDAY, OCTOBER 9, 2003 AND FRIDAY, OCTOBER 10, 2003 AND TRIGGERS THIS COURT'S BRIEFING SCHEDULE WHICH WAS CONDITIONED ON THE PARTIES BEING UNABLE TO AGREE.**

The second day of this preliminary hearing was scheduled for Wednesday October 15, 2003 at the prosecution's request. Specifically the prosecution approached the defense and stated that it would agree to an open hearing "provided no conclusions, just facts, were elicited." The defense agreed to this proposal on October 9, 2003, so informed the Court and accordingly the Court vacated the briefing schedule and set the hearing at the earliest possible

date based on the representation of the prosecution that it was willing to proceed in open court.¹

On Friday, October 10, 2003, the parties once again conferred, this time by telephone to ensure that all understood the limitations requested by the prosecution. Once again, the prosecution agreed to go forward with the preliminary hearing in open court provided the defense agreed not to name other witnesses by name or description. The defense agreed to these limitations. The prosecution requested that the defense agree to an *in camera* hearing with regard to anticipated evidence concerning the accuser's mental health and the implications that had on her credibility. The defense agreed to consider that request over the weekend. The defense proceeded to prepare for the hearing schedule for Wednesday, October 15, 2003.

Without warning, on Wednesday, October 14, 2003, the prosecution faxed *The People's Request for In Camera Proceedings Pursuant to 18-3-407 and 16-5-301(2)* repudiating its agreement and stating that the prosecution had change its mind and now demands a closed proceeding.

2. THE PROSECUTION'S MOTION PUBLICLY CLAIMS THAT DEFENSE COUNSEL MISREPRESENTED THE EVIDENCE BUT DISINGENUOUSLY SEEKS TO KEEP THE EVIDENCE WHICH SUPPORTS THE REPRESENTATION SECRET.

The evidence that the prosecution now seeks to shield from public view has been known to the prosecution since July 28, 2003, and some of the evidence long before that. The evidence offered is relevant and not in any way barred by the rape-shield law.

The prosecution's case relies heavily on "injuries" it claims were inflicted by Mr. Bryant. The prosecution has known for months that the defense contended that the "injuries" were not caused by a sexual assault. The prosecution accuses the defense of "misrepresentations" of the evidence. The attached Offer of Proof, filed under seal, conclusively demonstrates that substantial evidence supports these representations. The prosecution's attempt to hide this evidence is disingenuous.

¹ The Court had previously set a briefing schedule to allow all parties, including the "media applicants" to brief and be heard on whether the hearing should remain open or closed.

3. **THE PROSECUTION'S DEMAND THAT THIS PRELIMINARY HEARING BE OPEN IS A WAIVER OF ITS BELATED REPUDIATION OF THAT DEMAND.**

Despite the defense's written and oral urging to have this hearing closed, the prosecution demanded that it be open. Despite the *defense's* citation to C.R.S. § 16-5-301(2) the prosecution did nothing to protect the accuser in this case and demanded that the hearing be open. The prosecutors filed no motion in limine alerting the Court to the potential for embarrassing information to become known to the public through the public hearing demanded by the prosecution despite their knowledge of the alternate sources for the "injuries" which the prosecution seeks to attribute solely to Mr. Bryant.

The defense, unlike the prosecution, alerted the Court both by pleading and by oral argument to the evidentiary issues surrounding the surreptitiously taped, nearly inaudible tape recording of Mr. Bryant. Accordingly, the Court had ample opportunity to thoughtfully consider the factual and legal issues surrounding that evidence and make the correct legal ruling at the preliminary hearing concerning that evidence.

The prosecutors, knowing the facts about the alternate sources of injury, having had these facts reported to them by the accuser, CBI and Detective Winters, never made any attempt to shield her from what they now claim to be a "humiliating and embarrassing" "fishing expedition."² They have waived their request to now close this hearing.

4. **IN ITS EVIDENTIARY PRESENTATION, THE PROSECUTION OPENED THE DOOR TO REBUTTAL EVIDENCE BY CLAIMING THAT A MEDICAL EXAMINATION CONDUCTED SIXTEEN HOURS AFTER THE ALLEGED ASSAULT REVEALED MINOR INJURIES TO THE POSTERIOR FOURCHETTE WERE "NOT CONSISTENT WITH CONSENSUAL SEX." THE DEFENSE IS ENTITLED TO REBUT THAT CONCLUSORY HEARSAY STATEMENT WITH EVIDENCE THAT SUCH INJURIES MAY BE CONSISTENT WITH MULTIPLE AND RECENT SEXUAL ENCOUNTERS.**

Ethics require lawyers to ask questions for which they have a good faith basis in fact and law. As demonstrated by the attached Offer of Proof, every question asked of Detective Winters was carefully based on an analysis of the facts, as provided to the defense by the prosecution, and a careful analysis of the law.

² A "fishing expedition" implies that the questions seek information unknown to the questioner. To the contrary - the answers to the questions were known because of information provided to the defense by the prosecution.

Nothing the defense did at the preliminary hearing should have come as any surprise to the prosecution. If the prosecution had concerns about the evidence of alternate sources of injuries being presented (which surely they could have anticipated given the fact that they trumpeted to the world that the prosecution intended to introduce "photos of the victim's injuries from the medical examinations") then the proper way to proceed was to file a motion in limine. Perhaps if the Court knew what it knows now it would have granted the defense's request for a closed hearing. Instead, the prosecution demanded an open hearing, knowing the intense media scrutiny afforded this case, and did nothing to alert the Court to the alternate sources of injuries – did nothing to protect the accuser from the glare of the publicity. If the prosecution was unwilling to protect her, it certainly does not fall to the defense to do so, particularly when the prosecution is completely aware of the factual basis for the question about which they now complain.

However, now after damaging information about Mr. Bryant essentially unchallenged by cross-examination has been heard in open court and distributed world-wide as the prosecution intended, the prosecution now it seeks to close the hearing. This leaves the accuser's story untested in the court of public opinion – the court the prosecution sought to influence with its demand that the hearing be open.

The defense never wanted this hearing to be open. Now that it has begun in open court, Sixth Amendment considerations demand that it be concluded in open court. Mr. Bryant's right to a fair trial will be eviscerated if the prosecution is able to achieve what it clearly intended all along – to have only the damaging information about Mr. Bryant released and then to move to close the hearing when information unfavorable to the prosecution was elicited. After all, the prosecution knew of the factual evidence that was the basis for each of the questions asked of Detective Winters.

After hearing the defense offer of proof for the basis of questions directed to Detective Winters, the Court ruled that the defense is entitled to inquire further of Detective Winters and establish the facts set forth in the offer of proof, facts that come directly from discovery previously provided to the defense by the prosecution. The only question remaining for this Court to decide is whether that inquiry is to be made in public – as initially demanded by the prosecution – or *in camera* as it now requests now that, to use the Court's phrase "things have not gone as expected."

5. **IN ITS EVIDENTIARY PRESENTATION, THE PROSECUTION OPENED THE DOOR TO REBUTTAL EVIDENCE BY OFFERING HEARSAY PROOF THAT AT THE SAME MEDICAL EXAMINATION, BLOOD WAS FOUND IN THE PANTIES THE ACCUSER WORE TO THAT EXAMINATION. THIS WAS OFFERED AS PROOF THAT DEFENDANT CAUSED THE BLEEDING. DEFENDANT IS ENTITLED TO ELICIT SUBSTANTIAL SCIENTIFIC EVIDENCE FROM THE PROSECUTION'S OWN LABORATORY WHICH SHOWS THAT**

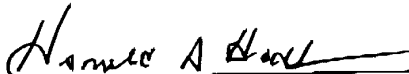
OTHER SUBSTANCES IN THOSE SAME PANTIES WERE FROM A SOURCE OTHER THAN DEFENDANT.

It is the prosecution through its intentionally incomplete examination of Detective Winters which mischaracterizes the evidence. The prosecution introduced evidence that yellow panties worn by the victim to Valley View Hospital in Glenwood Springs taken during the sexual assault examination had blood. The clear implication of this testimony was that the accuser was bleeding due to the alleged sexual assault. The prosecution deliberately mischaracterized that evidence by consciously failing to put before the Court all of the evidence concerning those panties. That evidence is set forth in the accompanying Offer of Proof, filed under seal, and is compelling evidence of innocence.

6. **HAVING DISCOVERED SUBSTANTIAL EXCULPATORY EVIDENCE IN ITS INITIAL TESTING, THE PROSECUTION NOW CLAIMS THAT IT IS SOMEHOW IRRELEVANT AND REFUSES TO TEST IT FURTHER TO DETERMINE ITS ORIGIN. THIS DEPRIVES DEFENDANT OF HIS RIGHT TO SUBSTANTIVE DUE PROCESS.**

As shown by the Offer of Proof, the prosecution knows of substantial exculpatory evidence which directly impeaches the credibility of the accuser and its claim that Mr. Bryant caused her injuries. Yet it declines to test it further and seeks to suppress that evidence in violation of Defendant's right to fundamental fairness as guaranteed by the due process protections of the state and federal constitutions.

DATED: October 14, 2003.


Harold A. Haddon (No. 1596)
Pamela Robillard Mackey (No. 15136)
Terrence P. O'Conner (No. 9574)
Ty Gee (No. 19772)
HADDON, MORGAN, MUELLER, JORDAN, MACKEY
& FOREMAN, P.C.
150 East 10th Avenue
Denver, Colorado 80203
Telephone: (303) 831-7364
Facsimile: (303) 832-2628
ATTORNEYS FOR DEFENDANT