DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO 7325 S. Potomac St. Centennial, Colorado 80112	▲COURT USE ONLY▲
PEOPLE OF THE STATE OF COLORADO **v.** **JAMES EAGAN HOLMES,** **Defendant**	Case No. **12CR1522** Division: **201**

ORDER REGARDING DEFENDANT'S MOTION TO DECLARE DEFENSE DISCLOSURE PROVISIONS OF SECTION 18-1.3-1201(3)(C), C.R.S. AND CRIM. P. 32.1(D)(7) UNCONSTITUTIONAL (D-156)

INTRODUCTION

In Motion D-156, the defendant seeks an order holding the pre-trial defense disclosure provisions of section 18-1.3-1201(3)(c), C.R.S. (2013) ("subsection (3)(c)") and Crim. P. 32.1(d)(7) unconstitutional. Motion at p. 1. The prosecution opposes the motion. *See generally* Response. For the reasons articulated in this Order, the motion is denied without a hearing.

STANDARD OF REVIEW

It is not the role of the judiciary to "act as overseer of all legislative action and declare statutes unconstitutional merely because [it] believe[s] they could be drafted better or more fairly applied." *People v. Dist. Court*, 185 Colo. 78, 81, 521

P.2d 1254, 1255 (Colo. 1974). A court is not to "seek out reasons to invalidate a statute." *People v. Jefferson*, 748 P.2d 1223, 1231 (Colo. 1988). To the contrary, when a statute is susceptible to different interpretations, including one which is constitutional, a court must "interpret it so as to preserve its validity." *Id.* (citation omitted); *see also Dist. Court*, 521 P.2d at 1255 ("Where a statute is capable of two interpretations," a court is required to "interpret it so as to satisfy constitutional dictates") (citation omitted).

Whether a statute is constitutional is a question of law. *See City of Greenwood Vill. v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 440 (Colo. 2000). "To declare an act of the legislature unconstitutional is always a delicate duty, and one which courts do not feel authorized to perform, unless the conflict between the law and the constitution is clear and unmistakable." *Id.* (quoting *People v. Goddard*, 8 Colo. 432, 437, 7 P. 301, 304 (Colo. 1885)). "[P]arties challenging statutes on constitutional grounds ordinarily must prove the statute's unconstitutionality 'beyond a reasonable doubt.'" *Id.* (citations omitted).

Courts must presume that the state legislature comports with constitutional standards when enacting a statute. *People v. Harper*, 111 P.3d 482, 484 (Colo. App. 2004) (citing *People v. Black*, 915 P.2d 1257, 1261 (Colo. 1996)). Thus, statutes are presumed to be constitutional and are interpreted accordingly. *People*

v. Martinez, 970 P.2d 469, 472 (Colo. 1998) (citations omitted); *People v. DeWitt*, 275 P.3d 728, 731 (Colo. App. 2011).

It is well established that, because statutes are presumed constitutional, "the party challenging a statute bears the burden of proving its invalidity beyond a reasonable doubt." *Harper*, 111 P.3d at 484; *see also City of Greenwood Vill.*, 3 P.3d at 440 (same). Unless the moving party satisfies this heavy burden, the Court lacks authority to declare a statute unconstitutional. *City of Greenwood Vill.*, 3 P.3d at 440.

Except in First Amendment cases, generally, the issue of whether a statute is unconstitutional should be decided "as applied" in a particular case. *See Broadrick v. Oklahoma*, 413 U.S. 601, 610-11, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). As the First Circuit has cautioned, "[d]eciding constitutional questions in the abstract is a recipe for making bad law." *United States v. Hilton*, 167 F.3d 61, 71 (1st Cir. 1999), *overruled on other grounds*, *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002). Given this admonishment, the Court proceeds with circumspection in addressing the defendant's facial challenge.

"To comport with due process, statutes must supply adequate standards to prevent arbitrary and discriminatory enforcement and give fair notice of the conduct prohibited so that persons may guide their actions accordingly." *People v. Allman*, 2012 COA 212, ¶ 18, --- P.3d --- (Colo. App. 2012) (citation omitted).

Thus, "[v]ague laws offend due process." *People v. Baer*, 973 P.2d 1225, 1233 (Colo. 1999).

In order to withstand a constitutional attack based on the vagueness doctrine, "[a] penal statute must define an offense with sufficient clarity to permit ordinary people to understand what conduct is prohibited and in [a] manner that does not encourage arbitrary and discriminatory enforcement of the statute." *People v. Norman*, 703 P.2d 1261, 1266 (Colo. 1985) (citations omitted). Both the United States and Colorado Constitutions "require articulation of definite and precise standards capable of fair application by judges, juries, police and prosecutors." *Id.* (citations omitted).

"This is not to say, however, that . . . mathematical exactitude in legislative draftsmanship" is required. *People v. Castro*, 657 P.2d 932, 939 (Colo. 1983). As long as the statutory terms "are sufficiently clear to persons of ordinary intelligence to afford a practical guide for law-abiding behavior and are capable of application in an even-handed manner by those responsible for enforcing the law," due process of law is satisfied. *Id.* (quotation and citations omitted). "Although the [vagueness] doctrine focuses both on actual notice to citizens and arbitrary enforcement," the United States Supreme Court has recognized that the more important aspect of the doctrine "is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal

guidelines to govern law enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357-58, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983) (quotation omitted). When the legislature fails to provide such minimal guidelines in a statute, it risks permitting "a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections." *Id.* (quotation omitted).

"Generally, a statute is unconstitutional on its face only 'if the complaining party can show that the law is unconstitutional in all its applications.'" *People v. Bondurant*, 296 P.3d 200, 206 (Colo. App. 2012) (quoting *Dallman v. Ritter*, 225 P.3d 610, 625 (Colo. 2010)); *see also People v. Boles*, 280 P.3d 55, 59 (Colo. App. 2011) (same). Consequently, "[i]n order to succeed in a vagueness challenge, the complaining party must show that the statute is impermissibly vague in all of its applications." *People v. Czemerynski*, 786 P.2d 1100, 1112 (Colo. 1990) (citations omitted). Mere "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications." *Hill v. Colorado*, 530 U.S. 703, 733, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000) (quotation omitted). A facial challenge to legislation is "the most difficult challenge to mount successfully, since the challenge must establish [beyond a reasonable doubt] that no set of circumstances exists under which the [statute] would be valid." *Nat'l Treasury Emps. Union v. Bush*, 891 F.2d 99, 101 (5th Cir. 1989) (quotation omitted).

ANALYSIS

Subsection (3)(c) provides:

> (c) The defendant shall provide the prosecuting attorney with the following information and materials no later than thirty-five days before the first trial date set for the beginning of the defendant's trial or within such other time frame as the supreme court may establish by rule; however, any reports, recorded statements, and notes, including results of physical or mental examinations and scientific tests, experiments, or comparisons, of any expert whom the defense intends to call as a witness at the sentencing hearing shall be provided to the prosecuting attorney as soon as practicable but not later than thirty-five days before trial:
>
> (I) A list of all witnesses whom the defendant may call at the sentencing hearing, specifying for each the witness' name, address, and date of birth and the subject matter of the witness' testimony;
>
> (II) The written and recorded statements, including any notes of those statements, of each witness whom the defendant may call at the sentencing hearing[;]
>
> . . . .
>
> (IV) A list of books, papers, documents, photographs, or tangible objects that the defendant may introduce at the sentencing hearing.

§ 18-1.3-1201(3)(c).

Rule 32.1(d)(7)(A) states:

> (A) Subject to constitutional limitations, the defendant shall provide the prosecuting attorney with the following information and materials not later than 35 days before trial:
>
> (I) A list of witnesses whom the defendant may call at the sentencing hearing. Along with the name of the witness, the defendant shall furnish the witness's address and date of birth, the

> subject matter of the witness's testimony, and any written or recorded statement of that witness, including notes, that comprise substantial recitations of witness statements and relate to the subject matter of the testimony;
>
> (II) A list of the books, papers, documents, photographs, or tangible objects, and access thereto, that the defendant may introduce at the sentencing hearing;
>
> (III) Any reports, recorded statements, and notes of any expert whom the defendant may call as a witness during the sentencing hearing, including results of physical or mental examinations and scientific tests, experiments, or comparisons.

Crim. P. 32.1(d)(7)(A).

The defendant argues that the disclosure requirements in subsection (3)(c) and Rule 32.1(d)(7)(A) "violate his constitutional right against compelled self-incrimination, right to effective assistance of counsel, right to due process of law, and right to present a defense at both [the] guilt and penalty phases" of the trial. Motion at p. 3. The crux of the defendant's motion is that the requirement to disclose penalty-phase evidence before the guilt phase of the trial is unconstitutional because it permits the prosecution to use, at the guilt phase of the trial, damaging information found by the defense. *Id.* at p. 4. Although the defendant's concerns are valid, the Court concludes that section 18-1.3-1201(3)(c.5) ("subsection (3)(c.5)") and Rule 32.1(d)(7)(B) adequately address them.

Subsection (3)(c.5) provides:

> (I) Any material subject to this subsection (3) that the defendant believes contains information that is privileged to the extent that the prosecution cannot be aware of it in connection with its preparation for, or conduct of, the trial to determine guilt on the substantive charges against the defendant shall be submitted by the defendant to the trial judge under seal no later than forty-nine days before trial.
>
> (II) The trial judge shall review any such material submitted under seal pursuant to subparagraph (I) of this paragraph (c.5) to determine whether it is in fact privileged. Any material the trial judge finds not to be privileged shall be provided forthwith to the prosecuting attorney. Any material submitted under seal that the trial judge finds to be privileged shall be provided forthwith to the prosecution if the defendant is convicted of a class 1 felony.

§ 18-1.3-1201(3)(c.5).

Rule 32.1(d)(7)(B) states:

> (B) Any material subject to this subsection (7) that the defendant believes contains self-incriminating information that is privileged from disclosure to the prosecution prior to the sentencing hearing shall be submitted by the defendant to the trial judge under seal no later than 49 days before trial. The trial judge shall review any material submitted under seal pursuant to this paragraph (B) to determine whether it is in fact privileged.
>
> (I) Any material submitted under seal pursuant to this paragraph (B) that the judge finds to be privileged from disclosure to the prosecution prior to the sentencing hearing shall be provided forthwith to the prosecution if the defendant is convicted of a class 1 felony.
>
> (II) If the trial judge finds any of the material submitted under seal pursuant to this paragraph (B) to be not privileged from disclosure to the prosecution prior to the sentencing hearing, the trial judge shall notify the defense of its findings and allow the defense 7 days after such notification in which to seek a modification, review or stay of the court's order requiring disclosure.

(III) The trial judge may excise information it finds privileged from information it finds not privileged in order to disclose as provided in (II) above.

Crim. P. 32.1(d)(7)(B).

Under the statute, any material "that the defendant believes contains information that is privileged to the extent that the prosecution cannot be aware of it in connection with . . . the trial to determine guilt" must be submitted to the trial judge under seal for the judge's review. § 18-1.3-1201(3)(c.5)(I). Likewise, under the rule, any material "that the defendant believes contains self-incriminating information that is privileged from disclosure to the prosecution prior to the sentencing hearing" must be submitted to the trial judge under seal for the judge's review. Crim. P. 32.1(d)(7)(B). Only material the judge determines not to be privileged may be provided to the prosecution before trial on the merits of the substantive charges. § 18-1.3-1201(3)(c.5)(II); Crim. P. 32.1(d)(7)(B)(I)-(II). And, in the event the Court determines that any material reviewed is not privileged, before disclosing it to the prosecution, the Court must afford the defendant an opportunity to seek modification, appellate review, or a stay of its order requiring disclosure. Crim. P. 32.1(d)(7)(B)(II).

The defendant acknowledges the existence of these constitutional protections. *See* Motion at pp. 11-12. However, he claims, in cursory fashion, that

subsection (3)(c) is "too vague to be enforced" because it does not contain a definition of the term "privileged." *Id.* at p. 12. The Court disagrees.

At the outset, the Court notes that "privileged" is also not defined in Rule 32.1(d)(7)(B). Yet the defendant does not argue that the rule's use of the term is ambiguous. *See id.* Instead, the defendant's criticism of the rule is that, "[i]n contrast to the statute, [it] provides that only 'self-incriminating information'" is privileged and protected. *Id.* The defendant infers that "it would appear that material which may be subject to other privileges, or that is otherwise confidential, must be directly disclosed [to the prosecution] . . . pursuant to Crim. P. 32.1." *Id.*

Contrary to the defendant's contention, the term "privileged" is not vague, and subsection (3)(c.5) and the rule are not incongruous. The flaw in the defendant's analysis is that it attempts to interpret the word "privileged" in isolation, without regard to the rest of the text in the statute and rule. To be sure, unlike the rule, subsection (3)(c.5) contains no reference to "self-incriminating information that is privileged," referring instead more generally to "information that is privileged." § 18-1.3-1201(3)(c.5)(I). However, the statute qualifies the reference to privileged information as follows: "information that is privileged ***to the extent that the prosecution cannot be aware of it in connection with its preparation for, or conduct of, the trial to determine guilt.***" *Id.* (emphasis added). Thus, while the statute and the rule use different verbiage, they appear to cover the

same type of information: self-incriminating information that is privileged and cannot be disclosed to the prosecution before completion of the guilt phase of the trial. Rather than create an inconsistency with the statute, the rule essentially clarifies the statute by equating subsection (3)(c)'s reference to information that is privileged—to the extent that it cannot be disclosed to the prosecution for purposes of its preparation for, or conduct of, the guilt phase of the trial—with self-incriminating information that is privileged from disclosure to the prosecution before or during the guilt phase of the trial.[1]

The prosecution's analysis suffers from the same flaw inherent in the defendant's position: it attempts to interpret the term "privileged" in isolation, without regard to the rest of the text in the statute and rule. *See* Response at pp. 5-6. The Court disagrees with the prosecution that "privileged," as used in the statute and rule, refers to the statutory privileges set forth in section 13-90-107, C.R.S. (2013). *Id.* Neither the text in subsection (3)(c.5) nor the text in Rule 32.1(7)(d)(B) supports this interpretation.

Additionally, the prosecution's construction is inconsistent with logic and common sense. It is unreasonable to interpret the statute as including information that is not incriminating but that is otherwise covered by a privilege identified in

[1] It is undisputed that the statute preceded the rule. *See* Motion at p. 2 ("Although the statute governing defense disclosures was amended in 2002, the applicable Supreme Court rule directing disclosures by the defense was not amended until 2004") (citation omitted).

section 13-90-107 because that information is already protected by section 13-90-107.[2] To the extent that such information must be disclosed pursuant to subsection (3)(c) and Rule 32.1(d)(7)(A) before the guilt phase of the trial, there is no concern that the defendant's constitutional rights will be violated because that information is not self-incriminating—i.e., it is not the type of information the prosecution may seek to introduce—and will eventually be disclosed at any sentencing hearing. *Martinez*, 970 P.2d at 473-74 ("In the context of reciprocal discovery, the United States Supreme Court has held that a state constitutionally may accelerate the timing of disclosure, forcing a defendant to divulge at an earlier date information that he or she from the beginning planned to divulge at trial;" therefore, "the defendant must produce to the prosecution before the trial or [capital sentencing] hearing the information that would ultimately become known to the prosecution at that trial or proceeding") (quotation omitted) (emphasis omitted).

[2] By "incriminating" information, the Court refers to any information—whether inculpatory or exculpatory—that the prosecution may seek to introduce at trial, including during the guilt phase of the trial. *Cf. Rhode Island v. Innis*, 446 U.S. 291, 301 n.5, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980) ("By 'incriminating response' we refer to any response—whether inculpatory or exculpatory—that the ***prosecution*** may seek to introduce at trial") (emphasis in original). "The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination." *Miranda v. Arizona*, 384 U.S. 436, 476, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). As the United States Supreme Court explained in *Miranda*, albeit in the context of a defendant's statements: "[n]o distinction can be drawn between statements which are direct confessions and statements which amount to 'admissions' of part or all of an offense." *Id.* Nor may any distinction be drawn "between inculpatory statements and statements alleged to be merely 'exculpatory.'" *Id.* at 477. If a defendant's statement "were in fact truly exculpatory it would, of course, never be used by the prosecution." *Id.*

The defendant's motion does not raise any concerns related to information that is not self-incriminating, regardless of whether it is protected by one of the privileges in section 13-90-107.[3] The concerns raised by the defendant's motion focus on the compelled pretrial disclosure, pursuant to subsection (3)(c) and Rule 32.1(d)(7)(A), of self-incriminating information—i.e., information the prosecution may seek to introduce at trial, including during the guilt phase of the trial. That is precisely the information that subsection (3)(c.5) and Rule 32.1(d)(7)(B) preclude the prosecution from acquiring or using before completion of the guilt phase of the trial and a conviction for a class 1 felony.

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[3] *See* Motion at p. 4 (arguing that the requirement to disclose penalty phase evidence before the guilt phase of the trial implicates the right against self-incrimination by permitting the prosecution to acquire and use at the guilt phase of the trial damaging information that the defense discovers during its investigation of the case and preparation of a defense); *id.* ("the defense disclosure requirements are blatantly unconstitutional to the extent that they appear to require disclosure of [the defendant's] own statements in order to preserve his right to allocute and to plead for his life in the event the case proceeds to the penalty phase"); *id.* at p. 6 ("Because the statute and rule now in effect require disclosure of penalty phase information before the trial on the merits, the disclosure provisions cannot be characterized as simply 'accelerating' disclosure of information the prosecution would learn during the trial on the merits"); *id.* at p. 7 ("A prudent attorney cannot make a meaningful decision about the presentation of mitigation evidence when, by disclosing the information to the prosecution, he runs the risk that the prosecution will use the evidence to convict his client"); *id.* at p. 8 ("It is hard to imagine a more severe intrusion into and violation of the attorney-client relationship than the prosecution's use of evidence during its case-in-chief which the defense was compelled to disclose in order to present it as mitigation in a capital sentencing trial"); *id.* at p. 8 ("It is not hard to imagine a circumstance in which [mitigation] evidence disclosed by the defense and evidence derived therefrom is used against the defendant at [the guilt phase of the] trial"); *id.* at p. 9 ("The defense disclosure requirements [of Rule 32.1(d)(7) and subsection (3)(c)] create an impermissible tension between the Sixth Amendment right to present a defense and the Fifth Amendment right against self-incrimination"); *id.* at p. 10 (Rule 32.1(d)(7) and subsection (3)(c) place the defendant "in the constitutionally untenable position of having to choose whether to effectuate his right to call witnesses and present evidence in mitigation notwithstanding the fact that the prosecution may use inculpatory information provided in his compelled disclosures to establish guilt of a first degree murder").

In his reply, the defendant opines, in conclusory fashion, "that the provisions allowing a defendant to submit arguably 'privileged' information under seal are inadequate to protect his constitutional rights." Reply at p. 3. There is no legal basis, or even a meaningful explanation, accompanying this naked assertion. For the reasons articulated earlier, in the Court's view, subsection (3)(c.5) and Rule 32.1(d)(7)(B) adequately address the concerns advanced in Motion D-156.

In any event, in an abundance of caution, the Court rules that the prosecution is precluded from using, for any purpose, the following information during the guilt phase of the trial: 1) any information obtained by the prosecution solely as a result of the defendant's compliance with the discovery requirements in subsection (3)(c) and Rule 32.1(d)(7)(A); and 2) any information derived by the prosecution solely from such information. This ruling is consistent with the trial court's protective order in *People v. Harlan*, which the Colorado Supreme Court found "adequately protected [the defendant's] privilege" against self-incrimination. 8 P.3d 448, 480 (Colo. 2000), *overruled on other grounds*, *People v. Miller*, 113 P.3d 743 (Colo. 2005).[4] It is also consistent with this Court's May 29, 2013 Order. *See* Order Regarding Outstanding Issues in Defendant's Motions D-28, D-29, D-

[4] In *Harlan*, because the trial court realized that its discovery order "might infringe upon [the defendant's] privilege against self-incrimination," it "ordered that the prosecution not use the [defendant's] discovery material" related to the sentencing phase of the trial "in framing voir dire questions or for any guilt phase purposes." 8 P.3d at 480-81. Rather, such information could "only be used by the prosecution in the penalty phase in regard to aggravation and mitigation." *Id.* at p. 481.

31, and D-32 at p. 48 ("the People have already agreed that the Court may enter [] an order in this case" similar to the protective order issued in *Harlan*).

In sum, even assuming subsection (3)(c.5) is unconstitutionally vague and inconsistent with Rule 32.1(d)(7)(B), this Order adequately protects the defendant's constitutional rights and saves the statute and the rule from any potential invalidation. "[C]ourts have a duty to interpret a statute in a constitutional manner where the statute is susceptible to a constitutional construction." *See People v. Montour*, 157 P.3d 489, 503-04 (Colo. 2007) (citations omitted). The Court follows this mandate in interpreting section (3)(c.5) and Rule 32.1(d)(7)(B).

CONCLUSION

For all the foregoing reasons, the Court finds that Motion D-156 lacks merit. Although the defendant's concerns regarding the disclosure requirements set forth in section (3)(c) and Rule 32.1(d)(7)(A) are valid, subsection (3)(c.5) and Rule 32.1(d)(7)(B), as interpreted in this Order, adequately address those concerns. Moreover, out of an abundance of caution, the Court prohibits the prosecution from using, during the guilt phase of the trial, any information obtained or derived solely from a disclosure made by the defendant pursuant to subsection (3)(c) or Rule 32.1(d)(7)(A). Accordingly, the defendant's constitutional attack fails and Motion D-156 is denied without a hearing.

Dated this 5th day of May of 2014.

BY THE COURT:

Carlos A. Samour, Jr.
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2014, a true and correct copy of the **Order regarding Defendant's motion to declare Defense disclosure provisions of Section 18-1.3-1201(3)(C). C.R.S. and CRIM.P.32.1(D)(7) unconstitutional (D-156)** was served upon the following parties of record:

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