

REDACTED

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	Filed  DEC 24 2014  CLERK OF THE COMBINED COURT ARAPAHOE COUNTY, COLORADO
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff  v.  <b>JAMES HOLMES,</b> Defendant	
DOUGLAS K. WILSON, Colorado State Public Defender Daniel King (No. 26129) Tamara A. Brady (No. 20728) Chief Trial Deputy State Public Defenders 1300 Broadway, Suite 400 Denver, Colorado 80203 Phone (303) 764-1400 Fax (303) 764-1478 E-mail: <a href="mailto:state.pubdef@coloradodefenders.us">state.pubdef@coloradodefenders.us</a>	Case No. <b>12CR1522</b>   Division 201
<b>MOTION TO COMPEL COMPLIANCE WITH ORDER D-251<sup>1</sup></b> <b>[D-263]</b>	

---

**CERTIFICATE OF CONFERRAL**

The prosecution's position on this issue is articulated in the body of the pleading.

---

Pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments and article II, sections 16, 20, 23 and 25 of the Colorado Constitution, James Holmes, through counsel, moves this Court to require the prosecution to comply with its Order D-251 and provide the defense with the additional discovery it was ordered to disclose pursuant to the Court's Order D-251. In support of this motion, Mr. Holmes states the following:

1. In Order D-251, the Court ordered the prosecution to provide the defense with discretionary disclosures pursuant to Rule 16(I)(d)(3). The Court held:

The prosecution does not bother to address the defendant's fourth request, which seeks discretionary disclosures pursuant to Rule 16(I)(d)(3). In the interests of justice, and consistent with Order P-43, the Court grants the defendant's request. Therefore, the prosecution must "disclose the underlying facts or data supporting the opinion" of any expert endorsed. Crim. P. 16(I)(d)(3). Further,

---

<sup>1</sup> The defense is not requesting that the body of the pleading be suppressed, but moves the Court to suppress the attachments to this pleading, which contain information that has not been made public.

“[i]f a report has not been prepared” by an expert, the prosecution must “provide a written summary of the testimony describing the witness’s opinion and the bases and reasons therefor, including results of physical or mental examination and of scientific tests, experiments, or comparisons.” *Id.* The Court wants to be clear that its intent is similar to the purpose behind the rule: “to allow the defense sufficient meaningful information to conduct effective cross-examination under CRE 705.” *Id.*

Order D-251, pp. 2-3.

2. The Court set a deadline of December 17, 2014 for the prosecution to provide this material to the defense. The prosecution provided the defense with additional discovery on that date, which included reports written by DA investigators about conversations the district attorney’s office had with Drs. Resnick, Mohandie, Metzner, and Rogers.<sup>2</sup> The defense also received three pages of handwritten notes that appear to be from Dr. Resnick. However, the defense did not receive any of the discretionary disclosures the Court ordered the prosecution to provide pursuant to Rule 16(I)(d)(3).<sup>3</sup>

3. On Monday, December 22, 2014, defense counsel sent the prosecution an email stating, in relevant part:

Prosecution:

As far as we can tell, we have not received any additional written notes or other materials from Dr. Mohandie (other than the DA investigator’s report regarding your conversation with him), nor have we received the discretionary disclosures pursuant to Rule 16(I)(d)(3) ordered by the Court in Order D-251, which requires you to provide us with a “written summary of the testimony describing the witness’s opinion and the bases and reasons therefor . . . .” as well as “the underlying facts or data supporting the opinion” of any expert endorsed. We recognize that there was a lot of material that was recently provided, so please let us know if we have missed something. Otherwise, we intend to file a motion to compel this additional discovery.

4. On Tuesday, December 23, 2014, the defense received the following response from the prosecution, in relevant part:

---

<sup>2</sup> Notably, the report regarding Dr. Resnick, at roughly a page and a half in length, was incredibly brief.

<sup>3</sup> The defense has attached as exhibits the sum total of the materials it has received since January 2014 either through CMHIP disclosures or from the prosecution pertaining to Drs. Resnick and Mohandie, in order to provide the Court with a better understanding of the information it has received concerning these prosecution experts.

Counsel,

We have asked Dr. Mohandie to provide any additional notes, and will confirm that we have everything.<sup>4</sup>

At this point we do not anticipate calling either Dr. Mohandie or Dr. Resnick in our case in chief. They may be called in rebuttal to defense witnesses, but that will be dependent on the nature of defense testimony. Additionally, as we stated in our letter of yesterday, they may be called to rebut defense witnesses during the sentencing phase of the trial.

5. The defense hereby moves to compel the prosecution to provide the discretionary disclosures the Court ordered it to provide pursuant to Order D-251 with respect to Drs. Resnick, Mohandie, and any other expert witness they have endorsed. The plain language of Crim. P. 16(I)(d)(3) clearly applies to “an expert endorsed as a witness.” Neither the rule, nor the Court’s order, makes any distinction between experts the prosecution intends to call in its case-in-chief, and experts the prosecution intends to call in rebuttal. The rule simply applies to “endorsed” experts, and the Court’s order applies to “any expert endorsed.” Drs. Resnick and Mohandie are endorsed expert witnesses in this case.

6. Even if the prosecution only intends to call Drs. Resnick and Mohandie in “rebuttal” to defense experts, the prosecution surely has enough information to provide the defense with the disclosures ordered by the Court in Crim. P. 16(I)(d)(3). The prosecution was provided with reports authored by the defense’s experts Dr. Raquel Gur and Dr. Robert Hanlon almost a year and a half ago, and has also been provided with voluminous notes and other materials pertaining to these experts. The prosecution is fully aware of the opinions of these defense experts and can certainly generally predict at this point what the content of their anticipated testimony will be.

7. On the other hand, the defense at this point has very little understanding of the scope and content of Dr. Resnick’s and Dr. Mohandie’s anticipated trial testimony. The defense is unaware of what opinions Dr. Resnick in particular has actually formed (and may testify about) concerning Mr. Holmes’s mental health. It is difficult to believe that Dr. Resnick has not formed an opinion, or altered any opinions he previously held, based on the extensive materials that were generated by Dr. Reid’s report, including 22 hours of videotaped footage of his sanity examination with Mr. Holmes, and that he will not testify about some of these opinions at trial. Moreover, to the extent that [REDACTED], this information constitutes exculpatory material that must be provided to the defense pursuant to Crim. P. 16(I)(a)(2) and *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, regardless of whether the prosecution intends to ask Dr. Resnick about any such opinion on direct examination.

---

<sup>4</sup> The defense received additional discovery that appears to be notes from Dr. Mohandie today, December 24, 2014. The defense has included these materials in Exhibit B, attached.

8. Nor does the defense have an adequate understanding of the opinions of Drs. Resnick and Mohandie about the findings and conclusions of the defense experts in this case, which is particularly important if these experts are to be offered in rebuttal. Nor does the defense have an adequate understanding of the bases or reasons for any such opinions.

9. Other than the recent discovery received, the only information the defense has received from the prosecution regarding these experts pertained largely to the limited issues in Motion P-68 regarding the adequacy of Dr. Metzner's report.

10. This is not a case where the prosecution is unaware ahead of time that it may be necessary to call these witnesses at trial. *Cf. People v. Avila*, 944 P.2d 673, 675 (Colo. App. 1997) ("Because the necessity of calling the witness was not known to the prosecution until mid-trial, the prosecution was not required to disclose the identity of the witness any earlier than practicable."). Drs. Resnick and Mohandie have been involved in this case since very early on. The prosecution has been aware of the defense experts and their respective opinions for well over a year.

11. It would be utterly unfair and would violate the spirit and purpose of Crim. P. 16(I)(d)(3), as well as Mr. Holmes's state and federal constitutional rights to fundamental fairness, due process, a fair trial, and a reliable sentencing proceeding, to allow the prosecution to skirt the Court's directives in Order D-251 simply by characterizing Drs. Resnick and Mohandie as "rebuttal" experts. As the Supreme Court held in *Wardius v. Oregon*, 412 U.S. 470, 475-76 (1973):

The State may not insist that trials be run as a 'search for truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses. It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State.

*Id.* The Court made clear in *Wardius* that Due Process requires a "balance of forces between the accused and his accuser." *Id.* at 474. *See also* U.S. Const. amends. V, VI, XIII, XIV; Colo. Const. art. II, secs. 16, 20, 23, 25.

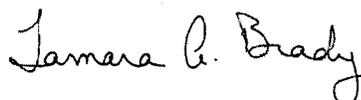
12. Finally, the defense notes that the prosecution's failure to provide timely expert disclosures was among the bases for the defendant's recent motion to continue the trial. *See* Motion D-255. In denying that motion, the Court set the December 17 deadline for the prosecution to provide these disclosures, noting, "This will ensure that the defense receives the prosecution's supplemental disclosures approximately five weeks before trial." Order D-255a, p. 10. As explained above, the defense has not received these disclosures. Even if the Court were to rule expeditiously on this issue, it is unlikely that the defense would receive any additional disclosures until next week, at which point the start of the trial will be approximately 3 weeks away. This is a staggeringly insufficient amount of time for the defense to prepare its cross-examination of these vital witnesses. Therefore, the defense requests that the Court reconsider its ruling in Order D-255a in light of the prosecution's failures to comply with Order D-251.

Mr. Holmes files this motion, and makes all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, on the following grounds and authorities: the Due Process Clause, the Right to a Fair Trial by an Impartial Jury, the Rights to Counsel, Equal Protection, Confrontation, and Compulsory Process, the Rights to Remain Silent and to Appeal, and the Right to be Free from Cruel and Unusual Punishment, pursuant to the Federal and Colorado Constitutions generally, and specifically, the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitutions, and Article II, sections 3, 6, 7, 10, 11, 16, 18, 20, 23, 25 and 28 of the Colorado Constitution.



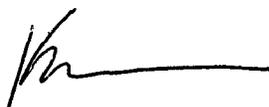
---

Daniel King (No. 26129)  
Chief Trial Deputy State Public Defender



---

Tamara A. Brady (No. 20728)  
Chief Trial Deputy State Public Defender



---

Kristen M. Nelson (No. 44247)  
Deputy State Public Defender

Dated: December 24, 2014

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff  v.  <b>JAMES HOLMES,</b> Defendant	σ COURT USE ONLY σ
DOUGLAS K. WILSON, Colorado State Public Defender Daniel King (No. 26129) Tamara A. Brady (No. 20728) Chief Trial Deputy State Public Defenders 1300 Broadway, Suite 400 Denver, Colorado 80203 Phone (303) 764-1400 Fax (303) 764-1478 E-mail: <a href="mailto:state.pubdef@coloradodefenders.us">state.pubdef@coloradodefenders.us</a>	Case No. <b>12CR1522</b>      Division 201
<b>ORDER RE: MOTION TO COMPEL COMPLIANCE WITH ORDER D-251          [D-263]</b>	

Defendant's motion is hereby GRANTED \_\_\_\_\_ DENIED \_\_\_\_\_.

BY THE COURT:

\_\_\_\_\_ JUDGE

\_\_\_\_\_ Dated

I hereby certify that on December 24, 2014, I

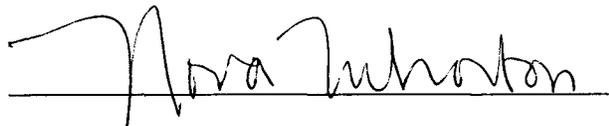
mailed, via the United States Mail,

faxed, or

hand-delivered

a true and correct copy of the above and foregoing document to:

George Brauchler  
Jacob Edson  
Rich Orman  
Karen Pearson  
Lisa Teesch-Maguire  
Office of the District Attorney  
6450 S. Revere Parkway  
Centennial, Colorado 80111  
Fax: 720-874-8501

  
\_\_\_\_\_