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District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	Filed in Division JUL 23 2012 <small>Arapahoe County District Court</small> σ COURT USE ONLY σ
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. JAMES HOLMES Defendant	
DOUGLAS K. WILSON, Colorado State Public Defender Daniel King (No. 26129) Deputy State Public Defender 1290 Broadway, Suite 900, Denver, Colorado 80203 Phone (303) 764-1400 Fax (303) 764-1478 E-mail: daniel.king@coloradodefenders.us	Case No. 12CR1522 Division 408
MOTION TO ALLOW CONFIDENTIAL DEFENSE EXPERTS TO BE PRESENT FOR SCIENTIFIC TESTING OF EVIDENCE [006] D-6	

Defendant, through counsel, asks this Court enter an order allowing the Defendant to have a confidential expert present during any scientific testing of evidence by law enforcement or prosecution agents in this case, and states:

1. The State, through law enforcement or other agents, may perform various forms of testing involving items of evidence, such as firearms, bullets, and shell casings, and biological sample testing.
2. In doing so, the State's agents apply various scientific procedures and methods of their own choosing to the evidence.
3. While such testing may not destroy the existing evidence, the evidence that is developed as a result of such scientific testing normally consists of the observations and subsequent testimony of the State's experts as to the methods and procedures which were employed, and their observations of the results thereof. Unless the Defendant is permitted to have his own representative confidential expert present during those procedures and tests, he will have lost any realistic ability to confront the State's evidence as to the procedures performed and the results obtained. The State's experts will have sole and virtually unchallengeable control of the evidence generated as a result of those tests.
4. Further, such testing may destroy the existing evidence. For example, bullets in evidence may be fired, and the condition of other evidence may be altered by the testing. In such situations, the Defendant has a due process right to have his/her own confidential expert be present at such testing.

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5. The Defendant requests the opportunity to have his own representative expert observe the scientific procedures and tests performed by the State. Such a representative expert would not participate in or in any fashion interfere with or influence the State's testing procedures. Such an expert would enable the Defendant to have reasonable access to the evidence and a reasonable opportunity to confront that sort of evidence in this case, and in this instance the requested relief is virtually the only method of allowing the Defendant access to the evidence and an ability to effectively confront such evidence in court.

6. The only consequences of allowing the Defendant to have an expert present at the State's scientific testing of evidence is a significant enhancement of the reliability of the truth-seeking function of this case, and the protection of the Defendant's right to effective assistance of counsel. It is well-recognized that the right to counsel may include the assistance of confidential experts. *See, e.g. Miller v. District Court*, 737 P.2d 834 (Colo. 1987); *Hutchinson v. People*, 742 P.2d 875 (Colo. 1987). The State has no privileges or rights to confidentiality or secrecy at any point in such testing. No "work product" is involved. Since their work is intended to generate evidence which may be used in court, the police and other prosecution agents have no legitimate reasons for keeping their methods or procedures from the strictest scrutiny by the affected party.

7. Additionally, Defendant moves that the Court order the State to refrain from performing any additional scientific testing on the evidence in this case until the issues presented by the Defendant's motions to have confidential defense experts present at such scientific testing are resolved, for the following reasons:

a. The Defendant expects that the issues raised in this motion can and should be resolved in an expeditious manner. The State would suffer no prejudice from a delay.

b. Testing of the weapon or biological material and other evidence in this case would potentially be exculpatory as to issues which are material to the defense. There is a manifest necessity that a defense expert be present in order to properly document and preserve potentially exculpatory evidence.

c. The State and Court are on notice that initial testing may destroy evidence that cannot be replicated by duplicative testing. The State and Court are also on notice that testing performed without the presence of the Defendant's experts will deprive the Defendant of a realistic ability to confront and rebut testimony concerning such testing. *See* U.S. Const. amend. VI, Colo. Const. Art. II, § 16, 25.

d. The Defendant also hereby requests that the State refrain from any scientific testing in this case until the Defendant's expert(s) are present and able to observe the testing procedures.

e. The Defendant also requests and demands of the prosecution that it refrain from conducting any such testing until such time as the issue of a defense expert observing testing is resolved.

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
Colorado Public Defender

Dated: July 23, 2012

CERTIFICATE OF SERVICE

I hereby certify that on 7/23, 2012, I

mailed, via the United States Mail,
 faxed, or
 hand-delivered

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

Carol Chambers
Office of the District Attorney
6450 S. Revere Parkway
Centennial, Colorado 80111
Fax: 720-874-8501

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