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CLERK OF THE COMBINED COURT
ARAPAHOE COUNTY, COLORADO

District Court Arapahoe County, Colorado 7325 South Potomac Street, Centennial, Colorado 80112 THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. JAMES HOLMES, Defendant.	*COURT USE ONLY*
GEORGE H. BRAUCHLER, 18th Judicial District Attorney 6450 S Revere Pkwy, Centennial, CO 80111 Phone Number: 720.874.8500 Atty. Reg. #: 25910	Case Number: 12CR1522 Division 22

PEOPLE'S BRIEF IN RESPONSE TO D-032 DEFENDANT'S MOTION TO DECLARE C.R.S. §§ 16-8-103.6, 103.7, 106, 107 AND 18-1.3-1201(3)(D) UNCONSTITUTIONAL

This response is filed by the District Attorney for the 18th Judicial District.

INTRODUCTION

Mental condition may be put in issue by the defendant in the following ways: (1) the defendant may plead not guilty by reason of insanity (including, but not limited to impaired mental condition); (2) the defendant may endorse experts who may testify to the defendant's mental condition; or (3) the defendant may endorse witnesses for the sentencing hearing who may testify to the defendant's mental condition. See C.R.S. §§ 16-8-103(1.5)(a), 16-8-107(3)(b) and 18-1.3-1201(3)(d)(I) respectively. As defendant has not presently undertaken any of the forgoing actions, the People respectfully assert that that defendant lacks standing to attack the constitutionality of any of the statutes cited by defendant's motion [D-032].

In this motion and related motions, [D-028, D-029, and D-030], defendant contends that the People or the trial court must define "mental condition" and "cooperate" as the statutes in question fail to do so. However, requiring the People to guess at whatever mental condition the

defense may be intending to assert in order to inform the defense of the prospective applicability of the various mental condition statutes is manifestly unfair. It is apparent that the Colorado Supreme Court does not take positions in this hypothetical and advisory fashion. On the contrary, see the recent decision of the Colorado Supreme Court in People v. Flippo, 159 P.3d 100 (Colo. 2007).

In Flippo, the defendant's alleged mental condition was identified, i.e. "intellectual disability." The defendant sought to raise his alleged "intellectual disability" without compliance with statutory requirements of notice and a court ordered examination. The Colorado Supreme Court held that defendant's claim of "intellectual disability" fell within the notice and examination requirements of C.R.S. § 16-8-107(3)(b). Id. at 106. Given defendant's failure to comply with these prerequisites, the defendant's expert mental condition testimony was properly excluded by the trial court. Id.

While our Supreme Court in Flippo declined to provide a definition of "mental condition," our Court nonetheless held that:

> The language of § 16-8-107(3)(b) evinces the General Assembly's desire to address evidence that relates to the condition of a defendant's mind beyond just issues of insanity.

Id. at 105. Thus, the Colorado Supreme Court has answered the queries posed throughout defendant's motion, by this statement, namely that the mental condition statutes define mental condition to include conditions of a defendant's mind beyond issues of insanity (including, but not limited to, impaired mental condition).

A recent Court of Appeals case, People v. Bondurant, 07CA2481, 2012 WL 1035975 (Colo. App. 2012), (attached), held that addressed this issue both with respect to the phrase "mental condition" and the word "cooperate". In People v. Bondurant, the court held that

the C.R.S. § 18-6-106 is not vague either on its face or as applied to Mr. Bondurant. 2012 WL 1035975 at *6. Bondurant challenged the constitutionality of C.R.S. § 18-6-106 and the conditioning of introduction of expert testimony to cooperation with a court ordered mental health examination. Statutes are presumed to be constitutional and the party challenging it on constitutional grounds bears the burden of establishing its unconstitutionality beyond a reasonable doubt. People v. Baer, 973 P.2d 1225, 1230 (Colo. 1999). Defendant has not met his burden to show any of the statutes he challenges are unconstitutional. Thus, the People respectfully request the Court deny Defendant's Motion [D-032].

C.R.S. § 18-1.3-1201(3)(d) IS CONSTITUTIONAL

C.R.S. § 18-1.3-1201(3)(d)(I) provides:

> Except as otherwise provided in subparagraph (II) of this paragraph (d), if the witnesses disclosed by the defendant pursuant to paragraph (c) of this subsection (3) include witnesses who may provide evidence concerning the defendant's mental condition at the sentencing hearing conducted pursuant to this section, the trial court, at the request of the prosecuting attorney, shall order that the defendant be examined and a report of said examination be prepared pursuant to section 16-18-106, C.R.S.

Colorado's capital statute, C.R.S. § 18-1.3-1201(3)(d)(I), provides that, if the defense witness list for the penalty phase includes "witnesses who may provide evidence concerning the defendant's mental condition at the sentencing hearing," the prosecuting attorney may request that the defendant "be examined and a report of said examination be prepared pursuant to § 16-8-106, C.R.S." Defendant challenges the constitutionality of this provision on the grounds that his privilege against self-incrimination is allegedly violated if he is required to undergo an examination for a mental condition, which he intends to inject into the capital sentencing hearing.

When measured by the Colorado Supreme Court's decision in People v. Martinez, 970 P.2d 469 (Colo. 1998), C.R.S. § 18-1.3-1201(3)(d)(I) is clearly constitutional. Colorado's present capital statute, C.R.S. § 18-1.3-1201(3)(c), generally requires that a defendant provide "(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" no later than thirty days before the first trial date or such other time as the trial court sets. In People v. Martinez, the Colorado Supreme Court construed a similar predecessor capital sentencing reciprocal discovery provision. Notably, the predecessor capital sentencing discovery provision at issue in Martinez, 970 P.2d at 471, also provided for defendant's disclosure of "any reports, recorded statements and notes of any expert whom the defendant may call as a witness," including the "**results of any "mental examinations.**" (Emphasis added.) Among other things, defendant Martinez asserted that the reciprocal discovery statute violated his right against self-incrimination. Id. This claim was rejected.

In Martinez the Colorado Supreme Court stated that, with respect to a defendant's disclosure obligation, "the courts have reasoned that reciprocal discovery requirements merely accelerate the timing of disclosures that would otherwise be made by the defendant at trial." 970 P.2d at 472. Our Supreme Court rejected the contention that reciprocal discovery forces a defendant to provide the prosecution with incriminating evidence from witnesses whom the defendant "would never call at trial." Id. at 473. Despite the fact that the capital sentencing reciprocal discovery statute construed in Martinez specified application to "all witnesses whom the defendant may call at the sentencing hearing," the Colorado Supreme Court interpreted the statute to extend only to "witnesses whom the defendant intends to call at the sentencing hearing." Id. This construction is equally applicable to Section 18-1.3-1201(3)(d)(I).

Further, to the extent that the defendant expresses concern that information concerning mental condition witnesses or experts disclosed pursuant to Section 18-1.3-1201(3)(d)(I) might be improperly utilized by the prosecution during the guilt phase of a death penalty trial, should that occur, the Court can enter a protective order regarding the People's use of any such information. Pursuant to People v. Harlan, 8 P.3d 448, 480-82 (Colo. 2000) such an order is sufficient to protect the defendant's rights.

Defendant Harlan claimed that the trial court's order requiring pretrial discovery of three sentencing phase expert witnesses impermissibly forced him to choose between exercising his privilege against self-incrimination during the guilt phase of the trial and his due process right to present mitigating evidence in the sentencing phase. Id. at 480. The Colorado Supreme Court rejected this contention and held that:

> Even assuming for the sake of argument, without actually deciding that it does, that Harlan's privilege against self-incrimination in the guilt phase of the trial attached to the sentencing phase expert witnesses' evidence, we find that the trial court's order limiting the prosecution's use of the evidence would have adequately protected Harlan's privilege. Consequently, we hold that the pretrial discovery order was proper.

Id. at 480.

The protective order entered by the trial court in Harlan properly required that discovery concerning defendant Harlan's "mental health experts whom the defense wished to call for mitigation purposes" be utilized by the prosecution only at the sentencing phase. Id. at 480. The trial court properly "conditioned discovery of Harlan's witnesses by requiring the prosecution to limit use of the material to the sentencing phase." Id. at 481.

Obviously, in this case, defendant's stated concern that the prosecution will allegedly utilize information concerning defendant's mental condition mitigation experts and witnesses prior to the sentencing hearing is likewise adequately addressed by entry of a protective order

such as that approved in Harlan and described above. As stated above, this Court has already entered such a protective order.

THE STATUTES DO NOT VIOLATE THE FIFTH AMENDMENT

Communications subject to the protection of the Fifth Amendment must be "testimonial, incriminating, and compelled." Hiibel v. Sixth Judicial District Court of Nevada, 542 U.S. 177, 189 (2004). To be testimonial "an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information." Doe v. United States, 487 U.S. 201, 210 (1988). Even if a communication is testimonial, it must also be incriminating and compelled. If any one of these requirements are not met, the privilege fails. Hiibel, 542 U.S. at 189-90.

The United States Supreme Court when addressing a State's requirement of alibi-notice stated: "(W)e decline to hold that the privilege against compulsory self-incrimination guarantees the defendant the right to surprise the State with an alibi defense." Williams v. Florida, 399 U.S. 78, 86 (1970). The United States Supreme Court when addressing a State's requirement of alibi-notice stated: "(W)e decline to hold that the privilege against compulsory self-incrimination guarantees the defendant the right to surprise the State with an alibi defense." Williams v. Florida, 399 U.S. 78, 86 (1970). "At most, the rule only compelled (the defendant) to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that the (defendant) from the beginning planned to divulge at trial." Id. at 85. There is no compulsion in such a situation because the defendant is left with making a choice. Nothing in the statute requires or prevents the defendant from asserting a mitigating factor in the present case: this is left to the "unfettered choice" of the defendant. Id. at 84-85.

Likewise, under Colorado's capital statute, the defendant is free to decide whether he wishes to present mental condition evidence at any sentencing hearing. Nothing in Colorado's

capital statute requires or prevents the defendant from asserting such evidence in the present case: this is left to his "unfettered choice." Id. at 84-85. As a matter of law, in this situation, there is no government compulsion within the meaning of the Fifth Amendment. Thus, there is no violation of defendant's privilege against self-incrimination. See People v. Martinez, 970 P.2d 469, 472 (Colo. 1998) ("In short, the broad question of whether it is constitutional to impose upon the defendant in a criminal proceeding certain disclosure obligations has been answered, and answered in the affirmative.") The privilege against self-incrimination is not violated when the defendant retains a choice in identifying the witnesses to whom the disclosure requirement applies. Id. at 473.

SECTION 16-8-106(2)(C) IS CONSTITUTIONAL (REFUSAL TO COOPERATE)

Once the defendant has placed his mental condition in issue, either by endorsing sentencing witnesses to testify concerning the defendant's mental condition or by giving notice of intent to introduce expert mental condition at sentencing, the court is required to order an examination. C.R.S. § 18-1.3-1201(3)(d)(I) and C.R.S. § 16-8-107(3)(b). As plainly stated by Section 16-8-106(2)(c), the defendant retains his Fifth Amendment privilege against self-incrimination throughout the examination procedure:

> (c) The defendant shall cooperate with psychiatrists and other personnel conducting any examination ordered by the court pursuant to this section. Statements made by the defendant in the course of such examination shall be protected as provided in section 16-8-107. If the defendant does not cooperate with psychiatrists and other personnel conducting the examination, the court shall not allow the defendant to call any psychiatrist or other expert witness to provided evidence at the defendant's trial concerning the defendant's mental condition including, but not limited to, providing evidence on the issues of insanity or competency, or at any sentencing hearing held pursuant to section 18-1.3-1201 or 18-1.4-102, C.R.S. In addition, the fact of the defendant's noncooperation with psychiatrists and other personnel

> conducting the examination may be admissible in the defendant's trial to rebut any evidence introduced by the defendant with regard to the defendant's mental condition including, but not limited to, the issues of insanity and competency, and in any sentencing hearing held pursuant to section 18-1.3-1201 or 18-1.4-102, C.R.S. This paragraph (c) shall apply to offenses committed on or after July 1, 1999.

If the defendant does not cooperate with the examination, "the court shall not allow the defendant to call any psychiatrist or other expert witness to provide evidence at the defendant's trial . . . or at any sentencing hearing held pursuant to section 18-1.3-1201." C.R.S. § 16-8-106(2)(c). However, notwithstanding the foregoing, in a court ordered examination, the defendant is never required to give up his privilege against self-incrimination. The defendant may decide to assert his Fifth Amendment privilege during the examination, or not. The fact that that there may be a consequence, which arises by reason of a defendant's assertion of his privilege against self-incrimination, does not make the defendant's choice compelled within the meaning of the Fifth Amendment. Under these circumstances, because the defendant's Fifth Amendment privilege against self-incrimination is not compelled, there is no Fifth Amendment violation. This provision does not preclude the introduction of lay mental condition opinion testimony, if such testimony is otherwise properly admitted.

In People v. Herrera, 87 P.3d 240, 247 (Colo. App. 2003), the Court of Appeals noted, C.R.S. § 16-8-103.6 does not require a defendant to cooperate against his will during an exam as there is "no legal mechanism by which a defendant can be legally compelled to answer the examiner's questions or participate in testing." Second, the section does not deprive the defendant of a defense because the statute does not bar the insanity defense but merely "precludes expert testimony in support of such a defense and allows evidence of noncooperation to be used to rebut the defense." Id. at 247.

As noted above, under Section 16-8-106(2)(c), the defendant's noncooperation "may be admissible in the defendant's trial to rebut any evidence introduced by the defendant with regard to defendant's mental condition including . . . in any sentencing hearing held pursuant to section 18-1.3-1201." C.R.S. § 16-8-106(2)(c). The "admissibility of non-cooperation" provision does not exclude mental condition mitigation. Rather, the provision permits evidence of the defendant's non-cooperation as evidence to rebut "any evidence introduced by the defendant with regard to the defendant's mental condition." C.R.S. § 16-8-106(2)(c). Again, this aspect of Section 16-8-106(2)(c), was upheld against constitutional challenge by the Colorado Court of Appeals in Herrera, 87 P.3d at 247-248 ("Thus, requiring the defendant to cooperate during an exam does not subject him or her to an unconstitutional risk of self-incrimination, nor is cooperation a prerequisite to asserting a mental condition defense.").

SECTION 16-8-103.6(2)(A) IS CONSTITUTIONAL (WAIVER OF COLORADO STATUTORY PRIVILEGES)

Colorado statute establishes the following privileges: the physician privilege in C.R.S. § 13-90-107(1)(d), and the psychologist privilege in C.R.S. § 13-90-107(1)(g). These statutory privileges are waived if the defendant puts his mental condition in issue. See C.R.S. § 16-8-103.6(2)(a), which provides in pertinent part that:

> (2)(a) A defendant who places his or her mental condition at issue by . . . disclosing witnesses who may provide evidence concerning the defendant's mental condition during a sentencing hearing held pursuant to section 18-1.3-1201 . . . or, for offenses committed on or after July 1, 1999, by seeking to introduce evidence concerning his or her mental condition pursuant to section 16-8-107(3) waives any claim of confidentiality or privilege as to communications made by the defendant to a physician or psychologist in the course of an examination or treatment for such mental condition for the purpose of any trial, hearing on the issue of such mental condition, or sentencing hearing conducted pursuant to section 18-1.3-1201 . . .

C.R.S. § 16-8-103.6(2)(a) is constitutional.

The privileges in question are statutory. Statutes, which create privileges, also define the scope of the same and often establish exclusions therefrom. It is well established that:

> When the privilege holder pleads a physical or mental condition as the basis of a claim or as an affirmative defense, the only reasonable conclusion is that he thereby impliedly waives any claim of confidentiality respecting the same condition. The privilege holder under these circumstances has utilized his physical or mental condition as the predicate for some form of judicial relief, and his legal position as to that condition is irreconcilable with a claim of confidentiality.

Clark v. District Court, 668 P.2d 3, 10 (Colo. 1983). In Gray v. District Court, 884 P.2d 286, 293 (Colo. 1994), the Colorado Supreme Court specifically addressed waiver of these statutory privileges in the context of insanity and impaired mental condition defenses and stated:

> The legislative history demonstrates that the legislature intended to allow for full disclosure of medical and mental health records concerning mental condition that the defendant has placed in issue in a criminal case. We therefore hold that, where a defendant tenders a plea of not guilty by reason of insanity or asserts the affirmative defense of impaired mental condition, the defendant waives his right to claim the attorney-client and physician/psychologist-patient privileges pursuant to section 16-8-103.6, and consents to disclosure of pre- and post-offense information concerning the defendant's mental condition.

The same reasoning concerning statutory waiver would apply in the current situation where the defendant has inserted his mental condition into his capital sentencing hearing. The Legislature may create statutory privileges and may also create exclusions and statutory waivers to those privileges. There are no constitutional rights associated with a waiver of this type.

People v. Herrera, 87 P.3d 240 (Colo. App. 2003) is dispositive of defendant's attack on Section 16-8-103.6(2)(a). In Herrera, the defendant argued that C.R.S. 16-8-103.6(2)(a), unconstitutionally forced him to relinquish his privilege against self-incrimination as to

communications made to a physician or psychologist. 87 P.3d at 248. The Colorado Court of Appeals rejected defendant's constitutional challenge and upheld Section 16-8-103.6(2)(a). Id. at 248-49. Further, the Court of Appeals also specifically repudiated defendant's argument that the "present statutory scheme" adopted in 1999 after issuance of decisions such as Gray and Bilecki rendered those cases and their holdings inapplicable. Id. at 249.

Although Herrera is a decision by the Colorado Court of Appeals, absent contrary authority from the Colorado Supreme Court, the People respectfully submit that Herrera is binding on this Court.

SECTION 16-8-107(1.5)(B) IS CONSTITUTIONAL (USE OF MENTAL CONDITION EVIDENCE AS MITIGATION)

Defendant claims that C.R.S. § 16-8-107(1.5)(b) is unconstitutional:

> "Evidence acquired directly or indirectly for the first time from a communication derived from the defendant's mental processes during the course of a court-ordered examination under section 16-8-106 or acquired pursuant to section 16-8-103.6 is admissible at any sentencing hearing held pursuant to section 18-1.3-1201 or 18-1.4-102, C.R.S. **only to prove the existence or absence of any mitigating factor**." (Emphasis added).

When a defendant asserts his mental condition as a mitigating factor by endorsing witnesses who testify to such, the only effective means of determining truthfully such a mental condition is through equal access to the information by the prosecution and the defense. In Buchanan v. Kentucky, 483 U.S. 402 (1987), the United States Supreme Court addressed an issue similar to that raised in this case.

Defendant Buchanan placed his mental condition in issue by pursuing the "mental status" defense of "extreme emotional disturbance." Id. at 408. The United States Supreme Court held that, "(I)f a defendant requests such an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation . . . ," and there is no Fifth Amendment

privilege against the admission of such evidence. Buchanan, 483 U.S. at 422-23. When a defendant asserts his mental condition as a mitigating factor by endorsing witnesses who testify to such, Section 16-8-107(1.5)(b) protects the defendant's Fifth Amendment privilege by limiting the use of information acquired for the first time from the court ordered examination to prove of the existence or absence of any mitigating factor only. In an analogous situation, in People v. Herrera, 87 P.3d 240 (Colo. App. 2003), the Colorado Court of Appeals upheld a similar mental condition provision applicable when a defendant injects his mental condition into a proceeding by entering a plea of not guilty by reason of insanity (in Herrera, a claim of impaired mental condition. i.e. assertion that defendant suffered from a condition of mind caused by a mental disease of defect that prevented him from forming a culpable mental state).

In a manner similar to Section 16-8-107(1.5)(b), which relates to a capital sentencing hearing, Section 16-8-107(1.5)(a) provides:

> (1.5)(a) [E]vidence acquired directly or indirectly for the first time form a communication derived from the defendant's mental processes during the course of a court-ordered examination . . . is admissible only as to the issues raised by the defendant's plea of not guilty by reason of insanity, and the jury, at the request of either party, shall be so instructed . . .

Herrera, 87 P.3d at 245. Defendant Herrera argued that use of statements obtained from his sanity examination violated his privilege against self-incrimination. Id. at 245. This claim was rejected because "[t]o preserve the privilege against self-incrimination, evidence derived from court-ordered sanity examinations can only be used to determine a defendant's capacity to form the requisite mental state." Id. at 245. "Hence, the privilege against self-incrimination is not implicated by a court-ordered mental examination when the information obtained therefrom is admitted only on the issue of mental condition." Id. Although Herrera is a decision by the

Colorado Court of Appeals, absent contrary authority from the Colorado Supreme Court, the People respectfully submit that Herrera is binding on this Court.

In a fashion similar to the statutory provision examined in Herrera, if a defendant raises the issue of his mental condition as mitigation in the context of a capital sentencing hearing, C.R.S. § 16-8-107(1.5)(b) provides that evidence from the ensuing court ordered examination may be used at the sentencing hearing by the prosecution "only to prove the existence or absence of any mitigating factor" or as impeachment or rebuttal if the defendant testifies in his own behalf. C.R.S. § 16-8-107(1.5)(c). Thus, the statute appropriately limits the use of such evidence so that the defendant's privilege against self-incrimination is not infringed.

As noted by the Colorado Court of Appeals in Herrera, to further protect the defendant's privilege against self-incrimination, the court may give a limiting instruction that advises the jury of the proper purpose of such evidence. "Jury instructions can therefore be sufficient to protect a defendant's privilege against self-incrimination in the face of a court-ordered" examination. Herrera, 87 P.3d at 246.

SECTION 16-8-107(3)(b) IS CONSTITUTIONAL
(DEFENSE REFUSAL TO COMPLY WITH STATUTES)

C.R.S. § 16-8-107(3)(b) provides in pertinent part:

> (b) Regardless of whether a defendant enters a plea of not guilty by reason of insanity pursuant to section 16-8-103, the defendant shall not be permitted to introduce evidence in the nature of expert opinion concerning his or her mental condition without having first given notice to the court and the prosecution of his or her intent to introduce such evidence and without having undergone a court-ordered examination pursuant to section 16-8-106. A defendant who places his or her mental condition at issue by giving such notice waives any claim of confidentiality or privilege as provided in section 16-8-103.6. Such notice shall be given at the time of arraignment; except that the court, for good cause shown, shall permit the defendant to inform the court and

> prosecution of the intent to introduce such evidence at any time prior to trial...

In summary, C.R.S. § 16-8-107(3)(b) provides for the exclusion of any defense mental condition **experts** if the defendant refuses to give the requisite statutory notice or refuses to undergo an examination in accordance with applicable statutory requirements. However, even under these circumstances, C.R.S. § 16-8-107(3)(b) does not exclude lay mental condition opinion testimony, if such testimony is otherwise properly admissible, or the defendant's own testimony. The provision is constitutional.

A defendant has a constitutional right to present evidence in his own defense. Taylor v. Illinois, 484 U.S. 400, 411 (1988), People v. Flippo, 159 P.3d 100, 106 (Colo. 2007). However, the manner in which a defense is presented may be controlled by statute, court rule, or court order. Taylor, 484 U.S. at 403, fn 2, (disclosure of witnesses, addresses, and written or recorded statements); Williams v. Florida, 399 U.S. 78 (1973) (alibi notice and witness disclosure, Florida rule of criminal procedure); Flippo, 159 P.3d at 106 ("manner in which evidence is presented may be controlled by statute").

Exclusion of witnesses and testimony may be an appropriate remedy for the defendant's failure to comply with statute, court rule, or court order. Taylor, 484 U.S. at 417-18 (exclusion of undisclosed witnesses upheld), Flippo, 159 P.3d at 106 (exclusion of expert testimony where non-compliance with statute appropriate), People v. Hampton, 696 P.2d 765, 775 (Colo. 1985) (exclusion of non-endorsed alibi witnesses did not violate defendant's right to put on a defense).

In United States v. Nobles, 422 U.S. 225 (1975), the United States Supreme Court upheld the exclusion of a defense expert because the defendant had refused to permit discovery of a report. "The court's preclusion sanction was an entirely proper method of assuring compliance with its order." Id. at 241. "The Sixth Amendment does not confer the right to present testimony

free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth." Id.

Similarly, in Taylor v. Illinois. 484 U.S. 400 (1988), which concerns the proper exclusion of a defense witness' trial testimony as a sanction for non-disclosure, the United States Supreme Court stated, "The State's interest in the orderly conduct of a criminal trial is sufficient to justify the imposition and enforcement of firm, though not always inflexible, rules relating to the identification and presentation of evidence." Id. at 411. The Supreme Court rejected the "argument that a preclusion sanction is never appropriate no matter how serious the defendant's discovery violation may be." Id. at 416. The Supreme Court upheld exclusion of the evidence holding that regardless of prejudice to the prosecution, if there is willful misconduct in failing to comply with pre-trial discovery, exclusion, the severest sanction, is appropriate. Id. at 417.

In Flippo, 159 P.3d at 106, the Colorado Supreme Court addressed the issue of the exclusion of mental condition expert testimony under Section16-8-107(3)(b), C.R.S. 2006 given the defendant's failure to comply with the statute's notice and examination requirements. The Colorado Supreme Court held that "the trial court was correct in excluding Flippo's expert testimony." Id. In Flippo, our Supreme Court cites Taylor v. Illinois, supra. with approval for the proposition that, "Although a defendant is entitled to present evidence in his or her defense, the manner in which the evidence is presented may be controlled by statute." Flippo, 159 P.3d at 106. C.R.S. § 16-8-107(3)(b) is constitutional.

CONCLUSION

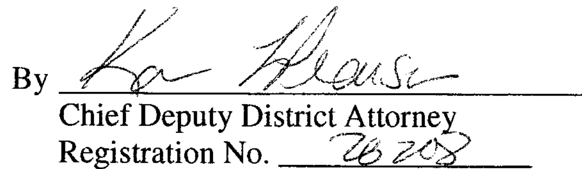
The defendant bears the burden of establishing the unconstitutionality of a statute beyond a reasonable doubt. People v. Baer, 973 P.2d 1225, 1230 (Colo. 1999). Defendant has not met

his burden to show any of the statutes he challenges are unconstitutional. Thus, the People respectfully request the Court deny Defendant's Motion [D-032].

Finally, the People would note that counsel for the defendant, the Public Defender's Office, also represented David Bueno in Lincoln County case 05CR73. Counsel filed a similar motion in that case, which was denied by Judge Douglas Tallman. Counsel for the defendant, the Public Defender's Office, also represented Sir Mario Owens in Arapahoe County case 06CR705 and filed a similar motion in that case, which was denied by Judge Gerald Rafferty.

DATED this 5th day of March, 2013.

Respectfully submitted,



By ______________________
Chief Deputy District Attorney
Registration No. 26208

GEORGE H. BRAUCHLER,
District Attorney

CERTIFICATE OF MAILING

I hereby certify that I have emailed to **tamara.brady@coloradodefenders.us** and **Daniel.king@coloradodefenders.us** AND I have deposited a true and correct copy of the foregoing **PEOPLE'S BRIEF IN RESPONSE TO D-032 DEFENDANT'S MOTION TO DECLARE C.R.S. §§ 16-8-103.6, 103.7, 106, 107 AND 18-1.3-1201(3)(D) UNCONSTITUTIONAL** in the Public Defender's Mailbox located at 6450 S Revere Pkwy Centennial CO 80111, addressed to:

TAMARA BRADY, ESQ.
DANIEL KING, ESQ.
OFFICE OF THE PUBLIC DEFENDER

Dated: 3/5/13

By ______________________

<table>
<tr><td>District Court Arapahoe County, Colorado
7325 South Potomac Street, Centennial, Colorado 80112<hr>THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff

v.

JAMES HOLMES,
Defendant.</td><td>▲ ▲

COURT USE ONLY</td></tr>
<tr><td></td><td>Case Number: 12CR1522

Division 22</td></tr>
<tr><td colspan="2">**ORDER D-032**</td></tr>
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The Court, being fully advised, hereby DENIES the DEFENDANT'S MOTION D-032 TO DECLARE C.R.S. §§ 16-8-103.6, 103.7, 106, 107 AND 18-1.3-1201(3)(D) UNCONSTITUTIONAL.

____
District Court Judge

____
Date