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District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	Filed JUL 17 2013 <small>CLERK OF THE DISTRICT COURT ARAPAHOE COUNTY, COLORADO</small>
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. JAMES HOLMES, 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: state.pubdef@coloradodefenders.us	σ COURT USE ONLY σ Case No. 12CR1522 Division 26
REPLY TO PROSECUTION'S RESPONSE TO MOTION FOR IMMEDIATE AND ONGOING DISCLOSURE OF ALL EXCULPATORY INFORMATION, INCLUDING ALL INFORMATION THAT MAY TEND TO SUGGEST THAT A LIFE SENTENCE, RATHER THAN A DEATH SENTENCE, IS APPROPRIATE [D-071]	

Mr. Holmes, through counsel, submits the following in reply to the prosecution's response to his Motion for Immediate and Ongoing Disclosure of All Exculpatory Information, Including All Information That May Tend to Suggest that a Life Sentence, Rather than a Death Sentence, is Appropriate:

1. The prosecution alleges that this motion was improperly filed and should be stricken because the discovery it seeks is mandatory pursuant to Crim. P. 16(I)(a)(2).

2. However, counsel and this Court cannot simply rely on the prosecution's statement that it is "fully aware of the obligations of discovery required by *Brady* and its progeny to disclose any materials that are impeaching, exculpatory, or mitigating" as well as the discovery requirements of Crim.P. 16 and that it has and "will continue to comply with those requirements." These assurances are insufficient and lack credibility given the history of serious discovery and *Brady* violations committed by the district attorney's office in the Eighteenth Judicial District in past capital cases.

3. For example, in the capital case of *People v. Bueno*, No. 05CR73 in Lincoln County District Court, Judge Douglas Tallman has ordered a new trial as a result of discovery violations committed by this prosecutor's office. After the trial in that case, in which Mr. Bueno was found guilty of killing a fellow inmate at Limon Correctional Facility and sentenced to life without parole, information came to light that prosecutors had previously failed to disclose to the defense documents that supported their theory at trial that the murder was committed by white supremacists in the prison rather than Mr. Bueno. In his order granting Mr. Bueno a new trial, Judge Tallman found that the district attorney's office for the Eighteenth Judicial District made "a conscious decision . . . at some point early in this case to keep" . . . "relevant and possible exculpatory documents and reports" from the defense. See Exhibit A, attached. The significance of these undisclosed materials is demonstrated by the fact that Mr. Bueno's co-defendant,

Alejandro Perez, whose trial occurred after these discovery violations came to light, was acquitted by a jury.

4. Additionally, in the capital case of *People v. Owens*, No. 06CR705, which was tried in Arapahoe County District Court and is presently in post-conviction proceedings, post-conviction counsel have uncovered and alleged numerous serious *Brady* and discovery violations by prosecutors, including failing to disclose to the defense critical impeachment information that its primary witness in the case had been involved in negotiations with the prosecution to cooperate against Mr. Owens and favorably resolve the witness's own criminal cases prior to Mr. Owens' arrest.

5. The post-conviction petition is still pending, but the court presiding over the petition has already made a finding that the prosecution's failure to disclose its negotiations with this witness prior to the arrest of Mr. Owens violated Crim. P. 16(I)(a)(2) and was a "deliberate choice." The court has further found that the prosecution's position that disclosure was not required under Crim. P. 16 was "untenable" given that this information contradicted the witness's trial testimony, as well as the government's theory at trial, that the witness had not come forward prior to Mr. Owens' arrest because the witness was fearful of Mr. Owens and believed he was dangerous.

6. Post-conviction counsel for Mr. Owens have also alleged numerous other serious *Brady*, *Giglio*, *Napue*, and discovery violations, including withholding information that a key government witness was being investigated for homicide in another state, failure to disclose statements from eyewitnesses containing descriptions inconsistent with the theory of prosecution, as well as failure to disclose a meeting between prosecutors and a jailhouse informant at which probation-eligibility was promised.

7. In both of those cases, prosecutors had made similar assurances that they were well-aware of their disclosure obligations under Rule 16 and *Brady* and its progeny. Given the significant history of prosecutorial misconduct in capital cases in the Eighteenth Judicial District and the prosecution's pattern of withholding exculpatory information from the defense, counsel are ethically obligated to make specific and repeated discovery demands despite the automatic disclosure provisions of Rule 16. Moreover, given this history, this Court should err on the side of ordering the discretionary disclosure of information Mr. Holmes has requested pursuant to Rule 16(I)(d)(1).

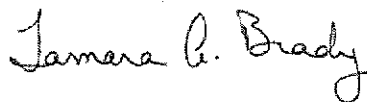
Request for a Hearing

8. Mr. Holmes renews his request for a hearing on this motion.

Mr. Holmes incorporates by reference the arguments set forth in his original pleading, files this reply, 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.



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Dated: July 17, 2013

D-071

Exhibit A

LINCOLN COUNTY DISTRICT COURT P. O. BOX 128 HUGO, COLORADO 80821	COURT USE ONLY						
THE PEOPLE OF THE STATE OF COLORADO, PLAINTIFF, VS. DAVID BUENO, DEFENDANT.							
THE HONORABLE DOUGLAS TALLMAN	Case Number: 05 CR 73 Division: T						
<p style="text-align: center;">ORDER RE: MOTIONS FOR NEW TRIAL</p> <table style="width: 100%; border: none;"> <tr> <td style="width: 50%;">B-318 (4/15/08)</td> <td style="width: 50%;">B-329 (4/17/09)</td> </tr> <tr> <td>B-331 (4/17/09)</td> <td>B-341 (5/19/09)</td> </tr> <tr> <td>B-342 (5/28/09)</td> <td>B-346 (7/22/09)</td> </tr> </table>		B-318 (4/15/08)	B-329 (4/17/09)	B-331 (4/17/09)	B-341 (5/19/09)	B-342 (5/28/09)	B-346 (7/22/09)
B-318 (4/15/08)	B-329 (4/17/09)						
B-331 (4/17/09)	B-341 (5/19/09)						
B-342 (5/28/09)	B-346 (7/22/09)						

THIS MATTER, having come before the Court beginning April 15, 2008, and continuing through various hearings on each motion or supplemental filed, concluded on January 21, 2010 for consideration and resolution of defense motions, including B-346, "Motion for New Trial Evidence Previously Withheld from Defense by Prosecution."

The People appeared at all hearings represented by Deputy District Attorneys Dan May, Rich Orman, Jason Siers,

and Chris Gallo. Deputy District Attorneys May and Orman have withdrawn from the case, replaced by Mr. Jason Siers and Mr. Chris Gallo. The defendant appeared in person and in custody at all hearings with counsel Tamra Brady, Derek Samuelson, and Kathleen Lord. Mr. Samuelson and Ms. Lord have each left the Public Defender's Office and did not appear during the January 21, 2010 hearing.

The Court took the matter under advisement, and now being fully apprised of the premises does now enter the following findings of fact, legal analysis, conclusions and order, to-wit:

FINDINGS OF FACT

1. Defendant David Bueno was an inmate in the Colorado Department of Corrections on March 28, 2004. Defendant was held at the Limon Correctional Facility (hereinafter referred to as "LCF") near Limon, Lincoln County, Colorado. Lincoln County is within the 18th Judicial District.
2. Another inmate at LCF was allegedly murdered by David Bueno. David Bueno was formally charged

with the murder of inmate Jeffrey Heird. Bueno was charged with First Degree Murder (Count I); Conspiracy to Commit First Degree Murder (Count II); and Solicitation to Commit First Degree Murder (Count III).

3. The Defendant requested and was granted a preliminary hearing in 2006 after which the Court bound over all charges.
4. The Defendant pled not guilty to all charges, after which the District Attorney for the 18th Judicial District gave notice of the intent to seek the death penalty should the Defendant be convicted of first degree murder.
5. Beginning in late 2006 and continuing through January 2008, the Court received and reviewed pleadings from the parties, presided over numerous motions hearings and scheduled the matter for jury trial beginning in late January 2008.
6. At trial, Defendant David Bueno was found guilty of Counts I and II, and acquitted on Count III. The

jury found the People were unable to sustain their burden at the sentencing trial and returned a life sentence.

7. During the trial on the merits, the jury deliberated for approximately four (4) days, during which they advised the Court they were deadlocked. After receiving further instruction (an "Allen" Instruction) from the Court, the jury returned guilty verdicts on Counts I and II, not guilty verdict on Count III.

ANALYSIS

The Defendant's motions and supplementals raised several issues as a basis in support of the request for a new trial.

1. Defendant's Motion B-318 filed April 15, 2008 cites several reasons a new trial should be granted in the interest of justice. A supplemental to B-318 filed September 24, 2009 raises an issue regarding contact by Prosecutors in the matter with an inmate witness which was not disclosed to the Defendant. A supplemental filed May 28, 2009 to B-318

concerns letters from an inmate witness requesting fulfillment of promises made to him by the Prosecution.

2. Defense Motion B-329, filed October 30, 2009 (Supplement to B-318) concerns requests by an inmate witness for the Prosecution to fulfill promises made to him prior to trial.
3. Defendant's Motion B-331, filed April 17, 2009 alleges misconduct of a trial juror.
4. Defendant's Motion B-341, filed May 19, 2009 also separately raises the issue of juror misconduct.
5. Defendant's Motion B-342, filed May 28, 2009 again raises the issue of correspondence from an inmate witness requesting the District Attorney fulfill promises made to him prior to trial.
6. Defendant's Motion B-346, filed July 22, 2009 raises the issue of the failure by the District Attorney to timely disclose relevant and potentially exculpatory evidence.

7. For the reasons discussed as follows in this order, the Court only addresses the matters raised in Defense Motion B-346.

CONCLUSIONS/DEFENSE MOTION B-346

1. The defense requests the Court grant a new trial because the Prosecutor failed to disclose material, potentially exculpatory evidence, to him until some fifteen (15) months after the guilty verdicts. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963).
2. A Prosecutor has an obligation to disclose to the Defendant any material, exculpatory evidence in the Prosecutor's possession. C.R.Crim.P. 16, Part I (a)(2). (See, *Salazar v. People*, 870 P.2d 1215 (Colo. 1994).) The failure to disclose information is a violation of a Defendant's constitutional right to due process only when the evidence is material to guilt or punishment. *Salazar, supra*, at 1220.
3. In order for the failure to disclose evidence to constitute reversible error, undisclosed evidence must be material to either guilt or punishment of

the Defendant; there must be reasonable probability that had evidence been disclosed to Defendant, the result of the proceeding would have been different. C.R.Crim.P. 16, Part I(a)(2); *Salazar* at 1222 (citing *People v. District Court*, 808 P.2d 831 (Colo. 1991) a reasonable probability is a probability sufficient to undermine the confidence in the outcome. Also, *People v. Thatcher*, 638 P.2d 760 (Colo. 1981) whenever outcome of trial may have been affected, reversal is mandated).

4. As noted previously, David Bueno was tried for first degree murder, conspiracy to commit murder and solicitation to commit murder. The Defendant's trial began January 30, 2008, concluding April 21, 2008 with the jury returning guilty verdicts on Counts I and II and not guilty on the charge of solicitation. The People had sought to impose the death penalty which was rejected by the jury.
5. In *People v. Alejandro Perez*, co-defendant of David Bueno, upon order from the trial court, the

Prosecution was ordered to review the working file of Robert Watson, formerly a Deputy District Attorney of the 18th Judicial District, working at the time in Lincoln County. The trial court in *Perez* ordered the working file be reviewed for correspondence and work-product to be deposited with the trial court for *in camera* review. Deputy District Attorney Jason Siers reported finding within the working file of former Deputy District Attorney Watson two pages (handwritten report of Linda Dietrich and handwritten letter) (p. 2 and 3, People's Ex. B, 1-21-10) which were then provided to defense counsel in "an abundance of caution". (Siers Memo of 7/6/09.) The People began an immediate investigation as to whether these documents had previously been provided in discovery. These documents were disclosed to the defense July 6, 2009, approximately 15 months after the Bueno trial.

6. The disclosures included what has been now referred to by counsel as the "ABN" letter; and a report concerning the "ABN" letter by an employee of LCF, Nurse Linda Dietrich. The "ABN" letter had been found by Dietrich within approximately 35 minutes of the discovery of Jeffrey Heird's death on March 28, 2004. The letter declares that certain white inmates (three) at LCF are to be exterminated. One of the three (3) named inmates, Hollenbeck, was hospitalized on March 30, 2004 and died at Denver General Hospital on April 2, 2004. (P. 5-7, People's Exh. B, 1-21-10.) Investigator Ron Jones, LCF, reported the death of Hollenbeck as "suspicious" in his report prepared after the autopsy of Hollenbeck conducted April 5, 2004.
7. It is important to note these two reports and the letter were in the possession of the District Attorney near the very beginning of the investigation into the death of Jeffrey Heird. These documents were never included in discovery provided by the District

Attorney to the Defendant until some fifteen (15) months after the David Bueno trial. The originals of these documents were later discovered by District Attorney's Investigators in the Department of Correction's file at LCF.

8. Furthermore, on April 2, 2004, Tim Smelser, LCF gang intelligence officer, authored a report (p. 1, People's Ex. B, 1-21-10) highlighting to the investigators the possible connections of the Jeffrey Heird death and the death of Hollenbeck. This report was not given in discovery until after the Dietrich report and the "ABN" letter were disclosed. Smelser testified he was responsible at the beginning of the investigation into Heird's murder to compile all relevant reports and information for the investigators. He further testified he gave his reports to all those assigned to investigate the Heird murder.
9. The defense team representing David Bueno immediately questioned the People's focus and

investigation in this case. The defense argued the murder could have been the work of other white inmates, specifically, those involved in gang activities at LCF.

10. It became apparent during pretrial hearings, little or no investigation was directed at any inmates other than David Bueno and his co-defendants. The investigation focused on the two (2) named inmates in an anonymous note found in the third tier shower nearest to Heird's cell, even though other details were known about other inmates' possible involvement, and the Prosecution was in possession of the "ABN" letter and the Smelser report of April 2, 2004.
11. The defense theory from the beginning was that the murder of Heird was the work of other white inmates, possibly white supremacists. The "ABN" letter of March 28, 2004, coupled with the death of inmate Hollenbeck shortly after the murder of Heird, and Investigator Smelser's voicing his

suspicious and concerns provides added credibility to the defense theory. This information was not in the possession of the Defendant prior to or during the trial on the merits.

12. The defense was never able to fully develop this theory of defense for David Bueno because the Prosecutors failed to timely disclose these relevant and possibly exculpatory documents and reports. These materials were in the District Attorney's possession at the very outset of the investigation of the Heird murder. The District Attorney does not get to decide which discovery is relevant for defense purposes. (*People v. Gallegos*, 644 P.2d 920 (Colo. 1982) defendant's counsel to determine relevance and usefulness of statement.) (Also, *People v. Smith*, 524 P.2d 607 (Colo. 1974) only the defense can determine what will be material and helpful to its case; and *People v. Gallegos*, *supra*, statement need not be admissible to be relevant to the conduct of the defense.)

13. The People argue this discovery, although provided when located in July 2009 by Deputy District Attorney Siers, was available to the defense in the files held at LCF. The originals of these reports were located by investigators for the District Attorney's office in monthly incident reports which were made available and had actually been reviewed by defense counsel and/or investigators in May 2007. At the time of the May 2007 review, the defense focus was on incidents in LCF involving the use of "shanks." The defense was given the opportunity to review and copy, if requested, documents at that time, but did not locate the documents in question. Despite this "opportunity" to locate, copy, and investigate the reports and the letter in May 2007, the Court is of the opinion the Prosecution failed to comply with its obligations under Rule 16, Part 1. This is simply because these materials were known to the Prosecution and in their possession. Apparently, someone from the

District Attorney's office made the conscious decision this information was not to be included in discovery because it was not relevant. This information was found segregated from the balance of the working file held by former Deputy District Attorney Watson. The Trial Court cannot say with certainty the District Attorney acted in bad faith by withholding relevant and possibly exculpatory evidence. Deputy District Attorney Watson left the District Attorney's office before formal charges were filed or hearings conducted in this matter, and after which new Deputy District Attorneys were appointed. It is apparent to the Trial Court that a conscious decision was made at some point early in this case to keep the information from the Defendant by separating these documents from the balance of Watson's working file.

14. It is the opinion and finding of the Trial Court that the failure by the Prosecution to provide this discovery when it was in the District Attorney's

possession and thought to have relevance to the Heird investigation at the outset is a violation requiring a severe sanction. This discovery, whether deemed admissible or not and if investigated, could have significantly impacted the outcome of the trial, a verdict which took almost four (4) days of deliberation and required the Court giving additional instruction to the jury after hearing they were at impasse. Evidence must be of character to probably bring about acquittal. *People v. Schmidt*, 528 P.2d 232 (Colo. 1974). *People v. Jones*, 690 P.2d 866 (Colo. App. 1984).

ORDER

For the foregoing reasons, the Trial Court finds the Defendant's right to present a full, fair, and complete defense to the charges, his right to due process under the State and Federal constitutions, and his right to be provided all relevant and possible exculpatory evidence that might negate his guilt have been violated. Thus, the Court does now **GRANT** Defendant's motion for new trial pursuant to Rule 33.

For these reasons, the Court declines to address the other matters raised by Defendant in his supplemental motions for new trial.

Dated this 8th day of October, 2010.

BY THE COURT:



DOUGLAS TALLMAN, DISTRICT JUDGE