REDACTED

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 FOR SANCTIONS FOR PROSECUTION'S FAILURE TO PROVIDE DISCOVERY IN A TIMELY FASHION (D-136)

This case is before the Court on the defendant's motion for sanctions based on the prosecution's alleged failure to provide discovery in a timely fashion. Motion D-136. The prosecution opposes the motion. Because the Court finds that the defendant has not demonstrated that the prosecution violated its discovery obligations or otherwise engaged in misconduct, the motion for sanctions is denied without a hearing. However, going forward, the Court orders the prosecution to disclose to the defendant new discoverable information generated, collected, or received by the FBI as soon as practicable after it is in the FBI's possession. Pursuant to Rule 16, all discoverable information, not just that provided by the FBI, should be disclosed to the defendant as soon as practicable.

Motion D-136 was triggered by the defendant's receipt on June 14, 2013, of a flash drive containing 53.6 gigabytes of materials from the FBI, which were apparently generated between July 20, 2012, and June 4, 2013. Motion at p. 1. The flash drive includes, among other things, "voluminous reports, expert opinions, lab files, electronic data, bench notes, CVs of analysts, protocols for collection and testing, photographs, and video interviews." *Id.* While the defendant concedes that some of this information appears to have been discovered previously, he contends that "much of it appears to have been provided for the first time almost a year after the [alleged offenses]." *Id.* at pp. 1-2.

The prosecution does not dispute these factual assertions. Instead, it provides the following explanation:

> The investigation in this case has involved over 100 FBI personnel from numerous FBI offices and agencies, and at least one international office, in addition to the Denver office. Because of the large number of personnel involved in the investigation, and the large number of offices involved, the FBI has taken special care in making sure that the defendant is provided with all the discovery materials he is entitled to receive under the Rules of Criminal Procedure, Colorado statutes, and legal precedents applicable to the prosecution's discovery obligations. According to FBI personnel, their efforts in this regard have been painstaking and detailed. Many, if not all, of the issues that form the basis of the defendant's allegations of discovery violations as set forth in the Motion are, in fact, a result of the FBI's painstaking effort to ensure compliance with discovery obligations . . . .
>
> Special Agent Jeremy Phelps has been responsible for coordinating discovery provided by the FBI. As part of these duties, Agent Phelps undertook to go page by page through all the information that the FBI

> gathered and possessed from all its field offices, resident agencies, and international offices to determine whether anything was missing (such as notes from FBI agents, and similar items), and also made sure that he had all the photographs and videos that were in the possession of the FBI.
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> Agent Phelps then took all the documents, reports, photographs, videos, etc. and combined them into one data storage unit, which he provided to the District Attorney, and which was subsequently provided to the defense. This unit took a significant time to produce. Some of the information in this data unit is duplicative of information previously provided because Agent Phelps wanted to ensure that all of the information from the FBI was provided in one group of information. For instance, the data contains all of the information that the Aurora Police Department had provided to the FBI, previously provided FBI reports and videos, and similar information. The data also includes new discovery that Agent Phelps had been provided by the FBI Lab, and information acquired in the course of Agent Phelps' communications with other FBI offices as he was reviewing the FBI reports page by page. Agent Phelps created the disk in an effort to ensure that the FBI (and thus the prosecution) complied with all of their discovery obligations, and so that the prosecution and the defense could have electronic access to all of the FBI reports in one place. Subsequent to creating this large amount of information, Agent Phelps received another large amount of data from the FBI lab, which has also been provided in discovery.

Response at pp. 1-2.

In his reply, the defendant does not contest the veracity of the prosecution's representations. To the contrary, he expresses his appreciation for "the painstaking efforts being made by law enforcement to assist the prosecution in complying with discovery obligations." Reply at p. 1. Nevertheless, the defendant argues that the prosecution cannot have it both ways: it cannot, on the one hand, "continue to disclose huge quantities of discovery . . . over a year after the commencement of

the case," and, on the other, "demand that [he] be prepared to try this case in February." *Id.* at pp. 1-2.[1] According to the defendant, "[i]f the prosecution and this Court actually believe that it is possible to afford" him his constitutional rights "while pushing this case to trial that quickly," then the Court must either set a discovery deadline or impose a sanction. *Id.* at p. 2.[2] The Court disagrees.

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[1] The defendant also requests a good faith witness list before trial. That request was addressed in Order D-96. The defense's motion to reconsider that Order, *see* Motion D-96a, will be addressed in a separate order.

[2] The defense complains that the Court imposed an "incredibly short timeframe . . . that is unprecedented for a capital case of anywhere close to this magnitude in Colorado." Reply at p. 1. The defense further appears to be critical of the Court for having "announced its intention in being 'aggressive' in moving this case along," setting "a trial date of February 3, 2014, over defense objection." Motion at p. 2 (quoting the Court during the April 1, 2013 hearing, *see* 4/1/13 Tr. at p. 30). What the record actually reflects is that, after denying the defense's request to group the motions to be filed into nine subject matter categories and to have nine corresponding sets of briefing deadlines, the Court gave the defense as much time as it requested to file non-capital motions and only a couple of weeks less than what it requested to file capital motions. *See* 4/1/13 Tr. at pp. 19, 23-27. Without objection, the Court then set non-capital motions hearings for four weeks in August and capital motions hearings for three weeks starting the last week of November. *Id.* at pp. 25, 28-29. Given the non-capital motions and capital motions filing deadlines of May 31 and September 27, respectively, and given the non-capital motions and capital motions hearing dates set in August and November-December, respectively, the Court felt comfortable that "by February 2014," more than 18 months after the date of the offenses charged and approximately two months after completion of the motions hearings, the case "would be ready" to proceed to trial. *Id.* at p. 30. "[T]hat scheduling," not the Court's desire to move the case along, is the reason the Court set the trial in February 2014 and rejected the defense's arbitrary suggestion to set the trial in the summer or fall of 2014. *Id.* at pp. 29-30. As a result of a subsequent delay caused by the Colorado Mental Health Institute of Pueblo, the Court later changed some of the motions filing deadlines and some of the motions hearing dates without objection from either party. *See* 6/25/13 Tr. at 3-6. In implying that the Court's primary concern is to get this case to its completion quickly, the defense quotes the Court out of context. What the Court actually said on April 1 is as follows: "Ms. Brady [defense counsel], obviously, if you need to make a motion to continue once we get closer to [the trial date], you're welcome to do it, and then I'll entertain that motion . . . [a]nd I'll rule [on it] . . . . ***But I would like us to be aggressive in . . . moving this case along, while at the same time, obviously, making sure that it's done right. Nobody wants to rush through things, and nobody is going to rush through things. But I think it is important that we're all efficient*** . . . ." *See* 4/1/13 Tr. at p. 30 (emphasis added). Indeed, to date, the Court has granted almost every motion the defense has

The defendant cites no authority that allows the type of anticipatory sanctions he requests. The Court is aware of none.[3]

The Court is vested with discretion to impose sanctions on the prosecution, but only "[i]n the event that a discovery violation is found." *People v. Lee*, 18 P.3d 192, 196 (Colo. 2001). "Because of the multiplicity of considerations involved and the uniqueness of each case, great deference is owed to trial courts in this regard . . . ." *Id.* Both parties agree that this case is unique and that there are multiple factors involved in determining whether the June 14 disclosure constitutes a discovery violation. Under the circumstances, the Court finds that no discovery violation occurred.

As relevant here, Crim. P. 16(I)(a)(3) extends the prosecution's discovery obligations "to material and information in the possession or control of members of [its] staff and of any others who have participated in the investigation . . . of the case and who . . . with reference to the particular case have reported[] to [its] office." Similarly, Crim. P. 16(I)(b)(4) requires that the prosecution "ensure that a flow of information is maintained between the various investigative personnel and [its] office sufficient to place within [its] possession or control all material and information relevant to the accused and the offense[s] charged." Under Crim. P.

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filed requesting extensions of deadlines, additional time to accomplish tasks, and leave to file pleadings after deadlines have expired.

[3] In any case, the Court is confident that all of the defendant's constitutional rights will be given effect. As such, the requested sanctions, in addition to being improper, are unnecessary.

16(I)(b)(3), the prosecution was required to provide the discovery in question "as soon as practicable but not later than 35 days before trial."

The material from the FBI provided to the defense on June 14 was discovered almost 8 months before the current trial date. While some of the information had admittedly been generated, collected, or received by the FBI some time before June 14, the discovery procedure used by the FBI was undertaken to allow Agent Phelps to review "page by page" all the information in the FBI's possession, combine it into a single "data storage unit," and provide it to the prosecution as "one group of information." Response at p. 2. Given that more than 100 FBI personnel from numerous FBI offices and agencies, including an international office, have been involved in the investigation of this case, the FBI's meticulous efforts were appropriate and necessary to ensure full compliance with the prosecution's discovery obligations. On the existing record, the Court has no basis to find that the June 14 disclosure did not satisfy the "as soon as practicable" standard in Rule 16(I)(b)(3). Therefore, sanctions are not warranted.

The defendant's request for a deadline is also rejected. Any deadline imposed by the Court would be arbitrary. There is no information in the record about how much, if any, additional investigation the FBI plans to undertake or how much more discovery the FBI anticipates providing. Nor is there any indication in

the record as to whether there is outstanding discovery that has not yet been produced by the FBI.[4]

However, as the defense aptly notes, its ability to discharge its constitutional duty to represent the defendant effectively at trial may be jeopardized if the prosecution discloses a large volume of new discovery 35 days before trial. Reply at p. 3. Although the Court understands why the FBI utilized the procedure discussed earlier to make an initial, comprehensive disclosure to the prosecution, going forward, as the trial date approaches, the prosecution must ensure it discloses to the defendant new discoverable information as soon as practicable after it becomes available. There is no reason to believe that it would be impracticable for the FBI or for any other law enforcement agency involved in this case to adopt a procedure that allows the transmission of new discoverable information to the prosecution promptly after it becomes available while still ensuring full compliance with all the prosecution's discovery obligations.

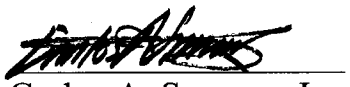
For all the foregoing reasons, Motion D-136 is denied without a hearing. However, the Court orders the prosecution to disclose to the defendant new discoverable information generated, collected, or received by the FBI as soon as practicable after it is in the FBI's possession. Pursuant to Rule 16, all discoverable

[4] In his motion, the defendant avers that "the materials provided are not complete." Motion at p. 2. Because this claim was not developed or included in the reply, the Court cannot address it.

information, not just that provided by the FBI, should be disclosed to the defendant as soon as practicable.

Dated this 30th day of September of 2013.

BY THE COURT:



Carlos A. Samour, Jr.
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2013, a true and correct copy of the **Order regarding defendant's motion for sanctions for prosecution's failure to provide discovery in a timely fashion (D-136)** was served upon the following parties of record:

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