

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	<p style="text-align: center;">Filed</p> <p style="text-align: center;">OCT 29 2014</p> <p style="text-align: center;">CLERK OF THE COMBINED COURT ARAPAHOE COUNTY, COLORADO</p> <p style="text-align: center;">σ COURT USE ONLY σ</p>
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	Case No. 12CR1522 Division 202
MOTION TO COMPEL SUPPLEMENTAL EXPERT DISCLOSURES [D-251]	

CERTIFICATE OF CONFERRAL

The prosecution states that it objects to this motion.

James Holmes, through counsel, moves this Court to order the prosecution to provide the defense with supplemental discovery concerning its expert witnesses pursuant to Crim. P. 16(I)(a)(1)(III), (I)(a)(2) & (I)(d)(1) & (3). The disclosures requested below are required not only by Rule 16, but pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments and article II, sections 16, 18, 20 and 25 of the Colorado Constitution. In support of this motion, Mr. Holmes states the following:

1. In pleading P-071, the prosecution endorsed Dr. Phillip J. Resnick as an expert witness in the area of forensic psychiatry, as well as Dr. Kris Mohandie in the area of forensic psychology. The endorsement provided, with respect to both experts, the following information:

This expert will testify to the matters contained in the affidavits that have been provided to the defense, and as to any additional affidavits or reports that he may prepare.

See Notice P-71, p.1.¹

2. These experts testified extensively at the January 2014 hearings concerning Motion P-68.

3. Prior to those hearings, the defense orally requested discovery pertaining to those experts in the form of “written materials [created in] preparation and investigation in this case.” Transcript, November 21, 2013, p. 11. The Court ordered the prosecution to make inquiry as to whether those materials existed, and if so, to disclose them to the defense. *Id.* The prosecution subsequently provided these materials prior to the January hearings, including these experts’ notes. These materials primarily related to the experts’ thoughts and critiques of Dr. Metzner’s evaluation.

4. Approximately 11 months have elapsed since that time, and additionally, the parties are now in receipt of Dr. Reid’s report regarding his sanity evaluation of Mr. Holmes.

5. In light of the completion of the report, which is the ultimate fruit of the litigation surrounding Motion P-68, the defense hereby specifically requests that the Court order the prosecution to provide the additional discovery described below.

6. First, the defense requests any reports or statements of Drs. Resnick and Mohandie made in connection with this case pursuant to Crim. P. 16(I)(a)(1)(III).

7. Second, the defense requests the material pertaining to those experts, including oral or written opinions, statements, notes, or reports within the prosecutor’s control or the control of “members of his or her staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report, or with reference to the particular case have reported, to his or her office,” including materials in the control of Drs. Resnick and Mohandie, which tends to negate the guilt of the accused as to the offense charged or would tend to reduce the punishment therefor.”

8. The defense makes this request pursuant to Crim. P. 16(I)(a)(1)(2) & (3) as well as *Brady v. Maryland*, 373 U.S. 83 (1963) and *Kyles v. Whitley*, 514 U.S. 419 (1995). See also *Gardner v. Florida*, 430 U.S. 349 (1977) (failure to allow accused notice of and opportunity to confront materials used in capital sentencing process violates Due Process Clause); *United States v. Bagley*, 473 U.S. 667 (1985) (Due Process Clause *Brady* rule includes impeachment material); *Giles v. Maryland*, 386 U.S. 66 (1967) (Due Process violated by prosecution suppression of evidence relevant to credibility of State’s witnesses); *Giglio v. United States*, 405 U.S. 150 (1972) (Prosecution’s non-disclosure of evidence relevant to credibility of its witness violated Due Process Clause); *Ring v. United States*, 419 U.S. 18 (1974) (Remand for determination of whether the prosecutor failed to disclose impeaching material to defense); *United States v. Agurs*, 427 U.S. 97 (1976) (State is presumed to realize significance of exculpatory, mitigating and impeachment information even if prosecutor has actually overlooked it); *People v. District Court*, 793 P.2d 163 (Colo. 1990); *Cheatwood v. People*, 435 P.2d 402 (Colo. 1967) (reversing due to State’s failure to disclose potentially exculpatory evidence, citing *Giles v. Maryland*);

¹ Because P-71 was filed suppressed, the defense is redacting this information from the public version of this pleading in an abundance of caution.

People v. Smith, 524 P.2d 607 (Colo. 1974) (Due Process requires disclosure of material which may exonerate or be of material importance to the accused, regardless of whether or not it pertains to evidence the State intends to present).

9. The defense stresses that its request for exculpatory or impeachment information pursuant to *Brady* includes but is not limited to any opinion, information, or diagnosis that supports the defense's contention in any way that Mr. Holmes is mentally ill and is not malingering his illness (regardless of whether the expert's opinion is in complete agreement with any of the diagnoses that have been rendered by other experts in the case). This request specifically includes information or opinions that have been expressed to the prosecution orally by its experts, even if those opinions or that information has never been written down or otherwise memorialized. See, e.g., *People v. Denton*, 91 P.3d 388, 392 (Colo. App. 2003); *People v. Anderson*, 837 P.2d 293, 299 (Colo.App.1992). The request also includes but is not limited to any information that has been generated in response to or as a reaction to Dr. Reid's report.

10. Third, the defense requests all other "written materials [created in] preparation and investigation in this case" by Drs. Resnick and Mohandie that have been generated since the prosecution's previous disclosure of these materials in advance of the January 2014 hearings, including but not limited to any new materials that have been generated in response or as a reaction to Dr. Reid's report. This request is made pursuant to the Court's previous oral order on November 21, 2013 described above, as well as Crim. P. 16(I)(d)(1) & (3).

11. Crim. P. 16(I)(d)(1) allows the court, in its discretion, to require "disclosure to the defense of relevant material and information" not covered elsewhere in discovery "upon a showing by the defense that the request is reasonable." To make this showing, "the defense must demonstrate that the information sought is: (1) relevant to the conduct of the defense, and (2) unavailable from any source other than the prosecution." *People v. Vlassis*, 247 P.3d 196, 198 (Colo. 2011).

12. This request is "relevant to the conduct of the defense," because these notes are necessary for the defense to prepare its cross-examination of these witnesses. The Court already implicitly acknowledged this when it previously granted a similar request by the defense in connection with preparations for the January 2014 hearings on Motion P-68. It would defy logic to order the prosecution to provide the defense with all written materials created in preparation and investigation in this case for a pre-trial hearing concerning the adequacy of Dr. Metzner's examination, but deny the defense's request for any additional notes in preparation for the upcoming trial. These materials are constitutionally necessary for the defense to adequately prepare for trial in this capital case. The defense cannot sufficiently prepare to confront and cross-examine the prosecution's experts without an opportunity to review the written materials they have produced in connection with this case, including their notes. See *Gardner v. Florida*, 430 U.S. 349 (1977) (failure to provide accused with notice of, and opportunity to confront, materials used in capital sentencing process violates Due Process Clause); *Washington v. Texas*, 388 U.S. 14 (1967); *Crane v. Kentucky*, 476 U.S. 683 (1986) (defendant has right to present evidence going to "weight" of prosecution's evidence); *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) (right of accused to access to confidential social services records outweighs statutory confidentiality right); *People v. Kogan*, 756 P.2d 945 (Colo. 1988) (right to confront adverse

witnesses is a fundamental element of the panoply of constitutional protections afforded those accused of crimes); *People v. Bowman*, 669 P.2d 1369 (Colo. 1983); *People v. Hendershott*, 653 P.2d (Colo. 1981) (due process right to present defense evidence overrides statutory prohibition on certain evidence for certain purposes); *People v. Pronovost*, 773 P.2d 555 (Colo. 1989) (strong Compulsory Process and Due Process Rights to present a defense, *vis-a-vis* discovery and disclosure violations by accused and appropriateness of exclusion of defense evidence as a result); U.S. Const. amends. V, VI, VIII, XIV; Colo. Const. art. II, secs. 16, 18, 20, 25.

13. Moreover, these materials are not available from a source other than the prosecution. [REDACTED]

[REDACTED] Notably, it was the prosecution (not its experts) that was ordered to, and did, provide defense counsel with these materials in connection with the January 2014 hearings.

14. Fourth, the defense requests that the Court order the prosecution to provide the discretionary disclosures described in Crim. P. 16(1)(d)(3):

Where the interests of justice would be served, the court may order the prosecution to disclose the underlying facts or data supporting the opinion in that particular case of an expert endorsed as a witness. *If a report has not been prepared by that expert to aid in compliance with other discovery obligations of this rule, the court may order the party calling that expert to provide a written summary of the testimony describing the witness's opinions and the bases and reasons therefor, including results of physical or mental examination and of scientific tests, experiments, or comparisons.* The intent of this section is to allow the defense sufficient meaningful information to conduct effective cross-examination under CRE 705.

(Emphasis added). *See also People v. Greer*, 262 P.3d 920, 930-31 (Colo. App. 2011). This request specifically includes but is not limited to a written summary of the anticipated testimony of Drs. Resnick and Mohandie, describing the opinions they have reached, the scope of those opinions, and the bases and reasons therefor, in light of the two court-ordered sanity examinations of Mr. Holmes that have now been completed.

15. The "interests of justice would be served" by this request. [REDACTED]

[REDACTED] The defense has not received any reports authored by Drs. Resnick or Mohandie, and at present is unaware of what opinions these experts will render at trial, or what the scope of their testimony

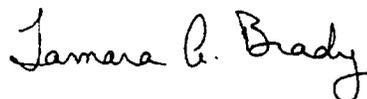
will be. This information is constitutionally necessary for the defense to prepare for trial. The defense incorporates by reference the authorities cited in paragraph 10 of this pleading.

16. Furthermore, the prosecution made an identical request in Motion P-43 pursuant to Crim. P. 16(II)(b)(2): "Because the purpose of these provisions of Rule 16 is to allow for effective cross-examination, the People request that the Court order the defense to produce expert materials as provided in the Rule if they endorse an expert witness to testify in this case, or if they intend to call an expert witness to testify at any hearing." Motion P-43, p. 2. The Court granted this request. *See* Order re: Motion P-43.

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.



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Dated: October 29, 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. JAMES HOLMES, 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: state.pubdef@coloradodefenders.us	Case No. 12CR1522 Division 202
ORDER RE: MOTION TO COMPEL SUPPLEMENTAL EXPERT DISCLOSURES [D-251]	

Defendant's motion is hereby GRANTED _____ DENIED _____.

BY THE COURT:

JUDGE Dated

I hereby certify that on October 29, 2014, I

mailed, via the United States Mail,

faxed, or

hand-delivered

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

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