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: **202**

ORDER REGARDING DEFENDANT'S MOTION TO COMPEL SUPPLEMENTAL EXPERT DISCLOSURES (D-251)

INTRODUCTION

In Motion D-251, the defendant seeks an order requiring the prosecution to supplement the discovery concerning its expert witnesses, Drs. Phillip Resnick and Kris Mohandie. Motion at p. 1. More specifically, the defendant asks for: (1) any written reports or statements Drs. Resnick and Mohandie have generated in connection with this case; (2) the material pertaining to these experts, "including oral or written opinions, statements, notes, or reports within the [prosecution's] control or the control of members of [its] staff and of any others who have participated in the investigation or evaluation of [this] case and who either regularly report, or with reference to [this] particular case have reported, to [its] office, including materials in the control of Drs. Resnick and Mohandie, which

tends to negate the guilt of the [defendant] as to the offense charged or would tend to reduce the punishment therefor;" (3) all other written materials that have been generated in the preparation or investigation of this case by Drs. Resnick and Mohandie since the prosecution's last disclosure in advance of the January 2014 hearing on Motion P-68, including any materials related to Dr. Reid's report; and (4) discretionary disclosures pursuant to Crim. P. 16(I)(d)(3). *Id.* at pp. 2-4 (quotation marks and emphasis omitted). The prosecution objects in part. *See generally* Response. For the reasons articulated in this Order, the motion is denied in part as moot, and granted and denied in part on the merits.

ANALYSIS

A. First and Third Requests

The prosecution informs the Court that it is planning to make the disclosures sought in the defendant's first and third requests. *Id.* at p. 1. Therefore, these requests do not require the Court's intervention and are denied as moot. If a dispute arises about one of these requests, the Court is confident that it will be notified by one of the parties.

B. Fourth Request

The prosecution does not bother to address the defendant's fourth request, which seeks discretionary disclosures pursuant to Rule 16(I)(d)(3). In the interests of justice, and consistent with Order P-43, the Court grants the defendant's request.

Therefore, the prosecution must "disclose the underlying facts or data supporting the opinion" of any expert endorsed. Crim. P. 16(I)(d)(3). Further, "[i]f a report has not been prepared" by an expert, the prosecution must "provide a written summary of the testimony describing the witness's opinion and the bases and reasons therefor, including results of physical or mental examination and of scientific tests, experiments, or comparisons." *Id.* The Court wants to be clear that its intent is similar to the purpose behind the rule: "to allow the defense sufficient meaningful information to conduct effective cross-examination under CRE 705." *Id.*

In exercising its discretion, the Court is mindful that "[t]he discovery rules in criminal proceedings are designed to further the truth-seeking process." *People v. Castro*, 854 P.2d 1262, 1264 (Colo. 1993) (citation omitted); *see also People v. Dist. Court*, 793 P.2d 163, 168 (Colo. 1990) (the purpose of discovery "is to advance the search for [the] truth"). By allowing the prosecution and the defense to acquire relevant information before the trial, "the rules also promote fairness in the criminal process" and "reduc[e] the risk of trial by ambush." *Lanari v. People*, 827 P.2d 495, 499 (Colo. 1992) (citations omitted); *see also People v. Roblas*, 193 Colo. 496, 500, 568 P.2d 57, 60 (Colo. 1977) ("Trial by ambush is no longer acceptable as a means for ascertaining the truth").

C. Second Request

The prosecution objects to the defendant's second request to the extent that it seeks to have all oral statements reduced to writing, arguing that "there is no requirement to reduce all conversations to writing." Response at p. 2. In his reply, the defendant counters that he is seeking oral statements that constitute "*Brady* [] material." Reply at p. 1. The Court denies the request because the prosecution is already required to discover such information under Crim. P. 16(I)(a)(2). *See* Crim. P. 16(V)(a). As such, the defendant's request is improper.

Notwithstanding the denial of the second request, the Court feels compelled to comment further. The Court agrees with the People that they are not required to disclose every oral statement by their experts or to reduce all of their experts' conversations or oral statements to writing. *See* Response at p. 2. Rule 16 requires neither the disclosure of all oral statements nor the reduction of all oral statements to writing. *People v. Knight*, 167 P.3d 147, 155 (Colo. App. 2006) ("The prosecution was not required to reduce the officer's oral statement to writing or furnish the substance of her anticipated testimony") (citation omitted); *People v. Graham*, 678 P.2d 1043, 1047 (Colo. App. 1983) ("there is no duty of the prosecution to reduce oral interviews with witnesses to writing and to provide the same to defense counsel") (citation omitted); *People v. Garcia*, 627 P.2d 255, 259 (Colo. App. 1980) (Rule 16 "specifically requires disclosure only of the substance

of oral statements made by the accused, or, if a joint trial is to be held, by a co-defendant") (citation omitted). The two cases cited by the defendant are consistent with the holdings in *Knight*, *Graham*, and *Garcia*. *See People v. Denton*, 91 P.3d 388, 391 (Colo. App. 2003) ("If the supreme court had intended . . . Crim. P. 16(I)(a)(1)(I) to require the disclosure of unrecorded oral statements, then it would have so specified as it did elsewhere in Crim. P. 16"); *People v. Anderson*, 837 P.2d 293, 299 (Colo. App. 1992) ("there is no duty on the prosecution to reduce oral interviews with witnesses to writing and to provide them to defense counsel").

However, the prosecution is required to discover exculpatory evidence, including exculpatory oral statements from expert witnesses. *Brady v. Maryland*, 373 U.S. 83, 87-88, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). And "the prosecution cannot circumvent [its] obligation to disclose exculpatory information by deliberately avoiding taking notes or reducing statements to writing." *Denton*, 91 P.3d at 392 (quoting *Anderson*, 837 P.2d at 299).

The prosecution represents that it is aware of its obligation under *Brady* "to provide any exculpatory statements of the defendant and will comply." Response at p. 2. But the holding in *Brady* is broader than that. It is not limited to ***exculpatory statements of the defendant***. Rather, it includes "***evidence*** favorable to an accused," and it requires the prosecution to disclose evidence that "is material either to guilt or to punishment." *Brady*, 373 U.S. at 87, 83 S.Ct. 1194 (emphasis

added).[1] As the Court concluded in *Brady*, "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.*

The prosecution's obligation to discover exculpatory evidence applies even if "there has been no request by the accused." *Strickler v. Greene*, 527 U.S. 263, 280, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) (citation omitted). Additionally, the prosecution's "duty encompasses impeachment evidence." *Id.* (citation omitted). "Moreover, the rule encompasses evidence known only to police investigators and not to the prosecutor." *Id.* at 280-81, 119 S.Ct. 1936 (quotation omitted). Consequently, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in [the] case, including the police." *Id.* at 281, 119 S.Ct. 1936 (quotation omitted).

"Under Crim. P. 16(I)(a)(2), prosecutors in Colorado are obligated to disclose *Brady* material to an accused even in the absence of a request by the defense." *People v. Dist. Court*, 790 P.2d 332, 338 (Colo. 1990). In other words, Rule 16(I)(a)(2) "incorporates the holding of [*Brady*] by requiring the prosecution to disclose to the defense any evidence within the prosecution's possession or

[1] Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

control that tends to negate the guilt of the accused as to the offense charged, or tends to reduce the punishment therfor." *People v. Bradley*, 25 P.3d 1271, 1276 (Colo. App. 2001).

Because the furnishing of the information sought by the defendant under Crim. P. 16(I)(a), and by extension under *Brady*, is "mandatory" in every criminal case in Colorado, "no motions for discovery with respect to such items may be filed." Crim. P. 16(V)(a). Therefore, the defendant's request for such disclosures fails as improper.

CONCLUSION

For all the foregoing reasons, the Court concludes that Motion D-251 has some merit. Accordingly, it is denied in part as moot, and granted and denied in part on the merits.

Dated this 17th day of November of 2014.

BY THE COURT:

Carlos A. Samour, Jr.
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2014, a true and correct copy of the **Order regarding Defendant's motion to compel supplemental expert disclosures (D-251)** was served upon the following parties of record:

Karen Pearson
Christina Taylor
Rich Orman
Jacob Edson
Lisa Teesch-Maguire
George Brauchler
Arapahoe County District Attorney's Office
6450 S. Revere Parkway
Centennial, CO 80111-6492
(via e-mail)

Sherilyn Koslosky
Rhonda Crandall
Daniel King
Tamara Brady
Kristen Nelson
Colorado State Public Defender's Office
1290 S. Broadway, Suite 900
Denver, CO 80203
(via e-mail)

Cheryl Robinson