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 TO CONTINUE TRIAL (D-255-A)

INTRODUCTION

In Motion D-245, the defendant moved to continue the trial. On October 27, 2014, the Court postponed the trial, but not for the extended period of time the defendant requested. *See generally* Order D-245-B. Instead, the Court continued the trial for six weeks, from December 8, 2014, until January 20, 2015. *See generally* Order D-245-B. In Motion D-255, the defendant moves for another continuance. Motion D-255 at p. 1. The prosecution opposes the motion. Response at p. 1. On December 8, the Court heard further argument on the defendant's request to continue at a pretrial status hearing. For the reasons articulated in this Order, the motion is denied.

LEGAL STANDARD

"Whether to grant a motion to continue a trial 'is addressed to the sound discretion of the trial court.'" *People v. Alley*, 232 P.3d 272, 274 (Colo. App. 2010) (quoting *People v. Hampton*, 758 P.2d 1344, 1353 (Colo. 1988)). "A trial court's decision to grant or deny a continuance is entitled to deference and may not be reversed on appeal absent a gross abuse of discretion." *People v. Cruthers*, 124 P.3d 887, 888 (Colo. App. 2005) (citation omitted). An abuse of discretion occurs if the denial of a motion to continue is "manifestly arbitrary, unreasonable, or unfair" under the totality of the circumstances. *People v. Mandez*, 997 P.2d 1254, 1265 (Colo. App. 1999) (citation omitted); *see also Miller v. People*, 178 Colo. 397, 399-400, 497 P.2d 992, 993 (Colo. 1972) (the totality of the circumstances must be considered when determining whether the trial court abused its discretion in denying a motion to continue).

In resolving a motion to continue, the trial court is required to "consider the peculiar circumstances of each case and balance the equities on both sides." *People v. Fleming*, 900 P.2d 19, 23 (Colo. 1995) (citations omitted). The trial court must also take into account the "prejudice to the moving party if the continuance is denied and whether that prejudice could be cured by a continuance, as well as the prejudice to the opposing party if the continuance is granted." *People in the Interest of D.J.P.*, 785 P.2d 129, 132 (Colo. 1990) (citation omitted).

A trial court does not abuse its discretion in denying a defendant's motion to continue if delay of the trial would be against the interest of justice. *See People v. Ellis*, 148 P.3d 205, 211 (Colo. App. 2006).

ANALYSIS

The Court understood Motion D-245 to request a trial date "as late as the Spring of 2015." Order D-245-B at p. 4. Without objection from the prosecution, the Court continued the trial until January 20, 2015. The defendant now seeks an extension of at least "two to three months," which would result in a trial setting in the Spring of 2015. Motion at p. 4. As such, Motion D-255 is essentially a motion to reconsider Order D-245-B.

The defendant argues that he needs more time before proceeding to trial. *Id.* at p. 2. His motion advances seven grounds in support of this proposition: (1) one of his attorneys recently testified for 8 days in another case; (2) the disclosures from the Colorado Mental Health Institute at Pueblo ("CMHIP") following the second Court-ordered sanity examination, which was performed by Dr. William Reid, were "incredibly voluminous," and his attorneys "and their experts require additional time to review and digest these materials;" (3) all of the trial preparation completed before the second sanity examination "must be redone" in light of the information generated by Dr. Reid's report; (4) the prosecution has not yet supplemented its expert disclosures; (5) his attorneys have been busy preparing

"their sentencing disclosures . . . and preparing and serving subpoenas on dozens of witnesses, including a number who reside out-of-state;" (6) the prosecution has continued to update its good faith witness list, but his attorneys have been unable to focus on it because they have been working on Dr. Reid's report and documentation; and (7) his attorneys continue to receive significant amounts of new discovery from the prosecution which takes time to review. *Id.* at pp. 2-3.

At the pretrial status hearing, the defendant added two more grounds in support of his motion: (1) [redacted]; and (2) [redacted]. Although the Court is very sympathetic to both of these tragic events, it is unpersuaded that they or the reasons set forth in Motion D-255 warrant a continuance. Furthermore, the Victims' Rights Act and public policy compel denial of the motion.

I. Grounds For A Continuance

A. Mr. King's Testimony in Another Case

The defendant asserts that the trial must be postponed because one of his attorneys, Dan King, recently spent 8 days testifying in post-conviction proceedings in another capital case. *Id.* at p. 2. The Court is unconvinced.

First, there is no basis in the record to believe that Mr. King's testimony in the other case came as a surprise to him or his co-counsel. Based on the electronic

record in the other case, Mr. King and his co-counsel should have been aware at least a month in advance that he would need to testify extensively starting in late October. Therefore, they had ample opportunity to plan for it.

Second, defense counsel knew that Mr. King would need to testify in the other case when they first requested a continuance in Motion D-245 on October 21. Indeed, Mr. King's testimony started on October 24.[1] Yet that motion made no mention of his impending testimony. If the time Mr. King spent in court on the other case is as concerning as the defendant suggests, Motion D-245 presumably would have raised the issue.

Third, it is unusual for deputy public defenders and deputy district attorneys to be able to work exclusively on one case, even if it is a death penalty case. At the hearing, Mr. Brauchler represented that "not a single" deputy district attorney on the case has had "the luxury of only working on this case." Rather, each has had other duties, such as supervising six felony prosecutors, running part of the office's appellate division, being in charge of the economic crimes unit, or carrying out the duties of the elected District Attorney. Likewise, the undersigned had a full-time Domestic Relations docket between April and September of 2013, and has been the Chief Judge of this Judicial District since July 2, 2014. To the extent Mr. King has only been pulled away from this case for a relatively short period of time to

[1] Mr. King testified on October 24, 27, 28, 29, and 30, on November 3 and 25, and on December 1 and 3. On one of these days, his testimony only took part of the day.

prepare to testify and to provide testimony in the other case, he appears to have it better, not worse, than opposing counsel and the Court. The limited time Mr. King recently devoted to the other case does not establish a burden; rather, it highlights a luxury that neither opposing counsel nor the Court have had continuously throughout this litigation.

Finally, there are at least five attorneys representing the defendant in this case.[2] It is difficult to imagine that they did not help Mr. King keep up to speed on this case while he was working on the other case.

B. Voluminous Materials From CMHIP

The defendant contends that his attorneys and expert witnesses need more time "to review and digest" the "incredibly voluminous" materials from CMHIP underlying Dr. Reid's examination. *Id.* According to the defendant, this material is "even more voluminous than anticipated." *Id.* The Court is unpersuaded.

The defendant is requesting the same trial date setting he sought in Motion D-245. However, that motion was premised in part on his prediction that it was "highly unlikely that all matters pertaining to the second sanity examination [would] be resolved by the third week in January." Motion D-245 Reply at p. 2. That prediction proved to be wrong. As of today, December 10, 2014, almost 6

[2] Five attorneys appear regularly at proceedings in Court. However, the Court is aware that Jason Middleton, a member of the Appellate Division at the Public Defender's Office, is also working on this case.

weeks before the third week in January and the start of trial, the Court has resolved all the matters pertaining to the second sanity examination. Nevertheless, the defendant continues to request a trial date in the Spring of 2015.

Further, in the reply in support of Motion D-245, the defendant anticipated filing some motions after October 29 related to the documentation from CMHIP underlying Dr. Reid's examination. *Id.* The defendant requested an extension of the deadline to file such motions because he represented that it was "necessary and prudent to review all supporting materials from CMHIP, speak with Dr. Reid, and consult with [his] experts first, so that [he could] make a more informed decision about which motions actually need[ed] to be filed." *Id.* The Court granted the request, extending the deadline until November 20. Order D-245-A at p. 3. Although the defendant did not file any such motions, based on his representation, the Court infers that, by November 20, he had already reviewed all of the supporting materials from CMHIP, spoken with Dr. Reid, and consulted with his expert witnesses about Dr. Reid's examination and its underlying documentation.

The Court recognizes that Dr. Reid's report and its underlying materials were provided to the parties and their expert witnesses in October and November respectively. The Court further realizes that defense counsel could not have worked on issues pertaining to Dr. Reid's examination until his report was completed. Motion D-255 at p. 5. However, by the time the trial starts, the

defense will have had Dr. Reid's report for more than three months and the report's underlying documentation for more than two months.

Notably, the defendant fails to identify any specific materials that he has been unable to review or that his experts have been unable to analyze. Nor does he specify which witness or witnesses need additional time to complete particular tasks. His general assertions, that the materials provided by CMHIP following Dr. Reid's examination are voluminous and that their review is time-consuming, fall short. If such vague allegations were sufficient, every criminal defendant would be entitled to a postponement of his trial.

C. Trial Preparation Completed Before the Second Sanity Examination

The defendant maintains that all of the trial preparation completed before Dr. Reid's report was submitted "must be redone" in light of the information in that report. *Id.* at p. 3. The Court agrees with the prosecution that this appears to be an overstatement. Motion D-255 Response at p. 2. A scenario in which Dr. Reid's report would require the defense to "redo" its entire investigation, or even most of it, is almost unfathomable. Nor has the defense presented any proof in support of its claim. In any event, while Dr. Reid's examination no doubt requires the defense to review, and perhaps reevaluate, certain aspects of the investigation it has conducted thus far, the defense has had Dr. Reid's report since October 15, and

the trial is not set until January 20.[3] Additionally, because the defense has been in receipt of the documentation underlying Dr. Reid's examination since early November, counsel and their experts will have more than two months to review it and digest it before trial.[4]

D. The Prosecution Has Not Yet Supplemented its Expert Discovery

The defendant informs the Court that, to date, he has not received any supplemental discovery regarding the prosecution's expert witnesses. Motion D-255 at p. 3. In particular, the defendant seeks "finalized opinions" from the prosecution's experts "incorporating Dr. Reid's report and the hours and hours of statements" the defendant made during the second sanity examination. *Id.* In its response to Motion D-251, the People advised that they were planning to supplement their expert disclosures "[w]hen [the People's experts] have completed their review" of the materials from the second sanity examination. Motion D-251 Response at p. 1. The People also represented that they would "request and provide any notes" created by their expert witnesses "in the course of reviewing

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[3] Dr. Reid's report is not nearly as extensive as the report completed by Dr. Jeffrey Metzner following the first sanity examination.

[4] As the prosecution observed at the pretrial status hearing, opening statements are unlikely to take place before June, and the first three weeks of the trial will only involve the review of juror questionnaires, which will require minimal court time (approximately 30 minutes in the morning and 30 minutes in the afternoon). Consequently, counsel will have additional time after January 20 to finalize their preparation for the presentation of evidence. Of course, the parties' expert witnesses will not participate in jury selection so they will have almost half of a year to finalize their preparations. The parties should not infer from this observation that the Court is extending expert disclosure deadlines or any other deadlines.

materials in this case since the prior [disclosure] of notes" in January 2014. *Id.* Based on these representations, the Court partially denied Motion D-251 as moot. Order D-251 at p. 2. However, the Court granted the defendant's request for discretionary expert disclosures pursuant to Crim. P. 16(I)(d)(3). *Id.*

At the December 8 hearing, the prosecution stated that it intends to supplement the disclosures of one of its expert witness, and that it can do so by December 19. The Court agreed to the proposed deadline. After further thought, the Court has decided to change that deadline to December 17. This will ensure that the defense receives the prosecution's supplemental disclosures approximately five weeks before trial. The Court emphasizes that, in supplementing its expert disclosures, the prosecution should err on the side of over-disclosing.

E. Defense Counsel Have Been Busy

The defendant avers that his attorneys have been "engaged in the time-consuming task" of preparing the required sentencing disclosures and preparing and serving subpoenas on dozens of in-state and out-of-state witnesses. Motion D-255 at p. 3. This contention carries little weight with the Court.

First, the Office of the State Public Defender has devoted seemingly unlimited resources and manpower to this case. There are at least six attorneys, four or five investigators, and multiple staff members assigned to the case. Thus, while "the sheer size and magnitude of this case is virtually unparalleled," *id.* at p.

5, the manpower and resources available to the defendant are equally unparalleled. In the eight years since taking the bench, the undersigned has not seen a case that has enjoyed anywhere close to the manpower and resources that have been dedicated by the defense to this case.

Moreover, this case has been pending for two and a half years. Counsel, their skilled experts, and their staff have had a considerable amount of time to prepare for trial. Significantly, much of this time has been idle time—there has not been a lot of courtroom time required and the two Court-ordered sanity examinations took the better part of a year to complete.[5]

The defendant asserts that his attorneys "have been working diligently to prepare for trial," but that there is simply insufficient time to be ready for trial by January 20 given that "[t]he amount of additional work that Dr. Reid's examination has generated is staggering." *Id.* at p. 2. The Court has no doubt that counsel have been working hard on this case since receiving Dr. Reid's report. However, the record does not support their contention that they have been pressed for time.

F. The Prosecution Has Continued Updating its Witness List

The defendant claims that a continuance is also warranted because the prosecution has continued to update its good faith witness list. Motion D-255 at p.

[5] The Court ordered the first sanity examination on June 4, 2013, and Dr. Metzner filed his report on September 6, 2013. The Court ordered the second sanity examination on May 8, 2014, and Dr. Reid filed his report on October 15, 2014.

3. According to the defendant, "[t]he materials and work that Dr. Reid's examination [] generated has interfered with [his attorneys'] ability to prepare to cross-examine numerous . . . witnesses, and to prepare their own case for trial." *Id.* The prosecution notes, however, that "[w]hile there have been some additions or deletions from the list, the overwhelming majority of the names on the list have remained unchanged." Motion D-255 Response at p. 2. The defendant did not dispute this at the hearing. In any event, there are plenty of lawyers and staff working for the defense to handle any updates to the prosecution's good faith witness list, while at the same time continuing to work on the report and materials related to Dr. Reid's examination.

G. New Discovery

The defendant complains that the prosecution has provided voluminous discovery since Dr. Reid filed his report. Motion D-255 at p. 3. However, based on the prosecution's detailed inventory, the vast majority of the new discovery is comprised of: materials already provided by CMHIP; witness lists, witness contact information, witnesses' criminal histories, and lists of CDs and DVDs previously provided; new reports, "almost all of which relate to conversations with witnesses that occurred in the course of prosecution trial preparation;" and copies of disks the defendant previously received from CMHIP or disks containing a few photographs. Motion D-255 Response at pp. 4-5. Although the defense had an opportunity to

contest the prosecution's representation, it did not do so. The Court, therefore, agrees with the prosecution that, while voluminous, this material does not necessitate a continuance. The discovery may be thousands of pages long, but it contains very little new information.

H. Medical Emergencies

At the hearing, defense counsel informed the Court about two recent medical emergencies unfortunately experienced by relatives of two members of the defense team: (1) an investigator's [redacted]; and (2) an attorney's [redacted]. The Court is very sympathetic to the investigator and counsel, as well as their families. However, these circumstances do not justify a continuance of the trial.

First, as the prosecution observed at the hearing, given the magnitude of this case and the length of the proceedings, it is not surprising that one of the case's participants experienced a significant and unexpected personal life incident. Other such events are likely to take place between now and the end of the trial.

Second, defense counsel were aware of the situation with their investigator when they filed Motion D-255. Yet they made no mention of it. This is telling

because counsel included seven other grounds in support of their motion to continue. If this was not a reason to postpone the trial on December 4, the Court does not understand why it became a reason on December 8.

Third, a new investigator has already been brought on board by the defense team. Although he has not worked on a capital case before, he has experience as an investigator and has been in the Arapahoe County Office of the State Public Defender for six years. The defense argued at the hearing that the only thing the new investigator is "not qualified to do is the mitigation witnesses." However, the fact that the new investigator does not yet have the rapport with mitigation witnesses that the absent investigator has developed does not render him unqualified to contact them, interview them (if necessary), and make travel arrangements for them.

Importantly, the defense candidly admitted that the absent investigator has already completed "a significant portion of the interviews" with mitigation witnesses, and previously discussed with many of these witnesses the possibility of testifying. Thus, the defense's primary concern is that assigning "a new [investigator] to be in contact with [these] witnesses" may be "detrimental to [the defense's] relationship with them and . . . to their willingness to come out and testify." This concern is speculative. At any rate, it is not unusual for an investigator or a different staff member to become unavailable before trial and to

have a new person pick up the pieces. For example, the prosecution explained that it had to replace the paralegal assigned to this case because she resigned from her job.

In terms of the attorney [redacted], Mr. King stated that he could not represent that she would be out for an extended period of time: "I can't imagine that would be the case." Mr. King also [redacted]. Thus, she may be back in the office next week or during the following week.

Mr. King impliedly acknowledged that this issue, alone, would not justify a continuance. The problem, he explained, "is that [defense counsel] were behind already" and this tragedy is "just another thing" piled onto the reasons set forth in the motion to continue. In other words, "it's [the] combination of events" that trouble the defense. Because the Court has rejected the contention that defense counsel are behind in their trial preparation, the Court concludes that this event, while tragic, does not justify a postponement of the trial.

II. Victims' Rights Act

The prosecution informs the Court that the victims are almost unanimously opposed to a continuance of the trial. Motion D-255 Response at pp. 8-9. In ruling on Motion D-255, the Court is required to consider the victims' position. The Victims' Rights Act states that "[i]n order to preserve and protect a victim's right

to justice and due process, each victim of a crime shall have . . . [t]he right to be assured that . . . the court, the prosecutor, and other law enforcement officials will take appropriate action to achieve a swift and fair resolution of the proceedings." § 24-4.1-302.5(1)(o), C.R.S. (2014). Similarly, the legislative declaration of the Victims' Rights Act provides, in pertinent part, as follows: "[i]t is the intent of this [legislation], [] to assure that all victims of and witnesses to crimes are honored and protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protection afforded criminal defendants." § 24-4.1-301, C.R.S. (2014).

III. Public Policy

Colorado's speedy trial statute advances not only "the liberty interest of the accused," but also "the public's interest in the effective enforcement of criminal laws." *People v. Arledge*, 938 P.2d 160, 166 (Colo. 1997). Likewise, "[t]he speedy trial provisions of the Colorado Constitution," which "parallel the speedy trial guarantee of the Sixth Amendment to the United States Constitution," protect "the defendant's right to be free from the anxiety accompanying a public accusation" and guard "society's need for a speedy and final determination of criminal charges." *People v. Deason*, 670 P.2d 792, 796 n.10 (Colo. 1983); *see also Jaramillo v. Dist. Court*, 174 Colo. 561, 484 P.2d 1219, 1221 (Colo. 1971) ("the right to a speedy trial is not only for the benefit of the accused, but also for

the protection of the public"); *People v. Roberts*, 146 P.3d 589, 592 (Colo. 2006) ("The interests of the public and the rights of the defendant are protected by an expeditious trial") (citation omitted).

"It is essential that an early determination of guilt be made, so that the innocent may be exonerated and the guilty punished." *Jaramillo*, 484 P.2d at 1221. For this reason, "[a] fundamental purpose of the speedy trial statute is to prevent unnecessary delay in a pending criminal proceeding." *Roberts*, 146 P.3d at 592 (citation omitted). "The policy of preventing undue delay that underlies speedy trial provisions must be balanced against a countervailing interest in effective enforcement of criminal laws." *Hills v. Westminster Mun. Court*, 245 P.3d 947, 950 (Colo. 2011) (quotation omitted). The trial court and the prosecution "are responsible for ensuring that a case is brought within statutory speedy trial limits." *Id.* (citations omitted). Therefore, like the defendant, the prosecution has "standing to compel enforcement of speedy trial requirements." *Arledge*, 938 P.2d at 166.

Throughout the litigation in this capital punishment case, the Court has repeatedly emphasized that it is responsible for enforcing the defendant's rights, including his constitutional rights. The Court has taken this responsibility to heart. The Court realizes that the easiest and safest resolution of Motion D-255 would be to simply continue the trial. But there is no provision in the law for postponing a

trial solely because the defendant faces a death sentence or to afford the record more protection on appeal in case of a conviction.

The law provides parameters to guide the Court as it exercises its discretion in ruling on a contested motion to continue. Stated differently, the discretion vested in the Court, although broad, is not unfettered. The Court must take care to avoid being arbitrary, unreasonable, or unfair. The Court must also be mindful that the defendant is not the only party in this case. The prosecution is entitled to a speedy and final determination of the case. So are the named victims. Similarly, the community has the right to expect timely justice from its judicial system. If the Court fails to exercise its discretion appropriately and in accordance with the law, it abuses that discretion and risks compromising the public's confidence in the justice system.

The perception of justice is as important as justice itself. If the citizenry loses trust in the administration of justice, it matters little whether justice is done in a particular case. To delay this trial unnecessarily or improperly solely on the basis that it is a death penalty case would only promote the cynical view—sadly held by many—that the justice system is broken. Hence, in ruling on the merits of Motion D-255, the Court cannot grant a continuance simply because it is the easiest or safest option. Rather, it must exercise its discretion cautiously and deliberately, and it must do its utmost to faithfully apply the law.

Because the Court has absolutely no doubt that defense counsel can be ready to proceed to trial on January 20, the motion fails. This case has been pending for an extended period of time—two and a half years to be exact—and defense counsel have dedicated such extensive resources and manpower to the case to be able to provide the defendant not only effective assistance, but outstanding assistance, at the January 20 trial. Simply put, it is time for this case to proceed to trial.

Almost five months ago, the Court informed counsel, in no uncertain terms, that it was unlikely to grant a continuance for additional trial preparation:

> ***And I can tell you, I am going to be disinclined to grant a motion to continue based on "We're not ready. We need more time to get ready." I expect both sides to be ready to go at trial*** . . . . [I]n terms of, you know, witness interviews, in terms of endorsements, in terms of disclosures, in terms of other experts wanting to do follow-up, even interviews of CMHIP staff . . . you'll just have to find a way to get those done. And I don't have any question that you can get those done and that you can do it effectively and you can do it with great skill. So I just think, you know, people have to prepare for what's coming up.

7/22/14 Tr. at pp. 193-94 (emphasis added). The next day, the Court acknowledged that everyone had "work to do to [] prepare[] for trial." 7/23/14 Tr. at p. 112. The Court, therefore, cautioned the parties to "use the time wisely." *Id.*

Under all of the circumstances present, denial of the motion will neither prejudice the defendant nor hinder his right to a fair trial or any of his other rights. But a postponement would deprive the prosecution of its right to a speedy trial, violate the Victims' Rights Act, interfere with the public's interest in the speedy

and final disposition of this case, run counter to the interest of justice, and further erode the public's confidence in the justice system. Accordingly, the defendant's motion to continue is denied. The trial will proceed on January 20, 2015.[6]

Dated this 10th day of December of 2014.

BY THE COURT:

Carlos A. Samour, Jr.
District Court Judge

[6] The Court will issue 9,000 jury summonses tomorrow, December 11, 2014.