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 PEOPLE'S MOTION TO COMPEL COMPLIANCE WITH COURT ORDER P-43, RELATING TO EXPERT WITNESS DISCOVERY (P-108)

INTRODUCTION

This matter is before the Court on the prosecution's Motion P-108, which includes two requests: (1) a request to compel compliance with Order P-43, relating to sentencing expert witness discovery; and (2) a request for an additional 20 days from the date a defense expert report is provided to notify the defendant of any rebuttal expert witness. Motion at p. 4. The defendant opposes the first request, but not the second request. *See generally* Response. For the reasons articulated in this Order, the first request is denied, but the second request is granted.

BACKGROUND

The defendant is charged with shooting, and killing or injuring, numerous people inside auditoriums 8 and 9 of the Century 16 Theatres in Aurora, Colorado, on July 20, 2012, during the midnight premiere of "The Dark Knight Rises." He is charged with two counts of Murder in the First Degree for each of twelve deceased victims, two counts of Criminal Attempt to Commit Murder in the First Degree for each of seventy injured victims, one count of Possession of Explosive and Incendiary Devices, and one sentence-enhancing Crime of Violence count. On June 4, 2013, the defendant pled not guilty by reason of insanity.

ANALYSIS

A. Order P-43

In Order P-43, the Court granted the prosecution's request for discretionary expert discovery under Crim. P. 16(II)(b). Order P-43 at pp. 1-3. Therefore, as relevant here, the Court ordered the defense "to disclose the underlying facts or data supporting the opinion" of every endorsed expert. *Id.* at p. 1 (relying on Crim. P. 16(II)(b)(2)). Pursuant to Order P-43 and Rule 16(II)(b)(2), in the event a report is not prepared by a defense expert to aid in compliance with the discovery obligations set forth in the rule, the defendant must provide "a written summary of the testimony describing the witness's opinions and the bases and reasons therefor,

including results of physical or mental examinations and of scientific tests, experiments, or comparisons." *Id.* at p. 2 (quoting Crim. P. 16(II)(b)(2)).

B. Request to Compel

The prosecution asks the Court to compel the defendant to discover sentencing hearing expert reports or, if no such reports exist, "a summary of [those] experts' proposed testimony describing their opinions." Motion at p. 1. In support of this request, the prosecution argues that Order P-43 and Crim. P. 16(II)(b)(2) "recognize no [] distinction" between expert witness discovery related to the guilt phase of the trial and expert witness discovery related to any sentencing phase of the trial. *Id.* at p. 2. The defendant counters that Rule 16 is limited to the guilt phase of the trial and has no application at any capital sentencing hearing. Response at pp. 1-2. Instead, asserts the defendant, Crim. P. 32.1(d)(7) sets forth all of his discovery obligations with respect to a capital sentencing hearing, and he has complied with those provisions. *Id.*

Crim. P. 32.1(d)(7)(A)(III) states, in pertinent part, that "the defendant shall provide the prosecuting attorney . . . not later than 35 days before trial . . . [a]ny reports, recorded statements, and notes of any expert whom the defendant may call as a witness during the sentencing hearing, including results of physical or mental examinations and scientific tests, experiments, or comparisons." Section 18-1.3-1201(3)(c), C.R.S. (2014), contains a similar provision: "[t]he defendant shall

provide the prosecuting attorney," as soon as practicable but not later than thirty-five days before trial, "any reports, recorded statements, and notes, including results of physical or mental examinations and scientific tests, experiments, or comparisons, of any expert whom the defense intends to call as a witness at the sentencing hearing." Thus, avers the defendant, if a defense expert does not generate a report, a recorded statement, or notes, neither Rule 32.1(7)(A)(III) nor section 18-1.3-1201(3)(c) requires a summary of that expert's proposed opinions. Response at pp. 2-3. According to the defendant, in such a situation, his expert witnesses would be treated the same as his lay witnesses and, as pertinent here, he would only have to disclose "the subject matter" of the expert's testimony. *See id.* at p. 2 n.2 (quoting Crim. P. 32.1(7)(A)(I)).[1]

It appears from recent briefs submitted by the parties that they are jockeying for a strategic advantage. Each party wants the other to make full expert disclosures before, or perhaps even without, having to make similar disclosures. Be that as it may, the question for the Court is whether the defendant has run afoul of Order P-43 and Rule 16. The Court answers the question in the negative.

The Court agrees with the defendant that Rule 32.1 "is an entirely self-contained, comprehensive rule that exclusively governs capital sentencing

[1] The Court addressed the meaning of "subject matter," as that term is used in Rule 32.1, in Order D-167. *See* Order D-167 at pp. 6-15. The prosecution does not allege that the defendant has failed to identify the subject matter of any witness's testimony. *See generally* Motion and Reply.

proceedings." Response at pp. 1-2. Subsection (a) declares that "[t]he purpose of [the] rule is to establish a uniform, expeditious procedure for conducting death penalty sentencing hearings in accordance with section 18-1.3-1201." Further, subsection (d), titled "Discovery Procedures for Sentencing Hearing," explains how discovery is to be conducted with respect to a capital sentencing proceeding. Crim. P. 32.1(d)(7)(A)(III) specifically addresses the defendant's discovery obligations with regard to expert witnesses he intends to call at any capital sentencing hearing: he must disclose "[a]ny reports, recorded statements, and notes of any expert whom [he] may call as a witness during the sentencing hearing."

There is no reference to Rule 16 in Rule 32.1. Nor is there any indication in either rule that the discovery requirements of Rule 16(II)(b)(2) apply to a capital sentencing proceeding. Recently, the Colorado Supreme Court observed that "no [] incorporation [of Rule 16] was attempted in Crim. P. 32.1, the separate rule governing the death penalty sentencing hearing itself, which instead provides for explicit disclosure requirements, in terms appropriate to, and with time periods expressly tailored for, death phase proceedings." *People v. Owens*, 330 P.3d 1027, 1031 (Colo. 2014).

In sum, the Court concludes that Rule 16 in general, and Rule 16(II)(b) in particular, have no application to capital sentencing proceedings. Because Motion P-43—and consequently, Order P-43—relied solely on Crim. P. 16(II)(b), the

request to compel compliance with Order P-43 fails. The defense's capital sentencing discovery obligations are identified in Rule 32.1(d)(7).

The Court nevertheless agrees with the prosecution that the defendant may not "purposefully engage[] in a strategy of requesting that his penalty phase expert witnesses not draft reports relating to their proposed testimony, because the defendant believes that there would be no reports that would be required to be produced." Motion at p. 2. Such a strategy "would turn the sentencing phase of the trial . . . into trial by ambush." *Id.*

"The discovery rules in criminal proceedings are designed to further the truth-seeking process." *Lanari v. People*, 827 P.2d 495, 499 (Colo. 1992) (citation omitted). By allowing the prosecution and the defense to obtain relevant information before a proceeding, "the rules also promote fairness in the criminal process by reducing the risk of trial by ambush." *Id.* (citations omitted). "Among the many important purposes of discovery, the most central to a fair trial is the parties' production of all relevant evidence." *Camp Bird Colo., Inc. v. Board of Cnty. Comm'rs*, 215 P.3d 1277, 1290 (Colo. App. 2009) (citation omitted). "Trial by ambush, or the old fox-and-hounds approach to litigation, does not promote accuracy or efficiency in the search for truth." *People ex rel. VanMeveren v. Dist. Court*, 531 P.2d 626, 628 (Colo. 1975) (citations omitted).

Without adequate sentencing expert discovery, the prosecution will be hampered in its preparation to cross-examine the defense's sentencing experts. Further, unless the defendant makes appropriate disclosures, the prosecution will be deprived of the opportunity to have its experts review in advance of the sentencing hearing the defense experts' opinions in order to attempt to refute them. Incomplete sentencing expert discovery from the defense will also interfere with the prosecution's ability to discern whether it should object to the proposed expert opinions as unreliable and inadmissible. In short, absent acceptable sentencing expert disclosures from the defense, the truth-finding process and justice will be jeopardized.

It is clear that the intent behind Rule 32.1(d)(7) was to avoid an unfair and unjust sentencing hearing. In the Court's view, the most likely reason the Supreme Court did not include discretionary expert disclosures like those contained in Rule 16(II)(b) is that it expected that any sentencing expert would generate a report, a recorded statement, or some notes regarding his or her opinions. It is clear that the Supreme Court felt that expert witness disclosures require more than lay witness disclosures. The spirit of Rule 32.1(d)(7)(A)(III) is to require the defense to provide the prosecution adequate notice of any expert testimony it intends to offer at a capital sentencing hearing. The decision not to include a provision like Rule 16(II)(b) in Rule 32.1(d)(7) should not be interpreted as an invitation to proceed

"by ambush" or to engage in "the old fox-and-hounds approach to litigation." *See People ex rel. VanMeveren*, 531 P.2d at 628.

The defendant contends that "[w]hen it was appropriate for a defense sentencing expert to write a report, the defense requested that the expert write a report," but "[o]ther defense experts did not prepare reports because it was neither appropriate nor necessary to do so." Response at pp. 2-3.[2] In unilaterally determining whether a report from an expert is "necessary" or "appropriate," the defense proceeds at its own peril. If the defense chooses not to make adequate disclosures for an expert, it runs the risk that the Court will disagree with its judgment and, in the interests of justice, will be required to exclude that expert's

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[2] The defense argues that a report is not necessary or appropriate from [redacted] because he has never met with the defendant "and will serve as an educational witness only regarding [redacted] Response at p. 3. The defense also asserts that [redacted] is continuing to review "the voluminous materials in the case," and if he "ultimately writes a report, the defense will certainly provide it to the prosecution." *Id.* If [redacted] does not write a report, the defense states that it will "provide a more detailed description of his testimony." *Id.* Next, according to the defense, [redacted]. Motion, Ex. Finally, the defense does not address [redacted], even though the prosecution's motion specifically complains that he has been endorsed to "testify as to a great many subjects: [redacted] Motion at p. 3. In a letter dated December 29, the defense informed the prosecution that [redacted] has not prepared a written report, [redacted] "written notes," which are his "supporting documents," have already been provided. Motion, Ex. The defense maintains that Rule 32.1 does not require any additional disclosures related to [redacted]. *Id.*

testimony at a sentencing hearing. Furthermore, by failing to adequately disclose an expert's opinions before any sentencing hearing, the defendant significantly reduces the likelihood that the Court will sustain any objection to new and unexpected rebuttal expert testimony by the prosecution. The defendant cannot, on the one hand, conceal his sentencing expert testimony, and on the other, be heard to complain about the prosecution's sentencing rebuttal expert testimony. The Court reiterates that it will not allow either party to turn any sentencing hearing into a proceeding by ambush or to impede the truth-seeking process and justice.

C. Request to Extend Deadline

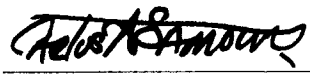
The prosecution wishes to "have 20 days from the date [any sentencing expert reports] are provided" by the defendant to notify him "of any rebuttal expert witnesses." Motion at p. 4. In this regard, the prosecution notes that the report of one of the defense experts, [redacted], will not be available until mid-February, approximately a month after jury selection is scheduled to commence. *Id.* at p. 2. Although the defendant's response does not discuss this request, the defense advised the prosecution that it has no objection to allowing the prosecution "to provide . . . any additional responsive witness endorsements and written reports within 20 days of [the prosecution's] receipt of [the expert's] written report." Motion, Ex. Accordingly, the prosecution's request is granted.

CONCLUSION

For all the foregoing reasons, the Court concludes that Motion P-108 has some merit. Accordingly, it is granted in part and denied in part.

Dated this 6th day of January of 2014.

BY THE COURT:



Carlos A. Samour, Jr.
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2015, a true and correct copy of the **Order regarding People's motion to compel compliance with Court Order P-43, relating to expert witness discovery (P-108)** was served upon the following parties of record:

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