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DISTRICT COURT ARAPAHOE COUNTY, COLORADO Court Address: Arapahoe County Justice Center 7325 S. Potomac St., Centennial, CO 80112	Filed DEC 05 2014 CLERK OF THE COMBINED COURT ARAPAHOE COUNTY, COLORADO
THE PEOPLE OF THE STATE OF COLORADO vs. Defendant: <b>JAMES EAGAN HOLMES</b>	
Attorney: GEORGE H. BRAUHLER, 18 <sup>th</sup> Judicial District Attorney 6450 S. Revere Pkwy. Centennial, CO 80111 Phone: (720) 874-8500 Atty. Reg. #: 25910	COURT USE ONLY  Case Number: <b>12CR1522</b> Division/Ctrm: <b>201</b>
<b>PEOPLE'S RESPONSE TO DEFENDANT'S MOTION TO CONTINUE [D-255]</b>	

This response is filed by the District Attorney for the 18<sup>th</sup> Judicial District.

1. The defendant has filed another motion to continue, designated D-255. The People object.
2. The defendant's first contention is that Dan King has been designated the attorney primarily responsible for examining mental health experts, and that he has had to devote eight days to testifying about his past performance in a previous capital case, People vs. Sir Mario Owens. There have been many more than eight days in the intervening time, and the defendant has not demonstrated that Mr. King, or other counsel representing him, have not had adequate time. While the defendant described a large amount of materials, he has not alleged any specific materials that he has been unable to review, or that his experts have been unable to review. Further, counsel has indicated that a minimum of five competent attorneys with 65 years of combined criminal defense experience have been working on this case who should have been available to help Mr. King during any time he was required to testify.
3. The defendant asserts that five counsel and their experts require additional time to review the materials associated with Dr. Reid. This is not accompanied by any information about what materials have been reviewed, and what have not been. Furthermore, there is no information from any expert as to the time that they have been able to devote to this matter, what materials they have reviewed, what materials they have been unable to review, or anything other than an assertion that the experts need more time.

4. The defendant also asserts that “any trial preparation that defense counsel had completed prior to receiving Dr. Reid’s report must be redone in light of the vast amount of information that was generated by Dr. Reid’s report, which has altered defense’s trial strategy in many ways.” (Paragraph 10). This is surely an exaggerated statement. The vast majority of the witnesses that the People have included on their good-faith witness list have little, if anything, to do with any issues raised in Dr. Reid’s report, and the defendant has not attempted to demonstrate how the totality of their trial preparation must be redone.

5. The defendant asserts in paragraph 12 that counsel have been engaged in the task of preparing the required sentencing disclosures. While this is no doubt true, defense counsel have been engaged in this case for a very long time, and they have presumably been working on preparing their case for any sentencing hearing for months, if not much longer.

6. The prosecution has attempted to keep the defendant’s lawyers informed of their plans as far as trial witnesses are concerned, and has periodically updated the good faith witness list as the prosecution has engaged in trial preparation. While there have been some additions or deletions from the list, the overwhelming majority of the names on the list have remained unchanged. If the defendant had complained of a large number of new witnesses that it had not previously thought were going to testify, and indicated with particularity what issues this created, his argument might have some merit.

7. The defendant complains that he has received voluminous discovery since he received the report and materials from Dr. Reid. The People have provided the defendant with the following discovery since October 30 2014:

**October 30, 2014:**

- Page 82086. Rule 16 discovery letter.
- Page 82087-82103. Cumulative list of all discovery CDs and DVDs. (17 pages)
- DVDs 271-279 (All containing sanity interview with Dr. Reid), CD 345 (6 photographs), CD 346 (1 photograph), and CD 347 (6 photographs).
- Pages 82104-82478 Sanity Examination and attachments.<sup>1</sup> (375 Pages)

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<sup>1</sup> Upon receipt of the materials from CMHIP, it has been the prosecution’s practice to provide copies of the disks received to the defendant in discovery and to also print out the pages and provide them as paginated discovery, even though the defense has received copies directly from CMHIP. The People feel that this is the best procedure, in that they can be sure that the defense has received the materials, in addition to providing a common pagination system for documents that can be used for obvious purposes in the litigation.

- Pages 82479-83154. Printed records produced by CMHIP originally provided on CDs 348 and 349. (676 Pages)
- Pages 83155-83339. Updated criminal histories. (185 pages).

**November 7, 2014**

- CD 354 (Contains 3 photographs), CD 355 (Contains 12 photographs), CD 356 (Contains 9 photographs), CD 357 (Contains 5 photographs), CD 358 (Contains 4 photographs), CD 359 (Contains 22 photographs), CD 360 (Contains 1 photograph),
- 83340-83357. Cumulative list of all discovery CDs and DVDs. (18 pages)
- 83358-83359. Two page supplemental report from Det. Appel dated 10/30/14. (Two pages).
- 83360. Supplemental Report From Det. Appel. (1 page).
- 83361-83410. Updated CV. (50 pages).
- 83411-83481. Supplemental reports from DA investigators regarding trial prep interviews with witnesses, and notes, and diagrams that witnesses were asked to make notes on. (71 pages).
- 83482-83707. Updated list of witness contact information. (226 pages).
- 83708-83716. Updated criminal histories. (9 pages).

**November 12, 2014**

- Disk DVD 280 (Video provided by defense to Dr. Reid) , DVD 281 (Video provided by defense to Dr. Reid), DVD 282 (Video provided by defense to Dr. Reid), CD 361 (CMHIP Materials), CD 362 (Tank CD), and CD 363 (18 photographs)
- 83717-83734. Cumulative list of all discovery CDs and DVDs. (18 pages)
- 83735-83754. Supplemental reports from DA investigators regarding trial prep interviews with witnesses, and notes, and diagrams that witnesses were asked to make notes on. (20 pages).
- 83755-83758. Supplemental APD reports regarding photographs of evidence. (4 pages).
- 83759-83761 Letter received by DA's office (3 pages).

- 83762-85244. Printed materials form CD 361 provided by CMHIP, i.e. Dr. Reid examination materials. (1,483 pages).
- 85245-85293. Updated good-faith witness list. (49 pages).
- 85294-85301. Emails received by DA's Office. (8 pages)
- 85302-85318. Criminal history printout. (17 pages).
- 85319-85320 Supplemental Report by Det. Appel (2 pages).
- 85321-85329. Emails received by DA's Office. (9 pages).
- 85330-85409. Supplemental reports from DA investigators regarding trial prep interviews with witnesses, and notes, and diagrams that witnesses were asked to make notes on. (80 pages).
- 85410-85570. Administrative materials regarding a law enforcement witness. (161 pages).

**December 1, 2014**

- CD 365 (Contains sound file of a 1 minute and 36 second long voice mail message left at DA's office), and CD 366 (Contains 1 photograph).
- 85571-85586. Cumulative list of all discovery CDs and DVDs. (16 pages).
- 85587-85611 Updated Good faith witness list. (25 pages).
- 85612-85617. Emails received by DA's Office. (6 pages).
- 85618-85850. Materials provided by CMHIP that had been provided by the defense to Dr. Reid, and produced to the prosecution after request. (233 pages).

By the People's reckoning, the defendant has received 3,765 pages of discovery since October 30, 2014, the vast majority of which (2,767 pages) were materials that had also been provided to the defense by CMHIP. 581 pages of the materials relate to things like witness lists, witness contact information, criminal histories, and lists of CDs and DVDs provided. Of the remaining 417 pages, 180 could be considered new police reports, almost all of which relate to conversations with witnesses that

occurred in the course of prosecution trial preparation. While the defendant has received a number of disks, most of them are either copies of disks the defendant independently received from CMHIP or contain a few photographs. This is not an amount of material that necessitates a continuance.

### APPLICABLE LAW

8. Consideration of a request for a continuance rests in the sound discretion of the trial court. *People v. Hampton*, 758 P.2d 1344, 1353 (Colo. 1988); *People v. Mann*, 646 P.2d 352, 358 (Colo. 1982). “A trial court is only required to grant a continuance if there is a compelling reason to do so. . . .” *People v. Brown*, No. 11SC441, 2014 WL 1355012 \* 5 (Colo. Apr. 7, 2014).

9. The People may properly object to a request for a continuance that will delay the trial under C.R.S. § 18-1-405, Colorado’s speedy trial statute, because the public has an interest in the effective enforcement of criminal laws. *People v. Arledge*, 938 P.2d 160, 166 (Colo. 1997). The Colorado Constitution’s speedy trial provision, Colo. Const. Art. II § 16, also protects society’s interest in a “speedy and final determination of criminal charges.” *People v. Deason*, 670 P.2d 792, 796 n. 10 (Colo. 1983). The speedy disposition of a criminal matter “has a significant deterring effect upon potential criminal conduct.” *United States v. Clendening*, 526 F.2d 842, 847 (5th Cir. 1976).

10. In addition to the constitutional and statutory guidance, the American Bar Association has formally adopted standards regarding speedy trial and the timely resolution of Criminal Cases specifically considering the interests of victims and witnesses that may be persuasive to the Court.<sup>2</sup> While obviously not constituting binding authority or having the persuasive value of

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<sup>2</sup> Standard 12-1.1 Purposes of the Standards on Speedy Trial and Timely Resolution of Criminal Cases

(a) The Standards on Speedy Trial and Timely Resolution of Criminal Cases have three main purposes: (1) to effectuate the right of the accused to a speedy trial; (2) to further the interests of the public, including victims and witnesses, in the fair, accurate, and timely resolution of criminal cases; and (3) to ensure the effective utilization of resources.

(b) These standards should be read in conjunction with other ABA Standards of Criminal Justice, and with recognition that fairness and accuracy are essential components of the criminal justice process. The standards are not intended to emphasize speedy disposition of cases to the detriment of the interests of the parties and the public, including victims and witnesses, in the fair, accurate and timely resolution of cases. In implementing these standards in individual cases and in developing policies for overall management of caseloads, jurisdictions should seek to ensure that both prosecutors and defense counsel have adequate opportunity to investigate their cases, consult with witnesses, review documents, make appropriate motions, and conduct other essential aspects of case preparation.

Standard 12-3.1 The public's interest in timely case resolution

appellate precedent, these guidelines do provide an appropriate list of factors for this court to consider.

11. When deciding a motion to continue, this Court must consider the prejudice to the moving party if the motion is denied, and the prejudice to the opposing party if the continuance is granted. *People v. Marsh*, -- P.3d --, 2011 WL 6425492 \* 11 (Colo. App. Dec. 22, 2011.)

12. The defendant must show a denial creates actual prejudice. *People v. Alley*, 232 P.3d 272, 274 (Colo. App. 2010); see *People v. Denton*, 757 P.2d 637, 638 (Colo. App. 1988) (defendant failed to demonstrate how additional time to prepare for trial would have helped defense effort).

13. Appellate courts look to the totality of the circumstances when determining whether the trial court committed an abuse of discretion by denying a continuance. *People v. Bakari*, 780 P.2d 1089, 1092 (Colo.1989); *Miller v. People*, 497 P.2d 992, 993 (Colo. 1972). The trial court

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The interest of the public, including victims and witnesses, in timely resolution of criminal cases is different from the defendant's right to a speedy trial. This interest should be recognized through formal adoption of policies and standards that are designed to achieve timely disposition of criminal cases regardless of whether the defendant demands a speedy trial. Reasons for developing effective policies and standards aimed at timely resolution of criminal cases include:

- (a) preserving the means of proving the charge(s) against the defendant;
- (b) maximizing the deterrent effects of prosecution and conviction;
- (c) increasing the likelihood that rehabilitative purposes of a sentence imposed if the defendant is convicted will be achieved;
- (d) minimizing the length of the periods of anxiety for victims, witnesses and defendants, and their families;
- (e) avoiding extended periods of pretrial freedom for defendants who pose risks of public safety or risks of flight;
- (f) reducing repetitious handling and review of files by police officers, prosecutors, defense counsel, judges, court staff, and others involved in cases;
- (g) reducing costs for jail operation (and avoiding or minimizing the costs of new jail construction) as the length of pretrial detention is minimized for defendants held in custody;
- (h) reducing the caseload pressures on pretrial services agencies, as the length of time on supervised release is minimized for released defendants;
- (i) better utilizing limited resources, and enhancing the opportunity for all of the institutions, agencies, and practitioners involved in criminal case processing to address high priority cases and issues; and
- (j) increasing public trust and confidence in the justice system.

may consider “any number of factors” when determining the “public’s interest in the efficiency and integrity of the judicial process.” *Brown*, 2014 WL 1355012 at \* 5.

14. Some factors a court may consider when determining a motion to continue under the totality of the circumstances include:

- The timeliness of the request<sup>3</sup>;
- The diligence of the party in preparing for trial<sup>4</sup>;
- The availability of witnesses at another date<sup>5</sup>;
- The position of the victim(s)<sup>6</sup>;
- Interference with the other necessary work of the court<sup>7</sup>;
- Age of the case and seriousness of the charge(s);
- Effect on children if the issue is continued and not resolved;
- Impact of a continuance on the safety of the parties or other persons;
- Status of the trial calendar for the session;
- Number, moving party, and grounds for previous continuances;
- Due diligence of counsel in promptly making a motion for continuance as soon as practicable and notifying opposing counsel and witnesses; period of delay caused by the continuance requested;
- A legitimate conflict with another court; consideration of the consequences to the public, the parties, the attorneys or witnesses if the case is continued;
- Availability of an interpreter;
- Any other factors that promote the fair administration of justice.

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<sup>3</sup> *People v. Apodaca*, 998 P.2d 25, 28 (Colo. App. 1999), cert. denied (Colo. 2000) (no abuse of discretion in denying defendant's request for continuance to enable defendant to raise money for private counsel and substitute private counsel for public defender, where there was no assurance that private counsel would be retained); *People ex rel. Gallagher v. County Court*, 759 P.2d 859, 861 (Colo. App. 1988).

<sup>4</sup> *E.g.*, *People v. Mann*, 646 P.2d 352 (Colo. 1982); *People v. Holcomb*, 532 P.2d 45, 48 (Colo. 1975); *People v. Denton*, 757 P.2d 637, 638 (Colo. App. 1988).

<sup>5</sup> *See People in the Interest of D.J.P.*, 785 P.2d 129 (Colo. 1990).

<sup>6</sup> *See* COLO. REV. STAT. § 24-4.1-303(3); *People v. Brown*, 2014 CO 25 (April 7, 2014) page 13.

<sup>7</sup> *See Johnson v. People*, 384 P.2d 454, 459 (Colo. 1963), cert. denied 376 U.S. 922 (1964). *But see People v. McCabe*, 546 P.2d 1289, 1290 (Colo. App. 1975) (court abused its discretion by denying defense motion for continuance on day of trial, requested in order to subpoena out-of-state alibi witness who unexpectedly could not afford cost of traveling to trial, where court considered the motion “an imposition” on the court).

15. Other factors specifically address the prejudice the People suffer when cases are needlessly continued. These include the deterioration in material witnesses' testimony or one witness' prospective inability to testify in court. *Marsh*, 2011 WL 6425492 at \* 11. Additional problems securing witnesses can include the administrative hurdles and costs the prosecution will face in obtaining a witness' presence at trial. *United States v. Trujillo*, 376 F.3d 593, 607 (6th Cir. 2004). The trial court is required to consider the "grave interests at stake in seeing further procrastination be avoided and that the trial be commenced without delay." *United States v. Bentvena*, 319 F.2d 916, 935 (2d Cir. 1963) cited in *People v. Brown*, No. 06CA1751, 2011 WL 1195778 \* 5 (Colo. App. Mar. 31, 2011). Continuances may not be granted where they "would interfere with the prompt dispatch of business in the various courts, tend to prolong the trial of criminal cases, and unnecessarily add materially to the expense of proper operation of the court system." *Arellano v. People*, 484 P.2d 801, 803 (Colo. 1971) (holding defendant did not carry his burden in showing continuance was necessary when weighed against the public interest).

16. Substantial delay of trial often hinders effective prosecution. "When criminal proceedings are delayed, tempers cool, memories fade, victims and witnesses are worn down by repeated court appearances, and victims and witnesses disappear." Albert Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L REV. 629 (1972); see *Barker v. Wingo*, 407 U.S. 514, 521 (1972) (stating delay is "not an uncommon defense tactic" where witness unavailability and fading memories weaken the prosecution's case); *Sibron v. New York*, 392 U.S. 40, 57 (1968) (litigation is better conducted when the dispute is fresh and additional facts may, if necessary, be taken without a substantial risk that witnesses will die or memories fade"); *Pagtalunan v. Galaza*, 291 F.3d 639, 643 (9th Cir. 2002) ("witnesses' memories will fade and evidence will become stale"); *United States v. Schreane*, 331 F.3d 548, 558 (6th Cir. 2003) (finding complained of delay benefitted defendant due to prosecution witness' memory lapses); *State v. Azania*, 865 N.E.2d 994, 999 (Ind. 2007) (quoting *Barker* and finding delay is often a defendant tactic); *State v. Ariegwe*, 167 P.3d 815, 839-40 (Mont. 2007) (fading memories and disappearing witnesses can "seriously" weaken prosecution case); *People v. Vernace*, 756 N.E.2d 66, 67 (N.Y. 2001) ("delay here has made the case against defendant more difficult to prove beyond a reasonable doubt") *McGregor v. State*, 394 S.W.3d 90, 116 (Tex. App. 2012) (recognizing that death of witness and delay in prosecution benefitted the defendant); *Wells v. McNeil*, No. 08-61621-CIV, 2009 WL 2767659 \* 12 (S.D. Fla. Aug. 25, 2009) (stating defendant delays may have been sought so witnesses could disappear, memories could fade, and evidence could go stale or disappear).

## ARGUMENT

17. The People respectfully object to any further delay in this case and object to the defendant's request for a continuance of the trial date in this case. Pursuant to C.R.S. § 24-4.1-302.5, the People have consulted with the victims in this case, and the large majority of the victims request that the People inform the Court that they also object to the defendant's requested continuance. In the brief time the People have had to contact the victims, one hundred

and fifty-seven (157) victims responded to the People's request for input. One hundred and fifty of the victims (150) object to any further delay of the trial, two (2) victims do not object to a delay of two months, and three (5) victims did not take a position on the defendant's request for a continuance.

18. Victims in Colorado have statutory rights to timely disposition of criminal cases. Under the Colorado Victim Right's Act ("VRA"), the victim has the 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." C.R.S. § 24-4.1-302.5(1.5)(o). Further, the VRA states, "that the full and voluntary cooperation of victims of and witnesses to crimes with state and local law enforcement agencies as to such crimes is imperative for the general effectiveness and well-being of the criminal justice system." COLO. REV. STAT. § 24-4.1-301.

19. The crimes alleged in the instant case occurred almost two years and five months ago. The Victims and their families desire closure and resolution in this case. The crimes alleged, along with the delayed legal proceedings, have been incredibly difficult for the victims. Continuing the trial for an additional two to three months prolongs the stress of the Victims unnecessarily.

20. Additionally, the victims have had to continually recount the events of this crime to police, investigators, and prosecutors, etc. for over two years and five months. The Victims have been forced to continually relive the alleged crimes and the aftermath associated with this crime each and every time another a court date has been set in this case. While the District Attorney's Office appreciates and respects the extreme care this Court has taken to assure due process in this case, at some point, the Defendant's unsubstantiated request for a delay cannot give rise to a continuance mandated by due process principles.<sup>8</sup> After two years and five months, it is time for the Court to allow the victims and witnesses to place the criminal charges alleged in this case in the past and it is time for the Court to allow the case to move forward so that the victims and witnesses may move on with the rest victims' lives.

21. The People acknowledge that the Defendant waives his statutory right to a speedy trial if the Court grants a continuance at his request. However, the Victims and the People have not

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<sup>8</sup> The People believe that the Due Process Clauses of the state and federal constitutions can provide the only real constitutional basis upon which the defendant can assert a constitutional argument that a continuance is mandated. The defendant cites 8 provisions of the U.S. Constitution and 11 provisions of the Colorado Constitution that he asserts would be violated by this court's decision to deny his request for a continuance. (See Motion p. 6). Several of the federal constitutional provisions would appear totally inapplicable, for instance: The First Amendment (Freedom, of religion, speech, and the press); the Fourth Amendment (Searches and seizures regulated); the Ninth Amendment (Reserving rights to retained by the People); and the Tenth Amendment (Reserving to the states and the People powers not delegated to the United States). Similarly, many of the provisions of the Colorado Constitution cited by the defendant appear to be completely inapplicable, to wit: Art II Sec, 7 (Search and Seizure); Art II. Sec 10 (Freedom of speech and the press); Art II, Sec 11 (Ex post facto laws), Art II, Sec 18 (Self-incrimination); Art II, Sec 23 (Right to a jury trial of 12 persons); Art II, Sec 25 (Reservation of non-enumerated rights).

waived their analogous rights. The VRA assures victims that, “the court, the prosecutor, and other law enforcement officials will take appropriate action to achieve a swift and fair resolution of the proceedings.” Colo. Rev. Stat. § 24-4.1-302.5(1.5)(o). After all, it was the intention of the legislature in passing the VRA to ensure that victims of crimes are “honored and protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protection afforded criminal defendants.” Colo. Rev. Stat. § 24-4.1-301.

22. The People appreciate defense counsel’s extensive experience in trial preparation. The amount of time left before the scheduled trial, at least 45 days, does not prevent competent counsel from effectively trying this case.

23. The People therefore object to the Defendant’s request for a continuance and ask the Court to deny the Defendant’s Motion to Continue Trial. The People further notify the Court that the victims object, and that the victims request that the Court deny the defendant’s Motion to continue. Considering the victims’ objection, and the prejudice that the victims will suffer if the court grants another continuance, the People respectfully urge the Court to take appropriate action to achieve a swift and fair resolution of this trial pursuant to Colo. Rev. Stat. § 24-4.1-302.5(1.5)(o).

24. The defendant has had more than adequate time to prepare for trial, and he has not established that he is entitled to a continuance. This motion should be denied.

George H. Brauchler, District Attorney

By   
District Attorney  
Registration No. 25910

**CERTIFICATE OF MAILING**

I hereby certify that I have deposited a true and correct copy of the foregoing in the Public Defender’s Mailbox located at 6450 S. Revere Pkwy. Centennial, CO 80111, addressed to:

TAMARA BRADY, ESQ.  
DANIEL KING, ESQ.  
KATHERINE SPENGLER, ESQ.  
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KRISTEN NELSON, ESQ.  
OFFICE OF THE PUBLIC DEFENDER

Dated: 12/5/14

By 

DISTRICT COURT ARAPAHOE COUNTY, COLORADO Court Address: Arapahoe County Justice Center 7325 S. Potomac St., Centennial, CO 80112	
THE PEOPLE OF THE STATE OF COLORADO vs. Defendant: <b>JAMES EAGAN HOLMES</b>	
	<p style="text-align: center;">COURT USE ONLY</p> Case Number: <b>12CR1522</b> Division/Ctrm: <b>201</b>

**COURT ORDER RE: DEFENSE MOTION D-255**

THE COURT, being fully advised, and being duly apprised of the relevant facts and law, hereby DENIES defense motion D-255.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2014

BY THE COURT

\_\_\_\_\_  
District Court Chief Judge Carlos A. Samour, Jr.