

REDACTED

DISTRICT COURT, ARAPAHOE COUNTY STATE OF COLORADO Arapahoe County Justice Center 7325 S. Potomac Street Centennial, Colorado 80112	<b>Filed</b>  JAN 05 2015  CLERK OF THE COMBINED COURT ARAPAHOE COUNTY, COLORADO
THE PEOPLE OF THE STATE OF COLORADO vs. Defendant(s):  <b>JAMES EAGAN HOLMES</b>	<b>COURT USE ONLY</b>
Attorney: GEORGE H. BRAUCLER 18 <sup>th</sup> Judicial District Attorney 6450 S. Revere Pkwy. Centennial, CO 80111 Phone: (720) 874-8500 Atty. Reg. #: 25910	Case Number: <b>12CR1522</b> Division: <b>201</b>

**REPLY IN SUPPORT OF MOTION P-108**

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

1. This Court has ordered the defendant to provide an expert report summary of the testimony of expert witnesses who will testify during the trial. *See* Order granting P-53. The Court's order did not contain any limitation that exempted penalty phase witnesses. Neither the language nor the structure of Crim. P. 16 exempts penalty phase expert witnesses from the Court's authority to order the disclosure of expert reports or summaries of testimony. Nor do Crim. P. 32.1 and C.R.S. § 18-1.3-1201(3)(c) limit the Court's authority to order discovery of the opinions of defense expert witnesses pursuant to Crim. P. 16. The defendant's reading of the rule and the statute would create a situation where a court would be without the authority to order the defense to provide expert reports or summaries of expert testimony during the penalty phase of the trial, while maintaining the authority to do so during the sentencing phase. Essentially, this would lead to a situation where the prosecution could never adequately prepare to cross-examine or rebut a defense expert witness who would testify during the penalty phase. There is no indication that the legislature or the Supreme Court intended such an absurd result in drafting the statute and the rule. A statutory interpretation leading to an illogical or absurd result will not be followed. *Frazier v. People*, 90 P.3d 807, 811 (Colo. 2004); *In re Marriage of Wiggins*, 279 P.3d 1, 7 (Colo. 2012) ("The standard principles of statutory construction apply to our interpretation of court rules").

2. The defendant additionally argues that P-53 does not apply to the expert witnesses to be called during the sentencing phase because the motion requested discovery related to expert witnesses who will be called at trial. The defendant's argument appears to be that the sentencing phase of the trial is not part of the trial at all, but is in fact something entirely different. The

defendant's argument should be rejected—the sentencing phase of a capital trial is part of the trial, and is not the type of post-trial, post-conviction proceeding discussed in Crim. P. 32.2 and *People v. Owens*, 330 P.3d 1027 (Colo. 2014). Crim. P. 32.2 establishes a *post-trial* unitary review, and *Owens* held that this *post-trial* procedure, like all other *post-trial* procedures is not governed by Crim. P. 16. Here, in contrast, Motion P-53 requested expert discovery related to experts who would testify *during* trial, not afterwards. While no Colorado court has considered the specific assertion raised by the defendant, it has been rejected in California when considering the question of reciprocal discovery in the sentencing phase of a capital trial:

Defendant asserts that the penalty phase is a sentencing proceeding and not part of a criminal “case” or “trial” within the meaning of the foregoing provisions. (See *People v. Overstreet* (1986) 42 Cal.3d 891, 896, 231 Cal.Rptr. 213, 726 P.2d 1288 [term “trial” is “ambiguous as to whether it includes proceedings following the determination of guilt prior to sentencing”]; *People v. Gilbert* (1944) 25 Cal.2d 422, 428, 154 P.2d 657; *People v. Williams* (1939) 14 Cal.2d 532, 536–537, 95 P.2d 456.) As the People observe, however, we have confirmed that the penalty phase of a capital trial is merely a part of a single, unitary criminal proceeding. (*People v. Robertson* (1989) 48 Cal.3d 18, 45–46, 255 Cal.Rptr. 631, 767 P.2d 1109.) In *Robertson*, construing the similar notice provision in former section 190.3, we observed that “[w]here the question of notice arises in the context of the initial trial in which the guilt and penalty phases occur in immediate sequence and thus are part of a unitary proceeding, we have construed ‘trial’ as the whole proceeding; hence notice must be given in advance of the guilt phase. [Citation.] ... We conclude, therefore, that the ‘trial’ to which former section 190.3 refers embraces the original trial, as defined above, or the retrial, be it of the entire proceeding or the penalty phase only.” (*People v. Robertson, supra*, 48 Cal.3d at pp. 45–46, 255 Cal.Rptr. 631, 767 P.2d 1109, italics added; see also *People v. Hardy* (1992) 2 Cal.4th 86, 94–95, 5 Cal.Rptr.2d 796, 825 P.2d 781.)

As the Court of Appeals herein observed, “[a]lthough *Robertson* did not consider the issue before us, its language embracing the penalty phase within the concept of the ‘trial’ under section 190.3 is authority that the proceeding is unitary and should not be arbitrarily broken down into distinct and separate procedures. From this it follows that section 1054, which refers to regulation of discovery in a criminal trial, applies to the penalty phase, which is part of the trial.” (See also § 190.1 [“A case in which the death penalty may be imposed ... shall be tried in separate phases....”]; *People v. Breaux* (1991) 1 Cal.4th 281, 311–312, and fn. 10 [general discovery principles apply to penalty phase evidence]; *Izazaga, supra*, 54 Cal.3d at p. 375, 285 Cal.Rptr. 231, 815 P.2d 304 [“The phrase ‘at trial’ means exactly that—at the trial, not merely during the prosecution's case-in-chief.”].)

*People v. Superior Court* 859 P.2d 102, 105–06 (Cal.,1993). See also *People v. Hart*, 976 P.2d 683, 752–53 (Cal.,1999) (Errors occurring during the capital phase are considered under “trial error” analysis.”); *People v. Shaw* 713 N.E.2d 1161 (Ill.,1999) (Same); *State v. Robertson*, 712

So.2d 8, 36 (La.,1998) (“[T]he penalty phase of a first degree murder trial, in which a jury of 12 men and women must assess and weigh the evidence in order to make a determination as to whether the defendant is sentenced to life in prison or to die by lethal injection, should not be considered a ‘post trial proceeding.’”); *State v. Berry*, 650 N.E.2d 433, 439 (Ohio 1995) (Request for competency hearing between guilt and mitigation phases of capital murder prosecution was made “after trial ha[d] begun” within meaning of statute requiring defendant to show good cause in order to obtain midtrial competency hearing, despite defendant's contention that mitigation phase of prosecution was a separate trial.”)

3. If the People had argued that *they* were exempt from the requirements of Crim. P. 16 for issues to be raised in the penalty phase, the People expect that the defendant would argue that each and every provision of Crim. P. 16 related to discovery applies to the People’s obligations throughout the trial.

4. This Court should, as previously ordered, require the defendant to provide the People with reports or summaries for their penalty-phase expert witnesses so that the people can adequately prepare for cross-examination and adequately determine whether they need rebuttal witnesses, and if so seek out and arrange for rebuttal expert witnesses. Otherwise, the sentencing phase will truly be a trial by ambush.

GEORGE H. BRAUCHLER, District Attorney

By   
Deputy District Attorney  
Registration No. 35892

**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.  
KRISTEN NELSON, ESQ.  
OFFICE OF THE PUBLIC DEFENDER

Dated: 1/5/15

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>	COURT USE ONLY
	Case Number: <b>12CR1522</b> Division/Ctrm: <b>201</b>
<b>COURT ORDER</b> <b>PEOPLE'S MOTION P-108</b>	

THE COURT, being fully advised, and being duly apprised of the relevant facts and law, hereby Grants the **PEOPLE'S MOTION P-108**.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2015.

BY THE COURT

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