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DISTRICT COURT, ARAPAHOE COUNTY STATE OF COLORADO Arapahoe County Justice Center 7325 S. Potomac Street Centennial, Colorado 80112	FILED NOV 26 2014 CLERK OF THE COMBINED COURTS ARAPAHOE COUNTY, COLORADO
THE PEOPLE OF THE STATE OF COLORADO vs. Defendant(s): **JAMES EAGAN HOLMES**	COURT USE ONLY
Attorney: GEORGE H. BRAUCHLER 18th Judicial District Attorney 6450 S. Revere Pkwy. Centennial, CO 80111 Phone: (720) 874-8500 Atty. Reg. #: 25910	Case Number: **12CR1522** Division: **201**

RESPONSE TO DEFENSE MOTION D-254

This pleading is filed by the District Attorney for the 18th Judicial District.

1. The defendant has filed Motion D-254, "MOTION TO DECLARE DISCLOSURE PROVISIONS OF SECTION § 18-1.3-1201(3)(C) AND CRIM. P. 32.1(D)(7) UNCONSTITUTIONAL AS APPLIED IN THIS CASE OR, ALTERNATIVELY, TO EXTEND THE DEFENSE'S SENTENCING DISCLOSURE DEADLINE." [D-254].

2. Statutes are presumed to be constitutional and the party challenging the constitutionality of a statute must show it to be unconstitutional beyond a reasonable doubt. *See, e.g., Hinojos-Mendoza v. People*, 169 P.3d 662, 668 (Colo. 2007); *People v. Loomis*, 698 P.2d 1320, 1321 (Colo. 1985). In order for a court to invalidate a statute, "it must be sufficiently infirm so that no limiting construction consistent with the legislature's intent will preserve its constitutionality." *People v. Hickman*, 988 P.2d 628, 634, (Colo. 1999).

3. An "as-applied" challenge requires the party challenging the constitutionality of a statute to show that the statute is unconstitutional under the specific factual situation at issue. *People v. Bowles,* 280 P.3d 55, 61 (Colo. App. 2011) ("An as applied challenge alleges that the statute is unconstitutional as to the specific circumstances under which the defendant acted.") When a litigant makes an as-applied challenge to a court rule, the question of constitutionality is considered in a manner similar to that of statutes. *E.g., In re Express-News Corp.*, 695 F.2d 807 (5th Cir. 1982) (considering an as-applied challenge to a court rule that prohibited any person from interviewing a juror concerning deliberations).

4. At the outset, it should be noted that Motion D-254 appears to argue that each and every potential defense penalty phase witness is also a potential guilt phase witness. If there are, in fact, defense witnesses who would only be called regarding issues related to sentencing, then the arguments contained in D-254 would not appear to apply to them.

5. In paragraphs 13 and 14, the defendant argues that the requirement that he provide notes that comprise a substantial recitation of witness statements and relate to the subject matter of the testimony is unconstitutional. In *People v. Martinez*, 970 P.2d 469 (Colo. 1980), the Colorado Supreme Court discussed its interpretation of this requirement and upheld its facial constitutionality. While the defendant provides his own interpretation of the requirement as to the production of notes, he does not indicate how this particular requirement is unconstitutional as applied to him.

6. The defendant's main argument is that some of the witnesses he might desire to call during any penalty phase could also be guilt phase witnesses, and that areas of their penalty phase and guilt phase testimony could overlap. The defendant asserts that this circumstance renders the disclosure provisions unconstitutional as applied to him because he might have to make disclosures as to witnesses who would testify during the guilt phase related to the issue of sanity but whom he might not call during the penalty phase depending on the way that the evidence develops at trial. Because the defendant is required to make additional disclosures as to penalty phase witnesses that do not exist for guilt-phase witnesses, he argues that providing disclosures for such a witnesses would place the prosecution at an unfair advantage. He also argues that if he declines to provide the required penalty phase disclosures for such a witness, the disclosure requirements would deprive him of his right to present mitigation evidence.

7. The defendant cites a number of cases which he argues stand for the proposition that the prosecution would receive a constitutionally prohibited "unfair advantage" if the defendant provided disclosures for a potential penalty phase witnesses but only called the witness during the guilt phase. None of the cases cited by the defendant support this proposition. *Wardius v. Oregon*, 412 U.S. 470 (1973) examined an Oregon statute that required the defendant to provide discovery related to notice of alibi, but did not impose reciprocal discovery obligations on the prosecution. The court found that the absence of a reciprocal discovery obligation rendered the statute unconstitutional, but praised the concept of reciprocal discovery in general: "'The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as 'due process' is concerned, for (a rule) which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence." 412 U.S. at 474. The defendant does not argue that a lack of reciprocity, such as existed in *Wardius*, exists under the Colorado statute. *Williams v. Florida,* 399 U.S. 78 (1970), also cited by the defendant, is particularly instructive. *Williams* upheld the general constitutionality of required defense disclosures related to notice of alibi. The defendant cites Justice Black's dissent in *Williams* for a general proposition that requiring a defendant to provide pretrial discovery regarding an alibi would violate his rights. Obviously a dissent is not precedent, and in fact

Justice Black made an argument in dissent—clearly rejected by the majority opinion—that is very similar to the defendant's argument in this case, namely that reciprocal pretrial discovery would unconstitutionally burden a defendant's right to a fair trial if he changed his mind about presenting the evidence required to be disclosed:

> When a defendant is required to indicate whether he might plead alibi in advance of trial, he faces a vastly different decision from that faced by one who can wait until the State has presented the case against him before making up his mind. Before trial the defendant knows only what the State's case might be. Before trial there is no such thing as the 'strength of the State's case'; there is only a range of possible cases. At that time there is no certainty as to what kind of case the State will ultimately be able to prove at trial. Therefore any appraisal of the desirability of pleading alibi will be beset with guesswork and gambling far greater than that accompanying the decision at the trial itself. Any lawyer who has actually tried a case knows that, regardless of the amount of pretrial preparation, a case looks far different when it is actually being tried than when it is only being thought about.

399 U.S. at 109. The defendant's argument in Motion D-254 is, at its heart, Justice Black's dissent applied to the defendant's description of the circumstances he faces in this case. That argument, however, was rejected by the Supreme Court in *Williams*. The defendant also cites *Washington v. Texas*, 388 U.S. 14 (1967), which held that a state could not categorically prohibit persons charged as principals, accomplices, or accessories from testifying on behalf of a defendant related to the same criminal episode. The legal principle expressed in *Washington* is clear enough, but has nothing to do with the circumstance the defendant claims he is in. No rule or statute related to this case has categorically prohibited the defendant from calling a particular class of witnesses who might have information relevant to mitigation. *A.M. v. A.C.*, 296 P.3d 1026 (Colo. 2013) was not a criminal case and did not deal with any issue remotely related to the questions raised in Motion D-254. *Harris v. People*, 888 P.2d 259 (Colo. 1995) did not address any question related to defense discovery obligations, but instead examined a prosecutor's comments comparing a defendant to a Saddam Hussein. Nothing from that case supports the defendant's assertions regarding his pretrial discovery obligations. In paragraph 18, the defendant cites *Mills v. Maryland*, 486 U.S. 367 (1988) and *People v. Tenneson*, 788 P.2d 786 (Colo. 1990) for the proposition that any overlap between the subject matter of a defense witness who might testify at both the guilt phase and the sentencing phase provides the prosecution with an unfair constitutional benefit. Neither of these cases considered any issue even remotely related to the issues raised in Motion D-254.

8. Nothing in the appellate precedent (or appellate dissents) cited by the defendant supports his proposition that requiring pretrial disclosure of defense penalty phase witnesses when their testimony might overlap with guilt phase testimony violates the defendant's constitutional rights. The fact that a defendant might change his mind about calling a witness does not change this fact. States can require a defendant to provide pretrial discovery of penalty phase witnesses, and the fact that the defendant has entered a plea of not guilty by reason of insanity does not change

this. The defendant has not demonstrated that Colorado's pretrial disclosure requirements place the prosecution at an unconstitutional unfair advantage.

9. In paragraphs 18 and 19, the defendant asserts that Colorado's pretrial disclosure requirements are unconstitutional because he might chose not to provide the required disclosures, and thus lose the ability to call witnesses at any sentencing phase. Colorado law provides the defendant with a mechanism to call witnesses at a sentencing hearing, with the constitutionally permissible requirement that he provide pretrial disclosure related to those witnesses. If the defendant elects not to follow Colorado's required process related to pretrial disclosure, that is his choice, and the fact that Colorado law provides him with such a choice does not deprive him of any constitutional right. In his assertions to the contrary, the defendant cites *Simmons v. United States*, 390 U.S. 377 (1968) and *Apodaca v. People*, 712 P.2d 467 (Colo. 1985). *Simmons* stands for the proposition that a defendant's statements made at a suppression hearing to establish standing to challenge the constitutional validity of a search cannot be used against him at trial to establish guilt. This case dealt with the *admissibility* of evidence, and the implications of the *Simmons* decision are contrary to the defendant's argument. If *Simmons* actually stood for the defendant's proposition, then it would have created a right for a defendant to present evidence to establish standing *ex parte* and *in camera*. After all, why should a defendant facing a suppression hearing have to make a choice between presenting evidence in a form accessible to the prosecution when the prosecution would thus be made aware of the contents of the testimony? *Simmons* held that a defendant could present such testimony, but in a circumstance where the prosecution would be present and could engage in cross-examination. *Apodoca* dealt with a defendant's opportunity to attack the admissibility of prior-conviction evidence that could potentially be used to impeach his trial testimony, and held that a trial court must timely rule on such motion. This case does not stand for the defendant's proposition that a state cannot require him to elect between following a constitutional pretrial disclosure procedure and not calling his witnesses.

10. This court has already issued a protective order regarding the use of information provided in the required death penalty disclosures. Order D-156. The defendant acknowledges the existence of this protective order in Paragraph 20, and appears to acknowledge that it would be feasible for this Court to enforce that order if the prosecution were to "question witnesses about information contained in these disclosures at the merits phase of the case. . ." The defendant asserts that the disclosures would somehow provide the prosecution with information that could be used to develop general strategies of cross-examination or argument notwithstanding the protective order. The defendant cites no precedent for the proposition that such a hypothetical limitation on the effectiveness of a protective order would deprive him of any constitutional right. The defendant's argument ignores the reality that the law often places limitations on the prosecution's use of information, whether pursuant to a protective order or otherwise. Were the defendant's arguments correct, Colorado's required capital phase disclosure requirements would be unconstitutional in every case where a defendant pleads not guilty by reason of insanity, but he has not presented the court with anything other than a conclusory statement that this is the case. The defendant has not demonstrated that this Court's protective order would be ineffective.

11. The defendant has not established any constitutional infirmity with Colorado's pretrial disclosure requirements, therefore his alternate request for this court to waive the requirements of pretrial disclosure until after the guilt phase has been completed (See paragraphs 22 and 23) should be rejected.

12. The motion should be denied without a hearing.

Respectfully submitted,
GEORGE H. BRAUCHLER, District Attorney

By: _____
Chief/Senior Deputy District Attorney
Registration No. 20035

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: 11/26/14 By: _____

DISTRICT COURT ARAPAHOE COUNTY, COLORADO Court Address: Arapahoe County Justice Center 7325 S. Potomac St., Centennial, CO 80112	
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COURT ORDER RE: DEFENDANT'S D-254

THE COURT, being fully advised, and being duly apprised of the relevant facts and law, hereby DENIES: DEFENDANT'S MOTION D-254.

Dated this _____ day of _____, 2014.

BY THE COURT

_____

District Court Chief Judge Carlos A. Samour, Jr.