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District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	FILED IN ARAPAHOE COUNTY COMBINED COUNTY, COLORADO 15 JAN -2 PM 3: 32
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff	
v.	
JAMES HOLMES, Defendant	σ COURT USE ONLY σ
DOUGLAS K. WILSON, Colorado State Public Defender Daniel King (No. 26129) Tamara A. Brady (No. 20728) Chief Trial Deputy State Public Defenders 1300 Broadway, Suite 400 Denver, Colorado 80203 Phone (303) 764-1400 Fax (303) 764-1478 E-mail: state.pubdef@coloradodefenders.us	Case No. 12CR1522 Division 201
RESPONSE TO PROSECUTION'S MOTION TO COMPEL COMPLIANCE WITH COURT ORDER P-43, RELATING TO EXPERT WITNESS DISCOVERY [P-108]	

James Holmes, through counsel, submits the following in response to the prosecution's Motion to Compel Compliance with Court Order P-43, Relating to Expert Witness Discovery [P-108]:

1. In Motion P-108, the prosecution argues that the Court's Order P-43,¹ which is premised on Rule 16, applies to the expert witnesses the defense intends to call at any sentencing hearing in this case, and that the defense should be required to provide either reports or summaries of these experts' testimony pursuant to Crim. P. 16(II)(d)(2). This argument is simply untenable.

2. As an initial matter, Motion P-43 itself referenced only "witnesses who will testify as expert witnesses [for the defense] *at trial or at a pre-trial hearing.*" Motion P-43, p. 1 (emphasis added). The motion is exclusively premised on Rule 16. It makes no mention whatsoever of sentencing witnesses. Likewise, the Court's Order granting the prosecution's request in Motion P-43 relies on Crim. P. 16(II)(b)(2).

3. Thus, the only possible justification for concluding that Order P-43 applies to the defense's sentencing experts is if Crim. P. 16 itself applies to capital sentencing proceedings. It clearly does not.

4. As its title plainly indicates, Crim. P. 16 governs discovery procedures "Discovery and Procedure Before Trial." In contrast, Crim. P. 32.1 is an entirely self-contained,

¹ In P-108, the prosecution repeatedly refers to "Motion P-53" and "Rule 32.2." The defense assumes that these were repeated typographical errors, and that the prosecution meant to reference Motion P-43 and Rule 32.1.

comprehensive rule that exclusively governs capital sentencing proceedings. Subsection (a) of the rule states, “The purpose of this rule is to establish a uniform, expeditious procedure for conducting death penalty sentencing hearings in accordance with section 18-1.3-1201, 6 C.R.S.”

5. Subsection (d) of the rule is expressly titled, “Discovery Procedures for Sentencing Hearing.” It contains lengthy and detailed provisions for how discovery is to be conducted with respect to a capital sentencing proceeding. Moreover, Crim. P. 32.1(d)(7)(A)(III) specifically addresses disclosures the defense is required to make with regard to any experts it intends to call at sentencing.² Crim. P. 32.1 makes no reference to Crim. P. 16, and there is absolutely no indication in either rule that the discovery requirements of Crim. P. 16(II)(2)(d) apply to a capital sentencing proceeding *in addition to* the comprehensive discovery obligations explicitly set forth in Crim. P. 32.1(d)(7).

6. Notably, the Colorado Supreme Court recently held that the discovery provisions of Crim. P. 16 do not apply to Crim. P. 32.2, which governs post-trial procedures in death penalty cases. The Court concluded that Rule 32.2 was intended to be a self-contained set of procedures that apply in cases where the death penalty has already been imposed, and that a ruling to the contrary would amount to a “highly impactful expansion of Rules 16 and 32.1” *People v. Owens*, 330 P.3d 1027, 1031 (Colo. 2014).

7. The Court also explicitly noted that “no such 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.” *Id.*

8. Based on this precedent, and the plain language of Crim. P. 16 and Crim. P. 32.1, it is clear that Crim. P. 16 does not apply to capital sentencing proceedings, nor does Order P-43.

9. Finally, the defense strongly disputes the prosecution’s deeply ironic allegation that it “has purposefully engaged 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 P-108, p. 2. The defense has made its disclosures pursuant to Crim. P. 32.1 in good faith. It is not trying to hide the ball. When it was appropriate for a defense sentencing expert to write a report, the defense requested that the expert write a report. Notably, defense sentencing expert ██████████ wrote a report in this case, which was disclosed to the prosecution in early September. Defense sentencing expert ██████████ is likewise in the process of writing a report. The defense has indicated to the prosecution that it will disclose this report when it is completed. Other defense experts did not prepare reports because it was neither appropriate nor

² Crim. P. 32.1(d)(7)(A)(III) requires the defense to disclose “Any 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.” Moreover, Crim. P. 32.1(d)(7)(A)(I) requires the defense to provide “the subject matter” of the testimony of any witness the defense may call at sentencing, as well as “any written or recorded statement of that witness, including notes, that comprise substantial recitations of witness statements and relate to the subject matter of the testimony.”

necessary to do so. For example, [REDACTED]

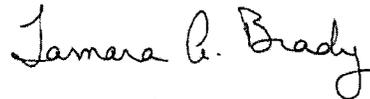
[REDACTED] Moreover, the defense indicated to the prosecution in its responsive letter dated December 29, 2014, that [REDACTED] is still reviewing the voluminous materials in the case and that the defense can provide a more detailed description of his testimony once he has completed this review. If [REDACTED] ultimately writes a report, the defense will certainly provide it to the prosecution.

10. The prosecution's assertions in Motion P-108 are meritless, and the motion should be denied.

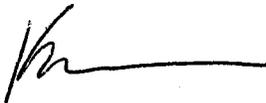
Mr. Holmes files this response, and makes all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, on the following grounds and authorities: the Due Process Clause, the Right to a Fair Trial by an Impartial Jury, the Rights to Counsel, Equal Protection, Confrontation, and Compulsory Process, the Rights to Remain Silent and to Appeal, and the Right to be Free from Cruel and Unusual Punishment, pursuant to the Federal and Colorado Constitutions generally, and specifically, the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitutions, and Article II, sections 3, 6, 7, 10, 11, 16, 18, 20, 23, 25 and 28 of the Colorado Constitution.



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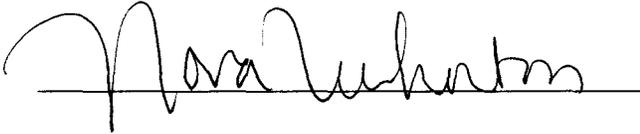
Dated: January 2, 2015

I hereby certify that on January 2, 2015, I

mailed, via the United States Mail,
 faxed, or
 hand-delivered

a true and correct copy of the above and foregoing document to:

George Brauchler
Jacob Edson
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A handwritten signature in black ink, appearing to read "Lisa Teesch-Maguire", is written over a horizontal line.