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| District Court, Arapahoe County, Colorado<br>Arapahoe County Courthouse<br>7325 S. Potomac St., Centennial, CO 80112   |  |
| THE PEOPLE OF THE STATE OF COLORADO,<br>Plaintiff  |  |
| v.   |  |
| <b>JAMES HOLMES,</b><br>Defendant  | σ COURT USE ONLY σ                           |
| DOUGLAS K. WILSON, Colorado State Public Defender<br>Daniel King (No. 26129)<br>Tamara A. Brady (No. 20728)<br>Chief Trial Deputy State Public Defenders<br>1300 Broadway, Suite 400<br>Denver, Colorado 80203<br>Phone (303) 764-1400 Fax (303) 764-1478<br>E-mail: state.pubdef@coloradodefenders.us | Case No. <b>12CR1522</b><br><br>Division 201 |
| <b>AMENDED MOTION TO EXCLUDE UNTIMELY ENDORSED EXPERT REBUTTAL<br/>TESTIMONY, OR FOR ALTERNATIVE SANCTION [D-285a]</b>   |  |
| <b>**SUPPRESSED FILING**</b>   |  |

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### CERTIFICATE OF CONFERRAL

The defense conferred with the prosecution concerning the subject matter of this motion. The prosecution responded, in relevant part:

“The new report from Dr. Gur discusses issues that were not discussed in previous reports. In fact, from our reading of Dr. Gur’s report, it is not even complete [REDACTED]  
[REDACTED]

We have requested that [REDACTED] draft reports. They are in the process of doing so. Since we do not consider the report from Dr. Gur complete even to this date, pending information [REDACTED], we have not yet asked Dr. Resnick to make a full assessment, and have not yet asked him to prepare any reports.

We therefore object to any such motion in all respects.”<sup>1</sup>

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<sup>1</sup> The defense requests an opportunity to reply in writing if the prosecution takes a similar position in its written response to this motion.

Pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments and article II, sections 16, 20, 23 and 25 of the Colorado Constitution, Crim. P. 16 and Crim. P. 32.1, James Holmes, through counsel, moves this Court to preclude Dr. Phillip Resnick and [REDACTED] from testifying as rebuttal experts to Dr. Gur in the merits and sentencing phases of the trial as described in pleading P-120, or impose an alternative sanction such as an extension of the recess the Court intends to take between jury selection and the commencement of the trial. In the event the Court disagrees, and at a minimum, the defense moves the Court for an order requiring the prosecution to provide reports or summaries of these experts' proposed testimony. In support of this motion, the defense states the following:

1. In pleading P-120, filed on Friday, March 20, 2015, the prosecution stated that it had received a "new report" from defense expert Dr. Raquel Gur on March 3, 2015, and that "after reviewing the report," the prosecution intends to call [REDACTED] and Dr. Phillip Resnick "to rebut Dr. Gur's testimony in whichever phase or phases of the trial she is called to testify by the defense."

2. These endorsements are untimely, and the Court should exclude any such expert testimony.

3. After protracted litigation, the prosecution previously stated in no uncertain terms that it *did not* intend to call Dr. Resnick at the merits phase of the trial *unless* the defense experts provide "new and unexpected opinions and assertions in their testimony," such as "a new possible diagnosis, hypothesis, theory or conclusion" that was not contained in their original report "because it had not occurred to them at the time." Response to Motion D-263, p. 1. Based on these assertions, the Court ruled that the testimony of Drs. Resnick and Mohandie would be strictly limited to new issues that come up at trial: "Drs. Resnick and Mohandie cannot render previously undisclosed opinions that do not rebut a new diagnosis, hypothesis, theory, or conclusion offered by a defense expert." See Order D-263-a, pp. 6-7. Nor has Dr. Resnick previously been endorsed as a rebuttal expert to Dr. Gur in any penalty phase of this case. In P-110, the prosecution endorsed Dr. Resnick as a rebuttal expert to [REDACTED].

4. The prosecution now appears to be second-guessing its decision to limit Dr. Resnick's role in the trial, and is attempting to use Dr. Gur's updated report as an excuse to expand the scope of Dr. Resnick's testimony.

5. Dr. Gur's "new report" [REDACTED] does not provide a basis for the prosecution to newly endorse *both* Dr. Resnick and [REDACTED] as rebuttal witnesses to her testimony in *both* the merits and penalty phases of this case. Dr. Gur does not espouse any opinions in her 4-page updated report that are new or different than the opinions stated in her original report. [REDACTED]