

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	<p style="text-align: center;">σ COURT USE ONLY σ</p>
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. JAMES HOLMES, Defendant	
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
AMENDED MOTION TO EXCLUDE UNTIMELY ENDORSED EXPERT REBUTTAL TESTIMONY, OR FOR ALTERNATIVE SANCTION [D-285a] **SUPPRESSED FILING**	

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.”¹

¹ 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]

[REDACTED]

6. Similarly, when the prosecution first endorsed [REDACTED] on January 5, 2015, just two weeks before jury selection began in this case, his role in the case was limited to providing rebuttal testimony at sentencing to [REDACTED], or to “rebut any other psychiatric or mental health-related testimony in the sentencing phase that was not previously described in an expert report or summary of opinions to be testified about.” P-110, p. 2.

7. There is nothing provided in Dr. Gur’s updated report that would provide the prosecution with a new basis to dramatically expand [REDACTED] role in the case as a merits phase (or sentencing phase) rebuttal expert to Dr. Gur.

8. The inequity with respect to the amount of information exchanged between the parties in this case regarding their respective experts is stark. The defense has now provided the prosecution with two reports authored by Dr. Gur, two reports authored by Dr. Hanlon, a preliminary report from [REDACTED], a report authored by [REDACTED], a report authored by [REDACTED] and additional information and discovery concerning the testimony of [REDACTED].

9. In contrast, despite the fact that it has now endorsed Dr. Resnick to testify in rebuttal to Dr. Gur at merits, and as a rebuttal witness to [REDACTED] and Dr. Gur at sentencing, the defense has never received any summary of Dr. Resnick’s anticipated testimony, nor has it received a report from Dr. Resnick. The only information the defense has received from the prosecution concerning Dr. Resnick is the affidavit attached to Motion P-68 authored in late 2013, which dealt exclusively with his critiques of Dr. Metzner’s report, and some notes and other minimal written materials that reveal virtually nothing about Dr. Resnick’s own opinions about Mr. Holmes’s mental health or his opinions about the other experts’ reports and anticipated testimony. The defense has very little, if any, idea of what Dr. Resnick will testify to at trial. Nor has the defense received any reports or written summaries concerning the testimony of Drs. Mohandie or [REDACTED].

10. The prosecution has provided the defense with just two reports – one authored by [REDACTED] and one authored by [REDACTED]. Notably, [REDACTED] report, which was not provided to the defense until January 23, 2015, provides no useful information regarding his intended rebuttal to Dr. Gur. Indeed, the stated purpose of [REDACTED] report was to provide “preliminary opinions in response to [REDACTED] opinions.” [REDACTED]

[REDACTED] However, nowhere does he discuss or address any planned or proposed rebuttal to Dr. Gur’s opinions.

11. Allowing the prosecution to introduce this rebuttal expert testimony will significantly prejudice the defense. The parties are less than three weeks away from the completion of jury selection in this case. As stated numerous times, and in numerous other pleadings, the defense is already behind in its trial preparations, and is working long hours to prepare to confront the rest of the prosecution’s evidence and testimony. Pleading P-120

significantly and unexpectedly expands the scope of the testimony of these experts in a way that is extremely unfair to the defense. What's more, the prosecution has greatly expanded these experts' roles without providing the defense with any reports or summaries of these experts' newly anticipated rebuttal testimony.

12. Given the current time frame, the defense does not have even close to enough time (or enough information at this point) to adequately prepare to confront these experts on these newly endorsed topics, to present a complete defense, or to provide Mr. Holmes with the effective assistance of counsel. *See Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' " (quoting *Crane v. Kentucky*, 476 U.S. 683, 689-90 (1986)); *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Rodriguez*, 914 P.2d 230, 294 (Colo. 1996); U.S. Const. amend. VI; Colo. Const. art. II, sec. 16.

13. The defense maintains that it would be unfair and would violate the spirit and purpose of Crim. P. 16 and 32.1, as well as Mr. Holmes's state and federal constitutional rights to fundamental fairness, due process, a fair trial, and a reliable sentencing proceeding, to allow the prosecution to skirt its discovery obligations in this case by withholding its true intentions with respect to these experts until the eleventh hour, to continue to fail to provide adequate information about the nature and content of these experts' anticipated testimony, and then to allow the prosecution to introduce the rebuttal testimony of these experts. *See Wardius v. Oregon*, 412 U.S. 470, 475-76 (1973) ("The State may not insist that trials be run as a 'search for truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses."); U.S. Const. amends. V, VI, XIII, XIV; Colo. Const. art. II, secs. 16, 20, 23, 25.

14. The defense asserts that the proper remedy under the circumstances is to exclude the endorsed rebuttal testimony at issue. Such a remedy would be an appropriate sanction for this late disclosure. *See People v. District Court*, 664 P.2d at 252-53 ("Preclusion of the use of evidence is a proper remedy to assure compliance with a discovery order."). Allowing the prosecution to introduce this testimony against Mr. Holmes at trial or sentencing would be contrary to the purpose of the rules of discovery, which are "designed to further the truth-seeking process," and to "promote fairness in the criminal process by reducing the risk of trial by ambush." *Lanari v. People*, 827 P.2d 495, 499 (Colo. 1992).

15. Exclusion of this testimony is required not only pursuant to the rules of discovery, but also pursuant to Mr. Holmes's constitutional right to fundamental fairness, as protected by the Due Process Clauses of the Colorado and United States Constitutions. *See Rochin v. California*, 342 U.S. 165 (1952) (Under the Due Process Clause of the Fourteenth Amendment, a state's convictions cannot be brought about by methods that offend a sense of justice); *People v. Auld*, 815 P.2d 956, 957 (Colo. App. 1991) (citing to *Bailey v. People*, 630 P.2d 1062 (Colo. 1981) for proposition that Colorado recognizes the due process claim of outrageous governmental conduct).

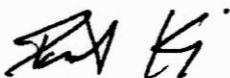
16. In the alternative, the defense moves the Court to extend the recess following the selection of the jury until mid to late May to enable the defense to have enough time to prepare

to confront this late-endorsed expert testimony. See, e.g., *People v. Zadra*, No. 10CA1207, 2013 WL 5761415 (Colo. App. Oct. 24, 2013) (trial court must consider feasibility of curing any prejudice caused by discovery violation through a continuance or recess during trial). The defense acknowledges that the Court will likely be reluctant to move the trial date again given all of the arrangements that have been made with prospective jurors, which is one of the reasons why the defense's preferred sanction is exclusion of the proposed rebuttal testimony. However, the defense feels compelled to ask for a recess as an alternative remedy to illustrate the degree of prejudice these late disclosures will cause them and how unprepared they are to address this new testimony.

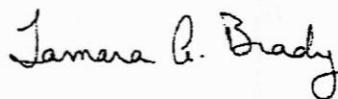
17. Finally, if the Court is not inclined to exclude the rebuttal testimony that is the subject of this motion, the defense moves the Court to order the prosecution to provide the defense with either reports or summaries of these experts' proposed rebuttal testimony pursuant to Crim. P. 16(I)(d)(3) and Crim. P. 32.1(d)(4) and (6) forthwith.

18. Depending on what is disclosed, the defense will need time to consider filing motions pursuant to *People v. Shreck*, 22 P.3d 68 (Colo. 2001) concerning the admissibility of some of [REDACTED] potential testimony in the merits phase of the trial [REDACTED].

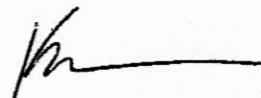
Mr. Holmes files this motion, and makes all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, on the following grounds and authorities: the Due Process Clause, the Right to a Fair Trial by an Impartial Jury, the Rights to Counsel, 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: March 26, 2015

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Defendant's motion is hereby GRANTED _____ DENIED _____.

BY THE COURT:

_____ JUDGE

_____ Dated

I hereby certify that on March 26, 2015, I

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

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

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