REDACTED

DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO 7325 S. Potomac St. Centennial, Colorado 80112	▲COURT USE ONLY▲
PEOPLE OF THE STATE OF COLORADO **v.** **JAMES EAGAN HOLMES,** **Defendant**	Case No. **12CR1522** Division: **201**

ORDER REGARDING DEFENDANT'S AMENDED MOTION TO EXCLUDE UNTIMELY ENDORSED EXPERT REBUTTAL TESTIMONY, OR FOR ALTERNATIVE SANCTION (D-285a-1)

INTRODUCTION

On March 20, 2015, the prosecution filed pleading P-120, explaining that it had received a new report from Dr. Raquel Gur, a defense expert, on March 3, 2015, and stating that it 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." Motion P-120 at p. 1. In Motion D-285a, the defense seeks to preclude Drs. Resnick and [redacted] from testifying as experts to rebut Dr. Gur's testimony during the guilt and sentencing phases of the trial as described in pleading P-120. Motion at p. 2. In the alternative, the defense asks the Court to impose a different sanction, such as extending "the recess the Court intends to take

between jury selection and the commencement of the trial." *Id.*[1] "[A]t a minimum, the defense moves the Court for an order requiring the prosecution to provide reports or summaries of these experts' proposed testimony." *Id.* The prosecution agrees to provide such reports or summaries, but otherwise opposes the motion. *See generally* Response.

For the reasons articulated in this Order, the defendant's motion is denied in part as lacking merit and in part as moot. To the extent that the motion seeks an order requiring the prosecution to provide reports or summaries of its rebuttal experts' proposed opinions, the motion is denied as moot because the prosecution intends to provide the defense such reports or summaries. The motion is otherwise denied as lacking merit.

BACKGROUND

On January 6, 2015, the Court denied the defense's Motion D-263, which, as relevant here, sought "to require the prosecution to . . . provide the defense with the additional discovery it was ordered to disclose pursuant to the Court's Order D-251." Motion D-263 at p. 1.[2] The defendant argued that the prosecution was

[1] The Court intends to recess for almost two weeks, between April 13 or 14 and April 27.

[2] In Order D-251, the Court required the prosecution to "disclose the underlying facts or data supporting the opinion" of any expert endorsed. Order D-251 at p. 3 (citing Crim. P. 16(I)(d)(3)). In the event that an expert does not prepare a report, the prosecution must "provide a written summary of the testimony describing the witness's opinion and the bases and reasons therefor, including results of physical or mental examination and of scientific tests, experiments, or comparisons." *Id.*

attempting "to skirt the Court's directives in Order D-251 simply by characterizing Drs. Resnick and [Kris] Mohandie as 'rebuttal' experts." *Id.* at p. 4.[3] The prosecution denied the defendant's claim, explaining that "notice of the nature of [the] potential rebuttal testimony" could not be known, let alone disclosed, until additional expert disclosures by the defense or until the defense experts testify at trial. Motion D-263 Response at p. 1.

In Order D-263-A, the Court concluded that the prosecution had not run afoul of Order D-251 and other authority governing its discovery obligations:

> The People's position appears to be as follows: (1) they plan to address the expert opinions already disclosed by the defense through cross-examination of the defense's experts and through the testimony of prosecution experts other than Drs. Resnick and Mohandie; (2) at least at this time, they only plan to use Drs. Resnick and Mohandie to rebut defense expert diagnoses, hypotheses, theories, or conclusions disclosed for the first time at trial; and (3) they cannot know, much less disclose, the nature of the potential rebuttal testimony by Drs. Resnick and Mohandie until after the defense makes additional disclosures or its experts testify at trial. Under the circumstances present, the Court finds that the prosecution is not in violation of Order D-251 or any rule or authority addressing its discovery obligations.

Order D-263-A at p. 5.

Significantly, the Court noted that, although the defense seemed to be particularly interested in learning more information related to what Drs. Resnick

[3] The defendant's motion does not seek relief with respect to Dr. Mohandie's proposed rebuttal testimony. *See generally* Motion.

and Mohandie have to say about the second Court-ordered sanity examination, which was completed by Dr. William Reid on October 13, 2014, it had not supplemented its own expert disclosures since Dr. Reid concluded his examination. *Id.* at p. 6. The Court cautioned the defense as follows:

> The defense cannot have it both ways. It cannot, on the one hand, choose not to supplement its own expert disclosures, while on the other, demand that the prosecution supplement its ***rebuttal*** expert disclosures. The prosecution cannot supplement its rebuttal expert disclosures if the defense does not first provide the supplemental expert disclosures the prosecution seeks to rebut. So long as the defense opts to play a "poker game of secrecy" with its supplemental expert disclosures, it cannot be heard to complain about the prosecution's rebuttal expert disclosures.

Id. (emphasis in original).

Nevertheless, the Court observed that it would hold the prosecution to its representation that it does not intend to call Drs. Resnick and Mohandie in its case in chief during the guilt phase of the trial, although it may call them to rebut "new and unexpected opinions" and assertions by a defense expert, such as "a new possible diagnosis, hypothesis, theory, or conclusion." *Id.* at pp. 4, 6-7. In other words, the Court stated that it would not allow Drs. Resnick and Mohandie to render undisclosed opinions that do not rebut new opinions or assertions by a defense expert. *Id.*

On March 20, 2015, the prosecution filed pleading P-120, explaining that based on Dr. Gur's second report, which was discovered on March 3, it now

intends to call Drs. [redacted] and Resnick "to rebut [her] testimony in whichever phase or phases of the trial she is called to testify by the defense." Motion P-120 at p. 1. Shortly thereafter, the defense filed Motion D-285a seeking to preclude such rebuttal testimony.

ANALYSIS

Motion D-285a hinges on the defense's contention that Dr. Gur's second report does not set forth any new opinions or assertions to allow the prosecution to call Drs. Resnick and [redacted] to rebut her testimony. The defense maintains that "[t]he 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 [endorsed] testimony." Motion at p. 2. According to the defense, Dr. Gur's new report does not contain "any opinions . . . that are new or different than the opinions stated in her original report." *Id.* Rather, avers the defense, the second report is "just a follow-up summary." *Id.* The Court disagrees.

Dr. Gur's initial report was completed almost two years ago, on June 17, 2013. The defendant had entered a plea of not guilty by reason of insanity just two weeks earlier. Thus, neither of the two Court-ordered sanity examinations had been completed.

Dr. Gur's second report is dated February 17, 2015, twenty months after the first report, and considers substantial additional information of great significance in this case, including the conclusions and findings of the two Court-ordered sanity examinations. Further, [redacted]

Dr. Gur acknowledges in her second report that she considered a large number of records that were not available before her first report: [redacted]

[redacted]. In total, Dr. Gur lists 21 separate items, or categories of items, considered in preparation of the second report. Finally, [redacted][4]

It is true that Dr. Gur [redacted] However, it is overly simplistic and inaccurate to characterize the report as "just a follow-up summary" that does not add any new opinions or assertions. Motion at p. 2. Indeed, if that were the case, the substantive part of the report presumably would have been one sentence long, not three pages long. Further, if the report

[4] [redacted]

adds nothing new, it is difficult to understand why Dr. Gur felt compelled to prepare it and the defense felt compelled to disclose it to the prosecution.

[redacted]

[redacted]

[redacted]

In sum, a comparison of the two reports contradicts the defense's position. The second report contains substantial new information of significance in this case.

Even if Dr. Gur's second report were deemed to contain no new assertions or opinions, the defense's motion would still fail. There is a significant difference between offering opinions based on the evidence available in June 2013 and offering the same opinions after reviewing all of the additional information that became available between June 2013 and February 2015. The prosecution may have felt comfortable attacking the reliability of the opinions in Dr. Gur's first

report without rebuttal testimony from Drs. Resnick and [redacted] based on the fact that those opinions did not (and could not) consider the significant evidence subsequently generated in this case. But once the defense submitted Dr. Gur's second report, that cross-examination strategy was rendered unrealistic.

The Court understands that the prosecution did not file its P-120 endorsements until March 20, two months into jury selection. However, the defense has no one but itself to blame for that, as it did not provide the prosecution Dr. Gur's second report until March 3, 2015, six weeks after the start of jury selection on January 20. The defense does not explain why it waited so long to discover Dr. Gur's second report. [redacted][5]

In *People v. Avila*, a panel of the Court of Appeals concluded that "the testimony of an unendorsed expert rebuttal witness is admissible when offered solely to impeach the credibility of a defense witness, or in this instance to question the analysis of a defense expert, and not to rebut a defense." 944 P.2d 673, 675 (Colo. App. 1997). *Avila* involved vehicular eluding and vehicular

[5] [redacted]

homicide charges. *Id.* at 674. Both parties presented expert testimony at trial. *Id.* However, at the end of the defendant's case, the People were allowed to call an additional expert witness who had not been endorsed or disclosed to the defendant prior to trial. *Id.* at 675. The rebuttal expert was a police officer with expertise in the field of accident reconstruction. *Id.* He was allowed to answer questions about the following subject matters: 1) weaknesses in the opinion testimony offered by the defendant's expert witness; 2) a diagram produced by the defendant's expert which was used to illustrate the opinion that the vehicle in question had tripped over the curb; 3) his opinion as to whether the curb could have acted as a tripping mechanism, as the defense expert contended;4) commentary as to his opinion regarding whether the curb could have acted as a tripping mechanism; 5) whether he had heard of "non-horizontal forces," a term used by the defendant's expert; 6) his opinion about a theory espoused by the defendant's expert that the vehicle had rebounded off a chain link fence because of the elasticity of the fence; and 7) his knowledge of "right-leading rolls" and "left-leading rolls," terms used by the defendant's expert, and whether, in his opinion, such rolls were applicable in the case based on his review of the photographs taken at the scene of the accident. *Id.*

The *Avila* Court agreed with the trial court's decision to admit into evidence the rebuttal expert testimony in question. *Id.* The Court's holding was premised, at least in part, on its conclusion that that "the necessity of calling the witness was

not known to the prosecution until mid-trial." *Id.* According to the Court, because the prosecution discovered that it needed to call the rebuttal expert witness mid-trial, it "was not required to disclose the identity of the witness any earlier than practicable." *Id. See also People v. Jowell*, 199 P.3d 38, 48 (Colo. App. 2008) (citing *Avila* for the proposition that it is proper to allow the prosecution to offer the testimony of an unendorsed rebuttal expert if the prosecution did not learn of the necessity of calling the witness until mid-trial); § 16-5-203, C.R.S. (2014) (the prosecution may call witnesses without prior notification if the names of such witnesses or the materiality of their testimony is first learned by the prosecution during the trial).

The Court of Appeals' discussion in *Jowell* is also instructive. There, the defense called J.D. as a witness during its case in chief. *Jowell*, 199 P.3d at 48. J.D. was a psychotherapist who had counseled the victim and had helped her prepare a written statement about the alleged sexual abuse perpetrated by the defendant. *Id.* She was endorsed by both parties as a potential perceiving witness, but not as a potential expert witness. *Id.* During direct examination, defense counsel elicited that J.D. had become concerned about the victim's interaction with a student counselor. *Id.* J.D. explained that, when mishandled, discussions about sexual abuse can precipitate many more post-traumatic stress disorder ("PTSD") symptoms. *Id.* On cross-examination, the prosecution asked J.D. about her

credentials and experience in PTSD and, over the defense's objection, was allowed to qualify J.D. as an expert witness in the area of PTSD. *Id.* J.D. then proceeded to testify about PTSD in some detail and opined that sexual abuse could cause PTSD and that the victim had exhibited signs of the disorder. *Id.*

In analyzing the issue on appeal, the Court first noted that the prosecution is required to provide notice of every witness it intends to call at trial, and that, if the witness is an expert, it must disclose pertinent reports and statements at least thirty days prior to trial. *Id.* (citing § 16-5-203, Crim. P. 16(I)(a)(1)(VII), and Crim. P. 16(I)(a)(1)(III), (b)(3)). Nevertheless, the Court upheld the trial court's decision to allow the People to elicit expert testimony during J.D.'s cross-examination even though she had not been endorsed as an expert witness. *Id.* The Court reasoned as follows:

> ***The record shows that the prosecution had no reason to inquire about J.D.'s expertise in PTSD diagnosis, or to think that her expertise would be relevant, until defense counsel raised the subject at trial.*** Under the circumstances, the trial court properly allowed the prosecution to pursue the line of questioning and to elicit expert testimony, despite the absence of a pretrial endorsement.

Id. (emphasis added).

Here, the prosecution did not learn about the need to have Drs. Resnick and [redacted] attempt to rebut the assertions and opinions contained in Dr. Gur's second report until March 5, 2015, six weeks into jury selection. Therefore, the

prosecution's pleading P-120 was appropriately and timely filed. The Court reiterates what it said in Order D-263-A:

> ***The defense cannot have it both ways. It cannot, on the one hand, choose not to supplement its own expert disclosures, while on the other, demand that the prosecution supplement its rebuttal expert disclosures.*** The prosecution cannot supplement its rebuttal expert disclosures if the defense does not first provide the supplemental expert disclosures the prosecution seeks to rebut. So long as the defense opts to play a "poker game of secrecy" with its supplemental expert disclosures, it cannot be heard to complain about the prosecution's rebuttal expert disclosures.

Order D-263-A at p. 5 (emphasis added).

The defense cannot be heard to complain now that it "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 [the defendant] with the effective assistance of counsel." Motion at p. 4. Simply stated, the defense cannot create a situation and then ask the Court to remedy it in order to avoid being prejudiced. This is particularly the case given the Court's comments in Order D-263-A.

Regardless, the defense's contention that it will suffer prejudice if the Court does not grant the relief requested lacks merit. It is true that the defense has "stated numerous times, and in numerous other pleadings," that it "is already behind in its trial preparations." *Id.* at p. 3. However, the fact that this assertion has been repeated numerous times in numerous pleadings does not make it more

persuasive. The Court has rejected the claim every time it has been advanced. Notably, as in the past, there is no basis in the record to support the defense's contention that it is already behind in its trial preparations and that it does not have sufficient time to be ready for trial and to effectively represent the defendant. Throughout these proceedings, the Court has never observed any indication that the defense is unprepared or lacks time to prepare.

The Court stands by what it has stated multiple times throughout this litigation: the defense has devoted seemingly unlimited resources and manpower to this case. To accept the defense's claim that it "does not have even close to enough time" to prepare for trial and to effectively represent the defendant simply strains credulity. In the eight years the undersigned has been on the bench, he cannot recall ever presiding over a criminal trial with more than four attorneys. This case has ten attorneys (five on each side). Moreover, the prosecution's rebuttal experts are unlikely to testify in the next few months. Therefore, the defense will have ample time to prepare to cross-examine them. Of course, it is up to the defense whether it discovers Dr. Gur's final report without undue or unreasonable delay. If it does not, the defense is on notice that the Court will not view a request for relief any more favorably than it views Motion D-285a.[6]

[6] The prosecution has agreed to provide a report or summary with respect to [redacted] rebuttal opinions before any additional report from Dr. Gur is discovered by the defense. However, the prosecution requests to wait to provide a report or summary with respect to Dr.

Finally, the defense contends that it provided some of Dr. Gur's notes to the prosecution in a timely fashion pursuant to Crim. P. 32.1. Reply at p. 1. However, only the notes [redacted] were timely disclosed. In any case, Rule 32.1 applies only to a sentencing hearing, and Dr. Gur has been endorsed as both a guilt-phase expert and a penalty-phase expert. Nor has the defense conceded that it will only use the information in the second report during the penalty phase of the trial. To the contrary, the premise of Motion D-285a is that the second report "simply provides additional explanation and support" for Dr. Gur's original [redacted] opinions, which the Court anticipates will be elicited by the defense during the guilt phase of the trial.

To the extent that the defense seeks to use the information in Dr. Gur's second report only during a sentencing hearing, in Order P-108 the Court allowed the prosecution to designate rebuttal experts within 20 days of receipt of a defense expert's report. The prosecution complied with this deadline. Regardless, as the Court stated in Order P-108, the defense "cannot, on the one hand, conceal [its] sentencing expert testimony, and on the other, be heard to complain about the prosecution's sentencing rebuttal expert testimony." Order P-108 at p. 9.

Resnick's opinions until the defense has discovered Dr. Gur's opinions in their entirety. The request is granted. The prosecution may wait until Dr. Gur supplements her report before providing the defense a report or summary with respect to Dr. Resnick's opinions.

Under all the circumstances present, the Court concludes that the defense's request for sanctions lacks merit. Accordingly, Motion D-285a is denied in part as moot and in part as lacking merit. The portion of the defendant's motion that seeks reports or summaries related to the prosecution's rebuttal experts is denied as moot. The motion is otherwise denied as lacking merit.[7]

Dated this 8th day of April of 2015.

BY THE COURT:

Carlos A. Samour, Jr.
District Court Judge

[7] The prosecution must provide all expert rebuttal reports or summaries in a timely fashion and without undue or unreasonable delay.

CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2015, a true and correct copy of the **Order regarding defendant's amended motion to exclude untimely endorsed expert rebuttal testimony, or for alternative sanction (D-285a-1)** was served upon the following parties of record:

Karen Pearson
Christina Taylor
Rich Orman
Jacob Edson
Lisa Teesch-Maguire
George Brauchler
Arapahoe County District Attorney's Office
6450 S. Revere Parkway
Centennial, CO 80111-6492
(via e-mail)

Sherilyn Koslosky
Rhonda Crandall
Daniel King
Tamara Brady
Kristen Nelson
Colorado State Public Defender's Office
1290 S. Broadway, Suite 900
Denver, CO 80203
(via e-mail)

Cheryl Lobmiller