

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 ORAL MOTION FOR VIDEO DEPOSITION TESTIMONY OF CERTAIN MITIGATION WITNESSES (D-293)	

The Court started selecting a jury in this case on January 20, 2015. A jury was selected on April 14, the evidence was completed on July 10, and closing arguments took place on July 14. The jury is currently deliberating.

On Monday, July 13, pursuant to Crim. P. 15, the defense orally moved for the videotaped deposition testimony of six potential sentencing witnesses who reside in California.¹ Earlier today, with the Court's permission, the defense filed Motion D-293, making a further record in support of its request. For the reasons articulated in this Order, the motion is denied without prejudice.

¹ The defense first notified the Court that some of its potential sentencing witnesses had scheduling conflicts on July 10. However, it did not move for the videotaped deposition testimony of the six witnesses identified in its motion until July 13. The defense identified the six witnesses by name during a bench conference held on July 13. In open Court and in its motion, the defense refers to these witnesses as Witnesses 1, 2, 3, 4, 5, and 6, in order to protect their identity. For the sake of clarity, the Court does the same in this Order.

Crim. P. 15 states that “the defendant may file a motion supported by an affidavit . . . requesting that the deposition of a prospective witness be taken before the court.” Crim. P. 15(a). The Court, in turn, “may order that a deposition be taken” before it “if the prospective witness may be unable to attend a trial or hearing and it is necessary to take that person’s deposition to prevent injustice.” *Id.* In criminal trials, “[d]eposition testimony in place of live testimony is the exception, rather than the rule.” *People v. Hernandez*, 899 P.2d 297, 300 (Colo. App. 1995). This Court is “entrusted with a great degree of discretion in determining whether to allow the taking of deposition testimony.” *Id.* at 299 (citing *People ex rel. Faulk v. Dist. Court*, 667 P.2d 1384, 1390 (Colo. 1983)).

First, the Court notes that the defense has not complied with Rule 15 because it has not filed an affidavit. Therefore, the motion is deficient.

The Court acknowledges that “the absence of an accompanying affidavit does not vitiate the deposition procedure.” *Id.* at 300. However, unlike the situation in *Hernandez*, here, the Court has not been “thoroughly informed of the facts and circumstances supporting the request to take the deposition.” *Id.* More specifically, the Court lacks information related to the alleged unavailability of the witnesses. Further, in contrast to the situation in *Hernandez*, the prosecution disputes the defense’s assertion that the six witnesses are unavailable.

The Court concludes that the defense has not established that the six witnesses are unavailable to testify at any sentencing hearing. At best, the defense has demonstrated that these witnesses may be inconvenienced if they have to testify at a sentencing hearing.

The defense asserts that Witness 1 is unavailable between July 31 and August 15 because "it is imperative that he be present to mentor [a] student during that entire period of time." Motion at p. 1. But the defense does not explain why the witness cannot miss one day of mentoring in order to testify in this case. The Court will accommodate the witness's schedule and will allow him to testify on July 31 or August 3 (or any time before or after July 31, as long as it is during any sentencing hearing). Additionally, the Court will make arrangements to allow the witness to fly to Colorado and back to California on the same day to reduce the impact on the mentoring the witness is providing.

Significantly, defense counsel represent that they spoke to Witness 1 yesterday. Yet they nevertheless seek a hearing tomorrow, while the jury is deliberating, so that the witness can explain his unavailability to the Court. The request is denied. The Court does not understand why the defense could not convey the details about this witness's purported unavailability in an affidavit (or even in its motion).

With respect to Witness 2, the Court does not believe that there is a scheduling conflict that would prevent the witness from testifying on July 30 or July 31. Similarly, as it relates to Witness 3, the Court does not see a scheduling conflict that would prevent the witness from testifying on August 3.

The Court lacks sufficient information as to Witness 4. If the defense provides proof of the witness's travel plans and additional details about those plans—such as when the plans were made, why he was scheduled to fly to Colorado on July 20, when his plans to fly to Colorado on July 20 were made, and when the defense learned of the witness's travel plans—the Court may allow his videotaped deposition on July 21.

The defense concedes that it has insufficient information regarding Witnesses 5 and 6.² Without such information, the Court cannot grant the request for the videotaped depositions of these witnesses.

Second, the defense has not shown that the depositions of these witnesses must be taken to prevent injustice. That a witness has been endorsed, or even subpoenaed, to testify in a sentencing hearing, without more, does not mean that he or she must be allowed to testify in order to prevent an injustice.

² The Court notes that the information disclosed by the defense with respect to Witness 6 suggests that he is available to testify at a sentencing hearing in this case, but that it would cause him an inconvenience or discomfort to do so.

Lastly, the defense does not explain why it waited until July 10 to raise these issues with the Court. The defense has known for more than a month that the jury would start deliberating this week. It also presumably has been aware of these witnesses' scheduling conflicts and plans to travel to Colorado for some time. A couple of these witnesses are either currently out of the country or have prepaid trips out of the country. Those are not the types of plans that are made at the last minute.

For all the foregoing reasons, the oral request for videotaped depositions is denied. However, this denial is without prejudice. If the defense complies with Rule 15 and this Order, the Court may grant in part or in whole its request for videotaped depositions.

Dated this 15th day of July of 2015.

BY THE COURT:



Carlos A. Samour, Jr.
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2015, a true and correct copy of the Court's **Order Regarding Oral Motion for Video Deposition Testimony of Certain Mitigation Witnesses (D-293)** was served upon the following parties of record:

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