

DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO 7325 S. Potomac St. Centennial, Colorado 80112	▲ COURT USE ONLY ▲
<b>PEOPLE OF THE STATE OF COLORADO</b>  v.  <b>JAMES EAGAN HOLMES,</b> <b>Defendant</b>	Case No. <b>12CR1522</b>  Division: <b>201</b>
<p style="text-align: center;"><b>ORDER REGARDING PEOPLE’S MOTION TO EXCLUDE EXPERT TESTIMONY (P-123-A)</b></p>	

### INTRODUCTION

The defendant is charged with the murders of 12 people and the attempted murders of 70 people at the Century 16 Theatres located at 14300 E. Alameda Ave., Aurora, Colorado, on July 20, 2012, during the midnight premier of the Batman movie, *The Dark Knight Rises*. He has also been charged with Possession of Explosive or Incendiary Devices at his apartment—1690 Paris St., Aurora, Colorado—on July 20, 2012. On June 4, 2013, the defendant entered a plea of not guilty by reason of insanity. Jury selection commenced on January 20, 2015, a jury was selected on April 14, and opening statements are scheduled to take place on April 27.

This matter is now before the Court on the prosecution's motion to limit the testimony of [REDACTED], a defense expert, "to the area of his original endorsement." Motion at p. 3. More specifically, the prosecution asks the Court to preclude the defendant "from presenting the opinions and conclusions contained" in a report authored by [REDACTED] which they received on April 8, 2015. *Id.* at pp. 2-3. The defense opposes the motion. *See generally* Response.<sup>1</sup> For the reasons articulated in this Order, the Court agrees with the prosecution that the defense violated Crim. P. 16 and Order P-43, but nevertheless denies the requested sanction as improperly drastic.

### **BACKGROUND**

Relying on Crim. P. 16(II)(b), in Order P-43 the Court granted the People's request for expert witness discovery. Therefore, over the defense's objection, the Court ordered the defense to: "(1) allow the prosecution to inspect and copy or photograph any reports or statements of defense experts made in connection with this case; and (2) . . . disclose the underlying facts or data supporting the opinion of every endorsed [defense] expert." Order P-43 at p. 1. It is undisputed that the defense was required to comply with Rule 16(II)(b) and Order P-43 no later than 33 days before trial.

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<sup>1</sup> The defense asks the Court to suppress the response. That request is granted.

The defense timely endorsed [REDACTED] on December 16, 2014, stating that he is an “[e]xpert in the field [REDACTED]” that his “materials and curriculum vitae [had] been provided to the prosecution,” and that he intended to “testify concerning his observations, conclusions and opinions [REDACTED]” Motion at pp. 1-2.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. *Id.*

On April 8, 2015, almost three months after the trial commenced, the defense provided the prosecution two expert reports from [REDACTED]. *Id.* One report is dated March 26, 2015, and the other report is dated April 1, 2015. Motion Exs. A, B. The contents of the reports exceed the areas in which [REDACTED] was endorsed: “his observations, conclusions, and opinions [REDACTED] [REDACTED]” Motion at p. 1. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**ANALYSIS**

The prosecution contends that the sanction requested is necessary or it will be prejudiced at trial. Motion at pp. 2- 3. The defense maintains that no sanction is appropriate because the contents of [REDACTED] reports fall within the scope of the December 16 endorsement, and, in any event, the prosecution will not suffer any prejudice. Response at pp. 1, 3. The Court agrees with the People that the untimely disclosure of [REDACTED] reports constitutes a discovery violation, but disagrees with them that the sanction requested is appropriate.

[REDACTED]

It is true that, consistent with the endorsement, [REDACTED] reports contain his observations and opinions. *Id.* at p. 1. However, that part of the



[REDACTED]

[REDACTED].

Significantly, the defense admits that it “spoke with [REDACTED] about the possibility of authoring a report in this case many months ago.” *Id.* at p. 2. The defense avers, however, that [REDACTED] needed to complete a review of the voluminous materials in this case first and that he “became so busy” during the last three years that “he closed his private practice” at some point. *Id.* [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

Even if the endorsement of [REDACTED] were deemed accurate, it would still be in violation of Rule 16 and Order P-43. Pursuant to Rule 16(II)(b)(2), the Court specifically ordered the defense to disclose “the underlying facts or data supporting the opinion of every endorsed [defense] expert.” Order P-43 at p. 1. [REDACTED] endorsement is clearly deficient in this regard.

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<sup>2</sup> [REDACTED]  
[REDACTED].

Under all the circumstances, the Court cannot find that “[t]he defense has made every effort to comply with its discovery obligations in this case.” Response at p. 2. To the contrary, the Court concludes that the defense violated its discovery obligations and Order P-43.

Having found a violation of the discovery rules and Order P-43, the Court must decide whether the sanction sought by the prosecution is appropriate. Although the Court is displeased with the defense’s violation of Rule 16 and Order P-43, it refrains from imposing the drastic sanction requested.

Discovery sanctions serve to protect the integrity of the truth-finding process. *People v. Acosta*, 338 P.3d 472, 476 (Colo. App. 2014). Thus, “[a] trial court should impose the least severe sanction that will ensure full compliance with its discovery orders and protect the defendant’s right to due process.” *Id.* (citation omitted). In determining an appropriate sanction for a discovery violation, the trial judge should consider: (1) “the reasons why disclosure was not made;” (2) “the extent of the prejudice, if any, to the opposing party;” (3) “the feasibility of rectifying that prejudice by a continuance;” and (4) “any other relevant circumstances.” *People v. Dist. Court*, 808 P.2d 831, 837 (Colo. 1991) (quotation omitted). “In fashioning a sanction . . . a court must strive to restore as nearly as possible the level playing field that existed before the discovery violation.” *Id.*

In *Acosta*, the Court addressed the appropriateness of excluding evidence as a discovery sanction:

***In considering sanctions, a trial court should be cautious not to affect the evidence to be introduced at trial or the merits of the case any more than necessary, and should, if at all possible, avoid excluding evidence as a means of remedying a discovery violation because the attendant windfall to the party against whom such evidence would have been offered defeats, rather than furthers, the objectives of discovery.***

338 P.3d at 477 (emphasis added) (internal quotation omitted).

Where a sanction “is not designed primarily to deter improper behavior, the goal must be to cure any prejudice resulting from the violation.” *Id.* (quotation omitted). “Absent a showing of prejudice resulting from the discovery violation, there is no reversible error.” *Id.* (citation omitted). Accordingly, “when a continuance or a recess in a trial in progress will cure the prejudice to the [moving party], the trial court should go no further in crafting a sanction to address a [discovery] violation.” *Dist. Court*, 808 P.2d at 837.

Here, the prosecution acknowledges that “[n]ot every failure to meet deadlines imposed by court rule or court order deserves the sanction of exclusion of evidence” and that such a sanction is not “appropriate every time an expert witness is called to testify in areas beyond those endorsed.” Motion at p. 2. According to the prosecution, however, it will be prejudiced by the untimely disclosure of [REDACTED] reports because it “will need to have potential



rebuttal experts review the report, and will ask them to prepare reports of potential rebuttal opinions.” *Id.* at pp. 2-3. The prosecution anticipates that “[t]his will most likely be Drs. [REDACTED] and [Phillip] Resnick,” and they will need until May 31 and May 17, respectively, “to make an assessment and prepare a report.” *Id.* at p. 3. Since opening statements are scheduled for April 27, the prosecution is concerned that it will not be able to prepare its opening statement and its case. *Id.*

However, as the defense notes, [REDACTED] is unlikely to testify before May 17 and “[a]rrangements regarding the timing of [REDACTED] testimony could certainly be made to allow these experts sufficient time to prepare any additional rebuttal to [REDACTED].” Response at p. 3. In other words, the Court can significantly reduce any prejudice the prosecution may suffer as a result of the defense’s discovery violation.

Although the Court does not condone the defense’s violation of Rule 16 and Order P-43, exclusion of some of [REDACTED] opinions would violate the defendant’s constitutional rights, including his right to a fair trial and the effective assistance of counsel. The Court cannot allow the defendant to suffer the consequences of his counsel’s actions or inactions. Moreover, as indicated, there is a remedy available that is less drastic than exclusion. Therefore, the Court denies the prosecution’s motion, but authorizes their rebuttal experts to prepare and submit their reports in May in accordance with this Order.

To the extent that the prosecution remains concerned about its ability to address [REDACTED] opinions in its opening statement, it may file a motion asking to preclude defense counsel from mentioning those opinions in their opening statement. Any such motion must be filed no later than April 22.

### CONCLUSION

For all of the foregoing reasons, the Court denies Motion P-123. However, the Court authorizes the prosecution's rebuttal experts, Drs. Resnick and [REDACTED], to prepare and submit their reports on May 17 and May 31 respectively. The Court also grants the prosecution leave to file a motion to prevent the defense from mentioning in its opening statement any of [REDACTED] opinions or assertions disclosed on April 8, 2015.

Dated this 20<sup>th</sup> day of April of 2015.

BY THE COURT:



Carlos A. Samour, Jr.  
District Court Judge

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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2015, a true and correct copy of the **Order regarding People's motion to exclude expert testimony (P-123-A)** was served upon the following parties of record:

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