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DISTRICT COURT  
ARAPAHOE COUNTY, COLORADO  
Court Address: Arapahoe County Justice Center  
7325 S. Potomac St., Centennial, CO 80112

Filed

AUG 14 2012

CLERK OF THE DISTRICT COURT  
ARAPAHOE COUNTY, COLORADO

THE PEOPLE OF THE STATE OF COLORADO vs.  
Defendant:  
**JAMES HOLMES**

COURT USE ONLY

Attorney:  
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Case Number:  
**12CR1522**  
Division/Ctrm:  
**22**

**PEOPLE'S PLEADING P-10**  
**BRIEF RELATING TO [REDACTED]**

This brief is submitted by the District Attorney for the 18<sup>th</sup> Judicial District.

**INTRODUCTION**

At some point in time the defendant was treated [REDACTED]  
The parties are currently litigating the issue of whether a package sent to [REDACTED] in July, 2012 contained materials protected by statutory privilege. The People have already submitted a preliminary bench brief on some issues relating to the [REDACTED] designated People's P-5. Subsequent to the submission of P-5, the Court issued Order C-5, entitled "Order Clarifying Briefing Schedule and Request For Further Briefing." In Order C-5, the court requested that the prosecution and defense simultaneously file briefs relating to the following five issues:

1. Under what circumstances can a [REDACTED] be waived or terminated?  
Please provide your law in support.

2. Is the [REDACTED] automatically waived or terminated if the [REDACTED] [REDACTED] or others? Please provide law in support as to what would be required to cause any such waiver or termination.
3. If termination or waiver were to have occurred, does the termination or waiver apply retroactively to documents or conversations protected by privilege prior to the termination or waiver? Please provide your law in support.
4. Is there a crime fraud exception to the privilege wherein the privilege becomes waived or terminated? Please provide law or rules in support.
5. Under what circumstances should the court determine an in camera review of the evidence is necessary? What do the parties believe are the factors the court must consider in conducting such a review? Please provide law in support.

This brief will provide the People's positions on all of these questions, with law in support.

Because many of the questions have answers based in general principles, prior to discussing the answers to the court's specific questions, the People will outline the general principles and origin of Colorado's law regarding privilege in general, and specifically as it pertains to [REDACTED]

### **The General Law Relating To The [REDACTED]**

Testimonial privileges in Colorado are derived from C.R.S. § 13-90-107. Subsection (1) acts as a pre-amble, and indicates: "There are particular relations in which it is the policy of the law to encourage confidence and preserve it inviolate therefore, a person shall not be examined as a witness in the following cases . . ."

Because [REDACTED] and [REDACTED], information she acquired in the course of a

[REDACTED] is governed by the statutory [REDACTED]

[REDACTED] is treated as a [REDACTED] under the

statute.”); [REDACTED] provides:

(d) [REDACTED] . . . shall not be examined without the consent of his or her [REDACTED] to any information acquired in attending the [REDACTED] that was necessary to enable him or her to prescribe or act for the [REDACTED] but this paragraph (d) shall not apply to:

(I) [REDACTED] . . . who is sued by the [REDACTED] . . . on any cause or action arising out or connected with the [REDACTED] . . . care or treatment of such patient;

(II) [REDACTED] . . . who is in consultation with a [REDACTED] . . . being sued . . .

(III) A review of the [REDACTED] . . . services by [a number of boards and state agencies].

Under this statute, two things are required in order for a privilege to attach to any particular communication or information (1) [REDACTED] and (2) The information was necessary to enable [REDACTED] to prescribe or act for [REDACTED]

The legislature created the [REDACTED] to “encourage[e] [REDACTED] to fully disclose medically relevant information to their [REDACTED] by reducing the possibility of humiliation or embarrassment through subsequent public disclosure of such information to the

[REDACTED] The courts construe the [REDACTED] narrowly. [REDACTED]

[REDACTED]

[REDACTED] (“Th [REDACTED] is a statutory creation in derogation of

common law. A statute in derogation of common law must be strictly construed to limit its application to the clear intent of the General Assembly.”).

Information acquired by [REDACTED] that does not relate to [REDACTED] on behalf of

[REDACTED] does not fall within the privilege. [REDACTED]

[REDACTED] “Statements made by one to a [REDACTED] are not *ipso facto* privileged, but are privileged only if they meet all of the several requirements contained in [the precursor statute to C.R.S. § 13-90-107(d).]” [REDACTED]

[REDACTED] ordered to perform an independent [REDACTED] for the court was not acting to treat the person evaluated, and thus C.R.S. § 13-90-107(1)(d) did not apply, and the statements were not privileged). Thus, the privilege “is not a blanket protection against the disclosure of all [REDACTED] Rather, it protects “the relationship between [REDACTED] . . . they consult.” [REDACTED]

[REDACTED] As such, the privilege “does not protect [REDACTED] that a party transmits outside of the statute’s specified relationships.” *Id.* [REDACTED]

[REDACTED] (Statements made to nurse during discharge from hospital not protected by privilege when they were not related to the [REDACTED] but instead to finding him a way home since he had come from out of state). [REDACTED]

[REDACTED] must exist in order for that privilege to apply, even if clergy member identifies self as clergy-member and is dressed in clerical garb);

*Milburn v. Haworth*, 108 P. 155, 165 (Colo. 1910) (statement made to clergy member outside of the clergy-relationship not privileged).

Although information [REDACTED] is governed by the [REDACTED] found in C.R.S. § 13-90-107 (d), the General Assembly has recognized a similar privilege for [REDACTED] and other [REDACTED] who are not [REDACTED] in subsection (g): “A licensed [REDACTED] . . . shall not be examined without the consent of [their client] as to any communication made by the client.”

The purposes of the [REDACTED] and the [REDACTED] are “identical.” [REDACTED] The purpose is “to enhance the effective diagnosis and treatment of illness by protecting [REDACTED] from the embarrassment and humiliation that might be caused by the [REDACTED] disclosure of information divulged by the client in the course of treatment.” [REDACTED] *See also* [REDACTED]

[REDACTED] If the communication is outside of that purpose, it is not privileged. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] (communications made in the course of a [REDACTED] employment are statutorily privileged.”).

**Court’s Question Number One: Under what circumstances can a [REDACTED] be waived or terminated?**

The People are not currently arguing—based on their present understanding of the facts—that the defendant has *waived* any [REDACTED]. The People believe that the defendant bears the burden to establish the existence of any privilege, and that the defendant needs to establish the existence of a [REDACTED] at the time the package was sent, and

if he establishes that, he needs to establish that the particular information contained in the notebook was for the purposes of treatment or therapy. If the defendant establishes all of those things then, and only then, would the issue of any "waiver" of the privilege be ripe for consideration.

Privileges can be waived. The defendant in this case may take actions to waive any [REDACTED] that ever existed in relation to [REDACTED] and any [REDACTED] [REDACTED] (he has ever seen) in the future, either expressly or impliedly. "A waiver, which is really a form of 'consent' to disclosure, may be express or implied, and the burden of establishing a waiver is on the party seeking to overcome the claim of privilege." [REDACTED]

"The test for determining an implied waiver is whether the privilege holder has injected his [REDACTED] into the case as the basis of a claim or affirmative defense." [REDACTED]

The most common way for a defendant to waive a [REDACTED] would be to place his [REDACTED] at issue by pleading insanity or impaired mental condition. [REDACTED] Defense counsel has indicated that they are investigating what they refer to as the defendant's [REDACTED] so it is possible such a plea would be entered at some future date, and if so the waiver would apply to both pre-offense and post-offense statements to any

[REDACTED] he has ever spoken to. [REDACTED] [REDACTED] decided prior to statutory enactment of [REDACTED] [REDACTED] recognizing validity of *Gray* in reference to the

Similarly, endorsing a [REDACTED] as an expert witness serves to waive statements made to the expert [REDACTED]

The privilege can also be waived by revealing information about otherwise privileged communications to third parties, or making them in presence of third parties [REDACTED]

[REDACTED] (“A party who testifies about the details of the service and treatment rendered to him by a [REDACTED] may waive the [REDACTED]”);

**Courts Question’s Number 2: Is the [REDACTED] automatically waived or terminated if the [REDACTED] Please provide law in support as to what would be required to cause any such waiver or termination.**

[REDACTED] have ethical and contractual obligations [REDACTED] to maintain the confidentiality of their communications. [REDACTED] including “any act or omission which fails to meet generally accepted standards of [REDACTED] as “unprofessional conduct.”);

[REDACTED] § 4, (“A [REDACTED] shall respect the rights of [REDACTED] and shall safeguard [REDACTED] confidences and privacy within the constraints of law.”) [REDACTED]

[REDACTED] discussing the contractual obligation of confidentiality that a [REDACTED] can be sued or subjected to professional discipline for failure to keep [REDACTED] Even so, the [REDACTED]

[REDACTED] recognize that these professional obligations are not absolute when [REDACTED] are concerned: “When, in the clinical judgment of a treating

[REDACTED] the risk of danger is deemed to be significant, the [REDACTED] may reveal confidential

information disclosed by [REDACTED]

[REDACTED] (No privilege attached to a notebook that the defendant was asked to keep as a thought journal [REDACTED] purposes when it contained threats against the life of President of the United States and the First Lady).

The General Assembly has recognized that doctors and other health professionals have an obligation to the community to provide warning concerning specific threats of violence, and provides a strong protection against civil liability when they do so. § 13-21-117 provides, in pertinent part:

[REDACTED] shall not be liable for damages in any civil action for failure to warn or protect any person against a [REDACTED] and any such person shall not be held civilly liable for failure to predict such violent behavior, except where the [REDACTED] has communicated to the [REDACTED] a serious threat of [REDACTED] specific person or persons. When there is a duty to warn and protect under the circumstances specified above, the duty shall be discharged by [REDACTED] making reasonable and timely efforts to notify any person or persons specifically threatened, as well as notifying an appropriate law enforcement agency or by taking other appropriate action including, but not limited to, hospitalizing [REDACTED]. [REDACTED] shall not be liable for damages in any civil action for warning any person against or predicting a [REDACTED] and any such person shall not be subject to professional discipline for such warning or prediction.

Thus, information related to [REDACTED] is not recognized as confidential under Colorado law and can be freely shared with the police and affected parties. It should be noted that this statute exempts certain communications from the general confidentiality that exists in



relation to privileged communications, and does not separately create an alternative class of privileged information itself.

Additionally, information may be subject to a contractual obligation of confidentiality, yet still not be privileged. This applies to [REDACTED] provides that the privilege only attaches to information "necessary to enable [REDACTED]

[REDACTED] Some [REDACTED] might ostensibly be covered by this statute, for instance if a [REDACTED] sought treatment from [REDACTED] to help them regarding [REDACTED]. Under such circumstances, the communication would normally be considered privileged and confidential except for the operation [REDACTED] which exempts [REDACTED] from the cloak of confidentiality. Once a statute provides for disclosure of otherwise confidential information, it is no longer privileged. [REDACTED]

(Statute providing for doctors to report information regarding episodes of domestic violence and gunshot wounds abrogates any privilege). Other threats might not be covered by any cloak of confidentiality or privilege at all. They are just threats—not confidential communication.

Many types of communications between [REDACTED] are "not necessary to enable him or her to [REDACTED]. For instance, many people are personal friends or acquaintances with [REDACTED] and interact with them in a variety of capacities. Communications unrelated to the professional relationship would not be privileged. Even when there is no extra-professional relationship, there can be a multitude of non-treatment related—and thus non-privileged—communications between [REDACTED]

[REDACTED]

("Statements made by one [REDACTED] are not *ipso facto* privileged, but are privileged only if they

meet all of the several requirements contained in [the precursor statute to C.R.S. § 13-90-107(d).]” [REDACTED] (Statements made to nurse during discharge from hospital not protected by privilege when they were not related to the [REDACTED] but instead to finding him a way home since he had come from out of state). These types of communications can range from the innocuous, such as Christmas cards sent from [REDACTED] to dangerous, such as a midnight phone call threatening [REDACTED]. The linchpin to this analysis is the language of the statute, i.e. whether the communication is “necessary to enable [REDACTED] to [REDACTED] [REDACTED]. To put it bluntly, [REDACTED]. They are simply not made for the purpose of enabling [REDACTED] to act or the patient or write him a prescription. C.R.S. § 13-21-117 provides that threats against others do not qualify either. And even if a [REDACTED] [REDACTED] might somehow be tangentially related to the treatment [REDACTED] and not directed at a specific individual, the policy behind the privilege statute would not stand to allow it to shield threats of future violence against the [REDACTED] herself, or against the community at large.

Because of the simultaneous nature of the court’s briefing schedule, the prosecution is not aware of the defendant’s actual arguments, but the prosecution anticipates that the defendant may argue that C.R.S. § 13-21-117 only exempts threats against specifically named—or otherwise readily identifiable—individuals from the general duty of confidentiality, and that [REDACTED] must keep threats directed at the community at large, or against a large group of not-readily identifiable individuals, to herself. Such a reading would lead to an absurd result, and courts are required to interpret statutes to avoid illogical or absurd results. [REDACTED]

[REDACTED] courts are to avoid “constructions that produce illogical or absurd

results.”). To take the matter to its logical extreme, if ██████████ in the midst of ██████████ were to inform ██████████ that he intended on planting a large and destructive bomb at an undisclosed—but crowded—location in a particular city, ██████████ would be unable to do anything to prevent it, because there would be no specifically identifiable target of the threat. Thus, under this (admittedly hypothetical at this point in time) defense reading of the statute, the General Assembly would have intended to protect a single individual whose name was known rather than to attempt to protect hundreds or thousands of people who might be subject to the actions of a mad bomber. Such an interpretation would be an “absurd result” in the most base form of that term. The only way that C.R.S. § 13-21-117 can be interpreted in anything other than an absurd manner is to interpret it to exempt from confidentiality specific threats against known or unknown individuals when ██████████ is in a position to minimize—or at least reduce—the risk by telling the authorities.

The statutes of the General Assembly, and those of Congress, and the Constitution of the United States, are designed to protect life, liberty, and the pursuit of happiness for everyone. They cannot be construed as to prevent ██████████ from sharing with appropriate individuals’ information necessary to secure the safety—or even the life—of the ██████████. They cannot be construed to allow an individual to make threats against the safety of the community, and at the same time, prohibit the recipient of such threats from acting on them. ██████████

██████████ “[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact.”).

**Court's Question Number Three: If termination or waiver were to have occurred, does the termination or waiver apply retroactively to documents or conversations protected by privilege prior to the termination or waiver?**

The People interpret this question to relate to the issues related to threats specified in Question No. 2. The People do not believe that [REDACTED] or others serves to waive or terminate any [REDACTED] with respect to non-threat related information that would otherwise be privileged. The People may seek to provide additional argument on this issue if the facts warrant it.

**Court's Question Number Four: Is there a crime fraud exception to the privilege wherein the privilege becomes waived or terminated? Please provide law or rules in support.**

This question is best answered by reference to C.R.S. § 13-90-107(d), which provides that the [REDACTED] applies to "information acquired in attending [REDACTED] that was necessary to enable him or her to prescribe or act for [REDACTED]." If a communication were made for the purposes of committing a crime, it would not be protected by the language of this statute. For instance, C.R.S. 18-18-415(1)(b) provides: "Information communicated to a practitioner in an effort to procure a controlled substance other than for legitimate purposes . . . shall not be deemed a privileged communication."

Regarding the recognition of an actual "crime-fraud" exception to the privilege, a number of federal courts have specifically recognized such an exception to the federal [REDACTED]

[REDACTED] ("[I]t is difficult to conjure up a case in which both [REDACTED] and criminal or fraudulent purposes might simultaneously be advanced. In our view, communications that are

intended to further a crime or fraud will rarely, if ever, be allied with bona fide [REDACTED] and, thus, protecting such communications will not promote [REDACTED]

[REDACTED] (“Thus, public policy supports the recognition of an exception to the [REDACTED] despite the absence of language to that effect in the statute which established the privilege. The exception exists where the communications were made for an unlawful purpose, the objective of which is the commission of a crime.”).

**Courts Question Number Five: Under what circumstances should the court determine an in camera review of the evidence is necessary? What do the parties believe are the factors the court must consider in conducting such a review?**

It is important to note the unusual—and possibly unique—nature of the package contents when considering Colorado jurisprudence relating to in camera review. The normal circumstance when communications [REDACTED] are subject to a potential in camera review would involve the actual *records* from the [REDACTED] being subpoenaed to court, things like charts, notes, test results, and the like. Or it could involve serving [REDACTED] with a subpoena to come to court and testify regarding a party’s statements made in the course of therapy.

This is a unique situation because it involves an item sent to [REDACTED] but never received by her. It was sent in the midst of the defendant entering a movie theater and shooting at scores of innocent movie goers, and at the same time rigging his apartment with explosives and incendiary devices that would be activated by tripwires. This was also at a time where the defendant had placed statements on internet dating sites asking whether potential dating partners would visit him in prison, and a time when the defendant had been planning his crime for a protracted period of time. The People believe that this provides strong circumstantial evidence that the contents of the

package were not for [REDACTED] but were likely something else entirely. The fact that the package contained a number of [REDACTED] was not for any [REDACTED]. The facts indicate that the defendant—at the time he sent the package—intended to be either [REDACTED] when it was received, and would not thereafter be receiving any treatment from [REDACTED]. Thus, even if there were an existing [REDACTED] between the defendant [REDACTED] at the time he sent the package, the People do not believe that the defense will be able to establish the second prong of the analysis to determine whether a privilege existed, namely whether the information was “information acquired in attending [REDACTED] that was necessary to enable him or her to [REDACTED].”

As a general rule, it is not appropriate for a court to examine actual [REDACTED] from [REDACTED] even for an in camera review, absent a waiver. [REDACTED] This refers to the treatment records and notes kept by [REDACTED] or [REDACTED] in the course of their professional duties. The notebook and the burnt currency are not [REDACTED]. Until and unless reviewed by this court, nobody knows what they are, or even whether they would be, in any way, related to [REDACTED]. Based on the circumstances, it is highly unlikely that they would be [REDACTED] or privileged in any way. The defense would need to establish that they have privileged contents—in addition to a privileged relationship—before the court could find them privileged.

The Colorado Supreme Court has recognized the difficulties in situations where particular information may or may not be protected by privilege. In discussing the [REDACTED] the court in [REDACTED] noted that some

information might have been provided for the purpose of [REDACTED] while other information might not have been. Under such circumstances, the court found that “an in camera hearing is normally appropriate to allow consideration of this preliminary fact question . . .” *Id.*

Carol Chambers, District Attorney

By 

Deputy District Attorney

Registration No. 20035

**CERTIFICATE OF MAILING**

I hereby certify that I have deposited a true and correct copy of the foregoing **PEOPLE'S PLEADING P-10 BRIEF RELATING TO** [REDACTED] in the Public Defender's Mailbox located at 6450 S Revere Pkwy Centennial CO 80111, addressed to:

TAMARA BRADY, ESQ.  
DANIEL KING, ESQ.  
OFFICE OF THE PUBLIC DEFENDER

Dated: 8/14/12

By 