REDACTED

DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO 7325 S. Potomac St. Centennial, Colorado 8011	▲COURT USE ONLY▲
PEOPLE OF THE STATE OF COLORADO **v.** **JAMES EAGAN HOLMES,** **Defendant**	Case No. **12CR1522** Division: **201**

ORDER REGARDING DEFENDANT'S MOTION FOR DISCOVERY OF ANY AND ALL EMERGENCY DISPATCH TAPES AND PRINTOUTS OF LAW ENFORCEMENT COMMUNICATION (D-75)

The defendant is charged with shooting, and killing or injuring, numerous people inside two adjacent Aurora movie theatres during the early morning hours of July 20, 2012. The defendant requests that the Court order the prosecution to discover "all dispatch tapes and printouts of law enforcement communication during the events of July 20, 2012." Motion at p. 1. The People oppose the motion. For the reasons articulated in this Order, the motion is denied without a hearing.

The defendant first argues that Crim. P. 16(I)(a)(VI) supports his request. *Id.* at p. 2. The Court disagrees.

Rule 16(I)(a)(VI) requires the prosecution "to make available" to the defendant "all tapes and transcripts" within its "possession or control" related to "any electronic surveillance (including wiretaps) of conversations involving the accused, any codefendant or witness in the case." The defendant cites no authority for the proposition that emergency dispatch tapes and printouts fall within the ambit of "tapes and transcripts of any electronic surveillance." The Court's research has uncovered none. Nor does the plain meaning of "electronic surveillance" support the defendant's position. *See* Black's Law Dictionary (9th ed. 2009) (referring the reader to the definitions of "eavesdropping" and "wiretapping" for the definition of "electronic surveillance;" "eavesdropping" is defined as "[t]he act of secretly listening to the private conversation of others without their consent," and "wiretapping" is defined as "[e]lectronic or mechanical eavesdropping, [usually] done by law-enforcement officers under court order, to listen to private conversations").

The defendant also contends that Crim. P. 16(I)(a)(2), when read in conjunction with Crim. P. 16(I)(c)(1), warrants the relief requested. Rule 16(I)(a)(2) requires the prosecution to "disclose . . . any material or information . . . which tends to negate the guilt of the accused as to the offense charged or would tend to reduce the punishment therefor." Rule 16(I)(c)(1), in turn, provides that, "[u]pon the defense's request and designation of [discoverable] material or

information . . . which is in the possession or control of other governmental personnel, the prosecuting attorney shall use diligent good faith efforts to cause such material to be made available to the defense."

In *People v. District Court*, the Colorado Supreme Court observed that Rule 16(I)(a)(2) "is grounded in the due process requirements identified by the United States Supreme Court in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)." 790 P.2d 332, 337 (Colo. 1990) (citation omitted). *Brady* and its progeny have "recognized that prosecutors have a constitutional duty to disclose evidence 'favorable to the accused' and 'material either to guilt or to punishment' to the defense prior to trial." *Id.* (quoting *Brady*, 373 U.S. at 87, 83 S.Ct. 1194). Impeachment evidence falls within the scope of evidence that is favorable to the accused; therefore, *Brady* requires its disclosure. *Id.* (citations omitted).

To qualify for disclosure pursuant to *Brady*, however, "impeachment or other exculpatory evidence must be 'material.'" *Id.* Exculpatory evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* (quotation omitted). A reasonable probability is one that is "sufficient to undermine confidence in the outcome." *Id.* (quotation omitted). Prosecutors "are

obligated to disclose *Brady* material to an accused even in the absence of a request by the defense." *Id.* at 338 (citing Crim. P. 16(I)(a)(2)).[1]

Generally, if a defendant "makes only a general request for *Brady* material, the prosecution decides which information should be disclosed in the first instance." *Id.* (citation omitted). The trial court does not become involved in the process unless the defendant "learns that exculpatory evidence has been withheld and brings it to the court's attention." *Id.* (citation omitted). If a dispute arises, the Court is responsible for determining what information must be disclosed. *Id.* (citation omitted). Whenever possible, disclosures required by Rule 16(I)(a)(2) should be made contemporaneously with other disclosures. *Id.* (citation omitted).

Against this backdrop, the Court finds that the defendant's reliance on Rule 16(I)(a)(2) is misplaced for two reasons. First, there is no basis in the record to allow the Court to conclude that the disclosure requested contains material exculpatory information. The Court notes that the People contend that "[t]he majority of communications between officers working a crime scene are seldom relevant, exculpatory, or material." Response at p. 1.[2] Second, to the extent that

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[1] This discussion should not be understood as recognizing a constitutional right to discovery. "[T]here is no general constitutional right to discovery in a criminal case, and *Brady* did not create one." *Id.* (citation omitted). By providing additional means for disclosure, Crim. P. 16 partially compensates "for the limitations on the protection afforded criminal defendants under the *Brady* doctrine." *Id.*

[2] The defendant chose not to dispute this contention.

the emergency dispatch tapes and printouts sought are exculpatory materials governed by Rule 16(I)(a)(2), the defendant's motion fails because it violates Rule 16(V)(a). That rule provides that no motions for discovery with respect to Rule 16(I)(a)(2) may be filed, as such discovery is mandatory.

At any rate, the People represent that they have already disclosed the dispatch tapes and printouts they have received from the law enforcement agencies involved in the investigation of this case. Response at p. 1.[3] Further, the People state that they have exercised due diligence to obtain all of the exculpatory and material evidence that must be disclosed, and recognize that such due diligence must continue until the trial. *Id.* The People add that they are "fully aware of their obligations of discovery required by *Brady* and its progeny to disclose any materials that are impeaching, exculpatory, or mitigating, as well as the discovery requirements of Crim. P. 16," and that they are in compliance with all of their discovery responsibilities. *Id.* at p. 3.

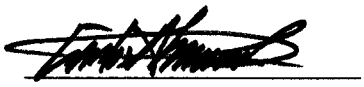
[3] According to the People, in addition to dispatch recordings and 911 calls, they have provided Computer Assisted Dispatch (commonly known as "CAD") printouts from: the Arapahoe County Sheriff's Office, the Aurora Fire Department, the Aurora Police Department, the Castle Rock Police Department, the Colorado State Patrol, the Columbine Valley Police Department, the Denver Police Department, the Englewood Police Department, the Jefferson County Sheriff's Office, the Parker Police Department, the Thornton Police Department, and the Westminster Police Department. Response at p. 2.

The People's representations are uncontroverted.[4] Therefore, the Court has no basis to reject them. Inasmuch as the People appear to have complied with their discovery obligations vis-à-vis emergency dispatch tapes and printouts, the Court concludes that Motion D-75 is moot.

For all the foregoing reasons, the Court finds that Motion D-75 lacks merit. Moreover, because the People appear to have complied with their discovery obligations with respect to emergency dispatch tapes and printouts, the matter is moot in any event. Accordingly, Motion D-75 is denied without a hearing.[5]

Dated this 16th day of August of 2013.

BY THE COURT:



Carlos A. Samour, Jr.
District Court Judge

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[4] The defendant elected not to file a reply.

[5] The defendant does not aver that the disclosure requested should be ordered pursuant to Crim. P. 16(I)(d)(1), which allows the Court, in its discretion, to "require disclosure . . . of relevant material and information not covered by Parts I (a), (b), and (c), upon a showing . . . that the request is reasonable." Nor does the defendant make the showing required to trigger the exercise of the Court's discretion. *See People v. Vlassis*, 247 P.3d 196, 198 (Colo. 2011) ("the defense must demonstrate that the information sought is: (1) relevant to the conduct of the defense, and (2) unavailable from any source other than the prosecution").

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2013, a true and correct copy the **Order regarding defendant's motion for discovery of any and all emergency dispatch tapes and printouts of law enforcement communication (D-75)** was served upon the following parties of record:

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