

REDACTED

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	Filed JUL 11 2014
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff	CLERK OF THE COMBINED COURT ARAPAHOE COUNTY, COLORADO
v. JAMES HOLMES, Defendant	σ COURT USE ONLY σ Case No. 12CR1522
DOUGLAS K. WILSON, Colorado State Public Defender Daniel King (No. 26129) Tamara A. Brady (No. 20728) Chief Trial Deputy State Public Defenders 1300 Broadway, Suite 400 Denver, Colorado 80203 Phone (303) 764-1400 Fax (303) 764-1478 E-mail: state.pubdef@coloradodefenders.us	Division 202
MOTION FOR COURT ORDER PROHIBITING THE NEW SANITY EXAMINER FROM VIDEOTAPING MR. HOLMES'S SECOND SANITY EXAMINATION AND REQUEST TO STAY ANY VIDEOTAPING OF [REDACTED] EXAMINATION OF MR. HOLMES UNTIL THE COURT RULES ON THIS ISSUE [D-221]	

CERTIFICATE OF CONFERRAL

The prosecution objects to this motion.

Mr. Holmes, through counsel, moves this Court to issue an order prohibiting [REDACTED] from videotaping [REDACTED] sanity examination of Mr. Holmes. In support of this request, Mr. Holmes states the following:

1. [REDACTED] has been selected to conduct a second sanity examination of Mr. Holmes in this case. [REDACTED] previously informed undersigned counsel that [REDACTED] intended to videotape [REDACTED] examination of Mr. Holmes. The defense informed [REDACTED] that it objected to this procedure.

2. Through a letter from the acting superintendent of CMHIP dated Monday, July 7, 2014, [REDACTED] informed the Court that [REDACTED] was requesting until October 15, 2014 to submit the report on the second sanity examination. In that letter, [REDACTED] also informed the Court that [REDACTED] intends to videotape the examination, which is [REDACTED] "regular practice." The letter stated that [REDACTED] has "a standardized procedure for conducting such videotaping," but did not provide any further

details.

3. The defense objects to [REDACTED] videotaping [REDACTED] examination of Mr. Holmes for two primary reasons. First, the law does not provide for such a procedure, and Mr. Holmes was not on notice that this was a possible consequence of pleading not guilty by reason of insanity. Second, videotaping is likely to interfere with the integrity of the examination, and therefore the proposed procedure implicates Mr. Holmes's constitutional rights.

4. With respect to the statute, nothing in C.R.S. § 16-8-101 *et seq.*, including section 16-8-106, explicitly authorizes or references videotaping a sanity examination. Indeed, the language of the statute implies that videotaping is not contemplated. Section 16-8-106(4) explicitly states that a "written report" of the examination shall be prepared following the examination; it makes no mention directing that a videotape of the procedure be made as well. Moreover, section 16-8-106(3)(b) provides that "the physicians and other personnel conducting the examination may *testify* to the results of any such procedures and the statements and reactions of the defendant insofar as the same entered into the formation of their opinions as to the mental condition of the defendant . . ." This provision also appears to contemplate that an examiner will be permitted to recount "the statements and reactions of the defendant" through testimony, but does not contemplate that any videotape evidence will be created during the examination or shown to the jury later. *People v. Campbell*, 885 P.2d 327, 329 (Colo. App. 1994) ("[W]hen a statute specifies the particular situations in which it is to apply, it should generally be construed as excluding from its operation all other situations not specified.").

5. In addition, Mr. Holmes was not advised that as a possible consequence of entering his plea of not guilty by reason of insanity, he would be subjected to a *videotaped* examination. See C.R.S. § 16-8-103(4) ("Before accepting a plea of not guilty by reason of insanity, the court shall advise the defendant of the effect and consequences of the plea."). Requiring Mr. Holmes to participate in a videotaped examination after he already made the decision to enter into an insanity plea, would also be unconstitutional and fundamentally unfair because it would violate his due process right to fair notice, as there is nothing in the language of C.R.S. § 16-8-106 that would have put counsel or Mr. Holmes on notice that his examination would be videotaped. See *Lankford v. Idaho*, 500 U.S. 110, 121 (1991) (noting the "importance that we attach to the concept of fair notice as the bedrock of any constitutionally fair procedure.").

6. This lack of notice is significant, because requiring Mr. Holmes to submit to an examination where his entire interaction with the sanity examiner will be memorialized on videotape raises Fifth Amendment concerns beyond those already raised by the defense in previous pleadings. See, e.g., Motions D-28, D-29, D-30, D-31, D-32, D-187. There is a distinct and notable difference between a defendant being aware that he is submitting to an unrecorded examination, and submitting to an examination knowing that it will produce documentation capturing not only a defendant's verbal responses to the examiner's questions, but also his demeanor, manner of speaking, facial expressions and body language during the examination. These nonverbal communications are testimonial acts, as they have the potential to give rise to incriminating inferences. See, e.g., *Pennsylvania v. Muniz*, 496 U.S. 582, 593-94 (1990).

7. Additionally, while there appears to be no Colorado precedent directly on point, a New York court deciding a similar issue held that because of “the policy questions concerning whether or not cameras should be permitted in proceedings conducted in connection with judicial determinations,” it should be up to the legislature to determine whether psychiatric examinations may be videotaped and that “[i]n the absence of any such [explicit legislative] authorization, in the view of this Court, trial courts are without authority to order the audio-visual recording of [psychiatric] evaluations.” *State v. R.H.*, 21 Misc. 3d 1127(A), 875 N.Y.S.2d 824 at *4 (N.Y. Sup. Ct. 2008).

8. With respect to the potential for the videotaping to interfere with the integrity of the examination, as an initial matter, the letter from CMHIP does not specify how the videotaping will occur. It is unknown whether the video camera will be prominently displayed in the room with Mr. Holmes, or whether the room where the examination takes place will be equipped with a camera that is either discreetly placed or is not visible to those inside the room. The letter does not indicate whether the hospital intends to have a third party videographer present in the room while the examination is conducted. The letter does not specify whether the videotaping will extend not only to [redacted] examination, but to any additional psychological or neuropsychological testing as well. The letter also does not specify what Mr. Holmes will be told (or not told) about the videotaping, the purpose of the videotaping, and about potential future uses of the videotape.

9. Without more specific information about the proposed videotaping procedure, the defense cannot lodge complete objections to this practice. Having this information in the record is vital not only for the defense to have a sufficient opportunity to object to any procedures it finds problematic and for the Court to make an adequate determination of whether the procedure is appropriate, but also to ensure that there is a complete record of this issue for appellate purposes.

10. Therefore, the defense requests that this Court hold an evidentiary hearing on this issue where CMHIP will be required to provide specific information about the proposed procedure for videotaping the examination and the defense will have an opportunity to present any evidence it wishes to present as well. *See Robertson v. Superior Court*, 82 Cal. Rptr. 2d 50, 58-59 (Cal. Ct. App. 1999) (“The videotaping method, the obtrusiveness of the equipment, the physical setting of the examination are extrinsic factors that impinge on the conduct of an examination and may appropriately be taken into account in deciding whether to permit videotaping or in prescribing conditions under which videotaping may take place. Moreover, it is possible that defendant, if given an opportunity, will be able to demonstrate that videotaping is inherently inimical to the conduct of a credible examination and a reliable assessment of a defendant’s mental condition. We cannot determine on this record whether videotaping in the manner proposed by the People will have such an effect We decline to speculate on what such evidence may show, but will instead vacate the videotaping order . . . and remand this matter for an evidentiary hearing.”).

11. Even without knowing the specific details of the proposed procedure, the defense has concerns about the chilling effect the presence of a video camera could have upon Mr. Holmes, and the potential for the video camera to adversely impact the integrity and reliability of

[REDACTED] examination of Mr. Holmes. The state hospital has previously acknowledged that “videotaping the clinical interview portion of an examination [has] an impact” on the examination, though “the impact has not been proven to be negative or positive.” See June 10, 2013 CMHIP Letter to the Court Regarding Motion D-92, p. 3.

12. Additionally, in its Response to D-92, the prosecution cited the American Psychological Association’s *Statement on Third Party Observers in Psychological Testing and Assessment: A Framework for Decision-Making*, and noted that:

Examinees who are aware that their assessment is being recorded, either in audio only or in combined audio and video, may also alter their assessment behavior (Constantinou, Ashendorf, & McCaffrey, 2005).

See Response to D-92, p. 10, citing Committee on Psychological Tests and Assessment, American Psychological Association, *Statement on Third Party Observers in Psychological Testing and Assessment: A Framework for Decision-Making*, p. 2; see also Constantinou, M., Ashendorf, L., & McCaffrey, R. J. (2006), *Effects of third party observer during neuropsychological assessment: When the observer is a video camera*, Journal of Forensic Neuropsychology, 4(2), 83-95.

13. Several of the concerns articulated by CMHIP in its June 10, 2013 letter opposing the presence of defense counsel at the initial sanity examination also apply to videotaping the examination. The presence of a video camera and the knowledge that his entire interaction with the examiners is being captured on film such that others may view it later “may inhibit dialog between the examiner(s) and Mr. Holmes.” June 10, 2013 CMHIP Letter to the Court Regarding Motion D-92, p. 2. Moreover, the presence of a video camera “may inhibit Mr. Holmes’ openness and cause him to be less likely to share personal information with the examiner(s).” *Id.*

[REDACTED]

14. Because videotaping the sanity examination will have an *impact* of some kind on the examination itself, this proposed procedure could call the reliability of the examination into question. This Court should not allow a procedure that is not typically used for sanity examinations conducted at CMHIP¹ and that could undermine the reliability of the sanity examination in this capital case, where Mr. Holmes’s life is at stake. Such a procedure implicates Mr. Holmes’s constitutional rights to due process, a fair and reliable sentencing determination, and a fair trial by an impartial jury, fundamental fairness, and equal protection. See, e.g., *Beck v. Alabama*, 447 U.S. 625, 637-638 (1980) (“To insure that the death penalty is indeed imposed on the basis of ‘reason rather than caprice or emotion,’ we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination.”); *People v. Young*, 814 P.2d 834,846 (Colo. 1991); U.S. Const. amends. V, VI, VIII, XIV; Colo.

¹ See June 10, 2013 CMHIP Letter to the Court Regarding Motion D-92, p. 3 (“Ordinarily, the clinical interview portion of an examination is not videotaped.”).

Const. art. II, secs. 16, 18, 20 & 25.

15. In addition, other than stating that “[REDACTED] basis for videotaping sanity examinations is grounded in [REDACTED] independent medical judgment of appropriateness and necessity,” the letter does not indicate why [REDACTED] believes that it is *necessary* to videotape the examination, as opposed to using a less intrusive method of memorializing the examination, such as audiotaping or taking or dictating notes during the examination. While there appears to be no Colorado appellate precedent on this issue, other courts have questioned the propriety of allowing psychiatric examinations to be videotaped as opposed to less intrusive methods of memorializing the examination, absent a compelling rationale to do so. *See State v. R.H.*, 875 N.Y.S.2d 824 at *3 (N.Y. Sup. Ct. 2008) (denying State’s motion to videotape psychiatric examination because, *inter alia*, “the Court does not believe that any compelling rationale exists to videotape Respondent’s examination. The expert who examines the Respondent in this case will obviously be able to write a report, take notes and testify concerning all of the aspects of his examination.”); *United States v. Kaczynski*, No. CR-S-96-259GEB, 1997 WL 668395, at *3 (E.D. Cal. Oct. 22, 1997) (allowing examinations to be audio-taped and permitting defense counsel to view examinations via live audio or video feed, but denying government request to videotape examinations where government conceded that no medical reason justified videotaping over audiotaping). [REDACTED]

16. Finally, defense counsel has twice requested to be present during the examination. The defense maintains that its presence is constitutionally required to protect Mr. Holmes’s rights to be free from self-incrimination, the effective assistance of counsel, confrontation, due process, a fair and reliable sentencing hearing as protected by the Fifth, Sixth, Eighth and Fourteenth Amendments and Colo. Const. art. II, secs. 16, 18, 20 & 25. The defense’s position is that any concerns over the impact that defense counsel as a third party observer would have on the examination must yield to procedures that are necessary to protect Mr. Holmes’s constitutional rights. Because videotaping the examination would not protect Mr. Holmes’s constitutional rights in the same manner that the presence of defense counsel would, the concern that videotaping the examination will have an impact on the reliability of the exam should be of paramount concern here.

17. However, in the event the Court decides to allow [REDACTED] to videotape the examination, the defense re-raises its request to be present during the examination. Given that it is undisputed that videotaping will have an impact on the examination that is not unlike the impact that a third-party observer would have, many of the Court’s concerns regarding the impact of defense counsel’s presence articulated in Order re: D-92a would be moot. If the examination is to be videotaped, defense counsel should be permitted to attend in order to safeguard Mr. Holmes’s constitutional rights.

Request for Stay

18. [REDACTED]

[REDACTED] The defense believes that this important issue must be fully and fairly litigated before any videotaping is allowed. Therefore, the defense requests that this Court enter an order staying any videotaping of [REDACTED] forensic examination of Mr. Holmes until the Court has resolved this issue.

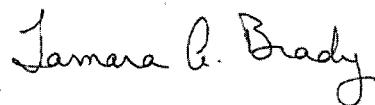
Request for a Hearing

19. As stated above, defense counsel request that the Court hold an evidentiary hearing on this issue.

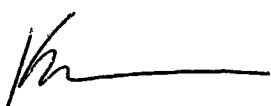
Mr. Holmes files this motion, and makes all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, on the following grounds and authorities: the Due Process Clause, the Right to a Fair Trial by an Impartial Jury, the Rights to Counsel, Equal Protection, Confrontation, and Compulsory Process, the Rights to Remain Silent and to Appeal, and the Right to be Free from Cruel and Unusual Punishment, pursuant to the Federal and Colorado Constitutions generally, and specifically, the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitutions, and Article II, sections 3, 6, 7, 10, 11, 16, 18, 20, 23, 25 and 28 of the Colorado Constitution.



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Dated: July 11, 2014

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff	
v.	
JAMES HOLMES, Defendant	σ COURT USE ONLY σ
DOUGLAS K. WILSON, Colorado State Public Defender Daniel King (No. 26129) Tamara A. Brady (No. 20728) Chief Trial Deputy State Public Defenders 1300 Broadway, Suite 400 Denver, Colorado 80203 Phone (303) 764-1400 Fax (303) 764-1478 E-mail: state.pubdef@coloradodefenders.us	Case No. 12CR1522 Division 202
ORDER RE: MOTION FOR COURT ORDER PROHIBITING THE NEW SANITY EXAMINER FROM VIDEOTAPING MR. HOLMES'S SECOND SANITY EXAMINATION AND REQUEST TO STAY ANY VIDEOTAPING OF DR. [REDACTED] EXAMINATION OF MR. HOLMES UNTIL THE COURT RULES ON THIS ISSUE [D-221]	

Defendant's motion is hereby GRANTED ____ DENIED ____.

BY THE COURT:

JUDGE

Dated

I hereby certify that on July 11, 2014, I

mailed, via the United States Mail,

faxed, or

hand-delivered

a true and correct copy of the above and foregoing document to:

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