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District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	<div style="text-align: right;"> <p>1380</p> <p>JUN - 8 2018</p> <p>10:45 AM</p> </div> <div style="text-align: center;"> <p>σ COURT USE ONLY σ</p> </div>
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. JAMES HOLMES, Defendant	
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 26
MOTION FOR WITNESS INTERVIEWS TO BE TAPE RECORDED AND ORAL STATEMENTS OF WITNESSES TO BE REDUCED TO WRITING AND DISCLOSED TO THE DEFENSE [D-091]	

CERTIFICATE OF CONFERRAL

The District Attorney states that they object to the motion, and that they will file a response.

Mr. Holmes, through counsel, demands from the State and moves this Court for an order directing the State to tape record witness interviews and to reduce oral statements of witnesses to writing and to disclose these statements to the defense. In support of this motion, he states the following:

1. As the investigation and preparation of Mr. Holmes' case remains ongoing, Mr. Holmes requests that witness interviews be tape recorded and all oral statements of witnesses be reduced to writing and disclosed to the defense.

2. Although the equipment and resources are always available to record statements, the government often chooses not to, thereby preventing the defense from ever being able to learn the exact words spoken, the tone and demeanor of the witness, and the *complete* statement of the witness.

3. Similarly, when tape recordings of statements are not made, government agents also exercise complete (adversarial) control over what notes to write down, and what portions of the witness statement or interview they wish to commit to any written form, knowing that some judges will not require oral statements to be reduced to writing. Consequently, it is not uncommon for the defense to receive a report indicating that an hour interview was conducted with a witness, but only reciting a couple of lines of the "text" of the interview.

4. Crim.P. 16(I)(a)(1)(I) requires the State to automatically disclose “[p]olice, arrest and crime or offense reports, including statements of all witnesses[.]”

5. “The scope of the rule clearly encompasses witness statements in or associated with police reports, arrest reports, crime reports and offense reports.” *People v. District Court*, 790 P.2d 332, 337 (Colo. 1990).

6. “[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

7. Additionally, Rule 16(I)(a)(2) mandates that “[t]he prosecuting attorney shall disclose to defense counsel any material or information within his possession or control which tends to negate the guilt of the accused as to the offense charged or would tend to reduce the punishment therefor.” See also *In re Attorney C.*, 47 P.3d 1167 (Colo. 2002).

8. Tape recording witness interviews and reducing all oral statements to writing, not only those that are patently exculpatory, is required to effectuate Mr. Holmes’ due process rights.

9. The purpose behind the discovery rules is, *inter alia*, to allow the defense to adequately prepare for trial and to prevent the unsavory “trial by ambush” technique.

10. If witness interviews are not recorded and statements not reduced to writing, the State can shirk its discovery obligations. An unrecorded hour-long interview may appear in discovery as a few mere lines noting something along the lines of “the witness basically repeated her previous story and offered no information favorable to the defense.”

11. Such cursory treatment of witness statements hinders the search for truth and hides inherently exculpatory evidence from the defense.

12. The simplest, most efficient way of ensuring complete preservation of the truth surrounding every witness statement is to require the state to tape record all witness interviews and reduce all oral statements to writing. The State has the resources and ability to do so. In fact, if statements were required to be recorded, time and expense involved in report writing would be greatly reduced. Mr. Holmes requests an order directing the State to record all future investigative interviews and statements, which would greatly enhance the truth finding function of the trial. The State has no legitimate reason to oppose this request for tape recorded interviews.

13. The State cannot circumvent an obligation to disclose exculpatory information by deliberately avoiding taking notes or reducing statements to writing. *People v. Anderson*, 837 P.2d 293 (Colo. App. 1992). This rule applies to impeachment evidence and any other evidence favorable to the accused that must be disclosed under *Brady* regardless of whether in oral or in written form. *United States v. Bagley*, 473 U.S. 667 (1985).

14. To allow the State or any of its agents to interview witnesses (endorsed or unendorsed) and not take notes, not reduce their statements to writing, and not tape record would allow them to avoid their ethical and legal obligation to provide discovery, making Crim. P. 16 and federal and State constitutional rules meaningless.

15. Also, to allow the State to decide what information will be recorded or not recorded, and then decide what information is relevant or not relevant, would be to allow them to usurp the function of the court and the defense pursuant to Crim. P. 16, interpreting case law, and

constitutional mandates. Furthermore, it is not the prosecution that decides whether the statements are discoverable or not. It is a *defense* function to determine the whether material is exculpatory and relevant to the defense; only the defense is capable knowing the significance of requested materials to the defense. See, e.g., *People v. Smith*, 524 P.2d 607 (Colo. 1974).

16. Under *Kyles v. Whitley*, 514 U.S. 419 (1995), the prosecuting attorney is personally responsible for ensuring that any possibly exculpatory or mitigating information in the possession or control of the relevant law enforcement agencies is produced to the accused. The prosecution in this case, contrary to *Kyles* and the express mandate of Crim.P. 16 (I)(b)(4), has no mechanism or procedures for ensuring compliance with the constitutions or the rules. The requested relief will assist Mr. Holmes in obtaining due process and fairness, at virtually no expense to the State.

17. Furthermore, the State has an ethical obligation to comply with the discovery rules. Here, Colo. RPC Rule 3.8(d) “requires prosecutors to disclose exculpatory evidence to the defense in advance of any critical stage of the proceeding.” *In re Attorney C*, 47 P.3d 1167, 1168 (Colo. 2002).

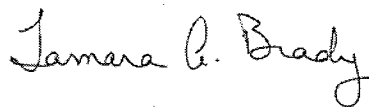
Request for a Hearing

18. Mr. Holmes requests a hearing on this motion.

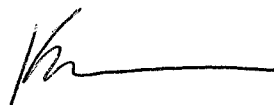
Mr. Holmes files this motion, and makes all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, on the following grounds and authorities: the Due Process Clause, the Right to a Fair Trial by an Impartial Jury, the Rights to Counsel, 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: June 3, 2013

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Defendant's motion is hereby GRANTED _____ DENIED _____.

BY THE COURT:

JUDGE

Dated

I hereby certify that on June 3, 2013, 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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