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District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	Filed in the Combined Court ARAPAHOE COUNTY COLORADO OCT 01 2013
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 1290 Broadway, Suite 900 Denver, Colorado 80203 Phone (303) 764-1400 Fax (303) 764-1478 E-mail: state.pubdef@coloradodefenders.us	Case No. **12CR1522** Division 201

REPLY TO PROSECUTION'S RESPONSE TO MOTION TO QUASH SUBPOENAS DUCES TECUM PSDT-3, PSDT-4, PSDT-5, & PSDT-6 [D-178]

Mr. Holmes, through counsel, submits the following in reply to the prosecution's Response to Motion to Quash Subpoenas Duces Tecum PSDT-3, PSDT-4, PSDT-5, & PSDT-6 [D-178]:

1. Mr. Holmes disagrees with the prosecution's expansive reading of *Gray v. District Court*, 884 P.2d 286, 293 (Colo. 1994). The prosecution cites *Gray* for the proposition that it is entitled to *all* of Mr. Holmes's medical records from the University of Colorado, whether or not they relate to treatment of a mental illness or psychiatric condition. *See* Response, p. 2 ("*Gray* . . . finds that the waiver applies to all medical records."). This is not the holding of *Gray*.

2. *Gray* examined the scope and extent of the waiver provisions of section 16-8-103.6, and concluded that once the insanity or mental condition defense is invoked, "[t]he defendant waives the protection to communications, including medical records, that pre-date and post-date the criminal offense, made by a defendant to a physician or psychologist in the course of examination or treatment." *Id.* at 293.

3. The issue in *Gray* was whether the prosecution was entitled to access to medical records of the defendant's *psychiatric* hospitalization that pre-dated the offense. Notably, the prosecution in that case asserted that it was "entitled to any records of any examinations ever performed on Gray in his lifetime *that may deal with any psychological condition* which might support a plea of not guilty by reason of insanity or not guilty by reason of impaired mental condition." *Id.* at 288 (emphasis added).

4. In reaching its conclusion that these records from a prior psychiatric hospitalization should be disclosed, the Court noted that "[t]he legislative history demonstrates that the legislature intended to allow for full disclosure of medical and mental health records *concerning the mental condition that the defendant has placed in issue in a criminal case*." *Id.* at 293 (emphasis added).

5. The holding of *Gray* was thus clearly limited to pre-offense records that involved the defendant's mental illness or mental condition at trial.

6. The holding of *People v. Ullery*, 984 P.2d 586 (Colo. 1999), also cited by the prosecution, is similarly inapplicable. *Ullery* involved the disclosure of materials generated by a defense-retained expert who evaluated the defendant in connection with his mental condition defense, and whether the reach of section 16-8-103.6 extended to materials in the expert's possession that included defense attorney work product. The Court concluded that it did not, and that work product should be exempted from disclosures pursuant to section 16-8-103.6.

7. The prosecution's assertion is wrong: they are not entitled, under those cases, to Mr. Holmes's medical records from the University of Colorado (or any other medical facility) that are unrelated to his mental illness. Disclosure of those records would violate Mr. Holmes's medical privacy rights under HIPAA as well as his physician-patient privilege.

8. Finally, neither *Gray* nor *Ullery* contained a specific discussion of the content of the records at issue, nor did either case specifically address the issue of whether information contained within records that is *not* a communication made by the defendant to a physician or psychologist in the course of an examination or treatment for his mental condition of the sort requested by the prosecution[1] should be subject to disclosure.

9. In fact, *Ullery* held that the waiver provisions of section 16-8-103.6 *did not* include attorney work-product contained in the file of the defense expert. *See* 984 P.2d at 590 ("[W]e conclude . . . that the waiver of privileged communications includes the disclosure of medical records but does not apply to the thoughts and conclusions of defense counsel . . . we see noting in *Gray* to suggest that a waiver of a defendant's attorney-client privilege would extend to a waiver of attorney work product.").

10. Thus, the prosecution's argument that the waiver provision of section 16-8-103.6 is essentially unlimited is without merit. The plain language of the statute only applies to "communications made by the defendant to a physician or psychologist in the course of an examination or treatment for such mental condition." The holdings of *Gray* and *Ullery* are consistent with this plain language. The prosecution's subpoenas are therefore overbroad.

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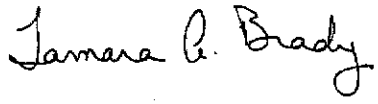
[1] The prosecution requests, *inter alia*, "nursing notes," "staff notes," "testing materials generated and utilized to treat and diagnose the defendant," and "all records of observations of the defendant and relating to the defendant's activities."

Mr. Holmes files this reply, 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.

Daniel King (No. 26129)
Chief Trial Deputy State Public Defender



Tamara A. Brady (No. 20728)
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Dated: October 1, 2013

I hereby certify that on October 1, 2013, I

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____ faxed, or
✓ hand-delivered

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

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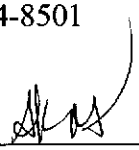

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