REDACTED

SUPPRESSED

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

OMNIBUS RESPONSE TO MOTIONS TO QUASH D-SDT-5 AND D-SDT-6 [P-88, C-130, C-131, C-132]

****SUPPRESSED FILING****[1]

The prosecution, counsel for [redacted], counsel for the University of Colorado, and counsel for the University of Colorado [redacted] have filed motions to quash D-SDT-5 and D-SDT-6. Because the issues raised in those pleadings are similar, Mr. Holmes submits the following omnibus response addressing the arguments raised in those motions:[2]

I. Introduction

1. As an initial matter, the defense reiterates a point that none of the motions to quash address: this is a case in which the prosecution is seeking the death penalty. As explained thoroughly in the defense's Response to Court Order C-126, because this is a case in which the State is seeking to kill one of its own citizens, the legal and ethical obligations defense counsel have in every case to thoroughly pursue all potentially exculpatory, favorable, or mitigating evidence on behalf of their client, are heightened. *See Strickland v. Washington*, 366 U.S. 668 (1984); *Wiggins v. Smith*, 539 U.S. 510 (2003); *People v. Cole*, 775 P.2d 551, 552-53 (Colo.

[1] The defense maintains its position, consistent with the other parties, that all pleadings pertaining to this issue should be suppressed. The defense is aware that based on the positions it has taken in Orders C-126, C-126-A, and C-129, the Court will likely disagree with the defense's request and will issue a redacted version of this pleading.

[2] Because the prosecution incorporated its Response to Motion D-225 within its Motion to Quash D-SDT-5 and D-SDT-6, the defense believes that any arguments in reply to this response are adequately contained in this pleading. Therefore, defense counsel did not believe it was necessary to file a separate Reply in Support of Motion D-225.

1989); Colo. R. Prof. Conduct 3.1, Comment [1]; ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.

2. The commentary to Guideline 1.1 of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003) explains, "Due to the extraordinary and irrevocable nature of the penalty, at every stage of the proceedings counsel must make extraordinary efforts on behalf of the accused." *Id.* at 4 (internal quotations omitted).

3. The defense realizes that its decision to seek in camera review of the materials that are the subject of D-SDT-5 and D-SDT-6 has caused [redacted] considerable distress. However, defense counsel's objective is not to "harass" [redacted] or the custodians of records who are involved, as at least one party has claimed. *See* Third Party Responding to Subpoena Duces Tecum D-SDT-6's Motion to Quash, p. 6. Defense counsel's paramount ethical and professional obligation under the Colorado and United States Constitutions, and their overarching objective in this case, is to save the life of their client. It is for this reason that they seek the materials that are the subject of D-SDT-5 and D-SDT-6.

4. In addition, because this is a capital case, the Eighth Amendment and article II, section 20 of the Colorado Constitution require this Court to apply a "strong presumption that possibly exculpatory evidence should be given to the defendant." *People v. Rodriguez*, 786 P.2d 1079, 1082 (Colo. 1989). *See also Beck v. Alabama*, 447 U.S. 625, 637-38 (1980). The Colorado Supreme Court has held that with respect to such evidence, "the nature of the death sentence requires an extraordinary showing, based on competent evidence, before nondisclosure can be permitted." *Id.*

5. Because the prosecution is seeking the execution of Mr. Holmes, this Court's analysis of this issue must be guided and informed by the heightened standards that are required by the state and federal constitutions in capital cases.

I. The Defense Has Satisfied Each of the Five Prongs of the Analysis Articulated in *People v. Spykstra*, 234 P.3d 662, 669-70 (Colo. 2010).

6. In *People v. Spykstra*, 234 P.3d 662, 669-70 (Colo. 2010), the Colorado Supreme Court set forth the following standard that a defendant must satisfy when a criminal pretrial third-party subpoena is challenged. A defendant must demonstrate:

> (1) A reasonable likelihood that the subpoenaed materials exist, by setting forth a specific factual basis;
>
> (2) That the materials are evidentiary and relevant;
>
> (3) That the materials are not otherwise procurable reasonably in advance of trial by the exercise of due diligence;
>
> (4) That the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to

obtain such inspection may tend unreasonably to delay the trial; and

(5) That the application is made in good faith and is not intended as a general fishing expedition.

Id.

7. Despite the arguments made by the various parties to the contrary, Mr. Holmes has satisfied each of these five prongs.

(1) There is a Reasonable Likelihood that the Materials Exist.

8. First, Mr. Holmes has established "[a] reasonable likelihood that the subpoenaed materials exist, by setting forth a specific factual basis." *Id.*

9. Based on the record before the Court, it cannot seriously be disputed that [redacted] in multiple emails and g-chats recovered from his iPhone, which he disclosed to law enforcement (and consequently, to the parties) by consent. He indicated that [redacted]. He also indicated that [redacted] further stated, [redacted] *See* Motion by Non-Party Witness to Quash Defendant's Subpoenas Duces Tecum and Response to D-225, p. 3. Based on these statements, it is clear that [redacted].

10. Moreover, the defense has established a "reasonable likelihood" that these [redacted] records contain exculpatory information that would impeach [redacted] credibility as a witness, impeach [redacted] credibility, and/or contain favorable or exculpatory information about Mr. Holmes himself.

11. It would obviously be impossible for the defense to conclusively prove the existence of information in records which they have not seen. This is not and cannot be the standard. *See, e.g.,* [redacted] The specific content of [redacted] emails and g-chats provided by the defense in the Attachments to Motion D-225 certainly constitutes as "sufficient" a factual basis as possible to establish the "reasonable likelihood" that such materials exist. *Spykstra*, 234 P.3d at 669-70.

12. The emails and chats contained in the FBI's analysis of [redacted] iPhone indicate that "some of [redacted] evidence will help the defense." These writings also indicate that [redacted], another crucial prosecution witness, was [redacted], and that [redacted] *believed* (whether or not this is true) that the University had an interest in making sure "that there were little records [redacted]."

13. The context of these statements, combined with the broader context of the University's well-known concern over its liability [redacted] and the actions it took in response to the information it had about him prior to the shooting, provide defense counsel with a plausible basis to infer that [redacted] made statements about Mr. Holmes [redacted] that are material and favorable to the defense, because these statements may [redacted]. The materials in the defense's possession also give counsel a reason to believe that [redacted] records may contain impeachment evidence relevant to [redacted] For example, the records could contain information that contradicts [redacted] statements he has made about Mr. Holmes to law enforcement and the prosecution after the shooting.[3]

14. Moreover, the recent statements provided by [redacted] to the prosecution and to his attorney do nothing to establish that the information the defense seeks does not exist. The majority of the statement [redacted] gave to the prosecution addresses discrepancies between his account of his time spent with the FBI and their version of events. The only thing [redacted] states with regard to the existence or absence of the information the defense seeks in D-SDT-5 and D-SDT-6 is that he apparently no longer believes that [redacted] "secreted" his [redacted] records, and that the records "that were or were not kept by [redacted] . . was [sic] not related to any case James Holmes may or may not have had, but were related to [redacted] (which was not related to this case)." Prosecution's Motion to Quash, p. 13.

15. [redacted] statement to the prosecution certainly does not disavow ever having spoken about James Holmes [redacted]. His statement does not disclaim the existence of any records [redacted]

---

[3] Counsel for the University of Colorado [redacted] criticizes the defense for not narrowing the language of the subpoenas. However, while the defense has a plausible basis to believe that favorable or exculpatory information exists in these records, the defense does not have any reason to believe that the information is contained in records pertaining to a specific time period. Mr. Holmes and [redacted] at the University [redacted] It is entirely possibly that [redacted] discussed Mr. Holmes [redacted] some time during that time frame. It is also certainly plausible that [redacted] continued to discuss Mr. Holmes [redacted], and after the events of July 20, 2012.

pertain to Mr. Holmes, and it does not deny that he has information that "will help the defense." Moreover, the Court cannot rely on the fact that [redacted] has now changed his position and asserts that he no longer believes [redacted] or the University secreted his records. [redacted] has an obvious motivation to change his story about his records now, as he has made emphatically clear that he does not wish for anyone, including the Court, to view them.

16. Likewise, [redacted] submitted by his attorney does not in any way deny the existence of the records or information sought by the defense or vitiate the defense's good faith basis to believe the information they seek exists.

(2) The Materials are Evidentiary and Relevant.

17. There is no question that the information sought is "relevant." [redacted] would not only be highly relevant, but also mitigating and exculpatory. *See* [redacted]. Likewise, information contained in these records that is suggestive of a motive or bias against Mr. Holmes [redacted] would also not only be relevant, but exculpatory. [redacted]

18. Moreover, while counsel for the University of Colorado [redacted] claims that there are "insurmountable barrier[s] to getting the records into evidence at trial," this is simply not the case. Without knowing what is in the records, it is difficult for counsel to make specific arguments concerning the admissibility of the information, but at a minimum, [redacted] could easily be cross-examined and/or impeached with information contained in his records.

(3) The Materials are Not Otherwise Procurable Reasonably in Advance of Trial by the Exercise of Due Diligence.

19. The defense has no other way of obtaining the information sought. Counsel for the University of Colorado [redacted] concedes this. *See* Third Party Responding to Subpeona Duces Tecum D-SDT-6's Motion to Quash, p. 6, fn. 6.

20. The prosecution suggests that the defense could have simply asked [redacted] about the information recovered from his iPhone. It argues that "The witness was previously interviewed by counsel for the defendant after counsel for the Defendant was in receipt of the discovery that is the subject of D-225. The defense had an opportunity to ask the witness about the alleged inconsistencies that the defense allege [sic] in D-225." This is untrue.

21. While [redacted] reluctantly consented to an interview with the defense on one occasion, January 13, 2013, he conditioned his interview upon the premise that the defense [redacted]. Therefore, the defense was not able to gain any sort of explanation from [redacted] about the meaning of these emails or g-chats, nor could the defense inquire into whether [redacted] records contained any sort of impeachment or other favorable information about Mr. Holmes.

(4) The Defense Cannot Properly Prepare for Trial Without Such Production and Inspection in Advance of Trial.

22. As mentioned previously, [redacted] is an endorsed prosecution witness and will almost certainly be called by the prosecution at trial. He is likely to offer lengthy testimony that is, at least in part, damaging to Mr. Holmes. [redacted] is a critical witness given [redacted] and the jury may rely heavily on his testimony as a result.

23. Mr. Holmes has a due process right to exculpatory and impeachment evidence in this case. *See* [redacted] U.S. Const. Amends. V & XIV; Colo. Const. art. II, secs. 16 & 25. Counsel for Mr. Holmes must obtain this information in advance of trial in order to be able to adequately prepare for the cross-examination of this witness in this capital case, as well as to be able to sufficiently prepare the presentation of the defense case.

24. Several of the parties suggest that the defense can obtain the information it seeks simply by cross-examining [redacted]. *See* Prosecution's Motion to Quash, p. 16; Third Party Responding to Subpeona Duces Tecum D-SDT-6's Motion to Quash, p. 10. As previously explained, [redacted] has a significant incentive at this point to be dishonest about the content of his [redacted] records (to the extent that he can accurately recall what may be in them in the first place), so as to avoid disclosure of the contents of the records, as well as because [redacted] Therefore, it is not sufficient for the defense to be able to cross-examine [redacted] at trial about the information recovered from his iPhone without actually receiving any pertinent material within the requested records in advance.

(5) The Application is Made in Good Faith and is Not Intended as a General Fishing Expedition.

25. As has been previously explained at length, this application is being made in good faith and pursuant to their constitutional, professional, and ethical obligations to Mr. Holmes. *See, e.g.,* Defendant's Response to C-126, paragraphs 2-7; *supra*, paragraphs 1-6.

26. Various parties argue that the defense is engaged in a "fishing expedition" akin to those described in [redacted] *v. People* [redacted] *Spykstra*, 234 P.3d at 669-70, and *People v.* [redacted] However, this case is unlike those cases, where the defendant asserted [redacted]

27. This is not a situation where the defense is hypothesizing out of thin air that there may be something relevant or exculpatory in [redacted] records. The defense did not take the decision to pursue this information lightly. Notably, it has not pursued information contained in [redacted] records of other witnesses or victims just in the vague hope of

finding something relevant or exculpatory. As previously explained, the defense has a specific and detailed factual basis for the requests made in D-SDT-5 and D-SDT-6. Counsel for the witness's assertion that [redacted] is simply untrue.

II. The Witness's [redacted] Does Not Preclude an *In Camera* Review of the Records Sought by D-SDT-5 and D-SDT-6.

28. As [redacted] explains, [redacted].

29. As an initial matter, the defense disputes that all of the information it seeks is [redacted] As explained in Motion D-225, [redacted]

30. As the prosecution states, the policy behind C.R.S. § [redacted] Prosecution's Motion to Quash, p. 4 (quoting *People v.* [redacted] This policy would not be thwarted by an in camera inspection of [redacted] records and the disclosure to the parties of information about *Mr. Holmes* because the disclosure of information about Mr. Holmes would not serve to [redacted] *See, e.g.,* [redacted]

31. Secondly, even assuming that at least some of the other information sought *is* [redacted] (such as information that would impeach [redacted] credibility), the various parties take the position that other than [redacted] there are absolutely no circumstances under which a criminal defendant's due process (or other constitutional) rights [redacted] This is simply not correct.

32. While [redacted] requires a defendant [redacted], it does not foreclose the possibility that [redacted] The defense has established [redacted], given the importance of [redacted] testimony, the specific factual basis for believing the materials

sought exist, as well as the fact that this is a capital case where this Court must apply a "strong presumption that possibly exculpatory evidence should be given to the defendant." *People v. Rodriguez*, 786 P.2d 1079, 1082 (Colo. 1989).

33. Indeed, no Colorado appellate court has ever held that [redacted] In fact, in [redacted], the Colorado Supreme Court signaled the opposite. It specifically cited to [redacted] which argued [redacted] The [redacted] Court also expressly stated that in camera review [redacted] This is consistent with the holdings of courts in other jurisdictions. *See, e.g.,* [redacted]

34. The parties' attempts to distinguish [redacted] from this case fail. The parties claim [redacted] is distinguishable from these circumstances because it did not involve [redacted] *See, e.g.,* Third Party Responding to Subpoena Duces Tecum D-SDT-6's Motion to Quash, p. 8; Motion by Non-Party Witness to Quash Defendant's Subpoenas Duce Tecum and Response to D-225, p. 8; Prosecution's Motion to Quash, p. 9. However, the parties ignore several central aspects of [redacted]

---

[4] Although the [redacted] Court cited [redacted] as a case that was distinguishable from [redacted] because it involved [redacted] does not control here because it is entirely distinguishable from this case on its facts. The reasoning in [redacted] was based expressly on the specific [redacted] as well as the fact that [redacted]. This case does not involve records of [redacted] nor does the defense's request here constitute a mere fishing expedition for material exculpatory information.

35. First, the records at issue in , which pertained to contained information that was In fact, the specifically argued that the contents Despite noting that the the Supreme Court specifically rejected the argument (similar to those advanced here) that

36. Second, while the Court in ultimately considered the fact that the explicitly noted that it was expressing

37. Also notable is the fact that the Colorado Supreme Court The Court also held that the Furthermore, similar to

38. Finally, the defense wishes to reiterate that its request in Motion D-225 is for a judicial in camera review of these records. Such a review adequately While the prosecution argues that "[n]o person should have [the information sought here] released to the public simply because the person cooperated with law enforcement in a criminal investigation that happened to attract media attention," Prosecution's Motion to Quash, p. 12, no one is suggesting that full-blown public disclosure of

---

[5] The parties also take issue with the defense's argument that pursuant to any statements made by . However, this conclusion is a logical extension of While held that . . . Thus, it follows that if communicated

[redacted] records would be appropriate, nor is such relief even under consideration by the Court.[6]

39. Even if the Court were to grant the relief requested in Motion D-225, the vast majority of [redacted] records will never be disclosed to or viewed by anyone except the Court. The Court would only disclose to the parties evidence contained in those records that is material and favorable to Mr. Holmes's defense, which is information that the state and federal constitutions entitle him to have. *See, e.g.,* [redacted] U.S. Const. amends V, VI, XIII, XIV; Colo. Const. art. II, secs. 16, 18, 20, 25.

40. What cannot be countenanced is a rule that [redacted] defendant's constitutional right to material and exculpatory information, even in the face of a competent showing that there is a reasonable likelihood that such exculpatory information exists [redacted]

Mr. Holmes files this response, and makes all other motions and objections in this case, whether or not specifically noted at the time, 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)
Chief Trial Deputy State Public Defender

Kristen M. Nelson (No. 44247)
Deputy State Public Defender

Dated: August 21, 2014

[6] Moreover, to the extent that "this witness did not realize that the entire contents of the witness's phone would be turned over to the prosecution and to the defense in this case," Prosecution's Motion to Quash, p. 12, it is the fault of law enforcement for not making this clear to [redacted] prior to obtaining his consent. It is not the fault of defense counsel, who are the mere recipients of information from [redacted] iPhone that were disclosed with his consent, and who are ethically obligated to act upon the information they received.

I hereby certify that on August 21, 2014, I

___ mailed, via the United States Mail,
X faxed, or
___ hand-delivered

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

George Brauchler
Jacob Edson
Rich Orman
Karen Pearson
Lisa Teesch-Maguire
Office of the District Attorney
6450 S. Revere Parkway
Centennial, Colorado 80111
Fax: 720-874-8501

I further certify that a true and correct copy of the foregoing document was emailed to the individuals listed below:

David P. Temple
Senior Associate University Counsel
Office of University Counsel
1800 Grant Street, Suite 700
Denver, Colorado 80203
(303) 860-5691 Phone; (303) 860-5650 Fax
David.Temple@cu.edu

Sheryl K. Bridges
Fennemore Craig P.C.
1700 Lincoln Street, Suite 2900
Denver, CO 80203
Telephone: 303-291-3200
Facsimile: 303-291-3201
sbridges@fclaw.com

Kari M. Hershey
Hershey Decker PLLC
10463 Park Meadows Dr., Suite 209
Littleton, CO 80124
Phone: (303) 226-1680
kari@hersheydecker.com

Nova Wharton