

# REDACTED

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| District Court, Arapahoe County, Colorado<br>Arapahoe County Courthouse<br>7325 S. Potomac St., Centennial, CO 80112  | <b>Filed</b><br><br>OCT 29 2014<br><br>CLERK OF THE COMBINED COURT<br>ARAPAHOE COUNTY, COLORADO<br><br>♦ COURT USE ONLY ♦ |
| THE PEOPLE OF THE STATE OF COLORADO,<br>Plaintiff<br><br>v.<br><br><b>JAMES HOLMES,</b><br>Defendant  |   |
| DOUGLAS K. WILSON, Colorado State Public Defender<br>Daniel King (No. 26129)<br>Tamara A. Brady (No. 20728)<br>Chief Trial Deputy State Public Defenders<br>1300 Broadway, Suite 400<br>Denver, Colorado 80203<br>Phone (303) 764-1400 Fax (303) 764-1478<br>E-mail: <a href="mailto:state.pubdef@coloradodefenders.us">state.pubdef@coloradodefenders.us</a> | Case No. <b>12CR1522</b><br><br><br><br><br><br>Division 202  |
| <b>MOTION TO EXCLUDE VIDEOTAPES OF DR. REID'S EXAMINATION OF MR. HOLMES FROM EVIDENCE [D-249]</b>   |   |

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### CERTIFICATE OF CONFERRAL

The prosecution states that it objects to this motion.

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Pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments and article II, sections 16, 18, 20 and 25 of the Colorado Constitution, James Holmes, through counsel, moves this Court to exclude from evidence for all purposes the video recording of Dr. Reid's sanity evaluation of Mr. Holmes. In support of this motion, Mr. Holmes states the following:

1. Dr. Reid specifically requested permission from the Court to videotape his examination of Mr. Holmes, describing such a procedure as his "regular practice." *See* C-113, C-121. The Court granted this request over defense objection. *See* Motion D-221, Order re: Motion D-221. The defense also asked to be present during the examination in the event it was videotaped, which was also denied. *Id.*

2. As a result, the prosecution is now in possession of over 22 hours of videotaped footage of Dr. Reid's forensic interviews with Mr. Holmes – interviews, the defense submits, that should never have occurred in the first place. *See* Motion D-246. The Court should exclude the videotapes from evidence at trial for a number of reasons.

3. First and foremost, the defense has already articulated in numerous pleadings the numerous Fifth Amendment objections it has to the sanity evaluation occurring at all, and to the use of, or testimony about, Mr. Holmes's statements acquired as a result of the evaluation. *See, e.g.*, Motions D-28, D-29, D-30, D-31, D-32, D-187, D-248. The defense hereby incorporates by reference the arguments made in these previous pleadings.

4. However, defense counsel additionally submit that allowing an actual videotape of their client speaking about the alleged offense (among other topics) to be presented to the jury would give rise to an even more acute Fifth Amendment violation than would second-hand testimony about his statements. Allowing the videotape of Mr. Holmes speaking about the offense to be played to the jury is the functional equivalent of placing Mr. Holmes on the witness stand to talk about the offense.

5. A videotape not only captures 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); *Schneider v. Lynaugh*, 835 F.2d 570, 573-77 (5th Cir. 1988) (psychiatrist's assessment of defendant included analysis of defendant's demeanor, facial expressions, and expressions of emotion).

6. Thus, allowing the jury to view the actual videotape of Mr. Holmes's conversations with Dr. Reid would further complicate the already impossible task of confining the jury's consideration of Mr. Holmes's statements solely to the issues of sanity, and not guilt, as well as ensuring that jurors comply with the restrictions the statute places on the use of such evidence for sentencing purposes. *See* C.R.S. §§ 16-8-101(1)(a) & (b); 16-8-101.5(a) & (b). *See also* Motion D-248.

7. Second, the defense submits that the procedures outlined in C.R.S. § 16-8-101 *et seq.* and the Court's order authorizing the videotaping of Dr. Reid's examination, coupled with any order authorizing the introduction of the videotape into evidence, would violate the state and federal due process protections against the introduction of involuntary confessions. *See Jackson v. Denno*, 378 U.S. 368 (1964) ("It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession . . . and even though there is ample evidence aside from the confession to support the conviction."); *People v. Raffaelli*, 647 P.2d 230 (Colo. 1982); *People v. Quintana*, 198 Colo. 461, 601 P.2d 350 (1979).

8. Mr. Holmes's submission to this videotaped examination was involuntary. After already having fully cooperated with the first sanity examination, he was forced to submit to a subsequent second, video-recorded interview with a sanity examiner during which he discusses, among other things, detailed aspects of the alleged offense (despite never having been advised, at the time he entered his not guilty by reason of insanity plea, that he may have to submit to a *videotaped* examination) or face the severe penalty of being unable to present any evidence of his mental condition at trial or sentencing. *See* C.R.S. § 16-8-106(2)(c). Videotaped evidence of this examination cannot be introduced and played for the jury given these circumstances. *See,*

e.g., *Minnesota v. Murphy*, 465 U.S. 420, 429, 434 (1984); *People in Interest of A.D.G.*, 895 P.2d 1067 (Colo. App. 1994).

9. Third, defense counsel move to exclude introduction of the videotape into evidence because the videotape was obtained in violation of Mr. Holmes's state and federal constitutional rights to counsel. *See Estelle v. Smith*, 451 U.S. 454, 470 (1981) ("It is central to the Sixth Amendment principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial."); U.S. Const. amend. VI, XIV; Colo. Const. art. II, secs. 16, 25; *see also* Motions D-92, D-221. The defense requested, and was denied, the opportunity to be present to advise Mr. Holmes at this critical stage of the proceeding.

10. Fourth, the video recording is not the mere equivalent of other ways of memorializing a conversation, such as handwriting or even orally dictating notes [REDACTED]. Rather, the video recording also captures Dr. Reid's reactions and responses to Mr. Holmes's statements. [REDACTED]

11. Allowing the jury to be exposed to Dr. Reid's reactions to Mr. Holmes's statements would thus violate Colorado's prohibition against witnesses opining about the veracity of other witnesses announced in *Liggett v. People*, 135 P.3d 725, 729 (Colo. 2006), which applies to both experts and lay witnesses: "In Colorado, neither lay nor expert witnesses may give opinion testimony that another witness was telling the truth on a specific occasion." *People v. Bridges*, No. 11CA2033, 2014 WL 2144846 at \*2 (Colo. App. May 22, 2014) (quoting *People v. Wittrein*, 221 P.3d 1076, 1081 (Colo. 2009)); *People v. Koon*, 713 P.2d 410, 411-12 (Colo. 1985).

12. Fifth, Dr. Reid explained to the Court that he prefers to videotape examinations *for his own purposes* because it facilitates his ability to memorialize the interviews and later write his report. *See* C-121. Although both parties were provided with copies of the videotape, the purpose of the videos was not to create evidence to be introduced against Mr. Holmes in court, but to assist Dr. Reid, at his own request, in creating his report. Other experts [REDACTED] chose to memorialize their interviews with Mr. Holmes in different ways.

13. Despite the fact that the intended purpose of videotaping Dr. Reid's examination with Mr. Holmes was not to provide *the jury* with a view of the interactions between Dr. Reid and Mr. Holmes, the fact remains that of the multiple sanity examinations that have been conducted in this case, Dr. Reid's was the only one that was videotaped. Dr. Reid's preferred method of memorializing his interviews with Mr. Holmes should not be permitted to unduly influence jurors or, simply due to its mere existence, cause jurors to place any more emphasis or

weight on his examination as compared to the other evaluations that have been conducted in this case.

14. Yet because of the unique nature of videotaped evidence, allowing the prosecution to introduce recordings of Dr. Reid's sanity examination into evidence could interfere with the jury's ability to make reliable credibility determinations about the expert witnesses, and could cause the jury to improperly place undue weight or emphasis on Dr. Reid's conclusions and opinions and/or on the videotape itself as a piece of evidence.

15. As the Court of Appeals recently acknowledged, the nature of videotaped evidence is unique and is fundamentally different from other ways of memorializing interviews or information, such as notes. A videotape captures, *inter alia*, "the animation passion, or vulnerability" of the person speaking, which increases the risk that a jury may give it undue weight or emphasis while considering it at trial or during deliberations. *People v. Jefferson*, No. 11CA1465, 2014 WL 2769104 at \*4 (Colo. App. June 19, 2014). *See also United States v. Binder*, 769 F.2d 595, 600 (9th Cir.1985) ("Videotape testimony is unique. It enables the jury to observe the demeanor and to hear the testimony of the witness. It serves as the functional equivalent of a live witness [with the jury in the room]."), *overruled on other grounds by United States v. Morales*, 108 F.3d 1031, 1035 n. 1 (9th Cir.1997) (en banc).

16. The issue in *Jefferson* was whether the trial court erred by allowing the jury to have unfettered access to a videotaped interview of an alleged victim in a child sexual assault case during deliberations. While the facts and the issue in *Jefferson* are different, the appellate court's acknowledgment of the uniqueness of videotaped evidence is relevant to the Court's determination of whether or not to allow the evidence to be presented to the jury in the first place given the circumstances of this case.

17. "It is, of course, essential that the court observe caution that evidence is not so selected, nor used in such a manner, that there is a likelihood of it being given undue weight or emphasis by the jury. This would be prejudicial abuse of discretion and constitute grounds for reversal." *Settle v. People*, 180 Colo. 262, 264, 504 P.2d 680, 680-81 (1972).

18. Because of the risk that the videotape will cause the jury to place undue emphasis and weight on the video recording itself, as well as potentially on Dr. Reid's examination and the conclusions he reached, introduction of the videotape into evidence would violate CRE 403, as well as Mr. Holmes's state and federal constitutional rights to due process, a fair trial by an impartial jury, and a fair and reliable sentencing proceeding. *See, e.g., Manson v. Brathwaite*, 432 U.S. 98 (1977) (due process requires convictions to be based upon reliable evidence); *Gardner v. Florida*, 430 U.S. 349, 358 (1977); *Noland v. People*, 175 Colo. 6, 485 P.2d 112 (1971); U.S. Const. amends. V, VI, VIII, XIV; Colo. Const. art. II, secs. 16, 18, 20, 25.

### **Request for a Hearing**

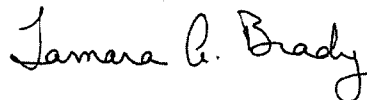
19. The defense requests a hearing on this motion.

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



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Tamara A. Brady (No. 20728)  
Chief Trial Deputy State Public Defender



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

Dated: October 29, 2014

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| District Court, Arapahoe County, Colorado<br>Arapahoe County Courthouse<br>7325 S. Potomac St., Centennial, CO 80112  | <p style="text-align: center;">♦ COURT USE ONLY ♦</p>                        |
| THE PEOPLE OF THE STATE OF COLORADO,<br>Plaintiff<br><br>v.<br><br><b>JAMES HOLMES,</b><br>Defendant  |  |
| DOUGLAS K. WILSON, Colorado State Public Defender<br>Daniel King (No. 26129)<br>Tamara A. Brady (No. 20728)<br>Chief Trial Deputy State Public Defenders<br>1300 Broadway, Suite 400<br>Denver, Colorado 80203<br>Phone (303) 764-1400 Fax (303) 764-1478<br>E-mail: <a href="mailto:state.pubdef@coloradodefenders.us">state.pubdef@coloradodefenders.us</a> | Case No. <b>12CR1522</b><br><br><br><br><br><br><br><br><br><br>Division 202 |
| <b>ORDER RE: MOTION TO EXCLUDE VIDEOTAPES OF DR. REID'S<br/>         EXAMINATION OF MR. HOLMES FROM EVIDENCE [D-249]</b>  |  |

Defendant's motion is hereby GRANTED \_\_\_\_\_ DENIED \_\_\_\_\_.

BY THE COURT:

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JUDGE

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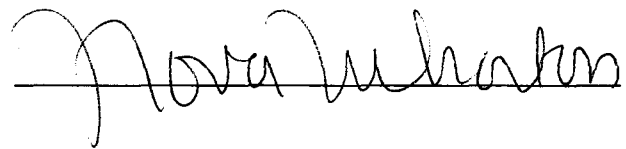
Dated

I hereby certify that on October 29, 2014, I

- mailed, via the United States Mail,
- 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

  
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