

REDACTED

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	Filed SEP 05 2014 CLERK OF THE COMBINED COURT ARAPAHOE COUNTY, COLORADO σ COURT USE ONLY σ
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 202
MOTION TO RECONSIDER PORTION OF COURT'S ORDER RE: D-221A [D-231]	

CERTIFICATE OF CONFERRAL

The prosecution states that it objects to this motion.

Pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and article II, sections 16, 18 and 25 of the Colorado Constitution, Mr. Holmes, through counsel, respectfully moves the Court to reconsider the portion of its Order re: D-221a directing the new sanity examiner to submit three copies of his videotaped examination to the Court along with his report of examination. In support of this motion, Mr. Holmes states the following:

1. Dr. [REDACTED], who has been selected by CMHIP to conduct a second sanity examination of Mr. Holmes, informed the Court in July that he intended to videotape his examination of Mr. Holmes. See Pleading C-113. The defense opposed. See Motion D-221. The Court overruled the defense's objections, and authorized [REDACTED] to videotape [REDACTED] examination. See Order re: D-221a, p. 2. The Court further ordered that "[a]long with [REDACTED] report, the second examiner must submit three copies of the videotaped examination—one for each party and one for the Court." *Id.*

2. Mr. Holmes requests that this Court reconsider this portion of its order and require the parties to pursue access to the videotape independently.

3. As an initial matter, C.R.S. § 16-8-106(4) states that a written report of any sanity examination conducted pursuant to § 16-8-101 *et seq.* “shall be prepared in triplicate and delivered to the clerk of the court which ordered it,” and that the clerk “shall furnish a copy of the report both to the prosecuting attorney and the counsel for the defendant.” There is no provision in Colorado law that requires the simultaneous¹ production of an examiner’s notes, or in this case, the *videotape* of a sanity examination, to both parties.

4. Notably, the Court did not order that Dr. Metzner’s notes² from the first sanity examination be produced in triplicate for the parties and the Court at the same time the report of his examination of Mr. Holmes was filed with the clerk. Rather, the prosecution pursued these notes, as well as the other material and data generated by Mr. Holmes’s first sanity examination at CMHIP, through Crim. P. 17(c).

5. The Court should require the parties to follow the same process here, so that the defense and CMHIP have the opportunity to file written responsive pleadings to the prosecution’s request for disclosure of the videotape and any other requested materials before the prosecution receives a copy to ensure that a full and complete record is made on this issue for appellate purposes. The Court’s order as it stands violates Mr. Holmes’s procedural due process rights. *See, e.g., Woodson v. Ingram*, 173 Colo. 65, 67, 477 P.2d 455, 456 (1970) (“Notice and an opportunity to be heard are basic ‘due process’ requirements under our system of justice.”); U.S. Const. amend. XIV; Colo. Const. art. II, sec. 25.

6. While the videotape created by [REDACTED] of [REDACTED] examination of Mr. Holmes will inevitably contain “communications made by the defendant to a physician or psychologist in the course of an examination or treatment for such mental condition for the purpose of any trial, hearing on the issue of mental condition, or sentencing hearing conducted pursuant to section 18-1.3-1201” that are subject to the waiver of privilege provision of C.R.S. § 16-8-103.6, it is not a given that the entirety of the videotape falls within the purview of section 16-8-103.6 or is discoverable to the prosecution.

7. It is possible that the videotape contains other communications, images, or information that may not be subject to the waiver or to disclosure to the prosecution for any number of reasons. For example, the videotaped examination could contain references to unrelated medical conditions, and/or discussions with Mr. Holmes about matters that could be protected by other doctrines, such as attorney work product. As the Court noted in previously ruling on the defense’s motion to quash P-SDT-3, P-SDT-4, P-SDT-5, and P-SDT-6, “[t]he

¹ While the Court’s order does not explicitly state that it is intending to distribute the copies of the videotape to the parties simultaneously, the defense received this impression from the Court’s comments at the August 25, 2014 hearing.

² [REDACTED]
[REDACTED] videotaped his examination apparently in lieu of taking notes.

[Colorado Supreme] Court in *Gray v. District Court*, 884 P.2d 286, 293 (Colo. 1994)] made clear that, while the waiver in section 16-8-103.6(2)(a) is broad, it is not unbounded. It applies only to medical and mental health records related to the mental condition the defendant has placed in issue.”³ Order re: Motion D-178a, pp. 8-9. See also *People v. Ullery*, 984 P.2d 586, 590 (Colo. 1999). Depending on the nature of the information, disclosure to the prosecution of protected information contained in the videotape would violate, *inter alia*, Mr. Holmes’s right to the effective assistance of counsel, right to present a defense, to self-incrimination, and to due process and a reliable sentencing proceeding. U.S. Const. amends V, VI, VIII, XIV; Colo. Const. art. II, secs. 16, 18, 20, 25.

8. In addition, consistent with the arguments made in Motions D-93 and D-230, requiring the parties to pursue access to the videotape independently would also enable Mr. Holmes to evaluate whether to maintain his plea of not guilty by reason of insanity in the wake of the results of the second sanity examination before the prosecution potentially gains access to this information. If Mr. Holmes were to elect to withdraw his plea, the prosecution would have no entitlement to the videotape, as “no evidence acquired directly or indirectly for the first time from a communication derived from the defendant’s mental processes during the course of a court-ordered examination under section 16-8-106 or acquired pursuant to section 16-8-103.6 is admissible against the defendant on the issues raised by a plea of not guilty, if the defendant is put to trial on this issue” C.R.S. § 16-8-107(1)(a).

9. If Mr. Holmes were to withdraw his plea, allowing the prosecution access not only to the report of the examination, but an actual recording of the examination itself, would provide the prosecution with statements of Mr. Holmes that it otherwise would not have had, and could enable the prosecution to develop evidence and arguments against Mr. Holmes that it otherwise could not have. This would undermine Mr. Holmes’s constitutional rights to due process and to be free from self-incrimination in violation of the Fifth and Fourteenth Amendments of the United States Constitution and article II, sections 18 and 25 of the Colorado Constitution. See, e.g., *People v. Herrera*, 87 P.3d 240, 245 (Colo. App. 2003); *People v. Galimanis*, 765 P.2d 644 (Colo. App. 1988); *People v. Tally*, 7 P.3d 172 (Colo. App. 1999). See also *State v. Rodriguez*, 807 N.W. 2d 35, 38-39 (Iowa 2011) (“We also believe that to fully protect a defendant’s constitutional rights, an expert should not disclose to the State any opinions, observations, or statements that fall under branch (b) [incriminatory observations of an expert sanity examiner in arriving at his opinion including incriminatory statements by the defendant].”).

10. If the Court is unwilling to reconsider the above-referenced portion of its Order re: D-221a, the defense requests that in the alternative, the Court issue a protective order staying the prosecution’s further disclosure of the videotape to its mental health experts until the defense

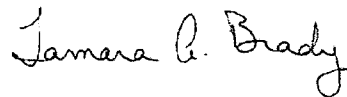
³ The defense would obviously require an opportunity to view the videotape in order to lodge any such objections with specificity. The defense believes it would be entitled to a copy of the videotape with a signed release from Mr. Holmes. If CMHIP or the sanity examiner is unwilling to release the videotape with such a release, defense counsel will request a court order authorizing them to review the videotape for the purposes of lodging any objections to its release to the prosecution.

has had the opportunity to view the videotape and litigate any issues pertaining to the further disclosure of the tape and/or use of the tape at trial.

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: September 5, 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
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Defendant's motion is hereby GRANTED ____ DENIED ____.

BY THE COURT:

JUDGE

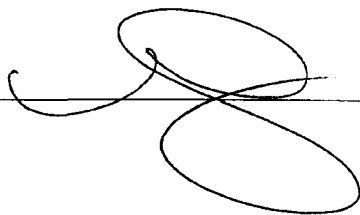
Dated

I hereby certify that on 9/5, 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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A handwritten signature in black ink is written over a horizontal line. The signature is stylized and appears to be a cursive representation of a name.