

DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO 7325 S. Potomac St. Centennial, Colorado 80112	▲COURT USE ONLY▲
<b>PEOPLE OF THE STATE OF COLORADO</b>  v.  <b>JAMES EAGAN HOLMES,</b> <b>Defendant</b>	Case No. <b>12CR1522</b>  Division: <b>201</b>
<b>AMENDED ORDER VACATING ORDER D-A (C-199-A)<sup>1</sup></b>	

This matter is before the Court on the prosecution’s oral motion to vacate Order D-A, which was entered *ex parte* by the undersigned’s predecessor on December 18, 2012. The prosecution learned about Order D-A when it requested from the Arapahoe County Sheriff’s Office (“the Sheriff”) the jail visit log related to the defendant. For the reasons articulated in this Order, the motion is granted.

In Motion D-A, the defendant sought, *ex parte*, an “order prohibiting [the Sheriff] from disclosing any information about visits [the defendant] receives at the jail from defense experts.” Motion D-A at p. 1. The Court, the Honorable William Sylvester presiding, granted the motion and signed the proposed order submitted by the defense. The Court ordered the Sheriff “not to disclose to any person or

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<sup>1</sup> This Order supersedes Order C-199, which was issued late yesterday.

party, including but not limited to members of the prosecution team . . . *any* information about visits [the defendant] receives from professionals.” Order D-A. More specifically, the Court ordered that the Sheriff “may not disclose to any person or party the fact that any such visit took place, the name of the professional, the date of the visit, the circumstances under which the visit took place, or any other information concerning the visit absent further Order of the Court.” *Id.* Significantly, the phrase, “absent further Order of the Court,” was not part of the proposed order filed; it was added by the Court.<sup>2</sup> *Id.*

The Court grants the People’s request to vacate Order D-A for multiple reasons. First, none of the authority cited by the defense in Motion D-A supports the relief requested. Second, since the issue was raised by the prosecution earlier this week, the defense has cited no authority that supports Order D-A. As the party asserting that these documents are protected or privileged, the defense bears the burden of establishing such protection or privilege. *See People v. District Court*, 743 P.2d 432, 435 (Colo. 1987) (“the claimant of a privilege bears the burden of establishing the applicability of the privilege”). Third, earlier this week, the defense acknowledged on more than one occasion that it has already disclosed to the prosecution the names of all of the defense experts retained on the issue of sanity who have visited the defendant at the jail and the dates such visits occurred;

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<sup>2</sup> This phrase put the defense on notice that Order D-A was subject to being modified or vacated by subsequent order.

sanity is the issue at the heart of this case.<sup>3</sup> The defense has represented that it does not object to the prosecution having this information. Fourth, the Court finds that the motion was improperly filed as an *ex parte* motion and that the Court erred in issuing an *ex parte* Order.<sup>4</sup> Finally, the decision by the defense to seek Order D-A is an implied admission that the records that are subject to that Order are not protected or privileged by the law and are accessible by the prosecution. Otherwise, there would have been no need for an Order, much less an *ex parte* Order.

It is worth noting that the defense has also orally asserted that any documentation in the jail visit log related to visits by lay people and counsel is protected or privileged. However, Motion D-A did not seek an Order preventing the Sheriff from disclosing such information. The motion was limited to visits by “defense experts.” Motion D-A at p. 1.<sup>5</sup> Nor has the defense previously expressed any concern over the disclosure of such information, much less taken any action to prevent the prosecution from obtaining it. If the jail visit log at issue had not included visits by “defense experts,” the Sheriff presumably would have given the

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<sup>3</sup> The Court believes that all defense experts who have visited the defendant at the jail are experts who have been retained in connection, whether directly or indirectly, to the insanity defense.

<sup>4</sup> The Court understands why the defense sought Order D-A before deciding whether to enter a plea of not guilty by reason of insanity. However, there was no basis for the *ex parte* filing of the motion or for an *ex parte* ruling. With this Order, the Court discloses to the prosecution both Motion D-A and Order D-A. *See* Attachments.

<sup>5</sup> This case has been pending for almost three years.

log to the prosecution without the defense ever knowing about it. In any event, as mentioned, the defense has presented no authority in support of the proposition that jail visit logs created and kept by the Sheriff may not be disclosed to the prosecution because every defendant in the custody of that Sheriff has some sort of a privilege in those records. *See District Court*, 743 P.2d at 435

For all of the foregoing reasons, Order D-A is hereby vacated. This Order should not be interpreted as requiring the Sheriff to disclose to the prosecution any part of the jail visit log related to the defendant. The Court does not believe it has authority to tell the Sheriff how it must address a request for records that the Sheriff routinely generates and keeps. The Court simply vacates Order D-A as erroneously and improperly entered. It is up to the People to decide how to conduct their investigation in this case and how to access documents that may be relevant to that investigation.

Without objection, however, any request by the People for the jail visit log related to the defendant should be accompanied by both a list of all of the attorneys, investigators, and staff from the Public Defender's Office working on this case and instructions that the Sheriff must redact those names from the copy of the log produced to the People.<sup>6</sup> If the Sheriff believes that the rest of the jail visit

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<sup>6</sup> The People have stated that they only seek information in the log that reflects visits by defense experts and lay people.

log, or any portions of it, are protected, privileged, or confidential, or for any other reason should not be disclosed, it may choose to deny the prosecution access to those documents or it may make further redactions.<sup>7</sup> In the event the prosecution serves a subpoena *duces tecum* on the Sheriff with respect to those records, the Sheriff and the defense may file a motion to quash.

Dated this 2<sup>nd</sup> day of May of 2015.

BY THE COURT:



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Carlos A. Samour, Jr.  
District Court Judge

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<sup>7</sup> There is no record before the Court regarding the policies and procedures in effect at the jail.

# **ATTACHMENTS**

**AMENDED ORDER C-199-A**

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff  v.  <b>JAMES HOLMES,</b> Defendant	
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: <a href="mailto:state.pubdef@coloradodefenders.us">state.pubdef@coloradodefenders.us</a>	σ COURT USE ONLY σ  Case No. <b>12CR1522</b>       Division 22
<b>EX PARTE MOTION FOR PROTECTIVE ORDER PROHIBITING ARAPAHOE COUNTY SHERIFF'S OFFICE FROM DISCLOSING INFORMATION ABOUT CONFIDENTIAL JAIL VISITS [D-A]<sup>1</sup></b>  <b>**FILED EX PARTE AND UNDER SEAL**</b>	

Pursuant to his rights under U.S. Const. amends, V, VI, XIV; Colo. Const. art. II, §§ 16, 18, 20, 25, and C.R.S. § 13-90-107(1)(d) & (g), James Holmes, through counsel, moves this Court to enter a protective order prohibiting the Arapahoe County Sheriff's Office from disclosing any information about visits Mr. Holmes receives at the jail from defense experts. In support of this motion, Mr. Holmes states the following:

1. Counsel is obligated under the Sixth Amendment and Colo. Const. art. II, sec. 16 to make reasonable investigations in connection with the case. *Strickland v. Washington*, 466 U.S. 668, 691 (1984); *People v. White*, 182 Colo. 417, 421-422, 514 P.2d 69, 71 (1973).

2. Moreover, Mr. Holmes is entitled to a pre-trial investigation that is confidential. *See generally, Richardson v. District Court*, 632 P.2d 595 (Colo. 1981) (reversing trial court's order granting the prosecution's motion for pre-trial discovery of the written and recorded statements of non-expert defense witnesses which were made to an investigator of the Public

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<sup>1</sup> Because this motion concerns confidential matters of defense investigation and strategy, it is being filed ex parte and everything about the motion, including the fact that it has been filed, should remain confidential and should not be disclosed to the prosecution or any other party. Therefore, the defense has designated this motion with a letter, rather than a number, to avoid creating the appearance of a gap in the sequential numbering of defense motions.

Defender's Office in the course of his pre-trial investigation of the case on behalf of the defendant's attorney); *see also Hutchinson v. People*, 742 P.2d 875, 881 (Colo.1987) (analogous analysis concerning why accused is entitled to confidential expert); *Perez v. People*, 745 P.2d 650 (Colo. 1987) (same), *rev'g People v. Perez*, 701 P.2d 104 (Colo.App. 1985); *Miller v. District Court*, 737 P.2d 834 (Colo. 1987) (same).

3. In *Hutchinson v. People*, 742 P.2d 875 (Colo. 1987), the Colorado Supreme Court announced:

To safeguard the defense attorney's ability to provide the effective assistance guaranteed by these constitutional provisions, it is essential that he be permitted full investigative latitude in developing a meritorious defense on his client's behalf. This latitude will be circumscribed if defense counsel must risk a potentially crippling revelation to the State of information discovered in the course of investigation which he chooses not to use at trial. *Id.* at 883.

*See also People v. Martinez*, 970 P.2d 469 (Colo. 1998) (noting that reciprocal discovery required of the defendant "comprises only substantial recitations of witness statements, and not the mental impressions, conclusions, opinions, or legal theories of the defense... [r]eciprocal discovery may not include statements of witnesses outside the subject matter of their testimony at trial, because such extraneous information would not otherwise become known to the prosecution during the defense witness's trial testimony.").

4. Because Mr. Holmes is constitutionally entitled to have confidential professional meetings at the jail, the defense respectfully requests this Court to issue a protective order prohibiting the Arapahoe County Sheriff's Office from releasing any information to anyone, including the prosecution, the media, or members of the public, about professional visits, including but not limited to the fact that such a visit took place, the name of the professional, the date of the visit, the circumstances under which the visit took place, or any other information concerning the visit.

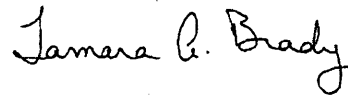


Mr. Holmes files this motion, and makes all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, on the following grounds and authorities: the Due Process Clause, the Right to a Fair Trial by an Impartial Jury, the Rights to Counsel, 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: December 18, 2012

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	           σ COURT USE ONLY σ
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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: <a href="mailto:state.pubdef@coloradodefenders.us">state.pubdef@coloradodefenders.us</a>	Case No. <b>12CR1522</b>          Division 22
<b>ORDER RE: EX PARTE MOTION FOR PROTECTIVE ORDER PROHIBITING          ARAPAHOE COUNTY SHERIFF'S OFFICE FROM DISCLOSING INFORMATION          ABOUT CONFIDENTIAL JAIL VISITS [D-A]</b>	

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

The Arapahoe County Sheriff's Office is hereby ORDERED not to disclose to any person or party, including but not limited to members of the prosecution team, the media, and the public, *any* information about visits Mr. Holmes receives from professionals. Specifically, the Sheriff's Office may not disclose to any person or party the fact that any such visit took place, the name of the professional, the date of the visit, the circumstances under which the visit took place, or any other information concerning the visit.

BY THE COURT:

\_\_\_\_\_

JUDGE

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Dated

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	<p style="text-align: center;">σ COURT USE ONLY σ</p>
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Defendant's motion is hereby GRANTED  DENIED .

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BY THE COURT:

  
 \_\_\_\_\_  
 JUDGE

*12/18/12*  
 \_\_\_\_\_  
 Dated

CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2015, a true and correct copy of the Court's **Amended Order Vacating Order D-A (C-199-A)** was served upon the following parties of record:

Karen Pearson  
Christina Taylor  
Rich Orman  
Jacob Edson  
Lisa Teesch-Maguire  
George Brauchler  
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Sherilyn Koslosky  
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Ronald A. Carl  
Erin L. Powers  
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A handwritten signature in black ink, appearing to read "Amanda Helms", is written over a horizontal line.