

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>ORDER REGARDING DEFENDANT'S ORAL MOTION TO EXCLUDE          VICTIM IMPACT VIDEOS (C-204)</b>	

On April 20, 2015, the defendant filed a motion to exclude seven victim impact videos. *See* Motion D-288. More specifically, the defendant moved to preclude: (1) a six-and-a-half minute video of Jessica Ghawi interviewing a hockey player as an intern for a media organization; (2) a video of Alexander Boik's girlfriend visiting a park and talking about his proposal to her, his mother analogizing losing her son to losing one of her limbs, close-up shots of Mr. Boik's grave, and his mother explaining that she bought a burial plot next to him so he wouldn't be alone; (3) a video entitled "Celebrating the Life of Alexander Jonathan Boik," featuring a photo montage and set to a musical medley; (4) a commemorative video featuring a montage of photos and videos of Mr. Boik set to a melancholic piano song entitled "Living Without You," by Steve Alek; (5) a

short video of Mr. Boik receiving his high school diploma, as well as a video of Mr. Boik having a conversation with his girlfriend and saying, “I love you so much;” (6) an hour-long video of Veronica Moser-Sullivan opening Christmas presents with her father and grandparents; and (7) a 14-minute video tribute to Gordon Cowden, featuring photographs from birth to adulthood, set to a medley of evocative songs. *Id.* at pp. 1-2.<sup>1</sup>

For the reasons stated in Order D-288, the Court struck Motion D-288 as improperly filed. *See* Order D-288. However, the Court afforded the defendant an opportunity to renew his motion orally on April 30. During the hearing held on April 30, the prosecution notified the Court that it intended to submit modified videos to attempt to address the defendant’s concerns. The prosecution subsequently filed four amended recordings, including: (1) a photo montage regarding Alexander Boik with no sound and a few very short video clips (with sound) regarding Alexander Boik; (2) a photo montage regarding Gordon Cowden with no sound; (3) a short video of Jessica Ghawi interviewing a hockey player; and (4) a short video of Veronica Moser-Sullivan opening Christmas presents.<sup>2</sup> Without objection, the Court has reviewed the May 1 videos. For the reasons articulated in this Order, the Court grants the defendant’s motion to exclude, but

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<sup>1</sup> The disc containing these recordings is marked as Ex. A.

<sup>2</sup> The disc containing the revised recordings is marked as Ex. B.

allows the prosecution an opportunity to use the videos after further redactions are made.

First, the defendant argues that the videos should be excluded as untimely under section 18-1.3-1201(3)(b), C.R.S. (2014) and Crim. P. 32.1(d)(3). The Court disagrees.

At the outset, the Court notes that the defendant did not object to the videos as untimely in Motion D-288. Additionally, the defendant, himself, has submitted sentencing materials after the deadline governing such materials. *See* § 18-1.3-1201(3)(c), C.R.S. (2014) and Crim. P. 32.1(d)(7). In fact, some of the defendant's sentencing materials were disclosed after the prosecution discovered the videos in question. The defendant cannot seek to enforce the procedural rules that apply to the prosecution while violating those that apply to him.

The defendant's argument that the deadline applicable to defense materials should be more flexible because it deals with mitigation is not supported by any authority. Nor is it persuasive. To be sure, mitigation is different than victim-impact evidence. But the rules setting deadlines for the discovery of materials to be introduced during a capital sentencing hearing have equal application to both types of evidence.

Moreover, the defendant has not asserted, much less demonstrated, that he will be prejudiced by the People's late disclosures. The Court notes that the vast

majority of the “books, papers, documents, photographs, or tangible objects” the prosecution plans to introduce at any sentencing hearing were disclosed in a timely fashion. The materials in dispute are comprised of four discs containing photo montages and short video recordings. It is extremely unlikely that the defendant will contest any victim-impact evidence presented.<sup>3</sup> In any event, any sentencing hearing is unlikely to take place for another couple of months. Therefore, the defense has ample time to prepare to address the materials recently disclosed.

Perhaps most significantly, section 18-1.3-1201(3)(f) appears to anticipate the situation before the Court. It states that “[t]here is a continuing duty on the part of the prosecuting attorney . . . to disclose the information and material specified in this subsection (3).” Further, under the same subsection, “[i]f, after complying with the duty to disclose the information and materials described in this subsection (3), either party discovers or obtains any additional information and materials that are subject to disclosure under this subsection (3), the party shall promptly notify the other party and provide the other party with complete access to the information and materials.” § 18-1.3-1201(3)(f). That is precisely what the prosecution did here.

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<sup>3</sup> The defendant has not cross-examined any listed victims who have testified during the guilt phase of the trial.

Under these circumstances, the Court concludes that the prosecution complied with section 18-1.3-1201(3)(b) and Rule 32.1(d)(3). Therefore, the defendant's request to exclude the videos as untimely is denied.

Second, as revised, the videos do not contain hearsay. To the extent that there are any statements in the videos, they are not being introduced for the truth of the matter asserted. CRE 801 (defining hearsay as an out-of-court statement that is offered to prove the truth of the matter asserted). Therefore, they are not inadmissible hearsay. *See* CRE 802.<sup>4</sup>

Third, the videos are generally relevant under CRE 401 and 402, and are appropriate victim-impact evidence. *See* Order P-83-B at pp. 6-17. The proposed evidence is probative of the lives extinguished during the shooting, the value of each victim's loss to society, and the personal characteristics of each victim. *Id.* at pp. 6-7.<sup>5</sup> The question remains, however, whether the probative value of the evidence is substantially outweighed by the danger for unfair prejudice. *See* CRE 403. The Court concludes that before the videos may become admissible under CRE 403, they must be further redacted.

“Victim-impact evidence has its limits.” *State v. Berget*, 826 N.W.2d 1, 26 (S.D. 2013). The “[i]ntroduction of overly prejudicial victim-impact evidence has

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<sup>4</sup> Contrary to the defendant's contention, the victim-impact videos are different from the defendant's testimonial videos excluded in Order P-109.

<sup>5</sup> The Court incorporates by reference here the discussion on pages 6 through 17 in Order P-83-B.

the possibility to rise to the level of a constitutional deprivation.” *Id.* (citation omitted).

“Courts have found victim-impact videos permissible when they are short in duration and when they do not include any sort of ‘special effects’ such as narration or evocative music.” *State v. Hess*, 23 A.3d 373, 392-93 (N.J. 2011); *see also People v. Brady*, 236 P.3d 312, 337-38 (Cal. 2010) (allowing a four-minute victim-impact video, which “was not enhanced by narration, background music, or visual techniques designed to generate emotion,” but which depicted “a rather ordinary event” in the victim’s life), *cert. denied, Brady v. California*, --- U.S. ---, 131 S.Ct. 2874, 179 L.Ed.2d 1191 (2011); *People v. Dykes*, 209 P.3d 1, 48 (Cal. 2009) (concluding that an eight-minute video depicting the victim shortly before his death was admissible, as it did not constitute a “memorial” or a “tribute”), *cert. denied, Dykes v. California*, 558 U.S. 1127, 130 S.Ct. 1088, 175 L.Ed.2d 909 (2010). “Alternatively, courts have expressed disfavor for victim-impact videos that are too lengthy, depict childhood pictures of adult victims, or are accompanied by evocative music.” *Hess*, 23 A.3d at 393; *Salazar v. State*, 118 S.W.3d 880, 882-85 (Tex. Ct. App. 2003) (vacating sentence because of a seventeen-minute victim-impact video that contained 140 still photographs that spanned the entirety of the victim’s life, including childhood, and was set to songs such as “River” by Enya

and “My Heart Will Go On” by Celine Dion);<sup>6</sup> *United States v. Sampson*, 335 F. Supp. 2d 166, 192 (D. Mass. 2004) (discussing the exclusion of a victim-impact video that was thirty minutes in length and featured pictures “from birth to college . . . set to poignant music”), *aff’d*, 486 F.3d 13 (1st Cir. 2007), *cert. denied*, *Sampson v. United States*, 553 U.S. 1035, 128 S.Ct. 2424, 171 L.Ed.2d 234 (2008);<sup>7</sup> *accord* *People v. Prince*, 156 P.3d 1015, 1093 (Cal. 2007) (expressing concern over videos that “last[] beyond a few moments,” that “emphasize[] the childhood of an adult victim, or [that are] accompanied by stirring music”), *cert. denied*, *Prince v. California*, 552 U.S. 1106, 128 S.Ct. 887, 169 L.Ed.2d 742 (2008).

In *Hess*, the Court reviewed the admission of the following victim-impact evidence:

[A] professionally produced seventeen-minute video entitled “A Tribute to Officer James Hess” . . . [that] include[d] features . . . specifically disapproved by courts in other jurisdictions: childhood photographs and music likely to appeal solely to emotion and engender undue prejudice. The video display[ed] approximately sixty still photographs and four home-video clips of the victim in various activities and phases of his life. The video include[d] photographs of the victim’s childhood and his tombstone and a television segment covering his funeral. Three poems scroll[ed] over the photographs

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<sup>6</sup> In *Salazar*, the Court explained that “the implicit suggestion” of the victim-impact video was “that [the defendant] murdered this angelic infant; he killed this laughing, light-hearted child; he snuffed out the life of a first-grade soccer player and of the young boy hugging his blond puppy dog.” 118 S.W.3d at 884. According to the Court, “[t]he danger of unconsciously misleading the jury [was] high.” *Id.*

<sup>7</sup> The defendant cited *Hess*, *Salazar*, and *Sampson* at the April 30 hearing.

and video clips. The video [was] scored to popular, holiday, country, religious, and military music.

23 A.3d at 393.

The Court in *Hess* concluded that there were elements of the victim-impact evidence introduced that had no probative value, but which had great capacity to unduly arouse or inflame the emotions of jurors. *Id.* at 394. For example, there was information, such as the pictures of the family at the funeral and of the gravesite, that did not “project anything meaningful about the victim’s life as it related to his family and others at the time of his death.” *Id.* The Court determined that this evidence should not have been permitted or, at a minimum, should have been subjected to intense scrutiny. *Id.*<sup>8</sup>

Significantly, the *Hess* Court recognized that appellate courts “cannot set forth an exhaustive catalogue of what is and is not permissible in a video, “other than to say how [the] video [in question] exceeded permissible bounds.” *Id.* The Court was also careful to make clear that it “in no way intend[ed] to limit the right of family members to present photographs and videos within a reasonable period before the death of the victim, or to express themselves in the ways they see fit,” including by “read[ing] a poem in court.” *Id.*

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<sup>8</sup> The sentence in *Hess* was imposed by the judge. 23 A.3d at 392. “Undoubtedly, concerns over prejudicial victim-impact statements, including photographs and videos, are less pronounced when a judge rather than a jury is imposing sentence.” *Id.*



Consistent with *Hess*, this Court recognizes that “[f]amily members have the right to describe the depths of their loss without filter on their thoughts.” *Id.* However, “there are limits.” *Id.* “An overly lengthy video, baby photographs of an adult victim, and a video scored to religious and pop music do not advance any legitimate objective even against the broad contours of the Victims’ Bill of Rights.” *Id.*

Guided by this authority, the Court concludes that the People’s revised recordings must be further redacted to be admissible under CRE 403.

First, Mr. Boik’s recording must be shortened. It currently contains over 65 photographs and four short video clips. The recording may not exceed 30 photographs or three minutes. Additionally, one of the two “I love you” video clips must be deleted to avoid concerns regarding the unnecessary presentation of cumulative evidence. Finally, the prosecution must ensure that all of the photographs and video clips in the new redacted recording are within a reasonable time (18 months) of Mr. Boik’s death.<sup>9</sup>

Second, Mr. Cowden’s photo montage must be amended to exclude photographs of his childhood, photographs of his youth, and photographs from years ago. Only photographs within a reasonable time (18 months) of his death

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<sup>9</sup> The Court recognizes that Mr. Boik’s graduation video clip contains music. However, the video clip is only a few seconds long. Further, the music was not added; it was playing at the time of the event.

may be included. Finally, this recording may not exceed 30 photographs or three minutes.

Third, Ms. Ghawi's recording must be redacted so as to delete the text, "Intern Jessi Fall Count." The video must also be shortened so that it does not exceed three minutes.

Lastly, the first 33 seconds of Veronica Moser-Sullivan's recording, which appears to have been completed within a reasonable time of her death, are admissible. The rest of the recording, however, is problematic because one can hear Christmas music playing in the background. The Court understands that this music was not added. However, the effect on the listener is the same. The prosecution must redact the recording in order to delete the background music. In the alternative, the prosecution may select a different recording. The recording may not exceed three minutes.

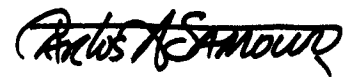
For all the foregoing reasons, the Court grants the defendant's oral motion to exclude the victim-impact evidence in question. However, the Court grants the prosecution two weeks to redact the recordings in accordance with this Order. After all of the redactions are made, if the defendant still objects to any of the recordings, he must orally advance such objections in a timely fashion.<sup>10</sup>

Dated this 27<sup>th</sup> day of May of 2015.

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<sup>10</sup> The Court cannot address the defense's cumulative objection at this time. If there is a sentencing hearing, the defense must make cumulative objections contemporaneously.

BY THE COURT:



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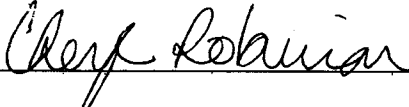
Carlos A. Samour, Jr.  
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2015, a true and correct copy of the **Order regarding Defendant's oral motion to exclude victim impact videos (C-204)** was served upon the following parties of record:

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