DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO 7325 S. Potomac St. Centennial, Colorado 80112	▲COURT USE ONLY▲
PEOPLE OF THE STATE OF COLORADO **v.** **JAMES EAGAN HOLMES,** **Defendant**	Case No. **12CR1522** Division: **201**

ORDER REGARDING PEOPLE'S ORAL REQUEST DURING TRIAL FOR ANOTHER *IN CAMERA* REVIEW OF DOCUMENTS PRODUCED BY THE UNIVERSITY OF COLORADO (C-201)

On August 6, 2012, the People served a subpoena *duces tecum* on the University of Colorado (hereinafter "the University"), seeking documents related to the defendant. *See* PSDT-1. The University responded to the subpoena on August 16, at which time it submitted a packet containing 340 pages of documents. *See* Order D-14 at p. 7. The defense filed a motion to quash, which the prosecution opposed. *See* Motion D-14 and Response to Motion D-14. After the motion was fully briefed, the Court, the Honorable William Sylvester presiding, conducted an

in camera review of the documents and released approximately 27 pages from the packet tendered by the University. *See generally* Order D-14.[1]

A few days later, on August 30, the Court granted the People leave to issue a narrower subpoena *duces tecum* on the University. The People did so on September 10, 2012. Specifically, the People sought:

> Records relating to student James Holmes, dob 12/13/1987, including the completed student application for James Holmes, all class schedules and transcripts of grades issued for James Holmes, any departmental files contained in the Department of Neuroscience relating to James Holmes, all records relating to building access for James Holmes, all oral examination documents and testing materials generated and utilized by [the University] staff relating to James Holmes, all documents from the University of Colorado Behavioral Evaluation and Threat Assessment team relating to James Holmes, and all campus police records relating to James Holmes.

See PSDT-2 at p. 1.

The subpoena asked the University to provide two "Bate[s]-stamped (numbered)" copies of the records and to "include the initials of the agency producing them; e.g. 'CU-1, CU-2, CU-3, etc.'" *Id.* Further, the subpoena

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[1] Included in the packet submitted by the University were three discs. One disc contains a voice mail message left by an investigator from the Public Defender's Office on Sunday, July 22, 2012, for Dr. Lynne Fenton, a psychiatrist at the University who treated the defendant in 2012. A second disc contains three short videotape clips of the defendant making a presentation during his third rotation in the neuroscience graduate program at the University. This disc also contains three photographs that appear to have been created from the video clips. The third disc contains seven voice mails left on University Police Officer Lynn Whitten's phone in June and July 2012, including one on June 11, 2012, by Dr. Fenton relaying a conversation she had with the defendant's mother.

specifically requested that certain information be redacted from the records produced:

> [T]he names and locations of any other students and any personal identifying information, including HIPAA information, medical information, social security numbers, identifying contact information, driver's license numbers, state identification numbers, as well as any other information required to be protected by law.

Id.

Finally, the subpoena stated that:

> Each set of documents must have 1) a cover page using the bates stamp numbers that identifies the author, source or included parties for each individual document from the University . . . or 2) a cover page attached to each individual document identifying the author, source or included parties for each University of Colorado document.

Id. at p. 2.[2]

On September 20, in response to PSDT-2, the University provided the Court two identical sets of records containing 340 pages and a disc.[3] The defense orally renewed Motion D-14. After conducting another *in camera* review, Judge Sylvester released most of the documents produced. *See generally* Order D-14a.

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[2] The Court had previously declined to release some of the documents because it "could not determine the author, source, or included parties" as to those documents. Order D-14 at p. 7.

[3] It appears that the University produced the same documents and recordings in response to PSDT-2 that it did in response to PSDT-1. However, in accordance with the People's instructions in PSDT-2, each copy of the second set of records contains redactions and is Bates-stamped, separated into nine categories, and accompanied by a table of contents, a redaction log, and a Bates index. Unlike the first packet produced on August 16, each copy of the packet produced on September 20 contains all of the recordings and photographs in a single disc.

On June 4, 2013, defense counsel entered a plea of not guilty by reason of insanity on the defendant's behalf. Jury selection in this matter commenced on January 20, 2015.[4] A jury was selected on April 14 and opening statements were held on April 27. On May 7 and 8, the prosecution asked the Court to conduct another *in camera* review of the records produced in response to P-SDT-1 and P-SDT-2 because the previous reviews occurred before the defendant raised the defense of insanity. The defense did not object to the request for an additional *in camera* review, but informed the Court that it continues to stand by Motion D-14 and the arguments advanced in connection with that motion.

As indicated, Judge Sylvester disclosed most of the documents produced by the University in response to PSDT-2. *See generally* Order D-14a. The Court incorporates by reference here the legal analysis and conclusions in Orders D-14

[4] On March 25, 2015, the People served PSDT-7 on the University, seeking "[a]ny and all records" relating to the defendant "not previously produced to the prosecution pursuant to subpoena," including "any reviews, comments, or assessments of the performance, behavior, activities, progress, or observations of [the defendant]." PSDT-7 at p. 1. On April 2, the University tendered an envelope with documents in response to this subpoena. *See* Order C-192 at p. 1. The People represented that all of these documents have been previously provided to the defense. *Id.* The defense did not take issue with that representation. Pursuant to the People's request, which the defense joined, the Court agreed to review the documents *in camera*. *Id.* When the Court asked what it should be reviewing for, counsel for the defense asked that the following types of documents not be disclosed to the prosecution: (1) medical documents that are privileged and have nothing to do with the defendant's mental health; and (2) documents that are not relevant to this case. *Id.* at pp. 1-2. On April 3, after conducting an *in camera* review, the Court determined that all of the documents produced in response to PSDT-7 should be disclosed to the People. *Id.* at p. 2. The Court provided a copy of the documents to each party. *Id.* at p. 2 n.2.

and D-14a to the extent that those Orders authorized the release of documents to the People.

The Court has undertaken an additional *in camera* review of the records produced by the University in response to PSDT-1 and PSDT-2. Consistent with its *in camera* review of the records produced by the University in response to PSDT-7, in completing this *in camera* review, the Court looked for medical documents that are privileged and have nothing to do with the defendant's mental health, as well as documents that have no relevance in this case. *See* Order C-192 at pp. 1-2.[5] The Court concludes that all of the records produced by the University in response to PSDT-2 should be disclosed to the People.[6] In this Order, the Court addresses only those documents not previously disclosed by Judge Sylvester.

First, the Court concludes that all of the records in the Registrar File are relevant. These records are probative of the culpable mental states required by the offenses charged, the defense of insanity, motive, the credibility of certain witnesses (including the mental health experts), and the circumstances surrounding

[5] The University represented that the documents produced in response to PSDT-1 and PSDT-2 do not include any medical records or documents protected by the Health Insurance Portability and Accountability Act ("HIPAA"). *See* Order D-14 at pp. 1, 6; Order D-14a at p. 7.

[6] As indicated, the records produced in response to PSDT-1 and PSDT-2 appear to be identical.

the crimes charged.[7] They are also probative of the issues the jury may be asked to consider in a sentencing hearing in the event that there is a guilty verdict on a charge of first degree murder.

Second, the Court concludes all of the records related to the defendant's class schedule are relevant. These records are probative of the culpable mental states required by the offenses charged, the defense of insanity, motive, the credibility of certain witnesses (including the mental health experts), and the circumstances surrounding the crimes charged. They are also probative of the issues the jury may be asked to consider in a sentencing hearing in the event there is a guilty verdict on a charge of first degree murder.

Third, to the extent that any Department File records were not disclosed, the Court concludes that they should be disclosed because there is no indication in Order D-14a that Judge Sylvester intended not to disclose them. Specifically, the Court discloses the three video clips of the defendant's presentation during his third rotation. There has been a lot of discussion during the first two weeks of trial about the defendant's demeanor, behavior, and interactions at school in 2011 and 2012. In fact, witnesses have testified about the defendant's school curriculum, work, and presentations. Both parties have elicited some of this evidence.

[7] As the Court explained in Order C-192, "the defendant has pled not guilty by reason of insanity, which, in turn, renders relevant evidence related to many different aspects of his life prior to the date of the offenses charged." Order C-192 at p. 2. Further, "there is a possibility that there will be a sentencing hearing, in which case evidence may be introduced on a wide variety of issues, including the defendant's background and upbringing." *Id.*

Records from the Department File are also probative of the issues the jury may be asked to consider in a sentencing hearing in the event that there is a guilty verdict on a charge of first degree murder.

Fourth, some Database Note records were not disclosed by Judge Sylvester because the University had indicated that they may be protected under the psychiatrist-patient privilege. Order D-14a at p. 6. However, by pleading not guilty by reason of insanity, the defendant has waived such privilege. *See* § 16-8-103.6(2)(a), C.R.S. (2014) ("A defendant who places his or her mental condition at issue by pleading not guilty by reason of insanity . . . waives any claim of confidentiality or privilege as to 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 . . . or [capital] sentencing hearing"). Therefore, all of the records in this category should be disclosed. To the extent that Judge Sylvester found that these records were not relevant, the Court now determines that they are relevant. These records are probative of the culpable mental states required by the offenses charged, the defense of insanity, motive, the credibility of certain witnesses (including the mental health experts), and the circumstances surrounding the crimes charged. They are also probative of the issues the jury may be asked to consider in a sentencing hearing in the event that there is a guilty verdict on a charge of first degree murder.

Fifth, any of the University police records and intelligence files not previously disclosed may now be disclosed because the defendant has waived the psychiatrist-patient privilege. This includes document CU 000277, which Judge Sylvester was concerned may have been authored by Dr. Fenton, not Officer Whitten. Order D-14a at p. 7. Given the defendant's waiver of the psychiatrist-patient privilege, this is no longer a concern. *See* § 16-8-103.6(2)(a). Additionally, to the extent that Dr. Fenton testified that her communications with Officer Whitten might have breached the statutory privilege held by the defendant, *see* Order D-14a at p. 7, this is no longer a concern either, *see* § 16-8-103.6(2)(a).

Sixth, the Court concludes that all of the voice mails should be disclosed. Judge Sylvester's concern that the voice mails may be protected by the psychiatrist-patient privilege, *see* Order D-14a at pp. 7-8, is no longer present, *see* § 16-8-103.6(2)(a).

Further, it is now clear that the voice mails are relevant. One of the voice mail messages is from Dr. Fenton to Officer Whitten, relaying a conversation Dr. Fenton had with the defendant's mother approximately five weeks before the shooting regarding Dr. Fenton's concerns about the defendant. A couple of other voice mails are probative of the steps the University took around the time the defendant withdrew as a student. The remaining voice mails, including one from

the defendant's former girlfriend on July 20, are probative of the investigation conducted by the University police and the Aurora Police Department.

Finally, the Court concludes that the voice mail left by the investigator from the Public Defender's Office on Dr. Fenton's phone on July 22, 2012 should be disclosed. Dr. Fenton testified about this voice mail on August 30, 2012. Despite the defense's assertion that the message was protected by the psychiatrist-patient privilege, the Court nevertheless allowed her to testify about the general content of the message. *See* 8/30/12 Tr. at pp. 70-71, 80-85. To the extent that Dr. Fenton did not fully answer questions related to the content of this message based on concerns that it may have been protected by the psychiatrist-patient privilege, that privilege has been waived, *see* § 16-8-103.6(2)(a), and the concerns are no longer valid.[8] In any event, Dr. Fenton testified that she terminated her professional relationship with the defendant on June 11, 2012. *Id.* at pp. 72, 81. Therefore, she did not consider herself to be "in any kind of a physician-patient, psychologist-[or] psychotherapist-patient relationship with the defendant" on July 22, when the voice mail was left. *Id* at p. 81.[9]

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[8] Although Dr. Fenton disclosed what the investigator said "in essence," she did not complete her answer for fear that she would reveal information protected by the psychiatrist-patient privilege. 8/30/12 Tr. at p. 80.

[9] The defense did not raise any other privilege or doctrine in objecting to Dr. Fenton's testimony about the content of the voice mail left by its investigator. The Court notes, however, that when the investigator left the voice mail for Dr. Fenton on July 22, the Office of the Public Defender was not yet representing the defendant. *See* Order D-127 at p. 82 (finding that the Office of the

The voice mail is relevant because it is related to the notebook sent by the defendant to Dr. Fenton just hours before the shooting, and the notebook is a key item of evidence in this case.[10] The message includes the defendant's general description of the notebook to the investigator. At the end of the voice mail, the investigator expressed concern that the notebook might be released to the police, the media, or an impersonator.

For all the foregoing reasons, the Court rules that the entire packet produced by the University on September 20 in response to PSDT-2 should be disclosed to the People. Since the University tendered two copies of the packet, the Court will give the People one copy and will keep the other copy for appellate review purposes. The People are ordered to make a copy of these records for the defense without delay.[11]

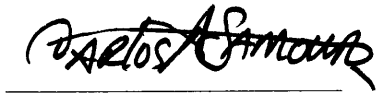
Dated this 11th day of May of 2015.

Public Defender was not appointed to represent the defendant until Monday, July 23, 2012). On July 22, the defendant was being "temporarily represent[ed]" by a private law firm. *Id.* at p. 3.

[10] This finding of relevance should not be confused with the relevance standard under CRE 401 and 402. This Order does not address the relevance of the voice mail for purposes of its admission at trial. If the People intend to admit the voice mail into evidence or to refer to its contents, they must first raise the issue outside the presence of the jury.

[11] After reviewing the redactions log, the Court believes that, with one exception, all of the redactions made by the University are appropriate. The one exception is a redaction related to a prescription written by Dr. Fenton for the defendant. Given the defendant's waiver of the psychiatrist-patient privilege, *see* § 16-8-103.6(2)(a), the Court provides the People an unredacted copy of that document (from the packet produced by the University on August 16, 2012). All other records are provided to the People in their redacted form.

BY THE COURT:



Carlos A. Samour, Jr.
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2015, a true and correct copy of the Court's **Order Regarding People's Oral Request During Trial for Another *In Camera* Review of Documents Produced by the University of Colorado (C-201)** was served upon the following parties of record:

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