

DISTRICT COURT, COUNTY OF ARAPAHOE, STATE OF COLORADO 7325 S. Potomac St. Centennial, Colorado 80112	▲ COURT USE ONLY ▲
Plaintiff: <b>People of the State of Colorado</b>  v.  Defendant: <b>Holmes, James Eagan</b>	Case No. <b>12CR1522</b>  Division: <b>22</b>
<p align="center"><b>ORDER RE: PEOPLE’S SUPPRESSED MOTION TO PRECLUDE DEFENSE FROM CALLING CERTAIN WITNESSES AT THE PRELIMINARY HEARING IN THIS CASE AND MOTION TO QUASH DEFENSE SUBPOENAS SERVED ON THOSE WITNESSES (P-35)</b></p>	

This Matter comes before the Court on the People’s Suppressed Motion to Preclude Defense from Calling Certain Witnesses at the Preliminary Hearing in this Case and Motion to Quash Defense Subpoenas Served on those Witnesses (P-35), filed December 26, 2012, (“Motion”) and Defendant’s Response to the People’s Motion to Preclude Defense from Calling Certain Witnesses at the Preliminary Hearing (P-35), filed under seal December 31, 2012, (“Response”). Having reviewed the pleadings, oral argument by counsel on January 2, 2013, and the applicable law, the Court hereby Finds and Orders as follows:

**PROCEDURAL HISTORY**

The Court will hold a preliminary hearing and proof evident presumption great hearing (“preliminary/proof evident hearing”) in this case beginning on January 7, 2013. The People have subpoenaed numerous witnesses scheduled to testify at the hearing, and they have provided Defendant with a good-faith list of those witnesses. The Defense has agreed to provide the People with their good-faith list of witnesses as well. At some point after December 17, 2012, the People learned that Defendant had subpoenaed two lay witnesses (“Witnesses”) to appear at the Arapahoe County Justice Center on January 7, 2013, at 9:00 a.m. Both of the Witnesses affirm that they have chosen not to be interviewed by Defendant’s investigators up to this point and are not ready to be so interviewed at this time. Both of the Witnesses have cooperated with law enforcement during the investigation of this case, and materials involving the Witnesses have been provided to Defendant. The People state that neither Witness has personal knowledge of the events at the Century Aurora 16 Theater on July 20, 2012. One Witness made plans to leave the state of Colorado for the week of January 7, 2013, prior to receiving the subpoena. The People believe there is a compelling interest in protecting the privacy of the Witnesses. They

have filed the Motion as suppressed and ask this Court to refrain from revealing the identity of either Witness.

## LAW AND ANALYSIS

### 1. *Motion to Quash Defendant's Subpoenas*

The People assert that they have standing, as the prosecuting party, to move to quash Defendant's subpoenas for the Witnesses' testimony at the preliminary/proof evident hearing. The People state that because they will present direct evidence at the preliminary/proof evident hearing, Defendant does not have the right to call the Witnesses, and, thus, the Court should quash Defendant's subpoenas for the Witnesses. The People also state that Defendant is using the subpoenas to conduct discovery and that such use is improper. Because of this improper use, they ask that the Court quash Defendant's subpoenas for the Witnesses.

Defendant, on the other hand, states that the People's Motion should be denied because the People have no authority to quash a properly issued subpoena for the attendance of a witness at a hearing. Defendant asserts that objections to aspects of a witness's testimony should be made when a specific question is posed during the preliminary/proof evident hearing, rather than through a motion to quash.

There is no general constitutional right to discovery in a criminal case under the United States or Colorado Constitutions. *People v. Baltazar*, 241 P.3d 941, 943–44 (Colo. 2010). Both the Colorado Supreme Court and the United States Supreme Court have emphasized that their respective rules permit subpoenas only for the production of "evidence," not as an investigative tool. *Id.* at 944 (citing *United States v. Nixon*, 418 U.S. 683, 698 (1974)). However, the Compulsory Process Clause of the Sixth Amendment to the United States Constitution serves to allow the defendant to secure witnesses and evidence for in-court presentation. *Baltazar*, 241 P.3d at 94; *Kentucky v. Stincer*, 482 U.S. 730, 737, 739 (1987) (Confrontation Clause guarantees a functional right for opportunity for cross-examination to promote reliability in the truth-finding functions of a criminal trial). The Colorado Constitution confers on a criminal defendant the right to compel witnesses on his behalf in criminal prosecutions. Colo. Const. art. II, § 16. Additionally, the Colorado Rules of Criminal Procedure grant the prosecution and the defendant the right to subpoena witnesses to compel their attendance and testimony at trial or another hearing. Colo. R. Crim. P. 17.

Rule 17 includes the right of the parties to compel attendance of witnesses at "other hearings." Colo. R. Crim. P. 17. Generally, "no preliminary showing is ordinarily required to subpoena a witness for trial testimony." *Williams v. Dist. Court*, 700 P.2d 549, 554 (Colo. 1985). An attorney must comply with the service requirements of Rule 17 for a subpoena to be valid. *People v. Ensor*, 632 P.2d 641, 641 (Colo. App. 1981) ("Although [Rule 17] provides

supervision by the court, there is no authority under it to quash the subpoena if the district attorney [issuing the subpoena] has complied with the technical requirements [of Rule 17]”); see *United States v. Pursley*, 577 F.3d 1204, 1230 (10th Cir. 2009). A subpoena that is properly issued and served must be honored by the witness and the court. See Colo. R. Crim. P. 17(h); *Ensor*, 632 P.2d at 641. Every citizen, as part of his civic duty, is expected to testify in judicial proceedings if subpoenaed by either party, even where that duty is inconvenient. *Losavio v. Dist. Court*, 533 P.2d 32, 34 (Colo. 1975).

The plain language of Rule 17 grants Defendant the right to subpoena the Witnesses at the preliminary/proof evident hearing. Colo. R. Crim. P. 17 (conferring the parties the right to subpoena witnesses for “trial or other hearing”). Similarly, the Colorado Constitution grants Defendant the process to compel witnesses on his behalf in “criminal proceedings.” Colo. Const. art 2, § 16. The preliminary/proof evident hearing is likely considered part of the “criminal proceedings;” the Colorado Supreme Court has stated that the preliminary hearing “is a critical stage in the administration of criminal justice.” *Maestas v. Dist. Court*, 541 P.2d 889, 891 (Colo. 1975). The Court has no evidence before it that Defendant failed to properly issue or serve either subpoena at issue. Therefore, the subpoenas must be honored by the witness and the Court. *Ensor*, 632 P.2d at 641.

The Court FINDS that Defendant has the power to subpoena the Witnesses for the preliminary/proof evident hearing and that there is no evidence showing the subpoenas were improper or invalid. Thus, the People’s Motion to Quash is DENIED.

## 2. *Motion to Preclude Defendant from Calling Witnesses at the Preliminary/Proof Evident Hearing*

The People assert that Defendant’s right to call the Witnesses at the preliminary/proof evident hearing is limited. They state that Defendant may call the Witnesses only if the prosecution’s evidence consists almost entirely of hearsay. The People affirm that they will present substantial direct evidence at the preliminary/proof evident hearing, and, therefore, the Court should preclude Defendant from calling the Witnesses during the hearing.

Defendant states that because of the nature of the preliminary/proof evident hearing, Defendant has a constitutional right and a basic due process right to cross-examine witnesses and present evidence relevant to the issue of probable cause or proof evident presumption great that Defendant committed the crimes charged. Defendant asserts that he has subpoenaed the Witnesses for the preliminary/proof evident hearing to rebut, impeach, contradict, or clarify testimony from government witnesses, particularly on the issue of Defendant’s mental state.

The preliminary hearing is designed to provide judicial determination that probable cause exists to bind an accused over for trial. *People v. Ayala*, 770 P.2d 1265, 1266 (Colo. 1989). While “the preliminary hearing provides the defendant with an early opportunity to question the government's case, it is not designed to alter the basic proposition that an accused is entitled to one trial on the merits of the charge.” *People v. Quinn*, 516 P.2d 420, 421 (Colo. 1973). The preliminary hearing is a screening device and the prosecution is not required to present all, or even its best, witnesses and evidence. *Id.* at 422. The prosecution has the burden of proof, but the prosecution is given considerable latitude in its presentation of the evidence; the court should view the evidence in the light most favorable to the prosecution, resolving conflicts of evidence in favor of the prosecution. *See Hunter v. Dist. Court*, 543 P.2d 1265, 1267–68 (Colo. 1975).

A defendant “may cross-examine the prosecutor’s witnesses and may introduce evidence” at the preliminary hearing. Colo. R. Crim. P. 7(h)(3). The court may curtail this right consistent with the purpose of the preliminary hearing. *Rex v. Sullivan*, 575 P.2d 408, 410 (Colo. 1978); *see also Kentucky v. Stincer*, 482 U.S. at 739 (“the Confrontation Clause guarantees only ‘an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish’”). But the court cannot curtail a defendant’s cross-examination or presentation of evidence that is relevant to the determination of probable cause. *Kuypers v. Dist. Court*, 534 P.2d 1204, 1207 (Colo. 1975) (finding trial court abused its discretion by not permitting defendant’s questions on cross-examination that addressed whether hearsay identification testimony was sufficiently credible to rise to the dignity of probable cause); *see also McDonald v. Dist. Court*, 576 P.2d 169, 171–72 (Colo. 1978) (finding trial court abused its discretion where it prohibited defendant from calling eyewitness available in court at preliminary hearing where prosecution relied almost entirely on hearsay testimony). “The full potential and purpose of the preliminary hearing is only realized when it is utilized as a check on the power of the prosecution.” *Maestas*, 541 P.2d at 891–92.

The purpose of a proof evident hearing is to determine whether “proof is evident or presumption great” that a defendant committed the crime charged. Colo. Const. art. II, § 19; *Yording v. Walker*, 683 P.2d 788, 791 (Colo. 1984). If the prosecution meets its burden at the proof evident hearing, the defendant may be held without bail. Colo. Const. art. II, § 19. The Colorado Constitution “requires the court to determine for itself whether or not the proof is evident or presumption great in a given case.” *In re Losasso*, 24 P. 1080, 1082 (Colo. 1890). The trial court may circumscribe a defendant’s right to be heard during the proof evident hearing, but the defendant has the right to cross-examine witnesses and present evidence. *See id.* (stating that the “character and scope of the inquiry are in many instances circumscribed, yet the right to be heard is nevertheless unquestioned,” and that the defendant “may be heard in argument, may produce evidence, and [may] make his own statement”); *Gladney v. Dist. Court*, 535 P.2d 190, 191 (Colo. 1975) (stating that questions of fact cannot be resolved at the bail hearing but that judge was free to believe or disbelieve the testimony of the parties’ witnesses at the proof evident hearing); *State v. Menillo*, 268 A.2d 667, 675–76 (Conn. 1970) (“[T]he accused has the right of

cross-examination of the state's witnesses at the bail hearing as well as the right to introduce evidence in his favor. But the court should confine the evidence to the issue involved and not allow an accused to transform the hearing into an unorthodox discovery procedure for forcing the state to produce its case.”) (interpreting the “proof is evident or presumption is great” provision of Conn. Const. art. 1, § 8).

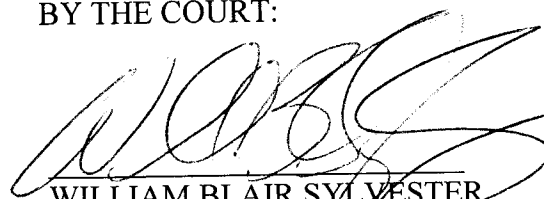
Defendant “may cross-examine the prosecutor’s witnesses and may introduce evidence” at the preliminary hearing, Colo. R. Crim. P. 7(h)(3), and Defendant “may be heard in argument, may produce evidence, and [may] make his own statement,” *In re Losasso*, 24 P. at 1082. While this Court may curtail Defendant’s rights consistent with the purpose of the preliminary/proof evident hearing, such determinations are best made at the time of testimony; otherwise, Defendant would be foreclosed from eliciting testimony from the Witnesses that could be relevant and admissible. *See Losavio*, 533 P.2d at 36 (finding trial court should determine whether each specific grand jury interrogatory falls under privilege statute during witness testimony rather than grant motion to quash witness subpoena entirely).

The Court FINDS that Defendant has made a showing that the subpoenaed Witnesses could potentially provide testimony at the preliminary/proof evident hearing that may be relevant to the issues of probable cause or proof evident presumption great that Defendant committed the crimes charged. Therefore, the Court declines to preclude Defendant from calling the Witnesses at the preliminary/proof evident hearing at this time. This Court continues to expect that witnesses will be promptly released from their subpoena if their testimony is not needed. The People’s Motion to Preclude is DENIED. The Court notes that it will hear and rule as needed on objections made by either party during testimony by any witness at the preliminary/proof evident hearing.

The People’s Motion is DENIED. This Order is not subject to suppression and may be released to the public.

Entered January 2, 2013.

BY THE COURT:


  
WILLIAM BLAIR SYLVESTER  
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on January 2, 2013, a true and correct copy of **Order Re: People's Suppressed Motion to Preclude Defense From Calling Certain Witnesses at the Preliminary Hearing in This Case and Motion to Quash Defense Subpoenas Served on Those Witnesses (P-35)** was served upon the following parties of record.

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