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DISTRICT COURT, COUNTY OF ARAPAHOE, STATE OF COLORADO 7325 S. Potomac St. Centennial, Colorado 80112	▲ COURT USE ONLY ▲
Plaintiff: **People of the State of Colorado** v. Defendant: **Holmes, James Eagan**	Case No. **12CR1522** Division: **22**
ORDER RE: DEFENSE MOTIONS D-28, D-29, D-30, D-31, AND D-32	

This Matter comes before the Court on Defendant's Motion for Definition of "Cooperate" as Used in C.R.S. § 16-8-106 or to Declare the Statute Unconstitutionally Vague [D-028], filed February 28, 2013 ("Motion D-28"); Defendant's Motion to Define "Mental Condition" as Used in C.R.S. §§ 16-8-103.6, 16-8-107(3)(b), and 18-1.3-1201(3)(d) or Declare the Statutes Unconstitutionally Vague [D-029], filed February 28, 2013 ("Motion D-29"); Defendant's Motion to Preserve Constitutional Rights and Request for Advisement Prior to Entry of Any Plea Pursuant to Section 16-8-103, C.R.S. [D-030], filed February 28, 2013 ("Motion D-30"); Defendant's Motion Regarding the Scope and Nature of Any Evaluation Resulting from Any Plea Pursuant to C.R.S. § 16-8-103 [D-031], filed February 28, 2013 ("Motion D-31"); Motion and Brief to Declare C.R.S. §§ 16-8-103.6, 103.7, 106, 107, and 18-1.3-1201(3)(d) Unconstitutional [D-032], filed February 28, 2013 ("Motion D-32"); the People's Response to D-028 Motion for Definition of "Cooperate" as Used in C.R.S. § 16-8-106 or to Declare the Statute Unconstitutionally Vague, filed March 5, 2013 ("Response D-28"); the People's Response to D-029 Motion to Define "Mental Condition" as Used in C.R.S. §§ 16-8-103.6, 16-8-107(3)(b) and 18-1.3-1201(3)(d) or Declare the Statutes Unconstitutionally Vague, filed March 5, 2013 ("Response D-29"); the People's Response to D-030 Defendant's Motion to Preserve Constitutional Rights and Request for Advisement Prior to Entry of Any Plea Pursuant to C.R.S. § 16-8-103, filed March 5, 2013 ("Response D-30"); the People's Response to D-031 Defendant's Motion Regarding the Scope and Nature of Any Evaluation Resulting from Any Plea Pursuant to C.R.S. § 16-8-103, filed March 5, 2013 ("Response D-31"); and the People's Brief in Response to D-032 Defendant's Motion to Declare C.R.S. §§ 16-8-103.6, 103.7, 106, 107 and 18-1.3-1201(3)(d) Unconstitutional, filed March 5, 2013 ("Response D-32").

Having reviewed the Motions, Responses, and applicable law, the Court FINDS and ORDERS as follows:

FACTS AND PROCEDURAL HISTORY

Defendant is charged with 166 criminal counts. The Court held a preliminary hearing in this case and Defendant is held without bond. Defendant's arraignment is scheduled for March 12, 2013. At this time, Defendant has not entered any plea under Colo. R. Crim. P. 11, and the People have not filed any pleadings related to Colo. R. Crim. P. 32.1.

In his five Motions D-28, D-29, D-30, D-31, and D-32 ("Motions"), Defendant requests that this Court rule and advise him on issues regarding entering a plea of Not Guilty by Reason of Insanity ("NGRI"). Defendant attacks the constitutionality of portions of Colo. Rev. Stat. §§ 16-8-103.6, -103.7, -106, -107, and 18-1.3-1201(3)(d) (2012) ("Statutes"). Defendant states multiple constitutional arguments regarding the statutory scheme as a whole, as well as regarding specific provisions of the Statutes. Defendant also asks this Court to issue instructions regarding hypothetical questions and mixed questions of fact and law pertaining to the Statutes.

The People's five Responses D-28, D-29, D-30, D-31, and D-32 ("Responses") assert that the Statutes are constitutional and that the Statutes and case law interpreting the Statutes are sufficiently clear. The People state that Defendant lacks standing to assert some of his arguments and that the issues are not ripe. The People request that this Court not issue any advisory opinions.

The Court respectfully declines the invitation to answer any questions that depend on facts and circumstances not presently before the Court. Thus, this Court will not address any questions dependent on hypothetical facts and circumstances. This Court will not prejudge any issues or deliver any premature or advisory opinions. As this case continues, the Court will apply the Statutes, as constructed by the General Assembly and interpreted by case law, to any issues that may arise. Similarly, Defendant's arguments regarding the Statutes and the general "heightened reliability" required in capital cases are mixed questions of law and fact, and this Court respectfully declines the opportunity to opine on those issues before the facts and circumstances related to those issues are fully before it.

Defendant raises a host of constitutional issues in his five Motions, and many of those issues overlap. Therefore, this Court will analyze Defendant's arguments by constitutional issue, citing specific arguments by Motion and either page or paragraph number (e.g. Def. Mot. 28 ¶ 1, Resp. 32, at 1). The constitutional issues raised in Defendant's Motions include arguments that the Statutes are unconstitutionally vague and violate due process; that the Statutes prevent defense counsel from providing effective assistance of counsel; that the Statutes violate his right to remain silent and against self-incrimination; that the Statutes prevent him from making a knowing, intelligent, and voluntary plea; that the Statutes burden Defendant's constitutional right to be free from exercising one right at the cost of forfeiting another; that the Statutes violate his

constitutional right to present a defense; and that the Statutes subject him to cruel and unusual punishment. As fully explained below, the Court FINDS the Statutes are not unconstitutional.

Additionally, throughout his Motions, Defendant makes cursory or undeveloped arguments that the Statutes violate his right to effective assistance of counsel; his right to be free from compulsory self-incrimination; his right to remain silent; his right to testify; his right to present evidence in his own defense; his right to equal protection; his rights under the due process clauses, including, but not limited to, his right to investigate, prepare, and present a defense to the charges; his right to have the state prove every element of the charges beyond a reasonable doubt; his right to exercise any of his constitutional rights without being penalized for doing so; his right to be free from having to choose to exercise one constitutional right at the cost of forfeiting another; his right to be free from cruel and unusual punishment; his attorney-client privilege; and his physician/psychologist-patient privilege. These cursory arguments are acknowledged, but they will not be addressed by the Court beyond the analysis and conclusions below. *See People v. Mershon*, 874 P.2d 1025, 1035 n.13 (Colo. 1994); *People v. Bondurant*, No. 07CA2481, 2012 WL 1035975, at *2 n.2 (Colo. App. 2012), *cert. denied*, No. 12SC482, 2013 WL 120466 (Colo. Jan. 7, 2013) (stating courts need not address arguments raised in a cursory fashion).

LAW AND ANALYSIS

The Statutes set forth the rules and procedures of a criminal defendant's plea of NGRI. Colo. Rev. Stat. § 18-1.3-1201 dictates special proceedings in the sentencing of class one felonies. Some of the specific issues the Statutes address include the definition of insanity and related terms, §§ 16-8-101 to -102; the process for and implications of pleading insanity as a defense and a trial of such a defense, §§ 16-8-103 to -105.5; and the procedure and use of court-ordered mental health examinations of criminal defendants, §§ 16-8-106 to -108. Defendant asserts that many specific provisions of the Statutes are unconstitutional and that the statutory scheme, read together, is unconstitutional both facially and as applied to a capital defendant.

Whether a statute is constitutional is a question of law. *See City of Greenwood Vill. v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 440 (Colo. 2000). Courts must presume that the state legislature comports with the constitutional standards when enacting a statute. *Id.*; *see also Bondurant*, 2012 WL 1035975, at *2. Generally, a statute is unconstitutional on its face only "if the complaining party can show that the law is unconstitutional in all its applications." *Dallman v. Ritter,* 225 P.3d 610, 625 (Colo. 2010). "To declare an act of the legislature unconstitutional is always a delicate duty, and one which courts do not feel authorized to perform, unless the conflict between the law and the constitution is clear and unmistakable." *City of Greenwood Vill.*, 3 P.3d at 440 (quoting *People v. Goddard*, 7 P. 301, 304 (Colo. 1885)). Parties challenging statutes on constitutional grounds ordinarily must prove the statute's

unconstitutionality beyond a reasonable doubt. *Id.* With these principles of analysis in mind, the Court addresses Defendant's specific arguments below:

1. Unconstitutional Vagueness and Violations of Due Process

Defendant argues that the meaning of "cooperate" in Colo. Rev. Stat. § 16-8-106 is unclear and asks this Court to define "cooperate" as used in the statute. Def. Mot. 28 ¶¶ 5–6, 8–10. Defendant asserts that the term "cooperate" as used in the Statutes is unconstitutionally vague and violates due process of law. *Id.* at ¶¶ 11, 13; Def. Mot. 30 ¶ 5D; Def. Mot. 32, at 15. Defendant also states that the term "mental condition" is unconstitutionally vague and violates due process of law as used in the Statutes. Def. Mot. 29 ¶¶ 9, 14–16; Def. Mot. 32, at 15, 41–42. Defendant states that because the term is not statutorily defined, the meaning and scope of the phrase is unclear. Def. Mot. 29 ¶¶ 7, 13; Def. Mot. 32, at 5.

The People assert that the terms "cooperate" and "mental condition" are not unconstitutionally vague and have common and ordinary meanings. Resp. 28 ¶¶ 6–8, 14; Resp. 29 ¶¶ 2, 5, 9, 11; Resp. 32, at 2–3. They also state that Defendant does not explain why a person of ordinary intelligence would have difficulty determining what it means to "cooperate". Resp. 28 ¶ 8. The People, therefore, ask the Court to deny Defendant's Motion D-28 and Motion D-29.

When evaluating a statute under a void-for-vagueness challenge, the primary issue is "whether the questioned law either forbids or requires the doing of an act in terms so vague that men of ordinary intelligence must necessarily guess as to its meaning and differ as to its application." *People ex rel. City of Arvada v. Nissen*, 650 P.2d 547, 550 (Colo. 1982) (internal quotations omitted). A court should construe the statute as written, giving full effect to the words chosen. *State v. Nieto*, 993 P.2d 493, 500 (Colo. 2000). Generally, courts interpret statutory words and phrases according to their commonly accepted meanings. *People v. Baer*, 973 P.2d 1225, 1230 (Colo. 1999) (citing Webster's Dictionary for the "commonly understood meaning of 'in connection with' "); *see Bondurant*, 2012 WL 1035975, at *7 (citing Webster's Dictionary and finding "cooperate connotes 'to act or work together with another or others to a common end' "). However, "[w]hen the language is clear and unambiguous, the statute must be construed as written, without resort to interpretive rules of statutory construction." *People v. Herrera*, 87 P.3d 240, 244 (Colo. App. 2003).

Colorado appellate courts have analyzed the definitions of "cooperate" and "mental condition" in various opinions. *See, e.g.*, *People v. Wilburn*, 272 P.3d 1078, 1081 (Colo. 2012) (finding defendant must comply with the mandates of § 16–8–107(3)(b) to admit expert testimony concerning his learning disorder because such a disorder was a "mental condition", but holding defendant did not have to plead NGRI to admit such mental condition testimony); *People v. Flippo*, 159 P.3d 100, 104-05, 106 n.11 (Colo. 2007) (holding evidence of "mental

condition," as used in section 16–8–107(3)(b), includes expert testimony regarding a defendant's intellectual disability and stating the statute is not vague and expresses the clear intent of the General Assembly); *Johnson v. People*, 470 P.2d 37, 40 (Colo. 1970) (holding the facts of defendant's noncooperation, such as refusing to talk to the examiner, answer questions, or make comments, are admissible by the prosecution's expert regarding defendant's sanity); *People v. Herdman*, No. 08CA1374, 2012 WL 2045733 (Colo. App. June 7, 2012) (noting the Colorado appellate courts have construed the term "mental condition" broadly and listing cases and finding evidence introduced to support defendant's involuntary intoxication defense was "mental condition" evidence); *Bondurant*, 2012 WL 1035975, at *5 (finding §§ 16-8-106(2)(c) and -107(3)(b) are not unconstitutionally vague and that the term "cooperate" appeared to be comprehensible and clear to a person of ordinary intelligence); *People v. Grant*, 174 P.3d 798, 806 (Colo. App. 2007) (finding no violation of privilege or constitutional rights where prosecution used evidence from court-ordered exam of defendant, including refusal to answer particular questions or divulge specific information, to rebut defendant's evidence of insanity); *Herrera*, 87 P.3d at 246, 249 (stating that the issue of "mental condition" includes insanity or competency and that the particular use of the term in a similar version of § 16-8-103.6(2)(a) "while not defined in the statute, refers in this context, . . . , to *capacity* to form the culpable mental state"); *People v. Roadcap*, 78 P.3d 1108, 1112 (Colo. App. 2003) (finding expert testimony related to an "organic disorder," which affected defendant's mental state and was listed as a mental illness in a medical text, related to defendant's "mental condition" and therefore defendant would have to comply with the provisions of § 16-8-107(3)(b) if he wanted his experts to testify).

In each of these cases, the state appellate courts have managed to define the terms "cooperate" and "mental condition" according to their plain and clear meaning, without resorting to speculation or guesswork. Accordingly, this Court FINDS that the terms "cooperate", as used in Colo. Rev. Stat. § 16-8-106, and "mental condition", as used in Colo. Rev. Stat. §§ 16-8-103.6, 16-8-107(3)(b), and/or 18-1.3-1201(3)(d), are not so vague that men of ordinary intelligence must necessarily guess as to the meaning and differ as to the application of the terms. Thus, the Court FINDS that the terms are not unconstitutionally vague and do not violate due process. Defendant has not proved that these terms render the Statutes unconstitutional beyond a reasonable doubt; and, therefore, this Court FINDS the Statutes are not void for vagueness and are not unconstitutional.

2. The Right to Effective Assistance of Counsel

As an initial matter, Defendant asserts that the waiver provisions of the Statutes violate a capital defendant's right to effective assistance of counsel. Def. Mot. 32, at 49–50. Defendant further claims that this Court must answer all questions he has regarding the Statutes before defense counsel can be considered effective, even if those questions are hypothetical or contain

mixed questions of fact and law. *See* Def. Mot. 30 ¶ 10; Def. Mot. 31 ¶ 13. This Court continues to decline the opportunity to opine about specific factual circumstances not presently before the Court.

Defendant contends that the Statutes violate his constitutional right to effective assistance of counsel. First, defense counsel asserts that it cannot provide Defendant with effective advice and representation absent this Court issuing an order interpreting the term "cooperate" under the Statutes. Def. Mot. 28 ¶¶ 12–13. Second, defense counsel further states it cannot intelligently or effectively advise Defendant on what plea to enter because of the lack of clarity in defining "mental condition" under the Statutes. Def. Mot. 29 ¶¶ 12–13, 16. Finally, defense counsel claims that it cannot effectively assist Defendant on the issues surrounding a plea and arraignment without the Court's ruling and interpretation of the cited statutes. *See* Def. Mot. 28 ¶¶ 12–13; Def. Mot. 29 ¶¶ 13, 16; Def. Mot. 30 ¶¶ 6, 7, 10; Def. Mot. 31 ¶¶ 9, 12, 13; Def. Mot. 32, at 4–7, 49–50.

The People state that Defendant does not have standing to attack the constitutionality of the Statutes as argued in Motion D-32, Resp. 32, at 1, and they state that many of Defendant's specific questions in the Motions are issues that are not ripe for this Court's review, Resp. 31 ¶¶ 1, 9–10. The People do not directly address Defendant's effectiveness of counsel argument, but their broader constitutional arguments shed light on their position. *See* Resp. 28 ¶¶ 10–11, 14; Resp. 32, at 3, 6–7, 13.

A defendant's right in a criminal proceeding to receive the reasonably effective assistance of an attorney acting as his diligent and conscientious advocate is guaranteed by the United States and Colorado Constitutions. *Davis v. People*, 871 P.2d 769, 772 (Colo. 1994); *see* U.S. Const. amends. VI, XIV; Colo. Const. art. II, §16. "One who relies on the advice of a legally trained representative when answering criminal charges is entitled to assume that the attorney will provide sufficiently accurate advice to enable the defendant to fully understand and assess the serious legal proceedings in which he is involved." *People v. Pozo*, 746 P.2d 523, 526–27 (Colo. 1987). The constitutional standard for an ineffective assistance of counsel claim was stated by the United States Supreme Court in *Strickland v. Washington,* 466 U.S. 668 (1984). Under *Strickland,* a defendant claiming a violation of his constitutional right to representation by competent counsel must show that his attorney's performance fell below an objective standard of reasonableness and that the deficient performance resulted in prejudice to the defendant. *Pozo*, 746 P.2d at 526 (citing *Strickland* and noting prior Colorado Supreme Court approval of the *Strickland* test for ineffective assistance of counsel claims based on Art II, § 16 of Colorado's Constitution).

A defendant is entitled to a pretrial investigation sufficient to reveal potential defenses and the facts relevant to guilt or penalty. *Davis*, 871 P.2d at 773; *see People v. Cole*, 775 P.2d

551, 555 (Colo. 1989) (finding ineffective assistance of counsel where there was "virtually no investigation or preparation before the trial"). When representing a client, an attorney is required to conduct "an independent examination of the facts, circumstances, pleadings and laws involved." *Strickland*, 466 U.S. at 680. Generally, representation meets the constitutional standard "when counsel's assumptions are reasonable given the totality of the circumstances and when counsel's strategy represents a reasonable choice based upon those assumptions." *Id.* at 681. However, the constitution does not demand counsel be perfect or represent a defendant with mathematical certainty. *See South Dakota v. Neville*, 459 U.S. 553, 564 (1983) ("[T]he criminal process often requires suspects and defendants to make difficult choices."); *People v. Velasquez*, 641 P.2d 943, 951 (Colo. 1982) ("A defendant is not constitutionally entitled to errorless counsel but rather to reasonably effective assistance of counsel."); *U. S. ex rel. Garrett v. Anderson*, 391 F. Supp. 174, 179 (D. Del. 1975) ("While at times it may be undeniably hard to require a defendant on trial for a crime who desires to present a defense of insanity to make nice calculations of the effect the evidence of his insanity will have on the jury's determination of his guilt, criminal defendants and their attorneys are quite routinely faced with analogous choices.").

It is evident from the detail articulated in Defendant's Motions that defense counsel seems to have conducted an independent examination of the facts, circumstances, pleadings, and laws involved in this case and specifically regarding the issues related to a plea of NGRI. Counsel's ability to ferret out the issues and inconsistencies in the Statutes dispels any concerns at this point in time regarding the competence and effectiveness of counsel's assistance of Defendant in this case. This Court notes that the uncertainty surrounding the Statutes and their application does not jeopardize a defendant's right to effective assistance of counsel. *See Bondurant*, 2012 WL 1035975, at *9 (finding defendant's contention that the insanity statutes prevent his defense counsel from adequately knowing and thus apprising a defendant of the consequences of submitting to a court-ordered examination and going forward at trial with a mental condition defense unsupported and non-persuasive and therefore upholding statutes as constitutional). The Statutes are not unconstitutional simply because a criminal defendant and his counsel must make difficult strategic decisions. *See Neville*, 459 U.S. at 564; *U. S. ex rel. Garrett*, 391 F. Supp. at 179. Additionally, claims of ineffective assistance of counsel should ordinarily focus on the facts of individual cases, none of which are currently before this Court. *See Hutchinson v. People*, 742 P.2d 875, 886 (Colo. 1987). Therefore, the Court FINDS that the Statutes do not violate Defendant's right to effective assistance of counsel and that the Statutes are not unconstitutional.

3. The Right Against Self-Incrimination

Defendant claims that the Statutes violate his right to remain silent and right against self-incrimination. Def. Mot. 28 ¶¶ 6, 6n.1, 10b, 13; Def. Mot. 29 ¶ 16; Def. Mot. 30 ¶¶ 7, 10; Def. Mot. 31 ¶¶ 2, 13; Def. Mot. 32, at 13–22, 26–27, 31, 36, 39–41, 47, 49, 53–54. First, Defendant

states that if the assertion of his right against self-incrimination could be considered as noncooperation under Colo. Rev. Stat. § 16-8-106, the statute is unconstitutional. Def. Mot. 28 ¶¶ 6, 6n.1, 10b, 13; Def. Mot. 32, at 13–18. Second, Defendant claims that the Statutes do not sufficiently limit the use of statements or evidence obtained from court-ordered examinations. Def. Mot. 32, at 36, 38–39, 47–51. Third, Defendant also asserts that § 16-8-106 is unconstitutional because any statements made under the influence of a narcoanalytic drug or during a court-ordered polygraph are per se unreliable and/or involuntary and would violate a defendant's privilege against self-incrimination. Def. Mot. 32, at 53–55. Fourth, Defendant argues that the waiver provisions in the Statutes violate a capital defendant's rights to due process and against self-incrimination. Def. Mot. 29 ¶ 6n.1; Def. Mot. 31 ¶ 9; Def. Mot. 32, at 40–41, 47, 49–50. Finally, Defendant states that the Statutes would violate his rights to due process and against self-incrimination if applied in a capital case. Def. Mot. 28 ¶¶ 6 n.1; Def. Mot. 31 ¶ 2; Def. Mot. 32, at 13–15, 22, 24–25, 31–41, 49–51, 53–54.

The People state that the Statutes do not subject Defendant to an unconstitutional risk of self-incrimination. Resp. 28 ¶ 1, 9, 11, 13; Resp. 31 ¶ 1, 5–8; Resp. 32, at 6–9, 13. The People assert that the Statutes and applicable case law sufficiently limit the use of statements or evidence obtained from court-ordered examinations of criminal defendants. Resp. 31 ¶¶ 1, 5–8; Resp. 32, at 13. Additionally, the People argue that many of Defendant's questions address issues that are not ripe, particularly regarding the death penalty, and they ask this Court not to issue any advisory opinions regarding such issues. Resp. 31 ¶¶ 1, 9.

The United States and Colorado Constitutions guarantee that no criminal defendant shall be compelled to testify against himself. U.S. Const. amend. V; Colo. Const. art 2, § 18. However, these constitutional rights do not bar any statement made by a criminal defendant from being admitted during criminal proceedings. *See Dunlap v. People*, 173 P.3d 1054, 1096 (Colo. 2007) (finding prosecution's use of testimony by doctors, hospital staff, and jail staff who had contact with defendant immediately prior to and during his mental health examination was proper where used to rebut the mental health issue raised by defendant in post-conviction proceedings); *People v. Trujillo*, 49 P.3d 316, 321 (Colo. 2002) (finding voluntary unwarned custodial statements may be admissible at trial to impeach a defendant); *People v. Branch*, 805 P.2d 1075, 1080 (Colo. 1991) (finding a defendant's confession or inculpatory statement made to a governmental agent may be admitted into evidence at trial if the prosecution establishes by a preponderance of the evidence that the confession or statement was voluntarily made); *People v. Cole*, 584 P.2d 71, 74 (Colo. 1978) ("Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury.") (quoting *Harris v. New York*, 401 U.S. 222, 225 (1971)).

The United States Supreme Court has held that "if a defendant requests [a psychiatric] evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this

presentation with evidence from the reports of the examination that the defendant requested." *Buchanan v. Kentucky*, 483 U.S. 402, 422-23 (1987). The Colorado appellate courts have confirmed that statements made during, or observations acquired from, a defendant's court-ordered mental examination are admissible to prove the defendant's sanity. *See Gray v. Dist. Court,* 884 P.2d 286 (Colo.1994) (upholding statute substantially similar to current version of § 16-8-103.6(2)(a), including the waiver provisions); *Johnson*, 470 P.2d at 40 (finding expert may testify regarding defendant's noncooperation during court-ordered exam and to any conclusions drawn from such exam); *see also Bondurant*, 2012 WL 1035975, at *8 (finding "this statutory scheme evinces the General Assembly's intent that information obtained in compulsory mental examinations be admissible only on the issue of mental condition," and therefore preserves defendants' privileges against self-incrimination); *Herdman*, 2012 WL 2045733, at *7-–*8 (finding admission of expert rebuttal evidence regarding defendant's mental condition derived from court-ordered exams did not violate defendant's privilege against self-incrimination) (citing *Bondurant*); *Herrera*, 87 P.3d at 245 (finding the privilege against self-incrimination is not implicated by the use of information from a court-ordered mental examination where the statutory scheme specifically limits the use of such information to the issue of mental condition); *Roadcap*, 78 P.3d at 1113 (finding defendant could comply with the mental condition statute without waiving his privilege against self-incrimination by invoking the privilege during the court-ordered examination); *People v. Tally*, 7 P.3d 172, 182 (Colo. App. 1999) (concluding the 1998 version of § 16-8-106(2)(a), which allowed statements made by defendant to be admitted to prove his sanity, was not unconstitutional on its face or as applied to the defendant). These opinions have addressed issues similar to Defendant's constitutional concerns regarding the Statutes and self-incrimination, and the appellate courts have generally upheld the constitutionality of the Statutes.

The Court FINDS that Defendant has not stated a "clear and unmistakable" conflict between the Statutes and the constitution. Further, the Court FINDS that Defendant has failed to otherwise prove that the Statutes are unconstitutional beyond a reasonable doubt. *See City of Greenwood Vill.*, 3 P.3d at 440. Therefore, the Court FINDS that the Statutes do not violate Defendant's right against self-incrimination and are not unconstitutional.

4. Knowing, Intelligent, and Voluntary Pleas

Defendant states that before he can knowingly, intelligently, and voluntarily enter a plea under the Statutes, he must understand the consequences of such a plea. Def. Mot. 30 ¶ 5[1]; Def. Mot. 32, at 6–8. Defendant also asserts that this Court must advise him of the consequences of entering an NGRI plea for any such plea to be knowing, voluntary, and intelligent. If the Court

[1] Motion D-30 contains two paragraphs numbered as 5. The Court will refer to the single paragraph with no subsections on page three as "¶ 5" and the paragraph with subsections as "¶¶ 5A–5J."

compels Defendant to make a decision on a plea before resolution of these issues, that plea would be rendered involuntary and unintelligent. Def. Mot. 30 ¶ 5; Def. Mot. 32, at 6–8.

The People do not affirmatively state that they oppose the Court formally advising defendant of the consequences of entering a NGRI plea before accepting any such plea. The People do oppose the Court issuing any sort of advisory opinion, Resp. 31 ¶¶ 1, 9, and they ask the Court to deny all of Defendant's Motions.

This Court agrees with Defendant's contention and FINDS that it must advise any criminal defendant of the consequences of entering a NGRI plea before accepting any such plea. Colo. Rev. Stat. § 16-8-103(4). Therefore, the Court FINDS that Defendant will be advised of the effect and consequences of entering a plea of not guilty by reason of insanity consistent with state statute. A copy of the written advisement is attached to this Order. If either party has suggestions for additional amendments to this advisement they should file their suggestions with the Court by 5:00 p.m. Friday, March 8, 2013.

5. The Right to Exercise a Constitutional Right Without the Cost of Forfeiting Another

Defendant further argues the Statutes' waiver provisions create an impermissible tension between the Sixth Amendment right to present a defense and the Fifth Amendment right against self-incrimination, forcing Defendant to choose between his constitutional right against self-incrimination and his constitutional right to present a defense. Def. Mot. 32, at 19–22, 24–25, 39, 47, 50–51.

The People state that the case of *People v. Herrera*, 87 P.3d 240 (Colo. App. 2003), is dispositive of this issue. Resp. 28 ¶¶ 11–13; Resp. 32, at 8–9, 11. The People assert that, while perhaps difficult, Defendant's strategic decisions in this case are not unconstitutionally forced or burdened. Resp. 28 ¶¶ 11–13; Resp. 32, at 6–8.

A defendant's constitutional right may be found impermissibly burdened when there is some penalty for exercising the right. *Apodaca v. People*, 712 P.2d 466, 473 (Colo. 1985). However,

> [t]he criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose. The threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved.

McGautha v. California, 402 U.S. 183, 213 (1971), *vacated on other grounds sub nom. Crampton v. Ohio*, 408 U.S. 941 (1972) (internal citations omitted); *see also Herrera*, 87 P.3d at 248 ("At no time was defendant in danger of sacrificing his insanity defense; he was simply faced with a difficult choice."). Additionally, the conflict of constitutional rights must not be speculative or prospective. *United States v. Peister*, 631 F.2d 658, 662 (10th Cir. 1980) (rejecting defendant's claim of Fifth Amendment protection that was based on an assumption that a financial disclosure form would be used to incriminate him).

Defendant assumes that the waiver provisions would allow statements he might make under the provisions of the Statutes to be used to incriminate him, and, therefore, he is being forced to choose between his right to present a defense and his right against self-incrimination. However, any conflict is speculative and prospective at this time. Further, § 16-8-107 sets limitations on the use of certain evidence derived during any court-ordered examination. This Court will not assume that any incriminating evidence will be produced under the Statutes, that the prosecution would impermissibly use such information, or that this Court would allow the prosecution to do so. Thus, Defendant has not proved beyond a reasonable doubt that any assertion of his Fifth or Sixth Amendment rights will impair his right to exercise any other constitutional rights. The Court FINDS that the Statutes are not unconstitutional and do not impermissibly burden any of Defendant's constitutional rights.

6. The Right to Present a Defense

Defendant states that the Statutes violate his right to present a defense. Def. Mot. 32, at 22–24, 39–40, 51, 57. Defendant states the Statutes exclude relevant evidence offered in his defense and that such exclusion violates his constitutional rights. Def. Mot. 32, at 23–25. Much of Defendant's argument that the Statutes violate his right to present a defense is based on his assumption that the Statutes force him to choose between his constitutional right against self-incrimination and his right to present a defense. Def. Mot. 32, at 23, 39–40, 57. This Court has already rejected that assumption. *See supra*, Part 5.

The People claim that the Statutes do not prevent Defendant from presenting a defense. Resp. 32, at 6–9, 14–15. The People point to case law stating that what evidence may be presented by a defendant may be controlled by statute. *Id.* at 14–15. Thus, the People state that the Statutes are constitutional and do not violate Defendant's right to present a defense. *Id.* at 15–16.

A defendant has a constitutional right to call witness in his defense, just as he has the right to testify in his own defense. *People v. Pronovost*, 773 P.2d 555, 558 (Colo. 1989); *see also Taylor v. Illinois*, 484 U.S. 400, 407–409 (1988) (defendant has a constitutional right to present

evidence on his behalf); *People v. Pate*, 625 P.2d 369, 371–72 (Colo. 1981) (defendant has a constitutional right to confrontation and cross-examination); *see also* U.S. Const. amend. V, VI; Colo. Const. art. II, §§ 16, 18, 25. Defendant still has those rights in this case under the Statutes. A defendant's interest in presenting relevant evidence must sometimes "bow to accommodate other legitimate interests in the criminal trial process." *United States v. Scheffer*, 523 U.S. 303, 308 (1998) (internal citations omitted).

"A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions." *Id.*; *see also Flippo*, 159 P.3d at 105–06 (stating Colorado law has made clear that evidence of a defendant's mental condition is admissible when relevant, but that a defendant introducing such evidence must comply with § 16-8-107); *People v. Dunlap*, 975 P.2d 723, 756 (Colo. 1999) (rejecting defendant's contention that trial court erred in precluding his polygraph evidence at trial where defendant offered no proof of the reliability of the polygraph and where, under Colorado law, polygraph evidence is per se inadmissible in a criminal trial); *Bondurant*, 2012 WL 1035975, at *9 (rejecting defendant's argument that §§ 16–8–103.6(2), 16–8–106(2)(c), (3)(b)-(c), and 16–8–107(1.5)(a), (3)(b), taken together, violate a defendant's constitutional right to due process because they prohibit calling witnesses to establish a defense); *Roadcap*, 78 P.3d at 1112 (upholding trial court's rejection of defendant's mental condition evidence where defendant did not comply with statutory requirements for presenting that evidence, stating "[t]he court did not preclude this line of defense, but only required defendant to comply with the statute if he chose to pursue it"); *U. S. ex rel. Garrett*, 391 F. Supp. at 180 (concluding defendant did not have a constitutional right to a bifurcated trial where he was presenting an affirmative defense of insanity, stating "[t]he criminal process, like the rest of the legal system, is replete with situations requiring the making of difficult judgments as to which course to follow").

Colorado state appellate courts have found that the Statutes are constitutional at least in some applications. Defendant fails to fully explain why the strategic choices he must make under the Statutes are suddenly unconstitutional. This Court FINDS that Defendant has not proved beyond a reasonable doubt that the Statutes are unconstitutional. Therefore, the Court FINDS the Statutes are not unconstitutional and do not violate Defendant's constitutional right to present a defense.

7. The Right Against Cruel and Unusual Punishment

Defendant also claims that the Statutes prevent him from presenting mitigating evidence during sentencing in a capital case in violation of his constitutional right against cruel and unusual punishment. Def. Mot. 28 ¶ 13; Def. Mot. 29 ¶ 16; Def. Mot. 30 ¶ 10; Def. Mot. 31 ¶ 13; Def. Mot. 32, at 13, 24–25, 35–36, 49. Defendant asserts that the exclusion of evidence offered

to defend against allegations in a capital sentencing proceeding can violate due process and/or the Eighth Amendment. Def. Mot. 32, at 23.

The People state that the Statutes clearly provide for the use of evidence from a court-ordered examination, and they maintain that the courts have placed sufficient limitations on such use to protect defendant's privilege against self-incrimination. Resp. 31 ¶¶ 1, 7; Resp. 32, at 9, 11–13. The People also state that many of the hypothetical questions Defendant has asked the Court regard issues that are not ripe, and they ask this Court not to issue advisory opinions about issues that are not before the Court at this time. Resp. 31 ¶¶ 1, 9–10.

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The Amendment was intended to limit the power of those entrusted with the criminal-law function of government and was designed to protect those convicted of crimes. *Ingraham v. Wright*, 430 U.S. 651, 664 (1977). However, "[n]ot every governmental action affecting the interests or well-being of a prisoner is subject to Eighth Amendment scrutiny." *Whitley v. Albers*, 475 U.S. 312, 319 (1986).

The General Assembly specifically provides a methodology for the presentation of evidence during the sentencing phase of a capital trial, including the ability for a defendant to present expert testimony regarding his mental condition. Colo. Rev. Stat. § 18-1.3-1201. The Colorado Supreme Court has addressed issues regarding presentation of mitigation evidence under a similar statutory scheme. *Dunlap*, 975 P.2d at 739 (holding evidence by the people for a purpose other than to rebut the specific issues of mitigation raised by the defense is not allowed in the first three steps of death penalty sentencing). Even in death penalty cases, a defendant's right to present evidence on his behalf is not unlimited, but subject to reasonable restrictions. *See Scheffer*, 523 U.S. at 308; *see also Buchanan*, 483 U.S. at 422-23 (stating the prosecution may rebut a defendant's presentation of psychiatric evidence with evidence from an exam conducted at the request of the defendant, even in the context of a capital case); *State v. Boyd*, 319 S.E.2d 189, 198–99 (N.C. 1984) (upholding trial court's exclusion of expert testimony designed to link together mitigating factors in death penalty sentencing where court found that expert's report "lacks comprehensiveness and is characterized by general conclusions of questionable scientific import or value in mitigation"); *State v. Chaffee*, 328 S.E.2d 464, 471 (S.C. 1984) *overruled on other grounds by State v. Torrence*, 406 S.E.2d 315 (S.C. 1991) (allowing prosecution to present expert testimony from court-ordered competency exam during sentencing where no expert testified as to defendant's actual statements and where presentation was only in response to defendant's presentation of mental condition evidence).

Defendant's argument seems to be that the Statutes dictate a process for presenting mental condition evidence in the sentencing phase of a capital case that violates the Eighth

Amendment. To the extent that Defendant's argument depends on specific facts and circumstances, the Court declines to comment. Such facts are not before the Court and, therefore, such circumstances are not currently at issue. To the extent that Defendant argues that the Statutes are unconstitutional, the Court FINDS that Defendant has not proved such assertions beyond a reasonable doubt. This Court presumes that the General Assembly conformed to the constitutional standards in enacting the Statutes and that there is a constitutional interpretation of the Statutes. Defendant has not proved the conflict between the law and the constitution is "clear and unmistakable." *See City of Greenwood Vill.*, 3 P.3d at 440. Therefore, the Court FINDS the statute is not unconstitutional and does not violate Defendant's right to be free from cruel and unusual punishment.

CONCLUSION

This Court has not and will not address any questions dependent on hypothetical facts and circumstances not before it at this time. Such opinions would be premature and advisory. The Court has examined, as a question of law, Defendant's argument that the Statutes are unconstitutional. The Court notes that the appellate courts consistently have upheld parts or versions of the Statutes. *See, e.g.*, *Gray*, 884 P.2d at 297 (upholding as constitutional a statute substantially similar to current version of § 16-8-103.6(2)(a)); *Johnson*, 470 P.2d at 39 (holding statutes allowing evidence of a defendant's noncooperation during a psychiatric examination to be admitted during a sanity trial as part of the prosecution's expert's testimony that defendant was sane were constitutional); *Bondurant*, 2012 WL 1035975, at *2 (rejecting defendant's contention that the statutory scheme regarding the prosecution's use of expert testimony regarding defendant's mental condition is unconstitutional); *Herrera*, 87 P.3d at 248 (holding evidence from court-ordered examinations regarding a defendant's capacity to form the requisite mental state is constitutionally admissible at trial); *Tally*, 7 P.3d at 182 (concluding the 1998 version of § 16-8-106(2)(a) was not unconstitutional on its face or as applied to the defendant).

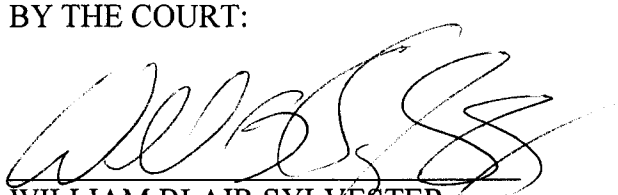
The Court FINDS that Defendant has not proved that the Statutes are unconstitutional beyond a reasonable doubt and that any conflict between the Statutes and the constitution is clear and unmistakable. WHEREFORE, the Court FINDS that the Statutes are not unconstitutional and do not violate Defendant's right to effective assistance of counsel; right to be free from compulsory self-incrimination; right to remain silent; right to testify; right to present evidence in his own defense; right to equal protection; rights under the due process clauses, including, but not limited to, his right to investigate, prepare, and present a defense to the charges; right to have the state prove every element of the charges beyond a reasonable doubt; right to exercise any of his constitutional rights without being penalized for doing so; right to be free from having to choose to exercise one constitutional right at the cost of forfeiting another; right to be free from cruel and unusual punishment; attorney-client privilege; or physician/psychologist-patient privilege. The Court FINDS that the Statutes are not unconstitutional under 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; or pursuant to the Federal and Colorado Constitutions, the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitutions, and Article II, §§ 3, 6, 7, 10, 11, 16, 18, 20, 23, 25 and 28 of the Colorado Constitution.

Defendant's Motions D-28, D-29, D-31, and D-32 are DENIED. Defendant's Motion D-30 is GRANTED, IN PART, with respect to Defendant's request that this Court advise him of the consequences of pleading Not Guilty by Reason of Insanity. A draft of the advisement is attached to this Order. If either party has suggestions for additional amendments to this advisement they should file their suggestions with the Court by 5:00 p.m. Friday, March 8, 2013. Otherwise, Motion D-30 is DENIED.

DATED this 7th day of March, 2013.

BY THE COURT:



WILLIAM BLAIR SYLVESTER
CHIEF JUDGE
EIGHTEENTH JUDICIAL DISTRICT

DISTRICT COURT, CITY AND COUNTY OF ARAPAHOE, COLORADO

Case No. 2012CR1522

ADVISEMENT ON PLEA OF NOT GUILTY BY REASON OF INSANITY[1]

THE PEOPLE OF THE STATE OF COLORADO, Plaintiffs,

v.

JAMES EAGAN HOLMES, Defendant

Before accepting your tendered plea of Not Guilty By Reason of Insanity, the Court must advise you of the following possible effects and consequences of such a plea:

1. Do you read, write, and understand English?

2. Is anyone forcing you to enter this plea?

3. You have requested to plead Not Guilty By Reason of Insanity. The applicable test for insanity shall be:

(a) A person who is so diseased or defective in mind at the time of the commission of the act as to be incapable of distinguishing right from wrong with respect to that act is not accountable. In determining whether this definition applies, care should be taken not to confuse such mental disease or defect with moral obliquity, mental depravity, or passion growing out of anger, revenge, hatred, or other motives and kindred evil conditions, for, when the act is induced by any of these causes, the person is accountable to the law; OR

(b) A person who suffered from a condition of mind caused by mental disease or defect that prevented the person from forming a culpable mental state that is an essential element of a crime charged. In determining whether this definition applies, care should be taken not to confuse such mental disease or defect with moral obliquity, mental depravity, or passion growing out of anger, revenge, hatred or other motives and kindred evil conditions because, when the act is induced by any of these causes, the person is accountable to the law.

"Diseased or defective in mind" does not refer to an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

[1] This advisement applies to all offenses committed after July 1, 1999.

"Mental disease or defect" includes only those severely abnormal mental conditions that grossly and demonstrably impair a person's perception or understanding of reality and that are not attributable to the voluntary ingestion of alcohol or any other psychoactive substance but does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

Authority: C.R.S. § 16-8-101.5 (1)-(3).

4. By pleading not guilty by reason of insanity and placing your mental condition at issue, by disclosing witnesses who may provide evidence concerning your mental condition during a sentencing hearing held pursuant to C.R.S. § 18-1.3-1201 or 18-1.4-102, or by seeking to introduce evidence concerning your mental condition, you waive any claim of confidentiality or privilege as to communications you made 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 such mental condition, or sentencing hearing conducted pursuant to C.R.S. § 18-1.3-1201 or 18-1.4-102. The Court will order both you and the prosecutor to exchange the names, addresses, reports, and statements of any physician or psychologist who has examined or treated you for such mental condition. **Authority: C.R.S. § 16-8-103.6 (2)(a)-(b).**

5. When, at the time of arraignment, the defense of insanity is raised, the Court shall order an examination of you with regard to the insanity defense. When you give notice pursuant to C.R.S. § 16-8-107(3) that you intend to introduce evidence in the nature of expert opinion concerning your mental condition, the Court will order an examination of you pursuant to C.R.S. § 16-8-106. **Authority: C.R.S. § 16-8-103.7(2)-(3).**

6. You have a right to trial by a jury or to the Court. The issues raised by the plea of not guilty by reason of insanity shall be treated as an affirmative defense and shall be tried in the same proceeding and before the same trier of fact,(i.e., the jury or the Court), as the charges to which not guilty by reason of insanity is offered as a defense. **Authority: C.R.S. § 16-8-104.5**; *see also* Amendment VI, U.S. Constitution (right to jury trial in criminal cases); Colo. Const. art. 2, § 23 (right to trial by jury in criminal cases).

7. When a plea of not guilty by reason of insanity is accepted, the Court shall immediately commit you for a sanity examination, specifying the place and period of commitment. Upon receiving the report of the sanity examination, the Court shall immediately set the case for trial. Every person is presumed to be sane; but, once any evidence of insanity is introduced, the People have the burden of proving sanity beyond a reasonable doubt. **Authority: C.R.S. § 16-8-105.5(1)-(2).**

8. If the trier of fact finds you not guilty by reason of insanity, the Court shall commit you to the custody of the Department of Human Services until such time as you are found eligible for release. The executive director of the Department of Human Services shall designate the state facility at which you shall be held for care and psychiatric treatment and may transfer you from one facility to another if, in the opinion of the director, it is desirable to do so in the interest of

the proper care, custody, and treatment of you or the protection of the public or personnel of the facilities in question. **Authority: C.R.S. § 16-8-105.5(4).**

9. All examinations ordered by the Court in criminal cases shall be accomplished by the entry of an order of the court specifying the place where such examination is to be conducted and the period of time allocated for such examination. You may be committed for such examination to the Colorado psychiatric hospital in Denver, the Colorado mental health institute at Pueblo, the place where you are in custody (in this case, Arapahoe County Jail), or such other public institution as designated by this Court. In determining the place where such exam is to be conducted, the Court shall give priority to the place where you are in custody, (in this case, the Arapahoe County Jail), unless the nature and circumstances of the examination require designation of a different facility. **Authority: C.R.S. § 16-8-106(1).**

10. You shall be observed and examined by one or more psychiatrists during such period as the Court directs. For good cause shown, upon your motion or motion by the prosecution, or upon the Court's own motion, the Court may order such further or other examination, including services of psychologists, as is advisable under the circumstances. Nothing in this section shall abridge your right to obtain a psychiatric examination as provided in section 16-8-108. **Authority: C.R.S. § 16-8-106(1).**

11. You shall cooperate with psychiatrists and other personnel conducting any examination ordered by the court. Statements you make in the course of such examination shall be protected as provided in section 16-8-107. If you do not cooperate with psychiatrists and other personnel conducting the examination, the court shall not allow you to call any psychiatrist or other expert witness to provide evidence at your trial concerning your mental condition, including, but not limited to, providing evidence on the issue of insanity or at any sentencing hearing held pursuant to C.R.S. § 18-1.3-1201 or 18-1.4-102. Additionally, the fact that you did not cooperate with psychiatrists and other personnel conducting the examination may be admissible in your trial to rebut any evidence you introduce with regard to your mental condition including, but not limited to, the issue of insanity and in any sentencing hearing held pursuant to C.R.S. § 18-1.3-1201 or 18-1.4-102. **Authority: C.R.S. § 16-8-106(2)(c).**

12. To aid in forming an opinion as to your mental condition, it is permissible in the course of an examination under this section to use your confessions and admissions and any other evidence of the circumstances surrounding the commission of the offense(s), as well as your medical and social history, in questioning you. If you are not cooperative with psychiatrists and other personnel conducting the examination, an opinion of your mental condition may be rendered by such psychiatrists or other personnel based upon such confessions, admissions, and any other evidence of the circumstances surrounding the commission of the offense(s), as well as your known medical and social history, and such opinion may be admissible into evidence at trial and in any sentencing hearing held pursuant to C.R.S. § 18-1.3-1201 or 18-1.4-102. **Authority: C.R.S. § 16-8-106(3)(b).**

13. It shall also be permissible to conduct a narcoanalytic interview of you with such drugs as are medically appropriate, and to subject you to polygraph examination. In any trial or hearing on the issue of your sanity or eligibility for release and in any sentencing hearing held pursuant to C.R.S. § 18-1.3-1201 or 18-1.4-102, the physicians and other personnel conducting the examination may testify to the results of any such procedures and your statements and reactions insofar as these entered into the formation of their opinions as to your mental condition both at the time of the commission of the alleged offense(s) and at the present time. **Authority: C.R.S. § 16-8-106(3)(b).**

14. When you undergo examination as set forth previously because you have given notice pursuant to section 16-8-107(3) that you intend to introduce expert opinion evidence concerning your mental condition, the physicians and other personnel conducting the examination may testify to the results of any such procedures and your statements and reactions insofar as these entered into the formation of their opinions as to your mental condition. **Authority: C.R.S. § 16-8-106(3)(c).**

15. With respect to your alleged offense(s), the report of the examination shall include, but not be limited to, the following items: (a) the name of each physician or other expert who examined you; (b) a description of the nature, content, extent, and results of the examination and any tests conducted; (c) a diagnosis and prognosis of your physical and mental condition; (d) an opinion as to whether you suffered from a mental disease or defect or from a condition of mind caused by mental disease or defect that prevented you from forming the culpable mental state that is an essential element of any crime charged; and, if so, (e) separate opinions as to your mental condition including, but not limited to, whether you were insane or are ineligible for release, as those terms are defined in C.R.S. § 16-8-101.5, et seq., and in any Class 1 Felony case, an opinion as to how the mental disease or defect or condition of mind caused by mental disease or defect affects any mitigating factor. The nature of the opinions required depends upon the type of examination ordered by this Court. **Authority: C.R.S. § 16-8-106(6)(a)-(b); § 16-8-106(5)(a)-(c).**

16. When you have undergone examination because you gave notice pursuant to section 16-8-107(3) that you intend to introduce expert opinion evidence concerning your mental condition, the report of the examination shall include, but not be limited to, the following items: (a) the name of each physician or other expert who examined you; (b) a description of the nature, content, extent, and results of the examination and any tests conducted; (c) a diagnosis and prognosis of your physical and mental condition; (d) an opinion as to whether you suffered from a mental disease or defect or from a condition of mind caused by mental disease or defect that affected your mental condition and, if so, (e) separate opinions as to your mental condition including, but not limited to, whether you were insane or are ineligible for release, as those terms are defined in C.R.S. § 16-8-101.5, et seq., and in any Class 1 Felony case, an opinion as to how the mental disease or defect or condition of the mind caused by mental disease or defect affects any mitigating factor. The nature of the opinions required depends upon the type of examination ordered by this Court. **Authority: C.R.S. § 16-8-106(7)(a)-(b); § 16-8-106(5)(a)-(c).**

17. Except as otherwise provided in this advisement, no evidence acquired directly or indirectly for the first time from a communication derived from your 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 you on the issues raised by a plea of not guilty, if you are put to trial on those issues, except to rebut evidence you introduce of your mental condition to show incapacity to form a culpable mental state; and, in such case, that evidence may be considered by the trier of fact only as bearing upon the question of capacity to form a culpable mental state, and the jury, at the request of either party, shall be so instructed. If you testify on your own behalf upon the trial of the issues raised by the plea of not guilty or at a sentencing hearing held pursuant to C.R.S. § 18-1.3-1201, 18-1.3-1302, or 18-1.4-102, the provisions of this section shall not bar any evidence used to impeach or rebut your testimony. **Authority: C.R.S. § 16-8-107(1)(a), (c).**

18. Except as otherwise provided in this advisement, evidence acquired directly or indirectly for the first time from a communication derived from your mental processes during the course of a court-ordered examination pursuant to section 16-8-106 or acquired pursuant to section 16-8-103.6 is admissible only as to the issues raised by your plea of not guilty by reason of insanity, and the jury, at the request of either party, shall be so instructed; except that, for offenses committed on or after July 1, 1999, such evidence shall also be admissible as to your mental condition if you undergo the examination because you have given notice pursuant to subsection (3) of C.R.S. 16-8-307 that you intend to introduce expert opinion evidence concerning your mental condition. If you testify on your own behalf, these provisions shall not bar any evidence used to impeach or rebut your testimony. **Authority: C.R.S. § 16-8-107(1.5)(a), (c).**

19. Evidence acquired directly or indirectly for the first time from a communication derived from your 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 at any sentencing hearing held pursuant to C.R.S. § 18-1.3-1201 or 18-1.4-102, only to prove the existence or absence of any mitigating factor. **Authority: C.R.S. § 16-8-107(1)(b); (1.5)(b).**

20. In any trial or hearing concerning your mental condition, physicians and other experts may testify as to their conclusions reached from their examination of hospital records, laboratory reports, X rays, electroencephalograms, and psychological test results if the material which they examined in reaching their conclusions is produced at the time of trial or hearing. **Authority: C.R.S. § 16-8-107(2).**

21. In no event shall the Court permit you to introduce evidence relevant to the issue of insanity, as described in section 16-8-101.5, unless you enter a plea of not guilty by reason of insanity pursuant to section 16-8-103. **Authority: C.R.S. § 16-8-107(3)(a).**

22. Regardless of whether you enter a plea of not guilty by reason of insanity pursuant to section 16-8-103, you shall not be permitted to introduce evidence in the nature of expert opinion concerning your mental condition without having first given notice to the court and the prosecution of your intent to introduce such evidence and without having undergone a court-ordered examination pursuant to section 16-8-106. If you place your mental condition at issue by giving such notice you waive any claim of confidentiality or privilege as provided in section

16-8-103.6. Such notice shall be given at the time of arraignment; except that the court, for good cause shown, shall permit you to inform the court and prosecution of the intent to introduce such evidence at any time prior to trial. Any period of delay caused by the examination and report provided for in section 16-8-106 shall be excluded, as provided in section 18-1-405(6)(a), C.R.S. from the time within which you must be brought to trial. **Authority: C.R.S. § 16-8-107(3)(b).**

23. If you wish to be examined by a psychiatrist, psychologist, or other expert of your own choice in connection with any proceeding under this article, the court, upon timely motion, shall order that the examiner you choose be given reasonable opportunity to conduct the examination. A copy of any report of an examination of you made at the instance of the defense shall be furnished to the prosecution a reasonable time in advance of trial. **Authority: C.R.S. 16-8-108 (1)-(2).**

24. Upon your motion and proof that you are indigent and without funds to employ physicians, psychologists, or attorneys to which you are entitled, the Court shall appoint such physicians, psychologists or attorneys for you at state expense. **Authority: C.R.S. § 16-8-119.**

25. Have you thoroughly discussed this matter with your attorney?

26. Knowing the consequences of entering a plea of not guilty by reason of insanity, do you still want to enter such a plea?

DATED this _____day of _____, 2013.

BY THE COURT:

_____
WILLIAM BLAIR SYLVESTER
CHIEF JUDGE
EIGHTEENTH JUDICIAL DISTRICT

ACKNOWLEDGMENT

I acknowledge that I have received a copy of this advisement and have reviewed the advisement with my attorney. I fully understand the effect and consequences of my plea of Not Guilty By Reason Of Insanity.

Dated this _____ day of _____, 2013.

_____
Defendant

_____
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2013, a true and correct copy of **Order Re: Defense Motions D-28,D-29, D-30, D-31, and D-32** was served upon the following parties of record.

Karen Pearson
Amy Jorgenson
Arapahoe County District Attorney's Office
6450 S. Revere Parkway
Centennial, CO 80111-6492
(via email)

Sherilyn Koslosky
Rhonda Crandall
Colorado State Public Defender's Office
1290 S. Broadway, Suite 900
Denver, CO 80203
(via email)

S. Martin