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District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. **JAMES HOLMES,** Defendant	σ COURT USE ONLY σ
DOUGLAS K. WILSON, Colorado State Public Defender Daniel King (No. 26129) Tamara A. Brady (No. 20728) Chief Trial Deputy State Public Defenders 1300 Broadway, Suite 400 Denver, Colorado 80203 Phone (303) 764-1400 Fax (303) 764-1478 E-mail: state.pubdef@coloradodefenders.us	Case No. **12CR1522** Division 26

MOTION TO DECLARE COLORADO'S DEATH PENALTY UNCONSTITUTIONAL BECAUSE, IN PRACTICE, IT IS ARBITRARY IN BOTH APPLICATION AND OPERATION [D-164]

CERTIFICATE OF CONFERRAL

The prosecution states that they object, and will file a responsive pleading to this motion.

James Holmes, by and through counsel, moves this Court to strike the death penalty because it is an unusual penalty that violates his inherent right to the equal administration of justice. The arbitrary and capricious manner in which Colorado's death penalty is applied within Colorado, and throughout the United States, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article II, §§ 3, 6 and 25 of the Colorado Constitution.[1] It violates the principle of uniform application of laws that is at the heart of the privileges and immunities clause of the U.S. Constitution, Amendment XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"), U.S Constitution, Article IV, § 2, cl. 1 ("The Citizens of each

[1] Article II, Section 3 of the Colorado Constitution guarantees certain inalienable rights: "All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness." Article II, Section 6 states: "Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay." Article II, Section 25 states: "No person shall be deprived of life, liberty or property, without due process of law."

State shall be entitled to all Privileges and Immunities of Citizens in the several States"), and Article II, Section 28 of the Colorado Constitution ("The enumeration in this constitution of certain rights shall not be construed to deny, impair or disparage others retained by the people.") Further, the application of the death penalty in Colorado is so random and rare as to be "unusual" within the meaning of the prohibition on cruel and unusual punishments contained in Article II, Section 20 and the Eighth Amendment of the United States Constitution. The disparities in the way that the Colorado death penalty is applied violate these constitutional guarantees, and reflects a system that is fundamentally unfair.

In support of this motion, Mr. Holmes states the following:

1. Mr. Holmes begins by referring this Court to the authority and argument in D-144, D-145, D-157, D-158, D-159, D-160, D-161, D-162, D-163, and D-165. This motion is filed separately to emphasize the fact that the present availability and application of the death penalty within the State of Colorado is geographically disparate, arbitrary, and unequal such that it violates several state and federal constitutional provisions that guarantee equality, consistency, uniform application of laws, fundamental fairness, and equal and fair administration of justice.

I. The Cause: Features of an Arbitrary System

2. There are numerous features of Colorado's death penalty scheme that contribute to its arbitrary application in practice.

3. First, as discussed in D-157, Colorado's capital sentencing statute, C.R.S. § 18-1.3-1201, is one of the broadest in the nation, containing seventeen aggravating factors, which in turn possess numerous subcategories of aggravators. Empirical data demonstrates that this exceptionally broad sentencing scheme creates a system in which approximately 90 percent of all first-degree murders are eligible for the death penalty in Colorado. *See* D-157, Attachment A. Yet in only a tiny fraction of those cases, 2.78 percent, has the prosecution sought the death penalty. As discussed in greater detail in that motion, this empirical evidence conclusively demonstrates that Colorado's death penalty scheme fails to perform the narrowing function that is a necessary component of any constitutionally sound capital sentencing scheme. *See, e.g., Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988); *Zant v. Stephens*, 462 U.S. 862, 877 (1983).

4. Second, in addition to its exceptionally high *quantity* of statutory aggravators, C.R.S. § 18-1.3-1201 possesses aggravators of an insufficient *quality*. As discussed in greater detail in D-158, D-159, D-160, D-161, D-162, and D-163, these aggravators, both individually and as a whole, make random distinctions between defendants whose lives are at risk and defendants who are beyond the reach of the state's ultimate sanction, and fail to create distinctions and classifications that "reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant*, 462 U.S. at 877.

5. Third, the Colorado Supreme Court's current interpretation of C.R.S. § 18-1.3-1201 in *People v. Dunlap ("Dunlap I")*, 975 P.2d 723 (Colo. 1999), is that the "eligibility" of a capital sentencing hearing in Colorado is not determined solely by the presence of statutory aggravating factors in step one of the sentencing process, but is instead determined at steps one through three, which include jurors' assessment of mitigation and their subjective weighing of

aggravation and mitigation. *See Dunlap I*, 975 P.2d at 739 ("[T]he eligibility phase continues through step three, when the jury weighs mitigating evidence against statutory aggravators."). As discussed in greater detail in Motion D-144, the Colorado Supreme Court's injection of jurors' decisions concerning mitigation and its relative weight into the decision whether the accused is "eligible" for the death penalty creates an arbitrary system where defendants who commit identical offenses and who have identical statutory aggravating factors proven against them may or may not be found to be death-eligible depending on the jury's subjective assessment and weighing of their individual mitigation. Such a system embodies the height of arbitrariness and violates the fundamental principles of *Furman v. Georgia*, 408 U.S. 238 (1972), as well as *Gregg v. Georgia*, 428 U.S. 153 (1976), *Proffitt v. Florida*, 428 U.S. 242 (1976), *Jurek v. Texas*, 428 U.S. 262 (1976) and the constitutionally-mandated narrowing of murder cases under the due process and cruel and unusual punishment clauses. Just as pre-*Furman*, it is now up to each sentencer to determine who might even be "eligible" for a death sentence under Colorado law.

6. Fourth, as discussed extensively in Motion D-149, empirical research from the National Science Foundation-funded Capital Jury Project has established that individuals who are selected to serve on capital juries uniformly fail in practice to perform their obligations in a capital case in compliance with constitutional mandates articulated by the United States Supreme Court's capital jurisprudence. The findings from this Project conclusively demonstrate that despite being subjected to a "qualifying" voir dire process and being instructed otherwise, capital jurors routinely, *inter alia*, engage in premature decision-making, fail to comprehend instructions, adhere to erroneous beliefs about the necessity of the death penalty, and misunderstand numerous critical legal concepts that are central to a constitutional capital scheme. The fact that real capital jurors across the country are not making sentencing decisions consistent with state and federal constitutional mandates, lends further support to the conclusion that the capital sentencing scheme in Colorado is as unguided, arbitrary, and capricious as the system of capital punishment struck down by *Furman*.

7. Indeed, as noted in D-157, during the legislative history for Senate Bill 95-054, which ultimately led to the enactment of a three-judge panel system of capital sentencing from 1995 until 2002 when it was struck down as unconstitutional in *Ring v. Arizona*, 536 U.S. 584 (2002), prosecutors across the state acknowledged that Colorado's death penalty statutes, which provided for jury sentencing, were unworkable and resulted in the arbitrary imposition of the death penalty.

8. Former Chief Appellate Deputy District Attorney and current Colorado Supreme Court Justice Nathan Ben Coats described the then-current system of jury sentencing in Colorado in terms that reinforces the findings of the Capital Jury Project. He indicated, among other things, that the death penalty as it currently existed was "a lightning shocker, a strike out of the blue," and that jurors in capital cases do not return reliable and non-arbitrary verdicts in capital cases because they are so unfamiliar with the legal concepts involved in a capital scheme that they are "asked to do something they have never been asked to do in English law."

9. Also tellingly, then-Chief Deputy Attorney General Steve Erkenbrack testified at the House Judiciary Committee that "this [jury sentencing] system is broken," and further noted that the system "has not worked since 1967." Then-Deputy Attorney General and current Court

of Appeals judge John Dailey likewise harkened to the findings of the CJP when he told legislators, "basically reasonable consistency is virtually impossible as long as you have the sentencing decision made by changing bodies of individuals and based on personal opinion rather than legal criteria."

10. The statements of these prosecutors thus confirm that the death penalty in Colorado is not applied fairly or with reasonably consistency, in direct violation of *Furman.*

II. The Effect: The Reality of the Death Penalty in Colorado

11. The Colorado death penalty is used in only a tiny handful of murder cases. It is confined to a small geographic area and is not applied consistently or uniformly around the State.

12. One way to accurately assess whether Colorado's death penalty statute has been applied uniformly throughout the state is to look at the cases where the State has filed a notice of intent to seek the death penalty. In the last 10 years, the State filed a notice of intent to seek death in the following cases (charges were filed in the Colorado district courts in the years shown):

2003	-	0	
2004	-	0	
2005	-	3	(Medina, Rio Grande County/12th Judicial District)
	-		(Bueno and Perez, Lincoln County/18th Judicial District)
2006	-	4	(Owens and Ray, Arapahoe County, and Rubi-Nava, Douglas County, both 18th Judicial District)
			(Lee, El Paso County/4th Judicial District)
2007	-	0	
2008	-	0	
2009	-	0	
2010	-	0	
2011	-	1	(Sher, Douglas County/18th Judicial District)
2012	-	2	(Holmes, Arapahoe County/18th Judicial District); (Lewis, Denver County/2nd Judicial District)
2013	-	1	(Montour, Douglas County/18th Judicial District)[2]

13. Eight of these prosecutions (including the instant one) are in the 18th Judicial District, with one in the 12th Judicial District (Medina, 2006), one in the 4th Judicial District (Lee,

[2] Mr. Montour's case originated in 2002, but his death sentence was overturned on appeal. *See People v. Montour*, 157 P.3d 489 (Colo. 2007). Mr. Montour has since been permitted to withdraw his guilty plea, and the prosecution formally announced that it was seeking the death penalty again in 2013.

2007), and one in the 2nd Judicial District (Lewis, 2013). Thus, in the past ten years, these new prosecutions in which death was sought have been limited to 4/22 judicial districts and 6/64 counties.

14. This contraction in the use of Colorado's death penalty laws has been steady for over three decades, ever since the return of the death penalty to Colorado in 1979. *See* D-165. Formal death penalty prosecutions have been declining overall, and have become more and more isolated within specific geographic areas.

15. Moreover, there has been only one execution in Colorado since 1967, and there are only three individuals on death row.

16. Several months ago, when presented with the impending execution of death row inmate Nathan Dunlap, Governor John Hickenlooper granted him a reprieve, relying heavily on the fact that a defendant's likelihood of facing the death penalty in Colorado depends largely on the jurisdiction in which his case arose. Having described the facts of various cases in which aggravated murders had been committed but in which defendants had been given life sentences rather than death, Governor Hickenlooper found that the Colorado death penalty is arbitrary and that it is not fairly or equitably imposed. Executive Order D 2013-006, p. 2 (May 22, 2013). More specifically, the governor found, the imposition of the death penalty is often a function of geography: "As one former Colorado judge said to us, '[the death penalty] is simply the result of happenstance, the district attorney's choice, the jurisdiction in which the case is filed, perhaps the race or economic circumstance of the defendant.'" *Id.* (brackets in original).

III. Conclusion

17. Clearly, a penalty that is used only once in a half-century and only in a small handful of jurisdictions in Colorado (and, overwhelmingly, primarily in this jurisdiction) is "unusual" under any definition of the term. It "is exacted with great infrequency even for the most atrocious crimes" in Colorado. *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring). Therefore, the death penalty is unconstitutional as it applies to Mr. Holmes and all other present or future capital defendants in this State.

18. The current capital sentencing scheme as it applies in Colorado is unconstitutional under the following legal provisions:

19. It violates the Eighth Amendment of the United States Constitution because it fails to administer the death penalty "in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." *Spaziano v. Florida*, 468 U.S. 447, 460 (1984).

20. It further violates article II, section 20 of the Colorado Constitution, which contains "fundamental requirements of certainty and reliability" which exceed those imposed by the federal constitution. *People v. District Court*, 834 P.2d 181, 186 (Colo. 1992) (*quoting People v. Young*, 814 P.2d 834, 846 (Colo. 1991)); *see also People v. Tenneson*, 788 P.2d 786, 792 (Colo. 1990) ("Colorado's death sentencing statute must be construed in light of the strong

concern for reliability of any sentence of death."). A capital sentencing system that allows for the arbitrary imposition of the death penalty is fundamentally unreliable.

21. Additionally, because of the features described in Section I, *supra*, the manner in which Colorado's capital sentencing statute operates functions to deprive its citizens of the fundamental rights to life and liberty in a manner that is arbitrary and capricious. Thus, also violates the substantive component of the Due Process Clauses of the state and federal constitution. *See, e.g., City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 200 (2003) (Scalia, J, concurring) (noting that "arbitrary and capricious" government action involving deprivation of "fundamental liberty interest[s]" can violate the "judicially created substantive component of the Due Process Clause"); *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (discussing that "the traditional and common-sense notion that the Due Process Clause, like its forebear in the Magna Carta . . . was 'intended to secure the individual from the arbitrary exercise of the powers of government'" (quoting *Hurtado v. California,* 110 U.S. 516, 527 (1884))); *Salazar v. Am. Sterilizer Co.*, 5 P.3d 357, 371 (Colo. App. 2000) ("Substantive due process requires that legislation be reasonable and not arbitrary or capricious.").

22. Furthermore, Colorado's capital scheme arbitrarily place certain categories of defendants at risk for their lives, while placing other categories of defendants outside of the category of individuals eligible to be executed. It therefore violates the Equal Protection principles embodied in the Fourteenth Amendment and article II, section 25 of the Colorado Constitution. *See Furman*, 408 U.S. at 249 (Douglas, J, concurring) ("There is increasing recognition of the fact that the basic theme of equal protection is implicit in 'cruel and unusual' punishments. 'A penalty . . . should be considered 'unusually' imposed if it is administered arbitrarily or discriminatorily.'"); *see also Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) ("Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.").

23. Finally, Justice Clarence Thomas recently clarified the history and reach of the privileges and immunities clause of the U.S. Constitution. *McDonald v. City of Chicago, Ill.*, __ U.S. ___, 130 S. Ct. 3020, 3074, 177 L. Ed. 2d 894 (2010) (Thomas, J., concurring). He argues that the privileges and immunities clause is superior to the due process clause in securing equal application of rights throughout the country. He notes that "[a]t the time of Reconstruction, the terms 'privileges' and 'immunities' had an established meaning as synonyms for 'rights,'" and that the privileges and immunities clause of the Fourteenth Amendment requires that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." *Id.* at 3060. Therefore, under his reasoning, state laws that abridge or impinge upon fundamental rights – such as Colorado's death penalty scheme, which arbitrary and capriciously impinges upon the fundamental rights to life and liberty – violates the privileges and immunities clause.

24. Mr. Holmes has a fundamental right to not be put to death under a system in which geography, income, race, gender, venue, the status of the victim, and a host of other arbitrary, extra-judicial factors have the most influence on whether a defendant lives or dies. As Justice Douglas so eloquently stated in his concurring opinion in *Furman v. Georgia:*

> It would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices.

Furman, 408 U.S. at 242. For Justice Douglas, this was a requirement of U.S. Constitutional law and it did not matter whether it came as a result of the due process clause or of the privileges and immunities clause. *See id.*, at 241. ("Whether the privileges and immunities route is followed, or the due process route, the result is the same.").

25. Mr. Holmes urges this Court to find that he has a fundamental right to not be put to death pursuant to such an unequal, rare, inconsistently applied, and unusual system that violates the constitutional principles of fair administration of justice, equal protection, equal application of the laws, and due process and thus, constitutes cruel and unusual punishment and violates the constitutional provisions cited herein.

Request for a Hearing

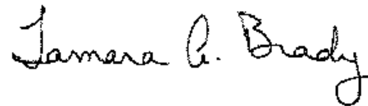
26. It is beyond dispute that the "heightened standard of reliability" applies to the capital sentencing proceedings in this case. *See, e.g.*, *Spaziano v. Florida*, 468 U.S. 447, 456 (1984); *Beck v. Alabama*, 447 U.S. 625, 637 (1980) (risk of unreliable conviction "cannot be tolerated" in case where defendant's life is at stake); *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). *People v. Young*, 814 P.2d 834, 846 (Colo. 1991); *People v. Rodriguez*, 786 P.2d 1079 (Colo. 1989).

27. Therefore, Mr. Holmes specifically requests that this Court refrain from ruling on this motion until the parties have completed briefing on this issue.

28. Additionally, Mr. Holmes moves for a hearing on this motion.

Mr. Holmes files this motion, and makes all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, on the following grounds and authorities: the Due Process Clause, the Right to a Fair Trial by an Impartial Jury, the Rights to Counsel, Equal Protection, Confrontation, and Compulsory Process, the Rights to Remain Silent and to Appeal, and the Right to be Free from Cruel and Unusual Punishment, pursuant to the Federal and Colorado Constitutions generally, and specifically, the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitutions, and Article II, sections 3, 6, 7, 10, 11, 16, 18, 20, 23, 25 and 28 of the Colorado Constitution.

Daniel King (No. 26129)
Chief Trial Deputy State Public Defender



Tamara A. Brady (No. 20728)
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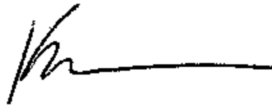

Kristen M. Nelson (No. 44247)
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Dated: August 30, 2013

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. **JAMES HOLMES,** Defendant	σ COURT USE ONLY σ
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ORDER RE: MOTION TO DECLARE COLORADO'S DEATH PENALTY UNCONSTITUTIONAL BECAUSE, IN PRACTICE, IT IS ARBITRARY IN BOTH APPLICATION AND OPERATION [D-164]

Defendant's motion is hereby GRANTED _____ DENIED _____.

BY THE COURT:

_______________________________ _______________________________
JUDGE Dated

I hereby certify that on August 30, 2013, I

____ mailed, via the United States Mail,
_✓_ faxed, or
_✓_ hand-delivered

a true and correct copy of the above and foregoing document to:

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