District Court, Arapahe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	Filed APR 10 2014 CLERK OF THE COMBINED COURT ARAPAHOE COUNTY, COLORADO
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 201

MOTION TO RECONSIDER COURT'S RULINGS THAT CERTAIN MOTIONS FILED BY THE DEFENSE ARE 'FRIVOLOUS' [D-208]

CERTIFICATE OF CONFERRAL

The prosecution states that it "objects" to this motion.

Mr. Holmes, through counsel, respectfully requests that this Court reconsider its rulings that certain capital motions filed by the defense are 'frivolous.' In support of this motion, he states the following:

I. Introduction

1. In its recent rulings on a number of the capital motions filed by the defense, the Court characterized the motions as 'frivolous' before denying relief.

2. Specifically, the Court found that Mr. Holmes's Motion to Require that the Jury Must Determine Beyond a Reasonable Doubt that Proven Statutory Aggravating Factors Outweigh Mitigation at Step Three of Any Sentencing Proceeding, or Alternatively, to Declare Colorado's Death Penalty Scheme Unconstitutional [D-143], was "frivolous." The Court defined "frivolous" as a motion where the filing party "can present no rational argument based on the . . . law in support" of it. Order re: Motion D-143, p. 4 (citing *W. United Realty, Inc. v. Isaacs*, 679 P.2d 1063, 1069 (Colo. 1984)).

3. It further chastised defense counsel that the motion was "completely devoid of merit and should not have been filed." The Court further admonished:

> While the Court understands the defendant's disagreement with *Dunlap III* and other Colorado Supreme Court precedent, this Court is bound by that authority. To the extent the defendant wishes to change the current state of the law in Colorado, his arguments should be directed to the legislature or the Colorado Supreme Court.

Order re: Motion D-143, p. 5.

4. The Court also found Mr. Holmes's Motion to Preclude the Death Penalty as a Possible Punishment in this Case Because Colorado's Current Death Penalty Sentencing Scheme, as Interpreted in *People v. Dunlap*, 975 P.2d 723 (Colo. 1999) (*Dunlap I*), is Unconstitutional [D-144] to be "frivolous."

5. Similarly, the Court found that Mr. Holmes's Motion to Declare Colorado's Death Penalty Scheme Unconstitutional in Light of *People v. Dunlap*, 36 P.3d 778 (Colo. 2001) (*Dunlap II*) [D-145] is "frivolous."

6. The Court also found Mr. Holmes's Motion to Put the Burden of Proof Beyond a Reasonable Doubt on the State at the Second and Third Steps and that the State Bear the Burden of Persuasion Beyond a Reasonable Doubt at the Fourth Step of the Statutory Sentencing Process, Should Those Steps be Reached, and Objection to Any Other Standard [D-146] to be "frivolous," "completely devoid of merit," and stated that it "should not have been filed." It again contained the admonishment that if Mr. Holmes has a "disagreement" with the current state of the law, he should direct his arguments to the "legislature or the Colorado Supreme Court" instead of this Court. Order re: Motion D-146, p. 6.

7. The Court further found that Mr. Holmes's Motion that the State be Required: (1) to Prove Beyond a Reasonable Doubt Every Alleged Non-Statutory Aggravating Fact/Circumstance; and (2) to Provide Notice of Every Alleged Non-Statutory Aggravating Fact/Circumstance it May Rely on at the Fourth Step of Any Sentencing Phase [D-147], to be "frivolous" with respect to Mr. Holmes's request to require the prosecution to prove beyond a reasonable doubt every alleged non-statutory aggravating fact or circumstance presented in step four.

8. In ruling that these motions were "frivolous" and chastising counsel for filing them, the Court misapprehends the role of defense counsel, and the special obligations and duties that counsel have in capital cases. It also incorrectly defines the term "frivolous."

II. Defense Counsel has a Heightened Duty and Obligation to Assert All Legal Claims in this Capital Case.

9. Counsel have a constitutional and ethical obligation to provide Mr. Holmes with the effective assistance of counsel. *See Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Strickland v. Washington*, 466 U.S. 668 (1984); U.S. Const. Amend. VI; XIV; Colo. Const. art. II, secs. 16, 25.

10. These obligations are especially important and are heightened in the context of a capital case. The Supreme Court has repeatedly emphasized the uniquely high stakes involved in capital cases:

> [D]eath is a different kind of punishment from any other which may be imposed in this country. . . . From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action.

Gardner v. Florida, 430 U.S. 349, 357-358 (1977). *See also People v. Young*, 814 P.2d 834 (Colo. 1991); *People v. Tenneson*, 788 P.2d 786, 791-792 (Colo. 1990).

11. In addition to the constitutional obligations of the Sixth Amendment and article II, section 16 of the Colorado Constitution and the ethical duties outlined in the Colorado Rules of Professional Conduct, which are discussed in more detail in Section III. A. below, the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, attached as Exhibit A, have long been regarded as the most authoritative summary of the prevailing professional norms in the realm of capital defense practice. *Wiggins*, 539 U.S. at 524 (noting that United States Supreme Court has long referred to the "standards for capital defense work articulated by the American Bar Association (ABA)" as "guides to determining what is reasonable.").

12. The Guidelines set forth a "national standard of practice for the defense of capital case in order to ensure high quality legal representation for all persons facing the possible imposition or execution of a death sentence by any jurisdiction." American Bar Association, *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 919 (2003), Guideline 1.1.

13. In the "History of the Guideline" in section 1.1, the drafters "emphasize" that "these Guidelines are not aspirational. *Instead, they embody the current consensus about what is required to provide effective defense representation in capital cases.*" *Id.* at 920 (emphasis added).

14. Guideline 10.8 states the following:

> A. Counsel at every stage of the case, exercising professional judgment in accordance with these Guidelines, should:
>
> 1. consider all legal claims potentially available; and
>
> 2. thoroughly investigate the basis for each potential claim before reaching a conclusion as to whether it should be asserted; and
>
> 3. evaluate each potential claim in light of:

a. the unique characteristics of death penalty law and practice; and

b. the near certainty that all available avenues of post-conviction relief will be pursued in the event of conviction and imposition of a death sentence; and

c. *the importance of protecting the client's rights against later contentions by the government that the claim has been waived, defaulted, not exhausted, or otherwise forfeited*; and

d. any other professionally appropriate costs and benefits to the assertion of the claim.

B. Counsel who decide to assert a particular legal claim should:

1. present the claim as forcefully as possible, tailoring the presentation to the particular facts and circumstances in the client's case and the applicable law in the particular jurisdiction; and

2. *ensure that a full record is made of all legal proceedings in connection with the claim.*

C. Counsel at all stages of the case should keep under consideration the possible advantages to the client of:

1. asserting legal claims whose basis has only recently become known or available to counsel; and

2. supplementing claims previously made with additional factual or legal information.

American Bar Association, *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 1028-29 (2003), Guideline 10.8 (emphasis added).

15. The commentary to Guideline 10.8 includes an extensive discussion of the fundamental obligation of defense counsel to preserve all issues for each stage of the extensive appellate and post-conviction review process that capital cases undergo in the event of a death sentence.

16. The commentary notes:

> "One of the most fundamental duties of an attorney defending a capital case at trial is the preservation of any and all conceivable errors for each stage of appellate and post-conviction review. *Failure to preserve an issue may result in the client being executed even though reversible error occurred at trial.*" For this reason, trial counsel in a death penalty case must be especially aware not only of strategies for winning at trial, but also of the heightened need to fully preserve all potential issues for later review.

Id. at 1030 (emphasis added) (quoting Stephen B. Bright, Preserving Error at Capital Trials, *The Champion*, Apr. 1997, at 42-43). It goes on to explain in a footnote:

> For example, John Eldon Smith was executed by the State of Georgia even though he was sentenced to death by a jury selected from a jury pool from which women were unconstitutionally excluded. *The federal courts refused to consider the issue because Mr. Smith's lawyers failed to preserve it.* Mr. Smith's co-defendant was also sentenced to death from a jury selected from the same pool. The issue was preserved in the co-defendant's case, and the co-defendant's conviction and death sentence were vacated. At retrial, the co-defendant was sentenced to life imprisonment. *See Smith v. Kemp*, 715 F.2d 1459, 1476 (11th Cir. 1983) (Hatchett, J., concurring in part and dissenting in part).

Id., footnote 227 (emphasis added).

17. The commentary also make clear that a legal claim must always be raised in a capital case at the first opportunity:

> As discussed supra in the text accompanying note 28, most jurisdictions have strict waiver rules that will forestall post-judgment relief if an issue was not litigated at the first opportunity. An issue may be waived not only by the failure to timely file a pretrial motion, but also because of the lack of a contemporaneous objection at trial, or the failure to request a jury instruction, or counsel's failure to comply with some other procedural requirement established by statute, court rule, or case law. Counsel must therefore know and follow the procedural requirements for issue preservation and act with the understanding that the failure to raise an issue by motion, objection, or other appropriate procedure *may well forfeit the ability of the client to obtain relief on that issue in subsequent proceedings.*
>
> Whether raising an issue specific to a capital case (such as requesting individual, sequestered voir dire on death-qualification of the jury) or a more common motion shaped by the capital aspect of the case (such as requesting a change of venue because of

> publicity), counsel should be sure to litigate all of the possible legal and factual bases for the request. This will increase the likelihood that the request will be granted and will also fully preserve the issue for post-conviction review in the event the claim is denied.

Id. at 1031-32 (emphasis added).

18. The commentary also *specifically notes* that counsel has a duty to "preserve issues calling for a change in existing precedent":

> Because of the possibility that the client will be sentenced to death, counsel must be significantly more vigilant about litigating all potential issues at all levels in a capital case than in any other case. As described in the commentary to Guideline 1.1, *counsel also has a duty, pursuant to Subsection (A)(3)(a)-(c) of this Guideline, to preserve issues calling for a change in existing precedent; the client's life may well depend on how zealously counsel discharges this duty. Counsel should object to anything that appears unfair or unjust even if it involves challenging well-accepted practices.*

Id. at 1032 (emphasis added). The commentary continues:

> As the nonexclusive list of considerations in Subsection A(3) suggests, *there are many instances in which counsel should assert legal claims even though their prospects of immediate success on the merits are at best modest.*

Id. at 1033-34 (emphasis added).

19. The introductory comments to the Guidelines echo these directives. The Introduction notes,

> Finally, trial counsel, like counsel throughout the process, must raise every legal claim that may ultimately prove meritorious, lest default doctrines later bar its assertion.
>
> *[T]he courts have shown a remarkable lack of solicitude for prisoners-- including ones executed as a result--whose attorneys through no fault of the prisoners were not sufficiently versed in the law to . . . consider the possibility that a claim long rejected by local, state, and federal courts nonetheless might succeed in the future or in a higher court.*

Id. at 927-28 (emphasis added).

20. A footnote to this paragraph includes a discussion of the numerous times the United States Supreme Court has overruled governing precedent. *See id.,* fn. 28 (listing cases where Supreme Court has reversed itself and noting, "It would have been appropriate (and indeed, some Justices might believe, required on pain of forfeiture) for capital counsel to assert these claims at every stage in the proceedings, *even though they were then plainly at odds with the governing law*. See infra Guideline 10.8 and accompanying commentary.") (emphasis added). Mr. Holmes further discusses these cases in Section III. B., below.

21. Presciently, this commentary to the Guidelines, which were published in 2003, notes that "One current example is the potential categorical unconstitutionality of the execution of juveniles. In light of a growing body of scientific evidence regarding the diminished culpability of juveniles, Eighth Amendment considerations, and international laws and treaties forbidding the execution for crimes committed while under the age of eighteen, four current Justices have suggested that the Court should absolutely bar the execution of such offenders." Indeed, two years after the Guidelines were published, the Supreme Court found that the execution of individuals for crimes committed as juveniles violated the Eighth Amendment in *Roper v. Simmons*, 543 U.S. 551 (2005). *See also* Section III. B., below.

22. The reason that the Guidelines direct counsel in capital cases to raise and preserve all issues so zealously is because of the "procedural morass" that capital defendants will later encounter in the event of a death sentence if the case reaches federal habeas. *See* Jordan Steiker, *Restructuring Post-Conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism*, 1998 U. Chi. Legal F. 315, 316-17 (1998) ("Virtually any recent federal decision reviewing a state conviction reveals the procedural morass in federal habeas. A typical decision will briefly recite the facts of the crime and the inmate's constitutional allegations. The bulk of the opinion, though, will address whether the inmate timely filed the petition, exhausted state remedies, avoided all state procedural defaults (or offered some persuasive reason for overlooking the defaults), and adequately developed a factual record in state court.").

23. As another commentator described it, "The post-conviction habeas corpus remedy has long resided in a legal no-man's-land . . . . [D]espite the writ's deep equitable roots, the Supreme Court and Congress in recent decades have curtailed its availability in ways that strike many as inequitable. Perhaps as a result, the modern doctrine has been described as 'an intellectual disaster area' and as having 'a Rube Goldberg quality that frustrates all efforts to give it logical coherence.'" Erica Hashimoto, *Reclaiming the Equitable Heritage of Habeas*, 108 Nw. U. L. Rev. 139, 140-41 (2013).

24. Thus, as the foregoing makes clear, defense counsel in this case are not only bound by the traditional ethical and constitutional obligations and duties of a criminal defense lawyer in a typical case, but are also required to adhere to special guidelines articulated by the ABA as the standard of practice in capital cases. If undersigned counsel do not raise all available legal claims in this capital case – including claims that may not prove to be meritorious at the trial level but advocate a modification or reversal of current law – they will not have provided their client with effective legal representation and will not have properly discharged their constitutional and ethical duties as capital defense attorneys.

III. The Claims Made By Defense Counsel in Motions D-143 Through D-147 Are Not Frivolous.

A. The Definition of 'Frivolous' Used by the Court is Incomplete, Inconsistent with the Colorado Rules of Professional Conduct, and Has No Application in the Context of a Criminal Defense Attorney's Obligations and Duties.

25. In its orders, the Court defines a frivolous motion as one in which the filing party "can present no rational argument based on the . . . law in support" of it. *See, e.g.,* Order re: Motion D-143, p. 4. The Court cites *W. United Realty, Inc. v. Isaacs*, 679 P.2d 1063, 1069 (Colo. 1984) as its source for this definition.

26. As an initial matter, that case addressed the definition of 'frivolous' in a very specific statute, C.R.S. § 13-17-101, which pertains to the awarding of attorney fees due to the bringing or maintaining of a "frivolous or groundless" action. The case has absolutely no application to motions filed by criminal defense attorneys in a death penalty case.[1]

27. However, more importantly, the quotation the Court extracted from that case to define 'frivolous' in its orders is incomplete. The complete definition adopted by the Supreme Court in that case is as follows:

> A claim or defense is frivolous if the proponent can present no rational argument based on the evidence or law in support of that claim or defense. This test encompasses the variations used in *Morton, Pierson,* and *Anderson* **but does not apply to** meritorious actions that prove unsuccessful, **legitimate attempts to establish a new theory of law, or good-faith efforts to extend, modify, or reverse existing law**. Similarly, a claim or defense is groundless if the allegations in the complaint, while sufficient to survive a motion to dismiss for failure to state a claim, are not supported by any credible evidence at trial. This test assumes that the proponent has a valid legal theory but can offer little or nothing in the way of

[1] *Western United Realty* involved a lawsuit brought by the buyers of a property against the sellers and their real estate agents for allegedly fraudulently and negligently misrepresenting the condition of a well on the property. At the conclusion of the trial, the court granted a motion for directed verdict against the real estate agents, and awarded $2,711.88 in attorney fees against the plaintiffs, concluding that their pursuit of the lawsuit against these parties beyond the pretrial conference was "frivolous and groundless persistence." 679 P.2d at 1065. The Court of Appeals reversed, concluding that the plaintiffs' claim presented a justiciable issue. The Colorado Supreme Court upheld the appellate court's ruling, ultimately concluding that the lawsuit brought against the real estate agents was not "frivolous," accepting the plaintiffs' argument that they "were attempting to explore at trial the "gray areas" of a relatively new theory of liability, negligent misrepresentation." *Id.* It upheld the Court of Appeals' decision reversing the award of attorney fees, concluding "that the conduct at issue here does not call for the award of attorney fees pursuant to section 13–17–101." *Id.* at 1070.

> evidence to support the claim or defense. Both of these tests presuppose a certain professionalism on the part of trial counsel. Certainly, if the record reveals that counsel or any party has brought, maintained, or defended an action in bad faith, the rationale for awarding attorney fees is even stronger. Bad faith may include conduct which is arbitrary, vexatious, abusive, or stubbornly litigious. It also may include conduct aimed at unwarranted delay or disrespectful of truth and accuracy.

679 P.2d at 1069 (emphasis added). The Colorado Supreme Court also explicitly noted, "We do not seek to discourage counsel from the zealous representation of clients." *Id.*

28. Notably, this Court omitted the sentence bolded in the block quote above from its definition of 'frivolous' contained in its orders. This bolded language is important, and is consistent with the definition and discussion of 'frivolous' contained in the Colorado Rules of Professional Conduct.

29. Colorado Rule of Professional Conduct 3.1 states:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, *which includes a good faith argument for an extension, modification or reversal of existing law*. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

(Emphasis added). The comment to that rule makes abundantly clear that a motion is not frivolous simply because it seeks modification or reversal of existing law. While an advocate has a duty not to abuse legal procedure, "the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, *account must be taken of the law's ambiguities and potential for change*." Comment [1] to Rule 3.1 (emphasis added).

30. In addition, Comment [2] to Rule 3.1 indicates that an action "is not frivolous even though the lawyer believes that the client's position ultimately will not prevail," and further makes clear that an action is only frivolous if the lawyer is unable to, *inter alia*, "support the action taken by a good faith argument *for an extension, modification or reversal of existing law*." (Emphasis added).

31. Finally, and perhaps even more importantly, Comment [3] to Rule 3.1 states that "[t]he lawyer's obligations under this Rule are *subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule*."

32. This Comment makes clear that criminal defense is different from other types of advocacy. As the Restatement of the Law Governing Lawyers similarly notes, while the section

on frivolous arguments applies "generally" to criminal defense lawyers, defense attorneys may nevertheless take "any step" that is either "required or permitted" by the constitutional guarantee of the effective assistance of counsel. Restatement (Third) The Law of Governing Lawyers § 110 (2000).

B. Counsel Had a Good Faith Basis to Argue for an Extension, Modification, and/or Reversal of Existing Law in Motions D-143 Through D-147.

33. Undersigned counsel had a good faith basis for asserting each of the claims made in Motions D-143 through D-147, as well as an ethical and constitutional obligation to raise those claims. In those pleadings, counsel acknowledged the Colorado Supreme Court's decisions in the *Dunlap* series of cases, as well as others, but made good faith arguments that the Colorado Supreme Court's decisions in those cases violate the Eighth Amendment, are inconsistent with United States Supreme Court precedent, and/or that the law should therefore be modified or reversed.

34. The law with respect to the issues raised in those pleadings is far from settled. As an initial matter, the body of capital case law in Colorado is relatively small, and as a result, many of the principles espoused in these cases are not well-established or developed. Moreover, the Colorado Supreme Court has shown that its own decisions in capital cases are not immune from reconsideration. Indeed, in *People v. Dunlap*, 975 P.2d 723 (Colo. 1999), the Court overruled its prior decision in *People v. Saathoff*, 790 P.2d 804 (Colo. 1990).

35. Additionally and notably, to date, the United States Supreme Court has not specifically ruled on the constitutionality of any of the unique features of Colorado's capital sentencing scheme described in those pleadings. If Mr. Holmes is to seek appellate review of these features by the high court, he must first raise those issues to this Court in order to properly preserve them for appeal.

36. Moreover, as the ABA Guidelines discussed above recognize, the Supreme Court's capital jurisprudence is an area that is particularly volatile and susceptible to change, which makes it especially important for counsel to raise and preserve issues even if the current state of the law is at odds with a particular claim. *See, e.g., Commonwealth v. Arrington*, No. 516 CAP, 2014 WL 783559, (Pa. Feb. 28, 2014) (Castille, C.J., concurring) (noting that "the U.S. Supreme Court's Eighth Amendment jurisprudence . . . is in a dynamic and changing phase favoring criminal defendants"); *United States v. Cheever*, 423 F. Supp. 2d 1181, 1193, fn. 9 (D. Kan. 2006) (in ruling on federal habeas petition, district court observed, "The court is sensitive to defendant's counsels' responsibility to raise every conceivable argument on defendant's behalf and does not fault them for doing so. Given the ever-changing nature of death penalty jurisprudence, the court understands counsels' need to 'make a record' for purposes of appeal."); *see also* American Bar Association, *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 923 (2003), Commentary to Guideline 1.1 (referring to capital jurisprudence as a "volatile and highly nuanced area of the law").

37. There have been a number of times in recent history that the United States Supreme Court has directly overruled itself on issues pertaining to capital punishment and the Eighth Amendment.

38. In *Penry v. Lynaugh*, 492 U.S. 302 (1989), the Supreme Court held that the Eighth Amendment does not categorically prohibit the execution of the mentally retarded. Thirteen years later, in *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court reversed itself and imposed such a categorical ban.

39. In *Walton v. Arizona*, 497 U.S. 639 (1990), the Court held that the Sixth Amendment does not require that every finding of a fact underlying a sentencing decision be made by a jury rather than a judge. In *Ring v. Arizona*, 536 U.S. 584 (2002), the Supreme Court overruled *Walton* and held that a jury must make the findings of fact that render a defendant eligible for the death penalty.

40. Notably, *Ring* had the effect of invalidating Colorado's capital sentencing scheme at the time, which provided for three-judge sentencing panels in capital cases. *See Woldt v. People*, 64 P.3d 256 (Colo. 2003).

41. In *Stanford v. Kentucky*, 492 U.S. 361 (1989), the Supreme Court held that the imposition of the death penalty on an individual for a crime committed at 16 or 17 years of age did not violate the Eighth Amendment. In *Roper v. Simmons*, 543 U.S. 551 (2005), the Court reversed itself and found that such a practice was inconsistent with the evolving standards of decency under the Eighth Amendment. Moreover, in *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 132 S.Ct. 2455 (2012), the Supreme Court extended that doctrine, holding that life without parole sentences for juveniles who commit non-homicide, and mandatory life without parole sentences for all juveniles, violate the Eighth Amendment.

42. The Court also overruled its earlier decisions categorically barring victim-impact evidence from capital trials in *Payne v. Tennessee*, 501 U.S. 808 (1991) (overruling *Booth v. Maryland*, 482 U.S. 496 (1987) and *South Carolina v. Gathers*, 490 U.S. 805 (1989)).

43. Finally, the Court has also overruled itself a number of times in non-capital criminal cases. *See, e.g., Montejo v. Louisiana*, 556 U.S. 778 (2009) (overruling *Michigan v. Jackson*, 475 U.S. 625 (1985)); *Crawford v. Washington*, 541 U.S. 36 (2004) (overruling *Ohio v. Roberts*, 448 U.S. 56 (1980)); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (overruling *Betts v. Brady*, 316 U.S. 455 (1942)); *Mapp v. Ohio*, 367 U.S. 643 (1961) (overruling *Wolf v. Colorado*, 338 U.S. 25 (1949)).

44. Had attorneys not made claims in those cases attempting to foster growth and change in the law, the Supreme Court would never have had the opportunity to reconsider its prior decisions. Moreover, in most circumstances, criminal defendants seeking to benefit from changes in the law are faulted for not raising those claims in their own cases earlier, even though they were contrary to the law at the time. *See, e.g., Smith v. Murray*, 477 U.S. 527 (1986) (capital petitioner procedurally defaulted from litigating meritorious constitutional claim on federal habeas that his lawyer elected not to raise on direct appeal to Virginia Supreme Court

because attorney determined that Virginia case law would not support his position at the time, and the law subsequently changed to the benefit of petitioner).

45. Given defense counsel's duties and obligations in a capital case to preserve all possible claims for appellate review, and given the ever-changing state of the law with respect to the Eighth Amendment and its Colorado counterpart, undersigned counsel certainly had not only a good faith basis for raising the claims in Motions D-143 through D-147, but an ethical and constitutional obligation to do so.

46. To be clear, counsel cannot simply "direct" the claims it raises in Motions D-143 through D-147 to "the Colorado Supreme Court," as this Court suggests in its orders, without first raising and preserving the issue with this Court and obtaining a ruling. In order to properly preserve a claim for appellate review, counsel must first raise the issue with this Court. *See People v. Miller*, 113 P.3d 743, 749 (Colo. 2005) (clarifying that "constitutional harmless error analysis is reserved for those cases in which the defendant preserved his claim for review by raising a contemporaneous objection," and holding that constitutional errors that are not preserved are subject to a plain error standard of review).

IV. Conclusion

47. Counsel understand that even if the Court retracts its characterization of their pleadings as "frivolous," this may not change the Court's ultimate ruling on the motion.[2] However, counsel feel it is important to ensure that the Court is aware of their ethical and constitutional obligations in this capital case, as the Court will undoubtedly consider other issues going forward where the defense may be requesting relief that would require a "modification" or "reversal" of existing law.

48. When the Court wrongly denigrates defense counsel in its orders for filing "frivolous" motions, it improperly undermines the important role of defense counsel in our adversarial system and incorrectly portrays defense counsel as wasting the Court's time. It is particularly problematic when the Court does so publicly, placing its orders on the court's official website for all to see and refusing to redact the portions of the orders making these misleading characterizations of counsel's legal arguments. In fact, as the foregoing makes clear, counsel are simply discharging their obligation to protect and preserve their client's constitutional claims. *See Miranda v. Arizona*, 384 U.S. 436, 480-81 (1966) (pursuant to his oath, a defense attorney is sworn "to protect to the extent of his ability the rights of his client. In fulfilling this responsibility the attorney plays a vital role in the administration of criminal justice under our Constitution."); *Escobedo v. Illinois*, 378 U.S. 478 (1964) ("The survival of our system of criminal justice and the values which it advances depends upon a constant, searching, and creative questioning of official decisions and assertions of authority at all stages of the

[2] Counsel are unsure of the purpose of the Court's repeated characterization of their motions as "frivolous." Even if this characterization were legitimate, which it is not, the reference appears to be gratuitous. If it was meant to convey a message that counsel should refrain from filing similar pleadings in the future, such a message was misplaced, given the constitutional and ethical obligations of defense counsel to preserve all legal claims in capital cases.

process."). As the Guidelines make abundantly clear, counsel would be ineffective if they did *not* file such motions.

49. For these reasons, counsel request that the Court reconsider its characterization of Motions D-143 through D-147 as "frivolous" and issue revised orders removing that language from the orders.

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.

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Dated: April 10, 2014

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 201

ORDER RE: MOTION TO RECONSIDER COURT'S RULINGS THAT CERTAIN MOTIONS FILED BY THE DEFENSE ARE 'FRIVOLOUS' [D-208]

Defendant's motion is hereby GRANTED _____ DENIED _____.

BY THE COURT:

_____ _____

JUDGE Dated

I hereby certify that on April 10, 2014, I

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

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

George Brauchler
Jacob Edson
Rich Orman
Karen Pearson
Office of the District Attorney
6450 S. Revere Parkway
Centennial, Colorado 80111
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Nova Wharton