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District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	Filed JUL 15 2014 CLERK OF THE COMBINED COURT ARAPAHOE COUNTY, COLORADO σ COURT USE ONLY σ
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. JAMES HOLMES, Defendant	
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 202
SURREPLY TO PEOPLE'S SUPPLEMENTAL DISCLOSURES PURSUANT TO CRIM. P. 32.1(D)(2); COLO. REV. STAT. §18-1.3-1201(1)(B); AND THE COURT'S ORDERS REGARDING D-167 AND D-168 [P-83]	

Mr. Holmes, through counsel, submits the following in surreply to the prosecution's reply in support of its supplemental disclosures regarding sentencing witnesses made in response to the Court's Orders regarding Motions D-167 and D-168:

1. As an initial matter, the prosecution argues that its disclosures go "far beyond what is required by Crim. P. 32.1, C.R.S. § 18-1.3-1201, or any Constitutional provision," and objects to providing "what amounts to a pre-determined script relating to victim-impact testimony." Reply, para. 3. The prosecution alleges that the defense "has cited no authority for the proposition that Colorado would require such a procedure, or that the United States Constitution would mandate it." *Id.*

2. In surreply, the defense notes that just because there is no provision in the Colorado criminal code that addresses *procedures* for admitting victim impact testimony at trial or for safeguarding a defendant's constitutional rights, does not mean that it is not incumbent upon the Court to put additional procedural protections into place, particularly in this case. First of all, the Colorado code does not prohibit the Court from doing so in any way. Moreover, there has never been a case in Colorado history with this magnitude of victim impact evidence. This case presents a prime example of the risk that victim impact evidence will overwhelm the jury and violate the defendant's due process rights, as acknowledged by the *Payne* Court itself. *Payne v. Tennessee*, 501 U.S. 808, 825 (1991). Therefore, the defense maintains that it is constitutionally imperative for the Court to put into place procedural safeguards designed to ensure that Mr. Holmes's constitutional rights are not violated. Notably, the *Turner* case

referenced by the prosecution in its reply involved procedures that were designed by the *trial court* – not procedures that were required by the Georgia statute addressing victim impact evidence. The Georgia Supreme Court praised the trial court for going to great lengths to devise a fair process by which this evidence could be introduced, stating, “[t]he procedure used by the state and trial court in this case has much to commend it.” *Turner v. State*, 486 S.E.2d 839, 842 (Ga. 1997). The defense requests that this Court similarly use its discretion to fashion additional procedures regarding the admissibility of victim impact evidence to protect Mr. Holmes’s constitutional rights.

3. Next, the prosecution contends that “[w]hile the individuals listed in P-083 certainly can testify as to the type of evidence that the defendant describes in paragraph 15, they also can provide information about other types of evidence that are specified in C.R.S. § 18-1.3-1201(1)(b), including evidence that is ‘relevant to the nature of the crime. . .’ and evidence about aggravating factors.” Reply, para. 6. [REDACTED]

4. The prosecution’s argument overlooks the fact that this Court has ruled that the jury will be asked to deliberate at the end of “part one” (which the Court has defined as “step one,” or the determination of whether the prosecution has proven the existence of at least one statutorily specified aggravator beyond a reasonable doubt), as well as “part two” (which the Court has defined as “steps two and three,” or the consideration of whether any mitigating factors exist, as well as whether mitigating factors outweigh proven statutory aggravating factors). *See* Order re: D-142, pp. 2, 4. The Court has further held that victim impact evidence is only admissible at “phase four” of a capital sentencing proceeding (in which the jury must decide whether the defendant should be sentenced to death or life imprisonment without the possibility of parole in the event that it finds that mitigating factors do not outweigh the statutorily specified aggravators). *See* Order re: D-168, p. 6. Thus, the prosecution does not explain how [REDACTED]

[REDACTED] would be admissible or relevant at step four, given that the jury will have already rendered a verdict with respect to the existence of statutory aggravators at that point in the capital sentencing trial.

5. Likewise, the prosecution seems to suggest that because, in its view, the Court should consider victim impact evidence as “simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question,” that victim impact evidence may be admissible at other points during the proceedings, such as the merits phase or during steps one through three of the capital sentencing hearing. Reply, para. 6. Again, this Court has already ruled that victim impact evidence is only admissible at step four, not at any other stage in these proceedings. While the defense maintains that the admission of any victim-impact evidence during any phase of the trial or sentencing proceedings in this case would violate Mr. Holmes’s constitutional rights, these constitutional violations would be greatly magnified if the Court were to allow victim-impact evidence to be introduced at any other point in the proceedings.

[REDACTED]

[REDACTED]

[REDACTED]

9. [REDACTED] the defense

also reiterates that in order to make a full assessment of the admissibility of this evidence, the Court should hold a pretrial hearing requiring the prosecution to specifically detail all of the victim impact evidence it intends to introduce, so that the Court can better consider this evidence in context.

10. At a minimum, the defense reiterates the request it made in Motion D-168a that

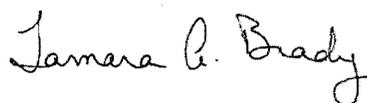
¹ [REDACTED]

the Court conduct a “dry run” of victim impact testimony at trial outside the presence of the jury, so that it can make a more fully informed assessment of the probative value of the specific victim impact evidence proffered by the government versus the prejudicial impact it would have on the jury, before the jury is exposed to this evidence.

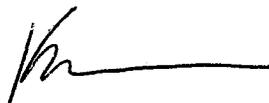
Mr. Holmes files this surreply, and makes all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, on the following grounds and authorities: the Due Process Clause, the Right to a Fair Trial by an Impartial Jury, the Rights to Counsel, 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: July 15, 2014

I hereby certify that on 7/15, 2014, I

mailed, via the United States Mail,
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