REDACTED

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	Filed AUG 15 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 202

RESPONSE TO ORDER REGARDING DEFENDANT'S REQUEST TO SUPPRESS MOTION D-225 AND PROPOSED REDACTIONS TO D-SDT-5 AND D-SDT-6 [C-126]

Mr. Holmes, through counsel, submits the following in response to the Court's Order C-126:

1. The defense urges the Court to reconsider its position and accept the redactions made by the defense to D-SDT-5 and D-SDT-6, and to accept Motion D-225 as a suppressed filing.

I. Defense Counsel Have Ethical and Constitutional Obligations to Seek the Information that is the Subject of D-SDT-5 and D-SDT-6.

2. Defense counsel are seeking an in camera review of the material that is the subject of D-SDT-5 and D-SDT-6 because they have both ethical and constitutional obligations to zealously represent their client.

3. The Sixth Amendment and article II, section 16 of the Colorado Constitution require counsel to provide Mr. Holmes with the effective assistance of counsel, which includes an obligation to make "reasonable investigations" into the facts and issues in his case. *Strickland v. Washington*, 366 U.S. 668, 691 (1984). *See also Kimmelman v. Morrison*, 477 U.S. 365, 384-85 (1986) (noting that the adversarial testing process "generally will not function properly unless defense counsel has done some investigation into the prosecution's case," and finding that defense counsel's "failure to conduct any discovery" and his "decision not to investigate the State's case through discovery" was unreasonable and violated defendant's Sixth Amendment rights); *People v. Cole*, 775 P.2d 551, 552-53 (Colo. 1989) (trial counsel ineffective where he failed to investigate client's case, including failing to contact witness "regarding documents which could possibly have been exculpatory").

4. Because this is a capital trial, defense counsel have the added obligation of conducting an adequate mitigation investigation. Indeed, the United States Supreme Court has explicitly held that trial counsel in a capital case is ineffective if they are in possession of records or documents that suggest that further investigation would lead to the discovery of additional mitigating evidence. *Wiggins v. Smith*, 539 U.S. 510 (2003) (trial counsel were ineffective for failing to expand investigation of client's social history beyond DSS records and presentence investigation report; given that these records revealed that client's mother was an alcoholic and client had been placed in foster care, counsel's decision to cease investigating when they did was unreasonable).

5. Additionally, both the Colorado Rules of Professional Conduct as well as the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases require defense counsel to consider all legal claims potentially available and "use legal procedure for the fullest benefit of the client's cause." Colo. R. Prof. Conduct 3.1, Comment [1]. These obligations are heightened given that this is a case in which the prosecution is seeking the death penalty.

6. As the commentary to Guideline 1.1 of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003) explains, "Due to the extraordinary and irrevocable nature of the penalty, at every stage of the proceedings counsel must make "extraordinary efforts on behalf of the accused." *Id.* at 4. The commentary goes on to explain, "The defense lawyer's obligation includes not only finding, interviewing, and scrutinizing the backgrounds of potential prosecution witnesses, but also searching for any other potential witnesses who might challenge the prosecution's version of events," and further notes that a defendant's Eighth Amendment right to offer mitigating evidence "does nothing to fulfill its purpose unless it is understood to presuppose that the defense lawyer will unearth, develop, present and insist on the consideration of those compassionate or mitigating factors stemming from the diverse frailties of human kind." *Id* at 6-7 (internal quotation marks omitted). *See also* Guideline 10.8 (entitled "The Duty to Assert Legal Claims"), discussed at length in Motion D-208.

7. On the basis of the foregoing authority, defense counsel have no choice but to pursue the material that is the subject of D-SDT-5 and D-SDT-6 and to request an in camera review of these materials. [redacted]

[redacted]

II. Reasons Why the Court Should Suppress Motion D-225 and Accept the Defense's Redactions of D-SDT-5 and D-SDT-6.

8. The defense urges the Court to accept its redactions of D-SDT-5 and D-SDT-6, and to suppress Motion D-225 as it requested, for the following reasons:

a. *Suppression of D-225 and Extensive Redactions of D-SDT-5 and D-SDT-6 is Necessary to Protect* [redacted] *Privacy Interests.*

9. First, suppression and extensive redactions of these pleadings are appropriate and necessary in order to protect [redacted] privacy, which is one of the concerns the Court must take into consideration when determining whether to provide the public with access to criminal justice records such as a pleading in a criminal case. *See Harris v. Denver Post Corp.*, 123 P.3d 1166, 1175 (Colo. 2005) (the concerns a custodian of criminal justice records must take into account when considering whether to provide access to records include "the privacy interests of individuals who may be impacted by a decision to allow inspection."). *See also* subsection d, below.

10. While defense counsel have ethical and constitutional obligations to seek the material that is the subject of D-SDT-5 and D-SDT-6, at the same time, defense counsel are sensitive to the impact that this litigation may have on [redacted]

11. While counsel's primary obligation must be to discharge their constitutional and ethical duties to Mr. Holmes, they nevertheless wish to protect [redacted] privacy to the extent they can do so consistent with these duties. Defense counsel do not wish to cause [redacted] even more unnecessary harm and distress than [redacted] is already experiencing as a result of their pursuit of this information, [redacted] Like many victims and witnesses in this case, [redacted] has already been through a great deal as a result of the events of July 20, 2012.

12. Suppression is the only way that [redacted] privacy and interests will be fully protected. Counsel considered filing a redacted version of Motion D-225 instead of requesting that the entire pleading be suppressed, but realized that it would be impossible to redact the pleading in such a way that would adequately protect [redacted] identity [redacted] Similarly, defense counsel considered filing redacted versions of D-SDT-5 and D-SDT-6 that redacted only [redacted] name, but concluded that such redactions would not sufficiently protect [redacted] identity.

13. [redacted]

14. In Order C-126, the Court quoted defense counsel as stating at the January 27, 2014 hearing that "[T]hese people's names are out in the media . . . [s]o it's just a matter of time that we're going to start talking about their names." Order C-126, p. 2 (quoting Transcript, January 27, 2014, p. 10).

15. However, the context of that statement, which involved whether or not to refer to prospective witnesses by initials in a closed hearing, is different than the context here. [redacted]

16. Moreover, defense counsel made the statement quoted above before Mr. Brauchler pointed out that "it is conceivable, although not likely, given where we're set, that it's possible that this case resolves one way or another short of the actual trial. And if that be the case, these steps right now to minimize [these witnesses'] exposure [by referring to them by initials] through something that may ultimately become public makes sense to be conservative about." Transcript, January 27, 2014, p. 11. As soon as Mr. Brauchler made that statement, the defense quickly agreed to the prosecution's proposal. Indeed, this rationale persuaded the Court to require the parties to refer to potential witnesses by initials even though the hearing was closed to the public. *See id.* at 12. The same rationale applies here – as much precaution as possible should be taken to protect the privacy interests of the witnesses involved in the event that this case is resolved short of trial.

b. *Suppression of Motion D-225 and Extensive Redaction of D-SDT-5 and D-SDT-6 is Consistent with the Court's Practice Regarding the Suppression of Other Pleadings Involving Potential Evidence in this Case.*

17. Second, suppression of Motion D-225 and the defense's proposed redactions of D-SDT-5 and D-SDT-6 are appropriate because they are consistent with the Court's practice regarding suppression of other documents that pertain to evidence or potential evidence in the case.

18. Up until now, this Court has consistently suppressed pleadings that contain information that will be or could become evidence that is introduced at trial. For example, the Court suppressed responses and offers of proof filed by the prosecution in response to defense motions related to expert testimony. The prosecution requested that those pleadings be suppressed because they contained "references to evidence that the People intend to introduce at trial," and because "[t]he People do not believe that it would be appropriate to publicly release this information prior to the trial." *See, e.g.,* Supplemental Response to Motion D-106, p. 1. The Court agreed, concluding that "suppression of these responses is appropriate." Order C-47, p. 1.

19. The Court also recently suppressed the prosecution's submission of exhibits introduced at the July 22-23, 2014 motions hearings, even though these exhibits pertain to issues that were litigated in open court. *See* Order C-125.[1]

20. Because the information contained in Motion D-225 and D-SDT-5 and D-SDT-6 also involves potential evidence in the case, suppression is appropriate and consistent with the Court's practice in this case. It is even more important for the Court to suppress this information than it was for the Court to suppress pleadings containing references to evidence that was already introduced and discussed in court during pre-trial hearings, given that the information that is the subject of Motion D-225 and D-SDT-5 and D-SDT-6 may not actually yield evidence that is admissible at trial, depending on the Court's ultimate ruling and the actual contents [redacted].

c. *Suppression of D-225 and Extensive Redaction of D-SDT-5 and D-SDT-6 is Necessary to Protect Mr. Holmes's Constitutional Rights.*

21. Third, and most importantly, suppression is necessary to protect Mr. Holmes's rights to due process, a fair trial by an impartial jury, and a fair and reliable sentencing proceeding. *See, e.g., Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966); *Irvin v. Dowd*, 366 U.S. 717 (1961); U.S. Const. amends. V, VI, VIII, XIV; Colo. Const. art. II, secs. 16, 18, 20, 25.

22. As stated above, it is possible that the information contained in Motion D-225, and any material obtained from an in camera review of the information sought in D-SDT-5 and D-SDT-6, may ultimately become evidence in this case. It is also certainly possible that one party or the other will seek to introduce some of the information contained in Motion D-225 as evidence, and it will be excluded. It is also possible that no evidence contained in Motion D-225 or in the [redacted] at issue will be discussed or introduced at trial. Regardless, Mr. Holmes has a constitutional right to a verdict that is "based upon the evidence developed at trial," rather than a verdict based on information that is disseminated in the media beforehand. *Irvin*, 366 U.S. at 722.

23. A criminal jury trial should never be "like elections, to be won through use of the meeting-hall, the radio, and the newspaper." *Sheppard*, 384 U.S. at 350. No person can "be punished for a crime without a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power." *Id.* (internal quotations and citations omitted). "Due process requires that the accused receive a fair trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measure to ensure that the balance is never weighed against the accused." *Id.* at 364.

24. In furtherance of these constitutional rights and principles, the Court's Amended Order re Motion to Limit Pre-Trial Publicity [D-2a], precludes the parties and their associates from making statements that they know or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing

[1] The Court has also suppressed the litigation surrounding its decision to order a second sanity examination of Mr. Holmes, as well as pleadings relating to the jury questionnaire.

an adjudicative proceeding in the matter.

25. In Section I.E(1) of this order, the Court noted "that there are certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a . . . criminal matter . . . ." The Court then noted that these subjects relate, *inter alia*, to "the character, credibility, reputation, or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness."

26. The subject matter of Motion D-225 squarely fits within this section. [redacted]

27. If the Court does not suppress Motion D-225, there is no question that the information contained in Motion D-225 will be made widely public. Publishing the motion on the Court's website would be the equivalent of making a public statement about [redacted]

28. Simply redacting [redacted] name from Motion D-225 and suppressing the attachments will not adequately protect Mr. Holmes's constitutional rights. If the Court adopts the proposal it has advanced in C-126, the public will learn that [redacted] Releasing this information to the public would be highly, highly prejudicial to Mr. Holmes's constitutional rights. At a minimum, it would provide potential jurors with information that [redacted]

29. Moreover, if the pleading is more heavily redacted, the media may attempt to guess at the information contained in the redactions as it has in the past, which may fuel even more speculation and the spreading of false information about the evidence in this case.

d. *The Public's Right of Access to these Pleadings Must Yield to Competing Interests in these Circumstances.*

30. Finally, the defense notes that unlike the closure of a hearing or a trial, to which the public and the media have a qualified First Amendment right of access in some circumstances, the public's right to access judicial records, including the court file in a criminal case, is governed by common law and the Colorado Criminal Justice Records Act. *See Nixon v. Warner Communications*, 435 U.S. 589, 597 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."); *United States v. Hickey*, 767 F.2d 705, 708 (10th Cir. 1985) (noting that U.S. Supreme Court has never held that constitutional right of access to court proceedings also applies to court files and documents, and analyzing defendant's request for access to sealed court documents under common law right of access); C.R.S. §§ 24-72-301—08 (defining and establishing parameters for public access to criminal justice records).

31. The United States Supreme Court has made clear that "the right to inspect and copy judicial records is not absolute," and "[e]very court has supervisory power over its own records and files." *Nixon*, 435 U.S. at 598. Thus, "the decision as to access [to judicial records] is one best left to the sound discretion of the trial court." *Id.* at 599. *See also* C.R.S. § 24-72-305(1)(b) (allowing inspection of criminal justice records unless inspection is prohibited, *inter alia*, "by the order of any court"); Colorado Judicial Dept. 05-01 § 4.60(a) ("Information in court records is not accessible to the public if protected by . . . court order").

32. The media has not objected to the suppression or redaction of these pleadings at this juncture. However, if the Court were to engage in an analysis to determine whether unsealing the case file is warranted under the public's common law right of access and the Colorado Criminal Justice Records Act, this Court would apply a simple balancing test to evaluate whether "the public's right of access is outweighed by competing interests." *Hickey*, 767 F.2d at 708. This analysis is "necessarily fact-bound" and "there can be no comprehensive formula for decision-making." *Id.*

33. Additionally, as noted in subsection a, above, the Colorado Supreme Court has noted that the concerns a custodian of criminal justice records must take into account when considering whether to provide access to records include "the privacy interests of individuals who may be impacted by a decision to allow inspection; the agency's interest in keeping confidential information confidential; the agency's interest in pursuing ongoing investigations without compromising them; the public purpose to be served in allowing inspection; and any other pertinent consideration relevant to the circumstances of the particular request." *Harris v. Denver Post Corp.*, 123 P.3d 1166, 1175 (Colo. 2005); *see also Freedom Colorado Info., Inc. v. El Paso County Sheriff's Dept.*, 196 P.3d 892, 895 (Colo. 2008).

34. There are ample "competing interests" that outweigh the public's right of access to Motion D-225 and D-SDT-5 and D-SDT-6. *Hickey*, 767 F.2d at 708.

35. Disclosure of these pleadings as the Court has proposed in C-126 is almost certain to generate even greater and more prejudicial pretrial publicity than the extensive coverage that has already occurred, which will only further jeopardize Mr. Holmes' ability to receive a fair

trial by an impartial jury, as guaranteed by the state and federal constitutions. *See Maxwell*, 384 U.S. at 350-51; *United States v. McVeigh*, 119 F.3d 806, 815 (10th Cir. 1997) (district court properly exercised discretion to seal suppression motion in Oklahoma City bombing case because public disclosure of materials would "generate pre-trial publicity prejudicial to the interests of all parties in this criminal proceeding.").

36. Second, as explained above, the redactions the Court has proposed will not adequately protect the privacy interests of [redacted], who will be impacted by a decision to release a redacted version of Motion D-225 to the media.

37. Third, disclosure of the pleadings as the Court has proposed may result in the disclosure of information to the public that is ultimately not admitted at trial.

38. Finally, the public purpose in allowing inspection of this pleading is minimal at this juncture. Most of the pleadings filed in this case are not suppressed and are available to the public. The public has been provided with ample information about this case. There is no reason why it needs to know about the defense's efforts to obtain [redacted]. Depending on the Court's ultimate ruling on the substantive issues involved, and on what actually exists in [redacted], the defense either will or will not obtain the information it seeks. If it does not obtain the information, or if there is ultimately no relevant information to be had, then there is nothing relevant for the public to know. If the defense does obtain relevant information as a result of filing Motion D-225 and D-SDT-5 and D-SDT-6, then the public will learn about the relevant information if and when it is admitted at trial.

III. Conclusion

39. For the reasons stated above, the defense urges the Court to suppress Motion D-225 and to allow the redactions made by the defense to D-SDT-5 and D-SDT-6 to stand.

Mr. Holmes files this response, and makes all other motions and objections in this case, whether or not specifically noted at the time, 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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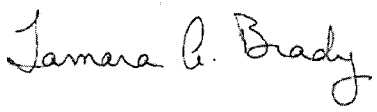

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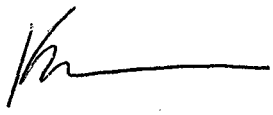

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Dated: August 15, 2014

I hereby certify that on 8/15, 2014, I

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_✓_ hand-delivered

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