REDACTED

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	Filed OCT 29 2014 CLERK
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. **JAMES HOLMES,** Defendant	♦ COURT USE ONLY ♦
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

MOTION TO SUPPRESS AND/OR EXCLUDE STATEMENTS MADE BY MR. HOLMES ACQUIRED DIRECTLY OR INDIRECTLY FOR THE FIRST TIME FROM THE SECOND SANITY EVALUATION CONDUCTED BY DR. WILLIAM REID DURING ALL PHASES OF THIS CAPITAL CASE [D-248]

CERTIFICATE OF CONFERRAL

The prosecution states that it objects to this motion.

Mr. Holmes, through counsel, moves this Court to suppress or exclude at all stages of this trial any statements made by Mr. Holmes that were acquired directly or indirectly for the first time from the second sanity evaluation ordered by the Court in its Order re: Motion P-68 and conducted by Dr. William Reid, pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments, and article II, sections 16, 18, 20 and 25 of the Colorado Constitution.[1] In support of this motion, he states the following:

I. Introduction

1. Unless all statements acquired by the process set in motion by the Court's Order re: Motion P-68 are suppressed at trial, the statutory schemes at work in a capital case in

[1] This motion is similar to Motion D-187, which the defense filed regarding the statements acquired as a result of Mr. Holmes's sanity evaluation with Dr. Metzner. The defense acknowledges that the Court denied Motion D-187. The defense stresses, however, that it is constitutionally and ethically obligated to file a similar motion with respect to Dr. Reid's evaluation. Otherwise, an appellate court will conclude that these issues have not been preserved with respect to *Dr. Reid's* evaluation.

Colorado where a defendant facing the death penalty has pled not guilty by reason of insanity will violate Mr. Holmes's Fifth Amendment right to be free from self-incrimination, as well as his rights to a fair trial by an impartial jury, to be free from cruel and unusual punishment, and to due process, as protected by the Fifth, Sixth, Eighth and Fourteenth Amendments and article II, sections 16, 18, 20 and 25 of the Colorado Constitution.

2. The Court must suppress and/or exclude these statements for at least four reasons.

3. First, Colorado's capital sentencing statute and the insanity statute interact in such a way that limitations cannot be placed on *which* statements acquired as a result of Mr. Holmes's not guilty by reason of insanity plea are admitted for consideration at sentencing. As a result, statements admitted at the merits phase of the trial pursuant to C.R.S. §§ 16-8-107(1)(a) & (1.5)(a) purportedly only for the limited issue of sanity can and will subsequently be impermissibly used and/or considered by the jury at sentencing.

4. Second, whatever limits the insanity statute attempts to place on the *purpose* for which the jury may consider a defendant's statements introduced at sentencing are illusory. As explained below, any evidence introduced by the prosecution at the sentencing hearing is, by its very nature, offered in support of the prosecution's effort to obtain a death sentence.

5. Third, to the extent case law permits the use of aspects of the sanity evaluation conducted pursuant to C.R.S. § 16-8-106 for limited rebuttal purposes, the case law does not condone the use of such *statements* made by a defendant, and consequently admission of these statements at sentencing will violate Mr. Holmes's state and federal constitutional rights.

6. Fourth, these statements are inadmissible on a number of evidentiary bases.

I. The Interplay Between Colorado's Capital Sentencing and Insanity Statutes Allows for Statements that are Purportedly Introduced on the Limited Issue of Sanity at the Merits Phase of a Trial to be Improperly Considered at a Subsequent Sentencing Hearing.

7. C.R.S. § 16-8-107(1)(a) provides:

> Except as provided in this subsection (1), *no evidence acquired* directly or indirectly for the first time from a communication derived from the defendant's 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 the defendant on the issues raised by a plea of not guilty*, if the defendant is put to trial on those issues, *except to rebut evidence of his or her mental condition introduced by the defendant 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.

(Emphasis added).

8. C.R.S. § 16-8-107(1.5)(a) further provides:

> Except as otherwise provided in this subsection (1.5), *evidence acquired* directly or indirectly for the first time from a communication derived from the defendant's 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 the defendant's plea of not guilty by reason of insanity*, and the jury, at the request of either party, shall be so instructed . . . .

(Emphasis added).

9. To the extent that Courts have rejected Fifth Amendment challenges to the introduction of statements derived from the sanity evaluation or the waiver provision of the insanity statute in a noncapital trial, it is because the statutory provisions cited above only allow for the introduction of such evidence on the issues raised by the defendant's plea of not guilty by reason of insanity, and *not* on the actual issue of guilt.[2] *See, e.g., People v. Herrera*, 87 P.3d 240, 245 (Colo. App. 2003) ("[T]he privilege against self-incrimination is not implicated by a court-ordered mental examination when the information obtained therefrom is admitted only on the issue of mental condition."); *People v. Galimanis*, 765 P.2d 644, 647 (Colo. App. 1988) ("Self-incrimination, by definition, applies to the admission of evidence to aid in establishing the guilt of the accused, not his sanity."); *People v. Rosenthal*, 617 P.2d 551, 554 (Colo. 1980) (privilege against self-incrimination precludes prosecution from offering psychiatric communications made by defendant to privately-retained psychiatrist on issue of guilt).

10. However, none of the cases cited above involved an insanity trial in a capital case, with the possibility of an ensuing capital sentencing proceeding. Introducing a defendant's statements on the issue of sanity during the merits phase of a capital case is quite a different matter.

11. As an initial matter, Mr. Holmes submits that all statements that were made by Mr. Holmes to Dr. Reid should be suppressed and/or excluded from trial because the second sanity examination never should have been ordered in the first place. *See* Motion D-246. Assuming the Court disagrees, however, he offers the following argument.

12. The Court specifically instructed the second sanity examiner not to consider "the defendant's competency to proceed or ***how any mental disease or defect or the condition of***

---

[2] Mr. Holmes disagrees with the outcome of these cases, and, in making this motion, does not waive his previously-raised claims regarding the unconstitutionality of the above-referenced statutes. *See* Motion D-032. Mr. Holmes maintains the position that the introduction of any statements acquired by the prosecution as a result of his plea of not guilty by reason of insanity are involuntary, and their admission violates the Fifth Amendment privilege against self-incrimination as well as article II, section 18 of the Colorado Constitution.

mind caused by a mental disease or defect affects any mitigating factor identified in the death penalty statutes." Order re: Motion P-68, pp. 49-50 (emphasis added).

13. However, Colorado's capital sentencing statute and the insanity statute interact in such a way that limitations cannot be placed on *which statements* acquired as a result of Mr. Holmes's not guilty by reason of insanity plea are admitted for consideration at sentencing.

14. Pursuant to C.R.S. § 18-1.3-1201(1)(b), "All admissible evidence presented by either the prosecuting attorney or the defendant that the court deems relevant to the nature of the crime, and the character, background, and history of the defendant, *including any evidence presented in the guilt phase of the trial* . . . . may be presented." (Emphasis added).

15. Therefore, the jury is statutorily authorized in a capital case to consider all evidence presented at the merits phase of the case at sentencing. In other words, when a statement is introduced at the merits phase, a constitutional violation automatically occurs in the event that the case proceeds to a sentencing hearing because – by virtue of the capital sentencing statute – the statement can be considered by the jury at sentencing in support of a death sentence. *See Estelle v. Smith*, 451 U.S. 454, 462-63 (1981) ("We can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned.").

16. Moreover, it would be particularly improper for the jury to consider at sentencing any of Mr. Holmes's statements made to Dr. Reid during the course of his evaluation, given that the purpose of Dr. Reid's examination was limited exclusively to sanity, and that he was (ostensibly) forbidden from assessing for, or opining about, mitigating factors. Dr. Reid's evaluation was not designed to assess for mitigation; thus, it would be unfair for the jury to consider statements made in the context of that evaluation for the purpose of mitigation.

17. Given the nature of the statements at issue here, a limiting instruction is a wholly inadequate remedy. It would be impossible to expect that a jury could abide by a limiting instruction to disregard at sentencing the myriad provocative statements they will have already been exposed to at the merits phase of the case – or to expect the jury to disregard some statements and not others, or only consider some of the statements for some sort of limited purpose such as rebuttal to mitigation (see below). *See, e.g., Bruton v. United States*, 391 U.S. 123, 135 (1968) ("[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."); *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932) (describing an instruction on the limited use of hearsay as a "recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else.").

18. Such an expectation or presumption that jurors will be able to abide by such a limiting instruction is particularly inappropriate in a capital case given the importance of the jury's decision and the heightened degree of reliability required. *Beck v. Alabama*, 447 U.S. 625, 637-638 (1980); *People v. Young*, 814 P.2d 834,846 (Colo. 1991). *See also* Judith L. Ritter, *Your Lips Are Moving . . . but the Words Aren't Clear: Dissecting the Presumption That Jurors Understand Instructions*, 69 Mo. L. Rev. 163, 164, 212 (2004) ("The presumption that delivered

instructions are actually understood by jurors is curious; it is not supported by an adequate foundation. It cannot be supported by historical experience. Empirical data directly refute it . . . . To be sure, however, if our system is willing to continue to tolerate a groundless presumption that pattern instructions are understood, the toleration should not carry over to the death penalty arena."); Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1542 (1998) (describing findings of Capital Jury Project, and noting that "[a]mong other things, we have good reason to believe that jurors don't really have a very good grasp of the instructions they receive."); Christopher N. May, *"What Do We Do Now?": Helping Juries Apply the Instructions*, 28 Loy. L.A. L. Rev. 869, 872 (1995) ("Studies literally abound demonstrating the extent to which jurors misapprehend the relevant law.").

19. Therefore, C.R.S. § 18-1.3-1201(1)(b) and C.R.S. § 16-8-107 operate in such a way as to not only violate Mr. Holmes's right to be free from self-incrimination, but also his constitutional right to due process and to be free from cruel and unusual punishment pursuant to the Eighth and Fourteenth Amendments and article II, sections 20 & 25 of the Colorado Constitution, because of the unacceptable risk that the jury will base its sentencing determination on the consideration of arbitrary and improper factors. *See, e.g., Mills v. Maryland*, 486 U.S. 367, 376 (1988) ("[I]n reviewing death sentences, the Court has demanded even greater certainty [than in other criminal cases] that the jury's conclusion rested on proper grounds."); *Beck v. Alabama*, 447 U.S. 625, 637-638 (1980); U.S. Const. amends. VIII, XIV.

20. The interplay of these statutes also specifically 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.").

21. Relatedly, the interplay of these statutes also violates Mr. Holmes's right to a fair trial by an impartial jury as protected by the Sixth Amendment to the United States Constitution and Article II, sections 16 and 23 of the Colorado Constitution. This right includes the right to have an impartial jury decide the accused's guilt or innocence solely on the basis of the evidence *properly* introduced at trial. *See, e.g., Harris v. People*, 888 P.2d 259, 264 (Colo.1995) (right to fair and impartial jury encompasses the right to a "fair verdict, free from the influence or poison of evidence which should never have been admitted."). This right extends to sentencing as well.

II. The Limits that Colorado's Insanity Statute Attempts to Place on the Purposes for Which Statements Acquired as a Result of a Defendant's Not Guilty by Reason of Insanity Plea Can Be Considered are Illusory; the Introduction of These Statements for *Any* Purpose at Sentencing Violates, *Inter Alia*, Mr. Holmes's Right to be Free From Self-Incrimination.

22. Aside from the insurmountable constitutional problem described above about *which* statements of Mr. Holmes's will be considered by the jury at sentencing, whatever limits the insanity statute attempts to place on the *purpose* for which the jury may consider those statements are illusory. This is so because any evidence introduced by the prosecution at the

sentencing hearing is, at its core, evidence in support of the prosecution's bid for a death sentence.

23. C.R.S. § 16-8-107(1.5)(b) provides that:

> Evidence acquired directly or indirectly for the first time from a communication derived from the defendant's 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 section 18-1.3-1201, 18-1.3-1302, or 18-1.4-102, C.R.S., *only to prove the existence or absence of any mitigating factor.*

(emphasis added).

24. Prior to entering a plea of not guilty by reason of insanity on June 4, 2013, Mr. Holmes extensively litigated the constitutionality of Colorado's insanity statute, C.R.S. § 16-8-101 *et seq.*, including specific features of this statute that are only applicable in cases in which the prosecution is seeking the death penalty. *See* Motions D-28, 29, 30, 31 and 32. Mr. Holmes hereby incorporates by reference all arguments set forth in those pleadings.

25. With respect to C.R.S. § 16-8-107(1.5)(b), Mr. Holmes argued that despite its purported limiting language, this provision of the insanity statute violates, *inter alia*,[3] a defendant's Fifth Amendment right against self-incrimination, because it allows the prosecution to use the evidence derived from the sanity examination as well as C.R.S. § 16-8-103.6 at sentencing in support of its bid to execute the person who is on trial for their life. *See* Motion D-32, pp. 31-41.

26. This Court upheld the constitutionality of C.R.S. § 16-8-107(1.5)(b) in an order dated May 29, 2013. *See* Order Regarding Outstanding Issues in Defendant's Motions D-28, D-29, D-31 and D-32, pp. 33-37.

27. The Court concluded that, contrary to the defense's argument, this statutory provision does not "allow the prosecution to *affirmatively* use evidence derived from a compulsory mental condition examination in a capital sentencing hearing to establish a defendant's death eligibility." Order, p. 33 (emphasis added).

---

[3] Mr. Holmes also argued, *inter alia*, that: (1) C.R.S. § 16-8-107, when read in conjunction with section 16-8-106, compels a defendant to agree to become a witness against himself at any potential sentencing hearing pursuant to C.R.S. § 18-1.3-1201 to prove an element of capital murder, i.e. death-eligibility, in order to present evidence of insanity at a trial on the alleged offense, which impermissibly forces a defendant to choose between his constitutional right against self-incrimination at sentencing and his constitutional right to present a defense at trial, and (2) that C.R.S. § 16-8-107 violates due process because it unconstitutionally relieves the prosecution of the burden of proving each and every element of the offense beyond a reasonable doubt.

28. Although the Court acknowledged that pursuant to *People v. Dunlap* ("*Dunlap I*"), 975 P.2d 723 (Colo. 1999), the eligibility stage of Colorado's capital sentencing process includes not only the finding of at least one aggravating factor beyond a reasonable doubt, but also includes the process of determining what mitigating factors exist, and the weighing of mitigation against aggravation, the Court concluded that the interplay between the capital sentencing statute and the insanity statute does not violate a criminal defendant's Fifth Amendment privilege against self-incrimination.

29. The Court held that "[d]uring the eligibility stage, the prosecution may use such evidence, if at all, *only* to rebut mitigation evidence presented by the defendant. Hence, if the defendant chooses not to present mental condition evidence as mitigation, the prosecution may not introduce mental condition evidence acquired during the Court-ordered examination at the eligibility stage of the sentencing hearing." Order, p. 37.

30. The Court further held that the prosecution may properly use evidence derived from a Court-ordered mental condition examination "to rebut mitigating psychiatric evidence [the defendant] presents during the eligibility phase of the sentencing hearing" pursuant to *Buchanan v. Kentucky*, 483 U.S. 402, 422-23 (1987). *Id.*

31. Mr. Holmes respectfully disagrees.

32. While it appears from the language of C.R.S. § 16-8-107(1.5)(b) that the legislature was trying to impose some sort of restriction on the use of such evidence at sentencing that is similar or analogous to the restrictions the statute places on the introduction of this evidence at the merits phase of a case, these efforts necessarily fail. It is not possible to separate and distinguish the purposes for which evidence is being offered at the sentencing phase in a manner that mirrors the distinction between guilt and sanity at the merits phase of a case.[4]

33. *Any* use by the prosecution of statements acquired from either the sanity examination or the waiver provision of the insanity statute in a capital sentencing proceeding – whether it is introduced affirmatively as evidence of statutory or nonstatutory aggravation or introduced as so-called "rebuttal" to mitigation – is constitutionally prohibited. Whatever the prosecution's stated purpose, the practical reality is that the statements are being offered in support of the State's bid for execution, and their introduction therefore violates the Fifth, Sixth, Eighth and Fourteenth Amendments. *See Estelle*, 451 U.S. at 465; *Powell v. Texas*, 492 U.S. 680, 685 n.3 (1989) ("Nothing in *[Estelle v.] Smith*, or any other decisions of this Court, suggests that a defendant opens the door to the admission of psychiatric evidence on future dangerousness by raising an insanity defense at the guilt phase trial.").

[4] Again, Mr. Holmes also disagrees with the guilt/sanity distinction made by the statute and the case law holding that there is no Fifth Amendment violation when such statements are introduced at the merits phase of a trial. *See* footnote 1, *supra*.

34. Moreover, as explained more fully in D-32 and other capital pleadings filed in this case, including but not limited to D-144, Colorado's unique capital sentencing scheme[5] injects mitigation, and the lack and relative weight thereof, into the determination of whether an individual is "eligible" for the death penalty. *See Dunlap I, supra.* Pursuant to *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring v. Arizona*, 536 U.S. 584 (2002), *Woldt v. People*, 64 P.3d 256 (Colo. 2003), the eligibility determination (including the jury's findings regarding mitigation) is the functional equivalent of an element of the offense.

35. Thus, even if the prosecution is limited to using Mr. Holmes's statements to "rebut" mental health mitigation introduced by the defense at sentencing, in reality, the *effect* of this evidence offered in "rebuttal" to defense evidence is that it is not simply being used to counteract mental health mitigation, but in fact is being employed to *affirmatively establish death-eligibility* for Mr. Holmes.[6] Not only does the prosecution's introduction of such evidence thus violate Mr. Holmes's Fifth Amendment right against self-incrimination, it also relieves the prosecution of the burden of proving every element beyond a reasonable doubt in violation of the Due Process Clause of the Fourteenth Amendment and article II, section 25 of the Colorado Constitution. *See, e.g., Mullaney v. Wilbur*, 421 U.S. 684 (1975).

III. The Case Law Does Not Condone the Introduction of a Defendant's Statements for Any Purpose at Sentencing, Including Limited Rebuttal.

36. Mr. Holmes further submits that to the extent that courts have relied on *Buchanan v. Kentucky*, 483 U.S. 402 (1987) to justify the admission of *statements* made by a criminal defendant in the context of a sanity examination, they have misinterpreted the holding of that case.

37. In *Buchanan*, the United States Supreme Court addressed a situation where a criminal defendant attempted to establish the affirmative defense of "extreme emotional disturbance" under Kentucky law. In presenting his defense at trial, the defendant presented testimony of a social worker who read from "several reports and letters dealing with evidence of petitioner's mental condition." *Id.* Prior to trial, the prosecution and defense had jointly requested a psychological evaluation of the defendant. During cross-examination of the social worker, the prosecution attempted to have her read from the report of the evaluation conducted at joint

---

[5] Mr. Holmes has contended in other motions that Colorado's placement of consideration of mitigation in the eligibility phase of the capital sentencing process is unconstitutional. *See, e.g.*, D-144, D-157. D-164.

[6] Additionally, as explained above, because C.R.S. § 18-1.3-1201(1)(b) allows the jury to consider all evidence introduced at the merits phase of a capital trial, there is no way to limit the prosecution's "introduction" of evidence that is solely offered to rebut mitigation. By the time any capital sentencing proceeding is reached, the prosecution will have already introduced a wide range of information derived from the second sanity evaluation at the merits phase of the proceedings, and the jury will have already been exposed to all of this information. Thus, efforts to limit the prosecution's introduction of information relating to the second sanity evaluation to information that is offered in "rebuttal" to mitigation would be completely illusory and ineffective.

request prior to trial, and the defendant objected on Fifth and Sixth Amendment grounds. The trial court overruled the objection.

38. On appeal, the United States Supreme Court found no constitutional violation. The Court referred to its prior statement in *Estelle, supra*, that "[a] criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." The Court then stated:

> This statement logically leads to another proposition: if a defendant requests such an 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. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution. See *United States v. Byers,* 239 U.S.App.D.C. 1, 8-10, 740 F.2d 1104, 1111-1113 (1984) (plurality opinion); *Pope v. United States,* 372 F.2d 710, 720 (CA8 1967) (en banc), vacated and remanded on other grounds, 392 U.S. 651, 88 S.Ct. 2145, 20 L.Ed.2d 1317 (1968).
>
> [3] This case presents one of the situations that we distinguished from the facts in *Smith.* Here petitioner's counsel joined in a motion for Doctor Lange's examination pursuant to the Kentucky procedure for involuntary hospitalization. Moreover, petitioner's entire defense strategy was to establish the "mental status" defense of extreme emotional disturbance. Indeed, the *sole* witness for petitioner was Elam, who was asked by defense counsel to do little more than read to the jury the psychological reports and letter in the custody of Kentucky's Department of Human Services. In such circumstances, with petitioner not taking the stand, the Commonwealth could not respond to this defense unless it presented other psychological evidence. Accordingly, the Commonwealth asked Elam to read excerpts of Doctor Lange's report, in which the psychiatrist had set forth his general observations about the mental state of petitioner but **had not described *any* statements by petitioner dealing with the crimes for which he was charged.** The introduction of such a report for this **limited rebuttal purpose** does not constitute a Fifth Amendment violation.

U.S. at 422-24 (footnote omitted, bold emphasis added, italics original).

39. Thus, *Buchanan* only permitted introduction of a court-ordered examination report for a "limited rebuttal purpose." Notably, it was significant to the Court's decision that in contrast with *Estelle*, the prosecution did not introduce "*any*" statements by Buchanan regarding the offense charged, in conjunction with such rebuttal evidence.

40. In relying upon or otherwise discussing *Buchanan*, a number of courts have likewise found this to be a critical distinction. *See also People v. Williams*, 197 Cal. App. 3d 1320, 1325-26, 243 Cal. Rptr. 480, 483 (Ct. App. 1988) (holding that defendant's constitutional privilege against self-incrimination was violated by allowing the psychiatrist to testify in the guilt phase of two-part sanity trial that defendant confessed his guilt during sanity examination, and noting distinction between *Estelle*, in which prosecution introduced defendant's statements, and *Buchanan*, where doctor's report at issue "set forth general observations about the defendant's mental state without describing any statements dealing with the charged crimes"); *Tankersley v. State*, 261 Ga. 318, 321-22, 404 S.E.2d 564, 568 (1991) (citing *Buchanan* in support of holding that defendant's Fifth Amendment privilege against self-incrimination was not violated despite failure to receive *Miranda* warnings prior to interview with state psychiatrist, because psychiatrist limited his testimony to defendant's mental state "and did not describe any statements by [defendant] regarding the crimes for which he was on trial"); *Estes v. State*, 146 P.3d 1114, 1121, 1133-34 (Nev. 2006) (relying on *Buchanan* for proposition that "a defendant is generally entitled to protection from admission of un-Mirandized incriminating statements made to health care professionals in the context of a court-ordered evaluation or examination. But, if the defendant seeks to introduce the evaluation or portions of it in support of a defense implicating his or her mental state, the prosecution may also rely upon ["other evidence" in] the evaluation for the limited purpose of rebuttal.").[7]

41. Thus, consistent with *Estelle* and *Buchanan* and the cases relying on *Buchanan* cited above, there is no proper use to which the prosecution can put any statements made by Mr. Holmes concerning the alleged offense and acquired as a result of his plea of not guilty by reason of insanity. Allowing these statements to be introduced or considered by the jury for any reason at sentencing,[8] including so-called "rebuttal," would violate Mr. Holmes's Fifth Amendment privilege against self-incrimination.

IV. The Introduction of these Statements Would Violate a Number of Evidentiary Principles.

A. Rules 401 and 403

[7] Last term, in *Kansas v. Cheever*, 134 S.Ct. 596 (2013), the Supreme Court reaffirmed its holding in *Buchanan* and observed in a footnote that its holding "suggests a constitutional ceiling on the scope of expert testimony that the prosecution may introduce in rebuttal," *id.* at 603, fn. 4, thus leaving unsettled the extent, if any, to which the prosecution may use a defendant's actual statements made in the context of a court-ordered psychiatric examination in rebuttal.

[8] Notably, *Buchanan* did not involve a capital sentencing proceeding, and the argument Mr. Holmes makes here also further supports the arguments he previously made in [D-032] that the admission of a defendant's statements acquired as a result of his not guilty by reason of insanity plea at the merits phase of a trial also violates the constitution. *See also* footnotes 1 and 3, *supra.*

42. Finally, the impossibility of parsing out and limiting the jury's consideration of Mr. Holmes's statements *only* on issues pertaining to *sanity* at the merits phase of the trial and *not* as to issues of guilt and/or aggravation or death-eligibility at sentencing is also well-illustrated by the nature of many of the statements made by Mr. Holmes to Dr. Reid.

43. While the prosecution may argue that a number of these statements are relevant to sanity (i.e. whether Mr. Holmes knew the difference between right and wrong), they are equally, if not more, relevant to guilt (i.e. whether Mr. Holmes acted with either intent and after deliberation or satisfied the statutory requirements of extreme indifference murder/attempted murder in committing the acts in the theater), and may also bear directly on issues related to sentencing. Yet the jury is expressly forbidden from considering these statements for purposes of guilt and/or statutory or nonstatutory aggravation, making jurors' merits-phase exposure to these statements extremely problematic.

44. Therefore, the introduction of any statements by Mr. Holmes obtained as a result of the entry of his plea of not guilty by reason of insanity must not only be suppressed based on the constitutional grounds explained above, but should be excluded from trial pursuant to CRE 401 and 403 because of the extremely high risk that they will be considered by the jury for an improper purpose, which renders them substantially more unfairly prejudicial than probative. *See, e.g., People v. Dist. Court*, 785 P.2d 141, 147 (Colo. 1990) ("Proffered evidence which calls for exclusion as unfairly prejudicial is given a more specialized meaning of an undue tendency to suggest a decision on an improper basis . . . .").

B. Other Evidentiary Issues With the Statements

45. Aside from the issues presented by the interplay of the insanity and capital sentencing schemes described above, Mr. Holmes further asserts that his statements to Dr. Reid should be excluded in their entirety for a number of other reasons. For example, [redacted].

46. It is Mr. Holmes's position that these myriad problems with these statements demonstrate that Dr. Reid's examination is fundamentally unreliable *as a whole*, and that all of Mr. Holmes's statements elicited by Dr. Reid should be excluded in their entirety. *See 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); *Herrera v. Collins*, 506 U.S. 390, 434 (1993) ("The decision in *Beck* establishes that, at least in capital cases, the Eighth Amendment requires more than reliability in sentencing. It also mandates a reliable determination of guilt."); *Manson v.*

Brathwaite, 432 U.S. 98, 114 (1977); *People v. Young*, 814 P.2d 834, 846 (Colo. 1991); *People v. Rodriguez*, 786 P.2d 1079 (Colo. 1989); U.S. Const. amend. V, VI, VIII, XIV; Colo. Const. art. II § 16, 20, 25. *See also* Motion D-246.

V. Conclusion

47. In sum, because it would be constitutionally impermissible for the jury to consider any of Mr. Holmes's statements at sentencing as evidence in support of the prosecution's bid for execution, this Court must also suppress or exclude from the merits phase of this capital trial all statements made by Mr. Holmes that the prosecution acquired either from the sanity evaluation or as a result of the disclosures pursuant to C.R.S. § 16-8-103.6.

Request for a Hearing

48. 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)
Chief Trial Deputy State Public Defender

Kristen M. Nelson (No. 44247)
Deputy State Public Defender

Dated: October 29, 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	♦ COURT USE ONLY ♦
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

ORDER RE: MOTION TO SUPPRESS AND/OR EXCLUDE STATEMENTS MADE BY MR. HOLMES ACQUIRED DIRECTLY OR INDIRECTLY FOR THE FIRST TIME FROM THE SECOND SANITY EVALUATION CONDUCTED BY DR. WILLIAM REID DURING ALL PHASES OF THIS CAPITAL CASE [D-248]

Defendant's motion is hereby GRANTED _____ DENIED _____.

BY THE COURT:

_____ _____

JUDGE Dated

I hereby certify that on October 29, 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
Lisa Teesch-Maguire
Office of the District Attorney
6450 S. Revere Parkway
Centennial, Colorado 80111
Fax: 720-874-8501