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District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	Filed APR 29 2013 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 26

RESPONSE TO ORDER REGARDING REVISED ADVISEMENTS [C-033]

CERTIFICATE OF CONFERRAL

Counsel did not confer with the prosecution prior to filing this pleading. This pleading is being filed at the request of the Court and the issues cannot be resolved without the Court's intervention.

Mr. Holmes, through counsel, submits the following in response to the Court's Order Regarding Revised Advisements:

1. As a preliminary matter, counsel's position regarding a potential insanity plea, as explained in motions D-028 through D-032, remains the same. Counsel is unable to intelligently and effectively advise Mr. Holmes of the consequences of entering a plea pursuant to C.R.S. § 16-8-101.5 or seeking to introduce "mental condition" evidence at trial and/or sentencing until the Court rules on the outstanding issues presented in those motions. Previously, the Court had deferred ruling on many of the important issues raised in D-028 through D-032 as not ripe.

2. As the Court noted in its Order Regarding Defendant's Motion for an Extension of Time [D-035], now that the prosecution has announced it is seeking the death penalty against Mr. Holmes, the issues related to the constitutionality and legal ramifications of § 16-8-101 *et seq.* in the context of a capital case that were not previously addressed are now ripe. Counsel therefore requests a ruling from the Court on those portions of D-028, D-029, D-030, D-031 and

D-032 that address capital sentencing proceedings.

3. Specifically, this Court's interpretation of the meaning, scope and constitutionality of C.R.S. § 16—8-101 *et seq.*, including but not limited to, C.R.S. §§ 16-8-103.6(2)(a), 16-8-103.7(3)(a), 16-8-106, and 16-8-107, as well as § 18-1.3-1201(3)(d), as applied to a death penalty case and any potential sentencing proceedings, is necessary before defense counsel can make any intelligent and effective decisions regarding how to advise Mr. Holmes about what plea to enter and whether or not to introduce mental condition evidence at any stage of these proceedings.

4. Defense counsel remain unable to effectively advise Mr. Holmes about the consequences of entering an insanity plea or introducing "mental condition" evidence. However, they submit the following response to the Court's proposed advisement and representations and acknowledgments in the event that the outstanding issues are resolved and they ultimately elect to pursue an insanity plea or introduce "mental condition" evidence.

A. Advisement

5. Mr. Holmes objects to the Court's revised proposed advisement in its entirety for all of the reasons stated in D-033, which was filed in response to the Court's original proposed advisement. The revised proposed advisement still does not resolve any of the issues that counsel has raised in their previous pleadings on this subject.

B. Acknowledgements and Representations

6. Mr. Holmes objects to the Acknowledgements and Representations proposed by the Court in their entirety for several reasons.

7. First, these proposed acknowledgments and representations seek to establish that both Mr. Holmes and defense counsel fully understand the legal consequences of entering a plea pursuant to C.R.S. § 16-8-101.5 or seeking to introduce "mental condition" evidence at trial and/or sentencing. However, for all of the reasons explained in D-028 through D-032, defense counsel is unable to truthfully state that they fully understand these consequences.

8. The defense cannot, for example, represent to the Court that either counsel or Mr. Holmes "fully understand[s] every word, every sentence, every paragraph, and every page" of the advisement and have no questions about the advisement, that counsel and Mr. Holmes "fully understand[] the effects and consequences of [Mr. Holmes pleading] not guilty by reason of insanity," or that counsel "explained every single provision" of the advisement to Mr. Holmes "carefully, thoroughly, and completely," when there is significant uncertainty and confusion surrounding key provisions of the insanity statute and its intersection with the capital sentencing scheme.

9. Indeed, counsel has filed over 76 pages of pleadings seeking to clarify and understand, among other issues, the nature and scope of any court-ordered examination that would ensue as a result of such a plea, the circumstances under which Mr. Holmes' behavior and

actions during such an exam will be deemed "noncooperative," the consequences of that "noncooperation," and whether and under what circumstances evidence gathered as part of any court-ordered psychiatric examination or materials obtained pursuant to § 16-7-103.6 can be used against Mr. Holmes at trial on the pending charges or at any potential capital sentencing hearing.

10. Additionally, as counsel has repeatedly stated in pleadings and in open court, the reason the defense is considering entering an NGRI plea is because Mr. Holmes suffers from a serious mental illness. Undersigned counsel are not psychiatrists or medical doctors. They cannot make representations to the Court about the cognitive ability of their mentally ill client to understand complex legal concepts that few lawyers understand. As the Colorado Supreme Court recognized in *Hendricks v. People*, 10 P.3d 1231 (Colo. 2000), in a case where an NGRI plea is being considered, a defendant's own thoughts, desires, and opinions about a plea may be "a manifestation of a mental illness" lacking "a plausible grounding in reality." *Id.* at 1243-44. That is one reason why Colorado's insanity statute provides a mechanism for entering an NGRI plea over the objection of a defendant in some circumstances, if the Court determines it is necessary for a just determination of the charge against the defendant. *See* C.R.S. § 16-8-103(2).[1]

11. Signing these proposed acknowledgments and representations would therefore be tantamount to perjury, and would also violate Rule 3.3(a)(1) of the Colorado Rules of Professional Conduct, which states that "a lawyer shall not knowingly make a false statement of material fact or law to a tribunal."

12. Furthermore, it would be unethical and constitutionally ineffective for counsel to sign the proposed acknowledgments and representations, or to advise Mr. Holmes to do so because these acknowledgments and representations would require both the defense and Mr. Holmes to disclose information about their communications and the circumstances surrounding such communications that are protected by the attorney-client privilege. For example, the proposed acknowledgments and representations would require Mr. Holmes and counsel to attest to the circumstances surrounding a decision to enter a plea of not guilty by reason of insanity, as well as their discussion of the consequences of such a plea, and to certify that Mr. Holmes has "expressly asked" his attorneys "to enter a plea of not guilty by reason of insanity" on his behalf.

13. Requiring Mr. Holmes or counsel to disclose such information would amount to a purposeful and unjustified intrusion on the attorney-client relationship that would violate the Sixth Amendment and Article II, section 16 of the Colorado Constitution. *See, e.g., Shillinger v. Haworth*, 70 F.3d 1132, 1141 (10th Cir. 1995) (purposeful intrusion on the attorney-client relationship "strikes at the center of the protections afforded by the Sixth Amendment and made

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[1]It would violate Mr. Holmes' rights to Equal Protection under the Fourteenth Amendment to the United States Constitution and Article II, section 25 of the Colorado Constitution, among other things, to refuse to allow him to enter such a plea unless he signs the acknowledgments and representations the Court has proposed, when by definition, nothing of the sort can be required of defendants for whom the plea is entered against their will.

applicable to the states through the Fourteenth Amendment"); *People v. Ragusa*, 220 P.3d 1002, 1007 (Colo. App. 2009) (defense counsel "breached their duty to defendant by revealing . . . communications [about whether to accept a plea offer] to the prosecution and to the court before and during the trial"); *State v. Cator*, 781 A.2d 285, 292 (Conn. 2001) (in the absence of evidence to the contrary, trial court has no affirmative duty to inquire into potential conflicts of interest between attorney and client; "[s]uch an inquiry would risk an unwarranted intrusion into the attorney-client relationship."); *Tilghman v. State*, 701 A.2d 847, 857 (Md. App. 1997) ("Where the defendant is represented by counsel and it is not evident that a constitutional violation is imminent, the court should not be made to undertake an inquiry into the defendant's understanding of his risk of impeachment that might result in judicial participation in trial strategy and intrusion by the court into the relationship between attorney and client.").

14. Part and parcel of Mr. Holmes' constitutional right to the effective assistance of counsel is the right to attorney-client confidentiality. Colo. R. Prof. Conduct, Rule 1.6. prohibits a lawyer from revealing "information relating to the representation of a client" without the client's consent, unless such disclosure is "impliedly authorized in order to carry out the representation" or "to the extent the lawyer reasonably believes necessary . . . to comply with other law or a court order." *See also* C.R.S. § 13-90-107(1)(b) (prohibiting attorney from being examined without consent of his client "as to an communication made by the client to him or his advice given thereon in the course of professional employment").

15. Strict enforcement of this latter right encourages full and frank communication between the client and the lawyer and facilitates the full development of facts essential to proper and effective representation of the client. *See Comment*, Rule 1.6. A lawyer must endeavor to act in a manner that preserves and protects the right to attorney-client confidentiality and that preserves and protects the confidentiality of the communications between herself and the client. *See Comment*, Rule 1.6; *Hutchinson v. People*, 742 P.2d 875, 882 (Colo. 1987) (noting that "relationship of trust" affords counsel an "accurate and honest assessment of the defendant's case" and that "without such relationship," defense counsel is likely to be ineffective); *State v. Quattlebaum*, 527 S.E.2d 105, 107-08 (S.C. 2000) ("The right to counsel would be meaningless without the protection of free and open communication between client and counsel.").

16. Mr. Holmes does not wish to waive his attorney-client privilege, and such disclosures are not necessary to comply with the law. Signing the Court's proposed advisements and representations is therefore prohibited by Rule 1.6. *See Affidavit* [redacted] attached as Exhibit A.

17. Neither the statute nor the Rules of Criminal Procedure require counsel or the defendant to disclose the content or circumstances of their communication in order to enter into such a plea. All that C.R.S. § 16-8-103(4) requires is for the court to "advise the defendant of the effect and consequences" of a plea of not guilty by reason of insanity. Likewise, while Rule 11(b) of the Colorado Rules of Criminal Procedure imposes an extensive list of requirements similar to those contained in the Court's proposed acknowledgments and representations in order for a court to accept a guilty plea, notably, Rule 11(e), which governs pleas of not guilty by

reason of insanity, does not impose those same requirements.[2]

18. Had the legislature intended to force a defendant and his counsel to make acknowledgments and representations similar to those proposed by the Court in order to enter an NGRI plea, it would have expressly included such a requirement. *See, e.g., City & County of Denver v. Gallegos,* 916 P.2d 509, 512 (Colo. 1996) ("The legislative choice of language may be concluded to be a deliberate one calculated to obtain the result dictated by the plain meaning of the words."). In fact, Colorado law requires the opposite. Pursuant to C.R.S. § 16-7-207(1)(a), the trial court has a duty to inform a defendant that "[h]e need make *no statement*, and any statement made can and may be used against him." (emphasis added).

19. Additionally, counsel cannot sign the proposed "Acknowledgments and Representations" because doing so would potentially transform counsel into witnesses regarding Mr. Holmes' mental condition for any trial or sentencing proceeding in this case, should Mr. Holmes' mental condition became a subject of dispute. Depending upon the nature of any such dispute, as well as what "acknowledgements and representations" defense counsel agree to sign or refuse to sign, counsel could become potential (and perhaps necessary) witnesses for the defense or the prosecution. Either scenario creates a conflict of interest in violation of Mr. Holmes' constitutional right to conflict-free counsel as well as well as Colo. R. Prof. Cond. 3.7's general prohibition against a lawyer serving as an advocate and a witness in the same proceeding. *See also* Colo. R. Prof. Conduct Rule 1.8(b); *Ragusa*, 220 P.3d at 1006 ("A defendant has a right to conflict-free counsel . . . . Counsel becomes conflicted when his or her 'ability to champion the cause of the client becomes substantially impaired.'" (quoting *People v. Harlan*, 54 P.3d 871, 878 (Colo.2002); *Rodriguez v. Dist. Court*, 719 P.2d 699, 704 (Colo.1986)); *Affidavit* [redacted] attached as Exhibit A.

20. Further, the State might attempt to use any such "acknowledgements and representations" to rebut any claims or evidence that Mr. Holmes is mentally ill at either or both phases of a capital trial, which would create an intolerable burden on Mr. Holmes' constitutional right to counsel. *E.g. People v. Finley*, 141 P.3d 911, 914-15 (Colo. App. 2006) (citing *Riley v. Dist. Court*, 507 P.2d 464, 466 (Colo. 1973)) ("Combining the roles of advocate and witness can create a conflict of interest between the attorney and the client because 'a lawyer cannot act as an advocate on behalf of his client, and yet give testimony adverse to the interests of that client in the same proceeding.'"). Such a scenario would implicate not only Sixth Amendment, but

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[2]Along the same lines, the Colorado Supreme Court held in *People v. Branch*, 805 P.2d 1075, 1083 (Colo. 1991), that where a defendant is ordered by the court to undergo a competency evaluation, the court must "advise a defendant that he has the right not to say anything to the psychiatrist during the competency examination, that his statements to the psychiatrist can be used against him at the guilt phase of the trial as rebuttal or impeachment evidence, that he has the right to confer with counsel prior to submitting to the competency examination, and that the court will appoint an attorney for the defendant at state expense if the defendant is unable to retain counsel prior to the competency examination." Notably, the Court did not impose a requirement that the defendant or defense counsel attest to a full understanding of the consequences of a competency examination before one can be conducted. Rather, the Court must simply *advise* the defendant of the consequences.

Eighth Amendment concerns over the fundamental fairness of a capital sentencing proceeding in this matter. *See, e.g., Caldwell v. Mississippi*, 472 U.S. 320, 340 (1985).

21. While defense counsel is required to explore every viable defense on behalf of Mr. Holmes and to assert those defenses which are most persuasive, *see, e.g.*, ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.7 & 10.10.1, *Rompilla v. Beard*, 545 U.S. 374 (2005), *People v. Bergerud*, 223 P.3d 686, 706 (Colo. 2010) (counsel has duty to reasonably investigate possible defenses), they are neither qualified nor obligated to make the sort of representations the Court seeks from them regarding the entry of this potential plea.

22. If Mr. Holmes ultimately attempts to enter into an insanity plea, it will be the task of medical professionals, and ultimately a jury, to reach conclusions about his mental status. "The attorney is appointed for the purpose of representing the defendant, not to serve as the court's fact-finder." *People v. Breaman*, 939 P.2d 1348, 1351 (Colo. 1997); *see also Anders v. California*, 386 U.S. 738, 744 (1967) ("The constitutional requirements of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae.").

23. Because an attestation by Mr. Holmes that he is entering into an insanity plea "knowingly, intelligently, and voluntarily" could later be used to convict and/or sentence him to death, requiring him to sign such a document would also violate his Fifth Amendment privilege against self-incrimination. *See, e.g., Minnesota v. Murphy*, 465 U.S. 420, 429, 434 (1984) (if a defendant asserts the privilege against self-incrimination "he may not be required to answer a question if there is some rational basis for believing that it will incriminate him, at least without *at that time* being assured that neither it nor its fruits may be used against him"); *Allen v. Illinois*, 478 U.S. 364, 368 (1986) ("This Court has long held that the privilege against self-incrimination not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also privileges him not to answer official questions put to him in any other proceedings, civil or criminal, formal or informal, where the answers might incriminate him in future proceedings.");*Wainwright v. Greenfield*, 474 U.S. 284 (1986) (use of defendant's post-*Miranda* assertion of his right to silence as evidence of sanity violated due process); *People v. Razatos*, 699 P.2d 970, 976 (Colo. 1985); Colo. Const. Art. II, § 18.

24. Additionally, Mr. Holmes has a constitutional right to present a defense grounded in the Sixth and Fourteenth Amendments. *See, e.g., Holmes v. South Carolina*, 547 U.S. 319, 324-25 (2006). Requiring defense counsel or Mr. Holmes to sign the proposed acknowledgments and representations would unconstitutionally force him to choose between exercising his right to present an insanity defense and his Sixth Amendment right to conflict-free and effective counsel, his Eighth Amendment right to be free from cruel and unusual punishment, and his Fifth Amendment privilege against self-incrimination. *Simmons v. United States*, 390 U.S. 377, 394 (1968); *United States v. Hardwell*, 80 F.3d 1471 (10th Cir. 1996); *Apodaca v. People*, 712 P.2d 467, 473 (Colo. 1985) ("A constitutional right may be said to be impermissibly burdened when there is some penalty imposed for exercising the right." (citing *Griffin v. California*, 380 U.S. 609 (1965)).

25. Furthermore, requiring Mr. Holmes and defense counsel to sign the extensive acknowledgments and representations the Court is proposing when the same is not required of every defendant in the state of Colorado who enters a not guilty by reason of insanity plea or a notice regarding the intent to introduce mental condition evidence is fundamentally unfair and violates Equal Protection. *See, e.g.* U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 18, 25; *People v. Marcy*, 628 P.2d 69 (Colo. 1981) ("Equal protection of the law is a guarantee of like treatment of all those who are similarly situated."); *McGuire v. People*, 749 P.2d 960, 961 (Colo. 1988) ("Due process guarantees that a criminal defendant will be treated with 'that fundamental fairness essential to the very concept of justice.'").

26. The Court's proposed acknowledgments and representations also violate the separation of powers doctrine and encroach upon the province of the legislature by imposing requirements upon a defendant who wishes to enter an NGRI plea pursuant to 16-8-101 *et seq.* that are not contained in the statute. *See, e.g.*, *People v. Zapotocky*, 869 P.2d 1234, 1243-44 (Colo. 1994) (separation of powers doctrine "imposes on the judiciary . . . a proscription against interfering with the executive or legislative branches . . . . Courts cannot, under the pretense of deciding a case, assume power vested in either the legislative or executive branch of government."); Colo. Const. Art. III.

27. The concerns that defense counsel has about these proposed acknowledgments and representations are particularly acute given the fact that Mr. Holmes is mentally ill and the State is seeking to execute him. *See, e.g., Beck v. Alabama*, 447 U.S. 625, 637-38 (1980) (concerns for heightened reliability which apply during sentencing phase of capital case are equally applicable to issues in merits phase); *People v. Rodriguez*, 78 P.2d 1079 (Colo. 1989). Counsel cannot, under any circumstances, agree to a proposed advisement or "Acknowledgments and Representations" that could reveal privileged communications between attorney and client, be used to harm Mr. Holmes in any way in this or future proceedings, or violate the trust that is the hallmark of the attorney-client relationship.

Request for a Hearing

28. Mr. Holmes requests a hearing on this issue.

Mr. Holmes files this response, 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 29, 2013

I hereby certify that on April 29, 2013, I

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__/__ faxed, or
__√__ hand-delivered

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