

REDACTED

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	Filed FEB 28 2013 CLERK OF THE COMBINED COURTS ARAPAHOE COUNTY, COLORADO COURT USE ONLY
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 1290 Broadway, Suite 900 Denver, Colorado 80203 Phone (303) 764-1400 Fax (303) 764-1478 E-mail: state.pubdef@coloradodefenders.us	Case No. 12CR1522 Division 22
MOTION FOR DEFINITION OF "COOPERATE" AS USED IN C.R.S. § 16-8-106 OR TO DECLARE THE STATUTE UNCONSTITUTIONALLY VAGUE [D-028]	

James Holmes, through counsel, hereby moves this Court to define "cooperate" as used in C.R.S. § 16-8-106. As grounds for this motion, Mr. Holmes states the following:

1. Mr. Holmes is charged with numerous counts of first-degree murder. Since arraignment has not yet occurred, the prosecution has not been required to file its notice of whether it intends to seek the death penalty against Mr. Holmes. Consequently, Mr. Holmes and counsel, and this Court, must proceed on the assumption that it is possible that the prosecution may decide to pursue the death penalty in this case.

2. Mr. Holmes is considering entering a plea pursuant to C.R.S. § 16-8-101.5 and 103. If he does so, he will be subjected to a court-ordered evaluation pursuant to C.R.S. § 16-8-106.

3. C.R.S. § 16-8-106(2)(c) provides:

(c) The defendant shall cooperate with psychiatrists and other personnel conducting any examination ordered by the court pursuant to this section. Statements made by the defendant in the course of such examination shall be protected as provided in section 16-8-107. If the defendant does not cooperate with psychiatrists and other personnel conducting the examination, the court shall not allow the defendant to call any psychiatrist or other expert witness to provide evidence at the defendant's trial concerning the defendant's mental condition including, but not limited to, providing evidence on the issue of insanity or at any sentencing hearing held pursuant to section 18-1.3-1201 or 18-1.4-102, C.R.S. In addition, the fact of the defendant's noncooperation

with psychiatrists and other personnel conducting the examination may be admissible in the defendant's trial to rebut any evidence introduced by the defendant with regard to the defendant's mental condition including, but not limited to, the issue of insanity and in any sentencing hearing held pursuant to section 18-1.3-1201 or 18-1.4-102, C.R.S. This paragraph (c) shall apply to offenses committed on or after July 1, 1999.

C.R.S. § 16-8-106(2)(c) (2012).

4. C.R.S. § 16-8-106(3)(b) provides:

(b) To aid in forming an opinion as to the mental condition of the defendant, it is permissible in the course of an examination under this section to use confessions and admissions of the defendant and any other evidence of the circumstances surrounding the commission of the offense, as well as the medical and social history of the defendant, in questioning the defendant. When the defendant is noncooperative with psychiatrists and other personnel conducting the examination, an opinion of the mental condition of the defendant may be rendered by such psychiatrists or other personnel based upon such confessions, admissions, and any other evidence of the circumstances surrounding the commission of the offense, as well as the known medical and social history of the defendant, and such opinion may be admissible into evidence at trial and in any sentencing hearing held pursuant to section 18-1.3-1201 or 18-1.4-102, C.R.S. It shall also be permissible to conduct a narcoanalytic interview of the defendant with such drugs as are medically appropriate and to subject the defendant to polygraph examination. In any trial or hearing on the issue of the defendant's sanity or eligibility for release and in any sentencing hearing held pursuant to section 18-1.3-1201 or 18-1.4-102, C.R.S., the physicians and other personnel conducting the examination may testify to the results of any such procedures and the statements and reactions of the defendant insofar as the same entered into the formation of their opinions as to the mental condition of the defendant both at the time of the commission of the alleged offense and at the present time. This paragraph (b) shall apply to offenses committed on or after July 1, 1995.

C.R.S. § 16-8-106(3)(b) (2012).

5. The meaning of "cooperate" and its various iterations used throughout C.R.S. 16-8-106 is unclear.

6. For instance, does an assertion of the constitutional right against self-incrimination regarding the facts of this case constitute "noncooperation" that is admissible at trial or sentencing? Some case law suggests that it might be, *see e.g. People v. Tally*, 7 P.3d 172 (Colo. App. 1999), while other case law indicates a defendant is compliant even if he asserts his privilege against self-incrimination. *See People v. Roadcap*, 78 P.3d 1108, 1113 (Colo. App. 2003) ("defendant could comply with the statute without waiving his privilege against self-incrimination by invoking the privilege against self-incrimination.") The United States Supreme Court has held that a defendant's custodial assertion of his right to silence is not admissible against the defendant on the issue of sanity. *See Wainwright v. Greenfield*, 474 U.S. 284 (1986). Mr. Holmes does not know whether the assertion of his privilege against self-incrimination, even if done through counsel, may constitute "noncooperation" that is admissible against him.¹

7. The current statute regarding competency evaluations, C.R.S. § 16-8.5-105, provides that "[i]f the defendant does not cooperate with the competency evaluator and other personnel...and the lack of cooperation is not the result of a developmental disability or a mental disability, then the fact of the defendant's noncooperation with the competency evaluator and other personnel...may be admissible in the defendant's competency or restoration hearing to rebut any evidence introduced by the defendant with regard to the defendant's competency." See C.R.S. § 16-8.5-105(2).

8. Thus, the competency statute clearly requires a determination that any "noncooperation" is not itself a product of a mental disability. However, section 16-8-106 contains no similar provisions. Does "noncooperation" under section 16-8-106 likewise necessitate a determination that any purported "noncooperation" is not the byproduct or result of a mental disability or mental illness before it may be admissible against a defendant?

9. Does "noncooperation" include refusal to submit to an involuntary narcoanalytic examination or any other refusal, in good faith, to comply with physically coercive or intrusive procedures?

10. Mr. Holmes submits that, at the very least, this Court should determine that:

(a) the state doctors should not be allowed to interrogate Mr. Holmes about the facts of the case;

¹ If "noncooperation" includes assertion of the privilege against self-incrimination, then admission of that evidence against Mr. Holmes for any purpose, but particularly if used to establish guilt or to attempt to procure a death sentence, is unconstitutional. Mr. Holmes has elsewhere raised arguments regarding the constitutionality of using any such "noncooperation" against him. *See e.g. MOTION TO DECLARE C.R.S. §§ 16-8-103.6, 103.7, 106, 107 AND 18-1.3-1201(3)(d) UNCONSTITUTIONAL*. He does not waive or abandon those arguments here. Rather, this motion is solely concerned with the meaning and construction of "cooperation" and "noncooperation." The constitutionality of any such construction(s) is a separate issue.

(b) assertion of the privilege against self-incrimination should not constitute "noncooperation";

(c) mere silence should not be considered noncooperation;

(d) before any conduct is labeled "noncooperation" there must be a determination that it did not result from any mental disability or disorder;

(e) Mr. Holmes does not forfeit his right to bodily integrity, and no physically invasive procedures may be used, and an objection to such does not constitute noncooperation; *see e.g. People ex. rel. Ofengand*, 183 P.3d 688 (Colo. App. 2008); *People v. Thompson*, 820 P.2d 1160 (Colo. App. 1991);

(f) the involuntary, forced administration of any drug, absent an emergency which threatens the safety of the defendant, is not permitted as part of any mental examination procedure, and a rational objection to forced medications does not constitute noncooperation, *see e.g. People v. Medina*, 705 P.2d 961 (Colo. 1985); *People ex. rel. Ofengand*, 183 P.3d 688 (Colo. App. 2008); *Washington v. Harper*, 494 U.S. 210, 223-225 (1990); *Sell v. United States*, 539 U.S. 166 (2003);

(g) the use of polygraph examinations is not permitted as part of the mental examination procedure due to their inherent lack of reliability, *see e.g. People v. Anderson*, 637 P.2d 354 (Colo. 1981), and an objection to such does not constitute noncooperation.

11. Mr. Holmes' counsel cannot, in the absence of court rulings interpreting the meaning of "cooperation" and "noncooperation," provide him with effective advice and representation. Currently, "cooperate" as used in section 16-8-106 is unconstitutionally vague and violates due process of law. *See, e.g., U.S. Const. amends. V, XIV; Colo. Const. art. II, § 25; People v. Hickman*, 988 P.2d 628, 643 (Colo. 1999) ("A law is void for vagueness if its prohibitions are not clearly defined and it may be reasonably susceptible to more than one interpretation by a person of common intelligence."); *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); *but see People v. Bondurant*, --- P.3d ---, 2012 WL 1035975 (Colo. App. 2012) (rejecting vagueness challenge to "cooperate").

12. Further, pursuant to statute and case law, Mr. Holmes must be properly advised of the consequences of entering a plea pursuant to section 16-8-103. *See e.g. C.R.S. § 16-8-103(4); People v. Branch*, 805 P.2d 1075 (Colo. 1991); *Estelle v. Smith*, 451 U.S. 454 (1981). Likewise, he must be aware of the nature and scope of any resulting examination. "[T]he Sixth Amendment right to counsel requires that counsel be given *advance* notice of the scope and nature of a psychological evaluation so that counsel can discuss with the client the advisability of undergoing the examination and give other appropriate advice." *Delguidice v. Singletary*, 84 F.3d 1359, 1362 (11th Cir. 1996)(emphasis original). "The Supreme Court case law is clear that, under the Sixth Amendment, counsel must have advance notice not only of the fact of an examination but also the scope of the examination." *Id.* at 1363. In addition to the Sixth Amendment, Mr. Holmes has Fifth Amendment protections in this context as well and must be

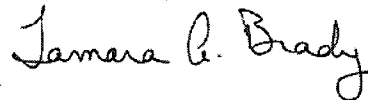
informed of the consequences of any potential Fifth Amendment waiver. *Estelle v. Smith, supra* at 467.

13. Rulings on, and an advisement regarding, the meaning of "cooperate" are necessary to protect Mr. Holmes' rights to due process and effective assistance of counsel, and against self-incrimination and cruel and unusual punishment, under the United States and Colorado Constitutions. U.S. Const. amends. V, VI, VIII, XIV; Colo. Const. art. II, §§ 16, 18, 20, 25.


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



Jason Middleton (No. 25314)
Deputy State Public Defender

Dated: February 28, 2013

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 1290 Broadway, Suite 900 Denver, Colorado 80203 Phone (303) 764-1400 Fax (303) 764-1478 E-mail: state.pubdef@coloradodefenders.us	Case No. 12CR1522 Division 22
<p align="center">ORDER RE: MOTION FOR DEFINITION OF "COOPERATE" AS USED IN C.R.S. § 16-8-106 OR TO DECLARE THE STATUTE UNCONSTITUTIONALLY VAGUE [D-028]</p>	

Defendant's motion is hereby GRANTED _____ DENIED _____.

BY THE COURT:

_____ JUDGE

_____ Dated

I hereby certify that on February 28, 2013, I

mailed, via the United States Mail,
 faxed, or
 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
Fax: 720-874-8501