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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 σ COURT USE ONLY σ
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. JAMES HOLMES, Defendant	
DOUGLAS K. WILSON, Colorado State Public Defender Daniel King (No. 26129) Tamara A. Brady (No. 20728) Chief Trial Deputy State Public Defenders 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 TO DEFINE "MENTAL CONDITION" AS USED IN C.R.S. §§ 16-8-103.6, 16-8-107(3)(B) AND 18-1.3-1201(3)(D) OR DECLARE THE STATUTES UNCONSTITUTIONALLY VAGUE [D-029]	

James Holmes, through counsel, hereby moves this Court to define "mental condition" as used in C.R.S. §§ 16-8-103.6, 16-8-107(3)(b) and/or 18-1.3-1201(3)(d). 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. However, in order to ascertain whether to enter such a plea, Mr. Holmes must assess the distinction between a plea entered pursuant to 16-8-101.5(1)(a) ("diseased or defective in mind"), 16-8-101.5(1)(b) ("a condition of mind caused by a mental disease or defect"), and a general not guilty plea involving expert opinion concerning "mental condition" under 16-8-107(3)(b) at the trial on the merits. In assessing which plea to enter in a potential capital case, Mr. Holmes must also assess the nature and meaning of "mental condition" as used in C.R.S. § 18-1.3-1201(3)(d), as it applies to any potential sentencing hearing.

3. The phrases "diseased or defective in mind" and "mental disease or defect" are statutorily defined. *See* C.R.S. § 16-8-101.5(2). However, the phrase "mental condition" is not defined by statute.

4. C.R.S. 16-8-103.6 provides:

(2)(a) *A defendant who places his or her mental condition at issue by pleading not guilty by reason of insanity pursuant to section 16-8-103, or disclosing witnesses who may provide evidence concerning the defendant's mental condition during a sentencing hearing held pursuant to section 18-1.3-1201 or 18-1.4-102, C.R.S., or, for offenses committed on or after July 1, 1999, by seeking to introduce evidence concerning his or her mental condition pursuant to section 16-8-107(3) waives any claim of confidentiality or privilege as to communications made by the defendant to a physician or psychologist in the course of an examination or treatment for such mental condition for the purpose of any trial, hearing on the issue of such mental condition, or sentencing hearing conducted pursuant to section 18-1.3-1201 or 18-1.4-102, C.R.S. The court shall order both the prosecutor and the defendant to exchange the names, addresses, reports, and statements of any physician or psychologist who has examined or treated the defendant for such mental condition.*

C.R.S. § 16-8-103.6 (2012)(emphasis added).

5. C.R.S. § 16-8-107(3)(b) provides:

Regardless of whether a defendant enters a plea of not guilty by reason of insanity pursuant to section 16-8-103, the defendant shall not be permitted to introduce evidence in the nature of expert *opinion concerning his or her mental condition* without having first given notice to the court and the prosecution of his or her intent to introduce such evidence and without having undergone a court-ordered examination pursuant to section 16-8-106. A defendant who places *his or her mental condition* at issue by giving such notice waives any claim of confidentiality or privilege as provided in section 16-8-103.6. Such notice shall be given at the time of arraignment; except that the court, for good cause shown, shall permit the defendant to inform the court and prosecution of the intent to introduce such evidence at any time prior to trial. Any period of delay caused by the examination and report provided for in section 16-8-106 shall be excluded, as provided in section 18-1-405(6)(a), C.R.S., from the time within which the defendant must be brought to trial.

C.R.S § 16-8-107(3)(b) (2012).

6. C.R.S. §§ 18-1.3-1201(3)(d)and (e) provide as follows:

(d)(I) Except as otherwise provided in subparagraph (II) of this paragraph (d), if the witnesses disclosed by the defendant pursuant

to paragraph (c) of this subsection (3) include *witnesses who may provide evidence concerning the defendant's mental condition at the sentencing hearing* conducted pursuant to this section, the trial court, at the request of the prosecuting attorney, shall order that the defendant be examined and a report of said examination be prepared pursuant to section 16-8-106, C.R.S.

(II) The court shall not order an examination pursuant to subparagraph (I) of this paragraph (d) if:

(A) Such an examination was previously performed and a report was prepared in the same case; and

(B) The report included an opinion concerning how any mental disease or defect of the defendant or condition of mind caused by mental disease or defect of the defendant affects the mitigating factors that the defendant may raise at the sentencing hearing held pursuant to this section.

(e) If the witnesses disclosed by the defendant pursuant to paragraph (c) of this subsection (3) include *witnesses who may provide evidence concerning the defendant's mental condition at a sentencing hearing* conducted pursuant to this section, the provisions of section 16-8-109, C.R.S., concerning testimony of lay witnesses shall apply to said sentencing hearing.

C.R.S. §§ 18-1.3-1201 (3)(d), (e) (2012) (emphasis added).¹

7. The term “mental condition” is not defined in 16-8-101 *et. seq.*, or elsewhere in Title 16, Article 8, and the meaning and scope of the phrase is unclear. *See People v. Flippo*, 159 P.3d 100 (Colo. 2007); *People v. Vanrees*, 125 P.3d 403 (Colo. 2005); *People v. Herrera*, 87 P.3d 240 (Colo. App. 2003). To date, the limited guidance provided by the courts has not eliminated the vagueness of the term. *See, e.g., Flippo, supra* at 105 (“mental condition” means different things at different places in §§16-8-101 *et seq.*). Nor is the term “mental condition” defined anywhere within C.R.S. § 18-1.3-1201 or related statutes. No Colorado case has construed the meaning and scope of the term “mental condition” as used in C.R.S. § 18-1.3-1201.

¹ Mr. Holmes believes that the requirement of a court-ordered examination and waiver of privilege, prior to trial on the merits, in order for a defendant to present relevant mitigation evidence at a sentencing hearing is unconstitutional for a number of reasons. Mr. Holmes has set forth a constitutional objection to C.R.S. 18-1.3-1201(3), as well as the provisions of C.R.S. 16-8-106, 16-8-103.6, and 16-8-107, to the extent they are made applicable to sentencing proceedings under 18-1.3-1201, in a separate motion. Mr. Holmes does not waive or abandon any claims regarding the unconstitutionality of those provisions, either on their face or as applied to him in this case. In this motion, however, Mr. Holmes is simply trying to ascertain the purported meaning and application of the statutes involved.

8. For instance, section 16-8-103.6 itself initially uses the phrase "mental condition" to refer to insanity and competency under sections 16-8-103 and 16-8-110. That same statute subsequently uses the exact same phrase - "mental condition" - to refer to evidence under section 16-8-107(3). The Colorado Supreme Court has held that subsection 107(3)(b) "uses 'mental condition' in a notably different manner" than "mental condition" as used for the affirmative defense of insanity. *See e.g. Flippo, supra* at 105. *Flippo* acknowledged that "mental condition" means different things under different circumstances and in different parts of the statutory scheme. *Id.* In §16-8-107(1.5)(a), §16-8-107(1)(a) and §16-8-103.6(2)(a), "mental condition" means "capacity to form a culpable mental state." *See People v. Herrera*, 87 P.3d 240,245,248,249 (Colo.App.2003).

9. C.R.S. § 16-8-106(7)(a) is particularly effective in highlighting the vague and uncertain meaning of the phrase "mental condition." That subsection provides that, where a defendant provides notice of intent to introduce evidence of "mental condition," he or she must submit to an evaluation and the evaluator must render:

An opinion as to whether the defendant suffered from a mental disease or defect or from a condition of mind cause by a mental disease or defect that affected the defendant's mental condition...

C.R.S. § 16-8-106(7)(a) (2012). Thus, the evaluator is to provide an opinion on how the defendant's condition of mind affected his mental condition? The circularity is apparent, unless condition of mind is different than mental condition – which then begs the question of what does "mental condition" mean?

10. The shifting and uncertain meaning of "mental condition" throughout the statutory scheme raises the unresolved question of what is the meaning of "mental condition" as used in reference to any potential capital sentencing proceeding pursuant to section 18-1.3-1201. Does it refer to evidence of sanity and competency, or does it refer to something broader and undefined?

11. A defendant who enters a plea of not guilty by reason of insanity under 16-8-101.5, or who provides notice of an intent to present expert testimony of a "mental condition" at the trial on the merits pursuant to 16-8-107(3)(b), triggers significant and serious consequences. A potential capital defendant who, as part of the disclosures required by C.R.S. § 18-1.3-1201 and Crim. P. 32.1, discloses any "witnesses who may provide evidence concerning the defendant's mental condition" during a sentencing hearing held pursuant to C.R.S. § 18-1.3-1201 triggers the same significant consequences. These consequences include, but are not limited to, requiring the accused to:

(a) waive any claim of confidentiality or privilege "as to communications made by the accused to a physician or psychologist in the course of an examination or treatment for such mental condition for the purpose of any trial, hearing on the issue of such mental condition, or sentencing hearing conducted pursuant to section 18-1.3-1201...." pursuant to §16-8-103.6(2)(a);

(b) undergo a court-ordered examination pursuant to §16-8-106;

(c) “cooperate with psychiatrists and other personnel conducting any examination ordered by the court” pursuant to §16-8-106 – which seems to require the accused to waive his constitutional right to remain silent; and/or

(d) lose his constitutional right to call any psychiatrist or other expert witness to provide evidence concerning the defendant’s mental condition at the defendant’s trial or at any potential sentencing hearing held pursuant to section 18-1.3-1201. *See* C.R.S. 16-8-106(2)(c).

12. Defense counsel cannot intelligently or effectively decide what plea to enter or evaluate how to proceed without knowing what constitutes “mental condition” evidence for purposes of 16-8-107(3)(b) and/or 18-1.3-1201(3)(d), or attempt to advise Mr. Holmes of the consequences of seeking to introduce “mental condition” evidence at sentencing, without knowing what constitutes “mental condition” evidence for purposes of C.R.S. §§ 16-8-107(3)(b) and/or 18-1.3-1201(3)(d) and (e). Further, is “mental condition” as used in C.R.S. § 18-1.3-1201 referring to a mental impairment affecting a defendant’s sanity or ability to form a culpable mental state, or something else? Mr. Holmes cannot discern, and the statutory provisions and case law provide inadequate guidance, whether “mental condition” as used in C.R.S. § 18-1.3-1201(3)(d) encompasses more than sanity and competency issues.

13. Without a proper construction of the meaning and scope of the phrase “mental condition,” counsel for Mr. Holmes is unable to determine what evidence may fall within the ambit of C.R.S. §§ 16-8-107(3)(b), 16-8-103.6, and 18-1.3-1201(3)(d). Counsel currently cannot determine what evidence beyond insanity as defined in 16-8-101.5 may or may not trigger the examination and waiver provisions of C.R.S. §§ 16-8-103.6 and 16-8-106. Counsel for Mr. Holmes cannot make an intelligent and effective decision regarding which plea to enter or how to proceed in a potential capital case without knowing the meaning and scope of the term “mental condition” as used in 16-8-107(3)(b) and 18-1.3-1201(3)(d). Further, counsel cannot effectively advise Mr. Holmes regarding the comparative consequences of proceeding in a particular fashion. *See e.g. Estelle v. Smith, supra; Buchanan v. Kentucky*, 483 U.S. 402,423 (1987) (For counsel to effectively advise a defendant regarding consequences of an examination, counsel must be made aware of the “possible uses to which [defendant’s] statements in the proceeding court be put.”).

14. The phrase "mental condition" as used in C.R.S. §§ 16-8-107(3) and 18-1.3-1201(3)(d) 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 “mental condition”). The only thing that *Flippo, supra* makes clear is that “mental condition” is an amorphous term with multiple meanings. "Mental condition" apparently means something different in each portion of the statute, but no definition is provided. A defendant in a potential capital case cannot be asked to simply guess, and proceed without a definition of what the phrase means. In order to effectively assess the best course of action and to effectively represent and advise Mr. Holmes, counsel needs to understand and assess which courses of action will or will not result in a court-ordered examination which is "'literally a life or death matter' which a

defendant should not be required to make without 'the guiding hand of counsel.'" *Satterwhite v. Texas*, 486 U.S. 249, 254 (1988), quoting *Estelle v. Smith*, 451 U.S. 454, 471 (1981). Mr. Holmes' counsel cannot, in the absence of court rulings interpreting the phrase "mental condition," provide him with effective advice on this possible "life or death matter."

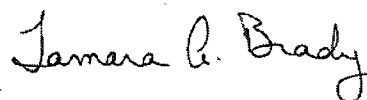
15. The statutes at issue may only be enforced if they are constitutional. Also, if they are susceptible to more than one interpretation, the interpretation which renders the statute constitutional must be adopted. *See e.g.* C.R.S. § 2-4-201(1)(a); *People v. Washburn*, 197 Colo. 419, 593 P.2d 962 (1979). Moreover, the rule of lenity requires courts to construe ambiguities in statutes in the defendant's favor. *See e.g. People v. Lowe*, 660 P.2d 1261 (Colo. 1983).

16. Rulings on, and an advisement regarding, all of the foregoing questions 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.

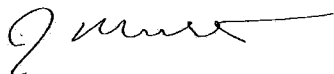
Mr. Holmes files this motion, and makes all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, on the following grounds and authorities: the Due Process Clause, the Right to a Fair Trial by an Impartial Jury, the Rights to Counsel,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



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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	
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	σ COURT USE ONLY σ Case No. 12CR1522 Division 22
<p align="center">ORDER RE: MOTION TO DEFINE "MENTAL CONDITION" AS USED IN C.R.S. §§ 16-8-103.6, 16-8-107(3)(B) AND 18-1.3-1201(3)(D) OR DECLARE THE STATUTES UNCONSTITUTIONALLY VAGUE [D-029]</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:

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AKW