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District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	Filed JUN - 3 2013 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 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
MOTION FOR DEADLINE ON ALL PROSECUTION EVIDENCE TESTING AND MOTION TO RELEASE EVIDENCE TO DEFENSE FOR TESTING [D-063]	

CERTIFICATE OF CONFERRAL

The District Attorney states that they object to the motion, and that they will file a response.

Pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article II, sections 16, 18 and 25 of the Colorado Constitution, Mr. Holmes, through counsel, respectfully moves for a deadline on all prosecution evidence testing and to release evidence to the defense for testing. In support of this motion, he states the following:

1. Defense counsel believe there are approximately 2000 pieces of physical evidence in this case. The prosecution and law enforcement have had exclusive control over this physical evidence for ten months.
2. Mr. Holmes asks the Court to order a deadline by which all testing of the physical evidence be completed by the prosecution, and that the results of all of that testing be promptly disclosed to the defense, so that the evidence can be released to the defense for confidential forensic testing and evaluation.
3. Once the prosecution completes its testing of the evidence, and the results of the testing are disclosed, then defense counsel can properly evaluate and decide how to conduct their own investigation of the physical evidence.

4. It is essential that Mr. Holmes' lawyers have access to the alleged evidence in this case without interference or delays if they are to expeditiously and effectively prepare Mr. Holmes' defense. Complete and accurate preservation and production of all of the physical evidence seized in this case as well as complete and accurate preservation and production of any and all notes, memoranda, computer generated documents, reports and the results of all scientific tests and comparisons, generated from any examinations, evaluations and testing of any and all physical evidence is therefore paramount.

5. Pursuant to Crim. P. 16, Part I (a)(1)(III), the prosecution is required to produce to the accused any notes, memoranda, reports or statements of experts made in connection with the particular case, including results of scientific tests, experiments or comparisons. The State bears the same responsibility under the due process, compulsory process, and right to counsel clauses of the federal and Colorado Constitutions. The State also bears an obligation under Crim. P. 16 Part I (1)(a)(IV) to make all of the physical evidence available to the accused. The State bears the same responsibility under the due process, compulsory process, and right to counsel clauses of the federal and Colorado Constitutions.

6. Colorado Rule of Criminal Procedure 16, Part I(a)(3), provides:

(3) The prosecuting attorney's obligations under this section (a) extend to material and information in the possession or control of members of his staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report, or with reference to the particular case have reported, to his office.

7. Colorado Rule of Criminal Procedure 16, Part I(b)(4), provides:

(4) The prosecuting attorney shall ensure that a flow of information is maintained between the various investigative personnel and his office sufficient to place within his possession or control all material and information relevant to the accused and the offense charged.

8. Colorado Rule of Criminal Procedure 16, Part I(c)(1), provides:

(1) Upon defense counsel's request and designation of material or information which would be discoverable if in the possession or control of the prosecuting attorney and which is in the possession or control of other governmental personnel, the prosecuting attorney shall use diligent good faith efforts to cause such material to be made available to defense counsel.

9. Colorado Rule of Criminal Procedure 16, Part I(d), provides:

(1) The court in its discretion may, upon motion, require disclosure to defense counsel of relevant material and information not covered by Parts I(a), (b), and (c), upon a showing by the defense that the request is reasonable.

10. Mr. Holmes' demands that the State preserve and produce all physical evidence, including all physical evidence sent to other agencies, and to preserve and produce any and all notes, memoranda, reports, documents, materials or scientific or comparison results generated from the testing, evaluation and comparison of any and all physical evidence, are also mandated by the due process clauses of the Constitutions. U.S. Const. amends. V, XIV; Colo. Const., art. II, § 25; see *Kyles v. Whitley*, 514 U.S. 419 (1995); *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Indeed, information and material that sheds light on the reliability and credibility of the State's investigation and prosecution, that can be used to impeach that investigation and prosecution, and that aids in the investigation and preparation of the defense is appropriate information for the defense to have possession of. See *Brady v. Maryland*, *supra*; *Kyles v. Whitley*, *supra*; *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) and *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (impeaching as well as exculpatory is favorable to the accused under *Brady* and constitutes *Brady* material).

11. The State seeks to kill Mr. Holmes, a presumptively innocent person. In a case in which the prosecution seeks to kill an accused, the stakes are obviously higher than in any other case. Death is a different kind of punishment than any other which may be imposed in this country and in this state. *Gardner v. Florida*, 430 U.S. 349, 357-358 (1977); see *Mills v. Maryland*, 486 U.S. 367, 376 (1988); *California v. Ramos*, 463 U.S. 993, 998-99 (1983); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *People v. Young*, 814 P.2d 834, 839 (Colo. 1991); *People v. Rodriguez*, 794 P.2d 965, 972 (Colo. 1990). "From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. at 357-358.

12. Because the State seeks to kill Mr. Holmes, he is guaranteed an enhanced right to due process and there exists a need for a heightened level of reliability in the fact-finding process. See *Beck v. Alabama*, 447 U.S. 625, 637-638 (1980); *People v. Tenneson*, 788 P.2d 786 (Colo. 1990); *People v. Drake*, 748 P.2d 1237 (Colo. 1988); *People v. Durre*, 690 P.2d 165 (Colo. 1984). "In a capital case, there is a strong presumption that possibly exculpatory evidence should be given to the defendant." *People v. Rodriguez*, 786 P.2d 1079, 1082 (Colo. 1989). In any case and particularly in a capital case, "[t]he determination of what may be useful to the defense can properly and effectively be made only by an advocate." *Dennis v. United States*, 384 U.S. 855 (1966).

13. In addition, because this is a capital case, Mr. Holmes is guaranteed the right under the due process and cruel and unusual punishment clauses to investigate, discover and obtain mitigation evidence and to present that evidence to the jury. See *Skipper v. South Carolina*, 476 U.S. 1 (1986); U.S. Const., amends. V, VIII, XIV; Colo. Const., art. II, § 20, 25.

14. To render effective assistance of counsel, an attorney must investigate his or her client's case. *See People v. White*, 182 Colo. 417, 514 P.2d 69 (1973); *People v. Dillon*, 739 P.2d 919 (Colo. App. 1988). Defense counsel cannot adequately and effectively investigate Mr. Holmes' case without the proper production of the information and materials requested in this motion. Effective investigation is necessary to promote and protect, among other important constitutional rights, the effective and complete cross-examination of witnesses called to testify against an accused, particularly those witnesses who testify on behalf of the State as expert witnesses. *See* C.R.E. 705. The underlying facts or data contained in the notes, memoranda and documents generated by these witnesses before, during and after the evaluation and testing of the physical evidence in this case constitutes a proper area of cross-examination. C.R.E. 705.

15. In order to protect and preserve Mr. Holmes' right to effective assistance of counsel, there must be complete and accurate preservation and production of all of the physical evidence seized in this case as well as complete and accurate preservation and production of any and all notes, memoranda, computer generated documents, reports and the results of all scientific tests and comparisons, generated from any examinations, evaluations, comparisons and testing of any and all physical evidence.

16. With respect to any governmental personnel or governmental agency that has either regularly reported to the State or has reported to the State concerning Mr. Holmes, the physical evidence seized in this case and of which the State has not disclosed to the defense, Mr. Holmes further demands that the State produce to him all material and information from these agencies and personnel that have reported to the State or its agents in this case, including CBI, FBI, and any others. The presently unknown agencies or governmental personnel would certainly include, but not be limited to, any other law enforcement authority or governmental personnel in Colorado, and any federal law enforcement authorities or other federal governmental personnel.

17. Even if the State contends that certain information and material is held by other governmental personnel and not by the State or its agents in this case, pursuant to Crim. P. 16, Part I, (c)(1), Mr. Holmes demands that the prosecution make diligent good faith efforts to discover to the defense all material and information to include but not be limited to all notes, reports, documents, computer generated documents, tangible items, and memorandum which would be discoverable if in the possession or control of the prosecution but which is in the possession of other governmental personnel, including but not limited to, CBI and FBI.

18. Denial of this discovery and production request would violate Mr. Holmes's right to the effective assistance of counsel, right to due process, right to confrontation, right to cross-examination, right to trial by jury, right to compulsory process and right to be free from cruel and unusual punishment under the Constitutions. U.S. Const., amends. V, VI, VIII, XIV; Colo. Const., art. II, §§ 3, 6, 7, 10, 11, 16, 18, 20, 23, 25, and 28 of the Colorado Constitution, and Crim. P. 16.

19. Mr. Holmes therefore moves this Court to order the State to preserve any and all physical evidence and to preserve any and all notes, memoranda, computer generated documents,

reports and the results of all scientific tests and comparisons generated from any examinations, evaluations, comparisons and testing of any and all physical evidence. Further, Mr. Holmes moves this Court to order the State to make all of the physical evidence and foregoing material and information available for Mr. Holmes's use, evaluation, examination and testing immediately after the prosecution and its agents have completed any such testing or evaluation.

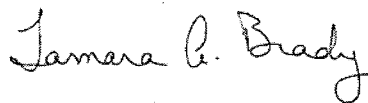
Request for a Hearing

20. 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.



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Chief Trial Deputy State Public Defender



Tamara A. Brady (No. 20728)
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Deputy State Public Defender

Dated: June 3, 2013

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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
ORDER RE: MOTION FOR DEADLINE ON ALL PROSECUTION EVIDENCE TESTING [D-063]	

Defendant's motion is hereby GRANTED _____ DENIED _____.

BY THE COURT:

_____ JUDGE

_____ Dated

I hereby certify that on June 3, 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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