

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	<div style="text-align: center;"> <p>FILED</p> <p>JUN - 8 2013</p> <p>CLERK OF DISTRICT COURT ARAPAHOE COUNTY, COLORADO</p> <p>σ COURT USE ONLY σ</p> </div>
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff  v.  <b>JAMES HOLMES,</b> 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: <a href="mailto:state.pubdef@coloradodefenders.us">state.pubdef@coloradodefenders.us</a>	Case No. <b>12CR1522</b> <div style="text-align: center; font-size: 2em; font-weight: bold; opacity: 0.5;">Redacted</div> Division 26
<p><b>MOTION FOR IMMEDIATE AND ONGOING DISCLOSURE OF ALL EXCULPATORY INFORMATION, INCLUDING ALL INFORMATION THAT MAY TEND TO SUGGEST THAT A LIFE SENTENCE, RATHER THAN A DEATH SENTENCE, IS APPROPRIATE [D-071]</b></p>	

**CERTIFICATE OF CONFERRAL**

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

Mr. Holmes, through counsel, asks that the prosecution immediately disclose, and that this Court order the prosecution to disclose, any and all exculpatory information, *i.e.*, any and all information that may tend to suggest that a life sentence, rather than a death sentence is appropriate. As grounds for support, he states the following:

1. Pursuant to Crim.P. 16, Part I (a)(2), the prosecuting attorney must disclose to defense counsel “any material or information within his possession or control which tends to negate the guilt of the accused as to the offense charged *or would tend to reduce the punishment therefore.*” (emphasis added).

2. Thus, pursuant to Rule 16, the prosecution is clearly obligated to disclose any information or evidence that tends to establish that a life sentence, rather than a death sentence, is appropriate. This would include any information or evidence that tends to show any mitigating circumstance and/or its weight, as well as any information or evidence that tends to refute or rebut any statutory aggravating factor or its lack of weight, or other aggravating circumstance, as well as any information or evidence that tends to show that the death penalty is not necessary, *i.e.*, that refutes the notion that death, rather than life, is the appropriate penalty.

3. The material referenced above must also be disclosed to the defense by the prosecution under the due process principles set forth in *Brady v. Maryland*, 373 U.S. 83 (1963) and *Kyles v. Whitley*, 514 U.S. 419 (1995).

4. A similar disclosure requirement is imposed on the prosecution pursuant to Crim.P. 32.1(d)(5), which is labeled “Material Favorable to the Accused,” and which requires the prosecution to disclose “any material information ... that would tend to mitigate or negate the finding of any of the aggravating factors the prosecuting attorney intends to prove at the sentencing hearing.” If *Dunlap* is applied so as to allow the admission of non-statutory aggravating factors at step 4, the reference in Rule 32.1(d)(5) to “aggravating factors” would presumably include both statutory aggravating factors and non-statutory aggravating factors. Moreover the Rule’s reference to information that would tend to “mitigate” aggravating factors would necessarily include all mitigating circumstances and information that would tend to show that the death penalty is unnecessary and/or that a life sentence is adequate.

5. To the extent there are any gaps between the scope of Rule 16 and Rule 32.1 vis-à-vis the prosecution’s discovery obligations, both Rules apply to the prosecution and the prosecution must disclose all information covered by either Rule.

6. The prosecution must produce Rule 16, Part I(a)(2) discovery as soon as practicable, and the deadline for the prosecution to disclose Rule 32.1(d)(5) material favorable to the accused passed weeks ago.

7. Although the cited rules of discovery should be self-executing, past experience in Colorado capital cases has tended to show that many prosecutors have a difficult time recognizing mitigation and/or evidence or information that would tend to be mitigating. Accordingly, Mr. Holmes requests a specific order from this Court requiring the State to produce the required exculpatory (i.e. tending to lessen punishment) information.

8. In light of the dearth of mitigating information produced in discovery to date by the prosecution, it appears that the prosecution in all likelihood has not fulfilled its discovery obligations pursuant to Rule 16 and Rule 32.1 in terms of producing the required information and evidence. Accordingly, Mr. Holmes asks this Court to order the prosecution to disclose immediately all information or evidence, as described in Paragraph 2 above, which is in its possession or control.

#### **Request for a Hearing**

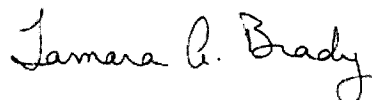
9. Mr. Holmes requests a hearing on this motion.

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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Daniel King (No. 26129)  
Chief Trial Deputy State Public Defender



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



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

Dated: June 3, 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.  <b>JAMES HOLMES,</b> 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: <a href="mailto:state.pubdef@coloradodefenders.us">state.pubdef@coloradodefenders.us</a>	Case No. <b>12CR1522</b>       Division 26
<p style="text-align: center;"><b>ORDER RE: MOTION FOR IMMEDIATE AND ONGOING DISCLOSURE OF ALL EXCULPATORY INFORMATION, INCLUDING ALL INFORMATION THAT MAY TEND TO SUGGEST THAT A LIFE SENTENCE, RATHER THAN A DEATH SENTENCE, IS APPROPRIATE [D-071]</b></p>	

Defendant's motion is hereby GRANTED \_\_\_\_\_ DENIED \_\_\_\_\_.

BY THE COURT:

\_\_\_\_\_ JUDGE

\_\_\_\_\_ Dated

I hereby certify that on June 3rd, 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

Mona Whorton.