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District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	<div style="text-align: center;">  JUN 18 2013 DISTRICT COURT ARAPAHOE COUNTY, CO </div> <p style="text-align: center;">σ COURT USE ONLY σ</p>
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 A BILL OF PARTICULARS [D-130]	

CERTIFICATE OF CONFERRAL

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

Mr. Holmes, through counsel, moves for a bill of particulars pursuant to Colo. R. Crim. P. 7(g), the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Article II, sections 16, 18 and 25 of the Colorado Constitution. In support of this motion, Mr. Holmes states the following:

1. Both the federal and Colorado constitutions entitle Mr. Holmes to sufficient notice of the charges against him. *See* U.S. Const. amend. V, VI; Colo. Const. art. II, §§ 16, 25. The United States Supreme Court has held that “[n]o principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.” *Cole v. Arkansas*, 333 U.S. 196, 201 (1948). *See also People v. Cooke*, 525 P.2d 426, 428 (1974) (“The right of an accused to notice of the charges which have been made against him constitutes a fundamental constitutional guarantee and lies at the foundation of due process of law The notice given must be sufficient to advise the accused of the charges, to give him a fair and adequate opportunity to prepare his defense, and to ensure that he is not taken by surprise because of evidence offered at the time of trial.”).

2. In addition, the Sixth Amendment and Article II, Section 16 of the Colorado Constitution entitle Mr. Holmes to the effective assistance of counsel. Pursuant to these

constitutional provisions as well as the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, counsel are obligated to conduct a thorough and independent pretrial investigation in order to prepare an adequate defense on Mr. Holmes's behalf. See *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948) ("Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved . . ."); *Powell v. Alabama*, 287 U.S. 45, 57 (1932) (noting that "thorough-going investigation and preparation" by defense counsel is "vitally important"); *People v. Tackett*, 742 P.2d 957, 959 (Colo. App. 1987) ("A defendant is entitled to a pretrial investigation of sufficient thoroughness to develop potential defenses and uncover facts relevant to guilt and punishment."); ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.7 (A), p. 77, rev. ed. 2003 ("Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty.").

3. Moreover, "[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment . . . or in the Compulsory Process or Confrontation clauses of the Sixth Amendment," the Constitution also guarantees Mr. Holmes "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986); see also *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006); *Davis v. Alaska*, 415 U.S. 308 (1974); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *Washington v. Texas*, 388 U.S. 14, 23 (1967); *Strickland v. Washington*, 466 U.S. 668, 684–685 (1984) ("The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment").

4. Colo. R. Crim. P. 7(g) serves to protect these constitutional principles by providing a mechanism for a criminal defendant to obtain additional information when, as in this case, the charging document lacks sufficiently particularized information about the alleged offenses to enable him to prepare an adequate defense.

5. The Colorado Supreme Court has recognized that a bill of particulars is required with respect to a charge or an element of an offense when the charging document, despite quoting the statutory definition of an offense, "is nonetheless so indefinite in its statement of a particular charge that it does not afford the defendant a fair opportunity to procure witnesses and prepare for trial." *People v. Dist. Court for Second Judicial Dist.*, 603 P.2d 127, 129 (Colo. 1979); see also *People v. Williams*, 984 P.2d 56, 64 (Colo. 1999) ("[A] defendant may request a bill of particulars seeking specificity when the information pleads the statutory elements of the offense but the count lacks specificity.").

6. A trial court should grant a request for a bill of particulars when "the requested information is necessary for the defendant to prepare his defense and to avoid prejudicial surprise." *Williams*, 984 P.2d at 64. See also *Erickson v. People*, 951 P.2d 919, 921 (Colo. 1998) (bill of particulars forecasts "the facts that the prosecution intends to prove and limits the proof at trial to those areas described in the bill of particulars"); *Balltrip v. People*, 157 Colo. 108, 112-113, 401 P.2d 259, 262 (1965) ("[T]he purpose of a bill of particulars is to define more specifically the offense charged.").

7. The charging document in this case is constitutionally deficient with respect to the 70 charged counts of attempted extreme indifference murder (Counts 83 through 140 and Counts 144, 146, 148, 150, 152, 154, 156, 158, 160, 162, 164, and 166).

8. In *People v. Castro*, 657 P.2d 932 (Colo. 1983), the Colorado Supreme Court rejected an equal protection challenge in which the defendant alleged that the attempted extreme indifference murder statute was indistinguishable from first-degree extreme indifference assault. In rejecting this challenge, the Court stated that “attempted extreme indifference murder requires an “added and critical element: the actor’s conduct must constitute a substantial step towards the completion of an extreme indifference murder which, by definition, necessarily includes the causation of another’s death.” *Id.* at 941.

9. The Court continued, “Thus, attempted extreme indifference murder requires conduct which poses a real and proximate risk of death to the victim,” as opposed to first-degree extreme indifference assault, which only contains a “serious bodily injury” element. This element “includes those injuries which involve serious permanent or protracted loss or impairment of the function of any part or organ of the body, even though in these instances there may be no risk of death resulting from the injuries.” *Id.*

10. In order to fulfill their constitutional obligations and satisfy Mr. Holmes’ constitutional rights, counsel therefore require the following information with respect to each of the 70 attempted extreme indifference murder counts:

- a. What are the factual circumstances demonstrating that Mr. Holmes’ conduct posed “a real and proximate risk of death” to the victim, which, pursuant to *Castro*, is the element that distinguishes attempted extreme indifference murder from first-degree extreme indifference assault.

11. No legitimate purpose is served by allowing the State to proceed to trial without being required to provide this additional information. A disclosure in the nature of a bill of particulars with respect to the above-referenced counts would simply enhance the ability of defense counsel to “make the adversarial testing process work . . .” *People v. Hickey*, 914 P.2d 377, 379 (Colo. App. 1995) (quoting *Strickland v. Washington*, 466 U.S. 668, 690 (1984)).

12. Nor would an order requiring the prosecution to produce a bill of particulars impose any significant burden on the State. The benefits which accrue to Mr. Holmes greatly outweigh the minimal burden on the prosecution to provide the information requested in such a disclosure.

13. It is particularly important that Mr. Holmes receive sufficient notice of the charges against him such that he can adequately defend himself at trial because the government is seeking the death penalty in this case. “The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations.” *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). Moreover, the Eighth and Fourteenth Amendments of the United States Constitution require a heightened degree of reliability in capital cases that has no parallel in noncapital cases. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Similarly, the “Colorado constitutional proscription of cruel and unusual

punishments requires that any sentence to death be both certain and reliable. This requirement is based on the recognition that there is a qualitative difference between the penalty of death and all other penalties.” *People v. Young*, 814 P.2d 834, 843 (Colo. 1991). *See also People v. Tenneson*, 788 P.2d 786, 790-92 (Colo. 1990). Accordingly, these proceedings – and this Court’s consideration of Mr. Holmes’s request for a bill of particulars – should be characterized and governed by a “heightened concern for fairness and accuracy.” *Ford v. Wainwright*, 477 U.S. 399, 414 (1986); *Spaziano v. Florida*, 468 U.S. 447, 456 (1984) (acknowledging need for heightened reliability in capital proceedings).

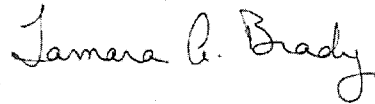
Request for a Hearing

14. 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.



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



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Chief Trial Deputy State Public Defender



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. JAMES HOLMES, Defendant	σ COURT USE ONLY σ
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ORDER RE: MOTION FOR A BILL OF PARTICULARS [D-130]	

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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