

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	JUN - 3 2018 σ COURT USE ONLY σ
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; color: black;">Redacted</div> Division 26
<b>MOTION FOR A FAIR TRIAL UNENCUMBERED BY AN UNNECESSARY DISPLAY          OF COURTROOM SECURITY [D-076]</b>	

**CERTIFICATE OF CONFERRAL**

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

Mr. Holmes, by and through his counsel, hereby moves for an order implementing procedures which ensure the right to fair trial under the Due Process and Equal Protection Clauses of the United States and Colorado Constitutions. As grounds for support, he states the following:

1. Since this case began, there has been a visible law enforcement presence on the grounds of the courthouse each time there is a hearing in this matter, including visible armed security on the roofs of the buildings and uniformed law enforcement personnel in the parking lots and grounds surrounding the courthouse. Additionally, during the pretrial hearings, Mr. Holmes has come into court in shackles and remained in shackles throughout the proceedings. Security is typically provided by approximately eight sheriff deputies. All of the deputies have been in uniform while providing courtroom security during the pretrial proceedings.

2. To date, Mr. Holmes has never been free of shackles while in court.

3. This display of security is troubling during pretrial hearings, especially to the extent it deprives Mr. Holmes of the opportunity to talk confidentially with his lawyers.

Mr. Holmes will be in court for many full days of pretrial hearings in the next several months. This Court should consider whether the proximity of deputies within approximately three feet of the defense table is a necessary security precaution or whether equally or more effective security would be achieved with the officers situated elsewhere in the courtroom.

4. When trial begins, due process and the right to a fair trial will require that Mr. Holmes be unshackled. *See, e.g., Deck v. Missouri*, 544 U.S. 622, 622-624 (2005). It should also require that if there are more than one or two deputies in the courtroom that they not be in uniform. Otherwise, the show of force by the Arapahoe County Sheriff's Office will constitute a constant, visible display of law enforcement's apparent belief that extraordinary security is necessary to contain Mr. Holmes, and few things could be more prejudicial to a man on trial for his life.

5. The only security allowed is that which is necessary to ensure that the defendant remains in custody, and will not endanger court personnel or others in the courtroom and will not disrupt the proceedings. *See Lucero v. Lundquist*, 196 Colo. 95, 580 P.2d 1245 (1978), *citing People v. Rogers*, 187 Colo. 128, 528 P.2d 1309 (1974); *Odell v. Hudspeth*, 189 F.2d 300 (10th Cir. 1951); *Illinois v. Allen*, 397 U.S. 337 (1970); *Way v. United States*, 285 F.2d 253 (10th Cir. 1960); *see also* The American Bar Association Standards for Criminal Justice—Trial by Jury (3d ed. 1996) § 15-3.2(c) and (d) (“(c) No defendant should be removed from the courtroom, nor should defendants and witnesses be subjected to physical restraint while in court unless the court has found such restraint reasonably necessary to maintain order. ... [S]ubjecting an individual to physical restraint in the courtroom should be done only after all other reasonable steps have been taken to insure order .... (d) If the court orders physical restraint ..., the court should enter into the record of the case the reasons therefor.”)

6. Mr. Holmes has always been well-behaved in court and there has been no showing that adequate security cannot be provided during the trial without Mr. Holmes being shackled and without the obvious display of so many uniformed officers in the courtroom.

7. The extraordinary and unnecessary *display* of security if continued at trial would be prejudicial to Mr. Holmes in at least three critical respects: (1) to the extent the security measures are made known, they prejudice Mr. Holmes's right to a fair trial by a fair and impartial jury; (2) they bias sheriff's deputies in a way that may unfairly influence any penalty phase testimony should Mr. Holmes be convicted of first degree murder; and (3) they are likely to bias the jury at both the trial on the charges and the penalty phase, if necessary, by creating an image of a person who is dangerous in a jail environment.

8. In *Deck, supra*, the petitioner was convicted of capital murder and sentenced to death, but his sentence was reversed on appeal. At his new sentencing proceeding, he was shackled with leg irons, handcuffs, and a belly chain. The trial court overruled counsel's objections to the shackles, and Deck was again sentenced to death. The Missouri Supreme Court affirmed the death verdict, rejecting Deck's claim that his shackling violated, *inter alia*, the Federal Constitution. The United States Supreme Court reversed, holding that the constitution forbids the use of visible shackles during a capital trial's penalty phase, just as it does during the trial on the charges, unless the use of shackles is “justified by an essential state interest”—such as courtroom security-specific to the defendant on trial. *Id.* at 624, *citing, Holbrook v. Flynn*, 475

U.S. 560, 568-569 (1986).

9. The defendant's right not to be visibly shackled at trial arises from the Fifth and Fourteenth Amendments and their state counterparts. The anti-shackling rule is necessary to preserve the presumption of innocence, secure a meaningful defense, and maintain dignified courtroom proceedings. *Deck, supra*. While the presumption of innocence may no longer apply at a penalty phase, the jury is deciding between life and death, which, given the sanction's severity and finality, is no less important than the jury's determination of guilt or innocence. *Id.*; *Monge v. California*, 524 U.S. 721. Nor is accuracy in making that decision any less critical.

10. Moreover, in Colorado, "not a continuing threat to society" is a statutory mitigator, the existence and weight of which may determine whether an accused is eligible for the death penalty and, if so, whether it or a life penalty should be imposed. See § 18-1.3-1201(4)(k), C.R.S. Another statutory mitigator is "[t]he extent of the defendant's cooperation with law enforcement officers or agencies and with the office of the prosecuting attorney." § 18-1.3-1201(4)(h), C.R.S.

11. An excessive level of courtroom security impairs Mr. Holmes' constitutional right to ask jurors to give fair consideration to statutory mitigating factors. Should counsel stand before the jury to argue for Mr. Holmes' life, counsel will argue that Mr. Holmes is cooperative and is not a continuing threat to society. Realistically, that lawyer's credibility is destroyed if the argument is presented with a backdrop of uniformed, armed deputies lining the courtroom.

12. Jurors in this case will be inundated with extraordinary unspoken messages signaling that Mr. Holmes is dangerous and uncooperative: uniformed rooftop snipers; uniformed deputies in the parking lot and approach to the courthouse; a court-sanctioned, court-constructed broadcast media platform; and a gauntlet of permanent and handheld metal detectors. No juror could possibly miss the message conveyed: *you are entering a dangerous place made dangerous because Mr. Holmes is here.*

13. The Court has an obligation to conduct the trial in a way that does not convey to jurors the message that Mr. Holmes is dangerous and uncooperative. The Court is obligated to strike a balance between reasonable security and a bell jar atmosphere which unconstitutionally defeats Mr. Holmes' right to ask jurors to consider statutory mitigating factors.

### **Request for a Hearing**

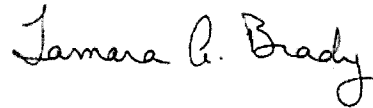
14. Mr. Holmes requests a pre-trial hearing for the Court to consider the display of courtroom security and to ensure that the display of security will not undermine the presumption of innocence to which he is entitled and his right to a fair trial.

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.



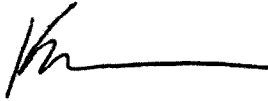
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Daniel King (No. 26129)  
Chief Trial Deputy State Public Defender



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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

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<p align="center"><b>ORDER RE: MOTION FOR A FAIR TRIAL UNENCUMBERED BY AN UNNECESSARY DISPLAY OF COURTROOM SECURITY [D-076]</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:

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Jacob Edson  
Rich Orman  
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Nava Wharton