REDACTED

| | |
|---|---|
| District Court, Arapahoe County, Colorado<br>Arapahoe County Courthouse<br>7325 S. Potomac St., Centennial, CO 80112 | |
| THE PEOPLE OF THE STATE OF COLORADO,<br>Plaintiff<br><br>v.<br><br>**JAMES HOLMES,**<br>Defendant | Filed<br>AUG 16 2013<br>σ COURT USE ONLY σ<br>CLERK OF THE COMBINED COURTS<br>ARAPAHOE COUNTY, COLORADO |
| DOUGLAS K. WILSON, Colorado State Public Defender<br>Daniel King (No. 26129)<br>Tamara A. Brady (No. 20728)<br>Chief Trial Deputy State Public Defenders<br>1300 Broadway, Suite 400<br>Denver, Colorado 80203<br>Phone (303) 764-1400 Fax (303) 764-1478<br>E-mail: state.pubdef@coloradodefenders.us | Case No. 12CR1522<br><br>Division 26 |

**MOTION TO REQUIRE THAT THE JURY MUST DETERMINE BEYOND A REASONABLE DOUBT THAT PROVEN STATUTORY AGGRAVATING FACTORS OUTWEIGH MITIGATION AT STEP THREE OF ANY SENTENCING PROCEEDING, OR ALTERNATIVELY TO DECLARE COLORADO'S DEATH PENALTY SCHEME UNCONSTITUTIONAL [D-143]**

---

**CERTIFICATE OF CONFERRAL**

The prosecution states that it intends to file a response to this motion.

---

Mr. Holmes, through counsel, moves for an order requiring the jury to determine beyond a reasonable doubt that proven statutory aggravation outweighs mitigation at step three of any sentencing proceeding, or alternatively to declare Colorado's death penalty scheme unconstitutional.

As grounds in support, Mr. Holmes states:

1. Under Colorado's capital sentencing scheme as set forth in *People v. Dunlap* ("*Dunlap I*"), 975 P.2d 723 (Colo. 1999) , steps 1-3 of the capital sentencing process are part of the "eligibility" determination regarding whether a defendant is even eligible for a death sentence.[1] Those steps thus potentially increase the sentence for first-degree murder from a sentence of life imprisonment to a possible death sentence. A defendant's *eligibility* for the death

[1] Mr. Holmes has attacked the constitutionality of Colorado's death penalty sentencing scheme as interpreted in *Dunlap I* in other motions. By setting forth the arguments in this motion, he is not waiving or abandoning his claims regarding the current unconstitutionality of the sentencing scheme.

penalty depends entirely on: (1) the statutory aggravating factors, and (2) all mitigation. Thus, steps 1-3 are the equivalent of elements in the State's bid for and arguments in support of the death penalty. *See, e.g., Woldt v. People*, 64 P.3d 256 (Colo. 2003); *People v. Dunlap,* 975 P.2d 723 (Colo. 1999) ("*Dunlap I*"); *Ring v. Arizona*, 536 U.S. 584 (2002) ("Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' ... the Sixth Amendment requires that they be found by a jury."); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Jones v. United States*, 526 U.S. 227 (1999); *see also Alleyne v. United States*, 133 S. Ct. 2151 (2013); *People v. Montour*, 157 P.3d 489 (Colo. 2007).

2. As the equivalent of elements that potentially raise a defendant's sentence from life to death, the factors found at steps 1-3 of Colorado's capital sentencing scheme must be proven by the State beyond a reasonable doubt to the jury. *See e.g. Ring, supra; Apprendi, supra*; U.S. Const. amends. V, VI, VIII, XIV; Colo. Const. art. II, secs. 16, 20, 23, 25.

> It is also an axiom no longer debatable that an accused has the constitutional right to require the State to prove his guilt beyond a reasonable doubt on every essential element of a criminal charge. (citations omitted) In fact, this court in *People v. District Court*, 165 Colo. 253, 439 P.2d 741 (1968), had no difficulty in concluding that a statutory provision relieving the prosecution of that burden was constitutionally flawed under state due process doctrine. Implicit in the concept of due process is the fundamental principle that the State must prove to the satisfaction of the jury beyond a reasonable doubt all the material elements necessary to constitute the offense charged. (citations omitted) A statutory scheme relieving the State of that burden would collide head-on with Article II, Section 25, of the Colorado Constitution. (citation omitted).

*People v. Chavez*, 621 P.2d 1362, 1368 (Colo. 1981) (Justice Quinn, concurring).

3. Under Colorado's post-*Dunlap I* sentencing scheme, a person is not eligible for a death sentence after a conviction for first-degree murder. *Woldt, supra.* Based upon the verdict, a life sentence is the only possible sentence. *Id.* Unless and until the unique sentencing trial set forth in § 18-1.3-1201 occurs and the sentencers decide certain facts against the accused at the first, second, and third steps of the process, only a life sentence is possible. *See Dunlap I*, 975 P.2d at 739-40 (holding that a person is not eligible for a death sentence under Colorado law unless and until the sentencers are convinced at the third step of the process beyond a reasonable doubt that mitigation does not outweigh the statutory aggravating factors that have been proven.); *accord Woldt, supra; Montour, supra.* A sentencing hearing, a presentence report, victim statements, and even the facts of the case are irrelevant where a person has been convicted of first-degree murder where no proceeding under §18-1.3-1201 occurs. There is no choice to be made because "the range of penalties to which a criminal defendant is exposed" based upon the facts found in the jury's verdict in that situation is only a life sentence. *Apprendi,* 530 U.S. at 532. The accused is simply not exposed to a death sentence based upon the findings required for a guilty verdict for first-degree murder. *Woldt, supra.*

4. Under *Ring, Apprendi, and Woldt, supra*, the eligibility determination is thus the equivalent of an element of the offense. *See, e.g. Ring,* 536 U.S. at 609 (factors that make a defendant eligible for the death penalty "operate as 'the functional equivalent of an element of a *greater offense.*'"(emphasis added)); *see also Sattazahn v. Pennsylvania*, 537 U.S. 101, 111 (2003).

> *Ring* held that, *because* Arizona's statutory aggravators restricted (as a matter of state law) the class of death-eligible defendants, those aggravators *effectively were* elements for federal constitutional purposes, and so were subject to the procedural requirements the Constitution attaches to trial of elements.

*Schriro v. Summerlin*, 542 U.S. 348, 354 (2004) (emphasis original). Thus, the eligibility determination and its components operate as the functional equivalent of elements of the offense and the constitutional requirements applicable to elements of the offense apply.

5. One of the fundamental "requirements the Constitution attaches to trial of the elements" is that the prosecution bear the burden of proving each element of the offense beyond a reasonable doubt. *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *In re Winship*, 397 U.S. 358 (1970); *Apprendi v. N.J., supra*; U.S. Const. amends. V, XIV; Colo. Const. art. II, sec. 25.

6. At the third step – pursuant to Colorado statute and as currently interpreted under Colorado case law – the jurors determine whether, beyond a reasonable doubt, mitigation "does not outweigh" the proven statutory aggravating factors. Only if the jurors decide they are each convinced beyond a reasonable doubt that mitigation does not outweigh the aggravating factors is the accused eligible for a death sentence. This is the last step of the eligibility determination and the equivalent of an element of the offense that must be established to the jury beyond a reasonable doubt. *See Woldt, supra; Ring, supra.* Constitutionally, the State, which clearly has the burden of proof on elements of the offense, *see In re Winship, supra,* must bear the burden of proving that a defendant is death eligible *See, e.g., Ring v. Arizona, supra; Apprendi v. New Jersey, supra.*

7. However, as currently interpreted, the third step does not require the State to affirmatively establish that a defendant is death-eligible. Rather, at step three, a defendant can be considered death eligible where mitigation and aggravation are equal, i.e. in equipoise. At step 3 it is *only if* the jury determines that *mitigation outweighs aggravation* that the defendant is no longer death-eligible.

8. Thus, the current structure of Colorado's death sentencing scheme – rather than requiring affirmative proof of eligibility – establishes an unconstitutional requirement that one or more jurors affirmatively determine the negative, i.e. that the defendant is NOT eligible for the death penalty because mitigation outweighs aggravation. Consequently, rather than requiring that a defendant's eligibility be affirmatively established beyond a reasonable doubt, the scheme requires one or more jurors to affirmatively decide that the defendant is not death eligible because of the superior value of his mitigation. Further, in cases where mitigation and

aggravation are in equipoise,[2] the scheme operates as an unconstitutional mandatory presumption that the defendant is eligible for the death penalty.

9. At the time of *People v. Tenneson*, 788 P.2d 786 (Colo. 1990), when the Colorado Supreme Court first analyzed and upheld the requisite step 3 determination that mitigation "does not outweigh" aggravation, the decisions in *Apprendi, Ring, Woldt*, and *Dunlap* had not been issued. In *Tenneson*, the Colorado Supreme Court viewed step 1 as the eligibility/narrowing determination and the remaining steps as the selection process. *See e.g. Tenneson, supra* at 791; *see also People v. Young*, 814 P.2d 834 (Colo. 1991).Consequently, step 3 was not considered part of the eligibility determination. Further, at the time of *Tenneson*, the United States Supreme Court had not held that the eligibility determination in a death penalty case operated as the equivalent of an element of the offense. *See e.g. Ring, supra; Woldt, supra.* Thus, the analysis related to the constitutionality of step 3 in *Tenneson* was under an entirely different rubric than exists today.

10. Since, pursuant to *Dunlap I*, step 3 is now part of the eligibility determination to which the same constitutional requirements that pertain to elements of the offense apply, due process requires that death-eligibility be affirmatively established by the prosecution beyond a reasonable doubt. In this regard, Chief Justice Quinn's concurrence and dissent in *Tenneson* seems almost prescient on this issue and bears extensive quotation:

> The practical effect of the majority's formulation of the "proof beyond a reasonable doubt" standard is to create a burden-shifting presumption of death eligibility upon the state's proof of an aggravating factor beyond a reasonable doubt. Rules relating to the burden of persuasion serve the function of directing jurors on how to decide an issue if their minds are in doubt. *See* C. McCormick, *Evidence* § 337 at 784 (E. Cleary ed. 1972). Presumptions which have the effect of shifting the burden of persuasion to an accused have been struck down as violative of due process of law under both the United States and Colorado Constitutions. *See, e.g., Francis v. Franklin,* 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985) (where defendant charged with "malice murder," jury instructions stating that acts of person of sound mind and discretion are presumed to be product of person's will, and that person of sound mind is presumed to intend natural and probable consequences of acts, created burden-shifting presumption in violation of due process); *Sandstrom v. Montana,* 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) (where defendant charged with "deliberate homicide," jury instruction stating that law presumes

[2] While a closely divided Supreme Court has approved selecting a death sentence in the equipoise situation, it has never upheld as constitutional a statute where equipoise (mitigating circumstances and statutory aggravating factors are of equal weight) determines eligibility. *See Kansas v. Marsh,* 548 U.S. 163 (2006); *compare People v. Young, supra* (a death sentence based on equipoise is insufficiently reliable and unconstitutional under the Colorado Constitution).

that a person intends ordinary consequences of voluntary acts was either a conclusive or burden-shifting presumption in violation of due process); *Jolly v. People,* 742 P.2d 891 (Colo.1987) (in prosecution for driving while license revoked, jury instruction stating that defendant's knowledge of revocation is established by evidence of mailing revocation notice to defendant's address as recorded on records of Department of Revenue created either conclusive or burden-shifting presumption in violation of due process).

Although the aforementioned decisions struck down burden-shifting presumptions in the context of the guilt phase of a criminal prosecution, the reliability essential to a constitutionally valid capital sentencing proceeding mandates that the state, which after all is seeking the death penalty, bear the burden of persuasion throughout all phases of the capital sentencing proceeding. Under the majority's formulation, unless the defendant produces evidence of mitigation *sufficient to outweigh* the state's proven aggravating factors, the jury is permitted to return a death verdict irrespective of the quantity and quality of mitigating evidence offered by the defendant. I cannot square such a rule with either the constitutional prohibition against cruel and unusual punishment, at least as a matter of state constitutional doctrine, or with the most rudimentary requirements of due process of law. *(citations omitted).* The fact that the jury, after determining that mitigating factors do not outweigh any proven aggravating factor, is then required to decide whether death is the appropriate penalty does not rectify the burden-shifting effect of the court's formulation of the "beyond a reasonable doubt" standard. If anything, the jury's determination that mitigating factors *do not outweigh* any proven aggravating factors predisposes the jury, under instructions and verdict forms duplicating the statutory terminology, to sentence the defendant to death. *See* § 16-11-103(2)(a)(III), 8A C.R.S. (1986). Such predisposition originates directly from a formulation of the "beyond a reasonable doubt" standard that permits the jury to consider the imposition of a death sentence upon the prosecution's proof of one or more aggravating factors notwithstanding the fact that the jury is not convinced to a moral certainty that the proven aggravating factors actually outweigh the mitigating evidence offered by the defendant.

IV.

I would construe section 16-11-103(2)(a)(II) to require that before a death sentence may be imposed the prosecution must establish to a moral certainty that any proven aggravating factors outweigh any

> mitigating factors established by the evidence. Such construction, in my view, is necessary to conform Colorado's capital sentencing scheme to the reliability requirement mandated, if not by the Eighth and Fourteenth Amendments to the United States Constitution, at least by the Cruel and Unusual Punishment and Due Process Clauses of the Colorado Constitution.

*People v. Tenneson*, 788 P.2d 786, 806-08 (Colo. 1990) (Quinn, C.J., concurring and dissenting).

11. Colorado's death penalty statute and death penalty sentencing scheme, as interpreted in *Dunlap I* and *Woldt,* must require the jury to be unanimously convinced beyond a reasonable doubt that the proven statutory aggravating factors outweigh mitigation before a defendant can be considered death-eligible and before proceeding to step 4. To do otherwise renders the scheme and the statute unconstitutional in violation of due process and the prohibitions against cruel and unusual punishment. *See, e.g., Ring, supra; In re Winship, supra*; *Tenneson, supra*; U.S. Const. amends. V, VI, VIII, XIV. Mr. Holmes believes the scheme violates the federal constitution but, even if it does not, the scheme is independently unconstitutional under the Colorado Constitution and its protections for due process of law and against cruel and unusual punishment. Colo. Const. art. II, secs. 20, 25; *People ex. Rel. Juhan*, 165 Colo. 253, 439 P.2d 741 (1968); *People v. Young*, 814 P.2d 834 (Colo. 1991).

12. A central principle in death penalty jurisprudence is that there is an enhanced need for reliability and rationality in such cases. The requirements that any death verdict "be based on reason rather than caprice or emotion," *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977), and that there be certainty and reliability in any death verdict have become primary principles in that jurisprudence. *People v. Young*, 814 P.2d 834 (Colo. 1991). Unless the standard requested by Mr. Holmes here is adopted and applied, any resulting death verdict would be bereft of any reliability or rationality, under Colorado's statute or the Constitutions.

**Request for a Hearing**

13. The "heightened standard of reliability" applies to the capital sentencing proceedings in this case. *See, e.g., Spaziano v. Florida*, 468 U.S. 447, 456 (1984); *Beck v. Alabama*, 447 U.S. 625, 637 (1980) (risk of unreliable conviction "cannot be tolerated" in case where defendant's life is at stake); *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). *People v. Young*, 814 P.2d 834, 846 (Colo. 1991); *People v. Rodriguez*, 786 P.2d 1079 (Colo. 1989).

14. 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.

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

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

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

Dated: August 16, 2013

| | |
|---|---|
| District Court, Arapahoe County, Colorado<br>Arapahoe County Courthouse<br>7325 S. Potomac St., Centennial, CO 80112 | |
| THE PEOPLE OF THE STATE OF COLORADO,<br>Plaintiff<br><br>v.<br><br>**JAMES HOLMES,**<br>Defendant | σ COURT USE ONLY σ |
| DOUGLAS K. WILSON, Colorado State Public Defender<br>Daniel King (No. 26129)<br>Tamara A. Brady (No. 20728)<br>Chief Trial Deputy State Public Defenders<br>1300 Broadway, Suite 400<br>Denver, Colorado 80203<br>Phone (303) 764-1400 Fax (303) 764-1478<br>E-mail: state.pubdef@coloradodefenders.us | Case No. **12CR1522**<br><br>Division 26 |

**ORDER RE: MOTION TO REQUIRE THAT THE JURY MUST DETERMINE BEYOND A REASONABLE DOUBT THAT PROVEN STATUTORY AGGRAVATING FACTORS OUTWEIGH MITIGATION AT STEP THREE OF ANY SENTENCING PROCEEDING, OR ALTERNATIVELY TO DECLARE COLORADO'S DEATH PENALTY SCHEME UNCONSTITUTIONAL [D-143]**

Defendant's motion is hereby GRANTED _____ DENIED _____.

BY THE COURT:

_____ _____

JUDGE Dated

I hereby certify that on August 26, 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