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| District Court, Arapahoe County, Colorado<br>Arapahoe County Courthouse<br>7325 S. Potomac St., Centennial, CO 80112  | <p style="text-align: center;">Filed<br/>         JUL 17 2013<br/>         DISTRICT COURT</p> <p style="text-align: center;">σ COURT USE ONLY σ</p> |
| THE PEOPLE OF THE STATE OF COLORADO,<br>Plaintiff<br><br>v.<br><br><b>JAMES HOLMES,</b><br>Defendant  |   |
| 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: <a href="mailto:state.pubdef@coloradodefenders.us">state.pubdef@coloradodefenders.us</a> | Case No. <b>12CR1522</b><br><br><br><br><br><br><br>Division 26   |
| <b>REPLY TO RESPONSE TO MOTION TO DECLARE C.R.S. §§ 18-2-101 AND 18-3-102(1)(D) (ATTEMPTED EXTREME INDIFFERENCE MURDER) UNCONSTITUTIONAL [D-129]</b>  |   |

Mr. Holmes, through counsel, submits the following in reply to the prosecution's response to his Motion to Declare C.R.S. §§ 18-2-101 and 18-3-102(1)(d) (Attempted Extreme Indifference Murder) Unconstitutional:

1. The prosecution alleges that the crimes of Attempted Extreme Indifference Murder (AEIM) and Attempted Extreme Indifference Assault (AEIA) survive an equal protection challenge and can be distinguished in that the former requires "conduct that is a substantial step towards *killing someone*" while the latter requires "conduct that is a substantial step towards causing *serious bodily injury*." The prosecution argues that "[w]hile the equivalent culpable mental states may be very close, the crimes are defined as taking substantial steps toward different results."

2. This argument is flawed for several reasons. First, as noted in Mr. Holmes's original pleading, these two crimes require the *same* culpable mental state of "knowingly."<sup>1</sup> Moreover, by definition, because they are attempt crimes, the results contemplated by these two offenses *did not in fact occur*.

3. Thus, the prosecution's argument is based on the faulty premise that a "substantial step towards *killing*" is readily discernable from a "substantial step towards *injuring*." Tellingly, the prosecution offers no explanation as to how to recognize this distinction, other than to argue

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<sup>1</sup> To the extent that the prosecution is arguing that the "extreme indifference" element of these offenses is a mental state, that argument is inconsistent with the position it takes in its Response to [D-128], which is that *Candelaria v. People*, 148 P.3d 178, 182 (Colo. 2006) squarely holds that this element is based solely on an *objective* assessment of the defendant's conduct. The fact that the prosecution appears to take inconsistent positions with respect to how the "extreme indifference" element is to be proven further supports Mr. Holmes's argument in [D-128] that the statute is void for vagueness.

that the “conduct of the perpetrator” and the “potential result” purportedly distinguish these two offenses.

4. The prosecution’s argument fails because there is “no intelligent standard for distinguishing the proscribed conduct.” *People v. Marcy*, 628 P.2d 69, 74-75. Any given act may give rise to a number of hypothetical “potential results,” and there is no meaningful way to identify which hypothetical result should form the basis of the actor’s criminal liability.

5. The prosecution is also incorrect in its assertion that because AEIM is a lesser-included offense of extreme indifference murder (EIM), and that AEIA is a lesser-included offense of extreme indifference assault (EIA), they are distinguishable. Again, EIM and EIA are distinguishable solely *because they require different results*. Because by definition, AEIM and AEIA do not require *any result*, they are not distinguishable on this same basis.

6. The prosecution cites to *People v. Ellis*, 30 P.3d 774, 782-83 (Colo. App. 2001), apparently in an effort to argue that AEIM should survive Mr. Holmes’s equal protection challenge because it once survived an entirely different equal protection challenge in the past. Because *Ellis* involved an equal protection challenge to AEIM in the context of extreme indifference first-degree assault – a result crime – it is distinguishable and of no utility to the Court’s analysis here.

7. Finally, Mr. Holmes is challenging the constitutionality of the statute both facially and as it is applied to him. Mr. Holmes’s rights to equal protection under the Colorado Constitution have been violated because the State has chosen to charge him with Attempted Extreme Indifference Murder, a class two felony, instead of Attempted Extreme Indifference Assault, a less serious class four felony, despite the fact that there is no meaningful difference between the definitions of these two offenses statutorily or as applied to the conduct in this case.

### **Request for a Hearing**

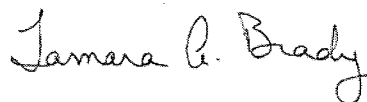
8. Mr. Holmes renews his request for a hearing on this motion.

Mr. Holmes incorporates by reference the arguments set forth in his original pleading, files this reply, 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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Deputy State Public Defender

Dated: July 17, 2013

I hereby certify that on July 17, 2013, I

mailed, via the United States Mail, to Office of the Attorney General  
 emailed,  
 faxed, or  
 hand-delivered to DA

a true and correct copy of the above and foregoing document to:

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as well as to:

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AKP