

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	<p style="text-align: center;">Filed</p> <p style="text-align: center;">OCT 07 2014</p> <p style="text-align: center;">CLERK OF THE COMBINED COURT ARAPAHOE COUNTY, COLORADO ♦ COURT USE ONLY ♦</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 202
MOTION FOR SPECIFIC INSTRUCTIONS TO WITNESSES AND JURORS REGARDING VICTIM IMPACT EVIDENCE [D-242]	

CERTIFICATE OF CONFERRAL

The defense conferred with the prosecution and provided the title of the pleading and a description of its contents, including a summary of the proposed instructions. The prosecution responded, "We would have to see the specific verbatim language in the proposed instructions in order to determine what position we would take."

Pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article II, sections 16, 18, 20 and 25 of the Colorado Constitution, Mr. Holmes, through counsel, respectfully requests that the Court provide witnesses and jurors with the following specific instructions regarding victim impact evidence:

1. In its order regarding the People's Supplemental Disclosures Pursuant to Crim. P. 32.1(D)(2), C.R.S. § 18-1.3-1201(1)(B), and the Court's Orders Regarding D-167 and D-168 [P-83-B], the Court noted in footnote 3 on page 5 that "Of course, it hardly bears mention that the prosecution must take all precautionary measures to ensure that its victim impact evidence does not overwhelm the jurors with emotion, thereby causing them to forsake their reasoning and to ignore their duty to exercise their reasoned and moral judgment."

2. Pursuant to its "inherent authority to use all powers reasonably required to protect its ability to function efficiently and to administer justice," *People v. Dahl*, 160 P.3d 301, 304 (Colo. App. 2007), as well as its obligation to protect Mr. Holmes's right to a fair trial by an impartial jury, *Simpson v. People*, 47 Colo. 612, 614, 108 P. 169 (1910), the Court also has an

obligation to take precautionary measures to ensure that the victim impact evidence does not overwhelm jurors with emotion. Therefore, Mr. Holmes requests that the Court issue the following contemporaneous instructions during any sentencing phase of the trial.

3. Prior to the testimony of each witness who is called by the prosecution to give victim impact testimony, the defense requests the Court to instruct the *witness*, outside the presence of the jury:

The law allows you to provide testimony offering a “quick glimpse” of the life of the victim and to demonstrate the loss to you and your family which has resulted from the defendant’s homicide.¹ Your testimony should be factual, not emotional, and should be free of inflammatory comments or references. The Court will not allow you to testify if you are unable to control your emotions.²

Additionally, you may not make any comments or statements that could be described as characterizations and opinions about the crime, the defendant, or the appropriate punishment in this case.³

4. In addition, immediately prior to each victim impact witness’s testimony, the defense requests that the Court instruct the *jury* as follows:

The testimony you are about to hear may include what is called “victim impact evidence.” The purpose of victim impact evidence, as with all of the other evidence that is introduced during the sentencing hearing in this case, is to assist the jury in assessing meaningfully the defendant’s moral culpability and blameworthiness.⁴

You may only consider evidence pertaining to the victim’s personal characteristics and the impact of the crimes on the victim’s family that you are about to hear to the extent that you conclude that this evidence is relevant to Mr. Holmes’s moral

¹ *Payne v. Tennessee*, 501 U.S. 808, 825 (1991).

² See *State v. Muhammad*, 678 A.2d 164, 181 (N.J. 1996) (“[T]he trial court should inform the victim’s family that the court will not allow a witness to testify if the person is unable to control his or her emotions.”).

³ *Booth v. Maryland*, 482 U.S. 496, 502 (1987).

⁴ *Payne*, 501 U.S. at 825 (“We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant’s moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant.”).

culpability and blameworthiness.⁵ If you conclude that this evidence is not relevant to Mr. Holmes's moral culpability and blameworthiness for any reason, you must disregard it.

Your consideration of victim impact evidence must be limited to a rational inquiry into the culpability of Mr. Holmes, not an emotional response to the evidence.⁶ In rendering your sentencing verdict in this case, you must not be influenced by any sort of sympathy or sentiment for the victim's family.

As I will further explain to you after the close of the evidence, victim impact evidence is not a statutory aggravating circumstance. The introduction of victim impact evidence does not relieve the State of its burden to prove beyond a reasonable doubt the existence of a statutory aggravating circumstance.⁷

5. The defense requests that the Court also remind the jury of the above instruction at the conclusion of each victim impact witness's testimony.

6. As the Court acknowledged in its Order re: D-168, victim impact testimony "is the most problematic[]" sentencing hearing evidence "and may present the greatest difficulty in determining the nature and scope of the 'information' to be considered." *Id.* at 8 (quoting *United States v. McVeigh*, 944 F. Supp. 1478, 1491 (D. Colo. 1996)).

7. Especially in a case of this magnitude, victim impact evidence easily has the capacity to distract the jury from its task of making a "reasoned moral response when imposing sentence upon a defendant convicted of a capital offense" and to allow "emotion to overwhelm reason." *McVeigh*, 153 F.3d at 1217. Even the *Payne* Court acknowledged that victim impact evidence that is unduly prejudicial could render a trial fundamentally unfair and violate the Due Process Clause of the Fourteenth Amendment. *See Payne v. Tennessee*, 501 U.S. 808, 825 (1991). Because of this heightened risk, the above-requested instructions are necessary to protect Mr. Holmes's state and federal constitutional rights to procedural and substantive due

⁵ *See Cargle v. State*, 909 P.2d 806, 829 (Okla. Crim. App. 1995) (jury shall be instructed in all capital murder cases where victim impact evidence is presented that its consideration of victim impact evidence "must be limited to a moral inquiry into the culpability of the defendant, not an emotional response to the evidence."); C.R.S. § 18-1.3-1201(1)(b).

⁶ *Id.*

⁷ *Id.* (jury must also be instructed that "[v]ictim impact evidence is not the same as an aggravating circumstance. Proof of an adverse impact on the victim's family is not proof of an aggravating circumstance. Introduction of this victim impact evidence in no way relieves the State of its burden to prove beyond a reasonable doubt at least one aggravating circumstance which has been alleged.").

process, fundamental fairness, a fair and reliable sentencing proceeding, and equal protection. U.S. Const. Amends. V, VI, VIII, XIV; Colo. Const. art. II, secs. 16, 18, 20, 25.

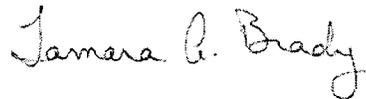
Request for a Hearing

8. Mr. Holmes moves for a hearing on this motion.

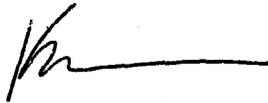
Mr. Holmes files this motion, and makes all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, on the following grounds and authorities: the Due Process Clause, the Right to a Fair Trial by an Impartial Jury, the Rights to Counsel, 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: October 7, 2014

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	♦ COURT USE ONLY ♦
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 202
<p align="center">ORDER RE: MOTION FOR SPECIFIC INSTRUCTIONS TO WITNESSES AND JURORS REGARDING VICTIM IMPACT EVIDENCE [D-242]</p>	

Defendant's motion is hereby GRANTED _____ DENIED _____.

BY THE COURT:

_____ JUDGE

_____ Dated

I hereby certify that on October 7, 2014, 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

Lisa Teesch-Maguire

Office of the District Attorney

6450 S. Revere Parkway

Centennial, Colorado 80111

Fax: 720-874-8501