

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 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 202
<p>MOTION IN LIMINE REQUESTING COURT AND PROSECUTION TO REFRAIN FROM REFERRING TO THE TWO PHASES OF THIS CAPITAL TRIAL AS THE “GUILT PHASE” AND/OR THE “DEATH PHASE” [D-237]</p>	

CERTIFICATE OF CONFERRAL

The defense conferred with the prosecution regarding the title of the pleading, and the prosecution inquired “about the alternative language the defendant is proposing.” The defense responded with information about the alternative language proposed below, and the prosecution then replied, “Our belief is that we should be allowed to call the two phases of the trial by appropriately descriptive words, and we believe that the words you suggest are not appropriately descriptive, nor necessarily understandable to the average non-attorney. Therefore we object to your suggested limitations. Once you file your motion, we will file a responsive pleading stating our position in full.”

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 refrain, at any time during this case, from referring to the two phases of this capital proceeding in terms such as “guilt phase” and “death phase” in the presence of the jury.¹ Mr. Holmes further moves the Court to order the prosecution

¹ The defense wishes to make clear that it does not recollect the Court or the prosecution utilizing the phrases “guilt phase” and “death phase” with any regularity up until this point in the

to similarly refrain from using such language. In support of this motion, Mr. Holmes states the following:

1. As a criminal defendant, Mr. Holmes has the state and federal constitutional right to a fair trial by an impartial jury, to due process, a fair and reliable sentencing proceeding, and to the presumption of innocence. U.S. Const. Amends V, VI, XIII, XIV; Colo. Const. art. II, secs. 16, 18, 20, 25.

2. “Without question, the presumption of innocence plays an important role in our criminal justice system. ‘The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.’” *Bell v. Wolfish*, 441 U.S. 520, 533 (1979) (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)). Moreover, “a defendant ‘retains a presumption of innocence throughout the trial process.’” *People v. McBride*, 228 P.3d 216, 223-24 (Colo. App. 2009) (quoting *Martinez v. Court of Appeal*, 528 U.S. 152, 162 (2000)).

3. Likewise, “the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358, 364 (1970).

4. Consistent with these principles, Mr. Holmes requests that the Court and prosecution refrain from referring to the two phases of this capital case using terms such as “guilt phase” and/or “death phase.”

5. With respect to the first phase of a capital trial, the term “guilt phase” is problematic for several reasons. First, it wrongly implies that the only issue to be decided in a capital case is a defendant’s “guilt” or innocence, when in fact a jury is frequently tasked with determining a defendant’s degree of criminal culpability in a capital case, rather than the all-or-nothing determination of guilt or innocence.

6. Moreover, in this case, Mr. Holmes has pleaded not guilty by reason of insanity. Although the prosecution is still required to prove every element of the offense beyond a reasonable doubt in a case where the defendant has entered such a plea, the prosecution has the additional burden in this case of proving a defendant’s sanity beyond a reasonable doubt. *See Leick v. People*, 136 Colo. 535, 322 P.2d 674 (1958) (“[O]nce [a defendant] has produced evidence tending to beget a reasonable doubt [as to sanity], he casts upon the state the obligation of presenting evidence which will satisfy the jury that he was sane beyond a reasonable doubt at the time of the act charged.”). Referring to the first phase of the capital trial as the “guilt phase” would needlessly confuse the jury as to the issues it will be called upon to resolve.

7. Additionally, repeated reference to the term “guilt phase” would violate the constitutional rights described above, including Mr. Holmes’s right to be presumed innocent and

proceedings. However, the defense files this motion out of an abundance of caution and in order to make a full and complete record on this issue.

to have the prosecution prove every element of the offense beyond a reasonable doubt, because it suggests to the jury that the issue of Mr. Holmes's "guilt" is predetermined.

8. In contrast, a neutral, descriptive term that describes a jury's obligation during the first phase of the trial such as "merits phase" or "culpability phase" more accurately describes the jury's obligations and duties in this capital case, and does not unconstitutionally or impermissibly suggest to the jury that Mr. Holmes is already guilty even before the case begins.

9. Likewise, any references to the second phase of a capital trial as the "death phase" would violate Mr. Holmes's rights to due process and a fair and reliable sentencing proceeding. Such a phrase would ease the prosecution's burden of proving death-eligibility, as it suggests to jurors that the second phase of the proceedings exists in order to render a death sentence, rather than to determine the appropriate sentence in this case. *See Ring v. Arizona*, 536 U.S. 584 (2002); *Woldt v. People*, 64 P.3d 256, 263 (Colo. 2003) ("A standard of beyond a reasonable doubt applies to eligibility fact-finding."). Such a term also unconstitutionally lessens the responsibility jurors feel for determining the appropriate sentence, as it suggests that a death sentence is the preferred and predetermined outcome. *See Caldwell v. Mississippi*, 472 U.S. 320 (1985).

10. Instead, the defense requests that the Court and the prosecution refer to the second phase of these capital proceedings as the "sentencing phase" of the case, which neutrally and accurately describes the jury's obligations.

11. Finally, as explained more fully in Motions D-149 and D-150, "death qualification" of juries has several distinct effects that impair the ability of the jury to fulfill its function as a fair and impartial representative of the community. *See Butler & Moran, The Role of Death Qualification in Venirepersons' Evaluations of Aggravating and Mitigating Circumstances in Capital Trials*, 2 J. Law & Human Behav. 26 (April 2002); Allen, Mabry, & McKelton, *Impact of Juror Attitudes About the Death Penalty on Juror Evaluations of Guilt and Punishment: A Meta-Analysis*, 6 J. Law & Human Behav. 22 (Dec. 1998). Use of the terms "guilt phase" and "death phase" is constitutionally impermissible because it exacerbates the bias towards conviction and death sentencing that social science has established that death-qualified jurors already have.

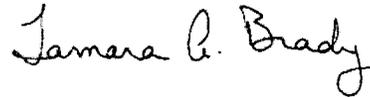
Request for a Hearing

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

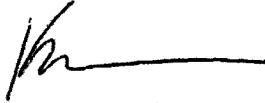
Mr. Holmes files this motion, and makes all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, on the following grounds and authorities: the Due Process Clause, the Right to a Fair Trial by an Impartial Jury, the Rights to Counsel,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



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Dated: October 7, 2014

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:

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