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	**Filed** OCT 07 2014 CLERK OF THE COMBINED COURT ARAPAHOE COUNTY, COLORADO ♦ 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

MOTION TO EXCLUDE LAY OPINION TESTIMONY REGARDING DEFENDANT'S "MENTAL CONDITION" OR "SANITY" IN THIS CAPITAL CASE [D-239]

CERTIFICATE OF CONFERRAL

The defense conferred with the prosecution and provided the title of the pleading and a description of its contents. The prosecution responded, "We object to this motion."

Mr. Holmes, through counsel, moves this Court to exclude any testimony from lay witnesses offering opinions or conclusions on the issue of Mr. Holmes's "mental condition" and/or sanity. The introduction of such testimony in this capital case would violate Mr. Holmes's constitutional rights to due process, a fair trial by an impartial jury, a reliable sentencing hearing, and fundamental fairness as protected by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article II, sections 16, 18, 20 & 25 of the Colorado Constitution:

1. Mr. Holmes has pled not guilty by reason of insanity in this case. The prosecution is seeking the death penalty.

2. CRE 701 permits lay witnesses to testify in the form of opinions or inferences which are:

(a) Rationally based on the perception of the witness, (b) helpful to

> a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

3. Concerning the issue of lay opinion testimony, Colorado's insanity statute further provides:

> In any trial or hearing in which the mental condition of the defendant is an issue, witnesses not specially trained in psychiatry or psychology may testify as to their observation of the defendant's actions and conduct, and as to conversations which they have had with him bearing upon his mental condition, **and they shall be permitted to give their opinions or conclusions concerning the mental condition of the defendant.**

C.R.S. § 16-8-109 (Emphasis added). While the statute explicitly employs the term "mental condition" and not sanity, case law has interpreted the statute to allow lay witnesses to opine (provided certain foundational elements are met) on the issue of whether a defendant was sane or insane at the time of the offense. *See, e.g., People v. Osborn*, 42 Colo. App. 376, 380-81, 599 P.2d 937, 940-41 (1979) ("A lay witness may give an opinion relative to the defendant's sanity if the witness details the facts which demonstrate his acquaintance with the defendant, and if those facts demonstrate that the acquaintanceship is close and that contacts were maintained at a point proximate in time to the alleged offense." (citing *People v. Medina*, 185 Colo. 101, 521 P.2d 1257 (1974) and C.R.S. §16-8-109, C.R.S.1973)).

4. However, to the defense's knowledge, C.R.S. § 16-8-109 has never been applied in a capital case, nor has any Colorado appellate court directly addressed the propriety of allowing lay witnesses to opine as to a defendant's sanity or insanity during the merits phase of a capital case.[1] While the defense acknowledges that lay witnesses should be permitted to testify as to their direct observations of Mr. Holmes's actions and conduct, provided that such evidence is relevant and satisfies all foundational requirements, there are numerous constitutional problems with allowing lay witnesses to provide "opinions or conclusions" concerning "mental condition" or sanity during the merits phase of a capital case.

5. As an initial matter, the statute is unconstitutionally vague and violates due

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[1] In *Dunlap v. People* ("*Dunlap III*"), 173 P.3d 1054, 1096-98 (Colo. 2007), the Colorado Supreme Court acknowledged that "Colorado courts have applied [C.R.S. § 16-8-109] to the admission of a lay witness' opinion of the defendant's sanity—i.e., the defendant's ability to understand right from wrong—and the defendant's future dangerousness if released." However, it did not specifically address the propriety of doing so in a capital trial where a defendant has pled not guilty by reason of insanity. The issue in *Dunlap* was whether the 35(c) court erred in allowing CMHIP staff members to offer opinions about Dunlap's mental health diagnoses, where none of the witnesses were certified as experts. The Court ruled that these opinions were improperly admitted, but that the error was harmless.

process of law, and the Court should declare it so. *See, e.g.,* U.S. Const. amends. V, XIV; Colo. Const. art. II, § 25. *See, e.g., People v. Hickman*, 988 P.2d 628, 643 (Colo. 1999) ("A law is void for vagueness if its prohibitions are not clearly defined and it may be reasonably susceptible to more than one interpretation by a person of common intelligence."); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *but see People v. Bondurant*, 296 P.3d 200 (Colo. App. 2012) (rejecting vagueness challenge to "mental condition").

6. As Mr. Holmes has explained in other pleadings, *see, e.g.,* Motion D-029, the term "mental condition" is not defined in 16-8-101 *et. seq.*, or elsewhere in Title 16, Article 8, and the meaning and scope of this phrase is unclear. In some sections of the statute, "mental condition" appears to be used interchangeably with "sanity," *see, e.g.,* C.R.S. § 16-8-103.6(2)(a) ("A defendant who places his or her *mental condition* at issue pursuant to section 16-8-103 . . . waives any claim of confidentiality or privilege as to communications made by the defendant to a physician or psychologist in the course of an examination or treatment for such mental condition . . . ."). However, C.R.S. § 16-8-107(3) contains a reference to "mental condition" that the Colorado Supreme Court has interpreted so broadly as to include even evidence of intellectual disability offered for the purpose of demonstrating the credibility of a statement the defendant gave to police. *See People v. Flippo,* 159 P.3d 100 (Colo. 2007). Yet the Colorado Court of Appeals has held that in §16-8-107(1.5)(a), §16-8-107(1)(a) and §16-8-103.6(2)(a), "mental condition" means "capacity to form a culpable mental state." *See People v. Herrera*, 87 P.3d 240, 245, 248, 249 (Colo. App. 2003).

7. Thus, "mental condition" apparently means something different in each portion of the statute, but no definition is provided. It is unclear whether C.R.S. § 16-8-109 authorizes lay witnesses to offer opinions as to Mr. Holmes's sanity, competency, capacity to form a culpable mental state, or an even broader array of mental health evidence. A defendant in a capital case who has pled not guilty by reason of insanity should not be forced to proceed to trial while having to simply guess what type of evidence is admissible against him.

8. In addition, even setting aside the confusion over what "mental condition" means in the context of C.R.S. § 16-8-109 and even if the Court disagrees that the statute is unconstitutionally vague, allowing lay witnesses to offer opinion testimony about a defendant's sanity or "mental condition" in a capital case raises serious constitutional concerns given the inherent reliability issues with this sort of testimony.

9. Both the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution guarantee a capital defendant a "greater degree of reliability when the death sentence is imposed." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). *See also Mills v. Maryland*, 486 U.S. 367, 376 (1988) ("[I]n reviewing death sentences, the Court has demanded even greater certainty [than in other criminal cases] that the jury's conclusion rested on proper grounds."); U.S. Const. amends. VIII, XIV. This guarantee extends both to "procedural rules that tend[] to diminish the reliability of the sentencing determination," as well as "rules that diminish the reliability of the guilt determination." *Beck v. Alabama*, 447 U.S. 625, 637-638 (1980).

10. In addition, article II, section 20 of the Colorado Constitution contains "fundamental requirements of certainty and reliability" which exceed those imposed by the

federal constitution. *People v. District Court*, 834 P.2d 181, 186 (Colo. 1992) (*quoting People v. Young*, 814 P.2d 834, 846 (Colo. 1991)); *see also People v. Tenneson*, 788 P.2d 786, 792 (Colo. 1990) ("Colorado's death sentencing statute must be construed in light of the strong concern for reliability of any sentence of death.").

11. Moreover, pursuant to Colorado's capital sentencing scheme, a jury may consider at sentencing "any evidence presented in the guilt phase of the trial." C.R.S. § 18-1.3-1201(1)(b).

12. Given heightened concerns over reliability contained in both the state and federal constitutions, the jury should not be permitted to rely upon lay opinion testimony concerning whether a defendant knew the difference between right and wrong on a particular date or had the capacity to form a culpable mental state in a case where the prosecution is seeking the death penalty. The determination of whether a person was sane or insane at the time of an alleged offense requires, at its threshold, an extremely difficult and nuanced assessment of an individual's mental health. As Colorado's insanity statute generally recognizes, these assessments are best made by psychiatrists and forensic psychologists with specialized training and skill. *See, e.g.,* C.R.S. § 16-8-106(1) ("The defendant shall be observed and examined by one or more psychiatrists or forensic psychologists during such period as the court directs.").

13. Indeed, whether or not an individual suffers from a "mental disease or defect" is an integral part of the sanity assessment. *See* C.R.S. § 16-8-101.5(1)(a) &(b) (a person is insane if he or she is "so diseased or defective in mind at the time of the commission of the act" as to be incapable of distinguishing right from wrong, or if he or she "suffered from a condition of mind caused by mental disease or defect" that prevented the person from forming a culpable mental state that is an essential element of a crime charged). A determination of whether an individual knew the difference between right and wrong or had the capacity to form a culpable mental state therefore cannot be divorced from a consideration and assessment of his or her mental illness. Obviously, lay persons are unqualified to diagnose a mental disease or defect. *See Dunlap v. People* ("*Dunlap III*"), 173 P.3d 1054, 1096-98 (Colo. 2007) ("[W]e do not believe the statute allows a lay witness to opine as to a defendant's specific diagnosis."). Thus, it follows that lay persons should not be permitted to opine on whether a defendant knew the difference between right and wrong or was capable of forming a culpable mental state in a capital case.

14. The reliability concerns in permitting a lay witness to opine about a defendant's sanity or "mental condition" are myriad. Lay persons without specialized training may be unskilled at recognizing signs and symptoms of mental illness. They may adhere to certain stereotypes about mental illness and mistake or misinterpret certain behaviors exhibited by a criminal defendant as "normal" when they are not. Based on these misinformed observations, lay witnesses may jump to the conclusion that an individual had the ability to comprehend the moral wrongfulness of his or her actions or form a culpable mental state when in fact the opposite may be true. What's more, because *Dunlap III* prohibits lay witnesses from opining about a defendant's "specific diagnosis," jurors may not even be made aware of what lay witnesses' opinions about a defendant's sanity are based on, or whether their opinions flow from misconceptions about mental illness.

15. In addition, the testimony of lay persons who have shown "adequate means of becoming acquainted with the person whose mental condition is in issue," *Medina*, 521 P.2d at 1259, is unreliable and has the potential to confuse and distract the jury because these witnesses are likely to be sufficiently acquainted with the defendant so as to be biased one way or the other. Lay witnesses who have had significant contact with a defendant, such as former friends or classmates, or police officers, would likely have different motives to testify than experts who are appointed by the court to evaluate a defendant's sanity, and therefore their testimony is far less trustworthy. Yet as lay persons, these witnesses' opinions may have particular resonance with jurors, who may be able to relate to and understand lay witnesses' observations and opinions even better than they relate to or understand experts.

16. Finally, the introduction of lay opinion testimony on the issue of sanity in a capital case would violate a defendant's constitutional right to a fair and impartial jury. "Each individual has a right to a trial by a fair and impartial jury under the Sixth Amendment to the United States Constitution and Article II, sections 16 and 23 of the Colorado Constitution." *Domingo-Gomez v. People*, 125 P.3d 1043, 1048 (2005); *see also Harris v. People*, 888 P.2d 259, 264 (Colo.1995); *Oaks v. People*, 150 Colo. 64, 68, 371 P.2d 443, 446-47 (1962). This right "comprehends a fair verdict, free from the influence or poison of evidence which . . . arouses passions and prejudices which tend to destroy the fairness and impartiality of the jury." *Harris*, 888 P.2d at 264 (quoting *Oaks*, 371 P.2d at 447). Because lay opinion testimony on the issue of sanity in a capital case could encourage jurors to make life-or-death sentencing decisions on the basis of unreliable and untrustworthy evidence that may arouse their passions or prejudices, the introduction of this evidence in a capital trial would deprive jurors of their impartiality, would violate Mr. Holmes's right to a fair trial by an impartial jury, and would render his trial fundamentally unfair. *See Bloom v. People*, 185 P.3d 797, 806 (Colo. 2008) (a court's evidentiary rulings rise to the level of constitutional error when "evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair." (quoting *Payne v. Tennessee*, 501 U.S. 808, 809 (1991)).

17. For the foregoing reasons, the state and federal constitutions forbid the introduction of lay opinion testimony concerning a defendant's sanity in a capital trial, and Mr. Holmes requests this Court to exclude any such testimony from his trial.

Request for a Hearing

18. Mr. Holmes requests 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

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THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. **JAMES HOLMES,** Defendant	♦ COURT USE ONLY ♦
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ORDER RE: MOTION TO EXCLUDE LAY OPINION TESTIMONY REGARDING DEFENDANT'S "MENTAL CONDITION" OR "SANITY" IN THIS CAPITAL CASE [D-239]

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
X hand-delivered

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

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