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DISTRICT COURT, ARAPAHOE COUNTY STATE OF COLORADO Arapahoe County Justice Center 7325 S. Potomac Street Centennial, Colorado 80112	Filed OCT 10 2014
THE PEOPLE OF THE STATE OF COLORADO vs. Defendant(s): JAMES EAGAN HOLMES	CLERK OF THE COMBINED COURT ARAPAHOE COUNTY, COLORADO COURT USE ONLY
Attorney: GEORGE H. BRAUCHLER 18 th Judicial District Attorney 6450 S. Revere Pkwy Centennial, CO 80111 Phone: (720) 874-8500 Atty. Reg. #: 25910	Case Number: 12CR1522 Division: 202

PEOPLE’S RESPONSE TO DEFENSE MOTION D-237

This pleading is filed by the District Attorney for the 18th Judicial District.

1. The defendant has filed Motion D-237, titled “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.”
2. The defendant cites no authority, from anywhere, actually standing for the proposition that using common terminology to refer to the two phases of a capital trial would deprive the defendant of any constitutional, statutory, or procedural right. Nor has the defendant cited authority actually holding that a trial court has an obligation to regulate the terminology that the attorneys use to refer to various parts of the trial.
3. Regarding the first phase of the trial, the defendant objects to anyone calling it the “guilt phase.” The defendant claims that using this terminology would somehow mislead the jury. (Motion ¶¶ 5-6). For each count charged, the jury would be asked to return three possible verdicts: (1) guilty of the charged offense or a lesser-included offense; (2) not guilty; and (3) not guilty by reason of insanity. One common denominator for all of those possible verdicts is the concept of the jury determining guilt or non-guilt in one way or the other. Calling this phase the “guilt phase” does not impliedly presuppose a verdict, nor does it mislead the jury as to what their ultimate role will be. It is a common-sense means of referring to a phase of the trial using words that will be adequately descriptive to the jury. Language such as “merits phase” and “culpability” phase may have great meaning to lawyers, who have spent careers reviewing statutes and appellate precedent and conforming their spoken language to the idiosyncratic

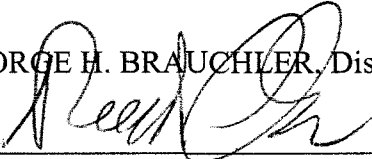
dialect expected of lawyers in American courtrooms, but the People submit that the mandated use of such language would actually serve to confuse jurors. The People object to the defendant's attempt to limit their vocabulary.

4. The defendant also raises a constitutional challenge to the use of the term "guilt phase." (Motion ¶ 7). The defendant cites no authority in support of this claim, and makes no real argument other than the conclusory statement that use of the word "guilt" would somehow impair his right to be presumed innocent. As the People have already argued, the use of the word "guilt" does not do this. Additionally, the jury will have been provided with information by the way of instruction from the court, and the jury questionnaire, that will adequately explain the purpose of the phases of the trial. In fact, the term "guilt phase" is commonly used by courts to describe the first part of a capital murder case. *E.g. White v. Woodall*, ___ U.S. ___, 134 S.Ct. 1697, 1699-70 (2014); *Bobby v. Mitts*, ___ U.S. ___, 131 S.Ct. 1762, 1764 (2011); *Cullen v. Pinholster*, ___ U.S. ___, 131 S.Ct. 1388, 1395 (2011). These are just the three most recent United States Supreme Court cases revealed in a Westlaw search in the U.S. Supreme Court database looking for the term "guilt phase." Even the Colorado Supreme Court has used the term "guilt phase" in terms of a capital murder trial. *Dunlap v. People*, 173 P.3d 1054, 1075-76 (Colo. 2007). While not in a published opinion, at least one court has specifically rejected the same argument. *State v. Mason*, 1996 WL 715480, 13 (Ohio App. 1996) ("First of all, we do not find that the prosecutor's terminology was error, since "guilt phase" and "penalty phase" are the terms commonly used by Ohio courts, including the supreme court, to describe the phases of a bifurcated aggravated murder trial. See, *e.g.*, *State v. Phillips* (1995), 74 Ohio St.3d 72, 90-91. Furthermore, even if an error had occurred, we do not find that use of the term was unfairly prejudicial to Appellant. Accordingly, the assignment of error is overruled."). The term "guilt phase" is a common term that almost all citizens will understand, and the court should not enter an order restricting the use of that term.

5. The defendant also objects to the use of the term "death phase" for the second phase of the trial, and likewise cites no authority for the proposition that it would be erroneous to allow the use of this term. Even so, the People have thought about the term "death phase," and have determined none of the prosecutors have any intention of using that term, as it is inartful. The People would more naturally use the terms "penalty phase," "sentencing phase," or perhaps "death penalty phase." While the defendant would apparently take issue with any of these terms, the People object to a Court order restricting the terminology they could use. In a long trial, it is possible that someone could unintentionally utter the words "death phase." If the Court were to grant the motion, the utterance of such phrase would no-doubt form the basis of a request for sanctions, or a motion for a mistrial, by virtue of the violation of the Court's order. Because of the fact that the defendant has not shown that the use of the term "death phase" would be prejudicial, or would violate any of the constitutional provisions he references in his Motion, the People request that the Court deny the motion.

6. The Motion should be denied based on the pleadings only, and without an in-court hearing.

GEORGE H. BRAUCHLER, District Attorney

By: 
Chief/Senior Deputy District Attorney
Registration No. 20935

CERTIFICATE OF MAILING

I hereby certify that I have deposited a true and correct copy of the foregoing in the Public Defender's Mailbox located at 6450 S. Revere Pkwy. Centennial, CO 80111, addressed to:

TAMARA BRADY, ESQ.
DANIEL KING, ESQ.
KRISTEN NELSON, ESQ.
OFFICE OF THE PUBLIC DEFENDER

Dated: 10/10/14

By: 
Certifying Secretary

DISTRICT COURT
ARAPAHOE COUNTY, COLORADO
Court Address: Arapahoe County Justice Center
7325 S. Potomac St., Centennial, CO 80112

THE PEOPLE OF THE STATE OF COLORADO vs.
Defendant:
JAMES EAGAN HOLMES

COURT USE ONLY

Case Number:
12CR1522
Division/Ctrm:
202

COURT ORDER REGARDING DEFENSE MOTION D-237

THE COURT, being fully advised, and being duly apprised of the relevant facts and law, hereby denies DEFENSE MOTION D-237.

Dated this _____ day of _____, 2014

BY THE COURT

District Court Chief Judge Carlos A. Samour, Jr.