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	σ COURT USE ONLY σ
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 CHANGE OF JUDGE [D-253]

CERTIFICATE OF CONFERRAL

The prosecution states that it objects.

Pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments, article II, sections 16, 20 and 25 of the Colorado Constitution, C.R.S. § 16-6-201 and Crim. P. 21(b)(2)(IV), James Holmes, through counsel, moves this Court for a change of judge. In support of this motion, he states the following:

1. C.R.S. § 16-6-201(1)(d) states that a judge of a court of record shall be disqualified to hear or try a case if "[h]e is in any way interested or prejudiced with respect to the case, the parties, or counsel."

2. Likewise, Crim. P. 21(b)(2)(IV) states that, upon good cause shown (if a motion is not filed within the first 14 days of a case being assigned to a court), a party may file a motion for a substitution of judges if "[t]he judge is in any way interested or prejudiced with respect to the case, the parties, or counsel."

3. Moreover, the Due Process Clauses of the state and federal constitutions entitle a criminal defendant to a fair trial in a tribunal that is unbiased. The United States Supreme Court has held that "[a] fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases." *In re Murchison*, 349 U.S. 133, 136 (1955); *see also Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 877 (2009); U.S. Const. amends. V, XIV; Colo. Const. art. II, secs. 23, 25.

4. "We start with the precept, basic to our system of justice, that a judge must be free of all taint of bias and partiality." *People v. Julien*, 47 P.3d 1194, 1197 (Colo. 2002). A motion for recusal and its accompanying affidavits are legally sufficient if, considered together, they "state facts from which it may reasonably be inferred that the respondent judge has a bias or prejudice that will in all probability prevent him or her from dealing fairly with a party." *Wilkerson v. Dist. Court In & For Cnty. of El Paso*, 925 P.2d 1373, 1375-76 (Colo. 1996) (internal citations and quotations omitted).

5. This motion, along with the accompanying affidavits, articulates such facts.

6. Throughout the course of this litigation, the Court has frequently ruled against the defense. While it is not unusual for a court to disagree with motions filed by the defense in a criminal case, it is neither common nor necessary for a court to take a tone in its orders that is as hostile and demeaning to defense counsel as the tone this Court has increasingly taken in this case. Because the language in the Court's recent orders reflects a heightened level of disdain that demonstrates the Court's "bent of mind" against the defense, Mr. Holmes believes that good cause exists for filing this motion, and that a change of judge is warranted. *See People v. Botham*, 629 P.2d 589, 595 (Colo. 1981).

7. "Legal rulings in a case are, by themselves, insufficient to demonstrate a bias or prejudice against a party." *People v. Thoro Products Co.*, 45 P.3d 737, 747 (Colo. App. 2001). *See also People v. Lanari*, 926 P.2d 116, 119 (Colo. App. 1996) ([A] judge's rulings on issues presented in prior proceedings, even if erroneous, are insufficient by themselves to demonstrate disqualifying bias or prejudice."). While defense counsel strongly disagree with some of the rulings the Court has made in this case, the fact that the Court has frequently denied the relief requested in the motions they have filed is <u>not</u> the basis for this request for a change of judge.

8. Rather, it is the derogatory tone taken by the Court in its orders, and its unnecessarily opprobrious characterization of defense counsel and their legal arguments that justify the relief requested in this motion.

9. The Court is aware that defense counsel have a constitutional and ethical obligation to raise and preserve all possible issues at the trial level of a capital case, because in the event the law later changes, "Failure to preserve an issue may result in the client being executed even though reversible error occurred at trial." American Bar Association, *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 1030 (2003), Guideline 10.8, commentary. *See also Smith v. Kemp*, 715 F.2d 1459, 1476 (11th Cir. 1983) (Hatchett, J., concurring in part and dissenting in part) ("John Eldon Smith was tried in the same county, by a jury drawn from the same unconstitutionally composed jury pool [as his co-defendant, who obtained relief], but because his lawyers did not timely raise the unconstitutionality of the jury pool, he faces death by electrocution."); Motion D-208, p. 6 (citing commentary to ABA guidelines, which specifically notes that counsel have a duty to "preserve issues calling for a change in existing precedent" and that "there are many instances in which counsel should assert legal claims even though their prospects of immediate success on the merits are at best modest").

10. The Court is also aware that in the event of a death sentence in this case and the lengthy years of direct appeal and post-conviction review that will follow, trial counsel will be faulted if they do not carefully preserve legal issues. *See, e.g., Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011) (federal habeas review pursuant to 28 U.S.C.A. § 2254(d)(1) is "limited to the record that was before the state court that adjudicated the claim on the merits"); *Puckett v. United States*, 556 U.S. 129, 134 (2009) ("If an error is not properly preserved, appellate-court authority to remedy the error . . . is strictly circumscribed . . . . "); *People v. Rodriguez,* 209 P.3d 1151, 1156 (Colo. App. 2008) ("The purpose of an objection is not only to express disagreement with a proposed course of action, but also to identify the grounds for disagreement. An objection must be specific enough to provide the trial court with a meaningful opportunity to prevent or correct error.").

11. Yet despite being well aware of these constitutional obligations on the part of defense counsel, the Court has continued to use gratuitously pejorative language when addressing the arguments made by the defense in this case.

12. As just a handful of examples, earlier this year, the Court wrongly labeled a number of the defense's motions as "frivolous," *see* Orders D-143, D-144, D-145, D-146, D-147; *see also* Motion D-208, Order D-208.

13. This summer, the Court accused the defense of "ridicul[ing] the Court" and being "satirical" when the defense suggested (not at all intending to be ridiculing or satirical, or even remotely disrespectful to the Court) that the idea of granting a pre-trial hearing to address the admissibility of victim impact evidence should not make the Court feel uncomfortable. *See* Order D-168-A, p. 3.

14. When denying the defense's motion for an in camera review of the materials requested in D-SDT-5 and D-SDT-6, the Court accused the defense of adopting a "kitchen sink approach" and wrote that although this case is a "death penalty case," that does not "authorize the defendant to embark upon an oceanic fishing expedition in the dark." Order C-133, p. 2.

15. Last month, the Court characterized the defense's proposed instructions to witnesses offering victim-impact evidence at the sentencing hearing in this case – which were based on instructions approved by several other jurisdictions – as "insensitive, if not downright offensive." Order D-242, p. 6.

16. In its order continuing the trial date until January 20, 2015, the Court gratuitously and unflatteringly described the defense as "grous[ing]" and "complain[ing]," despite *granting* a delay in the trial. Order D-245-B, pp. 5, 8.

17. Most recently, the Court took its language to a new extreme when it unleashed a litany of insulting adjectives and phrases aimed at the quality of defense counsel's work in its orders concerning Motions D-248 and D-249. The Court called the defense's arguments in Motion D-248 "devoid of merit," "almost entirely successive," a "rehash," "meritless," "largely successive," "an afterthought," "apathetic," "halfhearted[]," "cursory," "lackluster," and "anemic." It then stated that the defense "does not even bother to identify the statements to which he refers," "misses the point," and that "the Court cannot read the defendant's mind, only

his filings." *See* Order D-248, pp. 1, 2, 3, 4, 5, 6, 7. Indeed, instead of simply denying the relief requested, every single page of the order contains at least one disparaging comment about the Court's perceived quality of defense counsel's pleading.

18. The barrage of insults the Court used against defense counsel in its order regarding Motion D-249 was likewise extensive. The Court called the motion and the arguments contained therein "devoid of merit," "almost entirely successive," "doubly successive," "rehashed," a "naked allegation," "inherently flawed," "self-serving[]," "meritless and triply successive," "faulty," "unfounded and unreasonable," "meritless," and "almost entirely successive." It again characterized the defense as "complain[ing]" and described the "defendant" as "apparently sensing the walls of precedent closing in on his untenable position," as "recycling yet another old argument," and stated, "at the risk of sounding like a broken record, the court again notes that this is an issue it has previously addressed in this litigation." *See* Order D-249, pp. 1, 2, 3, 4, 5, 6, 7, 8, 11.

19. Consistently throughout this litigation, including in these recent orders, the Court has repeatedly and incorrectly labeled the defense's legal claims as "successive." *See, e.g.,* Orders D-187, D-201, D-202, D-229, D-239, D-248, D-249, P-83-B.[1] "Successive" is a term

[1] As defense counsel have previously explained, *see* Reply in Support of D-187, the use of the term "successive" here is inappropriate, as it implies that an argument should not have been made because it was previously made and rejected. There are often times when the defense **must** raise the same legal argument with respect to multiple different issues in a case in order for each issue to be properly preserved. No appellate court will find a specific legal issue to be properly preserved just because the defense has previously raised a general argument in a different context at an earlier point in the case. *See, e.g., People v. Vigil*, 127 P.3d 916, 929 (Colo. 2006) ("When a defendant alleges a trial error, we review the error under the harmless beyond a reasonable doubt standard if the defendant preserved his claim for review by raising a contemporaneous objection."); *Moore v. People*, 925 P.2d 264, 268 (Colo. 1996) ("Only the grounds previously specified to the trial court may be considered on review unless the alleged error is deemed "plain error" within the meaning of Crim. P. 52(b)."); *People v. Coughlin*, 304 P.3d 575, 580 (Colo. App. 2011) ("[W]e decline to address for the first time on appeal a different ground [for challenging a prospective juror] that was not clearly brought to the attention of the trial court and opposing counsel."); *People v. McNeely*, 68 P.3d 540, 545-46 (Colo. App. 2002) ("Although defendant asserts that he implicitly raised the equal protection argument, because he did not do so expressly, we do not consider it here."). For example, the defense previously challenged the constitutionality of the statute authorizing the prosecution's use of statements made by a criminal defendant during a court-ordered sanity examination at trial and sentencing. *See, e.g.,* Motion D-32. But just because the defense challenged the constitutionality of the statute does not mean that the defense properly preserved its objection to the introduction of the *actual statements* that were then subsequently obtained from their client pursuant to a court-ordered examination. *See* Motion D-187. The underlying legal argument in the two motions may be the same, but the request made in each of the motions is different. If the defense had not objected to the admissibility of the statements Mr. Holmes made to Dr. Metzner, an appellate court would have found that Mr. Holmes had not properly preserved that issue for appeal. Similarly, just because Mr. Holmes moved to exclude statements he made to Dr. Metzner does not mean that by doing so he preserved this argument with respect to statements he subsequently

that generally applies in the post-conviction and appellate context. Moreover, as footnote 1 explains, counsel's arguments in this case have not been successive. While counsel have raised certain arguments multiple times, counsel have only done so when the arguments apply to new issues or evidence in the case. *See People v. Rodriguez,* 914 P.2d 230, 249 (Colo.1996) ("A successive argument addresses an issue that was fully and finally litigated on a preceding appeal. Successive arguments generally will not be addressed."). The Court's incorrect use of this term in this highly-publicized case wrongly suggests to the public that the defense is wasting the Court's time with its "successive" motions, when in fact defense counsel are simply doing their jobs. *See also* Motion D-208.

20. The Colorado Code of Judicial Conduct requires a Court to refrain from using "words or conduct manifest[ing] bias or prejudice." Rule 2.3(B). Comments [1] and [2] to this rule states that "A judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute," and admonishes judges not to employ "epithets," demeaning language, or to engage in conduct that is "intimidating" or "hostile."[2] Moreover, "[a] judge must avoid conduct that may reasonably be perceived as prejudiced or biased." *Id.*

21. The Court's treatment of defense counsel in its orders is inconsistent with Rule 2.3(B), as well as with its obligation to be "patient, dignified, and courteous" to "litigants" and "lawyers." *See* Rule 2.8(B). While the Court has previously claimed that the language it chooses to use when describing defense counsel's legal work in this case is "blunt" but "accurate and fair," *see* Order D-208, p. 1, the disdain for defense counsel in the Court's orders is palpable, and conveys the impression that the Court is often downright angry with the defense for filing motions in this case. At the very least, the Court's language has given an impression of partiality. *See People v. Hrapski,* 718 P.2d 1050, 1054 (Colo. 1986) ("[W]e note that courts

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made to Dr. Reid. *See* Motion D-248. In each circumstance, the defense must move to challenge the admissibility of the actual evidence at issue, or it will be faulted later by an appellate court for failing to do so. Moreover, if the same argument applies to multiple pieces of evidence or multiple issues and the defense objects in some circumstances but not others, an appellate court could hold that any error in the admission of the evidence that *was* objected to was harmless because other, similar evidence was admitted *without* objection. *See, e.g., People v. Hinojos-Mendoza,* 140 P.3d 30, 40 (Colo. App. 2005) *aff'd in part, rev'd in part,* 169 P.3d 662 (Colo. 2007) ("Before defendant objected, the officer had already testified, without objection, that the informant called defendant to place an order for a kilogram of cocaine. Thus, even if the objected-to hearsay had not been admitted, the jury would still have had to weigh similar unobjected-to hearsay against defendant's explanation that he was only attempting to collect a debt and that he was not aware of the kilo of cocaine found in his truck. Because the objected-to hearsay testimony was cumulative of the unobjected-to hearsay, we conclude its erroneous admission was harmless beyond a reasonable doubt.").

[2] While the rule lists a number of prohibited bases for such bias, prejudice, or harassment, "including but not limited to" race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, the clear intent and purpose behind the rule is to prohibit judges from exhibiting bias or prejudice for *any* reason.

must meticulously avoid any appearance of partiality, not merely to secure the confidence of the litigants immediately involved, but to retain public respect and secure willing and ready obedience to their judgments.").

22. Recusal is justified in this case because it may "reasonably be inferred" from the Court's deprecatory and hostile tone in its orders, that the Court's disdain for defense counsel creates a "bias or prejudice that will in all probability prevent it from dealing fairly with the petitioner." *Kane v. Cnty. Court Jefferson Cnty.*, 192 P.3d 443, 445 (Colo. App. 2008); *see also People v. Vialpando*, 809 P.2d 1082, 1084-85 (Colo. App. 1990) (reversal required where, throughout the trial, "the judge demonstrated an attitude of prejudice against the defense," including making "numerous statements . . . evidencing his irritation and intolerance of defense questioning"; trial court's "patent partiality precluded the proper administration of justice").

23. Finally, when considering a motion for change of judge and supporting affidavits, "[a]s a matter of judicial policy, the court must accept as true the facts stated in the motion and affidavits for disqualification of a judge." *Botham,* 629 P.2d at 595. The facts alleged in this motion and the accompanying affidavits are all based on the plain language of the Court's orders, which is uncontroverted.

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.

We hereby verify and affirm under penalty of perjury that what is written in this motion is the truth.

Dated this 13th day of November, 2014.

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

SHERILYN KAY KOSLOSKY
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID 20044014903
MY COMMISSION EXPIRES DECEMBER 9, 2016

STATE OF COLORADO)
) ss.
COUNTY OF Denver)

The foregoing instrument was acknowledged before me this 13th day of November, 2014, by Daniel King, Tamara Brady, and Kristen Nelson.

Witness my hand and official seal.

My commission expires: 12/9/16

Notary Public

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	σ COURT USE ONLY σ
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

ORDER RE: MOTION FOR CHANGE OF JUDGE [D-253]

Defendant's motion is hereby GRANTED _____ DENIED _____.

BY THE COURT:

_____ _____

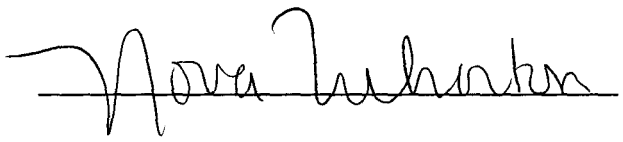
JUDGE Dated

I hereby certify that on November 13, 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:

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



D-253

Exh. A

AFFIDAVIT OF CARRIE LYNN THOMPSON

My name is Carrie Lynn Thompson. I am an attorney and have been licensed to practice law in Colorado since 1987.

I am currently the Managing Deputy State Public Defender for the Colorado Springs Regional Public Defender's Office. I have been employed by the Office of the Colorado State Public Defender since 1987. I was assigned to the Arapahoe County Regional Office for approximately eight and a half years. I transferred to the Denver Regional Office where I practiced for approximately ten years. While in the Denver Office, I served as a Division Lead and handled complex and high profile cases, including one case where the Denver District Attorney sought the death penalty and a jury trial was held. I also handled other cases where the Denver District Attorney was considering seeking the death penalty. I have held my current position as the Managing Deputy State Public Defender for the Colorado Springs Office since March 2006. In December 2006, I was assigned to represent a client who faced the death penalty in El Paso County.

I was awarded the David F. Vela Award in 1997, an award that acknowledges extraordinary dedication to the ideals of the Colorado Public Defender System and was named the Colorado State Public Defender Attorney of the Year in 2002. In 2012, I was honored by the Colorado Women's Bar Association Foundation at their annual "Raising the Bar" dinner.

I served as the president of the Colorado Criminal Defense Bar from 2003-2004. I have served on many local level and state level criminal justice committees including the Judicial Advisory Council and the Supreme Court Jury Reform Committee. I have participated in numerous capital litigation trainings. In 2007, I attended the Bryan R. Shechmeister Death Penalty College sponsored by Santa Clara University School of Law.

I have reviewed the motions and court orders referenced in the attached Motion for a Change of Judge and attest to the following:

1. I am well-acquainted with the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. These guidelines create a standard for high-quality legal representation in cases where the government is seeking the death penalty.

2. According to the Guidelines, one of the most important duties defense counsel must perform in a capital case is to ensure all legal issues are preserved for appellate review. The state of the law changes frequently. The Guidelines state that counsel must carefully consider the fact that the law might change when evaluating what claims to bring and what arguments to make in a case where the death penalty may be imposed. If defense counsel do not raise a legal claim at the trial level of a capital case, they may later be faulted by an appellate court for failing to do so.

3. The defense contacted me and asked me to review a number of motions and orders in *People v. Holmes*. These documents are cited in the attached pleading.

4. Based on my experience, the sorts of arguments raised in these motions are arguments that are made by defense counsel in most, if not all capital cases. It is imperative that lawyers in capital cases preserve the type of issues that were contained in defense counsel's motions.

5. The Court's language in the orders is, in my judgment, malicious and demonstrates a personal bias against the defense. Especially considering the fact that it was defense counsel's duty to raise and preserve the issues that were the subject matter of the pleadings, I believe the orders are highly disrespectful to the defense.

6. The Court's orders disparage defense counsel and their advocacy and seem to personally attack defense counsel and the quality of their work. In one order the Court goes so far as to state, "Indeed, the defendant **does not even bother** to identify the statements to which he refers, much less the questions he finds objectionable. It is not this Court's function to divine arguments on behalf of the litigants."

7. Many of the Court's remarks seem to accuse defense counsel of purposeful wrong-doing. The Court denounces defense counsel with comments such as "defendant ignores," "completely devoid of merit and should not have been filed," and "defendant's proposed instruction includes **only** those parts parsed from the *Cargle* instruction that **he apparently finds favorable.**" The Court alleges that "the defendant **self-servingly** refers to a Court-ordered examination as a 'critical stage of the proceeding.'" The Court even goes so far as to accuse the defense of ridiculing the Court in a motion and unfairly reprimands defense counsel in an order.

8. The mean-spirited language used by the Court suggests, and gives the impression, that the Court is upset with the defense counsel for filing motions. At times, the Court's comments seem to be mocking defense counsel. The language is sarcastic and flippant. In one order the Court cites the old adage, "what's sauce for the goose is sauce for the gander."

9. In my opinion and experience, the Court's orders that I have reviewed demonstrate such a significant level of contempt for defense counsel that indicates in all probability, the Court will not treat the defense fairly during the upcoming trial in this case.

I have read this affidavit and affirm under penalty of perjury that what is written in this affidavit is the truth.

Dated this 10th day of November, 2014.

Carrie Lynn Thompson

STATE OF COLORADO)
) ss.
COUNTY OF Denver)

SHERILYN KAY KOSLOSKY
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID 20044014903
MY COMMISSION EXPIRES DECEMBER 9, 2016

The foregoing instrument was acknowledged before me this 10th day of November, 2014, by Carrie Lynn Thompson.

Witness my hand and official seal.

My commission expires: 12/9/2016

Sherilyn K Kosloshy
Notary Public

D-253

Exh. B

AFFIDAVIT OF SHARLENE REYNOLDS

My name is Sharlene Reynolds. I am an attorney and have been licensed to practice law in Colorado since 1985.

I am currently in private practice. The focus of my practice for my entire career has been on the representation of people accused of crimes. I was employed by the Office of the Colorado State Public Defender from 1985 to 2006. From 1999 to 2006 I served as Chief Trial Deputy. In that capacity, I represented a number of clients facing the death penalty. While employed by the Colorado State Public Defender, I won the Bootcamper of the Year Award, the Public Defender of the Year award, the Colorado Criminal Defense Bar's Jonathan Olom Award, as well as an award from Coloradans for Alternatives to the Death Penalty for my representation of Robert Harlan on post-conviction review.

I am currently retained as an expert witness in the Sir Mario Owens case regarding Mr. Owens's post-conviction ineffective assistance of counsel claims.

I have reviewed the motions and court orders referenced in the attached Motion for a Change of Judge and attest to the following:

1. I am familiar with the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, which are widely-recognized as the preeminent source of professional norms for capital defense attorneys. These guidelines set forth a national standard of practice for criminal defense attorneys representing individuals facing the death penalty in this country.

2. Rules 1.1 and 10.8 of the Guidelines and their commentary impose a duty upon defense counsel in capital cases to preserve issues calling for a change in existing precedent. Counsel representing clients facing the death penalty often file such motions, because the law does change. For example, defense attorneys in Colorado filed motions challenging the three-judge panel sentencing scheme as unconstitutional for years. When the United States Supreme Court decided *Ring v. Arizona*, 536 U.S. 584 (2002), the decision had the effect of invalidating Colorado's capital sentencing scheme. *See Woldt v. People*, 64 P.3d 256 (Colo. 2003).

3. The Guidelines, as well as the ABA Standards for Criminal Justice, make clear that in capital cases, an attorney "defending the accused has the duty to render 'extraordinary efforts.'" *Summerlin v. Schriro*, 427 F.3d 623, 638 (9th Cir. 2005) (citing ABA Standards for Criminal Justice 4-1.2(c)).

4. I have reviewed a number of the motions filed by defense counsel in *People v. Holmes* including those that are cited in the attached pleading. These motions are consistent with the types of motions that I would expect attorneys striving to be thorough and comply with the ABA Guidelines to draft and file. The majority of these motions make arguments concerning the constitutionality of statutes and the permissible use of evidence at trial. These arguments are relatively mundane, yet important from the standpoint of issue preservation.

5. I have also reviewed the Court's orders ruling on those motions. In my opinion, the language the Court uses in its orders ruling on those motions is inflammatory and creates an appearance of bias against the defense. The tone of the orders is unprofessional and unnecessarily discourteous to defense counsel, particularly given the routine subject matter of the pleadings at issue.

6. It is my opinion that the following language in the Court's orders is among the language that constitutes grounds for recusal:

7. The Court described defense counsel's motions seeking a change in existing law as "frivolous" and "completely meritless" and states that the motions "should not have been filed." Orders D-143, D-144, D-145, D-146, D-147. When confronted with a detailed explanation of defense counsel's obligations under the ABA Guidelines and other ethical and constitutional rules, the Court then stood by its erroneous characterization of those motions and claimed that it was simply "calling it as it sees it." Order D-208.

8. In another order, the Court unjustifiably described the defense as making a "satirical remark" and "ridiculing" the court. Order D-168-A.

9. In a recent order, the Court states that it must find jurors who are "willing to impose the death penalty if warranted by the evidence and the law," which is not the law. Order D-245-B. This is not the law. It is well-established that jurors must be able to give fair consideration to both penalties to be qualified to serve in a capital case. *See Morgan v. Illinois,* 504 U.S. 719, 735-736 (1992).

10. When the defense pointed this out and argued that the Court is organizing a tribunal to return a death verdict and correctly articulating the relevant legal standard, the Court called their argument and accusation "downright farcical," "completely meritless," "outrageous," "disrespectful, unfair, and wholly inappropriate," and "unfounded," and excoriated defense counsel for "impugn[ing] the dignity of the Court." Order D-252.

11. The Court also characterized the defense as "grousing" when it asked to continue the trial for legitimate reasons. Order D-245-B.

12. The Court's language in its Orders D-248 and D-249 is particularly inappropriate and unprofessional. It refers to the defense's arguments in Motion D-248 as "an afterthought," "cursory," "apathetic," "lackluster," "halfhearted" and "anemic." It states that the defendant "does not even bother to identify the statements to which he refers, much less the questions he finds objectionable." Order D-248.

13. It wrongly identifies a number of defense counsel's arguments as "successive," "partially successive," "doubly successive," and "triply successive." Orders D-248 & D-249.

14. The Court further describes the defense's arguments in Motion D-249 as "rehashed" and "recycled," and characterizes the defendant as "apparently sensing the walls of precedent closing in on his untenable position." Order D-249.

15. The language above reflects a personal, negative judgment of the quality of defense counsel's legal work. The Court's language suggests that it views defense counsel as incompetent and lazy. The harsh language also suggests, and gives the impression, that the court is angry and/or offended that defense counsel is raising these arguments.

16. In my opinion and experience, the Court's orders that I have reviewed demonstrate an attitude of prejudice and bias against the defense that in all probability will prevent the Court from dealing fairly with the defense during the upcoming trial in this case.

I have read this affidavit and affirm under penalty of perjury that what is written in this affidavit is the truth.

Dated this 13 day of November, 2014.

Sharlene Reynolds

STATE OF COLORADO)
) ss.
COUNTY OF Denver)

The foregoing instrument was acknowledged before me this 13th day of November, 2014, by Sharlene Reynolds.

Witness my hand and official seal.

SHERILYN KAY KOSLOSKY
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID 20044014903
MY COMMISSION EXPIRES DECEMBER 9, 2016

My commission expires: 12/9/2016

Notary Public