REDACTED

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	Filed NOV - 7 2014 CLERK OF THE COMBINED COURTS ARAPAHOE COUNTY, COLORADO
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 FAIR, MEANINGFUL, AND CONSTITUTIONALLY ADEQUATE VOIR DIRE [D-252]

CERTIFICATE OF CONFERRAL

The defense conferred with the prosecution and it responded:

"For your first point, we would likely leave this to the court's discretion, as we believe that this issue has previously been argued and briefed, and that the court has discretion to set limits and court schedules.

For your second point, we will likely assert that playing a video recording for jurors is not something that has to be done in the presence of the parties, or recorded, but we will have to see your cited legal authority prior to taking an actual position on this question.

For your third point, we do not object to both parties having the opportunity to review the court's proposed video recorded instructions, but we do not believe that the court has indicated an intention to deny either party that opportunity.

For your last point, we will likely respond that the court is aware of the correct legal standard, and that the language in the order you cite does not indicate that the court plans on applying an incorrect standard."

Pursuant to the Sixth, Eighth and Fourteenth Amendments and article II, sections 16, 20 and 25 of the Colorado Constitution, James Holmes, through counsel, moves this Court to provide him with a voir dire process that vindicates his state and federal constitutional rights, and

provides him with a fair, meaningful, and constitutionally sufficient opportunity to identify unqualified jurors and make intelligent decisions about potential excusals for cause and potential peremptory challenges. In support of this motion, he states the following:

1. In several of its recent orders, the Court has made decisions and comments about voir dire the defense believes warrant reconsideration.

I. Mr. Holmes Moves the Court to Reconsider its *Sua Sponte* Decision to Limit Individual Voir Dire to 10 Minutes per Side and to Schedule 18 Prospective Jurors per Day.

2. On October 29, 2014, the Court issued Order D-154a-3, in which it *sua sponte* reconsidered its decision to limit each party's individual voir dire to 20 minutes per prospective juror, and to schedule 12 prospective jurors per day for individual questioning. The Court concluded that instead of 20 minutes, "[E]ach party shall have 10 minutes with each prospective juror during individual *voir dire*, and instead of 12 prospective jurors, the Court will plan to bring in 18 prospective jurors per day (nine in the morning and nine in the afternoon)." Order D-154a-3, p. 2.

3. As justification for this decision, the Court notes, among other things, that it has "decided it will question prospective jurors when they first enter the courtroom, after they have watched its videotaped remarks. This should cut down on the need for the parties to ask certain questions." *Id.* at 2.

4. The Court further states that even with 10 minutes, it is providing counsel with "almost 10 times the amount of time they would have in a non-capital first-degree murder case." *Id.* The Court then states that it is "not feasible" for counsel to "spend as much time as possible with each prospective juror," and that if "the rule were as the defendant urges, trials could drag on for weeks, months, or years."

5. Counsel request that the Court reconsider its ruling cutting the amount of time the parties are permitted to spend questioning each juror in half.

6. As an initial matter, the defense is confused by the Court's comment that if "the rule were as the defendant urges, trials could drag on for weeks, months, or years."

7. Everyone in this case acknowledges that given its unique size and nature, this trial inevitably take a considerable amount of time. Allowing the parties 10 minutes per side versus 20 minutes per side is not likely to change this essential fact.

8. Indeed, the Court made this ruling on the heels of an order continuing the trial until January 20, 2015. *See* Order D-245-B. The Court stated in that order that it intends to begin individual voir dire on February 1, 2015, and that general voir dire will take place on June 1, 2015, with opening statements occurring on June 3, 2015. Thus, the Court has allotted approximately 16 weeks for individual voir dire.

9. If the Court were to adhere to its original plan of bringing 12 jurors in for individual questioning each day for 16 weeks, this would give the parties the opportunity to question roughly 960 jurors during that time period, with the goal of qualifying between 120 and 150 prospective jurors. *See* Transcript, May 29, 2014, p. 35. While the defense has concerns that even 20 minutes per side may not be enough time for some individual jurors, a time frame that allows for the questioning of 960 jurors over the course of 16 weeks with the goal of qualifying between 100 and 150 of them[1] appears to the defense, at this point in time, to be a reasonable starting point. There was no need to *sua sponte* depart from the Court's original plan.

10. Allowing the parties just ten minutes per side to conduct individual voir dire on the topics of publicity, insanity, and the death penalty, in addition to any hardship issues the Court has not resolved, is a constitutionally insufficient amount of time in a case of this magnitude.

11. Notably, when the Court granted the defense's request to add insanity to the topics covered during individual voir dire, it noted that "adding insanity as a topic to individual *voir dire* means that individual *voir dire* will take longer." Order D-154a, p. 3. Indeed, this was the basis for the Court's decision to *reduce* the amount of time for general voir dire from the originally-allotted two hours to 75 minutes. *Id.* Thus, as it currently stands, the Court has increased the number of topics the parties will be permitted to discuss during individual voir dire, but has reduced the amount of time the parties have for both individual voir dire and general voir dire.

12. "Part of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors." *Morgan v. Illinois*, 504 U.S.719, 729 (1992); *see Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981); *Dennis v. United States*, 339 U.S. 162, 171-172 (1950); *Morford v. United States*, 339 U.S. 258, 259 (1950). "Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." *Rosales-Lopez*, 451 U.S. at 188. "Although the Constitution makes no mention of *voir dire*, the law recognizes the important role this process plays in ensuring the fair and impartial criminal jury mandated by the Sixth Amendment." *United States v. Quinones*, 511 F. 3d 289, 299 (2d. Cir. 2007). Adequate *voir dire* enables a capital defendant to exercise his constitutional right to an impartial jury by challenging prospective jurors for cause before a judge who has enough information to accurately rule on their removal. *See Morgan*, 504 U.S. at 729-30; *Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991).

13. In order to ensure that Mr. Holmes's constitutional rights are protected, the individual voir dire process cannot and must not be rushed. Placing an arbitrary ten minute time limitation on counsel's ability to question prospective jurors will serve to undermine, not enhance the fairness, of these proceedings.

[1] The Court indicated in open court on May 29, 2014 that it intended to qualify between 120 and 150 people. *See* Transcript, May 29, 2014, pp. 33, 35, 50. However, in footnote 1 of Order D-245-B, the Court indicated that it intended to qualify between 100 and 120 prospective jurors.

14. As the New Jersey Supreme Court stated:

> Suffice it to state that voir dire in a capital cause should probe the minds of the prospective jurors to ascertain whether they hold biases that would interfere with their ability to decide the case fairly and impartially . . . . [A] court should avoid any artificial time limits on questioning by counsel. Here, the court imposed a "three minute rule," which limited counsel's questioning to three minutes. The record reflects that this limitation led to questioning that often was rushed and superficial. As long as counsel acts reasonably and responsibly, as counsel did here, voir dire should proceed uninhibited by any such artificial constraints.

State v. Erazo, 594 A.2d 232, 241 (N.J. 1991).

15. In the event of a death sentence in this case, the appellate courts' concern over the accurate identification of jurors who are biased in favor of the death penalty will be so strong that the typical deference given to the district court will be strictly curtailed:

> In a noncapital case, we will overturn the trial court's resolution of a challenge for cause only if the record presents no basis for supporting it . . . . In capital cases, however, especially when the challenged juror's voir dire statements are ambiguous or contradictory, we will affirm the trial court's disposition of a defendant's challenge for cause only if we find affirmative support in the record for it. The extent to which the record must support the trial court's ruling cannot be delineated in the abstract; it must be the result of our considered judgment when presented with the unique circumstances of the voir dire before us.

People v. Harlan, 8 P.3d 448, 462 (Colo. 2000). In short, "While appellate courts normally defer to trial-level resolution of voir dire issues, capital cases inherently require a more searching degree of review." *Id.* at 462.[2]

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[2] While the *Harlan* court's discussion of voir dire was based in part on *People v. Macrander*, 828 P.2d 234 (Colo. 1992), which was recently overruled by *People v. Novotny*, 320 P.3d 1194 (Colo. 2014), *Novotny* in no way alters the *Harlan* court's conclusions and holdings concerning the standard of appellate review that is applied in capital cases when assessing for whether a trial judge conducted a constitutionally adequate and searching voir dire, or whether a particular challenge for cause was erroneously denied. *See Harlan*, 8 P.3d at 462 ("Regardless of whether the challenged jurors actually served on the jury or were removed by peremptory challenge, our task is to ensure that there are affirmative reasons discernible in the record to conclude that the trial court's rulings on the defendant's challenges for cause resulted in a jury that could fairly consider evidence in aggravation and mitigation before imposing a sentence on the defendant."). Additionally, it is also not at all settled whether *Novotny* even applies to a capital case.

16. Ten minutes per side per juror is simply an inadequate amount of time to ensure that a record is made that will withstand the years of appellate scrutiny that will follow in the event of a death sentence. As the United States Supreme Court held in *Morgan*, "A defendant on trial for his life must be permitted on *voir dire* to ascertain whether his prospective jurors function under such misconception [that the death penalty should be imposed automatically upon conviction of a capital offense]. The risk that such jurors may have been empaneled in this case and 'infected petitioner's capital sentencing [is] unacceptable in light of the ease with which that risk could have been minimized.'" 504 U.S. at 735-36 (quoting *Turner v. Murray*, 476 U.S. 28, 26 (1986)).

17. The Court's observation in Order D-154a-3 that 10 minutes per side is "almost 10 times" the amount of time they would have in a non-capital first-degree murder case" overlooks the unique and extraordinary nature of this case. The Court should instead look to other cases of similar magnitude and circumstance. For example, the district court in the Timothy McVeigh trial allowed voir dire of each individual juror to last an average of approximately an hour. *See United States v. McVeigh*, 153 F.3d 1166, 1184 (10th Cir. 1998) ("Voir dire was by no means a hurried affair; each seated juror's *voir dire* accounted for an average of forty-eight transcript pages, or a period of an hour or so. . . . Questioning by the court and the parties goes a long way towards ensuring that any prejudice, no matter how well hidden, will be revealed.").

18. Even if this were not a death penalty prosecution, a fair and meaningful individual voir dire would take much, much longer than ten minutes for some jurors. While some jurors will be excused after very little time, for cause or hardship, for example, many others will take substantially more time. The Court should reconsider its decision to impose a 10-minute per side time limitation, and should instead take a flexible approach, evaluating the time needed on a juror-by-juror basis, and remain committed to taking whatever time is needed to satisfy the requirements that have been set forth clearly by the Colorado Supreme Court and the United States Supreme Court for voir dire in capital cases.

19. In addition, the Court's decision to reduce the amount of time each party has to question prospective jurors from 20 minutes to 10 minutes was based in part on its conclusion that, following the jurors' viewing of a videotape of the Court explaining Colorado's capital sentencing process, the Court itself will first question jurors before the parties ask questions. The defense has already objected to the use of such a videotape, *see* Transcript, May 29, 2014, pp. 7-8. 44, and raises additional issues regarding that videotape below.

20. The defense further urges the Court to reconsider its decision to spend time questioning jurors itself following the viewing of that videotape, and instead allow the parties to spend that additional time questioning jurors. In counsel's experience, jurors tend be more guarded in their responses to the Court and will be more likely to tell the Court what they believe it wants to hear, simply by virtue of the fact that the Court is the ultimate authority figure in the room and will be donned in a black robe.

21. In one of the largest empirical studies of voir dire, funded by the U.S. Department of Justice, researchers "sought to determine whether the level of juror self-disclosure was affected by the identity of the questioner or the method of questioning." Frank P. Andreano, *Voir Dire: New Research Challenges Old Assumptions* 95 Ill. B.J. 474, 476 (2007). The results

of the study found that jurors are much more likely to be candid when speaking to attorneys conducting voir dire than with a judge:

> In examining courtroom behavior, the researchers found that the prospective jurors viewed the judge as an authority figure and were much more guarded in their responses. The jurors tended to provide less self-revealing information . . . and were much more conservative with the responses during judge initiated questioning. This correlation to past research lead to the observation that it seems from the direction and magnitude of the change scores that during a judge-conducted voir dire jurors attempted to report not what they truly thought or felt about an issue, but instead what they believed the judge wanted to hear. This skew continued to exist even when the judge adopted a less formal method of examination. In contrast, the jurors did not view the attorneys as possessing the same type of authority as the judge, which tended to result in a greater degree of self-disclosure.

Id. (internal citations and quotations omitted).

22. The videotape and questioning by the Court will take time that could be used instead for permitting jurors to speak freely and openly with the attorneys in the case, and to explore and share their actual views on the hot button issues that exist in this case.

23. Finally, even if the Court adheres to the 10 minute-per-side time limitation it has imposed in Order D-154a-3, and even if the Court insists on questioning these jurors in addition to allowing the parties to question jurors, the defense believes that calling 18 prospective jurors per day in for individual voir dire is too many. Assuming that the Court takes approximately 10 minutes to conduct its own questioning, that means that each prospective juror will be questioned for approximately 30 minutes. If a 30-minute process is repeated 18 times, that means that the parties will spend a minimum of 540 minutes, or 9 hours questioning jurors each day, which does not account for the time it will take the parties to make challenges for cause or hardship or to discuss any other matters that come up. Nor does it account for mid-morning and mid-afternoon breaks that will need to be taken for the court reporter, or for lunch.

24. Calling 18 jurors in for individual voir dire every day will not only create an unworkable, rushed situation for the parties, but is likely to inconvenience some prospective jurors, who will be forced to either wait until late in the evening to be questioned, or come back another day if the parties do not get through all 18 people scheduled for that day.

II. Mr. Holmes Demands the Right to be Present at All Stages of the Voir Dire Process and Moves the Court to Reconsider the Procedures it has Outlined With Respect to its Videotaped Instructions on the Capital Sentencing Process.

25. The defense maintains its objection to the use of an instructional videotape about Colorado's capital sentencing process during the individual voir dire process. *See* Transcript, May 29, 2014, pp. 7-8. 44.

26. However, if the Court insists on using such a videotape, the defense objects to the procedure the Court currently intends to follow, whereby prospective jurors will report to the courthouse and watch the videotape *outside the presence of the attorneys, Mr. Holmes, and the Court*. Mr. Holmes requests that the Court reconsider this procedure and require the videotape to be played on the record, in open court, in the presence of the parties and the Court, as well as the court reporter.

27. Mr. Holmes has a state and federal constitutional right to be present with counsel whenever this videotape is played. "A defendant has a constitutional right to be present at all critical phases of a criminal trial." *People v. Munsey*, 232 P.3d 113, 120 (Colo.App. 2009); *see also* U.S. Const. amends. VI, XIV; Colo. Const. art. II, § 16 (providing "the right to appear and defend in person and by counsel . . . ."); Crim. P. 43; *Key v. People,* 865 P.2d 822 (Colo.1994); *Luu v. People,* 841 P.2d 271 (Colo.1992).

28. The United States Supreme Court has specifically held that voir dire is "a critical stage of the criminal proceeding, during which the defendant has a constitutional right to be present." *Gomez v. United States*, 490 U.S. 858, 873 (1989). *See also Illinois v. Allen*, 397 U.S. 337, 338 (1970) ("One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial."); *Lewis v. United States*, 146 U.S. 370, 372 (1892) ("A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner . . . . It would be contrary to the dictates of humanity to let him waive the advantage which a view of his sad plight might give him by inclining the hearts of the jurors to listen to his defense with indulgence." (internal quotations and citations omitted)).

29. Although the Court "has emphasized that this privilege of presence is not guaranteed 'when presence would be useless, or the benefit but a shadow,' . . . due process clearly requires that a defendant be allowed to be present 'to the extent that a fair and just hearing would be thwarted by his absence[.]' . . . . Thus, a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987) (quoting *Snyder v. Massachusetts,* 291 U.S. 97, 105-06 (1934)); *accord Lockett v. Trammel*, 711 F.3d 1218, 1250 (10th Cir. 2013) (the right to be present is limited to circumstances where a defendant's "presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." (citing *Snyder,* 291 U.S. at 105-06)).

30. Put a different way, a defendant's right to be personally present is guaranteed by due process "if the fundamental fairness of the proceeding would be undermined by the defendant's absence." *People v. Isom,* 140 P.3d 100, 104 (Colo.App.2005).

31. In this case, prospective jurors' viewing of a videotape of the Court talking about substantive legal concepts related to the capital sentencing process is unquestionably an integral part of voir dire. Indeed, the Court itself recently stated that this video will "extensively educate the prospective jurors about the law." Order D-154a-3, p. 2.

32. Notably, Mr. Holmes previously requested to be present for the initial large group sessions with prospective jurors when questionnaires will be distributed. *See* Motion D-154a. The Court granted that request. *See* Transcript, May 29, 2014, pp. 17-18. Having Mr. Holmes present when the instructional videotape is played for jurors would likewise "contribute to the fairness of the procedure" and relate to the "fullness of his opportunity to defend against the charge." *Stincer*, 482 U.S. at 745; *Lockett*, 711 F.3d at 1250.

33. As the Tenth Circuit concluded in *Larson v. Tansy*, 911 F.2d 392 (10th Cir. 1990):

> [W]e hold that ***the defendant's presence in the courtroom during the instructing of the jury . . . would not have been useless*** . . . . Since defendant was competent to stand trial, we must assume that he was capable of assisting counsel if he desired . . . . [D]efendant's presence might have allowed him to provide assistance to his counsel. ***We also believe that defendant's mere presence, aside from any assistance defendant could have given to his counsel, would have been useful and would have provided more than a shadow of benefit.*** At least two circuit courts have held that a defendant was denied his due process right to be present throughout his trial when he was excluded from jury instructions in both cases and in one case the rendering of the verdict. *United States v. Fontanez,* 878 F.2d 33 (2d Cir.1989); *Wade v. United States,* 441 F.2d 1046 (D.C.Cir.1971). In *Fontanez,* the defendant was excluded from part of the jury instructions. The *Fontanez* court held that defendant's exclusion "deprived [Fontanez] of the 'psychological function' of his presence on the jury during a crucial phase of his trial." *Fontanez,* 878 F.2d at 38. In *Wade,* the defendant was absent from part of the jury instructions and the rendering of the verdict. The *Wade* court held that this was not harmless error because there was a reasonable possibility of prejudice.

Id. at 395 (emphasis added).

34. Moreover, in this capital case, it is absolutely critical that the playing of this videotape providing substantive information to jurors be done on the record. Given the large volume of prospective jurors and the number of times this video will be played (as well as the

complexity of the topic at hand), it is highly likely that there will be times when prospective jurors make comments or ask questions to each other, or to the bailiff, or make facial expressions or other gestures that would be important for the parties to know about, and for an appellate court to have a record of. *See, e.g., Mattox v. United States,* 146 U.S. 140, 150 (1892) (reversal required where bailiff made inappropriate remarks to jurors during deliberations); *Scott v. Commonwealth,* 399 S.E.2d 648 (Va. App. 1990) (jury officer's improper comments to prospective jurors during jury orientation session violated defendant's right to fair trial by impartial jury and required reversal). As with the large introductory group sessions when questionnaires will be distributed, there is simply no way to tell what will happen during these sessions in advance.

35. For these reasons, the only constitutionally sound course of action is to require the videotape to be played for prospective jurors on the record, in the presence of the attorneys, the Court, and the court reporter, to ensure that no improper communications occur and to ensure that an adequate record is made of these proceedings. *People v. Wells*, 776 P.2d 386, 390 (Colo. 1989) (recognizing that the appellate court must be provided with a record sufficient to allow it to review alleged errors, noting that "[a]ny facts not appearing of record cannot be reviewed" and that "[t]he presumption is that material portions omitted from the record would support the judgment").

III. The Defense Requests an Opportunity to Review the Court's Proposed Script for its Videotaped Instructions on the Capital Sentencing Process.

36. When the Court previously indicated that it intended to use an instructional video during individual voir dire, it stated, "What I plan to do is to have a video-recording made; of course, counsel will get a copy of my comments in advance before they're recorded. Both sides will get a copy." Transcript, May 29, 2014, p. 42.

37. The Court again referenced its preparations for this videotape in its recent order D-154a-3, in which it stated that it has been working on "its subsequent video recorded remarks for individual *voir dire*." *Id.* at 1.

38. In an abundance of caution, the defense reminds the Court that it requires an opportunity to view the script the Court intends to use for this videotape, as well as a sufficient amount of time to lodge any specific objections and proposed revisions it may have to the language of the script, so that an adequate appellate record can be made in this case. *See Wells, supra*; *Evitts v. Lucey*, 469 U.S. 387, 388-89 (1985); *Douglas v. California*, 372 U.S. 353 (1963); U.S. Const. amends V, VI, XIV; Colo. Const. art. II, secs. 16, 25; American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 10.8(B)(2) (requiring counsel to "ensure that a full record is made of all legal proceedings in connection with the claim").

IV. The Defense Moves the Court to Apply the Legally Correct Standard to Voir Dire in this Capital Proceeding.

39. In its recent order continuing the trial to January 20, 2014, the Court stated in footnote 1, "Individual *voir dire* may well take as long as the trial itself because the Court and

counsel must individually question hundreds of prospective jurors in order to find 100 to 120 prospective jurors who: (1) are willing to impose the death penalty if warranted by the evidence and the law . . . ." Order D-245-B, p. 2.

40. This statement immediately caught defense counsel's attention because it is an inaccurate statement of law. The defense moves the Court to apply the correct legal standard to voir dire in this case.

41. Given the Court's stated goals for jury selection in this footnote, it appears that this Court is intent upon organizing a tribunal to return a verdict of death, rather than the fair and impartial jury to which Mr. Holmes is constitutionally entitled. The objective of voir dire in a capital case is not to find jurors who are willing to impose the death penalty upon Mr. Holmes. *See Witherspoon v. Illinois*, 391 U.S. 510, 521 (1968) ("[A] State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death.").

42. Rather, "a capital defendant is entitled to a voir dire sufficient to ascertain whether prospective jurors can fairly consider ***both life imprisonment and a death sentence as possible punishments***." *People v. Harlan*, 8 P.3d 448 (Colo. 2000), *citing Morgan v. Illinois*, 504 U.S. 719, 735-736 (1992) (emphasis added).

43. In the event of a death sentence in this case, the concern on appeal will be with whether jurors who were biased *in favor of the death penalty* were identified and removed – not the other way around:

> A capital defendant's right to due process is violated if the jury is empanelled without the trial court first making an adequate determination that none of its members will automatically vote for a death sentence upon the defendant's conviction for a death-eligible offense. *See Morgan*, 504 U.S at 728–29, 112 S.Ct. 2222. A reviewing court need not conclude that any such jurors actually were empanelled; reversal is required if there is a sufficient possibility that the trial court failed to identify and remove prospective jurors whose death penalty views render them unqualified under *Witt*. *See id.* at 736, 112 S.Ct. 2222 ("The risk that such jurors may have been empanelled ... and infected petitioner's capital sentencing [is] unacceptable in light of the ease with which that risk could have been minimized.") (internal quotation marks and citations omitted).

People v. Harlan, 8 P.3d 448, 461 (Colo. 2000).

44. In *Morgan v. Illinois*, 504 U.S. 719 (1992), the United States Supreme Court held that, not only is a capital defendant entitled to an impartial jury, but such a defendant is also entitled to have the court strike for cause any juror who will automatically vote for death if the defendant is convicted. The Court reversed the death sentence and explained:

> A juror who will automatically vote for the death penalty [in the case before him or her] will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, ***because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror***. Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. ***If even one such juror is empanelled and the death sentence is imposed, the State is disentitled to execute the sentence.***
>
> . . . .
>
> Any juror to whom mitigating factors are likewise irrelevant should be disqualified for cause, for that juror has formed an opinion concerning the merits of the case without basis in the evidence developed at trial.

Id. at 729, 739 (emphasis added). As Justice Scalia explained, the *Morgan* ruling means that "a State is constitutionally *compelled* to exclude jurors who would, on the facts establishing the particular aggravated murder, invariably impose death." *Id.*, 504 U.S. at 749 (Scalia, J., dissenting).

45. The *Morgan* rule exists because, as the Supreme Court has held time and again, it is unconstitutional to have a sentencer who cannot or will not, in a particular case, give meaningful effect to mitigation but who would instead always return a death verdict if the allegations were proven. Such persons are not qualified to serve on a capital jury.

46. The Supreme Court stated in *Eddings v. Oklahoma,* 455 U.S. 104, 114-115 (1982), "Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence." (Emphasis in original). Four years later, the Supreme Court reiterated this rule:

> There is no disputing that this Court's decision in *Eddings* requires that in capital cases "'the sentencer ... not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' " *Eddings, supra,* 455 U.S., at 110, 102 S.Ct., at 874 (quoting *Lockett, supra,* 438 U.S., at 604, 98 S.Ct., at 2964 (plurality opinion of BURGER, C.J.)) (emphasis in original). Equally clear is the corollary rule that the sentencer may not refuse to consider or

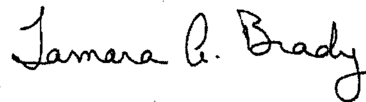
> be precluded from considering "any relevant mitigating evidence." 455 U.S., at 114, 102 S.Ct., at 877. These rules are now well established, and the State does not question them.

Skipper v. South Carolina, 476 U.S. 1, 4 (1986). *See also Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) ("Moreover, *Eddings* makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence . . . . Only then can we be sure that the sentencer has treated the defendant as a "uniquely individual human bein[g]" and has made a reliable determination that death is the appropriate sentence.").

47. In Colorado, a juror is never, under any circumstances, required to return a verdict of death, and is never, under any circumstances, required to find beyond a reasonable doubt that aggravating factors outweigh mitigation. *See, e.g., People v. Young*, 814 P.2d 834 (Colo. 1991) (elimination of "fourth step" of Colorado's capital sentencing scheme, which requires jurors to be satisfied beyond a reasonable doubt that death is the appropriate sentence, violated requirement of heightened reliability for death sentences under Colorado Constitution). The law in Colorado is always satisfied with a juror's personal moral decision against death, and this Court, the other jurors, and the District Attorney must all respect that decision. *Id.*; *see also People v. Tenneson*, 788 P.3d 786, 791, 794 (Colo. 1990) ("[T]he jury should be specifically instructed that the outcome of the balancing process required in step three does not govern the ultimate determination that the jury must make in step four as to whether the defendant should be sentenced to life imprisonment or to death."); Colo. Const. art. II, sec. 20.

48. The defense requests that the Court apply the foregoing legal principles to voir dire in this case.

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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Kristen M. Nelson (No. 44247)
Deputy State Public Defender

Dated: November 7, 2014

<table>
<tr><td>District Court, Arapahoe County, Colorado
Arapahoe County Courthouse
7325 S. Potomac St., Centennial, CO 80112</td><td rowspan="2">

σ COURT USE ONLY σ</td></tr>
<tr><td>THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff

v.

JAMES HOLMES,
Defendant</td></tr>
<tr><td>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</td><td>Case No. 12CR1522

Division 202</td></tr>
<tr><td colspan="2">ORDER RE: MOTION FOR FAIR, MEANINGFUL, AND CONSTITUTIONALLY ADEQUATE VOIR DIRE [D-252]</td></tr>
</table>

Defendant's motion is hereby GRANTED _____ DENIED _____.

BY THE COURT:

______________________________ ______________________________
JUDGE Dated

I hereby certify that on November 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:

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