

REDACTED

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	Filed SEP 17 2014 CLERK OF THE COMBINED COURT ARAPAHOE COUNTY, COLORADO ♦ COURT USE ONLY ♦
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. JAMES HOLMES, Defendant	
DOUGLAS K. WILSON, Colorado State Public Defender Daniel King (No. 26129) Tamara A. Brady (No. 20728) Chief Trial Deputy State Public Defenders 1300 Broadway, Suite 400 Denver, Colorado 80203 Phone (303) 764-1400 Fax (303) 764-1478 E-mail: state.pubdef@coloradodefenders.us	Case No. 12CR1522 Division 202
MOTION FOR A CERTIFICATE TO COMPEL ATTENDANCE OF [REDACTED] [REDACTED], AN OUT OF STATE WITNESS FROM [REDACTED] [D-232]	

CERTIFICATE OF CONFERRAL

Defense counsel's position is that the prosecution does not have standing to object to the defense's decision to seek out-of-state subpoenas *ad testificandum* for witnesses the defense feels are material to the presentation of their case, just as it has no standing to object to similar subpoenas served within the state of Colorado. *See, e.g., People v. Ensor*, 632 P.2d 641 (Colo.App. 1981). Therefore, the defense has not conferred with the prosecution with respect to its position on this pleading.

Defendant James Holmes moves this Court to issue a Certificate under Seal of the Court for the attendance and testimony of [REDACTED], who resides in [REDACTED], pursuant to C.R.S. § 16-9-203, the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article II, sections 16, 18, 20, and 25 of the Colorado Constitution.¹ As grounds

¹ Mr. Holmes previously requested permission to initiate the out-of-state subpoena procedure on an *ex parte* basis. *See* Motion D-215. The Court denied this request. Because of the amount of time it will take to obtain the subpoenas at issue, the defense has no choice but to initiate the out-of-state subpoena process at this point in time, despite the fact that its witness disclosures pursuant to Rule 16(II)(c), Rule 32.1(7)(A)(I), and C.R.S. § 18-1.3-1201(3)(c) are not yet due to the prosecution. Mr. Holmes maintains that the Court's decision to refuse to allow the defense to initiate this process on an *ex parte* basis violates Mr. Holmes's constitutional right to a confidential pre-trial investigation pursuant to the Sixth Amendment and article II, section 16 of the Colorado Constitution.

for this motion, Mr. Holmes states the following:

1. The above-captioned case is currently pending in the Arapahoe County District Court in the state of Colorado. In this case, Mr. Holmes is charged with 166 felony charges which include 24 counts of first degree murder and 140 counts of attempted murder against 82 victims. Mr. Holmes has pled not guilty by reason of insanity. The prosecution is pursuing the death penalty against Mr. Holmes.

2. Both Colorado and [REDACTED] have adopted the Uniform Act to Secure the Attendance of Witness From Without a State in Criminal Proceedings. *See* C.R.S. §16-9-201, *et. seq.*, [REDACTED] *et. seq.*

3. Pursuant to C.R.S. §§16-9-203 and 16-9-205, in order to subpoena a witness from without the state for trial, the defense requires a certificate under court seal from the court that will be hearing the criminal trial. The certificate must, at a minimum, state (1) that there is a criminal case pending before a court of record in Colorado, (2) that the witness is a material and necessary witness in that prosecution, and (3) the witness's presence will be required for a certain number of days.

4. Once the Court issues such a certificate in this case, a proceeding may be instituted in the [REDACTED] county in which the witness is located in order for a judge to determine whether or not to compel that witness to attend and testify at trial in Colorado. *See* [REDACTED] [REDACTED]. The judge in the [REDACTED] court must determine (1) that the witness is material and necessary and (2) that it will not cause undue hardship to the witness to be compelled to attend and testify. *Id.*

5. C.R.S. §16-9-204(1) provides the same protection against arrest or service of process as does [REDACTED]. *See* [REDACTED].

6. Both Colorado and [REDACTED] law require fees to be paid to a witness when they are compelled to travel across state lines to testify. It appears these laws are meant to compensate the witness for the cost of travel. The laws of both states differ regarding the compensation due. Colorado provides that the witness shall receive "the sum of ten cents a mile for each mile by the ordinarily traveled route to and from the court where the prosecution is pending or, in the alternative and at the discretion of the court, an airplane ticket and twenty dollars for each day that he is required to travel and attend as a witness." *See* C.R.S. §16-9-203(2). [REDACTED] law provides payment of \$.10/mile of ground travel as well as ten dollars for each day that the witness is required to travel and attend as a witness. *See* [REDACTED].

7. The defense estimates that the total number of days this witness would be traveling and testifying will be no more than three days.

8. As having to incur travel costs could cause potential hardship, the defense will reimburse the witness by purchasing and providing a round-trip airline ticket from [REDACTED] to Colorado, transportation to and from the airports in both [REDACTED] and Colorado, room and board in Colorado, and transportation to and from the courthouse.

9. The defense respectfully asks this Court to certify through issuance of the attached certificate that by providing this compensation, the defense will satisfy the compensation requirements of both C.R.S. §16-9-203(2) and [REDACTED] if the [REDACTED] court issues a summons to the witness to appear in Arapahoe County District Court as a witness in this case.

10. The testimony at trial of [REDACTED] is material and necessary to Mr. Holmes's defense of insanity in the merits phase of this case. [REDACTED]

Specifically, [REDACTED] testimony will be relevant to whether Mr. Holmes suffered from a mental disease or defect at the time of the crime. A finding that Mr. Holmes suffered from a mental disease or defect is required by Colorado's insanity statute, C.R.S. § 16-8-101.5(1)(a) & (b), which states that the applicable test of insanity shall be either that a person 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 with respect to that act," or that a person "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."

11. This testimony is also material and necessary to Mr. Holmes's presentation of mitigation and will provide support for a life sentence should we reach the penalty phase of this trial. Specifically this witness's testimony will be relevant to Mr. Holmes's background, character, and mental health history.²

12. Mr. Holmes is entitled to a certificate for the attendance and testimony of this witness pursuant to his right to compulsory process, as protected by the Sixth Amendment and article II, section 16 of the Colorado Constitution. *See Taylor v. Illinois*, 484 U.S. 400, 410 (1988) ("[T]he right to compel the presence and present the testimony of witnesses provides the defendant with a sword that may be employed to rebut the prosecution's case."); *Washington v. Texas*, 388 U.S. 14, 19-23 (1967) ("Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense We hold that the petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness . . . whose testimony would have been relevant and material to the defense.").

13. Mr. Holmes is also entitled to such a certificate pursuant to his constitutional rights under the United States and Colorado Constitutions to present a complete defense. *See, e.g., Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' " (quoting *Crane v. Kentucky*, 476 U.S. 683, 689-90 (1986)). *See also* U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, secs. 16, 18, 25.

² The defense is willing to provide more information to the Court regarding the anticipated content of this witness's testimony on an *ex parte* basis.

14. Additionally, counsel are obligated under the Sixth Amendment and Colo. Const. art. II, sec. 16 to make reasonable investigations in connection with the case, and seek the above-referenced certificate in order to fulfill these constitutional obligations to Mr. Holmes. *Strickland v. Washington*, 466 U.S. 668, 691 (1984); *People v. White*, 182 Colo. 417, 421-422, 514 P.2d 69, 71 (1973); *Hutchinson v. People*, 742 P.2d 875 (Colo. 1987) (to safeguard the defense attorney's ability to provide the effective assistance guaranteed by these constitutional provisions, it is essential that he be permitted full investigative latitude in developing a meritorious defense on his client's behalf.).

15. Moreover, the Eighth Amendment and article II, section 20 of the Colorado Constitution guarantee Mr. Holmes the right to a fair and reliable sentencing hearing, and the right to present mitigating evidence on his own behalf. *See, e.g., Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (Eighth Amendment requires that a capital 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."); *Tennard v. Dretke*, 542 U.S. 274 (2004) ("a State cannot bar 'the consideration of . . . evidence if the sentence could reasonably find that it warrants a sentence less than death . . . Once this low threshold for relevance is met, the 'Eighth Amendment requires the jury to be able to consider and give effect to a capital defendant's mitigating evidence'" (internal quotations and citations omitted)); *People v. District Court*, 196 Colo. 401, 405, 586 P.2d 31, 34 (1978) ("[T]he defendant must be allowed to present any relevant information as to why the death sentence should not be imposed upon him."); *People v. Drake*, 748 P.2d 1237, 1279 (Colo. 1988) ("The defendant is permitted to present any type of evidence, including any aspect of his character and any circumstances of the offenses, in mitigation."). ██████████ testimony is required at trial to ensure this important right is fully enforced. This is so even if ██████ testimony were only to be introduced at the merits phase of the trial. Under Colorado law, "[a]ll admissible evidence . . . including any evidence presented in the guilt phase of the trial . . . may be presented" at sentencing. C.R.S. § 18-1.3-1201(1)(b).

16. Currently a jury trial in this matter is set to begin on December 8, 2014. It is possible that the trial date will be postponed. Additionally, given the anticipated length of the trial, it is impossible to predict the exact date the court will be available to accept testimony from ██████████. In order to minimize the impact of testifying on ██████████, Mr. Holmes is willing to put ██████ on call for trial rather than flying ██████ to Colorado on a date certain simply to be ordered back by this Court.

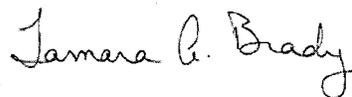
17. Therefore, Mr. Holmes requests that this Court issue a certificate noting that the specific return date for the subpoena will be ongoing from February 1, 2015 until both the merits and penalty phases of the trial are complete or ██████████ appears and testifies, provided that ██████ enters into an on-call agreement with the defense.

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

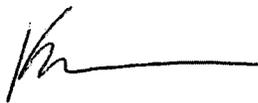
Remain Silent and to Appeal, and the Right to be Free from Cruel and Unusual Punishment, pursuant to the Federal and Colorado Constitutions generally, and specifically, the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitutions, and Article II, sections 3, 6, 7, 10, 11, 16, 18, 20, 23, 25 and 28 of the Colorado Constitution.



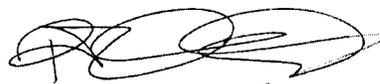
Daniel King (No. 26129)
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Dated: September 17, 2014

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	♦ COURT USE ONLY ♦
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. JAMES HOLMES, Defendant	
DOUGLAS K. WILSON, Colorado State Public Defender Daniel King (No. 26129) Tamara A. Brady (No. 20728) Chief Trial Deputy State Public Defenders 1300 Broadway, Suite 400 Denver, Colorado 80203 Phone (303) 764-1400 Fax (303) 764-1478 E-mail: state.pubdef@coloradodefenders.us	Case No. 12CR1522 Division 202
<p style="text-align: center;">AFFIDAVIT OF ATTORNEY REBEKKA HIGGS IN SUPPORT OF MOTION FOR A CERTIFICATE TO COMPEL ATTENDANCE OF ██████████, AN OUT OF STATE WITNESS FROM ██████████</p> <p style="text-align: center;">[D-232]</p>	

Rebekka Higgs, being duly sworn upon oath deposes and says:

1. That ██████████ is a necessary and material witness to Mr. Holmes' defense in this case for the reasons stated in the attached Motion for a Certificate to Compel Attendance of ██████████, an Out of State Witness from ██████████, and the defendant cannot proceed to trial in this matter without ██████████ testimony. Further, testimony from ██████████ is necessary to implement Mr. Holmes's Federal and State constitutional rights to due process of law, a fair trial, effective assistance of counsel, confrontation, and to be free from cruel and unusual punishment. *See* U.S. Const., Amend. V, VI, VII, XIV; Colorado Const. Art. 2, §§ 16, 20, 25.

2. That the defense estimates that both travel and testimony will require between 1 and 3 days.

3. That the defense estimates that the presence of ██████████ will be required on February 1, 2015 at 9:00 a.m. until released by the Court. However, as this date is merely an estimate given the nature of this trial, the defense will seek an on-call agreement with this witness to avoid this witness traveling to Colorado on numerous occasions simply to be ordered back for another date by this Court.

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CERTIFICATE OF THE DISTRICT COURT OF COLORADO [D-232]	

HAVING REVIEWED THE MOTION AND AFFIDAVIT of the Defendant to Compel the Attendance of [REDACTED], a Witness from [REDACTED], this Court, being the Court of Record in this matter pending in the State of Colorado, makes the following Certificate of the District Court of Colorado pursuant to Colo. Rev. Stat. §16-9-203 (2004) and [REDACTED] *et. seq.*:

1. The above-captioned case is now pending in the Arapahoe County District Court in which James Holmes is charged with 166 felony counts, including 24 counts of first degree murder and 140 counts of attempted murder against 82 victims. Mr. Holmes has pled not guilty by reason of insanity. The prosecution is pursuing the death penalty against Mr. Holmes.

2. Pursuant to the contents of the defense Motion for a Certificate to Compel Attendance of [REDACTED], An Out of State Witness From [REDACTED] and accompanying Affidavit, [REDACTED] will provide testimony relevant to the following:

- a. Information regarding Mr. Holmes relevant to whether Mr. Holmes suffered from a mental disease or defect at the time of the alleged offense.
- b. Information relevant to Mr. Holmes's mitigation case and support for a life sentence if there is a penalty phase of this trial. Specifically this testimony will be relevant to Mr. Holmes's background, character, and mental health history.

3. Therefore, the Court finds that [REDACTED] is a material and necessary witness for

Mr. Holmes's defense in this case.

4. Based on the contents of the defense's Motion for a Certificate to Compel Attendance of [REDACTED], An Out of State Witness From [REDACTED] and accompanying Affidavit, this Court finds that the defense will satisfy the compensation requirements of C.R.S. §16-9-203(2) and [REDACTED] by purchasing and providing [REDACTED] with a round-trip airline ticket from [REDACTED] to Colorado, transportation to and from the airports in [REDACTED] and Colorado, and room and board in Colorado.

5. It is estimated that [REDACTED] will be required to spend a maximum of 3 days in travel and testimony in this case.

6. Colorado law, specifically Colo. Rev. Stat. §16-9-203 (2004), provides for protection from arrest and service of civil and criminal process in connection with matters which arose before witness' entry into Colorado when the witnesses are commanded by a summons issued from a court of record in another state to appear in Colorado.

7. This Court issues this Certificate pursuant to Colo. Rev. Stat. §16-9-203 (2004) and [REDACTED] *et. seq.*, as well as Mr. Holmes's federal and state constitutional rights to compulsory process, to present a complete defense, due process, the effective assistance of counsel, a fair and reliable sentencing hearing, and to present mitigating evidence on his own behalf. *See* U.S. Const., Amend V, VI, VII, XIV; Colo. Const. art. II, secs. 16, 18, 20, 25.

8. Finally, this matter is currently set for jury trial on December 8, 2014. It is estimated that this witness will be required to testify in this case on February 1, 2015. Given the nature of this case, it is difficult to estimate the exact date and time this witness will be required to testify. In order to minimize travel and inconvenience for this witness, this Court will accept an on-call agreement made between this witness and the defense should the [REDACTED] court order this witness to appear in Colorado pursuant to this Certificate. In such a situation, the Order to Appear will be valid from the date noted through the end of the entire trial, including the penalty phase or until the witness appears and testifies.

CARLOS SAMOUR
DISTRICT COURT JUDGE

Date

Court Seal:

I hereby certify that on 9/17, 2014, I

mailed, via the United States Mail,
 faxed, or
 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
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