

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	<b>Filed</b>  OCT 21 2014  CLERK OF THE COMBINED COURT ARAPAHOE COUNTY, COLORADO  σ COURT USE ONLY σ
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff  v.  <b>JAMES HOLMES,</b> 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: <a href="mailto:state.pubdef@coloradodefenders.us">state.pubdef@coloradodefenders.us</a>	Case No. <b>12CR1522</b>    Division 202
<b>MOTION TO CONTINUE TRIAL [D-245]</b>	

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### CERTIFICATE OF CONFERRAL

The defense conferred with the prosecution. The prosecution indicated that it needs more time to consider its response, and will file a written response to this pleading.

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Pursuant to the Fifth, 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 continue the trial presently scheduled for December 8, 2014. In support of this motion, Mr. Holmes states the following:

#### **I. Background**

1. Mr. Holmes pled not guilty by reason of insanity on June 4, 2013. A sanity examination was subsequently conducted at CMHIP by Dr. Jeffrey Metzner. Dr. Metzner submitted the report of his examination to the Court on September 6, 2013, approximately five months before the trial was scheduled to commence on February 3, 2014. The case was on track to proceed to trial on that date until November 15, 2013, when the prosecution filed Motion P-68, seeking further psychiatric examination of the defendant. The defense vigorously opposed Motion P-68.

2. The Court quickly held a status hearing on November 21, 2013, and vacated the February 3, 2014 trial date. The Court initially scheduled an evidentiary hearing on Motion P-68 for December 17 and 18, 2013. However, that hearing was continued after the prosecution asserted new arguments in its reply in support of Motion P-68, and the Court ruled that “[i]t would be utterly unfair to force the defendant to proceed to a hearing for which he is not prepared, due to the prosecution’s failure to clearly communicate the relief it is requesting.” Order re: D-193, p. 6.

3. As a result, the parties litigated issues pertaining to Motion P-68 at a closed evidentiary hearing on January 27, 28, 29, and 30, 2014. On February 19, 2014, the Court issued an order granting an entirely new sanity examination by a different sanity examiner to be chosen by CMHIP. The Court ordered the sanity examiner chosen by CMHIP to complete the examination and report no later than July 11, 2014.

4. At a status hearing held on February 27, 2014, the Court set a new trial date of October 14, 2014. The Court based this trial date on the July 11, 2014 return date for the examination. The court noted that it would “have to allow some additional time after [July 11<sup>th</sup>] to account for any issues that may come up that may need to be litigated following the second report.” Transcript, February 27, 2014, p. 4. The Court proposed October 14 as a trial date, noting, “That would give us *three months* after the report is filed to try to address any issues that may come up.” *Id* (emphasis added).

5. At that hearing, and because of the obvious importance of the Court’s order regarding P-68, the defense requested and received permission to file motions in response to the order by March 14, 2014 (approximately one week after the defense received transcripts from the January 2014 hearings). The defense also requested that the Court stay the second examination until the litigation surrounding the Court’s Order on P-68 could be fully resolved. The Court granted that request.

6. The defense filed Motions D-200, D-201 and D-202 on March 14, 2014. After briefing was completed on defense motions D-200, D-201, and D-202, the Court issued orders denying those motions on April 14, 2014.

7. On May 5, 2014, the defense filed petitions to the Colorado Supreme Court pursuant to C.A.R. 21 regarding the Court’s rulings on the issue of the second examination, as well as its Order re: Motion D-181. The Colorado Supreme Court denied these petitions on May 8, 2014.

8. That same day, in Order C-96, the Court forwarded Order C-94 as well as a redacted copy of its order regarding P-68 to the new examiner. In that order, the Court extended the deadline for the new examiner to complete his examination and submit his report until Friday, August 15, 2014. The October trial date remained.

9. On May 30, 2014, the Court issued Order C-100, informing the parties that “given the short amount of time between the date when the report is due and the trial, the parties shall have two weeks from the date they receive the report to file any motions related to the second

sanity examination.” C-100, p. 2. Counsel understood that the Court imposed this short timeframe in an effort to keep the October 14, 2014 trial date intact if possible.

10. Subsequently, in July, the second sanity examiner filed a letter with the Court requesting an extension of time until October 15, 2014 to complete the sanity examination. The Court granted that extension in Order C-113 and vacated the October 14, 2014 trial date. On July 22, 2014, the Court set a new trial date of December 8, 2014. This new date gave the parties seven weeks from the date the examination would be submitted until the date the trial was scheduled to commence.

11. During that hearing, the Court explained,

It’s difficult to predict what’s going to happen and how things are going to unfold. But I have to do the best I can with the information I have. If we have to adjust, we’ll do it. We’ve done it in the past; we’ll do it in the future. But I prefer to at least give us a chance to have a trial date that we might be able to use as opposed to set something -- set a trial date that is, you know, three months from now or four months from now based only on contingencies that may not happen. And so that’s the difficulty in setting a trial date. I understand what Ms. Brady is saying. In terms of the litigation that may be needed as a result of the second report, nobody really knows. It may be that you get the second report and -- you get the second report and neither side wants to litigate anything. And so that’s no longer an issue. I have no idea what the percentage of -- or what possibility there is that one side or the other will want to file motions. I understand that it’s possible. It’s also possible that neither side may want to file motions. Again, we just don’t know. And I think if we need more time, then I’ll have to assess that at that point and I’ll have to adjust. But I don’t want to just assume that there is going to be litigation and that we’re going to need a lengthy period of time for that litigation . . . . [W]e may have to adjust depending on what happens . . . .

Transcript, July 22, 2014, pp. 191-92.

12. The Court and the parties received the second sanity examination completed by the second sanity examiner, Dr. William Reid,<sup>1</sup> last Wednesday, October 15, 2014. In addition,

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<sup>1</sup> Now that the second sanity examination is complete, counsel are unsure whether the Court believes it is appropriate to continue redacting Dr. Reid’s name from the public version of these pleadings or not. *See, e.g.*, Motion D-191a (making public the names of the first sanity examiner and defense and prosecution experts who testified at the January 2014 hearings). Defense counsel does not object to the Court continuing to redact Dr. Reid’s name, but has not redacted Dr. Reid’s name in the redacted copy of this pleading submitted to the Court on the

CMHIP provided nine DVDs containing approximately 22 hours of video recordings of Dr. Reid's interviews with Mr. Holmes. The defense has also requested, but has not yet received, the materials, notes, and supporting documentation from CMHIP pertaining to Dr. Reid's report.

## II. Legal Authority

13. Defense counsel have a constitutional obligation to provide Mr. Holmes with the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Rodriguez*, 914 P.2d 230, 294 (Colo. 1996) ("A defendant's right to effective assistance of counsel is guaranteed by the United States and Colorado Constitutions."); ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.8, commentary, rev. ed. 2003; U.S. Const. amends. VI, XIV; Colo. Const. art. II, secs. 16, 18, 25.

14. Mr. Holmes also has a constitutional right to present a defense. *See 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)).

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

16. In addition, article II, section 20 of the Colorado Constitution contains "fundamental requirements of certainty and reliability" which exceed those imposed by the federal constitution. *People v. District Court*, 834 P.2d 181, 186 (Colo. 1992) (quoting *People v. Young*, 814 P.2d 834, 846 (Colo. 1991)); *see also People v. Tenneson*, 788 P.2d 786, 792 (Colo. 1990) ("Colorado's death sentencing statute must be construed in light of the strong concern for reliability of any sentence of death.").

17. For the following reasons, if Mr. Holmes is required to proceed to trial in the above-captioned case on December 8, 2014, he will be denied these state and federal constitutional rights to the effective assistance of counsel, due process of law, compulsory process, confrontation, and to present a defense and defend his life and liberty. U.S. Const. Amend. V, VI, VIII, XIV; Colo. Const. art. II, secs. 16, 18, 20, 25.

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assumption that the Court is no longer concerned with keeping Dr. Reid's identity private now that his examination has been completed.

### III. Bases for Continuance

18. During the short time that defense counsel and their experts have had to review and digest Dr. Reid's report thus far and for the reasons that follow, it has become abundantly clear that counsel will require additional time before they are prepared to proceed to trial in this case. As a result, counsel felt it was prudent to request a continuance as soon as possible.

19. As an initial matter, defense counsel require more time to review and process the lengthy videotapes and all of the supporting documentation (which they have not yet received) from Dr. Reid's evaluation. There are simply not enough hours in the day for defense counsel to not only watch, but mentally process and digest 22 hours of forensic interviews of their client, review all of the supporting documentation that has been requested but not yet supplied by CMHIP, flesh out all of the legal issues involved, and draft all of the motions that will need to be drafted concerning Dr. Reid's report by October 29, 2014.

20. Defense counsel are in the process of determining what motions need to be filed. The defense can certainly draft and file motions concerning the report that pertain to general and more global legal issues by the two-week deadline of October 29, 2014. However, there are other motions the defense may file that will depend on the contents of the videotape and the underlying supporting documentation that has yet to be provided. Defense counsel cannot file those motions by October 29, 2014, because that deadline does not give them sufficient time to review and process those materials.

21. In addition to the motions that need to be filed, defense counsel also require additional time to review and process the materials underlying the second sanity examination to determine whether adjustments in defense investigation and trial preparation need to be made in light of the report, including what information contained in the voluminous discovery in this case best supports the defense's position regarding a number of points raised by the second sanity examination.

22. Even more importantly, in addition to the issues surrounding the impending motions deadline, Dr. Reid's report also raises significant new issues [REDACTED]. Defense counsel cannot be prepared to commence trial on December 8, 2014 without additional time to consult with their experts [REDACTED].

[REDACTED]

24. In order for the defense's experts to provide opinions to defense counsel about these matters, the experts need time to review not only the report itself, but the 22 hours of video recordings of his examination with Mr. Holmes that were provided to the parties, *as well as* all of the materials, notes, and supporting documentation from CMHIP pertaining to Dr. Reid's report which the defense has not yet received.

25. Given the nature of Dr. Reid's report, it is particularly critical for the defense and its experts to have the opportunity to fully review and process the materials underlying the report, including the 22 hours of videotape of his interview with Mr. Holmes, his notes and other supporting documentation. [REDACTED]

[REDACTED] Thus, it will be absolutely critical for the defense and its experts to have adequate time to review Dr. Reid's notes and any other supporting material he generated or relied upon in conducting his evaluation of Mr. Holmes in order to evaluate the bases for his opinions.

26. Among others, defense experts Drs. Robert Hanlon and Raquel Gur have informed defense counsel that they require additional time to review and digest the materials generated from the second sanity examination before they can fully advise the defense about how to proceed. Drs. Hanlon and Gur were aware that Dr. Reid's report would be disseminated to the parties in mid-October and made efforts to adjust their schedules accordingly. However, they both hold academic posts at universities and have teaching and other commitments that are ongoing and cannot simply be postponed at whim. It would be impossible for these experts to review and digest all of the materials described above in time for the defense to file *all* motions related to Dr. Reid's report by October 29, 2014 or [REDACTED]

[REDACTED] by December 8, 2014 – especially given that the defense has not yet received the materials underlying Dr. Reid's examination from CMHIP, and therefore has been unable to even distribute these materials to the experts at this point in time.

27. Dr. Gur has informed the defense that at a bare minimum, she needs a month to review the materials once she receives them, but that her strong preference would be to have until the first of the year (January 1, 2015) to complete her review of Dr. Reid's examination and supporting materials in order to be able to advise the defense. Once she has completed her review of the materials, the defense will require additional time to discuss Dr. Gur's opinions about Dr. Reid's examination with her and make decisions about how to proceed.

28. Likewise, Dr. Hanlon has indicated that he will need at least five weeks to review all of the materials pertaining to Dr. Reid's report. Dr. Hanlon has also specifically requested that he be given sufficient time to review the raw test data and test protocols from Dr. Gray, which the defense has not yet received, in addition to sufficient time to review the 22 hours of video recordings. [REDACTED]

[REDACTED]

29. In addition to the issues described above, defense counsel cannot make informed decisions about which witnesses to endorse pursuant to Rule 16 and Crim. P. 32.1(d)(7) until they have had sufficient time to thoroughly review all of the materials generated by the second sanity examination. The subject of the second sanity examiner's report – Mr. Holmes's mental illness and sanity – is the heart of this case. Given the nature of Mr. Holmes's plea, there is a significant amount of overlap between the issues that will be litigated at the merits and potential sentencing phases of the trial. Counsel need additional time to consume and process the new information contained in this report in order to determine whether certain witnesses they intended to endorse for trial and sentencing purposes should not be called in light of Dr. Reid's findings, or whether additional witnesses should be endorsed as a result. Presently, these disclosures are due in less than two weeks, on November 3rd. The defense cannot review and process all 22 hours of videotape, in addition to all of the underlying supporting materials they have not yet even received, and evaluate that information in light of witness endorsements, in that short amount of time.

30. Relatedly, since mid-August (shortly after Dr. Reid completed his interviews with Mr. Holmes at CMHIP), the defense has diligently attempted to set up interviews with the 36 CMHIP employees who participated in Mr. Holmes's care during his two visits there. CMHIP had requested that the defense wait to interview its employees who had contact with Mr. Holmes until Dr. Reid completed his examination. During the months of August, September, and early October, defense counsel was in very frequent communication with Assistant Attorney General Tanya Smith regarding these interviews and made earnest efforts to get them scheduled.

31. The earliest date CMHIP and defense counsel are mutually available to conduct these interviews is the last week in October. Counsel are presently scheduled to complete those interviews on October 30, which leaves just one business day (October 31) prior to the date the defense's Rule 16 and Rule 32.1 disclosures are due. After completing these 36 interviews, defense counsel will need sufficient time to evaluate which of these witnesses they intend to call at merits and/or sentencing. Even assuming counsel work all weekend, one work day and one weekend is not a sufficient amount of time to make such decisions in a capital case of this magnitude.

#### **IV. Conclusion**

32. In sum, there is simply not enough time for defense counsel and their experts to consume and process all of the material that has been generated by the second sanity examination and be ready for trial on December 8, 2014. Counsel understand the Court's reasoning for setting the tentative trial date of December 8, 2014 back in July when the Court could not anticipate whether there would be extensive litigation surrounding the second sanity examination. It is now clear based on Dr. Reid's report that there *will* be extensive litigation and [REDACTED]. Therefore, counsel respectfully submit that seven weeks is not a sufficient amount of time to allow for such litigation, as well as continued trial preparation regarding the second evaluation, to take place.

33. Once their experts have an opportunity to review the materials pertaining to the second sanity examination, counsel will be in a better position to inform the Court when they anticipate being ready to proceed to trial.

34. Notably, the seven weeks presently scheduled between the receipt of the report and the date the trial is due to commence is significantly shorter than both the time frame between the submission of Dr. Metzner's report and the original trial date (5 months) as well as the time frame the Court initially established between the original submission deadline for Dr. Reid's report and the October trial date (13 weeks). Indeed, the prosecution did not even request a second sanity examination until nearly two months after the parties received Dr. Metzner's report. The defense is now essentially being asked to perform a similar task in just two weeks. *See, e.g., Wardius v. Oregon*, 412 U.S. 470, 473-74 (1973) (due process requires "balance of forces between the accused and his accuser").

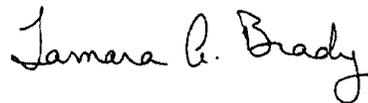
35. For the foregoing reasons, counsel therefore request that the Court grant this motion and continue the trial in this matter to allow the defense and its experts a sufficient amount of time to review the materials generated by the second sanity examination.

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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Daniel King (No. 26129)  
Chief Trial Deputy State Public Defender



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Tamara A. Brady (No. 20728)  
Chief Trial Deputy State Public Defender



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

Dated: October 21, 2014



I hereby certify that on October 21, 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  
Fax: 720-874-8501

  
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