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District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	Filed  DEC 04 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 201
<b>MOTION OBJECTING TO THE USE OF THE AUDIO SYSTEM CONNECTED WITH THE CLOSED CIRCUIT TELEVISION CAMERA IN COURTROOM 201 IN ITS CURRENT STATE FOR ANY PURPOSE IN THIS CASE BECAUSE IT INTERFERES WITH MR. HOLMES'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS [D-257]</b>	

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**CERTIFICATE OF CONFERRAL**

The defense conferred with the prosecution regarding the content of this motion. The prosecution responded, "We agree that no microphone should transmit conversations occurring between people seated at either trial table. While we objected to the court's order regarding expanded media coverage, and do not change our position, we believe that one or more overflow rooms may be necessary, and that the people observing the trial in those rooms will need to be able to hear audio from the courtroom. We believe that the problem of trial table conversations being audible can most likely be solved by removing or turning off the microphones on the trial tables. If other microphones are picking up that sound, we believe that they can almost certainly be adjusted so that they do not pick up private trial table conversations."

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Pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments and article II, sections 16, 20, 23 and 25 of the Colorado Constitution, James Holmes, through counsel, moves this Court to prohibit the use of the audio system connected with the closed circuit television camera in Courtroom 201 in its current state during the trial in this case because it interferes with Mr. Holmes's constitutional right to the effective assistance of counsel, as well as his rights to due process, a fair trial, and a reliable sentencing proceeding, his privilege against self-incrimination, and the attorney-client privilege. In support of this motion, Mr. Holmes states the following:

1. In Order C-137, the Court granted expanded media coverage of the trial in this case. It authorized the media to access, record, and broadcast the transmission from the remote-controlled closed circuit television camera already operating in the courtroom.

2. In footnote 6 of the order, the Court explained, “The small, inconspicuous camera is attached to the ceiling of courtroom 201 and has been in operation throughout most of the proceedings in this case. It serves two purposes. First, it allows the Sheriff to monitor the courtroom in order to effectively carry out his responsibilities. Second, it transmits the proceedings to witnesses, victims, members of the media, and others in overflow rooms who cannot be in the courtroom as a result of space limitations.” Order C-137, p. 8.

3. The Court further noted in footnote 7 that “Any precautions counsel must take in the courtroom as a result of this Order are precautions they would have been required to take even if the Court denied EMC. Regardless of EMC, the closed circuit camera will transmit the proceedings to victims, witnesses, and members of the public and media in overflow rooms. As indicated, the closed circuit transmission shows part of the prosecution’s table, the defense table, and the podium.”

4. The Court suggested in the same footnote that “Counsel may wish to visit one of the overflow rooms before or after the [pretrial status] hearing.” *Id.*

5. Court Administrator Laurie McKager offered counsel for both parties the opportunity to view and test this closed circuit television system after the November 18, 2014 hearing in this case. A screen was set up in Courtroom 202, and counsel had an opportunity to see the image that is projected from the closed circuit television camera and, even more importantly, had an opportunity to test out the audio component of this system.

6. The defense tested the system by remaining in Courtroom 202, while defense counsel’s paralegal and another member of the defense team remained at counsel table in Courtroom 201 and spoke with the microphone at counsel table turned on, as well as with the microphone turned off.

7. Defense counsel observed that even with the microphone at counsel table turned off, the audio system is so sensitive that it easily picked up conversations had at counsel table, even those had at a whisper.<sup>1</sup>

8. It is essential for defense counsel to be able to speak to each other and to Mr. Holmes during the trial in this case. Counsel cannot forgo opportunities to communicate with one another or their client out of concern that the microphones in the courtroom will pick up their conversations and broadcast them to those watching the proceedings via closed circuit television, including the security officers observing the closed circuit television footage,

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<sup>1</sup> This audio system has apparently already been used by members of the sheriff’s office as well as members of the public viewing prior hearings in this case in overflow rooms. Defense counsel have not heretofore made a record about this issue because they were unaware of the problem until now, but are concerned that violations of Mr. Holmes’s constitutional rights may have already occurred.

members of the public who are viewing the trial from one of the overflow rooms in the courthouse, and/or anyone who is viewing the broadcast of this trial on national television. Given the extreme sensitivity of these microphones, there are no precautions that counsel themselves can take that will effectively remedy the situation. The chilling effect these microphones will have on the defense will interfere with counsel's ability to provide effective assistance to Mr. Holmes, which, in turn, impacts his due process right to a fair trial and a reliable sentencing proceeding. U.S. Const. amends. V, VI, VIII, XIV; Colo. Const. art. II, secs. 16, 20, 23, 25.

9. The Supreme Court has acknowledged that courtroom arrangements which "interfere with the accused's 'ability to communicate' with his lawyer" can violate the right to counsel and due process. *Deck v. Missouri*, 554 U.S. 662, 631 (2005) (constitution forbids routine use of shackles on defendant at penalty phase of capital trial); *Illinois v. Allen*, 397 U.S. 337, 344, 90 S. Ct. 1057, 1061, 25 L. Ed. 2d 353 (1970) ("Moreover, one of the defendant's primary advantages of being present at the trial, his ability to communicate with his counsel, is greatly reduced when the defendant is in a condition of total physical restraint."). See also *State ex rel. U.S. Fid. & Guar. Co. v. Montana Second Judicial Dist. Court*, 240 Mont. 5, 13, 783 P.2d 911, 916 (1989) ("An attorney's inability to communicate freely with the client would impede all communications and could diminish the attorney's effectiveness.").

10. Several courts have addressed specific issues relating to the presence of microphones at or near counsel table. In *Hudson v. State*, 108 Ga. App. 192, 194-97, 132 S.E.2d 508, 509-11 (1963), the Georgia Court of Appeals held that a defendant's rights to counsel and a fair and impartial trial were violated by the placement of a microphone approximately five feet from counsel table that was connected with a tape recorder in another room in the building which recorded the proceedings to be broadcast later by a radio station after the conclusion of the trial. Defense counsel made a record prior to trial, stating, "I feel that her counsel cannot give her an adequate defense with this microphone staring him in the face at every turn he has to make. Counsel does not practice law on the radio." *Id.* at 194, 510.

11. In granting the defendant a new trial, the appellate court held:

And, we might add that the court has not only the inherent power but the duty to keep the courtroom free of distractions which might tend to hamper the proper conduct of the trial and to see that conditions surrounding the trial are not prejudicial to the accused. We cannot say in the case before us that the defendant was not prejudiced, and that the conduct of her defense was not hampered by the presence of the microphone. The record shows that the microphone was within five feet of her counsel's table. *It was so placed that it could pick up the proceedings of the trial, and this court will take cognizance of the fact that the accused and her counsel would be apprehensive that a microphone which was sensitive enough to pick up the voices of witnesses and the presiding judge would be sensitive enough to pick up even whispered conversations between them had within five feet of it. Under these circumstances the objection of counsel for the*

*defendant was well taken, and the allowance of the microphone in the courtroom was the injection of an element into the trial of the case which may have caused defendant and her counsel to feel as if they had been placed in a strait jacket and which was calculated to prejudice the rights of the defendant to a fair and impartial trial and to hinder the defendant and her counsel in the conduct of her defense. The overruling of her objection thereto was error and requires the reversal of the judgment overruling the motion for new trial, the second ground of which complains of the overruling of that objection.*

*Id.*

12. Several other courts have addressed claims on appeal pertaining to the impact of sensitive microphones at counsel table. While the courts in these cases declined to reverse the defendants' convictions because the specific records in those cases were not sufficient to establish prejudice, the appellate courts nevertheless criticized the trial courts for failing to take defense counsels' arguments regarding the microphones seriously.

13. In *State v. Douglas*, 485 N.W.2d 619, 625-26 (Iowa 1992), the Iowa Supreme Court noted, "It is clear that the presence of live microphones at the counsel table creates a real potential for prejudicing a defendant's constitutional rights. Further complicating this issue is the fact that proving a negative, *i.e.*, that counsel was prevented from adequately representing the defendant, is difficult. Having in mind that the irreducible charge of the trial court is to assure a fair trial, careful consideration to these constituents must be given in deciding if expanded coverage is warranted. Viewed in retrospect, the trial court would have been well advised in denying the media's request for the type of live microphones at the counsel table used in this case."

14. Likewise, in *State v. Wilson*, 440 N.W.2d 534 (Wisc. 1989), the Wisconsin Supreme Court declined to reverse for lack of "specific instances in the record where the microphone actually interfered with the defendant's right to counsel," but nevertheless emphasized, "Finally, in regard to the microphone which was placed at the defense table, we hold that in the event of objection by a party to placement of such a microphone, the circuit court is better advised to order the removal of the microphone."

15. Moreover, the broadcasting of – or testimony about – any confidential communications that are picked up by the microphones would violate the state and federal constitutional provisions cited above, as well as Mr. Holmes's attorney-client privilege and privilege against self-incrimination. *See, e.g., Weatherford v. Bursey*, 429 U.S. 545, 554 (1977); *Massiah v. United States*, 377 U.S. 201, 205 (1964); *Blackmon v. State*, 653 P.2d 669 (Alaska Ct. App. 1982) (attorney-client privilege and Sixth Amendment right to counsel violated where state trooper testified regarding conversation between defendant and his attorney in court that was intended to be confidential).

16. Finally, in addition to the constitutional rights above, the audio system at issue violates Chapter 38, Rule 2(a)(3) of the Colorado Rules of Court, which prohibits audio recording “of communications between counsel and client or between co-counsel.”

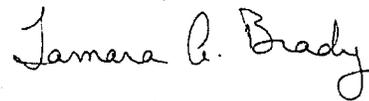
17. For the foregoing reasons, the defense moves the Court to prohibit the use of the audio system connected with the closed circuit television camera in Courtroom 201 in its current form during the pendency of this case.

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.



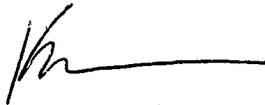
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Deputy State Public Defender

Dated: December 4, 2014

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	<p style="text-align: center;">σ COURT USE ONLY σ</p>
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: state.pubdef@coloradodefenders.us	Case No. <b>12CR1522</b>       Division 201
<b>ORDER RE: MOTION OBJECTING TO THE USE OF THE AUDIO SYSTEM          CONNECTED WITH THE CLOSED CIRCUIT TELEVISION CAMERA IN          COURTROOM 201 IN ITS CURRENT STATE FOR ANY PURPOSE IN THIS CASE          BECAUSE IT INTERFERES WITH MR. HOLMES'S STATE AND FEDERAL          CONSTITUTIONAL RIGHTS [D-257]</b>	

Defendant's motion is hereby GRANTED \_\_\_\_\_ DENIED \_\_\_\_\_.

BY THE COURT:

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JUDGE

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Dated

I hereby certify that on December 14, 2014, I

mailed, via the United States Mail,  
 faxed, or  
 hand-delivered

a true and correct copy of the above and foregoing document to:

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