

REDACTED

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	Filed DEC 05 2014 CLERK OF THE COMBINED COURT ARAPAHOE COUNTY, COLORADO σ COURT USE ONLY σ
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 201
MOTION REQUESTING ADDITIONAL REVISIONS TO COURT'S VIDEO SCRIPT [D-259]	

CERTIFICATE OF CONFERRAL

The defense shared a draft of this pleading with the prosecution. The prosecution responded, "With respect to paragraph three, we agree it would be appropriate to use the word 'could' instead of 'will'. We object to the other portions of your motion."

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 make additional revisions to the video script it distributed in Order C-162-A. In support of this motion, Mr. Holmes states the following:

1. On Tuesday, the Court issued Order C-162-A, containing a revised script for the videotape it plans to play for prospective jurors prior to individual voir dire. These revisions were based, in part, on objections to the script raised by the defense in its Response to C-162.

2. The defense has reviewed the revised script. Counsel maintain all of their original objections to the script that were not incorporated by the Court, and also feel compelled to make an additional record on several points.

3. First, counsel noticed for the first time when reviewing the revised script that the Court states on page 2, "We estimate that the trial will last 4 to 5 months." This statement appears to assume that the case will proceed to the penalty phase. The defense requests that the Court amend this statement to read, "It is possible that the trial could last up to 4 to 5 months,"

which is more consistent with the way a similar statement is phrased on page 13 of the jury questionnaire.

4. Second, while the Court included a sentence in its description of Phase 2 indicating that the jury's determination with respect to mitigation need not be unanimous, the defense continues to strongly object to the paragraph that begins, "At the end of Phase 2, the jury must deliberate." This paragraph is misleading and violates Mr. Holmes's state and federal rights to due process, a fair trial by an impartial jury, and a fair and reliable sentencing proceeding, because it still suggests to jurors that the decision regarding the finding of mitigation and the weighing of mitigation and aggravation are collective, rather than individual, determinations. U.S. Const. amends. V, VI, VIII, XIV; Colo. Const. art. II, secs. 16, 20, 23, 25. As explained in the defense's original response to C-162, it is well-established that it is unconstitutional to require juror unanimity on mitigating factors. *McKoy v. North Carolina*, 494 U.S. 433 (1990); see also *Mills v. Maryland*, 486 U.S. 367 (1988); *People v. Rodriguez* ("*Rodriguez IV*"), 794 P.2d 965, 980-82 (Colo. 1990).

5. Mr. Holmes requests that the Court rephrase the last two paragraphs describing Phase 2 on pages 7-8 of the Court's script as follows:

At the end of Phase 2, each juror must individually decide for him or herself the existence or non-existence of any mitigating factor or circumstance. The decision regarding mitigation is not a collective jury decision, but rather an individual decision to be made by each juror for him or herself. This determination need not be unanimous.

Once each juror makes these determinations, the jury must next engage in what the law calls a weighing process. It involves each individual juror weighing any mitigation that he or she determined exists against the aggravating factors previously found in Phase 1. Each individual juror has the authority to decide for himself or herself what constitutes a mitigating circumstance and to attach whatever significance or weight to that circumstance he or she feels is appropriate. Each individual juror must make a reasoned moral judgment as to whether he or she is convinced beyond a reasonable doubt that the mitigating factors do not outweigh the aggravating factor or factors.

Only if all jurors unanimously find beyond a reasonable doubt that the mitigating factors are insufficient to outweigh the aggravating factors will Phase 3 of the sentencing hearing take place. Otherwise, the sentencing hearing will conclude, and the Court must sentence Mr. Holmes to life imprisonment without the possibility of parole.

6. For the same reasons outlined above, Mr. Holmes objects to portions of the summary of Phase 2 on page 10 of the script. The sentence, "If the jury determines that at least

one mitigating factor exists, each juror must individually decide what weight to give each mitigating factor and then weigh the mitigating factors and the aggravating factors” wrongly implies that the jury first makes a collective decision regarding the existence of mitigation, and then makes an individual determination regarding the weighing of mitigating and aggravating factors, when in fact, both the determination about the existence or absence of mitigation *and* the weighing process are individual decisions under Colorado’s capital sentencing scheme. See *McKoy v. North Carolina*, 494 U.S. 433 (1990); *People v. Tenneson*, 788 P.2d 786, 791 (Colo.1990).

7. Mr. Holmes also objects to the sentence on page 10: “If the jury finds that the mitigating factors outweigh the aggravating factors, it must render a verdict of life imprisonment without parole. On the other hand, if the jury finds that no mitigating factors exist or that the mitigating factors do not outweigh the aggravating factors, the sentencing hearing will move to Phase 3.” Once again, this language erroneously implies that the jury’s decision-making process in phase two is collective, rather than individual.

8. This sentence is also legally incorrect because it is not compliant with *People v. Tenneson*, 788 P.2d 786 (Colo. 1990). In *Tenneson*, the Colorado Supreme Court made clear that Colorado’s capital sentencing statute “must be interpreted to require that in order to support the imposition of the death penalty, each juror must be convinced that the mitigating factors, if any, do not weigh more heavily in the balance than the proven statutory aggravating factors. An instruction to the jury that they must be convinced beyond a reasonable doubt that any mitigating factors do not outweigh the proven statutory aggravating factors before a sentence of death can be imposed adequately and appropriately communicates the degree of reliability that must inhere in the balancing process.” *Id.* at 792.

9. Thus, pursuant to *Tenneson*, Phase 3 (also known as step 4) only takes place under one circumstance: if the jury is unanimously convinced beyond a reasonable doubt that the mitigating factors do not outweigh the aggravating factors. Under any other circumstance, including situations where any one or more of the jurors concludes that mitigation outweighs aggravation, *as well as* situations where any one or more of the jurors has a *reasonable doubt* that the mitigating factors do not outweigh the aggravating factors, the proceedings conclude and the defendant will be sentenced to life without parole. The above-referenced sentence does not account for the second scenario described above (where one or more jurors has a reasonable doubt that the mitigating factors do not outweigh the aggravating factors).

10. After further reflection, for the purposes of the instructional video, defense counsel have concluded that language similar to the Court’s language in the first full paragraph of page 8 is legally correct, and is perhaps the best way of explaining this concept to jurors at this stage of the proceeding.¹

¹ The defense acknowledges that it previously objected to similar language in the Court’s original script. See Response to C-162, pp. 31-32. While the defense’s preference is still to convey to the jury that Phase 3 will *only* take place if the jury unanimously finds beyond a reasonable doubt that the mitigating factors do not weigh more heavily in the balance than the aggravating factors, it has concluded upon further reflection that the Court’s original language in this paragraph is legally correct. While the sentence beginning with the word “otherwise” may

11. The defense requests the Court to rephrase the summary of Phase 2 as follows:

If there is a Phase 2, at the end of it, each juror must individually decide whether one or more mitigating factors or circumstances exist. Each individual juror must then weigh any mitigation that he or she determined exists against the aggravating factors previously found in Phase 1. Only if all jurors unanimously find beyond a reasonable doubt that the mitigating factors are insufficient to outweigh the aggravating factors will Phase 3 of the sentencing hearing take place. Otherwise, the sentencing hearing will conclude, and the Court must sentence Mr. Holmes to life imprisonment without the possibility of parole.

12. For the reasons previously explained in paragraph 37 of his original response, the defense also continues to object to the following two sentences in the Court's description of Phase 3, on page 9: "If the jury is not unanimously convinced beyond a reasonable doubt that death is the appropriate punishment, it must either: (1) return a unanimous verdict of life imprisonment without the possibility of parole, or (2) notify the Court that it is unable to reach a unanimous verdict. If the jury is unable to reach a unanimous verdict, it will be discharged, and the Court will sentence Mr. Holmes to life imprisonment without the possibility of parole." Mr. Holmes also objects to the two sentences on page 11 that essentially repeat this language.

13. Mr. Holmes instead proposes the following language in place of these two sentences:

If any individual juror is not convinced beyond a reasonable doubt that death is the appropriate punishment, the jury must inform the Court. The jury will be discharged, and the Court will sentence Mr. Holmes to life imprisonment without the possibility of parole.

14. Finally, Mr. Holmes proposes the following changes to the chart attached to the Court's remarks:

15. With respect to the description under the heading "**Phase 2**," omit the phrase, "If the jury determines that at least one mitigating factor exists" and replace it with the word "Then." The sentence as it currently stands erroneously implies that the jury must make a collective determination about the existence of at least one mitigating factor before the jurors engage in an individual weighing process. As explained previously, both the determination about the existence or absence of mitigation as well as the weighing process are individual decisions.

not be sufficient for the Court's final instructions to the jury at any penalty phase of the trial, for the purposes of the introductory video, it seems to be the simplest way of articulating the *Tennessee* holding.

16. For the reasons explained above, to comply with *Tenneson*, Mr. Holmes requests the Court to replace the sentence, “If the jury finds that the mitigating factors outweigh the aggravating factors, it must render a verdict of life imprisonment without the possibility of parole,” with the following: “If any one or more jurors finds that the mitigating factors outweigh the aggravating factors, or if any one or more jurors is not convinced beyond a reasonable doubt that mitigating factors do not outweigh aggravating factors, then the sentencing hearing concludes and the Court will sentence Mr. Holmes to life imprisonment without the possibility of parole.”

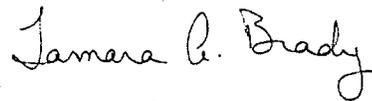
17. Mr. Holmes requests that the Court insert the phrase “unanimously” between the words “jury” and “finds” in the sentence: “If the jury finds that no mitigating factors exist or that the mitigating factors do not outweigh the aggravating factors, the sentencing hearing will move to Phase 3.”

18. Finally, Mr. Holmes requests that the Court rephrase the language in the box located in the bottom right corner of the page as follows: “If any one juror is not convinced beyond a reasonable doubt that death is the appropriate punishment, the jury will be discharged and the Court will sentence Mr. Holmes to life without parole.”

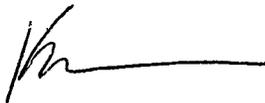
Mr. Holmes files this motion, and makes all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, on the following grounds and authorities: the Due Process Clause, the Right to a Fair Trial by an Impartial Jury, the Rights to Counsel, 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)
Chief Trial Deputy State Public Defender



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



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

Dated: December 5, 2014

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	σ COURT USE ONLY σ
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 201
ORDER RE: MOTION REQUESTING ADDITIONAL REVISIONS TO COURT'S VIDEO SCRIPT [D-259]	

Defendant's motion is hereby GRANTED _____ DENIED _____.

BY THE COURT:

_____ JUDGE

_____ Dated

I hereby certify that on December 5, 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

