

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	<p style="text-align: center;"><b>Filed</b></p> <p style="text-align: center;">JAN 5 2015</p> <p style="text-align: center;"><small>CLERK OF THE COMBINED COURT ARAPAHOE COUNTY, COLORADO</small></p> <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: <a href="mailto:state.pubdef@coloradodefenders.us">state.pubdef@coloradodefenders.us</a>	Case No. <b>12CR1522</b>          Division 201
<p><b>MOTION FOR ADVANCE DETERMINATION OUTSIDE THE PRESENCE OF THE JURY OF THE ADMISSIBILITY OF ANY PROFFERED LAY OPINION TESTIMONY REGARDING DEFENDANT’S “MENTAL CONDITION” OR “SANITY” IN THIS CAPITAL CASE [D-266]</b></p>	

**CERTIFICATE OF CONFERRAL**

Defense counsel conferred with the prosecution, who responded, “We object. To the extent that any foundation needs to be established, it can be done in the normal course of evidence presentation and there is no need for this evidence to be treated differently than other evidence.”

Mr. Holmes, through counsel, moves this Court for a hearing outside the presence of the jury to determine the admissibility of any lay witness opinion testimony on the issue of sanity or “mental condition.” The defense makes this motion pursuant to Mr. Holmes’s constitutional rights to due process, a fair trial by an impartial jury, a reliable sentencing hearing, and fundamental fairness as protected by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article II, sections 16, 18, 20, 23 & 25 of the Colorado Constitution. In support of this motion, counsel state the following:

1. Mr. Holmes has pled not guilty by reason of insanity in this case. The prosecution is seeking the death penalty.
2. Mr. Holmes alleged in Motion D-239 that it would violate his state and federal constitutional rights to allow lay witnesses to opine on the issue of “mental condition” or sanity in this capital case. The Court denied that motion in Order D-239.

3. It became clear from discovery the defense received from the prosecution late last week that the prosecution will likely seek to introduce lay opinion testimony about Mr. Holmes's mental condition or sanity at trial, and that the defense is likely to strongly dispute the admissibility of that testimony. There are a number of significant limitations and foundational requirements that must be satisfied before such evidence is presented to the jury. Therefore, for the reasons explained below, the determination of the admissibility of any such evidence would best be made in advance, outside the presence of the jury, in order to ensure that Mr. Holmes's state and federal constitutional rights to due process, fundamental fairness, a fair and impartial jury, and a reliable sentencing proceeding are not violated by the improper introduction of inflammatory and unreliable lay opinion testimony. U.S. Const. amends. V, VI, VIII, XIV; Colo. Const. art. II, secs. 16, 18, 20, 25.

4. Colorado's insanity statute provides:

In any trial or hearing in which the mental condition of the defendant is an issue, witnesses not specially trained in psychiatry or psychology may testify as to their observation of the defendant's actions and conduct, and as to conversations which they have had with him bearing upon his mental condition, and they shall be permitted to give their opinions or conclusions concerning the mental condition of the defendant.

C.R.S. § 16-8-109.

5. While lay witnesses may testify about their observations of the defendant's actions and conduct and their interactions with a defendant, *see, e.g., People v. Henderson*, 794 P.2d 1050, 1054 (Colo. App. 1989), the case law makes clear that certain foundational requirements must be met before a lay witness can be permitted to *opine* on a defendant's sanity.

6. In *People v. Medina*, 185 Colo. 101, 521 P.2d 1257 (1974), the Colorado Supreme Court held that "[a]s expressed in *Leick [v. People]*, 136 Colo. 535, 322 P.2d 674 (1958)], the two significant requirements which must be met before a lay witness can express his opinion as to the sanity of another, are: (1) it must be shown that the lay witness had an adequate means of becoming acquainted with the person whose sanity is in issue, and (2) the contacts must be proximate in time to the alleged offense." 521 P.2d at 1259.

7. The Court further noted, "Before such opinion evidence from a non-expert can be admissible, the specific facts upon which the opinion is based must be first stated by the witness and his testimony must also show a close or intimate relationship with the party alleged to be insane. Such a foundation is a fair and reasonable requirement for a non-expert's opinion on the issue of sanity or competency to stand trial." *Id.* at 1260.

8. Moreover, "Whether a lay witness may express an opinion as to sanity of a person rests within the sound discretion of the trial court. There is no abuse of discretion in refusing to permit a lay witness to express such an opinion where such witness did not see or know the defendant until immediately after the commission of a crime, and who was with defendant only for a very short time thereafter." *Smith v. People*, 120 Colo. 39, 49, 206 P.2d 826, 831 (1949);

*see also Wright v. United States*, 250 F.2d 4, 9-10 (D.C. Cir. 1957) (“Also obvious upon a moment’s reflection is the fact that, while a lay witness’s observation of abnormal acts by an accused may be of great value as evidence, a statement that the witness never observed an abnormal act on the part of the accused is of value if, but only if, the witness had prolonged and intimate contact with the accused.” (internal quotations and citations omitted)).

9. Before any lay witnesses are permitted to opine on the issue of sanity or “mental condition,” the Court must therefore make a determination as to whether the requirements described above are met.

10. In addition, CRE 701 imposes additional constraints upon lay witness opinion testimony. Such testimony is limited to opinions or inferences which are “rationally based on the perception of the witness,” are “helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue,” and are “not based on scientific, technical, or other specialized knowledge within the scope of Rule 702. Thus, the Court must make a threshold determination as to whether any proffered lay opinion testimony on the issue of sanity or “mental condition” meets these requirements.

11. Notably, in *Dunlap III*, the Colorado Supreme Court made clear that a lay witness may not opine “as to a defendant’s specific diagnosis,” and that “witnesses’ testimony about the symptoms of a specific mental illness and opinions whether [the defendant] suffered from a specific illness were impermissible expert testimony.” *Dunlap v. People* (“*Dunlap III*”), 173 P.3d 1054, 1097 (Colo. 2007). The Court noted, “Neither the case law nor the plain language of [C.R.S. § 16-8-109], however, allows a lay witness to offer diagnoses that could only be considered expert opinions under the rules of evidence.” *Id.* at 1098.

12. Moreover, where the evidence is in dispute, “insanity is a question of fact to be determined by the jury.” *Gomez v. Dist. Court In & For Adams Cnty.*, 179 Colo. 299, 303, 500 P.2d 134, 136 (1972). *See also People v. Wright*, 648 P.2d 665, 668 (Colo. 1982) (“The question of sanity in a criminal case is an issue of fact to be determined by the trier of fact.”).

13. Pursuant to CRE 704, “A lay witness can provide opinion testimony regarding an ultimate issue to be decided by the trier of fact under certain circumstances.” *See People v. Beilke*, 232 P.3d 146, 152 (Colo. App. 2009) (citing CRE 701, 704; *People v. Collins*, 730 P.2d 293, 306 (Colo.1986)). “However, a witness may not testify that a particular legal standard has or has not been met. The question that elicits the opinion testimony must be phrased to ask for a factual, rather than a legal opinion.” *Id.* Thus, in order to determine the admissibility of any lay opinion testimony on sanity or “mental condition,” the Court must make a determination that the information is being elicited in a manner that calls for a factual, rather than a legal, conclusion.

14. Finally, in order to be admissible, this Court must determine that any such evidence is relevant under CRE 401, and that the probative value of the testimony is not “substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” CRE 403.

15. As fully explained in Motion D-239, there are myriad reasons why lay witness

opinion testimony regarding “mental condition” or sanity has the potential to be unreliable and inflammatory. Indeed, notwithstanding the Court’s Order D-239, Mr. Holmes maintains that the introduction of any such testimony would violate his constitutional rights to due process, a fair trial by an impartial jury, a reliable sentencing hearing, and fundamental fairness as protected by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article II, sections 16, 18, 20 & 25 of the Colorado Constitution. *See, e.g., Beck v. Alabama*, 447 U.S. 625, 637-638 (1980); *People v. Young*, 814 P.2d 834,846 (Colo. 1991); *People v. Tenneson*, 788 P.2d 786 (Colo. 1990).

16. However, at a minimum, the state and federal constitutional provisions cited above require the Court to take as many precautions as possible to ensure that unreliable and inflammatory testimony is not arbitrarily injected into these capital proceedings. The Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as well as article II, sections 16, 18, 20, and 25 of the Colorado Constitution, therefore require the Court to make an advance determination outside the presence of the jury as to whether the foundational requirements of any such proffered evidence have been met, before the jury is exposed to potentially prejudicial lay witnesses’ testimony concerning their opinions about Mr. Holmes’s “mental condition” or sanity.

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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Dated: January 5, 2015

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<b>ORDER RE: MOTION FOR ADVANCE DETERMINATION OUTSIDE THE PRESENCE OF THE JURY OF THE ADMISSIBILITY OF ANY PROFFERED LAY OPINION TESTIMONY REGARDING DEFENDANT'S "MENTAL CONDITION" OR "SANITY" IN THIS CAPITAL CASE [D-266]</b>	

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

BY THE COURT:

\_\_\_\_\_ JUDGE

\_\_\_\_\_ Dated

I hereby certify that on January 5, 2015, 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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