

**REDACTED**

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	<b>Filed</b>  <b>JAN 07 2015</b>  CLERK OF THE COMBINED COURT ARAPAHOE COUNTY, COLORADO
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>	σ COURT USE ONLY σ Case No. <b>12CR1522</b>  Division 201
<b>MOTION TO CONTINUE TRIAL [D-267]</b>	

**CERTIFICATE OF CONFERRAL**

The defense conferred with the prosecution regarding the subject matter of this pleading. The prosecution stated, "We object to this motion to continue. With reference to the expert witnesses, if you are referring to the sentencing-phase rebuttal witnesses, we cannot see how endorsement of such witnesses in compliance with court rules can give rise to grounds for a continuance, considering the relatively small number of rebuttal experts endorsed. With regard to discovery, we do not believe that you have been provided anything unusual in a case of this nature. The discovery mainly consists of: (1) Reports prepared by DA investigators detailing trial preparation interviews with witnesses already known to you; (2) Materials which were previously in the possession of your office and which were provided to Dr. Reid, which were not previously provided to us; (3) Lengthy lists of witness contact information; (4) Extremely detailed CVs of expert witnesses the prosecution has endorsed as rebuttal witnesses in the penalty phase; (5) Reports of conversations with Drs. Resnick and Mohandie and their notes, and (6) a report from [REDACTED] report, accompanied by other materials and publications that [REDACTED] provided. These materials have been provided to your office expeditiously, and do not establish adequate grounds for a continuance. Regarding issues of defense counsel workload, we are not aware of factual specifics in this regard, but we do not believe that this would constitute adequate grounds for a continuance. The "other issues" that you mention are not known to us, but we do not believe that there are any grounds for the court to grant a continuance."

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, again moves

this Court to continue the trial presently scheduled for January 20, 2015. In support of this motion, Mr. Holmes states the following:

1. The trial in this matter is scheduled to start in less than two weeks. While defense counsel have been working diligently to get ready for trial, they feel compelled to make a further record about why they are not prepared to commence jury selection on January 20, 2015, and why a further continuance is needed.

2. The prosecution continues to transmit a vast amount of discovery and information to the defense at this late date. Since December 4, 2014, when the last motion to continue was filed, counsel have received 1,603 pages of new discovery, as well as five new CDs and one new DVD. The prosecution has also endorsed three new rebuttal sentencing witnesses the defense was previously unaware of. Assuming that adequate information about these individuals' testimony is received, it will take the attorneys assigned to these witnesses a solid four to six weeks of full-time research and preparation in order to conduct a constitutionally effective cross-examination of them. There will be no opportunity for this preparation given how busy counsel will be once jury selection commences. In addition, after receiving this new information, defense counsel are now considering hiring additional experts, but need time in order to make these assessments. In the event they decide to do so, they need time to get any additional experts up to speed on the case, make the required disclosures, and prepare any new expert's testimony. It is not possible to do a constitutionally effective job of preparing additional witnesses when the trial has already commenced.

3. In short, the defense was already behind on preparing to confront the information it had, let alone preparing to confront the additional information and witnesses it recently received notice of.

4. Although significant resources and effort have been devoted to this case on both sides, the defense has had neither the luxuries nor the resources that the Court has suggested it has in previous orders. On pages 4-5 of its Order D-255-A, denying the defense's December 4, 2014 motion to continue, the Court stated:

Third, it is unusual for deputy public defenders and deputy district attorneys to be able to work exclusively on one case, even if it is a death penalty case. At the hearing, Mr. Brauchler represented that "not a single" deputy district attorney on the case has had "the luxury of only working on this case." Rather, each has had other duties, such as supervising six felony prosecutors, running part of the office's appellate division, being in charge of the economic crimes unit, or carrying out the duties of the elected District Attorney. Likewise, the undersigned had a full-time Domestic Relations docket between April and September of 2013, and has been the Chief Judge of this Judicial District since July 2, 2014. To the extent Mr. King has only been pulled away from this case for a relatively short period of time to prepare to testify and to provide testimony in the other case, he appears to have it better, not worse, than opposing counsel and the Court. The limited time Mr. King

recently devoted to the other case does not establish a burden; rather, it highlights a luxury that neither opposing counsel nor the Court have had continuously throughout this litigation.

The defense feels compelled to correct the record on this issue.

5. As Chief Trial Deputies for the Office of the State Public Defender, Ms. Brady and Mr. King each have ongoing, significant responsibilities beyond this case. Since the inception of this case, they have supervised, worked on, and/or consulted with attorneys on at least thirteen major homicide cases at various points in time and continuing up until the present, including cases in which the prosecution considered, is considering, or has declared it is seeking the death penalty. They have planned and taught at statewide and national trainings, and also frequently consult with other trial-level deputy public defenders on a statewide basis. Ms. Higgs, Ms. Nelson, and Ms. Spengler have also been heavily involved in other matters at various points in time since the inception of this case, including carrying an active felony caseload, serving as lead counsel in a three-week, complex first-degree murder case in early November 2013 (at a time when this case was still set for trial in February 2014) which also involved 30 days of motions hearings leading up to trial, conducting trainings within the public defender system, handling first-degree murder appeals, consulting with attorneys assigned to other capital cases, and preparing for and commencing trial in September 2013 in a highly-publicized first-degree murder case that ultimately ended in a guilty plea, and an involved, two-day sentencing hearing in November 2013.

6. Notably, there is nothing in the record supporting the Court's insinuation in Order D-255-A that Mr. King or other members of the defense team have the "luxury" of exclusively working on this case. During the bench conference at the December 8, 2014 hearing, Mr. Brauchler stated,

When you look at that table of attorneys back there for the People, not a single one of them has the luxury of only working on this case. They are all tasked with multiple other jobs: supervising six felony prosecutors, running part of the appellate division, running the economic crimes unit, whatever I do. None of those things would bring us to the point of saying we cannot continue to process, assessing the form and the preparation of this case. Knowing full well that we will likely not get to opening statements until June, there isn't a reason to continue this case, Your Honor, that's more compelling than the reasons to not grant it.

Transcript, December 8, 2014, pp. 16-17.<sup>1</sup> The Court then immediately asked Mr. King a follow-up question about defense investigator John Gonglach's medical emergency.

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<sup>1</sup> While this conversation occurred at the bench conference, it does not contain any sensitive information. Therefore, the defense has not redacted it from its version of the public pleading.

7. Mr. Brauchler's remarks were about the various responsibilities of the attorneys representing the government in this case. They indicated nothing about defense counsel's responsibilities outside of this case, nor could they, as Mr. Brauchler has no personal knowledge about the workloads of the five defense attorneys presently assigned to this case. Moreover, the Court has never inquired of defense counsel about their respective workloads, and, to the extent that Mr. Brauchler's comments implied that Mr. King, or any other defense lawyer in this case, has no other responsibilities, the Court never attempted to clarify with the defense whether this was indeed true. Instead, the Court turned the conversation immediately back to the matter that was at issue at the bench conference – the medical emergencies that had been recently experienced by the members of the defense team. Had the Court indicated that its perception of defense counsel's workload was going to factor into its decision in ruling on Order D-255-A, counsel would have immediately corrected the Court's misimpression. Instead, the Court drew an unwarranted inference about the defense from Mr. Brauchler's comments about his own team, and then used that unjustified assumption against defense counsel in Order D-255-A.

8. In addition, the Court has stated on several occasions, most recently in its Order D-264, that Mr. Holmes "is represented by at least six attorneys." *See also* Order D-255-A, p. 6, fn. 2 ("Five attorneys appear regularly at proceedings in Court. However, the Court is aware that Jason Middleton, a member of the Appellate Division at the Public Defender's Office, is also working on this case.") and p. 10 ("There are at least six attorneys, four or five investigators, and multiple staff members assigned to the case.").

9. To clarify, Mr. Middleton attended early hearings in this case, and entered his appearance and authored pleadings between the months of January 2013 and April 2013, when he was covering for Ms. Nelson, who was out on maternity leave. Mr. Middleton has not appeared in court on this case since May 2013. Mr. Middleton carries an appellate caseload and is a supervisor in the Appellate Division of the Office of the State Public Defender. He has periodically consulted with the undersigned about various matters that have arisen in this case, but he is not presently drafting pleadings or receiving any other active assignments related to this case, nor is he expected to do so during the trial.

10. The defense also feels compelled to address another issue with the Court's Order D-255-A. On pages 13-14, the Court states that "defense counsel were aware of the situation with their investigator when they filed Motion D-255. Yet they made no mention of it. This is telling because counsel included seven other grounds in support of their motion to continue. If this was not a reason to postpone the trial on December 4, the Court does not understand why it became a reason on December 8."

11. As has since been made public knowledge,<sup>2</sup> defense investigator John Gonglach's infant daughter was diagnosed with cystic fibrosis on the evening of December 3, 2014. This was incredibly upsetting news, not only for Mr. Gonglach and his family, but for the other members of the defense team who care deeply about Mr. Gonglach. This information was not

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<sup>2</sup> Because the information discussed at the bench conference concerning Mr. Gonglach has been made public via Mr. Gonglach's recent letter to the Denver Post in response to Rich Tosche's opinion column, the defense does not believe it is necessary to redact this information from the pleading.

included in the written motion to continue, which was filed the very next day, because it was not immediately clear to counsel how Mr. Gonglach's daughter's diagnosis would impact his ability to be involved in this case. It would have been the height of insensitivity for defense counsel to begin demanding answers of Mr. Gonglach about his ability to continue to be involved in the case immediately upon hearing this devastating news about his daughter. Mr. Gonglach was still processing the news of his daughter's diagnosis, as were the other members of the defense team, at the time the motion to continue was filed.

12. It was only over the course of the next several days – after the motion to continue was filed, but before the December 8 hearing – that defense counsel began to assess what Mr. Gonglach's daughter's diagnosis meant in terms of his abilities to continue helping with the case. By Monday, December 8, defense counsel had reached the conclusion that another investigator would have to be brought into the case and brought up to speed to cover for Mr. Gonglach in the event that the health of his daughter will have to take some precedence over his responsibilities during the trial in this case.

13. The Court then issued Order D-255-B, indicating that it read a letter in the Denver Post written by Mr. Gonglach on December 19, 2014, indicating that he plans to spend the “greater part of the next year” working on this case in court. The defense wishes to emphasize that the fact that Mr. Gonglach recently made the decision to continue working on the case to the best of his ability is not inconsistent with, and does not undermine, any of the assertions defense counsel made at the December 8, 2014 hearing. While these are Mr. Gonglach's intentions, given the uncertainty of his personal situation, it was, and continues to be, necessary for the defense to bring on and train another investigator to assist with this case, and this continues to be a valid reason for continuing the trial in this case.

14. 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.

15. 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))).

16. 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).

17. 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.”).

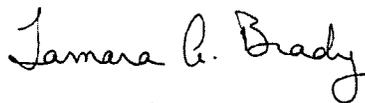
18. Requiring defense counsel to proceed to trial on January 20, 2015 would violate the aforementioned state and federal constitutional rights and guarantees because counsel does not have sufficient time to adequately prepare to give Mr. Holmes the fair trial, effective assistance of counsel, complete defense, and the fair and reliable sentencing proceeding to which he is constitutionally entitled.

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.



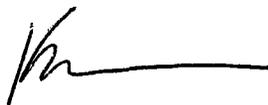
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Dated: January 7, 2015

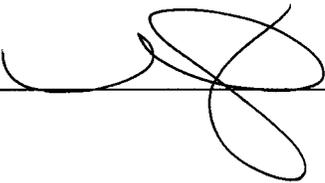


I hereby certify that on \_\_\_\_\_ 1/7, 2015, I

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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