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District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	FILED IN ARAPAHOE COUNTY COMBINED COURT, COLORADO
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff  v.  <b>JAMES HOLMES,</b> Defendant	15 JAN 12 PM 3:53  σ COURT USE ONLY σ
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 style="text-align: center;"><b>MOTION TO RECONSIDER RULING IN COURT ORDER D-268</b>  <b>[D-271]</b></p>	

**CERTIFICATE OF CONFERRAL**

The defense conferred with the prosecution regarding Motion D-268 and the prosecution stated that it objected. Therefore, the defense does not believe that additional conferral is required for this pleading.

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 reconsider its ruling on Motion D-268. In support of this motion, Mr. Holmes states the following:

1. In its Order denying Motion D-268, the Court calls the defense’s argument “convoluted,” “strained,” and a “labyrinth.”
2. The Court states that its remarks “inform prospective jurors that a sentencing hearing will not move from Phase 2 to Phase 3 unless the jury unanimously finds beyond a reasonable doubt that the mitigating factors do not outweigh the aggravating factors.” Order, p. 2. The Court asserts that this is the language the defense takes issue with, and then goes on to argue that its language is no different than the language proposed by the defense. The Court has misunderstood the defense’s motion.
3. To clarify, the defense does not take issue with the way the Court has articulated the weighing process on page 2 of its Order regarding Motion D-268, quoted in the paragraph

above. The defense agrees that such language is legally correct. As the defense pointed out in footnote 3 of Motion D-268, this language – which is consistent with the language contained in the first full paragraph of page 7 of the Court’s video script – is compliant with *Tenneson*.

4. The language that is incompliant with *Tenneson* is found in the box describing Phase 2 of the flow chart. That language states that “The jury will be asked whether it unanimously finds beyond a reasonable doubt that the aggravating factors are outweighed by the mitigating factors.” Similar language is found on page 9 of the video script. To make a clear record on this important point, the defense has highlighted in yellow the language it objects to in an exhibit attached to this motion.

5. There is a difference between the highlighted language and the language of *Tenneson*. The yellow highlighted language requires the jury to make an affirmative finding that the mitigating factors outweigh the aggravating factors beyond a reasonable doubt before the sentencing hearing stops and the defendant receives a life sentence. What *Tenneson* holds is that “before a defendant may be sentenced to death the jury must be convinced beyond a reasonable doubt that any mitigating factors do not outweigh the proven statutory aggravating factors.” 788 P.2d at 790. The defense explains the difference between the Court’s language and the *Tenneson* language in more detail in Motion D-268.

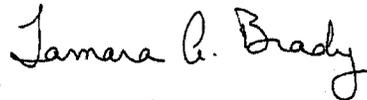
6. The defense reasserts all arguments made in Motion D-268 and requests that the Court reconsider its Order D-268 and amend its flow chart and its videotaped remarks to comply with *Tenneson*.

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: January 12, 2015

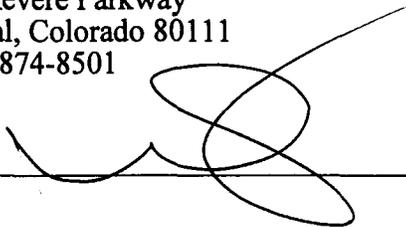


I hereby certify that on 1/12, 2015, I

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  
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A handwritten signature in black ink is written over a horizontal line. The signature is stylized and appears to be the name of the certifier.

**D-271**

**Exh. A**

***Videotaped Remarks Before Individual Voir Dire***

Hello. My name is Carlos Samour, and I am the judge assigned to the case of *The People of the State of Colorado v. James Holmes*, Case No. 12CR1522. Once again, I wish to express my gratitude for your willingness to fulfill your civic duty. I readily acknowledge the inconvenience that you are experiencing, but I want to remind you that our criminal justice system depends on the participation of jurors. Without you, we could not have the system of justice we have.

You have been provided with a copy of these remarks so that you may read along as I go through them. A staff member will collect your copy of these remarks when your questioning is completed.

You are here today for individual questioning. When you enter the courtroom later today, you can expect that I will start the questioning, and then an attorney for each party will have additional questions for you. Please be as forthcoming with information as possible.

The attorneys and I have a copy of your questionnaire and will likely ask you some questions about your answers. We will give you a copy of your questionnaire so that you may review your answers and refresh your memory. I suggest that you take time to do so after this video recording and before entering the courtroom for questioning.

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You may be questioned about four areas today: (1) hardship; (2) the publicity the case has received; (3) mental health; and (4) the potential penalties of life imprisonment without the possibility of parole and death by lethal injection.

First, we need to know whether serving as a juror in this case will cause you undue or unreasonable hardship. Under Colorado law, a potential juror can seek to be excused from jury service if serving for the anticipated length of the trial will cause him or her an undue hardship. Our best estimate is that the process of questioning individual jurors could take three to four months; therefore, we expect that sometime in May or June we will conduct the two-day group questioning of the 100 to 120 prospective jurors selected from these individual sessions. The trial will start immediately after we have completed group questioning and selected 24 jurors. We estimate that the trial could last four to five months, which would take us into August or September, or perhaps October. Unfortunately, unexpected delays can occur, so your flexibility is greatly appreciated.

Second, we may question you about the extent to which, if at all, you have been exposed to the publicity this case has received. We need to know whether you can be a fair and impartial juror notwithstanding the media's coverage of the case.

Third, we may ask questions about mental health. As you know, Mr. Holmes has pled not guilty by reason of insanity, which includes the plea of not

guilty. Under Colorado law, a person charged with certain crimes, including murder in the first degree, may plead not guilty by reason of insanity. Colorado has a legal test for insanity, which I will explain during the trial. If any evidence is presented during the trial that Mr. Holmes was insane on the date of the crimes charged, the prosecution will have the burden of proving beyond a reasonable doubt that he was not insane at the time of the crimes charged. At the end of the trial, after all the evidence has been completed, the jury must decide whether the prosecution proved beyond a reasonable doubt every element of each crime charged, including that Mr. Holmes was not insane at the time of the commission of the act. As to every charge, Mr. Holmes may be found guilty, not guilty, or not guilty by reason of insanity.

The Court provides you with the following informational instruction, which must have no persuasive bearing on the verdicts the jury reaches based on the evidence at the end of the trial in this case. If a defendant is found not guilty by reason of insanity, the Court must commit him to the Department of Human Services until such time as the Court determines that he no longer requires hospitalization because he no longer suffers from a mental disease or defect which is likely to cause him to be dangerous to himself, to others, or to the community in the reasonably foreseeable future. If a defendant is found not guilty by reason of insanity, he will never again be tried on the merits of the charges filed against him.

Finally, we may ask questions surrounding the potential penalties of life imprisonment without the possibility of parole and a death sentence. The prosecution is seeking the death penalty against Mr. Holmes. Colorado law allows the prosecution to seek the death penalty under certain circumstances if a defendant is charged with murder in the first degree.

It is important that you understand that no defendant may ever be sentenced to death based solely on a conviction for murder in the first degree, even if the defendant deliberated, premeditated, and intentionally committed the crime, and even if no defenses apply. In Colorado, if the jury finds the defendant guilty of a charge of murder in the first degree in a case in which the prosecution is seeking a death sentence, the law requires that the same jury that determined the defendant's guilt hear additional evidence at a sentencing hearing to decide the appropriate punishment. In that situation, the law, in essence, provides for a two-part trial. In the first part of the trial, the jury must decide if the defendant is guilty, not guilty, or not guilty by reason of insanity. Only if the jury finds the defendant guilty of a charge of murder in the first degree would it then hear additional evidence in the second part of the trial in order to decide what sentence to impose. In the second part of the trial, or the sentencing hearing, the jury would have two sentencing choices: the penalty of life imprisonment without the possibility of parole or the penalty of death.

Because the jury may have to decide Mr. Holmes's sentence in this case, the law requires prospective jurors to answer questions regarding your thoughts, feelings, and opinions about the possible penalties. This is true even though the jury may find that Mr. Holmes is not guilty or not guilty by reason of insanity with respect to every charge of murder in the first degree, in which case there would be no need for the jury to make any sentencing decisions. It is very important that you not assume that Mr. Holmes will be, or should be, found guilty of any crime. The Court reminds you that Mr. Holmes is presumed innocent, and that presumption of innocence remains with him and must be given effect by the jury throughout the trial unless, after considering all of the evidence, the jury is then convinced that the defendant is guilty beyond a reasonable doubt. It is equally important that you are aware that, even if Mr. Holmes is found guilty of a charge of murder in the first degree, the law **never** requires a death sentence.

If a sentencing hearing is necessary, it may consist of up to three phases. You will be instructed further about these three phases, as well as other legal principles, if there is a sentencing hearing. However, it is important that you have a basic understanding of these phases before you are questioned today.

The sentencing hearing can be broken down as follows:

**Phase 1.** In Phase 1, the prosecution has the burden of proof. It is required to prove beyond a reasonable doubt the existence of at least one of five

aggravating factors it has alleged in this case. An aggravating factor is a fact or circumstance that increases the severity or seriousness of the defendant's conduct.

At the end of Phase 1, the jury must deliberate. If the jury does not unanimously find that the prosecution has proven beyond a reasonable doubt the existence of at least one of the aggravating factors alleged, the jury must render a verdict of life imprisonment without the possibility of parole.

On the other hand, if the jury does unanimously find that the prosecution has proven at least one of the aggravating factors alleged beyond a reasonable doubt, the jury must render a verdict that reflects that finding, and the sentencing hearing will continue to Phase 2.

**Phase 2.** In Phase 2, the jury must consider any evidence of mitigation presented. A mitigating factor is a fact or circumstance which does not constitute justification or excuse for the offenses in question, but which in fairness or mercy may be considered as extenuating or reducing the degree of the defendant's moral culpability. With respect to mitigation, the question is whether the evidence is of such character that it might serve as a basis for a sentence less than death. The prosecution will have the opportunity to rebut any evidence of mitigation presented by Mr. Holmes.

At the end of Phase 2, the jury must deliberate. Each juror must individually determine whether one or more mitigating factors exist. The jury need not

unanimously agree that mitigating factors exist or that the same mitigating factors exist. Each juror must then individually: (1) decide what weight to give each mitigating factor; and (2) weigh the mitigating factors that exist and the aggravating factors proven by the prosecution in Phase 1. Each juror must individually determine whether sufficient mitigating factors exist to outweigh the aggravating factors. Jurors must not be influenced by prejudice, bias, or public opinion. Rather, each juror must individually make a reasoned moral judgment based on an assessment and comparison of the weightiness of each of the mitigating factors and the weightiness of each of the aggravating factors.

Neither party has the burden to prove anything in Phase 2. However, the sentencing hearing will only continue to Phase 3 if the jury is unanimously convinced beyond a reasonable doubt that the mitigating factors do not outweigh the aggravating factors. 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 must return a verdict that reflects that finding, and the sentencing hearing will continue to Phase 3. Otherwise, the jury must render a verdict of life imprisonment without the possibility of parole.

**Phase 3.** In Phase 3, both the prosecution and the defense may present additional evidence. The jury must then deliberate in order to decide the

appropriate sentence to impose: life imprisonment without the possibility of parole or a sentence to death.

During deliberations, each juror must individually determine whether he or she is convinced beyond a reasonable doubt that Mr. Holmes should be sentenced to death. Neither party has the burden to prove anything in Phase 3. However, the jury may only return a verdict of death if it is unanimously convinced beyond a reasonable doubt that death is the appropriate punishment. 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.

In reaching a verdict in Phase 3, the jury must not be influenced by prejudice or bias. Further, the jury should not be swayed by mere sentiment, conjecture, sympathy, passion, public opinion, or public feeling. Nor should the jury's decision be the result of an arbitrary or emotional response. Rather, each juror must apply his or her reasoned moral judgment in deciding whether, in light of the totality of the circumstances present, the situation calls for life imprisonment without the possibility of parole or the imposition of the death penalty. The jury

may consider mercy and sympathy for Mr. Holmes. But the jury must ultimately make a factual and moral assessment of whether death or life imprisonment without parole is the appropriate punishment. The jury's verdict as to the appropriate sentence must be based on a profoundly moral evaluation of the defendant's character and crime.

Let me sum up the three phases of the sentencing hearing. For this part of the advisement, I ask that you please look at the chart on the screen. At the end of Phase 1, the jury must decide if the prosecution proved beyond a reasonable doubt at least one of the aggravating factors alleged in this case. If the answer is "no," the jury must render a verdict of life imprisonment without the possibility of parole. If the answer is "yes," the sentencing hearing will continue to Phase 2.

If there is a Phase 2, at the end of it, each juror must individually determine whether one or more mitigating factors exist. Each juror must then individually decide what weight to give each mitigating factor and weigh the mitigating factors and the aggravating factors to determine whether the mitigating factors outweigh the aggravating factors. **The jury will be asked whether it unanimously finds beyond a reasonable doubt that the aggravating factors are outweighed by the mitigating factors.** If "yes," the jury must render a verdict of life imprisonment without the possibility of parole. If "no," the sentencing hearing will continue to **Phase 3.**

If there is a Phase 3, at the end of it, the jury must decide whether Mr. Holmes should be sentenced to death or life imprisonment without the possibility of parole. A death sentence may only be returned if the jury is unanimously convinced beyond a reasonable doubt that death is the appropriate sentence. If the jury is not unanimously convinced beyond a reasonable doubt that death is the appropriate sentence, it must either return a unanimous verdict of life imprisonment without the possibility of parole or inform the Court that it is unable to reach a unanimous verdict. In the event 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.

For your convenience, I have attached to my remarks a copy of the chart on the screen. I encourage you to review this chart and the rest of my comments while you wait to be called into the courtroom for your individual questioning session. At this time, I invite you to resume reading along, starting at the end of the last full paragraph on page 10, where it says **“RESUME READING ALONG HERE.”**

Both Mr. Holmes and the prosecution deserve jurors who can be fair and impartial, who can keep an open mind throughout the trial, and who will follow the law provided by the Court regardless of their personal views or opinions. You previously took an oath to honestly answer all the questions from counsel and me

about your service as a juror. We need you to be honest in your answers. Please remember that there are no right or wrong answers—only honest answers. You have every right to hold personal views and opinions on any subject. You are not here to be judged about your views or opinions, and you will not be criticized for holding any views or opinions. We are simply trying to select a fair and impartial jury for this case. If there is any reason why you should not sit on this jury, it is very important that you inform us of that reason today.

Please do not discuss this video or any aspect of this case, including your questionnaire, with anyone prior to coming into the courtroom. Also, please do not make any statements or ask any questions to Court staff or anyone else about this video advisement before coming into the courtroom.

Finally, because some time has passed since you were last here and heard the advisements that govern your conduct, please indulge me as I review them:

(1) Please do not discuss any aspect of the case with other prospective jurors, including while you wait to be called into the courtroom today. You are free to talk to other prospective jurors, but not about any aspect of the case.

(2) In addition to not being able to discuss the case with each other, you may not communicate about the case with anyone else through any means before you are released from jury service.

(3) Please do not talk with any witnesses, parties, or attorneys about anything, whether related to the case or not.

(4) To make sure that witnesses, parties, and attorneys do not inadvertently talk to you, it is imperative that you wear your JUROR

badge whenever you are on the Courthouse premises and that it is visible to everyone around you.

(5) Please do not talk to any members of the media about anything (not just about the case) until the case is completed.

(6) You must not read, view, or listen to any news or media reports that may refer to this case.

(7) You cannot visit any locations mentioned in the case or conduct your own investigation outside the courtroom.

Please remember that breaking any of these rules would violate the oath you took when you responded to your summons. If you violate any of these rules, you and your fellow prospective jurors might have to come back to court after this trial to testify under oath about your conduct. Thank you very much for your time and attention.

