

**REDACTED**

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| District Court, Arapahoe County, Colorado<br>Arapahoe County Courthouse<br>7325 S. Potomac St., Centennial, CO 80112  | <b>Filed</b><br><br>JAN 08 2015<br><br>CLERK OF THE COMBINED COURT<br>ARAPAHOE COUNTY, COLORADO<br><br>σ COURT USE ONLY σ |
| THE PEOPLE OF THE STATE OF COLORADO,<br>Plaintiff<br><br>v.<br><br><b>JAMES HOLMES,</b><br>Defendant  |   |
| DOUGLAS K. WILSON, Colorado State Public Defender<br>Daniel King (No. 26129)<br>Tamara A. Brady (No. 20728)<br>Chief Trial Deputy State Public Defenders<br>1300 Broadway, Suite 400<br>Denver, Colorado 80203<br>Phone (303) 764-1400 Fax (303) 764-1478<br>E-mail: <a href="mailto:state.pubdef@coloradodefenders.us">state.pubdef@coloradodefenders.us</a> | Case No. <b>12CR1522</b><br><br><br><br>Division 201  |
| <b>MOTION TO REVISE PENALTY PHASE FLOW CHART THE COURT INTENDS TO USE DURING VIDEOTAPED REMARKS AND INDIVIDUAL VOIR DIRE TO COMPLY WITH <i>PEOPLE V. TENNESON</i>, 788 P.2D 786, 796 (COLO. 1990), AND TO RECONSIDER ITS DENIAL OF A SIMILAR PROPOSED REVISION TO THE SCRIPT OF THE VIDEOTAPED REMARKS [D-268]</b>  |   |

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**CERTIFICATE OF CONFERRAL**

The defense conferred with the prosecution. The prosecution responded, "We object to the relief sought in Motion D-268. We believe that the court's flow-chart and script for the video accurately describe Colorado law and do not need to be revised."

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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 revise the penalty phase flow chart it intends to use during its videotaped remarks prior to individual voir dire, so that it complies with *People v. Tenneson*, 788 P.2d 786, 796 (Colo. 1990), to reconsider its rejection of a similar proposed revision to the script of its videotaped remarks, and to make several other small changes. In support of this motion, Mr. Holmes states the following:

1. The Court has issued several drafts of its proposed videotaped remarks. Most recently, on the evening of Tuesday, January 6, 2015, the Court circulated Order C-172-A, and then, on Wednesday morning, an amended version of Order C-172-A correcting a typographical error. Shortly thereafter, the defense realized that it had not seen an updated version of the penalty phase flow chart the Court intends to use along with its videotaped remarks since one

was circulated in Order C-162-A, and emailed the Division Clerk requesting such a copy, which she promptly provided.<sup>1</sup>

2. Upon reviewing the chart, defense counsel observed that there is a legal error in the chart that is incompliant with *People v. Tenneson*, 788 P.2d 786, 796 (Colo. 1990). The defense had observed and pointed out a similar error on page 9 of the version of the videotaped script that was circulated via Order C-172, but the Court found in Order C-172-A that this objection was “not persuasive” and overruled it. *See* Order C-172-A, p. 5.

3. This issue is of considerable legal importance and will inevitably come up again during individual voir dire and when penalty phase jury instructions are discussed. Therefore, counsel file this motion to make a more detailed record about this legal error, and to specifically object to the language used in the “Phase 2” box of the flow chart. Counsel also move the Court to correct one additional part of the video script they recently noticed that perpetuates this error on page 7, to reconsider its finding that their previous objection to page 9 the script on this point was not persuasive, and to make two other small changes to the chart.

4. The Court’s language describing Phase 2 in the flow chart states that the jury’s task during Phase 2 is to “determine whether the mitigating factors outweigh the aggravating factors,” and that at the end of Phase 2, the jury “will be asked whether it unanimously finds beyond a reasonable doubt that the *aggravating factors are outweighed by the mitigating factors*.” In other words, according to the Court’s description, the jury will be asked to make an affirmative finding as to whether the mitigating factors outweigh the aggravating factors beyond a reasonable doubt. Under the Court’s formulation, only upon such an affirmative finding does the jury conclude its deliberations at this point in the process.

5. *Tenneson* makes explicitly clear, however, that “Colorado’s death penalty statute must be construed to require that the jury must be convinced beyond a reasonable doubt that any *mitigating factors do not outweigh the proven statutory aggravating factors* before a sentence can be imposed.” 788 P.2d at 796 (emphasis added). This particular phrasing was significant to the *Tenneson* Court – the majority repeats this exact language eleven times in its opinion. This is the specific phrasing that must be used to describe the jury’s decision at step three of Colorado’s capital sentencing process, in order to comply with the holding of *Tenneson* as well as Colorado’s capital sentencing statute, the Eighth Amendment, and article II, section 20 of the Colorado Constitution.

6. Although it can be difficult at first to conceptualize the difference between the Court’s phrasing of the step three assessment and the *Tenneson* phrasing, and although the *Tenneson* phrasing may seem somewhat clunky, there is a real difference here that is not semantic.

7. This distinction is best illustrated by the hypothetical scenario in which a member or members of the jury think that the mitigating factors may arguably or possibly outweigh the

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<sup>1</sup> Because it appears that this version of the flow chart has not yet been formally attached to any pleading or court order, the defense attaches it as “Exhibit A” to this pleading in order to ensure that it is made part of the record.

statutory aggravating factors, but are not sure enough to be able to affirmatively state that mitigation outweighs aggravation *beyond a reasonable doubt*. This scenario is the same as having a reasonable doubt that “the mitigating factors do not outweigh the proven statutory aggravation factors.” If a juror thinks it is possible that mitigation outweighs aggravation, he or she has a doubt about whether mitigation *does not outweigh* aggravation. Under the Court’s construction, the jury would continue to Phase 3 (also known as step four) where they have such a doubt.

8. This is in direct conflict with the law in Colorado. *Tenneson* provides that if any one juror has a reasonable doubt that the mitigating factors *do not outweigh* the statutory aggravating factors, the defendant is not death-eligible and must be sentenced to life. In other words, a reasonable doubt about the outcome of the weighing process inures to the benefit of the defendant.<sup>2</sup>

9. The Court’s current phrasing of the decision to be made at step three (otherwise known as the end of “Phase 2”) is not compliant with *Tenneson*. If the jury’s answer to the question, “Do you unanimously find beyond a reasonable doubt that the aggravating factors are outweighed by the mitigating factors?” is “no” because one or more jurors thinks it is merely *possible* that mitigation outweighs aggravation, but is unable to reach that conclusion beyond a reasonable doubt, then the jury is nevertheless required to proceed to step four. Under *Tenneson*, however, if the jury harbors such a reasonable doubt that mitigation does not outweigh aggravation, the defendant cannot be sentenced to death.

10. Pursuant to the Court’s phrasing, the only way that jury deliberations stop at step three (also known as Phase 2) is if the jury affirmatively concludes beyond a reasonable doubt that mitigation outweighs aggravation. The Court’s phrasing effectively shifts a jury decision that a reasonable doubt exists as to whether mitigation does not outweigh the aggravation into a result that would lead to step four deliberations. Under *Tenneson*, such a decision must end deliberations and results in a life sentence.

11. Put another way, under *Tenneson*, reasonable doubt stops the process and leads to a life verdict. A unanimous decision beyond a reasonable doubt that mitigating factors do not outweigh the proven statutory aggravating factors is the only way the process continues to step four.

12. The defense therefore requests that the Court rephrase the language in the “Phase 2” box as follows:

Each juror must individually determine whether one or more mitigating factors exists. Each juror must then individually decide what weight to give each mitigating factor and weigh the

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<sup>2</sup> This finding is similar to a “not guilty” finding during a regular criminal trial. If any juror harbors a reasonable doubt about the defendant’s guilt, then the verdict is “not guilty.” Likewise, under Colorado’s capital sentencing scheme, at the end of step three, if any one juror harbors a reasonable doubt about the defendant’s death eligibility, then the defendant is not death eligible and is sentenced to life without parole.

mitigating factors and the aggravating factors. The jury will be asked whether it is unanimously convinced beyond a reasonable doubt that any mitigating factors do not outweigh the proven statutory aggravating factors.

The box below and to the left of this one should then read, "If the answer is 'no,' the jury must render a verdict of life imprisonment without the possibility of parole." The box to the right should state, "If the answer is 'yes,' the sentencing hearing will continue to Phase 3."

13. Additionally, the defense requests that the Court revise the sentence on page 7 of the current video script that currently reads, "Each juror must individually determine whether sufficient mitigating factors exist to outweigh the aggravating factors." The sentence should read, "Each juror must individually determine whether he or she is convinced beyond a reasonable doubt that the mitigating factors do not outweigh the aggravating factors."<sup>3</sup>

14. The defense also reiterates its request for a revision to page 9 of the current script, which incorrectly states,

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.

15. As requested in the defense's Response to C-172, the script should instead read:

Each juror must then individually decide what weight to give each mitigating factor and then individually weigh the mitigating factors and the aggravating factors. Each juror must decide whether he or she is convinced beyond a reasonable doubt that any mitigating factors do not outweigh the proven statutory aggravating factors. If each juror's answer is "yes," and the jury unanimously finds beyond a reasonable doubt that any mitigating factors do not outweigh the proven statutory aggravating factors, the sentencing

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<sup>3</sup> The Court correctly states in the following paragraph of page 7 that "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." This paragraph is compliant with *Tenneson*.

hearing will proceed to Phase 3. Otherwise, the jury must render a verdict of life imprisonment without parole, and the Court must sentence Mr. Holmes to life imprisonment without the possibility of parole.

16. In addition to this requested revision, the defense further requests that the Court insert the word “unanimously” between the words “must” and “decide” in the box describing Phase 1.

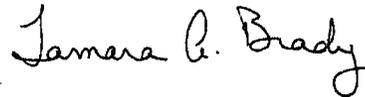
17. Finally, the defense also requests that the box below and to the right of the box describing Phase 3 simply state, “If the jury is not unanimously convinced beyond a reasonable doubt that death is the appropriate sentence, the Court will sentence Mr. Holmes to life imprisonment without the possibility of 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.



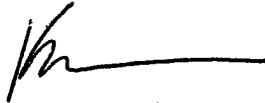
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Dated: January 8, 2015

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| District Court, Arapahoe County, Colorado<br>Arapahoe County Courthouse<br>7325 S. Potomac St., Centennial, CO 80112  |  |
| THE PEOPLE OF THE STATE OF COLORADO,<br>Plaintiff<br><br>v.<br><br><b>JAMES HOLMES,</b><br>Defendant  | σ COURT USE ONLY σ   |
| DOUGLAS K. WILSON, Colorado State Public Defender<br>Daniel King (No. 26129)<br>Tamara A. Brady (No. 20728)<br>Chief Trial Deputy State Public Defenders<br>1300 Broadway, Suite 400<br>Denver, Colorado 80203<br>Phone (303) 764-1400 Fax (303) 764-1478<br>E-mail: <a href="mailto:state.pubdef@coloradodefenders.us">state.pubdef@coloradodefenders.us</a> | Case No. <b>12CR1522</b><br><br><br><br><br><br><br>Division 201 |
| <b>ORDER RE: MOTION TO REVISE PENALTY PHASE FLOW CHART THE COURT INTENDS TO USE DURING VIDEOTAPED REMARKS AND INDIVIDUAL VOIR DIRE TO COMPLY WITH <i>PEOPLE V. TENNESON</i>, 788 P.2D 786, 796 (COLO. 1990), AND TO RECONSIDER ITS DENIAL OF A SIMILAR PROPOSED REVISION TO THE SCRIPT OF THE VIDEOTAPED REMARKS [D-268]</b>                                  |  |

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

BY THE COURT:

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JUDGE

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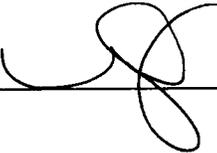
Dated

I hereby certify that on 1/8, 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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Office of the District Attorney  
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**D-268**

**Exh. A**

**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 "no," the jury must render a verdict of life imprisonment without the possibility of parole.

If "yes," the sentencing hearing will continue to Phase 2.

**Phase 2**  
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.

**Phase 3**  
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.