

**REDACTED**

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	<p><b>Filed</b></p> <p>DEC 01 2014</p> <p>CLERK OF THE COMBINED COURT ARAPAHOE COUNTY, COLORADO</p> <p>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
<b>REPLY IN SUPPORT OF DEFENDANT'S MOTION TO DECLARE DISCLOSURE PROVISIONS OF SECTION § 18-1.3-1201(3)(C) AND CRIM. P. 32.1(D)(7) UNCONSTITUTIONAL AS APPLIED IN THIS CASE OR, ALTERNATIVELY, TO EXTEND THE DEFENSE'S SENTENCING DISCLOSURE DEADLINE [D-254]</b>	

Mr. Holmes, through counsel, submits the following in reply to the prosecution's response to the defense's motion to declare the disclosure provisions of C.R.S. § 18-1.3-1201(3)(c) and Crim. P. 32.1(d)(7) unconstitutional as applied in this case or, alternatively, to extend the defense's sentencing disclosure deadline [D-254]:

1. The prosecution spends the majority of its response arguing that Mr. Holmes has presented no case law that actually supports his argument that C.R.S. § 18-1.3-1201(3)(c) and Crim. P. 32.1(d)(7) are unconstitutional as applied to him, given the specific circumstances of his insanity defense and the degree of overlap between his merits-phase mental health evidence and the evidence that will be presented in mitigation if this case reaches a sentencing phase.

2. The case law cited by the defense stands generally for the propositions that criminal defendants have a right to a fair trial by an impartial jury, a due process right to fundamental fairness that precludes the prosecution from gaining an unfair advantage over the defense, the right to a fair and reliable sentencing proceeding, the right to present a complete defense and to the effective assistance of counsel, and the right not to be forced to surrender one constitutional right in order to assert another.

3. There is not a specific case that is on all fours with the legal issues raised in Motion D-254 because the constitutionality of Colorado's current capital sentencing scheme has never been scrutinized on appellate review in a case where a defendant has pled not guilty by

reason of insanity. Obviously, that does not mean that the rule and statutory provision at issue in Motion D-254 are necessarily constitutional as applied here, nor does it mean that the case law cited by the defense is wholly inapplicable or irrelevant. This case has presented many issues of first impression in Colorado, including those raised in Motion D-254.

4. The prosecution further argues that Mr. Holmes's arguments regarding the inadequacies of the Court's protective order are merely "hypothetical" and "conclusory." This is not so. If the Court denies Motion D-254, the defense will be forced to turn over to the prosecution significant information concerning its merits-phase witnesses that the prosecution would not otherwise have. This includes handwritten notes taken by defense counsel of statements of the defense's key mental health experts who may or may not testify at sentencing, but who will undoubtedly testify at the merits phase of the case and will cross-examined by the prosecution at that time. Given these circumstances, it would be unrealistic and impossible for the Court to discern whether the prosecution had "used" any of this information in any way in preparation for its merits-phase case. The prosecution could employ this information in a number of ways that would completely evade the court's detection. This information could influence the prosecution's trial strategy even if it did not specifically address any of the information contained in these disclosures. There is simply too much overlap between the mental health and mitigation issues in this case for the Court's protective order to be effective under the circumstances.

5. Finally, in paragraph 11, the prosecution essentially argues that because (in its view) there is no constitutional infirmity with Colorado's capital sentencing disclosure requirements, the Court cannot grant Mr. Holmes's alternative request to extend the defense's sentencing disclosure deadlines until after the merits phase case is submitted to the jury. The defense disagrees. There is no legal support for the prosecution's argument that the Court cannot grant Mr. Holmes's request for an extension of his sentencing disclosure deadline if it finds these provisions to be constitutional (or avoids resolving the constitutional question).

6. Pursuant to Crim. P. 32.1(d)(8), the Court may extend the deadline "upon a showing of good cause."

7. There is no appellate precedent that the defense is aware of interpreting the "good cause" showing required by Crim. P. 32.1(d)(8). However, in other contexts, a showing of good cause is "not an onerous one." *People v. Grant*, 174 P.3d 798, 803 (Colo. App. 2007) (quoting *People v. Garcia*, 87 P.3d 159, 163 (Colo.App.2003)). The Court of Appeals has also held (in the context of determining whether to accept a late filed notice of appeal) that "[d]etermining whether good cause exists "naturally depends on the particular facts of each case and should be made after assessing the totality of the circumstances.'" *People v. Hill*, 296 P.3d 121, 124 (Colo. App. 2011) (quoting *People v. Baker*, 104 P.3d 893, 896 (Colo.2005)).

8. Even if the Court does not agree that Colorado's capital sentencing disclosure provisions are unconstitutional, it nevertheless has the discretion to extend the defense's sentencing disclosure deadline in the interests of fairness, given the specific circumstances of this case and the amount of overlap between the mental health and mitigation evidence that will be presented at trial. As stated in Motion D-154, the defense is not opposed to allowing the

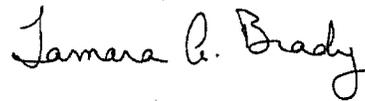
prosecution a sufficient amount of time to digest any material that is disclosed following the submission of the merits phase case. Thus, delaying the defense's sentencing disclosure deadline would not cause any significant prejudice to the prosecution; it would simply negate the unfair advantage to the prosecution and the disadvantage to the defense that would result if the defense is required to make these disclosures prior to trial.

Mr. Holmes files this reply, 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.



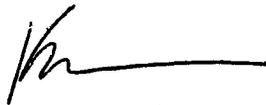
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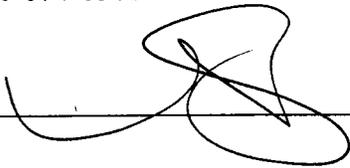
Dated: December 1, 2014

I hereby certify that on 12/1, 2014, 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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A handwritten signature in black ink is written over a horizontal line. The signature is stylized and appears to be the initials 'JB'.