REDACTED

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	Filed JAN 07 2015 CLERK OF THE COMBINED COURT ARAPAHOE COUNTY, COLORADO
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. **JAMES HOLMES,** Defendant	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: state.pubdef@coloradodefenders.us	Case No. **12CR1522** Division 201

RESPONSE TO PROSECUTION'S MOTION IN LIMINE REGARDING CAPITAL EVIDENCE [P-109]

James Holmes, through counsel, submits the following in response to the prosecution's Motion in Limine Regarding Capital Evidence:

1. The prosecution takes issue with four categories of evidence the defense intends to offer at sentencing: (1) two videos produced by organizations for which Mr. Holmes volunteered as a teenager and young adult, (2) recorded video interviews of certain mitigation witnesses, (3) a recording of a speech by [redacted] and a book by [redacted], and (4) videos of [redacted]. The defense addresses the admissibility of each category of evidence in turn.

2. The prosecution first objects to the introduction into evidence of promotional videos about [redacted], two organizations that Mr. Holmes was involved in as a teenager and young adult. The prosecution claims these videos contain inadmissible hearsay in the form of statements "in graphics" and narration, and should be excluded from any sentencing hearing in this case.

3. The graphics and statements in these videos are not hearsay, because they are not being offered to prove the truth of the matter asserted. *See* CRE 801(c) (defining hearsay as "a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). The "hearsay statements in graphics" the prosecution objects to in the [redacted] video include words flashing across the images on the screen depicting the statements, [redacted] Mr. Holmes is not introducing this

video to assert the truth of any of these statements. Rather, he seeks to introduce the video as demonstrative evidence to provide jurors with a visual image of the place he [redacted] and the type of establishment he chose to serve. Similarly, the [redacted] video is not being offered to prove the truth of the statements of the narrator, which include descriptions of [redacted]. The defense seeks to introduce the video to provide context for other evidence and testimony about the [redacted]. *See, e.g., People v. Hagos*, 250 P.3d 596, 623 (Colo. App. 2009) (utterances of victim not hearsay because they were offered for the limited purpose of putting defendant's responses in context); *People v. Banks*, 983 P.2d 102, 105 (Colo. App. 1999), *impliedly overruled on other grounds by People v. Hoang*, 13 P.3d 819 (Colo. App. 2000) (statements made by 911 dispatcher that defendant was "dangerous" were not offered to show the truth of these comments, but to provide context for officers' descriptions of how they approached defendant and why they interacted with him as they did).

4. The prosecution does not appear to contest that Mr. Holmes worked and volunteered with these organizations. Nor can it seriously dispute that these videos, which were downloaded directly from the organizations' websites, accurately describe the mission of the organizations. *See, e.g., People v. Richardson*, 58 P.3d 1039-1045-46 (Colo. App. 2002) ("To be admissible for such purpose, demonstrative or illustrative evidence must be shown to be reasonably accurate and correct, and admission of such evidence is within the trial court's discretion."). The Court should reject the prosecution's argument that these videos are inadmissible because they contain inadmissible hearsay.

5. Second, the prosecution objects to videos of certain defense mitigation witnesses. The prosecution argues that "[t]he totality of the videos constitutes hearsay evidence, and this Court should rule that they are thus inadmissible. The defendant can subpoena the individuals depicted in the videos if he desires to present evidence from these individuals."

6. While the defense acknowledges that it seeks to introduce statements contained in these videos for the truth of the matter asserted, the Court should nevertheless find these videos admissible at any penalty phase proceeding in this case. There is ample support for this argument.

7. First, strictly applying the rules of evidence to exclude mitigation offered by the defense in a capital case would violate Mr. Holmes's state and federal constitutional rights to due process, to present a defense, an impartial jury, and to a fair and reliable sentencing hearing. U.S. Const. amends. V, VI, VIII, XIV; Colo. Const. art. II, secs. 16, 20, 23, 25. It is axiomatic that pursuant to these constitutional provisions, Mr. Holmes has the right to present mitigating evidence on his own behalf, and United States Supreme Court case law supports the argument that this evidence can include hearsay. While the prosecution attempts to minimize the holding of *Green v. Georgia*, 442 U.S. 95 (1979), that case stands for the proposition that "the hearsay rule may not be applied mechanistically to defeat the ends of justice" in a capital sentencing proceeding. *Id.* at 97 (quoting *Chambers v. Mississippi*, 410 U.S. 284 (1973)). Contrary to the prosecution's efforts to suggest that *Green* should be confined to its facts, the Supreme Court has repeatedly acknowledged its holding in *Green* and has never retreated from it. *See, e.g., Oregon*

v. Guzek, 546 U.S. 517, 524-25 (2006) (declining to extend the reasoning of *Green* to find a federal constitutional right to present residual doubt evidence at sentencing, but acknowledging that *Green*'s holding was that the Constitution prohibits States from mechanistically applying the hearsay rule to defeat the ends of justice); *Barclay v. Florida*, 463 U.S. 939, 958-59 (1983) (Stevens, J., and Powell, J. concurring in the judgment) (citing *Green* for the proposition that "States may impose this ultimate sentence only if they follow procedures that are designed to assure reliability in sentencing determinations"); *Estelle v. Smith*, 451 U.S. 462-63 (1981) (citing *Green* for the proposition that "[g]iven the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental constitutional guarantees").

8. The prosecution's characterization of *Sears v. Upton*, 561 U.S. 945 (2010) is particularly misleading. The prosecution claims that the Supreme Court's holding in *Sears* recognized "the limitation" of the holdings of *Green* and *Chambers*. To the contrary, *Sears* affirmed the principles behind these decisions. The issue in *Sears* was whether the state post-conviction court failed to apply the proper prejudice inquiry in determining that trial counsel's facially inadequate mitigation investigation did not prejudice the defendant. In a *per curiam* opinion, the Court granted certiorari, reversed, and remanded Mr. Sears's case to the state court. It found that the state post-conviction court erred when it concluded that trial counsel's mitigation investigation had been deficient, but that it could not speculate as to the effect that the additional mitigating evidence uncovered and presented during postconviction proceedings would have been. The Court held that a "proper analysis of prejudice under *Strickland* would have taken into account the newly uncovered evidence of Sears' 'significant' mental and psychological impairments, along with the mitigation evidence introduced during Sears' penalty phase trial, to assess whether there is a reasonable probability that Sears would have received a different sentence after a constitutionally sufficient mitigation investigation." *Id.* at 956.

9. The Court's reference to *Green* is contained in its discussion of the nature of some of the additional evidence post-conviction counsel uncovered. The Court noted that the fact that "some of such evidence may have been 'hearsay' does not necessarily undermine its value – or its admissibility – for penalty phase purposes." *Id.* at 950. In a footnote, the Court explicitly reaffirmed the holding of *Green*, stating,

> [W]e have also recognized that reliable hearsay evidence that is relevant to a capital defendant's mitigation defense should not be excluded by rote application of a state hearsay rule. See *Green v. Georgia,* 442 U.S. 95, 97, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979) *(per curiam)* ("Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause .... The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial"); see also *Chambers v. Mississippi,* 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) ("In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice"). We take

> no view on whether the evidence at issue would satisfy the considerations we set forth in *Green,* or would be otherwise admissible under Georgia law.

Id. at n. 6.[1]

10. Colorado capital case law lends additional support for the argument that a defendant should not be prohibited from offering mitigating evidence that includes some hearsay during the penalty phase of a capital trial. In *People v. Rodriguez*, 794 P.2d 965 (Colo. 1990), the Colorado Supreme Court noted:

> The defendant also contends that the prosecutors during closing argument misstated the law. First, the prosecutor told the jurors that in the sentencing phase of a capital trial, the normal rules of evidence, and especially the rule against hearsay, are relaxed. Thus *the defendant's exhibit entitled "Frank Rodriguez—A Life History," should be evaluated by the jurors keeping in mind that it contained hearsay and was not subject to cross-examination.* The question of whether the rules of evidence are in fact "relaxed" at the sentencing phase of a capital trial is not before us, and we express no opinion thereon. *The prosecutor's statement was essentially accurate with respect to the mitigating evidence introduced by the defendant*, however, and we conclude that the comment did not constitute reversible error.

Id. at 978-79 (emphasis added). Not only is it clear that the trial court in that case allowed the defendant to introduce hearsay evidence in support of his mitigation case, it noted that the prosecutor's statement "was essentially accurate." *Id.*

11. Additionally, in *People v. Davis*, 794 P.2d 159 (Colo. 1999), the court noted that:

> [I]n the sentencing phase of a capital case, the jury is not limited to consideration of matters technically defined as evidence. In making the profoundly moral decision of whether to impose a

[1] The prosecution's citation to *Holmes v. South Carolina*, 547 U.S. 319, 326-27 (2006) is also extremely misleading. The prosecution states that there, "the Supreme Court rejected the proposition that capital sentencing hearings are bereft of evidentiary limitations, even when those limitations would be applied to evidence relating to mitigation." Motion P-109, p. 5. *Holmes* was a capital case, but it has nothing to do with the admissibility of evidence at capital sentencing hearings or mitigation. Indeed, neither the word "mitigation" nor the word "sentencing" appears anywhere in the *Holmes* opinion. The holding of *Holmes* pertained to the merits phase of a capital case. The Supreme Court held that the defendant's federal constitutional rights were violated by a state evidentiary rule under which the defendant was precluded from introducing evidence of third-party guilt because the prosecution had introduced forensic evidence that, if believed, strongly supported a guilty verdict. The case makes no mention whatsoever of sentencing evidence.

> sentence of death, it must consider all the facts and circumstances of the crime, the defendant's background and character and any mitigating factors raised by the defendant. Plainly, the jury's deliberations are not limited to assessing technical evidence.

Id. at 192.

12. Moreover, as this Court has recognized several times, in *People v. Dunlap*, 975 P.2d 723, 741 (Colo. 1999), the Colorado Supreme Court held that "the admissibility of rebuttal mitigation evidence for purposes of *Tenneson* step four is constrained only by familiar evidentiary principles concerning the relevance of the evidence and the potential for that evidence to inflame the passion or prejudice of the jury." In several previous rulings, the Court has implied that it will take an expansive view of the admissibility of any evidence offered by the prosecution as nonstatutory aggravation if we reach "step four" of the capital sentencing proceeding. *See, e.g.*, Order P-83-B, p. 16; Order D-147, pp. 4-5. The issue of the prosecution's ability to introduce hearsay evidence at sentencing is not at issue in P-109, and the defense does not concede that, if proffered, any such evidence would be admissible. However, it would be a gross violation of Mr. Holmes's state and federal constitutional rights to due process, fundamental fairness, an impartial jury, and a fair and reliable sentencing proceeding, to allow the prosecution to introduce hearsay evidence in support of its bid for a death sentence while simultaneously excluding hearsay evidence proffered by the defense in mitigation. *See, e.g., Wardius v. Oregon*, 412 U.S. 470 (1973) (due process requires "balance of forces" between accused and his accuser).

13. In addition, even if the Court were to find that the rules of evidence can sometimes operate to exclude some hearsay evidence offered in mitigation in a Colorado capital sentencing proceeding, the specific circumstances surrounding the particular evidence challenged by the prosecution weigh heavily in favor of admission here. The defense conducted a limited number of video interviews of the mitigation witnesses at issue for specific and good reasons. Several of the witnesses whose video testimony is at issue expressed reluctance to provide live testimony, and were frightened at the prospect of testifying on national television. Forcing these witnesses to come to court under threat of subpoena would damage the quality of their testimony. Others have just a small, albeit important, part of Mr. Holmes's mitigation story to tell.[2] The defense does not believe it would seriously prejudice the prosecution to introduce small pieces of Mr. Holmes's mitigation story through these brief videotaped clips. Notably, most of these individuals are not unknown to the prosecution, and the prosecution itself has met and interviewed a number of these witnesses. It is difficult to imagine what meaningful cross-examination the prosecution could possibly have with respect to most of them, nor has the prosecution specifically asserted that any of the information contained in these videotapes is unreliable or untrustworthy. Moreover, a number of these witnesses have jobs and other

[2] Despite the alarmist tone of the prosecution's last paragraph suggesting that if the Court denies Motion P-108, the defense could present its entire sentencing case via videotape, the overwhelming majority of the defense's case will be presented through live testimony. Indeed, the defense has endorsed well over 50 witnesses, most of whom it intends to have testify live at any penalty phase of this capital trial.

obligations that would make it exceptionally burdensome, and perhaps impossible, for them to travel to Colorado to provide such brief testimony.

14. Third, the prosecution seeks to exclude video of a [redacted], as well as any passages from a book written by [redacted], about [redacted], on the grounds that the information contained therein is both hearsay and irrelevant. The defense disagrees. As explained in detail above, the fact that some of this evidence may contain hearsay is not dispositive of its admissibility at a capital sentencing hearing. Moreover, [redacted] are relevant, because they demonstrate what it is like for a person [redacted]. While [redacted] life story is, of course, personal to her, many of [redacted] experiences are common to individuals [redacted]. It is the defense's position (and there is very strong evidence corroborating this position) that, like [redacted] Mr. Holmes [redacted]. The evidence regarding [redacted], which the defense intends to introduce through an expert witness, is relevant to demonstrate to jurors in a unique way what it is like for a person [redacted] It would further serve to rebut the common myth that many people have that individuals who are highly intelligent cannot also be mentally ill, and the myth that [redacted].

15. It is important to note that the standard for "relevancy" regarding mitigating evidence is a very low standard. As the Colorado Supreme Court has held, "[T]he defendant must be allowed to present any relevant information as to why the death sentence should not be imposed upon him". *People v. District Court*, 196 Colo. 401, 405, 586 P.2d 31, 34 (1978). The United States Supreme Court has likewise indicated:

> When we addressed directly the relevance standard applicable to mitigating evidence in capital cases in *McKoy v. North Carolina,* 494 U.S. 433, 440-441, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990), we spoke in the most expansive terms. We established that the "meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding" than in any other context, and thus the general evidentiary standard-" ' "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" ' "-applies. *Id.*, at 440, 110 S.Ct. 1227 (quoting *New Jersey v. T.L. O.*, 469 U.S. 325, 345, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985)). We quoted approvingly from a dissenting opinion in the state court: " 'Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.' " 494 U.S., at 440, 110 S.Ct. 1227 (quoting *State v. McKoy,* 323 N.C. 1, 55-56, 372 S.E.2d 12, 45 (1988) (opinion of Exum, C. J.)). Thus, a State cannot bar "the consideration of ... evidence if the sentencer could

> reasonably find that it warrants a sentence less than death." 494 U.S., at 441, 110 S.Ct. 1227.
>
> Once this low threshold for relevance is met, the "Eighth Amendment requires that the jury be able to consider and give effect to" a capital defendant's mitigating evidence. *Boyde v. California,* 494 U.S. 370, 377-378, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990) (citing *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Eddings v. Oklahoma,* 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *Penry I,* 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989)); see also *Payne v. Tennessee,* 501 U.S. 808, 822, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) ("We have held that a State cannot preclude the sentencer from considering 'any relevant mitigating evidence' that the defendant proffers in support of a sentence less than death.... [V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances" (quoting *Eddings, supra,* at 114, 102 S.Ct. 869)).

Tennard v. Dretke, 542 U.S. 274, 284-85 (2004). Given this standard, the evidence regarding [redacted] is relevant, because a juror could reasonably find that it warrants a sentence less than death.

16. Finally, the video footage of [redacted] will be used as demonstrative evidence during the testimony of Mr. Holmes's parents. [redacted] The purpose of a capital sentencing hearing is for the jury to determine the appropriate punishment for Mr. Holmes as an individual. Mr. Holmes is, necessarily, in part, the product of his family and his upbringing. The defense is entitled to acquaint the jurors with Mr. Holmes's parents and give them a full picture of the type of family Mr. Holmes came from, the values his parents instilled in him as a child, the values they continue to hold today as a family despite this tragedy, and the values they still endeavor to impart to their son (and will continue to impart to their son long after this trial is over) despite the events of July 20, 2012 and his serious mental illness. [redacted] is relevant to Mr. Holmes's own moral fabric and the likelihood that his mother will continue to have a positive influence on him, on his life, and on his own outlook about and understanding of the events of July 20, 2012. Given the broad definition of relevance quoted above, there is no question that this video evidence should be admitted at any penalty phase of this trial.

Mr. Holmes files this response, 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.

Daniel King (No. 26129)
Chief Trial Deputy State Public Defender

Tamara A. Brady (No. 20728)
Chief Trial Deputy State Public Defender

Kristen M. Nelson (No. 44247)
Deputy State Public Defender

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:

George Brauchler
Jacob Edson
Rich Orman
Karen Pearson
Lisa Teesch-Maguire
Office of the District Attorney
6450 S. Revere Parkway
Centennial, Colorado 80111
Fax: 720-874-8501