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ARAPAHOE COUNTY  
COMBINED COURT, COLORADO

15 JUL 14 AM 7:59

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff  v.  <b>JAMES HOLMES,</b> 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: <a href="mailto:state.pubdef@coloradodefenders.us">state.pubdef@coloradodefenders.us</a>	Case No. <b>12CR1522</b>       Division 201
<b>SUBMISSION OF DEFENDANT'S ADDITIONAL MERITS PHASE JURY INSTRUCTIONS AND RE-SUBMISSION OF DEFENDANT'S PREVIOUSLY PROPOSED MERITS PHASE INSTRUCTIONS WITH NUMBERS [D-291a]</b>	

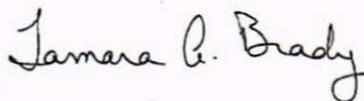
1. James Holmes submits the attached supplemental proposed merits phase jury instructions which were discussed at the charging conference held on July 10, 2015, and further re-submits his previously proposed merits phase instructions with assigned numbers.
2. Counsel has assigned numbers to the defense's previously submitted proposed merits phase instructions that were provided to the Court in pleading D-290, and has attached these instructions as "Exhibit A." Pursuant to the discussion with the court and the court's staff, counsel's understanding is that the instruction submitted during the prosecution's case regarding corrections made to the theater model has been designated Defendant's Proposed Jury Instruction No. 1. Therefore, the defense's proposed merits phase instructions attached as Exhibit A begin with Defendant's Proposed Jury Instruction No. 2.
3. The defense has also attached the supplemental instructions submitted in open court at the charging conference on Friday, July 10, 2015 as "Exhibit B" to this document. These instructions have also been assigned numbers.

Mr. Holmes submits these instructions, 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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Daniel King (No. 26129)  
Chief Trial Deputy State Public Defender



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



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

Dated: July 14, 2015

I hereby certify that on July 14, 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

skw

**Motion D-292a**

**Exhibit A**

**(Submitted on July 14, 2015)**

INSTRUCTION NO. \_\_\_\_\_

The defendant is charged with Murder in the First Degree—After  
Deliberation in each of the following counts:

- Count 1 (Jonathan Blunk)
- Count 2 (Alexander Boik)
- Count 3 (Jesse Childress)
- Count 4 (Gordon Cowden)
- Count 5 (Jessica Ghawi)
- Count 6 (John Larimer)
- Count 7 (Matthew McQuinn)
- Count 8 (Micayla Medek)
- Count 9 (Veronica Moser-Sullivan)
- Count 10 (Alex Sullivan)
- Count 11 (Alexander Teves)
- Count 12 (Rebecca Wingo)

The elements of the crime of Murder in the First Degree—After  
Deliberation, as charged in each of these counts, are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. after deliberation, and
4. with the intent,
5. to cause the death of a person other than himself,
6. caused the death of that person or of another person,
7. and that the defendant was not insane, as defined in Instruction \_\_\_\_\_.

**D-291a Exhibit A**

**Defendant's Proposed Merits Phase Jury Instructions**

**(Initial Set)**

**(Originally submitted on June 23, 2015)**

**Re-submitted with Numbers on July 14, 2015**

## **Defendant's Proposed Jury Instruction No. 2**

### **(Duties of Judge and Jury)**

Members of the jury, the evidence in this case has been completed. In a moment, I will read to you jury instructions that contain the rules of law you must apply to reach your verdict. You will have copies of what I read to take with you to the jury room. But first, I want to mention a few things you need to keep in mind when you are discussing this case in the jury room.

As I told you at the beginning of the case, you must decide this case based only on the evidence and law presented in the courtroom. Until you have returned a verdict, you must not do any research about this case or this kind of case using any source, including dictionaries, reference materials, the internet or any other electronic means. Do not communicate about the case with anyone else in any way, including in person, by telephone, cell phone, smart phone, iPhone<sup>®</sup>, Blackberry<sup>®</sup>, computer, the internet, or any internet service. This means you must not e-mail, text, instant message, Tweet<sup>®</sup>, blog, or post information about this case, or about your experience as a juror on this case, on any website, list serve, chat room, blog, or website such as Facebook<sup>®</sup>, My Space<sup>®</sup>, LinkedIn<sup>®</sup>, YouTube<sup>®</sup>, or Twitter<sup>®</sup>. You must not communicate in any way with anyone else about this case or this kind of case until you have returned a verdict in court. This includes your family and friends. If you have a cell phone or other electronic device, you must surrender it to my bailiffs during jury deliberations.

You must not read, review, or accept any communications in any form from anyone regarding this case or cases like this.

During your deliberations, do not attempt to gather any information on your own. Do not read or research about this case or this kind of case from any other source, including the internet. Many of us routinely use the internet to research topics of interest, but you may not do that in this case. You may not use Google<sup>®</sup>, Bing<sup>®</sup>, Yahoo<sup>®</sup>, or any other type of internet search engine to learn about any person, place or thing that is involved in this case. This includes the defendant, the attorneys, the witnesses, your fellow jurors, and the court personnel. This applies whether you are here, at home, or anywhere else. Do not read about this case in the newspapers or on the internet, or listen to any radio or television broadcasts about the trial. The law even prohibits you from consulting a dictionary.

Do not attempt to visit any places mentioned in this case during your deliberations. Finally, do not in any other way try to learn about this case or this kind of case outside the courtroom.

It is my job to decide what rules of law apply to the case. While the attorneys may comment on some of these rules, you must follow the instructions I give you. Even if

you disagree with or do not understand the reasons for some of the rules of law, you must follow them. No single instruction describes all the law which must be applied; the instructions must be considered together as a whole.

During the trial, you received all of the evidence that you may properly consider in deciding the case. Your decision must be made by applying the rules of law that I give you to the evidence presented at trial. Remember, you must not be influenced by sympathy, bias or prejudice in reaching your decision.

At times during the trial, attorneys made objections. Do not draw any conclusions from the objections or from my rulings on the objections. These only related to legal questions I had to decide and should not influence your thinking. If I told you not to consider a particular statement that was made during the trial, you must not consider it in your deliberations.

Finally, you should consider all the evidence in light of your experience in life.

**Source:**

COLJI-Crim. No. E:01 (2014) (proposed instruction above incorporates suggestion to court in this instruction that it should “consider having the jurors surrender their electronic devices during deliberations”)

COLJI-Crim. No. B:06 (2014)

**Defendant's Proposed Jury Instruction No. 3**

**(Description of Charges)**

The defendant is charged with 12 counts of First-Degree Murder After Deliberation, 12 counts of First-Degree Extreme Indifference Murder, 70 counts of Attempted First-Degree Murder After Deliberation, 70 counts of Attempted First-Degree Murder After Deliberation, and one count of Possession of an Explosive or Incendiary Device.

Mr. Holmes had pled not guilty by reason of insanity, which includes a plea of not guilty.

**Defendant's Proposed Jury Instruction No. 4**

**(The Charges Against the Defendant)**

The charges against the defendant are not evidence. These charges against the defendant are just accusations. The fact that Mr. Holmes has been accused is not evidence that he is guilty of any crime, or that he is sane.

**Source:**

COLJI-Crim. No. E:02 (2014) (modified to include reference to sanity)

## **Defendant's Proposed Jury Instruction No. 5**

### **(Direct and Circumstantial Evidence – No Distinction)**

A fact may be proven by either direct or circumstantial evidence. Under the law, both are acceptable ways to prove something. Neither is necessarily more reliable than the other.

Direct evidence is based on first-hand observation of the fact in question. For example, a witness's testimony that he or she looked out a window and saw snow falling might be offered as direct evidence that it had snowed.

Circumstantial evidence is indirect. It is based on observations of related facts that may lead you to reach a conclusion about the fact in question. For example, a witness's testimony that he or she looked out a window and saw snow covering the ground might be offered as circumstantial evidence that it had snowed.

#### **Source:**

COLJI-Crim. No. D:01 (2014)

**Defendant's Proposed Jury Instruction No. 6**

**(Number of Witnesses)**

The number of witnesses testifying for or against a certain fact does not, by itself, prove or disprove that fact.

**Source:**

COLJI-Crim. No. E:04 (2014)

## **Defendant's Proposed Jury Instruction No. 7**

### **(Presumption of Innocence, Burden of Proof, and Reasonable Doubt)**

Every person charged with a crime, including a person such as Mr. Holmes who has pled not guilty by reason of insanity, is presumed innocent. This presumption of innocence remains with the defendant throughout the trial and into deliberations. The presumption of innocence is only extinguished upon the jury's determination that guilt has been established beyond a reasonable doubt. The presumption should be given effect by you unless, after considering all of the evidence, you are then convinced that the defendant is guilty beyond a reasonable doubt.

The burden of proof is upon the prosecution to prove to the satisfaction of the jury beyond a reasonable doubt the existence of all of the elements necessary to constitute the crime charged.

Reasonable doubt means a doubt based upon reason and common sense which arises from a fair and rational consideration of all of the evidence, or the lack of evidence, in the case. It is a doubt which is not a vague, speculative or imaginary doubt, but such a doubt as would cause reasonable people to hesitate to act in matters of importance to themselves.

If you find from the evidence that each and every element of a crime has been proven beyond a reasonable doubt, you should find the defendant guilty of that crime. If you find from the evidence that the prosecution has failed to prove any one or more of the elements of a crime beyond a reasonable doubt, you should find the defendant not guilty of that crime.

#### **Source:**

COLJI-Crim. No. E:03 (2014) (modified to include additional language on presumption of innocence in first paragraph)

*People v. McBride*, 228 P.3d 216, 224 (Colo. App. 2009) (presumption of innocence "remains until after a jury returns a guilty verdict")

**Defendant's Proposed Jury Instruction No. 8**

**(Credibility of Witnesses)**

You are the sole judges of the credibility of each witness and the weight to be given to the witness's testimony. You should carefully consider all of the testimony given and the circumstances under which each witness has testified.

For each witness, consider that person's knowledge, motive, state of mind, demeanor, and manner while testifying. Consider the witness's ability to observe, the strength of that person's memory, and how that person obtained his or her knowledge. Consider any relationship the witness may have to either side of the case, and how each witness might be affected by the verdict. Consider how the testimony of the witness is supported or contradicted by other evidence in the case. You should consider all facts and circumstances shown by the evidence when you evaluate each witness's testimony.

You may believe all of the testimony of a witness, part of it, or none of it.

**Source:**

COLJI-Crim. No. E:05 (2014)

**Defendant's Proposed Jury Instruction No. 9**

**(Expert Witnesses)**

You have heard witnesses who have testified as experts. The credibility of an expert's testimony is to be considered as that of any other witness. You may believe all of an expert witness's testimony, part of it, or none of it.

The weight you give the testimony is entirely your decision.

**Source:**

COLJI-Crim. No. E:06 (2014) (first sentence modified)

## **Defendant's Proposed Jury Instruction No. 10**

### **(Testimony of Defendant – Not Compelled)**

Every defendant has a constitutional right not to testify. Mr. Holmes's decision not to testify cannot be used to infer his guilt or his sanity, and cannot prejudice Mr. Holmes. It is not evidence, does not prove anything, and must not be considered for any purpose.

#### **Source:**

COLJI-Crim. No. E:07 (2014) (modified to include reference to sanity)

*Carter v. Kentucky*, 450 U.S. 288 (1981) (no-adverse-inference-of-guilt instruction constitutionally required when requested by defendant)

*Wainwright v. Greenfield*, 474 U.S. 284 (1986) (use of petitioner's post-arrest, post-*Miranda* warnings silence as evidence of his sanity violated due process)

**Defendant's Proposed Jury Instruction No. 11**

**(Jurors' Conduct During Trial – Discussions Outside Presence of Entire Jury)**

Members of the jury, you may discuss this case only when you are all present and you may only deliberate in the jury room. No juror should attempt to discuss this case with other jurors or anyone else at any other time except when all jurors are in the jury room.

**Source:**

COLJI-Crim. No. E:08 (2014)

**Defendant's Proposed Jury Instruction No. 12**

**(Questions During Deliberations)**

Once you begin your deliberations, if you have a question, your foreperson should write it on a piece of paper, sign it and give it to the bailiff, who will bring it to me.

The Court will then determine the appropriate way to answer the question.

However, there may be some questions that, under the law, the Court is not permitted to answer. Please do not speculate about what the answer to your question might have been or why I am not able to answer a particular question.

Finally, please be sure to keep the original question and response. Do not destroy them as they are part of the official record in this case, and must be returned to me when you return the instructions and verdict forms at the end of the case.

**Source:**

COLJI-Crim. No. E:09 (2014)

## **Defendant's Proposed Jury Instruction No. 13**

### **(Juror Questions of Witnesses)**

During this trial you were permitted to submit written questions to witnesses. If a particular question was not asked, do not guess why the question was not asked or what the answer might have been. My decision not to ask a question submitted by a juror is not a reflection on the person asking it, and you should not attach any significance to the failure to ask a question. By making legal rulings on the admissibility of questions, I did not intend to suggest or express any opinion about the question. My decision whether or not to allow a question is based on the applicable rules of evidence and other rules of law, and not on the facts of this particular case. It is my responsibility to assure that all parties receive a fair trial according to the law and the rules of evidence.

The fact that certain questions were not asked must not affect your consideration of the evidence in any way. Do not give greater weight to questions, or answers to questions, that are submitted by yourself or your fellow jurors. In making your decision, you must consider all of the evidence that has been presented.

#### **Source:**

COLJI-Crim. No. E:10 (2014)

## **Defendant's Proposed Jury Instruction No. 14**

### **(Requirements for Criminal Liability)**

A crime is committed when the defendant has committed a voluntary act prohibited by law, together with a culpable state of mind.

“Voluntary act” means an act performed consciously as a result of effort or determination.

Proof of the voluntary act alone is insufficient to prove that the defendant had the required state of mind.

The culpable state of mind is as much an element of the crime as the act itself and must be proven beyond a reasonable doubt, either by direct or circumstantial evidence.

In this case, the applicable states of mind are explained as follows:

The term “after deliberation” means not only intentionally, but also that the decision to commit the act has been made after the exercise of reflection and judgment concerning the act. An act committed after deliberation is never one which has been committed in a hasty or impulsive manner.

A person acts “intentionally” or “with intent” when his conscious objective is to cause the specific result proscribed by the statute defining the offense.

A person acts “knowingly” or “willfully” with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such a circumstance exists. A person acts “knowingly” or “willfully”, with respect to a result of his conduct, when he is aware that his conduct is practically certain to cause the result.

A person acts “recklessly” when he consciously disregards a substantial and unjustifiable risk that a result will occur or that a circumstance exists.

#### **Source:**

COLJI-Crim. No. G1:01 (2014) (the following sentence has been removed from the definition of intentionally: “It is immaterial whether or not the result actually occurred.”)

## **Defendant's Proposed Jury Instruction No. 15**

### **(Multiple Theories of First-Degree Murder)**

With respect to each victim named in the complaint and information, the defendant is charged with one crime, first-degree murder or attempted first-degree murder.

However, in this case, the prosecution has charged multiple theories of first-degree murder and attempted first-degree murder in separate counts.

The two theories are:

- (1) The defendant is guilty of first-degree murder after deliberation or attempted first-degree murder after deliberation; and
- (2) The defendant is guilty of first-degree extreme indifference murder or attempted extreme indifference murder.

#### **Source:**

COLJI-Crim. No. 3-1:01 (2014), Comment 3.

**Defendant's Proposed Jury Instruction No. 16**

**(Explanation of Counts 1 – 12)**

In the following counts, the defendant is charged with the first-degree murder after deliberation of the following persons:

- Count 1 – Jonathan Blunk
- Count 2 – Alexander Boik
- Count 3 – Jesse Childress
- Count 4 – Gordon Cowden
- Count 5 – Jessica Ghawi
- Count 6 – John Larimer
- Count 7 – Matthew McQuinn
- Count 8 – Micayla Medek
- Count 9 – Veronica Moser-Sullivan
- Count 10 – Alex Sullivan
- Count 11— Alexander Teves
- Count 12 –Rebecca Wingo

**Defendant's Proposed Jury Instruction No. 17**

**(First-Degree Murder (After Deliberation))**

This instruction pertains to Counts 1 through 12 of the Complaint and Information.

The elements of the crime of murder in the first degree (after deliberation) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. after deliberation, and
4. with the intent,
5. to cause the death of a person other than himself,
6. caused the death of that person or of another person.
7. and that the defendant was not insane, as defined in Instruction \_\_\_\_\_.

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of murder in the first degree (after deliberation).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of elements 1 through 6 beyond a reasonable doubt, you should find the defendant not guilty of murder in the first degree (after deliberation).

If you find that the prosecution has failed to prove element 7 beyond a reasonable doubt, you should find the defendant not guilty by reason of insanity.

**Source:**

COLJI-Crim. No. 3-1:01 (2014) (modified to include insanity element and explanation)

**Defendant's Proposed Jury Instruction No. 18**

**(Explanation of Counts 13 – 24)**

In the following counts, the defendant is charged with the first-degree murder (extreme indifference) of the following persons:

- Count 13 – Jonathan Blunk
- Count 14 – Alexander Boik
- Count 15 – Jesse Childress
- Count 16 – Gordon Cowden
- Count 17 – Jessica Ghawi
- Count 18 – John Larimer
- Count 19 – Matthew McQuinn
- Count 20 – Micayla Medek
- Count 21 – Veronica Moser-Sullivan
- Count 22 – Alex Sullivan
- Count 23 – Alexander Teves
- Count 24 – Rebecca Wingo

**Defendant's Proposed Jury Instruction No. 19**

**(First-Degree Murder (Extreme Indifference))**

This instruction pertains to Counts 13 through 24 of the Complaint and Information.

The elements of the crime of murder in the first degree (extreme indifference) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. under circumstances evidencing an attitude of universal malice manifesting extreme indifference to the value of human life generally,
5. engaged in conduct which created a grave risk of death to a person, or persons, other than himself, and
6. thereby caused the death of another,
7. and that the defendant was not insane, as defined in Instruction \_\_\_\_\_.

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of murder in the first degree (extreme indifference).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of elements 1 through 6 beyond a reasonable doubt, you should find the defendant not guilty of murder in the first degree (extreme indifference).

If you find that the prosecution has failed to prove element 7 beyond a reasonable doubt, you should find the defendant not guilty by reason of insanity.

**Source:**

COLJI-Crim. No. 3-1:04 (2014) (modified to include insanity element and explanation)

**Defendant's Proposed Jury Instruction No. 20**

**(Explanation of Counts 25-82, 143, 145, 147, 149, 151, 153, 155, 157, 159, 161, 163, 165)**

In the following counts, the defendant is charged with the attempted first-degree murder (after deliberation) of the following persons:

- Count 25 – Petra Hogan
- Count 26 – Adan Avila Arredondo
- Count 27 – Brandon Axelrod
- Count 28 – Toni Billapando
- Count 29 – Christina Blache
- Count 30 – Maria Carbonell
- Count 31 – Alejandra Cardona Lamas
- Count 32 – Louis Duran
- Count 33 – Craig Enlund
- Count 34 – Alex Espinoza
- Count 35 – Jacqueline Fry
- Count 36 – Yousef Gharbi.
- Count 37 – Zackary Golditch
- Count 38 – Munirih Gravelly
- Count 39 – Eugene Han
- Count 40 – Kirstin “K.C.” Han
- Count 41 – Katie Medley
- Count 42 – Jasmine Kennedy
- Count 43 – Marcus Kizzar
- Count 44 – Patricia Legarreta Rohrs
- Count 45 – Brenton Lowak
- Count 46 – Ryan Lumba
- Count 47 – Caleb Medley
- Count 48 – Ashley Moser
- Count 49 – Stefan Moton
- Count 50 – Joshua Nowlan
- Count 51 – Pierce O’Farrill
- Count 52 – Prodeo Patria
- Count 53 – Rita Paulina
- Count 54 – Christopher Rapoza
- Count 55 – Carli Richards
- Count 56 – Dion Rosborough
- Count 57 – Carey Rottman
- Count 58 – Lucas Smith
- Count 59 – Heather Snyder
- Count 60 – Farrah Soudani
- Count 61 – Catherine Streib
- Count 62 – Jamison Toews

Count 63 – Denise Axelrod  
Count 64 – Mark “Marcus” Weaver  
Count 65 – Michael White  
Count 66 – David Williams  
Count 67 – Alleen Young  
Count 68 – Jansen Young  
Count 69 – Samantha Yowler  
Count 70 – Gage Hankins  
Count 71 – McKayla Hicks  
Count 72 – Stephen Barton  
Count 73 – Nickelas Gallup  
Count 74 – Evan Farris  
Count 75 – Jennifer Avila Arredondo  
Count 76 – Jarell Brooks  
Count 77 – Amanda Hernandez-Memije  
Count 78 – Kelly Lewis  
Count 79 – Bonnie Kathleen Pourciau Zoghbi  
Count 80 – Anggiat Mora  
Count 81 – Ethan Rohrs  
Count 82 – Nathan Juranek  
Count 143 – Corbin Dates  
Count 145 – Lauren Shuler  
Count 147 – Jamie Rohrs  
Count 149 – Evan Morrison  
Count 151 – Richelle Hill  
Count 153 – Kaylan Bailey  
Count 155 – Kelly Bowen  
Count 157 – Shirley Clark  
Count 159 – Hailee Hensley  
Count 161 – Victor Edgar Nava Hernandez  
Count 163 – Daybra Thomas-Kizzar  
Count 165 – Caitlin Peddicord

## Defendant's Proposed Jury Instruction No. 21

### (Attempted First-Degree Murder (After Deliberation))

This instruction pertains to Counts 25 through 82, and counts 143, 145, 147, 149, 151, 153, 155, 157, 159, 161, 163, and 165 of the Complaint and Information.

The elements of the crime of attempted murder in the first degree (after deliberation) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. after deliberation, and
4. with the intent,
5. to cause the death of a person other than himself,
6. engaged in conduct constituting a substantial step toward the commission of murder in the first degree (after deliberation) as explained in Instruction \_\_\_\_\_,
7. and that the defendant was not insane, as defined in Instruction \_\_\_\_\_.

A "substantial step" is any conduct, whether act, omission, or possession, which is strongly corroborative of the firmness of the actor's purpose to complete the commission of murder in the first degree (after deliberation).

After considering the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal attempt to commit murder in the first degree (after deliberation).

After considering the evidence, if you decide the prosecution has failed to prove any one or more of elements 1 through 6 beyond a reasonable doubt, you should find the defendant not guilty of criminal attempt to commit murder in the first degree (after deliberation).

If you find that the prosecution has failed to prove element 7 beyond a reasonable doubt, you should find the defendant not guilty by reason of insanity.

**Source:**

COLJI-Crim. No. G2:01 (2014) (modified to include insanity element and explanation)

**Defendant's Proposed Jury Instruction No. 22**

**(Explanation of Counts 83-140, 144, 146, 148, 150, 152, 154, 156, 158, 160, 162, 164, 166)**

In the following counts, the defendant is charged with the attempted first-degree murder (extreme indifference) of the following persons:

- Count 83 – Petra Hogan
- Count 84 – Adan Avila Arredondo
- Count 85 – Brandon Axelrod
- Count 86 – Toni Billapando
- Count 87 – Christina Blache
- Count 88 – Maria Carbonell
- Count 89 – Alejandra Cardona Lamas
- Count 90 – Louis Duran
- Count 91 – Craig Enlund
- Count 92 – Alex Espinoza
- Count 93 – Jacqueline Fry
- Count 94 – Yousef Gharbi
- Count 95 – Zackary Golditch
- Count 96 – Munirih Gravelly
- Count 97 – Eugene Han
- Count 98 – Kirstin “K.C.” Han
- Count 99 – Katie Medley
- Count 100 – Jasmine Kennedy
- Count 101 – Marcus Kizzar
- Count 102 – Patricia Legarreta Rohrs
- Count 103 – Brenton Lowak
- Count 104 – Ryan Lumba
- Count 105 – Caleb Medley
- Count 106 – Ashley Moser
- Count 107 – Stefan Moton
- Count 108 – Joshua Nowlan
- Count 109 – Pierce O’Farrill
- Count 110 – Prodeo Patria
- Count 111 – Rita Paulina
- Count 112 – Christopher Rapoza
- Count 113 – Carli Richards
- Count 114 – Dion Rosborough
- Count 115 – Carey Rottman
- Count 116 – Lucas Smith
- Count 117 – Heather Snyder
- Count 118 – Farrah Soudani
- Count 119 – Catherine Streib
- Count 120 – Jamison Toews

Count 121 – Denise Axelrod  
Count 122 – Mark “Marcus” Weaver  
Count 123 – Michael White  
Count 124 – David Williams  
Count 125 – Alleen Young  
Count 126 – Jansen Young  
Count 127 – Samantha Yowler  
Count 128 – Gage Hankins  
Count 129 – McKayla Hicks  
Count 130 – Stephen Barton  
Count 131 – Jennifer Avila Arredondo  
Count 132 – Jarell Brooks  
Count 133 – Amanda Hernandez-Memije  
Count 134 – Nathan Juranek  
Count 135 – Kelly Lewis  
Count 136 – Anggiat Mora  
Count 137 – Bonnie Kathleen Pourciau Zoghbi  
Count 138 – Ethan Rohrs  
Count 139 – Nickelas Gallup  
Count 140 – Evan Farris  
Count 144 – Corbin Dates  
Count 146 – Lauren Shuler  
Count 148 – Jamie Rohrs  
Count 150 – Evan Morrison  
Count 152 – Richelle Hill  
Count 154 – Kaylan Bailey  
Count 156 – Kelly Bowen  
Count 158 – Shirley Clark  
Count 160 – Hailee Hensley  
Count 162 – Victor Edgar Nava Hernandez  
Count 164 – Daybra Thomas-Kizzar  
Count 166 – Caitlin Peddicord

## **Defendant's Proposed Jury Instruction No. 23**

### **(Attempted First-Degree Murder (Extreme Indifference))**

This instruction pertains to Counts 83 through 140, and counts 144, 146, 148, 150, 152, 154, 156, 158, 160, 162, 164, and 166 of the Complaint and Information.

The elements of the crime of attempt to commit the crime of murder in the first degree (extreme indifference) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
5. engaged in conduct constituting a substantial step toward the commission of murder in the first degree (extreme indifference) as explained in Instruction \_\_\_\_\_,
6. and that the defendant was not insane, as defined in Instruction \_\_\_\_\_.

A "substantial step" is any conduct, whether act, omission, or possession, which is strongly corroborative of the firmness of the actor's purpose to complete the commission of murder in the first degree (extreme indifference).

After considering the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal attempt to commit murder in the first degree (extreme indifference).

After considering the evidence, if you decide the prosecution has failed to prove any one or more of the elements 1 through 5 beyond a reasonable doubt, you should find the defendant not guilty of criminal attempt to commit murder in the first degree (extreme indifference).

If you find that the prosecution has failed to prove element 6 beyond a reasonable doubt, you should find the defendant not guilty by reason of insanity.

**Source:**

COLJI-Crim. No. G2:01 (2014) (modified to include insanity element and explanation)

**Defendant's Proposed Jury Instruction No. 24**

**(Possession or Control of an Explosive or Incendiary Device)**

Count 141 of the Complaint and Information charges the defendant with possession or control of an explosive or incendiary device.

The elements of the crime of possession or control of an explosive or incendiary device are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. possessed, controlled, manufactured, gave, mailed, sent, or caused to be sent,
5. an explosive or incendiary device.
6. and that the defendant was not insane, as defined in Instruction \_\_\_\_\_.

“Explosive or incendiary device” means dynamite and all other forms of high explosives, including, but not limited to water gel, slurry, military C-4 (plastic explosives), blasting agents to include nitro-carbon-nitrate, and ammonium nitrate and fuel oil mixtures, cast primers and boosters, R.D.X., P.E.T.N., electric and nonelectric blasting caps, exploding cords commonly called detonating cord or det-cord or primacord, picric acid explosives, T.N.T. and T.N.T. mixtures, and nitroglycerin and nitroglycerin mixtures; any explosive bomb, grenade, missile, or other similar device; any incendiary bomb or grenade, fire bomb, or similar device, including any device, except kerosene lamps, which consists of or include a breakable container including a flammable liquid or compound and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound and can be carried or thrown by one individual acting alone.

“Explosive or incendiary device” does not include a rifle, pistol or shotgun ammunition, or the components for handloading rifle, pistol or shotgun ammunition.

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of possession or control of an explosive or incendiary device.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of elements one through 5 beyond a reasonable doubt, you should

find the defendant not guilty of possession or control of an explosive or incendiary device.

If you find that the prosecution has failed to prove element 6 beyond a reasonable doubt, you should find the defendant not guilty by reason of insanity.

**Source:**

COLJI-Crim. 12-1:25 (2014) (modified to include insanity element and explanation)

COLJI-Crim. F:134 (2014)

**Defendant's Proposed Jury Instruction No. 25**

**(Introduction to Lesser-Included Offenses)**

If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the offenses charged, he may, however, be found guilty of any lesser offense or offenses, the commission of which is necessarily included in the offenses charged, if the evidence is sufficient to establish his guilt of the lesser offense or offenses beyond a reasonable doubt.

**Source:**

COLJI-Crim. No. E:14 (2014) (first paragraph)

**Defendant's Proposed Jury Instruction No. 26**

**(Lesser-Included Offenses of First-Degree Murder (After Deliberation):  
Second-Degree Murder, Reckless Manslaughter)**

The offense of first-degree murder (after deliberation), as charged in the information in this case, necessarily includes the lesser offenses of second-degree murder and reckless manslaughter.

You do not need to unanimously agree that Mr. Holmes is not guilty of a greater charge in order to consider whether he is guilty of a lesser-included offense. The law does not restrict the order in which you may consider the various offenses.

The elements of the crime of murder in the second degree are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. caused the death of another person,
5. and that the defendant was not insane, as defined in Instruction \_\_\_\_\_.

The elements of the crime of reckless manslaughter are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. recklessly,
4. caused the death of another person,
5. and that the defendant was not insane, as defined in Instruction \_\_\_\_\_.

You should bear in mind that the burden is always upon the prosecution to prove beyond a reasonable doubt each and every element of any lesser-included offense which is necessarily included in any offense charged in the information; the law never imposes upon a defendant in a criminal case the burden of calling any witnesses or producing any evidence.

After considering all the evidence, if you decide that the prosecution has proven each element of a lesser-included offense, you should find the defendant guilty of the offense proven, and you should so state in your verdict.

After considering all the evidence, if you decide the prosecution has failed to prove one or more of elements 1 through 4 of second degree murder or reckless manslaughter beyond a reasonable doubt, you should find the defendant not guilty of these offenses.

If you find that the prosecution has failed to prove element 5 of second degree murder or reckless manslaughter beyond a reasonable doubt, you should find the defendant not guilty by reason of insanity.

While you may find the defendant not guilty of the crimes charged and the lesser-included offenses, you may not find the defendant guilty of more than one of the following offenses: first-degree murder (after deliberation), second-degree murder, or reckless manslaughter.

**Source:**

COLJI-Crim. No. E:14 (2014) (modified to include second paragraph, as well as language in second to last paragraph regarding element 5 and a finding of not guilty by reason of insanity)

Basis for additional language in second paragraph:

*People v. McGregor*, 635 P.2d 912, 914 (Colo. App. 1981) (Requiring “acquittal of the greater charge by a unanimous vote of the jury . . . before the jury can consider the lesser included offenses . . . has been held to be reversible error . . . . The instruction given here did not restrict the order in which the jury could consider the various offenses, and correctly stated the law as expressed in *Bowers*, supra.”).

*People v. Zamarripa-Diaz*, 187 P.3d 1120, 1122 (Colo. App. 2008) (“A criminal defendant is entitled to a jury instruction on a lesser included offense when a jury could have a reasonable doubt of the defendant’s guilt of the greater offense but be convinced beyond a reasonable doubt that the defendant is guilty of the lesser included offense. *Bowers v. People*, 617 P.2d 560, 562 (Colo.1980). As set forth in *People v. Bachicha*, 940 P.2d 965, 967 (Colo.App.1996), it is error to instruct a jury that it must unanimously acquit a defendant of a greater offense before it may consider a lesser included offense.”).

*People v. Bachicha*, 940 P.2d 965, 967 (Colo. App. 1996) (“The trial court’s direction that the jury’s verdict be unanimous and its reference in the supplemental instruction to the original instruction requiring a unanimous verdict of guilt or acquittal erroneously implied to the jury that it would have to acquit defendant of the greater offense by a

unanimous vote before it could consider the lesser-included offense. *See People v. McGregor*, 635 P.2d 912 (Colo.App.1981) (unanimous acquittal of greater offense not required before the jury can consider lesser-included offense and submission of an instruction indicating otherwise may constitute reversible error”).

**Defendant's Proposed Jury Instruction No. 27**

**(Lesser-Included Offenses of First-Degree Murder (Extreme Indifference):  
Second-Degree Murder, Reckless Manslaughter)**

The offense of first-degree murder (extreme indifference), as charged in the information in this case, necessarily includes the lesser offenses of second-degree murder and reckless manslaughter.

You do not need to unanimously agree that Mr. Holmes is not guilty of a greater charge in order to consider whether he is guilty of a lesser-included offense. The law does not restrict the order in which you may consider the various offenses.

The elements of the crime of murder in the second degree are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. caused the death of another person,
5. and that the defendant was not insane, as defined in Instruction \_\_\_\_\_.

The elements of the crime of reckless manslaughter are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. recklessly,
4. caused the death of another person,
5. and that the defendant was not insane, as defined in Instruction \_\_\_\_\_.

You should bear in mind that the burden is always upon the prosecution to prove beyond a reasonable doubt each and every element of any lesser-included offense which is necessarily included in any offense charged in the information; the law never imposes upon a defendant in a criminal case the burden of calling any witnesses or producing any evidence.

After considering all the evidence, if you decide that the prosecution has proven each of the elements of the crime charged or of a lesser-included offense, you should find the defendant guilty of the offense proven, and you should so state in your verdict.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of elements 1 through 4 of second degree murder or reckless manslaughter beyond a reasonable doubt, you should find the defendant not guilty of these offenses.

If you find that the prosecution has failed to prove element 5 of second degree murder or reckless manslaughter beyond a reasonable doubt, you should find the defendant not guilty by reason of insanity.

While you may find the defendant not guilty of the crimes charged and the lesser-included offenses, you may not find the defendant guilty of more than one of the following offenses: first-degree murder (extreme indifference), second-degree murder, or reckless manslaughter.

**Source:**

COLJI-Crim. No. E:14 (2014) (modified to include second paragraph, as well as language in second to last paragraph regarding element 5 and a finding of not guilty by reason of insanity)

Basis for additional language in second paragraph:

*People v. McGregor*, 635 P.2d 912, 914 (Colo. App. 1981) (Requiring “acquittal of the greater charge by a unanimous vote of the jury . . . before the jury can consider the lesser included offenses . . . has been held to be reversible error . . . . The instruction given here did not restrict the order in which the jury could consider the various offenses, and correctly stated the law as expressed in *Bowers*, supra.”).

*People v. Zamarripa-Diaz*, 187 P.3d 1120, 1122 (Colo. App. 2008) (“A criminal defendant is entitled to a jury instruction on a lesser included offense when a jury could have a reasonable doubt of the defendant’s guilt of the greater offense but be convinced beyond a reasonable doubt that the defendant is guilty of the lesser included offense. *Bowers v. People*, 617 P.2d 560, 562 (Colo.1980). As set forth in *People v. Bachicha*, 940 P.2d 965, 967 (Colo.App.1996), it is error to instruct a jury that it must unanimously acquit a defendant of a greater offense before it may consider a lesser included offense.”).

*People v. Bachicha*, 940 P.2d 965, 967 (Colo. App. 1996) (“The trial court’s direction that the jury’s verdict be unanimous and its reference in the supplemental instruction to the original instruction requiring a unanimous verdict of guilt or acquittal erroneously implied to the jury that it would have to acquit defendant of the greater offense by a unanimous vote before it could consider the lesser-included offense. *See People v.*

*McGregor*, 635 P.2d 912 (Colo.App.1981) (unanimous acquittal of greater offense not required before the jury can consider lesser-included offense and submission of an instruction indicating otherwise may constitute reversible error”).

**Defendant's Proposed Jury Instruction No. 28**

**(Lesser-Included Offenses of Attempted First-Degree Murder (After Deliberation):  
Attempted Second-Degree Murder, Attempted Reckless Manslaughter)**

The offense of attempted first-degree murder (after deliberation), as charged in the information in this case, necessarily includes the lesser offenses of attempted second-degree murder and attempted reckless manslaughter.

You do not need to unanimously agree that Mr. Holmes is not guilty of a greater charge in order to consider whether he is guilty of a lesser-included offense. The law does not restrict the order in which you may consider the various offenses.

The elements of the crime of attempted murder in the second degree are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. engaged in conduct constituting a substantial step toward the commission of second-degree murder,
5. and that the defendant was not insane, as defined in Instruction \_\_\_\_.

The elements of the crime of attempted reckless manslaughter are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. recklessly,
4. engaged in conduct constituting a substantial step toward the commission of manslaughter,
5. and that the defendant was not insane, as defined in Instruction \_\_\_\_.

A "substantial step" is any conduct, whether act, omission, or possession, which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense.

You should bear in mind that the burden is always upon the prosecution to prove beyond a reasonable doubt each and every element of any lesser-included offense which is necessarily included in any offense charged in the information; the law never imposes upon a defendant in a criminal case the burden of calling any witnesses or producing any evidence.

After considering all the evidence, if you decide that the prosecution has proven each of the elements of the crime charged or of a lesser-included offense, you should find the defendant guilty of the offense proven, and you should so state in your verdict.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of elements 1 through 4 of attempted second degree murder or attempted reckless manslaughter beyond a reasonable doubt, you should find the defendant not guilty of these offenses.

If you find that the prosecution has failed to prove element 5 of attempted second degree murder or attempted reckless manslaughter beyond a reasonable doubt, you should find the defendant not guilty by reason of insanity.

While you may find the defendant not guilty of the crimes charged and the lesser-included offenses, you may not find the defendant guilty of more than one of the following offenses: attempted first-degree murder (after deliberation), attempted second-degree murder, or attempted reckless manslaughter.

**Source:**

COLJI-Crim. No. E:14 (2014) (modified to include second paragraph, as well as language in second to last paragraph regarding element 5 and a finding of not guilty by reason of insanity)

Basis for additional language in second paragraph:

*People v. McGregor*, 635 P.2d 912, 914 (Colo. App. 1981) (Requiring “acquittal of the greater charge by a unanimous vote of the jury . . . before the jury can consider the lesser included offenses . . . has been held to be reversible error . . . . The instruction given here did not restrict the order in which the jury could consider the various offenses, and correctly stated the law as expressed in *Bowers*, supra.”).

*People v. Zamarripa-Diaz*, 187 P.3d 1120, 1122 (Colo. App. 2008) (“A criminal defendant is entitled to a jury instruction on a lesser included offense when a jury could have a reasonable doubt of the defendant's guilt of the greater offense but be convinced beyond a reasonable doubt that the defendant is guilty of the lesser included offense. *Bowers v. People*, 617 P.2d 560, 562 (Colo.1980). As set forth in *People v. Bachicha*, 940 P.2d 965, 967 (Colo.App.1996), it is error to instruct a jury that it must unanimously acquit a defendant of a greater offense before it may consider a lesser included offense.”).

*People v. Bachicha*, 940 P.2d 965, 967 (Colo. App. 1996) (“The trial court’s direction that the jury’s verdict be unanimous and its reference in the supplemental instruction to the original instruction requiring a unanimous verdict of guilt or acquittal erroneously implied to the jury that it would have to acquit defendant of the greater offense by a unanimous vote before it could consider the lesser-included offense. See *People v. McGregor*, 635 P.2d 912 (Colo.App.1981) (unanimous acquittal of greater offense not required before the jury can consider lesser-included offense and submission of an instruction indicating otherwise may constitute reversible error”).

*People v. Thomas*, 729 P.2d 972, 977 (Colo. 1986) (recognizing the crime of attempted reckless manslaughter).

**Defendant's Proposed Jury Instruction No. 29**

**(Lesser-Included Offenses of Attempted First-Degree Murder  
(Extreme Indifference):**

**Attempted Second-Degree Murder, Attempted Reckless Manslaughter)**

The offense of attempted first-degree murder (extreme indifference), as charged in the information in this case, necessarily includes the lesser offenses of attempted second-degree murder and attempted reckless manslaughter.

You do not need to unanimously agree that Mr. Holmes is not guilty of a greater charge in order to consider whether he is guilty of a lesser-included offense. The law does not restrict the order in which you may consider the various offenses.

The elements of the crime of attempted murder in the second degree are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. engaged in conduct constituting a substantial step toward the commission of second-degree murder,
5. and that the defendant was not insane, as defined in Instruction \_\_\_\_\_.

The elements of the crime of attempted reckless manslaughter are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. recklessly,
4. engaged in conduct constituting a substantial step toward the commission of manslaughter,
5. and that the defendant was not insane, as defined in Instruction \_\_\_\_\_.

A "substantial step" is any conduct, whether act, omission, or possession, which is strongly corroborative of the firmness of the actor's purpose to complete the commission

of the offense.

You should bear in mind that the burden is always upon the prosecution to prove beyond a reasonable doubt each and every element of any lesser-included offense which is necessarily included in any offense charged in the information; the law never imposes upon a defendant in a criminal case the burden of calling any witnesses or producing any evidence.

After considering all the evidence, if you decide that the prosecution has proven each of the elements of the crime charged or of a lesser-included offense, you should find the defendant guilty of the offense proven, and you should so state in your verdict.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of elements 1 through 4 of attempted second degree murder or attempted reckless manslaughter beyond a reasonable doubt, you should find the defendant not guilty of these offenses.

If you find that the prosecution has failed to prove element 5 of attempted second degree murder or attempted reckless manslaughter beyond a reasonable doubt, you should find the defendant not guilty by reason of insanity.

While you may find the defendant not guilty of the crimes charged and the lesser-included offenses, you may not find the defendant guilty of more than one of the following offenses: attempted first-degree murder (extreme indifference), attempted second-degree murder, or attempted reckless manslaughter.

**Source:**

COLJI-Crim. No. E:14 (2014) (modified to include second paragraph, as well as language in second to last paragraph regarding element 5 and a finding of not guilty by reason of insanity)

Basis for additional language in second paragraph:

*People v. McGregor*, 635 P.2d 912, 914 (Colo. App. 1981) (Requiring “acquittal of the greater charge by a unanimous vote of the jury . . . before the jury can consider the lesser included offenses . . . has been held to be reversible error . . . . The instruction given here did not restrict the order in which the jury could consider the various offenses, and correctly stated the law as expressed in *Bowers*, supra.”).

*People v. Zamarripa-Diaz*, 187 P.3d 1120, 1122 (Colo. App. 2008) (“A criminal defendant is entitled to a jury instruction on a lesser included offense when a jury could have a reasonable doubt of the defendant’s guilt of the greater offense but be convinced beyond a reasonable doubt that the defendant is guilty of the lesser included offense. *Bowers v. People*, 617 P.2d 560, 562 (Colo.1980). As set forth in *People v. Bachicha*,

940 P.2d 965, 967 (Colo.App.1996), it is error to instruct a jury that it must unanimously acquit a defendant of a greater offense before it may consider a lesser included offense.”).

*People v. Bachicha*, 940 P.2d 965, 967 (Colo. App. 1996) (“The trial court’s direction that the jury’s verdict be unanimous and its reference in the supplemental instruction to the original instruction requiring a unanimous verdict of guilt or acquittal erroneously implied to the jury that it would have to acquit defendant of the greater offense by a unanimous vote before it could consider the lesser-included offense. See *People v. McGregor*, 635 P.2d 912 (Colo.App.1981) (unanimous acquittal of greater offense not required before the jury can consider lesser-included offense and submission of an instruction indicating otherwise may constitute reversible error)”).

## Defendant's Proposed Jury Instruction No. 30

### (Affirmative Defense of Insanity)

The evidence in this case has raised the defense of insanity as to each of the counts charged in the complaint and information.

The defendant was insane at the time of the commission of the acts if:

1. he was so diseased or defective in mind at the time of the commission of the act as to be incapable of distinguishing right from wrong with respect to that act; or
2. he suffered from a condition of mind caused by a mental disease or defect that prevented him from forming a culpable mental state that is an essential element of a crime charged.

"Diseased or defective in mind" does not refer to an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

"Mental disease or defect" means only those severely abnormal mental conditions that grossly and demonstrably impair a person's perception or understanding of reality and that are not attributable to the voluntary ingestion of alcohol or any other psychoactive substance. "Mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

The prosecution has the burden to prove beyond a reasonable doubt that the defendant was not insane at the time of the commission of the act[s]. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, both of the above numbered conditions.

You have been instructed on the elements of each of the offenses charged in the complaint and information, as well as lesser offenses that are included within those offenses. I have instructed you that the final element of each of those offenses is "that the defendant was not insane, as defined in Instruction \_\_\_\_."

In order to meet its burden of proof with respect to that element of each of the charged offenses, the prosecution must disprove, beyond a reasonable doubt, both of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove that the defendant was sane at the time of the commission of the acts, which is an essential element of each of the offenses charged in the complaint and information, as well as the lesser-included offenses you were previously instructed on, namely: first-degree murder (after deliberation), first-degree murder (extreme indifference), second-degree murder,

manslaughter, attempted first-degree murder (after deliberation), attempted first-degree murder (extreme indifference), attempted second-degree murder, attempted reckless manslaughter, and possession of an explosive or incendiary device. In that event, you must find the defendant not guilty by reason of insanity.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved **beyond a reasonable doubt** that the defendant was not insane at the time of the commission of the acts. In that event, your verdicts concerning the charges of first-degree murder (after deliberation), first-degree murder (extreme indifference), second-degree murder, manslaughter, attempted first-degree murder (after deliberation), attempted first-degree murder (extreme indifference), attempted second-degree murder, attempted reckless manslaughter, possession of an explosive or incendiary device must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of those offenses.

Even if you determine that the defendant was not insane at the time of the commission of any of the offenses charged, you may consider all of the evidence presented concerning his mental condition in assessing whether he acted “after deliberation,” “intentionally,” or “knowingly” at that time. The burden is always on the prosecution to prove each element of each charge beyond a reasonable doubt.

If you find that, based on all the evidence presented concerning his mental state and condition, the defendant did not act “after deliberation,” “intentionally,” or “knowingly,” then you must find him not guilty of the charges containing that element.

**Source:**

COLJI Crim. No. I:01 (2014) (modified as explained below)

*People v. Vanrees*, 125 P.3d 403, 409 (Colo. 2005); *Hendershott v. People*, 653 P.2d 385, 391 (Colo. 1982) (last two paragraphs)

**Argument in support of modifications made to pattern instruction:**

The proposed instruction above eliminates the following paragraph:

“But care should be taken not to confuse mental disease or defect with moral obliquity, mental depravity, or passion growing out of anger, revenge, hatred, or other motives and kindred evil conditions because, when an act is induced by any of these causes, the person is accountable to the law.”

The defense continues to maintain that the inclusion of this paragraph is unnecessary and confusing to the jury, and as such, would violate Mr. Holmes’s state and federal constitutional rights to due process and a fair trial by an impartial jury. U.S. Const. amends V, VI, VIII, XIV; Colo. Const. art. II, secs. 16, 20, 23, 25.

As the defense noted when objecting to the inclusion of this language in the Court's introductory remarks to the jury, the current version of the statute no longer affirmatively states that the jury shall be instructed with this language. Compare C.R.S. § 16-8-101 and C.R.S. § 16-8-101.5. This language unnecessarily injects the concept of motive into the insanity statute, and incorrectly suggests to jurors that they must reach a conclusion about motive in order to reach a verdict. See, e.g., *Armijo v. People*, 134 Colo. 344, 353, 304 P.2d 633, 638 (1956) ("It is not necessary to prove a motive as an essential element in the crime of murder.").

The defense's proposed instruction also includes the two paragraphs in red (beginning with "You have been instructed..."). The defense submits that these proposed paragraphs are necessary to plainly explain and/or reinforce to the jury the relationship between the affirmative defense of insanity and the elements of the charged offenses.

The final two paragraphs of the proposed instruction are based on well-established Colorado law holding that "[p]rohibiting a defendant from contesting or disproving the required culpable mental state would create an 'impermissible presumption of culpability' which would violate a defendant's due process rights and unconstitutionally 'render the prosecution's evidence on that issue uncontestable as a matter of law.'" *People v. Vanrees*, 125 P.3d 403, 409 (Colo. 2005) (quoting *Hendershott v. People*, 653 P.2d 385, 391 (Colo. 1982)). Cf. *People v. Welsh*, 176 P.3d 781, 787-88 (Colo. App. 2007) (holding that trial court did not err by refusing to give a similar tendered instruction because, under the facts and circumstances of that case, the instruction was duplicative).

Such an instruction would not be duplicative in this case. Moreover, a guilty verdict during this phase of the trial would expose Mr. Holmes to a possible death sentence. Therefore, this instruction is necessary to avoid the risk of an unwarranted conviction, which "cannot be tolerated in a case in which the defendant's life is at stake." *Beck v. Alabama*, 447 U.S. 625, 637 (1980); *People v. Young*, 814 P.2d 834 (Colo. 1991); U.S. Const. amends VIII, XIV; Colo Const. art. II, secs. 20, 25.

## **Defendant's Proposed Jury Instruction No. 31**

### **(Explanation of "Incapable of Distinguishing Right from Wrong")**

The phrase 'incapable of distinguishing right from wrong' refers to a person's cognitive inability, due to a mental disease or defect, to distinguish right from wrong as measured by a societal standard of morality, even though the person may be aware that the conduct in question is illegal. The phrase 'incapable of distinguishing right from wrong' does not refer to a purely personal and subjective standard of morality.

A person may understand that his acts are against the law, but may nevertheless be insane because he is incapable of understanding that they are morally wrong.

#### **Source:**

COLJI Crim. No. I:01 (2014), Comment 3 (proposed instruction replaces "criminal" with "illegal")

*People v. Serravo*, 823 P.2d 128, 136-37 (Colo. 1992) (second paragraph) ("Various forms of mental diseases or defects can impair a person's cognitive ability to distinguish moral right from moral wrong and yet have no effect whatever on the person's rather sterile awareness that a certain act is contrary to law.")

## **Defendant's Proposed Jury Instruction No. 32**

### **(Informational Instruction on Commitment Procedure)**

This is an informational instruction and must have no persuasive bearing on the verdicts you arrive at under the evidence.

If a defendant is found not guilty by reason of insanity, it is the Court's duty to commit the defendant to the department of human services. The executive director of the department of human services shall designate the state facility at which the defendant shall be held for care and psychiatric treatment and may transfer the defendant from one facility to another if in the opinion of the director it is desirable to do so in the interest of the proper care, custody, and treatment of the defendant or the protection of the public or the personnel of the facilities in question.

The defendant will not be released from commitment unless the court determines, after holding a hearing on release, that the defendant has no abnormal mental condition which would be likely to cause him to be dangerous to himself or to others or to the community in the reasonably foreseeable future.

A release hearing may be ordered by the court on its own motion, or upon motion of the prosecuting attorney or the defendant. The court need not hold a hearing unless the medical documentation is favorable to the defendant or unless the defendant demonstrates in an offer of proof that there is favorable medical evidence to support his release.

The victims of any crime and/or any members of the victims' immediate family must be notified by the court in a timely manner prior to any such hearing.

Prior to any such hearing, a release examination of the defendant must be conducted, and the court has the discretion to order any additional or supplemental examination, investigation, or study which it deems necessary to a proper consideration and determination of the question of eligibility for release.

The release hearing shall be to the court, or upon request by the defendant, to a jury of not to exceed six persons.

At the hearing, the defendant has the burden of proving by a preponderance of the evidence that he has no abnormal mental condition which would be likely to cause him to be dangerous either to himself or to others or to the community in the reasonably foreseeable future.

If the court or the jury finds the defendant eligible for release, the court may impose such terms and conditions as the court determines are in the best interests of the defendant and the community. If the court or jury finds the defendant ineligible for

release, the court shall recommit the defendant. The court's order placing the defendant on conditional release shall include notice that the defendant's conditional release may be revoked.

A defendant who has been conditionally released remains under the supervision of the department of human services until the committing court enters a final order of unconditional release.

A defendant's commitment to the department of human services upon a finding of not guilty by reason of insanity is indefinite unless all of the conditions described above are met. A defendant who is found not guilty by reason of insanity will never be released from commitment unless the above conditions are satisfied.

**Source:**

COLJI Crim. No. I:04 (2014)

C.R.S. §§ 16-8-105.5; 16-8-115

## Defendant's Proposed Jury Instruction 33

### (Final Concluding Instruction)

The bailiff will now escort you to the jury room, where you will select one of your members to be your foreperson. Your foreperson will preside over your deliberations and shall sign any verdict form and verdict question form that you may agree on, according to the rules that I am about to explain.

The verdict for each charge must represent the considered judgment of each juror, and it must be unanimous. In other words, all of you must agree to all parts of it. This requirement also applies to any determinations that you make in response to a verdict question which you conclude should be answered.

Only one verdict shall be returned signed for each count. The verdict forms, verdict question forms, and these instructions shall remain in the possession of your foreperson until I ask for them in open court. Upon reaching a verdict and, if required by your verdicts, answering any verdict questions, you will inform the bailiff, who in turn will notify me, and you will remain in the jury room until I call you into the courtroom.

You will be provided with [*insert number*] verdict forms. You also will be provided with [*insert number*] verdict question forms with directions that explain under what circumstances you should complete those forms.

When you have unanimously agreed upon your verdicts you will select the option on each form which reflects your verdict, and the foreperson will sign the verdict forms as I have stated. Similarly, if you conclude that any verdict questions should be answered, you will select the option on each verdict question form which reflects your unanimous decision, and the foreperson will sign each verdict question form as I have stated.

I will now read to you the verdict and verdict question forms. You must not draw any inferences based on the order in which I read them. The verdict and verdict question forms you will receive read as follows:

**Source:**

COLJI-Crim. No. E:23.

**D-291a Exhibit B**

**Defendant's Proposed Supplemental Merits Phase Jury Instructions  
Discussed at July 10, 2015 Charging Conference**

**Submitted on July 14, 2015**

**Defendant's Proposed Jury Instruction No. 34**

You are instructed that following the conclusion of this trial, no juror is permitted to provide any person not involved in this case, including members of the media, with information about another juror, including another juror's name or contact information, or information concerning another juror's verdict and/or comments during deliberation.

**Defendant's Proposed Jury Instruction 35**

**(Duration of Insanity Immaterial)**

The duration of insanity is immaterial so long as the defendant was insane at the time of the alleged crime.

**Source:**

*People v. Voth*, 312 P.3d 144, 153 (Colo. 2013)

## Defendant's Proposed Jury Instruction 36

### (Impact of Psychotic Delusion on Ability to Distinguish Right from Wrong)

A defendant may be judged legally insane under Colorado law where his cognitive ability to distinguish right from wrong with respect to an act charged as a crime has been destroyed as a result of a psychotic delusion.

#### Source:

*People v. Serravo*, 823 P.2d 128, 130, 139 (Colo. 1992) (“[W]e hold that a defendant may be judged legally insane where, as here, the defendant’s cognitive ability to distinguish right from wrong with respect to an act charged as a crime has been destroyed as a result of a psychotic delusion that God has ordered him to commit the act . . . . In our view, the ‘deific-decree’ delusion is not so much an exception to the right-wrong test measured by the existing societal standards of morality as it is an integral factor in assessing a person’s cognitive ability to distinguish right from wrong with respect to the act charged as a crime.”)

*People v. Galimanis*, 944 P.2d 626, 630-31 (Colo. App. 1997) (“In its discussion, however, the *Serravo* court also clarified that, in deciding legal insanity, a jury could properly consider evidence that a defendant’s cognitive ability to distinguish right from wrong has been destroyed as a result of a psychotic delusion that God has demanded the conduct. The court cited the often used example of a mother who murders the child she loves under a delusion that God appeared to her and ordered the sacrifice. Under such circumstances, such a delusion would ‘obscure moral distinctions’ and render the mother incapable of distinguishing right from wrong . . . .”)

## **Defendant's Proposed Jury Instruction 37**

### **(Theory of Defense)**

Mr. Holmes suffers from a chronic and serious mental illness with psychotic features. The court-appointed experts as well as the defense experts in this case agree that regardless of Mr. Holmes's specific diagnosis, his illness falls within the schizophrenia spectrum of disorders. These experts also agree that there is no evidence that Mr. Holmes is malingering or faking his illness.

Mr. Holmes has a significant history of mental illness on both sides of his family including psychotic disorders.

Mr. Holmes exhibited subtle signs and symptoms of an emerging mental illness for years leading up to the tragic events of July 20, 2012.

During the spring of 2012, Mr. Holmes's mental illness worsened and he experienced his first psychotic break. Mr. Holmes began to suffer from a psychotic delusion that he could increase his self-worth by gaining "human capital" and killing people.

It was also at this time that Mr. Holmes sought help from student mental health services and met with Dr. Lynne Fenton a total of 7 times. Following her last meeting with Mr. Holmes on June 11, 2012, Dr. Fenton observed that Mr. Holmes "is intermittently functioning at a psychotic level" and questioned whether he was "shifting insidiously into a frank psychotic disorder such as schizophrenia."

Planning and preparation is not inconsistent with mental illness, psychosis, or sanity. Although Mr. Holmes engaged in planning, he did so as a result of his delusional beliefs and psychotic thought process. Mr. Holmes's purpose for engaging in this planning and preparation was to pursue his psychotic delusion that he could increase his self-worth and "human capital" by killing other people.

Mr. Holmes's delusional belief system, borne of his mental illness, obscured his ability to make moral distinctions, and rendered him incapable of understanding that his actions were wrong from a societal perspective of morality. Mr. Holmes's delusional beliefs also interfered with his ability to act with reflection and judgment concerning the charged offenses.

But for Mr. Holmes's mental illness, the tragic events of July 20, 2012 would never have occurred.