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District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	Filed JUL 17 2015 CLERK OF THE COMBINED COURTS ARAPAHOE COUNTY, COLORADO
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. JAMES HOLMES, Defendant	
DOUGLAS K. WILSON, Colorado State Public Defender Daniel King (No. 26129) Tamara A. Brady (No. 20728) Chief Trial Deputy State Public Defenders 1300 Broadway, Suite 400 Denver, Colorado 80203 Phone (303) 764-1400 Fax (303) 764-1478 E-mail: state.pubdef@coloradodefenders.us	σ COURT USE ONLY σ Case No. 12CR1522 Division 201
DEFENDANT'S SUBMISSION OF PENALTY PHASE INSTRUCTIONS FOR PHASE ONE AND INTRODUCTION TO PHASE TWO [D-296]	

James Holmes submits the attached preliminary proposed penalty phase jury instructions for Phase One and the introduction to Phase Two. Pursuant to Mr. Holmes's state and federal constitutional rights to due process, a fair trial by an impartial jury, right to counsel, and the right to a fair and reliable sentencing proceeding as protected by the Fifth, Sixth, Eighth and Fourteenth Amendments and Colorado Constitution article II, sections 16, 18, 20, 23 and 25, defense counsel further states:

1. The defense has attached its proposed penalty phase instructions for Phase One as well as its proposed introductory instructions for Phase Two as "Exhibit A" to this document. The Phase One proposed instructions also include a sample verdict form.

2. The defense reserves the right to supplement and/or amend this submission, and plans to submit additional proposed penalty phase instructions in the upcoming week or weeks.

3. The defense has also attached a CD to this pleading containing a Word version of the submitted instructions. A copy of this disc has also been provided to the prosecution.

4. In addition, the defense has submitted some comments regarding the prosecution's proposed instructions for Phase One and the introduction to Phase Two attached to this document as "Exhibit B." These comments are intended to provide the Court with a general overview of the defense's position on these instructions, and are not meant to be a complete and comprehensive set of objections to these instructions. Counsel reserve the right to make additional arguments and objections to the prosecution's proposed instructions at the upcoming charging conferences.

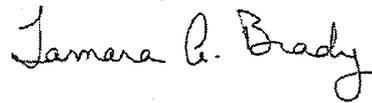
5. In submitting these instructions, Mr. Holmes incorporates by reference all

applicable legal arguments made in conjunction with the tendering of the merits phase instructions in D-290 and at the charging conferences held on these instructions.

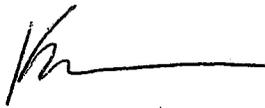
Mr. Holmes submits these instructions, and makes all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, on the following grounds and authorities: the Due Process Clause, the Right to a Fair Trial by an Impartial Jury, the Rights 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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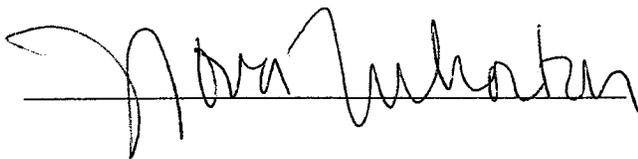
Dated: July 17, 2015

I hereby certify that on July 17, 2015, I

mailed, via the United States Mail,
 faxed, or
 hand-delivered

a true and correct copy of the above and foregoing document to:

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D-296

EXHIBIT A

**(Defense's Proposed Penalty Phase Instructions -- Phase One and
Introductory Phase Two Instructions)**

Defense Proposed Jury Instructions
Penalty – Phase One Introductory Instructions

Defendant's Proposed Jury Instruction No. 39

(Penalty Phase One – Introductory Instructions)

Members of the jury, because Mr. Holmes was found guilty of first-degree murder, we are now starting the sentencing phase of this trial. It now becomes your duty to determine the sentence that will be imposed upon Mr. Holmes.

Defendant's Proposed Jury Instruction No. 40
(Penalty Phase One – Introductory Instructions)

At the previous phase of the trial, Mr. Holmes was charged with two counts of first-degree murder for each of the 12 individuals who were killed in the theater based upon different theories: 12 counts of first degree murder – after deliberation, and 12 counts of first degree murder – extreme indifference. Mr. Holmes was convicted of all 24 of those counts. However, for sentencing purposes, the two counts of first-degree murder for each individual merge into one single conviction for first-degree murder. Only one conviction of murder is permitted for the killing of each victim, and only one punishment can be imposed for each victim.

Source:

Candelaria v. People, 148 P.3d 178, 183-84 (Colo. 2006) (“Because, however, the mittimus reflects guilty verdicts of both deliberate murder and extreme indifference murder for killing the same victim, it must be corrected to reflect a single verdict of guilt for first degree murder. Unless entry of a judgment of conviction upon either theory would be barred by convictions of other offenses simultaneously entered against the defendant . . . a single, generic judgment of conviction for first degree murder is the appropriate entry. *See People v. Lowe*, 660 P.2d 1261, 1270–71 (Colo.1983). Should they become important on appeal or in post-conviction proceedings, the jury’s specific findings are adequately reflected in the special interrogatories.”)

People v. Lowe, 660 P.2d 1261, 1269-71 (Colo. 1983) (“Only one conviction of murder is permitted for the killing of one victim. There is only one crime of first-degree murder, although there are four ways of committing the crime. Only one judgment of conviction and one punishment can be imposed for one first-degree murder. It would be a strange system of justice that would permit the defendant to be sentenced to two concurrent life sentences for the killing of one person.”)

Defendant's Proposed Jury Instruction No. 41

(Penalty Phase One – Introductory Instructions)

This sentencing hearing only pertains to the sentences Mr. Holmes will receive for these twelve first-degree murder convictions. Mr. Holmes was also found guilty of 134 counts of attempted first-degree murder, 6 counts of attempted second-degree murder, and one count of possession of an explosive or incendiary device. It is not your responsibility to determine what Mr. Holmes's punishment should be for those crimes. The law requires a judge, not a jury, to impose sentences for those offenses. I will sentence Mr. Holmes on those counts at a later date. You are instructed that Mr. Holmes will receive a minimum sentence of _____ years of incarceration for those convictions. Your obligation in this sentencing hearing is solely to determine the appropriate sentence for Mr. Holmes's first degree murder convictions.

Supporting Argument and Authorities:

C.R.S. § 18-1.3-1201(1)(a) (“Upon conviction of guilt of a defendant of a class 1 felony, the trial court shall conduct a separate sentencing hearing to determine whether the defendant should be sentenced to death or life imprisonment . . .”).

The jury must not be misled about the role it plays in the sentencing decision, and the real outcomes of its decisions under local law. *See Caldwell v. Mississippi*, 472 U.S. 320 (1985); *People v. Durre*, 690 P.2d 165, 173-174 (Colo. 1984) (“Because under Colorado’s capital sentencing procedures the jury’s resolution of the existence of mitigating, additional mitigating, and aggravating circumstances necessarily involves a determination of whether life imprisonment as opposed to a death sentence is justified under the evidence, the certainty essential to a jury verdict directly resulting in death can only be achieved when the jurors are clearly instructed concerning the effect of their verdicts on the ultimate question of life imprisonment or death.”); *Simmons v. South Carolina*, 512 U.S. 154 (1994); *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Gardner v. Florida*, 430 U.S. 349 (1977).

The fact that there is no possibility that the defendant will ever be released is mitigating evidence, as it provides a basis upon which the jury could impose a sentence less than death. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (mitigating evidence is “any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death”); *Skipper v. South Carolina*, 476 U.S. 1, 7 (1986) (evidence is “‘mitigating’ in the sense that [it] might serve ‘as a basis for a sentence less than death.’”).

Moreover, the Eighth Amendment commands that a capital sentencing proceeding lead to a reliable determination. *Thompson v. Oklahoma*, 487 U.S. 815, 856 (1988); *Zant v. Stephens*, 462 U.S. 862, 884 (1983); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). There can be no reliable penalty assessment when the jury is not aware of the additional sentencing authority a court will exercise over the additional crimes.

See also:

State v. Kleypas, 40 P.3d 139, 270 (2001) (“[W]here a defendant has been found guilty of charges in addition to capital murder, the trial court upon request must provide the jury with the possible terms of imprisonment for each additional charge and advise the jury that the determination of whether such other sentences shall be served consecutively or concurrently to each other and the sentence for the murder conviction is a matter committed to the sound discretion of the trial court.”)

State v. Koskovich, 776 A.2d 144, 187 (N.J. 2001) (“Trial courts are obligated to inform penalty-phase juries about the potential sentences that a defendant could receive for non-capital convictions arising from the same trial as the capital murder conviction;” failing to inform capital sentencing jurors about other sentences faced by the defendant “undermines their responsibility [in deciding the appropriateness of the death penalty] and invites speculation concerning those sentences, thereby risking a death verdict based on a jury’s unwarranted fear of the defendant’s premature release from prison.” (internal citations and quotations omitted))

Clark v. Tansy, 882 P.2d 527, 534 (N.M. 1994) (“[O]nce the length of incarceration facing a convicted capital felon is asserted by the defendant to be mitigating evidence, the court cannot choose between an instruction detailing the actual sentence imposed for noncapital offenses and an instruction detailing the range of sentencing alternatives; the trial court must impose sentence on noncapital charges before jury deliberations on the capital charge.”)

Defendant's Proposed Jury Instruction No. 42

(Penalty Phase One – Introductory Instructions)

The crime of first degree murder may be punished by either imprisonment for life without the possibility of parole, or death by lethal injection.

A life sentence under Colorado law means that a person must spend the rest of his natural life in prison. A person who has been sentenced to life in prison without parole in Colorado cannot ever apply for parole and cannot ever be paroled under Colorado law. If he receives a life sentence, Mr. Holmes will die in prison.

Your verdict in the first phase of this trial does not in any way require you to vote to impose a sentence of death. In fact, your guilty verdict alone is an insufficient basis for the imposition of a death sentence.

A death sentence is never mandatory or required by law.

Sources:

Simmons v. South Carolina, 512 U.S. 154, 169 (1994) (“Because truthful information of parole ineligibility allows the defendant to “deny or explain” the showing of future dangerousness, due process plainly requires that he be allowed to bring it to the jury’s attention by way of argument by defense counsel or an instruction from the court.”)

Woodson v. North Carolina, 428 U.S. 280 (1976) (rejecting as unconstitutional statute requiring mandatory death penalty statute for first-degree murder)

Gregg v. Georgia, 428 U.S. 153 (1976) (“[T]he concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.”)

C.R.S. § 18-1.3-1201(1)(b)

Defendant's Proposed Jury Instruction No. 43

(Penalty Phase One – Introductory Instructions)

As you will recall, during the earlier phase of this trial, Mr. Holmes was presumed to be innocent of the crime of murder. That presumption was overcome only after you considered all the evidence tendered before you, and only after you concluded that the prosecution had proven his guilt beyond a reasonable doubt.

During this proceeding, Mr. Holmes is entitled to a presumption of life, or, put another way, a presumption that he should not be put to death as punishment for this offense. The law requires that each and every one of you be convinced beyond a reasonable doubt that death is the only appropriate sentence, before you may impose a sentence of death.

Supporting Arguments and Authorities:

“The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice.” *Estelle v. Williams*, 425 U.S. 501, 503 (1976). The United States Supreme Court has held that “it long has been recognized that an instruction on the presumption is one way of impressing upon the jury the importance of that right.” *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978).

The presumption of life in a capital sentencing proceeding is similarly constitutionally compelled. As the United States Supreme Court has repeatedly recognized, “[D]eath as punishment is unique in its severity and irrevocability. ... When a defendant’s life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed. ... It is an extreme sanction, suitable to the most extreme of crimes.” *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (citations omitted); *see also Zant v. Stephens*, 462 U.S. 862 (1982).

Moreover, in *Ring v. Arizona*, 536 U.S. 584 (2002), the United States Supreme Court held that aggravating circumstances in a capital case “operate as ‘the functional equivalent of an element of a greater offense.’” *Id.* at 585. *See also Sattazahn v. Pennsylvania*, 537 U.S. 101, 111 (2003) (“[F]or purposes of the Sixth Amendment’s jury-trial guarantee, the underlying offense of ‘murder’ is a distinct, lesser included offense of ‘murder plus one or more aggravating circumstances’: Whereas the former exposes a defendant to a maximum penalty of life imprisonment, the latter increases the maximum permissible sentence to death.”).

In addition, under Colorado’s post-*Dunlap I* sentencing scheme, a person is not eligible for a death sentence after a conviction for first-degree murder. *See Woldt v. People*, 64 P.3d 256 (Colo. 2003). Based upon the verdict, a life sentence is the only

possible sentence. *Id.* Unless and until the unique sentencing trial set forth in § 18-1.3-1201 occurs and the sentencers decide certain facts against the accused at the first, second, and third steps of the process, only a life sentence is possible. See *Dunlap v. People* (“*Dunlap I*”), 975 P.2d 723, 739-740 (holding that a person is not eligible for a death sentence under Colorado law unless and until the sentencers are convinced at the third step of the process beyond a reasonable doubt that mitigation does not outweigh the statutory aggravating factors that have been proven.); accord *Woldt, supra*; *Montour, supra*.

Because a capital sentencing jury in Colorado cannot impose the death penalty unless it reaches the requisite conclusions at steps one, two, and three of the process, it is axiomatic that there is a presumption at the start of any capital sentencing proceeding in Colorado that the defendant should receive a life sentence, or should not receive a death sentence. As the Colorado Supreme Court explained in *People v. Tenneson*, 788 P.2d 796-797 (Colo. 1990):

Because we hold that the jury must be convinced beyond a reasonable doubt that any mitigating factors do not outweigh the proven statutory aggravating factors, there is in some sense a presumption that the mitigators do outweigh the proven statutory aggravators and therefore a presumption favoring a sentence of life imprisonment. See Note, *The Presumption of Life: A Starting Point for a Due Process Analysis of Capital Sentencing*, 94 Yale L.J. 351, 367-71 (1984). To the extent that an instruction embodying a presumption of life imprisonment expresses no more than that before a death sentence can be imposed the jury must be convinced beyond a reasonable doubt that the sentence should be imposed, it correctly expresses the law. The instructions given in the cases before us meet this test.

While the Court stated that “the better practice” is to avoid the use of that term because it “has the potential for confusing the jury,” it also held that the trial courts “acted within their discretion in giving the presumption of life instructions,” based on “the language of those instructions, including the contexts in which the term ‘presumption of life imprisonment’ appears.” 788 P.2d at 797-98. The defense submits that the proposed language above accurately states the law and does not have the potential for confusing the jury in the context in which it is given. *Cf. Dunlap v. People*, 173 P.3d 1054, 1089 (Colo.2007) (“contrary to Dunlap’s argument, there is no presumption of life imprisonment in Colorado.”)

U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 20, 25.

Defendant's Proposed Jury Instruction No. 44

(Penalty Phase One – Introductory Instructions)

The purpose of the sentencing proceeding is to determine the appropriate punishment for Mr. Holmes, based on his individual, personal, moral culpability. In other words, the punishment should fit the person who committed the crime. Your sentencing decision should not be based solely on the nature of the crime itself.

Source:

Eddings v. Oklahoma, 455 U.S. 104 (1982) (“By requiring that the sentencer be permitted to focus on the characteristics of the person who committed the crime, . . . the rule in *Lockett* recognizes that justice ... requires ... that there be taken into account the circumstances of the offense together with the character and propensities of the offender.” (internal quotations and citations omitted)).

Defendant's Proposed Jury Instruction No. 45

(Penalty Phase One – Introductory Instructions)

Death is the ultimate punishment. It is irrevocable. In any case in which the death penalty is sought, a juror may always vote for a life sentence without the possibility of parole based upon evidence in mitigation, mercy, or any other reason. A death sentence is never mandatory or required by law.

Sources:

Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (“[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.”)

Gregg v. Georgia, 428 U.S. 153, 199 (1976) (“Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution.”)

Defendant's Proposed Jury Instruction No. 46

(Penalty Phase One – Introductory Instructions)

The sentencing hearing may or may not consist of up to three phases to determine the sentence that will be imposed upon Mr. Holmes.

I will give you detailed instructions before you begin each possible phase and at the close of evidence and prior to your deliberations at each phase that is reached in this case. Colorado law requires that you carefully follow the legal guidelines that I will give you in making your decisions during all possible phases of the sentencing trial.

However, I will now provide you with a brief overview as to how this sentencing trial will be conducted. Please keep in mind that these are just introductory instructions and you will be given more detailed instructions later in the trial.

I will instruct you on the principles that will govern your deliberations during these three possible phases. In explaining your duties, I must refer to many matters that you may not ever need to reach. I must give you as complete an explanation as possible concerning the legal matters that must govern your deliberations. Therefore, it is necessary for me to instruct you on the entire process even though it may not be necessary for you to go through each phase.

By explaining each phase I do not want to imply or suggest that I believe that it is necessary or in any way proper for you to reach any particular phase or resolution in the deliberative process in this case. My instructions are not intended as an expression of any opinion or desire concerning the result you should reach.

Phase One: Under Colorado law, the prosecution is given an opportunity to prove beyond a reasonable doubt to the unanimous satisfaction of the jury the existence of at least one statutory aggravating factor in relation to each first-degree murder conviction. In this case, the prosecution has charged five aggravating factors:

The aggravating factors alleged by the prosecution are:

- (1) The defendant unlawfully and intentionally, knowingly, or with universal malice manifesting extreme indifference to the value of human life generally, killed two or more people during the commission of the same criminal episode.

- (2) The defendant intentionally killed a child who has not yet attained twelve years of age.
- (3) In the commission of the offense of murder in the first degree, the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense.
- (4) The defendant committed the offense of murder in the first degree in an especially heinous, cruel, or depraved manner.
- (5) The defendant committed the offense of murder in the first degree while lying in wait or from ambush.

If the prosecution fails to prove the existence of at least one aggravating factor in relation to any of the first-degree murder convictions, the sentencing trial will stop, and Mr. Holmes will be sentenced to life without parole. Under such a circumstance, the law is satisfied with such a result and each juror will have fully and correctly fulfilled his or her civic duty, regardless of his or her personal Phase Two decision and regardless of the outcome of the case. The sentencing trial will only proceed to Phase Two if the jury unanimously concludes that the prosecution has proven beyond a reasonable doubt at least one aggravating factor relating to at least one of the first-degree murder convictions. In order for an aggravator to be found, all twelve jurors must agree that the particular aggravator at issue has been proven beyond a reasonable doubt.

Phase Two: In the event this case reaches Phase Two, Mr. Holmes may, but is not required to, present evidence of mitigating factors, although the jury must consider all evidence of mitigation, regardless of who presents it. A mitigating factor is anything which suggests a reason for not imposing a death sentence. Mitigation is not a justification or excuse for the crime. Mitigating factors are things about a person or an offense that weigh in favor of a life sentence rather than a death sentence. They are circumstances which, in fairness or mercy, may be considered as reducing the degree of the defendant's moral culpability or diminishing the appropriateness of a death sentence. Factors in mitigation are not restricted to the events or circumstances related to the crime. Mitigation can include, but is not limited to, a broad range of factors relating to Mr. Holmes's personal history, character, background, or mental health, as well as the circumstances of this case. Mitigation is not limited to evidence presented by the

defense, but can come from any source. The prosecution will have the opportunity to rebut any evidence of mitigation presented by Mr. Holmes. There is no burden on Mr. Holmes to present any mitigating evidence at all or to prove the existence of any mitigating factor to any degree of certainty.

At the end of Phase Two, each juror independently decides what mitigating factors exist. The decision regarding mitigating factors is not a collective jury decision, but rather an individual juror decision. The law states that it is not necessary for jurors to unanimously agree about whether a mitigating factor exists before it may be considered by any individual juror. If there is any evidence of any mitigating factor in any juror's opinion, that juror must consider the mitigating factor. A juror must consider all mitigating factors he or she finds to exist, even if other jurors disagree about the existence of such mitigation.

After each juror determines for himself or herself what mitigating factors exist, then for each conviction of first-degree murder, each juror must weigh any mitigation that he or she has determined exists against the aggravating factor or factors that were unanimously found to exist in Phase One for that conviction. This weighing process is not a mere counting process. A single mitigating factor may outweigh all proven aggravating factors. Your decision should not be mechanical or mathematical. Instead, with respect to each conviction of first-degree murder, each juror must make an individual reasoned moral judgment whether he or she has been convinced beyond a reasonable doubt that the mitigating factors do not outweigh the aggravating factors. The only aggravating factors a juror may consider during this weighing process are the aggravating factors that were proven for that conviction at Phase One of the sentencing trial. Your decision as to what weight to give any aggravating or mitigating factors does not have to be unanimous. The sentencing trial only moves on to Phase Three if every juror is individually convinced beyond a reasonable doubt that the mitigating factors *do not* outweigh the proven aggravating factors. If one or more jurors is not convinced, the sentencing hearing stops and Mr. Holmes will be sentenced to life imprisonment without the possibility of parole. The law is fully satisfied with such a result and each juror will have fully and correctly fulfilled his or her civic duty, regardless of his or her personal Phase Two decision and regardless of the outcome of the case. A juror is never required

to articulate, explain, or justify the weight that the juror assigns to any aggravating or mitigating factors. Each juror may emphasize one factor more than another, giving each factor as little or as much weight as the juror deems appropriate.

Phase Three: Phase Three of the sentencing hearing will take place only if every juror is unanimously convinced beyond a reasonable doubt that the mitigating factors do not outweigh the proven aggravating factors. During Phase Three, the jury may hear additional evidence from the prosecution and/or the defense. In this phase, each juror would be asked to individually decide whether he or she is convinced beyond a reasonable doubt that Mr. Holmes should be sentenced to death based on his or her reasoned, personal moral judgment. No juror may make a decision for the death penalty unless that juror is convinced beyond a reasonable doubt that the death penalty should be imposed. If any one or more of the jurors is not convinced beyond a reasonable doubt that death is the appropriate sentence, Mr. Holmes will be sentenced to imprisonment for life without the possibility of parole. The law is satisfied with such a result, and each juror will have fully and correctly fulfilled his or her civic duty, regardless of his or her personal Phase Three decision and regardless of the outcome of the case. Only if all twelve jurors are unanimously convinced beyond a reasonable doubt that death is the only appropriate penalty for Mr. Holmes can Mr. Holmes be sentenced to death and executed by the State of Colorado.

Sources:

People v. Tenneson, 788 P.2d 786 (Colo. 1990)
People v. Young, 814 P.2d 834, 839 (Colo. 1991)
People v. District Court, 196 Colo. 401, 405, 586 P.2d 31(1978)
Lockett v. Ohio, 438 U.S. 586 (1978)
Eddings v. Oklahoma, 455 U.S. 104 (1982)
Skipper v. South Carolina, 476 U.S. 1 (1986)
Penry v. Lynaugh (“*Penry I*”), 492 U.S. 302 (1989)
Penry v. Johnson (“*Penry II*”), 532 U.S. 782 (2001)
Colo. Rev. Stat. 18-1.3-1201
Colo. Const. art. II, secs. 16, 20, 23, 25; U.S Const. amends. V, VI, VIII, XIV

Defendant's Proposed Jury Instruction No. 47

(Penalty Phase One – Introductory Instructions)

You must approach this sentencing proceeding, and consider the evidence presented and the arguments of the attorneys, with open minds. It is your sworn obligation to withhold any judgment and decline to form any opinion about the matters at issue during each part of this sentencing trial until after you have heard the evidence presented at the sentencing hearing, been instructed on the applicable law, heard the arguments of counsel and retired to the jury room. Further instructions will be provided for you at the close of evidence in Phase One of the sentencing trial.

Defense Proposed Jury Instructions
Penalty – Phase One Final Instructions

Defendant's Proposed Jury Instruction No. 48

(Penalty Phase One – Final Instructions)

Members of the jury, the evidence in part one of this sentencing trial has been completed. In a moment, I will read you the law which you should apply in order to reach your decisions. 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 that you need to keep in mind when you are deciding the issues presented by Phase One of this sentencing trial in the jury room.

As I told you at the beginning of the case, you must decide the issues presented by Phase One of this sentencing trial 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, Blackberry, computer, the internet, or any internet service. This means you must not e-mail, text, instant message, Tweet, 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, My Space, LinkedIn, YouTube, or Twitter. 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, Bing, Yahoo, 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.

I will now instruct you on the principles that will govern your deliberations.

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. 49

(Penalty Phase One – Final Instructions)

Based upon your earlier verdicts, Mr. Holmes has twelve convictions of first-degree murder. Therefore, you must make twelve separate determinations regarding the existence of aggravating factors in this case.

You must give separate and individual consideration to the question of the aggravating factors with respect to the first-degree murder of each of the following individuals:

Jonathan Blunk
Alexander Boik
Jesse Childress
Gordon Cowden
Jessica Ghawi
John Larimer
Matthew McQuinn
Micayla Medek
Veronica Moser Sullivan
Alex Sullivan
Alexander Teves
Rebecca Wingo

The evidence and the law applicable to the murder of each of these individuals should be considered separately by you. The fact that you may enter a finding of an aggravating factor or factors for one individual conviction should not control your decision as to the aggravating factors with respect to any other first degree murder conviction. The law permits you to decide that an aggravating factor exists for one conviction, but not for another. You must consider separately and independently, for each conviction, the evidence and the law applicable to that conviction.

Source:

C.R.S. § 18-1.3-1201(1)(a)

C.R.S. § 18-1.3-1201(5)

Defendant's Proposed Jury Instruction No. 50

(Penalty Phase One – Final Instructions)

The fact that the prosecution has alleged that aggravating factors exist is not evidence. You should not consider those allegations against Mr. Holmes as any proof or evidence that the aggravating factors exist or that Mr. Holmes should be sentenced to death.

You shall presume that each aggravating factor does not exist, each and every time you consider that factor with respect to each individual conviction, unless you unanimously agree that it has been proven beyond a reasonable doubt.

The burden of proof at Phase One is upon the prosecution to prove to your satisfaction beyond a reasonable doubt all elements necessary to establish each aggravator charged as it pertains to each count of first-degree murder. Mr. Holmes has no burden of proof during this, or any other, phase of this sentencing hearing.

Your prior verdicts at the previous phase of this trial do not control your findings with respect to any of the elements regarding any aggravating factor. At this stage, you must make an independent determination regarding whether the elements of each aggravating factor have been proven beyond a reasonable doubt.

Sources:

Woldt v. People, 64 P.3d 256 (Colo. 2003)

Ring v. Arizona, 536 U.S. 584 (2002)

Defendant's Proposed Jury Instruction No. 51

(Penalty Phase One – Final Instructions)

The applicable states of mind that pertain to the alleged aggravating factors are explained as follows:

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

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.

Source:

COLJI-Crim. No. G1:01 (2014)

Defendant's Proposed Jury Instruction No. 52

(Penalty Phase One – Final Instructions)

The elements of aggravating factor #1 are as follows:

- (1) The defendant
- (2) committed the offense
- (3) while lying in wait or from ambush.

If you find from the evidence that the prosecution has proven each and every element of this aggravating factor beyond a reasonable doubt as it pertains to a particular conviction, then you should find that this aggravating factor has been proven with respect to that conviction.

If you find from the evidence that the prosecution has failed to prove beyond a reasonable doubt that any one or more of the elements of this aggravating factor exist with respect to a particular conviction, you must find that the aggravating factor has not been proven with respect to that conviction.

Source:

C.R.S. § 18-1.3-1201(5)(f)

Defendant's Proposed Jury Instruction No. 53

(Penalty Phase One – Final Instructions)

The elements of aggravating factor #2 are as follows:

- (1) In the commission of the offense,
- (2) the defendant
- (3) knowingly
- (4) created a grave risk of death to another person in addition to the victim of the offense.

If you find from the evidence that the prosecution has proven each and every element of this aggravating factor beyond a reasonable doubt as it pertains to a particular conviction, then you should find that this aggravating factor has been proven with respect to that conviction.

If you find from the evidence that the prosecution has failed to prove beyond a reasonable doubt that any one or more of the elements of this aggravating factor exist with respect to a particular conviction, you must find that the aggravating factor has not been proven with respect to that conviction.

Source:

C.R.S. § 18-1.3-1201(5)(i)

Defendant's Proposed Jury Instruction No. 54

(Penalty Phase One – Final Instructions)

The elements of aggravating factor #3 are as follows:

- (1) the defendant
- (2) committed the offense
- (3) in an especially heinous, cruel, or depraved manner.

Not all first degree murders are committed in an especially heinous, cruel or depraved manner. In order to satisfy the elements of this aggravator, the prosecution must prove beyond a reasonable doubt that the defendant acted in a manner that was both (1) conscienceless or pitiless, and (2) unnecessarily torturous to the victim.

“Conscienceless” means that the defendant acted with utter indifference to, or the enjoyment of, the suffering of others.

“Pitiless” means intentional infliction of physical or psychological torture.

“Unnecessarily torturous” means using a particularly shocking or brutal method of killing, or a killing in which the victim is unable to physically defend himself because of physical or mental disability or because he is too old or too young.

If you find from the evidence that the prosecution has proven each and every element of this aggravating factor beyond a reasonable doubt as it pertains to a particular conviction, then you should find that this aggravating factor has been proven with respect to that conviction.

If you find from the evidence that the prosecution has failed to prove beyond a reasonable doubt that any one or more of the elements of this aggravating factor exist with respect to a particular conviction, you must find that the aggravating factor has not been proven with respect to that conviction.

Source:

C.R.S. § 18-1.3-1201(5)(j)

People v. Dist. Court, 834 P.2d 181, 200-01 (Colo. 1992)

People v. Davis, 794 P.2d 159, 176 (Colo. 1990)
C.R.S. § 16-8-107(1)(b) & (1.5)(b)

Defendant's Proposed Jury Instruction No. 55

(Penalty Phase One – Final Instructions)

The elements of aggravating factor #4 are:

- (1) The defendant
- (2) unlawfully and
- (3) intentionally, knowingly, or with universal malice manifesting
extreme indifference to the value of human life generally,
- (4) killed two or more persons
- (5) during the commission of the same criminal episode.

If you find from the evidence that the prosecution has proven each and every element of this aggravating factor beyond a reasonable doubt as it pertains to a particular conviction, then you should find that this aggravating factor has been proven with respect to that conviction.

If you find from the evidence that the prosecution has failed to prove beyond a reasonable doubt that any one or more of the elements of this aggravating factor exist with respect to a particular conviction, you must find that the aggravating factor has not been proven with respect to that conviction.

Source:

C.R.S. § 18-1.3-1201(5)(l)

Defendant's Proposed Jury Instruction No. 56

(Penalty Phase One – Final Instructions)

The elements of aggravating factor #5 are:

- (1) The defendant
- (2) intentionally
- (3) killed a child who has not yet attained twelve years of age

If you find from the evidence that the prosecution has proven each and every element of this aggravating factor beyond a reasonable doubt as it pertains to the first-degree murder conviction for Veronica Moser-Sullivan, then you should find that this aggravating factor has been proven with respect to that conviction.

If you find from the evidence that the prosecution has failed to prove beyond a reasonable doubt that any one or more of the elements of this aggravating factor exist with respect to the first-degree murder conviction for Veronica Moser-Sullivan, you must find that the aggravating factor has not been proven with respect to that conviction.

Source:

C.R.S. § 18-1.3-1201(5)(m)

Defendant's Proposed Jury Instruction No. 57

(Penalty Phase One – Final Instructions)

If the prosecution fails to prove the existence of at least one aggravating factor in relation to any of the first-degree murder convictions, the sentencing trial will stop, and Mr. Holmes will be sentenced to life without parole. Under such a circumstance, the law is satisfied with such a result and each juror will have fully and correctly fulfilled his or her civic duty, regardless of his or her personal Phase Two decision and regardless of the outcome of the case. The sentencing trial will only proceed to Phase Two if the jury unanimously concludes that the prosecution has proven beyond a reasonable doubt at least one aggravating factor relating to at least one of the first-degree murder convictions. In order for an aggravator to be found, all twelve jurors must agree that the particular aggravator at issue has been proven beyond a reasonable doubt.

Sources:

Woldt v. People, 64 P.3d 256 (Colo. 2003)

Ring v. Arizona, 536 U.S. 584 (2002)

Defendant's Proposed Jury Instruction No. 58

(Penalty Phase One – Final Instructions)

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 sentencing hearing. 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.

Defendant's Proposed Jury Instruction No. 59

(Penalty Phase One – Final Instructions)

In making your decision during Phase One, you may consider any evidence that was presented during this phase of the sentencing trial.

During Phase One, you may also consider some, but not all, of the evidence that was presented in the previous phase of this trial. You may not consider any evidence that was admitted solely for your consideration of the issues raised by Mr. Holmes's plea of not guilty by reason of insanity during the previous phase of this trial in support of any aggravating factor.

Source:

Colo. Rev. Stat. 18-1.3-1201(1)(b)

C.R.S. § 16-8-107

Estelle v. Smith, 451 U.S. 454, 462-63 (1981)

Defendant's Proposed Jury Instruction No. 60

(Penalty Phase One – Final Instructions)

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. 61

(Penalty Phase One – Final Instructions)

You are instructed that the fact that the death penalty is being sought in this case is entitled to no weight whatsoever in your decisions regarding aggravating factors. No juror should allow himself or herself to be influenced or prejudiced against James Holmes because of the fact that the death penalty is being sought.

Additionally, no juror should allow himself or herself to be prejudiced against Mr. Holmes in any way because of his plea of not guilty by reason of insanity.

Defendant's Proposed Jury Instruction No. 62

(Penalty Phase One – Final Instructions)

Every citizen charged with a crime or convicted of first-degree murder has the constitutional right not to testify. James Holmes did not testify at the first trial or during Phase One of the sentencing trial, as was his right. You shall not draw any negative inference from his choice as to the punishment to be imposed or any other matter. You shall not allow this choice to prejudice him in any way. His decision not to testify cannot be used as a reason to support or impose the death penalty.

You must not discuss Mr. Holmes's choice not to testify or permit it to enter into your deliberations in any way.

Defendant's Proposed Jury Instruction No. 63

(Penalty Phase One – Final Instructions)

In reaching your decision on punishment, you must not be influenced by prejudice or bias of any sort against James Holmes. You must not be influenced by public opinion of any sort against James Holmes.

Source:

C.R.S. §18-1.3-1201(6)(b) (“A sentence of death shall not be imposed pursuant to this section if the supreme court determines that the sentence was imposed under the influence of passion of prejudice or any other arbitrary factor...”.)

Defendant's Proposed Jury Instruction No. 64

(Penalty Phase One – Final Instructions)

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. 65

(Penalty Phase One – Final Instructions)

Members of the jury, you may discuss this case and deliberate only after the presentation of evidence and/or information is completed and you have received all of the legal instructions that you must follow, heard closing arguments and you are all present. No juror should attempt to discuss this case with other jurors or anyone else at any other time except when all twelve jurors are in the jury room.

It is your duty as jurors to consult with one another and to deliberate. However, each of you must individually decide the issues for yourself after discussion and consideration of the evidence and/or information with your fellow jurors.

Defendant's Proposed Jury Instruction No. 66

(Penalty Phase One – Final Instructions)

After the closing argument, the bailiff will escort you to the jury room. Your foreperson will preside over your deliberations and the foreperson shall sign the Aggravating Factor verdict form reflecting whatever decisions you reach. The decisions must represent the considered judgment of each juror. To find that an aggravating factor has been proven beyond a reasonable doubt, it is necessary that each and every juror agree to it. That is, the decision must be unanimous.

You will be given twelve separate Aggravating Factor Verdict Forms – one for each first-degree murder conviction. The forms shall be completed in the manner that reflects your decisions and shall be signed by the foreperson as indicated. The aggravating factor verdict forms and these instructions shall remain in the possession of your Foreperson until such time when they are called for in open court. Upon reaching your aggravating factor decisions, you will inform the bailiff, who will in turn notify the Court, and you will remain in your jury room until called into the courtroom.

The foreperson shall complete the aggravating factor verdict forms in the manner that reflects your decisions and the foreperson shall sign them as the Court has stated. The original instructions and the aggravating factor verdict forms shall be returned with no other markings on them other than the signature of the foreperson. You are further instructed that no inferences are to be drawn from the order in which the court reads the aggravating factor verdict forms.

I will now read the aggravating factor verdict form you will receive.

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. JAMES HOLMES, Defendant	
	σ COURT USE ONLY σ Case No. 12CR1522 Division 201
SENTENCING PHASE ONE VERDICT FORM FIRST-DEGREE MURDER CONVICTION FOR JONATHAN BLUNK	

Does the jury unanimously find that the prosecution has proven beyond a reasonable doubt the existence of any one or more of the alleged aggravating factors?

- No*
- Yes**

The foreperson should check the appropriate box above and should sign below.

FOREPERSON

*If your answer is NO, Mr. Holmes will be sentenced to imprisonment for life without the possibility of parole for the first-degree murder of Jonathan Blunk.

**If your answer is YES, you must indicate which aggravating factor or factors have been proven beyond a reasonable doubt to the unanimous satisfaction of the jury by checking the appropriate box or boxes set forth below and the Foreperson should sign below.

□ Aggravating Factor No. 1 – Killed Two or More Persons

The defendant unlawfully and intentionally, knowingly, or with universal malice manifesting extreme indifference to the value of human life generally, killed two or more persons during the commission of the same criminal episode.

Aggravating Factor No. 2 – Intentionally Killed Child Under 12 does not apply to this count.

□ Aggravating Factor No. 3 – Grave Risk of Death to Another Person

In the commission of the offense, the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense.

□ Aggravating Factor No. 4 - Especially Heinous, Cruel, or Depraved Manner.

The defendant committed the offense in an especially heinous, cruel, or depraved manner.

□ Aggravating Factor No. 5 – Lying In Wait or From Ambush

The defendant committed the offense while lying in wait or from ambush.

FOREPERSON

Defense Proposed Jury Instructions
Penalty – Phase Two Introductory Instructions

Defendant's Proposed Jury Instruction No. 67

(Penalty Phase Two – Initial Instructions)

Members of the jury, because you have unanimously found the existence of one or more aggravating factors, the sentencing trial will now proceed to Phase Two. In this Phase Two, it becomes your duty to individually determine what mitigating factors exist, and to individually weigh the mitigating factors and the aggravating factors. You are reminded that even though you have found the existence of one or more aggravating factors, a death sentence is still never mandatory or required by law. You must approach this phase of the sentencing hearing with an open mind.

You will receive further instructions from me at the conclusion of this phase. However, at this time I will provide you with a brief overview of what will occur next.

Mr. Holmes may, but is not required to, present mitigation. Mr. Holmes may present evidence or information on his own behalf, but he is not required to do so. A mitigating factor is not a justification or excuse for the crime. Mitigation is anything that may suggest a reason for imposing a sentence of life imprisonment without parole instead of imposing a death sentence by lethal injection. Mitigating factors are things about a person or an offense that weigh in favor of a life sentence rather than a death sentence. They are circumstances which, in fairness or mercy, may be considered as reducing the degree of the defendant's moral culpability or diminishing the appropriateness of a death sentence. Mitigating factors may provide a basis for a life penalty by providing a more complete understanding of Mr. Holmes's personal history, character, background, or mental health. Mitigation can include facts or circumstances about this case or the crime, but mitigation does not need to have any link or connection to the crimes for which Mr. Holmes has been convicted. Mitigation is not limited to evidence presented by the defense, but can come from any source.

If Mr. Holmes presents mitigating evidence, the prosecution will then have the opportunity to rebut the mitigation presented. Then, you will retire to the jury deliberation room again.

The first task for each juror during this phase is to independently decide for him or herself what mitigating factors exist. This is an individual decision, not a group

decision. Jurors need not unanimously agree about the existence of a mitigating factor before it may be considered by any juror. If there is any evidence of any mitigating factor in a juror's opinion, that juror must consider the mitigating factor. No juror is required to identify which mitigating factors he/she has found to exist. After each juror determines for himself or herself the existing mitigation, the jury will move on to the next step of the decision making process.

The second task for each juror during this Phase Two is to weigh for each conviction the mitigation he or she has found to exist against the aggravating factor or factors the jury unanimously found to have been proven beyond a reasonable doubt during Phase One of the sentencing trial. The only aggravating factors any of you may consider during the weighing process are the aggravating factors proven at Phase One of the sentencing trial. Each of you must decide for yourself what weight to give any aggravating or mitigating factors. Your decision as to what weight to give any aggravating or mitigating factors does not have to be unanimous. Like the first task in Phase Two, this weighing process is conducted individually and each juror must determine for himself or herself whether the mitigating factors outweigh the proven aggravating factor or factors. Each juror must conduct this weighing process in accordance with his or her own reasoned moral judgment. Each juror must make an individual reasoned moral judgment whether he or she has been convinced beyond a reasonable doubt that the mitigating factors do not outweigh the proven aggravating factors.

A juror is never required to articulate, explain, or justify the weight that the juror assigns to any aggravating or mitigating factors. Each juror may emphasize one factor more than another, giving each factor as little or as much weight as the juror deems appropriate. A single mitigating factor may outweigh all proven aggravating factors. Each juror may determine what weight to give any mitigating factor, but when a juror has determined that a mitigating factor exists, the juror may not give it no weight by excluding it from his or her deliberations or refusing to give it meaningful consideration and effect.

The sentencing trial only moves on to Phase Three if every juror is individually convinced beyond a reasonable doubt that the mitigating factors *do not* outweigh the proven aggravating factors. If one or more jurors are not convinced, the sentencing

hearing stops and Mr. Holmes will be sentenced to life imprisonment without the possibility of parole. The law is fully satisfied with such a result and each juror will have fully and correctly fulfilled his or her civic duty, regardless of his or her personal Phase Two decision and regardless of the outcome of the case.

Any decisions concerning the existence of mitigation and the weighing of mitigating factors against aggravating factors must be reserved until the evidence is completed and you have received all of the legal instructions that you must follow. It is your sworn obligation to withhold any judgment and decline to form any opinion until after you have heard the evidence presented and you have been instructed on the applicable law.

Sources:

“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.” *McKoy v. North Carolina*, 494 U.S. 433, 440 (1990). A State cannot prevent “the consideration of...evidence if the sentencer could reasonably find that it warrants a sentence less than death.” *Id.* at 441.

Tennard v. Dretke, 542 U.S. 274, 286-287 (2004) (regarding mitigation, “the question is simply whether the evidence is of such a character that it “might serve ‘as a basis for a sentence less than death.’”)

Mills v. Maryland, 486 U.S. 367 (1988) (jurors cannot be precluded from considering any mitigating evidence unless they unanimously agree)

McKoy v. North Carolina, 494 U.S. 433 (1990) (state capital sentencing scheme must allow each individual juror to consider mitigating factors when deciding whether to impose death penalty, even if factors are not found unanimously by all jurors)

Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (sentence must reflect a “a reasoned moral response to the defendant’s background, character and crime”)

People v. Tenneson, 788 P.2d 786 (Colo. 1990) (“Unlike the determination of guilt or innocence, which turns largely on an evaluation of objective facts, the question whether death is the appropriate sentence requires a profoundly moral evaluation of the defendant’s character and crime.”(quoting *Satterwhite v. Texas*, 486 U.S. 249 (1988) (Marshall, J. concurring)))

People v. Rodriguez, 794 P.2d 965, 980-982 (Colo. 1990) (“*Rodriguez IV*”) (Colorado does not require unanimity on mitigating factors); *see also People v. Davis*, 794 P.2d 159 (Colo. 1990)

Defendant's Proposed Jury Instruction No. 68

(Penalty Phase Two – Initial Instructions)

The defendant is never under an obligation to present any evidence or information nor does he have the burden to prove or disprove anything during the sentencing hearing. There is no burden of proof assigned to either party during Phase Two.

Supporting Authorities and Argument:

The defense submits this proposed instruction in light of the Court's ruling on D-146 denying Mr. Holmes's request for an order requiring the prosecution to bear the burden of proof beyond a reasonable doubt at the second and third steps of the sentencing process, and that the state must bear the burden of persuasion beyond a reasonable doubt at the fourth step of any sentencing proceeding. *See* Order D-146. Mr. Holmes maintains the position taken in Motion D-146 that such an assignment of burdens is constitutionally required, and does not waive those arguments by submitting this instruction.

C.R.S. 18-1.3-1201(1)(d) ("There shall be no burden of proof as to proving or disproving mitigating factors")

People v. Rodriguez, 914 P.2d 230, 250 fn.12 (Colo. 1996) ("*Rodriguez V*") (trial court properly instructed jury that "a mitigating factor does not have to be proved by any burden of proof. You must find that a mitigating factor exists if there is any evidence to support it.")

D-296

EXHIBIT B

**(Defense Comments on Prosecution's Proposed Instructions for Phase One
and introduction to Phase Two)**

**PHASE ONE INTRODUCTION
INSTRUCTIONS**

FIRST PHASE INTRODUCTORY INSTRUCTION NO. _____

Members of the jury, the defendant has been found guilty of ___ counts of the offense of Murder in the First Degree. For each count of Murder in the First Degree of which the defendant was convicted, it becomes your duty to determine the punishment to be imposed for the offense. The crime of Murder in the First Degree may be punished by either imprisonment for life without the possibility of parole, or death by lethal injection. A death sentence is never mandatory or required by law. The fact that the defendant has been found guilty does not mean that a death sentence is automatic or even warranted. You must make an individual decision for each count of Murder in the First Degree of which the defendant was convicted.

We are now starting the sentencing hearing which may consist of up to three phases to determine the sentence that will be imposed upon the defendant. You must approach the sentencing hearing, and consider the evidence presented and the arguments of the attorneys, with an open mind. The fact that the defendant has been found guilty does not in any way require you to vote to impose the sentence of death. In other words the questions to be decided in the sentencing hearing remain unresolved.

I will give you detailed instructions before you begin each phase and at the close of evidence and prior to your deliberations at each phase. Colorado law requires that you carefully follow the legal guidelines that I will give you in making your decisions during the sentencing hearing.

However, in order for you to understand the nature and significance of the evidence and arguments being presented during the sentencing hearing, I will provide an overview as to how

this sentencing hearing will be conducted. In doing so, please keep in mind that these are just introductory instructions and you will be given more detailed instructions later in the hearing.

Phase One: Under Colorado law, the prosecution is given the opportunity to prove beyond a reasonable doubt that at least one statutory aggravating factor exists. On this particular issue, the prosecution has the burden of proof. The prosecution has alleged the following aggravating statutory factors:

- a.) The defendant unlawfully and intentionally, knowingly, or with universal malice manifesting extreme indifference to the value of human life generally, killed two or more people during the commission of the same criminal episode.
- b.) The defendant intentionally killed a child who has not yet attained twelve years of age.
- c.) In the commission of the offense of murder in the first degree, the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense.
- d.) The defendant committed the offense of murder in the first degree in an especially heinous, cruel, or depraved manner.
- e.) The defendant committed the offense of murder in the first degree while lying in wait or from ambush.

If the jury does not unanimously find that at least one statutory aggravating factor exists for each count of Murder in the First Degree, the sentencing hearing is concluded and the defendant will be sentenced to imprisonment for life without the possibility of parole. If the jury unanimously finds that one or more of the identified statutory aggravating factors has been proven by the prosecution beyond a reasonable doubt, the sentencing hearing will continue into phase II for any count of Murder in the First Degree of for which the jury has found that one or more statutory aggravating factors have been proven beyond a reasonable doubt.

Phase Two: In Phase II, the defendant may, but is not required to, present mitigation. Mitigation is a fact or circumstance that might cause a juror to not impose the death penalty. If the defendant presents mitigation evidence, the prosecution will then have the opportunity to rebut the mitigation presented. When the opportunity for mitigation and rebuttal is completed, each juror must independently decide for himself or herself which, if any, mitigation exists based

upon evidence presented during the guilt trial, and/or based upon mitigation presented during the sentencing hearing.

The decision regarding mitigators is not a collective jury decision, but rather an individual juror decision. Each juror is free to decide for himself or herself the existence or non-existence of any mitigating factor or circumstance.

Once mitigation has been presented, the jury must next engage in what the law calls a weighing process. This involves each individual juror weighing any mitigation that he or she has determined exists against the aggravating factors that were unanimously found to have been proven by the prosecution beyond a reasonable doubt in Phase I. Regarding each individual count of Murder in the First Degree of which the defendant was convicted, if one or more of the jurors is satisfied that the mitigation outweighs the aggravating factors, the sentencing hearing stops for that count and the defendant will be sentenced to imprisonment for life without the possibility of parole for that count. The jury only moves on to Phase III for any count of Murder in the First Degree of which the defendant was convicted if every juror is individually convinced beyond a reasonable doubt that the mitigation does not outweigh the aggravating factors. The degree of certainty that is defined as beyond a reasonable doubt does not involve a burden of proof on either side in Phase II. Rather, it is a standard of profound moral certainty that each individual juror is required to have before deciding whether mitigation does not outweigh any proven aggravating factors.

In reaching your decisions during Phase II, you must not be influenced by prejudice or bias of any sort against the defendant. You must treat him as a uniquely individual human being, and you must not consider any public opinion or community sentiment for or against the defendant. A juror must use his/her individual reasoned moral judgment during Phase II of the sentencing proceedings for each count of Murder in the First Degree of which the defendant was convicted. Each juror may consider mercy for the defendant during Phase II, but mercy must be based upon evidence and/or information you have received during the guilt trial and/or the sentencing hearing, and reflect an individual reasoned moral response to the defendant's background, character, history, and crime.

The law requires that your decisions not be the result of mere sympathy, passion, bias, prejudice, conjecture or any other irrational or arbitrary emotional response.

Phase Three. For each individual count of Murder in the First Degree of which the defendant was convicted, if every juror is unanimously convinced beyond a reasonable doubt that the mitigation does not outweigh the aggravating factors, the jury may then hear additional evidence and/or information from the prosecution and/or defense in Phase III. In this phase, for each count of Murder in the First Degree of which the defendant has been convicted, each juror would be asked to individually decide based upon all evidence and information presented during the guilt trial and the entire sentencing hearing whether he or she is convinced beyond a reasonable doubt that the defendant should be sentenced to death. No juror may make a decision for the death penalty unless that juror is convinced beyond a reasonable doubt, that the death penalty should be imposed. For each individual count of murder in the first degree of which the defendant is convicted, if all jurors do not unanimously agree on a death sentence, or if one or more jurors decide on a life sentence, the defendant will be sentenced to imprisonment for life without the possibility of parole. The degree of certainty that is defined as beyond a reasonable doubt does not involve a burden of proof on either side in phase III. Rather, it is a standard of profound moral certainty that each individual juror is required to have before deciding to impose the death penalty.

In reaching your decisions during Phase III, you must not be influenced by prejudice or bias of any sort against the defendant. You must treat him as a uniquely individual human being, and you must not consider any public opinion or community sentiment for or against the defendant. A juror must use his/her individual reasoned moral judgment during Phase III of the sentencing proceedings for each count of Murder in the First Degree of which the defendant was convicted. Each juror may consider mercy for the defendant during Phase III, but mercy must be based upon evidence and/or information you have received during the guilt trial and/or the sentencing hearing, and reflect an individual reasoned moral response to the defendant's background, character, history and crime.

The law requires that your decisions not be the result of mere sympathy, passion, bias, prejudice, conjecture or any other irrational or arbitrary emotional response.

Any decision regarding the appropriate penalty for each individual count of Murder in the First Degree must be reserved until the evidence is completed and you have received all of the

legal instructions that you must follow. It is your sworn obligation to withhold any judgment and decline to form any opinion as to penalty until after you have heard the evidence presented, been instructed on the applicable law, heard closing arguments, and retire to deliberate. Then and only then should you begin to discuss and deliberate as to the first phase of the sentencing hearing. It is your duty as jurors to consult with one another and to deliberate. However, each of you must individually decide the issues for yourself after discussion and consideration of the evidence and/or information with your fellow jurors.

Defense Comments:

The defense has submitted introductory instructions that cover many of the same topics covered above. The defense believes its tendered instructions more accurately and fully address the relevant legal concepts and requests that its instructions be given in lieu of the prosecution's above-tendered instruction. The defense has several issues with the instruction above.

For example, the above instruction references "each count" of first-degree murder. As defense tendered instruction 40 makes clear, Mr. Holmes was convicted of 24 counts of first-degree murder based on two separate theories pursued by the prosecution. These counts should merge into twelve first-degree murder *convictions*. The defense will make an additional record at the charging conference about this issue if necessary.

Additionally, the prosecution's description of Phase One does not include the defense's proposed language in defense tendered instruction 46 indicating at the end of each phase that the law is fully satisfied regardless of the verdicts. The defense will make an additional record at the charging conference about why that language is constitutionally required.

The prosecution's description of mitigation in Phase Two is inadequate. The defense will make an additional record at the charging conference about why the proposed language describing mitigation in defense tendered instruction 46 on this issue is constitutionally required.

The defense objects to the references to the jury's consideration of evidence presented in the "guilt trial" throughout this introductory instruction. As the defense-tendered instruction 59 makes clear, there are limitations on the jury's consideration at sentencing of evidence that was introduced at the merits phase of the trial solely on the issue of Mr. Holmes's sanity. These limitations must be clearly defined for the jury. The defense believes this is most appropriately done during the final instructions for each phase of the sentencing trial, rather than in the introductory instruction that merely provides an overview of the sentencing process.

The defense objects to the portion of the prosecution's tendered instruction prohibiting the jurors from basing their decision on "mere sympathy" at Phase Two, because sympathy for

Mr. Holmes is a constitutionally appropriate consideration for the jury. The defense will make an additional record about this at the charging conference if necessary.

FIRST PHASE INTRODUCTORY INSTRUCTION NO. _____

The procedure of introducing evidence is as follows: First, the prosecution is given an opportunity to offer evidence in addition to the evidence presented during the guilt trial. The prosecution may also rest upon the evidence already presented during the guilt trial. Evidence consists of the following from either the guilt trial or this sentencing trial: sworn testimony of the witnesses, the exhibits received in evidence, and stipulated, admitted, or judicially noticed facts. The defendant may then, but is not required, to present evidence concerning whether any one or more of the aggravating factor(s) have been proven beyond a reasonable doubt. If the defense chooses to present evidence concerning one or more aggravating factor(s), the prosecution may offer additional evidence in response.

Defense Comments:

The defense questions whether this instruction is necessary given that neither party is intending to introduce evidence at Phase One. Nor does the defense believe there were any stipulated, admitted, or judicially noticed facts during the merits phase of the trial.

Additionally, the defense objects to this instruction because, pursuant to the Fifth, Eighth, and Fourteenth Amendments, Colo. Const. art. II, secs. 18, 20, and 25, and C.R.S. § 16-8-107, the jury is prohibited from considering evidence introduced at the merits phase of the trial on the issues raised by Mr. Holmes's plea of not guilty by reason of insanity in support of aggravation. See defense tendered instruction No. 59.

FIRST PHASE INTRODUCTORY INSTRUCTION NO. _____

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. 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.

The prosecution has the burden to establish that one or more of the aggravating factors have been proven beyond a reasonable doubt. The defendant has no burden of proof in the sentencing hearing.

Defense Comments:

The defense has no objection to this instruction, but included the definition of reasonable doubt in its final instructions for Phase One, rather than in the introductory instructions.

PHASE ONE INSTRUCTIONS

FIRST PHASE FINAL INSTRUCTION NO. _____

Members of the jury, the evidence in the first phase of the sentencing hearing has been completed. In a moment, I will read you the law which you should apply in order to reach your decisions. But first, I want to mention a few things that you need to keep in mind when you are deciding this case in the jury room.

It is my job as the judge to decide what rules of law apply to the case. While the lawyers may have commented during the sentencing hearing on some of these rules, you are to be guided by what I say about them when you are making your decisions in this case. You must follow all of the rules as I explain them to you. Even if you disagree with some of the rules, you must follow them. Even if you do not understand the reasons for some of the rules, you must follow them. No single instruction describes all of the law which must be applied. Therefore, the instructions must be considered together as a whole by you.

It is your duty to determine the facts from the evidence you have heard during this first phase of the sentencing hearing. Then you are to evaluate those facts in light of the requirements set forth in these instructions.

At times during the sentencing hearing, lawyers made objections to questions asked by other lawyers, and to answers by witnesses. This simply means that the lawyer was requesting that I make a decision on a particular rule of law. It is the duty of a lawyer to object to evidence which he or she believes may not properly be offered. Do not draw any conclusions from such objections. Those objections only related to the legal questions that I had to determine and they should not influence your thinking.

You must not consider any evidence or statements of a witness or a lawyer when I have sustained an objection to that evidence or statement. Also, you must not consider any evidence or statements which I instructed you to disregard. You should put that evidence and those statements out of your mind and you must not consider them in your deliberations. Such evidence and statements must be treated as if you had never seen or heard them.

The remarks, rulings and orders I made during the sentencing hearing which were not directed to you should not be considered by you in making your decision. Nothing I have said during the sentencing hearing should be understood by you as suggesting any opinion or feeling on my part as to what has or has not been proven in this case. Nothing I have said during the sentencing hearing should be understood by you as suggesting any opinion or feeling on my part as to what decisions you should make.

I will now instruct you on the principles that will govern your deliberations

Defense Comments:

The defense does not believe that the fourth, fifth, and sixth paragraphs of this instruction will apply, given that both parties have signaled that they will not be introducing additional evidence in Phase One.

The defense also believes it is appropriate to include additional instructions and admonishments prohibiting jurors from accessing media or conducting outside research about the case, which were included in defense tendered instruction No. 48.

FIRST PHASE FINAL INSTRUCTION NO. _____

You are instructed that you are to give separate and individual consideration to the question of each of the aggravating factors for each individual count of Murder in the First Degree of which the defendant was convicted. The fact that you may or may not find a particular aggravating factor beyond a reasonable doubt for any individual count of Murder in the First Degree should not control your decision as to any of the other aggravating factors for that particular count or for any other count.

Defense Comments:

The defense has no specific comment on this instruction at this time.

FIRST PHASE FINAL INSTRUCTION NO. _____

The defendant has asserted his right to be sentenced by a jury. No juror should allow himself or herself to be prejudiced against the defendant in any way because of his assertion of his constitutional right to sentencing by jury. The fact that the defendant has asserted his right to be sentenced by a jury may not be considered as an aggravating factor or considered in any way in the determination of aggravating factors.

Defense Comments:

This is similar to a defense-proposed instruction, but the defense prefers its own proposed language. The defense will make a further record on this at the charging conference if necessary.

FIRST PHASE FINAL INSTRUCTION NO. _____

You are instructed that the fact that the death penalty is sought in this case is entitled to no weight whatsoever in your decisions. No juror should allow himself or herself to be influenced or prejudiced against the defendant because of the fact that the death penalty is being sought.

Defense Comments:

This is similar to a defense-proposed instruction, but the defense prefers its own proposed language. The defense will make a further record on this at the charging conference if necessary.

FIRST PHASE FINAL INSTRUCTION NO. _____

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 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 she looked out a window and saw snow covering the ground might be offered as circumstantial evidence that it had snowed.

Defense Comments:

The defense does not believe this instruction is necessary at Phase One.

FIRST PHASE FINAL INSTRUCTION NO. _____

The evidence which may be considered at this time consists of all evidence which was presented during the guilt trial or the penalty trial that relates to the alleged aggravating factors.

Evidence consists of the sworn testimony of all the witnesses, all exhibits which have been received in evidence, all stipulated or admitted facts and any judicially noticed facts. You are to consider only the evidence in this case and reasonable inferences therefrom.

A judicially noticed fact is one which the jury may, but is not required to, accept as conclusive.

When the lawyers on both sides stipulate to the existence of a fact, you may, but are not required to, deem that fact as proven.

You are to consider the evidence in this case and reasonable inferences therefrom. An inference permits, but does not require, you to find a fact from proof of another fact, if that conclusion is warranted by the evidence as a whole. The weight to be given the evidence rests entirely with you.

Defense Comments:

The defense objects to this instruction because, pursuant to the Fifth, Eighth, and Fourteenth Amendments, Colo. Const. art. II, secs. 18, 20, and 25, and C.R.S. § 16-8-107, the jury is prohibited from considering evidence introduced at the merits phase of the trial on the issues raised by Mr. Holmes's plea of not guilty by reason of insanity in support of aggravation. *See* defense tendered instruction no. 59.

FIRST PHASE FINAL INSTRUCTION NO. _____

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

Defense Comments:

The defense does not believe this instruction is necessary at Phase One.

FIRST PHASE FINAL INSTRUCTION NO. _____

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.

Defense Comments:

The defense proposed an identical instruction and does not object.

FIRST PHASE FINAL INSTRUCTION NO. _____

You are not bound by the testimony of a 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.

Defense Comments:

The defense does not believe this instruction is necessary at Phase One.

FIRST PHASE FINAL INSTRUCTION NO. _____

Every citizen has the constitutional right not to testify. Even though the defendant has been found guilty of Murder in the First Degree, he retains his constitutional right not to testify and chose not to testify. You shall not draw any negative inference from this choice. You shall not allow this choice to prejudice him in any way. His decision not to testify cannot be used as a reason to find an aggravating factor proven beyond a reasonable doubt.

Defense Comments:

This is similar to a defense-proposed instruction, but the defense prefers its own proposed language. The defense will make a further record on this at the charging conference if necessary.

FIRST PHASE FINAL INSTRUCTION NO. _____

Concerning the aggravating factors certain words or phrases have a particular meaning.

The following are the definitions of these words or phrases:

A person acts "with intent" or "intentionally" when the person's conscious objective is to cause the specific result proscribed by the statute defining the offense. It is immaterial to the issue of intent whether or not the result actually occurred.

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 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.

Defense Comments:

The defense proposed an identical instruction and does not object.

FIRST PHASE FINAL INSTRUCTION NO. _____

At this phase of the sentencing hearing, for each count of Murder in the First Degree of which the defendant was convicted, you must determine whether the prosecution has proven the existence of at least one aggravating factors beyond a reasonable doubt. On this particular issue, the prosecution has the burden of proof. The elements of the aggravating factors alleged by the prosecution in this case consist of the following:

Aggravating Factor No. 1 – Killed Two Or More People.

- (a) The defendant,
- (b) unlawfully and intentionally, knowingly, or with universal malice manifesting extreme indifference to the value of human life generally, killed two or more people during the commission of the same criminal episode.

Aggravating Factor No. 2 – Intentionally Killed Child Under 12 Years Of Age

- (c) The defendant,
- (d) intentionally killed a child who had not yet attained twelve years of age.

Aggravating Factor No. 3 – Grave Risk Of Death To Person Other Than Victim

- (a) The defendant,
- (b) in the commission of the offense of murder in the first degree knowingly created a grave risk of death to another person in addition to the victim of the offense.

Aggravating Factor No. 4 – Especially Heinous, Cruel, Or Depraved Manner

- a) The defendant,
- b) committed the offense of murder in the first degree in an especially heinous, cruel, or depraved manner.

Aggravating Factor No. 5 – Lying In Wait Or Ambush

- a) The defendant,
- b) committed the offense of murder in the first degree while lying in wait or from ambush.

If you find from the evidence that the prosecution has proven each and every element of an aggravating factor beyond a reasonable doubt, you will find that the aggravating factor has been proven.

If you find from the evidence that the prosecution has failed to prove beyond a reasonable doubt that any one or more of the elements of an aggravating factor exist, you will find that the aggravating factor has not been proven.

Defense Comments:

The defense objects to this instruction and asks that its proposed elemental instruction on aggravators be given instead. *See* defense tendered instructions 52 through 56. The prosecution's instruction above combines several elements into one element for a number of the aggravating factors.

In addition, the defense requests that the proposed language contained at the end of each of its elemental instructions on the aggravators be given.

Finally, the defense believes that the additional definitional language it submitted on the heinous, cruel or depraved aggravator in defense tendered instruction 54 must be given with the aggravator because the aggravator is unconstitutionally vague without this language.

The defense will make additional argument on this instruction at the charging conference.

FIRST PHASE FINAL INSTRUCTION NO. _____

You shall presume that each aggravating factor(s) does not exist unless you unanimously agree that each and every element of the aggravating factor(s) has been proven beyond a reasonable doubt. The burden of proof is upon the prosecution to prove to your satisfaction beyond a reasonable doubt the existence of one or more of the aggravating factor(s) listed in these instructions. If the jury does not unanimously find that at least one statutory aggravating factor exists, the sentencing hearing is concluded and the defendant will be sentenced to imprisonment for life without the possibility of parole. If the jury unanimously finds that one or more of the identified statutory aggravating factors has been proven by the prosecution beyond a reasonable doubt, the sentencing hearing will continue into Phase II. A particular aggravating factor is not proven unless each juror agrees that it has been proven beyond a reasonable doubt.

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 sentencing hearing. 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.

Defense Comments:

The defense has no specific comment on this instruction at this time. It is similar to one or more of the defense-proposed instructions.

FIRST PHASE FINAL INSTRUCTION NO. _____

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 the Court is 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.

Defense Comments:

The defense proposed an identical instruction and does not object.

FIRST PHASE FINAL INSTRUCTION NO. _____

At the beginning of the trial, I authorized you to take notes. At that time, I told you not to allow your note-taking to detract from your close attention to the testimony and demeanor of each witness and other evidence received at the sentencing hearing.

You are reminded that, if you took notes, you should rely on your memory as much as possible and not upon notes taken by you or another juror. You are not bound by any notes taken by other jurors or yourself.

Defense Comments:

The defense does not object to this instruction.

FIRST PHASE FINAL INSTRUCTION NO. _____

You are reminded that any media coverage of this case must be completely disregarded by you. Your decision in this case must be made solely on the evidence presented and the law that you receive in these instructions. You cannot and should not consider any outside sources in reaching your decision about whether or not the prosecution has proven one or more of the aggravating factors beyond a reasonable doubt.

Defense Comments:

The defense has no specific objection to this instruction, but believes the admonishments the Court has been giving to the jurors throughout this trial more thoroughly convey the concepts covered in this instruction.

FIRST PHASE FINAL INSTRUCTION NO. ____

In your evaluation of the evidence and issues you are to decide at this phase, you must not consider the race, gender, or sexual orientation of the defendant or of any of the victims.

Defense Comments:

The defense will state its position on this instruction at the charging conference.

FIRST PHASE FINAL INSTRUCTION NO. _____

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.

Defense Comments:

The defense has no specific objection to this instruction, but is unsure whether it needs to be given.

FIRST PHASE FINAL INSTRUCTION NO. _____

After the closing argument, the bailiff will escort you to the jury room. Your Foreperson will preside over your deliberations and the Foreperson shall sign the Aggravating Factor Verdict Form reflecting whatever decisions you reach. The decisions must represent the considered judgment of each juror. To find that an aggravating factor has been proven beyond a reasonable doubt, it is necessary that each and every juror agree to it, that is, the decision must be unanimous.

You will be given one Aggravating Factor Verdict Form. The Aggravating Factor Verdict Form shall be completed in the manner that reflects your decisions and shall be signed by the Foreperson as indicated. The Aggravating Factor Verdict Form and these instructions shall remain in the possession of your Foreperson until such time when they are called for in open court. Upon reaching your aggravating factor decisions, you will inform the bailiff of this Court, who in turn will notify the Court, and you will remain in your jury room until called into the courtroom.

The Foreperson shall complete the Aggravating Factor Verdict Form in the manner that reflects your decisions and the Foreperson shall sign them as the Court has stated. The original instructions and the Aggravating Factor Verdict Form shall be returned with no other markings on them other than the signature of the Foreperson. You are further instructed that no inferences are to be drawn from the order in which the court reads the Aggravating Factor Verdict Form.

I will now read the Aggravating Factor Verdict Form you will receive.

Defense Comments:

This instruction is not accurate in that the jury should be given twelve separate aggravating factor verdict forms, one for each conviction of first-degree murder.

In addition, the defense objects to the verdict forms submitted by the prosecution because the prosecution has submitted a verdict form for each of the 24 counts of first-degree murder Mr. Holmes was convicted of, rather than one verdict form for each first-degree murder *conviction*.

PHASE ONE FINAL INSTRUCTION NO. ____

Members of the jury, you may discuss this case and deliberate only after the presentation of evidence and/or information is completed and you have received all of the legal instructions that you must follow, heard closing arguments and you are all present. No juror should attempt to discuss this case with other jurors or anyone else at any other time except when all twelve jurors are in the jury room.

It is your duty as jurors to consult with one another and to deliberate. However, each of you must individually decide the issues for yourself after discussion and consideration of the evidence and/or information with your fellow jurors.

Defense Comments:

The defense submitted a similar instruction and does not object.

PHASE ONE FINAL INSTRUCTION NO. ____

You must give careful and thorough consideration to all the evidence you have seen and heard during the entire course of the guilt trial and sentencing hearing. It is your obligation to strictly follow the applicable law.

Counsel may quite properly refer to some of the governing rules of law in their arguments. If, however, any difference appears to you between the law as stated by the Court in these instructions and what counsel has said, you are to be governed by my instructions. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

I will instruct you on the principles that will govern your deliberations during this phase. In explaining your duties, I must refer to many matters that you may not ever need to reach. I must give you as complete an explanation as possible concerning the legal matters that must govern your deliberations. The legal instructions you are about to receive are not intended as an expression of any opinion or desire concerning the result you should reach.

Defense Comments:

The defense objects to this instruction because, pursuant to the Fifth, Eighth, and Fourteenth Amendments, Colo. Const. art. II, secs. 18, 20, and 25, and C.R.S. § 16-8-107, the jury is prohibited from considering evidence introduced at the merits phase of the trial on the issues raised by Mr. Holmes's plea of not guilty by reason of insanity in support of aggravation.

PHASE ONE FINAL INSTRUCTION NO. ____

You are instructed that the fact that the death penalty is sought in this case should not be considered by any juror and is entitled to no weight whatsoever in your decisions. No juror should allow himself or herself to be influenced or prejudiced against the defendant because of the fact that the death penalty is being sought by the prosecution.

Defense Comments:

This instruction is repetitive of an earlier instruction.

**PHASE TWO INTRODUCTORY
INSTRUCTIONS**

PHASE TWO INTRODUCTORY INSTRUCTION NO. _____

Members of the jury, it now becomes your duty at this Phase II to determine first, if mitigating factors exist and then, second, if you find mitigating factors, whether the mitigating factors do not outweigh the aggravating factors that you found to exist beyond a reasonable doubt in the first phase of this sentencing hearing. Even though you have found the existence of one or more aggravating factors, a death sentence is still never mandatory or required by law. In other words, questions still remain unresolved. You must approach each phase of the sentencing hearing with an open mind. Remember, you must make an individual determination for each count for which the defendant was convicted of Murder in the First Degree.

Before we continue with the sentencing hearing, I would like to provide you an overview of what occurs at this Phase II of the sentencing hearing. In Phase II, the defendant may, but is not required to, present mitigation. Mitigation is a fact or circumstance that might cause a juror to impose a sentence of life imprisonment without parole. If the defendant presents mitigation evidence, the prosecution will then have the opportunity to rebut the mitigation presented. When the opportunity for mitigation and rebuttal is completed, each juror must independently decide for himself or herself what, if any, mitigation exists based upon evidence presented during the guilt trial, and/or based upon mitigation presented during the sentencing hearing.

The decision regarding mitigation is not a collective jury decision, but rather an individual juror decision. Each juror is free to decide for himself or herself the existence or non-existence of any mitigating factor or circumstance.

Once mitigation has been presented and the prosecution has been allowed to present rebuttal evidence, the jury must next engage in a weighing process. This involves each individual

juror weighing any mitigation that he or she determined exists against the aggravating factors that were unanimously found to have been proven by the prosecution beyond a reasonable doubt in phase I. If one or more of the jurors is satisfied that the mitigation outweighs the aggravating factors, the sentencing hearing stops and the defendant will be sentenced to imprisonment for life without the possibility of parole. The jury only moves on to Phase III if every juror is individually convinced beyond a reasonable doubt that the mitigation does not outweigh the aggravating factors. The degree of certainty that is defined as beyond a reasonable doubt does not involve a burden of proof on either side in Phase II. Rather, it is a standard of moral certainty that each individual juror is required to have before deciding whether mitigation does not outweigh any proven aggravating factors.

In reaching your decisions during Phase II, you must not be influenced by prejudice or bias of any sort against the defendant. You must treat him as a uniquely individual human being, and you must not consider any public opinion or community sentiment for or against the defendant. A juror must use his/her individual reasoned moral judgment during Phase II of the sentencing proceedings. Each juror may consider mercy for the defendant during Phase II, but mercy must be based upon evidence and/or information you have received during the guilt trial and/or the sentencing hearing, and reflect an individual reasoned moral response to the defendant's background, character, history and crime.

The law requires that your decisions not be the result of mere sympathy, passion, bias, prejudice, conjecture or any other irrational or arbitrary emotional response.

Any decisions concerning the existence of mitigation and the weighing of mitigating factors against aggravating factors must be reserved until the evidence is completed and you have received all of the legal instructions that you must follow. It is your sworn obligation to not

look ahead to a different phase of the hearing, but to withhold any judgment and decline to form any opinion until after you have heard the evidence and been instructed on the applicable law.

Further instructions will be provided to you at the close of evidence and/or information presented in Phase II.

Defense Comments:

The defense has submitted introductory instructions (defense tendered instruction 67 and 68) that covers many of the same topics covered above. The defense believes its tendered instructions more accurately and fully address the relevant legal concepts and requests that its instructions be given in lieu of the prosecution's above-tendered instruction. The defense has several issues with the instruction above.

The prosecution's description of mitigation in Phase Two is inadequate. The defense will make an additional record at the charging conference about why the proposed language describing mitigation in the defense's proposed instruction on this issue is constitutionally required.

Additionally, the prosecution's description of Phase Two does not include the defense's proposed language indicating at the end of each phase that the law is fully satisfied regardless of the verdicts. The defense will make an additional record at the charging conference about why that language is constitutionally required.

The following statement does not comport with *People v. Tenneson*, 788 P.2d 786 (Colo. 1990): "If one or more of the jurors is satisfied that the mitigation outweighs the aggravating factors, the sentencing hearing stops and the defendant will be sentenced to imprisonment for life without the possibility of parole."

The defense's proposed language on this issue (in its introductory instruction on Phase Two) complies with *Tenneson* and should be given instead: "The sentencing trial only moves on to Phase Three if every juror is individually convinced beyond a reasonable doubt that the mitigating factors *do not* outweigh the proven aggravating factors. If one or more jurors are not convinced, the sentencing hearing stops and Mr. Holmes will be sentenced to life imprisonment without the possibility of parole."

The defense objects to the portion of the prosecution's tendered instruction prohibiting the jurors from basing their decision on "mere sympathy" at Phase Two, because sympathy for Mr. Holmes is a constitutionally appropriate consideration for the jury.

The defense will make an additional record about this instruction at the charging conference if necessary.

PHASE TWO INTRODUCTORY INSTRUCTION NO. ____

In determining whether mitigation exists, there is no assigned burden of proof on the defendant or on the prosecution.

There is also no assigned burden of proof on any party during the weighing process of phase two. However, the reasonable doubt standard applies during the weighing process. The standard beyond a reasonable doubt during the weighing process is the level of certainty that each juror must possess in making the determinations.

Reasonable doubt when used as a level of certainty in phase two of the sentencing hearing 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 sentencing hearing. 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.

Defense Comments:

The defense maintains its position regarding the burden of proof articulated in the argument contained in defense tendered instruction 68.

The defense will make an additional record regarding this instruction at the charging conference if necessary.

PHASE TWO INTRODUCTORY INSTRUCTION NO. _____

The defendant may present evidence or information on his own behalf, but he is not required to do so. The defendant is never under an obligation to present any evidence or information nor does he have the burden to prove or disprove anything during the sentencing hearing.

You may only consider the aggravating factors from your verdict at the first phase. You may not consider any other evidence on the side of aggravating factors in the weighing process.

Defense Comments:

The defense does not have a specific objection to this instruction, but believes these topics are adequately covered in its tendered instructions 67 and 68.