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District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	Filed JUL 24 2015 CLERK OF THE COMBINED COURTS ARAPAHOE COUNTY COLORADO ♦ COURT USE ONLY ♦
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	Case No. 12CR1522 Division 201
DEFENDANT'S SUBMISSION OF PROPOSED PENALTY PHASE INSTRUCTIONS FOR PENALTY PHASES TWO (FINAL) AND THREE (INTRODUCTORY AND FINAL) [D-297]	

James Holmes submits the attached proposed penalty phase jury instructions. 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. For purposes of the record, the defense has attached as Exhibit A defense proposed instruction 38, which was tendered in open court on Thursday, July 16, 2015 when the jury returned its merits phase verdicts.
2. Next, the defense has attached its proposed final penalty phase instructions for Phase Two as well as its proposed introductory and final instructions for Phase Three as "Exhibit B" and "Exhibit C" to this document. Both sets of proposed instructions also include sample verdict forms.
3. 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, including but not limited to a theory of mitigation instruction after the conclusion of Phase Two.
4. The defense has also attached a CD to this pleading containing a Word version of the submitted instructions (Exhibits A, B, and C). A copy of this disc has also been provided to the prosecution.
5. In addition, the defense has submitted some comments regarding the prosecution's proposed final instructions for Phase Two and introductory and final instructions

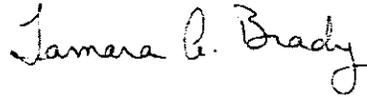
for Phase Three attached to this document as "Exhibit D." These comments are intended to provide the Court with a general overview of the defense's position on these instructions, and are not meant to be a complete and comprehensive set of objections to these instructions. Counsel reserve the right to make additional arguments and objections to the prosecution's proposed instructions at the upcoming charging conferences.

6. 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 files this motion, and makes all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, on the following grounds and authorities: the Due Process Clause, the Right to a Fair Trial by an Impartial Jury, the Rights to Counsel, Equal Protection, Confrontation, and Compulsory Process, the Rights to Remain Silent and to Appeal, and the Right to be Free from Cruel and Unusual Punishment, pursuant to the Federal and Colorado Constitutions generally, and specifically, the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitutions, and Article II, sections 3, 6, 7, 10, 11, 16, 18, 20, 23, 25 and 28 of the Colorado Constitution.



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Dated: July 24, 2015

I hereby certify that on July 24, 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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Nova Schubert

D-297

EXHIBIT A

(Defense Tendered Instruction 38)

Defendant's Proposed Jury Instruction No. 38

(To be given immediately after jurors are polled regarding verdict, and before recess of proceedings that precedes sentencing phase.)

We are now done with the first trial. We will take a recess before we begin the second trial, during which you will determine the sentence that will be imposed on Mr. Holmes. You are instructed that you are still jurors in this case and have not been discharged. We will reconvene on _____. In the meantime, do not discuss the case with anyone or permit anyone to discuss the case with you. Do not read anything about the trial.

At this time, you should not be giving thought or consideration to the penalty to be imposed in this case. Do not form opinions about the upcoming sentencing trial. When we reconvene, you will receive additional evidence to consider and instructions on the law that you must follow in deciding the penalty. Any decision regarding penalty must be reserved until the evidence is completed and you have received the legal instructions that you must follow.

You are reminded that regardless of your verdict at the first trial, no juror is ever required to sentence a defendant to death.

If any juror has, at this time, discussed or formed an opinion regarding what penalty should be imposed, or if any juror knows of another juror who has done so, please notify the bailiff.

Supporting Arguments and Authorities:

See e.g., Dunlap v. People, 173 P.3d 1054, 1087 (Colo. 2007) (no error in "guilt phase" instruction no. 1 advising jurors that, when determining whether Dunlap was guilty of the crimes charged, they were not to consider the issue of punishment). *See also* Motion D-149, p. 43, and authorities cited therein ("Nearly half (49.2%) of all capital jurors make their sentencing decision before the penalty phase begins. These jurors feel strongly about their decision. And they do not waver from it over the course of the trial."). One of the most predominant, and disturbing, findings of the Capital Jury Project was premature decision-making by jurors in capital cases. An instruction that the jury should not be giving thought or consideration to the penalty during the recess is thus necessary to preserve Mr. Holmes's constitutional right to a fair and impartial sentencing jury and to a reliable sentencing decision. *See also Gregg v. Georgia*, 428 U.S. 153, 162-68 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 298-99 (1976); *Lockett v. Ohio*, 438 U.S. 586, 599-600 (1978).

U.S. Const. amends. V, VI, VIII, XIV; Colo. Const. art. II, secs. 16, 20, 23, 25.

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EXHIBIT B

**(Defense's Proposed Penalty Phase Instructions – Phase Two Final
Instructions)**

Defendant's Proposed Jury Instruction No. 69

(Penalty Phase Two – Final Instructions)

Members of the jury, the evidence in Phase Two of the sentencing hearing has been completed. In a moment, I will read 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.

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 duty as the judge to decide what rules of law apply to the case. While the lawyers may have commented during the sentencing trial 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 rule describes all of the law which must be applied. Therefore, the rules must be considered together as a whole by you.

At times during this phase of the sentencing trial, 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 trial which were not directed to you should not be considered by you in making your decision. Nothing I have said during this sentencing trial should be understood by you as suggesting any opinion or feeling on my part about what has or has not been proven. Nothing I have said during this second phase of the sentencing trial should be understood by you as suggesting any opinion or feeling on my part about what decisions you should reach.

The outcome of your decisions during Phase Two of this sentencing trial are not dictated by law – each of you will be making decisions at this phase of the sentencing trial based upon your individual reasoned moral judgment. This decision is separate and

distinct from all the decisions you made previously – and none of those earlier decisions dictate what the result will be now.

Source:

Based on COLJI-Crim. No. E:01 (2014) & COLJI-Crim. No. B:06 (2014)

Defendant's Proposed Jury Instruction No. 70

(Penalty Phase Two – 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 or Two 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.

Source:

See e.g. Carter v. Kentucky, 450 U.S. 288 (1981); *Estelle v. Smith*, 451 U. S. 454 (1981); U.S. Const. V, XIV; Colo. Const. art. II, sec. 18.

Based on COLJI-Crim. No. E:07 (2014)

Defendant's Proposed Jury Instruction No. 71

(Penalty Phase Two – Final Instructions)

When you retire to deliberate, you first decide what mitigation exists. Mitigation is anything which suggests a reason for not imposing a death sentence. Mitigation is not a justification or excuse for the crime. Mitigation is anything about a person or an offense that weigh in favor of a life sentence rather than a death sentence for any one or more jurors. Mitigating factors 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. Each juror has the responsibility and authority to decide for himself or herself what constitutes a mitigating circumstance and to attach whatever significance to that circumstance he or she feels is appropriate. 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. However, factors in mitigation are not restricted to the events or circumstances related to the crime. Mitigation is not limited to evidence presented by the defense, but can come from any source. Any juror may find any fact or any circumstance mitigating, even if it has not been specifically called to your attention by the parties. Any list of mitigating factors provided in these instructions cannot and does not limit your deliberations, since you are free to consider any aspect of this case or Mr. Holmes's life as mitigating.

You may not in any fashion consider mitigating factors as aggravation or reasons in favor of a death sentence.

Supporting Argument and Authority:

“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.’”)

Zant v. Stephens, 462 U.S. 862, 885 (1983) (upholding Georgia's capital sentencing scheme and noting that Georgia has not “attached the ‘aggravating’ label to . . . conduct that actually should militate in favor of a lesser penalty, such as perhaps the

defendant's mental illness. Cf. *Miller v. Florida*, 373 So.2d 882, 885–886 (Fla.1979). If the aggravating circumstance at issue in this case had been invalid for reasons such as these, due process of law would require that the jury's decision to impose death be set aside.”)

C.R.S. § 18-1.3-1201(1)(b)

Defendant's Proposed Jury Instruction No. 72

(Penalty Phase Two – Final Instructions)

You are instructed that during Phase Two, you can consider the evidence that was admitted at trial for the limited purpose of considering the issues raised by Mr. Holmes's plea of not guilty by reason of insanity for purposes of mitigation. However, you may not consider this evidence as aggravation or reasons in favor of a death sentence.

Supporting Arguments and Authorities:

C.R.S. § 16-8-107(1)(b) & (1.5)(b)

Mr. Holmes maintains that allowing the jury to consider evidence acquired directly or indirectly for the first time from a communication derived from his mental processes during the course of a court-ordered examination pursuant to C.R.S. § 16-8-106 or acquired pursuant to C.R.S. § 16-8-103.6 as rebuttal to mitigation violates his state and federal constitutional rights. *See, e.g.*, Motions D-32, D-187, D-248, D-264a. Mr. Holmes submits this instruction in light of the Court's rulings on those motions. Mr. Holmes in no way waives any arguments he made in those motions by submitting this proposed instruction.

Defendant's Proposed Jury Instruction No. 73**

(Penalty Phase Two – Final Instructions)

***The defense will submit a theory of mitigation instruction after the close of Phase Two evidence.*

Defendant's Proposed Jury Instruction No. 74

(Penalty Phase Two – Final Instructions)

The mitigating factors that I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death sentence in this case. You should pay careful attention to each of those factors, but you should not limit your consideration of mitigation to these specific factors.

Each individual juror may consider as mitigation any evidence or information he or she finds to have mitigating value, or that warrants a sentence less than death, even if the evidence has not been specifically presented or argued to you as mitigation.

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.’”)

Defendant's Proposed Jury Instruction No. 75

(Penalty Phase Two – Final Instructions)

Each juror during this phase must independently decide for him or herself whether mitigation exists. This is an individual decision, not a group decision. In contrast to the decision you make regarding aggravating factors, you are not required to reach a unanimous decision as to the existence of any particular mitigation before you may consider it. You are not required to take the decisions, feelings, or opinions of other jurors into account, although you may do so if you wish.

Each individual juror must use his or her own personal discretion, life experiences, and moral judgment, to determine what mitigation exists for himself or herself. If there is any evidence of any mitigation in a juror's opinion, that juror must consider that mitigation. There is no burden on Mr. Holmes to prove the existence of any mitigation to any degree of certainty.

No juror is required to explain the mitigation he or she has found to exist unless he or she chooses to do so.

Sources:

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

It is unconstitutional to require juror unanimity on mitigating factors. *McKoy v. North Carolina*, 494 U.S. 433 (1990); *see also Mills v. Maryland*, 486 U.S. 367 (1988).

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

"The trial court properly instructed the 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.'" *People v. Rodriguez*, 914 P.2d 230, 250, n. 12 (Colo. 1996) ("*Rodriguez V*")

McKoy v. North Carolina, 494 U.S. 433 (1990) & *Mills v. Maryland*, 486 U.S. 367, 384 (1988) (requiring unanimity from jurors with respect to mitigating factors violates the Eighth Amendment)

Defendant's Proposed Jury Instruction No. 76

(Penalty Phase Two – Final Instructions)

During Phase Two, each juror must weigh the mitigation he or she has found to exist against the aggravating factors the jury unanimously found to have been proven beyond a reasonable doubt during Phase One of the sentencing trial.

Although you were required to unanimously agree on whether any of the statutory aggravating factors were proven beyond a reasonable doubt, each of you must decide individually, for yourself, what weight, if any, to give any aggravating factor that you have found to exist.

The only aggravating factors any of you may consider during this phase of your deliberations are the aggravating factors that you unanimously found to exist beyond a reasonable doubt during Phase One of the sentencing hearing. The fact that you have found Mr. Holmes guilty beyond a reasonable doubt of first-degree murder is not an aggravating factor.

This weighing process is not a mere counting process. The number of factors is not the only criteria you use in the weighing process. You should not merely count up the number of aggravating factors and compare that to the number of mitigating factors. The number of factors found to exist is not determinative. Nor should you merely assign arbitrary values to the aggravating and mitigating factors and subtract one value from another. Your decision should not be mechanical or mathematical. Instead, you should attempt to arrive at a reasoned moral judgment as to whether you have been convinced beyond a reasonable doubt that the mitigating factors do not outweigh the aggravating factor or factors with respect to each conviction.

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. A juror is never required to articulate, explain, or justify the weight that the juror assigns to any aggravating or mitigating factors. You do not have to take the decisions, opinions or feelings of any other juror into account, although you may do so if you wish. It is not necessary that any of you be able to express in words the value you attach to any factor during the weighing process.

In weighing the mitigating factors and the aggravating factors, each juror may emphasize any factor more than another, giving each factor as little or as much weight as the juror deems appropriate. When a juror has determined that a mitigating factor exists, the juror may give it any weight that he or she chooses, but 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. This weighing process is conducted individually and each juror must conduct this weighing process in accordance with his or her own reasoned moral judgment.

Source:

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)

Mills v. Maryland, 486 U.S. 367 (1988) (same)

Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (“Thus, the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant’s background, character, and crime.” (quoting *California v. Brown*, 479 U.S. 538, 545 (1987))).

“Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence The sentence, and the Court of Criminal Appeals on review, may determine the weight to be given relative mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.” *Eddings v. Oklahoma*, 455 U.S. 104, 113-15 (1982).

“Moreover, *Eddings* makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence Only then can we be sure that the sentencer has treated the defendant as a ‘uniquely individual human being’ and has made a reliable determination that death is the appropriate sentence.” *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989).

“*Penry I* did not hold that the mere mention of ‘mitigating circumstances’ to a capital sentencing jury satisfies the Eighth Amendment. Nor does it stand for the proposition that it is constitutionally sufficient to inform the jury that it may ‘consider’ mitigating circumstances in deciding the appropriate sentence. Rather, the key under *Penry I* is that the jury be able to ‘consider and give effect to [a defendant’s mitigating] evidence in imposing sentence.’” *Penry v. Johnson*, 532 U.S. 782, 797 (2001) (“*Penry II*”).

“We have held that in capital cases, “ ‘the sentencer’ ” may not refuse to consider or “ ‘be precluded from considering’ ” any relevant mitigating evidence.” *Hitchcock v. Dugger*, 481 U.S. 393, 394 (1987).

“The trial court’s statement that the jury ‘as a group’ weighs and balances the aggravating and mitigating factors was incorrect. *See People v. Tenneson*, 788 P.2d 786, 791 (Colo.1990) (“The determination whether any mitigating factors outweigh the statutory aggravating factors, therefore, requires *each juror* to make a judgment”) (emphasis added).” *Dunlap v. People*, 173 P.3d 1054, 1083 (Colo. 2007)

Defendant's Proposed Jury Instruction No. 77

(Penalty Phase Two – Final Instructions)

The sentencing hearing 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.

Source:

C.R.S. § 18-1.3-1201(2)(b)(II), (d)

Defendant's Proposed Jury Instruction No. 78

(Penalty Phase Two – Final Instructions)

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

Source:

COLJI-Crim. No. E:03 (2014) (paragraph on reasonable doubt)

Defendant's Proposed Jury Instruction No. 79

(Penalty Phase Two – Final Instructions)

If any one of you has a reasonable doubt whether the mitigating factors do not outweigh the proven statutory aggravating factors, Mr. Holmes will be sentenced to life in prison without the possibility of parole. Each individual juror has the authority and power to stop the deliberations at this point and, by their decision, require imposition of a life sentence. You do not have to take into account the decisions, opinions or feelings of any other juror in this process, although you may do so if you wish. However, the ultimate decision must be your own, individual decision.

If you are unable to unanimously agree, your foreperson should complete the appropriate portion of the verdict form and you should notify the bailiff that you have reached a verdict. In that situation, Mr. Holmes will be sentenced to life in prison without the possibility of parole.

Supporting Arguments and Authorities:

“Colorado’s death sentencing statute must be construed in light of the strong concern for reliability of any sentence of death. We are persuaded, therefore, that the statute must be interpreted to require that in order to support the imposition of the death penalty, *each juror* must be convinced that the mitigating factors, if any, do not weigh more heavily in the balance than the proven statutory aggravating factors. An instruction to the jury that they must be convinced beyond a reasonable doubt that any mitigating factors do not outweigh the proven statutory aggravating factors before a sentence of death can be imposed adequately and appropriately communicates the degree of reliability that must inhere in the balancing process.” *People v. Tenneson*, 788 P.2d 786, 792 (Colo. 1990) (emphasis added).

“The trial court’s statement that the jury ‘as a group’ weighs and balances the aggravating and mitigating factors was incorrect. *See People v. Tenneson*, 788 P.2d 786, 791 (Colo.1990) (“The determination whether any mitigating factors outweigh the statutory aggravating factors, therefore, requires *each juror* to make a judgment”) (emphasis added).” *Dunlap v. People*, 173 P.3d 1054, 1083 (Colo. 2007)

“Colorado has tailored its four-step death penalty process to center on the proposition that any individual juror may ultimately trigger life imprisonment by not agreeing to a death penalty verdict In reaching its ultimate verdict, the jury may consider all the evidence introduced at trial, as well as the defendant’s statement in allocution. Any one juror, by holding out against a unanimous verdict of death, can

require imposition of life imprisonment without parole.” *People v. Harlan*, 109 P.3d 616, 630 (Colo. 2005).

C.R.S. § 18-1.3-1201(1)(d)

Defendant's Proposed Jury Instruction No. 80

(Penalty Phase Two – Final Instructions)

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.

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.”)

C.R.S. § 18-1.3-1201(1)(b)

Defendant's Proposed Jury Instruction No. 81

(Penalty Phase Two – Final Instructions)

Your starting point during your Phase Two deliberations must be that the mitigating factors outweigh the statutory aggravating factor or factors. You must give this presumption effect unless and until you are convinced beyond a reasonable doubt that the mitigating factors do not, in fact, outweigh any aggravating factors.

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. 82

(Penalty Phase Two – Final Instructions)

Even though Mr. Holmes has presented evidence during this phase of the sentencing trial, you are reminded that the defendant does not have any burden to prove anything to you or convince you of anything in this case, including regarding the finding of mitigation or the outcome of the weighing process.

Supporting Authorities and Argument:

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.”)

Defendant's Proposed Jury Instruction No. 83

(Penalty Phase Two – Final Instructions)

In reaching your decisions during Phase 2, you are instructed that you may consider mercy or sympathy for James Holmes in this case. You must treat him as a uniquely individual human being.

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

You must not consider or be influenced by any prejudice or bias of any sort against Mr. Holmes. You must not be influenced by public opinion of any sort against Mr. Holmes. Similarly, you must not be influenced by any sort of sympathy for the victims.

Source:

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.”)

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 or prejudice or any other arbitrary factor...”).

Defendant's Proposed Jury Instruction No. 84

(Penalty Phase Two – Final Instructions)

The decisions you are to make concerning the life or death of another person are the most important and serious decisions that you will ever be asked to make. Each of you must fully appreciate your obligation to carefully and fairly consider the choices you have been called upon to make. Each of you must fully appreciate that the life of another person, James Holmes, rests solely in your hands.

Supporting Arguments and Authorities:

Gardner v. Florida, 430 U.S. 349, 357-358 (1977):

“[D]eath is a different kind of punishment from any other which may be imposed in this country. . . . From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.”

See also, Thompson v. Oklahoma, 487 U.S. 815 (1988). Justice O'Connor concurring in judgment:

Under the Eighth Amendment, the death penalty has been treated differently from all other punishments. . . . Among the most important and consistent themes in this Court's death penalty jurisprudence is the need for special care and deliberation in decisions that may lead to the imposition of that sanction. The Court has accordingly imposed a series of unique substantive and procedural restrictions designed to ensure that capital punishment is not imposed without the serious and calm reflection that ought to precede any decision of such gravity and finality.

. . . [S]ee also *Strickland v. Washington*, 466 U.S. 668, 704 . . . (Brennan, J., concurring in part and dissenting in part) (capital sentencing proceedings must be policed at all stages by an especially vigilant concern for procedural fairness and accurate fact-finding.)

See also Mills v. Maryland, 486 U.S. 367, 376 (1988) (“[I]n reviewing death sentences, the Court has demanded even greater certainty [than in other criminal cases] that the jury’s conclusion rested on proper grounds.”); *California v. Ramos*, 463 U.S. 993, 998-99 (1983) (qualitative difference of death from all other punishments “requires a correspondingly greater degree of scrutiny of the capital sentencing determination”); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (qualitative difference between death and other penalties “calls for a greater degree of reliability when the death sentence is imposed”); *Caldwell v. Mississippi*, 472 U.S. 320, 329-30 (1985) (“[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant’s death rests elsewhere.”); *People v. Tenneson*, 788 P.2d 786, 791-92 (Colo. 1990), *People v. Rodriguez*, 786 P.2d 1079, 1082 (Colo. 1989); *People v. Young*, 814 P.2d 834 (Colo. 1991); *People v. Rodriguez*, 794 P.2d 965, 972 (Colo. 1990); *People v. White*, 870 P.2d 424 (Colo. 1994) (“Colorado’s death sentencing statute must be construed in light of the strong concern for reliability of any sentence of death.”)

Defendant's Proposed Jury Instruction No. 85

(Penalty Phase Two – 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. 86

(Penalty Phase Two – 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. 87

(Penalty Phase Two – 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 Phase Two verdict form reflecting whatever decisions you reach. The decisions must represent the considered judgment of each juror.

You will be given twelve separate Phase Two 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 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 Phase Two decision, 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.

I will now read the Phase Two 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	♦ COURT USE ONLY ♦ Case No. 12CR1522
	Division 201
SENTENCING PHASE TWO VERDICT FORM FIRST-DEGREE MURDER CONVICTION FOR JONATHAN BLUNK	

Does the jury unanimously agree beyond a reasonable doubt that the mitigating factor(s) do not outweigh any aggravating factor(s) found to exist in phase I?

Yes*

No**

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

 FOREPERSON

* If your answer is YES, the sentencing hearing will proceed to Phase Three.

** If any one or more of the jurors answer is NO, you have completed your deliberations and the defendant will be sentenced to life imprisonment without parole for this conviction.

D-297

EXHIBIT C

**(Defense's Proposed Penalty Phase Instructions – Phase Three
Introductory & Final Instructions)**

Introductory Jury Instructions – Phase Three

Defendant's Proposed Jury Instruction No. 88

(Penalty Phase Three – Introductory Instructions)

Members of the jury, it now becomes your duty to determine what punishment should be imposed in this case.

Your verdicts in the trial and in the first and second phases of this sentencing hearing do not in any way require you to vote to impose the sentence of death. This third phase is entirely separate and independent of the other two phases in this proceeding. A death sentence is still never mandatory or required by law. In other words, the question of punishment still remains unresolved.

Source:

“[W]e believe the jury should be specifically instructed that the outcome of the balancing process required in step three does not govern the ultimate determination that the jury must make in step four as to whether the defendant should be sentenced to life imprisonment or to death.”

People v. Tenneson, 788 P.2d 786, 796 (Colo. 1990)

Defendant's Proposed Jury Instruction No. 89
(Penalty Phase Three – Introductory Instructions)

During this phase of the sentencing trial, you may hear additional evidence from the prosecution and/or the defense. At the conclusion of this phase, each of you will be asked to individually decide whether, in light of your own personal morality and personal, moral judgment, you are convinced beyond a reasonable doubt that Mr. Holmes should be sentenced to death. No juror may make such a decision 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 decision at this phase 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 may Mr. Holmes be sentenced to death and executed by the State of Colorado.

Source:

“[It is] important that the jurors understand that the fourth step is separate and independent and requires that their ultimate conclusion that death is the appropriate penalty be reached only if they possess the degree of certainty that is communicated by the standard of beyond a reasonable doubt.”

People v. Tenneson, 788 P.2d 786, 796 (Colo. 1990)

Note: 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.

Defendant's Proposed Jury Instruction No. 90

(Penalty Phase Three – Introductory Instructions)

Mr. Holmes may present evidence and information on his own behalf during this phase of the sentencing proceeding, 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.

Defendant's Proposed Jury Instruction No. 91
(Penalty Phase Three – Introductory Instructions)

During this phase, you may hear evidence that is known as victim impact evidence. This evidence has been introduced to show the effects of a victim's death on the members of the victim's immediate family. This evidence is simply another method of informing you about the specific harm caused by the crime in question.

Victim impact evidence is not the same as an aggravating circumstance. Proof of an adverse impact on the victim's family is not proof of an aggravating circumstance. You may consider this evidence in determining an appropriate punishment. However, your consideration must be limited to a moral inquiry into the culpability of the defendant, not an emotional response to the evidence.

Source:

Cargle v. State, 909 P.2d 806, 829 (Okla. Crim. App. 1995)

Payne v. Tennessee, 501 U.S. 808, 838 (Souter, J., concurring).

See also Motion D-188, D-188a, D-242, and points and authorities cited therein.

Defendant's Proposed Jury Instruction No. 92

(Penalty Phase Three – Introductory Instructions)

Further instructions will be provided to you at the close of the evidence. Any decision regarding penalty must be reserved until the hearing is completed and you have received the legal instructions you must follow. It is your sworn obligation to withhold any judgment concerning the issues and decline to form any opinion until after you have heard the evidence, been instructed on the applicable law, heard the arguments of counsel and retired to the jury room. Then, and only then, may you begin to deliberate.

Final Jury Instructions – Phase Three

Defendant's Proposed Jury Instruction No. 93

(Penalty Phase Three – Final Instructions)

Members of the jury, the evidence in Phase Three of the sentencing hearing has been completed. In a moment, I will read 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.

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 duty as the judge to decide what rules of law apply to the case. While the lawyers may have commented during the sentencing trial 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 rule describes all of the law which must be applied. Therefore, the rules must be considered together as a whole by you.

At times during this phase of the sentencing trial, 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 trial which were not directed to you should not be considered by you in making your decision. Nothing I have said during this sentencing trial should be understood by you as suggesting any opinion or feeling on my part about what has or has not been proven. Nothing I have said during this second phase of the sentencing trial should be understood by you as suggesting any opinion or feeling on my part about what decisions you should reach.

The outcome of your decisions during Phase Three of this sentencing trial are not dictated by law – each of you will be making decisions at this phase of the sentencing trial based upon your individual reasoned moral judgment. This decision is separate and distinct from all the decisions you made previously – and none of those earlier decisions dictate what the result will be now.

Source:

Based on COLJI-Crim. No. E:01 (2014) & COLJI-Crim. No. B:06 (2014)

Defendant's Proposed Jury Instruction No. 94

(Penalty Phase Three – Final Instructions)

Members of the jury, at this phase in the proceedings, you must now consider whether Mr. Holmes should be sentenced to life in prison without the possibility of parole, or to death. This is a decision left exclusively to each of you. Each one of you must make your own individual moral assessment as to whether Mr. Holmes will be executed or sentenced to imprisonment for life without any possibility of parole.

None of you individually, nor the jury collectively, is ever required to impose a sentence of death. The law never requires a death sentence, not in this case, or in any other case.

Any verdict you return sentencing Mr. Holmes to death must be unanimous. Each one of you must agree to return a verdict of death before you may return such a verdict. If you are not unanimously convinced beyond a reasonable doubt that death is the only appropriate punishment in this case – in other words, if any one of you has a reasonable doubt as to whether death is the appropriate sentence in this case – you must end any deliberations and Mr. Holmes will be sentenced to life imprisonment without parole.

Even if you are convinced that mitigating factors do not outweigh any aggravating factor or factors, or even if you find that there is at least one aggravating factor and no mitigating factors at all, you must still each make a further individual, moral assessment of whether you have been convinced beyond a reasonable doubt that the death penalty, instead of life in prison, is the appropriate punishment for Mr. Holmes in this case. Regardless of the number or nature of the aggravating factors unanimously found by the jury, you may impose a sentence to life imprisonment without the possibility of parole. In other words, your verdicts in the trial and in the first and second phases of this sentencing hearing do not in any way control the outcome of this third phase. The law emphasizes that this third phase is entirely separate and independent of the other two phases in this proceeding. There is never a requirement that you must impose a death sentence in any situation.

There is no requirement that you must agree with any other juror or that you must take the views or opinions of any other juror into account in making a decision that Mr. Holmes receive a life sentence. No juror should ever feel compelled to reach a verdict that is

contrary to that juror's conscientious view of what the sentence should be in the case, just for the sake of reaching a unanimous verdict.

Supporting Arguments and Authorities:

The fourth step, mandated by the pre-1988 statute, required that the jurors continue their deliberations after balancing aggravating and mitigating factors and specifically focus on whether the defendant should be sentenced to death or life imprisonment. § 16-11-103(2)(a)(III) (1986). Only if this further consideration of the defendant's character and crime resulted in a conclusion beyond a reasonable doubt that the defendant should be sentenced to death could such a sentence be returned. *Tenneson*, 786 P.2d at 796. This we considered necessary "to communicate to the jurors the degree of confidence they must have in their ultimate conclusion before they can return a verdict of death." *Id.* This fourth step provided essential assurance, absent from the present sentencing scheme, that the requisite moral evaluation of the defendant's character and crime had been fully performed by *each juror*.

People v. Young, 814 P.2d 834, 844 fn. 8 (Colo.1991) (emphasis added) (holding 1988 version of statute unconstitutional for eliminating the fourth step).

"We noted that 'the question [of] whether death is the appropriate sentence requires a profoundly moral evaluation of the defendant's character and crime.' *Id.* at 791." *People v. White*, 870 P.2d 424, 455 (Colo.1994) (quoting *People v. Tenneson*, 788 P.2d 786, 791 (Colo. 1990))

"[I]n the sentencing phase of a capital case, the jury is not limited to consideration of matters technically defined as evidence. In making the profoundly moral decision of whether to impose a sentence of death, it must consider all the facts and circumstances of the crime, the defendant's background and character and any mitigating factors raised by the defendant. Plainly, the jury's deliberations are not limited to assessing technical evidence." *People v. Davis*, 794 P.2d 159, 192 (Colo. 1990).

It is:

especially important that the jurors understand that the fourth step is separate and independent and requires that their ultimate conclusion that death is the appropriate penalty be reached only if they possess the degree of certainty that is communicated by the standard of beyond a reasonable doubt. For this reason, in addition to the general need to assure that

the jury understands that step four is separate and distinct from step three, we believe the jury should be specifically instructed that the outcome of the balancing process required in step three does not govern the ultimate determination that the jury must make in step four as to whether the defendant should be sentenced to life imprisonment or to death.

People v. Tenneson, 788 P.2d 786, 796 (Colo. 1990) (footnotes omitted).

Dunlap v. People, 173 P.3d 1054, 1090 (Colo. 2007) (“Reading these jury instructions as a whole, the trial court correctly instructed the jury. The instructions repeatedly stated that a death sentence could only be returned if the jury unanimously agreed beyond a reasonable doubt that death was the appropriate penalty. *Furthermore, the jury was instructed that it never had to return the death penalty.*”) (emphasis added).

Harlan instruction No. 18 (“There is never a requirement that you must impose a death sentence in any situation”)

Dunlap instruction No. 24 (“There is never a requirement that you must impose a death sentence in any situation”)

“Colorado has tailored its four-step death penalty process to center on the proposition that any individual juror may ultimately trigger life imprisonment by not agreeing to a death penalty verdict.” *People v. Harlan*, 109 P.3d 616, 630 (Colo. 2005). “In reaching its ultimate verdict, the jury may consider all the evidence introduced at trial, as well as the defendant’s statement in allocution. Any one juror, by holding out against a unanimous verdict of death, can require imposition of life imprisonment without parole.” *Id.*

C.R.S. § 18-1.3-1201(2)(c),(d).

Defendant's Proposed Jury Instruction No. 95

(Penalty Phase Three – Final Instructions)

At this point in the proceedings, and despite any other findings you have made, you must continue to presume that the appropriate sentence in this case is life in prison, rather than the death penalty. You may only return a verdict sentencing the defendant to death if you unanimously agree that death is the appropriate punishment in this case.

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. 96

(Penalty Phase Three – Final Instructions)

The standard of beyond a reasonable doubt in this context refers to the level of moral certainty a juror must have before concluding that death is the appropriate sentence to impose in this case.

A “reasonable doubt” means a doubt based upon reason and common sense, which arises from a fair, rational, and moral consideration of all of the evidence, or the lack of evidence, or other information you have received during the entirety of this case. It is a doubt which is not a vague, speculative or imaginary doubt, but such a doubt as would cause reasonable people to hesitate to act in matters of life or death or other moral importance to themselves.

Defendant's Proposed Jury Instruction No. 97

(Penalty Phase Three – Final Instructions)

In reaching your decisions during Phase Three, you are instructed that you may consider mercy or sympathy for James Holmes in this case. You must treat him as a uniquely individual human being.

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

You must not consider or be influenced by any prejudice or bias of any sort against Mr. Holmes. You must not be influenced by public opinion of any sort against Mr. Holmes. Similarly, you must not be influenced by any sort of sympathy for the victims.

Source:

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.”)

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. 98

(Penalty Phase Three – Final Instructions)

You are instructed that Mr. Holmes does not have any burden of convincing you that life in prison is the appropriate punishment, or that death is not the appropriate punishment.

Sources:

See e.g. People v. White, 870 P.2d 424, 455-56 (Colo. 1994); *People v. Tenneson*, 788 P.2d 786 (Colo. 1990); *see also In re Winship*, 397 U.S. 358 (1970); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *People ex rel. Juhan v. District Court*, 165 Colo. 253, 439 P.2d 741, 745 (Colo. 1968); *Ring v. Arizona*, 536 U.S. 584 (2002); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Woldt v. People*, 64 P.3d 256 (Colo. 2003); U.S. Const. amends. V, VI, VIII, XIV; Colo. Const. art. II, sec. 20, 25.

Defendant's Proposed Jury Instruction No. 99

(Penalty Phase Three – Final Instructions)

When evaluating what sentence to impose, you may not consider any fact as a reason to impose a death sentence unless you unanimously conclude that (1) the prosecution has proven the existence of that fact beyond a reasonable doubt, and (2) you are convinced beyond a reasonable doubt that it is a reason to impose a death sentence rather than life without parole on Mr. Holmes.

Sources:

See Motion D-147 (**denied** by this Court) and arguments and authorities therein; *Ring v. Arizona*, 536 U.S. 584 (2002); *Woldt v. People*, 64 P.3d 256 (Colo. 2003) *but see* *Dunlap v. People*, 173 P.3d 1054, 1089 (Colo.2007).

Defendant's Proposed Jury Instruction No. 100

(Penalty Phase Three – 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 this 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.

Source:

See e.g. Carter v. Kentucky, 450 U.S. 288 (1981); *Estelle v. Smith*, 451 U. S. 454 (1981); U.S. Const. V, XIV; Colo. Const. art. II, sec. 18.

Based on COLJI-Crim. No. E:07 (2014)

Defendant's Proposed Jury Instruction No. 101

(Penalty Phase Three – Final Instructions)

In making your decision during Phase Three, 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 as a reason to impose the death penalty or in support of any aggravating factor or circumstance that was alleged at this, or any other phase of the sentencing trial. You may consider this evidence as mitigation or a reason in favor of a life sentence.

Sources:

See Estelle v. Smith, 451 U.S. 454, 462-63 (1981) (“We can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned.”)

Powell v. Texas, 492 U.S. 680, 685 n.3 (1989) (“Nothing in [*Estelle v.*] *Smith*, or any other decisions of this Court, suggests that a defendant opens the door to the admission of psychiatric evidence on future dangerousness by raising an insanity defense at the guilt phase trial.”)

Satterwhite v. Texas, 486 U.S. 249 (1988) (use of psychiatrist's testimony at capital sentencing proceeding on issue of future dangerousness violated Sixth Amendment where counsel was not informed that examination of defendant, including assessment of future dangerousness, would take place)

Defendant's Proposed Jury Instruction No. 102

(Penalty Phase Three – Final Instructions)

During Phase Three, you heard evidence that is known as victim impact evidence. This evidence has been introduced to show the effects of a victim's death on the members of the victim's immediate family. This evidence is simply another method of informing you about the specific harm caused by the crime in question.

Victim impact evidence is not the same as an aggravating circumstance. Proof of an adverse impact on the victim's family is not proof of an aggravating circumstance. You may consider this evidence in determining an appropriate punishment. However, your consideration must be limited to a moral inquiry into the culpability of the defendant, not an emotional response to the evidence.

Source:

Cargle v. State, 909 P.2d 806, 829 (Okla. Crim. App. 1995)

Payne v. Tennessee, 501 U.S. 808, 838 (Souter, J., concurring).

See also Motion D-188, D-188a, D-242, and points and authorities cited therein.

Defendant's Proposed Jury Instruction No. 103

(Penalty Phase Three – 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. 104

(Penalty Phase Three – Final Instructions)

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

Source:

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

Defendant's Proposed Jury Instruction No. 105

(Penalty Phase Three – 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.

Defendant's Proposed Jury Instruction No. 106

(Penalty Phase Three – Final Instructions)

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.

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. 107

(Penalty Phase Three – Final Instructions)

The manner of inflicting the punishment of death in the State of Colorado is by the administration of a lethal injection. You must assume that the penalty of death will be carried out if you vote to impose it.

Source:

Caldwell v. Mississippi, 472 U.S. 320, 329 (1985) (“[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant’s death rests elsewhere.”)

C.R.S. § 18-1.3-1202

Defendant's Proposed Jury Instruction No. 108

(Penalty Phase Three – Final Instructions)

Colorado law authorizes and permits any individual juror to require a penalty of life imprisonment by not agreeing to a death penalty verdict.

If any juror, at any time during the deliberations, decides that they are not convinced beyond a reasonable doubt that a death sentence is the appropriate sentence for Mr. Holmes, the jury must end its deliberations and must inform the court's bailiff that they have reached a sentencing decision of life in prison. There is no requirement that a juror who has decided that he or she is not convinced beyond any reasonable doubt that death must be the penalty for Mr. Holmes must continue to deliberate.

Supporting Arguments and Authorities:

People v. Tenneson, 788 P.2d 786 (Colo. 1990); *People v. Young*, 814 P.2d 834, 844 fn. 8 (Colo. 1991); C.R.S. §§ 18-1.3-1201(2)(c),(d); *People v. Harlan*, 109 P.3d 616, 630 (Colo. 2005) (“Colorado has tailored its four-step death penalty process to center on the proposition that any individual juror may ultimately trigger life imprisonment by not agreeing to a death penalty verdict In reaching its ultimate verdict, the jury may consider all the evidence introduced at trial, as well as the defendant's statement in allocution. Any one juror, by holding out against a unanimous verdict of death, can require imposition of life imprisonment without parole.”).

Defendant's Proposed Jury Instruction No. 109

(Penalty Phase Three – Final Instructions)

The decisions you are to make concerning the life or death of another person are the most important and serious decisions that you will ever be asked to make. Each of you must fully appreciate your obligation to carefully and fairly consider the choices you have been called upon to make. Each of you must fully appreciate that the life of another person, James Holmes, rests solely in your hands.

Supporting Arguments and Authorities:

Gardner v. Florida, 430 U.S. 349, 357-358 (1977):

“[D]eath is a different kind of punishment from any other which may be imposed in this country. . . . From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.”

See also, Thompson v. Oklahoma, 487 U.S. 815 (1988). Justice O'Connor concurring in judgment:

Under the Eighth Amendment, the death penalty has been treated differently from all other punishments. . . . Among the most important and consistent themes in this Court's death penalty jurisprudence is the need for special care and deliberation in decisions that may lead to the imposition of that sanction. The Court has accordingly imposed a series of unique substantive and procedural restrictions designed to ensure that capital punishment is not imposed without the serious and calm reflection that ought to precede any decision of such gravity and finality.

. . . [S]ee also *Strickland v. Washington*, 466 U.S. 668, 704 . . . (Brennan, J., concurring in part and dissenting in part) (capital sentencing proceedings must be policed at all stages by an especially vigilant concern for procedural fairness and accurate fact-finding.)

See also Mills v. Maryland, 486 U.S. 367, 376 (1988) (“[I]n reviewing death sentences, the Court has demanded even greater certainty [than in other criminal cases] that the jury’s conclusion rested on proper grounds.”); *California v. Ramos*, 463 U.S. 993, 998-99 (1983) (qualitative difference of death from all other punishments “requires a correspondingly greater degree of scrutiny of the capital sentencing determination”); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (qualitative difference between death and other penalties “calls for a greater degree of reliability when the death sentence is imposed”); *Caldwell v. Mississippi*, 472 U.S. 320, 329-30 (1985) (“[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant’s death rests elsewhere.”); *People v. Tenneson*, 788 P.2d 786, 791-92 (Colo. 1990), *People v. Rodriguez*, 786 P.2d 1079, 1082 (Colo. 1989); *People v. Young*, 814 P.2d 834 (Colo. 1991); *People v. Rodriguez*, 794 P.2d 965, 972 (Colo. 1990); *People v. White*, 870 P.2d 424 (Colo. 1994) (“Colorado’s death sentencing statute must be construed in light of the strong concern for reliability of any sentence of death.”)

Defendant's Proposed Jury Instruction No. 110

(Penalty Phase Three – 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. 111

(Penalty Phase Three – 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. 112

(Penalty Phase Three – 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 Phase Three verdict form reflecting whatever decisions you reach. The decisions must represent the considered judgment of each juror.

You will be given twelve separate Phase Three 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 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 Phase Three decision, 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.

I will now read the Phase Three 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	♦ COURT USE ONLY ♦
	Case No. 12CR1522 Division 201
SENTENCING PHASE THREE VERDICT FORM FIRST-DEGREE MURDER CONVICTION FOR JONATHAN BLUNK	

I.* We, the jury, are UNANIMOUSLY convinced beyond a reasonable doubt that DEATH is the only appropriate sentence for the First-Degree Murder Conviction for Jonathan Blunk. We each sign this verdict form indicating our unanimity.

FOREPERSON

II.** We, the jury, are UNANIMOUSLY convinced beyond a reasonable doubt that death is NOT the only appropriate sentence for the murder of Jonathan Blunk, OR one or more of the jurors are not convinced beyond a reasonable doubt that death is the appropriate sentence for the murder of Jonathan Blunk, signed by the Foreperson.

FOREPERSON

*** If the jury is unanimously convinced, beyond a reasonable doubt, that death is the appropriate punishment for this murder of Jonathan Blunk, then I. above shall be signed by each juror.**

**** If the jury is unanimously convinced that death is NOT the appropriate sentence for murder of Jonathan Blunk OR one or more of the jurors are not convinced beyond a reasonable doubt that death is the appropriate sentence for the murder of Jonathan Blunk, then II above shall be signed by the foreperson.**

D-297

EXHIBIT D

(Defense Comments on Prosecution's Proposed Final Instructions for Phase Two and Introductory and Final Instructions for Phase Three)

PHASE TWO FINAL INSTRUCTIONS

PHASE TWO FINAL INSTRUCTION NO. ____

Members of the jury, the evidence in Phase II of the sentencing hearing has been completed. In a moment, I will read 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 duty 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 rule describes all of the law which must be applied. Therefore, the rules 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 phase of the sentencing hearing. You are then to evaluate those facts in light of the requirements of law set forth in these instructions. During the course of the guilt trial and Phases I and II of the sentencing proceedings, you received all of the evidence that you may properly consider to decide the issues presented in this phase of the case.

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 this sentencing hearing should be understood by you as suggesting any opinion or feeling on my part about what has or has not been proven. Nothing I have said during this second phase of the sentencing hearing should be understood by you as suggesting any opinion or feeling on my part about what decisions you should reach.

Your decisions are not dictated by law—each of you will be deciding based upon your individual reasoned moral judgment. This decision is separate and distinct from all the decisions you made previously—and none of those earlier decisions dictate what the result will be now.

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

Defense Comments:

The defense objects to the use of the term “guilt trial.” The defense also believes it is appropriate to include in this instruction additional instructions and admonishments prohibiting jurors from accessing media or conducting outside research about the case, as the Court has done in previous instructions.

PHASE TWO 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 the use of the term "guilt trial."

PHASE TWO 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:

The defense submitted a similar instruction.

PHASE TWO FINAL INSTRUCTION NO. ____

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

.Defense Comments:

The defense questions whether this instruction is necessary. but if the Court is inclined to include it. the defense reserves the right to state its position at the upcoming charging conference.

PHASE TWO FINAL INSTRUCTION NO. ____

Both the defendant and the People have presented witnesses and evidence. You are instructed that neither the defendant nor the prosecution is assigned a burden of proof concerning the existence of mitigating factors, or the weight to be given aggravating or mitigating factors. However, the degree of certainty that is defined as beyond a reasonable doubt does apply during the weighing process and involves a standard of profound moral certainty that each individual juror is required to have before deciding whether mitigation does not outweigh any proven aggravating factor(s).

Reasonable doubt when used as a level of certainty in Phase II 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 objects to the first paragraph of the instruction because it continues to maintain its position stated in D-146 that the prosecution must bear the burden of proof during Phases Two and Three of the sentencing hearing.

Without waiving that objection, the defense does not have any further objection to this instruction.

PHASE TWO 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 that this instruction is necessary or appropriate for Phase Two of a capital sentencing hearing.

PHASE TWO 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 may only consider 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 to prove the existence or absence of mitigation.

PHASE TWO 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 object to this instruction.

PHASE TWO 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 does not object to this instruction.

PHASE TWO FINAL INSTRUCTION NO. ____

You are not bound by the testimony of 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 reserves the right to state its position on this instruction during the charging conference.

PHASE TWO FINAL INSTRUCTION NO. ____

Every citizen has the constitutional right not to testify. The defendant retains his constitutional right not to testify. The defendant has not testified, as was his right. 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 for any purpose.

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.

PHASE TWO FINAL INSTRUCTION NO. ____

You may not consider as any sort of reason to impose a death sentence the fact that the defendant asserted his constitutional right to sentencing by jury. No juror should allow himself or herself to be prejudiced against the defendant in any way because of his assertion of his right to sentencing by jury.

Defense Comments:

The defense objects to this instruction for reasons similar to its objection to such an instruction at Phase One. The defense will make a further record on this at the charging conference if necessary.

PHASE TWO FINAL INSTRUCTION NO. ____

Your deliberations must take place in a certain order and within certain legal guidelines. I will now explain the process in more detail:

PHASE ONE

In the first phase of your deliberations, you unanimously determined that one or more aggravating factors had been proven to your unanimous satisfaction beyond a reasonable doubt.

Even though you have found the existence of one or more aggravating factors, a death sentence is never mandatory or required by law.

PHASE TWO

In this Phase II, the defendant may, but is not required to, present mitigation. In contrast to the decision you made regarding aggravating factors, jurors need not unanimously agree about the existence of a mitigating factor before it may be considered and there is no burden on the defendant to prove the existence of any mitigating factor. 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. This must be an individual determination for each count of murder in the first degree of which the defendant was convicted.

The decision regarding mitigation for each individual count of Murder in the First Degree of which the defendant was convicted 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. It 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. This is an individual weighing process for each count of murder of which the defendant has been convicted. If one or more of the jurors is satisfied that the mitigation outweighs the aggravating factors for any individual count of murder, the sentencing hearing stops and the defendant will be sentenced to imprisonment for life without the possibility of parole for that particular count. The jury only moves on to phase III for any count of murder if every juror is individually convinced beyond a reasonable doubt that the mitigation does not outweigh the aggravating factors for that particular count. 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. Each juror may consider mercy for the defendant during Phase II, 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.

Defense Comments:

First, the defense finds the discussion of "Phase One" under a separate heading confusing and unnecessary.

Second, 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 tendered instructions for Phase Two on this issue is constitutionally required.

Third, the defense objects to the use of the term "guilt trial."

Fourth, the defense believes the following sentence is incompliant with *People v. Tenmeson*, 788 P.2d 786, 791 (Colo.1990):

"If one or more of the jurors is satisfied that the mitigation outweighs the aggravating factors for any individual count of murder, the sentencing hearing stops and the defendant will be sentenced to imprisonment for life without the possibility of parole for that particular count."

Fifth, the defense continues to object to the notion that the jurors must deliberate as to each "count," and continues to maintain that the two counts of murder charged for each victim in this case merge into one, such that the jurors make sentencing decisions as to twelve *convictions* rather than 24 *counts*.

Sixth, the defense continues to object to instructing the jury on the concept that its exercise of mercy must be based on the evidence and or information in the case.

PHASE TWO FINAL INSTRUCTION NO. ____

You should consider all of the evidence presented throughout guilt trial, and sentencing hearing, relating to mitigating factors. Mitigating factors include:

The remainder of this instruction is dependent on the evidence presented at the sentencing hearing and the mitigating factors that the defendant requests be included in this instruction.

Defense Comments:

The defense will submit a mitigation instruction at the end of Phase Two.

PHASE TWO FINAL INSTRUCTION NO. ____

During the weighing process stage of Phase II, each individual juror must decide whether you are convinced beyond a reasonable doubt that the mitigating factor(s) do not outweigh the aggravating factor(s) that you unanimously determined to exist in Phase I. This must be done individually for each count of Murder in the First Degree. This weighing process is not a mere counting process. The number of factors should not be the only criteria you use in the weighing process.

You should not merely assign arbitrary values to the aggravating and mitigating factors and subtract one value from another. Your decision should not be mechanical or mathematical. Instead, each juror should attempt to arrive at an individual reasoned moral response as to whether you have been convinced beyond a reasonable doubt that the mitigating factors do not outweigh the aggravating factors.

The only aggravating factors any of you may consider during the weighing process stage of phase II are the aggravating factors that you unanimously found to exist beyond a reasonable doubt at the first phase of the sentencing hearing. Copies of your verdict form from the first phase will be provided with these instructions.

In phase II of your deliberations, for each individual count of Murder in the First Degree, if the jurors are unanimously convinced beyond a reasonable doubt that the mitigating factor(s) found to exist do not outweigh the aggravating factor(s), then your Foreperson shall sign the appropriate verdict form and the jury is to return to open court to begin the next phase of the sentencing hearing for each individual count where the jurors have unanimously found this to be the case. If one or more of you are not convinced beyond a reasonable doubt that mitigating factors found to exist do not outweigh the aggravating factors for any individual count of Murder in the First Degree, you must indicate that on the verdict form and the Court will sentence the defendant to the penalty of imprisonment for life without the possibility of parole for that count.

Defense Comments:

The defense continues to object to the notion that the jurors must deliberate as to each "count." and continues to maintain that the two counts of murder charged for each victim in this case merge into one, such that the jurors make sentencing decisions as to twelve *convictions* rather than 24 *counts*.

The defense prefers the phrasing of the last sentence to read "and Mr. Holmes will be sentenced to life imprisonment without the possibility of parole" rather than "the Court will sentence...."

PHASE TWO FINAL INSTRUCTION NO. ____

It is your duty, as jurors, to consult with one another and to deliberate. While there is no requirement that you understand or articulate to anyone why your individual reasoned moral judgment leads you to any particular result, you must each be given a complete opportunity to speak during the deliberative process if you wish to speak. You are each required to listen to and consider carefully the individual reasoned moral judgment of each of your fellow jurors if they wish to articulate it, however, each of you must decide the issues for yourself.

Defense Comments:

The defense will indicate its position on this instruction at the charging conference if necessary.

PHASE TWO FINAL INSTRUCTION NO. _____

The court admitted certain evidence offered by the prosecution for the limited purpose of rebuttal to mitigation. You are instructed not to consider it for any purpose other than the limited purpose of determining the existence and weight of mitigating factors. You may not consider this evidence as aggravating factors or for any other purpose.

If you determine that the evidence you heard on these matters has any bearing on the issue of mitigation, then you may consider the evidence for the limited purpose of determining the existence of mitigating factors and the weight of mitigating factors. If you determine that this evidence has no bearing on the issue of mitigation, then you must disregard the evidence for purposes of your deliberations.

Defense Comments:

The defense is confused by this instruction and objects to it. It is unclear what evidence this instruction may refer to. The defense will make a further record about this instruction if necessary at the charging conference.

PHASE TWO FINAL INSTRUCTION NO. ____

Any media coverage of this case must be completely disregarded by you. Your decision in this case must be based solely on the evidence and/or information presented during the entirety of the guilt trial and Phases I and II of the sentencing hearing, and the law that you receive in these instructions. You should not read, watch, or listen to any media publications or reports, and you should not consider any outside sources, including any publications or media reports, in reaching your decisions.

Defense Comments:

The defense believes the admonishments the Court has been giving to the jurors throughout this trial more thoroughly convey the concepts covered in this instruction.

PHASE TWO 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.

Defense Comments:

The defense has no objection to this instruction.

PHASE TWO 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 objection to this instruction.

PHASE TWO FINAL INSTRUCTION NO. _____

After the closing arguments, the bailiff will escort you to the jury room. Your Foreperson will preside over your deliberations. The decisions you make must represent the reasoned moral judgment of each juror.

The Mitigating and Weighing Verdict Forms for the second phase shall be completed in the manner that reflects your decisions and shall be signed as indicated on the verdict forms. The 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 sentencing 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.

When you have reached your second phase decisions, the Mitigating and Weighing Verdict Forms shall be completed in the manner that reflects your decisions and shall be signed as indicated. The original instructions and verdict forms shall be returned with no other markings on them other than the appropriate signatures. You are further instructed that no inferences are to be drawn from the order in which the court reads the verdict forms.

The Mitigating and Weighing Verdict Forms you will receive read as follows: (Court reads the second phase verdict form).

Defense Comments:

The defense believes the verdict forms should be entitled "Phase Two Verdict Forms." The defense has submitted its own proposed verdict form that differs in several ways from the prosecution's verdict form, and requests that the Court use its proposed verdict form instead of the prosecution's. The defense will make a further record about the verdict form at the charging conference if necessary.

PHASE THREE

INTRODUCTORY INSTRUCTIONS

PHASE THREE INTRODUCTORY INSTRUCTIONS NO. ____

Members of the jury, it now becomes your duty to determine the appropriate punishment to be imposed for the crime of Murder of [List victims of counts applicable to this phase]. Your verdicts in the first and second phases of this sentencing hearing do not in any way require you to vote to impose the sentence of death. A death sentence is still never mandatory or required by law. In other words, the question of punishment still remains unresolved.

In this phase, 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 for each count of murder at this phase. 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 all jurors do not unanimously agree on death, or if one or more jurors decide on life, 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 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 proceeding. 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.

Defense Comments:

The defense objects to the first sentence of the second paragraph of this instruction, because it limits the jurors' decision-making in Phase Three to "evidence and information presented during the guilt trial and the entire sentencing hearing" and makes no mention of moral judgment. The defense also believes the sentence does not adequately reflect the limitations placed on jurors' consideration of evidence presented on the issues raised by his plea of not guilty by reason of insanity, and a more nuanced instruction is needed.

The defense continues to object to instructing the jury on the concept that its exercise of mercy must be based on the evidence and or information in the case.

PHASE THREE INTRODUCTORY INSTRUCTION NO. ____

In this Phase III, there is no burden of proof on any party. However, the reasonable doubt standard applies. The beyond a reasonable doubt standard is the level of certainty that each juror must possess in making the determination of the appropriate sentence. Reasonable doubt when used as a level of certainty in Phase III 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, or other information you have received during the entirety of the guilt trial and this 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 objects to the first portion of the instruction because it continues to maintain its position stated in D-146 that the prosecution must bear the burden of proof during Phases Two and Three of the sentencing hearing.

Without waiving that objection, the defense does not have any further objection to this instruction.

PHASE THREE INTRODUCTORY INSTRUCTION NO. _____

The defendant may present evidence and information in 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.

Each juror must independently decide the appropriate punishment for each count in this phase based upon their own individual reasoned moral judgment.

Defense Comments:

The defense does not object to this instruction.

PHASE THREE INTRODUCTORY INSTRUCTION NO. _____

You are instructed that there are two types of aggravation that you may consider in making your sentencing decision(s).

The first type of aggravation is referred to as aggravating factor(s). At Phase I of the sentencing hearing, you determined that these specific aggravating factor(s) were proven beyond a reasonable doubt. These aggravating factor(s) may also be considered in Phase III.

The second type of aggravation is referred to as aggravating circumstances. Aggravating circumstances are evidence that goes to the nature of the crime and its impact on the victims and their family, and the character, background and history of the defendant.

Defense Comments:

The defense objects to this instruction. It is confusing and unnecessary, and also mischaracterizes victim impact evidence as an "aggravating circumstance." The defense will make a further record about this instruction if necessary at the charging conference.

PHASE THREE INTRODUCTORY INSTRUCTION NO. _____

You may receive evidence concerning the personal characteristics of each victim for the counts in this Phase III, and the impact of the crimes on each victim's family which you may consider when making your decision during Phase III. You may consider testimony from the victim's family aggravating or mitigating evidence if you choose.

Defense Comments:

The defense objects to this instruction because it does not adequately explain what the purpose of victim impact evidence is, and how and for what purposes it can be considered by the jury. The defense requests that the instruction proposed by the defense on the issue of victim impact evidence be given instead.

PHASE THREE INTRODUCTORY INSTRUCTION NO.

Further instructions will be provided to you at the close of evidence and/or information of this final phase. Any decision regarding penalty must be reserved until the hearing is completed and you have received the legal instructions that you must follow. It is your sworn obligation to withhold any judgment concerning the issues and decline to form any opinion until after you have heard the evidence presented at this Phase III, been instructed on the applicable law, heard the arguments of counsel and retired to the jury room. Then, and only then, should you begin to deliberate.

Defense Comments:

The defense does not have a specific objection to this instruction.

PHASE THREE FINAL INSTRUCTION NO. ____

I will now 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 duty 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 rule describes all of the law which must be applied. Therefore, the rules must be considered together as a whole by you.

During the course of the trial and the sentencing hearing, you received all of the information and evidence that you may properly consider to decide the case. At times during this case, 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 this sentencing hearing should be understood by you as suggesting any opinion or feeling on my part about what has or has not been proven in this case. Nothing I have said during this case should be understood by you as suggesting any opinion or feeling on my part about what sentence you should impose. The decision about whether the defendant is sentenced to death or the penalty of imprisonment for life without the possibility of parole is solely your individual decision.

Your decisions are not dictated by law – each of you will be deciding the penalty based upon your individual reasoned moral assessment. This decision you make for each count in this phase III is separate and distinct from all the decisions you made previously – and none of those earlier decisions dictate what the result will be now.

Defense Comment:

The defense objects to the sentence. “During the course of the trial and the sentencing hearing, you received all of the information and evidence that you may properly consider to decide the case” as unnecessarily limiting. The sentence does not convey the concept that the jurors are required to use their own individual reasoned moral judgment in deciding the issue of punishment.

PHASE THREE 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 comment:

The defense does not have an objection to this instruction.

PHASE THREE FINAL INSTRUCTION NO. _____

You must now consider whether the defendant should be sentenced to imprisonment for life without the possibility of parole or to death for each count in this Phase III. This is a decision left exclusively to each of you. You, and you personally, will decide whether or not the defendant will be executed or sentenced to imprisonment for life without any possibility of parole for each count in this Phase III. You must give careful and thorough consideration to all the information and evidence you have received.

None of you individually, nor the jury collectively, is ever required to impose a sentence of death. If any one of you believes that death is not appropriate for a count in this Phase III, that ends the inquiry of imposing a death sentence for that count. While all of you must agree to sentence the defendant to death for each count in this Phase III, after deliberating with the other jurors any one of you can disagree, and that disagreement must be respected by this Court and by the other jurors.

It is your duty, as jurors, to consult with one another and to deliberate. While there is no requirement that you understand or articulate to anyone why your individual reasoned moral judgment leads you to any particular result, you must each be given a complete opportunity to speak during the deliberative process if you wish to speak. You are each required to listen to and consider carefully the individual reasoned moral judgment of each of your fellow jurors if they wish to articulate it, however, each of you must decide the punishment for yourself.

Defense Comments:

The defense continues to maintain its objection to "each count" for the reasons previously stated, which are related to the issue of merger.

The defense will indicate its position on the last paragraph of this instruction at the charging conference if necessary.

PHASE THREE FINAL INSTRUCTION NO. ____

The defendant has been found guilty of Murder in the First Degree. You have also found beyond a reasonable doubt at least one aggravating factor(s), and found that any mitigating factors do not outweigh the aggravating factor(s). The fact that you have made these findings does not mean that a sentence of death is automatic or warranted.

These verdicts require that you make an additional decision which will determine whether the defendant will be sentenced to imprisonment for life without the possibility of parole or to death for each count in this Phase III.

Defense Comments:

The defense objects to this instruction as unnecessary and confusing.

PHASE THREE FINAL INSTRUCTION NO. ____

You are instructed that the fact that the death penalty is being 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:

The defense does not have an objection to this instruction.

PHASE THREE FINAL INSTRUCTION NO. ____

You may not consider as any sort of reason to impose a death sentence the fact that the defendant asserted his constitutional right to sentencing by jury. No juror should allow himself or herself to be prejudiced against the defendant in any way because of his assertion of his right to sentencing by jury.

Defense Comments:

The defense objects to this instruction for reasons similar to its objection to such an instruction at Phase One. The defense will make a further record on this at the charging conference if necessary.

PHASE THREE FINAL INSTRUCTION NO. ____

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

Defense Comments:

The defense questions whether this instruction is necessary, but if the Court is inclined to include it, the defense reserves the right to state its position at the upcoming charging conference.

PHASE THREE FINAL INSTRUCTION NO. ____

The defendant has presented witnesses, evidence and information. You are instructed that the presentation of any information and evidence by the defendant never puts any burden on him of proving or disproving any fact or circumstance. The defendant does not have any burden of convincing you that the penalty of imprisonment for life without the possibility of parole is the appropriate punishment, or that death is not the appropriate punishment.

Defense Comments:

The defense reserves the right to take a position on this instruction at the close of Phase Three if necessary.

PHASE THREE 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 appropriate for Phase Three of a capital sentencing hearing.

PHASE THREE FINAL INSTRUCTION NO. ____

The information and evidence in this case consists of the sworn testimony of all the witnesses, any allocution by the defendant, all exhibits which have been received in evidence, all stipulated or admitted facts, and any judicially noticed facts received during the entirety of the trial related to guilt and sentencing proceeding.

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 information and 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 or facts, if that conclusion is warranted by the information and evidence as a whole. The weight to be given the information and evidence rests entirely with you.

Defense Comments:

The defense objects to this instruction. Not only does not apply in general to the type of evidence that is likely to be admitted at Phase Three, the instruction does not adequately reflect the limitations placed on jurors' consideration of evidence presented on the issues raised by his plea of not guilty by reason of insanity, and a more nuanced instruction is needed.

The defense reserves the right to make an additional record on this instruction at the charging conference.

PHASE THREE 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 object to this instruction.

PHASE THREE 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 does not object to this instruction.

PHASE THREE FINAL INSTRUCTION NO. ____

You are not bound by the testimony of 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 in Phase Three but will consider it further and make an additional record at the charging conference if necessary.

PHASE THREE FINAL INSTRUCTION NO. ____

Every citizen has the constitutional right not to testify. Even though the defendant has been convicted of Murder, the defendant retains his constitutional right not to testify.

The defendant has not testified, as was his right. 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 support or impose the death penalty.

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.

PHASE THREE FINAL INSTRUCTION NO. ____

In this phase, each juror ~~would~~ ~~will~~ be asked to ~~must~~ **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 ~~for each count in this phase~~. 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 any individual count in this phase~~. If all jurors do not unanimously agree on death for any individual count in this phase, or if one or more jurors decide on life for any individual count in this phase, 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 moral certainty that each individual juror is required to have before deciding to impose the death penalty.

In reaching your decision on punishment, you must not be influenced by prejudice or bias of any sort. You must ~~treat him~~ Mr. Holmes 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 proceeding for each count in this phase. Each juror may consider mercy for the defendant during Phase III for each count in this phase, but both moral judgment and 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.

Defense Comments:

The defense has made some modifications to the instruction above. Additionally, the defense continues to object to instructing the jury on the concept that its exercise of mercy must be based on the evidence and or information in the case.

PHASE THREE FINAL INSTRUCTION NO. _____

In Phase III, each juror will decide, based on any evidence and information presented during the entire trial relating to guilt and all of the sentencing proceedings, including mitigating factors, aggravating factors, aggravating circumstances, and the defendant's allocution whether he or she is convinced beyond a reasonable doubt whether imprisonment for life without the possibility of parole or death, is the appropriate sentence for each count in this phase. Your decisions in phases one and two are not controlling in phase three. You may consider any and all evidence and information that you have heard in the sentencing hearing. You are no longer bound by any limiting instruction concerning the use of information and evidence that the Court may have given during any earlier phase of this sentencing hearing. If any one or more of the jurors is not convinced beyond a reasonable doubt that the appropriate sentence is death for at least one individual count in this phase, or if one or more of the jurors agree to life for any individual count in this phase, then the result is a sentence of imprisonment for life without the possibility of parole. If the jury is unanimously convinced beyond a reasonable doubt that the death penalty is the appropriate punishment for any count in this phase, the result is a sentence of death for that count. Phase III requires a reasoned moral judgment as to the appropriate sentence for each count in this phase by each juror individually.

Defense Comments:

In general, the defense feels this is a poorly-worded instruction and should not be given. The defense objects to it. It would not be accurate, nor would it be constitutional, to instruct the jury that the Court's limiting instructions no longer apply. The defense will make a further record about this instruction at the charging conference if necessary.

PHASE THREE FINAL INSTRUCTION NO. ____

In this third phase there is no burden of proof on any party. However, the reasonable doubt standard applies. The beyond a reasonable doubt standard is the level of certainty that each juror must possess in making the determination of the appropriate sentence. Reasonable doubt when used as a level of certainty in this third phase 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, or other information you have received during the entirety of the guilt trial and this 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 objects to the first sentence of the instruction because it continues to maintain its position stated in D-146 that the prosecution must bear the burden of proof during Phases Two and Three of the sentencing hearing.

Without waiving that objection, the defense does not have any further objection to this instruction.

PHASE THREE FINAL INSTRUCTION NO. ____

The defendant had the right to personally address you, the jurors, before you make your decisions on what his sentence will be. This is called his “right to allocution.” The law provides that the defendant’s statements to you are information that he is allowed to present to you.

Defense Comments:

The defense objects to this instruction if Mr. Holmes elects not to allocute.

PHASE THREE FINAL INSTRUCTION NO. _____

You are instructed that there are two types of aggravation that you may consider in making your sentencing decision(s).

The first type of aggravation is referred to as aggravating factor(s). At Phase I of the sentencing hearing, you determined that these specific aggravating factor(s) were proven beyond a reasonable doubt. These aggravating factor(s) may also be considered in phase three.

The second type of aggravation is referred to as aggravating circumstances. Aggravating circumstances are evidence that goes to the nature of the crime and its impact on victims and their families, and the character, background and history of the defendant. During Phase III, you may use any evidence and information presented during the entire trial relating to guilt and all of the sentencing proceedings whether you found it to be a mitigating factor, an aggravating factor, or an aggravating circumstance.

Defense Comments:

The defense objects to this entire instruction and will make a further record about it at the charging conference if necessary.

PHASE THREE FINAL INSTRUCTION NO. _____

You have received evidence concerning the personal characteristics of the victim and the impact of the crimes on the victim's family which you may only consider when making your decision during Phase III. You may consider testimony from the victim's family aggravating circumstances or mitigating evidence, if you choose.

In reaching your decision on punishment, you may consider evidence relating to the personal characteristics of the defendant. You must not use this evidence to make comparative judgments between the defendant and the victims of his crime. You are never permitted to do a comparative judgment between a defendant and the victims.

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

Defense Comments:

The defense objects to this instruction for the reasons previously stated and requests that its proposed instruction on victim impact evidence be given instead.

PHASE THREE FINAL INSTRUCTION NO. ____

You must not speculate about whether imposition of one punishment is more expensive to taxpayers than imposition of the other punishment. You have heard no evidence on which penalty is the more costly to society, or the government, or the taxpayers. You must set aside and not rely upon any preconceived notions you may have about which penalty is more expensive. The relative cost of the two penalties is not a legitimate factor for you to consider.

Defense Comments:

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

PHASE THREE FINAL INSTRUCTION NO. ____

You are instructed that the penalty of imprisonment for life without the possibility of parole 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 in Colorado cannot apply for parole and cannot be paroled under Colorado law.

Defense Comments:

The defense has submitted a similar instruction and does not object.

PHASE THREE FINAL INSTRUCTION NO. ____

The manner of inflicting the punishment of death in the State of Colorado is by the administration of a lethal injection. The penalty of death will be carried out if you choose to impose it.

Defense Comments:

The defense does not object to this instruction.

PHASE THREE FINAL INSTRUCTION NO. ____

You are reminded that you must completely disregard any media coverage of this case. Your decision in this case must be based solely on the evidence and information presented during the entire trial relating to guilt and all of the sentencing proceedings and the law that you receive in these instructions. You cannot and should not consider any outside sources, including media reports, in reaching your sentencing decision.

Defense Comments:

The defense believes the admonishments the Court has been giving to the jurors throughout this trial more thoroughly convey the concepts covered in this instruction.

PHASE THREE 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.

Defense Comments:

The defense does not object.

PHASE THREE FINAL INSTRUCTION NO. ____

During this hearing 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 or an attorney is not a reflection on the person asking it and you should not attach any significance to the question not being asked. 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 asked by an attorney or a juror was based on the applicable rules of evidence and other rules of law, and not on the facts of a particular case. It is my responsibility to ensure that all parties receive a fair hearing 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. In making your decision, you must consider all of the evidence that has been presented.

Defense Comments:

The defense does not object.

PHASE THREE FINAL INSTRUCTION NO. _____

After the closing arguments, the bailiff will escort you to the jury room. Your Foreperson will preside over your deliberations. You are now called upon to make the decision as to whether the defendant should be sentenced to imprisonment for life without the possibility of parole or to death.

The sentencing decisions must be unanimous and represent the individual reasoned moral judgment of each juror.

The Sentencing Verdict Forms shall be completed in the manner that reflects your decision regarding each count of Murder in this phase III and shall be signed as indicated on each individual Sentencing Verdict Form. The Sentencing 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 sentencing 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.

When you have reached your sentencing decision, the Sentencing Verdict Forms shall be completed in the manner that reflects your decision and shall be signed as indicated on the Sentencing Verdict Forms. The original instructions and Sentencing Verdict Forms shall be returned with no other markings other than the appropriate signature(s). You are further instructed that no inferences are to be drawn from the order in which the court reads the sentencing forms.

The Sentencing Verdict Form you will receive read as follows: (Court reads Sentencing Forms).

Defense Comments:

The defense believes the verdict forms should be entitled "Phase Three Verdict Forms." The defense has submitted its own proposed verdict form that differs in several ways from the

prosecution's verdict form, and requests that the Court use its proposed verdict form instead of the prosecution's. The defense will make a further record about the verdict form at the charging conference if necessary.