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District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	Filed JUN 14 2013 CLERK OF THE COMBINED COURT ARAPAHOE COUNTY, COLORADO σ COURT USE ONLY σ
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 1290 Broadway, Suite 900 Denver, Colorado 80203 Phone (303) 764-1400 Fax (303) 764-1478 E-mail: state.pubdef@coloradodefenders.us	Case No. 12CR1522 Division 22
REPLY TO PROSECUTION'S RESPONSE TO MOTION FOR COURT ORDER PERMITTING DEFENSE COUNSEL TO BE PRESENT DURING ANY EXAM CONDUCTED PURSUANT TO C.R.S. § 16-8-101, ET SEQ. [D-092]	

James Holmes, through counsel, submits the following in reply to the prosecution's Response to Motion for Court Order Permitting Defense Counsel to be Present During Any Exam Conducting Pursuant to C.R.S. § 16-8-101 *et seq.* and the Submission of Additional Information in Response to Motion D-092:

1. The prosecution argues that “[t]he overwhelming weight of federal and state appellate precedent demonstrate that the defendant does not have” a constitutional right to have counsel present during the examination. In support of this argument, it cites to cases from the Second, Fourth, Fifth and Seventh Circuits as well as Arizona, Texas, South Carolina, Louisiana, and Massachusetts.

2. However, the majority of courts considering the issue in the cases cited by the prosecution reached the conclusion that a psychiatric examination is not a “critical stage” in the proceedings because the Fifth Amendment is *not* implicated. *See, e.g., U.S. v. Baird*, 414 F.2d 700, 711 (2d Cir. 1969) (“Bearing in mind that the purpose of the examination was to qualify the Government’s expert and furnish him with a basis for an opinion as to the accused’s mental condition to which the expert could testify at the trial; that statements made to him by the accused could not be used on the issue of guilt or innocence of committing the offenses and were to be treated only as verbal acts from which the expert’s opinion was drawn; and that the accused had no privilege to refuse to answer the alienist’s questions, the examination did not constitute the kind of critical stage in the proceedings at which the assistance of counsel was needed or at which counsel could make a useful contribution.”); *U.S. v. Albright*, 388 F.2d 719, 726 (4th Cir.

1968) (“[I]f defendant’s privilege against self-incrimination is given full effect with regard to his inculpatory statements to his examiner, the need for the presence of an attorney is obviated.”); *U.S. v. Smith*, 436 F.2d 787, 790 (5th Cir. 1971) (“A psychiatric examination is not an adversary proceeding. No inculpatory statements made to the examiner are admissible.”); *Stultz v. State*, 500 S.W.2d 853, 855 (Tex.Cr.App. 1973) (“A psychiatric examination is not an adversary proceeding. Its purpose is not to aid in the establishment of facts showing that an accused committed certain acts constituting a crime; rather, its sole purpose is to enable an expert to form an opinion as to an accused’s mental capacity to form a criminal intent.”); *State v. Hardy*, 325 S.E.2d 320, 322 (S.C. 1985) (“Appellant has not demonstrated that this procedure is a “critical stage” of the proceeding which would trigger the right to counsel. Nothing appellant said to the psychiatrist was used against him in an incriminating manner.”).

3. However, Colorado’s insanity statute, as applied in a death penalty case, does implicate a defendant’s Fifth Amendment rights, among others. Pursuant to C.R.S. §§ 16-8-106(2)(c) & (6)(b) & 16-8-107(1.5)(a)&(b), a defendant’s conduct, behavior, and responses to questions can later be used in a capital sentencing proceeding in an effort to execute him or as a basis for disallowing expert mental health testimony proffered by the defense in mitigation at such a proceeding.

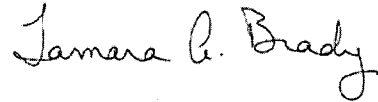
4. None of the cases cited by the prosecution involved a psychiatric examination where, as here, the examiner has been ordered by the court to render “an opinion as to how the mental disease or defect or condition of mind caused by mental disease or defect affects any mitigating factor.” Because such a report can later be used in support of the State’s bid for execution, “potential substantial prejudice to [the] defendant’s rights inheres in [this] particular confrontation.” *United States v. Wade*, 388 U.S. 218, 227 (1967). Counsel has the ability “to help avoid that prejudice” by advising Mr. Holmes how to conduct himself in reference to that examination. *Id.* Therefore, this Court should hold that a sanity examination in this capital case is a critical stage in the proceedings at which the presence of counsel is required.

5. Counsel’s objective in requesting to be present is not to “intentionally or inadvertently coach Mr. Holmes between evaluation sessions.” *See* Submission of Additional Information in Response to Motion D-092, p. 3. Rather, it is to provide critical legal assistance to their client, who the State is seeking to execute, in order to minimize the risk that he will unwittingly serve as the “‘deluded instrument’ of his own execution.” *Estelle v. Smith*, 451 U.S. 454, 462 (1981). Counsel recognizes that CMHIP has expressed a preference for counsel not to be present. However, because Mr. Holmes is on trial for his life and is being subjected to a psychiatric exam that can be used against him at sentencing, his Fifth and Eighth Amendment rights must take precedence over the preferences of clinicians.


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.



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



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



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

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