

<p>DISTRICT COURT, ARAPAHOE COUNTY STATE OF COLORADO Arapahoe County Justice Center 7325 S. Potomac Street Centennial, Colorado 80112</p>	<p style="text-align: center;">Filed MAY 10 2013</p> <p style="text-align: center;"><small>CLERK OF THE COMBINED COURT ARAPAHOE COUNTY COLORADO COURT HOUSE</small></p>
<p>THE PEOPLE OF THE STATE OF COLORADO vs. Defendant(s): JAMES EAGAN HOLMES</p>	
<p>Attorney: GEORGE BRAUCHLER 18th Judicial District Attorney 6450 S. Revere Pkwy Suite 100 Centennial, CO 80111 Phone: (720) 874-8500 Atty. Reg. #: 25910</p>	<p>Case Number: 12CR1522 Division 26</p>

RESPONSE TO DEFENSE MOTION D-36

This Response is filed by the District Attorney for the 18th Judicial District.

1. The Defendant has filed Motion D-036, "Motion For Application Of Heightened Standards Of Fairness And Reliability To All Aspects of This Capital Case."
2. Motion D-36 requests that this court "apply heightened standards of fairness and reliability to *all* proceedings and *all* aspects of this capital case . . ." (Emphasis in original).
3. At the outset, the People would note that the Defendant's Motion does not actually request any describable, concrete relief. Instead, the Defendant requests that this court apply—to all aspects of this case—a vague standard of "heightened standards of fairness and reliability" that purportedly emanates from a penumbra of protections derived from the U.S. and Colorado Supreme Courts' death penalty jurisprudence. The Motion does not purport nor demonstrate how this penumbral standard of heightened fairness would apply in any discrete situation that this court is likely to encounter in this case. Without tying the request for relief to a particular proceeding or standard, the relief requested in the motion is essentially meaningless. For instance:
 - a. This court will undoubtedly have to hear multiple motions to suppress evidence filed by the defense alleging violations of the U.S. Constitution's 4th Amendment and the related portion of the Colorado Constitution. Is the defendant claiming that the court should apply a standard other than probable cause to determine whether a particular search and seizure is reasonable? The motion implies that a heightened standard of fairness and reliability applies to a suppression hearing (after all, such a hearing would be a



“proceeding” in this case), so one could assume that the defendant might argue that there is some “probable cause plus” standard that would apply.

- b. Similarly, it is all but a certainty that this court will hear motions where the issues of exigent circumstances and the public safety exception to the *Miranda* rule are at issue. Is the defendant claiming that the standards applied in appellate precedent relating to these issues are somehow modified because this is a capital case?
- c. Likewise, the People will seek to call numerous expert witnesses to testify in this case as to opinions based on scientific forensic analysis. Is the defendant claiming that the heightened reliability he espouses in the Motion would somehow modify the analysis that this court is required to conduct pursuant to C.R.E. 702 and *People v. Shreck*, 22 P.3d 68 (Colo. 2001)?

The People have listed only three examples above, but the claim that “heightened standards of fairness and reliability” apply to all proceedings and all aspects of this case could result in the defense claiming that the sum total of Colorado jurisprudence is inapplicable to this case, and that the court cannot rely upon the tests and standards developed in Colorado appellate precedent on such other issues as: prosecutorial discovery obligations, defense discovery obligations, amendment of charges, adding charges, direct examination of witnesses, cross-examination of witnesses, competency of witnesses, motions in limine, opening statement, closing argument, motions for change of venue, access to defense witnesses, and the list could go on virtually *ad infinitum*. If the Defendant is claiming that “heightened standards of fairness and reliability” somehow change the burdens, standards, and tests that this court is to apply at various phases of this prosecution, he should be required to establish why a particular burden, standard or test long recognized in Colorado jurisprudence does not apply to this case. As it is, the Motion seeks a virtually meaningless ruling from this court that “heightened standards of fairness and reliability” apply so that at any proceeding, in addition to arguing the actual burden, standard, or test at issue, the defense can say something like: “Because heightened standards of fairness and reliability apply, even though the law says that you should rule against the defense, you can’t follow that law, and you should rule in favor of the defense.” This court should deny the request to enter such a meaningless ruling and require the Defendant to specify particular burdens, standards, or tests that he believes generally apply to Colorado criminal prosecutions, but not to capital cases.

4. In addition to requesting vague and essentially meaningless relief, untied to any particular burden, standard, or test, the argument in Motion D-36 is wrong.
5. U.S. Supreme Court and Colorado Supreme Court precedent uniformly holds that the requirement of heightened reliability in a capital case is applicable **to the sentencing phase** of the capital proceeding. When tried on the question of guilt or innocence for the underlying offense, capital defendants are not entitled to greater due process or other rights than noncapital defendants who proceed to trial.

6. As a matter of U.S. Supreme Court jurisprudence, the requirement of heightened reliability applicable to capital sentencing hearings is achieved when the death penalty statute meets the following two prerequisites:

In sum, our decisions since *Furman* have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decision maker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. . . .

Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant.

Blystone v. Pennsylvania, 494 U.S. 299, 308-9 (1990) (citing *McCleskey v. Kemp*, 481 U.S. 279 (1987)). Similarly, in *People v. Tenneson*, 788 P.2d 786, 790 (Colo. 1990), the Colorado Supreme Court likewise determined that the requirement of heightened reliability applicable to capital sentencing hearings is achieved as follows:

First, the discretion of the sentencer must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action" [extensive citation to U.S. Supreme Court precedent omitted]. . . .

Second, in order to achieve constitutional validity, a capital sentencing scheme must allow the sentencing body to consider any relevant mitigating evidence regarding the defendant's character and background and the circumstances of the offense. [Extensive citation to U.S. Supreme Court precedent omitted.]

To like effect, see *People v. O'Neill*, 803 P.2d 164, 177 (Colo. 1990):

In order to ensure reliability, and not impose a sentence of death in violation of the United States and Colorado Constitutions, a capital sentencing scheme must meet at least two requirements. First, the discretion of the sentencer must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." [Citation omitted.] . . . Colorado has chosen to narrow that class by statutorily prescribing the aggravating circumstances that the jury must find exist, beyond a reasonable doubt, before the death penalty may be imposed. [Citation omitted.]

The second requirement is that the sentencing scheme “must allow the sentencing body to consider any relevant mitigating evidence regarding the defendant’s character and background and the circumstances of the offense.”

Accord *People v. White*, 870 P.2d 424, 439 (Colo. 1994) (“This concern for the reliability of a jury verdict of death finds expression in United States Supreme Court decisions requiring that a **jury’s determination to impose the penalty of death** reflect the conviction of each juror, guided by constitutionally sufficient statutory standards.”) (emphasis supplied.); see also *California v. Ramos*, 463 U.S. 992, 998-99 (1983) (“The Court, as well as the separate opinions of a majority of the individual Justices, has recognized the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.”);

7. In *Tennessee*, 788 P.2d at 791, the Colorado Supreme Court held that Colorado’s jury sentencing scheme was constitutionally reliable because:

- A. It “narrows the group of persons convicted of first degree murder who may be subjected to a death sentence by requiring that before such a sentence can be imposed at least one of a specified group of aggravating factors be established to the satisfaction of a jury beyond a reasonable doubt.”
- B. “The statute then allows both the prosecution and the defendant to present evidence relevant to the nature of the crime and the character and background of the defendant in order to provide information based upon which the jurors can decide whether any mitigating factors exists.”

8. The Colorado Supreme Court held that, when the death penalty statute was considered as a whole and in light of the requirements described in the previous paragraphs:

. . . [I]t is adequate to direct and limit the discretion of the sentencer and to permit the sentencing jury to consider relevant mitigating circumstances as constitutionally required. [Citation omitted.] Moreover, we conclude that the statutory procedures are adequate to assure that **any verdict imposing the death penalty will be constitutionally reliable**. [Citation omitted.] (Emphasis supplied.)

Tennessee, 788 P.2d at 808 n. 15.

9. With the exception of *Beck v. Alabama*, 447 U.S. 625, (1980), not a single case cited by the Defendant’s Motion can be fairly read to acknowledge a “requirement” of “heightened reliability” concerning the constitutional rights accorded capital defendant at trial on the question

of guilt or innocence. Defendants in noncapital and capital cases are entitled to the same constitutional rights during the trial on the underlying offense.

10. Defendant's reliance on *Beck* is misplaced as it is distinguishable. *Beck* construed an Alabama statute which prohibited a capital defendant from requesting lesser included offense instructions if charged with a capital offense. Unlike Alabama, in Colorado, all defendants (capital and noncapital) are entitled to request lesser included offense instructions if "there is any credible evidence supporting it." *People v. Garcia*, 826 P.2d. 1259, 1262 (Colo. 1992).

11. While the peculiar statute at issue in *Beck* did undermine the reliability of the guilt determination in that case, there is no showing by the Defendant in this case that application of any statute or rule of evidence or procedure or any aspect of Colorado appellate precedent defining a defendant's rights at trial on the merits penalizes a capital defendant by withholding constitutional or other rights applicable to noncapital defendants.

12. The defense similarly cites dicta from the opinion in *People v. Rodriguez*, 786 P.2d 1079, 1082 (Colo. 1989). In that case, the court noted: "In a capital case, there is a strong presumption that possibly exculpatory evidence should be given to the defendant." This statement is not made in the context of any "heightened fairness or reliability;" indeed, the court in *Rodriguez* does not mention that concept, or any variation of that concept, in the opinion. The defendant would apparently interpret *Rodriguez* to create a form of "Super *Brady*," somehow enhancing the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963) in a capital case. *Rodriguez* does not purport to do this, and it does not support the defendant's argument.

13. The Defendant has not shown that his claimed penumbral shield called "heightened fairness and reliability" exists, nor that its existence would change the fundamental nature of each proceeding in this case.

14. The Motion should be denied without a hearing.

GEORGE BRAUCKLER, District Attorney

By 
Deputy District Attorney
Registration No. 20935

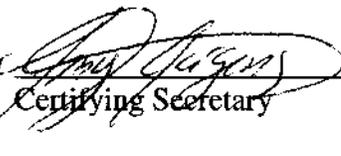
Dated 5/10/13.

CERTIFICATE OF MAILING

I hereby certify that I have deposited a true and correct copy of the foregoing in the Public Defender's Mailbox located at 6450 S Revere Pkwy., Centennial, CO 80111, addressed to:

TAMARA BRADY, ESQ.
DANIEL KING, ESQ.
OFFICE OF THE PUBLIC DEFENDER

Dated: 5/10/13

By  _____
Certifying Secretary