REDACTED

DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO 7325 S. Potomac St. Centennial, Colorado 80112	▲COURT USE ONLY▲
PEOPLE OF THE STATE OF COLORADO **v.** **JAMES EAGAN HOLMES,** **Defendant**	Case No. **12CR1522** Division: **201**
ORDER REGARDING DEFENDANT'S MOTION THAT THE STATE BE REQUIRED: (1) TO PROVE BEYOND A REASONABLE DOUBT EVERY ALLEGED NON-STATUTORY AGGRAVATING FACT/CIRCUMSTANCE; AND (2) TO PROVIDE NOTICE OF EVERY ALLEGED NON-STATUTORY AGGRAVATING FACT/CIRCUMSTANCE IT MAY RELY ON AT THE FOURTH STEP OF ANY SENTENCING PHASE (D-147)	

INTRODUCTION

In Motion D-147, the defendant seeks an order requiring: (1) that the prosecution prove beyond a reasonable doubt every alleged non-statutory aggravating fact or circumstance it presents during step four of any capital sentencing hearing; and (2) notice of any such fact or circumstance. Motion at p. 1. The prosecution opposes the motion. *See generally* Response. For the reasons articulated in this Order, the defendant's motion is denied without a hearing.

ANALYSIS

A. Colorado's Capital Sentencing Scheme

Section 18-1.3-1201, C.R.S. (2013), sets forth Colorado's capital sentencing scheme.[1] It consists of four steps. In the first step, the jury must determine whether the prosecution has proven the existence of at least one statutorily specified aggravator beyond a reasonable doubt. § 18-1.3-1201(2)(a)(I); *People v. Dunlap*, 975 P.2d 723, 736 (Colo. 1999) ("*Dunlap I*"). In the second step, the jury must decide whether any mitigating factors exist. § 18-1.3-1201(2)(a)(II); *Dunlap I*, 975 P.2d at 736. In the third step, based on the mitigating evidence presented, the jury must assess whether "mitigating factors exist which outweigh any aggravating factor or factors found to exist." § 18-1.3-1201(2)(a)(II); *Dunlap I*, 975 P.2d at 736. If the jury finds that mitigating factors do not outweigh the statutorily specified aggravators, the jury moves to the fourth and final step to determine whether the defendant should be sentenced to death or life

---

[1] Section 18-1.3-1201(1)(b) identifies the evidence that may be admitted at a capital sentencing hearing:

> All admissible evidence presented by either the prosecuting attorney or the defendant that the court deems relevant to the nature of the crime, and the character, background, and history of the defendant, including any evidence presented in the guilt phase of the trial, any matters relating to any of the aggravating or mitigating factors enumerated in subsections (4) and (5) of this section, and any matters relating to the personal characteristics of the victim and the impact of the crimes on the victim's family may be presented. Any such evidence . . . which the court deems to have probative value may be received, as long as each party is given an opportunity to rebut such evidence.

imprisonment. § 18-1.3-1201(2)(a)(III); *Dunlap I*, 975 P.2d at 736. The jury may not render a verdict of death unless it unanimously finds beyond a reasonable doubt that at least one aggravating factor has been proven and that there are insufficient mitigating factors to outweigh the aggravating factor or factors that were proven. § 18-1.3-1201(2)(b)(II); *Dunlap I*, 975 P.2d at 736.

Although the prosecution has the burden of proof at step one, neither party has a burden of proof during the remaining three steps. In step two, the jury "considers whether any mitigating factors exist," but "[t]here is no burden of proof on either party at this stage" of the proceeding. *Dunlap v. People*, 173 P.3d 1054, 1089 (Colo. 2007) ("*Dunlap III*") (citation omitted). Nor is there a burden of proof "on either party" in the remaining two steps. *Dunlap III*, 173 P.3d at 1089; *People v. White*, 870 P.2d 424, 455-56 (Colo. 1994). Nevertheless, at the end of step three, "a capital sentencer, in order to deliver a certain and reliable sentence, must be convinced beyond a reasonable doubt that any mitigating factors do not outweigh proven statutory aggravating factors." *White*, 870 P.2d at 456 (citation omitted). Similarly, following step four, "a capital sentencer must still be convinced beyond a reasonable doubt that the defendant should be sentenced to death." *Id.* (quotation omitted). "[T]he purpose of the 'beyond a reasonable doubt' standard . . . is not to fulfill the traditional function of providing guidance in fact-finding but is to communicate to the jurors the degree of confidence they must

have in the correctness of their ultimate conclusion before they can return a verdict of death." *Id.* (quotation omitted).

In *Dunlap I*, the Court discussed "the constitutional distinction between [a] statutory aggravator[]," which the prosecution must establish beyond a reasonable doubt in step one, and "other aggravating evidence," which the prosecution may introduce into evidence in step four. 975 P.2d at 739. The Court explained that "[s]tatutory aggravators are those factors the General Assembly has identified as weighing in favor of imposition of the death penalty." *Id.* "Other aggravating evidence is evidence that is unfavorable to the defendant, but that does not relate to a statutory aggravator." *Id.* As the Court observed:

> [S]tatutory aggravating [factors] play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. ***But the Constitution does not require the jury to ignore other possible aggravating [circumstances] in the process of selecting, from among that class, those defendants who will actually be sentenced to death.***

Id. (quoting *Zant v. Stephens*, 462 U.S. 862, 878, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983)) (emphasis in original).

The *Dunlap I* Court recognized that, in the event the jury reaches step four, "the state and federal constitutions impose few guidelines concerning the scope of aggravating evidence that the jury may consider in its selection decision." *Id.* at 740. Indeed, the admissibility of evidence at step four "is constrained only by familiar evidentiary principles concerning the relevance of the evidence and the

potential for that evidence to inflame the passion or prejudice of the jury." *Id.* at 741.

B. Request to Place a Burden of Proof on the Prosecution at Step Four

The defendant's request to require the prosecution to prove beyond a reasonable doubt every alleged non-statutory aggravating fact or circumstance presented in step four is frivolous.[2] In addition to being partially redundant of Motion D-146, this argument has been expressly rejected by the Colorado Supreme Court on more than one occasion. *White*, 870 P.2d at 456; *Dunlap III*, 173 P.3d at 1089. In fact, in *Dunlap III*, the Court characterized this argument as "completely meritless." 173 P.3d at 1089. It is now axiomatic in Colorado that there is no burden of proof on either party in step four of a capital sentencing hearing. *Id.*

C. *Request for Notice*

At the outset, the Court notes that in Motion P-49, the prosecution made a similar request for notice of the defendant's mitigating factors prior to the close of the evidence during any capital sentencing hearing. Motion P-49 at p. 1. The defendant objected, arguing that section 18-1.3-1201(3) and Rule 32.1 of the Colorado Rules of Criminal Procedure set forth the parties' disclosure obligations in a death penalty sentencing proceeding, and neither the statute nor the rule

[2] As pertinent here, a request is "frivolous" if the filing party "can present no rational argument based on the . . . law in support" of it. *W. United Realty, Inc. v. Isaacs*, 679 P.2d 1063, 1069 (Colo. 1984).

requires the notice requested. Response to Motion P-49 at p. 1. The Court agreed with the defendant and denied the prosecution's motion. *See* Order P-49 at pp. 1-2.

Now, however, it is the defendant who requests notice of the prosecution's proposed step four evidence. The defendant cites no authority for his position, and none exists. Neither section 18-1.3-1201(3) nor Rule 32.1 requires the prosecution to provide notice of the non-statutory aggravating facts or circumstances it intends to introduce at step four of a capital sentencing hearing. Consistent with Order P-49, the Court denies the defendant's request for notice because it is not required. As the old adage goes, "what's sauce for the goose is sauce for the gander."

In any event, the Court is not persuaded by the defendant's underlying premise: that "notice should be given so that [he] will have an opportunity to challenge the admission of any such aggravating facts or circumstances," and so that the Court may "carefully screen such evidence in advance for admissibility." Motion at p. 4; Reply at p. 2. Only evidence that is relevant and admissible under the Colorado Rules of Evidence and any other applicable rules of law will be allowed at step four of any capital sentencing hearing. *Dunlap I*, 975 P.2d at 741. The defendant will have an opportunity to object to any evidence he believes is inadmissible, and the Court is comfortable that it will be able to control the

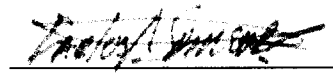
proceeding through its rulings. Hence, neither notice nor a pretrial hearing is necessary or appropriate.[3]

CONCLUSION

For all the foregoing reasons, the Court concludes that Motion D-147 lacks merit. Accordingly, it is denied without a hearing.

Dated this 14th day of March of 2014.

BY THE COURT:



Carlos A. Samour, Jr.
District Court Judge

[3] The defendant also half-heartedly contends that his request for notice should be granted in order to afford him "the opportunity to defend against the allegation of an aggravating fact or circumstance." Motion at p. 4. According to the defendant, he must "be able to adequately defend his life at sentencing," but he "has no way of discerning . . . what [non-statutory aggravating evidence] . . . the government will use in its bid for execution." Reply at p. 2. It is undisputed that the prosecution has provided more than 60,000 pages of discovery in this case. *Id.* The prosecution informs the Court that it has complied with its discovery obligations and will continue to do so. Response at p. 21. The defendant does not take issue with this assertion. *See generally* Reply. Moreover, the defendant is represented by multiple capable attorneys, and the Court is confident that, armed with the disclosures required by section 18-1.3-1201(3) and Rule 32.1, as well as the extensive discovery provided by the prosecution, they will effectively assist the defendant at any capital sentencing hearing.

CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2014, a true and correct copy of the **Order regarding Defendant's motion that the State be required: (1) to prove beyond a reasonable doubt every alleged non-statutory aggravating fact/circumstance; and (2) to provide notice of every alleged non-statutory aggravating fact/circumstance it may rely on at the fourth step of any sentencing phase (D-147)** was served upon the following parties of record:

Karen Pearson
Amy Jorgenson
Rich Orman
Dan Zook
Jacob Edson
Lisa Teesch-Maguire
George Brauchler
Arapahoe County District Attorney's Office
6450 S. Revere Parkway
Centennial, CO 80111-6492
(via e-mail)

Sherilyn Koslosky
Rhonda Crandall
Daniel King
Tamara Brady
Kristen Nelson
Colorado State Public Defender's Office
1290 S. Broadway, Suite 900
Denver, CO 80203
(via e-mail)

Cheryl Robinson