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 PEOPLE'S MOTION *IN LIMINE* REGARDING CAPITAL EVIDENCE (P-109)	

INTRODUCTION

In Motion P-109, the prosecution seeks to exclude some of the exhibits the defendant intends to introduce at a capital sentencing hearing. Motion at p. 1. The defendant opposes the motion. *See generally* Response. For the reasons articulated in this Order, the motion is granted.

ANALYSIS

At the center of the parties' dispute is whether the Colorado Rules of Evidence apply at a capital sentencing hearing. The Court finds that they do. To the extent that what the parties disagree about relates to the admissibility of some of the challenged evidentiary items under the rules of evidence, the Court sustains the prosecution's objections.

A. Applicability of the Colorado Rules of Evidence

Relying on *Green v. Georgia*, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979), the defendant argues that he may present inadmissible hearsay evidence because the Colorado Rules of Evidence cannot be "strictly" applied "to exclude mitigation." *Id.* at p. 2. The defendant misunderstands the holding in *Green*.

Green is inapposite. That case involved a defendant convicted of murder who sought to introduce, at a capital sentencing hearing, a statement made by his confederate to a third party in which the confederate admitted to committing the murder without the defendant's assistance. 442 U.S. at 96, 99 S.Ct. 2150. "The Court, in a brief *per curiam* opinion, noted that the State had used the confession in the confederate's trial, referred to an earlier case holding that the Constitution prohibits States from 'mechanistically' applying the hearsay rule 'to defeat the ends of justice,' and held that the Constitution prohibited the State from barring use of the confession." *Oregon v. Guzek*, 546 U.S. 517, 524, 126 S.Ct. 1226, 163 L.Ed.2d 1112 (2006) (quoting *Green*, 442 U.S. at 97, 99 S.Ct. 2150).

The Court in *Green* held that "[r]egardless of whether the proffered testimony [came] within Georgia's hearsay rule, under the facts of [that] case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment." 442 U.S. at 97, 99 S.Ct. 2150. The Court reasoned that "[t]he excluded testimony was highly relevant to a critical issue in the punishment phase

of the trial, and substantial reasons existed to assume its reliability." *Id.* (citation omitted).[1] According to the Court, in such "unique circumstances, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id.* (quotation omitted). Because the Court ruled that the defendant had been deprived of his right to a fair trial on the issue of punishment, it vacated the sentence. *Id.*

In *Simmons v. Epps*, the Fifth Circuit observed "that the application" of the holding in *Green* "is quite limited." 654 F.3d 526, 543 (5th Cir. 2011). The Court in *Simmons* stated that "*Green* is limited to its facts, and certainly did not federalize the law of evidence." *Id.* (quotation omitted). Rather, noted the Court, *Green* stands for the proposition "that certain egregious evidentiary errors may be redressed by the due process clause." *Id.* (quotation omitted). The Court agrees with the Fifth Circuit that "[t]he Supreme Court was clear that its holding[] in *Green* . . . [was] based on unique and disturbing facts: the exclusion of evidence about another person confessing to the murder." *Id.*

Significantly, the Supreme Court has never broadened the scope of the holding in *Green*. Fifteen years after deciding *Green*, the Court spoke as follows in *Romano v. Oklahoma*:

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[1] The "substantial reasons" for assuming the reliability of the testimony were: (1) the confederate made the confession spontaneously to a close friend; (2) ample evidence corroborated the confession; (3) the confederate's statement was a statement against interest and there was no basis to suggest he had an ulterior motive; and (4) "[p]erhaps most important, the State considered the testimony sufficiently reliable to use it against [the confederate], and to base a death sentence upon it." *Green*, 442 U.S. at 97, 99 S.Ct. 2150.

> Petitioner's argument, pared down, seems to be a request that we fashion general evidentiary rules, under the guise of interpreting the Eighth Amendment, which would govern the admissibility of evidence at capital sentencing proceedings. We have not done so in the past, however, and we will not do so today. ***The Eighth Amendment does not establish a federal code of evidence to supersede state evidentiary rules in capital sentencing proceedings.***

512 U.S. 1, 11-12, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994) (emphasis added).

More recently, the Court made a similar declaration, albeit not in the context of a capital sentencing case:

> While the Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.

Holmes v. South Carolina, 547 U.S. 319, 326, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (citations omitted). This statement is consistent with the Fifth Circuit's narrow interpretation of the holding in *Green*.

Numerous federal and state courts across the land have now expressly or impliedly recognized that neither *Green* nor the decision on which it relied, *Chambers v. Mississippi*, 410 U.S. 284, 98 S.Ct. 1038, 35 L.Ed.2d 297 (1973), render the rules of evidence obsolete at a capital sentencing hearing. *See, e.g.*, *People v. Gonzales*, 281 P.3d 834, 877 (Cal. 2012) ("But as we have often explained, the high court has never held that a defendant's right to present

mitigating evidence overrides the usual rules of evidence") (citations omitted); *Commonwealth v. Spotz*, 47 A.3d 63, 123 (Pa. 2012) ("the *Chambers* holding did ***not*** signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures;" thus, "*Chambers* cannot generally be relied upon to support common, straightforward challenges to hearsay rulings that have correctly applied state criminal procedure") (quotations and citations omitted) (emphasis in original); *McGinnis v. Johnson*, 181 F.3d 686, 693 (5th Cir. 1999) ("Our court has limited *Green* to its facts"); *Gacy v. Welborn*, 994 F.2d 305, 316 (7th Cir. 1993) (*Green* and *Chambers* "hold that states must permit defendants to introduce reliable third-party confessions when direct evidence is unavailable"); *Lofton v. California*, 2011 WL 1260042, at *6 (C.D. Cal. 2011) ("Only in a limited context has the Supreme Court found that the exclusion of evidence violates due process—cases in which the excluded evidence is both highly reliable and relevant to the defense or where the application of the evidentiary rule in question is not rationally related to its intended purpose") (citations omitted); *State v. Sheppard*, 703 N.E.2d 286, 294 (Ohio 1998) ("the United States Supreme Court has carved out an exception to evidentiary rules for mitigation evidence in extreme circumstances when its exclusion would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution") (citing *Green*, 442 U.S. at 97, 99 S.Ct. 2150).

Colorado's appellate courts have not directly addressed this issue. However, the Colorado Supreme Court's decision in *People v. Dunlap*, 975 P.2d 723 (Colo. 1999), provides some guidance. In *Dunlap*, the Court examined "the scope of admissible evidence for purposes of [] step four" of a capital sentencing hearing. 975 P.2d at 740.[2] The Court turned to Colorado's capital sentencing statute, which states:

> 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.

§ 18-1.3-1201(1)(b), C.R.S. (2014).[3]

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[2] Colorado's capital sentencing scheme 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); *Dunlap*, 975 P.2d at 736. In the second step, the jury must decide whether any mitigating factors exist. § 18-1.3-1201(2)(a)(II); *Dunlap*, 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." *Id.* 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 imprisonment without the possibility of parole. § 18-1.3-1201(2)(a)(III); *Dunlap*, 975 P.2d at 736.

[3] At the time *Dunlap* was decided, this provision appeared in section 16-11-103(1)(b) and did not mention "any matters relating to the personal characteristics of the victim and the impact of the crimes on the victim's family."

The Court in *Dunlap* concluded that "[t]he plain language of the statute envisions that either the prosecution or the defendant may introduce evidence that is 'relevant to the nature of the crime, and the character, background, and history of the defendant' and 'any matters relating to any of the aggravating or mitigating factors.'" 975 P.2d at 740 (quoting § 16-11-103(1)(b)). The Court found support for this interpretation in the statute's legislative history. *Id.* According to the Court, "[t]he members of the House and Senate Committees on the Judiciary understood that the Bill defined admissible evidence in the broadest sense, enabling the jury to make its solemn life or death decision with all relevant and constitutionally admissible evidence." *Id.* at 741. Therefore, the Court "determine[d] that the admissibility of . . . evidence for purposes of [] 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.* "Within this conceptual framework," the Court applied CRE 401 and 403 to discern "what evidence the trial court should have permitted the jury to consider, and for what purpose." *Id.*

Based on the analysis in *Dunlap*, this Court believes that the Colorado Supreme Court would hold that, save for the type of "unique circumstances" discussed in *Green*, the rules of evidence apply in a capital sentencing hearing.

Accordingly, the Court will apply the Colorado Rules of Evidence at any sentencing hearing.[4]

B. Challenged Evidence

1. Videotaped Interviews of Defense Mitigation Witnesses

The defense seeks to introduce videotaped interviews of [redacted] mitigation witnesses in lieu of their live testimony. Response at p. 2. The prosecution objects, arguing that "the videos constitute[] hearsay evidence" and are inadmissible. Motion at p. 2. Significantly, the defense admits that these videotaped statements constitute inadmissible hearsay because they are being introduced "for the truth of the matter asserted." Response at p. 2. The defense nevertheless urges that this evidence must be allowed under the decisions in *Chambers* and *Green*. *Id.* at pp. 2-4. The Court disagrees.

The defendant has not established that the type of "unique circumstances" or disturbing facts identified in *Chambers* and *Green*—the exclusion of another person's confession to the murder the defendant was charged with committing—are present here. *See Simmons*, 654 F.3d at 542-43. Further, the probative value of

[4] The defendant asserts that "[i]n several previous rulings, the Court has implied that it will take an expansive view of the admissibility of any evidence offered by the prosecution as nonstatutory aggravation if we reach 'step four' of the capital sentencing proceeding." Response at p. 5. The defendant cites two Orders in support of this contention. *Id.* In neither Order did the Court imply that, at any capital sentencing hearing, it will allow evidence that is inadmissible under the rules of evidence. *See generally* Orders P-83-B and D-147. To the contrary, both Orders relied on the conclusion in *Dunlap* that the admissibility of evidence at step four of a sentencing hearing "is constrained only by familiar evidentiary principles." Order P-83-B at p. 16; Order D-147 at pp. 4-5.

the videotaped interviews "pales in comparison to the excluded evidence in *Green* and *Chambers*." *Id.* Most importantly, the videotaped statements lack "the considerable assurance of reliability" of the challenged evidence in *Chambers* or the "substantial reasons" to support the reliability of the evidence at issue in *Green*. *Id.* at 543-44. The videotaped interviews: (1) were not made spontaneously, as were the confessions in *Chambers* and *Green*; (2) are not statements against interest; and (3) were not relied upon or introduced into evidence by the prosecution in another trial or proceeding. *See id.*

The Court notes that the videotaped statements are not the only method available to present this mitigation evidence to the jury. Further, admission of the videotaped statements would allow the defense to introduce mitigation testimony that was not given under oath while depriving the prosecution of the ability for cross-examination.

The defense has not argued, much less shown, that the witnesses in question are unavailable. The witnesses' reluctance or potential fear to testify because of the prospect that the trial may be broadcast, Response at p. 5, is insufficient. First, although the Court has allowed the media to access the feed from the closed circuit camera in the courtroom, there is no evidence that these witnesses' testimony will be broadcast, and if broadcast, how and to whom it will be broadcast. Second, the defense does not explain why these witnesses cannot be subpoenaed for the trial.

Third, the People also have witnesses who are reluctant and fearful to testify. Reply at p. 2. If the Court allows the defense witnesses to testify through videotaped interviews, it will have to afford the prosecution's witnesses the same opportunity. Yet the Court is not aware that the defense has agreed to allow the prosecution's witnesses to present videotaped statements in lieu of live testimony.

The defense insists, however, that a number of the defense's mitigation witnesses "have jobs and other obligations that would make it exceptionally burdensome, and perhaps impossible, for them to travel to Colorado to provide such brief testimony." Response at pp. 5-6. Again, the same could be said for some of the prosecution's witnesses, who, as the prosecution notes, "not only have jobs, but are gravely disabled as a result of their injuries suffered in the theater, and will have to come to court with the additional burden of that disability." Reply at p. 2. In any case, the defense provides no details about the extraordinary burdens its witnesses will purportedly experience, or even how many or which witnesses may face such exceptional burdens or "perhaps impossible" obstacles.

According to the defense, some of the videos should be allowed because the witnesses "have just a small, albeit important, part of Mr. Holmes's mitigation story to tell." Response at p. 5. The dichotomy in this assertion is not lost on the Court. It is difficult to harmonize the defense's contention that these witnesses' out-of-court statements should be admitted because they are not particularly

significant and the defense's contention that these witnesses' out-of-court statements should be admitted because they are significant. At any rate, the applicability of the rules of evidence does not hinge on whether the proponent of the evidence views the evidence as significant or not. Nor does application of the rules depend on "serious[] prejudice" to the opposing party. *Id.* The Court lacks the authority to deviate from the rules based simply on the defense's belief that the evidence sought to be introduced is unlikely to "seriously prejudice" the prosecution. *Id.*

The defendant speculates that the prosecution is unlikely to conduct any "meaningful cross-examination" of the witnesses at issue. *Id.* The Court cannot suspend the rules of evidence based on such conjecture. Besides, the Court cannot require a party to disclose in advance of trial whether it intends to cross-examine certain witnesses. Even if the People were to represent to the Court that they do not intend to cross-examine these witnesses, it could not hold them to such a representation if they change their mind during the course of the trial. Regardless of the prosecution's plans for cross-examination, the rules of evidence still apply to the videotaped interviews.

2. <u>TED Talk and Passages From Book by [redacted]</u>

The defense wishes to introduce a "video of a TED talk given by [redacted], as well as [] passages from a book written by [redacted], about [redacted]

[redacted]." *Id.*[5] The Court agrees with the prosecution that this evidence is inadmissible under the rules of evidence for at least two reasons: it is irrelevant and it is hearsay. *See* Motion at p. 3.

[redacted] is irrelevant to the nature and circumstances of the crimes charged or the character, background, and history of the defendant. Moreover, the videotape [redacted]. While this may be appropriate evidence at a legislative hearing, it has no place in a capital sentencing hearing.[6]

In any event, the defense does not dispute that the video and the book passages constitute hearsay. Response at p. 6. Thus, the video and the book passages are inadmissible on this independent ground.

3. Video of [redacted]

The Court agrees with the prosecution that the video of [redacted] is irrelevant and inadmissible. Reply at p. 3. The People do not dispute that the defendant is entitled to present evidence of his upbringing, as such is relevant to

[5] [redacted].

[6] The Court is also concerned about allowing the defense to select passages from [redacted] book for the jury.

his character. *Id.* This includes acquainting the jurors with the defendant's parents, the type of family he came from, and the values his parents instilled in him as a child. *See* Response at p. 7. However, like the People, the Court disagrees with the defendant that [redacted] are all relevant to . . . Mr. Holmes's own moral fabric and the likelihood that his mother will continue to have a positive influence on him, on his life, and on his own outlook about and understanding of the events of July 20, 2012." *Id.* [redacted] are irrelevant to the nature and circumstances of the crimes charged or the character, background, and history of the defendant.

4. Promotional Videos

The prosecution objects, on hearsay grounds, to the statements (including narration) and text contained in two promotional videos about [redacted] and [redacted], two organizations with which the defendant volunteered as a teenager and adult. *Id.* at p. 2. The defendant responds that he is not seeking to introduce these videos "to assert the truth of any of these statements." *Id.* at pp. 1-2. Rather, he wishes to introduce the [redacted] video "as demonstrative evidence to provide jurors with ***a visual image*** of the place he [redacted] and the type of establishment he chose to serve," and the [redacted]

[redacted] video "to provide context for other evidence and testimony about [redacted]." *Id.* (emphasis added).

The Court finds that the defendant is seeking to introduce the out-of-court statements in the videos for the truth of the matter asserted. In addition to informing the jury that he volunteered at these organizations, the defendant wants to show the jury what these organizations are about and what they do. Accordingly, the People's hearsay objection is sustained.

Further, given that what the defense wishes to accomplish is to provide the jurors with "a visual image of the place" where he worked as a volunteer for [redacted] and "context" for other testimony and evidence related to [redacted], the statements and text seem irrelevant.[7] The defense can present the videos without sound and without the text and still accomplish its goal. Therefore, the promotional videos are excluded on this independent ground. However, assuming the proper foundation is established and that the videos are otherwise admissible, the defense may attempt to introduce redacted versions of them in accordance with this Order.

[7] Depending on the other testimony and evidence presented related to the videos, the statements and text may also be cumulative and, therefore, inadmissible under CRE 403. However, the Court cannot make this determination at this time.

For all the foregoing reasons, the Court sustains the prosecution's objections in Motion P-109. Therefore, the motion is granted.

Dated this 14th day of January of 2015.

BY THE COURT:

Carlos A. Samour, Jr.
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2015, a true and correct copy of the **Order regarding People's motion in limine regarding capital evidence (P-109)** was served upon the following parties of record:

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