

REDACTED

DISTRICT COURT, ARAPAHOE COUNTY  
STATE OF COLORADO  
Arapahoe County Justice Center  
7325 S. Potomac Street  
Centennial, Colorado 80112

Filed

AUG 16 2013

THE PEOPLE OF THE STATE OF COLORADO vs.  
Defendant(s):

CLERK OF THE COMBINED COURTS  
ARAPAHOE COUNTY, COLORADO  
COURT USE ONLY

**JAMES EAGAN HOLMES**

Attorney:  
GEORGE H. BRAUCHLER  
18<sup>th</sup> Judicial District Attorney  
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Phone: (720) 874-8500  
Atty. Reg. #: 25910

Case Number: **12CR1522**  
Division: **201**

**MOTION IN LIMINE REGARDING EXCLUSION OF EVIDENCE  
OF PRISON CONDITIONS [P-055]**

**CERTIFICATE OF CONFERRAL**

The prosecution conferred with the defense counsel prior to the filing of this motion, and the defense counsel has indicated that they will file a response to this motion.

THIS MOTION is filed by the District Attorney for the 18<sup>th</sup> Judicial District.

1. The District Attorney respectfully requests that, in the event defendant is found guilty of first degree murder, at any capital sentencing hearing which may be held, this Court exclude any evidence, testimony, argument or other reference concerning the day to day living conditions allegedly experienced by inmates serving sentences of life without parole in the Department of Corrections ("DOC").
2. In the event defendant is found guilty of first degree murder, by statute, evidence admissible at a capital sentencing hearing is limited to the following:
  - A. 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
  - B. Any evidence presented in the guilt phase of the trial,

- C. Any matters relating to any of the aggravating factors enumerated by section 18-1.3-1201(5),
- D. Any matters relating to any of the mitigating factors enumerated in section 18-1.3-1201(4),
- E. Any matters relating to the personal characteristics of the victim,
- F. Any matters relating to the impact of the crimes on the victim's family.

See C.R.S. § 18-1.3-1201(1)(b). Nothing in the statute authorizes the admission of evidence, testimony, argument or other reference concerning the daily living conditions experienced by those serving sentences of life without parole in DOC.

3. It is anticipated that the defense may seek to present evidence or argue that day to day living conditions in DOC are allegedly relevant to mitigation or are purportedly admissible for some other purpose. As a matter of law, such evidence does not qualify as "mitigation" as defined by the U.S. Supreme Court. See the following federal cases, which are cited by way of example only, and define mitigation as "any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604, (1978). The rule of *Lockett* has been reaffirmed by the U.S. Supreme Court many times. *Eddings v. Oklahoma*, 455 U.S. 104, (1982); *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Mills v. Maryland*, 486 U.S. 367 (1988); *Penry v. Lynaugh*, 492 U.S. 302 (1989), reversed on another point by *Atkins v. Virginia*, 536 U.S. 304 (2002); *Blystone v. Pennsylvania*, 494 U.S. 299 255 (1990); *Johnson v. Texas*, 509 U.S. 350, (1993); *Oregon v. Guzek*, 546 U.S. 517 (2002); *Kansas v. Marsh*, 548 U.S. 163, 126 S.Ct. 2516, 2525 (2006).
4. While it is unknown exactly how this Court will instruct the jury in the event a capital sentencing hearing is held in this case, for purposes of this motion, the definition of mitigation evaluated by the Colorado Supreme Court in *People v. Davis*, 794 P.2d 159, 231 n. 26 (Colo. 1990) is instructive:

Mitigation is any abatement or diminution of a penalty or punishment imposed by law. Mitigating factors are circumstances which do not constitute a justification or excuse for the offense in question, but which, in fairness, **may be considered as extenuating or reducing the degree of moral culpability** or which in any other way, alone or together with other such circumstances, may allow a sentence of life imprisonment instead of the death penalty. (Emphasis added.)

5. Pursuant to Colorado's capital sentencing statute and the above judicial definition of mitigation, in order to qualify as admissible mitigation evidence, this Court must determine that evidence of prison conditions experienced by others serving sentences of life without parole:
  - A. Is relevant to the nature of the crime or the character, background or history of the defendant; and
  - B. Is "extenuating" or otherwise reduces the defendant's "degree of moral culpability" with respect to killing Jonathan Blunk, Alexander Boik, Jesse Childress, Gordon Cowden, Jessica Ghawi, John Larimer, Matt McQuinn, Micayla Medek, Veronica Moser-Sullivan, Alex Sullivan, Alexander Teves, and Rebecca Wingo.
6. Evidence concerning the daily living conditions experienced by DOC inmates serving sentences of life without parole is irrelevant to mitigation as defined by the United States and Colorado Supreme Court and to any other issue confronting a Colorado jury in a capital sentencing hearing.
7. For a second reason, evidence concerning the day to day living conditions allegedly experienced by inmates serving sentences of life without parole in DOC is inadmissible. Evidence relating to prison conditions, which the defendant might encounter in the event he is sentenced to DOC, is entirely speculative. In the event that the defendant were to receive a sentence of life imprisonment, instead of death, DOC has the discretion to place prisoners at any one of many facilities depending upon DOC's internal regulations and decision-making procedures. Additionally, prison conditions may change over time due to numerous factors, such as amendments to statutes, different state government administrations, appellate precedent on prison conditions, and many other factors. There is no way to accurately predict what prison conditions will be like in 2023, 2033, 2043, 2053, or 2063. Any suggestion concerning particular conditions of incarceration that any individual defendant might face in the future if sentenced to DOC is entirely uncertain.
8. Other courts have excluded evidence, testimony or argument of the type addressed by this motion. By way of example, see:
  - A. *People v. Daniels*, 802 P.2d 906, 938 (Cal. 1991) ("Day in the Life" videotape of prison conditions was properly excluded as it had "no bearing upon the character and record of the individual offender and the circumstances of the particular offense.")
  - B. *People v. Smith*, 107 P.3d 229, 366 (Cal. 2005) (In upholding the exclusion of defense expert evidence, offered to show "what occurs in prison and what prison means as a form of punishment," the California Supreme Court rejected defendant's request to

modify its prior holdings that “evidence of the conditions of confinement that a defendant will experience if sentenced to life imprisonment without parole is irrelevant to the jury’s penalty determination because it does not relate to the defendant’s character, culpability, or the circumstances of the offense.”

- C. *People v. Martinez*, 224 P.3d 877, 914 (Cal. 2010) (“As defendant acknowledges, we have repeatedly held that evidence concerning conditions of confinement for a person serving a sentence of life without possibility of parole is not relevant to the penalty determination because it has no bearing on the defendant’s character, culpability, or the circumstances of the offense under either the federal Constitution or [the California capital sentencing statute].”).
- D. *State v. Kleypas*, 40 P.3d 139 (Kan. 2001)(The trial court properly refused to allow evidence of “the conditions of future incarceration and the testimony of the Secretary of Corrections as to what life would be like for [the defendant] in prison.”) reversed on other grounds by *State v. Marsh*, 102 P.3d 445 (Kan. 2004).<sup>1</sup>
- E. *Cherrix v. Commonwealth*, 513 S.E.2d 642, 653 (Va. 1999)(Defendant’s proffered evidence involving the “general nature of prison life,” including “what prison life would be like for Cherrix if he received a life sentence,” was properly excluded on the ground that “what a person may expect in the penal system is not relevant mitigation evidence.”).
9. *Lockett v. Ohio*, 438 U.S. 586, 605 n. 12 (1978), is a leading U.S. Supreme Court case concerning mitigation. When writing for the majority in *Lockett*, Chief Justice Burger emphasized that, in the context of a capital sentencing hearing:
- Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant’s character, prior record, or the circumstances of his offense.
10. This motion does not implicate evidence properly admissible as mitigation under *Skipper v. South Carolina*, 476 U.S. 1 (1986), i.e. evidence reflecting a particular defendant’s good behavior during time spent in jail awaiting trial. (Conversely, evidence of bad

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<sup>1</sup> While not germane to this motion, *State v. Marsh* held that Kansas’ capital sentencing statute allegedly violated the Eight and Fourteenth Amendments to the US Constitution because a jury might elect to impose the death penalty when aggravating and mitigating evidence were in “equipoise,” reversing *Kleypas* on this issue. *State v. Marsh* was later reversed on this point by the US Supreme Court in *Kansas v. Marsh*, 548 U.S. 163 (2006).

behavior by a particular defendant during time spent in jail awaiting trial is also admissible, although this principle is not the subject of this motion.)

WHEREFORE, the People respectfully request that, in the event the defendant is convicted of murder in the first degree, in the ensuing sentencing hearing, defendant be prohibited from presenting evidence, testimony, argument or other reference concerning the day to day living conditions allegedly experienced by inmates serving sentences of life without parole in DOC.

DATED this 16 day of August, 2013.

Respectfully submitted,

GEORGE H. BRAUCHLER,  
District Attorney

By 

Deputy District Attorney

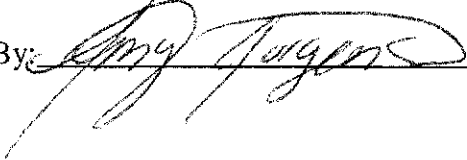
Registration No. 20935

**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: 8/16/13

By: 

DISTRICT COURT  
ARAPAHOE COUNTY, COLORADO  
Court Address: Arapahoe County Justice Center  
7325 S. Potomac St., Centennial, CO 80112

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**COURT ORDER**  
**RE: PEOPLE'S MOTION IN LIMINE REGARDING EXCLUSION OF EVIDENCE OF PRISON CONDITIONS [P-055]**

THE COURT, being fully advised, and being duly apprised of the relevant facts and law, hereby GRANTS the PEOPLE'S MOTION IN LIMINE REGARDING EXCLUSION OF EVIDENCE OF PRISON CONDITIONS [P-055].

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2013

BY THE COURT

\_\_\_\_\_  
District Court Judge Carlos A. Samour