

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

JAMES EAGAN HOLMES

COURT USE ONLY

Attorney:
GEORGE H. BRAUCHLER
18th Judicial District Attorney
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Case Number: **12CR1522**
Division: **201**

**PEOPLE'S MOTION FOR DEFENSE DISCLOSURE OF MITIGATING FACTORS
PRIOR TO CLOSE OF EVIDENCE AT SENTENCING [P-049]**

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 18th Judicial District, by and through his duly appointed Deputy District Attorney or Chief Deputy District Attorney and requests the Court order the Defendant to disclose mitigating factors prior to close of evidence at sentencing. The disclosure by the Defendant of mitigating factors will make the sentencing hearing a more constitutionally reliable proceeding. Even though no statute or rule requires that the Defendant provide such a list, reliability in the sentencing proceeding is an objective standard that requires both the prosecution and the defense to proceed in a manner that ensures that all the evidence presented to the jury is reliable. An advance disclosure of mitigating factors will also assist the Court and the parties in making sure that appropriate jury instructions are given to the jury.

1. The sentencing procedure after conviction of a class 1 felony requires a separate sentencing hearing. Pursuant to §18-1.3-1201(2)(a), C.R.S. (2008) the fact finder is required to make the following findings:

a. whether at least one aggravating factor has been proved;

- b. whether mitigating factors exist and what weight to give mitigating factors;
 - c. whether mitigating factors do not outweigh aggravating factors;
 - d. the appropriate sentence based upon aggravating factors, mitigating factors and aggravating circumstances.
2. The aggravating factors are enumerated in the statute. § 18-1.3-1201(5) C.R.S.
 3. The statute refers to Crim.P. 32.1 and required notice of aggravating factors. § 18-1.3-1201(3)(a). Crim.P. 32.1(d)(1) requires a filing of a list of aggravating factors “no later than 20 days after the filing of the written statement of intention” to seek the death penalty.
 4. “[T]he Eighth Amendment does not deprive the State of its authority to set reasonable limits upon the evidence a defendant can submit, and to control the manner in which it is submitted.” Oregon v. Guzek, 546 U.S. 517, 526 (2006). The “qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.” Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964 (1978). And, the United States Supreme Court has “consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding.” Strickland v. Washington, 466 U.S. 668, 704, 104 S.Ct. 2052, 2073 (1984) (Brennan, J., concurring).
 5. Mitigation may come from the list contained in the statute, C.R.S. § 18-1.3-1201(4), or may consist of other evidence that goes to “the character, background, and history of the defendant.” § 18-1.3-1201(1)(b); *see also* Lockett v. Ohio, 438 U.S. 586, 604, (1978) (holding “ that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a 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”); Abdul-Kabir v. Quarterman, 550 U.S. 233, 127 S.Ct. 1654, 1674 (2007) (holding that jurors “must be allowed to consider a defendant's moral culpability and decide whether death is an appropriate punishment for that individual in light of his personal history and characteristics and the circumstances of the offense”).
 6. The disclosure of mitigating factors is essential to a reliable sentencing determination , as is required by the Colorado and United States Constitutions.
 7. The statute provides that the Court will admit evidence that has “probative value” “as long as each party is given an opportunity to rebut such evidence.” § 18-1.3-1201(1)(b). The statute provides for two important requirements: first, the determination by the court of relevance, and, second, a party’s opportunity to present rebuttal evidence.

8. In order to determine relevance of a piece of evidence, the Court must know what the possible mitigating factor is for which the evidence is "of consequence." C.R.E. 401. "To be material, the evidence must relate to a fact that is of consequence to the determination of the action. (Courts) necessarily look to the elements of the crime charged to make this determination." *Fletcher v. People*, 179 P.3d 969, 974 (Colo. 2007) (citations omitted).
9. In a substantive criminal trial the court is required to look to the elements of the crimes charged in determining the relevance of offered evidence, if making that same determination at a sentencing hearing, the court must consider how the evidence relates to the mitigating factors presented. Simply put, if the court does not know what the claimed mitigation consists of, the court will be unable to determine whether offered evidence is relevant. To not require the disclosure of mitigating factors would be like trying a criminal case without knowing what the charges are.
10. Second, in order for a party to determine how to "rebut" evidence, that party needs to know what is being rebutted. The statute appears to require a court to grant a delay in the sentencing hearing, in order to allow the party an opportunity to investigate and gather evidence to rebut the particular mitigating factor. Advance disclosure of mitigating factors would prevent such a delay.
11. The disclosure of the mitigating factors is not burdensome since the Defendant is already under discovery obligations concerning mitigation witnesses. § 18-1.3-1201(3)(c); Crim.P. 32.1(d)(7).
12. As the United States Supreme Court stated in *Williams v. Florida*, 399 U.S. 78 (1970) (holding constitutional alibi disclosures): "The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played." 399 U.S. at 82. "At most, the rule (concerning alibi disclosures) only compelled petitioner to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that the petitioner from the beginning planned to divulge at trial." 399 U.S. at 85. The Supreme Court followed the *Williams* holding in *Wardius v. Oregon*, 412 U.S. 470, 474, 93S.Ct. 2208, 2212 (1973), in holding that "the ends of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial."
13. "The trial of a criminal case is not a game of fox and hounds in which the state attempts to outwit and trap a quarry. It is, instead, a sober search for truth, in which not only the resources of the defendant, but those readily available to the state must be put to work in aid of that search." *City of Englewood by and on behalf of the People v. Municipal Court*, 687 P.2d 521, 523 (Colo.App. 1984) (citations omitted). "Trial by ambush, or the old fox-and-hounds approach to litigation, does not promote accuracy or efficiency in the search for the truth." *People v. Small*, 631 P.2d 148, 158 (Colo. 1981) (requiring disclosure of defense investigator report) (citing *People v. District Court*, 187 Colo. 333, 337, 531 P.2d

626, 628 (1975)(upholding against constitutional challenges Crim.P. 16 defense disclosures)).

14. A criminal defendant “may constitutionally be required to make difficult strategic choices, such as whether to give advance notice of an alibi or forego the ability to present that defense.” *People v. Martinez*, 970 P.2d 469, 472 (Colo. 1998). “In short, the broad question of whether it is constitutional to impose upon the defendant in a criminal proceeding certain disclosure obligations has been answered, and answered affirmatively.” *Id.* “(R)eciprocal discovery carries no inherent flaws.” *Id.*
15. Timely disclosures seek to achieve the “obvious purpose” “to provide the prosecution with information necessary for adequate preparation for trial; to reduce the possibility of surprise and concomitant delays at trial; and to enhance the overall reliability of the factfinding process.” *People v. Hampton*, 758 P.2d 1344, 1350 (Colo. 1988) (upholding the sanction of exclusion of witnesses supporting the defendant’s alibi defense for failure to disclose them) (citations omitted). The Defendant in this case can hardly be heard to complain of a procedure requested by the prosecution that “enhances the overall reliability” of the sentencing hearing. Reliability does not depend upon one advocate’s position: it is a two-way street that create certain obligations on both the prosecution and the defense.
16. Timely disclosure of mitigating factors that the Defendant will introduce will improve the reliability of the final sentencing decision. Disclosure will permit the prosecution to determine and prepare rebuttal to mitigating factors. Objections that may be made to possible mitigation include, but are not limited to assertions that offered evidence is irrelevant, is not supported by the evidence in the record, is argumentative, and is repetitive. As a result, disclosure will permit the court to properly rule on any objections to offered evidence, as well as to provide appropriate jury instructions.
17. The issue of appropriate jury instructions includes any limiting instructions given contemporaneously with the admission of evidence. Some of the People’s sentencing hearing evidence will likely consist of rebuttal to mitigation, which the jury may consider at Steps 2 and 3 of the sentencing process, when jurors determine the existence of mitigation and the weight to be given to mitigating and aggravating factors. Other of the People’s sentencing hearing evidence will consist of aggravated circumstance evidence, which the jury may only consider at Step 4 of the sentencing process, where the decision concerning what sentence to impose is made; this evidence therefore requires a contemporaneous limiting instruction be given.
18. Only if the defendant is required to disclose the mitigation he intends to present and argue can the Court ensure that the appropriate limiting instructions are given during the presentation of the People’s sentencing hearing evidence. This is essential in order to avoid the problem that was identified in *Dunlap I*, 975 P.2d 723 (Colo. 1999), when, for other reasons, the People’s sentencing hearing evidence was presented without the proper contemporaneous limiting instructions.

19. In *People v. Sir Mario Owens*, Arapahoe District Court 06CR705, in addition to the statutory mitigators, the Defendant tendered and this Court instructed regarding a list of 61 possible mitigating factors. In *People v. David Bueno*, Lincoln District Court 05CR73, in addition to the statutory mitigators, the defendant tendered and that court instructed regarding a list of 104 possible mitigating factors. In both the *Owens* and *Bueno* cases the lists of mitigating factors were tendered after the close of evidence, and included some factors that were not supported by the evidence, not relevant, argumentative and/or repetitive. Because the mitigating factors had not been identified in advance, neither the People nor the Court had the opportunity to carefully and thoughtfully review each and every factor before its submission to the jury.
20. The disclosure of mitigating factors can be ordered at particular points during the process. It is the People's position that mitigating factors should be disclosed as soon as possible. However, the Court could order disclosure at some other time, eg. prior to the start of the sentencing hearing or after a Step 1 finding of the existence of one or more aggravating factors, but prior to the presentation of any evidence in Step 2. At the very least, the Court should order disclosure prior to the close of evidence in order to permit the People a real opportunity to present all relevant evidence that rebuts any claimed mitigation. Disclosure only after the close of evidence forecloses that opportunity entirely.

WHEREFORE, the People respectfully request that the Defendant be required to disclose his proposed mitigating factors.

DATED this 16 day of August, 2013.

Respectfully submitted,
GEORGE H. BRAUCHLER,
District Attorney

By 

Deputy District Attorney

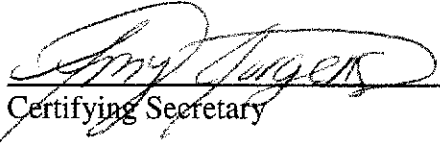
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CERTIFICATE OF MAILING

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 
Certifying Secretary

DISTRICT COURT
ARAPAHOE COUNTY, COLORADO
Court Address: Arapahoe County Justice Center
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THE PEOPLE OF THE STATE OF COLORADO vs.
Defendant:
JAMES EAGAN HOLMES

COURT USE ONLY

Case Number:
12CR1522
Division/Ctrm:
201

COURT ORDER
RE: PEOPLE'S MOTION FOR DEFENSE DISCLOSURE OF MITIGATING FACTORS
PRIOR TO CLOSE OF EVIDENCE AT SENTENCING [P-049]

THE COURT, being fully advised, and being duly apprised of the relevant facts and law, hereby GRANTS the PEOPLE'S MOTION FOR DEFENSE DISCLOSURE OF MITIGATING FACTORS PRIOR TO CLOSE OF EVIDENCE AT SENTENCING [P-049].

Dated this _____ day of _____, 2013

BY THE COURT

District Court Judge Carlos A. Samour