

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
<p align="center">ORDER REGARDING PEOPLE’S MOTION REGARDING JURY INSTRUCTION CONCERNING DUTY TO DELIBERATE (P-50)</p>	

In Motion P-50, the People request “that the defendant be ordered not to argue or imply to jurors that they have no duty to deliberate, during both voir dire and the remainder of the trial.” Motion at p. 1.¹ The defendant asks the Court to deny the motion. For the reasons articulated in this Order, the motion is granted.

The defendant does not assert that he has the right to argue or imply to jurors that they have no duty to deliberate. Response at pp. 1-2. Nor does he indicate that he intends to advance such an argument during any phase of the trial. *Id.* Instead, he contends that the prosecution’s concern is “entirely speculative,” that

¹ The People also inform the Court that if there is a death penalty sentencing hearing, they will submit a proposed duty to deliberate jury instruction. Motion at p. 1. The defendant advises that in the event such an instruction is tendered, he will submit a substantive response. Response at p. 1. Additionally, the defendant notes that he intends to submit proposed instructions too. *Id.*

he will not make any statements that misstate the law, and that the prosecution can make a contemporaneous objection to any statement it deems improper. *Id.* at p. 1. The defendant urges the Court to deny the motion on the ground that it presents “nothing for the Court to rule on” because it “does not request any specific relief.” Response at p. 2. The Court disagrees.

Long ago, Colorado’s Appellate Courts “approved the use of motions and orders in limine to forestall introduction of potentially prejudicial evidence until the court has ruled on its admissibility outside the presence of the jury.” *Good v. A.B. Chance Co.*, 39 Colo. App. 70, 565 P.2d 217, 221 (Colo. App. 1977), *superseded on other grounds by statute/rule, as stated in Uptain v. Huntington Lab, Inc.*, 685 P.2d 218, 221-22 (Colo. App. 1984).² “Other states have also recognized the efficacy and importance of a procedure which restrains parties from referring to prejudicial matters of questionable legal relevance prior to a decision regarding admissibility.” *Id.* “Because a motion in limine shortens trial, simplifies issues, and reduces the possibility of mistrial, its function is not unlike the pre-trial conference, and it may accomplish similar ends.” *Id.* (citations omitted).

Although *Good* involved a civil dispute, a motion in limine serves similar purposes in criminal cases. It is “used to obtain a ruling from the court prior to trial when counsel needs to know in advance of trial how certain matters that

² “In limine” literally means “at the threshold.” *Good*, 565 P.2d at 221 n. 1.

counsel anticipates may arise during the trial will be handled or whether certain evidence will be admissible.” 15 Colo. Prac., *Criminal Practice & Procedure* § 19.6 (2d ed.) (2012). By seeking a ruling before trial, “counsel can preclude any taint attendant to attempts by the opposing party to introduce the evidence before the jury.” *Id.* Additionally, once counsel learns whether the challenged evidence will be admitted, he “is better able to conduct jury voir dire and give a more effective opening statement.” *Id.*

The People’s Motion P-50 is in the form of a motion in limine. It seeks to preclude the defendant from referring to a matter they deem improper and prejudicial. That it is necessarily anticipatory in nature does not render it improper. Indeed, it is not unusual for a motion in limine to be directed at arguments or comments the moving party anticipates the other party may make at trial. As such, Motion P-50 is appropriate and the Court has the inherent power to resolve it in limine. *See generally id.* at 221 (“[t]he underlying power of the trial court to [rule] on the admissibility of evidence is inherent;” thus, “[s]pecific statutes are not required to authorize a motion in limine”) (citations omitted).

Turning to the merits of Motion P-50, the Court agrees with the People that jurors have a duty to deliberate during the guilt phase of the trial. *See generally People v. Lewis*, 676 P.2d 682, 689, n. 10 (Colo. 1984) (explaining that if, in response to inquiries by the Court, the jury indicates it is deadlocked over guilt as

to any offense and nonguilt as to all offenses—as opposed to being deadlocked only on the particular degree of guilt—and that the division is such that progress toward a unanimous verdict is unlikely, the Court in its discretion may give pattern instruction 38:14 from the Colorado Criminal Jury Instructions, which reminds the jurors, among other things, that “[i]t is [their] duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement if [they] can do so without violence to individual judgment”), *superseded on other grounds by statute as stated in People v. Richardson*, 184 P.3d 755, 761-62 (Colo. 2008).³ “In Colorado, a verdict in a criminal trial must be unanimous,” and “[u]nanimity requires a free and untrammelled deliberative process that expresses the conscientious conviction of each individual juror.” *Id.* at 686 (citations omitted); *see also People v. Dahl*, 160 P.3d 301, 306 (Colo. App. 2007) (reversing the defendant’s conviction because “the nature, number, and tenor of the trial court’s

³ Instruction 38:14 is commonly known as the “modified Allen” instruction, a label which causes some confusion because it involves two relevant, but unrelated, cases by the last name of *Allen*. The instruction had its genesis in *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896). On September 22, 1971, the Chief Justice of the Colorado Supreme Court issued a directive for trial judges to utilize a four-part modified *Allen* instruction in accordance with Standard 5.4 of the *ABA Standards Relating to Trial by Jury*. *Lewis*, 676 P.2d at 686. The ABA House of Delegates approved this Standard in August 1968, and the Standard was again adopted in August 1978, when the standards were updated; the Standard may be found at III *ABA Standards for Criminal Justice* 15-4.4 (2d ed. 1980). *Id.* at 687, n. 2. Twelve years after the Chief Justice Directive setting forth the modified *Allen* instruction, the Colorado Supreme Court disapproved of “time-fuse” instructions (in which the court informs the jury that it will declare a mistrial if a verdict is not returned by a specific time), explaining that such instructions “may have a coercive effect, like that of the [original] *Allen* charge.” *See Allen v. People*, 660 P.2d 896, 898-99 (Colo. 1983). Thus, the four-part modified-*Allen* instruction does not include a time-fuse admonition, and Colorado’s *Allen* decision prohibits a trial court from adding one. *Id.*

comments created a substantial possibility that the juror might forsake his duty duly to deliberate the merits of the case in favor of promptly reaching a disposition, indeed any disposition”).

The Court also agrees with the People that the jury has a duty to deliberate during any capital sentencing hearing held. Section 18-1.3-1201(2)(a), C.R.S. (2013), provides, in pertinent part, that “[a]fter hearing all the evidence and arguments of the prosecuting attorney and the defendant, the jury shall deliberate” Further, under subsection (2)(d) of the same statute, if the sentencing decision is not unanimous, “the jury shall be discharged, and the court shall sentence the defendant to life imprisonment.”

For all the foregoing reasons, the Court concludes that Motion P-50 has merit. Accordingly, it is granted. The defendant may not argue or imply to the jurors, either in the guilt phase of the trial or during any capital sentencing hearing held, that they do not have to deliberate. The jury has a duty to deliberate.

Dated this 1st day of October of 2013.

BY THE COURT:



Carlos A. Samour, Jr.
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2013, a true and correct copy of the **Order regarding People's motion regarding jury instruction concerning duty to deliberate (P-50)** 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)


