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DISTRICT COURT, ARAPAHOE COUNTY STATE OF COLORADO Arapahoe County Justice Center 7325 S. Potomac Street Centennial, Colorado 80112	Filed OCT 10 2014 CLERK OF THE COMBINED COURT ARAPAHOE COUNTY, COLORADO
THE PEOPLE OF THE STATE OF COLORADO vs. Defendant(s): **JAMES EAGAN HOLMES**	COURT USE ONLY
Attorney: GEORGE H. BRAUCHLER 18th Judicial District Attorney 6450 S. Revere Pkwy. Centennial, CO 80111 Phone: (720) 874-8500 Atty. Reg. #: 25910	Case Number: **12CR1522** Division: **202**

PEOPLE'S RESPONSE TO DEFENSE MOTION D-239

This pleading is filed by the District Attorney for the 18th Judicial District.

1. The defendant has filed Motion D-239, titled "MOTION TO EXCLUDE LAY OPINION TESTIMONY REGARDING DEFENDANT'S 'MENTAL CONDITION' OR 'SANITY' IN THIS CAPITAL CASE."

2. The defendant requests that this court find that C.R.S. § 16-8-109 is unconstitutional, or in the alternative, that this court disregard C.R.S. § 16-8-109.

3. Statutes are presumed to be constitutional and the party challenging the constitutionality of a statute must show it to be unconstitutional beyond a reasonable doubt. E.g. *Hinojos-Mendoza v. People*, 169 P.3d 662, 668 (Colo. 2007); *People v. Loomis*, 698 P.2d 1320, 1321 (Colo. 1985). In order for a court to invalidate a statute, "it must be sufficiently infirm so that no limiting construction consistent with the legislature's intent will preserve its constitutionality." *People v. Hickman*, 988 P.2d 628, 634, (Colo. 1999).

4. There are two types of constitutional challenges, a "facial challenge" and an "as applied" challenge. An "as-applied" challenge requires the party challenging the constitutionality of a statute to show that the statute is unconstitutional under the specific factual situation at issue. *People v. Bowles*, 280 P.3d 55, 61 (Colo. App. 2011) ('An as applied challenge alleges that the statute is unconstitutional as to the specific circumstances under which the defendant acted.") The defendant does not indicate in his motion that C.R.S. §§ 18-3-102(1)(d) and 18-2-101 are

unconstitutional as applied to him, and provides no argument that the statutes are facially unconstitutional.

5. A statute is facially unconstitutional only if no conceivable set of circumstances exist under which it may be applied in a constitutionally permissible manner." *People v. Montour*, 157 P.3d 489, 499 (Colo. 2007). Thus, the standard that this court must apply in reviewing the facial constitutional challenge is whether the defendant has shown beyond a reasonable doubt that C.R.S. §§ 18-3-102(1)(d) and 18-2-101 are incapable of a constitutional application in all conceivable circumstances.

6. The defendant's argument appears to be that C.R.S. § 16-8-109 is both facially unconstitutional, and is unconstitutional as applied to him. Under either circumstance, the defendant has not shown that the statute is unconstitutional beyond a reasonable doubt.

7. The defendant's argument that the term "mental condition" is so vague as to render the statute facially unconstitutional because it is not specifically defined is without merit. As a matter of Colorado law, the term "mental condition" is not unconstitutionally vague. *People v. Boundurant,* 296 P.3d 200, 208 (Colo. App. 2012). By entering a plea of not guilty by reason of insanity, the defendant has placed his sanity at issue. The phrase "mental condition" is easy to understand in this context.

8. As for the "as applied" challenge to the statue, the defendant's main argument is that lay witnesses are incapable of providing reliable evidence, because "[t]he determination of whether a person was sane or insane at the time of the offense requires, at its threshold, an extremely difficult and nuanced assessment of an individual's mental health." (Motion ¶ 12). Under some circumstances, providing a *specific diagnosis* may be "extremely difficult and nuanced" for a mental health professional, but lay witnesses would not be requested to provide any opinions as to diagnoses, indeed they cannot provide such evidence. The opposite is true:

> Furthermore, although section 16–8–109 permits lay opinion testimony regarding a defendant's "mental condition," we do not believe the statute allows a lay witness to opine as to a defendant's specific diagnosis. Under the statute, a witness without training in psychiatry or psychology who has observed the defendant's actions and conduct may give an opinion about the defendant's mental condition. § 16–8–109. Colorado courts have applied the statute to the admission of a lay witness' opinion of the defendant's sanity—i.e., the defendant's ability to understand right from wrong—and the defendant's future dangerousness if released. Neither the case law nor the plain language of the statute, however, allows a lay witness to offer diagnoses that could only be considered expert opinions under the rules of evidence.

Dunlap v. People, 173 P.3d 1054, 1098 (Colo. 2007) (Citations omitted). Lay witnesses with appropriate knowledge of a defendant can provide the kind of common sense determination that people have been able to provide through the ages—did a person know right from wrong, did a

person appear to understand what they were doing. While the defendant complains that this type of evidence is not reliable, it could just as easily be argued that it is more reliable than the learned professional opinions of mental health professionals that did not have intimate knowledge of a person prior to the crime, and who did not speak to the defendant until a substantial period of time had elapsed from the commission of the crime.

9. The defendant also asserts that "jurors may not even be made aware of what lay witness' opinions are based on, or whether their opinion flow from misconceptions about mental illness," and that people not sufficiently acquainted with the defendant would be allowed to opine (Motion ¶¶ 14, 15). This assertion ignores two facts: (1) the witnesses would be subject to cross examination by the defendant's skilled attorneys, and (2) the proponent of lay opinion testimony regarding mental condition must establish an adequate foundation for the admission of the testimony. *E.g. People v. Giles*, 557 P.2d 408, 414 (Colo. 1976). ("The necessary predicate for this lay opinion evidence is a showing of adequate means to have become acquainted with the person whose mental condition is at issue."); *Turley v. People*, 216 P. 536, 539 (Colo. 1923) ("A non-expert witness may never, in response to purely hypothetical questions stating the facts, be permitted to give an opinion on the question of sanity. But by the great weight of authority one who, in the opinion of the trial court, shows adequate means of becoming acquainted with the person whose mental condition is in issue, after detailing the facts and circumstances concerning his acquaintance and the acts, conduct, and conversation upon which his conclusion is based, may give his opinion on the question of sanity. The weight of that opinion is for the jury."); *Rupert v. People*, 429 P.2d 276, 278 (Colo. 1967) (Quoting *Turley* at length); *Leick v. People*, 322 P.2d 674, 683 (Colo. 1958) ("'This court is committed to the rule that 'one who, in the opinion of the trial court, shows adequate means of becoming acquainted with the person whose mental condition is in issue, after detailing the facts and circumstances concerning his acquaintance and the acts, conduct, and conversation upon which his conclusion is based, may give his opinion on the question of sanity' . . .. '. . . Furthermore, the opinion of such non-expert is admissible only when it is made to appear that his acquaintanceship with the defendant had the requisite nearness in time after the act in issue which would properly move the sound discretion of the court to receive it . . ."); *People v. Medina*, 521 P.2d 1257, 1259 (Colo. 1974) ("As expressed in *Leick*, the two significant requirements which must be met before a lay witness can express his opinion as to the sanity of another, are: (1) it must be shown that the lay witness had an adequate means of becoming acquainted with the person whose sanity is in issue, and (2) the contacts must be proximate in time to the alleged offense. . . . Before such opinion evidence from a non-expert can be admissible, the specific facts upon which the opinion is based must be first stated by the witness and his testimony must also show a close or intimate relationship with the party alleged to be insane. Such a foundation is a fair and reasonable requirement for a non-expert's opinion on the issue of sanity or competency to stand trial."); *People v. Henderson*, 794 P.2d 1050, 1054 (Colo. App. 1989), rev'd on other grounds, 810 P.2d 1058 (Colo. 1981) (Allowing testimony of a corrections deputy who observed defendant during pre-trial incarceration).

10. The issue of what "heightened reliability" means in the context of a capital trial has already been considered by this Court. The defendant seems to assert that the fact that evidence

from the guilt phase of the trial can be considered by the jury in the sentencing phase imbues the guilt phase with requirements that evidence not only be considered according to the general relevance, prejudice, and balancing considerations found in C.R.E. 401, 402, and 403, but that the evidence be extra relevant, super relevant, or as George Orwell might have put it, "double plus" relevant. The defendant has provided no citation to any appellate precedent supporting his implied assertion that once the death penalty is sought, evidence must have super-relevancy in order to be admissible. The same rules of relevance apply in the guilt phase of a death penalty trial as in any other criminal trial, and such rules of relevance also apply to the penalty phase.

11. The defendant also asserts that introduction of lay opinion evidence regarding mental condition would deny him the right to a fair and impartial jury. (Motion ¶ 16). In support of this argument, the defendant asserts that the evidence would be unduly prejudicial. It is difficult to understand how witnesses testifying as to their opinions and conclusions about the defendant's mental state would be so prejudicial, so long as those opinions complied with the evidentiary requirements for such testimony. At any rate, the defendant has provided no legal authority for the proposition that this type of evidence can be so prejudicial that it would deny the defendant his right to a fair and impartial jury.

12. The Motion should be denied based on the pleadings only and without an in-court hearing.

GEORGE H. BRAUCHLER, District Attorney

By:_____
Chief/Senior 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.
KRISTEN NELSON, ESQ.
OFFICE OF THE PUBLIC DEFENDER

Dated: 10/10/14

By:_____
Certifying Secretary

DISTRICT COURT ARAPAHOE COUNTY, COLORADO Court Address: Arapahoe County Justice Center 7325 S. Potomac St., Centennial, CO 80112	
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COURT ORDER REGARDING DEFENSE MOTION D-239

THE COURT, being fully advised, and being duly apprised of the relevant facts and law, hereby denies D-239.

Dated this _____ day of _____, 2014

BY THE COURT

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District Court Chief Judge Carlos A. Samour, Jr.