REDACTED

DISTRICT COURT, ARAPAHOE COUNTY STATE OF COLORADO Arapahoe County Justice Center 7325 S. Potomac Street Centennial, Colorado 80112	
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: **201**

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

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

SUPPRESSION

Because this pleading discusses specific evidence and witnesses relating to the sentencing phase, the People request that it, and all attachments, be suppressed.

CONFERRAL

The Prosecution has conferred with defense counsel about the evidentiary items discussed herein. The defendant objects to this motion. The Defendant's designation of evidence and witnesses is attached is Attachment A. Correspondence related to that designation and conferral between the parties is attached as Attachments B and C. Since that correspondence, the prosecution has further notified the defense of the evidence sought to be excluded in this motion, and the defense has not modified its stated objection.

MOTION

1. The defendant has provided the People with a notice as to the exhibits it intends to introduce as evidence at any sentencing hearing in this case. The People may object to numerous items during trial, depending on the state of the evidence, but the People believe that certain of the items that the defendant indicates he may attempt to introduce at trial would be inadmissible under any circumstances. As such, the People believe that it is appropriate to file a motion in limine regarding this evidence. The People could not file this motion previously because the

People had not been notified by the defendant of the proposed exhibits he intended to introduce at any sentencing hearing.

2. Evidence presented in the sentencing phase of a capital trial must be "admissible." C.R.S. § 18-1.3-1201(1)(b). By using the term "admissible" evidence in the statute, the legislature indicated that Colorado's general framework for determining the admissibility of evidence—i.e. The Colorado Rules of Evidence—applies in the sentencing phase of a capital trial. *People v. Rodriguez*, 794 P.2d 965, 978-9 (Colo. 1990) noted that the question of whether the rules of evidence are "relaxed" in the sentencing phase was not before the court, and thus the court expressed no opinion on that matter. At the same time, the *Rodriguez* court seemed to indicate that it was a given the Rules of Evidence generally applied.

3. In the absence of a specific exception to the hearsay rule, hearsay evidence "is not admissible." C.R.E. 802.

4. The defendant has indicated that he plans on introducing [redacted]

5. The defendant has provided the prosecution with [redacted] that are potential sentencing phase exhibits. Nineteen of the files contain inadmissible hearsay evidence. Disks containing the relevant files are attached as Exhibit 4.

6. Files 1 and 2 are [redacted]. File 1 contains [redacted]. File 2 contains [redacted]. At trial the People might have additional objections related to foundation and relevance, but at this point the People base their Motion in Limine on hearsay grounds.

7. Files 49 through 64 contain [redacted]

8. File 65 is a [redacted]

9. The defendant has also stated an intention to introduce [redacted]

10. The People request that this court rule that [redacted] are inadmissible at any sentencing phase of the trial.

11. Additionally, the defendant has indicated that he intends to admit [redacted] Irrelevant evidence is not admissible. C.R.E. 402. Because this evidence would not be relevant, the People request that the court rule that it cannot be admitted at any sentencing hearing.

12. The People expect the defendant to argue that it would be unconstitutional for the Court to place any restrictions on his ability to present evidence during any sentencing hearing, and that concepts such as the hearsay rule should not apply. Such an argument should be rejected by the Court.

13. Under some circumstances, it is unconstitutional for a state to limit the admissibility of some hearsay evidence in a capital sentencing hearing. In *Green v. Georgia*, 442 U.S. 95, 97 (1979) (Per Curium), the Supreme Court held that a state evidentiary code could not exclude hearsay evidence that "was highly relevant to a critical issue in the punishment phase of the

[redacted]

trial." In *Green*, the defendant and a co-defendant Carzell Moore, were indicted together for the rape and murder of the victim. The evidence showed that Green and Moore abducted the victim from her place of employment, and either acting separately or in concert, raped and murdered her. At Moore's trial, a witness testified that Moore had confided in him that he had killed the victim, after ordering Green to run an errand. Green attempted to present similar testimony during the capital phase of his trial, but the court rejected the evidence on the basis that it was hearsay. The Supreme Court noted with regard to this evidence that there were

> substantial reasons . . . to assume its reliability. Moore made his statement spontaneously to a close friend. The evidence corroborating the confession was ample, and indeed sufficient to procure a conviction of Moore and a capital sentence. The statement was against interest, and there was no reason to believe that Moore had any ulterior motive in making it. Perhaps most important, the State considered the testimony sufficiently reliable to use it against Moore, and to base a sentence of death upon it.

442 U.S. at 97. The Court held that "[i]n these unique circumstances, 'the hearsay rule may not be applied mechanistically to defeat the ends of justice.'" *Id.*, quoting *Chambers v. Mississippi,* 410 U.S. 284 (1973). As the Supreme Court noted, *Green* dealt with a unique set of circumstances where relevant evidence in the form of a statement against penal interest, with other indicia of trustworthiness, was excluded. In *Sears v. Upton*, 561 U.S. 945, 950 (2010), the court discussed, without deciding, the potential admissibility of hearsay evidence in a capital sentencing hearing, noting that the fact that the evidence was hearsay "does not *necessarily* undermine its value—or admissibility—for penalty phase purposes." Thus, the Supreme Court has continued to recognize the limitation of *Green*'s and *Chambers*'s holdings. Neither *Green* nor *Chambers* establishes a general proposition that rules of evidence cannot be applied to a capital sentencing hearing. *E.g. People v. Gonzales*, 281 P.3d 834 (Cal. 2012) ("But as we have explained, the high court has never held that a defendant's right to present mitigating evidence overrides the usual rules of evidence."); *Commonwealth v. Spotz*, 47 A.3d 63, 123 (Pa. 2012) ("[T]he *Chambers* holding did not signal any diminution in the respect traditionally accorded to the States in establishment of their own criminal trial rules and procedures. *Chambers* cannot generally be relied upon to support common, straightforward challenges to hearsay rulings that have correctly applied state criminal procedure." Internal quotations and citation omitted); *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) (Recognizing that *Green* and *Chambers* require only that "states must permit defendants to introduce third-party confessions when direct evidence is unavailable."); *Meece v. Commonwealth*, 348 S.W.2d 627, 694 and n. 42 (Ky 2011) (Noting the continued viability of a Kentucky hearsay rule in a capital sentencing phase, and noting that *Green* and Chambers are limited to the particular hearsay restrictions at issue in those cases.); *Lofton v. California*, 2011 WL 1260042, *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"); *State v. Sheppard*, 703 N.W.2d 286, 294 (Ohio 1998) (Describing *Green* as

establishing "an exception to evidentiary rules for mitigation evidence in *extreme circumstances*." Emphasis added). State evidentiary rules govern the admissibility of evidence during a capital sentencing proceeding. Romano v. Oklahoma, 512 U.S. 1, 11-12 (1995) ("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.").

In *Holmes v. South Carolina,* 547 U.S. 319, 326-27 (2006), the Supreme Court rejected the proposition that capital sentencing hearings are bereft of evidentiary limitations, even when those limitations would be applied to evidence relating to mitigation:

> 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 ... Plainly referring to rules of this type, we have stated that the Constitution permits judges "to exclude evidence that is 'repetitive ..., only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.

Application of the hearsay rule—and the requirement that evidence be relevant—to the defendant's proposed evidence would not constitute an evidentiary prohibition "under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote." The rules would serve a legitimate purpose that evidence not only be relevant but be subjected to a legally binding oath and cross-examination, which is "the greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158 (1970).

14. The [redacted] sought to be admitted by the defendant does not satisfy the unique circumstances discussed in *Green*, and would not be admissible under the Colorado Rules of Evidence. Further, unlike the case in *Chambers* and *Green*, application of the Colorado Rules of Evidence would not prevent the defendant from [redacted]. The defendant has the ability to use the subpoena process to require witnesses to come to court and testify, where they would be subject to an oath and cross-examination. Evidence of the originations with which the defendant had an association, even if relevant, can be presented through admissible evidence that does not contain inadmissible hearsay. Likewise the defendant could call [redacted] as a witness, assuming that this court found her testimony otherwise admissible and relevant, and without admission of the [redacted]

15. If a defendant were able to present evidence at a sentencing hearing without common evidentiary restrictions—especially the hearsay rule—sentencing hearings could devolve into situations where the defendant simply shows the jury [redacted]

[redacted] The defendant could use this practice to deprive the prosecution of any opportunity of cross-examination, and none of the witnesses would be legally obliged to provide accurate information. Indeed, there would be no reason to think that if the defendant is allowed to present evidence [redacted] The reason for "why not" is that evidence presented at a sentencing hearing must be "admissible." The defendant's proposed evidence is not.

16. The People request that this Court grant the motion.

GEORGE H. BRAUCHLER, District Attorney

By _____
Deputy District Attorney
Registration No. 20135

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: 12/30/14 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
PEOPLE'S MOTION P-109

THE COURT, being fully advised, and being duly apprised of the relevant facts and law, hereby Grants the **PEOPLE'S MOTION P-109.**

Dated this _____ day of _____, 2014.

BY THE COURT

_____
District Court Judge Carlos A. Samour