

## PART I

# The Reality of Evolving Standards and the Death Penalty

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The death penalty is not only a local issue, but a national issue as well. The vast majority of states have death penalty laws that are supported by as much as 78% of the population. Both the law and the citizens continue the call for the death of this narrow class of murderers who commit the most heinous crimes. The interpretation of polling data may be crucial in the analysis we do for our courts—and the data is misleading. Generalized philosophical questions of whether a person favors or opposes the death penalty only reveals those citizens who would automatically impose the death penalty or automatically impose a life sentence. More situation-specific questions in the polls have revealed that some of those who philosophically oppose the death penalty would vote for the death penalty.

As prosecutors seeking the death penalty for those few heinous murders, we are often confronted with a challenge to the death penalty by defense attorneys' allegations that the penalty fails to meet the constitutional evolving standards test.

ON DECEMBER 14, 2012, ADAM LANZA fatally shot twenty children and six adults after murdering his mother in Newtown, Connecticut.<sup>2</sup> Three people were killed and 264 wounded on April 15, 2013 when Tamarlan

Tsarnev and his brother exploded pressure cooker bombs.<sup>3</sup> Nidal Malik Hasan is charged with 13 counts of murder and 32 counts of attempted murder for the November 5, 2009 mass shooting at Fort Hood, Texas.<sup>4</sup> Is the death

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<sup>2</sup> [http://en.wikipedia.org/wiki/Sandy\\_Hook\\_Elementary\\_School\\_shooting](http://en.wikipedia.org/wiki/Sandy_Hook_Elementary_School_shooting)

<sup>3</sup> [http://en.wikipedia.org/wiki/Boston\\_Marathon\\_bombings](http://en.wikipedia.org/wiki/Boston_Marathon_bombings)

<sup>4</sup> [http://en.wikipedia.org/wiki/Nidal\\_Malik\\_Hasan](http://en.wikipedia.org/wiki/Nidal_Malik_Hasan)

<sup>5</sup> [http://www.denverpost.com/breakingnews/ci\\_22874746/house-committee-take-up-death-penalty-repeal-bill?source=pkg](http://www.denverpost.com/breakingnews/ci_22874746/house-committee-take-up-death-penalty-repeal-bill?source=pkg)

<sup>6</sup> D 2013 Executive Order – Death Sentence Reprieve (Executive Order) attached.

<sup>7</sup> *Id.*

<sup>8</sup> *People v. Edward Montour*, 2002CR782, Douglas County, Colorado, motion D-181 “Motion to Declare Colorado Death Penalty Statute Unconstitutional Because It Has So Many Aggravating Factors That It Does Not Serve to Narrow The Class of Death-Eligible Defendants,” Order of May 2, 2013, the Governor informed when meeting the prosecutors concerning the Nathan Dunlap application for clemency on May 3, 2013.

<sup>9</sup> <http://thecoloradoobserver.com/2012/12/poll-coloradans-favor-death-penalty-by-large-margin/>.

penalty constitutional? The United States is faced with horrendous murders and yet a vocal, activist anti-death-penalty minority has slowed death penalty prosecutions and executions to a crawl. This article will address the constitutionality of the death penalty statute in one state, Colorado.

A bill sponsored by Democrats in the Colorado General Assembly to repeal the death penalty died in committee on March 25, 2013 after the governor voiced opposition to the bill.<sup>5</sup> Yet, on May 22, 2013, the same governor reasoning that the Colorado death penalty is “flawed,” granted a reprieve to a self-confessed murderer of four people during a revenge and robbery spree in 1993.<sup>6</sup> The governor went so far as to say that the people are “divided on the question of whether a punishment of death or a punishment of life in prison without the possibility of parole should be the maximum penalty for criminals in Colorado.”<sup>7</sup> The governor took this position after being informed that a district court judge had rejected defense claims that the death penalty was unconstitutional for failing to narrow the murderers eligible for the death penalty.<sup>8</sup> The governor took this position even though 67% - 70% of Colorado citizens believe that the death penalty is the appropriate punishment under certain circumstances while only 27% of citizens believe that the death penalty should be repealed.<sup>9</sup> Death penalty opponents have called into question the constitutionality and efficacy of the Colorado death penalty statute. The questions asked by the opponents have been asked for over thirty years with the Courts answering that the death penalty is constitutional at every turn. They have generated an incorrect perception of the death penalty in Colorado.<sup>10</sup> This article addresses the misconceptions and misinformation that exist concerning this issue.

## Horrendous Murders in Colorado.

On July 20, 2012, James Holmes allegedly murdered fifteen people and injured fifty others in his massacre at a movie theater in Aurora, Colorado.<sup>11</sup> The district attorney is seeking the death penalty.<sup>12</sup> The district attorney stated: “it is my determination and my intention that, in this case, for James Eagan Holmes, justice is death.”<sup>13</sup> On October 17, 2012, Dexter Lewis stabbed five people to death in a Denver, Colorado bar.<sup>14</sup> The district attorney is seeking the death penalty.<sup>15</sup> The Denver district attorney said that the case “cries out for the death penalty, based on the number of victims, based on the number of aggravating factors that we have.”<sup>16</sup> Edward Montour, serving a life sentence for the murder of his baby daughter, allegedly beats to death a guard in the Colorado Department of Corrections with a ladle.<sup>17</sup> Miguel Contreras-Perez, serving a thirty-five-year-to-life sentence for kidnap and sexual assault of a fourteen-year-old girl, allegedly murders one female guard while horribly cutting up another female guard.<sup>18</sup> Two individuals, Sir Mario Owens and Robert Ray, who had already committed one murder, plot and murder a witness to the first murder and his fiancée.<sup>19</sup>

## Reprieve Granted Because of Purported “Flaws.”

The Colorado governor granted a reprieve to an individual who was convicted of the murder of four people and the nearly fatal injuries caused another because there were “flaws” in the Colorado death penalty.<sup>20</sup> Nathan Dunlap had been charged for the December 14, 1993 murders, found guilty, sentenced to death by a jury, took advantage of his right to a direct appeal through the United States Supreme Court, and took advantage of postconviction pro-

<sup>10</sup> Jacque Ellul wrote “Propaganda: The Formation of Men’s Attitudes” in 1965 indicating the difference between propaganda and education in the end is what people believe to be true, not what in reality is actually true.

<sup>11</sup> [http://www.denverpost.com/breakingnews/ci\\_21191265/hearing-under-way-man-suspected-killing-12-aurora-theater?IADID=Search-www.denverpost.com-www.denverpost.com](http://www.denverpost.com/breakingnews/ci_21191265/hearing-under-way-man-suspected-killing-12-aurora-theater?IADID=Search-www.denverpost.com-www.denverpost.com)

<sup>12</sup> [http://www.denverpost.com/breakingnews/ci\\_22915093/prosecutors-will-look-death-against-james-holmes-aurora?IADID=Search-www.denverpost.com-www.denverpost.com](http://www.denverpost.com/breakingnews/ci_22915093/prosecutors-will-look-death-against-james-holmes-aurora?IADID=Search-www.denverpost.com-www.denverpost.com)

<sup>13</sup> *Id.*

<sup>14</sup> [http://www.denverpost.com/breakingnews/ci\\_21845605/3-suspects-murder-5-at-denver-bar-armed?source=pkg](http://www.denverpost.com/breakingnews/ci_21845605/3-suspects-murder-5-at-denver-bar-armed?source=pkg)

<sup>15</sup> [http://www.denverpost.com/breakingnews/ci\\_23730480/man-charged-five-stabbing-deaths-awaits-decision-death?IADID=Search-www.denverpost.com-www.denverpost.com](http://www.denverpost.com/breakingnews/ci_23730480/man-charged-five-stabbing-deaths-awaits-decision-death?IADID=Search-www.denverpost.com-www.denverpost.com)

<sup>16</sup> [http://www.denverpost.com/opinion/ci\\_23738970/another-round-colorados-death-penalty?IADID=Search-www.denverpost.com-www.denverpost.com](http://www.denverpost.com/opinion/ci_23738970/another-round-colorados-death-penalty?IADID=Search-www.denverpost.com-www.denverpost.com)

<sup>17</sup> [http://www.denverpost.com/ci\\_22988146/da-seeks-death-penalty-slaying-prison-worker?IADID=Search-www.denverpost.com-www.denverpost.com](http://www.denverpost.com/ci_22988146/da-seeks-death-penalty-slaying-prison-worker?IADID=Search-www.denverpost.com-www.denverpost.com)

<sup>18</sup> [http://www.denverpost.com/breakingnews/ci\\_22385944/inmate-faces-first-degree-murder-charge-death-ordway?IADID=Search-www.denverpost.com-www.denverpost.com](http://www.denverpost.com/breakingnews/ci_22385944/inmate-faces-first-degree-murder-charge-death-ordway?IADID=Search-www.denverpost.com-www.denverpost.com)

<sup>19</sup> [http://www.denverpost.com/ci\\_11172107?IADID=Search-www.denverpost.com-www.denverpost.com](http://www.denverpost.com/ci_11172107?IADID=Search-www.denverpost.com-www.denverpost.com)

<sup>20</sup> [http://www.denverpost.com/breakingnews/ci\\_23299865/nathan-dunlap-temporary-reprieve-from-governor?IADID=Search-www.denverpost.com-www.denverpost.com](http://www.denverpost.com/breakingnews/ci_23299865/nathan-dunlap-temporary-reprieve-from-governor?IADID=Search-www.denverpost.com-www.denverpost.com)

ceedings through the United States Supreme Court. The governor indicated that the people were “divided on the question of whether a punishment of death or a punishment of life in prison without the possibility of parole should be the maximum penalty for criminals in Colorado.”<sup>21</sup> The arguments made against the death penalty are the same arguments that have been made for over thirty years – and continually rejected by the courts.

### **Coloradans Support the Death Penalty.**

An informal poll by the Denver Post indicated that 67% believed that Nathan Dunlap should have been executed instead of being reprieved. A poll released by Quinnipiac University published in the Denver Post indicated that 69 percent of Coloradans support the death penalty.<sup>22</sup> Yet what the Post found “revealing” that “53 percent said they thought the death penalty was applied fairly in Colorado, despite a mountain of evidence that its use in death-penalty eligible cases is quite arbitrary.”<sup>23</sup> The Post, in what purports to be a news story, chose instead to editorialize and adopts the anti-death-penalty position. But where is this “mountain of evidence” and where is the factual support for the conclusion that eligibility is “arbitrary?” Colorado has had the death penalty and citizens have supported it since 1861, except for a four-year period between 1897 and 1901.<sup>24</sup> This article will demonstrate that what the Post supposes is merely speculation and conjecture and that the 53% are correct that the death penalty is applied fairly.

### **Recent Law Review Articles Critical of the Colorado Death Penalty.**

The governor cited a study “co-authored by several law professors who claim to have shown that under Colorado’s capital sentencing system, death is not handed down fairly.”<sup>25</sup> While the Colorado eligibility determination requires

a three-step analysis of statutory aggravating factors, mitigation, and weighing whether mitigation does not outweigh aggravating factors, the study argues that aggravating factors alone provide the constitutional narrowing and in Colorado are overly broad. That study has been rejected by a Colorado district court as flawed in its analysis.<sup>26</sup> The court in rejecting the study held that “the finding of a statutory aggravating factor, standing alone, is not sufficient to render a defendant eligible for the death penalty.”<sup>27</sup> Another recent law review article was critical of the cost of Colorado’s death penalty. This article was co-written by a criminal defense attorney who currently represents death penalty defendants without disclosing her obvious conflict of interest and her biased scholarship.<sup>28</sup>

### **Editorial Opposition.**

The Denver Post, Colorado’s leading newspaper, has come out against the death penalty.<sup>29</sup> An editorial on July 26, 2013 criticized the Denver district attorney’s decision to seek the death penalty against Dexter Lewis. The decision, the Post opined, “could well mean that Lewis will be front and center in the news for many years — at least if he is convicted and sentenced to die — as endless appeals drain off both prosecutorial time and taxpayer dollars.”<sup>30</sup> The editorial acknowledged that in 2014, an election year, “a majority of voters may well support keeping the penalty in place.”<sup>31</sup>

### **INTRODUCTION**

This article will first look at the development of the death penalty and its constitutional requirements as addressed by the United States Supreme Court. The discretion of the prosecutor in seeking the death penalty is then discussed, including complaints concerning race and location. The history of the Colorado death penalty is important in understanding how the death penalty developed in

<sup>21</sup> D 2013-006 Executive Order, Death Sentence Reprieve, May 22, 2013, Attachment 1.

<sup>22</sup> [http://www.denverpost.com/opinion/ci\\_23455324/what-poll-means-death-penalty?IADID=Search-www.denverpost.com-www.denverpost.com](http://www.denverpost.com/opinion/ci_23455324/what-poll-means-death-penalty?IADID=Search-www.denverpost.com-www.denverpost.com)

<sup>23</sup> *Id.*

<sup>24</sup> *People v. Davis*, 794 P.2d 159, 171 fn 3 (Colo. 1990).

<sup>25</sup> Executive Order, referring to “Colorado Capital

Punishment: An Empirical Study,” Justin Marceau, Sam Kamin, and Wanda Foglia, University of Denver Sturm College of Law, Working Paper 13-08, also “Many are Eligible Few Are Chosen: An Empirical Study of Colorado’s Death Penalty,” *Colo. L. Rev.* (forthcoming 2013). The DU Study is also suspect by permitting the capital defense attorneys and staff providing them with data — data collection was not from an objection party, but from a party with interest in the outcome of the study.

<sup>26</sup> May 2, 2013 Order in *People v. Edward Montour*, 2002CR782, Douglas County, Colorado, Attachment 2.

<sup>27</sup> *Id.*

<sup>28</sup> <http://www.law.du.edu/documents/criminal-law-review/issues/v03-1/Cost-of-Death-Penalty.pdf>

<sup>29</sup>

[http://www.denverpost.com/opinion/ci\\_23738970/another-round-colorados-death-penalty?IADID=Search-](http://www.denverpost.com/opinion/ci_23738970/another-round-colorados-death-penalty?IADID=Search-)

Colorado, the constitutional setbacks that have since been corrected, and the constitutionality of the current statute.

Second, this article will explore how the Colorado death penalty constitutionally narrows the group of murderers eligible for the death penalty and the statutory aggravating factors are constitutional. The Colorado Supreme Court has determined that the death penalty statute as currently written is constitutional and does not violate due process or the cruel and unusual clauses of the United States or Colorado Constitutions. The evolving standards test developed by the

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United States Supreme Court is not violated because there is massive death penalty support shown by the citizens of Colorado. The death penalty is specifically authorized in the due process clauses of the United States and Colorado constitutions. While only bifurcation between guilt and punishment is constitutionally required, the trial courts in Colorado have experimented with trifurcation and quadri-furcation of the proceedings.

Third, this article explains how in death penalty cases a deliberate and necessarily slow process is necessary to ensure the defendant has fair and meaningful trial, appellate,

and post-conviction proceedings. However, the defense takes unfair advantage of the need for careful consideration in the trial and appellate courts by inserting delay at every moment in the process.

## **MCGAUTHA, FURMAN, AND GREGG**

To understand why the death penalty in Colorado is constitutional, one must first understand the history of the principles that make the death penalty constitutional under the Due Process and Cruel and Unusual Clauses of the United States and Colorado Constitutions.<sup>32</sup>

### ***McGautha v. California***<sup>33</sup>

In *Furman v. Georgia*,<sup>34</sup> the United States Supreme Court Justices could not give a unified and rational explanation concerning why the death penalty's constitutionality, but five Justices for different reasons held that it was.<sup>35</sup> Only thirteen months before in *McGautha v. California*, the Court had held that a death penalty imposed without governing standards was constitutional in reviewing the capital sanction imposed in California and Ohio.<sup>36</sup> The case was based upon a Due Process challenge to standardless jury imposition of the death penalty.<sup>37</sup> "In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution."<sup>38</sup> The Court recognized that it was not their function to impose the best or better system, but rather to decide whether the Constitution requires a different outcome.<sup>39</sup>

In *McGautha*, only Justices Douglas, Brennan and Marshall dissented.<sup>40</sup> Justice Douglas' dissent was based on two issues: first, the exclusion of evidence supporting the defendant's plea for mercy and, second, the joinder of the

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> United States Constitution, Amendments Five, Eight and Fourteen; Colorado Constitution, Article II, Sections 20 and 25.

<sup>33</sup> 402 U.S. 183 (1971)

<sup>34</sup> 408 U.S. 238 (1972)

<sup>35</sup> *Id.*

<sup>36</sup> *McGautha v. California, Crampton v. Ohio*, 402 U.S. 183 (1971)

<sup>37</sup> *Id.* at 196.

<sup>38</sup> *Id.* at 207.

<sup>39</sup> *Id.* at 196-97.

<sup>40</sup> *Id.* at 226, dissenting opinion by Justice Douglas with Brennan and Marshall joining, and at 248, dissenting opinion by Justice Brennan with Douglas and Marshall joining.

substantive, insanity, and penalty phases of trial into a single proceeding.<sup>41</sup> Justice Brennan's dissent complained about the "unguided, unreviewed, and unreviewable discretion" to impose the death penalty.<sup>42</sup> The Justice suggested that there must be procedural regularity and not arbitrary fiat when it comes to the life and death decision. Whether the death penalty should be imposed at all, Justice Brennan believed, was an issue that should be left to the States.<sup>43</sup>

No Justice opined in *McGautha* that the death penalty itself was unconstitutional.

### *Furman v. Georgia*

Thus, it came as a surprise when only the next year the Supreme Court held that the death penalty was unconstitutional under the Cruel and Unusual Clause of the Eighth Amendment applicable to the states through the Fourteenth Amendment.<sup>44</sup> There are ten opinions in *Furman*, a short per curiam opinion and nine separate opinions authored by each justice.<sup>45</sup> The per curiam opinion consists of one paragraph and one sentence. The Court held that the imposition and carrying out of the death penalty is cruel and unusual punishment.<sup>46</sup> There is no explanation of the basis for such a holding in the brief per curiam opinion.<sup>47</sup>

Only Justices Brennan and Marshall held that the death penalty itself was per se unconstitutional. Justice Brennan reasoned that the death penalty was unconstitutional under the Eighth Amendment because if there is a less severe punishment that achieves the societal purposes, the less severe punishment must be utilized.<sup>48</sup> The Justice noted that murder can be punished by the less severe punishment of life with or without parole.<sup>49</sup> A life sentence was sufficient punishment and less severe than the death penalty, so the constitution, according to Justice Brennan, requires life sentences.<sup>50</sup> That the least severe punishment must be utilized

has never been adopted by the United States Supreme Court or by the Colorado courts. In fact, in death penalty cases the Colorado Supreme Court has held that "in assessing the validity of punishment selected by a democratically elected legislature, "we may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved."<sup>51</sup>

Justice Brennan delineated four principles in determining whether the death sentence was an appropriate punishment: (1) whether the punishment is unusually severe, (2) whether there is a strong probability that it is being imposed in an arbitrary manner, (3) whether the punish-

*The per curiam opinion consists of one paragraph and one sentence. The Court held that the imposition and carrying out of the death penalty is cruel and unusual punishment.*

ment has been substantially rejected by society, and (4) whether there is no rational reason to believe that the punishment serves any penal purpose more effectively than a less severe punishment.<sup>52</sup> Justice Brennan rejected the death penalty in 1972 for all these four reasons. He was also concerned that there was no procedure for a painless death.<sup>53</sup>

Justice Marshall called upon the principle of evolving standards of decency in society.<sup>54</sup> The evolving standards paradigm was first articulated in *Trop v. Dulles* in 1958.<sup>55</sup> The

41 *Id.* at 248.

42 *Id.* at 310.

43 *Id.*

44 *Furman*, 408 U.S. at 239.

45 *Id.* at 239-40.

46 *Id.* at 240.

47 *Id.* at 239-40.

48 *Id.* at 279.

49 *Id.* at 280.

50 *Id.*

51 *People v. Young*, 814 P.2d 834, 854 (Colo. 1991); and see *People v. Davis*, 794 P.2d 159, 173 (Colo. 1990) ("we may not strike down a particular penalty because we deem less severe penalties adequate to serve the ends of penology"); *Furman*, 408 U.S. at 451 (Powell, J., dissenting).

52 *Furman* at 281-82.

53 *Id.* at 287-88.

54 *Id.* at 329.

55 356 U.S. 86, 100 (1958) *Trop* had been found guilty of desertion from the United States Army in wartime. Part of the punishment was expatriation. The Court found this a violation of the Eighth Amendment's Cruel and Unusual Clause. The Court found the clause to be based in the 1688 English Declaration of Rights and the principles back to the Magna Carta. To be clear, however, the Court further stated: "Fines, impris-

Justice framed the issue as “whether informed people would find the penalty shocking, unjust, and unacceptable.”<sup>56</sup> The evolving standards of human morality, Justice Marshall reasoned, must reduce pain and suffering,<sup>57</sup> not be excessive,<sup>58</sup> have a valid legislative purpose,<sup>59</sup> and not suffer from popular abhorrence.<sup>60</sup> In determining whether a punishment is excessive or unnecessary, the analysis should consider both its purpose and the severity.<sup>61</sup> The purposes in favor of a death penalty included deterrence in general, deterrence of individual recidivism, isolation of dangerous individuals, and rehabilitation.<sup>62</sup> The Justice noted that for him the possible purposes of retaliation, vengeance, and retribution must be rejected because they condemned as “intolerable aspirations for a government in a free society.”<sup>63</sup> The Justice found the death penalty was unconstitutional because an informed citizen would find the penalty “shocking, unjust, and unacceptable.”<sup>64</sup>

Justices Douglas, Stewart, and White, also held that the procedures used to obtain the death penalty violated the Constitution. In later cases, the death penalty would be held to be constitutional in requiring certain procedural safeguards. Surprisingly, both Justices Stewart and White had joined the majority in *McGautha* in upholding standardless jury discretion in imposing the death penalty only a year before.

Justice Douglas held that the death penalty was cruel and unusual because it was barbaric,<sup>65</sup> selective to poor, minorities and the outcasts of society,<sup>66</sup> irregularly used,<sup>67</sup> and “unusual” because it was imposed arbitrarily or discriminatorily.<sup>68</sup>

Justice Stewart found that retribution was a constitutionally permissible purpose.<sup>69</sup> He found that the death penalty was cruel in that it was excessive and that it was unusual because it was infrequently imposed and when imposed it was done so in a wanton and freakish manner.<sup>70</sup> Justice

White found that the death penalty was not unconstitutional per se,<sup>71</sup> but that it was so seldom imposed that it ceased to be a credible deterrent or to measurably contribute to any legitimate punishment purpose.<sup>72</sup>

The leading dissent written by Chief Justice Burger found that the death penalty was not “cruel,” because that principle only prohibits extreme and barbarous cruelty regardless of frequency,<sup>73</sup> and it was not “unusual” because the punishment had been known to history and authorized by legislative enactments.<sup>74</sup> The Chief Justice indicated that the Court had no authority for excluding retribution as a constitutional principle where the legislatures had found that it was.<sup>75</sup> Justice Blackmun noted that the opinions finding the death penalty unconstitutional ignored consideration of the victims, the victim’s family, and the victim’s community.<sup>76</sup>

Justice Powell, in his dissent, looked at five factors: (1) the worldwide trend; (2) scholarly literature; (3) decreasing number of executions; (4) decreasing number of death penalties imposed; and (5) public abhorrence – rejecting them all from being a basis for holding the death penalty to be unconstitutional.<sup>77</sup> The Justice indicated that the measure that needed to be utilized was the contemporary standards of society as an objective measurement based upon the beliefs of the citizens, the actions of the legislatures, and the verdicts of juries.<sup>78</sup> Because the death penalty was known throughout history and was widely accepted, the Justice found that it could not be found to be unconstitutionally “cruel.”<sup>79</sup>

Faced with the decision in *Furman*, many states reenacted death penalty statutes. Each state attempted to satisfy the requirements of *Furman*. However, because of the nine separate opinions, *Furman* provided little guidance to legislatures in determining what would be found to be constitutional. Certainly seven of the Justices had indicated that

onment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect.” (emphasis added). Thus while

expatriation was unconstitutional, the death penalty was not.  
<sup>56</sup> *Gregg* at 361  
<sup>57</sup> *Id.* at 330  
<sup>58</sup> *Id.* at 331  
<sup>59</sup> *Id.*  
<sup>60</sup> *Id.* at 332.  
<sup>61</sup> *Id.* at 342.

<sup>62</sup> *Id.* at 342.  
<sup>63</sup> *Id.*  
<sup>64</sup> *Id.* at 361.  
<sup>65</sup> *Id.* at 245  
<sup>66</sup> *Id.* at 245, 255  
<sup>67</sup> *Id.*  
<sup>68</sup> *Id.* at 249.  
<sup>69</sup> *Id.* at 308.  
<sup>70</sup> *Id.* at 309–10.

<sup>71</sup> *Id.* at 311  
<sup>72</sup> *Id.* at 311.  
<sup>73</sup> *Id.* at 376  
<sup>74</sup> *Id.* at 379.  
<sup>75</sup> *Id.* at 394–95  
<sup>76</sup> *Id.* at 414  
<sup>77</sup> *Id.* at 434–442  
<sup>78</sup> *Id.* at 436–37.  
<sup>79</sup> *Id.* at 425, 430.

some form of death penalty would be constitutional, but the Justices had no consistent and unified theory on how the death penalty could be constitutional.

### The 1976 Cases Including *Gregg*

*Furman* led to the adoption of new capital sentencing procedures in at least 35 States.<sup>80</sup> In 1976, the Court issued opinions in five cases, upholding the newly enacted death penalty statutes from three states and rejecting the mandatory death penalty statutes that had been enacted in two States.<sup>81</sup> In the lead case of *Gregg v. Georgia*, the Court was split into a three Justice plurality, a three Justice concurrence, and a one Justice concurrence, in total adding up to seven Justices voting to uphold the Georgia statute.<sup>82</sup> Justice Stewart's plurality opinion held that a statute that procedurally required a bifurcated trial with guilt/innocence and sentencing being separated into distinct phases, finding of murder plus an aggravating circumstance beyond a reasonable doubt, consideration of other aggravating and mitigating circumstances, and specific review required by the State Supreme Court, was constitutional.<sup>83</sup> The Justice found that the infrequency of imposition of the death penalty was not a rejection of the death penalty itself, but a measure of a jury's respect for human dignity.<sup>84</sup> The death penalty can be justified, the plurality held, by the penological purposes of retribution and deterrence.<sup>85</sup> Further, the plurality held that whether the death penalty is a deterrent is a legislative, not judicial, determination.<sup>86</sup> The death penalty could constitutionally be used as an expression of society's moral outrage at a particular crime.<sup>87</sup> Certain crimes, the plurality held, are so outrageous and so grievous an affront to humanity that the only adequate societal response is the death penalty.<sup>88</sup> The only requirements for a constitutional death penalty, the plurality held, is that it be procedurally constitutional by suitably directing and limiting its application based upon the characteristics of the defendant and the circumstances of the crime.<sup>89</sup>

Justice Stewart addressed the issue of discretionary

actions inherent in the death penalty process.<sup>90</sup> The defendants claimed that the discretion exercised by the prosecution in making decisions in selecting persons for the death penalty, permitting plea bargains to non-death sentences, and the discretion exercised post-trial by a governor, commutation commission, or pardon and paroles board, made the Georgia death penalty statute unconstitutional.<sup>91</sup> These arguments were rejected.<sup>92</sup> The Justice noted that the exercise of discretion in favor of a defendant at any one of these steps is the exercise of mercy and that the Constitution does not create unconstitutional decision making when deci-

*The death penalty could constitutionally be used as an expression of society's moral outrage at a particular crime.*

sions are made based upon mercy.<sup>93</sup> In order to meet the defendants' concerns about prosecutorial discretion, the Court surmised if the defendant's complaints were valid, a system would have to be created where any murder would have to be charged, where there was at least one aggravating factor then the death penalty would have to be sought, and where the death penalty was sought there could be no plea bargaining.<sup>94</sup> Such notions "would be totally alien to our notions of criminal justice."<sup>95</sup> Such a system would be unconstitutional because it would create a system of mandatory death sentences.<sup>96</sup>

Justice White wrote a concurrence that was joined by two other Justices.<sup>97</sup> Justice White noted that the *Furman* statutes were held to be unconstitutional because the death penalty was imposed in a discriminatory, wanton and freakish, and infrequent manner.<sup>98</sup> The Georgia statute, Justice

<sup>80</sup> *Walton v. Arizona*, 497 U.S. 639, 659 (1990) (J. Scalia, cc).

<sup>81</sup> *Gregg v. Georgia*, 428 U.S. 153; *Proffitt v. Florida*, 428 U.S. 242;

*Jurek v. Texas*, 428 U.S. 262; *Woodson v. North Carolina*, 428 U.S. 280; *Roberts v. Louisiana*, 428 U.S. 325

<sup>82</sup> *Gregg*, 428 U.S. at 158.

<sup>83</sup> *Id.* at 195, 196-97, 206-07

<sup>84</sup> *Id.* at 182-83.

<sup>85</sup> *Id.* at 183.

<sup>86</sup> *Id.* at 186.

<sup>87</sup> *Id.* at 183.

<sup>88</sup> *Id.* at 184.

<sup>89</sup> *Id.* at 189

<sup>90</sup> *Id.* at 199.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 199, fn. 50.

<sup>95</sup> *Id.*

White observed, identified aggravating factors relevant to the question of whether a defendant should be executed, while permitting the jury to dispense mercy based upon “factors too intangible to write in a statute.”<sup>99</sup>

In other opinions decided the same day as *Gregg*, the Court in *Jurek v. Texas*<sup>100</sup> and *Proffitt v. Florida*,<sup>101</sup> upheld statutes that permitted the narrowing by statutory aggravating factors, determined either during the substantive trial or at the sentencing hearing and permitted jury consideration of mitigation.

In both *Woodson v. North Carolina*<sup>102</sup> and *Roberts v. Louisiana*,<sup>103</sup> the Court held that mandatory death penalty statutes were unconstitutional. In addressing the arbitrariness that was noted in *Furman*, the North Carolina legislature enacted a statute that required the death penalty in first degree murders. The plurality noted that there were “two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society: jury determinations and legislative enactments . . . .”<sup>104</sup> The opinion held that mandatory imposition of the death penalty was an unconstitutional response to *Furman*’s holding that unbridled jury discretion created an unconstitutional penalty.<sup>105</sup> Finally, the plurality held, the statute failed to provide for “particularized consideration of relevant aspects of the character and record of each convicted defendant before imposition upon him of a sentence of death.”<sup>106</sup>

Justices Brennan and Marshall filed separate dissents in *Gregg*, *Jurek*, and *Proffitt*.<sup>107</sup> Justice Brennan complained that the majority of the Court had missed the point in being concerned not with the death penalty as a substantive issue, but rather addressing procedural issues associated with the death penalty.<sup>108</sup> Justice Brennan, consistent with his position in *Furman*, found that “(d)earth is not only an unusually severe punishment, unusual in its pain, in its finality, and its enormity, but it serves no penal purpose more effectively than a less severe punishment . . . .”<sup>109</sup> Justice Marshall, consistent with his position in *Furman*, found that the death penalty was unconstitutional because it was excessive

and citizens would reject the death penalty if they were fully informed concerning its utilization.<sup>110</sup> The justification for the death penalty can never be retribution, Justice Marshall opined, “the mere fact that the community demands the murderer’s life in return for the evil he has done cannot sustain the death penalty . . . .”<sup>111</sup>

Constitutional principles developed in the 1976 opinions included:

- That a constitutional death penalty scheme must be suitably directed and limited by providing for
  - a bifurcated trial, separating guilt from sentencing;
  - narrowing of individuals who are eligible for the death penalty; and
  - broad consideration of mitigating circumstances.
- That the discretion that is lodged with the prosecution does not make the death penalty unconstitutional.

The Colorado statute meets all these principles.

## CONSTITUTIONAL PROSECUTORIAL DISCRETION

Since the *Gregg* opinion in 1976, the United States Supreme Court and the Colorado Supreme Court have recognized and sanctioned prosecutorial discretion in determining whether the death penalty should be sought. Anti-death-penalty arguments concerning prosecutorial discretion are not new and have never been sustained. The exercise of discretion by the prosecution in the decision to charge, the decision to seek the death penalty, and the decision whether to plea bargain death penalty cases is not per se unconstitutional.<sup>112</sup> The prosecution at each of these stages has authority to exercise mercy by excluding certain individuals from the death penalty. The exercise of mercy in the criminal justice system does not create an unconstitutional defect.<sup>113</sup> “Nothing in any of our cases suggests that the decision to afford an individual mercy violates the Constitution.”<sup>114</sup> The only defendants who complain about an abuse of discretion by the prosecution are those defen-

96 *Id.*  
97 *Id.* at 207.  
98 *Id.* at 220-21.  
99 *Id.* at 221-22.  
100 428 U.S. 262 (1976)

101 428 U.S. 242 (1976)  
102 428 U.S. 280 (1976)  
103 428 U.S. 325 (1976)  
104 428 U.S. at 293.  
105 *Id.* at 302.

106 *Id.* at 304.  
107 Justice Brennan at 428 U.S. 227; Justice Marshall at 428 U.S. 231.  
108 428 U.S. at 227-28.

109 *Id.* at 230.  
110 *Id.* at 231-32  
111 *Id.* at 240.  
112 *Gregg v. Georgia*, 428 U.S. at 199.

113 *Id.*  
114 *Id.*



dants to whom the prosecution has not extended mercy.

Justice White in his concurring opinion in *Gregg* stated that:

*“Petitioner’s argument that prosecutors behave in a standardless fashion in deciding which cases to try as capital felonies is unsupported by any facts. Petitioner simply asserts that since prosecutors have the power not to charge capital felonies they will exercise that power in a standardless fashion. This is untenable. **Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts.** Unless prosecutors are incompetent in their judgments, the standards by which they decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence. Thus defendants will escape the death penalty through prosecutorial charging decisions only because the offense is not sufficiently serious; or because the proof is insufficiently strong. This does not cause the system to be standardless any more than the jury’s decision to impose life imprisonment on a defendant whose crime is deemed insufficiently serious or its decision to acquit someone who is probably guilty but whose guilt is not established beyond a reasonable doubt.”*<sup>115</sup>

Further, there is no constitutional violation where there is an inconsistency in results in death penalty cases that are based on objective factors.<sup>116</sup> The Court in *McCleskey v. Kemp* stated that:

*“The Constitution is not offended by inconsistency in results based on the objective circumstances of the crime. Numerous legitimate factors may influence the outcome of a trial and a defendant’s ultimate sentence, even though they may be irrelevant to his actual guilt. If sufficient evidence to link a suspect to a crime cannot be found, he will not be charged. The capability of the responsible law enforcement agency can vary widely. Also, the strength of*

*the available evidence remains a variable throughout the criminal justice process and may influence a prosecutor’s decision to offer a plea bargain or to go to trial. Witness availability, credibility, and memory also influence the results of prosecutions. Finally, sentencing in state courts is generally discretionary, so a defendant’s ultimate sentence necessarily will vary according to the judgment of the sentencing authority. The foregoing factors necessarily exist in varying degrees throughout our criminal justice system.”*<sup>117</sup>

The Colorado Supreme Court has turned back attacks on prosecutorial discretion in death penalty cases.<sup>118</sup>

In *People v. Davis*, a Colorado Supreme Court case, the defendant argued that both due process and the prohibition against cruel and unusual punishment were violated by the discretion that is given to prosecutors in determining against whom the death penalty is sought.<sup>119</sup> The court, relying upon the decisions in *Gregg*<sup>120</sup> and *McCleskey*,<sup>121</sup> held that placement of discretion in determining when and against whom the death penalty is sought is within the authority of the prosecutor and will only be overturned based upon clear and convincing evidence of an abuse of discretion.<sup>122</sup> The court agreed with the United States Supreme Court analysis of the federal constitution when it held that there was no violation of the Colorado Constitution’s due process and cruel and unusual clauses.<sup>123</sup>

In Colorado, prosecutors must make several discretionary decisions throughout the process. The first decision is whether and what to charge. This decision is made based upon the law and the strength of the evidence. The prosecutor is required to review the evidence to make a decision concerning both the provability and the type of homicide that has been committed. The first degree murder statute in Colorado consists of six different manners of causing a death: (1) after deliberation and with intent; (2) felony mur-

<sup>115</sup> *Gregg*, 428 U.S. at 225 (emphasis added), cited in *People v. Drake*, 748 P.2d 1237, 1265 (Colo. 1988) (J. Erickson, cc).

<sup>116</sup> *McCleskey v. Kemp*, 481 U.S. 279, 307 fn 28 (1987).

<sup>117</sup> *Id.*

<sup>118</sup> *People v. Davis*, 794 P.2d 159, 172 (Colo. 1990)

<sup>119</sup> *Id.*

<sup>120</sup> 428 U.S. at 199

<sup>121</sup> 481 U.S. at 307

<sup>122</sup> *Davis*, 794 P.2d at 172.

<sup>123</sup> *Id.*

<sup>124</sup> C.R.S. §18-3-102.

<sup>125</sup> C.R.S. §18-3-103.

<sup>126</sup> C.R.S. §18-3-104.

<sup>127</sup> C.R.S. §18-3-105.

<sup>128</sup> Colorado Rules of Criminal Procedure, Crim.P. Rule 32.1(b) “In any class 1 felony

case in which the prosecution intends to seek the death penalty, the prosecuting attorney shall file a written statement of that intention with the trial court no later than 63 days after arraignment and shall serve a copy of the statement on the defendant’s attorney of record or the defendant if appearing pro se.”

<sup>129</sup> C.R.S. §18-1.3-401(4)(a)

<sup>130</sup> Article II, §16a. “Any person who is a victim of a criminal act, or such person’s designee,

der as to specific enumerated crimes; (3) perjury resulting in conviction and execution; (4) universal malice manifesting extreme indifference to the value of human life which generally creates a grave risk of death and causes death; (5) dispensing controlled substances to a person under 18 years of age on school grounds and death occurs; and (6) knowingly causing death of a child not yet twelve years of age and being in a position of trust to the victim.<sup>124</sup> If the homicide does not fall within any of these sections, the prosecution can charge murder in the second degree, knowingly causing death;<sup>125</sup> manslaughter, recklessly causing death or assisting suicide;<sup>126</sup> or criminally negligent homicide.<sup>127</sup> The prosecutor can decide that the facts do not support a homicide charge at all.

Next, the prosecutor will do an independent investigation concerning mitigation and any rebuttal to mitigation. The prosecutor will make sure that when he has a potential death penalty case, an independent investigation of mitigation is proceeding while the investigation into the crime is continuing. At some point, usually after charging but before the formal filing of the intent to seek the death penalty,<sup>128</sup> the defense will meet with the prosecution to set out the defendant's mitigation in hopes of having the prosecution not seek the death penalty. Typically, the defense will make a plea that the defendant will plead guilty to the charge and accept a life without parole sentence.<sup>129</sup> After the meeting, the elected prosecutor will determine whether to seek the death penalty or to offer any plea bargain.

The prosecutor is required both by the Colorado Constitution<sup>130</sup> and the statutory Victims' Rights Act,<sup>131</sup> to "consult" with the district attorney concerning charging, disposition, and trial, and to inform the victim(s) of the status of the case prior to charging by either the law enforcement agency or district attorney.<sup>132</sup> The victim's family is consulted concerning the death penalty. The position of the

family concerning the death penalty is considered along with other factors in the determination of whether to seek the death penalty. Because it is only one of a myriad of factors, the position of the surviving family members may not in itself be controlling.

Each case is different. Although an aggravating factor may appear in any number of cases, the existence of an aggravating factor alone is not sufficient. In Colorado, a prosecutor must also consider mitigation and whether that mitigation outweighs the aggravating factors. The prosecutor needs to also consider aggravating circumstances: reasons for the jury to impose a death sentence over and above the statutory aggravating factors. One aggravating circumstance the prosecutor needs to consider is victim impact evidence of the murder on the survivors. While a particular murder may contain one or even several aggravating factors, this is not the only consideration in whether a death penalty is sought.

Anti-death-penalty advocates often argue that race of the defendant or the victim of the murder and location are considerations that are utilized in the exercise of prosecutorial discretion. Table 1 (page 38) indicates the cases where a jury or judge has imposed the death penalty in Colorado demonstrating that these claims are false.<sup>133</sup>

The table demonstrates that circumstances of the murder are the deciding factors in exercising prosecutorial discretion. Whites, Hispanics, and Blacks are being prosecuted for murder and sentenced to death. Whites, Hispanics, and Blacks are the victims of murder. The death penalty has been sought in at least nine of the twenty-two judicial districts in Colorado. There is no prosecutorial abuse of discretion based upon race or location. The decision to seek the death penalty in a case calls upon a prosecutor to exercise his constitutional discretion based upon many factors. It has never been shown that any prosecutor in Colorado

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legal guardian, or surviving immediate family member is such person is deceased, shall have the right to be heard when relevant, informed, and present at all critical stages of the criminal justice process. All terminology, including the term "critical stage," shall be defined by the general assembly."

<sup>131</sup> C.R.S. §24-4.1-301 et seq.

<sup>132</sup> C.R.S. §24-4.1-302.5(1)(e), (f)-

<sup>133</sup> Information from JBITS,

<http://www.courts.state.co.us/Administration/Program.cfm?Program=11> Colorado: Colorado DOC Inmate Locator, <http://www.doc.state.co.us/oss/>; Colorado Appellate Decisions. Many of these cases did not result in execution based upon appellate or postconviction decisions. The chart is demonstrative of the types of cases where the prosecution exercises its discretion to seek the death penalty.

**TABLE 1 — Cases Where a Jury or Judge has Imposed the Death Penalty in Colorado**

Year	Name	Judicial District	Circumstances	Race Defendant	Race Victim
1975	Dean Wildermuth	17th	Heinous cruel depraved manner of woman's stabbing death	***	***
1975	Michael Corbett	4th	Robbery-murder	Black	***
1975	Freddie Glenn	4th	Kidnap-rape-murder	Black	***
1975	Kenneth Botham	21st	Murder wife, neighbor, two children (4)	White	White
1976	Ronald Ferrell	21st	Murder of partner in drug deals	White	Hispanic
1976	Scott Raymer	2nd	Felony-murder – second murder 20 minutes later	White	Black
1977	Ricky Dillon	8th	Robbery-murder	White	***
1980	Edgar Duree	2nd	Robbery-murder	White	***
1981	Steven Morin	***	Kidnap-rape murder	Hispanic	White
1981	Johnnie Arguello	19th	Robbery-murder – beaten to death with a hammer	Hispanic	***
1982	Richard Drake	21st	Murder of wife – for life insurance	White	White
1984	Frank Rodriguez	2nd	Kidnap-rape-murder	Hispanic	White
1986	Gary Davis	17th	Kidnap-rape-murder	White	White
1987	John O'Neill	21st	Murder of marijuana growing partner	White	Hispanic
1987	Ronald Lee White	10th	Multiple murder (2)	White	White
1993	Nathan Dunlap	18th	Multiple murder (4)	Black	White
1994	Robert Harlan	17th	Kidnap-rape-murder	Black	White
1999	George Woldt	4th	Kidnap-rape-murder	White	White
1997	Francisco Martinez	2nd	Kidnap-rape-murder	Hispanic	White
1998	William Neal	1st	Multiple murder (3)	White	White
2002	Edward Montour	18th	Murder of law enforcement; prior conviction murder	Hispanic	Hispanic
2006	Sir Mario Owens Robert Ray	18th	Multiple murder (2); prior conviction murder; murder of witness	Black	Black

has ever used an unconstitutional factor such as race in making the decision.

While the United States Supreme Court and the Colorado Supreme Court have both held that prosecutorial discretion is an important constitutional part of the criminal justice system, death penalty critics continue to complain about the discretion that prosecutors have. Those critics simply choose to ignore Supreme Court precedent. Although almost always attacked by the defendant in death penalty cases, no attack on prosecutorial discretion concerning the death penalty has ever been successful in any court in Colorado.

### HISTORY OF THE COLORADO DEATH PENALTY SINCE GREGG

In 1974, the Colorado General Assembly enacted a new statute attempting to comply with the *Furman* requirements.<sup>134</sup> The statute provided for a bifurcated hearing where during sentencing the jury was required to consider specific enumerated aggravating factors and a limited number of specific mitigating factors.<sup>135</sup> The statute provided that if there was a finding that there were neither aggravating nor mitigating factors a life sentence was imposed; when jurors found any mitigating circumstances a life sentence must be imposed; if the responses were non-unanimous, a life sentence was imposed; but if the jury found no mitigating circumstances but one or more aggravating factors, a death sentence was imposed.<sup>136</sup> In *People v. District Court*, the Colorado Supreme Court held that this statute was unconstitutional based upon the limitation on mitigating factors.<sup>137</sup> A death penalty statute, the Colorado

Supreme Court held, must meet two requirements: it must distinguish between cases where death is imposed from those where it is not, and, the defendant must be permitted to present any relevant mitigating information.<sup>138</sup> The Colorado statute limited mitigation to five specific circumstances.<sup>139</sup> The statute provided for eight aggravating factors.<sup>140</sup>

The General Assembly soon thereafter enacted another death penalty scheme that permitted jury consideration of mitigation including seven additional specified mitigators<sup>141</sup> and a catchall for mitigation providing for admission of “any other evidence which in the court’s opinion bears on the question of mitigation.”<sup>142</sup> Colorado Supreme Court was called upon to determine whether the jury instructions and verdicts were sufficient to be constitutional under the new statute in *People v. Durre*.<sup>143</sup> The jury determined that there was no statutory mitigating circumstances, no additional mitigating circumstances to justify a life sentence, and three statutory aggravating factors. The jury returned a verdict with a note indicating that seven jurors are in agreement with the death sentence and five jurors asked for life imprisonment only.<sup>144</sup> The court reversed the death sentence, holding that the reliability required in the death penalty process required the jury express its decision in terms that are certain and devoid of ambiguity.<sup>145</sup> A death penalty verdict, the court held, must be phrased in words that convey beyond a reasonable doubt the meaning and intention of the jury.<sup>146</sup> The court noted that the statute required unanimous verdicts — and that if there is a non-unanimous verdict, the trial court is required to sentence the defendant to life imprisonment.<sup>147</sup> The court faced the same issue and reached the same result as was reached in *People v. Drake*.<sup>148</sup>

134 *People v. District Court*, 190 Colo. 342, 546 P.2d 1268 (Colo. 1976)

135 *Id.* at 345, 546 P.2d at 1270.

136 *Id.*

137 *People v. District Court*, 196 Colo. 401, 586 P.2d 31 (Colo. 1978).

138 *Id.* 196 Colo. at 405, 586 P.2d at 34.

139 *Id.* 196 Colo. at 406. C.R.S. §16-11-103(5) provided: “The court shall not impose the sentence of death on the defendant if the sentencing hearing results in a verdict or finding that at the time of the offense: “(a) He was under the age of eighteen; or

“(b) His capacity to appreciate wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired\*\*35 as to constitute a defense to prosecution; or “(c) He was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution; or “(d) He was a principal in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution; or “(e) He could not reasonably have foreseen that his conduct in the course of the com-

mission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person.”

140 *Id.*

141 C.R.S. §16-11-103

142 *Id.* (5)(h).

143 *People v. Durre*, 690 P.2d 165 (Colo. 1984).

144 *Id.* at 170.

145 *Id.* at 173.

146 *Id.*

147 *Id.*

The prosecution appealed from the death penalty jury instructions that were given in two cases in 1990, *People v. Tenneson* and *People v. Vialpando*.<sup>149</sup> The court noted that the statute did not designate standards or burdens of proof.<sup>150</sup> The court held that the correct standard before a defendant may be sentenced to death is that any mitigating factors do not outweigh the proven statutory aggravating factors beyond a reasonable doubt.<sup>151</sup> The “qualitatively unique and irretrievably final nature of the death penalty makes it unthinkable for jurors to impose the death penalty when they harbor a reasonable doubt as to its justness.”<sup>152</sup> Further, the court applied the “beyond a reasonable doubt” standard of proof to the sentencing decision.<sup>153</sup> The court stated that the burden of proof was not assigned to a party.<sup>154</sup> The *Tenneson* decision is important because after future experimentation with judge-sentencing, the General Assembly would return to the *Tenneson* death penalty scheme.<sup>155</sup>

The *Tenneson* statute was held to be constitutional in *People v. Davis* in 1990.<sup>156</sup> First, the court held that the cruel and unusual punishment clause of the Eighth Amendment and Article II, Section 20 of the State constitution were not violated by Colorado’s death penalty statute. The court rejected the notion that the statute violated the “evolving standards” test.<sup>157</sup> That the death penalty had been utilized throughout the history of Colorado was an important consideration for the court.<sup>158</sup> The court pointed out that voters in 1966 and 1974, as well as the legislature in 1974, 1979, 1984, 1985, 1987, 1988, and 1989 had approved of the death penalty.<sup>159</sup> The defendant’s argument that the sentencing scheme violates due process and cruel and unusual punishment because it provides too much discretion to the

prosecution was rejected.<sup>160</sup> The defendant argued that because the death penalty was not the least drastic means of fulfilling the state’s interest that there was a due process violation.<sup>161</sup> This argument was rejected as well because the court held that it is for the legislature to determine what punishment is to be imposed.<sup>162</sup> Finally the defendant attacked the statutory aggravating factors that applied in his case and the method of utilizing mitigation. These attacks were rejected as well. The court affirmed the sentence of death.<sup>163</sup>

In 1988, before *Tenneson* and *Davis* were decided, the legislature amended the statute so that instead of a three-step eligibility process, there were only three total steps that included both eligibility and sentencing: (1) the proving of at least one statutory aggravating factor, (2) presentation of mitigation, and (3) determining whether mitigating factors outweigh the proven aggravating factors.<sup>164</sup> The Colorado Supreme Court held that under Article II, section 20 of the Colorado Constitution that prohibits cruel and unusual punishment and Article II, section 25, providing for due process, the elimination of the fourth or selection stage of the death penalty scheme made the statute unconstitutional.<sup>165</sup> The court was concerned that if the jurors stopped at step 3 weighing that mitigation does not outweigh aggravating factors, that a situation of equipoise would require a death sentence.<sup>166</sup>

The General Assembly in 1995 changed death penalty sentencing from a jury to a three-judge panel.<sup>167</sup> The decision of the panel had to be unanimous.<sup>168</sup> The statute at that time was consistent with the United States Supreme Court decision in *Walton v. Arizona* which permitted a judge to

148 *People v. Drake*, 748 P.2d 1237 (Colo. 1988).

149 *People v. Tenneson*, *People v. Vialpando*, joined in one opinion, 788 P.2d 786 (Colo. 1990).

150 *Id.* at 790.

151 *Id.*, *People v. O’Neill*, 803 P.2d 164, 178-79 (Colo. 1990) (reversing the death sentence where the jurors were not instructed that the decision concerning selection of death had to proven beyond a reasonable doubt).

152 *Id.* at 792.

153 *Id.* at 796.

154 *Id.*

155 See, e.g., *People v. Rodriguez*, 914 P.2d 230, 250 (Colo. 1996).

156 794 P.2d 159 (Colo. 1990).

157 *Id.* at 171.

158 *Id.*

159 *Id.*

160 *Id.* at 172 citing *Gregg*, 428 U.S. at 199; *McCleskey*, 481 U.S. 279, 307 (1987).

161 *Id.* at 173.

162 *Id.*

163 *Id.* at 213.

164 *People v. Young*, 814 P.2d 834, 841 (Colo. 1991).

165 *Id.* at 842.

166 *Id.* at 844-45.

167 See, e.g. *People v. Martinez*, 22 P.3d 915, 918-19

(Colo. 2001).

168 *Id.*

169 497 U.S. 639 (1990)

170 *Ring v. Arizona*, 536 U.S. 584 (2002).

171 *Woldt v. People*, *Martinez v. People*, 64 P.3d 256 (Colo. 2003).

172 C.R.S. §18-1.3-1201.

173 C.R.S. §18-1.3-1201

174 *Dunlap*, 975 P.2d 723, 736 (Colo. 1999)

175 *Id.*

176 *Id.*

177 *Id.*

178 *Id.*

sentence a defendant to death.<sup>169</sup> However, just twelve years later the United States Supreme Court switched positions in *Ring v. Arizona* in holding that a jury must make the factual findings.<sup>170</sup> The Colorado Supreme Court then invalidated the three-judge-panel sentencing scheme.<sup>171</sup> The General Assembly would then return to the *Tenneson* statute which still exists today.

**OVERVIEW OF COLORADO’S  
CURRENT DEATH PENALTY STATUTE**

The current Colorado statute<sup>172</sup> is substantially the *Tenneson* statute and requires the jury to proceed through four steps in determining the appropriate sentence. See Table 2 below.

A life sentence must be imposed if any of three verdicts

are returned. A life sentence is required to be imposed if any one of the jurors does not agree that a statutory aggravating factor has not been proven,<sup>174</sup> or that mitigation outweighs the statutory aggravating factors,<sup>175</sup> or by determining that life is the appropriate punishment.<sup>176</sup> According to the Colorado Supreme Court, the first three are the “eligibility” steps.<sup>177</sup> The fourth is the actual imposition of the sentence or “selection” step.<sup>178</sup>

No court—none—including the United States Supreme Court, any federal circuit court, any federal district court, any state supreme court, any state court of appeals, any state trial court have found that the number of aggravating factors were so numerous as to violate the narrowing requirement of the Cruel and Unusual Clause.

**Table 2 — Murder in the First Degree Conviction — Plus**

<b>Phase 1: Eligibility</b>	<b>Step 1</b> Aggravating Factors	Jury must find at least one statutory aggravating factor unanimously and beyond a reasonable doubt. <sup>173</sup>
	<b>Step 2</b> Mitigation and Rebuttal to Mitigation	The jury must determine whether any mitigating factors exist — an individual determination without a standard or burden of proof
	<b>Step 3</b> Weighing	The jury must determine whether mitigation outweighs statutory aggravating factors beyond a reasonable doubt and unanimously — without the standard of proof being assigned to a party
<b>Phase 2: Selection</b>	<b>Step 4</b> Selection	The jury must determine the appropriate sentence — life without parole or the death penalty. To impose death the verdict must be found unanimously and beyond a reasonable doubt — without the standard of proof being assigned to a party.



**The Reality of Evolving Standards  
and the Death Penalty**

By Daniel Edwards

Continues in the April/May/June Issue of *The Prosecutor*