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Lies, Damn Lies, and Anti-Death Penalty Research

LIES, DAMN LIES, AND ANTI-DEATH PENALTY RESEARCH[1]

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ABSTRACT

The authors are two prosecutors with experience in Colorado capital litigation. They examine and scrutinize the claims and methodology of two prior articles, *Death Eligibility in Colorado: Many Are Called, Few Are Chosen* (*Many Are Called*) and *Disquieting Discretion: Race, Geography & the Colorado Death Penalty in the First Decade of the Twenty-First Century* (*Disquieting Discretion*). The prior articles criticize the death penalty in Colorado and make claims about racial disparity, and in the opinion of the authors, accuse Colorado prosecutors of racial bias in the death penalty process. The authors examine Colorado's death penalty from a practitioner's perspective, examine the history of Colorado's death penalty, reveal the bias and failures of the defendant-initiated "study" relied upon in the prior articles, and conclude that the criticisms of Colorado's death penalty are inaccurate and without merit. Finally, any geographic disparity in the pursuit of the death penalty within Colorado is most attributable to the disparity in available resources between the state-funded public defenders and the county-funded prosecutors.

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1. "Lies, damned lies, and statistics" is a phrase relating to the improper use of statistics to prove any proposition, which is attributed to Mark Twain, who attributed it to Disraeli. MARK TWAIN, AUTOBIOGRAPHY, VOLUME I, at 228 (2010).

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The Authors wish to extend their sincere appreciation for the invaluable experience, expertise, contributions, and input shared by Daniel W. Edwards, Senior Assistant Attorney General for Colorado. He was of tremendous assistance to us in the writing of this Article.

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INTRODUCTION

In *Death Eligibility in Colorado: Many Are Called, Few Are Chosen* (*Many Are Called*), University of Denver Sturm College of Law Professors Justin Marceau and Sam Kamin and Rowan University Professor Wanda Foglia (the Authors) argue that Colorado's death penalty statute is unconstitutional because the law permits too many homicide cases to be treated as death penalty cases.[2] In their follow-up article, *Disquieting Discretion: Race, Geography & the Colorado Death Penalty in the First Decade of the Twenty-First Century* (*Disquieting Discretion*), which is based upon the same "original research" as *Many Are Called*, the Professors—Marceau and Kamin, Meg Beardsley, and Scott Phillips—claim that Colorado prosecutors are racially motivated in their decisions to seek—or not to seek—the death penalty and that the Eighteenth Judicial District is the worst offender.[3]

The original research is goal-oriented, biased, and flawed.[4] Even a cursory review demonstrates that the Authors did not base their "original research" on a scientific, or even pseudoscientific, methodology. Original, honest, and scientific research gathers facts and evidence, examines the facts and evidence, and then reaches a hypothesis or theory. This "original research" did the opposite. The Authors cherry-picked convenient "facts" in order to fit those facts into,[5] and thus "prove," a preconceived notion. The resulting accusations are not only unreliable, they are demonstrably false.[6] This Article is, in part, a rebuttal to those outrageous claims and the biased "data" upon which they are purportedly based. This Article will not attempt to detail the many justifications for maintaining the death penalty as a matter of justice and public policy, nor will it describe the ways in which Colorado's current death penalty laws

2. *See* Justin Marceau et al., *Death Eligibility in Colorado: Many Are Called, Few Are Chosen*, 84 U. COLO. L. REV. 1069, 1072 (2013). Although uncited by the Authors, the phrase "many are called, few are chosen" comes from *Matthew* 22:14 (King James).

3. Meg Beardsley et al., *Disquieting Discretion: Race, Geography & The Colorado Death Penalty in the First Decade of the Twenty-First Century*, 92 DENV. U. L. REV. 431, 431, 433 (2015).

4. *See infra* Part IV.

5. For a discussion of the source of the data set used in this study, see Marceau et al., *supra* note 2, at 1070 n.1, and *infra* Part IV.C.

6. *See* argument *infra* Part IV.

can be improved and made consistent with other states and Federal death penalty laws.

A. Bottom Line Up Front

In the course of litigation, you sometimes observe things. Here is what I (Brauchler) observed: the defense attorneys for a double murderer (one of whose victims was the murderer's infant daughter) facing the death penalty[7] sought, and ultimately found, anti-death penalty academics to help the defense team in attempting to keep their client from receiving the death penalty for his second murder.[8] These academics had no experience actually practicing law in Colorado, much less practicing criminal law in Colorado, and much less practicing capital litigation in Colorado.[9] Indeed, they had negligible experience actually practicing criminal law at all. The defense attorneys got their handpicked academics to examine defense selected and screened data in order to reach what to me (Brauchler), as a participant in the litigation, was a predetermined conclusion.[10] The conclusion sought by the defense would support the defense's goal of striking down the death penalty statute that their client faced. Their efforts failed in court. But as the old saying goes, when life gives you lemons, you make lemonade. So, the academics took the defense provided research—so far rejected by all three Colorado trial court judges who have been asked to consider it[11]—and turned it into a law

7. *See* People v. Montour, 157 P.3d 489, 492 (Colo. 2007).

8. *Cf.* Karen Augé, *Edward Montour to Get New Trial in Killing of Corrections Officer*, DENVER POST (Apr. 9, 2013, 2:31 PM), http://www.denverpost.com/news/ci_22988352/edward-montour-to-get-new-trial.

9. Justin Marceau states prior experience as an Assistant Federal Public Defender in Arizona and as counsel in federal habeas of death penalty cases. *Faculty Profile, Justin Marceau*, U. DENV. STURM C. L., http://www.law.du.edu/index.php/profile/justin-marceau (last visited Jan. 24, 2016). Sam Kamin claims no practical legal experience. *Faculty Profile, Sam Kamin*, U. DENV. STURM C. L., http://www.law.du.edu/index.php/profile/sam-kamin (last visited Jan. 24, 2016). Wanda Foglia claims experience as a local prosecutor in Pennsylvania for two years in the mid-1980s. *C.V. of Wanda D. Foglia*, ROWAN U., http://www.rowan.edu/open/RUFaculty/cv_pdf/Dr.%20Foglia's%20CV.pdf (last visited Apr. 11, 2016).

10. The defense attorneys had the selected academics support their motion attacking the Colorado death penalty in a specific case. This is the essence of the finding of the court in the People v. Lewis. *See* Denial of Defendant's Motions DL-D-3, 27, 39 and 102 C-61 at 5–10 , People v. Lewis, 12CR4743 (Denver Dist. Ct.) [hereinafter Order C-61]; *see also* Marceau et al., *supra* note 2, at 1070 n.1.

11. *See* Order Regarding Defendant's Motion to Declare C.R.S. § 18-1.3-1201 (2012) Unconstitutional Because it Fails to Sufficiently Narrow the Class of Individuals Eligible for the Death Penalty (D-157), People v. Holmes, 12CR1522 (Arapahoe Cty. Dist. Ct. May 2, 2014) [hereinafter Order D-157]; Order [2013-05-02] D-181, People v. Montour, 02CR782 (Douglas Cty. Dist. Ct. May 2, 2013) [hereinafter Order D-181]; Order C-61, *supra* note 10, at 5–10. Specifically referencing the Authors' study in their Death Eligibility article, the Holmes court found that "[t]he study suffers from the . . . flaw . . . [that] its focus is solely on statutory aggravating factors. . . . [I]ts conclusion—that at least one aggravating factor potentially applied to 90.4% of first-degree murders examined—is nothing more than a red herring." Order D-157, *supra*, at 8–7. Citing the Authors' study from the Marceau, Kamin, & Foglia, *Death Eligibility* article, the Lewis court stated "it is clear it was not an unbiased study, but one designed to provide support for a particular position and designed to reach an anticipated conclusion." Order C-61, *supra* note 10, at 5. The court went on to question the bias of a study commissioned by "a defendant facing a death penalty prosecution" and

review article. Then, the same anti-death penalty academics used the same incomplete, untrustworthy, and unscientifically gathered data to impugn the motives of prosecutors throughout Colorado.[12] Over the past fifteen years, budget—not bias—has led to the limitation of capital prosecutions to those metro area District Attorneys' offices that have the resources to match the exploding and unchecked budgets of the Public Defender and Alternate Defense Counsel.[13]

B. Our Background and Bias

In any academic paper attempting to influence litigation or policy through original research or other statistical analysis, the proponents of the research and conclusions should disclose to the reader their relevant backgrounds and positions on the ultimate issue of the paper, in other words: their bias. Only by knowing the bias and background of the Authors can a reader fairly scrutinize the "research" and conclusions purportedly supported by it. Because the Authors fail to do so in either of their articles, we will do so here.

We are both prosecutors. We are both also former criminal defense attorneys. Combined, we have practiced criminal law in Colorado courts for 44 years.

We are pro-death penalty. That is to say, we are in favor of the potential use of the death penalty as an exercise of prosecutorial discretion by a District Attorney elected by the population with whom the District Attorney works to enforce the law and seek justice. We are both seasoned prosecutors who have also worked as defense attorneys. Between us, we have conducted hundreds of jury trials in Colorado.

George Brauchler has been the elected District Attorney of the Eighteenth Judicial District, the most populous jurisdiction in Colorado,[14] since January 2013. He made the decision to seek the death penalty against the shooter in the Aurora Theater Massacre, a case we both par-

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stated "those same defense attorneys, along with paralegals and interns, collected and presented the data for the authors' review and the participation of the defendant's attorneys and their staff creates an even greater bias concern." *Id.* The court likened the methodology used by the Authors as "GIGO, which stands for Garbage In, Garbage Out." *Id.* at 6. The court also concluded that "the approach taken to identify death penalty eligible cases was guaranteed to overestimate the instances in which the death penalty would ever be sought." *Id.* at 7.

12. Throughout *Disquieting Discretion*, the word "race" appears twenty-five times, "racial" appears sixty-two times, and "discrimination" appears fifteen times. *See generally* Beardsley et al., *supra* note 3. The Authors include a direct statement that Colorado prosecutors' use of the death penalty "might be the result of implicit biases as opposed to explicit showings of racial discrimination." *Id.* at 443 n.62. Conversely, "disparate impact" appears only three times. *See generally id.*

13. *See infra* App. E.

14. COLO. JUDICIAL DEP'T, THE EIGHTEENTH JUDICIAL DISTRICT STATE OF COLORADO OVERVIEW (2016), https://www.courts.state.co.us/userfiles/File/Court_Probation/Supreme_Court/Judicial_Nominating_Commissions/Overviews/18_Overview.pdf.

ticipated in prosecuting.[15] The mass murderer is a highly educated white man from a privileged background who sought to massacre hundreds of innocent people, but was successful in "only" murdering twelve—including six-year-old Veronica Moser-Sullivan—and wounding seventy others, including paralyzing and causing the miscarriage of Veronica's mother, who sat next to her in the theater.

The Authors of *Many Are Called* and *Disquieting Discretion* are anti-death penalty. There is, of course, nothing wrong with that. However, they should not be perceived, in any way, as disinterested, unbiased academics examining a problem and reaching a conclusion. In our opinion, there is no version, method, or legal procedure involving the death penalty that they would ever support. We believe their goal is to see the death penalty abolished, and their published research is a means to that end.[16] It is that ideological mindset—undisclosed in their papers—that appears to have influenced their outcome-based research and analysis.

An unbiased review of all relevant facts and the pertinent law—not just the Authors handpicked ones—reveals a far different outcome than that advocated by the anti-death penalty Authors. The specific conclusions are fourfold:

1. Coloradans overwhelmingly want to maintain the death penalty;

2. Colorado's death penalty statutes make the death penalty more difficult to obtain than in any other state in the United States, or even in Federal Court;

3. The race of the defendant is not a factor in the determination to pursue the death penalty in Colorado;

4. The vast disparity between the resources available to District Attorneys' offices outside of the Denver-metro area, when compared with the exploding and unscrutinized budget of the statewide public defender's office, accounts for any geographic disparity in the pursuit of the death penalty in Colorado.

II. COLORADANS SUPPORT THE DEATH PENALTY

Those who seek to permanently end the death penalty in Colorado recognize that they are unlikely to do so through the democratic process, either through the legislature or at the ballot box. A brief history of the death penalty in Colorado demonstrates Coloradans' strong interest in maintaining capital punishment in the state.

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15. We were both involved in all aspects of the Aurora Theater Case prosecution and will refer to events in this case based on our own personal knowledge and experience.

16. *See supra* note 12 and accompanying text. Specifically citing the Authors' study from the Marceau, Kamin, & Foglia, *Death Eligibility* article, the Lewis court stated "it is clear it was not an unbiased study, but one designed to provide support for a particular position and designed to reach an anticipated conclusion." Order C-61, *supra* note 10, at 5.

In 1861, "the death penalty was formally instituted as a means of punishment in Colorado."[17] Since the beginning, Colorado has historically used the death penalty sparingly. In the thirty years from 1859 to 1889, "a total of 25 men were legally hanged,"[18] the exclusive method of execution during that time. From 1890–1933, there were "45 executions by hanging in Cañon City."[19] A brief period of abolition of the death penalty beginning in 1897 resulted in new death penalty legislation only four years later in 1901.[20] In the thirty-eight years from 1934–1972, thirty-two men were executed.[21] In 1966, the legislature's attempt to repeal the death penalty by public referendum "failed by a nearly two-to-one margin."[22] After the U.S. Supreme Court's *Furman v. Georgia*[23] decision in 1972, Colorado voters approved new death penalty legislation—again by more than 60%—only two years later, in 1974.[24] In 1978, the Colorado Supreme Court struck down the death penalty, only to have the legislature amend and correct the statute in 1979.[25]

In September 1991, less than three months after the Colorado Supreme Court yet again struck down the death penalty statute, the legislature repealed the old statute and passed a new one.[26] Pursuant to the U.S. Supreme Court's decision in *Walton v. Arizona*,[27] the General Assembly passed a statute that permitted a three-judge panel to decide the life sentence or death sentence issue.[28] However, in June 2002, the U.S. Supreme Court in *Ring v. Arizona*[29] struck down the three-judge panel used in death penalty cases since 1995. Less than three weeks later, "Colorado became the first state to pass legislation that . . . would bring the state into compliance with *Ring*."[30]

The history that we have discussed above demonstrates that since before becoming a state, Coloradans have successfully and quickly resisted and reversed every effort to abolish the death penalty.

A. Recent Public Opinion

Recent polling indicates consistent and overwhelming support for maintaining the death penalty in Colorado. In December 2012, *The Colo-*

17. Stephanie Hindson et al., *Race, Gender, Region And Death Sentencing in Colorado, 1980-1999*, 77 U. COLO. L. REV. 549, 553 (2006).
18. *Id.*
19. *Id.* at 554.
20. *Id.*
21. *Id.*
22. *Id.* at 554–55.
23. 408 U.S. 238 (1972).
24. Hindson et al., *supra* note 17, at 555.
25. *Id.* at 555–56.
26. *Id.* at 556.
27. 497 U.S. 639 (1990), *overruled by* Ring v. Arizona, 536 U.S. 584 (2002).
28. Colorado Session Laws, Ch. 244, sec. 1, § 16-11-103 (1995); *see also* Woldt v. People, 64 P.3d 256 (Colo. 2003); Hindson et al., *supra* note 17, at 556–57.
29. 536 U.S. 584 (2002).
30. Hindson et al., *supra* note 17, at 557.

rado Observer published a poll conducted by Dave Sackett, one of the most well-known public opinion researchers in the United States.[31] Sixty-eight percent of respondents opposed abolishing the death penalty, compared with twenty-seven percent who favored ending capital punishment.[32] In December 1993, Nathan Dunlap chose to seek revenge for being fired by the Chuck E. Cheese restaurant in Aurora, Colorado.[33] He murdered Ben Grant, Marge Kohlberg, Sylvia Crowell, and 17 year-old Colleen O'Connor, while she begged for her life.[34] A fifth potential victim, Bobby Stephens, escaped to report Dunlap's crimes.[35] Support for the death penalty increased to 69% when respondents were told that abolishing the death penalty would lead to a commutation of mass murderer Nathan Dunlap's death sentence.[36]

A poll conducted by the Quinnipiac University Polling Institute from June 5–10, 2013, found that 69% of Coloradans wanted the death penalty to remain the law, compared to 24% who opposed the death penalty.[37] The same poll found that 67% of Coloradans believed that Governor John Hickenlooper's decision to reprieve convicted and condemned mass murderer Nathan Dunlap less than two weeks earlier was wrong.[38]

Even an informal, online poll by the *Denver Post* in 2013 indicated that 67% of respondents believed that mass murderer Dunlap, who murdered four people and seriously injured a fifth, should have been executed instead of Governor Hickenlooper granting a reprieve.[39]

In short, Coloradans—by historically wide and consistent margins—want the death penalty to remain the law of the land.

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31. *See POLL: Coloradans Favor Keeping Death Penalty by Large Margin*, COLO. OBSERVER (Dec. 31, 2012) [hereinafter *POLL*], http://thecoloradoobserver.com/2012/12/poll-coloradans-favor-death-penalty-by-large-margin/.

32. *Id.*

33. People v. Dunlap (*Dunlap I*), 975 P.2d 723, 733 (Colo. 1999).

34. *Id.* at 734.

35. *Id.*

36. *POLL*, *supra* note 31. Dunlap was convicted of four counts of first-degree murder, attempted murder, robbery, and burglary in 1996 and was sentenced to death and an additional 113 years. *See* Dunlap v. People (*Dunlap III*), 173 P.3d 1054, 1061 (Colo. 2007); People v. Dunlap (*Dunlap II*), 36 P.3d 778, 779 (Colo. 2001); *Dunlap I*, 975 P.2d at 733. During his sentencing hearing, Dunlap launched into a profanity-laden tirade directed at the family of a murder victim. *Condemned Killer Unleashes Rage in Court*, DENV. POST (Feb. 19, 2013, 12:01 AM), http://www.denverpost.com/arvada/ci_22637314/condemned-killer-unleashes-rage-court?source=pkg (originally published May 18, 1996).

37. Opinion, *What Poll Means for the Death Penalty in Colorado*, DENV. POST (June 14, 2013, 12:01 AM), http://www.denverpost.com/ci_23455324/what-poll-means-death-penalty; Press Release, Quinnipiac Univ., Colorado Voters Back Death Penalty Almost 3-1, Quinnipiac University Poll Finds; Early Look Shows Close Governor's Race in 2014 (June 13, 2013), https://www.qu.edu/news-and-events/quinnipiac-university-poll/colorado/release-detail?ReleaseID=1907.

38. *Id.*

39. Daniel Edwards, *The Reality of Evolving Standards and the Death Penalty: Part I*, PROSECUTOR, Jan.–Mar. 2014, at 28, 30.

Public opinion matters to the U.S. Supreme Court. The U.S. Supreme Court, in *Gregg v. Georgia*,[40] held that public opinion is a factor in the consideration of what might be "cruel and unusual" under the Eighth Amendment.[41] The Court held that "the Clause forbidding 'cruel and unusual' punishment 'is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.'"[42] "Thus, an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment."[43] As the Court indicated in 1976, and continuing to this day, "[d]espite the continuing debate, dating back to the 19th century, over the morality and utility of capital punishment, it is now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction."[44]

Thus, opponents of the death penalty in Colorado have turned their attention to the courts—unsuccessfully—for years. To understand the most recently attempted legal attack, it is necessary to understand the current Colorado death penalty.

III. OVERVIEW OF COLORADO'S CURRENT DEATH PENALTY STATUTE

Colorado's death penalty statute, Colo. Rev. Stat. §18-1.3-1201(2), is unique. Our opinion is that the statute and case law interpreting the statute[45] make the procedure for obtaining the death penalty in Colorado the most difficult in the United States. The Colorado statute requires the jury to proceed through four steps in determining the appropriate sentence after an offender has been convicted of a class-one felony:[46] (1) proving statutory aggravating factors beyond a reasonable doubt; (2) considering mitigation limited by only a relevance requirement; (3) requiring that the jury make a finding beyond a reasonable doubt that mitigation does not outweigh the statutory aggravating factors found in step one; and (4) selecting an appropriate punishment between life without parole or the death penalty, during which any individual juror can decide that life is the appropriate punishment.[47] The court is required to impose a life sentence if any one of the jurors does not agree that the prosecution has not proven a statutory aggravating factor, or that mitigation outweighs the statutory aggravating factors, or by determining that

40. 428 U.S. 153 (1976).

41. *Id.* at 171.

42. *Id.* (quoting Weems v. United States, 217 U.S. 349, 373 (1910)).

43. *Id.* at 173.

44. *Id.* at 179.

45. *See, e.g.*, *Dunlap I*, 975 P.2d 723, 735–36 (Colo. 1999) (effectively creating a two-phase or three-phase sentencing hearing); People v. Tenneson, 788 P.2d 786, 789 (Colo. 1990) (setting forth the procedures for the four-stage process discussed below).

46. Colorado has three class-one felony offenses for which the death penalty theoretically applies: first degree murder; first degree kidnapping where the victim dies in the course of the kidnapping; and Treason. *See* COLO. REV. STAT. § 18-3-102 (2015); *id.* § 18-3-301(2); *id.* § 18-11-101.

47. *Dunlap I*, 975 P.2d at 735–36; *Tenneson*, 788 P.2d at 791–92.

life is the appropriate punishment. According to the Colorado Supreme Court, the first three are the "eligibility" steps.[48] The fourth is the actual imposition of the sentence or "selection" step.[49] The Colorado Supreme Court has held that this statute is constitutional against every attack against it.[50]

A. The Colorado Death Penalty Statute Narrows the Pool of Death Penalty Eligible Murderers More Than Any Other Statute in the United States

Only one murderer, Gary Davis, has been executed in Colorado since 1976, when the Supreme Court upheld the constitutionality of a Georgia death penalty procedure that incorporated a bifurcation of guilt and punishment and allowed the parties to present additional evidence in aggravation and mitigation.[51] Yet death penalty opponents have argued that the Colorado death penalty can be applied too often.[52] Too often!

University of Denver Sturm College of Law professors Marceau and Kamin have recently claimed that the death penalty in Colorado has two main constitutional faults: (1) that it is too broad by failing to narrow the class of people eligible for the death penalty, and (2) almost comically, that it is too narrow because it is sought against too few defendants.[53] Death penalty opponents want it both ways on two issues: that it is unconstitutional both because it is too broad and because it is too narrow and that it is unconstitutional because it is imposed too often and not imposed frequently enough.

Of course, more than just the death penalty statute needs to be considered in determining whether the Colorado scheme constitutionally narrows the group of individuals who are eligible for the death penalty. In fact, Colorado takes extreme, unprecedented, and unique steps to narrow the scope of the death penalty.

First, Colorado narrows in the statutory definition of "first degree murder" more than most other states that have the death penalty for first degree murder. In the most utilized theory of first degree murder in the statute, the law requires that the prosecution prove that "[a]fter deliberation *and* with the intent to cause the death of a person other than himself, [the murderer caused] the death of that person."[54] Of the thirty-three

48. *Dunlap I*, 975 P.2d at 735.

49. *Id.*

50. *E.g.*, *Dunlap III*, 173 P.3d 1054, 1092–93 (Colo. 2007) (finding the statute constitutional and in full compliance with *Gregg v. Georgia*, 428 U.S. 153 (1976), and *Zant v. Stephens*, 462 U.S. 862 (1983)); *Tenneson*, 788 P.2d at 790–91; People v. Davis, 794 P.2d 159, 170–71 (Colo. 1990), *overruled by* People v. Miller, 113 P.3d 743 (Colo. 2005).

51. *See Gregg*, 428 U.S. at 196–98, 207.

52. *See* Marceau et al., *supra* note 2, at 1113.

53. *See* Sam Kamin & Justin Marceau, *Waking the* Furman *Giant*, 48 U.C. DAVIS L. REV. 981, 1019–22 (2015); Marceau et al., *supra* note 2, at 1071–75.

54. COLO. REV. STAT. § 18-3-102(1)(a) (2015) (emphasis added).

states that have the death penalty, seventeen require lesser culpability by requiring either just an intentional or knowing murder.[55] In those seventeen states (i.e., 51% of states that have the death penalty), a murderer is thus eligible for the death penalty for what would be second degree murder in Colorado, where the murderer would not be eligible for death penalty consideration at all.

In a nutshell, the sentencing phase of a capital trial can be divided into two phases, or functions: (1) eligibility for the death sentence and (2) a decision as to whether the defendant should receive the death sentence or a different sentence.[56] This first part, eligibility, can also be referred to as "narrowing," in that it narrows the class of murderers eligible for the death penalty, because it "channel[s] and limit[s] the jury's discretion to ensure that the death penalty is a proportionate punishment and therefore not arbitrary or capricious in its imposition."[57] Constitutionally, this serves the purpose of providing a "meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not."[58] Indeed, "[n]o court, not the U.S. Supreme Court, not any federal inferior court, not any state court, and specifically no Colorado court has ever found a death penalty statute to be unconstitutional based upon the number of aggravating factors in a particular statute."[59] There are only two requirements for aggravating factors to pass constitutional muster: (1) "the circumstance may not apply to every defendant convicted of murder, it must apply only to a subclass of defendants convicted of murder," and (2) "the aggravating [factor must] not be unconstitutionally vague."[60]

The Colorado death penalty statute[61] (the Colorado Statute) narrows the pool of death eligible defendants more than any other jurisdiction in the United States.[62] The Colorado Statute provides for both eligibility

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55. Alabama, Arkansas, Delaware, Georgia, Indiana, Kentucky, Louisiana, Missouri, Montana, New Hampshire, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, and Utah. *See infra* Apps. B & F.

56. *Buchanan v. Angelone*, 522 U.S. 296 (1998) ("Petitioner initially recognizes, as he must, that our cases have distinguished between two different aspects of the capital sentencing process, the eligibility phase and the selection phase. In the eligibility phase, the jury narrows the class of defendants eligible for the death penalty, often through consideration of aggravating circumstances. In the selection phase, the jury determines whether to impose a death sentence on an eligible defendant.").

57. *Id. at 275-76.*

58. Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (quoting Gregg v. Georgia, 428 U.S. 153, 188 (1976)) (striking down as unconstitutional an aggravating factor based on a finding that the offense was "outrageously or wantonly vile, horrible and inhuman.").

59. Daniel Edwards, The Reality of Evolving Standards and the Death Penalty: Part II, PROSECUTOR, April– June 2014, at 22 (emphasis omitted).

60. Tuilaepa v. California, 512 U.S. 967, 972 (1994).

61. COLO. REV. STAT. § 18-1.3-1201 (2015).

62. *See infra* Apps. B & F. Thirty-five jurisdictions including thirty-three states, the U.S. Government and the U.S. Military have the death penalty as an option for murder in the first degree. TRACY L. SNELL, U.S. DEPT. OF JUSTICE, CAPITAL PUNISHMENT, 2013 – STATISTICAL TABLES, at 3, 6 (2014), http://www.bjs.gov/content/pub/pdf/cp13st.pdf.

and sentencing (or selection). The Colorado Supreme Court has found that the determination of eligibility consists of the first three steps of the sentencing hearing:

The eligibility phase of a capital sentencing scheme must genuinely narrow the class of persons eligible to receive the death penalty. In Colorado, the class of persons eligible to receive the death penalty is narrowed by requiring the jury find the existence of one statutory aggravating factor beyond a reasonable doubt. The jury then considers the existence of any mitigating factors and must determine whether mitigation outweighs aggravation. If the jury is convinced beyond a reasonable doubt that mitigation does not outweigh aggravation, the defendant is eligible to receive the death penalty and the jury moves to the final selection stage of deliberations.[63]

Demonstrating a clear understanding of the narrowing requirement and that this requirement is contained in the jury's progression through *all three steps* of eligibility, the Colorado Supreme Court stated:

> The death penalty eligibility determination includes three steps: finding aggravating factors, finding mitigating factors, and weighing aggravating factors against mitigating factors.[64]

Therefore, just the eligibility phase of the Colorado Statute requires:

> 1. A unanimous and beyond a reasonable doubt finding that at least one aggravating factor exists beyond a reasonable doubt;[65]
>
> 2. Presentation of any mitigation by the defense and rebuttal to mitigation by the prosecution—each individual juror assesses whether mitigation exists;[66]
>
> 3. A finding as to whether mitigation does not outweigh aggravation beyond a reasonable doubt.[67] Each juror gives whatever weight the

63. *Dunlap III*, 173 P.3d 1054, 1092 (Colo. 2007) (citations omitted).

64. People v. Montour, 157 P.3d 489, 492 (Colo. 2007).

65. COLO. REV. STAT. § 18-1.3-1201(1)(d), (2)(a)(I).

66. *Id.* §18-1.3-1201(1)(d) ("The burden of proof as to the aggravating factors . . . shall be beyond a reasonable doubt. There shall be no burden of proof as to proving or disproving mitigating factors.").

67. *See generally* COLO. REV. STAT. § 18-1.3-1201. The Colorado Supreme Court on numerous occasions has held that eligibility requires the three steps and that the Colorado Statute is constitutional. *See, e.g.*, *Montour*, 157 P.3d at 492; Woldt v. People, 64 P.3d 256, 264 (Colo. 2003); *Dunlap I*, 975 P.2d 723, 739 (Colo. 1999); People v. Martinez, 970 P.2d 469, 471–73, 476 (Colo. 1998) (finding no violation right against self-incrimination, due process, effective assistance of counsel, and equal protection); People v. Rodriguez, 914 P.2d 230, 250, 277 (Colo. 1996) (finding no violation of cruel and unusual or due process clauses); People v. White, 870 P.2d 424, 436–41 (Colo. 1994) (finding no violation of due process, cruel and unusual, or ex post facto clauses); People v. Davis, 794 P.2d 159, 192–95 (Colo. 1990), *overruled by* People v. Miller, 113 P.3d 743 (Colo. 2005).

> individual juror decides should be given to any mitigation that he found to exist.[68]

Currently, an aggravating factor is any one of the seventeen factors listed by the Colorado General Assembly in the statute.[69] When Nathan Dunlap committed his murders, there were fifteen aggravating factors. A mitigating factor can be any of eleven statutory mitigating factors or "[a]ny other evidence which in the court's opinion bears on the question of mitigation."[70] Mitigation must be "relevant to the nature of the crime, and the character, background, and history of the defendant."[71]

Colorado is the *only* jurisdiction that requires more than mere proof of one or more aggravating factors at the eligibility stage. Every other state uses aggravating factors, either in the guilt phase of trial or as the first step at the sentencing hearing, as the *only* eligibility requirement.[72] The consideration of mitigation and the weighing of that mitigation, in all other jurisdictions, with the possible exception of Virginia, are sentencing factors, not eligibility factors.[73] Colorado's unique procedure, providing for the jury's consideration and weighing of aggravation and mitigation at the *eligibility* stage makes a tremendous difference to the prosecution and the murderer, as it may lead to an offender escaping the *possibility* of a life or death vote.

B. How the Death Penalty Actually Works: Procedures That Narrow Eligibility Where the Death Penalty Is Sought

The death penalty process and sentencing scheme can be seen as a pyramid. Multiple levels provide layer after layer of "narrowing," beginning with the crime, then the decision regarding filing of charges, a determination of guilt at trial, the sentencing phase (eligibility and selection), review by the trial court, post-conviction review, mandatory review of the death sentence by the Colorado Supreme Court, and other state and federal appeals. Only after climbing to the apex of the pyramid, and after any commutation or pardon authority of the Governor, may a court impose the death penalty.

Elected District Attorneys must consider myriad factors in making the decision that is consistent with Colorado constitutional, statutory, and case law.

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68. People v. Tenneson, 788 P.2d 786, 791 (Colo. 1990).
69. COLO. REV. STAT. § 18-1.3-1201(5)(a)–(q).
70. *Id.* § 18-1.3-1201(4)(a)–(l).
71. *Id.* § 18-1.3-1201(1)(b); *see also* Lockett v. Ohio, 438 U.S. 586, 604–08 (1978); People v. District Court, 586 P.2d 31, 34–36 (Colo. 1978).
72. *See infra* App. F.
73. *See infra* App. F.

1. Prosecutor's Decision Making Examples:

1. The bottom layer in the pyramid is the crime itself. The District Attorney must make a good-faith decision whether he or she can prove murder in the first degree beyond a reasonable doubt.

2. After a District Attorney makes a decision on what to charge the defendant, or submits the case to a grand jury for a probable cause determination, and authorities conduct a proper investigation, a District Attorney needs to review the facts to determine whether any statutory aggravating factors exist and appear to be provable beyond a reasonable doubt.

3. A District Attorney considers the defendant's prior criminal history, or lack of history (can be either aggravating or mitigating).

4. A District Attorney must make a determination after investigation of what mitigation may exist. This determination usually is performed after a "mitigation meeting" with the defense, where the defense presents the mitigation to the prosecution. Only after considering mitigation does a prosecutor announce that the People of the State of Colorado will pursue the death penalty.

5. The prosecutor is required to discuss the case with the victim's family members.[74] There are constitutional, statutory, and practical requirements concerning victims. Some of those considerations include:

i. A victim's family's position concerning the death penalty;

ii. Any victim's family's concerns with the length of the appeals and post-conviction proceedings until the ultimate outcome of the case is determined;

iii. Relationship of the victim to the defendant;

iv. Relationship of the defendant to the surviving victim's family members who may also need to be witnesses. A consideration of the impact upon the victim-witnesses if they have to testify;

v. A victim's background, criminal and personal histories, and level of contribution to their own death; and

vi. Number, age, and vulnerability of the victims.

6. The unique legal and factual issues in the case.

7. The weighing of known aggravating factors and known mitigation by the prosecutor in making the decision.

74. COLO. CONST. art. II, § 16A.

8. Legal climate—effect of pending legislation and existing appellate authority.

2. Jury Decision Making

The Colorado death penalty sentencing procedure is set forth in Colo. Rev. Stat. § 18-1.3-1201. The jury is required to find the defendant guilty of first degree murder unanimously and beyond a reasonable doubt.[75] A sentencing hearing is then conducted.[76] At phase one, the jury must determine whether a statutory aggravating factor has been proven by a unanimous decision beyond a reasonable doubt.[77] At phase two, the jury hears mitigation evidence from the defense and any rebuttal to mitigation from the prosecution.[78] Any individual juror may decide that a particular mitigating factor exists.[79] Also at phase two, the jurors must determine individually that mitigation outweighs the aggravating factors that were proven beyond a reasonable doubt. Each juror decides what is mitigating and what weight to give any mitigating evidence. The only items the jurors can consider at this phase in aggravation are the statutory aggravating factors.[80] Only if a statutory aggravating factor has been proven beyond a reasonable doubt and mitigation does not outweigh aggravation, as determined individually but unanimously beyond a reasonable doubt, can the jurors proceed to the final phase, selection of the sentence.[81]

At the selection phase, the parties can introduce further evidence. The defendant can introduce other mitigation. The prosecution can introduce aggravating circumstances (i.e., facts that are not statutory factors but are factors that speak to the impact of the crime on the victims; the circumstances of the crime; and the character, background, and history of the defendant).[82] The aggravating circumstances, including victim-impact evidence, can only be presented after the jury finds that the defendant is eligible for the death penalty.[83] The jurors decide the appropriate sentence between a life sentence and the death penalty.[84] Despite the eligibility finding, if any individual juror decides (unconstrained by any

75. *See* COLO. REV. STAT. § 18-1.3-1201(1)(a). Technically, the jury is required to convict the defendant of a class-one felony offense, which includes first degree murder, *id.* § 18-3-102, treason, *id.* § 18-11-101, first degree kidnapping when death occurs, *id.* § 18-3-301, and certain assaults during escape attempts by individuals convicted of class-one felonies, *id.* § 18-8-206. We have been unable to find any reference in a Colorado appellate decision to the prosecution seeking the death penalty for any crime other than first degree murder.

76. *Id.* § 18-1.3-1201(1)(a)–(b).

77. *Id.* § 18-1.3-1201(1)(d), (2).

78. *Id.* § 18-1.3-1201(2).

79. *See id.* § 18-1.3-1201(4); *see also* Lockett v. Ohio, 438 U.S. 586, 604–08 (1978); *Dunlap III*, 173 P.3d 1054, 1092–93 (Colo. 2007); People v. Tenneson, 788 P.2d 786, 790–91 (Colo. 1990); People v. District Court, 586 P.2d 31, 34–36 (Colo. 1978).

80. *See Tenneson*, 788 P.2d at 790–91.

81. *Id.*

82. COLO. REV. STAT.§ 18-1.3-1201(1)(b); *see also Dunlap III*, 173 P.3d at 1092–93.

83. *Id.* § 18-1.3-1201(1)(b).

84. *Id.* § 18-1.3-1201(2)(a).

burden of proof) that life is the appropriate sentence, the defendant is sentenced to life without parole.[85]

3. Trial Court Decision Making

The trial court is required to review a death sentence to determine whether "the verdict of the jury is clearly erroneous as contrary to the weight of the evidence, in which case the court shall sentence the defendant to life imprisonment."[86] Further, if the jury verdict is not unanimous, the court is required to sentence the defendant to life.[87]

After a verdict and sentence, the defendant can exercise his rights under the Unitary Review in Death Penalty Cases.[88] The trial court is required to set a date for execution and then stay that date pending review.[89] Two separate proceedings occur: (1) a post-conviction review similar to that provided by Colorado Rule of Criminal Procedure 35(c), and (2) a direct appeal.[90] In the *People v. Owens*[91] and *People v. Ray*[92] cases, the court appointed for each defendant four taxpayer-funded attorneys to do the post-conviction review and four attorneys as direct-appeal counsel.[93] Thus, at this point, eight taxpayer-funded attorneys represented each defendant. Sir Mario Owens filed a post-conviction motion that was over 1,000 pages in length.[94] Hearings on the Owens post-conviction petition are currently proceeding. Only after the court issues an order can the defendant then exercise his right to the direct appeal and the post-conviction-review appeal.

4. Colorado Supreme Court Review

The Colorado Supreme Court not only considers the usual appellate issues, but must make specific determinations as to the death penalty[95]:

> Whenever a sentence of death is imposed upon a person pursuant to the provisions of this section, the supreme court shall review the propriety of that sentence, having regard to the nature of the offense, the character and record of the offender, the public interest, and the manner in which the sentence was imposed, including the sufficiency and accuracy of the information on which it was based.[96]

85. *See id.* § 18-1.3-1201(2)(d).
86. *Id.* § 18-1.3-1201(2)(c).
87. *Id.* § 18-1.3-1201(2)(d).
88. *Id.* § 16-12-201(1).
89. *Id.* § 16-12-204(1).
90. *Id.* § 16-12-204(2).
91. 228 P.3d 969 (Colo. 2010).
92. 252 P.3d 1042 (Colo. 2011).
93. *See, e.g., id.* at 1044; *Owens*, 228 P.3d at 969–70.
94. This motion was filed with court and is being actively litigated in our office.
95. COLO. REV. STAT. § 18-1.3-1201(6) (2015).
96. *Id.* § 18-1.3-1201(6)(a).

The court also must review the sentence to determine whether the sentence "was imposed under the influence of passion or prejudice or any other arbitrary factor or that the evidence presented does not support the finding of statutory aggravating circumstances."[97]

5. Federal Court Decision Making

A defendant may seek certiorari in the U.S. Supreme Court of any constitutional holding by the state appellate courts. Further, a defendant can take advantage of federal habeas proceedings that proceed through the federal district court, to the circuit court, and to the U.S. Supreme Court.[98]

The Colorado Statute constitutionally narrows the class of individuals who are eligible for the death penalty by having a three-step procedure of (1) statutory aggravating factors; (2) mitigation; and (3) weighing of mitigation against statutory aggravating factors. The comprehensiveness of the death penalty statutory scheme and its actual application in Colorado should assuage any moral or legal concerns with random or arbitrary application, as there are many constitutionally sufficient layers of discretion and procedural safeguards in Colorado to ensure that death is the appropriate punishment.

IV. "THE STUDY"

In an effort to support their claims that Colorado's death penalty was unconstitutional and that its use was motivated by racial discrimination,[99] the Authors rely on self-declared original research, which they later entitle "the Colorado Narrowing Study" (the Study).[100] Examination of the Study demonstrates that it that suffers from significant subjectivity on the part of what we can only conclude, based on our interpretation of the evidence (i.e., in our learned opinions), were nonpractitioner academicians who suffered from bias (whether over, subconscious, or uncon-

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97. *Id.* § 18-1.3-1201(6)(b).

98. *See* 28 U.S.C. 2241, 2254(a) (2012).

99. In the conclusion to *Disquieting Discretion* the authors state:

Colorado's system is thus based on a capital statute that vests extraordinary discretion in the hands of prosecutors. We now know that this essentially unfettered discretion has been exercised in ways that should trouble anyone interested in the even-handed application of justice. We have demonstrated that the location of a murder and the color of the killer's skin have far more to do with whether the death penalty is sought than whether a defendant's crime is among the worst of the worst, as measured by examining whether the defendant has killed multiple victims.

Beardsley et al., *supra* note 3, at 451. The clear implication is that prosecutors use their discretion in a racially discriminatory manner.

100. See Beardsley et al., *supra* note 3, at 443 & n.7 (citing to *Many Are Called* and stating "We refer to this study as the Colorado Narrowing Study"). In People v. Montour D-181, Appendix to Montour Brief, the Authors refer to the same study as the Colorado Death Penalty Eligibility Study (CDPES). *See* D-181 (2013-3-29) Appendix to Mr. Montour's Brief in Reply to the Prosecution's Motion to Vacate and to Its Submission of the Prosecution Montour Murder Study (PMMS) at 4, People v. Montour, No. 2002-CR-782 (Douglas Cty. Dist. Ct., March 29, 2013) [hereinafter D-181 Appendix].

scious), and a cart-before-the-horse, outcome-oriented methodology and, perhaps most importantly, a dearth of real-world, practical experience. That unchecked and only lightly revealed subjectivity calls into question the accuracy of the Study and any attempted argument and policy implications based upon it.

A. "The Experts"

Professors Marceau and Kamin make repeated reference to the "Expert Review Team (ERT)."[101] They, of course, have made themselves the "experts." It is unclear why the Authors adopt this moniker, instead of simply stating that they—the Authors—conducted the review of the information they requested. Nonetheless, these self-proclaimed experts then use the defense-anti-death-penalty identification and selection of cases. The self-titled experts then use their subjective application to the biased information. It is, therefore, relevant and important to know what bias and experience they may bring to their chosen task. Unrevealed in their article is that the Authors are anti-death penalty attorneys who have spent the majority of their professional careers attempting to defeat and strike down the death penalty.[102]

One expert, Professor Justin Marceau, a co-author of the Study and law review article—is the Animal Legal Defense Fund professor at the University of Denver Sturm College of Law—whose prior criminal law experience was two years fighting the death penalty as an appellate Assistant Federal Public Defender in Arizona.[103] At the time of his self-designation as an expert for the Study, he had been a licensed attorney for eight years, four of those as an academician.[104]

Another expert, Professor Wanda Foglia, is a twenty-year law professor from Rowan University who publishes in opposition to the death penalty and testifies across the country on behalf of defendants facing the death penalty in an attempt to have the death penalty process declared unconstitutional.[105] Her touted past experience as a criminal law practitioner consists of two years as a prosecutor in the mid-1980s, prior to entering academia.[106]

The third expert, Professor Sam Kamin, is the co-author of the Study and law review article, a law professor from the University of Denver Sturm College of Law, and a career academician who has fo-

101. *See, e.g.*, Marceau et al., *supra* note 2, at 1100.
102. *See* sources cited *supra* note 9.
103. *See Faculty Profile, Justin Marceau*, supra note 9.
104. See Curriculum Vitae, Justin Marceau, UNIVERSITY OF DENVER STURM COLLEGE OF LAW, http://www.law.du.edu/documents/directory/full-time/justin-marceau.pdf (last visited Mar. 7, 2016).
105. Marceau et al., *supra* note 2, at 1069 n.1; *see also C.V. of Wanda Foglia*, *supra* note 9.
106. *C.V. of Wanda Foglia*, *supra* note 9.

cused significant time advocating against the death penalty.[107] It appears that he has never practiced criminal law anywhere.

It must be noted that, despite the Study's claimed attempt to examine the entire process for case selection, which is purportedly based upon an application of Colorado statutes and Colorado appellate opinions to Colorado criminal cases, none of the experts are licensed to practice law in Colorado.[108] One of the most obvious demonstrations of the impact of inexperience and bias is the experts' statement that "[o]nce a defendant is convicted of first-degree murder and at least one aggravating factor has been proven to the jury, the selection question—weighing aggravators against mitigators—is all that stands between a defendant and a death sentence."[109] As detailed below in the discussion of Colorado's capital punishment scheme, every part of the expert statement is false and contrary to Colorado law.

Additional misstatements of the law appear throughout the Authors' articles. In criticizing Colorado's first degree murder statute as being "one of the broadest known in law,"[110] the Authors claim that Colorado's inclusion of felony murder "in the definition of first-degree murder is quite unusual."[111] They provide no support for this extreme statement, which is explained by the fact that the vast majority of States—thirty-eight of them—in the United States have a felony murder statute *and* define felony murder as first degree murder.[112] Completely contrary to the claims of the Authors, it is actually unusual for a state to *not* have a felony murder statute *and not* define felony murder as first degree murder.[113] The failure to research other states' felony murder statutes before

107. *See Faculty Profile, Sam Kamin, supra* note 9.

108. *See* Marceau et al., *supra* note 2, at 1100. The author's lack of experience in criminal law in Colorado is revealed throughout the article and prior working copies. For example, footnote 162 of the article states "a defendant convicted of conspiracy to commit first-degree murder, which is a class two felony, could be guilty of first degree murder as an accomplice under Colorado law." *Id.* at 1100 n.162. This is a misstatement of Colorado law. By statutory definition and practical application, conspirators are not a subset of accomplices, nor vice versa. *See* COLO. REV. STAT. § 18-2-201(1) (2015); *id.* § 18-1-603. Likewise, the authors make reference to "second-degree felon[ies]" and "third degree felon[ies]." *See, e.g.*, Marceau et al., *supra* note 2, at 1100, 1115. Colorado does not classify felonies by degree, but by class. *See, e.g.*, COLO. REV. STAT. § 18-2-206. This is akin to the "fan" who yells "touchdown!" at a basketball game. Far from mere semantics, this misstatement of terms used routinely and universally throughout Colorado highlights an unfamiliarity with—and lack of facility with—the very laws and procedures the authors purport to analyze and critique. Further, a search of the Colorado Judicial website showed that the authors were not admitted to practice law in Colorado. *See Attorney Lookup*, COLO. SUP. CT., http://www.coloradosupremecourt.com/Search/AttyInfo.asp

109. Marceau et al., *supra* note 2, at 1090.

110. *Id.* at 1087.

111. *Id.*

112. *See infra* App. A.

113. *See infra* App. A. Forty-six states have a felony murder rule, or the functional equivalent, as does the United States Code. Thirty-eight states classify felony murder as first degree murder or the state equivalent of first degree murder. *See, e.g.*, 18 U.S.C. §1111(a) (2015); ALA. CODE § 13A-6-2(c) (2015); ARIZ. REV. STAT. ANN. § 13-1105 (2015); ARK. CODE ANN. § 5-10-101(a) (2015); CAL. PENAL CODE § 189 (West 2015); COLO. REV. STAT. § 18-3-102(1); DEL. CODE ANN. tit. 11, § 636(a)(2) (2015); FLA. STAT. § 782.04(2) (2015); GA. CODE ANN. § 16-5-1(c) (2015); IDAHO CODE

criticizing Colorado's laws is further suggestion of the Authors' bias and apparent inexperience in the area of criminal law.

The Authors further criticize Colorado's law in claiming that "the existence of 17 aggravating factors render Colorado's statute broad in the aggregate."[114] The Authors do not independently verify their claim, but rather rely upon a 1998 law review article as support for their conclusion that "it appears that only California has more aggravating factors than Colorado."[115] In reality, six other states (excluding California) have as many or more enumerated statutory aggravating factors as does Colorado.[116]

B. The Purpose of the Study at the Outset Was to Defeat the Death Penalty in Colorado

In scrutinizing the objectivity of those conducting a Study that relies upon a substantial amount of subjectivity in developing its data, it is appropriate and necessary to evaluate not just the credentials and the predisposed positions of the experts but also the motivations for conducting such a Study. Here, the defense attorneys working for convicted infant murderer Edward Montour[117] solicited the anti-death penalty Authors of the article to complete the Study in an effort to defeat the imposition of the death penalty against their client.[118] At the time the Authors agreed to conduct the Study, they knew their work would become the foundation for the defense team's motion to declare Colorado's death penalty un-

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ANN. § 18-4003(d) (2015); IND. CODE § 35-42-1-1(2) (2015); KAN. STAT. ANN. § 21-5402(a)(2), (c) (2015); LA. STAT. ANN. § 14:30(A)(1) (2015) (first-degree murder with intent); LA. STAT. ANN. § 14:30.1(A)(2) (2015) (second degree murder, without intent); MISS. CODE ANN. 97-3-19(1)(c) (2015); MO. REV. STAT. § 565.021(1) (2015) (second-degree murder); MONT. CODE ANN. § 45-5-102(1)(b) (2015) (deliberate homicide); N.H. REV. STAT. ANN. § 630:1-a(I)(b)(2), (3) (2015); N.C. GEN. STAT. 14-17(a) (2015); OHIO REV. CODE ANN. §§ 2903.02(B), 2929.02(B)(1) (2015) (murder, punishable by 15 years to life);OKLA. STAT. tit. 21, § 701.7(B) (2015); OR. REV. STAT. §§ 163.115(1)(b), 163.095 (2015) (murder, aggravated murder); 18 PA. CONS. STAT. § 2502(b) (2015) (second-degree murder); S.C. CODE ANN. §§ 16-3-10, 16-3-20(c)(a)(1), 16-3-50 (2015) (felony murder aggravating circumstance; manslaughter); S.D. CODIFIED LAWS § 22-16-4(2) (2015); TENN. CODE ANN. § 39-13-202(a)(2) (2015); TEX. PENAL CODE ANN. § 19.02(b)(3) (West. 2015); UTAH CODE ANN. § 76-5-203(1), (2)(d) (West 2015); VA. CODE ANN. § 18.2-31 (2015) (capital murder); WASH. REV. CODE § 9A.32.030(1)(c) (2015); WYO. STAT. ANN. § 6-2-101(a) (2015); *see also* Bennett v. Commonwealth, 978 S.W.2d 322, 327 (Ky. 1998) ("[P]articipation in a dangerous felony may constitute wantonly engaging in conduct creating a grave risk of death to another under circumstances manifesting an extreme indifference to human life, thus permitting a conviction not only of the dangerous felony, but also of wanton murder. Intent is not an element of wanton murder. Thus, the conviction of robbery is unnecessary to prove the mens rea required to convict of murder. Rather, the facts proving the element of endangerment necessary to convict of first-degree robbery may be the same facts which prove the element of aggravated wantonness necessary to convict of wanton murder.").

114. Marceau et al., *supra* note 2, at 1088.

115. *Id.* at 1088 n.91.

116. *See infra* App. B.

117. People v. Montour, 157 P.3d 489, 493–94 (Colo. 2007) (describing that the Office of the District Attorney for the Eighteenth Judicial District sought the imposition of the death penalty against Montour, who bludgeoned a prison guard to death while serving a life sentence for murdering his eleven-week old daughter).

118. *See* Marceau et al., *supra* note 2, at 1070 n.1.

constitutional. In fact, their work—which is nearly identical in content to their later published article—was used by the defense attorneys for that very purpose.[119] The Authors acknowledge that they "are indebted" to Montour's defense attorneys and even to "Mr. Montour," the convicted murderer who was pending a possible death sentence at the time of the Study.[120]

More than that, the Montour defense team limited the data which the Authors were to consider, provided the limited date range of cases to be included, and provided all of the case information and data relied upon by the Authors.[121] The Authors supplemented the list of cases they were provided by the Montour defense team—purportedly obtained from the Colorado Judicial Branch[122]—with additional cases identified and provided only by the same Montour defense team. Thus, all of the cases considered by the Authors in their Study were identified and provided by the Montour defense team who were working to have Colorado's death penalty law declared unconstitutional. A fair attempt to review all homicide cases over a limited period would have included seeking supplementation or amendment of the defense-provided list by seeking input from the Colorado District Attorneys Council, which maintains a statewide database of cases, or from the twenty-two individual District Attorneys' offices in Colorado.

The experts did not do this, instead they decided to rely on information provided by, and supplemented exclusively by, defense counsel working to defeat the death penalty on behalf of their client.

The Authors claim that, through this method, they worked from "a complete dataset of all homicides in Colorado for a 12-year period."[123]

C. An Incomplete and Unreliable Dataset of Homicides

The information relied upon by Montour's defense team and the Authors to advance their theory was analyzed.[124] Specifical-

119. *See* Justin Marceau, Wanda Foglia, & Sam Kamin, PRELIMINARY MURDER STUDY REPORT 1 (2012) (submitted by Montour defense attorneys in their motion D-181, filed on July 18, 2012).

120. Marceau et al., *Colorado Capital Punishment: An Empirical Study* 1 n.4 (University of Denver Sturm College of Law, Working Paper No. 13-08, 2013).

121. *See* Marceau et al., *supra* note 2, at 1070 n.1. The Montour defense team provided the list of cases to be considered by the Authors and chose not to consider any murder cases filed prior to January 1, 1999 or any murder cases concluded after December 31, 2010. *See* D-181 Appendix, *supra* note 100, at 17. It is noteworthy that *Many Are Called* claims in its introductory words that "This Article reports the conclusions of an empirical study of every murder conviction in Colorado between January 1, 1999 and December 31, 2010," when their submission to the *Montour* court states that only cases "filed and concluded" between January 1, 1999 and December 31, 2010 were considered.

122. *See* Marceau et al., *supra* note 2, at 1098.

123. *Id.* at 1071 n.5.

124. *See infra* App. C. Subsequent to Montour's defense team filing the Study as a supplement to their motion D-181 asking the court to declare Colorado's death penalty statute unconstitutional, the Prosecution filed with the court a detailed analysis and critique of the Study, entitled *Prosecution*

ly, each one of the defense-created "case files" included in the Study was reviewed for accuracy and reliability. Also the database was evaluated to determine whether the defense team had captured all of the applicable cases for the time period examined. The analysis revealed that the Montour defense team's "database" of 1,350 cases—on which their entire Study was premised—is fatally flawed and incomplete.

- Seventy-one additional cases were identified from the Eighteenth Judicial District alone, that were eligible to be included, but they were not considered.[125]

- It is unknown how many additional cases from Colorado's other twenty-one judicial districts were similarly not included or considered.

- Twenty-two cases included by the Montour defense team should have been excluded.[126]

- Twenty-six cases were excluded but should not have been.[127]

D. Questionable Sources and Quality of Information

The Authors relied upon Montour's defense team of attorneys, paralegals, and interns to build "case file[s]" from which the experts (the Authors) sought to identify statutory aggravating factors that they subjectively determined would have made the case "death eligible."[128]

In addition to the unreliable and incomplete database from which the Montour defense team began, detailed analysis also reveals a disturbing lack of reliable information considered by the Montour defense team for each case they selected for additional review by the experts, as well as an alarming reliance upon questionable sources of incomplete information.

- Less than one-third of the reviewed case files contained an affidavit or probable cause statement—containing facts that resulted in arrest—routinely filed in every felony case in Colorado.[129]

Murder Study. Merely for consistency and analysis, the Prosecution used the Defense team's protocols to assess their claimed "complete database." The names and qualifications of those participating in the *Prosecution Murder Study* are contained in Appendix C.

125. *See* D-181 (2012-11-20) Submission of Prosecution Murder Study Report at 7, People v. Montour, 02CR782 (Douglas Cty. Dist. Ct. Nov. 20, 2012) [hereinafter Prosecution Study].

126. *Id.* at 7.

127. *Id.* at 7.

128. *See* Marceau et al., *supra* note 2, at 1098–1102, 1105. Elsewhere in this Article, we discuss the inaccuracy of the "death eligible" analysis of the authors. *See infra* notes 149–51 and accompanying text.

129. *See* Prosecution Study, *supra* note 125, at 20–21.

- Eighty-nine percent contained no information—or charging document—that would have captured the prosecutor's specific charges in a case.[130]

- Sixty-six percent of the case files lacked *both* a charging document *and* an affidavit/probable cause statement.[131]

- Eighty-seven percent contained no motions filed by the prosecution or defense, sentencing memos, or briefs that would have provided specific facts of the actual case.[132]

- Ninety-seven percent contained no orders on motions, bond paperwork, plea paperwork, copies of advisements, sentencing orders, or other court documents that would provide specific and actual facts.[133]

- More than twenty-five percent of the case files rely entirely upon news articles, press releases, or other press/media document for the "factual" documents relied upon by the Authors to determine whether a statutory aggravator existed.[134]

- Once they culled their list of 1,350 cases, there were 215 cases in which the Montour defense team misapplied statutory aggravating factors, or found more aggravating factors than actually existed, resulting in an error rate of thirty-eight percent on aggravating factors alone.[135]

Most concerning is that of the 1,350 cases provided by the Montour defense team, the Authors provided no information for 420 of the cases (31.1% of the cases).[136] Despite that significant lack of information, the Montour defense team reached conclusions on how to classify all 420 of those cases without a single piece of paper from any source related to the case. Remarkably, the Montour defense team coded only thirty-one cases as "insufficient information to support a conclusion."[137]

E. A Flawed and Misleading Time Period Chosen for the Study

The database the Montour defense attorneys directed the Authors to use is seriously flawed and unrepresentative of the death penalty in Colorado. By utilizing dates from January 1, 1999, to December 31, 2010,[138]

130. *See id.*
131. *See id.*
132. *Id.*
133. *See id.*
134. *See id.*
135. *Id.* at 7.
136. *Id.* at 21.
137. D-181Appendix, *supra* note 100, at 6–7.
138. *See* Marceau et al., *supra* note 2, at 1070–71.

the database excludes the following data from the appellate cases in just the two years leading up to that date where the death penalty was sought:

Table 1: 1997-1998 Data Excluded by the Study

Name / Citation	Race of Defendant	Race of Victim(s)	Judicial District	Outcome
Randy Canister *People v. Canister*, 110 P.3d 380 (Colo. 2005)	Black	Black (2) Bi-racial (1)	18th	Judge sentence unconstitutional
William Neal cited in *In re Pautler*, 47 P.3d 1175 (Colo. 2002)	White	White (3)	1st	Death sentence - reversed by *Ring v. Arizona*[139]
Danny Martinez *People v. Martinez*, 22 P.3d 915 (Colo. 2001)	Hispanic	Hispanic	1st	Life
George Woldt *Woldt v. People*, 64 P.3d 256 (Colo. 2003)	White	White	4th	Death sentence – reversed by *Ring v. Az.*
Lucas Salmon cited in *Woldt v. People*, 64	White	White	4th	Life

139. 536 U.S. 584, 588–89 (2002) (holding that a determination of aggravating factors had to be determined by a jury), *overruling* Walton v. Arizona, 497 U.S. 639 (1990) (holding judge sentencing constitutional). The Colorado General Assembly after the *Walton* decision enacted a three-judge panel to sentence in a death penalty case.

P.3d 256 (Colo. 2003)				
Francisco Martinez *People v. Martinez*, 970 P.2d 469 (Colo. 1998)	Hispanic	Hispanic	1st	Death sentence – reversed by *Ring v. Az.*

Thus, a brief perusal of the *Pacific Reporter* shows that in just those two years prosecutors sought the death penalty against three Whites, two Hispanics, and one African-American. Since 1980, according to the appellate reported cases, prosecutors have sought the death penalty through trial against twelve Whites, seven African-Americans, and nine Hispanics.[140]

In just those two years, the death penalty was sought in the First, Fourth, and Eighteenth Judicial Districts, and most of those cases were outside of the Eighteenth Judicial District. If we go back a little farther, another nine years to 1978, we see that prosecutors sought the death penalty in the First, Second, Fourth, Seventeenth, Eighteenth, Nineteenth, and Twenty-First Judicial Districts.[141] The above statistics regarding race and location would seem to be important when addressing "the risk of arbitrariness and discrimination"[142] of the death penalty in Colorado, but inexplicably, these cases are just outside the parameters of the Authors' Study. The Montour defense team and the Authors chose the best possible dataset to get the results that they were trying to reach in an effort to spare Montour from a death sentence, and further, to attempt to declare Colorado's long-standing death penalty unconstitutional.

The Study likewise does not include more recent decisions where prosecutors sought the death penalty. For instance, the decision to seek the death penalty in the James Holmes Case (Aurora Theater Shooting Case) involved a white male from a privileged economic and educational background who murdered twelve people.[143] This case is not included. Also, the Authors fail to include cases where prosecutors could have sought the death penalty—or notice was actually filed, in which the defendant agreed to plead guilty to first degree murder with a life sentence in order to avoid a death sentence. In the Thirteenth Judicial District, a

140. *See infra* App. D (describing research based upon Colorado appellate reported cases where the death penalty was sought).

141. *See infra* App. D (describing research based upon Colorado appellate reported cases where the death penalty was sought).

142. *See* Marceau et al., *supra* note 2, at 1094.

143. People v. Holmes, No. 2012-CR-1522 (Arapahoe Cty. Dist. Ct. Aug. 6, 2015).

rural jurisdiction, the district attorney made the decision to seek the death penalty against Brendan Johnson,[144] a white male, and Cassandra Rieb,[145] a white female. In the Eleventh Judicial District, a rural jurisdiction, the district attorney made the decision to seek the death penalty against Jaacob VanWinkle,[146] a white male.

Since 1978, there have been twenty-four verdicts in cases in which prosecutors sought the death penalty.[147] Of the total, eighteen where White defendants (including five Hispanics) and six were African-American. Nine were reversed either in the trial court or on appeal because the U.S. Supreme Court, having held that a judge could impose a death sentence in *Walton*, reversed that decision in *Ring*.[148]

F. Additional Defense Imposed Limitations on the Cases Considered in the Study

The Montour defense team adopted chronological parameters that further limited "considered" cases to those that were both filed between January 1, 1999, and December 31, 2010, *and* resolved (by verdict, plea, or dismissal) within that same period of time.[149] In the Eighteenth Judicial District alone, twenty-five first degree murder cases filed within the defense-selected time period were not considered solely because they were not resolved prior to December 31, 2010.[150] It is unknown how many additional first degree murder cases throughout Colorado the Authors excluded for similar reasons.

Having created an unreliable, inadequate, and incomplete database, the Authors misapply to it their misunderstanding of Colorado law.

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144. People v. Johnson, No. 2014-CR-99 (Logan Cty. Dist. Ct. Mar. 12, 2015); *see also* Sara Waite, *Brendan Johnson Pleads Guilty to Grandmother's Murder, Will Get Life*, JOURNAL-ADVOCATE (Mar. 12, 2015, 12:01 PM), http://www.journal-advocate.com/sterling-public-records/ci_27698160/brendan-johnson-pleads-guilty-grandmothers-murder-will-get.

145. People v. Rieb, No. 2014-CR-98 (Logan Cty. Dist. Ct. May 1, 2015); *see also* Sara Waite, UPDATED: *Rieb to Serve 80 Years in Severance Murder Case*, JOURNAL-ADVOCATE (May 1, 2015, 10:41 AM), http://www.journal-advocate.com/sterling-public-records/ci_28026226/rieb-serve-80-years-severance-murder-case.

146. People v. Van Winkle, No. 2014-CR-86 (Fremont Cty. Combined Ct. Sept. 29, 2014); *see also* Anastasiya Bolton, *Triple-Murder Victims' Family Cries in Court*, 9NEWS (Sept. 29, 2014, 6:38 PM), http://www.9news.com/story/news/crime/2014/09/29/canon-city-triple-murder-court/16429149/.

147. *See infra* app. D.

148. *See infra* app. D; *see also* Ring v. Arizona, 536 U.S. 584, 589 (2002) (holding judge sentencing constitutional).

149. *See* Marceau et al., *supra* note 2, at 1098–1104; *see also* D-181Appendix, *supra* note 100, at 17.

150. Prosecution Study, *supra* note 125, at 8; *see also* D-181Appendix, *supra* note 100, at 17.

V. A FLAWED APPROACH—THE STUDY'S FOCUS ON ONLY ONE SIDE OF THE "ELIGIBILITY TRIANGLE"—THE "STRAIGHT LINE" VS. COLORADO'S COMPREHENSIVE THREE-TIERED APPROACH TO ELIGIBILITY

In an attempt to establish the lack of constitutional narrowing of those murderers eligible for the death penalty, the Study focuses on the breadth of the Colorado first degree murder statute, as well as what the Authors claim to be an unduly high number of statutory aggravating factors. The Authors conclusively state: "Notably . . . Colorado's aggravating factors are also too broad to be effective at narrowing the class of death-eligible offenders."[151] Examination of the Authors' illustrative examples in this area demonstrates that their objectivity is noticeably lacking.

For instance, the Authors claim that one of Colorado's aggravating factors, "lying in wait, from ambush, or by use of an explosive" is overbroad and overinclusive.[152] The Colorado Supreme Court has found that the specific statutory aggravating factor is constitutional.[153] Failing to cite to any source for their conclusion, the Authors claim that this applies to almost any first degree murder after deliberation:

> For any murderer who kills "after deliberation," it will be the rare case in which the perpetrator did not also surprise the victim, or at least wait for an opportune moment to kill. Thus, the lying in wait aggravator has application in an extremely large number of murder cases in Colorado.[154]

Here, the Study seems to suffer from what one can understatedly call a dearth of practical experience. By contending that the absence of "lying in wait or ambush" aggravator is rare in a first degree murder prosecution, the Study demonstrates a misunderstanding of the nature of first degree murder prosecutions in Colorado and, likely, any other state.

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151. Marceau et al., *supra* note 2, at 1088.

152. *Id.* at 1089 (quoting COLO. REV. STAT. § 18-1.3-1201(5)(f) (2012)).

153. Only *People v. Dunlap*, *Dunlap I*, 975 P.2d 723, 751–52 (Colo. 1999), discusses the meaning of "lying in wait." The Court found that the term has "well-founded roots in common and legal parlance." *Id.* at 751. The meaning of the phrase is that "the killer conceals himself and waits for an opportune moment to act, such that he takes his victim by surprise." *Id.* The Court quoted from the dictionary that "ambush" means "the act of lying in wait in or of attacking by surprise from a concealed position," and a California case for the proposition that "lying in wait" is "a waiting and watching the victim for an opportune time to act, together with the concealment by ambush or some other secret design to take the victim by surprise." *Id.* (first quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 67 (1976); then quoting People v. Edwards, 819 P.2d 436, 457 (Cal. 1991)). *Dunlap I* held that "lying in wait" and "ambush" are not unconstitutionally vague—"the terms 'lying in wait' and 'ambush' have well-founded roots in common and legal parlance, and thus the aggravator has a 'common-sense core of meaning . . . that criminal juries should be capable of understanding.'" *Id.* (alteration in original) (quoting Jurek v. Texas, 428 U.S. 262, 279 (1976) (White, J., concurring)). California has also found the aggravating factor constitutional in *People v. Morales*, 770 P.2d 244, 260 (Cal. 1989). The Indiana Supreme Court has also upheld the constitutionality in *Washington v. State*, 808 N.E.2d 617, 626 (Ind. 2004), and *Ingle v. State*, 746 N.E.2d 927, 940–41 (Ind. 2001).

154. Marceau et al., *supra* note 2, at 1089.

Indeed, our practical experience, and that of other prosecutors with whom we have discussed this issue, shows killing from ambush, or lying in wait, are the rare case. Very rare.

The Study is replete with oversimplifications and misapplications of U.S. and Colorado Supreme Court precedent to the Colorado Statute. Perhaps most telling, with the exception of failing to consider the additional layers of the eligibility phase, is the Study's failure to carefully and comprehensively compare the Colorado Statute to statutes that have been held to be constitutional in other states (which have only one level of eligibility). Unfortunately, given the lack of objectivity, in many instances the Study is guilty of comparing apples to oranges.

With the understanding that there are three phases of eligibility, the Colorado Supreme Court has stated, "We see no constitutional infirmity in Colorado's capital sentencing scheme."[155] As stated above, the Study assumes that eligibility includes only aggravating factors, a clearly wrong assumption.[156] The Study begins with a faulty premise: "[T]he purpose of the study was to determine whether Colorado's statutory aggravating factors meaningfully narrow the class of death-eligible offenders."[157] Thus the Study only considers one of the three considerations in Colorado eligibility determination as far as narrowing is concerned. This approach is like looking at one side of a triangle, a straight line, and arguing conclusions without considering the other two sides that support the whole.[158]

Even though the Study finds that Colorado allows *too many* murderers to be eligible for the death penalty, it paradoxically and simplistically finds reasonable a claim that "a capital sentencing scheme that produces too low of a death sentence rate is unconstitutional."[159] The obvious deficiency in this reasoning stems from the flawed premise of aggravating factors being the only narrowing condition precedent to a death sentence in Colorado. The Authors then extrapolated that improper premise to the conclusion that the low number of death sentences sought and obtained means the statutory scheme lends itself to intolerable arbitrariness. When one looks at the Colorado scheme comprehensively though,

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155. *Dunlap III*, 173 P.3d 1054, 1092 (Colo. 2007).

156. The Study only mentions in passing the consideration of mitigation and weighing. *See* Marceau et al., *supra* note 2, at 1086 n.76. This passing consideration flies in the face of numerous Colorado Supreme Court cases that hold that mitigation and weighing are essential parts of the "eligibility determination." *See supra* note 67 and accompanying text. The Study ignores long-standing Colorado law. Further the Study confounds Colorado's eligibility determination by moving mitigation and weighing from eligibility into the selection phase. *See* Marceau et al., *supra* note 2, at 1090.

157. Marceau et al., *supra* note 2, at 1071.

158. *See generally* EDWIN A. ABBOTT, FLATLAND: A ROMANCE OF MANY DIMENSIONS (6th ed. 2015).

159. Marceau et al., *supra* note 2, at 1082.

it is clear that the Study is woefully incomplete, as it considers no practical application of the eligibility criteria.

That the Study finds supportive language from *Furman v. Georgia* regarding the arbitrary application of the death penalty is not surprising, as the *Furman* court was dealing with an unconstitutional statutory scheme in Georgia that is incomparable to Colorado's scheme.[160] The Study uses language from this decades old, fact-specific opinion and applies it broadly to the Colorado Statute—a statute which provides more protection than the Georgia statute that was enacted post-*Furman* and found to be constitutional by the same U.S. Supreme Court in *Gregg v. Georgia*:

> The basic concern of *Furman* centered on those defendants who were being condemned to death capriciously and arbitrarily. Under the procedures before the Court in that case, sentencing authorities were not directed to give attention to the nature or circumstances of the crime committed or to the character or record of the defendant. Left unguided, juries imposed the death sentence in a way that could only be called freakish. The new Georgia sentencing procedures, by contrast, focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant. While the jury is permitted to consider any aggravating or mitigating circumstances, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death. In this way the jury's discretion is channeled. No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines. In addition, the review function of the Supreme Court of Georgia affords additional assurance that the concerns that prompted our decision in *Furman* are not present to any significant degree in the Georgia procedure applied here.[161]

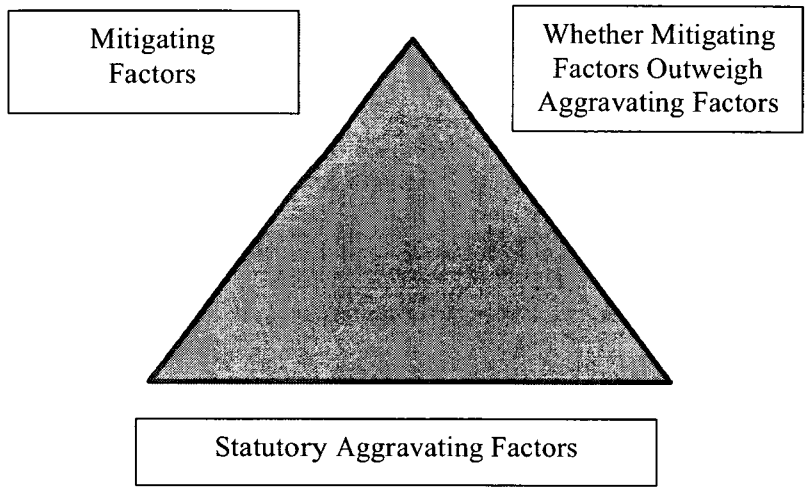
Relying on the reasoning in *Gregg*, it is overwhelmingly clear that the Colorado Statute constitutionally narrows the class of murderers eligible for the death penalty, as the Georgia statute that the *Gregg* court found constitutional cannot possibly be said to narrow more than the Colorado Statute.

The Study reaches an absolutely unsupportable position that "[t]hese numbers [despite the low amount of cases on which sought and obtained] compel the conclusion that Colorado's capital sentencing system fails to satisfy the constitutional imperative of creating clear statutory standards for distinguishing between the few who are executed and the many who commit murder."[162] The Study does not include any analysis whatsoever concerning the jury's consideration of mitigation and weigh-

160. *See* Furman v. Georgia, 408 U.S. 238, 239–40 (1972).
161. Gregg v. Georgia, 428 U.S. 153, 206–07 (1976).
162. Marceau et al., *supra* note 2, at 1072.

ing of mitigation against aggravation. The Study overlooks the likely cause and effect of Colorado's more stringent set of eligibility safeguards and appropriate prosecutorial discretion accounting for the relatively low percentage of death sentences sought or obtained. Where the Study only considers one of three stages that are required for eligibility in Colorado, it is impossible to say that the statute is unconstitutional. Again, it is like describing a straight line, while not describing the triangle which is Colorado's eligibility criteria.

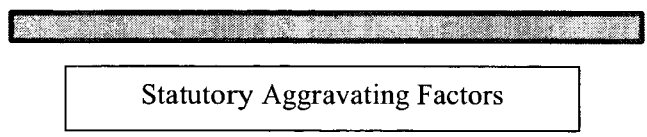
Table 2



THE COLORADO ELIGIBILITY TRIANGLE

versus

THE STUDY'S STRAIGHT LINE



In support of the Study, one might argue that only the statutory aggravators should be considered toward constitutional narrowing, as it is aggravators that are objectively measurable and not subject to juror discretion. This position would also be symptomatic of flawed reasoning. The Study, quoting not from the per curiam decision but to a concurring opinion from the *Furman*[163] decision, conflates the U.S. Supreme Court's

163. *See Furman*, 408 U.S. 238 (1972). A paragraph per curiam opinion holding the death penalty unconstitutional as a violation of the Eight Amendment's Cruel and Unusual clause, was

prohibition against unfettered or "untrammeled discretion" with any, or even guided, discretion by jurors and prosecutors alike.[164]

Fifteen years after *Furman*, the U.S. Supreme Court stated, "Implementation of [death penalty] laws necessarily requires discretionary judgments. Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused."[165] When an elected District Attorney in Colorado is called upon to make the decision to seek a death sentence, that decision must be made after consideration of several factors and after determining that the case is properly charged as first degree murder. Those factors include, but are not limited to: (1) Are there any statutory aggravators—and how many—that the jury is likely to unanimously find existed beyond a reasonable doubt? (2) What statutory mitigation exists and what "other evidence which in the court's opinion bears on the question of mitigation"[166] will or may be presented by the defense? (3) Will the mitigation outweigh aggravation beyond a reasonable doubt?

To meet the Colorado eligibility requirement, not only must the jury determine the aggravating factors, but it also must give those factors weight; not only must the jury determine any mitigation, but it also must give those factors weight; and finally, the jurors must determine whether the weightiness of mitigation outweighs the weightiness of aggravating factors. This three-step eligibility phase defines the "types of murders" eligible for the death penalty in Colorado.

The Authors argue that this is not constitutional narrowing at all. The Authors dismiss the notion that four separate district court judges and the Colorado Supreme Court have adopted this view of narrowing in Colorado.[167] The Colorado Supreme Court has held that narrowing in Colorado consists of statutory aggravating factors, mitigation, and the decision whether mitigation outweighs those aggravating factors.[168] The

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followed by five separate concurring opinions and four separate dissenting opinions. Justice Douglas held the death penalty unconstitutional because it was discriminatory in practice. *Id.* at 240 (Douglas, J., concurring). Justice Brennan held the death penalty unconstitutional because it was the product of uncontrolled arbitrary discretion that was not acceptable to contemporary society. *Id.* at 305 (Brennan, J., concurring). Justice Stewart held that it was unconstitutional because it was "wantonly and so freakishly imposed." *Id.* at 310 (Stewart, J., concurring). Justice White held it unconstitutional because of its infrequency. *Id.* at 313 (White, J., concurring). Justice Marshall held that it was unconstitutional because, most importantly, it violated the "evolving standards of decency." *Id.* at 329 (Marshall, J., concurring).

164. *See* Marcaeu et al., *supra* note 2, at 1073.

165. McCleskey v. Kemp, 481 U.S. 279, 297 (1987).

166. COLO. REV. STAT. § 18-1.3-1201(4)(I) (2015).

167. *See, e.g.*, *Dunlap III*, 173 P.3d 1054, 1092 (Colo. 2007); People v. Tenneson, 788 P.2d 786, 791 (Colo. 1990); People v. Lewis, No. 2012-CR-4743 (Den. Dist. Ct. Aug. 27, 2015) (presided over by J. Madden); People v. Holmes, No. 2012-CR-1522 (Arapahoe Cty. Dist. Ct. Aug. 6, 2015) (presided over by J. Samour); People v. Johnson, No. 2014-CR-99 (Logan Cty. Dist. Ct. Mar. 12, 2015) (presided over by J. Singer); People v. Montour, No. 2002-CR-782 (Douglas Cty. Dist. Ct. May 2, 2013) (presided over by J. Caschette).

168. *See, e.g.*, *Dunlap III*, 173 P.3d at 1092; *Tenneson*, 788 P.2d at 791.

Authors' articles and arguments have been presented to all three of these trial court judges, who then unanimously rejected the Authors' view of narrowing.[169] For the Authors to be correct, the Colorado Supreme Court and three separate district court judges must be wrong.[170]

VI. EVEN IF ONE WERE TO ADOPT THE REJECTED AND UNDULY RESTRICTIVE INTERPRETATION OF COLORADO LAW PROPOSED BY THE AUTHORS THAT ASSUMES ELIGIBILITY IS DETERMINED ONLY BY LOOKING AT THE STATUTORY AGGRAVATING FACTORS, COLORADO'S STATUTE IS STILL CONSTITUTIONAL

What is the purpose of narrowing the class of murderers eligible for the death penalty? In 1972, in *Furman v. Georgia*, the U.S. Supreme Court found Georgia's death penalty statute unconstitutional.[171] *Furman* harkens one back to the early days of the Republic, when U.S. Supreme Court Justices were expected to provide their opinions seriatim, as the five justices in the opinions concurring with the per curiam decision wrote five separate opinions, and the four dissenting justices filed separate dissenting opinions.[172] The key similarity among the Justices in the majority was the position that Georgia applied the death penalty arbitrarily under the current statute.[173] Under the Georgia and Texas state statutes at issue in *Furman*, jurors could consider any factor, once there was a first degree murder conviction, to impose the death penalty.[174] In response to *Furman*, a number of states, including Georgia, amended their death penalty statutes, and in a series of opinions in 1976, the U.S. Supreme Court found that these statutes, which included additional specific limitations and required specific additional findings, were constitutional.[175] The thing that made the death penalty constitutional in the eyes of the U.S. Supreme Court was this series of legislative amendments, which switched the death penalty procedure from what *Furman* would have described as a completely arbitrary system of imposing the death penalty to one that had specific procedures and limited what the jury could consider in deciding that the death penalty was the appropriate punishment. Most states adopted a model where the jury would weigh aggravating factors against mitigation.[176] Colorado added a fourth step, and instead of a simple model where the jury would weigh aggravating factors in miti-

169. *See supra* note 13 and accompanying text.

170. Of course, the Colorado Supreme Court has no quality of supernatural perfection in its legal pronouncements, but its status as Colorado's highest court makes its pronouncements regarding Colorado law dispositive. One is reminded of the oft-quoted phrase from Justice Robert H. Jackson regarding the U.S. Supreme Court, "We are not final because we are infallible, but we are infallible only because we are final." Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

171. Furman v. Texas, 408 U.S. 238, 239–40 (1972).

172. *See id.* at 240.

173. *See id.* at 242–371; *see also supra* note 163.

174. *See, e.g.*, *Furman*, 408 U.S. at 240.

175. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 206–07 (1976); Proffitt v. Florida, 428 U.S. 242, 259 (1976).

176. *See infra* App. F.

gation, the Colorado General Assembly added an additional step to protect the defendant—selection of the appropriate penalty.[177]

The Colorado statutory eligibility process constitutionally narrows what the jurors may consider in deciding whether death is the appropriate punishment. During their determination as to whether the defendant is even eligible for the death penalty, the jurors must only focus on those aggravating factors as limited by the General Assembly and that have been unanimously proven to exist beyond a reasonable doubt.

At the same time that limitations were placed on what a jury could consider *in favor* of a death sentence (i.e., statutory aggravating factors) there was an expansion of what a jury could consider *in favor of a life sentence* (i.e., mitigating circumstances). The Colorado Statute strictly limits the aggravating factors that the jury can consider.[178] In the Theater Shooting Case, we alleged five statutory aggravating factors, and the jury found that we proved four beyond a reasonable doubt. Conversely, there is no limitation on what the defendant can present as mitigating circumstances so long as the judge finds that those circumstances are relevant to mitigation.[179] "All admissible evidence presented by . . . the defendant that the court deems relevant to the nature of the crime, and the character, background, and history of the defendant . . . may be presented."[180]

No matter the number of statutory aggravating factors, those aggravating factors serve the purpose of limiting what a juror can consider against the defendant. There has never been a case in Colorado where all of the statutory aggravating factors have been found to exist or were even charged. In the reported appellate cases in which prosecutors sought the death penalty, there were as few as two and as many as six aggravating factors.[181]

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177. *See* People v. Young, 814 P.2d 834, 840–41, 846–47 (Colo. 1991) (holding unconstitutional under the Colorado Constitution a procedure that eliminated the fourth step); People v. Tenneson, 788 P.2d 786, 788–89 (Colo. 1990) (holding constitutional the four-step procedure). The General Assembly then reenacted the prior, i.e. *Tenneson*, statute containing the four steps.

178. COLO. REV. STAT. § 18-1.3-1201(5) (2015); *see also Dunlap III*, 173 P.3d at 1092; *Tenneson*, 788 P.2d at 791.

179. COLO. REV. STAT. § 18-1.3-1201 (1)(b), (4)(l).

180. *Id.* § 18-1.3-1201 (1)(b).

181. For example, *People v. White* is an example of a case with two aggravating factors (prior violent felony and heinous, cruel, or depraved)–one of which the Colorado Supreme Court found to be in considering in error, although a harmless error–was sufficient. However, the death sentence after being affirmed was vacated because the sentence was imposed by a judge. *See* People v. White, 870 P.2d 424, 436, 450–51 (Colo. 1994). *People v. Petrosky* is an example of a case with seven aggravators, including intentional killing of peace officer, lying in wait, felony murder-intentional killing, grave risk harm to another, avoid or prevent arrest or prosecution, and killing two or more people in the same incident. *See* People's Notice of Statutory Aggravators (DA015), People v. Petrosky, No. 95CR1171 (Jefferson Cty. Dist. Ct. Aug. 9, 1995). Defendant Petrosky was found guilty, but after the verdict, he committed suicide. *Convicted Colorado Murderer Kills Self*, UNITED PRESS INT'L (May 8, 1996), http://www.upi.com/Archives/1996/05/08/Convicted-Colorado-murderer-kills-self/3508831528000/.

Of course, the Authors are not the first to argue that the presence of too many statutory aggravating factors renders a death penalty statute unconstitutional. When the Delaware Supreme Court was faced with an argument that there were too many statutory aggravating factors in Delaware (twenty-two), the court rejected the argument because the defendant did not argue (1) that every aggravator applied to every defendant or were unconstitutionally vague, or (2) that the aggravators in his case were constitutionally infirm.[182] The defendant had failed to demonstrate how the number of statutory aggravating factors made "his own sentence unconstitutional or otherwise invalid."[183] In fact, there are states that have numerous statutory aggravating factors.[184] In another Delaware Supreme Court case, the court said that the question was never "whether, taken in combination, Delaware's statutory aggravating circumstances apply to virtually all defendants convicted of first degree murder."[185]

In Illinois, the Supreme Court held that each aggravator narrowed the class of murderers eligible for the death penalty and asked: "Even assuming that a death penalty statute could have 'too many' aggravating factors rendering a first degree murder defendant eligible for the death penalty, how many aggravating factors are 'too many'?[sic]."[186] The question has never been answered by any court, at least in a way that would agree with the argument of the Authors.

In *Jones v. United States*,[187] the U.S. Supreme Court held that "[i]n order for a capital sentencing scheme to pass constitutional muster, it must perform a *narrowing function with respect to the class of persons eligible* for the death penalty *and must also ensure that capital sentencing decisions rest upon an individualized inquiry.*"[188] The U.S. Supreme Court has never held that the exclusive method of narrowing the class of death-eligible defendants was by limiting the number of statutory aggravating factors.

The U.S. Supreme Court has stated that:

> When the purpose of a statutory aggravating circumstance is to enable the sentencer to distinguish those who deserve capital punishment

182. *See* Stevenson v. State, 709 A.2d 619, 636, 640 (Del. 1998). The Authors' Study does not cite to this Delaware case or statute where there are twenty-two aggravating factors. *See* DEL. CODE ANN. tit. 11, § 4209(e) (2015) (listing twenty-two aggravating factors). One must question the scholarship that ignores pertinent citations that disfavor the Authors' position.

183. *Stevenson*, 709 A.2d at 636.

184. *See* SNELL, *supra* note 62, at 5. For example, the following states have numerous aggravating factors: Alabama has eighteen; Arizona has fourteen; Nevada has fifteen; Pennsylvania has eighteen; Tennessee has sixteen; and Virginia has fifteen. *Id.*

185. Steckel v. State, 711 A.2d 5, 12–13 (Del. 1998).

186. People v. Ballard, 794 N.E.2d 788, 817–18 (Ill. 2002).

187. 527 U.S. 373 (1999).

188. *Id.* at 381 (emphasis added).

> from those who do not, the circumstance must provide a principled basis for doing so. If the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm.[189]

The U.S. Supreme Court opinion in *Arave v. Creech*[190] is instructive on eligibility. In that case, the Idaho statute at issue had a statutory aggravating factor of "utter disregard for human life" defined as being "cold-blooded [and] pitiless."[191] The Court examined that factor to determine whether the state appropriately "channel[ed] the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death."[192] The court found that (1) murderers eligible for capital punishment was broadly defined to include all first degree murderers, and (2) that a sizable class was eligible for the death penalty. The Court stated that a "pitiless" murder might include every first degree murderer, but that not all murders are "cold-blooded" and that there must be some within the broad class who do exhibit feeling.[193] The Court found that because "some" might exhibit feeling, "it has narrowed in a meaningful way the category of defendants upon whom capital punishment may be imposed."[194]

A. Court Rejects the Study Authors' Opinions and Conclusions

The Montour defense team adopted the Authors' Study and legal arguments about the claimed unconstitutionality of Colorado's death penalty statute and incorporated them into a pleading filed with the trial court.[195] The Montour defense team and the Authors, consistent with their article, *Many Are Called*, argued that eligibility for the death penalty derived exclusively from the claimed existence of a statutory aggravating factor.[196] The Study and the Authors' legal conclusions are entirely based on this premise.

The trial court disagreed. The trial court found—consistent with Colorado statutory construction—that "the finding of a statutory aggravating factor, standing alone, is not sufficient to render a defendant eligible for the death penalty."[197] In rejecting the Authors' legal conclusions,

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189. Arave v. Creech, 507 U.S. 463, 474 (1993).

190. 507 U.S. 463 (1993).

191. *Id.* at 465 (first quoting IDAHO CODE § 19-2515(g)(6) (1987); then quoting Creech v. Arave, 947 F.2d 873, 884 (9th Cir. 1991), *rev'd in part by* Arave v. Creech, 507 U.S. 463 (1993)).

192. *Id.* at 471 (quoting Lewis v. Jeffers, 497 U.S. 764, 774 (1990)).

193. *Id.* at 475–76.

194. *Id.* at 476.

195. *See* D-181 (2012-07-11) Submission of Murder Study Report, People v. Montour, No. 2002-CR-782 (Douglas Cty. Dist. Ct. May 2, 2013). The prosecution in the Montour case stipulated to the authors' flawed numbers for purposes of resolving the motion.

196. *See id.* at 8, 10.

197. Order at 10, People v. Montour, No. 2002-CR-782 (Douglas Cty. Dist. Ct. May 2, 2013).

the trial court cited *People v. Montour*[198] for the settled Colorado law that "[t]he death penalty eligibility determination includes three steps: finding aggravating factors, finding mitigating factors, and weighing aggravating factors against mitigating factors."[199] Ultimately, the trial court found that the Study "does not fully capture the relationship between constitutional narrowing and the Colorado death penalty statute."[200]

Thus, at least one Colorado court agrees that the Study failed to accomplish its first stated primary goal, specifically, to determine "what percentage of first-degree murderers in Colorado were eligible for the death penalty."[201]

VI. CLAIMS OF RACIAL DISCRIMINATION

Having failed to convince the court that Colorado's death penalty was unconstitutional by design, the Authors then shifted their focus to attacking prosecutors for their use of the death penalty.

In their follow-up article, *Disquieting Discretion*, Professors Marceau and Kamin[202] use the exact same flawed and biased research in the Study from the Montour case[203] to support the additional and outrageous suggestion that the application of the death penalty in Colorado is the product of racism.[204] The Authors claim that "prosecutors in Colorado were more likely to seek the death penalty against minority defendants than against white defendants."[205]

The reliance the Authors put on their prior Study is undeniable, and given its judicial rejection, inexplicable.[206] Of the eighty-five footnotes in *Disquieting Discretion*, forty reference the Authors' Study, their article based upon the Study, or their mathematical computations using the Study's claimed "complete dataset."[207] The entire basis for the legal conclusions advanced by the Authors in their recent article is premised on complete reliance and faith in the accuracy and integrity of their Study. If the Study is incomplete and inaccurate, as explained and demonstrated

198. 157 P.3d 489 (Colo. 2007).

199. *Id.* at 492.

200. Order at 11, People v. Montour, No. 2002-CR-782 (Douglas Cty. Dist. Ct. May 2, 2013).

201. Marceau et al., *supra* note 2, at 1071.

202. Also joining the professors are Meg Beardsley and Scott Phillips, who—like Professors Marceau and Kamin—have no experience in the practice of criminal law and procedure in Colorado, nor are they licensed to practice law in Colorado.

203. Beardsley et al., *supra* note 3, at 442–43.

204. *See supra* note 14 and accompanying text.

205. Beardsley et al., *supra* note 3, at 431. Likewise, the authors proclaim "the death penalty charging decisions being made by Colorado prosecutors have a strong racially disparate impact." *Id.* at 436.

206. The Authors restate their previously rejected position that "nearly every murderer in Colorado could have been charged with first degree murder and that nearly every first degree murderer could have been sentenced to death." *Id.* at 439.

207. *See, e.g., id.* at 442 n.57.

previously, the remainder of the Authors' analysis and conclusions are suspect and, arguably, unreliable.

Rather than correct the errors and shortcomings of the Study as described above, the Authors attempt instead to invent and define the term "statutorily death-eligible [as] . . . murders for which the death penalty was permitted as a matter of law under the Colorado first-degree murder and death penalty statutes."[208] As demonstrated earlier, the existence of a statutory aggravator alone does not permit the imposition of the death penalty "as a matter of law," as claimed by the Authors.

Aside from the Authors' ongoing misunderstanding of Colorado's death penalty, for the numerous reasons stated earlier in this Article, the Study cannot be relied upon for accuracy or completeness.

The Authors attempt to justify their adoption of the Montour defense team's dictated and unrepresentative period of 1999–2010, by stating, "Our work picks up where the Radalet studies left off."[209] Professor Michael L. Radalet, also a well-known opponent of the death penalty, co-wrote an article for which a secondary goal was "to compare cases *in which the death penalty was sought with all homicides* that occurred in Colorado during the twenty-year period from January 1, 1980 through December 31, 1999."[210] The Authors' Study did not attempt to further objectively measure "cases in which the death penalty was sought" since 1999, but rather use the subjectively determined cases in which the death penalty *could have been sought* [211] in their questionably expert and subjective opinion. Another distinction between the studies is that Radalet's was focused "primarily on victim attributes," not the race of the murderer. The Study only faintly "picks up"[212] where the Radalet studies left off.[213]

As with their first scholarly endeavor involving Colorado's death penalty, the Authors again exhibit bias in their analysis and argument. Take, for example, the manner in which they presented information in their article. Immediately after a paragraph containing a statement for which District Attorney Brauchler is referenced by name—not in a footnote, but in the body of the article, the Authors then write: "At the same legislative hearing, some attempted to excuse the racially disparate operation of Colorado's death penalty by noting that non-whites commit

208. Beardsley et al., *supra* note 3, at 438.
209. *Id.*
210. Hindson et al., *supra* note 17, at 552 (emphasis added).
211. Marceau et al., *supra* note 2, at 1096–99.
212. Beardsley et al., *supra* note 3, at 438.
213. Hindson et al., *supra* note 17, at 552.

more of the violent crime in our state and that, as a result, 'African American[s] tend to be just easier to convict.'"[214]

The sentence immediately following that one quotes by name Dan May, the District Attorney from the Fourth Judicial District, not in a footnote, but again in the body of the article.[215] Neither individual whose names bookend that ridiculous statement made that statement. Yet, without further information, the reader could conclude that this was part of the testimony of prosecutors or some in favor of maintaining the death penalty statute. Only in the footnotes do the Authors reveal that the hyperbolic and outrageous quote was made by State Representative Jovan Melton, who happens to be both African-American and the sponsor of a bill that would have repealed the death penalty.[216] Clearly, Representative Melton was not attempting to "excuse" anything about the death penalty in Colorado. The Authors intentionally mislead the reader about the nature of the quote cited in the body of their article.

Additionally, the Authors quote a portion of District Attorney Brauchler's statements to the Colorado General Assembly House Judiciary Committee, "It's false to say that every first degree murder case could arguably be the death penalty . . . . In fact, it requires more than the existence of an aggravating factor . . . ."[217] The Authors then mischaracterize this statement as a recognition and concession that "the death penalty was frequently available but rarely used . . . [and that] there was a great disparity between those eligible for the [death] penalty and those who receive it . . . ."[218]

The Authors state, "[I]t is beyond the scope of this Article to identify or isolate the causes of this disparity . . . the existence of such disparity is undeniable."[219] The Authors continue—in yet another footnote—"that such disparities might be the result of implicit biases as opposed to explicit showings of racial discrimination."[220] The Authors thus conclude that the disparity they claim exists is the product of either explicit or implicit racial bias on the part of prosecutors. We deny the existence of the massive disparity they claim exists. Their claims are unsupported by their Study, as well as by the actual cases prosecuted in Colorado since

214. Beardsley et al., *supra* note 3, at 440 (alteration in original) (quoting *Proposal of Repeal of the Death Penalty: Hearing on H.B. 13–1264 Before the Comm. on the Judiciary*, 2013 Leg., 69th Reg. Sess. 302 (Colo. 2013) (statement of Rep. Jovan Melton)).

215. *Id.*

216. *See* Concerning the Repeal of the Death Penalty by the General Assembly, H.B. 13-1264, 69th Gen. Assemb., Reg. Sess. (Colo. 2013).

217. Beardsley et al., *supra* note 3, at 440 (quoting *Proposal of Repeal of the Death Penalty: Hearing on H.B. 13-1264 Before the Comm. on the Judiciary*, 2013 Leg., 69th Reg. Sess. 302 (Colo. 2013) (statement of George Brauchler, Dist. Att'y, 18th Judicial District)).

218. *Id.* at 440.

219. *Id.* at 443.

220. *Id.* at 443 n.62.

1978—not just in the narrow period selected by the Montour defense team.

The Authors claim that their article "examines the results of the broad discretion afforded prosecutors under Colorado's capital statute."[221] However, the Study does not include any analysis of cases in which prosecutors filed the required notice of their intention to seek the death penalty but later resolved the case through a plea short of trial. This obvious exercise of discretion is unexplored by the Authors and unaddressed by their Study. Instead, the Authors backhandedly imply racial bias based on supposition, innuendo, and as is readily apparent to even a casual observer, a hard-core anti-death penalty ideology, to wit: "The disparities found at the intersection of place and race suggest that prosecutorial discretion is not a reliable force for ensuring the even-handed administration of the death penalty in Colorado."[222]

The Authors rely upon their expert review of an unreliable and skewed database to attempt to statistically discern in which cases the death penalty *could have been* sought, as well as the subsequently extrapolated motivations of prosecutors to seek—or not to seek—the death penalty. That methodology is wrought with subjectivity and speculation. When those who are applying their subjective analysis are unlicensed to practice law in Colorado, unfamiliar with Colorado law, and have never prosecuted, defended, or litigated a single criminal case in Colorado, scrutiny is the order of the day.

The anti-death penalty faction suggests that the death penalty is racially biased, as are the prosecutors who have sought death, by focusing only on the racial composition of the current death row. Objectively, it is true that all three defendants currently on death row in Colorado are African-American, yet the anti-death penalty crew do not address the five death penalty convictions (two whites, two Hispanics, and one African American) which occurred between *Dunlap* and *Owens/Ray*; each of those convictions was overturned as a result of *Ring v. Arizona* and *Walton v. Arizona*.[223]

A more relevant and objective measure is a review of all Colorado cases in which a death sentence was rendered since 1975. The entire list of those cases is found at Appendix D. From that objective list of twenty-two death penalty convictions, there are several important observations that can be made.

- The last three murderers sentenced to death were from the Eighteenth Judicial District (Montour, Owens, and Ray). Although all three murderers are minorities (one Hispanic and two African Ameri-

221. *Id.* at 441.
222. *Id.* at 445.
223. *See infra* App. D.

cans, respectively), all three murder victims were minorities as well (one Hispanic and two African Americans, respectively).

- Prior to the death sentence imposed in the Fourth Judicial District by an El Paso County jury in mass murderer Nathan Dunlap's 1993 case, the Eighteenth Judicial District had only one killer sentenced to death, a white man in 1980.

- Twenty percent of the death penalty convictions (one case) were against Hispanics, specifically Frank Rodriguez, and it is worth noting that this death sentence was sought and obtained by the African-American District Attorney of Denver, Norm Early (who also unsuccessfully sought death against Frank Rodriguez's brother and co-defendant, Chris Rodriguez).[224]

- The death penalty convictions have been rendered against eighteen whites (including five Hispanics) and five African-Americans.

Considering those numbers, African-Americans have received 22.7% of the verdicts, far more than the 4.5% of the total Colorado population they comprise.[225] However, the accurate comparison is between the percentage of convicted murderers and those murderers receiving death verdicts. 17.6% of convicted Colorado murderers are African-American.[226] Given the small number of total death penalty convictions since 1975 (twenty-four) and the number of death penalty convictions against African-Americans, the 4.9% difference between 22.7% and 17.6% is the result of a single case. If there was only one less African-American sentenced to death, the difference between the percentage of murders and the percentage of murderers sentenced to death drops to 0.5%.

The same goes for national statistics. The right comparison should be percentages of those on death row versus percentages of murderers as a whole. FBI statistics indicate that nationally in 2014 there were 5,472 murders where the race was either white or black.[227] White murderers numbered 3,021.[228] African-American murderers numbered 2,451.[229]

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224. *See infra* App. D; *see also* Steve Jackson, *Murderer's Row*, WESTWORD (June 7, 2001, 4:00 AM), http://www.westword.com/news/murderers-row-5067064.

225. *QuickFacts: Colorado*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/08000.html (last visited Jan. 31, 2016); *see also infra* App. D.

226. *2014 Supplemental Homicide Report*, CRIME IN COLORADO 2014, http://crimeinco.cbi.state.co.us/cic2k14/supplemental_reports/homicide.html (last visited Jan. 30, 2016).

227. *2014 Crime in the United States*, FED. BUREAU INVESTIGATION, https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/expanded-homicide-data-table/expanded_homicide_data_table_6_murder_race_and_sex_of_vicitm_by_race_and_sex_of_offender_2014.xls (last visited Jan. 23, 2016).

228. *Id.*

229. *Id.*

Thus, although African-Americans make up only 13.2% of the population,[230] almost 40% of the murders are committed by African-Americans.[231] In Colorado, a comparison cannot be made as to Hispanic murderers or victims because neither the Federal Bureau of Investigation (FBI) nor the Colorado Bureau of Investigations (CBI) kept statistics concerning Hispanics. The FBI only recently began keeping a breakout statistic concerning Hispanic murderers and victims. The CBI has yet to keep Hispanic breakouts.

The U.S. Supreme Court addressed the issue of racial disparity in capital punishment in *McCleskey v. Kemp*.[232] There, the defense argued that the Georgia death penalty was more often imposed on African-American defendants and killers of white victims than on white defendants and killers of African-American victims. The court held that the statistical Study failed to establish any discriminatory purpose by prosecutors in the *McCleskey* case. The Court reasoned that the Study, at most, indicated a correlation and not a causation and, thus, did not establish a constitutional violation.[233]

Given the relative infrequency with which Colorado prosecutors have sought and obtained the death penalty since 1975, the Authors could have reviewed each of the death penalty convictions rendered against African-Americans to assess—in their expert opinions—whether the case warranted pursuit of the death penalty. For example, three of the five African-Americans and one of the Hispanics who have been sentenced to death since 1975—including all three current members of death row—were prosecuted by the District Attorney's Office in the Eighteenth Judicial District.[234]

> **Nathan Dunlap**: A remorseless mass murderer who murdered four, while trying to murder five, by shooting each helpless victim in the head at a Chuck E. Cheese's family restaurant.[235]
>
> **Robert Ray**: Just prior to his trial on murder, Ray conspired with Sir Mario Owens to murder an eyewitness to the first murder and his fiancé, both African-Americans.[236]

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230. *QuickFacts: USA*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/00000.html (last visited Jan. 31, 2016); U.S. CENSUS BUREAU, PROFILES OF GENERAL DEMOGRAPHIC CHARACTERISTICS: 2000 CENSUS OF POPULATION AND HOUSING (2000), http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk.

231. *Crime in the United States 2011*, FED. BUREAU INVESTIGATION, https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/expanded-homicide-data-table-3 (last visited Feb. 1, 2016). In 2011, there were 4,729 white, 5,486 black, 256 "other," and 4,077 unknown murder offenders.

232. 481 U.S. 279, 286–87 (1987).

233. *See id.* at 314–19.

234. *See infra* App. D.

235. *Dunlap I*, 975 P.2d 723, 733–34 (Colo. 1999).

236. People v. Ray, 252 P.3d 1042, 1044–45 (Colo. 2011).

> **Sir Mario Owens**: The double murderer of the eyewitness and Robert Ray's fiancé in the Ray case.[237]
>
> **Edward Montour**: While serving a life sentence for murdering his eleven-week-old daughter, Montour used an industrial-sized heavy metal soup ladle to crush the skull of an unsuspecting prison guard, who was Hispanic.[238]

The Authors do not attempt to explain the exercise of prosecutorial discretion to seek death against a mass murderer, joint murderers of an eyewitness and his fiancé, or a convicted baby killer who then murdered a prison guard as the product of racial discrimination.

Subsequent to those cases, the same Eighteenth Judicial District Attorney's Office (with a new District Attorney as of January 2013) exercised the prosecutorial discretion to seek the death penalty for the mass murderer from the Theater Shooting Case. In that 2012 case, a highly educated white man from a privileged background murdered twelve and injured seventy others, while trying to murder a movie theater full of people, after booby-trapping his apartment with explosive and incendiary devices. Those facts support the pursuit of the death penalty regardless of the race of the mass murderer. Although we were not involved in the prosecution, we have no doubt that the Fero's Bar murders in Denver, resulting in five people stabbed to death and then set on fire, would have been treated as a death penalty case by any Colorado District Attorney (except perhaps by a District Attorney morally opposed to the death penalty) regardless of race.[239] There, the defendant happened to be African-American.

The Authors completely omit any consideration of these cases in their analysis.

A. Geography

The Authors state, "If prosecutors were, in fact, using their discretion to prevent the arbitrary imposition of the death penalty, one would . . . expect that neither race *nor geography* would be statistically relevant predictors of whether a death sentence is sought."[240] In suggesting that geography matters in the determination of when to seek the imposition of the death penalty, the Authors attempt to suggest that there is an ulterior motive, even a sinister one: racial bias on behalf of the prosecutors. The Authors presuppose, in part, that the decision to seek the death penalty is unaffected by factors such as available resources and impact on the District Attorney office responsible for prosecuting a case. Of course, any-

237. *See id.*
238. *See* People v. Montour, 157 P.3d 489, 491 (Colo. 2007).
239. People v. Dexter Lewis, No. 2012-CR-4743 (Denver Cty. Dist. Ct. Sept. 30, 2015).
240. Beardsley et al., *supra* note 3, at 441 (emphasis added).

one familiar with the vast differences between Colorado's twenty-two judicial districts knows otherwise.

The Authors began their Study with data collected from a purpose-driven source: the Montour defense team. They used that questionable data having already concluded there was a bogeyman: racial discrimination, and the prosecutors in the Eighteenth Judicial District are the biggest offenders. It is no coincidence that the Authors focus their conclusions of racism on the Eighteenth Judicial District, the judicial district in which the only current members of death row were sentenced.

The suggestion of racism or racial bias, whether explicit or implicit in the exercise of prosecutorial discretion is offensive and unsupported by the facts—all of them, not just the handpicked ones used by the Montour defense team and the anti-death penalty Authors.

As has been highlighted and critiqued previously, the Authors' questionable reliance upon the date range 1999–2010, a period specifically picked by the Montour defense team, lends itself to a false representation of death penalty prosecution in Colorado.

A fair presentation of the death penalty across the twenty-two judicial districts in Colorado would be more comprehensive. The list of Colorado jurisdictions in which death penalty cases have been prosecuted since 1978, the year the death penalty was reinstituted post-*Furman/Gregg*, is extensive and covers the entire state. Since 1978, prosecutors have sought the death penalty in the First, Second, Fourth, Seventeenth, Eighteenth, Nineteenth, and Twenty-First Judicial Districts.[241]

It is fair to explore any possible trend that the death penalty is more likely to be sought in Denver-metro area offices. Yet, in concluding that the answer is "racial discrimination or bias" and working backwards with flawed data, the Authors—who combined have zero capital punishment trial experience (Professor Marceau appears to have had two years in the habeas corpus world in the Federal system in another state), as either prosecutors or defense counsel—fail to consider any race-neutral, but common-sense and practical explanations. The answer is not the explicit or implicit racism claimed by the biased interpretations of flawed data. The answer is money.

It is a matter of common sense that pursuing the death penalty, even under a death penalty statute that is not the most demanding in the United States, requires more resources from a prosecutor's office than a non-capital murder case. One of the most significant costs to capital litigation

241. *See infra* App. D (describing cases based upon the appellate reported cases where the death penalty was sought).

is the delay associated with getting the cases to trial. That delay is growing.

VII. DELAY

"[F]or more than 160 years [in the United States], capital sentences were carried out in an average of two years or less" from the date of sentencing.[242] But by 2014, it took an average of eighteen years to carry out a death sentence.[243] In the meantime, there has been a "proliferation of labyrinthine restrictions on capital punishment, promulgated by [the U.S. Supreme] Court under an interpretation of the Eighth Amendment that empowered it to divine 'the evolving standards of decency that mark the progress of a maturing society.'"[244]

The observation that capital litigation takes a long time is not of recent vintage. In 1983 the Supreme Court noted in *Sullivan v. Wainwright*:

> This case has been in litigation for a full decade, with repetitive and careful reviews by both state and federal courts, and by this Court. There must come an end to the process of consideration and reconsideration. We recognize, of course, as do state and other federal courts, that the death sentence is qualitatively different from all other sentences, and therefore special care is exercised in judicial review.[245]

When confronted with the assertion that lengthy post-conviction litigation raised by the defense means that the ultimate punishment is cruel or unusual, or violates some other constitutional provision, the courts have uniformly disagreed.[246]

Daniel Edwards, an experienced capital litigator in Colorado, has made these observations:

> A large portion of the delay in death penalty cases is directly attributable to defense attorneys. A former chief deputy public defender has spread the word in Colorado and throughout the United States that there are only two rules that apply to defense attorneys in death penalty litigation: "Prison Rules," and "Vegas Rules." Prison Rules mean that when it comes to defense attorneys in capital litigation, there are no rules. Defense attorneys are encouraged to play dumb and not follow the rules until and unless the attorney is threatened with serious penalties. Vegas Rules mean that if you are going to go, go big.

242. Glossip v. Gross, 135 S. Ct. 2726, 2749 (2015) (Scalia, J., concurring).
243. *Id.* at 2764 (Breyer, J., dissenting).
244. *Id.* at 2749 (Scalia, J., concurring) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).
245. *Id.* at 112.
246. Daniel Edwards, *The Reality of Evolving Standards and the Death Penalty: Part II*, PROSECUTOR, April– June 2014, at 22, 39.

Further, a chief deputy public defender indicated in the early 1980s that the way that the death penalty was going to be defeated in Colorado was to create the greatest possible expenditure of governmental money, time, and resources. The objective, therefore, was to build delay. Defense attorneys in Colorado are facile at building in delay.[247]

IX. BUDGET, NOT BIAS

The reason death penalty defendants are able to expend such significant resources in delaying and defending against Colorado's death penalty is money, specifically the unmatched growth of budgets for taxpayer-funded defense attorneys compared to the budgets of public prosecutors throughout the state.

Death penalty cases in the modern era are defended by the Office of the State Public Defender (OSPD) and the Office of the Alternate Defense Counsel (OADC).[248] Since before 2000, the budgets of OSPD and OADC have exploded: the OSPD budget increasing 317.4% and the OADC budget increasing 289.8%.[249] Funding for those two offices have outpaced the growth in population, violent crime, inflation, the state budget, and most significantly for the analysis of the death penalty, the budgets of the District Attorneys throughout Colorado.

A. Vast Disparity in Funding

State taxpayer monies entirely fund the OSPD and OADC. That is to say that the state legislature annually approves the expenditure of state general funds to OSPD and OADC. OSPD funds a team specifically designated and trained to defend death penalty cases. They can—and are—deployed wherever a death penalty case is pursued.[250] In the Theater Shooting Case, OSPD even paid taxpayer monies to house the defense team near the courthouse for the duration of the seven-month trial.

By contrast, District Attorneys' offices are funded locally. That is to say that the county commissioners of the various counties within a judicial district each vote on the budget of their District Attorney. For example, in the Eighteenth Judicial District, the Boards of County Commissioners of Arapahoe, Douglas, Elbert, and Lincoln counties each scrutinize and vote on the budget of the District Attorney; they contribute to that budget based upon the proportion of the judicial district's population that resides within each respective county.[251] The tax base available to Colorado's sixty-four counties contained in twenty-two Judicial Districts is far different than that available to the state.

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247. *Id.* at 22, 39–41.
248. Based on personal knowledge in death penalty litigation.
249. *See infra* App. E.
250. Based on the authors' personal knowledge in death penalty litigation.
251. *See, e.g.*, Beacom v. Adams Cty, 657 P.2d 440, 444 (Colo. 1983).

Likewise, the level of public scrutiny to which OSPD and OADC are subject is non-existent in comparison to the District Attorneys across the state.[252]

The result is stark and unjustifiable.

The most straightforward way to assess the explosion of monies available to taxpayer-funded defense attorneys is to compare the documented growth of their budgets with other relevant and known variables over the same time period.

B. Population

Colorado: *increased* 24.5% from 2000 (4,301,261)[253] to 2014 (5,355,866).[254]

Eighteenth Judicial District: increased by 96% from 2000 (490,722)[255] to 2014 (962,585).[256]

C. Economy

Between 2000 and 2014, the cumulative rate of inflation was 39.5%, with an average of 2.25% annually.[257]

D. Crime

The number of "major crimes"[258] reported in 2000 *decreased* by 4.6% in 2013.

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252. Malia Zimmerman, *Public Defender Mum as Taxpayer Tab Mounts for Accused 'Batman' Killer James Holmes*, FOX NEWS (Feb. 15, 2015), http://www.foxnews.com/us/2015/02/15/public-defender-mum-as-taxpayer-tab-mounts-for-accused-batman-killer-james.html. For example, the public has been denied any information about how much taxpayer money was spent—even in the aggregate—in the defense of the mass murderer in the Theater Shooting Case, the Chuck E. Cheese's massacre case, or in the case of the assassination of a murder eyewitness and his fiancé. In fact, the public has been denied any information about any taxpayer monies spend on any case in which OSPD or OADC has represented the defendant.

253. *Population of Colorado*, CENSUSVIEWER, http://censusviewer.com/state/CO (last visited Jan. 31, 2016).

254. *QuickFacts: Colorado*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/08000.html (last visited Jan. 31, 2016).

255. *County and Municipal Population Estimates - Parameters*, COLO. DEP'T LOC. AFF., https://dola.colorado.gov/demog_webapps/peParameters.jsf;jsessionid=f05ea58192a950d8109e00883f05 (last visited Jan. 31, 2016).

256. *Id.*

257. Based on consumer price index. *See Consumer Price Index*, BUREAU LAB. STAT., http://www.bls.gov/cpi/cpi_dr.htm (last visited Jan. 31, 2016).

258. Using the classifications of "major crimes" as reported by the Colorado Bureau of Investigations in 2000, which were limited to homicide, rape, robbery, burglary, and auto theft. *Colorado 2000 Statewide Major Offenses*, CRIME COLO. 2000, http://crimeinco.cbi.state.co.us/cic2000/state_totals/statewide_offense.htm (last visited Jan. 31, 2016). Since 2000, the number of classifications has increased. *2014 Colorado Reported Statewide Crimes*, CRIME COLO. 2014, http://crimeinco.cbi.state.co.us/cic2k14/state%20totals/statewide_offense.html (last visited Jan. 31, 2016).

The number of district court criminal (felony) filings for all of Colorado in FY[259] 2001 (36,860)[260] increased by 10.97% in FY 2015 (40,903).[261]

The number of juvenile delinquency cases filed in FY 2001 (16,986)[262] *decreased* by 48.27% by FY 2015 (8,786).[263]

The number of misdemeanor cases filed in FY 2000 (73,853)[264] *decreased* by 15.87% in FY 2015 (62,131).[265]

E. Budgets of OSPD and OADC

Appendix E captures the annual budgets of OSPD and OADC from 2000–2015 and illustrates the following: [266]

> Between 2000 ($27,296,931) and 2015 ($86,639,8883), the annual budget of OSPD *increased by 317.4%.*
>
> Between 2000 ($10,683,438) and 2015 ($37,980,369), the annual budget of OADC *increased by 289%.*

The Eighteenth Judicial District, the most populous judicial district in the state with nearly one million residents, has a budget that permits the District Attorney to make decisions about how to seek justice in individual cases independent of the resources available to the taxpayer-funded behemoth OSPD and OADC. Of the other judicial districts, only the largest, the First (Jefferson), Second (Denver), and Seventeenth (Adams) have the fiscal ability to withstand the seemingly limitless resources available to—and used by—those who represent the murderers facing the death penalty.

F. Additional Inquiries Not Made by the Authors

It is a matter of common sense that increased population and population density may provide for a great opportunity and incidence of multiple and mass murders. Cities such as Denver, Aurora, Colorado

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259. FY = Fiscal year. Colorado State Judicial Fiscal Year runs from July 1st through June 30th each year.

260. COLO. JUDICIAL BRANCH, COLORADO JUDICIAL BRANCH FY 2001 ANNUAL REPORT, at 27, https://www.courts.state.co.us/userfiles/file/Administration/Planning_and_Analysis/Annual_Statistical_Reports/2001/2001%20annual%20report.pdf.

261. *Id.*; COLO. JUDICIAL BRANCH, JUDICIAL BRANCH ANNUAL STATISTICAL REPORT FISCAL YEAR 2015, at 17, https://www.courts.state.co.us/userfiles/file/Administration/Planning_and_Analysis/Annual_Statistical_Reports/2015/FY2015%20Annual%20Statistical%20Report.pdf.

262. COLORADO JUDICIAL BRANCH FY 2001 ANNUAL REPORT, *supra* note 261, at 47.

263. *Id.*; JUDICIAL BRANCH ANNUAL STATISTICAL REPORT FISCAL YEAR 2015, *supra* note 262, at 43.

264. COLORADO JUDICIAL BRANCH FY 2001 ANNUAL REPORT, *supra* note 261, at 75.

265. *Id.*; JUDICIAL BRANCH ANNUAL STATISTICAL REPORT FISCAL YEAR 2015, *supra* note 262, at 65.

266. *See infra* App. E (containing the delineated Colorado Sessions Laws within the table).

Springs, and Lakewood have far different societal, historic, and economic issues related to crime and violent crime rates than do Durango, Aspen, Glenwood Springs, and Lake City. Nonetheless, the Study's Authors do not address or attempt to explore this issue.

If there is any recent geographic trend regarding the pursuit of the death penalty, although none has been reliably shown with the Authors' unreliable data and Study, it is likely due to these non-discriminatory explanations—and perhaps others never explored by the Authors. The Authors, having not pursued any explanation other than their predetermined one of racial discrimination, left to hypothetical future research the determination of whether the Colorado death penalty statute is unconstitutional on its face or as applied by Colorado prosecutors.

X. CONCLUSION

Colorado should continue to assess and analyze the death penalty. There is no more grave decision an elected prosecutor can make than to set the machinery of government in motion to take the life of another member of society, even one who is a heinous, depraved, and multiple killer of the innocent. Coloradans have assessed and analyzed the death penalty since before statehood, and Coloradans have historically and consistently insisted on having the death penalty available as a discretionary tool of elected prosecutors. The anti-death penalty, "life for killers" group does what minority opinion groups do every time they fail to convince the populace of the rightness of their position: they turn to the courts to override the will of the people. In Colorado, those modern efforts to invite the judiciary to impose public policy on the majority have failed.

To achieve their goal of lowering the bar of punishment for aggravated murderers, the Authors—at the request of a murderer attempting to avoid the death penalty for his second murder—have applied their questionable expertise and nearly complete misunderstanding of Colorado's death penalty laws to a biased and flawed set of data compiled by the murderer's defense team to support a theory they had from the outset: the Colorado law is defective and unconstitutional. That argument having failed, they then used the exact same data to support another preconceived notion: prosecutors discriminate based on race and the worst offenders are in the Eighteenth Judicial District. The Study does not draw any reliable conclusions about anything related to homicides or the death penalty in Colorado.

Colorado's death penalty is the toughest in the United States to achieve. Taxpayer-funded defense attorneys have turned a historic explosion in funding over the past fifteen years into undeniable and significant increases in delay and cost associated with capital litigation, and in so doing, they have priced many non-metro area jurisdictions out of the ability to pursue the death penalty. Colorado should consider amending

its statutes to be more consistent with those of the federal government and the vast majority of states that have death penalty laws.

APPENDIX A

FELONY MURDER RULE SURVEY

State	**Felony-Murder Statute**	**Felony Murder as First-degree Murder**	**Capital Punishment for Felony Murder**
Alabama	Yes — ALA. CODE § 13A-6-2(a)(3) (2015)	Yes	Yes — ALA. CODE § 13A-6-2(c) (2015)
Alaska	Yes — ALASKA STAT. § 11.41.100(a)(2)–(5) (2015); ALASKA STAT. § 11.41.110(a)(3)–(5) (2015)	*Yes — Only those enumerated in ALASKA STAT. § 11.41.100(a)(2)–(5) (2015)*	*No — ALASKA STAT. § 12.55.125(a) (2015)*
Arizona	Yes — ARIZ. REV. STAT. ANN. § 13-1105(A)(2) (2015)	Yes — Enumerated Felonies in ARIZ. REV. STAT. ANN. § 13-1105(A)(2) (2015)	Yes — ARIZ. REV. STAT. ANN. § 13-1105(D) (2015)
Arkansas	Yes — ARK. CODE ANN. § 5-10-101(a)(1) (2015)	Yes	Yes — ARK. CODE ANN. § 5-10-101(c) (2015)
California	Yes — CAL. PENAL CODE § 189 (West 2015)	Yes — Only those enumerated in CAL. PENAL CODE § 189 (West 2015)	Yes – CAL. PENAL CODE § 190(a) (West 2015)
Colorado	Yes — COLO. REV. STAT. § 18-3-102(1)(b) (2015)	Yes	Yes — COLO. REV. STAT. § 18-1.3-1201(1)(a) (2015)
Connecticut	Yes — CONN. GEN. STAT. §	No — Felony Murder	No — CONN. GEN. STAT. §

	53a-54c (2015)		53a-45 (2015)
Delaware	Yes — DEL. CODE ANN. tit. 11, § 636(a)(2) (2015)	Yes	Yes — DEL. CODE ANN. tit. 11, § 4209(a) (2015)
Florida	Yes — FLA. STAT. § 782.04 (2015)	Yes — Only those enumerated in FLA. STAT. § 782.04(1)(a)(2) (2015)	Yes — FLA. STAT. § 775.082(1)(a) (2015)
Georgia	Yes — GA. CODE ANN. § 16-5-1(c) (2015)	Yes	Yes — GA. CODE ANN. § 16-5-1(e)(1) (2015)
Hawaii	None	N/A	N/A
Idaho	Yes — IDAHO CODE § 18-4003(d) (2015)	Yes — Only those enumerated in IDAHO CODE § 18-4003(d) (2015)	Yes — IDAHO CODE § 18-4004 (2015)
Illinois	Yes — 720 ILL. COMP. STAT. 5/9-1(a) (2015)	Yes — Only forcible felonies under 720 ILL. COMP. STAT. 5/9-1(a) (2015)	Yes — Only with presence of aggravating factor 720 ILL. COMP. STAT. 5/9-1(b) (2015)
Indiana	Yes — IND. CODE § 35-42-1-1(2) (2015)	N/A	Yes — IND. CODE § 35-50-2-3(b) (2015)
Iowa	Yes — IOWA CODE § 707.2(1)(b) (2015)	*Yes — Only forcible felonies under IOWA CODE § 707.2(1)(b) (2015)*	*No — IOWA CODE § 902.1(1) (2015)*
Kansas	Yes — KAN. STAT. ANN. § 21-5402(a)(2)	Yes	No — KAN. STAT. ANN. § 21-6620

	(2015)		(2015)
Kentucky	None	N/A	N/A
Louisiana	Yes — LA. STAT. ANN. § 30(A)(1) (2015)	*Yes — Only those enumerated in LA. STAT. ANN. § 30(A)(1) (2015)*	*Yes — LA. STAT. ANN. § 30(C) (2015)*
Maine	Yes — ME. STAT. tit. 17-a, § 202 (2015)	*No — Felony Murder*	*No — ME. STAT. tit. 17-a, § 1251 (2015)*
Maryland	Yes — MD. CODE ANN., CRIM. LAW § 2-201(a)(4) (West 2015)	*Yes — Only those enumerated in MD. CODE ANN., CRIM. LAW § 2-201(a)(4) (West 2015)*	*No — MD. CODE ANN., CRIM. LAW § 2-201(b) (West 2015)*
Massachusetts	Yes — However, the felony must be punishable by life in prison — MASS. GEN. LAWS ch. 265, § 1 (2015)	*Yes — However, the felony must be punishable by life in prison — MASS. GEN. LAWS ch. 265, § 1 (2015)*	*No — MASS. GEN. LAWS ch. 265, § 2(a) (2015)*
Michigan	None — Abolished by case law, *People v. Aaron*, 299 N.W.2d 304 (Mich. 1980).	N/A	N/A
Minnesota	Yes — MINN. STAT. § 609.185(a)(3) (2015)	*Yes — Only those enumerated in MINN. STAT. § 609.185(a)(3) (2015)*	No
Mississippi	Yes — MISS. CODE ANN. § 97-3-19(1)(c), (2)(e) (2015)	Yes	Yes — Only those enumerated in MISS. CODE ANN. § 97-3-19(2)(e) (2015)
Missouri	Yes — MO. REV. STAT. § 565.021(1)(2)	*No — Second Degree*	No

	(2015)		
Montana	Yes — MONT. CODE ANN. § 45-5-102(1)(b) (2015)	*Yes — Deliberate Homicide*	*Yes — MONT. CODE ANN. § 45-5-102(2) (2015)*
Nebraska	Yes — NEB. REV. STAT. § 28-303(1)(b) (2015)	*Yes — Only those enumerated in NEB. REV. STAT. § 28-303(1)(b) (2015)*	*No — NEB. REV. STAT. § 29-2502 (2015)*
Nevada	Yes — NEV. REV. STAT. § 200.030(1)(b) (2015)	*Yes — Only those enumerated in NEV. REV. STAT. § 200.030(1)(b) (2015)*	*Yes — NEV. REV. STAT. § 200.030(4)(a) (2015)*
New Hampshire	Yes — N.H. REV. STAT. ANN. § 630:1-a(I)(b) (2015); N.H. REV. STAT. ANN. § 630:1-b(I) (2015)	*Yes — Only those enumerated in N.H. REV. STAT. ANN. § 630:1-a(I)(b) (2015)*	No
New Jersey	Yes — N.J. REV. STAT. § 2C:11-3(a)(3) (2015)	Yes	No — N.J. REV. STAT. § 2C:11-3(b) (2015)
New Mexico	Yes — N.M. STAT. ANN. § 30-2-1(A)(2) (2015)	*Yes — Called Capital Felony*	*Yes — N.M. STAT. ANN. § 30-2-1(A) (2015)*
New York	YES — N.Y. PENAL LAW § 125.25(3) (McKinney 2015)	*No — Second Degree — N.Y. PENAL LAW § 125.25(3) (McKinney 2015)*	No
North Carolina	Yes — N.C. GEN. STAT. § 14-17(a) (2015)	Yes	Yes — N.C. GEN. STAT. § 14-17(a) (2015)
North Dakota	Yes — N.D. CENT. CODE § 12.1-16-01(1)(c)	Yes	No — N.D. CENT. CODE § 12.1-32-01(1)

	(2015)		(2015)
Ohio	Yes — OHIO REV. CODE ANN. § 2903.04(A) (West 2015)	*No — Involuntary Manslaughter — OHIO REV. CODE ANN. § 2903.04(C) (West 2015)*	No
Oklahoma	Yes — OKLA. STAT. tit. 21, § 701.7(B) (2015)	*Yes — Only those enumerated in OKLA. STAT. tit. 21, § 701.7(B) (2015)*	Yes — OKLA. STAT. tit. 21, § 701.9(A) (2015)
Oregon	Yes — OR. REV. STAT. § 163.115(1)(b) (2016)	*Yes — Only those enumerated in OR. REV. STAT. § 163.115(1)(b) (2016)*	*No — OR. REV. STAT. § 163.115(5) (2016)*
Pennsylvania	Yes — 18 PA. CONS. STAT. § 2502(b) (2016)	*No — Second Degree*	*No — 18 PA. CONS. STAT. § 1102(b) (2016)*
Rhode Island	Yes — 11 R.I. GEN. LAWS § 11-23-1 (2016)	*Yes — Only those enumerated in 11 R.I. GEN. LAWS § 11-23-1 (2016)*	*No — 11 R.I. GEN. LAWS § 11-23-2 (2016)*
South Carolina	None	N/A	N/A
South Dakota	Yes — S.D. CODIFIED LAWS § 22-16-4(2) (2015)	*Yes — Only those enumerated in S.D. CODIFIED LAWS § 22-16-4(2) (2015)*	*Yes — With Aggravating Circumstance — S.D. CODIFIED LAWS § 23A-27A-4 (2015)*
Tennessee	Yes — TENN. CODE ANN. § 39-13-202(a)(2) (2015)	*Yes — Only those enumerated in TENN. CODE ANN. § 39-13-202(a)(2) (2015)*	*Yes — TENN. CODE ANN. § 39-13-202(c)(1) (2015)*
Texas	Yes — TEX. PENAL CODE ANN. §	Yes	Only if Intentional — TEX. PENAL CODE

	19.02(b)(3) (West 2015)		ANN. § 19.03(a)(2), (b) (West 2015)
Utah	Yes — UTAH CODE ANN. § 76-5-203(2)(d) (2015)	*Yes — Only those enumerated in UTAH CODE ANN. § 76-5-203(1), (3)(a) (2015)*	*No — UTAH CODE ANN. § 76-5-203(3)(b) (2015)*
Vermont	Yes — VT. STAT. ANN. tit. 13, § 2301 (2015)	*Yes — only those enumerated in VT. STAT. ANN. tit. 13, § 2301 (2015)*	*No — VT. STAT. ANN. tit. 13, § 2303(a) (2015)*
Virginia	Yes — VA. CODE ANN. § 18.2-32 (2015)	*Yes — Only those enumerated in VA. CODE ANN. § 18.2-32 (2015)*	No
Washington	Yes — WASH. REV. CODE § 9A.32.030(1)(c) (2015)	*Yes — Only those enumerated in WASH. REV. CODE § 9A.32.030(1)(c) (2015)*	*No — WASH. REV. CODE § 9A.32.040 (2015)*
West Virginia	Yes — W. VA. CODE § 61-2-1 (2015)	*Yes — Only those enumerated in W. VA. CODE § 61-2-1 (2015)*	*No — W. VA. CODE § 61-2-2 (2015)*
Wisconsin	Yes — WIS. STAT. § 940.03 (2015)	*No — Sentence Enhancer*	No
Wyoming	Yes — WYO. STAT. ANN. § 6-2-101(a) (2015)	*Yes — Only those enumerated in WYO. STAT. ANN. § 6-2-101(a) (2015)*	*Yes — WYO. STAT. ANN. § 6-2-101(b) (2015)*

APPENDIX B[267]

NUMBERS OF AGGRAVATING FACTORS IN THIRTY-THREE DEATH PENALTY STATES

Table A6-1 below gives the counts of statutory and specified factors in the death penalty of thirty-three states, sorted in descending order by the number of specific factors.

STATE	STATUTE	STATUTORY FACTORS	SPECIFIC FACTORS
Utah	UTAH CODE ANN. § 76-5-202 (2015)	20	98
Georgia	GA. CODE ANN. § 17-10-30	12	62
Tennessee	TENN. CODE ANN. § 39-13-204 (2015)	17	62
Missouri	MO. REV. STAT. § 565.032 (2015)	17	59
Delaware	DEL. CODE ANN. tit. 11, § 4209 (2015)	22	56
Louisiana	LA. STAT. ANN. § 14:30 (2015)	10	55
North Carolina	N.C. GEN. STAT. § 15A-2000 (2015)	11	53
Indiana	IND. CODE § 35-50-2-9 (2015)	16	50
Arkansas	ARK. CODE ANN. § 5-10-101 (2015)	10	48
Wyoming	WYO. STAT. ANN. § 6-2-102 (1977)	12	48
Idaho	IDAHO CODE § 19-2515 (2015)	11	45
Pennsylva-	42 PA. CONS. STAT. § 9711	18	45
Colorado	COLO. REV. STAT. § 18-1.3-1201 (2015)	17	44
Washington	WASH. REV. CODE § 10.95.020 (2015)	14	41
Ohio	OHIO REV. CODE ANN. § 2929.04 (2015)	10	39
Florida	FLA. STAT. § 782.04 (2015)	18	38
California	CAL. PENAL CODE § 189 (2015)	1	34
South Caro-	S.C. CODE ANN. § 16-3-20 (2015)	12	30
Texas	TEX. PENAL CODE ANN. § 1903 (West 2015)	9	29

267. This appeared as Appendix 6 to the Prosecution Murder Study filed in response to the Montour Defense Motion D-181 in People v. Montour, 02CR782. *See* Prosecution Study, *supra* note 137, at 30–31. The research was conducted by the Staff identified in Appendix C. *See infra* app. C.

Virginia	VA. CODE ANN. § 18.2-31 (2015)	15	28
Oregon	OR. REV. STAT. § 163.095 (2016)	12	27
Arizona	ARIZ. REV. STAT. ANN. § 13-751 (2015)	14	25
Mississippi	MISS. CODE ANN. § 97-3-19 (2015)	8	25
Alabama	ALA. CODE § 13A-5-40 (2015)	10	24
South Dakota	S.D. CODIFIED LAWS § 23A-27A-1 (2015)	10	24
Kentucky	KY. REV. STAT. ANN. § 532.025 (West 2015)	8	23
Maryland	MD. CODE ANN., CRIM. LAW § 2-303 (West 2016), *repealed by* 2013 Laws of Maryland, c. 156 (May 2, 2013).	10	21
Montana	MONT. CODE ANN. § 46-18-303 (2015)	9	20
Nevada	NEV. REV. STAT. § 200.033	15	20
Kansas	KAN. STAT. ANN. § 21-6624 (2015)	8	17
Nebraska	NEB. REV. STAT. § 20-303 (2015)	8	17
New Hampshire	N.H. REV. STAT. ANN. § 630:5 (2015)	10	15
Oklahoma	OKLA. STAT. tit. 21, § 701.7 (2015)	8	11

TABULATION METHODOLOGY

The goal of this appendix is to present, for comparison purposes, a list of the number of specific aggravating factors identified in the death penalty statutes of the thirty-three states that actually have the death penalty. Because the statutes of the states vary considerably in specificity, each state's list of aggravating factors was converted into a standardized form, using equivalent levels of aggregation for the specific factors.

The standard for the level of aggregation was based roughly on the Colorado Statute, with factors (c), (e), (g), and (k) expanded into their constituent parts. Using this standard, Colorado has seventeen *enumerated* factors, (a) through (q), which constitute forty-four *specific* factors. This level of aggregation for specific factors was applied consistently across all thirty-three states.

As an example of this process, a factor that distinguishes between killing a peace officer and killing a *former* peace officer was listed as a single factor. A factor that distinguishes between a prior homicide and a prior *attempted* homicide was similarly listed as a single factor. On the

other hand, a statute that lists within one paragraph the killing of a peace officer and a fireman was broken down into two specific factors: killing a peace officer, and killing a fireman.

APPENDIX C

STUDY PERSONNEL[268] FROM MONTOUR PROSECUTION TEAM[269]

1. Loren Cobb is an Associate Research Professor at the University of Colorado Denver, Department of Mathematical and Statistical Sciences. He has been on the faculty since 2008, teaching mathematical statistics and running the department's statistical consulting service. For fifteen years prior to joining the research faculty of the University of Colorado Denver, Dr. Cobb was a consultant, primarily for the U.S. Department of Defense and secondarily for the Ministries of Defense of Sweden and the United Kingdom. He has designed and facilitated scores of high-level international exercises in long-range national strategic planning, United Nations peacekeeping, disaster-relief operations, complex humanitarian emergencies, and hemispheric multilateral negotiation. Prior to this he was an Associate Professor of Biostatistics and Biomathematics in two medical schools. He has taught courses at the doctoral level in departments of sociology, anthropology, psychology, statistics, and mathematics. His research has been continuously funded since 1988 by a variety of agencies, including the National Science Foundation, the National Institutes of Health, the Defense Advanced Research Projects Agency, the Defense Modeling and Simulation Office, the U.S. Air Force, and the U.S. Joint Chiefs of Staff. He is the author of several dozen scientific papers, chapters, and books, and holds a patent for his analytical software algorithms. His PhD is from Cornell University, 1973, in mathematical sociology.

2. Paul Wolff (legal expert for the Prosecution Team) received his BA from Knox College in 1967 and his JD from the University of Colorado Law School in 1973. He served with the United States Marine Corps from 1968–71, rising to the rank of captain. His work experience includes seven years with the Denver District Attorney's Office (Deputy DA, Chief Deputy DA), two years in private practice, ten years with US West Communications (counsel, senior counsel), and two years with St. Paul Fire and Marine Insurance Company (attorney). Mr. Wolff served in

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268. Other than Dr. Cobb, all Study personnel are or were licensed to practice law in Colorado, based on information known to personnel at District Attorney's Office for the 18th Judicial District.

269. The report generated by the staff was a component of the Prosecution response to the Montour Defense Team's motion D-181, regarding the Defense-titled "Colorado Death Penalty Eligibility Study," dated 9 September 2012, referred to in this report as the Defense Murder Study. The purpose of their response was to provide the trial court with a critical evaluation of the Defense Murder Study, an analysis of the Defense and Prosecution databases, a quantification of the process of narrowing death penalty eligibility in Colorado, and a brief examination of the statistical consequences of severing certain aggravating factors from the Colorado death penalty statute.

the Colorado Attorney General's Office from 1994–2003, as First Assistant for the Capital Crimes Unit, and then served from 2003–2009 in the Eighteenth Judicial District Attorney's Office as Chief Appellate Deputy DA. He retired in 2009.

3. Chris Wilcox received his JD from the University of Denver Sturm College of Law in 2012. He has been a Deputy District Attorney in the Eighteenth Judicial District since 2012, following nearly two years during which he worked as a legal intern in the Economic Crimes Unit, Arapahoe County Court, and as a researcher for the D-181 Research Team. Chris received his B.S. in Organizational Communications in Business and Government through the Liberal Studies program at Montana State University Billings.

Prior to law school, Mr. Wilcox worked on several large-scale, multi-source, collaborative research projects. In 2003, as an Aide to the Senate Majority Leader in the Montana Legislature, he developed and implemented a vote-tracking program, which gathered information on every vote cast by every member of the Montana Legislature on every bill, analyzing the effects of key legislation and reporting on voting patterns. He also worked as the Victory Director for the Montana Republican Party (2005–2006), building and coordinating a massive voter contact operation, which gathered and analyzed millions of pieces of information on voters, culminating in a voter-targeting program that was recognized one of the best in the nation. Chris also worked as the Executive Director of the Montana Republican Party (2007), which included significant research focused on legislative district targeting, and the Campaign Manager for the Roy Brown for Governor Campaign (2008), which involved coordinating detailed county and precinct research and strategy development.

4. Kristina Lynne Hayden received her BA from Davidson College, Charlotte, North Carolina, in 2007, and her JD from the University of Denver Sturm College of Law in 2012. Ms. Hayden has been a Deputy District Attorney in the Eighteenth Judicial District since 2013. She previously worked as a researcher for the D-181 Research Team of the Colorado Eighteenth Judicial District Attorney's Office and the Appellate Department of the Eighteenth Judicial District Attorney's Office from May 2010 to May 2011 as a legal intern, and as a legal intern (under the Student Practice Act) in the Arapahoe County courts.

5. Ashley Brea Muñoz received her BA from the University of Wyoming, Laramie, Wyoming, in 2008, and her JD from the University of Denver Sturm College of Law in 2012. Ms. Munoz has been a Deputy District Attorney in the Eighteenth Judicial District since 2013. Previously, she worked as a researcher for the D-181 Research Team of the Colorado Eighteenth Judicial District Attorney's Office. She previously worked as a legal intern for the Eighteenth Judicial District Attorney's Office (under the Student Practice Act) in the Arapahoe County courts.

Ryan Stephen Robertson received his BA from the University of Colorado, Boulder, Colorado, in 2009, and his JD from the Ohio Northern University Pettit College of Law, in Ada, Ohio, in 2012. Mr. Robertson has been a Deputy District Attorney in the Fourth Judicial District since 2012. Previously, he worked as a researcher for the D-181 Research Team of the Colorado Eighteenth Judicial District Attorney's Office. He previously worked in the Appellate Department of the Eighteenth Judicial District Attorney's Office from May 2010 to August 2011 as a legal intern, and as a legal intern (under the Student Practice Act) in the Arapahoe County courts.[270]

APPENDIX D

DEATH PENALTY SENTENCES IMPOSED IN COLORADO TRIAL COURTS 1975–2015*

Highlighted are *Ring v. Arizona* vacated death sentences after *Walton v. Arizona*.[271]

Year	Name	Judicial District**	Circumstances	Race Defendfendant[272]	Race Victim
1975	Dean Wildermuth	17th		White	White
1975	Michael Corbett	4th	Murder x 3	Black	White
1975	Freddie Glenn	4th	Kidnap-rape-murder	Black	White
1975	Kenneth Botham	21st	Murder wife, neighbor, two children (4)	White	White
1976	Ronald	21st	Murder of partner in	White	White (Hispanic)

270. It should be noted that the Defense Data Collection Team was composed of unidentified paralegals and interns working for the Montour Defense Team and unrevealed in the *Many Are Called* and *Disquieting Discretion*.

271. This table is intended to show those cases in which the death penalty was imposed from 1975-2015, specifying the race of both the murderer and the victim, as well as a general description of the murder or murders. *See* Prosecution Study, *supra* note 137, at 26–43.

272. Because the FBI and CBI did not keep a break-out of Hispanic murderers from White murderers, all are classified as White, with a Hispanic notation in parenthesis.

	Ferrell		drug deals		
1976	Scott Raymer	1st	Felony-murder – x 2	White	Black
1977	Ricky Dillon	4th	Robbery-murder	White	White
1980	Robert Williams	18th	Murder-conspiracy	White	
1980	Edgar Duree	2nd	Robbery-murder	White	White
1981	Steven Morin	1st	Kidnap-rape murder	White (Hispanic)	White
1981	Johnnie Arguello	19th	Robbery-murder – beaten to death with a hammer	White (Hispanic)	White
1982	Richard Drake	21st	Murder of wife – for life insurance	White	White
1984	Frank Rodriguez	2nd	Kidnap-rape-murder	White (Hispanic)	White
1986	Gary Davis	17th	Kidnap-rape-murder	White	White
1987	John O'Neill	21st	Murder of marijuana growing partner	White	White (Hispanic)
1987	Ronald Lee White	1st	Multiple murder (2)	White	White
1993	Nathan Dunlap	18th	Multiple murder (4)	Black	White

1994	Robert Harlan	17th	Kidnap-rape-murder	Black	White
1997	George Woldt	4th	Kidnap-rape-murder	White	White
1997	Francisco Martinez	1st	Kidnap-rape-murder	White (Hispanic)	White
1998	William Neal	1st	Multiple murder (3)	White	White
2002	Edward Montour	18th	Murder of law enforcement; prior conviction murder	White (Hispanic)	White (Hispanic)
2006	Sir Mario Owens Robert Ray	18th	Multiple murder (2); prior conviction murder; murder of witness	Black Black	Black Black
	Totals	24		18 White (5 Hispanic) 6 Black	

*Information from JBITS, Colorado DOC Inmate Locator, Colorado Appellate Decisions; ** 1st, 2nd, 4th, 8th, 10th, 17th, 18th, 19th, 21st.

APPENDIX E

FUNDING FOR PUBLIC DEFENDERS AND ALTERNATE DEFENSE COUNSEL[273]

(not including any supplemental appropriation)

2000–2015		
Public Defenders	2000	$27,296,931
317.4%	2015	$86,639,883
Average yearly increase 8.019%		
Alternate Defense	2000	$10,683,438
289.8%	2015	$30,962,991
Total	2000	$37,980,369
309.6%	2015	$117,602,874

Year	Colorado Sessions Laws	Public Defender	Percent increase (decrease) over prior year	Alternate Defense Counsel	Percent increase (decrease) over prior year
2000	Chapter 413 pp 2522-23	$27,296.931		$10,683,438	
2001	Chapter 349 pp 1727-28	$27,321,931	.09%	$10,919,838	2.21%
2002	Chapter 399 pp 2819-20	$31,313,247	14.6%	$11.973,335	9.64%
2003	Chapter	$31,956,458	2%	$11,941,766	(0.3%

273. Compiled October 27, 2015.

	449, pp 3287-88				)
2004	Chapter 427, pp 2517-18	$32,593,660	1.9%	$12,443,302	4.2%
2005	Chapter 354 pp 2045-46	$34,920,760	7.1%	$13,889,280	11.6%
2006	Chapter 394 pp 2629-30	$37,171,280	6.4%	$18,291,224	31.7%
2007	Chapter 466 pp 2698-99	$44,720,097	20.3%	$21,640,265	18.3%
2008	Chapter 474 pp 2870-71	$50,893,524	13.8%	$23,227,619	7.3%
2009	Chapter 464 pp 3037-39	$54,583,854	7.25%	$23,692,141	1.99%
2010	Chapter 453 pp 2791-2792	$57,355,891	5%	$24,556,665	3.6%
2011	Chapter 335, pp 1999-2000	$61,938,317	7.98%	$23,248,059	(5.4%)
2012	Chapter 305 pp 2129-30	$62,998,015	1.7%	$22,560,446	(3%)
2013	Chapter 441, pp 2981-82	$71,148,573	12.9%	$22,896,598	1.5%
2014	Chapter 420, pp 2513-14	$82,604,070	16.1%	$29,645,966	29.5%
2015	Chapter 364 pp 1924-26	$86,639,883	4.9%	$30.962,991	4.4%

APPENDIX F

PROCEDURE IN JURISDICTIONS WITH THE DEATH PENALTY

State	Phase 1- Eligibility	Phase 2 – Selection
Alabama: ALA. CODE §§ 13A-5-39-40,13A-5-43,13A-5-45 to -49,13A-5-51-52 (2015)	1- Aggravating circumstances: jury must unanimously find one aggravating factor beyond a reasonable doubt	2- Defendant can provide mitigating circumstances—only need to interject issue if factual problem and then state must disprove beyond a preponderance; beyond that no assigned standard or burden 3- Jury weighs aggravating circumstances (statutory) against mitigating circumstances; if mitigating outweighs, recommend life if majority would recommend; if aggravating outweighs, recommend death if ten jurors vote for death 4- Judge decides life without parole or death sentence after considering all the evidence, considering the jury's advisory verdict, and making a written finding of his decision. No burden of proof is assigned to this stage of the proceeding
Arizona: ARIZ. REV. STAT. ANN. §§ 13-751 to -752 (2015)	"Aggravation Phase" • State must prove one or more statutory aggravating circumstances beyond a reasonable doubt and trier of fact must unanimously find that an aggravating circumstance has been	"Penalty Phase" • Mitigating circumstances must be proven by a preponderance of the evidence by the defendant and the jurors do not have to unanimously find that these circumstances have been proven • The trier of fact shall impose a sentence of death if the trier of fact

	proven beyond a reasonable doubt	unanimously determines that there are no mitigating circumstances sufficiently substantial to call for leniency
Arkansas: ARK. CODE ANN. §§ 5-4-602 to -605 (2015)	1- Jury must unanimously find that a statutory aggravating circumstance exists beyond a reasonable doubt but does not assign the burden of proof	2- After the presentation of evidence of aggravating circumstances and mitigating circumstances, the jury must unanimously find that the aggravating factor(s) outweighs all mitigating circumstances found to exist beyond a reasonable doubt but does not assign the burden of proof 3- Jury unanimously agrees that aggravating circumstances justify a sentence of death beyond a reasonable doubt but does not assign the burden of proof
California: CAL. PENAL CODE §§ 190.1–.5 (West 2015); Jury Instructions:California Criminal Jury Instructions, Nos. 763 – 766	1. The jury must unanimously determine whether one or more of the charged special circumstances has been found to be true beyond a reasonable doubt	2. The trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section 3. The jury shall impose a sentence of death if the trier of fact unanimously concludes that the aggravating circumstances outweigh the mitigating circumstances. No burden assigned to this weighing. • Jury instructions state: "To return a judgment of death, each of you must be persuaded that the aggravating circumstances both out-

		weigh the mitigating circumstances and are also so substantial in comparison to the mitigating circumstances that a sentence of death is appropriate and justified"
Colorado: COLO. REV. STAT. § 18-1.3-1201 (2015)	1. Jury must find at least one statutory aggravating factor unanimously and beyond a reasonable doubt 2. The jury must determine whether any mitigating factors exist—an individual determination without a burden of proof 3. 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	4. 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 d a reasonable doubt—without the standard of proof being assigned to a party
Delaware: DEL. CODE ANN. tit. 11, § 4209 (2015)	1. Jury must unanimously find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt	2. Jury must find by a preponderance of the evidence that the aggravating factors (statutory and non-statutory) outweigh the mitigating circumstances and report to the court the number of affirmative and negative votes 3. The court may impose a sentence of death if the jury has found the existence of one statutory ag-

		gravating circumstance beyond a reasonable doubt and the court finds by a preponderance of evidence that the aggravating circumstances outweigh the mitigating circumstances
Florida: FLA. STAT. § 921.141 (2015)	1. Jury must find that at least one statutory aggravating circumstance has been established beyond a reasonable doubt. The statute does not state if this must be majority or unanimous.	2. Jury must decide whether there are sufficient mitigating circumstances such that they outweigh the statutory aggravating circumstances and then determine whether the defendant should be sentenced to death or life without parole 3. The court enters a sentence of life or death and may override the majority of the jury and impose a death sentence if the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ
Georgia: GA. CODE ANN. §§ 17-10-30, 17-10-31 (2015)	1. The jury must find that there is at least one statutory aggravating circumstance proven beyond a reasonable doubt.	2. Both the state and the defendant may put on all evidence related to aggravating circumstances, statutory and non-statutory, as well as any mitigating circumstances. There is no requirement that the jury weigh these circumstances but the jury may consider them. 3. The jury's verdict as to penalty must be unanimous.
Idaho: IDAHO CODE § 19-2515 (2015)	1. The jury must unanimously find the existence of a statutory aggravating cir-	2. The jury must consider whether the mitigating circumstances make the imposition of the death

Jury Instructions: Idaho Criminal Jury Instructions, Nos. 1704, 1707, 1718	cumstance beyond a reasonable doubt. This is the State's burden. However, the State may introduce other evidence of aggravation.	penalty unjust. Whether or not the death penalty is unjust must be a unanimous decision although the jury does not have to unanimously agree on which mitigating circumstances exist. Furthermore, the existence of mitigating circumstances need not be proven beyond a reasonable doubt. 3. Jury must determine which sentence is appropriate. If there is 1 statutory aggravating circumstance proven beyond a reasonable doubt, and the jury unanimously agrees that the mitigating circumstances do not make the imposition of the death penalty unjust, then the death penalty will be imposed
Indiana: IND. CODE § 35-50-2-9 (2015) Jury Instructions: Indiana Pattern Jury Instructions, Criminal Instruction Nos. 15.0060, 15.0180, 15.0200, 15.0280	1. The Jury must find at least one statutory aggravating factor unanimously and beyond a reasonable doubt—burden on the state. The jury instructions states that the jury should consider both aggravating and mitigating circumstances. It is unclear whether this is meant to include non-statutory aggravating circumstances.	2. The jury must find that any mitigating circumstance has been proven by a preponderance of the evidence, but it does not have to be unanimous and the burden is not assigned 3. The jury should consider whether the mitigating circumstances outweigh the aggravating factor before recommending a penalty to the judge. Jury must unanimously agree that the aggravating circumstances outweigh the mitigating circumstances to recommend a sentence of death. 4. The jury must unanimously recommend a sen-

		tence. If they cannot agree, it proceeds as if the sentencing hearing were to the court. The judge makes the final decision as to sentence but a unanimous jury finding is binding on the court.
Kansas: KAN. STAT. ANN. §§ 21-6617, 21-6624, 21-6625 (2015) Jury Instructions: Pattern Instructions Kansas – Criminal, Nos. 54.030, 54.040, 54.050, 54.060, 54.100	1. Jury must unanimously find a statutory aggravating circumstance beyond a reasonable doubt. State has the burden here.	2. Jury must determine whether the mitigating circumstances outweigh the proven statutory aggravating circumstances. No burden of proof but the jury instructions almost suggest that the state bears the burden of showing that the aggravating circumstances is not outweighed by any mitigating circumstances. 3. Jury must make a unanimous decision as to whether or not to impose the death penalty
Kentucky: KY. REV. STAT. § 532.025 (2015)	1. Jury must find one statutory aggravating factor proven beyond a reasonable doubt. Does not require unanimity or assign a burden.	2. Jury must weigh the aggravating (statutory and non-statutory) and mitigating circumstances but no burden is given or assigned. 3. Jury recommends a sentence—death or life in prison—to the judge who imposes the sentence.
Louisiana: LA. CODE CRIM. PROC. ANN. art. 905.3–.6 (2015)	1. Jury must find that at least one statutory aggravating circumstance exists beyond a reasonable doubt. Case law suggests that the jury may only consider statutory aggravating circumstances.	2. Jurors should consider mitigating circumstances in rendering their verdict but there are no presumptions or burdens of proof with respect to mitigating circumstances. 3. A sentence of death shall be imposed only upon a unanimous determina-

		tion of the jury
Mississippi: MISS. CODE ANN. §§ 99-19-101, 103 (2015)	1. Jury must find that the defendant killed, attempted to kill, intended a killing take place, or contemplated that lethal force would be employed. 2. Jury must unanimously find, beyond a reasonable doubt, the existence of one or more statutory aggravating circumstances.	3. The jury must consider whether the mitigating circumstances outweigh the aggravating circumstances. No burden of proof assigned. 4. The jury must unanimously decide to impose the death penalty. No burden of proof assigned.
Missouri: MO. REV. STAT. §§ 565.030, .032 (2015)	1. The jury must unanimously find at least one statutory aggravating circumstance beyond a reasonable doubt 2. The jury must unanimously find that the evidence in aggravation of punishment warrants imposing a death sentence	3. The jury must decide whether there is evidence in mitigation of punishment which outweighs the evidence in aggravation (statutory and non-statutory) of punishment 4. The jury must decide, under all the circumstances, whether to impose a death sentence
Montana: MONT. CODE ANN. §§ 46-18-301–305 (2015)	1. Trier of fact must find one or more aggravating circumstances beyond a reasonable doubt; or defendant plead guilty and admitted to an aggravating circumstance—statutes do not limit this to statutory or non-statutory aggravating circumstances	2. The Court must consider whether there are mitigating circumstances sufficiently substantial to call for leniency 3. If there is one aggravating circumstance proven beyond a reasonable doubt and insufficient mitigating circumstances to call for leniency, the court shall impose the death sentence
Nebraska: NEB. REV. STAT. §§ 29-2520–2523	1. The court must conduct an aggravation hearing where a jury must unanimous-	2. The jury is then dismissed and a three-judge panel is installed to determine the sentence. The

(2015)	ly find the existence of an aggravating circumstance beyond a reasonable doubt. It is unclear whether this is limited to statutory aggravating circumstances or if the jury can consider any and all alleged aggravating circumstances.	court then holds a hearing to consider the aggravating factors the jury found and receive evidence on mitigation and sentence excessiveness/disproportionality 3. The three-judge panel must unanimously decide to impose the death penalty after a careful consideration of: (1) whether the aggravating circumstances as determined to exist justify imposition of a sentence of death (2) whether sufficient mitigating circumstances exist which approach or exceed the weigh given to the aggravating circumstances; or (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.
Nevada: NEV. REV. STAT. §§ 175.552, 175.554, 175.556 , 200.030, 200.033, 200.035, 200.170 (2015)	1. The jury must designate the statutory aggravating circumstances it finds beyond a reasonable doubt	2. The jury must consider whether any mitigating circumstances exist 3. The jury must consider whether the mitigating circumstances are sufficient enough to outweigh the statutory aggravating circumstances 4. The jury may impose a sentence of death if it unanimously finds the existence of an aggravating circumstance(s) be-

		yond a reasonable doubt and that any mitigating circumstances are insufficient to outweigh the aggravating circumstance(s)
New Hampshire: N.H. REV. STAT. ANN. § 630:5 (2015)	1. The state has the burden of proving beyond a reasonable doubt the existence of an aggravating factor. The statute contemplates statutory aggravating factors, but allows the jury to consider other aggravating factors so long as notice has been given. 2. The jury must unanimously agree on the existence of an aggravating factor and that it was proven beyond a reasonable doubt	3. The defendant has the burden of proving beyond a preponderance of the evidence the existence of a mitigating factor 4. The jury then must consider whether the mitigating factors outweigh the aggravating factors, or if the aggravating factors are sufficient to justify the death penalty if there are no mitigating factors 5. If the jury concludes that the aggravating factors outweigh the mitigating factors or that the aggravating factors, in the absence of any mitigating factors, are themselves sufficient to justify a death sentence, the jury, by unanimous vote only, may recommend that a sentence of death
North Carolina: N.C. GEN. STAT. § 15A-2000 (2015)	1. The jury must unanimously find the existence of a statutory aggravating circumstance beyond a reasonable doubt	2. Defendant has the burden of proving any mitigating circumstances by a preponderance of the evidence 3. The jury must unanimously, and beyond a reasonable doubt, find that the mitigating circumstances are insufficient to outweigh the statutory aggravating circumstances in order to impose the death

		penalty
Ohio: OHIO REV. CODE ANN. §§ 2929.03–.04 (West 2015)	1. To be death eligible, the jury must find the defendant guilty of aggravated murder and one or more statutory aggravating circumstances beyond a reasonable doubt—must be unanimous	2. Defendant has the burden to prove any factors in mitigation of imposing the death penalty 3. State has the burden to prove beyond a reasonable doubt that the statutory aggravating circumstances that the defendant was found guilty of are sufficient to outweigh the factors in mitigation of imposing the death penalty 4. If the jury finds, unanimously and beyond a reasonable doubt, that the statutory aggravating circumstances outweigh the mitigating circumstances, they shall impose the death penalty
Oklahoma: OKLA. STAT. tit. 21, §§ 701.10–.12 (2015); Jury Instructions: Oklahoma Uniform Jury Instructions – Criminal, Nos. 4-69 , 4-70, 4-72, 4-76, 4-78	1. The jury must unanimously, and beyond a reasonable doubt, find the existence of one or more statutory aggravating circumstances. State has burden of proving beyond a reasonable doubt	2. No burden of proof or unanimity required to determine existence of mitigating circumstances 3. In order to impose the death penalty, the jury must unanimously find that the mitigating circumstances are insufficient to outweigh the statutory aggravating factors that were proven beyond a reasonable doubt
Oregon: OR. REV. STAT. § 163.150 (2016)	In the sentencing phase, the jury may consider any and all relevant aggravating and mitigating evidence. At the close of evidence, three questions are posed to the jury:	The court also poses a fourth question to the jury at the close of evidence: whether the defendant should receive a death sentence. • There is no burden of proof assigned to this but the jury must be

	• (A) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that death of the deceased or another would result; • (B) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; • (C) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased. The state has the burden to prove each of these issues beyond a reasonable doubt and the jury must be unanimous to answer yes to any of these questions.	unanimous in finding that it is the appropriate sentence
Pennsylvania: 42 PA. CONS. STAT. § 9711 (2016)	1. State has the burden of proving the statutory aggravating circumstances beyond a reasonable doubt. The jury must be unanimous in finding the statutory aggravating circumstance beyond a reasonable	2. Defendant has the burden of proving any mitigating circumstances by a preponderance of the evidence. The jury does not have to be unanimous in finding any mitigating circumstances. 3. The verdict must be a

	doubt	sentence of death if the jury unanimously finds at least one statutory aggravating circumstances and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances
South Carolina: S.C. CODE ANN. § 16-3-20 (2015)	1. The jury can consider evidence of any mitigating circumstance allowed by statute and law and may only consider the aggravating circumstances provided in the statute 2. The jury must unanimously find the existence of a statutory aggravating circumstance beyond a reasonable doubt	Once the jury has found the existence of a statutory aggravating circumstance beyond a reasonable doubt, it may impose the death penalty if the jury unanimously agree to impose that sentence
South Dakota: S.D. CODIFIED LAWS §§ 23A-27A-1, -2, -4 (2015)	1. The jury will receive and consider evidence of all mitigating circumstances as well as evidence of the statutory aggravating circumstances 2. The jury must find the existence of a statutory aggravating circumstance beyond a reasonable doubt	If the jury finds at least one aggravating circumstance beyond a reasonable doubt and unanimously recommends the sentence to be death, the court shall sentence the defendant to death
Tennessee: TENN. CODE ANN. § 39-13-204 (2016); Jury Instructions: Tennessee Pattern Jury Instructions -	1. The jury must unanimously find at least one statutory aggravating circumstance beyond a reasonable doubt. The state has the burden to prove this beyond a	2. The defendant does not have the burden of proving a mitigating circumstances and there is no jury unanimity requirement as to any particular mitigating circumstance 3. The jury may weigh the

Criminal, No. 7.04(a)	reasonable doubt.	proven statutory aggravating circumstances against any and all evidence of mitigating circumstances 4. The jury may impose a penalty of death if they unanimously find that the state proved at least one statutory aggravating circumstance beyond a reasonable doubt and this circumstance or circumstances outweigh any mitigating circumstances beyond a reasonable doubt. The state also bears the burden of proving that the aggravating circumstances outweigh the mitigating ones beyond a reasonable doubt.
Texas: TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 2015)	At the conclusion of evidence, the court will submit two issues to the jury: (1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and (2) in cases in which the jury charge at the guilt or innocence state permitted the jury to find the defendant guilty as a party under sections 7.01 and 7.02 (criminal responsibility/complicity), whether the defendant actually caused the	The court shall instruct the jury that if the jury returns an affirmative finding to each issue submitted under Subsection (b), it shall answer the following issue: • Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed. • The jury must unanimously answer no to

	death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken • The state bears the burden of proving these issues beyond a reasonable doubt and the jury must unanimously answer yes to move to the next step	this question to impose the death penalty and no burden is assigned. To impose the death penalty, the jury must unanimously answer yes to the two special issues in the eligibility phase and no to the issue presented in the selection phase.
Utah: UTAH CODE ANN. § 76-3-207 (West 2015)	1. Jury must find defendant guilty of a capital felony—aggravated murder, which includes the statutory aggravating circumstances	2. Jury may consider all relevant facts in aggravation or mitigation of the penalty; suggests statutory and non-statutory circumstances 3. The jury must unanimously find that the total aggravation outweighs total mitigation beyond a reasonable doubt. State bears the burden of proving beyond a reasonable doubt that, after considering the totality of the aggravating and mitigating circumstances, the total aggravation outweighs total mitigation. 4. Jury must then unanimously find, beyond a reasonable doubt, that the imposition of the death penalty is justified and appropriate in this circumstance.
Virginia:	1. Defendant found guilty of an crime	2. Jury must consider all evidence that the court

VA. CODE ANN. §§ 19.2-264.2, .4, § 18.2-10 (2015)	punishable by death	deems relevant; admissible evidence may include circumstances surround the offense, the history and background of the defendant, and any other facts in mitigation of the offense 3. The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that: • there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or • that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim. 4. Jury must find these aggravating circumstances proven beyond a reasonable doubt and must unanimously agree to impose the death penalty
Washington: WASH. REV. CODE §§ 10.95.030, .050–080 (2015)	1. The defendant must be found guilty of aggravated first degree murder, which is first degree murder	2. The jury must consider whether there are sufficient mitigating circumstances to merit leniency.

	plus an aggravating circumstance	3. To impose the death penalty, the jury must find, unanimously and beyond a reasonable doubt, that the mitigating circumstances are insufficient to merit leniency.
Wyoming: WYO. STAT. ANN. § 6-2-102 (2015)	1. The jury must unanimously find a statutory aggravating circumstance to exist beyond a reasonable doubt. State bears this burden.	2. The jury may consider the evidence presented considering statutory aggravating circumstances and any mitigating circumstances relevant to the imposition of the sentence 3. Any mitigating circumstances must be proven by a preponderance of the evidence 4. A jury may impose the death penalty if it unanimously agrees on the penalty after unanimously finding a statutory aggravating circumstance proven beyond a reasonable doubt and considering the mitigating circumstances proven by a preponderance of the evidence
Federal: 18 U.S.C. §§ 3591–3593 (2012)	1. The jury must unanimously find, beyond a reasonable doubt, the existence of a statutory aggravating factor, or an aggravating factor the defendant has been given notice of. The state bears this burden.	2. The defendant may present mitigating evidence which must be proven by a preponderance of the information. 3. The jury must consider whether the aggravating factors found to exist are sufficient to outweigh the mitigating factors so as to impose a death penalty, or if not mitigating circumstances, whether the aggravating circumstance on its own is sufficient to

		warrant the death penalty 4. The jury must unanimously find that the death penalty is the appropriate sentence.